

[Sutter Case Watch] Court Officially Rejects Sutter's Proposed Settlement Due to Inadequate Compliance Monitor Selection

See case page: [UFCW & Employers Benefit Trust v. Sutter Health](#)

In August, The Source reported on the preliminary approval hearing for the proposed settlement of California's high-profile antitrust suit against Sutter Health. Among other issues, Judge Anne-Christine Massullo of the Superior Court of San Francisco was particularly troubled by the selection process of the independent compliance monitor and required supplemental filings from the parties regarding the selection and outreach process employed in the selection of [Jesse Caplan](#) of [Affiliated Monitors](#), whom the parties jointly requested to appoint (see [The Source Blog](#) for additional details).

Following that hearing, the court took the parties' [supplemental filings](#) under submission and issued an order on September 22, denying both the motion for preliminary approval of the settlement and the motion to appoint a monitor. The court held that the process the parties used to select the monitor was unreasonable and contrary to public policy.

According to the jointly submitted supplemental filings, the parties began the search for a monitor during settlement negotiations, as selection of the monitor is a material term of the consent decree. They identified fifteen individuals with the necessary healthcare antitrust and/or monitoring experience, then narrowed that list to five candidates based on the following factors: 1) antitrust and healthcare

knowledge and experience; 2) lack of actual or potential conflicts; 3) ability to be impartial on the basis of prior experience and/or current professional relationships; and 4) reputation for effectiveness, fairness, and good judgment. The parties then invited these identified candidates to submit applications and conducted interviews accordingly.

The [court found](#) such a “limited and confidential selection process in which applications to be monitor were solicited by personal invitation only” to be unreasonable and inadequate, particularly as it resulted in “an applicant pool in which all of the candidates interviewed were white men.” Judge Massullo noted that given the parties had identified potential candidates while negotiating a settlement on the brink of trial, it necessitated the selection process to move quickly and quietly. As such, it resulted in applications to be solicited in confidence, without sufficient time for the parties to conduct a nationwide search for applicants. In summary, Judge Massullo found “the idea that in 2020 there are only five white men in the United States who are qualified to be interviewed for this position is anathema to what are today basic notions of fairness, equity, and justice.”

In denying the motion to appoint Caplan as compliance monitor, the court also denied the motion for preliminary approval of the settlement, both without prejudice, as the identity of the monitor is a material term of the settlement. The court order provides that the parties may refile both motions after addressing the issues the court identified. In the renewed motion, the parties should describe their efforts to broaden the applicant pool and consideration of any additional applicants, whether they agree on a new monitor or determine that Caplan is still the best candidate.

The next scheduled hearing in the case is on October 8, for a case management conference, prior to which the parties are ordered to file a joint case management statement to address if and when a renewed motion for preliminary approval will be

filed, or alternatively, how litigation in this case will proceed.

**Updated October 8: the parties agreed at the case management conference to make a joint filing regarding their proposed process for appointing a monitor by 10/15, with hearing set for 10/19 at 10AM.*

See:

- [The Parties' Joint Submission in Response to the Court's August 13, 2020 Order Re Appointment of the Monitor \(8/24/2020\)](#)
- [Order Re \(1\) Plaintiffs' Motion for Preliminary Approval; and \(2\) Plaintiffs' Unopposed Motion to Appoint a Monitor \(9/22/2020\)](#)