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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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

ASSIGNED FOR ALL PURPOSES TO HON. CURTIS E.A. KARNOW, DEPT. 304

[REDACTED] MEMORANDUM IN SUPPORT OF PLAINTIFF UEBT'S MOTION FOR CLASS CERTIFICATION

Hearing Date: May 3, 2017
Time: 9:00 a.m.

Complaint Filed: April 7, 2014
Trial Date: None Set

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INTRODUCTION

For over 15 years, Defendants Sutter Health and its numerous affiliates ("Sutter") have used their market dominance in Northern California to impose anticompetitive contractual arrangements that inhibited efforts to promote price competition and insulated Sutter's excessive prices from market discipline. Sutter did not [redacted] (Lundbye Decl. Ex. 43 at UHC-149277) because, as Sutter acknowledged, [redacted] (Wheeler Decl. 1) and [redacted] *Id.* Ex 2. Therefore, Sutter employed its market power to impose and enforce anticompetitive contract provisions that restricted the ability of health plans to financially motivate patients to select more cost-effective providers. By sheltering its providers from price competition, Sutter was able to impose substantial illegal overcharges that have persisted for well over a decade.

Among those most severely impacted by Sutter's anticompetitive conduct and illegal overcharges are the members of the class that is now before the Court—well over 1500 California self-funded health plans that pay Sutter for the healthcare charges incurred by their employee-members, instead of purchasing insurance to cover those costs.[1] To obtain healthcare for their members, self-funded health plans utilize provider networks assembled by "Network Vendors"—health insurance companies that make their provider networks (and the provider pricing they negotiate) available to both their self-funded health plan customers and their fully insured customers.

This case is ideally suited for class treatment because all class members paid Sutter inflated rates resulting from a single anticompetitive contracting scheme. By restricting the ability of the Network Vendors to assemble networks offering incentives that promote price competition, Sutter suppressed price competition on a market-wide basis, and thereby inflated the prices that Sutter was paid. Each class member purchased services from Sutter at prices negotiated by one of just five Network Vendors which, together, account for 98% of the enrollees

[1] The class UEBT seeks to certify is defined as: all self-funded health plans that are citizens of California for purposes of 28 U.S.C. § 1332(c)(1) or (d)(10) and that compensated Sutter for general acute care hospital services or ancillary products at any time from January 1, 2003 to the present at prices set by contracts between Sutter and Aetna, Anthem, Blue Shield, Cigna, PacifiCare or United Healthcare.

in California's self-funded health plans. Leitzinger Decl. ¶20. Each of these Network Vendors has provided one or more sworn declarations, and produced documents, describing how Sutter's "systemwide" contracts have restricted their ability to financially motivate health plan members to choose lower cost providers. Appendix A [redacted]—that cut off their ability to foster price competition for the benefit of their self-funded health plan customers.

Sutter disavows its conduct and denies its anticompetitive effect in the marketplace, disputing even its own well-documented market power. *See generally* Sutter's Answer. However, the core allegations surrounding Sutter's antitrust liability and the damages sustained by the class will all rise or fall at trial with common, classwide proof, and common issues will predominate over any individual class member issue. The members of this class are too numerous to be joined at trial, yet are readily ascertainable through data produced in discovery, publicly available records, and a standard notice procedure. The claims of Class Representative UFCW & Employers Benefit Trust ("UEBT" or "Plaintiff") are typical of other class members' claims because, like other self-funded health plans in California during the class period, UEBT paid Sutter higher prices than it would have absent Sutter's anticompetitive conduct. Finally, a class action is superior to individual actions in which the same issues would be repeatedly retried.

STATEMENT OF FACTS

I. SUTTER'S SCHEME TO RESTRAIN PRICE COMPETITION THROUGHOUT NORTHERN CALIFORNIA

The healthcare market is one of the few markets where the person who makes the purchase decision is not the person who pays the majority of the purchase price. As a result, unless they are properly motivated, patients have little incentive to care about the amount healthcare providers charge because all or most of those costs are paid by their health plans.

In an unrestrained market, Network Vendors are able to remedy this anomaly and foster price competition among providers through recognized principles of "managed care." Joyner Decl. ¶¶5, 16, 44-45, 62. The following managed care strategies incentivize health plan members

to avoid high cost providers, which in turn, incentivizes high-cost providers to lower their prices to avoid losing business.

- **Narrow Networks:** Health plans can utilize narrow provider networks that exclude overpriced providers. To encourage their members to select the most cost-effective providers, health plans can cover a significantly larger share of their members' healthcare charges when they select "in-network" providers.

- **Tiering:** Health plans that need to include the more expensive providers in their provider networks can implement tiering. In a tiered network, all providers are included in the network but overpriced providers are placed in disfavored, lower tiers. Health plan members are motivated to select the more cost-effective providers placed in Tier 1 because a larger portion of their healthcare costs is covered.

- **Price Transparency:** When health plans require their members to pay a percentage of their healthcare costs, there is at least some incentive to choose more cost-effective providers. Health plans can provide their members with price comparison tools to facilitate their ability to make informed decisions based on price.

Beginning with its first [redacted] between [redacted], Sutter secretly embarked on a contracting strategy that was designed to illegally disrupt each of these strategies for fostering price competition. First, Sutter imposed on all Network Vendors explicit "all or nothing" terms that restrained their ability to exclude overpriced Sutter providers from their networks unless all Sutter providers were excluded—a commercial impossibility. When Network Vendors responded by attempting to promote price competition through tiered networks, Sutter imposed on all Network Vendors [redacted] that improperly prohibited incentives for health plan members to select more cost-effective providers in a tiered network. And to perpetuate its all-or-nothing and anti-tiering restraints, Sutter imposed on all Network Vendors a [redacted]

All of Sutter's contractual restraints were implemented with the principal Network Vendors in contracts Sutter [redacted]

Sutter used these [redacted] to charge every health plan unlawfully inflated prices that far exceeded the prices charged by rival hospitals.

II. SOME SUTTER PROVIDERS ARE "MUST-HAVE" FOR NETWORK VENDORS AND CLASS MEMBERS.

[redacted]

See, e.g., Wheeler Decl. Ex. 3; De La Torre Decl. ¶8; Leitzinger ¶11. In some areas, Sutter controls the only nearby acute care hospital. *See, e.g.*, Wheeler Decl. Ex. 4 at 156:12-22. [redacted] Joyner Decl. ¶¶20-21; Melody Decl. ¶7; Lundbye Decl. ¶5. [redacted][2] [redacted].[3]

III. SUTTER EXPLOITS ITS MARKET POWER BY RESTRICTING THE ABILITY OF NETWORK VENDORS TO PROMOTE PRICE COMPETITION.

Until the late 1990s, Sutter providers contracted with Network Vendors on an individual basis.[4] Between 2001 and 2003, however, Sutter required each of the five major Network

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[2] *See, e.g.*, Joyner Decl. ¶¶20-21; Katz Decl. ¶4; Welsh Decl. ¶8; Lundbye Decl. ¶5; Melody Decl. ¶8; De La Torre Decl. ¶8.

[3] *See also, e.g.*, Melody Decl. ¶8 [redacted]; Katz ¶4; Lundbye Decl. ¶6; Melody Decl. ¶8; De La Torre Decl. ¶¶9-10.

[4] *See, e.g.*, Joyner Decl. ¶¶7-8; Katz Decl. ¶7; Melody Decl. ¶5; Welsh Decl. ¶11; Lundbye Decl. ¶8; Lacroix-Milani Decl. ¶12.

Vendors to enter into [redacted] that covered *all* Sutter providers and included provisions restricting the ability of Network Vendors to offer products that promote price competition. By imposing its all-or-nothing, anti-tiering, and price secrecy restrictions, Sutter reduced competition throughout the market and illegally insulated itself from price competition so that it could charge improperly inflated rates to all class members.

Sutter's "systemwide" contracts were based on a [redacted] Lacroix-Milani Decl. ¶40 & Ex. 16.[5] [redacted] Joyner Decl. ¶13; Barnes Decl. ¶19; Melody Decl. ¶6; De La Torre Decl. ¶11 [redacted] As a result of Sutter's [redacted] contracting strategy, and as demonstrated by Appendix A, the key anticompetitive provisions [redacted]—thus restricting the types of networks that any Network Vendors could make available to its self-funded health plan customers if they needed access to even a single Sutter provider.

A. The Common Evidence That Sutter Imposed "All or Nothing" Contracting Arrangements On All Of The Network Vendors

Throughout the Class Period, Sutter has consistently taken [redacted] Lundbye Decl. Ex. 2 at UHC-00499835.[6] Sutter's early [redacted] contracts expressly required Network Vendors [redacted] *See, e.g.*, Appendix A [redacted]

[5] *See also, e.g.*, Katz Decl. ¶5; Welsh Decl. ¶¶9, 33; Lundbye Decl. ¶¶7, 21; Melody Decl. ¶10; Wheeler Decl. Ex. 6 at 244:9-25; Ex. 4 at 57:7-18,

[6] *See also, e.g.*, Wheeler Decl. Ex. 8 at HN-0003282 [redacted]

[redacted][7]

Sutter later adopted a less overt, but equally powerful, means of forcing the Network Vendors to include all Sutter providers in their offerings: [redacted] *See, e.g.*, Appendix A [redacted] (Barnes Decl. ¶17) [redacted] Sutter provider. [redacted]

Hospitals are rarely paid their full list prices—known as "billed charges"—even when they have no contract with the Network Vendor and are considered out-of-network. Absent a contract providing otherwise, the health plan and its members are required to pay only the "reasonable and customary value for the health care services rendered" by out-of-network providers. Cal. Code Regs., title 28 §1300.71(a)(3)(B). [redacted] Joyner Decl. ¶32; Barnes Decl. ¶16; Lundbye Decl. ¶9. [redacted]

Because members often find themselves in circumstances where they must visit out-of-network providers (especially for emergency services), [redacted] Lundbye Decl. ¶10.[8] [redacted] Joyner Decl. ¶40; Barnes Decl. ¶¶7, 16, 19; De La Torre Decl. ¶14; Melody Decl. ¶18.

[redacted]

[7] *See, e.g.*, Joyner Decl. ¶¶8, 15-16, 20, 23; Barnes Decl. ¶¶9-12, 15-18; Katz Decl. ¶¶10-14; Lundbye Decl. ¶¶8-9; Melody Decl. ¶¶12-13; De La Torre Decl. ¶13; Lacroix-Milani Decl. ¶33.

[8] *See also* De La Torre Decl. ¶14; Melody Decl. ¶18; Joyner Decl. ¶47; Barnes Decl. ¶19, Ex. 11 [redacted]

[redacted] Wheeler Decl. Ex. 10 at DEF000094520. [redacted] De La Torre Decl. ¶15. [redacted][9] [redacted] Joyner Decl. ¶27.

B. The Common Evidence That Sutter Imposed Anti-Tiering Contracting Arrangements On All Of The Network Vendors

[redacted] Joyner Decl. ¶43; Barnes Decl. ¶15; Melody Decl. ¶25; Lundbye Decl. ¶¶18-19.

[redacted] *See* Appendix A [redacted] These provisions made it clear that Sutter providers [redacted] De La Torre Decl. ¶27

[9] *See, e.g.*, Katz Decl. ¶18; Welsh Decl. ¶18; Lundbye Decl. ¶11; Melody Decl. ¶22; De La Torre Decl. ¶18; Lacroix-Milani Decl. ¶18.

[redacted] Wheeler Decl. Ex. 4 at 102:8-16 [redacted] [10] As Sutter's Chief Contracting Officer, Melissa Brendt, reminded Sutter executives: [redacted] Wheeler Decl. Ex. 11 at STCA0380691.[11] [redacted] [12]

C. The Common Evidence That Sutter Contractually Restricted The Ability Of All Network Vendors To Promote Price Transparency

[redacted]

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[10] *See, e.g.*, Joyner Decl. ¶¶48-49, 54; Barnes Decl. ¶19; Melody Decl. ¶29; De La Torre Decl. ¶¶22-26; Lukins Decl. ¶¶3-10.

[11] *See also, e.g.*, De La Torre ¶ 25 (Letter from Brendt) [redacted] Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37888 [redacted]

[12] *See e.g.*, Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37887 [redacted]

[redacted][13] Sutter, however, was [redacted] Wheeler Decl. Ex. 12 at STCA0630564; *see also id.* Ex. 1 at STCA0234221 [redacted] De La Torre Decl. ¶11.[14] [redacted] *See* Appendix A [redacted] As Sutter's Chief Contracting Officer admitted: [redacted] Wheeler Decl. Ex. 4 at 107:18-22; *see also id.* 110:15-17. [redacted][15]

Later, in an effort to promote transparency, the California Assembly passed legislation known as "SB 751" to ban contract provisions that prohibited Network Vendors from disclosing hospital pricing. Health & Safety Code § 1367.49(a). Sutter recognized this legislation to be [redacted] Wheeler Decl. Ex. 14. [redacted]

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[13] *See, e.g.* Melody Decl. ¶32; De La Torre Decl. ¶34; Welsh ¶37.

[14] *See also, e.g.*, De La Torre Decl. ¶32 [redacted] *Id.*, ¶32 [redacted] Joyner Decl. ¶64 [redacted] Barnes Decl. ¶21 [redacted]; Welsh Decl. ¶41; De La Torre Decl. ¶40.

[15] *See, e.g.*, Wheeler Decl. Ex. 13 at STCA0113832 [redacted] Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37889 [redacted] Katz Decl. ¶¶27-29; Welsh Decl. ¶¶38-44 & Ex. 2; Lundbye Decl. ¶¶15-16; Melody Decl. ¶¶36-38; De La Torre Decl. ¶¶33, 35, 38; Ramseier Decl. ¶¶7-9.

[redacted] Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37889.[16] [redacted][17]

IV. CLASS MEMBERS WERE OVERCHARGED AS A RESULT OF SUTTER'S ANTICOMPETITIVE PRACTICES.

Because Sutter's anticompetitive contract provisions have prevented Network Vendors and their self-funded health plan customers from incentivizing members to choose lower-priced hospitals, Sutter can price its services at supracompetitive levels without fear of losing patients to competing hospitals. Sutter's practices create a seamless bulwark against market pressures on its hospitals to lower their prices to competitive rates.

The effect on healthcare prices has been dramatic, as demonstrated by the Declaration of Dr. Jeffrey Leitzinger, a distinguished and highly experienced antitrust economist who, in numerous antitrust class actions, has estimated damages, addressed economic issues related to class certification, and/or studied hospital healthcare markets. As Figure 4 of Dr. Leitzinger's Declaration illustrates, [redacted]

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[16] *See also* Wheeler Decl. Ex. 15 at BSC-UFCW-128813 [redacted] Katz Decl. ¶32, Ex. L [redacted].

[17] *See, e.g.*, Barnes Decl. ¶¶22-25; Katz Decl. ¶¶30-33; Welsh Decl. ¶¶42-44; Lundbye Decl. ¶15; De La Torre Decl. ¶¶40-41; Lacroix-Milani Decl. ¶32.

[redacted]

Contemporaneous pricing analyses by Network Vendors over the entire class period [redacted] Joyner Decl. ¶¶ 26, 56-60; *see also* Barnes Decl. ¶17, Ex. 10 at BSC-UEBT-6 ([redacted] De La Torre Decl. ¶ 5.[18]

[18] *See also, e.g.*, Lacroix-Milani Decl. ¶5 & Ex. 1 [redacted] Joyner Decl. ¶¶26, 56-60; Barnes Decl. ¶¶4-5; Lundbye Decl. ¶20; De La Torre Decl. ¶¶4-5, 10; Ramseier Decl. ¶6.

[redacted] Lundbye Decl. ¶20. As one Network Vendor observed, [redacted] Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37887. [redacted] *See, e.g.*, Lacroix-Milani Decl. ¶6 & Ex. 2 [redacted]; Joyner Decl. ¶36 [redacted]

Throughout the class period, [redacted] In 2004, [redacted] Wheeler Decl. Ex. 19. In 2007, Sutter observed that it was "15-30% more expensive than other providers." *Id.* Ex. 12 at STCA0630563. It acknowledged that in the prior five years, [redacted] which was [redacted] but would [redacted] *Id.* Ex. 20 at STCA0583423. A 2008 Sutter presentation recognized that [redacted] *Id.* Ex. 12 at STCA0630569. In 2010, Sutter recognized that its [redacted] *Id.* Ex. 21. These supracompetitive prices [redacted] Barnes Decl. ¶17, Ex. 10 at BSC-UEBT-4. [redacted] Wheeler Decl. Ex. 22.

These extreme prices were not rooted in better quality or patient satisfaction. [redacted]

[redacted] *Id.* Ex. 23 at STCA0524691. Indeed, Sutter acknowledged [redacted] *Id.* Ex. 12 at STCA0630564. Nor can Sutter's prices be justified by its costs or case mix; [redacted] *Id.* Ex. 23 at STCA0524692.

Dr. Leitzinger analyzed the reimbursement rates and prices that Network Vendors and their self-funded payer-customers and insureds paid both at Sutter and at hundreds of general acute care ("GAC") hospital in California. He relied primarily on three data sources: (1) revenues and billed charges of 339 GAC hospitals in California (including 24 Sutter GAC hospitals) for the period 1998-2015 as collected annually by the California Office of Statewide Health Planning and Development ("OSHPD"); (2) [redacted] (3) [redacted] Leitzinger Decl. ¶¶45, 76, 81.

Dr. Leitzinger used the OSHPD data to demonstrate how the class's aggregate damages during the class period can be accurately calculated. Leitzinger Decl. ¶¶43-71. Dr. Leitzinger compared Sutter's reimbursement rates during 2003-2015 to two benchmarks that were not (or were less) affected by Sutter's conduct: Sutter's reimbursement rates in an earlier time period, 1998-2002 (before and during the time its challenged practices were being rolled out), and reimbursement rates at non-Sutter GAC hospitals in California. *Id.* ¶¶65-68. Dr. Leitzinger made these comparisons using a standard regression analysis that controlled for several factors affecting reimbursement rates—including hospital characteristics, macroeconomic conditions, market concentration and hospital quality—to isolate the effect of Sutter's challenged conduct on its reimbursement rates.[19] *Id.* ¶¶ 56-68. Dr. Leitzinger's analysis conservatively estimates damages for class members identified to date [redacted] *Id.* ¶71. [20]

[19] Courts routinely treat such regressions as a reliable form of common evidence. *See, e.g., Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 810 (7th Cir. 2012); *see also* Leitzinger Decl. ¶43, n.102 (collecting cases).

To assess the likelihood that all or nearly all class members were impacted by Sutter's overcharges, Dr. Leitzinger conducted three additional analyses, all involving classwide methodologies and datasets. Leitzinger Decl. ¶¶75-90. First, [redacted] *Id.* ¶¶77-79. [redacted] *Id.* ¶78.

Second, Dr. Leitzinger examined [redacted] Leitzinger Decl. ¶¶75-77. [redacted] *Id.* ¶77.

Third, Dr. Leitzinger used [redacted] Leitzinger Decl. ¶¶80-90. [redacted] *Id.* ¶81. [redacted][21]

[20] [redacted]

[21] [redacted]

[redacted]

LEGAL STANDARD

Class certification under Code of Civil Procedure Section 382 is appropriate where there is "proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e. that proceeding as a class is superior to other methods. In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *In re Tobacco II Case*s, 46 Cal. 4th 298, 313 (2009) (internal citations and quotations omitted). The class's request for injunctive relief is also subject to California Business & Professional Code Sections 17203–17204, which require that the named plaintiff have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

California law and public policy favor the fullest and most flexible use of class action procedures. *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981). Any doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to later modification. *Id.* at 473-75. The "focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case" and "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Sav-on Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 327 (2004).

ARGUMENT

I. THE PROPOSED CLASS MEETS THE REQUIREMENTS FOR CERTIFICATION.

A. The Class Of Well Over 1500 Members Is Sufficiently Numerous.

The numerosity requirement "is indefinite and has been construed liberally," with "no set number" required. *Hendershot v. Ready to Roll Transp., Inc.*, 228 Cal. App. 4th 1213, 1222 (2014) (internal citation and quotation omitted). There can be no serious question that this case satisfies the numerosity requirement. The proposed class contains well over 1500 members. Leitzinger Decl. ¶27 & Ex. 5.

B. The Class Is Readily Ascertainable.

This case also easily satisfies the requirement of an "ascertainable class." *In re Tobacco II*, 46 Cal. 4th at 313. A "class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 14 (2007). The class must be defined "in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 915 (2001). The class representative need not actually "identify . . . individual class members to establish the existence of an ascertainable class." *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 1301 (2015).

The class in this case consists of self-funded health plans that (a) purchased general acute care hospital services or ancillary products from Sutter through one or more of the five major Network Vendors during the Class Period going back to 2003; and (b) are citizens of California under 28 U.S.C. § 1332(c)(1) or (d)(10). Both facts are easily ascertained. [redacted]

All class members are corporations or unincorporated associations.[22] As relevant to this case, both corporations and unincorporated associations are citizens of (a) the state under whose laws they are organized and (b) the state in which they have their principal place of business. *See* 28 U.S.C. § 1332(c)(1) & (d)(10); *see also, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (corporations); *Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026, 1032 n.13 (9th Cir. 2009) (unincorporated associations). For many class members, UEBT has been able to determine citizenship from publicly available data maintained by the California Secretary of State. All domestic corporations, as well as foreign corporations, partnerships, or LLCs conducting intrastate business, are required to file the address of their "principal executive office" with the Secretary of State. *See* Corp. Code §§ 1502(a)(5), 2105(a)(2), 16959(a)(1), 17708.02(a)(3). Healthcare trusts typically make their principal place of business clear on mandatory documents such as Summary Plan Descriptions. In most cases, UEBT has been able to use these sources to determine which self-funded payers are California citizens.

To the extent that these sources cannot, at this early stage, definitively identify all class members because names and addresses in the claims data may not always be identical to those in the Secretary of State's records, any gaps can be filled efficiently by the class notice process, as described in Plaintiff's Proposed Trial Management Plan. Hence, the proposed class is ascertainable.

C. A Well-Defined Community of Interest Is Present.

1. Common Questions of Law and Fact Predominate.

"[P]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 165 (C.D. Cal. 2002) (citation omitted); *see also, e.g.*, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:52, at fn.11 (5th ed. 2016) ("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."). "In order to determine predominance, the Court looks to whether the focus of the proposed class action will be on the words and conduct of the defendants rather than on the

[22] "Unincorporated associations" include sole proprietorships, partnerships, LLCs, and trusts.

behavior of the individual class members." *Thomas & Thomas*, 209 F.R.D. at 167. The ultimate question is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Sav-on*, 34 Cal. 4th at 326 (internal citation and quotations omitted). The presence of individual issues will not bar certification, provided those individual issues can be "managed fairly and efficiently." *Safeway, Inc. v. Super. Ct.*, 238 Cal. App. 4th 1138, 1154 (2015) (internal citation and quotations omitted).

This case presents an extraordinary number of common legal and factual issues that predominate over any conceivable individual class member issues. Sutter's market power, its "systemwide" contracting practices, and the market-wide impact of those practices on competition and on Sutter's prices will be the central issues at trial and are common to every class member.[23]

a. Sutter's Anticompetitive "Systemwide" Contracts And Practices Are Common Issues.

Sutter restricted competition and charged inflated prices by restraining the ability of Network Vendors and self-funded health plans to foster price competition among hospitals. The claim of every class member depends on showing that Sutter did so broadly, across enough Network Vendors to harm competition and illegally inflate prices.

Sutter implemented its scheme through [redacted] that restricted the ability of Network Vendors to offer narrow networks, tiered products, and transparency to all self-funded health plans. *See* Appendix A. Sutter used a [redacted] for its [redacted] contracts and sought [redacted] on terms. Sutter's [redacted] contracts and their collective effect on competition are common liability issues that can be proved only with common evidence, such as the [redacted] themselves and the testimony of the

[23] *See, e.g., In re Cipro Cases I & II*, 121 Cal. App. 4th 402, 411 (2004) ("State and federal courts alike have recognized that common issues usually predominate in cases where the defendants are alleged to have engaged in collusive, anticompetitive conduct resulting in artificially high market-wide prices for a product. In such cases, the existence of the conspiracy and its legality generally present common questions of law and fact that predominate over any questions affecting only individual class members.").

Network Vendors. [redacted][24]. [redacted] *See e.g.*, Barnes Decl. ¶19, Ex. 11 at BSC-UEBT-37887 [redacted]; De La Torre Decl. ¶ 15 [redacted] Moreover, even if Sutter's anticompetitive policies were not enforced perfectly, the question of whether Sutter successfully restrained *enough* of the market to harm competition and inflate its prices is a common issue.[25] *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 278 (3d Cir. 2009) (common questions included whether defendants' "actions reduced competition for insurance" or "resulted in . . . a consolidation of the insurance market"); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 117 (C.D. Cal. 2007) (identifying "common issues such as market definition, monopoly power, anticompetitive conduct, and causal antitrust injury").

All the evidence regarding Sutter's all-or-nothing, anti-tiering, and price secrecy

[24] *See, e.g.*, Joyner Decl. ¶¶19, 23, 45, 47-49, 54, 62-65; Barnes Decl. ¶¶6-8, 16, 19-21, 24-25; Katz Decl. ¶¶14-15, 19; Welsh Decl. ¶¶10, 45; Lundbye Decl. ¶¶10, 13; Melody Decl. ¶¶11, 14, 18-21, 24, 30; De La Torre Decl. ¶¶12, 14, 16, 27; Lacroix-Milani Decl. ¶¶9-12.

[25] [redacted]

contracting practices will be "*generalized* evidence applicable to wide swaths of the class, rather than evidence truly specific to individual class members." *In re Animation Workers Antitrust Litig.*, 315 F.R.D. 270, 311 (N.D. Cal. 2016). Thus, the critical question of whether Sutter engages in the challenged practices encompasses common issues.

b. The Impact Of Sutter's [redacted] Contracting Practices On Hospital Competition Is A Common Issue.

All class members, whether suing individually or in a class, would need to establish whether Sutter's practices inhibit price competition in a manner that allows it to charge supracompetitive prices. The issue is the same for each class member: either Sutter restrained enough of the market to choke competition and enable overcharges, or it did not.

Notably, this inquiry is the same regardless of which Network Vendor an individual class member used. For an Anthem self-funded client, the question is not simply what Anthem's contracts contained; the question is whether the five principal Network Vendors and their self-funded health plan customers were able to impose competitive price discipline on Sutter.

c. The Impact Of Sutter's Practices On Class Members' Payments Is A Common Issue.

Common modes of analysis can also show which class members paid Sutter inflated prices—prices that were set by contracts with just five Network Vendors [redacted] As described above, Dr. Leitzinger [redacted] Leitzinger Decl. ¶87. In addition, Dr. Leitzinger found that [redacted]. *Id.* ¶79. [redacted] Together, these analyses, as well as other relevant evidence (*see* Leitzinger Decl., §VI (Common Proof of Antitrust Impact)),

provide overwhelming evidence of classwide impact, and demonstrate that such impact can be proven with common evidence.

d. The Amount Of Damages For Impacted Class Members Is A Common Issue.

Plaintiffs will prove the class's aggregate damages at trial and then allocate any award of aggregate damages in a post-trial claims process. California courts have approved this procedure in numerous cases and the California Legislature has expressly authorized it. *See, e.g.*, Cal. Bus. & Prof. Code § 16760(d); *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 127 (2000), *superseded on other grounds as stated in Arias v. Super Ct.*, 46 Cal. 4th 969 (2009); *Bruno v. Super. Ct.*, 127 Cal. App. 3d 120, 129 (1981) (antitrust). Proof of the class's aggregate damages is a common question (*see, e.g.*, *Sejournet v. Goldman Kurlan & Mohidin, LLP*, No. 13-cv-1682-DMG, 2015 WL 10793109, at *1 (C.D. Cal. Apr. 6, 2015)), and will be accomplished at trial in this case through a single damages formula—Dr. Leitzinger's regression model described above. Any aggregate damages awarded by the jury can be allocated among class members after trial based on the overcharge percentages Dr. Leitzinger calculates for the ten groups of Sutter hospitals, the dollar amount each class member spent at each of these Sutter hospitals, and each class member's reimbursement rate at each of these hospitals. This post-trial claims process is fair and readily administrable.

e. The Statute of Limitations Presents Common Issues.

Although UEBT does not know which defenses Sutter will pursue in this case, it may attempt to prove that UEBT's claims are barred in part by the statute of limitations. However, "courts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action so long as the necessary commonality and . . . predominance are otherwise present." *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1295 (2002) (internal citation omitted); *accord, e.g.*, *In re Animation*, 315 F.R.D. at 308 ("[I]t is clear as a general matter that a statute of limitations defense does not automatically preclude certification where common questions otherwise predominate.") (collecting cases).

Determination of the applicable tolling and accrual rules is a legal question that will be common to all class members. The evidence showing that Sutter's contractual restraints and anticompetitive conduct were part of a continuous course of conduct extending into the four-year limitations period will be proven by evidence common to all class members. Moreover, the questions of when class members knew or should have known of Sutter's antitrust violations, and whether Sutter concealed its wrongdoing, will be proven through common evidence.

As the Court has already found, Sutter prohibited Network Vendors from disclosing their contracts or terms to class members or anyone else. Oct. 9, 2014 Stmt. of Decision Denying Mot. to Compel Arb. at 14. But Sutter also took active steps to mislead class members and the public, fraudulently concealing its practices and giving false justifications for its prices. To cite just a few examples, [redacted] Wheeler Decl. Ex. 24 at STCA0135015. [redacted] (*Id.* Ex. 25 at STCA0276824), [redacted] *Id.* Ex. 11. Likewise, Sutter routinely claimed to support price transparency, while working behind the scenes to fight it at every turn. *Compare e.g.*, *id.* Ex. 25 at STCA0276826 [redacted] *with* De La Torre ¶38 [redacted] Even now, Sutter has said in open court and its publicly filed answer to UEBT's complaint that it does not engage in the practices shown in the documentary record. Apr. 12, 2016 Tr. at 62:17-20 ("the three allegations—price secrecy, no tiering, and all or nothing—they're all false"). All of this evidence is "*generalized* evidence applicable to wide swaths of the class, rather than evidence truly specific to individual class members," and thus is readily susceptible to class-wide use. *In re Animation*, 315 F.R.D. at 311.

2. UEBT's Claims Are Typical Of The Class's Claims.

Typicality requires only that the plaintiff's claims, not every aspect of the plaintiff or its transactions, be typical of the claims of the class. *See, e.g.*, *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1090 (2007). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Martinez v. Joe's Crab Shack Holdings*, 231 Cal. App. 4th 362, 375 (2014) (internal citation and quotation omitted); *see also Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 763 (1982) (fact that plaintiff's purchase was "dissimilar from that of another purchaser at approximately the same time of purchase . . . has no bearing on her ability to represent a class of like purchasers"). Unique defenses against the named plaintiff's claims can defeat typicality only if they are "likely to become a major focus of the litigation." *Fireside Bank*, 40 Cal. 4th at 1091 (internal citation and quotation omitted).

UEBT's claims are typical of the class's claims. UEBT, like all other self-funded health plans, purchased from Sutter at prices set by a contract between a Network Vendor and Sutter. These prices and the prices paid by all other class members were set by contracts between Sutter and just five major Network Vendors in California, with very similar pricing across contracts. All of these prices were impacted by Sutter's challenged practices, which applied uniformly to all Network Vendors.

3. UEBT And Its Counsel Will Adequately Represent The Class.

Plaintiff's counsel are eminently qualified to conduct this litigation. This Court has already seen counsel's effective advocacy in their successful oppositions to Sutter's demurrer and Sutter's motion to compel arbitration. Moreover, as outlined in the Declaration of Richard Grossman, plaintiffs' counsel are skilled trial lawyers with substantial experience in antitrust, healthcare and class action litigation. For example, together with his co-counsel at Kellogg Huber, Mr. Grossman represented a class of plaintiffs that obtained a $1.1 billion recovery in

antitrust litigation in the San Francisco Superior Court against Microsoft Corporation. Cohen Milstein and Kellogg Huber jointly won the largest antitrust class action jury verdict in U.S. history, leading the presiding judge to note that "[i]n almost 25 years of service on the bench, this Court has not experienced a more remarkable result." *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016).

In addition, UEBT's interest in proving Sutter's wrongdoing and its impact on the class is squarely aligned with that of the rest of the class. While Sutter may argue some purported divergence of interest, conflict concerns only come into play when the party opposing certification "brings forth evidence indicating widespread antagonism to the class suit." *Capitol People First v. Dep't of Developmental Servs.*, 155 Cal. App. 4th 676, 696-97 (2007). There is neither widespread antagonism among class members nor any other ground for believing that UEBT's interests conflict with those of other class members. To the contrary, UEBT has already proven itself a zealous defender of the class's interests. And as stated in the declaration of UEBT's Executive Director Rick Silva, UEBT "understands the fiduciary obligations of serving as a class representative" and "is committed to vigorously and tenaciously protecting the interests of class members in this case." Silva Decl. ¶17.

D. A Class Action Is Superior To Other Available Methods.

To assess the superiority of a class action, courts "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." *Linder v. Thrifty Oil. Co.*, 23 Cal. 4th 429, 435 (2000) (internal quotation marks omitted). "[C]lass actions are appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." *Linder*, 23 Cal. 4th at 446 (internal quotation omitted).

All these grounds apply here. While all or nearly all class members paid overcharges, their individual damages pale in comparison to the expected cost of antitrust litigation. *See, e.g.*, *Four In One Co. v. S.K. Foods, L.P.*, No. 08-cv-3017-KJM, 2014 WL 28808, at *10 (E.D. Cal. Jan. 2, 2014) ("An antitrust class action is arguably the most complex action to prosecute."

(internal citation and quotations omitted)). Without a class action, thousands of individual suits would be required to reach the same result, vastly increasing the costs to the courts and the parties. By contrast, class resolution is readily manageable, as shown in Plaintiffs' Proposed Trial Management Plan.

II. UEBT HAS STANDING TO SEEK AN INJUNCTION.

Finally, UEBT has sufficiently alleged that it has "suffered injury in fact and has lost money or property as a result of the unfair competition," and therefore has standing under Sections 17203 and 17204 of the UCL as well as the Cartwright Act. At the class certification stage, standing need only be established based on the allegations of the complaint and the declarations put before the Court. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006); *cf. Richmond*, 29 Cal. 3d at 478. Whatever Sutter's challenge to the merits of UEBT's claim, there can be no question that UEBT has standing to proceed with its claim. UEBT purchased services from Sutter from 2002 to the present, at prices set by Sutter's contracts with UEBT's Network Vendors. Silva Decl. ¶12. UEBT has been injured by Sutter's anticompetitive practices and overcharged by Sutter for healthcare services and ancillary products, and it will continue to be injured without injunctive relief. Accordingly, UEBT has standing to enjoin Sutter's unlawful conduct.

CONCLUSION

All self-funded health plans paid Sutter inflated rates as the result of Sutter's single anticompetitive contracting scheme. The Court, therefore, should certify the proposed class.

DATED: February 10, 2017

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Lead Counsel for Plaintiff
UFCW & Employers Benefit Trust

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APPENDIX A

Appendix A

Common Anticompetitive Terms In Sutter's "Systemwide" Contracts With The Principal Network Vendors[1]