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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 **DECLARATION OF ELIZABETH MITCHELL IN SUPPORT OF 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 am Judge: Hon. Anne-Christine Massullo Dept.: 304 Action Filed: April 7, 2014

I, Elizabeth Mitchell, declare:

1. I am the President and Chief Executive Officer of the Pacific Business Group on Health (PBGH), a non-profit 501(c)(3) organization, that includes a number of large public and private purchasers who are members of the Plaintiff Class. PBGH's Members represent diverse industries as well as state agencies, including Chevron Corporation, Cisco Systems, The Walt Disney Company, Hewlett Packard Enterprise, Intel Corporation, Pacific Gas & Electric Company, RETA Trust, Safeway Inc, Walmart, Wells Fargo & Company, California Public Employees' Retirement System, University of California, Covered California, and the City and County of San Francisco Health Service System. Additionally, the Silicon Valley Employers Forum, representing over 50 companies in the technology industry, is a PBGH Member.

2. In this declaration, I highlight PBGH's and its Members' direct experiences in purchasing health insurance and the inability to offer product designs that leverage high performance and narrow networks to improve affordability. Competitive healthcare markets are crucial to achieving both the federal and state health reform and transformation goals that PBGH has espoused and contributed to for 30 years. The COVID-19 pandemic creates even greater urgency that the terms of the Proposed Final Judgment (PFJ) be implemented. Rather than retreating back to the status quo, the COVID-19 crisis presents an opportunity to transform health care delivery and payment. Nothing inspires innovation more than competition – competition that is amplified with transparency on quality and price.

PBGH Programs and Experience Promoting Market Competition

3. For over three decades, PBGH has advanced policy positions to promote market competition, cost transparency, and quality performance accountability:

a. Working collaboratively with diverse stakeholders, PBGH published California's very first public health plan and medical group report cards on clinical quality and patient experience, holding a contract with the State of California Office of the Patient Advocate to produce its consumer information website on health care quality for many years.

b. PBGH operated the California Healthcare Performance Information System multi-payer claims database that sought to measure individual practice and physician-level

quality, and was the first organization nationally to receive Medicare fee-for-service claims data as a Qualified Entity.

c. PBGH built a Plan Chooser tool used by its predecessor health exchange, PacAdvantage, CalPERS, University of California, and Wells Fargo to assist beneficiaries in selecting health plans with comparative information on quality, benefit coverage rules, and premium cost.

d. PBGH Members such as Safeway piloted early cost transparency tools using their own self-funded claims with emerging vendors such as Castlight.

e. PBGH leads the engagement of California hospitals in voluntarily reporting patient safety performance through the national Leapfrog Group.

f. PBGH also implemented the statewide California Joint Replacement Registry to measure longitudinal outcomes for hip and knee surgery that included participation by several Sutter Health hospitals. PBGH has also conducted research with Milliman actuaries using California Office of Statewide Health Planning and Development (OSHPD) data to assess hospital efficiency; a broader initial research design using actual cost data was stymied due to Sutter Health's gag clauses in its health plan contracts, which prohibited the release of Sutter data. Recently, PBGH served on OSHPD's multi-stakeholder Healthcare Payments Data Review Committee with the goal of establishing a statewide data utility to support cost management, quality, public health and policy.

g. PBGH is currently researching oncology patient-reported outcome measures under a CMS cooperative agreement to develop advanced measures for its alternative payment model programs.

4. PBGH invests in quality improvement activities through the California Quality Collaborative, which works directly with physician medical groups to improve care for medically complex patients, implement whole-person care and deploy team-based primary care delivery. PBGH has brought nearly $40 million in federal grants from the Center for Medicare and Medicaid Innovation and Centers for Medicare & Medicaid Services (CMS) to support health care transformation in California medical groups and clinics, including participants from Dignity

Health and Sutter Health, such as Brown & Toland Medical Group, Sutter Health Foundations and Palo Alto Medical Foundation.

5. PBGH's subsidiary Negotiating Alliance (PBGHNA) previously provided direct support to up to 19 private large purchasers representing nearly 400,000 beneficiaries in group California HMO purchasing from 1993 to 2010. In this capacity, PBGH has had direct experience with the monopolistic and antitrust issues that are addressed by the Settlement.

a. For many years, PBGHNA assessed strategies to improve affordability and sought to partner with health plans to offer high performance networks in Northern California that demonstrated higher quality and lower costs, but such products were not available due to the anti-tiering and all-or-nothing requirements Sutter Health had negotiated with health plans.

b. The Negotiating Alliance was more successful with offering high performance network options in Southern California where there was greater competition among medical groups and hospitals.

c. For the last decade of the PBGHNA group HMO purchasing program, employers experienced a widening gap in Northern California health expenditures in comparison to Southern California in excess of 30 percent, due in large part to the Sutter Health's contracting tactics. This regional variation in cost continues to be reflected in geographic pricing differentials in the rates of health plans offered by CalPERS and Covered California.

Market Competition & State and Federal Regulation of Health Care

6. PBGH believes that as the market advances towards accountable care through value-based contracting strategies, market competition must be maintained to assure consumer choice of providers and affordability.

7. PBGH continuously obtains and shares feedback among its large purchasers to spread best practices and foster a continuously improving health care delivery system. Market competition leads to innovation.

8. Market competition with transparency in price and quality information are essential for both employers' value-purchasing strategies and consumer decision-making. Whether there

are new federal or state policies, health epidemics or pandemics, changing technologies, new treatments and drugs, health care delivery is constantly adapting. Ultimately, as purchasers, PBGH seeks to assure that the underlying incentives and market drivers contribute to better outcomes through greater accountability.

9. For many years, there have been both state and federal proposals to expand public coverage options. Against the backdrop of expanded coverage is a pressing need to assure that the current health care dollars go farther through more efficient delivery of health care, reduced waste through avoidance of medically inappropriate services, improved patient safety and fewer clinical complications. The success of coverage expansion initiatives depends on improving affordability, which can only be achieved through competitive markets.

10. California's Department of Managed Health Care has embraced managed care as a strategy to promote coordinated care and improved alignment of financial incentives. These and related payment reform strategies are designed to unravel the traditional fee-for-service incentives that reward volume over value. The PFJ can serve to reinforce these reform efforts by allowing distinction among provider sites that are engaged in payment and care transformation. The absence of provider tiering in benefit design and price disclosures actually works against these reform initiatives by not allowing employers and consumers to distinguish performance across providers.

Terms of the PFJ are More Essential Than Ever in the Current Economic Crisis

11. As evidenced by the significant focus on health coverage and access as part of the national policy dialogue and the broad impact of the COVID-19 pandemic on the U.S. economy and health delivery system, now, more than ever, the terms of the PFJ are vital to the ability of large public and private purchasers to maintain affordable access to health insurance and high quality health care for their eligible employees.

a. During difficult economic times, the release of the settlement dollars will be used to offset future health care cost increases and support other programs focused on improving the health of employees. Access to price, quality and cost information are critical to employers and consumers in making informed decisions about their health care and choice of providers. Employers and consumers have a right to know how much

providers are paid for their services and the quality of those services to make value-based decisions. For the last 30 years, federal policy has moved in the direction of greater transparency and performance accountability, and the data reporting provisions of the PFJ are wholly consistent with this objective. COVID likely heightens consumers' interest in cost and quality information about providers to help them choose an appropriate and safe site of care.

b. Access to price, quality and cost information are needed by consumers in managing their out-of-pocket costs, especially with the increasing number of patients enrolled in high deductible health plans. The agreed upon caps on out-of-network billings are even more essential in times of economic hardship as employees experience furloughs or temporary unemployment. Based upon a PBGH Member survey, one in five companies has experienced layoffs and over 40 percent have had to furlough employees during the COVID-19 crisis.

c. Consistent with the transparency requirements outlined in the PFJ, employers seek to offer benefit designs that deliver greater affordability and quality by distinguishing higher performing providers and using incentives such as lower out-of-pocket costs or expanded benefits to choose those providers. Timely approval of the PFJ is critical to enabling health plans to refine high performance network offerings that could be made available as early as Plan Year 2021.

d. Absent the terms of PFJ, Sutter Health has used its negotiating leverage to require health plans to offer its full network or not at all, resulting in higher premiums and consumer cost-sharing.

e. The PFJ's prohibition on anticompetitive bundling of services and products is also essential to providing employers with higher value choices in health care. This anticompetitive behavior has limited the availability of Centers of Excellence programs that can deliver higher quality care and better outcomes, with fewer medical complications that result in readmissions, longer periods of disability and absence from work. PBGH expects that the increased competition that will result from the PFJ will enable companies

with significant Northern California enrollment to offer employees more benefit choices at lower cost through narrow and tiered network options.

f. Much as employers have employed claims and service auditors to assure payment accuracy and compliance with contract terms, the PFJ's stipulation of a Monitor will provide crucial oversight that the terms of the injunctive relief are being met.

g. PBGH is on record as supporting California Senate Bill 977 (Monning), which we believe is important legislation that is wholly independent of the PFJ. SB 977 strengthens the authority of the Attorney General to review and approve healthcare mergers. It does not impact or eliminate the need for the PFJ.

Impact of the Pandemic on Sutter and Health Care Delivery Systems

12. PBGH acknowledges the wide-ranging impact of the pandemic, but PBGH is concerned that Sutter's recent discussion of potential COVID-19 impacts at the hearing on May 29th is an attempt to further obfuscate the facts of the pandemic and its near-term and longer-term impact and needlessly delay implementation of the settlement.

13. America's public and private entities are demonstrating resilience and innovation in addressing the COVID-19 challenges and we expect nothing less from its health care delivery systems.

a. Risk management is a standard expectation of hospitals and preparedness for emergency situations has long been a part of standard hospital accreditation practices. By example, California hospitals have had to maintain readiness for potential earthquakes, and most recently, dealt with regional evacuations due to wildfires.

b. Surge preparations have been cited as a major concern. As a result of early emergency preparedness in California and cross-county collaboration on shelter-in-place guidelines, the volume of admissions and use of ICU beds in Northern California has been relatively modest.

c. COVID-19 has taxed many health delivery systems with access to personal protective equipment and medical equipment such as ventilators. However, in recent years, hospital supply chain management has evolved significantly with large group

purchasing organizations and other infrastructure such as barcoding to track utilization for billing purposes. Much as independent hospitals have achieved economies of scale through group purchasing, Sutter Health no doubt has large scale supply management and sophisticated procurement operations.

d. The financial impact of COVID-19 on health care delivery has been widely reported. While hospitals have had reduced elective surgery volumes over the last three months, organizations have been in the process of phasing in these services again. As has been publicly reported, Sutter Health has received over $200 million from the CARES Act funds and also had access to Medicare's pre-payment of claims based on prior year volumes. Additionally, Sutter Health has also benefited from the CARES payroll tax deferral.

Delay Will Harm Market Competition, the Class and Consumers

14. PBGH is concerned that in Sutter Health's recent Motion to Continue Preliminary Approval Hearing is an effort to renegotiate the terms of the PFJ that were mutually agreed upon by the Parties. The Defendant has presented a series of speculative points in its Memorandum that cloud the facts of this case. PBGH strongly believes that Sutter Health has engaged in anti-competitive behavior for many years, resulting in significant overcharges to PBGH Members and out-of-pocket costs for its employees. Any 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.

a. For the reasons noted above, COVID-19 is not a sufficient reason to delay preliminary approval. All hospitals have mobilized risk management resources, experienced near-term revenue losses from fewer elective admissions, and expanded capacity for potential COVID-19 admissions. And all hospitals are expected to do so while adhering to California's statutory requirements for fair competition.

b. Sutter Health cites the financial impact of COVID-19 on operations and investments in the 1st Quarter of 2020, but the stock market has recovered significantly during the 2nd Quarter of 2020, and Sutter's credit rating as reported by S&P Global Ratings is A+. As noted above, the CARES Act has provided more than $200 million in

payments to Sutter Health, advanced Medicare payments of $1 billion, as well as payroll tax relief. The intent of the CARES Act was to provide economic relief to mitigate the impact of COVID-19 and to avoid exacerbating public-private cost shift. Decisions by Medicare and health plans to cover the cost of COVID-19 testing and treatment also reduce any financial exposure for providers and offset losses due to uncompensated care.

c. While there has been reduced near-term volume in elective surgical procedures, it is likely that the pent-up demand will soon offset past reduced volume.

d. It appears that having the benefit of the settlement, Sutter now seeks to unwind the PFJ provisions that were negotiated specifically to address its anti-competitive behavior.

i. Chargemaster manipulation has long been a vehicle by which hospitals circumvent negotiated health plan rates, creating unpredictable cost-sharing and out-of-pocket liability for patients. It is unconscionable for Sutter Health to seek to renege on an agreed upon cap on chargemaster increases. This signals an intent to raise prices above the reasonable levels Sutter agreed to in the PFJ at a time when private employers, state and municipal governments are working hard to cut costs to address revenue shortfalls.

ii. The PFJ provisions against conditional participation as part of health plan contract negotiations are critical to preventing future anti-competitive behavior that limits narrow networks and tiering.

15. PBGH works collaboratively with plans and providers across all of our programs. Product innovation and network design requires planning and lead time to define populations and geographies, evaluate health plans, hospitals and provider systems, negotiate contracts, design incentives, educate and communicate with employees (and their dependents). If preliminary approval of the PFJ is further delayed, the opportunity for such products could be further delayed until Plan Year 2022.

16. Preliminary approval of the Settlement is urgently needed to advance opportunities for better and more affordable health care. PBGH urges the Court to proceed expeditiously with

preliminary approval of the PFJ to enable the marketplace to begin responding to the terms that have been mutually agreed upon by Sutter Health and the Plaintiffs. At this critical time with the economic challenges and state budgetary shortfalls, it is imperative that we advance the opportunities for a more competitive and transparent marketplace.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on this 24th day of June, 2020, at San Francisco, California.

Elizabeth Mitchell