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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UFCW & Employers Benefit Trust, on behalf of itself and all others similarly situated Plaintiffs, vs. Sutter Health, et al., Defendants.	Case No. CGC 14-538451 Consolidated with Case No. CGC-18-565398 **PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING**
People of the State of California, ex. rel. Xavier Becerra, Plaintiff, vs. Sutter Health, Defendant.	Date: July 9, 2020 Time: 9:15 a.m. Dept.: 304 Judge: Hon. Anne-Christine Massullo Action Filed: April 7, 2014

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INTRODUCTION

The Court should deny Sutter's motion for a continuance because any possibility that COVID-19-related concerns may eventually justify some future modification to the injunction provides no basis for delaying approval of the parties' settlement – let alone delaying preliminary approval. The injunctive relief to which Sutter agreed (and to which it is bound) includes a "Changed Circumstances" provision that fully addresses Sutter's concerns. Sutter may invoke this provision once (and only once) the Proposed Final Judgment ("PFJ") comes into force.

Furthermore, delaying approval deprives the People and the Class of the expeditious relief for which they bargained and for which they gave up the opportunity to pursue their claims of anticompetitive conduct at trial. The parties settled this case in October 2019. When Sutter publicly suggested, during the May 29, 2020 status hearing, that it might try to modify the settlement even before approval, the reaction from the healthcare community was extremely critical. As reflected in the attached declarations, the injunctive relief is crucial to bringing the benefits of greater competition to consumers in Northern California, and delaying the approval process will hurt those consumers. To be clear, the only issue that Sutter's motion brings before the Court is the appropriateness of a stay of the approval process in the hope that such a delay will bring "clarity." Mot. at 6. But we know now that: the parties reached a binding settlement eight months ago; Plaintiffs moved for preliminary approval six months ago; Plaintiffs' motion is unopposed; Plaintiffs have responded to the Court's questions concerning the PFJ and the proposed Class notice; and the legal requirements for preliminary approval are unquestionably met (indeed Sutter does not and cannot argue otherwise). And it is equally clear that the time to move forward with preliminary approval is now – further delay would disserve the public interest, as the Attorney General emphasizes herein.

The Attorney General has a unique responsibility to protect the interests of the People and to represent the public interest; counsel for the Class have a fiduciary obligation to protect the interests of the Class; and the Court's responsibility is to ensure that the settlement is "within the 'ballpark' of reasonableness" (*Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008)), and that the public interest is not disserved by the injunction, giving substantial deference to the Attorney

General's assessment of that interest. The possibility that Sutter may be having second thoughts about whether the settlement serves its own interests is, under governing law, irrelevant to whether approval (preliminary or final) should be granted. Sutter's concerns cannot serve as a basis for denial of Plaintiffs' preliminary approval motion or allowing any alterations to the bargain struck between the parties as reflected in the PFJ *before* the PFJ is approved.

Plaintiffs, mindful of the challenges that healthcare providers faced at the outset of the COVID-19 crisis, accommodated Sutter's repeated requests for delay, which were initially justified based solely on Sutter's need to concentrate on matters other than litigation. But Sutter has now made clear that the problem is not lack of time. After many months of delay, the preliminary approval process should proceed expeditiously so that the Class may receive notice of the settlement and an opportunity present their views of its terms at a final approval hearing.

PROCEDURAL HISTORY

Following five-and-one-half years of litigation, the parties agreed to settle this case and executed a Memorandum of Understanding on October 15, 2019. On October 16, the Court announced the settlement, excused the jury, and set the preliminary approval hearing for February 25, 2020. Declaration of Russell Taylor Ex. 1 at 8:21-9:2; 10:9-19. Plaintiffs filed their motion for preliminary approval on December 19, 2019, shortly after the formal settlement agreement was executed. Plaintiffs filed their motion to appoint a monitor on January 30, 2020. Both motions are unopposed.

Following the February 25 hearing, the Court directed the parties to submit a supplemental filing responding to the Court's questions concerning the pending motions by March 18, and it continued the hearing to April 6. February 25, 2020 Order at 1. Plaintiffs provided draft responses to Sutter in early March.

On March 16, in light of the disruptions of the COVID-19 pandemic, Sutter and Plaintiffs agreed to continue the submission date from March 18 to March 27, and the hearing date from April 6 to April 15 or 22. In early April, Sutter sought a 60-day stay, representing that it was requesting a stay "so that during this period, both Sutter and its in-house counsel don't have to divert any resources away from the efforts in responding to COVID-19." Taylor Decl. Ex. 2 at 8:11-14, 7:9-22.

Plaintiffs, again, agreed. The Court stayed the case for 60 days and re-set the hearing on Plaintiffs' preliminary approval motion for June 22.

At a May 15 status hearing, Sutter argued that the "uncertainty and fluidity" associated with COVID-19 precluded Sutter from providing input regarding Plaintiffs' responses to the Court's February 25 questions or hearing dates.[1] On May 22, after Sutter repeatedly failed to provide input regarding the draft responses Plaintiffs had provided to Sutter in early March, Plaintiffs sought leave to file those responses, which the Court granted. On June 12, Sutter filed this motion to continue the approval proceedings. The Court then vacated the June 22 hearing.

LEGAL STANDARD

In considering a request for a continuance, the Court should consider: whether there was any previous continuance; the length of the continuance requested; the availability of alternative means to address the problem that gave rise to the request; the prejudice that parties would suffer as a result of a continuance; whether the parties have stipulated to the continuance; and whether the interests of justice are best served by a continuance.[2] Cal. Rules of Court rule 3.1332(d).

To the extent that Sutter does not identify any "date certain" by which it will possess the desired "clarity," Sutter is requesting a stay. *See Panoche Energy Ctr., LLC v. PG & E*, 1 Cal. App. 5th 68, 105 (2016) (while a continuance "postpone[s] a trial to a date certain which is not tied to any matter outside the parties control," a stay "refers to those postponements that freeze a proceeding for an indefinite period, until the occurrence of an event that is usually extrinsic to the litigation and beyond the plaintiff's control." (internal citation and quotations omitted.)) "When the party opposing the stay shows even a 'fair possibility of prejudice' occasioned by such a stay, the moving party must demonstrate that proceeding with the case would clearly impose 'hardship or inequity.'" *Trahan v. U.S. Bank Nat. Ass'n*, 2012 WL 5815372 (Cal. Super. Oct. 12, 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

[1] Taylor Decl. Ex. 3 at 22:8-13; 23:23-24:1; *see also* Sutter's May 28 letter at 3 ("there are simply too many uncertainties [] for the parties to meaningfully answer the Court's questions").

[2] *See Mahoney v. Southland Mental Health Assocs. Med. Grp.*, 223 Cal. App. 3d 167, 170 (1990) (in deciding whether to continue a motion hearing, "a review of the standards governing requests for continuance of trial dates is instructive").

ARGUMENT

I. SUTTER FAILS TO JUSTIFY A CONTINUANCE BECAUSE THE PFJ ALREADY CONTAINS A PROVISION TO ADDRESS CHANGED CIRCUMSTANCES.

Sutter's request for a continuance should be denied because the rationale it offers – that the impact of COVID-19 will be clearer in 90 days – does not justify any delay. The parties reached a settlement after a year of negotiation among experienced antitrust counsel. That settlement expressly addresses the possibility of changed circumstances. Mot. for Prelim. Approval, App'x 1, Ex. B (PFJ), § VII ("Retention of Jurisdiction & Changed Circumstances"). Once the PFJ is entered by the Court, Sutter may apply to modify the PFJ. Before entry by the Court, the PFJ is simply part of a settlement agreement, and Sutter has no legal right to seek modifications to a settlement agreement to which it agreed and by which it is bound. *Collins v. Thompson*, 679 F.2d 168, 172-173 (9th Cir. 1982) ("the parties to consent decrees are bound by general contract principles with respect to their proposed settlement."); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 596 (3d Cir. 2010) ("It is essential that the parties to class action settlements have complete assurance that a settlement agreement is binding once it is reached.").

Sutter's unsupported argument that "the better course is to make any needed modifications to the proposed injunction before the settlement is approved" (Mot. at 5) is incorrect. At the outset, Sutter has no standing to seek any modification because it is bound to the settlement that it signed. *See* Mot. for Prelim. Approval, Appendix 1 (Settlement Agreement), § VII(T) at p. 27 ("Class Counsel and Defendants' Counsel agree this Settlement is beneficial to the Class and will not represent otherwise to the Court"); *Ehrheart*, 609 F.3d at 596. No member of the Class (or of the public) has opposed preliminary approval or asked for delay to entertain possible modifications – on the contrary, Class members support approval and oppose Sutter's bid for delay. *See* § II(B), *infra*. The Attorney General has determined that delay is not in the public interest, including a delay for the purpose of entertaining modifications. *See* § II(A), *infra*. And if, as Sutter argues, the possible need for potential modification will be clearer in 90 days than it is today, the Court will be in a still better position to evaluate any claimed need for modification after the PFJ comes into effect, which will be more than 90 days from now.

More fundamentally, one of the main features of the PFJ is that it will be implemented through negotiations between Sutter and health insurers; the provisions restrict Sutter's ability to leverage its market power to *force* insurers to accept certain arrangements, but Sutter and insurers are generally free to reach agreements that are mutually beneficial. Accordingly, it makes little sense to try to anticipate what points of disagreement might be reached in private negotiations and to address those issues in advance. To be sure, there are certain provisions of the PFJ that cannot be bargained away: Sutter's motion focuses on two – limits on chargemaster increases and restrictions on conditioning participation of Group A providers. But even if COVID-19 could justify revisiting those provisions – and, as explained below, there is no support for that – the question is premature. The PFJ will not be entered in time to limit Sutter's ability to increase its chargemaster rates in 2020; the question whether Sutter's future increases should be allowed to exceed limits in the PFJ can hardly be addressed today. And if Sutter actually seeks terms from an insurer inconsistent with the PFJ's restrictions on conditioning of Group A providers in order to provided needed care in the midst of a pandemic, it can confer with Plaintiffs and the monitor. If no agreement can be reached, Sutter then can seek a modification of the PFJ.

The same is equally true of Senate Bill 977. As explained below, that bill – if it becomes law – does not supersede or obviate the need for the PFJ in any respect (and Sutter offers no concrete argument to the contrary). The *possibility* of legislative action is no basis for delaying preliminary approval of the settlement to which Sutter agreed.

Finally, Sutter's claim that modification after approval might necessitate further notice to the class likewise provides no basis for delaying approval. Supplemental notice "is only required where the amendment to the settlement agreement would have a material adverse effect on the rights of class members." *In re Diet Drugs*, 2010 WL 2735414, at 6 (E.D. Penn. July 2, 2010). A modification of the PFJ after approval in accordance with the Changed Circumstances provision of the PFJ would not amend the agreement, but effectuate it. Moreover, supplemental notice is unnecessary for "changes [that] improve[] the settlement." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 56 (2008).

II. FURTHER DELAY IS CONTRARY TO THE PUBLIC INTEREST AND WOULD PREJUDICE THE CLASS.

Sutter's failure to provide a colorable legal basis for delaying preliminary approval provides a sufficient basis to deny its motion. Furthermore, the delay that Sutter seeks would cause Plaintiffs – who have already seen their motion delayed by months as a result of the COVID-19 threat and the courtesies Plaintiffs agreed to extend to Sutter – significant prejudice that is neither speculative nor hypothetical. Rather, it is supported by the informed judgment of the Attorney General to which deference is owed, and by representatives of Class members and consumers of health care services whose detailed submissions are summarized below.

A. The Attorney General's Determination That Further Delay is Contrary to the Public Interest Is Entitled to Deference.

The Court should take appropriate account of the Attorney General's assessment of the public interest. The Attorney General has wide discretion to act in the public interest and has determined that further delay in hearing Plaintiffs' unopposed motion for preliminary approval would be contrary to the public interest. Sutter's requested relief wrongly seeks to override the substantial degree of deference given to the Attorney General's public interest assessment. Sutter's conflation of its self-interest with the public interest has no bearing on this analysis.

1. The Role of the Attorney General Is to Represent the Public Interest.

The California Constitution provides that the Attorney General is the chief law enforcement officer of the state and ensures that the laws of the state are uniformly and adequately enforced. Cal. Const. Art. V, § 13. He is elected by the People of the State of California and takes an oath of office to defend the Constitution. Cal. Const. Art. XX, § 3.

Based on these constitutional provisions and the common law history of the Office, our Supreme Court has endorsed the role of the Attorney General as "guardian" or "representative" of the "public interest" in representing the People on a matter of "public concern." *D'Amico v. Bd. of Med. Exam.*, 11 Cal. 3d 1, 15 (1974), *disapproved on other grounds in Woodland Hills Res. Ass'n v. City Council of Los Angeles*, 23 Cal 3d 917, 944 (1979). Our Supreme Court recognized that the Attorney General's role might call for him to make legal determinations in "his capacity as a

representative of the public interest." *Id.* Similarly, federal courts, relying on cases such as *D'Amico*, *supra*, and similar decisions in many other jurisdictions, have found that state attorneys general, especially those that are elected, have "wide discretion in making determinations as to the public interest." *Florida ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 & ns.6, 7, 9. (5th Cir. 1976).

The special role of the Attorney General as a representative of the public interest is also recognized under the Cartwright Act. The Attorney General is notified of any appeal so that he can intervene in an amicus capacity. Cal. Bus. & Prof. Code, § 16750.2. The Attorney General has the express right to seek injunctive relief to be enforced against antitrust defendants that imposes whatever affirmative duties are reasonably necessary to restore and preserve competition affected by those defendants' violations. *Id.* § 16754.5. Similarly, the special role of the Attorney General to act on behalf of the state in requesting injunctive relief for anticompetitive conduct injuring the state's economy has long been recognized under federal antitrust law. *See Georgia v. Penn. R. Co.*, 324 U.S. 439, 447-50 (1945). The Attorney General's Office has a particular expertise on healthcare provider competition issues: it has reviewed healthcare provider mergers for competition issues as part of a public interest inquiry under the relevant statutes governing nonprofit transactions (*see, e.g.*, 11 Cal. Code Regs., § 999.5); it has participated in several challenges to proposed healthcare insurer mergers; and it conducted a multi-year investigation into competition issues in healthcare provider markets prior to filing its complaint in this case and consolidating it with UEBT's pre-existing class action. Declaration of Emilio Varanini at ¶ 6.

Accordingly, the Attorney General is particularly well-positioned, and has the primary jurisdiction, to represent the public interest as to issues raised by settlement with Sutter, including Sutter's efforts to delay the settlement approval process. *See* Declaration of Dr. Mark Ghaly, Secretary of California Health and Human Services Agency, Attachment 4 to the Varanini Declaration (confirming that provider competition issues are within the primary jurisdiction of the Attorney General's Office and that the Attorney General speaks for the public interest as to the settlement). The Governor has been diligently addressing the emergency of COVID-19 by instituting a series of measures such as the temporary opening of formerly closed hospitals. Ghaly

Decl. ¶¶ 5-18. However, the Governor has not exercised his emergency powers, either directly or through a state agency, to override or supersede state antitrust law or excuse anticompetitive actions by Sutter or other healthcare systems. *Id.* ¶ 19. Thus, the Governor has not superseded the Attorney General's role and responsibility to speak on behalf of the public interest.

In contrast, Sutter, as a defendant that agreed to pay $575 million to resolve allegations that it imposed hundreds of millions of dollars in overcharges and that agreed to comprehensive injunctive relief, cannot credibly claim a right to represent the public interest in seeking to delay that very same relief. *Cf., e.g.*, *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1074 (1998) (because the Attorney General and other state agencies acted on behalf of the public interest in entering into a settlement, representative groups otherwise purporting to represent the public were bound to the settlement).

2. Significant Deference Should Be Given to the Attorney General's Determination that Further Delay Is Contrary to the Public Interest.

Federal courts have found that "significant deference" should be given to an enforcer's assessment of the public interest on the entry of negotiated injunctive relief. Those holdings logically extend to the Attorney General's assessment of the public interest in avoiding delay in the entry of that same relief, because such delay can be tantamount to denial in losing the benefits of that relief and because these decisions rest on the same separation of powers concepts that apply under our state constitution.

SEC v. Citigroup, 752 F.3d 285 (2d Cir. 2014) is instructive here. The district court judge refused to enter a negotiated consent decree resulting from a Securities and Exchange Commission enforcement action because the SEC failed to secure a stipulation as to the factual basis for the settlement. *Id.* at 289-90. The *Citigroup* Court explained that the decision as to whether a negotiated consent decree is in the public interest rests with the SEC and that the SEC's decision in that respect merits "significant deference." *Id.* at 296. In doing so, the *Citigroup* Court cited and quoted *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984), a seminal separation of powers case, for the following proposition:

[F]ederal judges—who have no constituency—have a duty to respect legitimate

Citigroup, 752 F.3d at 296.

Other federal courts have also concluded that an enforcer's assessment of the public interest in the context of a negotiated consent decree is entitled to deference. *SEC v. Randolph,* 736 F.2d 525, 529 (9th Cir. 1984) ("The initial determination whether the consent decree is in the public interest is best left to the [enforcer] and its decision deserves our deference.").[3]

3. The Attorney General Has Determined that Further Delay Would Be Contrary to the Public Interest.

The premise of Sutter's request for delay is its apparent desire to open up the possibility of modifying the PFJ. After carefully considering the issues raised by Sutter's motion, the Attorney General has determined, for the reasons set out below, that it is in the public interest that the PFJ not be delayed, much less be modified prior to final approval.

Plaintiffs expressly bargained for relief that would address Sutter's anticompetitive conduct, restore competition and choice to healthcare markets, and provide benefits for healthcare consumers. The declarations of Janet Lundbye of United Healthcare and Becky Lacroix-Milani of Health Net[4] describe how insurers are continuing to negotiate contracts with Sutter, notwithstanding COVID-19, as well as how Sutter is seeking to delay implementation of the relief set out in the PFJ past the end of 2020.

As set out in the analysis of Dr. Glenn Melnick ("Melnick Analysis") in support of this statement,[5] and as supported by the declarations of Suzanne Delbanco, Ph.D. and Elizabeth Mitchell

[3] These federal decisions are persuasive because the separation of powers concept that motivates them applies equally under our state constitution. *See e.g., Steen v. Appellate Div. of Super. Ct.*, 59 Cal. 4th 1045, 1053-55 (2014).

[4] These declarations, like the declaration of Secretary Ghaly, M.D., M.P.H., are attached to the Declaration of Emilio Varanini in support of this determination by the Attorney General that further delay would not be in the interest of the public.

[5] The Attorney General consulted with Professor Melnick in reaching the determination that further delay would be contrary to the public interest pursuant to the process that it follows for the

regarding the prejudice to the Plaintiff Class from delay (*see infra*, §II(B)), furthering healthcare competition and choice, and bringing relief for consumers, by implementing the settlement without delay continues to be of critical importance for healthcare markets in this state notwithstanding COVID-19. Melnick Analysis ¶¶ 8-15, 25, 44. Moreover, furthering competition is even more important in the COVID-19 era to prevent price increases that would not be justified by market forces. *Id*. ¶¶ 11, 12, 14-15; Declaration of Suzanne Delbanco, Ph.D. ¶¶ 11, 14. Finally, federal antitrust agencies have stated that emergencies like COVID-19 generally do not suffice as an excuse to skirt the antitrust laws and the Attorney General agrees. Melnick Analysis ¶¶ 21-22.

Insofar as Sutter argues that COVID-19 has placed Sutter in a different financial position as a justification for delay, the Melnick Analysis supports this public interest determination by explaining how Sutter is in a far better position to weather inimical effects of COVID-19 than many other providers and that Sutter has been receiving, and may continue to receive, substantial direct and indirect financial aid from the federal government. Melnick Analysis ¶¶ 19-24, 33, 39-40, 42. The Melnick Analysis, as supported by the Declaration of Secretary Ghaly, M.D., M.P.H., also supports this determination by highlighting how Sutter's pleas regarding the impact of COVID-19 are more appropriately directed to the federal and state governments – which have been and continue to be very active in responding to COVID-19. Melnick Analysis ¶¶ 19-23; Ghaly Decl. ¶¶ 5-18.

Finally, the Melnick Analysis and the Lundbye and Lacroix-Milani Declarations provide support for the Attorney General's rejection of Sutter's hypothetical modifications of the PFJ as a reason for delay, as part of his public interest determination. In particular, market responses may provide alternatives short of a need by Sutter to increase its revenues from its chargemaster, whether that be cost reductions or non-chargemaster increases as dictated by market forces. *See* Melnick Analysis ¶ 25; Lundbye Decl. ¶ 12; Lacroix-Milani Decl. ¶ 7. Moreover, any need by Sutter to redirect patients to any out-of-network providers may be met either by the use of alternatives to out-of-network Sutter providers or by benefit waivers that would treat a Sutter patient at an out-of-

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public interest review of nonprofit healthcare provider mergers. The Attorney General is not submitting the Melnick Analysis for the Court's independent consideration. Rather, the Melnick Analysis is attached to the Varanini Declaration in support of the Attorney General's public interest determination pursuant to that process. Professor Melnick had previously consulted with the UEBT Plaintiffs. Varanini Decl. ¶ 2.

network hospital as if they have inpatient status. Melnick Analysis ¶ 38; Lundbye Decl. ¶ 12; Lacroix-Milani Decl. ¶ 7.

B. Further Delay Would Prejudice the Class.

Plaintiff Class members, and health care organizations to which they belong, strongly support proceeding with preliminary approval of the settlement agreed to eight months ago. Sutter's announcement in open court that it might seek modification of the PFJ was greeted with understandable dismay by Class members and others who work to promote the interests of health care consumers in Northern California. The declarations of these organizations, summarized here and submitted along with this opposition, are true evidence of the interests of the Class – unlike the speculation of the defendant that was alleged to have overcharged the Class by many hundreds of millions of dollars.

Catalyst for Payment Reform. Catalyst for Payment Reform is a nonprofit organization that works to produce higher-value health care and improve the functioning of health care markets; its members include several class members including CalPERS, Google, Hilmar Cheese, the San Francisco Health Services System, Self-Insured Schools of California, and Qualcomm, among others. *See* Delbanco Decl. ¶¶ 1-2. Dr. Delbanco explains that it is "now even more essential, in this time of economic crisis and during the recovery, that employers and other health care purchasers are able to exercise a full range of options when offering health care coverage to their health plan members." *Id.* ¶ 8.

Pacific Business Group on Health. PBGH, which represents numerous class members and large self-funded payors in California, including Chevron, Cisco Systems, Disney, Hewlett Packard Enterprise, Intel Corporation, Pacific Gas & Electric Company, RETA Trust, Safeway Inc., Walmart, Wells Fargo, CalPERS, University of California, Covered California, and the City and County of San Francisco Health Service System, opposes the stay and strongly supports proceeding with preliminary approval. Declaration of Elizabeth Mitchell ¶¶ 1-2, 11-16. PBGH notes that the PFJ's prohibition on anticompetitive bundling of services and products is also essential to providing employers with higher value choices in health care, which is of critical importance during an economic recession. Mitchell Decl. ¶ 11. As Ms. Mitchell explains, "[a]ny delay to advance the

much-needed reforms defined in the PFJ to support competition and transparency in California would be harmful to purchasers and consumers alike." *Id.* ¶ 14.

California Health Care Coalition. The California Health Care Coalition is composed of public and private sector employers and unions, and ERISA and non-ERISA health care plans, including Taft-Hartley ERISA plans, school district pooled-risk groups representing hundreds of school districts, and employer-management association plans. Declaration of Ken Stuart ¶ 3. CHCC's members have strongly expressed support for the settlement moving forward, and for opposing any stay requested by Sutter. *Id.* ¶ 6. Like CPR and PBGH, CHCC believes that preventing anti-competitive practices is critical during the current pandemic, as members need monetary and injunctive relief more than ever. *Id.*

Further delay in approving a settlement that was agreed to eight months ago deprives the Class of a principal benefit of settlement: expeditious relief. *See Sykes v. Harris*, 2016 WL 3030156, at *14 (S.D.N.Y. 2016) ("[m]uch of the value of a settlement lies in the ability to make funds available promptly" (internal citation and quotation marks omitted)); *Skochin v. Genworth Fin., Inc.*, 2020 WL 2950353, at *3 (E.D. Va. June 3, 2020) ("the settlement provides substantial monetary and other benefits to the class members, and it is important that class members be able to partake in those benefits as promptly as possible, if they so desire.… the sooner the individuals are able to receive the Notice and understand the benefits of the settlement, if it is approved, the better off they are.") (denying motion to stay class notice following preliminary approval). Similarly, UEBT, as representative of the Class, strongly supports proceeding with preliminary approval, and has determined that doing so is in the best interests of the Class. Declaration of Jacques Loveall ¶ 6.

III. SUTTER OFFERS NO BASIS FOR THE ASSERTION THAT ANY MODIFICATION TO THE PFJ IS LIKELY TO BE WARRANTED.

Although Sutter seeks no modification to the PFJ today, it argues that delay is warranted to account for the mere possibility that the impact of COVID-19 could warrant such modification at some undetermined future date. But even leaving aside that Sutter has no right to seek any modification to the PFJ (it cannot invoke the Changed Circumstances provision until after the PFJ is effective), Sutter offers no plausible basis to believe that any such modification ever would be

appropriate.

Sutter identifies just two provisions in the 27-page PFJ that Sutter speculates "may" be impacted by COVID-19. *First*, Sutter suggests that the provision limiting increases in Sutter's "chargemaster" – essentially, its list prices – may interfere with price increases that allegedly may be required to deal with losses occasioned by COVID-19. But this assumes that Sutter has to increase prices to address COVID-19, that the Court has some duty to ensure Sutter's profitability, and that Sutter cannot reduce costs to address COVID-19 losses or secure offsetting government relief. And nothing in the settlement prevents Sutter from seeking higher negotiated in-network rates in the future if warranted by competitive market conditions. Finally, Sutter ignores the importance of PFJ's chargemaster limits to ending the Sutter financial coercion that undercuts the ability of insurers to create narrow networks or steer to more affordable providers.

Furthermore, Sutter's underlying claims of COVID-19 losses are overstated. Those losses are largely "paper" losses based on the Q1 drop in the market value of its multibillion dollar investment portfolio; Sutter has received hundreds of millions of dollars in government aid since the crisis began and $1 billion from Centers for Medicare & Medicaid Services as part of the Accelerated and Advance Payment Program; and its current assets exceed current liabilities by $4.5 billion. *See* Taylor Ex. 8 at 4 & Ex. 9 at 2-4. But, more fundamentally, *if* Sutter genuinely requires assistance to address COVID losses, that assistance should be the responsibility of the executive and legislative branches; Sutter should not be freed of the restrictions in the settlement it agreed to and allowed to improperly exercise its market power to impose higher prices on consumers (who are suffering due to COVID-19).

Second, Sutter suggests that the PFJ's prohibitions on Sutter's conditioning in-network participation of certain must-have providers on the inclusion of other, unwanted Sutter providers may prevent Sutter from realigning the provision of care at certain facilities. But, again, these restrictions address conduct at the heart of Plaintiffs' case: conditioning participation has allowed Sutter to leverage the power of its must-have providers to weaken insurers' ability to create narrow and tiered networks, leading to higher prices. Any modification of these restrictions would seriously undermine the relief to which the parties agreed, to the detriment of healthcare consumers.

Moreover, the suggestion that these restrictions should be revisited now is based on speculation that future surges will cause Sutter to redirect services to out-of-network hospitals, that hospitals providing important services will be placed out of network, and that there will be no reasonable alternatives, such as insurer benefit waivers, provider accommodations or government action, to address pandemic-related issues. Such concerns are speculative.

IV. SENATE BILL 977 DOES NOT JUSTIFY ANY CONTINUANCE.

Finally, Sutter argues that potential legislation provides a basis for a stay. But Sutter's speculative assertion that SB 977, "if passed, could materially impact the injunction or even render it unnecessary or in conflict with the injunction" (Mot. at 16) is incorrect.

It is well-established that when legislation is not clearly intended to supersede a settlement agreement, the settlement agreement will be upheld. *See e.g., Envtl. Def. Fund, Inc. v. Costle*, 636 F.2d 1229, 1244 (D.C. Cir. 1980) (holding Congress did not intend to supersede settlement agreement in the absence of a clear conflict with the terms of the legislation or evidence that the legislature intended to supersede the agreement).[6] Even a change in law that conflicted with the settlement would not affect its binding nature. *See, e.g., Haggart v. United States*, 131 Fed. Cl. 628, 640 (2017) ("[A] change in law will not affect the binding nature of a settlement agreement."). The independent contractual obligations of a settlement agreement remain even after a change in law. *See Ehrheart*, 609 F.3d at 596 ("Where, as here, the parties have executed an agreement, a party cannot avoid its independent contractual obligations simply because a change in the law confers upon it a benefit that could have altered the settlement calculus.") (internal citations omitted). Sutter is well aware of this principle. *See Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 506 (2009) ("To allow post-approval changes or clarifications in the law to upset a settlement would be contrary to the established policy of encouraging settlements and frequently would allow a party to back out of a bargained-for position." (internal citation and quotations omitted)).

In any event, SB 977 does not conflict with the PFJ. Indeed, Sutter does not identify any

[6] In *Robert Ito Farm, Inc. v. Cty. of Maui*, 2015 WL 1279422 (D. Haw. Mar. 19, 2015) – the sole case upon which Sutter relies – plaintiffs challenged the legality of a county ordinance. The legislation at issue would have "prohibit[ed]" the "ordinance at the heart of this case." *Id.* at *1. Sutter has not and cannot identify any language in SB 977 that "prohibits" any provision of the PFJ. To the contrary, the PFJ is perfectly consistent with SB 977.

specific language in SB 977 that would impact or alter the need for the PFJ in any way. Instead, Sutter vaguely speculates that, "if passed," "depending on its final content," there is a "possibility" that the bill could "duplicate[] portions of the injunctive relief" or "could" conflict in some undisclosed manner. Mot. at 16. This is speculation. Nothing in the plain text of the bill or the legislative history of SB 977 suggests that it was meant to supersede or conflict with the PFJ or the settlement. *See* Taylor Decl. Exs. 4 & 5.

CONCLUSION

Further delay in approving the October 2019 settlement would prejudice both the People and the Class. In speculating about two hypothetical modifications, Sutter ignores the Changed Circumstances provision for which the parties bargained. Sutter's motion should be denied.

DATED: June 25, 2020

CALIFORNIA ATTORNEY GENERAL

By: /s/ Emilio Varanini

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By: /s/ Richard Grossman

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Lead Counsel for Plaintiff Class

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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 CONTRA COSTA

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 June 25, 2020, I served true copies of the document(s) described as

PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

DECLARATION OF EMILIO E. VARANINI IN SUPPORT OF THE ATTORNEY GENERAL'S DETERMINATION THAT FURTHER DELAY IS CONTRARY TO THE PUBLIC INTEREST IN PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION FOR CONTINUANCE

DECLARATION OF RUSSELL TAYLOR IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

DECLARATION OF KEN STEWART ISO PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO STAY

DECLARATION OF ELIZABETH MITCHELL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

DECLARATION OF JACQUES LOVEALL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

DECLARATION OF SUZANNE F. DELBANCO Ph.D, IN SUPPORT OF PLAINTIFFS' OPPOSITION TO SUTTER'S MOTION TO CONTINUE PRELIMINARY APPROVAL HEARING

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 llaflamme@fbm.com to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on June 25, 2020, at Concord, California.

LouAnne Laflamme