No. 22-15634

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sidibe, *et al*,

Plaintiffs - Appellants,

v.

Sutter Health, *et al*,

Defendants - Appellees

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:12-cv-04854
The Honorable Laurel D. Beeler, Magistrate Judge

BRIEF OF *AMICI CURIAE* CONSUMER ACTION AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT OF CONSUMER ACTION

Consumer Action is a nonprofit, non-stock corporation. It has no parent corporation and there is no corporation that has an ownership interest of any kind in it.

CORPORATE DISCLOSURE STATEMENT OF UNITED STATES PUBLIC INTEREST RESEARCH GROUP

United States Public Interest Research Group ("U.S. PIRG") is a nonprofit, nonstock corporation. It has no parent corporation and there is no corporation that has an ownership interest of any kind in it.

INTEREST OF AMICI CURIAE

Amici Curiae Consumer Action and U.S. Public Interest Research Group ("U.S. PIRG") (collectively "Amici") are leading advocates for competitive markets, which benefit all consumers by maintaining lower prices and promoting innovation and developing efficiencies.[1] Amici are public interest groups and advocates for competitive health care markets and consumers who seek lower healthcare costs. Amici respectfully submit this brief in support of Plaintiffs-Appellants' appeal of the District Court's commission of substantial legal errors such as barring the jury from seeing vast amounts of critical evidence. This error compromised the jury's assessment and caused significant prejudice to Plaintiffs. The jury found in favor of Defendant, Sutter Health, effectively allowing Sutter Health to avoid compensating fully insured consumers.

Consumer Action is a national not for profit organization that has worked to advance consumer literacy and protect consumer rights in many areas for over forty years. The organization achieves its mission through several channels, from direct consumer education to issue-focused advocacy. Consumer Action is

[1] No counsel for a party has authored this brief in whole or in part, and no party or party's counsel, or any other person has contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

particularly concerned with ever-growing healthcare costs and has been an Amici in healthcare competition cases.

U.S. PIRG is a not-for-profit organization that advocates for the public interest, working to win concrete results on real problems that affect millions of lives, and standing up for the public against powerful interests. It employs grassroots organizing and direct advocacy for the public on many different issues including healthcare, preserving competition, and protecting consumer welfare. U.S. PIRG has been an Amici in healthcare competition cases.

These leading consumer organizations have a long history of advocating for access to affordable health care and controlling healthcare costs without compromising quality. Amici have a strong interest in preserving competition in healthcare markets and in protecting the ability of consumers to challenge anticompetitive conduct. Amici submit this brief because the anticompetitive conduct at issue led to demonstrably higher hospital prices that were passed through to Northern California fully insured consumers.

Amici have a strong interest in protecting their members and the public from market manipulation that increases the cost of hospital care services and insurance premiums. Amici are concerned about the increasing costs of healthcare caused by anticompetitive contracting practices of dominant hospital systems such as Sutter Health and are concerned that the District Court's errors below will undermine

consumers' ability to bring lawsuits to stop future anticompetitive conduct by dominant hospital systems. Amici's participation in this case will assist this Court to understand the importance of protecting local hospital markets and the consumer harm that would result if the District Court's final judgment is affirmed. Amici urge this Court to reverse the District Court's final judgment and remand for a new trial; otherwise, Amici are concerned that the ruling will discourage consumers from bringing cases against dominant hospital systems that abuse their market power.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are concerned about hospital consolidation, which has resulted in many local markets throughout the United States becoming highly concentrated. This consolidation created dominant hospital systems that have only spurred the increase in hospital costs without any increase in the quality of care.[2] Dominant hospital systems in local markets are increasingly leveraging their market power using anticompetitive contracting strategies to raise prices. One anticompetitive contracting strategy that dominant hospitals systems have used is what is known as an "all or nothing" clause, which is a system wide contracting strategy that requires

[2] Jaime S. King *et al*., *Preventing Anticompetitive Healthcare Consolidation: Lessons from Five States*, THE SOURCE ON HEALTH CARE AND COMPETITION (June 2020), https://2zele1bn0sl2i91io41niae1-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/PreventingAnticompetitiveHealthcareConsolidation.pdf.

health plans that need a particular "must have" hospital in their provider networks, to include all the system's hospitals in the health plans' provider network regardless of location, services, or quality of care. This strategy allows dominant providers to raise the costs of inpatient services for all its hospitals in its system even the ones that are not as desirable to health insurers.

In the case of Sutter Health System ("Sutter"), it was able to successfully merge its higher priced hospital, Alta Bates Medical Center, which is located in Berkeley, California, with Summit Medical Center ("Summit"), a lower priced hospital located in Oakland, California a little over twenty years ago. After the acquisition was consummated, Sutter was able to significantly raise prices for the lower priced hospital.[3] It was able to do this largely by forcing systemwide, "all or nothing" contracts upon health plans. Because Sutter has a large hospital system in Northern California due to its past acquisitions, it has the bargaining leverage to force health plans to accept all its hospitals at a higher price even if some of the hospitals are not as desirable and do not offer a higher quality of care than other competing hospitals. This contracting strategy interferes with health plans' ability to create narrow provider networks that would likely result in lower insurance premiums for small businesses and patients. These anticompetitive systemwide

[3] Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter–Summit Transaction*, Int. J. of the Economics of Business, Vol. 18, No. 1, February 2011, pp. 65–82.

contracts that are employed by large hospital systems throughout the United States cause enormous harm, as they require payors to overpay for hospital services and fully insured consumers to overpay for health plan premiums, which are partly based on higher hospital costs. These contracting practices also deprive patients' access to lower priced and quality hospital services.

Amici submit this brief in support of Plaintiffs/Appellants in their appeal of multiple pre-trial and trial errors made by the District Court that resulted in the jury finding in favor of Sutter. This Court should reverse the District Court's judgment and remand for a new trial. If the decision is affirmed, it will make it increasingly difficult for consumers to challenging anticompetitive conduct by hospitals. The implications of the decision are significant. Dominant hospital systems may feel emboldened by Sutter's victory and may feel free to engage in similar conduct. For these reasons, Amici seek for this Court to reverse the District Court's decision and remand for further consideration.

ARGUMENT

I. "All or Nothing" and "Anti-Steering" Contracts Harm Competition and Lead to Higher Hospital Prices

Because of significant consolidation over the years, nearly 95% of the local hospital markets throughout the country are highly concentrated.[4] The consolidation that has occurred harms consumers as these local hospital markets

[4] King, *supra* note 2 at 5.

are dominated by hospital systems with market power. Increased market power gained through acquisitions results in increased bargaining power over health insurers. With increased bargaining power, large hospital systems can negotiate and charge higher prices for its inpatient hospital services of all its hospitals by forcing health plans to include all hospitals in the entire system in the health plans' provider networks and preventing health plans from steering individuals to lower cost hospital providers. A health plan needs certain hospitals, which are considered "must have" - meaning providers that health plans must include in their networks to attract employers and consumers—within its provider network to be commercially viable. A hospital could be "must have" because of its geographic proximity, reputation for quality, or specialized services.[5] Hospital systems use all-or-nothing provisions to leverage the status of their "must-have" hospitals in highly concentrated markets to demand higher prices for the entire system, including those hospitals in more competitive geographic markets and specialties.[6]

Here, the District Court judge precluded the jury from hearing any pre 2006 evidence at trial. As a result, the jury missed out on some important history related to Sutter's acquisitions, Sutter's defense against the state of California's attempted

[5] Robert A. Berenson, Paul B. Ginsburg, Jon B. Christianson & Tracy Yee, *The Growing Power of Some Provider to Win Steep Payment Increases from Insurers Suggests Policy Remedies May Be Needed*, 31 HEALTH AFF. 973 (2012).
[6] *Id. at 973-975.*

block of its acquisition of Summit, and its intent to use its increased bargaining power to force health plans to accept its "all or nothing" and anti-steering strategies. According to evidence cited by the district court during pre-trial proceedings, Sutter already had a plan to use "all or nothing" clauses in its contracts in the late 1990s. And, in 2001, Sutter successfully defended against the state of California's preliminary injunction motion to stop its merger with Summit. *California v. Sutter Health System*, 130 F. Supp. 2d 1109 (2001). California alleged that the transaction was anticompetitive, but Sutter put on a defense that health plans could steer patients to lower cost hospitals to discipline Sutter and Summit from raising prices after the merger. *Id.* The evidence if it were allowed to be provided to the jury, demonstrates that Sutter had a plan to use system wide contracting strategies, grew by acquisition, obtained market power in Northern California local hospital markets, increased its bargaining leverage over insurers, planned to use the increased power to raise prices for all of its hospitals in its system, and then successfully exerted that market power through anticompetitive contracting strategies, which resulted in higher prices for hospital services for all of its hospitals.

Moreover, the jury would have learned that Sutter's witnesses and experts testified and argued in the defense of its merger with Summit that health plans have numerous mechanisms to discipline hospitals from raising prices. *Id.* at 1130.

Sutter put on evidence that health plans can exclude hospitals from the plans' provider networks and can steer patients to lower cost hospitals and away from hospitals that try to impose a price increase. *Id.* Sutter argued that health plans can do this by providing direct financial incentives as well as more general risk sharing arrangements to reward physicians that refer their patients to more cost-effective hospitals. *Id.* Sutter also put on evidence that health plans' ability to steer individual patients from a higher cost hospital to a lower cost hospital is effective in disciplining prices. *Id.*

Sutter, however, had no intentions of allowing any health plan to steer patients to lower cost providers as it successfully implemented its "all or nothing" and "anti-steering" policy. In fact, before 2001, insurers negotiated with Sutter hospitals individually, but Sutter moved to systemwide contracts and when Anthem, a larger health insurer, pushed back, Sutter terminated its individual contracts with Anthem. Then, Anthem acquiesced and signed up for a system wide contract. *See Sidibe v. Sutter*, 2021 WL 879875, at *2 (N.D. Cal. Mar. 9, 2021). This contracting strategy resulted in higher prices. At least one economic study suggests that after Sutter's acquisition of Summit, Sutter was able to increase the prices for Summit's hospital procedures by up 72%.[7] Prior to the acquisition,

[7] *Tenn*, *supra* note 3.

health plans contracted with Summit for much lower prices as Summit lacked the bargaining power to charge higher prices on its own.[8]

Since the early 2000s, Sutter required health plans to include all of Sutter's hospitals in their networks to have any of Sutter's "must have" hospitals. As evidenced by Anthem's decision to acquiesce to a system wide contract, Sutter possessed certain "must have" hospitals that insurers needed to be commercially viable and forced the insurers to include its less desirable hospitals. Indeed, Sutter used its market power for inpatient services in areas where it is the only or dominant hospital system to force insurers into other hospitals located in competitive areas (tied markets).[9] Sutter had the leverage to condition the pricing of its "must have" hospitals on the inclusion of its other hospitals and to take steps that denied patients the ability to use lower cost hospitals in competitive markets.

It is worth noting that a class of plaintiffs and the state of California brought a case against Sutter making similar allegations that Sutter's use of "all-or-nothing" clauses is illegal under the state's antitrust laws. The California action concerned

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[8] *Id.*

[9] Fourth Amended Complaint, *Sidibe v. Sutter Health*, 4 F. Supp 3d 1160 (N.D. Cal. 2013) (No. C 12–04854 LB), at 2. The eight tying markets included the hospital service areas in Antioch, Auburn, Berkeley/Oakland, Crescent City, Davis, Jackson, Lakeport, and Tracy. Sutter has 100% share in each tying market except for Berkeley/Oakland, where it has 66.7% of the inpatient hospital services market. The four tied markets included the hospital service areas in San Francisco, Sacramento, Modesto, and Santa Rosa.

fully-insured consumers (e.g, employers and individuals who pay premiums, the same consumers involved in this case) as well as self-insured entities, but the California AG did not seek damages on behalf of those fully-insured consumers. The case settled and Sutter agreed to pay $575 million in compensation to the self-insured entities.[10] However, the fully insured consumers covered by this action were not compensated.

Under the antitrust laws and California's Cartwright Act, "all or nothing" clauses can be considered an illegal tying arrangement as the dominant provider utilizes its market power over services in one market (tying product) to pressure health plans to buy its hospital services at higher prices in other markets (tied product), and thereby foreclose competition in the tied market. *UAS Mgmt., Inc. v. Mater Misericordiae Hosp.*, 169 Cal. App. 4th 357, 369 (2008) (quoting *Classen v. Weller*, 145 Cal. App. 3d 27, 37-38 (1983) (reversing summary judgment to hospital system alleged to have tied its inpatient and outpatient services together). Here, Sutter demanded higher prices in more competitive markets by tying "must have" providers to its other hospitals.

[10] Press Release, *Attorney General Becerra: State, Unions, Employers, and Workers Reach Settlement to Address Alleged Anticompetitive Practices by Sutter Health that Increased Healthcare Costs for Californians,* December 20, 2019.

These types of contracting practices are bad for consumers and hinder the growth of narrow network products, whereby insurers could provide less expensive options for employers and patients who do not require a large network of hospitals. Indeed, Sutter's contracting practice made it impossible for insurance plans to offer that type of product to small business employers meaning that employers were required to purchase health insurance at a higher cost because the health plan's prices for hospital services were higher than they should have been. A 2018 University of California study found that prices for inpatient hospital services in Northern California were seventy percent (70%) higher than hospital prices in Southern California.[11] For inpatient hospital procedures, the cost in Southern California was nearly $132,000 compared to more than $223,000 in Northern California.[12] The same report also found that the average price for an outpatient cardiology procedure in Northern California was approximately 55% more than the same procedure in Southern California.[13] A 2016 study found that a cesarean delivery in Sacramento, where Sutter is based, cost more than $27,000, nearly

[11] *See Consolidation in California's Health Care Market: 2010-2016*, Nicholas C. Petris Center on Healthcare Markets and Consumer Welfare, School of Public Health, UC Berkeley 1, 9 (March 26, 2018).The Petris Center at the University of California found huge price disparities between Northern California and Southern California inpatient prices, which is consistent with the higher concentration and the anticompetitive conduct that existed in the hospital markets in Northern California as compared to Southern California.

[12] *Id.*

[13] *Id. at* 40.

double what it cost in Los Angeles or New York, making Northern California one of the most expensive places in the country to have a baby.[14]

Unfortunately, the District Court limited the evidence that was provided to the jury and if the jury had been provided the full set of evidence, the jury would have had a better understanding of Sutter's anticompetitive intent and why Sutter's contracting practice was so egregious. The jury would have understood why Sutter wanted the "all or nothing" and "anti-steering" clauses in its contracts and the way the terms were negotiated and enforced. The jury would have understood that Sutter had been engaged in this practice for a long time.

Accordingly, consumers and patients are concerned about hospital consolidation and hospital systems that abuse their market power through "all or nothing" and "anti-steering" contracts.

II. Dominant Hospital Systems Do Not Provide Patients With Better Quality of Care

There have been nearly 1,600 hospital mergers in the past twenty years, resulting in a majority of local areas now being dominated by one large, powerful health system, like Sutter in Northern California.[15] And, the evidence is clear that

[14] Jenny Gold, *If You Want To Spend A Bundle On Your Bundle Of Joy, Go To Northern California*, California Healthline, June 30, 2016.

[15] Hearing on Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets Before the Subcommittee on Antitrust, Commercial, and Administrative Law of the H. Committee on the Judiciary, 116th Cong. (2019) (statement of Martin Gaynor, E.J. Barone University

dominant hospital systems that have grown through acquisitions do not necessarily provide better quality of care. Indeed, some research shows that consolidation between competitors can cause serious harm to the quality of care received by patients.[16] Several studies have shown that health outcomes are substantially worse at both the hospital and physician level when providers face less competition.[17] Moreover, there is little to no evidence that finds that consolidation results in quality improvements.[18] And, this all makes sense because reduced competition preserves the status quo, which means that it has less incentive to invest in innovation, which would lead to higher quality of care.

In fact, once a hospital provider has become dominant, its incentive is to enhance and maintain that market power through anticompetitive tactics.[19] This is why dominant hospital systems like Sutter may choose to implement an anticompetitive contracting strategy using "all-or-nothing" or "anti-steering"

Professor Economics and Public Pol'y, Heinz College, Carnegie Mellon University), https://www.congress.gov/116/meeting/house/109024/witnesses/HHRG-116-JU05-Bio-GaynorM-20190307.pdf [hereinafter Gaynor Statement 2019].

[16] Gaynor Statement 2019.

[17] David J. Balan & Patrick S. Romano, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT'L J. OF THE ECON. OF BUS. 45 (2010).

[18] *See* Gaynor Statement 2019 at 13; Nancy D. Beaulieu et al., Changes in Quality of Care after Hospital Mergers and Acquisitions, 382 N. ENG. J. OF MED. 51 (2020).

[19] Graynor Statement 2019 at 17.

clauses in provider contracts because the use of these clauses helps health systems maintain and enhance their market power and charge supra competitive prices.[20] Acquisitions and "all or nothing" strategies protect the dominant provider's position in the market, which makes dominant hospitals even more rigid and reduces their incentives to modernize and provide a higher quality service.[21]

Northern California employers and individuals all paid higher premiums to use hospital services, but they did not receive better quality of care. Despite being acquired by Sutter approximately 20 years ago and significantly increasing its prices for inpatient services, neither the Alta Bates Summit Medical Center in Berkeley nor the Alta Bates Summit Medical Center in Oakland is nationally ranked in any specialty nor do they rank high in terms of quality of care in the state of California.[22] According to U.S. News & Report, Alta Bates Summit Medical Center in Berkeley is not rated high performing in any category and Alta Bates Summit Medical Center in Oakland is only rated high performing in one category,

[20] Graynor Statement 2019 at 17; Katherine L. Gudiksen, Alexandra D. Montague, Jaime S. King, Amy Y. Gu, Brent D. Fulton, and Thomas L. Greaney, *Preventing Anticompetitive Contracting Practices in Healthcare Markets*, The Source on Healthcare Price and Competition, 2020, at 28.
[21] Graynor Statement 2019 at 17.
[22] U.S. News & Report, Best Hospitals, https://health.usnews.com/best-hospitals/area/ca/alta-bates-summit-medical-center-6930031#common-care-ratings.

stroke, but its other ratings are fair to low.[23] For example, Summit Medical Center in Oakland's cancer ratings are low and it gets low marks for staffing, services, and advanced technologies.[24] In terms of Sutter's entire hospital system, it does not have one hospital ranked in the top 40 providers in the state for quality.[25]

In short, hospital consolidation has created hospital systems with market power and those hospital systems have the ability and incentive to leverage their power to engage in anticompetitive conduct using "all-or-nothing" and "anti-steering" clauses in provider contracts to increase prices, but there is little to no evidence that hospital mergers have positive effects on quality.[26] Indeed, this type of anticompetitive conduct does not result in any efficiencies that raise the quality of care. When hospitals obtain higher prices, research finds that those higher prices flow through to consumers, leading to higher insurance premiums and out of pocket costs. In the end, reduced competition and anticompetitive contracting

[23] U.S. News & Report, available at https://health.usnews.com/best-hospitals/area/ca/alta-bates-summit-medical-center-6930031/cancer.
[24] U.S. News & Report, available at https://health.usnews.com/best-hospitals/area/ca/alta-bates-summit-medical-center-6930031/cancer.
[25] Sixteen Sutter Health Plus Network Hospitals Recognized for Quality, August 3, 2022, available at https://news.sutterhealthplus.org/sixteen-sutter-health-plus-network-hospitals-recognized-for-quality/.
[26] Robert Town & William Vogt, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?,* Robert Wood Johnson Foundation Synthesis Project (2006) ("Although the results of the literature are mixed, a narrow balance of the evidence and the evidence form the best studies indicates that hospital consolidation more likely decreases quality than increases it.")

strategies leads to artificially high prices without increasing the quality of care, thereby harming consumers.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully urge this Court to reverse the District Court's Order and remand for further consideration.

Date: October 7, 2022

Respectfully submitted,

/s/ Elizabeth C. Pritzker

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Circuit Rule 29 because it contains 3,552 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman style font.

Date: October 7, 2022 *<u>/s/ Elizabeth C. Pritzker</u>*