

[Sutter Case Watch] Sutter Health Preliminary Approval of Settlement Agreement Held up by Compliance Monitor Selection

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

After much delay due to the pandemic induced hiatus, the preliminary approval hearing for the proposed settlement agreement in the Sutter Health antitrust case resumed on August 12 at the Superior Court of San Francisco. At the hearing, plaintiff attorneys on behalf of both class members UEBT and the Attorney General addressed in turn questions with respect to specific proposed terms raised in a tentative ruling by Judge Anne-Christine Massullo.^[1] One key issue the court rested on was the selection of the independent compliance monitor, who will be responsible for evaluating and enforcing the compliance of the settlement terms for up to thirteen years.^[2] At the last preliminary approval hearing in February, the parties requested to appoint [Jesse Caplan](#) of [Affiliated Monitors](#) in Boston, Massachusetts as the compliance monitor. However, while the court did not question the qualification of the choice, the court expressed significant reservations and lack of confidence in the selection process.

Judge Massullo appeared troubled by the fact that a nationwide search and outreach resulted in a choice who is neither a woman nor a person of color, but an individual from a firm with a lack of diversity in its management structure and not even based in California. The court repeatedly emphasized that the application and selection process for this role must be based on considerations of diversity, equity and inclusion. Yet, through the lens of the court and given the backdrop of the case (the parties' previous choice of experts also showed lack of diversity), there was insufficient evidence presented to the court that this was adequately considered. Judge Massullo noted that class members are sophisticated companies that value diversity and inclusion. For a role that is a multi-million dollar appointment to act as

an officer of the court for the next decade or more, the selection process must be transparent and preserve public integrity and confidence.

Emilio Varanini from the AG's office assured the court that the application and interview process, a long collaborative process involving both the AG's office (headed by Deputy AG Cheryl Johnson) and Sutter's counsel that began in October 2019, considered all necessary factors to promote diversity, equity, and inclusion. However, the qualified candidate must be an expert with appropriate experience in antitrust and healthcare and must be free of conflict of interest, which significantly narrowed down the broad pool of applicants to only five candidates. Additionally, the parties provided that [Dionne Lomax](#), a managing director of Affiliated Monitors who is a woman of color, will work closely with Jesse Caplan on the case, and offers a great total package. In response to the court's request to provide insight and transparency to the selection process, Varanini stated that the selection process of experts has always been confidential and for good reasons, citing adverse impact on the business of denied applicants, among others. At the same time, the fiduciary duty to the people and the integrity of both the AG's office and Sutter as a large healthcare system ensures that the selection process is fair and reasonable.

Nonetheless, Judge Massullo indicated that because the appointment of the monitor is a material term of the contract, the court will not grant preliminary approval of the settlement agreement until it is satisfied that there is sufficient public record to show a fair and reasonable selection process. To that end, the supplemental filing should provide generic, non-confidential information that would provide additional insight to the outreach process, including the race and gender identity of all applicants and the total pool of applicants. Additionally, the court requested a supplemental declaration from deputy AG Cheryl Johnson regarding Dionne Lomax's involvement with the monitor, as well as a report on the outreach process for hiring additional experts to assist the monitor.

The parties agreed to provide Sutter with a draft of the filing by August 17, and submit to court by August 24, jointly or otherwise. The court tentatively set a continued approval hearing for September 4 at 9:15AM. It may be taken off calendar if the court has no additional questions based on the submissions, including other outstanding issues such as notice to class members and allocation of settlement

funds, in which case the settlement approval could finally move forward to bring closure to this long dragged out case.

[1] Order re (1) Plaintiffs' Motion for Preliminary Approval of Settlement; and (2) Plaintiffs' Motion to Appoint a Monitor, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2020).

[2] See Amy Y. Gu, *A Huge Deal: Settlement Terms of Sutter Health Antitrust Case Will Promote Transparency and Competition in California Provider Markets*, The Source on Healthcare Price & Competition: The Source Blog, January 15, 2020.