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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.

People of the State of California, ex. rel. Xavier Becerra,

Plaintiff,

vs.

Sutter Health,

Defendant.

Case No. CGC 14-538451
Consolidated with
Case No. CGC-18-565398

THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF THE MONITOR

Date: September 4, 2020
Time: 9:15 a.m.
Judge: Hon. Anne-Christine Massullo
Dept.: 304

Action Filed: April 7, 2014

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BACKGROUND

On August 13, 2020, the Court issued an Order seeking (A) responses to four specific questions in the Court's Tentative Ruling Re (1) Plaintiffs' Motion for Preliminary Approval of Settlement and (2) Plaintiffs' Motion to Appoint a Monitor (Plaintiffs' Motions); (B) copies of the Request for Proposal and non-disclosure and confidentiality agreements used in the monitor selection process; and (C) an explanation of the policy issues precluding the submission of the information requested by the Court. (Order, August 13, 2020, p. 5; Further Tentative Ruling on Plaintiffs' Motions, Aug. 11, 2020, p. 24.) This submission provides the information requested by the Court, and also responds to the Court's request for guidance on the standard of review applicable to the parties' monitor selection. (FT, Aug. 12, 2020, 90:3-13; 83:3-10.)

PARTIES' JOINT RESPONSE

The Parties welcome the opportunity to supplement the record with further documentation related to diversity, equity, and inclusion. The Attorney General, UEBT, Sutter, and counsel for all parties share the Court's commitment to these issues, both in their day-to-day operations and in the selection process for the monitor. We believe that our commitment yielded a monitor team that is highly qualified to address specialized healthcare and antitrust issues; is free of actual or potential conflicts of interest; is balanced and neutral on the issues likely to come before it; and is a diverse and inclusive team that collectively will engage in the substantive issues that may arise in this case.

I. LEGAL STANDARD

The standard by which the Court reviews the Parties' monitor selection at preliminary approval is whether that selection "is within the 'ballpark' of reasonableness." (*Kullar v. Foot Locker* (2008) 168 Cal.App.4th 116, 133.) This standard is applicable to the Court's review of the Parties' entire settlement for preliminary approval, which includes the terms governing the Monitor. (Proposed Final Judgment (PFJ), attached as Exh. B to Mot. for Preliminary Approval of Settlement, § V.)[1]

[1] At final approval, a court evaluating a class settlement must give "[d]ue regard" to the fact that the settlement is a "consensual agreement between the parties" and the inquiry "must be limited to

Although no California cases appear to have addressed the issue, persuasive authority in *U.S. v. Baltimore Police Department* recently addressed the standards that apply to the Court's review of the Parties' monitor selection as part of a consent decree. ((D. Md. 2017) 282 F.Supp.3d 897, 900 (*Baltimore*).) The district court held that, where a monitor is selected by the parties pursuant to a settlement, the court role is limited to "decid[ing] whether the parties' jointly proposed monitor candidate was selected in accordance with the terms of the Consent Decree and is qualified to oversee execution of the specific requirements of the Decree." (*U.S. v. Baltimore, supra,* 282 F.Supp.3d at pp. 901-902); *Ibid*. (where the monitor selection process is detailed in the settlement, the "relevant law by which the Court is constrained is the terms of the Consent Decree, and the relevant facts are the available evidence and data regarding the qualifications of the proposed monitor and team . . . ".) The court explained that it is constrained by the settlement agreement:

> The fact remains, however, that this is the *remedy* phase of *a lawsuit* between two adverse parties, and the Court is constrained to act only within that context. The Court is *not* granted the broad authority given legislatures and elected executives to set policy—rather, just the opposite. The Court is limited by rules of procedure, statutes, the Constitution, and here, very specifically, the terms of the Decree. In other words, the Court does not write on a blank slate and is not free to frame policy or adopt reform measures that the Court (or the public) might think is best under the circumstances . . . . . This means that the Court must resolve any issue before it, largely as framed by the parties, according to the relevant law and facts. Here, the Court's role is narrowly defined: It must decide whether the parties' jointly proposed monitor candidate was selected in accordance with the terms of the Consent Decree and is qualified to oversee execution of the specific requirements of the Decree.

(*U.S. v. Baltimore, supra,* 282 F.Supp.3d at pp. 901-902, emphasis in original.)

Applying this standard, the court gave deference to the parties' monitor selection because under the settlement, the parties were responsible for evaluating the monitor candidates and selecting a qualified individual and supporting team. The court reasoned that "[a]bsent any evidence that the parties have mishandled or short-circuited the selection process, it would be

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the extent necessary [for the Court] to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (See *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

inappropriate for the Court to lightly disregard their recommendation." (*Id.* at p. 902.)

In addition to the persuasive authority in *Baltimore*, the U.S. Department of Justice and American Bar Association (ABA) have published guidelines to government agencies on monitor selection. The U.S. Department of Justice states that "[t]he selection process for a monitor should be designed to (1) choose a highly qualified and respected person based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interest; and (3) otherwise instill public confidence in the selection." (U.S. Department of Justice, Stuart DeLery, Acting Associate Attorney General, *Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions*, at subd. II (1) (April 13, 2016).)

The ABA similarly includes the very factors that the parties used in their monitor selection process: (1) the integrity, credibility and professionalism of the Monitor; (2) the expertise or experience in the industry or specific subject matter of the monitorship; (3) the relevant skills and experience necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement; (4) the expected structure of the Monitorship Team and the ability of the Monitor to access and deploy resources as necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement; and (5) the commitment to serving as the Monitor for the entire monitorship term. (ABA, Monitor Standards, Standard 24-2.4, available at https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/.) As set forth below, the selection process was designed to ensure the selection of a highly qualified and respected person, avoid conflicts of interest, and instill public confidence in the monitor selection.

II. THE PARTIES' MONITOR SELECTION IS WITHIN THE "BALLPARK" OF REASONABLENESS

The Parties' selected Monitor, Jesse Caplan of Affiliated Monitors, Inc. (AMI), and the process used to select him, are within the "ballpark" of reasonableness. (*Kullar v. Foot Locker, supra,* 168 Cal.App.4th at p. 133.) The Parties' selected Jesse Caplan based on agreed-upon criteria for selecting a monitor: (1) being well-versed in antitrust law and healthcare operations,

including managed care contracting experience; (2) lack of conflicts of interest;[2] and (3) preferably has experience as a monitor. These qualifications are critical due to the unique and complex nature of the proposed injunctive relief agreed to by the Parties. The Proposed Final Judgment concerns Sutter's managed care contracting practices in the context of ongoing, complex contract negotiations with Insurers for the services of a multi-hospital, $15 billion health care system. An effective monitor must have knowledge of and experience with managed care contracting and concepts such as tiering, steering, narrow networks, and the dynamics of rate negotiations. A monitor also must be an experienced antitrust practitioner, given that the terms of the Proposed Final Judgment require an understanding and application of legal concepts such as clinical integration, financial integration, tying, bundling, and the assessment of competitive effects. There are very few professionals who have both the substantial antitrust and healthcare experience required to assist the Court in monitoring compliance with the Proposed Final Judgment.

After the Parties reached a settlement in principle, we jointly prepared a Request for Proposal which built on the criteria earlier agreed in principle and identified several other qualifications for the position, including one on the applicant's commitment to diversity, equity, and inclusion.[3] (Decl. of Cheryl Johnson (Johnson Decl.), Exh. A, Request for Proposal (RFP); Plaintiffs' Supp. Submission in Response to Feb. 25, 2020 Order, filed May 22, 2020 (Supp. Submission to Feb. 25 Order), pp. 33-34.) Each applicant was required to provide a description of his/her qualifications and experience for each criterion. (See Johnson Decl., Exh. A, RFP, p. 4.)

[2] The Parties advised the Court on October 16 that they had reached an "agreement in principle" which was confidential (FT Oct. 16, 2019 at 8:21-9:2). The Parties expressly do not waive confidentiality of their settlement discussions or the mediation privilege.

[3] The RFP requested that applicants describe their qualifications and experience in seven areas: healthcare operations in California and/or the United States, including but not limited to managed care contracting; California and/or federal antitrust law; auditing, investigating, or reviewing compliance of organizations, including experience in monitoring settlements or court orders, specifically in healthcare and/or antitrust matters; experience with dispute resolution or in preparing recommendations as a judge, counsel, or neutral; and any other information relevant to the ability to satisfy Monitor duties; the applicant's organization's commitment to equity, diversity, and inclusion; any unique characteristics of the applicant's organization and/or personnel relevant to the ability to perform the duties of the monitor.

The appointment of Mr. Caplan satisfies the criteria agreed upon by the Parties, as well as the monitor standards issued by the U.S. Department of Justice and ABA. Mr. Caplan has significant experience serving as a monitor and has requisite experience in healthcare antitrust and managed care contracting, and otherwise meets the qualifications agreed upon by the Parties. (Plaintiffs' Mot. to Appoint a Monitor, filed January 30, 2020 (Monitor Mot.), pp. 4-5.) He will be joined by a team that includes Dionne Lomax, whom the parties invited to apply to be a monitor early on in the selection process because of her substantial healthcare antitrust knowledge and experience with managed care contracting, both as an attorney with the U.S. Department of Justice Antitrust Division and as a private practitioner representing health care systems, provider groups, and other health care-related entities. (Supp. Submission to Feb. 25 Order, p. 34; Decl. of Dionne Lomax (Lomax Decl.), ¶¶ 2-5; Caplan Decl., ¶¶ 3-7.) Neither Mr. Caplan nor any other member of AMI's team has conflicts of interests; indeed, as a monitoring firm, none of AMI's engagements involve attorney-client relationships, thereby avoiding conflicts issues. (Monitor Mot., p. 5.) Mr. Caplan has committed to serving the full duration of the monitorship. (Monitor Agmt., attached as Exh. B to Johnson Decl. in Support of Monitor Mot. (Monitor Agmt.), ¶ 3.1.)

As discussed in more detail below, after reviewing the applications of other candidates, conducting phone interviews, and a second round of in-person finalist interviews, the parties jointly selected Mr. Caplan because he has substantial monitoring experience and the requisite healthcare (particularly managed care contracting) and antitrust expertise, as well as the credibility and independence necessary to be effective in his role. The experience, knowledge and diversity of his team also are critical to his selection. In particular, Ms. Lomax augments Mr. Caplan's candidacy because of her substantial healthcare antitrust knowledge and experience. (Ward Decl., ¶ 17.) Together, Mr. Caplan and his team offer substantial knowledge and experience in monitoring, healthcare operations, and healthcare antitrust. Furthermore, Mr. Caplan's monitor appointment will also garner public confidence because of his and his team's experience and expertise, professional reputation, the lack of conflicts, and the support and resources of AMI.

Mr. Caplan's team also best satisfied the parties' requirements for diversity, equity and inclusion. The Parties took account of these considerations during the monitor selection process.

(Supp. Submission to Feb. 25 Order, pp. 33-34.) Whether viewed against the legal standards applicable to preliminary approval, or beyond those standards, to considerations regarding diversity, equity and inclusion discussed below, the Parties believe that they have satisfied both in their monitor selection and recommendation.

III. THE COURT'S QUESTIONS IN THE AUGUST 13, 2020 ORDER

The Court asked for information related to the parties' monitor selection process, as follows: "(1) the race and gender identity of all applicants; (2) qualification ratings, including on fostering diversity and inclusion in the workplace; (3) how outreach to drive applications was conducted; and (4) whether outreach was successful." (Aug. 13, 2020 Order, p. 5.) The Parties address the Court's questions in the order in which we conducted the monitor selection process, starting with our initial outreach to potential applicants.

A. How Outreach To Drive Applications Was Conducted

1. The Parties Established a Fair Process to Identify Qualified Monitor Candidate Applicants

The Parties' efforts to identify qualified and suitable candidates began in mid-to late September 2019 for the Plaintiffs and early October for Sutter, when settlement emerged as a meaningful possibility. (Johnson Decl., ¶ 7; Decl. of Margaret Ward (Ward Decl.), ¶ 6.) Initially, the Parties worked to identify candidates that at a minimum (1) have knowledge and experience in antitrust law and healthcare operations, including but not limited to managed care contracting; (2) preferably have served as a monitor in a prior case of similar magnitude; and (3) did not have an existing or prior relationship with any of the Parties. (Johnson Decl., ¶ 8; Ward Decl. ¶ 4.) Due to the confidential nature of the possible settlement, the Parties first consulted publicly available resources; with each other; and with colleagues who are knowledgeable about and have experience working with healthcare antitrust professionals throughout the nation. (Johnson Decl., ¶ 9; Ward Decl., ¶ 6.) In conducting this review and consultation, the Parties worked to identify potentially qualified candidates nationwide, who are associated with law firms, monitoring firms, academia, consultant firms, alternative dispute resolution organizations, professional healthcare and antitrust bar associations and practice groups, healthcare advocacy organizations, and the judiciary (retired

jurists). (Johnson Decl. at ¶ 10; Ward Decl., ¶¶ 6-9.) Both parties also researched and reviewed monitor appointments in cases prosecuted by the U.S. Department of Justice Antitrust Division and Federal Trade Commission within the past 10 years. (Johnson Decl., ¶ 11; Ward Decl., ¶ 6.)

2. The Parties Identified and Proposed an Adequate Slate of Potentially Qualified Applicants

The Parties agreed at the outset that the monitor must be well versed in healthcare and antitrust, have sufficient balance, impartiality and credibility that all parties would be able to repose confidence in the monitor's determinations, and preferably have monitor experience. (Johnson Decl., ¶ 12; Ward Decl., ¶ 5.) Consistent with DOJ and ABA guidance, through this process the Parties sought to identify qualified and respected candidates and avoid potential and actual conflicts of interest. (Johnson Decl., ¶ 14; Ward Decl., ¶ 7-10, 13.) Applying these standards, the resulting pool of qualified and suitable candidates was a small one, as there are relatively few professional with sufficient healthcare antitrust experience and knowledge (many have antitrust or healthcare experience but not both). (Johnson Decl., at ¶ 15; Ward Decl., ¶ 7-10, 13.) Of those, as discussed below, many have prior or existing relationships that could give rise to actual or potential conflicts of interest (e.g., candidates that had only represented providers or insurers but not both; candidates that had only held a regulatory/enforcement roles; candidates that had previously done work on behalf of Sutter or an insurer). Other factors, including the length of the monitor engagement, available resources for carrying out the engagement, and a lack of a demonstrated ability to be impartial, also narrowed the field of potential suitable applicants.

Consistent with DOJ monitor guidance, the Parties initially agreed that each would propose three candidates and invite them to apply for the monitorship. (Johnson Decl., ¶ 21.) The Parties initially each contacted three potential candidates by phone, and after securing their agreements of confidentiality, described the general terms of the monitorship and supplied them with the Request for Proposal. (*Id.* at ¶ 22.) Sutter continued to identify potential candidates and with the agreement of the Attorney General, subsequently contacted a seventh candidate, Ms. Lomax. (Ward Decl., ¶¶ 13-14.) Interested applicants executed a non-disclosure and confidentiality agreement prior to receiving a copy of the Request for Proposal (RFP), which referenced the terms

of the settlement that the Parties had provisionally agreed to as later reflected in the Settlement Agreement filed with the Court on December 19, 2019.[4] (Johnson Decl., ¶ 26.) Of the seven candidates contacted, five submitted applications to serve as monitor. (*Id.* at ¶ 24; Ward Decl., ¶¶ 12-15.) All five applicants had substantial antitrust health care expertise; several had experience as both an antitrust enforcer as well as a private practitioner; and two had monitor experience. (*Id.* at ¶ 27.) The candidate who declined indicated that he was not inclined to add to his existing workload. (*Id.* at ¶ 25; Ward Decl., ¶ 12.)

Three factors in particular contributed to a significant limitation of the pool of viable candidates. First, many potential applicants were eliminated from consideration based on conflicts of interest, as many experienced healthcare antitrust attorneys in California with managed care contracting expertise had represented Sutter or a major insurer.[5] (Johnson Decl., ¶ 16.) For this reason, while the Parties had initially focused on identifying potential applicants based in California, out of necessity, the Parties soon broadened the search to include candidates from throughout the U.S. All five interviewees were based out of state, including Mr. Caplan who is based in Massachusetts. (*Id.* at ¶ 17.) As a professional monitor, Mr. Caplan does not have professional relationships that give rise to the sort of actual or potential conflicts that affected other potential applicants who are practicing attorneys, because he is not engaged in any attorney-client relationships and does not face potential conflicts in future client engagements. The same applies to Ms. Lomax, who is a professor at Boston University.

Second, many candidates' practices were skewed toward either healthcare provider or insurer representation, but rarely had a balance of both. (Johnson Decl., ¶ 18.) This same pattern also appeared among neutrals, which is likely driven by referrals by similarly situated litigants and/or a reputation for understanding a certain constituency – the few arbitrators and mediators with extensive healthcare antitrust experience either had a history of presiding over matters involving healthcare insurers or healthcare providers, but not both. (*Id.* at ¶ 19.)

[4] At this stage of the proceedings, it was critical to all Parties that the terms of the proposed settlement remain confidential, as the Parties were still engaged in the process of drafting the Proposed Final Judgment.

[5] The Parties asked applicants in the RFP for a list of potential conflicts over the last eight years. (See Johnson Decl., Exh. A, RFP, p. 5.)

Third, the length of the monitorship deterred some potential applicants who did not wish to jeopardize future healthcare business that would have to be turned away due to future potential conflicts from serving as the Monitor. (Johnson Decl., ¶ 20; Monitor Agmt., ¶ 2.5, p. 6.) The necessary tradeoff of turning away potential future business in exchange for serving as a Monitor which lacks a guaranteed level of activity and compensation for 10 years and possibly up to 13 years, dampened interest in the position. The Monitor's compensation may be relatively modest if the process works as intended by encouraging consensual dispute resolution among negotiating parties without resorting to the Monitor.[6] Moreover, in theory, the volume of disputes at the beginning of the monitorship will likely decline over time as an understanding develops among parties regarding the PFJ and covered contracting practices.

B. Qualification Ratings, Including on Fostering Diversity and Inclusion in the Workplace

Jesse Caplan more than satisfies all seven monitor criteria and does not present actual or potential conflicts or partiality concerns (discussed below). As the Court itself has recognized, Mr. Caplan is "extraordinary" and "extremely well-qualified." (FT Aug. 12, 2020 at 61:25 -62:1, 62:3.) Prior to joining AMI, where he has developed significant monitoring experience, he served as General Counsel of the Massachusetts Executive Office of Health and Human Services; Chief Legal Counsel for a health maintenance organization and was a prosecuting antitrust attorney at both the federal and state levels in healthcare. (Monitor Mot., pp. 4-5.) He has deep knowledge of both antitrust and healthcare. He has experience in dispute resolution. His candidacy also reflects a meaningful commitment to diversity. Mr. Caplan presented a proposed team that not only is diverse (including women and people of color), but in the Parties' judgment also consists of members that are likely to play meaningful roles in Mr. Caplan's ability to carry out his duties. (Johnson Decl., ¶ 28.) In reviewing the applicants' responses to the RFP, the Parties took into account not only the composition of Mr. Caplan's and other candidates' proposed staffing

[6] Academic studies show that when negotiations are conducted with a mandatory arbitration backstop, parties generally reach agreement and actual arbitration is relatively rare. (See Plaintiffs' Supp. Submission in Response to the Court's Feb. 25, 2020 Order, filed May 22, 2020, p. 10.)

arrangements, but also tried to assess whether and how the proposed members of each candidate's team would serve a relevant or meaningful role in fulfilling the duties of the Monitor.[7] (*Id.* at ¶ 29.)

Mr. Caplan's decision to include Ms. Lomax on his team after the Parties invited him to apply strengthened his candidacy. Ms. Lomax, a woman of color, is a well-regarded and respected attorney with substantial knowledge and experience in healthcare antitrust matters. Indeed, Sutter identified Ms. Lomax as a qualified and suitable candidate early on in the monitor selection process. (Ward Decl., ¶ 13.) Several colleagues of Sutter's outside counsel identified her as someone with the necessary knowledge, expertise, and judgment to serve as Monitor. (*Id.*) Indeed, a day before Mr. Caplan reached out to Ms. Lomax with whom he had worked in the Antitrust Section of U.S. Department of Justice, Sutter, after consulting with the Plaintiffs, contacted Ms. Lomax and invited her to apply for the Monitorship. (*Id.* at ¶¶ 14-16; Caplan Decl. ¶ 3-4.) While expressing interest in the opportunity, she declined due to her lack of resources (Ms. Lomax had recently transitioned from private practice to join the faculty of Boston University). (Lomax Decl., ¶ 2; Caplan Decl. ¶ 4.) She did however, accept Mr. Caplan's invitation to be a consultant for his monitoring team, with Mr. Caplan's application making clear that Ms. Lomax would play a major role in the Monitorship. (Lomax Decl., ¶ 3.) She also participated along with Mr. Caplan in each round of applicant interviews. (*Id.* at ¶ 4.) After final monitor selection, Ms. Lomax signed an employment contract with AMI to become its Managing Director of Antitrust and Trade Regulation in February 2020, and started at AMI in March 2020. (*Id.* at ¶ 5.)

C. The Race and Gender Identity of All Applicants

The Parties' interest in and focus on fostering DEI is reflected in the RFP's question regarding each applicant's "commitment to diversity, equity, and inclusivity." (Johnson Decl., Exh. A, RFP, p. 4.) The Parties sought this information in an open-ended manner and gave applicants the opportunity to address their and their firm's commitment to any aspect of DEI, of

[7] We focus on gender and race based on the Court's inquiry and note that the individuals may express affinity with other protected classes, but protected class information was not voluntarily disclosed.

which race and gender are a part. Each applicant addressed DEI with respect to gender[8] and race, and also provided information that was more expansive to include, for example, LGBTQ and disability, among others. (Johnson Decl. at ¶ 34.) While the RFP asked that each applicant include the name of each individual on the team and describe his or her "expertise, experience, qualifications, billing rates, and references," the question did not ask that applicants identify either their own or their team members' race, gender, or any other protected class. (Johnson Decl., Exh. A, RFP, pp. 4-5.) Each applicant identified themselves and their team members only by name and title. (Johnson Decl., ¶ 35.) Additionally, the parties received written descriptions of qualifications and other information requested by the RFP, copies of resumes or professional biographies, and in some instances, photographs. (*Id*. at ¶ 36.) Thus, the Parties' responses to the Court's question regarding applicants' race and gender are largely based on observer identification.[9] (*Id*. at ¶ 37.)

The Court requests "an explanation as to why applicants are not asked to identify their gender or race as part of the process . . ." and "an explanation of the policy issues precluding the submission of the information requested by the Court." (Order, p. 5.) The RFP did not specifically inquire about the race and gender of each applicant, though the RFP question was formulated such that it could have been answered with that information. The Parties' decision to adopt this approach is best understood in the context of the legal authority governing employment hiring and standard best practices.

California's Fair Employment and Housing Act (FEHA) prohibits pre-employment inquiries on gender or race, which are each considered a protected class under FEHA. (Cal. Code Regs., tit. 2, § 11016 ["Inquiries that directly or indirectly identify an individual on a basis [of a

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[8] For our purposes, references to "gender" will also encompass "gender identity" and "gender expression."

[9] The applicants' observer-selected gender was cross-checked with pronoun usage in the Proposals. While the applicants' observer-selected race is provided here, we recognize the potential discrepancy between self-identified and observer-identified race, and that self-identified information is preferred. (See EEOC, EEO-1 Instruction Booklet, available at https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-instruction-booklet [instructs employers required to report protected class information to use observer-selected information only when an employee declines to voluntarily self-identify].)

protected class] are unlawful unless made pursuant to a permissible defense."]; Cal. Gov. Code, §§ 12926; 12940.)[10] Promoting DEI may be a permissible defense as "affirmative action" under FEHA or its federal counterpart, Title VII of the Civil Rights Act of 1964. (Cal. Code Regs. tit. 2, § 11010, subd. (e) [permitting a bona fide voluntary affirmative action plan]; *United Steelworkers of Am., AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193, 200 [Title VII's prohibitions against racial discrimination does not condemn all voluntary, race-conscious affirmative action plans].) But where an employer disregards the result of a valid job selection process because it failed to yield a racially diverse group of candidates, the employer's good faith belief that its actions were necessary to comply with Title VII's prohibition against disparate-impact employment practices may not justify the employer's race-conscious conduct under current case law "absent a strong basis in evidence that the [process] was deficient and that discarding the results is necessary to avoid violating the disparate impact provision." (*Ricci v. DeStefano* (2009) 557 U.S. 557, 584.)

In any event, even if inquiries about protected class information were permissible here, the standard practice and prevailing wisdom is to avoid this line of inquiry in the absence of special measures to separate the protected class information from the information used to determine if a person is qualified for the job. The Equal Employment Opportunity Commission (EEOC) counsels the following:

> We recommend that you avoid asking applicants about personal characteristics that are protected by law, such as race, color, religion, sex, national origin or age. These types of questions may discourage some individuals from applying, may be viewed suspiciously by some applicants, and may be considered evidence of intent to discriminate by the EEOC . . .[11]
>
> Questions about an applicant's sex, (unless it is a bona fide occupational qualification (BFOQ) and is essential to a particular position or occupation) . . . . are generally viewed as non job-related and problematic under Title VII.[12]
>
> . . . [E]mployers should not request information that discloses or tends to disclose an applicant's race unless it has a legitimate business need for such information. If

[10] The considerations underlying pre-employment inquiries are still relevant even though Mr. Caplan is not an employee.

[11] U.S. Equal Employment Opportunity Commission (EEOC), *What Shouldn't I Ask When Hiring,* available at https://www.eeoc.gov/employers/small-business/4-what-cant-i-ask-when-hiring.

[12] EEOC, *Pre-Employment Inquiries and Gender,* available at https://www.eeoc.gov/pre-employment-inquiries-and-gender.

> an employer legitimately needs information about its employees' or applicants' race for affirmative action purposes and/or to track applicant flow, it may obtain the necessary information and simultaneously guard against discriminatory selection by using a mechanism, such as "tear-off" sheets. This allows the employer to separate the race-related information from the information used to determine if a person is qualified for the job.[13]

The Parties' question in the RFP follows standard best practices; asking about the applicants' commitment to DEI is likely to elicit information that is "sufficient to address the underlying issues" of DEI. (Order, fn. 8, p. 5.) That question and the requirement for applicants to describe themselves and each member of the applicant's team, invites voluntary self-identification of race, gender, or any other protected class. (Johnson Decl., Exh. A, RFP, pp. 4-5.) And implicit in those questions is the Parties' focus on DEI. The Parties' question re DEI elicited a comprehensive view of each applicant's contribution to DEI, which serves a similar purpose to soliciting protected class information to evaluate diversity and inclusivity in the workplace. (Johnson Decl. ¶¶ 38-39 [responses included policies regarding inclusivity and diversity, industry recognition of representation of underrepresented groups, including women, people of color and LGBTQ lawyers in leadership positions and promotions; indexes tied to DEI; recruitment and mentorship initiatives; and support for affinity groups, among others].)

Mr. Caplan has proposed a diverse team to work with him in serving as Monitor. It consists of three women and three people of color. (Caplan Decl. ¶ 5, 8.) Jesse Caplan is a white male, and his team includes Ms. Lomax, a woman of color, whom Mr. Caplan identified as taking a leading role in the monitoring team (and whom Sutter previously identified as a compelling monitor candidate due to her healthcare antitrust knowledge and experience. (*Id*. at ¶ 9.) She accompanied him to and actively participated in the final in-person interview round in November 2020. (Lomax Decl., ¶ 4.) As for the other four applicants, the Parties believe that the racial and gender composition of their teams is as follows.[14]

- Team A: Applicant (white male) proposed a team comprised of five individuals: one

[13] EEOC, *Pre-Employment Inquiries and Race*, available at https://www.eeoc.gov/pre-employment-inquiries-and-race.

[14] See fn. 9.

female of color, one male of color, one white female, and one white male.

- Team B: Applicant (white male) proposed a team comprised of six individuals: one female of color, four white females, and one white male.
- Team C: Applicant (white male) proposed a team comprised of five individuals: two white females and three white males.
- Team D: Applicant (white male) proposed a team comprised of four individuals: one male of color, one white male, and two white females.

(Johnson Decl. ¶ 40.)

D. Whether Outreach was Successful

The Parties believe their outreach was successful because those efforts yielded a highly qualified consensus monitor candidate who satisfies all seven criteria and does not present any actual or potential conflicts or concerns about impartiality. This is particularly important, given the complexity of the issues that might come before the Monitor and the limited pool of viable candidates with extensive healthcare antitrust experience, balance, and lack of conflicts. Moreover, as in *Baltimore*, the Parties have selected a monitor team consisting of individuals who together have more of the requisite qualifications and experience than they have separately. (*Baltimore, supra,* 282 F.Supp.3d 897, 902-903.)

IV. CONCLUSION

For the reasons detailed herein, as well as in the Monitor Motion and the Plaintiffs' Supplemental Submissions regarding the monitor, the Parties believe that Mr. Caplan and his team have the experience, expertise, resources, and credibility to effectively serve as Monitor. The Parties' monitor selection process yielded a consensus candidate who satisfied all the criteria identified by the Parties. Mr. Caplan has assembled a highly qualified and diverse team. The Parties favorably view AMI's retention of Ms. Lomax as a Managing Director in senior management, as a further indicator or Ms. Lomax's significant role on the monitoring team. (Johnson Decl. ¶ 41.) The Parties consider Ms. Lomax integral to Mr. Caplan's candidacy and view his candidacy through the strength of her presence in his team according to non-DEI and DEI criteria, consistent with our evaluation of the comparative strengths of the other applicants and

their respective teams in the same manner.

The Parties believe that the selection of Mr. Caplan is well within the reaches of reasonableness and is part of a settlement that should be granted preliminary approval.

Dated: August 24, 2020 CALIFORNIA ATTORNEY GENERAL

By: */s/ Emilio Varanini*
Emilio Varanini
Attorneys for The People of the State of California

Dated: August 24, 2020 PILLSBURY & COLEMAN, LLP

By: */s/ Richard Grossman*
Richard Grossman
Attorneys for Plaintiff Class

Dated: August 24, 2020 JONES DAY

By: */s/ David Kiernan*
David Kiernan
Attorneys for Defendants Sutter Health et al.

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PROOF OF SERVICE

UFCW & Employers Benefit Trust vs. Sutter Health, et al.
Case No. CCG-14-538451

People of the State of California, ex. rel. Xavier Becerra vs. Sutter Health
Case No. CGC-18-565398

STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery Street, 17th Floor, San Francisco, CA 94104.

On August 24, 2020, I served true copies of the document(s) described as

THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF THE MONITOR

DECLARATION OF CHERYL L. JOHNSON IN SUPPORT OF THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF A MONITOR

DECLARATION OF JESSE M. CAPLAN IN SUPPORT OF THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF A MONITOR

DECLARATION OF MARGARET A. WARD IN SUPPORT OF THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF A MONITOR

DECLARATION OF DIONNE C. LOMAX IN SUPPORT OF THE PARTIES' JOINT SUBMISSION IN RESPONSE TO THE COURT'S AUGUST 13, 2020 ORDER RE APPOINTMENT OF A MONITOR

on the interested parties in this action as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address llaflamme@fbm.com to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

sutterservice@jonesday.com; Sutterredgraveteam@redgravellp.com; SUTTKVP@keker.com; sutterservice@bzbm.com; AG_AntitrustService@doj.ca.gov; UEBT@cohenmilstein.com; SERVICEUEBT@lists.kellogghansen.com; UEBT@msh.law; uebt@pillsburycoleman.com; UEBTservice@fbm.com;

BY ELECTRONIC SERVICE: I electronically served the document(s) described above via File & ServeXpress, on the recipients designated on the Transaction Receipt located on the

File & ServeXpress website (https://secure.fileandservexpress.com) pursuant to the Court Order establishing the case website and authorizing service of documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 24, 2020, at Concord, California.

LouAnne Laflamme