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
for the Northern District of California
No. 3:12-cv-4854-LB
Hon. Laurel Beeler, United States Magistrate Judge

BRIEF FOR THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS AND THE AMERICAN ANTITRUST INSTITUTE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

AMERICAN ANTITRUST INSTITUTE
Randy M. Stutz
1025 Connecticut Avenue NW,
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel for Amicus Curiae The American Antitrust Institute

LOCKRIDGE GRINDAL NAUEN P.L.L.P.
Kristen G. Marttila
Counsel of Record
Joseph C. Bourne
100 Washington Ave S, Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
kgmarttila@locklaw.com
jcbourne@locklaw.com

Counsel for Amicus Curiae The Committee to Support the Antitrust Laws

October 11, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it.

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INTEREST OF AMICI CURIAE[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court and this Court have long recognized the key role private litigants play in enforcing federal antitrust laws. *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1383 (9th Cir. 1977) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to preventing, remediating, and

[1] All parties have consented to this filing. Amici curiae state that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than amici curiae—has contributed money that was intended to fund its preparation or submission.

deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws.[2]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[3]

COSAL and AAI submit this amicus brief because the goals of U.S. and California competition policy would be undermined if this Court does not clarify: (1) the proper role of evidence regarding the reasons for the initial implementation of challenged restraints on competition in rule-of-reason cases; and (2) the legal standard for market definition and market power in healthcare cases.

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[2] No COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

[3] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

SUMMARY OF ARGUMENT

The plaintiffs in the litigation below claimed they paid supracompetitive prices for health insurance premiums because of Sutter Health's anticompetitive conduct. The plaintiffs alleged Sutter Health violated the federal and California antitrust laws when it forced health plans to negotiate with its hospitals on a systemwide (rather than hospital-by-hospital) basis beginning in the late 1990s or early 2000s and to accept anticompetitive provisions in its contracts.

The plaintiffs tried their claims to a jury. The class period for damages began in 2011. The district court permitted the plaintiffs to present evidence dating back to 2006, but categorically excluded pre-2006 evidence. As a result, the jury did not hear or see any contemporaneous evidence about "the history of the restraint and the reasons for its adoption," which may help determine whether the restraint is an unreasonable restraint in violation of the Sherman Antitrust Act under the rule-of-reason standard. *See Topco*, 405 U.S. at 607. Likewise, the jury did not hear or see any contemporaneous evidence about Sutter's move to systemwide contracting, even though a contract is illegal if it "has as its *purpose or effect* an unreasonable restraint of trade" under the Cartwright Act. *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*, 583 P.32d 777, 784 (Cal. 1978) (emphasis in original).

Sutter Health's reasons for adopting systemwide contracting carry significant weight under federal law, and even more weight under California law. The district court's decision to categorically preclude such evidence primarily on relevance grounds was error.

To prove their claims, the plaintiffs also needed to prove Sutter Health had market power in a relevant market. Courts have defined a two-stage model of competition in the healthcare industry. First, providers such as Sutter Health compete for inclusion in health insurance plans. Second, providers seek to attract patients, primarily on a non-price basis because insured patients are largely insensitive to price. *See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 n.10 (9th Cir. 2015).

To assess market definition and market power, courts assess the likely response of *insurers* to a price increase by a hypothetical monopolist. *See id.* at 784. In this case, however, the jury was permitted to consider evidence about the response of *insured patients*, which is the wrong focus as a matter of law. Compounding this error, the court permitted the jury to consider evidence about hypothetical competition from another healthcare provider, Kaiser Permanente, even though Kaiser hospitals accept only Kaiser's own insurance product and do not negotiate with any of the health plans relevant to this litigation.

To ensure that unreasonable restraints of trade remain actionable under the Sherman Antitrust Act and the Cartwright Act, this Court should clarify the law in both respects. First, contemporaneous evidence is highly relevant to the reasons for a restraint's adoption and should be admissible accordingly. Second, in healthcare cases, for purposes of defining the relevant market and assessing market power, the focus must be on the insurers who purchase the product, not insureds.

ARGUMENT

I. The District Court Erred in Categorically Excluding Pre-2006 Evidence

The district court explained the factual overview of the plaintiffs' claims against Sutter Health in various previous orders. In one summary judgment order, for instance, the court put it succinctly:

> Before 2002, insurers negotiated with Sutter hospitals individually when they assembled their provider networks. Then, Sutter moved to systemwide contracts, forcing insurers to participate. For example, when one insurer (Anthem) pushed back, Sutter terminated its individual hospital contracts with Anthem. Anthem then folded and entered into a systemwide contract.
>
> The systemwide contracts had allegedly anticompetitive provisions: (1) penalty non-par rates; (2) anti-steering and anti-tiering terms; and (3) secrecy provisions about price and quality.

Order Granting Sutter's Mot. for Summ. J. for 2008 to 2010 & for the § 2 Claims & Otherwise Denying the Mot. 3, ECF No. 962.

The district court's synopsis encapsulated the plaintiffs' case. But strikingly, the district court did not let the plaintiffs tell that story to the jury. Instead, so far as

the jury knew, the story began in 2006 because the plaintiffs were not allowed to introduce any pre-2006 evidence showing the reasons Sutter Health adopted systemwide contracting in 2002. The district court's decision to exclude all pre-2006 evidence conflicts with fundamental principles of antitrust law, and in particular, the rule of reason. It was error as a matter of law.

In this case, one basis for relief was the plaintiffs' challenge to Sutter Health's conduct under a rule-of-reason theory. Under the rule of reason, courts "weigh[] legitimate justifications for a restraint against any anticompetitive effects." *Aya Healthcare Servs., Inc., v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1108 (9th Cir. 2021). Analysis of restraints under the rule of reason requires a "fact-specific assessment." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021). That analysis "includes consideration of 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*." *Topco*, 405 U.S. at 607 (emphasis added); *see also Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("The *history* of the restraint, the evil believed to exist, the *reason* for adopting the particular remedy, the *purpose* or end sought to be attained, are all relevant facts.") (emphasis added); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191-92 (9th Cir. 2015) (courts consider "the facts peculiar to the business, the *history* of the restraint, and the *reasons* why

it was imposed, to determine the effect on competition in the relevant product market.") (internal quotation marks and citation omitted; emphasis added).

Clear evidence of intent to restrain competition at the moment of a restraint's formation is "relevant to the court's task of discerning the competitive consequences of a defendant's actions." *California Dental Ass'n v. F.T.C.*, 224 F.3d 942, 948 (9th Cir. 2000). That is, "the history of the restraint and the reasons for its adoption" may help determine whether it is an *unreasonable* restraint of trade. *Topco*, 405 U.S. at 607; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953) ("[N]o monopolist monopolizes unconscious of what he is doing"); *see also Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988) (observing "the intent of the defendants is relevant but not dispositive" under federal law); *Lewis v. Pennington*, 400 F.2d 806, 810-11 (6th Cir. 1968) ("Under this standard, each restraint is evaluated in light of the particular facts of that case, considering the peculiarities of the industry, the conditions in the industry before and after the inception of the restraint, the nature of the restraint and its effect, the problem to which the restraint was directed, and the end or purpose sought by reason of the restraint.").

Similarly, clear evidence of anticompetitive intent can undermine or eliminate a defendant's efficiency defenses. When an anticompetitive purpose is clearly established, the only remaining defense is that the conduct failed to succeed

in harming competition. *Bd. Of Trade*, 246 U.S. at 238 ("[K]nowledge of intent may help the court to interpret facts and to predict consequences."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (intent is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'").

Although the law is similar under California's Cartwright Act, that Act adopts an independent legal standard. *See Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir. 1986) (explaining that when "interpreting the Cartwright Act, not the Sherman Act, [federal courts] must decide what the California courts would do"). Here, that legal standard is somewhat broader than under federal law. Under the Cartwright Act, "a plaintiff must show that *either the purpose o[r] the effect* of the conspiracy is an illegal restraint of trade." *Id*. at 1483 (citing *Corwin*, 583 P.32d at 784) (emphasis added). Relevant considerations include "the history of the restraint and the reasons for its adoption." *In re Cipro Cases I & II*, 348 P.3d 845, 861 (Cal. 2015).

For the plaintiffs' state law claim, Sutter's reasons for adopting systemwide contracting in 2002 thus carry even more weight. Anticompetitive intent in enacting a restraint is not just one factor among several in a rule-of-reason analysis under the Cartwright Act; it suffices, on its own, to show an unreasonable restraint of trade. *See Sure Safe Indus. Inc. v. McGrath Rentcorp*, No. D033648, 2001 WL

1488032, at *3 (Cal. Ct. App. Nov. 26, 2001) (affirming jury instruction in rule-of-reason case where jury had to find conduct "sufficiently anticompetitive, *in purpose or effect, or both*, as to unreasonably restrain trade"); *Kolling v. Dow Jones & Co.*, 187 Cal. Rptr. 797, 804 (Cal. Ct. App. 1982) ("Accordingly, our task is to determine whether the evidence supports the jury's finding that Dow Jones' termination of Kolling and its refusal to deal with Fisher were motivated by anticompetitive reasons and so resulted in a restraint of trade.").

Here, the district court granted Sutter Health's motion in limine to exclude all pre-2006 evidence, concluding that it "has minimal relevance, and in any event results in confusing, cumulative presentations that substantially outweigh any relevance." Final Pretrial Order 8-9, ECF No. 1167. The court further reasoned that pre-2006 evidence was "substantially similar" to post-2006 evidence and was "too attenuated from the relevant period" because "the case is about Sutter's contracting practices in the relevant time period." *Id*. at 9.

The district court's analysis misunderstands the role of an anticompetitive purpose in a rule-of-reason analysis and focuses too much on attenuation from the damages period rather than attenuation from the decision to adopt the challenged restraints. Although the plaintiffs ultimately needed to prove that the contracts in effect during the damages period (beginning in 2011) were anticompetitive and caused them harm, they also needed to prove the formation of an unreasonable

restraint of trade. That determination requires consideration of all the relevant circumstances described above, including the reasons and motivations for Sutter Health's implementation of systemwide contracting in 2002. The district court apparently viewed, as an acceptable compromise, evidence from 2006 to 2011 "to provide context in the form of pre-limitations and pre-damages period evidence." *Id*. at 8. But not all pre-limitations evidence is the same. Evidence from 2006-2011 is necessarily less probative of the reasons Sutter Health adopted systemwide contracting in 2002 than contemporaneous evidence from the late 1990s and early 2000s would be.

In seeking to exclude this contemporaneous evidence, Sutter Health argued that pre-2006 communications on which the plaintiffs might rely were similar to communications within the class period. Sutter Health's Mot. in Limine No. 3 to Exclude Pre-2006 Evidence 34, ECF No. 1234-1. Sutter Health emphasized that "none of the operative contracts were in effect" before 2006. *Id*. at 5. It further contended that the plaintiffs sought to "highlight inflammatory remarks" from the late 1990s, which would prejudice the jury—evidently by exposing the jury to evidence that would cast the defendant in a poor light. *Id*. at 6 ("Plaintiffs create too high a risk that jurors will make up their minds before even considering evidence within the class period.").

Sutter Health's redacted public filing does not reveal the nature of this "inflammatory" evidence. But the parties' and court's discussion of the issue makes clear that the probative value of this evidence related to Sutter Health's *motives* in the late 1990s and early 2000s when it switched to systemwide contracting. Such evidence is highly relevant to a rule-of-reason claim. *See Pretz v. Holstein Friesian Ass'n of Am.*, 698 F. Supp. 1531, 1540 (D. Kan. 1988) (finding fact issues "regarding defendant's motives and intentions" precluded summary judgment in rule-of-reason case); *see also Jolley v. Texas Ass'n of Realtors, Inc.*, No. A-08-CA-364-SS, 2008 WL 11333898, at *3 (W.D. Tex. Aug. 25, 2008) (citing *Pretz*).

In other areas of the law, courts consistently recognize that contemporaneous evidence is the best and most probative evidence of an actor's intent. *See, e.g.*, *United States v. Carter*, 742 F.3d 440, 450 (9th Cir. 2014) ("Given these circumstances, the district court's statements made contemporaneously with sentencing, read in conjunction with the surrounding circumstances, are simply more probative of its intent at that time than its much-later interpretation."); *Dow Chem. Co. v. Nova Chems. Corp. (Canada)*, 458 F. App'x 910, 932 (Fed. Cir. 2012) ("Delaware law treats such contemporaneous documentation as more probative of intent than later-created evidence or testimony.").

This Court should reaffirm these straightforward principles. In a rule-of-reason case under the Sherman Act, a party's reasons for adopting an allegedly anticompetitive restraint is one relevant factor for the jury to consider. Under the Cartwright Act, it is a basis for establishing liability. Accordingly, intent evidence that is contemporaneous with the enactment of the challenged restraint is relevant and highly probative of a fact of consequence to the action. Such evidence should not be excluded based on a district court's determination that it lacks relevance or has only marginal relevance. Nor should contemporaneous evidence be excluded as duplicative of later evidence prior to the damages period based on nothing more than arbitrary line-drawing. Here, Sutter Health's method of contracting with health plans changed significantly in the late 1990s or early 2000s. Accordingly, evidence from *that* period should have been available to the jury to help it determine Sutter Health's motives in switching to systemwide contracting and including the allegedly anticompetitive provisions in those systemwide contracts.

II. The District Court Erred in Allowing the Jury to Consider Evidence of Market Power and Market Definition from the Perspective of the Insured, in Violation of *St. Luke's*

The district court's jury instructions addressed market power, the product market, and the geographic market. Final Jury Instructions 8-9, ECF No. 1511. The parties disputed the jury instructions regarding these issues. In particular, as the district court noted, the parties agreed the product market was general acute care

inpatient hospital services, but they disagreed about whether Kaiser Permanente is a relevant participant in that market. *See id*. at 8. More broadly, they also disagreed about the appropriate lens through which to view market issues: health plans, their insureds, or both.

The parties addressed this issue in numerous filings. As one example, the plaintiffs proposed that the jury should determine "whether Sutter wields market power over commercial health plans." Joint Proposed Jury Instructions (Disputed & Stipulated) 89, ECF No. 1133. Sutter Health disagreed with the focus on commercial health plans, arguing that it was a "disputed fact" that it "sells inpatient hospital services to commercial health plans rather than to patients." *Id*. at 91.

It does not appear that any *facts* were actually in dispute. Rather, the parties disputed the conclusions to be drawn from the facts—a quintessential issue of law. Although the jury was appropriately tasked with determining the relevant market definition and answering the question of whether Sutter Health had market power, the instructions to the jury and evidence it could consider were questions of law to be decided by the district court. The district court erred in resolving those questions.

Case law provides a well-established framework for market definition and market power issues. This Circuit has addressed these inquiries in the context of

analyzing a merger of two healthcare providers in the same city. *St. Luke's*, 778 F.3d at 781. That analysis followed the familiar steps of determining the relevant product and geographic markets. *Id*. at 783. To do so, the court approved the district court's use of the so-called "SSNIP" test, which asks whether a hypothetical monopolist could impose a "small but significant nontransitory increase in price." *Id*. at 784. But applying the SSNIP test in the context of the general healthcare marketplace differs from its application in many other marketplaces because of who the relevant buyer for healthcare services is.

As *St. Luke's* explains, the district court in that case was correct to focus on the "likely response of *insurers* to a hypothetical demand by all the PCPs [primary care physicians] in a particular market for a [SSNIP]." *Id*. (emphasis added). Insureds (also sometimes referred to as plan members, patients, or healthcare consumers) "are not direct purchasers of health care—the consumers purchase health insurance and the insurance companies negotiate directly with the providers." *Id*. The evidence in that case established: (1) insurers need providers to market their health plans; (2) consumers would not change their behavior in the event of a SSNIP; and (3) consumers choose providers on factors other than price. *Id*. at 785.

The *St. Luke's* court explained that the "accepted model" of healthcare competition is a "two-stage model." *Id*. at 784 n.10. First, "providers compete for

inclusion in insurance plans." *Id*. Second, "providers seek to attract patients enrolled in the plans." *Id*. The second stage is predominantly a non-price issue because patients are "largely insensitive" to price." *Id*.; *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1048 (8th Cir. 1999) (noting patients are "largely insensitive to price"). The health plan may pay the majority of a plan member's hospital bill, for instance, while the plan member may be left with a relatively modest co-pay or other payment obligation. *See FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *16 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022) ("The healthcare industry is unique in antitrust cases because patients, the direct users of inpatient GAC services, do not pay hospitals for the services (with the exception of co-pays or other similar charges)."). Indeed, plan members may find it difficult (or even impossible) to determine what the cost of their healthcare will be in advance even if they want to do so. *See Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 531-32 (D.C. Cir. 2020) ("Patients usually learn what a given hospital service cost[s] only after the fact, either from a hospital bill or an 'Explanation of Benefits' form from their insurance company . . . ."); *Yebba v. AHMC Healthcare Inc.*, No. G058817, 2021 WL 2657058, at *3 (Cal. Ct. App. June 29, 2021), *review denied* (Sept. 29, 2021) (noting "pricing transparency" is a critical issue in today's healthcare marketplace).

For this reason, "courts must focus their analysis on insurers, who are the actual payors." *Hackensack Meridian Health*, 2021 WL 4145062, at *16 (D.N.J. Aug. 4, 2021). Of course, patient behavior could affect the relative bargaining positions of health plans and healthcare providers, but the focus of an antitrust analysis should be on the first stage. *Id*.

Other courts have reached similar conclusions. The Third Circuit has expressly recognized that "the healthcare market is represented by a two-stage model of competition." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3d Cir. 2016). As that court explained, there is a "fundamental difference between analyzing the likely response of consumers through the patient or the payor perspective." *Id*. Antitrust law requires a focus on economic reality, including in the healthcare space. *See id*. ("This is the commercial reality of the healthcare market as it exists today."). This requires application of the "hypothetical monopolist" test, or SSNIP test, "through the lens of the insurers." *Id*.

Similarly, in adopting this two-stage analysis, the Seventh Circuit has explained that "[i]nsured patients are usually not sensitive to retail hospital prices, while insurers respond to both prices and patient preferences." *FTC v. Advoc. Health Care Network*, 841 F.3d 460, 471 (7th Cir. 2016). Simply put, "patients [are not] the relevant buyers in this market." *Id*. at 475. Instead, "insurers are the most relevant buyers." *Id*.

Applying these precedents, the district court's error is plain. The lens through which the relevant market and market power must be assessed is that of health plans, not plan members. Health plans are the ones who contracted with Sutter Health, originally with individual Sutter Health hospitals and subsequently during the class period on a systemwide basis. Health plans are the ones who accepted the challenged restraints in their contracts with Sutter Health. The crux of the plaintiffs' case was that the health plans had no choice but to accept systemwide contracting and the challenged contractual terms because they needed to have certain Sutter Health hospitals (or more specifically, hospitals in certain regions in which Sutter Health was the only option) in their network in order to provide a product that plan members want. Plan members, in this context, are a red herring. Telling the jury it could consider plan members' response to a hypothetical monopolist raising rents was wrong as a matter of antitrust law and policy. The jury should have been instructed to focus on the health plans, and how they would react to a SSNIP by Sutter Health.

The district court's decision to permit the jury to consider evidence related to Kaiser Permanente suffered from the same erroneous reasoning. The district court decided to let the jury decide the veracity of "Sutter's contention that Kaiser competes in the same market." Order on Proposed Jury Instructions 3, ECF No. 1193.

Sutter Health had argued that the jury should be able to consider whether Kaiser competed with Sutter in "the general acute care inpatient hospital services market," including considering "evidence of whether Sutter and other industry participants viewed or treated Kaiser hospitals as competitors in the general acute care inpatient hospital services market." Joint Proposed Jury Instructions (Disputed & Stipulated) 62, ECF No. 1133. Sutter Health further argued that "Kaiser exerts tremendous competitive pressure on Sutter," and so, the patients must be viewed as relevant buyers to account for its competitive significance. *Id*. at 14.

The plaintiffs argued that the tying arrangement was imposed on health plans (not patients), and therefore "the fact that hospitals may have viewed Kaiser as a competitor for patients is not relevant to the issue of whether Kaiser is a participant in the relevant product market in this case." *Id*. The plaintiffs noted that "Kaiser Permanente was not an alternative available to health plans." *Id*. The plaintiffs made the point that Kaiser is vertically integrated (it offers health care provider services and health insurance services) and has never sold inpatient hospital services to any of the health plans relevant to the class or competed for in-network status in any of their networks. Pls.' Mem. of P. & A. re Certain Disputed Jury Instructions 4, ECF No. 1135. Kaiser Permanente hospitals do not take outside insurance; they only take Kaiser insurance. *See* Pls.' Mem. re Jury Instructions & Verdict Form Issues 7, ECF No. 1492 ("[T]he Health Plan

witnesses have all confirmed that they cannot purchase hospital services from Kaiser and therefore cannot substitute Kaiser hospitals for Sutter hospitals in response to Sutter price hikes.").

These facts about Kaiser Permanente appear to be undisputed. If Kaiser does not sell services to the direct purchasers at issue, it cannot conceivably be a participant in the product market from the health plans' perspective. The health plans could not contract with Kaiser to have Kaiser hospitals in network, because Kaiser hospitals are only in network with Kaiser's own health insurance product. Focusing on the health plans, as the court and jury were required to do under this Court's *St. Luke's* precedent, it is clear that Kaiser could not restrain supracompetitive pricing to health plans because it does not sell hospital services to health plans. Kaiser is therefore irrelevant to the jury's consideration of the market definition and market power inquires.

CONCLUSION

Amici respectfully submit that the district court's evidentiary decisions and jury instructions, discussed above, were error as a matter of law. To ensure that unreasonable restraints of trade remain actionable, as intended under the Sherman Antitrust Act and the Cartwright Act, this Court should clarify or reaffirm the law with respect to both issues. First, contemporaneous evidence is highly relevant to the reasons for a restraint's adoption, which is an important issue under a rule-of-

reason analysis. Second, in healthcare cases, for purposes of defining the relevant market and assessing market power, the focus must be on insurers, not insureds, as this Court previously held in *St. Luke's*.

October 11, 2022

By: */s/ Kristen G. Marttila*

LOCKRIDGE GRINDAL NAUEN
P.L.L.P.
Kristen G. Marttila
Joseph C. Bourne
100 Washington Ave S,
Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
kgmarttila@locklaw.com
jcbourne@locklaw.com

Counsel for Amicus Curiae The Committee to Support the Antitrust Laws

Randy M. Stutz
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue NW,
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel for Amicus Curiae the American Antitrust Institute

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,449 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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 brief has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman 14-point font.

October 11, 2022 */s/ Kristen G. Marttila*

Certificate of Service

I hereby certify that on October 11, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: October 11, 2022 */s/ Kristen G. Marttila*