SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

UFCW & EMPLOYERS BENEFIT TRUST, ET AL.,

Plaintiffs,

v.

SUTTER HEALTH, ET AL.,

Defendants.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA,

Plaintiff,

v.

SUTTER HEALTH,

Defendant.

Case No. CGC-14-538451

Consolidated with

Case No. CGC-18-565398

ORDER RE (1) PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL; AND (2) PLAINTIFFS' UNOPPOSED MOTION TO APPOINT A MONITOR

INTRODUCTION

Before the Court are Plaintiffs' motion for preliminary approval and Plaintiffs' motion to appoint a monitor.

The Court finds that the process the parties used to select the monitor was unreasonable and

contrary to public policy. As described in more detail below, the parties engaged in a limited and confidential selection process in which applications to be monitor were solicited by personal invitation only. The selection process involved consideration of certain criteria, including prior experience as a monitor in cases of similar magnitude and "reputation," that frequently operate to skew an applicant pool against diversity and must be applied with awareness and caution.

The result was an applicant pool in which all of the candidates interviewed by the parties for the position of monitor were white men. This outcome is contrary to public policy. California consumers of health care – the victims of the antitrust violations alleged in this case – are entitled to an application process that is designed to generate a diverse pool of potential monitors. 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.

Accordingly, both motions are denied with leave to refile after addressing the deficiencies identified in this Order.

Before proceeding, the Court makes two observations. First, the Court does not intend to impugn the good faith or question the hard work of the parties, both of which are evident beyond any doubt in this case. The issues addressed herein are complex and structural. They require conscious attention and considerable effort. Second, the Court is not mandating that the process must reach a particular result. The Court's concerns are exclusively with the *process* itself. If the process is designed fairly and the individual selected is objectively qualified, the Court will approve the selection.

BACKGROUND

UEBT initiated the lead case in this consolidated action on April 7, 2014. The People initiated their action, which is now consolidated with UEBT's action, on March 29, 2018. On October 16, 2019, after years of contentious litigation and on the brink of a jury trial, the parties gave notice that they had reached a settlement in principle. (Oct. 16, 2019 Order, 1-2.)

Shortly before the parties announced that they had reached a settlement in principle, in mid-to-late September 2019, Cheryl Johnson of the California Attorney General's office began to identify qualified candidates to monitor Sutter's compliance with the injunctive relief that would be imposed by the

proposed settlement. (Aug. 24, 2020 Johnson Decl. ¶ 7.) At that time, the potential settlement was confidential. (*Id.* at ¶ 9.) As a result, Ms. Johnson focused on publicly available resources regarding monitors and healthcare antitrust professionals and consulted with colleagues who were knowledgeable about and had experience working with healthcare antitrust professionals throughout the nation. (*Ibid.*)

In early October 2019, Margaret Ward, a Jones Day partner representing Sutter in this matter, began to work with Johnson to identify and select a monitor. (*Ibid.*; Aug. 24, 2020 Ward Decl. ¶ 3.) The parties agreed that a monitor would need to (1) have no conflicts; (2) be well-versed in state and federal antitrust law, including its application to the healthcare industry; (3) have experience and knowledge with healthcare operations, including managed care contracting; and (4) preferably have served as a monitor in a prior case of similar magnitude in the healthcare/antitrust area. (Aug. 24, 2020 Ward Decl. ¶ 4; see also Aug. 24, 2020 Johnson Decl. ¶ 8.) The parties worked jointly to identify potential candidates, looking to individuals who were associated with law firms, monitoring firms, academia, consulting firms, alternative dispute resolution organizations, professional healthcare and antitrust bar associations and practice groups, healthcare advocacy organizations, and the judiciary. (Aug. 24, 2020 Johnson Decl. ¶ 10; Aug. 24, 2020 Ward Decl. ¶ 6.)

The parties identified a small pool of qualified applicants. (See Aug. 24, 2020 Johnson Decl. ¶ 15.) Ms. Ward, working with Sutter, preliminarily identified fifteen individuals who had the necessary healthcare antitrust and/or monitoring experience. (Aug. 24, 2020 Ward Decl. ¶ 7.) Ward, in consultation with Sutter, narrowed that list to five individuals based on several factors: antitrust and healthcare knowledge and experience; lack of actual or potential conflicts; ability to be impartial on the basis of prior experience and/or current professional relationships; and reputation for effectiveness, fairness, and good judgment. (Aug. 24, 2020 Ward Decl. ¶ 8.) Sutter provided its list of five candidates to the Attorney General on October 22, 2019. (*Id.* at ¶ 10; Aug. 24, 2020 Johnson Decl. ¶ 21.) The Attorney General also identified a small pool of qualified and suitable candidates. (Aug. 24, 2020 Johnson Decl. ¶¶ 15, 21 [pool of qualified candidates was small; parties agreed to exchange lists of three candidates each, although Sutter ultimately produced a list of five candidates].)

In late October 2019, the parties agreed to contact a list of six candidates to see if they were

interested in applying to serve as monitor. (Aug. 24, 2020 Ward Decl. ¶ 12; Aug. 24, 2020 Johnson Decl. ¶ 22.) Five of the six potential candidates agreed to apply. (Aug. 24, 2020 Ward Decl. ¶ 12.) The sixth declined due to concerns about his ability to take the project due to his existing workload. (*Ibid.*; Aug. 24, 2020 Johnson Decl. ¶ 25.) After the potential candidates agreed to confidentiality, the parties described the general terms of the monitorship and gave the candidates a request for proposal. (Aug. 24, 2020 Ward Decl. ¶ 12; Aug. 24, 2020 Johnson Decl. ¶ 22.) Those five candidates submitted applications. (Aug. 24, 2020 Johnson Decl. ¶ 24.)

While the parties were soliciting applications from the six candidates, Ms. Ward continued to search for additional qualified candidates. (Aug. 24, 2020 Ward Decl. ¶ 13.) As a result of her efforts, the parties agreed to solicit an application from one more individual, Dionne Lomax. (*Id.* at ¶¶ 13-15; Aug. 24, 2020 Johnson Decl. ¶ 23.) Ms. Lomax did not apply for the position. Instead, she joined the application of Jesse Caplan, one of the other candidates. (Aug. 24, 2020 Ward Decl. ¶ 16; Aug. 24, 2020 Johnson Decl. ¶ 23.)

The parties only solicited applications from the seven potential applicants identified above and only received five applications, one of which included Ms. Lomax as a team member. All five applicants were white males. (See Aug. 24, 2020 Johnson Decl. ¶ 40.) Through the request for proposal, the parties required applicants to describe their organization's commitment to equity, diversity, and inclusion. (*Id.*, Ex. A.)

After receiving the monitor applications, the parties conducted two rounds of interviews in November 2019, limited to the five applicants. (See *id.* at ¶ 31.) The parties agreed to select Mr. Caplan as the monitor. A part of the reason they did so was because Ms. Lomax would serve as a key member of Mr. Caplan's team. (See Aug. 24, 2020 Ward Decl. ¶ 17.)

On December 19, 2019, Plaintiffs filed their motion for preliminary approval of the class action settlement. The appointment of Mr. Caplan as the monitor is one material term of the settlement. (See Dec. 19, 2019 Motion, Appendix I ("Proposed Settlement") § III(B)(1), Exhibit B ("PFJ") at § V(A).) On January 30, 2020, Plaintiffs filed a separate unopposed motion to appoint Mr. Caplan as the monitor. On February 11, 2020, Plaintiffs filed a supplemental submission in support of their preliminary approval

motion. On February 25, 2020, the Court first heard argument on Plaintiffs' motions. That same day, the Court issued an order directing a supplemental filing and scheduling a continued hearing for April 6, 2020. (Feb. 25, 2020 Order, 1-2.) As the Court has described elsewhere, shortly after the Court entered the February 25, 2020 Order this litigation was delayed as a result of the COVID-19 pandemic, including the Court's and the parties' responses thereto. (See July 10, 2020 Order, 2-3.) Ultimately, the Court heard further argument on Plaintiffs' preliminary approval and appointment motions on August 12, 2020. (See Aug. 13, 2020 Order, 1-2.) At that time, the Court had the benefit of several supplemental filings submitted in response to its requests. Following the August 12, 2020 hearing, the Court issued an order directing a further supplemental filing to address its concerns regarding the selection process that led to Mr. Caplan's appointment. (See *id.* at 1-7.) The parties timely submitted the supplemental filing required by that order. The Court then took the matter under submission.[1]

DISCUSSION

I. Legal Standard

A. Preliminary Approval

Before approving a class action settlement, the Court must determine that the terms of the settlement are "fair, adequate and reasonable." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) In making this determination, there is a "presumption of fairness . . . where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Id.* at 1802.) To grant final approval, the trial court must "independently [satisfy] itself that the consideration . . . received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129.)

The proposed settlement in this case includes a stipulated judgment, or consent decree. Entry of a stipulated judgment is a judicial act that a court has discretion to perform. (*Villacres v. ABM Indus., Inc.*

[1] Although the Court reserved time for a further hearing after the submission of the supplemental papers, the Court vacated the hearing after receiving the supplemental papers. (See Aug. 13, 2020 Order, 7; Sept. 3, 2020 Order, 1-2.)

(2010) 189 Cal.App.4th 562, 597.) Although a court may not add to or make a new stipulation without mutual consent of the parties, it may reject a stipulation that is contrary to public policy. (*Ibid.*)

B. Appointment of a Monitor

The parties argue that because the appointment of a monitor is a term of a class action settlement, the Court should apply the legal standard for class action settlement approval to evaluate whether the Court should appoint the monitor. (Aug. 24, 2020 Joint Submission, 5.) Assuming that argument is correct, the Court cannot decide whether the monitor is within the range for possible final approval without taking into consideration the legal standard for the appointment of a monitor.

The parties are unable to identify any California authority addressing the issue. (*Id.* at 6.) Instead, they point the Court to *United States v. Baltimore Police Department* (D. Md. 2017) 282 F.Supp.3d 897. The *Baltimore Police* case differs from the present action in an important respect – monitor selection was distinct from settlement approval. First, the parties filed a motion for an order entering a consent decree. (*Baltimore Police*, 282 F.Supp.3d at 898.) The consent decree set forth the process for selecting an independent monitor. (*Id.* at 899.) The District Court approved the consent decree – thereby approving the process for selecting an independent monitor. (*Id.* at 898.) The parties then selected a monitor and filed a joint motion for appointment of the monitor. (*Id.* at 898-99.) In that context, the District Court stated that its role was to decide whether the parties' jointly proposed monitor candidate was selected in accordance with the terms of the consent decree and was qualified to oversee the execution of the specific requirements of the decree. (*Id.* at 901-02.) The parties argue that the same standard should apply here. (Aug. 24, 2020 Joint Submission, 6.) But that is impossible – the Court cannot evaluate whether the parties' carried out the monitor selection process in compliance with a consent decree where there is no consent decree that governs the monitor selection process. Here, the parties' consent decree includes a pre-selected monitor as one of its terms; the parties never submitted, and the Court never approved, a consent decree governing the monitor selection process. (See PFJ § V(A).)

The parties also draw the Court's attention to monitor selection guidelines published by the U.S. Department of Justice and the American Bar Association. (Aug. 24, 2020 Joint Submission, 7.)[2] The

[2] These sources and the *Baltimore Police* case were also in the tentative ruling the Court provided to the parties in advance of the August 12, 2020 continued hearing.

United States 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 guidance states that "The Government, Host Organization, and court, for Monitors appointed subject to a Court Order, should consider what qualifications are necessary for a Monitor to effectively conduct the monitorship based on the specific facts and circumstances of the matter. The Monitor selection process should ensure that the Monitor is a highly competent person or entity for the specific assignment and that the Monitor possesses the qualifications set forth under these standards. Absent extraordinary circumstances, both the Host Organization and the Government should be allowed to have a significant role in the selection process. … The selection process should encourage consideration of a broad range of Monitor candidates that should not be artificially limited by demographic, professional, and geographic factors. When possible, the Government should announce the decision to select a Monitor so that appropriate persons or entities may submit indications of interest. … When determining the necessary qualifications of the Monitor and when reviewing Monitor candidates, the following factors should be considered: [¶] 1. Qualifications [¶] a) The integrity, credibility and professionalism of the Monitor. [¶] b) The expertise or experience in the industry or specific subject matter of the monitorship. [¶] c) The relevant skills and experience necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement. [¶] d) 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. [¶] e) The commitment to serving as the Monitor for the entire monitorship term. [¶] 2. Costs … 3. Mandatory Exclusions … 4. Potential Exclusions…." (ABA, Monitor Standards, Standards 24-2.1-24-2.2, 24.2.4, available at https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/.)

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II. The Court's Denial of Preliminary Approval and the Request to Appoint a Monitor

The Court denies the motion for preliminary approval and denies the unopposed motion for appointment of a monitor. In so doing, the Court finds that the process whereby the parties generated the pool of applicants for the monitor position was inadequate. Given that the monitor will be appointed for a decade (and potentially up to thirteen years) to handle complaints regarding violations of an injunction directed to remedy the high costs of health care allegedly resulting from past antitrust violations,[3] more is required to instill public confidence in the monitor selection and to ensure that entry of the consent decree, which appoints the monitor as an officer of the court, is consistent with the public interest. That defect is curable. Setting that issue aside, the Court is otherwise persuaded that the settlement is within the range of possible final approval such that preliminary approval would properly be granted.[4]

The defects in the process flow from the circumstances under which the parties chose to select a monitor. The parties were negotiating a settlement on the brink of trial. The parties wanted to keep the terms of the settlement secret until a motion for preliminary approval was filed. (See Proposed Settlement § VII(A)(3).) The parties also wanted to name the monitor as a material term of the settlement. (See Proposed Settlement § III(B)(1); PFJ § V(A).) To achieve both of those ends, it was necessary for the individuals tasked with monitor selection to move quickly and quietly. The Court does not doubt that the individuals who carried out the monitor selection process sought to identify a complete and inclusive pool of applicants who possessed a unique set of qualifications within the constraints imposed upon them. Nevertheless, the Court finds that the constraints themselves, and the resulting process, were unreasonable.

The first problem was that applications were solicited by personal invitation only. The Court finds that there was insufficient time for the parties to conduct a nationwide search for applicants. Notably, Ms. Ward declared that she continued searching for qualified candidates worthy of outreach, and did in fact identify one such individual, Ms. Lomax, after the parties had conferred on a list of qualified candidates

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[3] See Veronica Root, *Constraining Monitors*, 85 Fordham L. Rev. 2227, 2228-29 (2017) [in seeking appointment as a monitor, the stakes are quite high].

[4] First, for preliminary approval purposes the Court is persuaded that the consideration given for the release is within the range of reasonableness. Second, the Court has not through the preliminary approval proceedings identified potential stumbling blocks in the consent decree, aside from the appointment of the monitor, that preclude preliminary approval.

and begun their outreach. (See Aug. 24, 2020 Ward Decl. ¶¶ 13-15; see also Aug. 24, 2020 Johnson Decl., Ex. A [deadline for applications set forth in request for proposal was October 31, 2019].) Put differently, when the parties conferred on a list of qualified candidates, they missed Ms. Lomax.

The fact that the parties solicited a last-minute application from Ms. Lomax does not show that she was given a fair opportunity to apply to be *the* monitor. While the Court recognizes that this demonstrates some effort towards generating a diverse applicant pool, the Court finds this story too familiar. Ms. Lomax did not feel that she was able to apply to be the monitor because at the time she was contacted by Ms. Ward she lacked the resources to take the lead position. Diverse candidates are not prohibited from applying, but they are often found to lack the "experience" or "resources"[5] that white male candidates possess on paper, and thus are weeded out of the process before getting even an opportunity to establish themselves. The Court sees this on a daily basis in the law firms that appear before it. Most of the complex litigation teams are led by white men, all of whom are well-qualified, and supported by a somewhat more diverse group of junior partners, associates and paralegals. These men are then hired in the next complex case and so this small circle of highly qualified attorneys is perpetuated with little room for attorneys from different backgrounds to take on a lead role.

A second and related problem was that the applications were solicited in confidence. (See Aug. 24, 2020 Johnson Decl. ¶ 22, Ex. B.) This prevented one mechanism where the selection process could encourage the consideration of a broad range of monitor candidates – a public announcement of the decision to select a monitor so that appropriate persons or entities could submit indications of interest. (See ABA, Monitor Standards, Standard 24-2.2.) Thus, the parties considered only a closed pool of candidates that they were able to identify themselves.

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[5] Ms. Lomax declared that when Ms. Ward contacted her about submitting a response to a request for proposal, Ms. Lomax felt that without access to sufficient resources she was not able to submit her own proposal. (Aug. 24, 2020 Lomax Decl. ¶ 2.) Accordingly, when Mr. Caplan contacted Ms. Lomax the next day about serving as a consultant in connection with his bid, which was backed by the track record and infrastructure of Affiliated Monitors, Inc., Ms. Lomax decided to join Mr. Caplan's bid because it was the best way for her to participate in the matter. (*Id.* at ¶ 3.) If appointed, the monitor is empowered to hire staff to carry out its assignment. (Jan. 30, 2020 Johnson Decl., Ex. B at Art. 1, § 1.1.) Based on Ms. Lomax's experience, the Court is confident that given time Ms. Lomax could have assembled a capable support team, the "resources" Ms. Lomax appears to have been lacking when she was contacted. But Ms. Lomax was not given time – she was invited to apply just before the application deadline, apparently after, as a result of outreach to six other individuals, five other applications had already been solicited.

The parties did not have to forego a public search. The fact that the parties had agreed to a settlement in principle was public on October 16, 2019. The preliminary approval papers were filed on December 19, 2019. The preliminary approval hearing was held on February 25, 2020. Even if the identity of the monitor needed to be in the consent decree itself, unlike in the *Baltimore Police* case, there was ample time for the Attorney General's office to publicize the fact that it was seeking a monitor and to broadly solicit indications of interest. (See ABA, Monitor Standards, Standard 24-2.2. ["The selection process should encourage consideration of a broad range of Monitor candidates that should not be artificially limited by demographic, professional, and geographic factors. When possible, the Government should announce the decision to select a Monitor so that appropriate persons or entities may submit indications of interest"].)

The results of the parties' approach to the selection of the monitor were predictable and stark. All of the original six candidates identified for outreach were male and at least five of them were white. (See Johnson Decl. ¶¶ 24-25, 40; Aug. 24, 2020 Caplan Decl. ¶ 5.)[6] Put differently, so far as the record discloses, all of the qualified applicants that the parties were able to identify and agree on in a nationwide search conducted pursuant to their self-imposed timing and confidentiality restraints were white males. Ms. Lomax, the only candidate the parties reached out to that breaks the pattern, was identified as a potential candidate at the last minute. This leaves the Court with a lingering question, who else did the parties miss?

The parties argue that the Court should grant preliminary approval if the appointment of Mr. Caplan and/or the underlying process was within the ballpark of reasonableness. (Aug. 24, 2020 Joint Submission, 7.) To the extent the parties contend that the process was within the ballpark of reasonableness, the Court disagrees. The process was unreasonable. To be clear, the Court is persuaded that the parties made a good faith effort. However, the Court finds that their effort was inadequate. To the extent the parties contend that the appointment of Mr. Caplan is within the ballpark of reasonableness because the Court would approve the appointment of Mr. Caplan had he been appointed pursuant to an adequate process, the Court disagrees because the Court must only deal with the facts before it, not

[6] The record does not reveal the race of the sixth candidate solicited but not interviewed by the parties.

counterfactuals.

As a result of the deficiencies identified above, the Court finds that the process used by the parties to select applicants and interview candidates was not reasonable and violated public policy. Accordingly, the motion to appoint the monitor will be denied. Because the identity of the monitor is a material term of the settlement, the Court also denies preliminary approval of the settlement.

III. Leave to Refile

The Court's denial of Plaintiffs' motion for preliminary approval and Plaintiffs' unopposed motion for appointment of a monitor is with leave to refile.[7] The parties have invested a significant amount of time and energy negotiating this settlement and presenting it to the Court. The Court appreciates the effort that the parties have undertaken to argue in favor of preliminary approval. As noted above, the Court finds one discrete stumbling block in the way of preliminary approval. That stumbling block can be removed. The settlement, and the parties' desire to appoint a monitor, is now public. The Attorney General may solicit indications of interest from additional potential applicants and the parties may vet them in good faith, including by conducting additional interviews as appropriate. If, after completing the process, the parties are unable to agree to a different monitor and/or both continue to believe that Mr. Caplan is the best candidate, Plaintiffs may renew their motion for preliminary approval. If the parties agree to a different monitor, Plaintiffs may renew their motion for preliminary approval identifying a different monitor. In either case, Plaintiffs may incorporate the existing record but should also describe their efforts to broaden the applicant pool and the parties' consideration of any additional applicants.

CONCLUSION AND ORDER

The Attorney General's office, in describing its hiring practices, expresses a commitment to diversity and prioritizes "foster[ing] a culture where everyone has the opportunity to excel." (See https://oag.ca.gov/careers/aboutus.) This statement reflects the public policy of the State of California. Fostering a culture is not a passive activity. It requires transparency, purpose, conscious effort, and

[7] As a practical matter, the Court sees no need to file two motions. The appointment of a monitor is a term of the settlement. Accordingly, the Court will necessarily need to decide whether to appoint a monitor as one component of the settlement approval process. If Plaintiffs prefer to file two motions, they may do so.

positive action.[8] This at least begins by ensuring that candidates considered for important and powerful positions reflect the diversity of the People.

The Court holds that the process used to identify individuals to interview for the monitor position was not reasonable and interviewing only white males for the monitor position as a result of this process was contrary to public policy. Plaintiffs' motions are therefore denied without prejudice. Plaintiffs may refile their motions after addressing the issues identified in this order.

IT IS SO ORDERED.

Dated: September 22, 2020

Anne-Christine Massullo
Judge of the Superior Court

[8] The Court is aware that the parties here are being required to expend considerable effort addressing the monitor appointment which, based on argument made during prior hearings, they have not been required to do in the past. But the Court is mindful, particularly this week, that "[r]eal change, enduring change, happens one step at a time."

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On September 22, 2020, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: September 22, 2020

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk