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 SUTTER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

INTRODUCTION

The above entitled matter came on regularly for hearing on Friday, June 7, 2019. A tentative ruling was issued by the Court before oral argument. The appearances are as stated in the record. Having reviewed and considered the argument and written submissions of all parties and being fully

advised, the Court denies Sutter's motion.

LEGAL STANDARD

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct." (Cal. Code of Civ. Proc., § 437c(a)(1).) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, § 437c(f)(1).)

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.* at 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[A] defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Ibid.*)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of

production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "A burden of production entails only the presentation of 'evidence.'" (*Ibid.*)

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Id.* at 851.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*)

The pleadings delimit the scope of the issues and frame the outer measure of materiality in a summary judgment proceeding. (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493.) The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint; a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Ibid.*)

DISCUSSION AND ANALYSIS

I. Count II

A. Allegations

In their complaints, Plaintiffs include sections summarizing the relevant markets, Sutter's alleged anticompetitive conduct, and the alleged anticompetitive effects of that conduct. (See UEBT Complaint ¶¶ 69-125; People's Complaint ¶¶ 73-138.) In Count II, Plaintiffs allege that Sutter entered contracts with "Health Plan Vendors." (UEBT Complaint ¶ 146; People's Complaint ¶ 148.) Plaintiffs allege that Sutter's hospitals in "Sutter-Dominated Markets" have "overwhelming market power" in each of the "Relevant Geographic Markets." (UEBT Complaint ¶ 147; see also People's Complaint ¶ 149 [using different wording to the same effect].) Plaintiffs allege that Sutter uses its market power to compel "Network Vendors" to agree to all-or-nothing, anti-incentive, and price secrecy terms, thereby unlawfully

restraining trade and restricting the ability of its competitors to compete in the relevant markets. (UEBT Complaint ¶¶ 147-48; People's Complaint ¶¶ 149-50.) Plaintiffs allege that the purpose of the conduct, and its anticompetitive effect, is to eliminate competition on the basis of price. (UEBT Complaint ¶ 149; People's Complaint ¶ 151.) Plaintiffs allege that, as a result, Sutter is able to charge supracompetitive prices. (UEBT Complaint ¶ 150; People's Complaint ¶ 152.) In addition, Plaintiffs allege that Sutter unlawfully conditions the sale of general acute care hospital services and ancillary products on an in-network price basis at any Sutter hospital to an agreement to offer and pay for Sutter's price-inflated services and products at all of Sutter hospitals, thereby shifting business away from low cost competitors. (UEBT Complaint ¶ 151; People's Complaint ¶ 153.) Plaintiffs allege that Sutter's anticompetitive conduct is an unlawful restraint on competition as both a per se violation of the antitrust laws and an unreasonable and unlawful restraint of trade. (UEBT Complaint ¶ 152; People's Complaint ¶ 154.)

B. Unlawful Restraint of Trade

The first basis for Sutter's motion is that Plaintiffs cannot prove "a restraint of trade with an anticompetitive effect." (Motion, 6.) Sutter has not made a prima facie showing of the nonexistence of any triable issue of material fact. Rather, Sutter's motion turns on a series of partial challenges to discrete elements of the alleged restraint, none of which show the absence of a triable issue of material fact. Accordingly, this basis for the motion is rejected.

1. Background Law

a. General Principles and Rule of Reason Analysis

The Cartwright Act prohibits only unreasonable restraints of trade. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146.) "Under the traditional rule of reason, 'inquiry is limited to whether the challenged conduct promotes or suppresses competition.' [Citations.] To determine whether an agreement harms competition more than it helps, a court may consider 'the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.' [Citations.]" (*Ibid.*)[1] "Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.*

[1] A traditional rule of reason analysis is not required in every case. (*In re Cipro Cases I & II*, 61 Cal.4th at 146.) Some categories of agreement or practices are per se illegal and others may be subject to a quick look rule of reason analysis. (See *id.* at 146-47.)

(1971) 4 Cal.3d 842, 855; see also *Redwood Theatres, Inc. v. Festival Enters., Inc.* (1988) 200 Cal.App.3d 687, 713; *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 335; *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 934-35 [under rule of reason standard, must analyze the economic effects of the practices and the possible justifications for the practices]; CACI 3405 [form jury instruction setting forth elements for rule of reason analysis].)[2]

b. Tying

"A tying arrangement typically involves a seller with monopoly or other extensive market power in a given product, who then refuses to sell that product unless the buyer buys (or agrees not to buy from seller's competitor) a separate product over which the seller does not have extensive independent market power. (See *Cascade Health Solutions v. PeaceHealth* (2008) 515 F.3d 883, 912 et seq.) Such arrangements are unlawful unless their effect on commerce is de minimis. (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 542, 161 Cal.Rptr. 811.)" (*UAS Management, Inc.* (2008) 169 Cal.App.4th 357, 366.)

"[T]he specific elements of an unlawful tying cause of action have been stated as follows: '(1) a tying agreement, arrangement or condition [ ] whereby the sale of the tying product [or service] was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was effected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 37–38, 192 Cal.Rptr. 914; see also *Morrison v. Viacom, Inc.*, *supra*, 66 Cal.App.4th at pp. 541–542, 78 Cal.Rptr.2d 133.)" (*Id.* at 369.)

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[2] Plaintiffs argue that courts apply a burden shifting framework to implement the rule of reason analysis. (See Opposition, 15.) For example, the United States Supreme Court applied burden shifting to conduct a rule of reason analysis under the Sherman Act. (See *Ohio v. Am. Express Co.* (2018) 138 S.Ct. 2274, 2284; *In re Cipro Cases I & II*, 61 Cal.4th at 142 [cases interpreting the Sherman Act may be persuasive authority in interpreting the Cartwright Act].) As the burden shifting approach was described there, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. (*Am. Express*, 138 S.Ct. at 2284.) If plaintiff satisfies the initial burden, the burden shifts to defendant to show a procompetitive rationale for the restraint. (*Ibid.*) If defendant satisfies its burden, then the burden shifts back to plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. (*Ibid.*)

2. The Briefing

a. Opening Papers

Sutter argues that Plaintiffs' claims fail because Plaintiffs cannot identify any unlawful restraint. (Motion, 8.) Instead, Sutter contends that Plaintiffs cannot establish the existence of an anticompetitive restraint. (*Id.* at 8-9.)

Sutter begins by addressing "all or nothing," "anti-tiering," and "anti-steering" contract terms. (*Id.* at 9-13.) Sutter asserts that those contract terms cannot support Cartwright Act claims because the undisputed facts show that the terms do not prohibit narrow or tiered provider networks or steering. (*Id.* at 10.) Instead, Sutter argues that it does participate in narrow and tiered networks and only prohibits steering where insurers have voluntarily contracted to forgo steering in exchange for discounted rates from Sutter – a bargain that is protected by California law and that is procompetitive. (*Ibid.*)

Next, Sutter addresses its "non-par rate." Sutter characterizes Plaintiffs' challenge to its non-par rate as a challenge to its amount. (See *id.* at 13-14.) Sutter contends that a challenge to the amount Sutter charges, alone, cannot establish a violation of the Cartwright Act. (*Ibid.*) Accordingly, Sutter concludes that the non-par rate is per se lawful because it is nothing but an agreement on price. (*Id.* at 13-15.)

Sutter considers the possibility that the foregoing provisions are not independently unlawful, but may be unlawful when combined. (See *id.* at 15.) Sutter characterizes this theory as a tying theory. (See *ibid.*) Sutter argues that this case cannot be "shoehorn[ed]" "into a tying mold" because (1) Plaintiffs did not identify a tied product market; (2) Plaintiffs cannot show that Sutter required Plaintiffs to purchase one product or service in order to purchase another; (3) in-network status is not a product or service at all; and (4) assuming in-network status were a product or service, Sutter did not require a buyer to include a hospital in its network as a condition of including another. (*Id.* at 16-18.) To the extent Plaintiffs' theory may be that products were "tied as a matter of economic imperative," Sutter argues that the theory does not work because even if Sutter coerces insurers to include Sutter providers in their networks, it could not constitute a tying claim because it does not involve Sutter extending its power from the alleged tying market into a distinct product market by using increased prices on a product over which it has market power to force the purchase of a product over which it lacks market power. (*Id.* at

19-20.) Sutter asserts, instead, it is "simply setting a higher price for the excluded hospitals themselves because, by excluding them, the insurers have reduced the patient volume that the hospital will receive." (*Id.* at 20.)

Sutter also addresses the possibility that Plaintiffs' allege the non-par rate term constitutes a bundled discount. (See *id.* at 21.) Sutter asserts that such a theory may be asserted under § 2 of the Sherman Act, which regulates single-firm conduct and does not have an analog under the Cartwright Act. (See *ibid.*) In any event, Sutter contends that a bundling theory is inapt because Sutter does not require buyers to purchase Product B in order to obtain Product A. (See *ibid.*) Sutter concludes by arguing that a bundling theory applies only to below cost sales, which did not occur in this case. (*Id.* at 21-22.)

Finally, Sutter addresses its "confidentiality provisions." (*Id.* at 22-23.) Sutter argues that price secrecy is common in the industry and has a procompetitive effect, such that confidentiality provisions are lawful. (See *ibid.*)

b. Opposition

Plaintiffs argue that there is evidence from which a jury could conclude that Sutter's conduct violates the Cartwright Act under a rule of reasons analysis, such that Plaintiffs need not show that Sutter's conduct was per se unlawful under a distinct tying theory to overcome the present motion. (Opposition, 14-15.) Plaintiffs interpret Sutter's motion as challenging their ability to carry their initial burden in a rule of reason analysis, which Plaintiffs assert they can do by either (1) showing by circumstantial evidence that Sutter (a) had market power and (b) engaged in conduct that had a tendency to reduce competition; or (2) showing an anticompetitive effect through direct evidence of increased prices, reduced output, or decreased quality. (*Id.* at 15-16.) On the first front, Plaintiffs contend that (1) Plaintiffs have expert testimony to establish Sutter's market power; and (2) Sutter imposed a combination of contractual provisions that operate together to reduce price competition by (a) requiring all-or-nothing contracting, either explicitly or through the use of a non-par rate; (b) preventing steering by, *inter alia*, limiting the use of narrow or tiered networks; (c) imposing confidentiality provisions that limit price transparency. (*Id.* at 16-18.) On the second front, Plaintiffs assert that its experts will provide direct evidence that Sutter's conduct increased prices. (*Id.* at 18-19.)

Addressing Sutter's arguments, Plaintiffs begin by asserting that Sutter has mischaracterized their

claims. (*Id.* at 19.) Plaintiffs underscore their theory of liability – that the combination of Sutter's practices is the challenged restraint. (*Ibid.*) As such, Plaintiffs contend that the anticompetitive effect of the practices must be considered together. (*Ibid.*)

Next, Plaintiffs argue that each of the challenged practices is separately unlawful. (See *id.* at 19-21.) As to anti-steering and all-or-nothing provisions, Plaintiffs argue that these are unlawful because they suppress price competition. (*Id.* at 19-20.) Plaintiffs assert that their expert supplies evidence that such provisions are anti-competitive, not procompetitive. (*Id.* at 20.) As to the non-par rate, Plaintiffs contend that even if unilateral price setting "standing alone" may be lawful, a broader strategy to eliminate the price-constraining consequences of steering through pricing decisions is not. (*Ibid.*) As to price secrecy provisions, Plaintiffs argue that the evidence shows that such provisions are anticompetitive as applied here even if they may be procompetitive in other contexts. (*Id.* at 21.)

With respect to tying, Plaintiffs argue that they have established the elements of a per se tying claim. (*Id.* at 22-24.) Plaintiffs assert that their evidence shows that Sutter linked access to hospitals in markets it dominated (the tying product) to the health plans' purchase of in-network status in other markets (the tied product). (*Id.* at 22-23.) Plaintiffs contend that there is no requirement to define a tied product market – the tied product must only be from outside the product market. (*Id.* at 23.) Further, Plaintiffs argue that in-network status is a service and has, in past decisions, been recognized as such. (*Id.* at 23-24.) Finally, Plaintiffs argue that the present case is analogous to "economic tying" cases. (*Id.* at 24.)

c. Reply

In reply, Sutter argues that its alleged use of a non-par rate, anti-tiering provisions, anti-steering provisions, all-or-nothing practices, and confidentiality provisions are lawful. (Reply, 4-10.)[3] Further, Sutter asserts that analyzing the practices in combination makes no difference. (*Id.* at 10-11.) Moreover, Sutter argues that increased prices are irrelevant because Sutter is not challenging Plaintiffs' ability to put on evidence of an anti-competitive effect, but are instead challenging whether any of the conduct alleged by Plaintiffs can constitute a restraint of trade. (*Id.* at 11-12.)

[3] Sutter opens its reply by asserting, without citation, that Plaintiffs "all but concede" that Sutter's all-or-nothing, anti-tiering, and anti-steering contract provisions are lawful. (Reply, 4.) The Court does not read Plaintiffs' briefing to make such a concession.

3. Rule of Reason Analysis

The analysis begins with Plaintiffs' theory of the case, as pled in the complaints. (*Hutton*, 213 Cal.App.4th at 493.) As summarized above, Plaintiffs alleged that Sutter used its market power to compel "Network Vendors" to acquiesce to contract terms that, working in tandem, harmed competition by insulating Sutter from competing on price. For the reasons that follow, Sutter's challenge to Count II, summarized above, is denied.[4]

a. Non-Par Rate

Sutter relies on the argument that its non-par rate is per se lawful. Sutter does not otherwise address a rule of reason analysis in connection with its non-par rate. (See Reply, 11-12.) As discussed below, Sutter's contention that its non-par rate is per se lawful is rejected. Accordingly, Sutter has not carried its initial burden as to the non-par rate.

Sutter's cases stand for the proposition that setting prices at supracompetitive levels is not, standing alone, actionable even where the firm setting prices possesses monopoly power. (Motion, 13-14; Reply, 4-5; *Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 200 ["unilateral action by a monopoly holder in charging allegedly excessive prices, standing alone, does not ordinarily violate antitrust laws even though high prices may have some ancillary effect on the ability of consumers of those products to compete"]; *Kartell v. Blue Shield of Massachusetts, Inc.* (1st Cir. 1984) 749 F.2d

[4] Broadly, Sutter's challenge is to the effect that none of its conduct violated the anti-trust laws. The reasoning by which Sutter arrives at the conclusion is, at times, difficult to follow. In the moving papers, the argument appears to rest on some combination of three premises, which vary based on the precise practice being discussed, (1) Sutter did not implement the alleged practices; (2) if Sutter implemented the practices, they had no anticompetitive effect; and/or (3) if Sutter implemented the practices, they were per se lawful. In the opening brief, Sutter explains the law as follows: (1) The fact that an agreement restrains trade does not make it unlawful, to be unlawful a restraint of trade must be unreasonable; and (2) To prove that a restraint of trade is unreasonable, Plaintiffs must show that the restraint had an anticompetitive effect. (Motion, 8.) Sutter's arguments are consistent with that statement of the law. But, in its reply brief, Sutter argues that whether its practices had an anticompetitive effect is irrelevant because Plaintiffs must first identify a restraint of trade. (Reply, 11-12.) While this is difficult to follow – Plaintiffs have identified the alleged restraints of trade and sought to establish that they are unreasonable by demonstrating their anticompetitive effects, as Sutter indicated in its moving papers was appropriate – the Court construes Sutter's argument, in context, as asserting that the non-par rate cannot constitute an unreasonable restraint of trade even if it has an anticompetitive effect because it is an exercise of per se legal unilateral price setting. (See *ibid.*) Sutter cannot be saying that whether a practice has an anticompetitive effect is irrelevant to the question of whether the conduct is an unreasonable restraint of trade. A restraint of trade is an activity that restrains trade. (See, e.g., *Exxon Corp. v. Superior Court*, 51 Cal.App.4th 1672, 1682.) Proof that conduct is anticompetitive – that it stifles or suppresses competition – is proof that conduct restrains trade. Whether the restraint is unreasonable is a fact question involving, among other things, a question of degree and of the countervailing purposes that justify the restraint.

922, 927 [more than monopoly power is necessary to make the charging of noncompetitive price unlawful].)

This case is not a challenge to Sutter's prices "standing alone." To the extent the amount of Sutter's non-par rate is implicated, it is challenged as part of a broader scheme through which Sutter used the threat of supracompetitive prices in some markets to extract concessions in other markets. Sutter cites no authority holding that such conduct is per se legal.[5] Nor does Sutter cite authority holding that challenged conduct is immune from an antitrust challenge on the basis that one element of the conduct touches on pricing. The facts that Sutter's non-par rate can be described as a pricing decision and that Sutter's non-par rate is one element of the alleged restraint do not foreclose the application of a rule of reason analysis.

b. All-or-Nothing, Anti-Tiering, and Anti-Steering Provisions

Sutter argues that its all-or-nothing, anti-tiering, and anti-steering provisions are part of a negotiated quid pro quo in which Sutter provides access to its services at a discounted rate and secures an increased flow of patients. (Motion, 10-13.) Sutter asserts that offering discounts is procompetitive and lawful. (*Id.* at 11-13.) Further, Sutter contends that its contract terms did not categorically preclude narrow networks or tiering – although the contract terms prevented Network Vendors from unilaterally modifying their networks after receiving discounted rates Sutter did, in some circumstances, agree to participate in limited or tiered networks. (*Ibid.*)

The fact that an agreement could be reached lawfully does not mean that an agreement is lawful. (See *UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 370 [an exclusive-provider agreement is not necessarily unlawful, but the relevant issue for antitrust purposes, at least under a tying theory, was that the arrangement did not result from competition focused in the

[5] Sutter aims for a lower bar by arguing that such conduct cannot constitute tying. But that mixes the issues. There is a middle ground between conduct that is per se legal and unlawful tying. In that middle ground, a rule of reason analysis holds sway. Assuming that Sutter's practices do not rise to the level of tying, the fact, if true, that Sutter's practices can be analogized to tying suggests that the practices may constitute an unreasonable restraint of trade. (See *Corwin*, 4 Cal.3d at 856 [explaining that "tying agreements fare harshly under the laws forbidding restraints of trade" and are in some circumstances illegal per se].) The question that must be answered now is not whether such conduct satisfies all of the elements of a claim for tying, but whether, *inter alia*, a fact finder could conclude that the purpose of the conduct was to restrain competition and the anticompetitive effect of the restraint outweighed any beneficial effect on competition. (See, e.g., CACI 3405.)

relevant market, but instead from respondent's exercise of monopoly power in a different market].)

The theory of liability pled in the complaints is that Sutter exercised its market power to compel Network Vendors to accept contractual terms that Sutter wielded to stifle price competition. Sutter has not contradicted that theory. Accordingly, Sutter has not carried its initial burden.

First, nothing in Sutter's papers contradicts the allegation that each of the terms has an anticompetitive effect. The fact Sutter did not *always* exercise its contractual right to refuse to participate in limited or tiered networks does not mean that that contractual terms lacked an anticompetitive effect. (See Sutter Reply Separate Statement ¶¶ 17-20, 22.) For example, Sutter's evidence indicates that it did, in some instances, exercise its contractual right to refuse such requests. (See *id.* at ¶ 22.)

Second, Sutter's reference to one procompetitive effect of its contracts – that Sutter provided a discount – is of little assistance. Sutter has connected the alleged procompetitive effect not to the challenged restraints, but to a different provision in its contracts. Whether the challenged contractual provisions are necessary to the allegedly beneficial provision is, at best, a factual question on which a fact finder may disagree with Sutter.[6] In any event, a fact finder may weigh, among other things, the anticompetitive effects of a challenged restraint against its procompetitive effects to determine whether, as a question of fact, a restraint is unreasonable. Sutter's argument that there are procompetitive effects to its conduct does not demonstrate the absence of triable factual disputes.[7]

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[6] Sutter states: "If it is lawful for Sutter to trade lower rates for in-network status, then it cannot be unlawful for Sutter to insist that insurers negotiate with Sutter over any exceptions to the agreed-upon in-network status. If insurers could keep the in-network discounts and then unilaterally remove Sutter providers from their networks or discourage their enrollees from using Sutter providers, Sutter would have no reason to offer in-network discounts." (Motion, 12-13.) To the contrary, Sutter would have an incentive to offer in-network discounts even if Network Vendors could direct business to Sutter's competitors if Sutter was subject to price competition. The reason that discounts have a procompetitive effect, as articulated by Sutter, is that healthcare providers such as Sutter have an incentive to control their costs if they are subject to price competition. To argue, without citation, that Sutter would have no incentive to offer a discount unless it could condition the discount on assent to terms that will preclude price competition is to assert that competition is irrelevant. But competition is not irrelevant to antitrust law. (Compare Motion, 13; with *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP* (9th Cir. 2010) 592 F.3d 991, 997 [easy terminability of an exclusive dealing arrangement substantially negates its potential to foreclose competition; expert report never explained "why price-sensitive hospitals would adhere to Tyco's market-share agreements when they could purchase less expensive generic sensors instead" so "something more than the discount itself is necessary to prove that Tyco's market-share discount agreements forced consumers to purchase its sensors rather than generics," noting that any "customer subject to one of Tyco's market-share discount agreements could choose at anytime to forego the discount offered by Tyco and purchase from a generic competitor].)

[7] Sutter's citation to support the existence of alleged procompetitive effects is to an expert report submitted by an expert retained by Plaintiffs. (See Motion, 10.) As a whole, that expert report does not

c. Confidentiality Provisions

Sutter argues that its confidentiality provisions are lawful because courts have held that price secrecy is procompetitive. (Motion, 22-23 [citing *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan* (8th Cir. 2000) 203 F.3d 1028, 1042-43 [explaining that in an oligopoly with price-shading, publically announced prices discourage sellers from cutting prices because public price cuts will be matched, whereas secret price cuts may effectively steal customers without retaliation]; *O. Hommel Co. v. Ferro Corp.* (3d Cir. 1981) 659 F.2d 340, 348-49 [price secrecy was not evidence of predation where secrecy was necessary to give favored customers a lower price and were secret discount pricing may be the only effective means to undercut an oligopolistic price]; *Lewis-Westco & Co. v. Alcoholic Bev. Control Appeals Bd.* (1982) 136 Cal.App.3d 829, 835-36 [statute requiring price posting, coupled with regulatory compliance condition, was unlawful because it facilitated price fixing].) While Sutter's cases illustrate the point that certain market conditions arise in which either (1) the only form of price competition that can exist will be secret price competition; or (2) making pricing information public facilitates price fixing, Sutter does not draw an analogy between those cases and this one.

Notably, as Sutter recognizes, Plaintiffs' theory of liability is not predicated on keeping Sutter's prices secret from its competitors, but from its customers. (Compare Motion, 22 [citing UEBT Complaint ¶¶ 117-19; People's Complaint ¶¶ 129-32]; with Sutter Reply Separate Statement ¶ 47.) To that point, Sutter offers two insights: (1) Sutter's practice as to price secrecy is common in the industry; and (2) Sutter's price secrecy provisions permit self-insured entities to access their own claims data, including price. (See Sutter Reply Separate Statement ¶¶ 48-49, 52.) While these facts are likely germane to a rule or reason analysis, they do not demonstrate the absence of any triable disputes of fact.[8] For example, they say nothing about the anticompetitive impact of the price secrecy provisions, or Plaintiffs' ability to prove the same.

d. Combined Effects

The theory of liability pled in the complaints is based on the combined effects of multiple

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support Sutter's effort to show there are no triable factual issues with respect to whether Sutter's conduct constituted an unreasonable restraint of trade.

[8] If Sutter had offered evidence that its pricing is not kept confidential from self-insured entities, that may have been sufficient to contradict Plaintiffs' theory as to price secrecy by showing that Sutter's pricing is not secret. But Sutter's evidence does not rise to that level. (See Sutter Reply Separate Statement ¶ 52.)

contractual provisions. Sutter does not argue that its practices, taken together, lacked an anticompetitive effect or that other considerations outweighed the anticompetitive effects of its practices in combination. (Compare Motion, 15-20 [arguing that Sutter's practices do not, in combination, constitute tying]; Reply, 10-11.) In so doing, Sutter has disregarded the theory of liability disclosed in the complaints. For this independent reason, Sutter has not carried its initial burden.

C. Antitrust Injury

In its moving papers, Sutter argued that (1) Plaintiffs have no admissible proof of antitrust injury because Dr. Leitzinger's damages analysis is inadmissible; and (2) Plaintiffs have not attempted to establish antitrust injury or damages from any subset of the challenged practices standing alone. (Motion, 23-24.) In opposition, Plaintiffs contend that (1) Sutter conflated proof of antitrust injury, which is supported by both Dr. Vistnes and Dr. Leitzinger, with quantification of damages; (2) Whether a subset of Sutter's practices is lawful changes nothing; and (3) Dr. Vistnes offers evidence that each practice separately caused antitrust injury. (Opposition, 21-22.) In reply, Sutter argues only that both Dr. Vistnes and Dr. Leitzinger relied on analyses that grouped all of Sutter's practices together. (Reply, 11.) Sutter has not carried its initial burden on this theory.

First, the Court has denied, in pertinent part, Sutter's motion to exclude Dr. Vistnes' testimony. Dr. Vistnes' report, included with Sutter's moving papers,[9] contains evidence of anti-trust injury. Sutter's assertion that Plaintiffs rely on Dr. Leitzinger alone is incorrect because, as stated in the opposition without a response in the reply, Plaintiffs need not measure their damages to demonstrate antitrust injury. (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 n.7.)

Second, Sutter has not, for the reasons articulated above, produced evidence that even one of the provisions challenged by Plaintiffs is lawful. In addition, as noted above, Sutter has not supplied a persuasive basis to disregard Plaintiffs' theory of liability by considering whether each contract term was independently anticompetitive, as opposed to anticompetitive in combination.

II. Counts I and III

Counts I and III involve the same conduct as Count II, but include allegations that the conduct

[9] Because Dr. Vistnes' report was included in Sutter's moving papers, the Court considers it in evaluating whether Sutter carried its initial burden.

constitutes a per se violation of the Cartwright Act, in addition to being unlawful pursuant to a rule of reason analysis. (See UEBT Complaint ¶¶ 138-43, 156-58; People's Complaint ¶¶ 140-145, 158-60.) Sutter's challenges do not generally distinguish between Counts I and III and Count II.

However, Sutter adds that (1) Count I fails because it is addressed at price tampering, and the only price restraint is the per se lawful non-par provision; and (2) Count III fails because Plaintiffs cannot show that Sutter engaged in any unlawful exclusionary practice. (Motion, 9 n.1.) Neither argument establishes a true distinction between the counts for present purposes. Count I, like Count II, is pled on the basis of Sutter's whole body of conduct, which Plaintiffs allege operates to constrain price competition. Count III, like the other counts, is pled on the basis of Sutter's whole body of conduct, which Plaintiffs allege was undertaken for the purpose and effect of obtaining or maintaining monopoly power.

As a result, Sutter's arguments do not dispose of Counts I and III if they do not dispose of Count II. Sutter's challenges to Counts I and III are rejected.[10]

III. Unfair Competition Law

Sutter argues that UEBT's claim for violation of the Unfair Competition Law falls with its Cartwright Act claims because it is based on the same conduct. (Motion, 24-25.) Because Sutter's challenge to the Cartwright Act claims is rejected, Sutter's challenge to UEBT's claim for violation of the Unfair Competition Law is also rejected.[11]

CONCLUSION AND ORDER

The motion is denied.

IT IS SO ORDERED.

Dated: June 13, 2019

Anne-Christine Massullo
Judge of the Superior Court

[10] The Court need not reach Plaintiffs' argument that Sutter failed to address all of their theories of liability. (See Opposition, 24-25.)

[11] The Court need not reach Plaintiffs' argument that this claim can proceed even if the Cartwright Act claims are summarily adjudicated.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, 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 JUN 14 2019, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: JUN 14 2019

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk