SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UFCW & EMPLOYERS BENEFIT TRUST, et al., Plaintiff, vs. SUTTER HEALTH, ET AL., Defendants.	Case No. CGC – 14-538451 ORDER OVERRULING DEMURRERS

On April 12, 2016 I heard argument on Sutter's demurrer to plaintiff UFCW & Employers Benefit Trust (UEBT)'s complaint. For reasons summarized in my oral tentative, expanded on here, the demurrers are overruled.

Requests for Judicial Notice

Sutter seeks judicial notice of the complaints and orders in *Sidibe v. Sutter Health*, No. 3:12-CV-045854-LB (N.D. Cal.) (Exs. A-F). UEBT seeks judicial notice of: (1) the Federal Trade Commission/Department of Justice Antitrust Division "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medical Shared Savings Program," 6 Fed. Reg. 67026 (Oct. 28, 2011) (Ex. A), and several additional filings from the *Sidibe* case (Exs. B-E).

These requests are unopposed and granted.

Anti-Competitive Behavior

UEBT alleges that Sutter exacts supracompetitive prices from it and other Self-Funded Payors by: (1) requiring UEBT to offer its beneficiaries the services of either all Sutter hospitals or none of them; (2) prohibiting UEBT from incentivizing its beneficiaries to choose competing hospitals; and (3) prohibiting Blue Shield – the network vendor – from disclosing Sutter's prices. Complaint ¶¶ 19-20, 104, 113-14, 117. It asserts a provider network "will not be commercially viable, unless it covers all of the geographic areas where the Health Plan's Enrollees live and work." *Id.* ¶ 58. Because some regions (UEBT alleges 7 markets in this category) lack options other than Sutter, the networks are compelled to include Sutter in its network even where there are far cheaper providers (UEBT alleges about 13 markets in this category). *Id.* ¶¶ 104-108. Additionally, when choosing among hospitals included in their Health Plan's provider network, enrollees are generally indifferent to which hospital they visit because the Self-Funded Payor will pay virtually all of the fee. *Id.* ¶¶ 65, 111, 117-18. By contractually prohibiting the use of "tiered" provider networks, by which enrollees would incur higher costs for using costlier providers, Sutter allegedly prevents price competition for the sale of acute care hospital services. *Id.* ¶¶ 114-15. Even if a patient wished to make a decision based on price, he or she could not do so because the prices are kept secret. *Id.* ¶ 111.

Taken together the "all-or-nothing terms," "anti-incentive terms," and "price secrecy terms" in the agreements between Sutter and the network vendors constitute an illegal restraint on trade that allows Sutter to charge substantially more than other providers for comparable services. *Id.* ¶¶ 121-22. Sutter's conduct inflates healthcare service costs in all of Northern California: for example, hospitals in San Francisco and Sacramento cost over 38% more than comparable hospitals in Southern California regions where Sutter is not present. *Id.* ¶ 122.

Sutter now demurrers to the complaint, arguing the allegations are insufficient to state a claim.

Price Tampering

Sutter argues that UEBT fails to state a price tampering claim because it has not alleged the existence of "a conspiracy among unrelated parties to fix prices." MPA, 5, citing *Freeman v. San Diego Ass'n of Realtors*, 77 Cal.App.4th 171, 189 (1999) ("Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations"); *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal.App.4th 1, 11 (2012) (same). At argument it appeared that Sutter waived this argument, having it seems assured itself that Sutter and the network vendors were separate economic entities. *Compare, Copperweld Corp. v. Indepnd. Tube Corp*, 467 U.S. 752 (1984). In any event the complaint adequately alleges that Sutter coerced the network vendors into agreeing to the anticompetitive terms. Complaint ¶¶ 14-16. The Complaint nominates an economic motive for the network vendors' adherence to the conspiracy, i.e. a provider network "will not be commercially viable, unless it covers all of the geographic areas where the Health Plan's Enrollees live and work." Complaint ¶ 58.

Combination to Monopolize

Sutter suggests at least under the Sherman Act a conspiracy to monopolize requires: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. MPA, 6, citing *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). It stresses in particular that the complaint does not allege a "combination to monopolize" claim because each party must have had "a conscious commitment to a common scheme designed to achieve an

unlawful objective," citing *Sonora*, 236 F.3d at 1155; *see also Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986) (summary judgment case). This argument is similar to that discussed and resolved above. The conspiracy is adequately alleged.

Rule of Reason

The parties disagree whether the rule of reason or the per se rule should be used to analyze claims. I assume for present purposes the option favoring Sutter, which is that the rule of reason applies. Under this rubric Sutter says the complaint fails to define a relevant market, does not properly allege market power, and does not allege market-wide anticompetitive effects.

These are fact intensive issues, depending very heavily on expert testimony. *In re Cipro Cases I & II*, 61 Cal. 4th 116, 146, (2015) (analysis in "a typical [rule of reason] case [] may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power"); *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("[t]here is no requirement that [markets and market power] be pled with specificity," "[a]n antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect," and "since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial"). Sutter's reliance on federal cases is, at least in part, weakened because they have a heightened plausibility standard, which finds its way into Sutter's papers. *See, e.g.*, Reply, 6 ("UEBT's 'markets' are untethered from any *plausible* alternatives available to patients in those regions" [emphasis supplied]). As another example, Sutter relies on Judge Beeler's *Sidibe* Order, which stated that the plaintiffs "fail to *plausibly* define the geographic markets for the sale of Inpatient Hospital Services to commercial health plans because they do not define the

geographic markets in terms of the areas where a health plan (or its member) could seek substitutes...." [emphasis supplied]. MPA, 12, citing RJN Ex. F [June 2014 Order] at 19.

1. Geographic Markets

Sutter complains that UEBT has not identified "alternate sources of hospital services in the proposed geographic markets" or "facts to show that hospitals outside of the proposed geographic markets do not draw patients from the same region as the hospitals UEBT includes in its markets." MPA, 11. Sutter's cases generally involved failures to meet *evidentiary* burdens, or implementation of the federal plausibility standard. *E.g.*, *F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999); *Lloyd Design Corp. v. Mercedes Benz of N. Am., Inc.*, 66 Cal.App.4th 716, 720-21 (1998) (summary judgment motion); *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*, 4 Cal. 3d 842, 855 (1971) (summary judgment motion); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 599 (8th Cir. 2009) (dismissing complaint because Plaintiff failed to state "a plausible antitrust claim").

The complaint does allege the markets. Complaint ¶¶ 69-91. UEBT describes the relevant geographic markets as "those areas in which Health Plans must have one or more general acute care hospitals with sufficient capacity to reasonably handle the anticipated healthcare requirements of the Health Plan Enrollees located in the region." *Id.* ¶ 82. It also identifies the various alternatives in numerous specific markets, which it claims are based on hospital utilization data. *Id.* ¶ 84.

2. Market Power

Sutter seem to argue that unless the complaint specifies that, for example, Sutter controls 65% of a market, the complaint is deficient. Motion at 13, citing *MetroNet Servs. Corp. v. U.S.*

W. Commc'ns, 329 F.3d 986, 1003 (9th Cir. 2003), *vacated on other grounds*, 540 U.S. 1147 (2004). Actually, *MetroNet* – the only case Sutter offers here– was a federal case involving summary judgment, and noted only that a "plaintiff may establish a prima facie case of market power by showing that the defendant has a 65 percent or greater market share." Obviously this isn't a pleading requirement in any court, much less this state court.

UEBT alleges both direct and circumstantial evidence of market power. See *Forsyth v. Humana*, 114 F.3d 1467, 1475 (9th Cir. 1997), *overruled on other grounds*, *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012) ("A Plaintiff may demonstrate market power either by direct evidence or by circumstantial evidence"). The complaint maps out market power across all of Northern California by which Sutter used its advantages in some markets without competitors to foreclose price competition in other markets. Opp., 9; Complaint ¶¶ 92-99 ("Because of the anticompetitive terms in its contracts with the Network Vendors, Sutter has considerable market power within every market that is relevant to the claims described in this complaint."). UEBT asserts that "Sutter's ability to impose anticompetitive terms that insulate it from price competition is direct evidence of its market power." *Id.*, citing, e.g., *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 562 F. Supp. 2d 392, 399 (E.D.N.Y. 2008). High barriers to entry are further circumstantial evidence of Sutter's market power. See *In re Payment Card*, 562 F. Supp. 2d at 402 ("a competitor in a market with high entry barriers could raise its prices unfettered by the prospect of a new entrant into the market who would undercut prices").

Sutter notes that high prices alone are "insufficient to establish market power." Reply, 8. Perhaps, but the allegations go beyond that, and whether or not UEBT can "establish" market power is not for demurrer; again, Sutter's authorities involve rule of reason analyses at an

evidentiary level. *See, e.g.*, *Forsyth*, 114 F.3d at 1476 (summary judgment); *Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 887 (N.D. Cal. 2011) (same).[1]

3. Anticompetitive Effects

Finally, Sutter says there are insufficient allegations concerning adverse effects on competition. But the complaint explains, in detail, that Sutter's all-or-nothing, anti-incentive, and price secrecy terms foreclose price competition by rival providers, Complaint ¶¶ 14, 21-22, 94-95.

Sutter also claims that UEBT failed to allege facts showing "restricted output in a specifically defined relevant market." MPA, 14, citing *Forsyth*, 114 F.3d at 1476. Put differently, UEBT has not alleged "that Sutter has prevented other providers from contracting with the Network Vendors in order to compete against Sutter." MPA, 15. But as UEBT counters, the fact that other providers can compete with Sutter based on quality does not have any bearing on their ability to compete based on price, the issue here. In its Reply, Sutter argues that "the Complaint alleges no facts suggesting that Sutter prevents Network Vendors from bargaining on price with Sutter...." Reply, 9. Not so. Even a cursory reading of the complaint makes clear that network vendors have no leverage to bargain on price because they cannot exclude Sutter from any health plans. Anticompetitive effects are adequately alleged.

The demurrers are overruled.

Dated: April 15, 2016

Curtis E.A. Karnow
Judge Of The Superior Court

[1] When asked at argument for authority that complaints must in detail specify market power with correctly drawn markets, Sutter's counsel suggested two cases: *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1380 (W.D. Wis. 1997) and *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1681 (1997). Both were summary judgment cases and neither prescribes the sufficiency of allegations.