CASE NO. 22-15634

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DJENEBA SIDIBE, ET AL.,

Plaintiffs-Appellants,

v.

SUTTER HEALTH,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO)
CASE NO. 3:12-CV-04854-LB

***AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

CHCC is not a corporation that issues stock, and it is neither a subsidiary nor affiliate of any publicly held corporation. Fed. R. App. P. 26.1(a) and 29(a)(4).

Date: October 11, 2022

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
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FED. R. APP. P. 29(A)(4)(E) DISCLOSURE

Amicus hereby indicates that this brief was authored by its own counsel. No party to the case, counsel thereof, nor other person contributed money that was intended to fund the preparation or submission of this brief. None of the same authored this brief in whole or in part.

Amicus has obtained the consent of both Plaintiffs-Appellants and Defendant-Appellee for the filing of this brief.

Date: October 11, 2022

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
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/s/ WILLIAM A. SOKOL
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I. STATEMENT OF IDENTITY AND INTEREST

The California Health Care Coalition ("CHCC") is an educational nonprofit organization composed of health care purchasers across the State of California. Its membership includes Taft-Hartley multiemployer health benefit plans, non-ERISA health benefit plans, employers and unions in both the private and public sectors, and health care risk pools for hundreds of school districts. Altogether, CHCC's members cover the costs of health-related items and services for over one-million lives, approximately 500,000 of whom are in networks with Sutter Health ("Sutter") facilities. For nearly twenty years, CHCC has researched the causes of higher health care costs in California while evaluating solutions to lower them. Bringing together a wide range of stakeholders and expertise, CHCC has advocated for a more affordable and fairly priced health care system.

This advocacy brought CHCC to question Sutter's anticompetitive business practices as early as 2005, and today, it is the basis of CHCC's interest in this case. As direct purchasers of health care in both northern and southern California, CHCC's members literally pay the price for Sutter's anticompetitive practices. Absent reversal by this Court, the District Court's errors[1] will let stand such practices that contribute to higher health care costs in California—a direct obstacle to CHCC's mission and its members. The District Court proceedings have failed to protect health care purchasers and their covered individuals from Sutter's anticompetitive practices, contrary to the purposes of the Sherman Act and Cartwright Act. Accordingly, the District Court's final judgment must be reversed.

[1] Plaintiffs-Appellants' Opening Brief thoroughly analyzes these errors. Pursuant to Circuit Advisory Committee Note to Circuit Rule 29-1, this Brief will not reiterate Plaintiffs-Appellants' arguments in full. CHCC concurs with the analysis of the Opening Brief.

II. ARGUMENT

Antitrust laws are designed to protect the public, as well as more immediate victims, from trade restraints and monopolistic practices that have an anticompetitive impact on the market. *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964); *People v. Nat'l Assn. of Realtors*, 120 Cal.App.3d 459, 478 (1981). The impact of such practices is so injurious, that, as the Fourth Circuit has recognized, "the case will be quite rare in which a per se violation of [e.g.,] the Sherman Act does not cause competitive injury." *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979).

As thoroughly analyzed in Plaintiffs-Appellants' Opening Brief, the District Court erred in excluding crucial evidence, failing to instruct the jury to determine whether Sutter had an anticompetitive purpose in imposing the challenged restraints, and failing to identify health plans as relevant direct purchasers. Far from harmless, these errors have been fatal to Plaintiffs-Appellants' case. *See* Plaintiff-Appellants' Opening Brief, p. 1. Absent reversal, these errors will ensure that Sutter's anticompetitive practices will continue to injure health care purchasers—from multiemployer trust funds, labor unions, and private-sector employers to health care risk pools—as well as the public at large. These harms are two-fold: *First*, Sutter's anticompetitive practices will continue to undermine efforts to lower health care costs for millions of Californians and health plan constituents of CHCC. *Second*, they will maintain already anticompetitive, exorbitant pricing for health care items and services, thus harming Taft-Hartley health benefit plans and their related parties. These outcomes frustrate the purpose of the antitrust laws that Plaintiffs-Appellants have invoked for protection. Accordingly, the District Court's final judgment must be reversed.

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A. HEALTH PLANS WILL REMAIN SUBJECT TO SUTTER'S NON-PARTICIPATING PENALTY PROVISIONS, UNDERMINING PRIOR EFFORTS TO LOWER HEALTH CARE COSTS.

Prior to 2006, Sutter leveraged its systemwide contracts to undermine narrow and tiered network designs, thus raising health care costs for CHCC's fully-insured health plan members. The District Court's final judgment ensures that Sutter may continue this anticompetitive practice at the expense of health plans and their participants.

Sutter's non-participating penalty ("non-par") provisions prevent health plans from excluding Sutter's higher-priced facilities from their coverage networks while achieving a cost saving for doing so (i.e., offering a "narrow network"). Those provisions also prevent health plans from incentivizing their participants to use lower-priced facilities, as by offering participants lower co-payments in return for visiting lower-cost hospitals (i.e., offering a "tiered network").

These non-par provisions impose contractual, out-of-network rates far higher than the reasonable and customary charges that health plans pay other facilities for the same items and services, thus erasing any cost saving to gain through narrow and tiered networking. Absent such provisions, narrow networking and tiered networking would spur competitive pricing between health care facilities and permit cost savings for health plans with such networks. Indeed, prior to Sutter's penalty provisions, these networking practices did so—and in Southern California, just beyond Sutter's sphere of influence, they continue to do so.

B. THE FINAL JUDGMENT ENSURES ANTICOMPETITIVE PRICING FOR HEALTH CARE ITEMS AND SERVICES WILL HARM TAFT-HARTLEY PLANS, THEIR CONTRIBUTING EMPLOYERS, AND THEIR PARTICIPANTS AND UNIONS.

Sutter's non-participating rates drive higher health care costs for Taft-Hartley health plans in California, and in turn, they lead to higher financial and opportunity costs to their contributing employers and unions, as well as their participants.

1. Sutter's anticompetitive practices threaten the financial stability of Taft-Hartley health benefit plans.

Unlike other purchasers of health care, Taft-Hartley health benefit plans are managed by trustees who must act solely in the interests of their plans' participants and beneficiaries under the "highest" standard of loyalty "known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Equally unique, these plans are jointly represented by employee trustees, often from the ranks of the plans' participants themselves, and employer trustees who represent the entities funding those plans. 29 U.S.C. § 186(a). Such plans are funded by contributions from participating employers pursuant to a collective bargaining agreement. Accordingly, a plan's trustees must meet a remarkably high fiduciary standard, achieve a consensus between employer and employee parties, and do so with a restricted income stream when paying for plan benefits and adapting to changing market conditions. State-regulated insurance companies, on the other hand, need not meet these demands. Thus, Taft-Hartley benefit plans operating in northern California necessarily have fewer means, legally and politically, than other health care purchasers to confront substantial rises in health care costs. Sutter's anticompetitive practices have contributed to such costs in markets where these plans operate, threatening their financial stability.

2. Sutter's anticompetitive practices result in higher contribution rates to employers and opportunity costs to participants and their unions.

When facing a substantial rise in health care costs, a Taft-Hartley health benefit plan may adapt by raising the rates at which employers contribute to it (i.e., raise additional funds), excluding benefits that it would otherwise include in its plan design (i.e., cut back on its costs), or both.

Sutter's anticompetitive practices have undermined attempts to lower health care costs that are ultimately paid by purchasers such as Taft-Hartley health benefit plans and ultimately result in higher prices for health items and services. *See* Part

A. Accordingly, employers shoulder the cost of Sutter's anticompetitive practices in the form of higher contribution rates. Even more, participants and their unions must shoulder the opportunity costs arising from Sutter's practices, either by losing out on items and services that were once included in their coverage or by making concessions at the bargaining table to maintain the status quo. Such are the outcomes of the District Court's final judgment.

III. CONCLUSION

Absent reversal, Sutter's anticompetitive practices will continue to harm health purchasers in the State of California. Indeed, practices such as these have motivated CHCC's work of advocating for a just and more fairly priced health care system. Because the District Court's final judgment shields these anticompetitive practices on erroneous grounds and therefore frustrates the purposes of the Sherman Act and Cartwright Act, it should be reversed.

Date: October 11, 2022

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing Amicus Curiae Brief in Support of Plaintiffs-Appellants and in Support of Reversal is double-spaced, has a typeface of 14 points, and contains 1299 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

Date: October 11, 2022

Respectfully Submitted,

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/s/ WILLIAM A. SOKOL
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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1375 55th Street, Emeryville, CA 94608.

I hereby certify that on August 1, 2022, I electronically filed the foregoing ***AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL** with the United States Court of Appeals, for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that for all participants in the case that are registered CM/ECF users service will be accomplished by the Notice of Electronic Filing through the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Emeryville, California, on August 1, 2022.

/s/ *Rhonda Fortier-Bourne*
Rhonda Fortier-Bourne

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