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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 304

UFCW & EMPLOYERS BENEFIT TRUST, ET AL.,

Plaintiffs,

v.

SUTTER HEALTH, ET AL.,

Defendants.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA,

Plaintiff,

v.

SUTTER HEALTH,

Defendant.

Case No. CGC-14-538451

Consolidated with

Case No. CGC-18-565398

TENTATIVE RULING RE SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

TENTATIVE RULING

Sutter's motion is denied. The parties should be prepared to discuss a new hearing date for the continued preliminary approval motion at the hearing.

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1 **BACKGROUND**

2 Sutter is a healthcare provider. To put it generally, Plaintiffs allege that Sutter violated California
3 law by engaging in certain anti-competitive practices. The parties entered a class action settlement
4 agreement. The settlement agreement includes a monetary component and an injunction.

5 Class action settlements are subject to a two-step approval process. At the first step, preliminary
6 approval, courts evaluate whether the settlement is within the range for which final approval may be
7 granted such that, among other things, the parties should undertake the time and expense of providing
8 notice to the class. If preliminary approval is granted, notice is disseminated and absent class members
9 are given an opportunity to respond. At the second step, final approval, the Court considers whether the
10 settlement should be approved taking into consideration, among other things, the class' response.

11 On December 19, 2019, Plaintiffs filed their motion for preliminary approval of the class action
12 settlement agreed to by the parties in this action. On December 20, 2019, Sutter filed a motion to seal
13 portions of the proposed final judgment that constitutes a part of the settlement. On January 30, 2020,
14 Plaintiffs filed a motion for appointment of a monitor in connection with the settlement. The Court heard
15 argument on all three motions on February 25, 2020. On that same date, the Court continued the
16 preliminary approval motion and motion for appointment of a monitor for a supplemental filing to address
17 specified issues. (See February 25, 2020 Order re (1) Plaintiffs' Motion for Preliminary Approval of
18 Settlement; and (2) Plaintiffs' Motion to Appoint a Monitor ("Feb. 25, 2020 Order"), 1-2.)¹

19 Under the terms of the February 25, 2020 Order, a supplemental filing was to be submitted on
20 March 18, 2020 and a further hearing was to be held on April 6, 2020. As the deadline for the
21 supplemental filing approached, the local ramifications of the COVID-19 pandemic began to materialize.
22 On March 16, 2020, the Presiding Judge of the San Francisco Superior Court entered his first general
23 order exercising the emergency powers granted to him by the Honorable Tani G. Cantil-Sakauye, Chief
24 Justice of California and Chair of the California Judicial Council. This was the first of a series of
25 emergency orders that coincided with a substantial reduction in court operations. On the same date, the
26 parties submitted a stipulation and proposed order requesting a limited extension of the dates set in the
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28 ¹ Sutter's sealing motion was granted in a separate order.

1 February 25, 2020 Order. Ultimately, the Court held a telephonic status conference with the parties on
2 April 2, 2020. Following that conference, pursuant to an agreement between the parties, the Court stayed
3 the case for sixty days from April 2, 2020 and vacated all extant deadlines and hearing dates. (Apr. 3,
4 2020 Order, 2.) The Court reserved June 22, 2020 on its calendar for either a continued hearing on the
5 preliminary approval motion or a further status conference, as circumstances would permit.

6 As time passed, the parties' views of the settlement, and the settlement approval process, diverged.
7 Plaintiffs filed their supplemental filing in support of the preliminary approval with an eye towards using
8 the June 22, 2020 reservation for the supplemental hearing on the preliminary approval motion. (See June
9 2, 2020 Order After May 29, 2020 Status Conference, 2.) On June 12, 2020, Sutter filed the present
10 motion to continue the preliminary approval hearing. The Court subsequently vacated the June 22, 2020
11 hearing, to be reset after this motion is heard. (See June 16, 2020 Order, 1-2.)

12 **LEGAL STANDARD**

13 The parties express some disagreement as to whether this motion should be considered as a
14 request for a continuance or a request for a stay. (Compare Motion, 7, 7 n.3; Opposition, 8.)² To the
15 extent the motion is treated as a request to continue a motion hearing, the parties agree that the Court
16 should consider the factors set forth in California Rules of Court, Rule 3.1332(d) in evaluating the
17 request. (See Motion, 7; Opposition, 8.) To the extent the motion is treated as a request to stay the case,
18 Sutter argues that the Court should decide the motion "in the interests of justice and to promote judicial
19 efficiency" whereas Plaintiffs contend that the Court should evaluate whether Sutter has shown that
20 proceeding with the action will clearly impose a hardship or inequity on it if there is a fair possibility that
21 Plaintiffs will be prejudiced by the stay. (See Motion, 7 n.3; Opposition, 8.) Fundamentally, the Court's
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23 ² In a different context, a California Court of Appeal recently observed that a stay "refers to those
24 postponements that freeze a proceeding for an indefinite period, until the occurrence of an event that is
25 usually extrinsic to the litigation and beyond the plaintiff's control" whereas a continuance is more likely
26 to postpone a trial to a date certain "not tied to any matter outside the parties' control." (*Panoche Energy
27 Center, LLC v. Pacific Gas & Elec. Co.* (2016) 1 Cal.App.5th 68, 105 [citing *Gaines v. Fidelity National
28 Title Ins. Co.* (2016) 62 Cal.4th 1081, 1092-94 [distinguishing between a stay and a stipulated
continuance for the purposes of the five-year rule].) Here, Sutter has requested a postponement to a date
certain, or some earlier date if contingencies outside of the parties' control are satisfied. The request
would not put a stop to other litigation that is ongoing in this action, specifically the resolution of sealing
issues. Accordingly, the present motion bears a closer resemblance to a request for a continuance than a
motion to stay.

1 responsibility is to consider all relevant facts and circumstances before entering a ruling that is in the
2 interests of justice. (See, generally, Cal. Rules of Court, Rule 3.1332(c)-(d) [trial continuance must be
3 considered on its own merits and can only be granted on an affirmative showing of good cause after
4 considering all the facts and circumstances that are relevant to the determination]; *Mahoney v. Southland*
5 *Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [in reviewing trial court’s
6 denial of request for a continuance for the purposes of preparing an opposition to a summary judgment
7 motion, a review of the rule of court concerning motions and grounds for continuance of trial dates is
8 instructive]; *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377 [discussing inherent power of the
9 court to control litigation before it pursuant to the state Constitution]; *Freiberg v. City of Mission Viejo*
10 (1995) 33 Cal.App.4th 1484, 1489 [stating that trial courts generally have the inherent power to stay
11 proceedings in the interests of justice and to promote judicial efficiency].) Under each of the standards
12 proposed by the parties, the Court would reach the same result – Sutter’s motion is denied.

13 **DISCUSSION AND ANALYSIS**

14 The proposed settlement includes both a monetary payment and injunctive relief intended to
15 protect competition in the relevant market. Sutter’s motion stakes out an uncomfortable middle ground.
16 Sutter does not support approval of the settlement, as most defendants do when they have agreed to a
17 settlement and as Sutter once did in this case. Nor does Sutter oppose approval of the settlement. Instead,
18 Sutter indicates that it might oppose approval of the settlement depending on how future events pertaining
19 to the COVID-19 pandemic unfold. (See Motion, 7 [asserting that continuance will save Sutter from
20 having to oppose the settlement].) Accordingly, Sutter asks the Court to delay resolution of preliminary
21 approval so that Sutter has the benefit of more information about how the future will unfold before it
22 decides whether or not to oppose approval of the settlement or incurs the expense of disseminating notice
23 to the class. (See *id.* at 5-6, 8.) Plaintiffs oppose the request.

24 Put in terms parallel to those of Rule 3.1332, Sutter’s essential position is that there has been a
25 “significant, unanticipated change in the status of the case as a result of which the case is not ready” for
26 preliminary approval. (See Cal. Rules of Court, Rule 3.1332(c)(7); Motion, 5-7; Reply, 4-7.)³ For the
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28 ³ No other Rule 3.1332(c) factors are present.

1 reasons that follow, the Court finds that the case is ready to proceed to a continued preliminary approval
2 hearing such that further delay is not appropriate.

3 **I. Whether the Case is Ready for Further Preliminary Approval Proceedings**

4 For the reasons that follow, neither the COVID-19 pandemic nor SB 977 render this case unready
5 for further preliminary approval proceedings.

6 **A. The COVID-19 Pandemic**

7 **1. Monetary Component**

8 The COVID-19 pandemic has and is continuing to cause Sutter financial losses, both in terms of
9 investment losses and operating losses. (Conforti Decl. ¶ 11; Motion, 9-10; Reply, 7.) Sutter has not,
10 however, tied its financial losses to any present or prospective inability to comply with the monetary
11 component of the settlement relief. (See Motion, 6 [stating that Sutter is continuing to assess the financial
12 impact it is experiencing as a result of COVID-19, before tying Sutter’s financial concerns to certain
13 terms of the proposed injunction]; Reply, 7-8 [tying Sutter’s economic situation to its ability to comply
14 with the injunction].) Accordingly, the Court focuses on the Sutter’s arguments regarding the proposed
15 injunctive relief.

16 **2. Injunctive Relief**

17 Sutter asserts that that its “ability to comply with the terms of the proposed injunction is already in
18 question” such that the settlement “may no longer make sense in its current form and could jeopardize
19 Sutter’s ability to continue providing care.” (Motion, 5.) Sutter takes issue with two specific terms in the
20 proposed injunction. First, Sutter asserts that it may need to increase its chargemaster rates higher than is
21 permitted under the proposed injunction to compensate for decreased revenues and increased costs
22 resulting from COVID-19. (*Id.* at 14; Reply, 7-8; Conforti Decl. ¶ 18.) Second, Sutter contends that
23 restrictions on its ability to condition participation of certain hospitals in a network on the participation of
24 other hospitals in the same network may create problems (a) if certain services are moved from one
25 facility to another such that there is no Sutter provider within a network at which a service can be received
26 at all or (b) COVID-19 patients are redirected to providers that are outside the network. (Motion, 14-15;
27 Reply, 8; Conforti Decl. ¶¶ 20-22; Supp. Conforti Decl. ¶ 2.)

1 Plaintiffs respond that if the settlement is approved and circumstances that arose after the parties
2 agreed to the terms of the settlement preclude Sutter from complying with its terms, Sutter may then
3 apply to modify the proposed injunction. (Opposition, 9.) In Plaintiffs’ view, the hypothetical future
4 problems⁴ raised by Sutter can be addressed through the framework of the injunction, to the extent any
5 such problems need to be addressed. (*Id.* at 10, 17-19.) More to the point, Plaintiffs argue that the class’
6 interest and the public’s interest is in the prompt issuance of notice so that the Court can consider final
7 approval of the settlement and, if final approval is granted, the injunction can go into effect. (*Id.* at 11-
8 17.) If Sutter’s response to the COVID-19 pandemic necessitates modifications to the proposed
9 injunction, those modifications can be made after final approval is granted. (See *id.* at 9.)

10 As detailed below, the Court is not persuaded that the proposed injunction will interfere with
11 Sutter’s ability, or the broader healthcare system’s ability, to provide patient care during the COVID-19
12 pandemic. To the extent that a provision of the proposed injunction poses a threat to patient care or the
13 public interest during the COVID-19 pandemic, or as a result of some other presently unforeseen
14 circumstance, any party may seek a modification of the offending provision if and when such a
15 modification becomes appropriate. If it is Sutter’s position that the framework for modifying the
16 injunction in response to changed circumstances is inadequate, that is a reason to oppose settlement
17 approval, not to delay the settlement approval proceedings.

18 **a. Chagemaster Rates**

19 Sutter’s first concern is that, pending future events, it may need to increase its chagemaster rates
20 above the current caps to cover the previously unanticipated need to fund its operations in response to
21 COVID-19. (Motion, 14; Reply, 7-8; Proposed Injunction § IV(D);⁵ Conforti Decl. ¶¶ 17-18.) If the
22 settlement is approved, that is a discrete issue that can be addressed in a contested proceeding to modify
23 the injunction if and when it is necessary. (Proposed Final Judgment § VII [Court would retain
24 jurisdiction to modify injunction in light of changed circumstances]; Opposition, 18.) If Sutter believes

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26 ⁴ To be clear, COVID-19 is a present problem, not a hypothetical future problem. The proposed
27 injunction at issue in the underlying preliminary approval motion interfering with Sutter’s response to
28 COVID-19 is a hypothetical future problem.

⁵ The “Proposed Final Judgment” is Exhibit B to the Settlement Agreement, which was filed on
December 19, 2019 as Appendix 1 to Plaintiffs’ Notice of Motion and Motion for Preliminary Approval
of Settlement; Memorandum of Points and Authorities.

1 the proposed injunction is inadequate to protect its interest, or the public interest, because the procedure
2 for adjusting rate caps in response to changed circumstances is inadequate, Sutter may take that position
3 now, in connection with the settlement approval proceedings, without waiting for any additional
4 information. Because the rate caps are, like any other provision in the proposed injunction, subject to
5 post-approval modification if the settlement is approved, Sutter's concerns about its future inability to
6 comply with the rate caps does not justify a delay in the preliminary approval proceedings.

7 **b. Conditional Participation**

8 Sutter's argument is, in effect, that it wants to be able to make the participation of certain Group A
9 hospitals in a narrow network contingent on the participation of other providers because it may move
10 some services from Group A hospitals to other providers and because it has begun to redirect COVID-19
11 patients to a Group A hospital. (Motion, 14-15; Reply, 8; Conforti Decl. ¶¶ 6, 19-22 [citing Proposed
12 Final Judgment § IV(C)(1)(a), (3)(a)-(c)]; Supp. Conforti Decl. ¶ 2.) This proposal is a non-starter for
13 Plaintiffs, who view restrictions on Sutter's ability to use conditional participation to anticompetitive ends
14 as a critical component of the injunctive relief secured on behalf of the class and the public. (Opposition,
15 18-19.)

16 The proposed injunction does not foreclose the parties to negotiations from discussing whether a
17 proposed narrow network will be adequate to serve patients. Rather it forecloses Sutter from imposing its
18 will on insurers subject to certain limited exceptions. (See Proposed Final Judgment § IV(B)-(C).)⁶ In
19 any event, to the extent that Sutter does contend that it should be permitted to condition the participation
20 of Group A hospitals on the participation of other providers as a result of events that arose after the
21 proposed injunction was negotiated, that is again a discrete issue that can be addressed in a contested
22 proceeding to modify the injunction if such a modification is appropriate after the injunction has gone into
23 effect. (Proposed Final Judgment § VII; Opposition, 19.)⁷ Moreover, if Sutter believes the proposed

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25 ⁶ Nor does the injunction preclude other actors from protecting patients who are forced to go outside of a
narrow network for care. (See Varanini Decl., Attachment 2 at ¶ 12, Attachment 3 at ¶ 7.)

26 ⁷ The proposed injunction does not directly limit Sutter's ability to redirect COVID-19 patients. But
27 Sutter's point is that if Sutter is not admitting COVID-19 patients at any in-network facilities but is
instead directing them to out-of-network facilities, patients may refuse to be redirected due to their
28 exposure to heightened out-of-network costs. (Conforti Decl. ¶ 22.) One solution to this problem,
identified by Sutter, is to allow Sutter to permit it to make its participation in a network conditional on the
inclusion of certain Sutter providers. That solution may not be the only solution. More to the point, if the

1 injunction is inadequate to protect its interest, or the public interest, because the procedure for seeking a
2 modification to the limits on conditional participation in response to changed circumstances is inadequate,
3 Sutter may take that position now without waiting for any additional information. This concern does not
4 support a further delay in the preliminary approval proceedings.

5 **B. Pending Legislation**

6 Sutter argues that pending legislation, SB 977, may materially impact the injunction or render it
7 unnecessary. (Motion, 16; Reply, 8-9.) The only specific argument Sutter makes is that if the legislation
8 duplicates the injunctive relief, then the injunctive relief is unnecessary. (Motion, 16; Reply, 8-9.)⁸
9 Plaintiffs assert that the legislation will not impact the injunction because it is not clearly intended to
10 supersede the settlement and, in any event, Sutter is engaging in baseless speculation about the legislation.
11 (Opposition, 19-20.) The pendency of SB 977 does not support a further delay of the preliminary
12 approval proceedings.

13 Taking up Sutter’s one specific argument, if legislation duplicating the injunctive relief were
14 guaranteed to pass, then the value of the injunctive relief would arguably be lower because Plaintiffs
15 secured no benefit that is greater than existing law.⁹ But the essence of settlement is compromise. (*Sutter*

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17 proposed injunction is approved and, at some point thereafter, Sutter believes that it needs to be able to
18 condition its participation in a network on the inclusion of certain Sutter providers to combat COVID-19
19 or some future pandemic, the proposed injunction allows Sutter to seek such a modification.

18 ⁸ Sutter’s citation to *Robert Ito Farm, Inc. v. County of Maui* (D. Haw. Mar. 19, 2015) 2015 WL 1279422
19 is inapposite. There, the Legislature of the State of Hawaii was considering two bills to prohibit county
20 ordinances abridging the rights of farmers and ranchers to use agricultural practices not prohibited by
21 federal or state law. (*Robert Ito Farm*, 2015 WL 1279422 at *1.) The action before the District Court
22 concerned whether the ordinances targeted by the proposed legislation were lawful. (*Id.* at *1-*2.)
23 Before the legislation was introduced, the District Court entered a stipulated order enjoining the county
24 from acting on the ordinance in an effort to allow for judicial resolution of the lawfulness of the
25 ordinance. (*Id.* at *2.) After the legislation was introduced, the District Court decided to delay the to
26 maintain the injunction on acting on the ordinance until the District Court had resolved the challenge to
27 the ordinance, thereby allowing the legislative process to play itself out. (See *id.* at * 6.) In that case, the
28 proposed statewide legislation was intended to override the same ordinance that the District Court had
29 been asked to examine. Keeping the injunction in place would save the county from “build[ing] the
30 infrastructure necessary to enforce the Ordinance” only to find that the ordinance was unenforceable.
31 (*Ibid.*) Here, the action involves past conduct and the settlement includes, as one component, injunctive
32 relief. The only suggestion from Sutter is that the legislation may alter the value of one component of the
33 settlement package because the legislation may, to an unknown extent, duplicate the injunctive relief.

34 ⁹ In conducting the fairness inquiry, courts properly consider the value of the injunctive relief secured by
35 settlement. (See Feb. 25, 2020 Order, 2 [citing *Montoya v. PNC Bank, N.A.* (S.D. Fla. Apr. 13, 2016)
36 2016 WL 1529902, at *14]; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 961-63 [discussing
37 concerns with the injunctive relief provision in an approved settlements, including the concern that the
38 district judge did not fully understand the injunction, but upholding district court’s fairness

1 *Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 510.) The parties agreed to a compromise
2 as a result of which Plaintiffs do not need to depend on the legislation to protect their interests. The fact
3 that an alternative source of protection may exist in the future is not a sound basis to delay the review of
4 the settlement or, if appropriate, the imposition of the injunctive relief to which Sutter has acquiesced.¹⁰
5 Moreover, to the extent SB 977 is properly considered in the settlement approval analysis, the pendency
6 of SB 977 can be considered at preliminary approval and the fate of the legislation will likely be known
7 by the time any final approval hearing may be held. (See Motion, 16 [Sutter anticipates that the fate of
8 SB 977 will be known by September 30, 2020, at the latest].)

9 **II. Other Factors**

10 The preliminary approval proceedings have already been substantially delayed as a result of the
11 COVID-19 pandemic. A further delay will prejudice Plaintiffs and the class.¹¹ That prejudice outweighs
12 the potential prejudice Sutter may face should it be required to oppose approval of the settlement or incur
13 the costs of sending notice pertaining to a settlement that is not ultimately approved.

14 The parties agreed to settle this case after a jury was selected and immediately prior to opening
15 statements. As a result of the settlement, no trial date is set. However, the continued hearing on the
16 preliminary approval motion was first scheduled to be held on April 6, 2020. The underlying motion was
17 heard on February 25, 2020. The preliminary approval proceedings have already been continued for a
18 substantial amount of time, including as a result of a sixty-day stay entered by the Court pursuant to an
19 agreement between the parties. (See Cal. Rules of Court, Rule 3.1332(d)(1)-(2).) The further continuance
20 sought here, which may extend for up to ninety-days, is lengthy. (See Motion, 6-7 [requesting
21 continuance until the sooner of ninety days from the resolution of the pending motion or thirty days after
22 the Governor declares that California is no longer in a State of Emergency and the shelter-in-place orders
23 have been lifted]; Cal. Rules of Court, Rule 3.1332(d)(3).) Moreover, there is little indication that Sutter
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determination].) That said, the value of an injunction can be difficult to quantify. (See *Staton*, 327 F.3d
25 at 973-74.)

26 ¹⁰ The Court has asked whether certain portions of the proposed injunction require anything more than
27 compliance with pre-existing law. (See Feb. 25, 2020 Order, 3.) Provisions that replicate existing law
28 may provide no independent value to the class, although they may add value to the proposed injunction in
context.

¹¹ As is made clear throughout this order, Plaintiffs oppose the request for a continuance. (Cal. Rules of
Court, Rule 3.1332(d)(9).)

1 will be prepared to take a position on the preliminary approval motion after ninety days, as opposed to
2 requesting a further continuance to wait for more information. (See Reply, 7 [while discussing the price
3 caps, asserting that the cost reductions or price increases that may be required “will likely be much more
4 clear” at some unspecified time in the future “after everyone knows more about the path the pandemic is
5 taking and its impact on hospitals in California”].)¹²

6 Further delaying the continued preliminary approval proceedings will prejudice Plaintiffs and the
7 class in a way that is more direct and significant than holding the continued preliminary approval
8 proceedings may prejudice Sutter. (Cal. Rules of Court, Rule 3.1332(d)(5).) Plaintiffs, on behalf of a
9 class, have entered a settlement that calls for Sutter to make a substantial monetary payment and comply
10 with the terms of an injunction intended to promote competition. If the settlement is ultimately approved,
11 a delay in approval of the settlement delays payment of the settlement proceeds and delays the imposition
12 of the injunctive relief. This is prejudicial to Plaintiffs – among other things the time period during which
13 Sutter is permitted to engage in the conduct prohibited by the proposed injunction is extended. (See
14 Varanini Decl., Attachment 2 at ¶¶ 3-8, Attachment 3 at ¶¶ 2-5; Loveall Decl. ¶ 6; see also Delbanco
15 Decl. ¶¶ 2-14.)¹³ If the settlement is not ultimately approved, a delay in the approval proceedings will in
16 turn delay any subsequent efforts to resolve the matter or the ultimate trial in this action. This is
17 prejudicial to Plaintiffs and to Sutter – the class action included in these proceedings has been pending
18 since 2014.¹⁴

19 Sutter has identified two forms of prejudice that it may suffer as a result of holding the
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22 ¹² Sutter points to a few different sign posts, but it is not clear which of these will be most significant to it.
23 For example, Sutter would like to know when patient volume will return to pre-pandemic levels, which
24 will depend on, inter alia, shelter-in-place orders and when members of the public “feel comfortable
25 returning to physician offices, hospitals and other facilities.” (Conforti Decl. ¶ 12.) Sutter would also like
26 to know how the COVID-19 pandemic may impact its payer mix, including whether the country will
27 remain in a recession with high unemployment for a sustained period of time. (*Ibid.*) Sutter does not
28 suggest that these sorts of data points will be available in the next three months.

¹³ Notably, the People emphasize that the injunctive relief they have negotiated here is intended to serve
the public interest, such that a delay in its implementation is adverse to the public interest. (See
Opposition, 14-16.)

¹⁴ The class action case was filed in 2014 and was ready for trial in 2019. If the end of the road is to be a
trial, that trial should be held as soon as practicable. While it is premature to explore that particular
contingency in detail, it is enough to note here that delaying the preliminary approval proceedings is
prejudicial to Plaintiffs whether or not the preliminary approval motion is granted.

1 preliminary approval proceedings without a further continuance.¹⁵ One, Sutter may decide to oppose
2 settlement approval, either at the preliminary approval or final approval stage, because it does not have
3 enough information to evaluate the impacts of the settlement post-COVID-19. (See Motion, 7.) The first
4 problem with this argument is that it is not clear that delaying the proceedings will resolve Sutter’s
5 concerns – after three months Sutter may decide it does not wish to oppose preliminary approval, that it
6 does wish to oppose preliminary approval, or that it still needs more time to decide. The second problem
7 with this argument is that even if the settlement is preliminarily approved today, Sutter will have months
8 to evaluate new information and decide whether to oppose settlement approval before the Court hold a
9 final approval hearing. The third problem with this argument is that it has effectively already briefed its
10 opposition to preliminary approval – Sutter does not believe that preliminary approval is appropriate at
11 this time for the reasons set forth in its motion to continue the preliminary approval hearing.

12 Two, if preliminary approval is granted but final approval is denied, or the parties agree to modify
13 the settlement after notice is sent, Sutter will have incurred the costs of sending notice to the class with
14 nothing to show for it. (*Id.* at 5, 7-8.) The preliminary approval proceeding will address whether the
15 settlement is within the range of possible final approval. Sutter may be prejudiced if, after notice is
16 disseminated, circumstances evolve in a way that changes the approval calculus, but the likelihood of
17 such a chain of events is speculative.¹⁶

18 Sutter may, as described in the foregoing sections, also contend that it will be prejudiced if final
19 approval is granted and it is unable to comply with the terms of the proposed injunction. (See *id.* at 5
20 [“Sutter’s ability to comply with the terms of the proposed injunction is already in question”].) For the
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22 ¹⁵ These issues are distinct from the issues discussed in the foregoing sections, which relate to Sutter’s
23 contention that it may be prejudiced, or the public interest may suffer, if the proposed injunction goes into
24 effect.

25 ¹⁶ In its reply brief, Sutter argues that notice will need to be sent twice if the proposed injunction is
26 modified after preliminary approval. (Reply, 9-10.) Sutter does not suggest that the Court may
27 unilaterally change the terms of the proposed injunction as part of the settlement approval proceedings.
28 (*Ibid.*) The Court cannot do so. (*Villacres v. ABM Indus., Inc.* (2010) 189 Cal.App.4th 562, 597.)
However, the proposed injunction, by its own terms, allows for the Court to modify it after it is finally
approved in certain circumstances. (Proposed Final Judgment § VII.) If preliminary approval is granted,
the class will be given notice of the terms of the proposed injunction, including the term that allows for
post-approval modification. The class will have an opportunity to respond to the notice. The Court will
then decide whether to approve the settlement or reject it. Neither the Court nor the parties will tinker
with the terms of the proposed injunction between preliminary approval or final approval.

1 reasons set forth above, the Court is not persuaded that the proposed injunction lacks the flexibility to be
2 adapted to changed circumstances, if it is approved. Moreover, prejudice that may flow from final
3 approval is not closely tethered to prejudice from denying a continuance of the preliminary approval
4 motion.

5 In light of the considerations set forth above and all of the relevant circumstances, the Court finds
6 that denial of Sutter’s motion best serves the interests of justice. (Cal. Rules of Court, Rule
7 3.1332(d)(10)-(11).)¹⁷

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26 ¹⁷ As to the factors not specifically discussed in the body, the Court finds as follows. First, Sutter will
27 have additional time to further evaluate the settlement prior to final approval even if the relief is denied.
28 (Cal. Rules of Court, Rule 3.1332(d)(4).) To the extent a prospective inability to comply is the critical
issue, that issue may be raised at any time that the injunction is in effect. (*Ibid.*) Second, there are no
scheduling conflicts that call for, or preclude, a continuance. (Cal. Rules of Court, Rule 3.1332(d)(7)-(8).)
Third, this is not a preference case. (Cal. Rules of Court, Rule 3.1332(d)(6).)