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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,

Plaintiff,

v.

Sutter Health, et al.,

Defendants.

CASE NO. CGC-14-538451

Related to Case No. CGC-18-565398

SUTTER HEALTH'S OPPOSITION TO APPLICATION TO CONSOLIDATE ACTIONS

Date: May 7, 2018
Time: 9:00 a.m.
Dept: Dept. 304
Judge: Hon. Curtis E.A. Karnow

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I. INTRODUCTION

With the California Attorney General's knowledge and cooperation, the *UEBT* plaintiffs have been litigating this private antitrust class action against Sutter for four years. Sutter has taken and defended dozens of depositions, produced and received millions of documents, and litigated scores of motions that have helped define the scope of UEBT's claims and requests for relief before trial. Now, just four months before the *UEBT* fact discovery cut-off, the California Attorney General seeks to inject himself into that matter by requesting all-purposes consolidation of his newly-filed equitable enforcement action with UEBT's private damages action. The Attorney General's new complaint asserts allegations that go beyond those made in the *UEBT* matter, and seeks relief on behalf of far more than the self-funded payers at issue in the *UEBT* litigation, including relief for commercial insurance plans. The Attorney General also seeks what amounts to structural relief that would disrupt the delivery of health care in Northern California and affect the rights of third-party health plans by forcing them into arbitration on core contracting issues. A case of this magnitude and import should not be rushed. Sutter will challenge the pleadings and, if the suit continues, take necessary (and critical) discovery to prepare for trial on an appropriate schedule.

In his cursory application and in meet-and-confer efforts regarding this motion, the Attorney General disregards the significant distinctions between these cases, both in terms of the issues to be discovered and tried, as well as the nature of the relief sought. As described in greater detail below, the Attorney General's complaint asserts new and different facts and theories of liability that implicate the relevant market definitions, competitors, and services at issue—such as outpatient services, physician referrals, commercial insurance premiums, and contracts with commercial insurance carriers, HMOs, and physician groups. And, unlike the *UEBT* plaintiffs, the Attorney General seeks sprawling and unprecedented mandatory injunctive relief that would fundamentally change the way Sutter operates and ultimately would harm California residents. For example, the Attorney General would prohibit Sutter from using systemwide contracting and require it to sequence contracting with different teams contracting on behalf of different providers at different times. In effect, the Attorney General seeks to break up

Sutter's system. The Attorney General also seeks to impose on Sutter—and anyone who would contract with it—mandatory contract terms, including a requirement that an arbitrator resolve any impasses in negotiating renewed contracts between those parties. The magnitude of what is at stake—not just for Sutter, but also for the communities it serves and the health care industry throughout California—is fundamentally different from what is presented by UEBT's action.

Despite the broad reach of the Attorney General's allegations, his application disregards Sutter's right to conduct orderly discovery of its own in the Attorney General's lawsuit once it knows the parameters of that case. Sutter should not be forced to proceed with deposition discovery in this new action when it has not yet been able to challenge the complaint, to propound contention interrogatories and obtain other written and documentary discovery into the ***new*** allegations, to evaluate the written discovery received with the assistance of experts, to develop its position in defense, and then to proceed with appropriate deposition discovery after conducting that analysis. There simply is not sufficient time under the *UEBT* case schedule.

This is particularly true where, as here, Sutter's pleading challenges in the Attorney General's action likely will not be resolved for several months. Sutter anticipates a demurrer and other possible motion practice, and is evaluating (among other things) the legal viability of the Attorney General's core requests for relief and whether the Attorney General has failed to name indispensable parties such as the health plans, network vendors that are not at issue in *UEBT*, and physician groups that the Attorney General seeks to bind by its claims for relief. Furthermore, a finding that there are unnamed indispensable parties may have either dismissal or removal consequences given the diverse citizenship of the many parties impacted by the complaint.

Putting aside the logistical hurdles posed by consolidation, the Attorney General's participation at trial would confuse a jury that is only being asked to resolve UEBT's claims. The motive behind the Attorney General's and UEBT's eleventh-hour request for consolidation is transparent: they seek to use the Attorney General's presence during the jury trial to unfairly influence the jury by "standing shoulder-to-shoulder" even though none of the Attorney General's claims are to be resolved by the jury. That is yet another reason to deny consolidation and certainly not a legitimate reason to shoehorn the new case into the long-pending *UEBT* matter.

Sutter intends to challenge the Attorney General's pleadings and, if the suit continues, to take the necessary discovery on a reasonable schedule to defend itself at trial. Given the time this process will take, the Court should deny the Attorney General's consolidation application, particularly in light of the Attorney General's delay in filing suit. However, Sutter will agree to a protective order promptly to afford the parties to the Attorney General's case access to *UEBT* case discovery materials. As Sutter also proposed to the Attorney General, Sutter will agree to tailored coordinated discovery by agreeing to allow the Attorney General to participate in Sutter witness depositions going forward in the *UEBT* case—of which 35 are currently scheduled or being scheduled, including on 38 different "person most knowledgeable" topics. In the meantime, motion practice in the Attorney General's action will settle the scope of the pleadings. The rest of the Attorney General's action should otherwise be stayed pending trial in *UEBT*.[1]

II. BACKGROUND

A. The Attorney General's Dilatory Conduct and Awareness of the *UEBT* Case

The Attorney General started his investigation at least seven years ago. He first subpoenaed Sutter regarding its contracting practices in 2011. LeVee Decl. ¶ 2. Sutter produced hundreds of thousands of pages of documents from 27 custodians, and seven Sutter witnesses sat for eight depositions with the Attorney General. *Id.* ¶¶ 2, 4. After Sutter counsel sent a March 11, 2015 letter directly to the then Attorney General regarding the conduct of the investigation, the Attorney General halted a second subpoena her office had issued on March 10, 2015. *Id.* ¶ 5.[2] For more than three years, Sutter heard nothing from the Attorney General regarding this investigation until the Attorney General filed his suit on March 29, 2018. *Id.* ¶ 8.

UEBT filed its case in April 2014. After early motion practice, discovery in the *UEBT* case began in February 2016. *See* CMO No. 3 (Feb. 10, 2016). Over the past two years, Sutter has produced more than 1.5 million documents, and third parties have produced another 170,323 documents. LeVee Decl. ¶ 6. The parties have deposed 11 Sutter witnesses and are scheduling (or have already scheduled) another 35 current or former Sutter employees for deposition, many

[1] Sutter will be filing an appropriately-noticed motion for partial stay.

[2] The parties will meet and confer regarding the disclosure of Sutter counsel's letter.

in response to UEBT's "person most knowledgeable" deposition notice that contained ***thirty-eight*** separate categories. *Id.* ¶ 7. The parties have also deposed 29 third-party witnesses to date, with many more scheduled. *Id.* Further, for nearly five months Sutter and UEBT have worked to coordinate discovery with the plaintiffs in the federal *Sidibe* action to reduce inefficiency and the burden on witnesses while at the same time ensuring that discovery for the *UEBT* action is completed by the rapidly approaching August 31 discovery cut-off. Dunlap Decl. ¶¶ 2-3. Many of the depositions currently scheduled are coordinated among the parties in the three actions.[3]

Despite the Attorney General's lack of contact with Sutter, the Attorney General has been aware of the *UEBT* case and appears to have been coordinating with UEBT for much of the past year of discovery. Seven months ago, before a *UEBT* hearing he attended, Deputy Attorney General Varanini sent the Court a letter indicating that the Attorney General was considering whether the Attorney General or class counsel would represent CalPERS in the *UEBT* case, and that he would inform UEBT—not Sutter or the Court—of the Attorney General's decision by November 17, 2017. Silveira Decl. ¶ 2 & Ex. A. In subsequent months, the Attorney General relayed messages to Sutter and the Court through UEBT counsel. *Id.* ¶¶ 3-5 & Exs. B-D. Those messages were consistent—the Attorney General consented to class counsel representing CalPERS and other governmental entities in the class. *Id.* Yet, when Sutter asked for un-redacted copies of class counsel's correspondence with the Attorney General to better understand the Attorney General's positions, UEBT refused. *Id.* ¶ 6 & Ex. E.

B. The Attorney General's Complaint and Consolidation Request

It was not until March 29—***seven years*** after serving his subpoena on Sutter and 26 months into the 31-month discovery period in the *UEBT* case—that the Attorney General filed his lawsuit and consolidation application. In the application, the Attorney General confirmed his collaboration with UEBT, noting that "Class Plaintiffs in that case support this Application." App. at 2. Despite collaborating with UEBT and garnering its support for consolidation, the Attorney General did not discuss his plans to file suit and seek consolidation. LeVee Decl. ¶ 8.

[3] The *Sidibe* action was filed in 2012, but dismissed for a third time in June 2014. *See Sidibe v. Sutter Health*, 51 F. Supp. 3d 870 (N.D. Cal. 2014). While the Ninth Circuit ultimately reversed, it did not remand the action to the district court until September 2016.

In contrast to the Attorney General's and UEBT plaintiffs' arguments that their lawsuits are the same and can readily be consolidated at this late juncture (Anderson Decl. ¶ 4), the Attorney General's complaint adds materially new theories of liability premised on different allegations from those made by UEBT, and his prayer for relief seeks a laundry list of mandatory injunctive remedies under California Business & Professions Code section 16754.5 that were not pleaded by UEBT. Some of the significant new allegations are the following:

- that physician referrals enhance Sutter's market power, AG Compl. ¶¶ 31, 57, 63;
- that commercial insurance premiums are inflated due to Sutter's contracts, affecting market participants that are not at issue in UEBT's complaint, *id.* ¶¶ 5-6, 30, 38, 73;
- that Sutter has caused higher prices in the "submarket" for outpatient services distinct from inpatient services, as opposed to a single, hospital cluster market as UEBT alleged, *compare id.* ¶ 86, *with* UEBT Compl. ¶ 75; and
- that geographic markets should be defined as counties in which Sutter hospitals are located or based solely on a 15-mile/30-minute driving time radius from those hospitals, rather than as the geographic regions alleged in UEBT's complaint, *compare* AG Compl. ¶ 94, *with* UEBT Compl ¶ 84.

Although UEBT's counsel suggested during meet-and-confer efforts that these "all are issues/factual allegations we planned to address at trial" and that "the AG has simply provided you with additional detail" (Anderson Decl. ¶ 4), UEBT has not raised or pressed these allegations either in its complaint (as shown), class or in responses to interrogatories.

The Court did not certify a class that addressed physician referrals or a submarket for outpatient services. In fact, at class certification, UEBT argued outpatient services are part of a hospital "cluster market" and opposed Sutter's argument that outpatient services are in a different market. Nor is UEBT seeking any relief related to commercial insurance premiums. The Attorney General has pointed out that UEBT is seeking PMQ testimony related to any incentives for physician referrals. (The timing of the PMQ notice and the Attorney General's complaint strongly suggests that the Attorney General had a hand in developing that topic, particularly given that physician referrals have played no part in discovery.) But UEBT has not challenged any conduct and seeks no damages or relief related to physician referrals. By contrast, the Attorney General expressly alleges that Sutter uses physician referrals to enhance its market power and

seeks an order requiring that Sutter negotiate rates for physicians separately from other providers. AG Compl. ¶ 57 & p. 47:11-18 (Prayer, ¶ E). Similarly, while market definitions are highly relevant, UEBT has refused to answer Sutter's contention interrogatories on market definition and has never pursued the alternative market definitions proposed by the Attorney General.

The Attorney General also seeks broad forms of relief not at issue in *UEBT*. In particular, the Attorney General relies on his unique authority under section 16754.5 to seek both disgorgement and mandatory injunctive relief that would:

- apply these rules to contracts for insurance products ***not*** at issue in *UEBT* because they do not involve self-funded payors that make up the *UEBT* class,
- dictate the process by which Sutter and its counterparties negotiate future contracts, including requiring sequenced negotiations with different teams for different hospitals and physician groups,
- regulate the prices Sutter may charge for services at newly acquired facilities,
- restrict how Sutter allocates its revenues internally,
- appoint a trustee with intrusive oversight authority over Sutter, and
- impose an unprecedented mandatory arbitration requirement that implicates the rights and interests of entities (health plans) that are parties to neither the Attorney General's action nor the *UEBT* case.

AG Compl. at 47-49 (Prayer, ¶ E). As a private plaintiff unable to benefit from section 16754.5's allowance for "mandatory injunctions" in Attorney General actions, UEBT seeks only prohibitory injunctive relief. *See* UEBT Compl. at 44-45 (Prayer, ¶¶ F, G).[4] The facts that might be relevant to the Attorney General's sweeping and unprecedented effort to intrude into private contracting, as well as the consequences thereof for Sutter and for other healthcare providers in California and the United States, have not been the subject of discovery in *UEBT*.

C. Meet-and-Confer Efforts

The parties met and conferred regarding potential consolidation and/or coordination on April 20 and April 24, 2018. During that discussion, it became clear that the Attorney General is

[4] While UEBT's complaint also prays for "restitution and disgorgement of ill-gotten monetary gains," UEBT Compl. at 44 (Prayer, ¶ E), UEBT has never explained what it intends by this prayer, and UEBT has not pursued it at any stage of the litigation, including in the incomplete (and outdated) trial management plan filed with its class certification motion.

not open to reasonable proposals for coordination of the actions. Rather, the Attorney General contends that he ***already*** has a right to participate in all discovery in the *UEBT* matter, that his action will not expand the scope of the litigation, and that there will be no prejudice to Sutter at trial because the Attorney General will stand shoulder to shoulder with UEBT and divide UEBT's trial time. Anderson Decl. ¶ 6. The Attorney General did not show concern for the tardy filing of his suit, claiming instead that "delay" is irrelevant to the analysis, and suggesting instead that this is common practice for his office. *Id.* ¶ 5. Finally, the Attorney General offered no alternatives to all-purposes consolidation. *Id.* ¶ 12.

Sutter, in contrast, proposed a reasonable alternative that would allow for coordination of all Sutter witness depositions. Specifically, Sutter proposed that the Attorney General be allowed to attend the depositions noticed of Sutter witnesses in the *UEBT* action and ask questions of those witnesses provided that he agrees that is the Attorney General's deposition of that witness and topic for purposes of the Attorney General's action. *Id.* ¶ 10-12. Sutter also proposed entering into a protective order that gives the parties to the Attorney General action access to all pleadings and documents produced in the *UEBT* matter. *Id.* ¶ 10-12. Finally, Sutter proposed that all other proceedings in the Attorney General matter should be stayed until resolution of the pleadings and the completion of the *UEBT* trial. *Id.* ¶ 10-12.

Although the Attorney General had sent Sutter a deposition notice on April 19 indicating his intention to attend the April 25 deposition of one of Sutter's "person most knowledgeable" deponents, during the April 24 call, he stated that his office would not be prepared to attend the deposition and ask questions and, instead, reserved his rights to take the deposition later. *Id.* ¶ 11. He therefore declined to attend, and did not attend, the April 25 deposition. *Id.* ¶ 11.

III. ARGUMENT

While the Court has discretion to consolidate actions involving common questions of law or fact, Cal. Civ. Proc. Code § 1048, it must consider whether prejudice or undue confusion is likely to result from consolidation, *see Todd-Stenberg v. Dalkon Shield Claimants Trust*, 48 Cal. App. 4th 976, 979 (1996). That is, common questions of law or fact are a necessary predicate to consolidation, but far from dispositive. *See Askew v. Askew*, 22 Cal. App. 4th 942, 964 (1994)

("actions may be thoroughly 'related' in the sense of having common questions of law or fact, and still not be 'consolidated'"). Rather, the key factors are timeliness of the motion, complexity, and "whether consolidation would adversely affect the rights of any party." Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 12(I)-E, ¶ 12:362 (Rutter Group 2017). While some tailored discovery coordination may promote judicial efficiency and conservation of party resources here (as discussed below), all of the key factors counsel against consolidation for all purposes or trial.

First, consolidating these cases while maintaining the *UEBT* schedule would prejudice Sutter's ability to complete discovery and present its defense in both cases. The scope of the Attorney General's complaint is fundamentally different from that of UEBT's complaint and the new case raises both factual and legal issues absent from the *UEBT* case. Second, the Attorney General's expansive new allegations and prayer for relief will over-complicate the trial, potentially confusing jurors who will not be deciding the claims in the Attorney General's complaint. And third, the Attorney General should not be rewarded for purposefully delaying his lawsuit and seeking consolidation only near the end of the *UEBT* discovery period, particularly given the unique issues raised by the Attorney General's complaint. Indeed, the Attorney General's untimely insertion into the *UEBT* litigation undoubtedly would jeopardize the existing trial schedule, notwithstanding the Court's stated intent to retain that schedule.

A. Consolidation Would Prejudice Sutter in Both Actions.

"[C]onsolidation should not be ordered if it would prejudice defendant, for considerations of convenience and economy must yield to the interests of justice in a fair and impartial trial." *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 464–65 (S.D.N.Y. 1977).[5] At the April 11 CMC, the Court made clear that it will not change the discovery cut-off, pre-trial schedule, or trial dates in the *UEBT* action. LeVee Decl. Ex. B at 9-10. But the Court cannot adhere to that position and at the same time consolidate the Attorney General's case into the *UEBT* case without prejudicing Sutter in both cases. Consolidation is incompatible with the interests of justice.

[5] "CCP § 1048(a) is derived from Rule 42 of the Federal Rules of Civil Procedure. It follows that cases decided under FRCP 42 may be persuasive authority for procedural questions arising under the California statute." Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 12(I)-E, § 12:348; *see also Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 407-08 (1974).

1. Prejudice in the Attorney General's Case

Consolidation would prejudice Sutter at every stage of the Attorney General's action. Sutter and its newly-retained counsel for the case are still evaluating all available bases to challenge the complaint, but Sutter intends to challenge the Attorney General's ability to seek the unprecedented relief he has requested. Efficiency counsels in favor of narrowing the Attorney General's novel, overreaching, and improper requests for relief before the parties undertake burdensome discovery.

The Attorney General's proposed remedies—individually and cumulatively—are overbroad, not reasonably related to the antitrust violations articulated in the Attorney General's complaint, and would dictate how Sutter and others negotiate contracts. To begin, there is no authority for seeking disgorgement under section 16754.5. *See* Cal. Bus. & Prof. Code § 16754.5 (authorizing Attorney General to seek "mandatory injunctions as may be reasonably necessary to restore and preserve fair competition," not disgorgement). And the Attorney General's complaint was filed far outside the statute of limitations in any event. *See id.* § 16750.1. Moreover, while mandatory injunctions may be granted, the Attorney General's specific requests are improper. For example, mandating Sutter to have separate negotiating teams for each provider and each insurance carrier or network vendor—and prohibiting communication between those teams—would eliminate the established efficiencies of systemwide contracting that benefit parties and consumers. *See* AG Compl. at 47:11-20. Similarly, requiring Sutter and counterparties to the contracts (that are not parties to the action) to arbitrate disputed issues associated with contract terminations would eviscerate either side's ability to terminate a contract and would result in arbitrators (rather than the parties) setting prices and other key terms in health plan contracts. *See id.* at 47:22-26. Indeed, because health plans would know that they could compel Sutter to arbitrate disputes without risking an actual termination of the contract, the health plans would have less incentive to negotiate in good faith. This government intrusion into the bargaining process affects not only Sutter, but also any party that contracts with Sutter for discounted rates.

The scope of the relief ultimately at issue will shape the nature of third-party discovery, including discovery of in-state and out-of-state health plans, network vendors, and providers. As

the Court recognized at the April 11 CMC, challenges to the pleadings are unlikely to be resolved for at least three months, LeVee Decl. Ex. B at 14-15, which would leave Sutter two months at most to take discovery on issues unique to the Attorney General's case once the pleadings are set. Sutter's only alternative would be to take premature discovery on topics that may be moot once the pleadings are set. Not only would that be inefficient, but it would prejudice Sutter by requiring it to complete a massive amount of discovery in *UEBT* during this same time period.

Moreover, it is not the case that these actions will be identical once the pleadings are settled. As discussed above, the prayers for relief and factual allegations in the cases materially differ. Sutter will need to issue new document requests and contention interrogatories related to the Attorney General's new theories and requests for relief. Sutter will need to pursue third party discovery related to the new matters in the Attorney General's complaint, including discovery of health plans and other third parties that are not at issue in *UEBT* given that case's narrower focus. Sutter will need time to evaluate the productions received following the new discovery. Sutter will need to take depositions (including of third parties) in light of the new information received in response to its new discovery. Sutter may need to retake certain depositions of witnesses with relevant information on the new topics. And Sutter will need new experts to address topics that are not at issue in *UEBT*, potentially including experts on physician referrals, commercial insurance products, and other topics that will emerge after Sutter and its counsel have had sufficient time to analyze and evaluate the new Attorney General complaint.

Further, the Attorney General is seeking, among other things, to impose a mandatory arbitration requirement that would affect the rights and interests not only of Sutter but of third-party health plans. AG Compl. at 47-48. Based on "the issues framed by the pleadings and in light of the relief sought in [the Attorney General]'s complaint," Sutter is evaluating whether the health plans and other entities are indispensable parties to that complaint. *Morrical v. Rogers*, 220 Cal. App. 4th 438, 464 (2013) (finding third parties indispensable); *see also Sierra Club, Inc. v. California Coastal Comm'n*, 95 Cal. App. 3d 495, 501 (1979) ("Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party."); *Olszewski v. Scripps Health*, 30 Cal. 4th 798,

808 (2003) (person is indispensable party "when the judgment to be rendered necessarily must affect his rights"); *Deltakeeper v. Oakdale Irrigation Dist.*, 94 Cal. App. 4th 1092, 1105-06 (2001) (ordinarily, all parties to a contract are indispensable). The potential for joinder of these third parties may further delay the Attorney General's case and, if the cases are consolidated, prejudice third parties that have not had any opportunity for discovery either in the Attorney General's case or *UEBT*.[6]

2. Prejudice in the *UEBT* Case

Requiring Sutter to complete discovery related to the Attorney General's case over the next four months would also prejudice Sutter's ability to complete discovery in the *UEBT* case. As shown above, the Attorney General's requested relief goes far beyond anything currently at issue in *UEBT*, is premised on additional factual allegations, and may require the participation of other interested parties. "[P]roper judicial administration does not recommend consolidation where two actions are at such widely separate stages of preparation." *Schacht v. Javits*, 53 F.R.D. 321, 325 (S.D.N.Y. 1971).

The Attorney General's case "is in a completely different procedural posture from" the *UEBT* case, and thus consolidation "would serve only to delay the disposition of [the *UEBT* case] and prejudice the parties in that case." *Ulibarri v. Novartis Pharm. Corp.*, 303 F.R.D. 402, 404 (D.N.M. 2014). Even if the Attorney General's complaint survives the pleading stage in its existing form, the Attorney General and Sutter will have to undertake discovery to address the aspects of the Attorney General's complaint that differ from UEBT's complaint on a significantly expedited schedule while Sutter is trying to complete its discovery of the *UEBT* action.

As the recent CMCs have made clear, the parties in the *UEBT* case already have a significant amount of discovery to complete in the coming months notwithstanding the massive efforts to date. And coordination with the federal *Sidibe* case, which the parties hope will ultimately increase efficiency, has so far slowed the pace of deposition scheduling, making the final four months of discovery in the *UEBT* case even more critical.

[6] Moreover, the third-party health plans include not only the five insurers underlying the *UEBT* class, but other health plans such as Interplan and Multi-Plan that have not been subject to any discovery or otherwise involved in the lawsuit.

Adding another plaintiff into the mix—and particularly the Attorney General seeking a massive restructuring of Sutter's managed care function—will draw out discovery even further. In fact, despite assuring the Court at the April 11 CMC that his case will not slow discovery and that he would abide by all dates in the *UEBT* case, LeVee Decl. Ex. B at 54-55, the Attorney General subsequently requested an additional seven hours of questioning at each party deposition (and two hours at each non-party deposition), the ability to seek depositions of ***ten*** additional witnesses generally (and one additional witness per insurer), and to exclude objections and responses to objections from any time limits imposed on depositions. Dunlap Decl. ¶¶ 4-5 & Exs. A-C. In short, despite his representations to the Court, the Attorney General's actions have made clear that his suit will in fact slow the pace of discovery in *UEBT*.[7]

Nor will Sutter be able to complete expert discovery (expert reports are due between August and October) in time for trial. Were the Attorney General's complaint to move forward on the same schedule as *UEBT*, Sutter will have to retain experts to address (among other things) the new antitrust theories reflected in the Attorney General's complaint and the mandatory injunctive relief sought by the Attorney General. Moreover, despite representing the People of the State of California, the Attorney General requests disgorgement as to all self-funded payors, which appears to exceed UEBT's damages request that is limited to California citizens. *Compare* AG Compl. ¶ 25 & p. 49 (Prayer, ¶ F), *with* UEBT Compl. ¶ 126 & p. 45 (Prayer, ¶ H). Sutter will need to commission additional expert work to address the economic underpinnings of the Attorney General's broader request for monetary relief.[8]

Consolidation will also prejudice Sutter at trial. While the Attorney General and UEBT have now represented that they will divide the 120 hours currently allotted to UEBT, that does not

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[7] Notably, the Attorney General insists that he is already entitled to attend and participate in depositions that were scheduled and coordinated before he even filed his complaint, let alone before consolidation has been ordered. Anderson Decl. Exs. A and B. The Attorney General is putting the cart before the horse.

[8] As noted above, the Attorney General is not entitled to disgorgement, and certainly not for non-California residents, but were the Court to permit the Attorney General to seek disgorgement of alleged overcharges to non-California citizens after consolidation with a class case that UEBT pled to avoid removal, it would effectively be allowing UEBT to evade the provisions of the Class Action Fairness Act.

account for the expanded scope of the case if the Attorney General is included. Despite the Attorney General's representation to the contrary, that expansion undoubtedly will reduce Sutter's time to present its defense to UEBT's case.

B. Consolidation Would Increase Trial Complexity and Confuse the Jury.

To the extent the factual underpinnings of the Attorney General's new allegations and proposed remedies are addressed during the jury trial, Sutter undoubtedly will be prejudiced because the jury would view that testimony as within its purview, and could easily be influenced in its deliberations by evidence that is not relevant to the issues before it. *See, e.g.*, *Flintkote*, 73 F.R.D. at 465 (addressing "likelihood of confusion in the minds of the jurors because of … irrelevant evidence" in two complex cases with different framing).

For example, UEBT does not rely on physician referrals to support its antitrust claims; instead, UEBT pled and has exclusively relied on contract provisions concerning hospitals in arguing liability. Injecting new theories of anticompetitive behavior at trial will muddy the case. Similarly, whether purchasers of commercial insurance are harmed is beyond the scope of UEBT's requested relief. This new theory of impact, and category of injured persons, is irrelevant to UEBT's case. Finally, the new product and geographic markets that the Attorney General alleges will make an already difficult topic even more challenging for the jury. Through it all, the jury will be wondering why the Attorney General is there, why witnesses are being asked questions that are not necessary to the questions the jury will decide, and how the Attorney General's evidence is relevant. In all events, it would be fair for the jury to assume that the evidence somehow relates to its mandate, which would be of enormous prejudice to Sutter.

Finally, were the Attorney General permitted to join its action to UEBT's, the Attorney General would simply be lending the State's name to UEBT's suit. But private plaintiffs should not be able to boost their credibility with the Attorney General's presence where the State has not prepared the case and the relief sought by the State will not be resolved by the jury.

C. The Attorney General's Tactical Delay Is Reason Enough to Deny His Untimely Consolidation Request.

The Attorney General's tactical decision to delay his filing, which will substantially

prejudice Sutter, is an additional reason to reject consolidation. The Attorney General has had at least seven years to file his action. And he has been collaborating with UEBT for at least the past eight months (and likely much longer).[9] Yet, by his deputy's own admission during meet and confer, he intentionally waited until just a few months remained in the *UEBT* discovery period to file suit. Far less time will remain by the time the pleadings are set. *Cf. Brown v. Presley of S. California*, 213 Cal. App. 3d 612, 620–21 (1989) (holding that a "trial court is certainly not required to permit" litigants "to delay and complicate [a] separate action by … tardily seeking to thrust [a new party] therein") (citing Cal. Civ. Proc. Code § 1048(b)).

The Attorney General's unique role in antitrust enforcement does not justify his delay. Well-established public policy counsels against consolidating tag-along private actions with ongoing federal antitrust suits. *See United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 144 (D. Del. 1999). Congress gave primacy to governmental suits because the government is interested in protecting the public from competitive injury, whereas private parties are primarily interested in recovering damages for injuries already suffered. *Id.* at 145. Here, however, the government sat on its hands for ***seven years***, exposing the public to the alleged anticompetitive conduct that the Attorney General now contends merits onerous structural relief, while private plaintiffs moved their case to trial. Rather than driving the agenda, the Attorney General seeks to ride coattails.

While the Attorney General's passivity turns the standard antitrust enforcement paradigm on its head, equally strong public policy counsels against consolidation when the government is the tag-along plaintiff, as here. By injecting his own issues into the *UEBT* litigation at this late stage, the Attorney General not only presses his thumb firmly (and unfairly) on UEBT's side of the scales of justice, but also risks delaying those proceedings and thereby preventing both the *UEBT* class and Sutter from obtaining the resolution promised by this Court's CMO No. 10 in October 2017. And, for the reasons discussed above, there can be no expedition of the Attorney General's action without substantially prejudicing Sutter.

The Attorney General's application for consolidation did not address his delay. In fact,

[9] In meet-and-confer discussions, the Attorney General declined to reveal how long he has been coordinating this litigation with the plaintiffs in *UEBT*. Anderson Decl. ¶ 5.

the only authority the Attorney General cites to support consolidation, *Ford Motor Warranty Cases*, 11 Cal. App. 5th 626 (2017), addresses ***coordination*** of cases pending in different courts under California Code of Civil Procedure section 404 et seq., not consolidation under California Code of Civil Procedure section 1048. And it involved hundreds of nearly-identical lemon law cases to be coordinated as "add-on" cases to existing coordinated proceedings in which hundreds of cases already had been settled or dismissed before trial. *Ford Motor Warranty Cases* provides no support for the Attorney General's untimely request to cram a newly-filed antitrust case into an action that has been pending for nearly four years and is nearing the discovery cut-off. There is no support for that request.

D. Limited Discovery Coordination Is Appropriate.

While consolidation for all purposes or for trial would be improper, tailored discovery coordination would promote judicial efficiency and conservation of resources and would be consistent with the goals of section 1048. Specifically:

- Sutter will agree to a protective order that gives the parties to the Attorney General case access to all pleadings and documents produced in the *UEBT* matter.
- Sutter will enter into a coordination order allowing the Attorney General's attendance and participation in depositions of Sutter witnesses in the *UEBT* case provided that, absent a showing of good cause, he does not seek to re-depose those individuals for purposes of his case.
- In the period of time leading up through the *UEBT* trial, the parties to the Attorney General matter should focus on motions directed at settling the pleadings (*e.g.*, demurrer, motion to strike, etc.) given the serious issues raised above.
- All other proceedings in the Attorney General matter should be stayed until the completion of the *UEBT* trial.

At the time of filing, the Attorney General continues to argue that the cases should be consolidated for all purposes. This Court asked the parties to be creative because there are many different facets and ways to partially join related actions, especially where they are at disparate stages of development. LeVee Decl. Ex. B at 53-54. The Attorney General's and UEBT's one-size-fits-all approach is contrary to the Court's direction and to the interests of justice.

IV. CONCLUSION

The Court should deny the Attorney General's application for consolidation.

Dated: April 27, 2018

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By: 

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Dated: April 27, 2018

JONES DAY

By: */s/ David C. Kiernan*

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