No. 14-16234

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DJENEBA SIDIBE, DIANE DEWEY, AND JERRY JANKOWSKI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

SUTTER HEALTH,
Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS

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

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Djeneba Sidibe, Diane Dewey, and Jerry Jankowski are not a "corporate party," do not issue stock, and are not controlled by any publicly-held corporation.

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JURISDICTIONAL STATEMENT

This antitrust case is brought by plaintiffs-appellants Djeneba Sidibe, Diane Dewey, and Jerry Jankowski, on behalf of themselves and those similarly situated, against defendant Sutter Health and its affiliated entities (collectively, "Sutter"). Plaintiffs seek to recover damages and permanent injunctive relief under Sections 4 and 16 of the Clayton Act, 15. U.S.C. §§ 15 and 16, for violations of the Sherman Act, 15. U.S.C. §§ 1 and 2. Plaintiffs also seek to obtain damages, restitution, and permanent injunctive relief for Sutter's violations of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, *et seq*., and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*.

The District Court had subject matter jurisdiction over the federal antitrust claims under 28 U.S.C. §§ 1331 and 1337. This District Court also had supplemental jurisdiction over the pendant California state law claims under 28 U.S.C. §§ 1332(d) and 1367.

Following a hearing, the District Court entered an Order Granting Sutter's Motion to Dismiss Plaintiffs' Third Amended Complaint ("TAC") on June 20, 2014 With Prejudice (the "Order"). Excerpts of Record ("ER") 7-28. On June 25, 2014, the District Court entered Final Judgment dismissing the case. ER 6. Plaintiffs filed a timely notice of appeal from the Order on June 27, 2014. ER 1-3. This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

Whether, in dismissing the case with prejudice, the District Court erred by:

1. Failing to assume the truth of factual allegations in the TAC that support plaintiffs' claims that the geographic dimension of the alleged relevant markets for the sale of Inpatient Hospital Services to commercial health plans are congruent with the boundaries of hospital service areas ("HSAs"), as defined by *The Dartmouth Atlas of Health Care*;
2. Requiring that plaintiffs plead their allegations concerning the relevant geographic markets for Inpatient Hospital Services sold to commercial health plans with even greater specificity than they have;
3. Holding that plaintiffs' geographic market claims were implausible, notwithstanding: (a) the District Court's statement that "the problem is not that plaintiffs' geographic market definition is based on faulty logic"; (b) that plaintiffs' allegations follow the generally accepted test for defining geographic markets; (c) that the commercial realities faced by commercial health plans confirm their ability to substitute for Inpatient Hospital Services provided in an HSA with those services provided outside an HSA; and (d) that the boundaries of the alleged

geographic markets have been recognized by a reliable, third-party expert industry source -- *The Dartmouth Atlas of Health Care*;

4. Failing to consider whether plaintiffs' allegations of direct evidence of Sutter's market power over commercial health plans demonstrate that plaintiffs' legal theories are plausible; and

5. In the very least, failing to provide plaintiffs with leave to amend where the TAC: (a) by the District Court's own admission, "was a very different complaint" than those previously filed; and (b) no finding was made that Sutter would be prejudiced by such leave being granted.

PERTINENT STATUTES

15. U.S.C. §§ 15 and 16, 15. U.S.C. §§ 1 and 2, Cal. Bus. & Prof. Code § 16720, *et seq*., and Cal. Bus. & Prof. Code § 17200, *et seq*., are reproduced in the attached Addendum.

STATEMENT OF THE CASE

This case concerns illegal tying arrangements and anti-steering clauses forced upon commercial health plans by defendant Sutter to the detriment of health plan members/subscribers, such as plaintiffs. These arrangements have caused (1) health plan members/subscribers to pay massive anticompetitive overcharges for health insurance and medical expenses (ER 7 (Order at 1, 13-14)); ER 204-05 (¶¶

101-04)), and (2) hospital competitors to suffer substantial foreclosure in relevant markets for Inpatient Hospital Services sold to commercial health plans (ER 200-02 (¶¶ 86-91)).

The TAC recounts that Sutter has possessed and exercised market power over Inpatient Hospital Services sold to commercial health plans in certain relevant local geographic markets in Northern California, the boundaries of which are congruent with HSAs defined by *The Dartmouth Atlas of Health Care*. *The Dartmouth Altas* "defines HSAs as 'local health care markets for hospital care.' According to *The Dartmouth Atlas* website (www.dartmouthatlas.org), '[a]n HSA is a collection of ZIP codes whose residents receive most of their hospitalizations from the hospitals in that area.'" ER 13-14 (Order at 7-8); ER 182, 188 (¶¶ 25, 45).

Specifically, the TAC alleges how Sutter has employed tying arrangements to force health plans to purchase all of Sutter's Inpatient Hospital Services throughout all the HSAs in which Sutter operates at supra-competitive prices as a condition for purchasing any Sutter Inpatient Hospital Services. ER 7-8 (Order at 1-2; ER 117, 183-85, 111 (¶¶ 5, 28-33, 78). The TAC also explains how Sutter has reinforced and exacerbated the anticompetitive effects of these tying arrangements by imposing provisions upon health plans that prevent them from steering members to lower-cost, better quality hospitals, thus barring health plans from

engaging in a central managed care function. ER 8 (Order at 2); ER 177-78, 185-87 (¶¶ 6, 34-38). And the TAC specifies how the higher medical costs caused by Sutter's anticompetitive acts have been passed downstream to members/subscribers, such as plaintiffs, in the form of inflated health insurance premiums and co-insurance payments. ER 8, 19 (Order at 2, 13); ER 3, 204-05 (¶¶ 7, 101-04).

Plaintiffs originally filed this case on September 17, 2012. ER 229. The matter was assigned to Magistrate Judge Laurel Beeler. By December 18, 2012, the parties consented to conduct all proceedings in this case, including trial, before Magistrate Judge Beeler. ER 228.

On December 9, 2013, following the retention of counsel specializing in antitrust, plaintiffs filed the TAC. ER 221-23. On January 8, 2014, Sutter moved to dismiss the case with prejudice. ER 223. On March 6, 2014, Magistrate Judge Beeler held a hearing on defendant's motion to dismiss, in which she noted that the TAC was "very different" than prior complaints filed in this matter. ER 32. On June 20, 2014, Magistrate Judge Beeler issued the Order granting defendant's motion to dismiss, holding that plaintiffs' detailed geographic market allegations did not pass pleading muster because they were "unmoored from any factual support." ER 25 (Order at 19). Magistrate Judge Beeler granted the motion, despite finding that "the problem is not that plaintiffs' definition is based on faulty

logic," and that "plaintiffs' proposed analysis can be a reasonable way to assess the sufficiency of the relevant geographic market allegations." ER 25, 27 (Order at 19, 21). On June 25, 2014, Magistrate Judge Beeler entered Judgment dismissing the case with prejudice. ER 6. This appeal followed.

Following is a statement of facts relevant to this case.

A. The Parties

Plaintiffs are or have been residents of Alameda, Marin, San Francisco and San Mateo counties during the applicable damages period. ER 180-81 (¶¶ 16-18). During that time, plaintiffs have paid premiums to the Aetna, Anthem Blue Cross, Regence Blue Cross, Premera Blue Cross and Blue Shield health plans, and deductibles, co-payments and other out-of-pocket payments for their health care. ER 9 (Order at 3); ER 180-81 (¶¶ 16-18). Also during that time, plaintiffs Sidibe and Dewey have received medical services at Sutter's facilities. ER 205 (¶ 104). They seek to represent classes of persons enrolled in certain health plans that contract with Sutter or its affiliates. ER 9-10 (Order 3-4); ER 205-06 (¶ 105). "Plaintiffs claim that they were injured by Sutter's allegedly anticompetitive conduct by paying higher premiums, co-payments, deductibles, and other out-of-pocket payments not covered by their health plans." ER 9 (Order at 3); ER 180 (¶¶ 16-18).

Defendant Sutter is a corporation organized and existing under the laws of the State of California, with its principal place of business located at 2200 River Plaza Drive, Sacramento, California. ER 181 (¶ 19). Sutter controls the largest and most dominant network of hospitals and medical service providers in Northern California. ER 9 (Order at 3); ER 181 (¶ 19). In 2012, Sutter's operating revenues were approximately $9.6 billion. ER 9 (Order at 3); ER 181 (¶ 21).

B. The Sale of Commercial Insurance to Members/Subscribers

Commercial health plans compete to be chosen by employers and individual members/subscribers in markets for commercial health insurance. ER 16 (Order at 10); ER 195 (¶ 64). They do so by offering healthcare provider network that their members/subscribers prefer and by the amounts of premiums they charge, among other factors.[1]

Health plan members/subscribers prefer local hospitals that are convenient for them; they receive the bulk of their hospitalizations near where they live and work. ER 24 (Order at 18); ER 182 (¶ 25). Accordingly, to make their plans attractive to their actual and potential members, health plans compete by offering

[1] The TAC defines six markets for the sale of commercial health insurance to members/subscribers. ER 195-99 (¶¶ 62-77). Neither the product nor geographic dimension of those markets has been challenged by Sutter.

their actual and potential members/subscribers access to Inpatient Hospital Services that are near their home or work. ER 188-89, 195 (¶¶ 46, 64).[2]

"To ensure that health plan members can access local hospitals for Inpatient Hospital Services," California passed the Knox-Keene Act. ER 188-89 (¶ 46). That Act requires that certain health plans contract with a "hospital that has the capacity to serve the entire dependent enrollee population based on normal utilization" that is located within 30 minutes or 15 miles of member residences or workplaces." *Id.* This requirement demonstrates that law, in addition to marketplace realities, requires health plans to provide hospital options for their members that are close to their homes.

C. The Sale of Inpatient Hospital Services to Health Plans

Health plans purchase Inpatient Hospital Services for the "benefit of their insured members: consumers who purchase commercial health insurance from these plans." ER 10 (Order at 4); ER 181-82 (¶ 23). In a competitive market, a health plan contracts for Inpatient Hospital Services based upon hospitals offering competitive pricing and quality services. ER 181-81 (¶ 23). The costs that health plans bear "for Inpatient Hospital Services [are passed] on to health plan members,

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[2] Health plan members/subscribers do not know the costs for Inpatient Hospital Services that health plans bear. ER 19 (Order at 13); ER 202 (¶ 93) ("[T]he entire cost of medical procedures are opaque to patient-health plan members and these costs are spread throughout a health plan's member base"). They will therefore not choose Inpatient Hospital Services based on these costs.

such as plaintiffs, in the form of commercial health insurance premiums." ER 10 (Order at 4); ER 181-81 (¶ 23). Therefore, insurance premiums paid by health plan members/subscribers, such as plaintiffs, increase when their health plans are forced to purchase Inpatient Hospital Services at supra-competitive rates. These members/subscribers also pay higher costs for Inpatient Hospital Services in the form of out-of-pocket expenses (*i.e.*, co-pays) when their health plans are forced to pay supra-competitive rates for Inpatient Hospital Services. *Id*.

Hospitals compete against one another to be part of health plan networks based on the prices that they charge. In a competitive market unrestrained by Sutter's conduct, "higher priced Sutter hospitals would not have been included in [] health plan networks. Had these higher-priced hospitals not been included in these networks, patient-health plan members would have had financial incentives to visit lower-cost facilities. . .," and these patients health plan subscribers/members would have done so. ER 178-79 (¶ 8) ("the conduct at issue has resulted in lower-cost, non-Sutter hospitals . . . serving far fewer patients than they otherwise would have had competition prevailed").

D. The Relevant Markets for the Sale of Inpatient Hospital Services to Health Plans

A relevant product market in this case is the sale of Inpatient Hospital Services to commercial health plans. ER 187-88 (¶¶ 39-44). This is not in dispute.

Order at 17 ("Sutter does not dispute . . . that the market for the sale of Inpatient Hospital Services to commercial health plans is a plausible antitrust market").

There are fourteen relevant geographic markets for the sale of Inpatient Hospital Services to health plans. Each of them is roughly congruent with a hospital service area, defined by *The Dartmouth Atlas of Health Care,* and is located in Northern California. ER 13-14 (Order at 7-8); ER 188-89 (¶¶ 46-47). *The Dartmouth Atlas* is compiled by the Dartmouth Institute for Health Policy & Clinical Practice. ER 13 (Order at 7); ER 178-79, 182 (¶¶ 3, 25). *The Dartmouth Atlas* "defines HSAs as 'local health care markets for hospital care.' According to *The Dartmouth Atlas* website (www.dartmouthatlas.org), '[a]n HSA is a collection of ZIP codes whose residents receive most of their hospitalizations from the hospitals in that area.'" ER 13-14 (Order at 7-8); ER 182, 188 (¶¶ 25, 45).

The Dartmouth Atlas is a well-established industry source. ER 176 (¶ 3). "Policy makers and other legal and economic authorities have looked to Dartmouth Institute-defined HSAs in order to assess the economics of hospital markets." ER 13 (Order at 7); ER 176, 188 (¶¶ 3, 45).

The fourteen Northern California HSAs that are relevant geographic markets for Inpatient Hospital Services sold to health plans in this case are located in Antioch, Berkeley, Burlingame, Castro Valley, Davis, Modesto, Oakland, Roseville, Sacramento, San Francisco, San Leandro, Santa Rosa, Tracy and

Vallejo. ER 14 (Order at 8); ER 188-94 (¶¶ 45-61). Of these fourteen HSAs, nine are "Tying Markets," in which Sutter has possessed and continues to possess market power (*i.e.,* Antioch, Berkeley, Burlingame, Castro Valley, Davis, Roseville, San Leandro, Tracy and Vallejo), and five are "Tied Markets" (*i.e.,* San Francisco, Oakland, Sacramento, Modesto and Santa Rosa). ER 14 (Order at 8); ER 189-94 (¶ 47-61). "The TAC identifies the zip codes in each of these HSAs and the Sutter Inpatient Hospital Services facilities located there . . ." ER 14 (Order at 8). Sutter provides Inpatient Hospital Services in all fourteen HSAs. *Id.*

The economic coherence of each of the fourteen HSA-wide relevant geographic markets is supported by the fact that: (a) health plans must provide local hospital access to their actual and potential subscribers/members in order to stay competitive; and (b) most residents in each of these HSAs prefer to go to hospitals located in their HSA. *See infra* Part III. B.1-4. For these reasons, health plans would pay a small, but significant, non-transitory increase in the price ("SSNIP") of Inpatient Hospital Services to a hypothetical (or actual) monopolist of Inpatient Hospital services located in *each* of the HSAs. ER 189-94 (¶¶ 48-61). In other words, "[t]here are no economic substitutes to commercial health plans for Inpatient Hospital Services" provided in each one of these HSAs. *Id.*

The relevant geographic markets are not "one size fits all." "The 14 alleged geographic markets include as few as 4 zip codes (the Castro Valley and San

Leandro HSAs), and as many as 160 zip codes (the Sacramento HSA)." ER 24 (Order at 18); ER 189-94 (¶¶ 48-61).

E. Sutter Exercises Substantial Market Power When Selling Inpatient Hospital Services to Health Plans.

1. Sutter Possesses Market Power.

Sutter has market power in each of the Tying Markets for Inpatient Hospital Services sold to health plans. Sutter's power over price demonstrates this: Sutter charges "substantially higher prices for Inpatient Hospital Services" than those charged by other Northern California hospitals. ER 18 (Order at 12); ER 199 (¶ 79). For example, in 2004, CalPERS, the largest pension fund in the United States, reported that Sutter demanded 2005 rates at least 50% higher than other hospitals in Northern California. ER 199 (¶ 80). Similarly, an analysis performed by Blue Cross of California in 2004 found that the average cost of claims paid at Sutter hospitals is "73% greater than the average cost of all other hospital claims …" *Id.* News sources, including *Bloomberg* (2010) and the *L.A. Times* (2011), have also reported that Sutter charges 40% to 70% more than other Northern California hospitals. ER 200 (¶¶ 81-82). Even Sutter executives have touted Sutter's pricing power over health plans by noting that Sutter affiliated hospitals can charge up to

40% more than competing hospitals per procedure. ER 200 (¶ 83).[3] This is all "direct evidence of Sutter's market power in the Tying Markets." *Id.*

Market share evidence also demonstrates that Sutter wields market power. Sutter wields a 100% share in each of the Tying Markets, other than San Leandro, where it has a 78% share. These shares are based on publicly-available information on patient discharges and hospital beds from the Office of Statewide Health Planning and Development. ER 18 (Order at 12); ER 199 (¶ 78).[4]

Industry experts have recognized Sutter's substantial market power: Glenn Melnick, a Professor of Health Care economics at the University of Southern California has recently stated that "Sutter is a leader – a pioneer – in figuring out how to amass market power to raise prices and decrease competition." ER 176 (¶ 1) (quoting from December 3, 2013 *New York Times* article).

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[3] A December 2013 *New York Times* exposé on Sutter notes that prices "for many procedures" performed at its California Pacific Medical Center in the San Francisco Tied Market "are among the top 20 percent in the country." ER 203 (¶ 97). In the San Francisco Tied Market, the UCSF Medical Center, a world-renowned teaching hospital, "charges far less per day" for hospital services than Sutter does in San Francisco. *Id.*

[4] Sutter wields market power in these HSAs because the other large hospital system located in Northern California – Kaiser Permanente – does not participate in the relevant markets, as it does not offer to contract with non-Kaiser health plans. Rather, Kaiser only contracts with Kaiser's affiliated health insurance plans. ER 177, 182-83 (¶¶ 4 n.1, 27); ER 15 (Order at 9) ("Kaiser . . . is not a competitor in the relevant markets").

2. Sutter Has Imposed Tying and Anti-Steering Arrangements on Health Plans.

Sutter's market power in the sale of Inpatient Hospital Services sold to health plans is also evidenced by the fact that it has been able to force its "all-or-nothing" tying arrangements upon health plans. These arrangements "force health plans . . . to include Sutter's higher-priced Inpatient Hospital Services in the Tied (and Tying) Markets in their health plan networks." ER 10 (Order at 4); ER 183, 200 (¶¶ 28, 85) ("Sutter's ability to impose the subject tying arrangements [also] directly evidences Sutter's massive market power"). These arrangements make it impossible for such health plans to bargain down Sutter's hospital rates or drop any Sutter facility from their health plan networks. *See e.g.,* ER 178, 202-03 (¶¶ 8, 94) ("But for this conduct, these higher-priced Sutter hospitals would not have been included in these health plan networks"). If not for Sutter's tying arrangements, health plans would have the ability to forego including Sutter hospitals in their networks unless and until those hospitals offered health plans lower, competitively-priced rates for their Inpatient Hospital Services. *Id.*[5]

Sutter's market power in the sale of Inpatient Hospital Services is also directly evidenced by its ability to force "anti-steering" clauses upon health plans. In a competitive managed care system, "[h]ealth plans have the ability to steer

[5] The District Court stated that "[a] number of authorities support plaintiffs' assertion that Sutter's 'all or nothing policy' results in anticompetitive conduct." ER 11 (Order at 5).

some of their members to lower-cost, quality" hospitals in their networks. ER 12 (Order at 6); ER 185, 200 (¶¶ 34, 85). Health plans do this to reduce the cost of the medical expenses they pay. ER 185 (¶ 34). Sutter, however, has included provisions in its agreements with health plans that prohibit them from steering members away from Sutter hospitals, forcing them instead to steer members *from* lower-cost hospitals *to* higher-cost Sutter hospitals. ER 14 (Order at 6); ER 185-86 (¶¶ 35-37).[6] This is contrary to the core managed care function of health plans -- to control costs by steering members to lower-cost providers. These anti-steering provisions would not have been accepted by health plans absent Sutter's exercise of market power. ER 177-78, 186 (¶¶ 6, 37).

3. Health Plans Have Not Substituted for Non-Sutter Hospitals in Assembling their Networks.

Sutter's tying and steering clauses have precluded health plans from substituting less expensive non-Sutter hospitals in the relevant Inpatient Hospital Services markets. ER 202-04 (¶¶ 93-98). As explained by health plan executives, "Sutter Health's size and dominant position in many *local markets* give it the upper

[6] For example, one Sutter contract includes a provision that requires the health plan to "[a]ctively encourage members obtaining medical care to use Sutter Health Providers" and to punish members who use non-Sutter providers through the use of, among other things, "financial penalties." ER 12 (Order at 6); ER 185-86 (¶ 35). The penalties to health plans for failing to steer members to Sutter facilities are severe. Health plans that fail to steer to Sutter are threatened with having to pay Sutter double what insurers typically pay for hospital procedures. ER 12 (Order at 6); ER 185-86 (¶ 36).

hand in contract negotiations *over prices and which of its hospitals are included in the insurers' networks*." ER 203 (¶ 96) (quoting March 2011 *L.A. Times* article) (emphasis added).

A July 2012 report by CALPIRG clearly sets out how Sutter uses its dominant position to force its tying arrangements on health plans:

> Sutter Health has two dozen facilities in northern California, *and it negotiates prices with insurers on an "all or none" basis. In a city where Sutter Health represents a large share of the market* it can command a higher price from insurers, and *then by negotiating a system wide contract it can impose higher rates at all its hospitals*.

ER 203 (¶ 95) (emphasis added). In light of Sutter's tying arrangements, health plans have not been able to substitute for non-Sutter hospitals that are located outside of the relevant geographic markets. ER 183 (¶¶ 28-30).

F. Sutter's Conduct Has Caused Substantial Anticompetitive Effects.

1. Sutter Has Substantially Foreclosed Competition in Inpatient Hospital Services.

Sutter has substantially harmed competition in the relevant markets for Inpatient Hospital Services. As a result of Sutter's conduct, Sutter hospitals do not have to compete with other hospitals for inclusion in health plan networks. "This has distorted the normal competitive process." ER 18 (Order at 12); ER 200-01 (¶¶ 86-87).

In each of the Tied Markets, Sutter's conduct has foreclosed non-Sutter hospitals by causing them to lose a substantial number of patients that they

otherwise would have treated. ER 18 (Order at 12); ER 201 (¶ 87). This has resulted from Sutter's forcing health plans to include Sutter hospitals located in the Tied Markets in their networks. *Id.* But for this forced network inclusion, health plan members would have had greater financial incentives -- *i.e.*, avoiding "out-of-pocket" costs associated with going "out of network" to Sutter -- to visit non-Sutter hospitals. *Id.* Accordingly, in the absence of Sutter's tie, many health plan members would have chosen to seek medical treatment at competitive, non-Sutter facilities in the Tied Markets rather than pay these "out-of-pocket" costs. *Id.*

Sutter's anti-steering provisions have also caused lower cost competing hospitals in the Tied Markets to lose substantial patient volume. ER 201 (¶ 88). In a market not distorted by Sutter's anti-steering provisions, health plans "could channel" patients to lower-cost facilities. ER 18 (Order at 12); ER 201 (¶ 88).[7]

2. Sutter Has Caused the Price of Medical Care to Increase.

"Sutter's practices also have enabled Sutter to charge supra-competitive prices" for Inpatient Hospital Services in the Tying and Tied Markets. ER 19 (Order at 13); ER 199-200 (¶¶ 79-85)." This is borne out by third-party source data. *See infra* Part II.

[7] Sutter's tying arrangements and anti-steering provisions have also foreclosed substantial commerce in each of the Tying Markets for Inpatient Hospital Services. But for these provisions, hospitals would have had much greater ability and incentive to open competitive facilities in the Tying Market. ER 202 (¶ 91). With Sutter's anti-steering provisions in force, opening competing hospitals in these markets has not been viable. *Id.*

3. Sutter Has Harmed the Quality of Medical Care.

Sutter's anticompetitive practices have caused the quality of patient care to suffer in the relevant markets. ER 204 (¶ 99). The quality of patient care that Sutter offers is not as high as it would have been in a market where Sutter had to compete for entry into health plan networks. ER 204 (¶¶ 99-100) (noting that Sutter's degree of care has violated national medical standards, according to an April 2005 California Health Care Coalition Report).

G. Plaintiffs and Class Members Have Suffered Antitrust Injury.

The higher costs for Inpatient Hospital Services that have been forced upon health plans due to Sutter's anticompetitive conduct have been passed along, in the form of insurance premiums, to plaintiffs and Class members in the relevant markets for commercial health insurance. ER 204-05 (¶ 101). Accordingly, plaintiffs and Class members have incurred antitrust injury.

News sources and industry experts confirm the overcharges plaintiffs have been forced to pay in their premiums. An *L.A. Times* article notes that Aetna "charges customers in Northern California about 30% more in premiums than those in Southern California as a result of higher hospital reimbursements in the north." ER 205 (¶ 102). It also identifies that Blue Shield "says it charges up to 40% more for insurance in" Northern, as opposed to Southern, California due to the higher medical costs that it pays there. *Id.*

Plaintiffs and Class members have incurred additional antitrust injury by having to pay higher deductibles and co-payments as a result of Sutter's anticompetitive conduct. ER 19-20 (Order at 13-14); ER 205 (¶ 104).

SUMMARY OF ARGUMENT

The District Court held that plaintiffs proposed "***a reasonable way*** to assess the sufficiency of the relevant geographic market allegations," and that "the problem is ***not*** that plaintiffs' alleged geographic market definition," premised on *Dartmouth Atlas*-HSAs, "is based on ***faulty logic***." ER 25, 27 (Order at 19, 21) (emphasis added). These statements demonstrate that plaintiffs' geographic markets are plausible, satisfying pleading standards.

Despite these findings and the numerous allegations in the TAC that specify the contours of the alleged geographic markets and identify the economic bases for plaintiffs' geographic market theory, the District Court dismissed this case. This was plain error. Four reasons demonstrate why.

First, the District Court's Order is premised on a fundamental misunderstanding of the analysis to be performed at the Rule 12(b)(6) stage. That inquiry requires a court to *presume the truth* of factual allegations that *support* plaintiffs' legal conclusions. But the Court did not do that, holding instead that these supporting allegations must be rejected because they are "unmoored from any factual support." ER 25 (Order at 19). The inquiry performed by the District

Court on this motion was therefore akin to those employed by courts at the summary judgment stage -- after the parties have conducted fact and expert discovery. In this critical respect, the District Court's Order contravenes well-settled Supreme Court and Ninth Circuit precedent and, if not reversed, will set precedent that will permit antitrust violators to be immunized from meritorious cases.

If plaintiffs had merely stated that the relevant markets are HSA-wide with nothing more, the TAC would arguably not have provided Sutter with enough notice of plaintiffs' market definition theory under Fed. R. Civ. P. 8. But that is not even remotely the case here. Instead, the TAC contains specific allegations that show how and why HSAs are plausible geographic markets and that provide detail with much greater specificity than required. Among other things, plaintiffs have alleged that:

- Inpatient Hospital Services markets are local (ER 188 (¶ 45));
- Most health plan members/subscribers will seek Inpatient Hospital Services close to home or work (ER 188-89 (¶¶ 45-46));
- *The Dartmouth Atlas* has analyzed where Northern California residents received most of their hospitalizations and called them HSAs (ER 188 (¶ 45));
- Health plans compete by providing access to actual and prospective health plan members/subscribers to hospitals (ER 195 (¶ 64));
- As most residents in HSAs actually receive their hospitalizations in HSAs, "there are no economic substitutes to commercial health plans

for Inpatient Hospital services provided" in each of the HSAs (ER 189-94 (¶¶ 48-61)); and

- "To compete for members" in each HSA, health plans would pay a SSNIP to a hypothetical monopolist of Inpatient Hospital Services located in each HSA (ER 189-94 (¶¶ 48-61)).

The truth of all of these allegations and others should have been presumed to be true by the District Court. They were not. This alone merits reversal.

Second, the District Court, failing to presume the truthfulness of plaintiffs' supporting geographic market definition allegations, held that plaintiffs' geographic market contentions are implausible. But that conclusion is wholly contradicted by the District Court's assertion that plaintiffs have proposed "a reasonable way to define relevant geographic markets." ER 25 (Order at 19).

A proper analysis of plaintiffs' geographic market claims must conclude that they are plausible, as these claims are supported by allegations that precisely follow the generally accepted test for defining geographic markets. That test, set forth in the *Horizontal Merger Guidelines* of the Department of Justice and Federal Trade Commission, considers the economic substitutes offered to buyers located in a given area. It does so by postulating how a consumer would react to a SSNIP by a hypothetical monopolist supplier in that consumers' area.

Recently, appellate and district courts (as well as state and federal enforcement agencies and economists) have held that, in health care cases concerning hospital market power, this substitution test should be viewed through

the prism of health plans -- since health plans are direct consumers of hospital services -- as opposed to the lens of any particular patient. That is precisely how the relevant markets for Inpatient Hospital Services to health plans -- the alleged direct consumers in this case -- were defined here. In this case, the TAC prominently alleges that health plans would pay a SSNIP in each HSA if imposed by a monopolist over Inpatient Hospital Services in that HSA. This allegation demonstrates that HSAs are economically coherent geographic markets.

The TAC includes even more on this score. It also identifies that the commercial realities of health plan contracting practices -- which must account for Sutter's anti-competitive forcing and the regulatory mandates of the Knox-Keene Act -- further buttress plaintiffs' geographic market claims. And it alleges that experts in the industry recognize that HSAs are "local hospital markets." For all these reasons, the Order's holding that plaintiffs' geographic markets are implausible is error.

Third, the District Court should not have dismissed the case when considering the plausibility of the TAC's allegations concerning Sutter's market power -- allegations that have not been disputed by Sutter. Market definition is merely a means to an end; that is, it is only a device for determining whether a defendant wields market power. Here, as plaintiffs' allegations identify direct evidence from third-party sources that shows that Sutter has substantial power over

health plans -- in terms of prices charged and the arrangements which require health plans to include all Sutter hospitals in their networks -- dismissing this case makes little sense and is contradicted by well-established precedent.

Fourth, in the very least, the case should not have been dismissed with prejudice. The District Court here stated that the TAC, unlike the other complaints filed in this case, was "very different." ER 32 (3/6/14 Tr. at 4:4). It was the first complaint filed, for example, by specialized antitrust counsel. Moreover, the District Court did not find that Sutter would suffer any prejudice if leave to replead was granted. Under these circumstances, a dismissal with prejudice was wrong.

Plaintiffs' supporting factual allegations regarding geographic market definition are much more specific than minimal pleading standards require, follow the accepted test for defining relevant markets, and conservatively rely on data and analysis prepared by an expert third-party source that is in the business of defining hospital markets. Moreover, the TAC's theory of Sutter market power has not been contested and its allegations of anticompetitive harm emanating from Sutter's conduct are supported by facts and expert sources. The District Court's Order should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A. Appellate Standard of Review

Appellate courts conduct a *de novo* review of a district court's Rule 12(b)(6) dismissal for failure to state a claim. *Williams v. Gerber Prods Co.*, 552 F.3d 934, 937 (9th Cir. 2008) (reversing and remanding).

B. Applicable Pleading Standards

A review of the applicable pleading standards demonstrates that the TAC should not have been dismissed. Those standards merely require a complaint to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" as opposed to unsupported legal conclusions. Fed. R. Civ. P. 8(a)(2); *Sheppard v. David Evans & Assoc.,* 694 F.3d 1045, 1048-49 (9th Cir. 2012) (reversing dismissal). In the antitrust context, the Supreme Court has reaffirmed that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 570 (2007).[8] And the Court has held that "[w]hen ruling on a . . . motion to dismiss, a judge *must* accept as true *all* of the factual allegations

[8] The District Court appears to have subjected the TAC to a heightened pleading standard. *See* ER 82 (3/6/14 Tr. at 54:22-25) ("In a straight up business case that, nonetheless, involved a lot of money . . . we wouldn't be looking at things this critically at the pleadings stage, and there's a – there's a difference here in this context").

contained in the complaint." *Eriksson v. Pardus,* 551 U.S. 89, 94 (2007) (emphasis added) (following *Twombly* and reversing dismissal). *See also Somers v. Apple, Inc.* 729 F.3d 953, 959 (9th Cir. 2013).[9]

The Ninth Circuit, mindful of these Supreme Court cases, has articulated "two common principles" applicable to the civil pleading standards relevant to this case. *First*, it has underscored that a "presumption of truth" is to be afforded to those "allegations of underlying facts [that] give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011) (reversing dismissal). In this regard, it has clarified that only those allegations that "simply recite the elements of a cause of action," *i.e.*, conclusory allegations, will not be given the benefit of such a presumption. *Id. See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (the "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable [only] to legal conclusions").

Second, the Ninth Circuit has held that "the factual allegations that are taken as true must plausibly suggest an entitlement to relief . . ." *Starr,* 652 F.3d at 1216. In this regard, the *Starr* court held that the plausibility test at the pleading stage is

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[9] The *Somers* court affirmed the dismissal of antitrust claims where the plaintiff's allegations of anticompetitive overcharging were not plausible "in the face of contradictory market facts alleged in her complaint." 792 F.3d at 964. There are no such contradictory allegations in the complaint subject to this motion.

not a "standard" that looks to "whether a claim will succeed on the merits." *Id.* at 1215. According to *Starr*, even if it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely," a complaint can pass plausibility muster. *Id.; see Iqbal,* 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully"); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678), *cert. denied*, 134 S. Ct. 70 (2013). A well-pleaded complaint therefore survives a dismissal motion "even if it strikes a savvy judge that actual proof of those facts is improbable" and that "recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 696 (quoting *Twombly*).

Accordingly, a plaintiff need not provide *any* proof at the pleadings stage before fact and expert discovery has even taken place, but rather need only allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of illegality. *Twombly*, 550 U.S. at 556; *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (reversing and holding that court dismissed complaint "prematurely" and "erroneously," thereby "preclud[ing] any opportunity for the plaintiffs" to establish their case "by subsequent proof"); *see also In re Gilead Sciences Securities Litig.,* 536 F.3d 1049, 1057 (9th Cir. 2009) (reversing dismissal and holding that "a district court ruling on a motion to dismiss is not sitting as a

trier of fact"); *In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 629 (7th Cir. 2010) (Posner, J.) (affirming denial of motion to dismiss antitrust conspiracy claim).

In considering the sufficiency of alleged relevant markets, the Ninth Circuit has expressly held that they need not "be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). Unless "it is apparent from the face of the complaint that the alleged market suffers from a fatal legal defect," it will survive a Rule 12(b)(6) dismissal motion. *Id*. An antitrust complaint need only present "sufficient information to plausibly suggest the contours of the relevant geographic market" in order to withstand dismissal on those grounds. *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I.*, 997 F. Supp. 2d 142, 163 (D.R.I. 2014); *see E.I. DuPont de Nemours v. Kolon Indus., Inc.*, 683 F. Supp. 2d 401, 409 (4th Cir. 2011) (reversing dismissal when alleged geographic market was plausible). At the pleading stage, relevant geographic markets are plausibly alleged so long as the complaint bears a "rational relation to the methodology courts prescribe to define a market." *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.). *See infra* Part III.A for discussion of legal tests for defining markets. "And since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by

summary judgment or trial." *Newcal Indus*, 513 F.3d at 1045*; see Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 453 (1992) (holding that geographic market definition "can be determined only after a factual inquiry into the commercial realities" faced by relevant consumers); *Todd,* 275 F.3d at 199 ("[M]arket definition is a deeply fact-intensive inquiry"). For these reasons, "courts historically are reluctant to dismiss an antitrust claim for deficiency of market allegation at the 12(b)(6) stage before the plaintiffs have had a chance to conduct discovery." *Kolon Indus.*, 683 F. Supp. 2d at 409.[10] II PHILLIP E. AREEDA

[10] The District Court's Order referenced cases in which motions to dismiss were granted on market definition grounds. Those cases are all inapposite. Most of them concerned scenarios where plaintiffs defined the relevant market by plaintiffs' preferences to use only those facilities, services or products offered by defendants, despite the fact that relevant substitutes existed. In *Apani*, for instance, the Fifth Circuit rejected a plaintiff's alleged geographic market as "fictitious" where it sought to artificially limit the relevant area to consisting of "only the twenty-seven facilities owned by the [defendant]." *Apani Sw., Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 618, 633 (5th Cir. 2002); *see also Tanaka v. USC*, 252 F.3d 1059 (9th Cir. 2001) (rejecting alleged geographic market that was limited to a "single athletic program in Los Angeles based solely on [plaintiff's] own preferences" of wanting to remain close to home); *Double D Spotting Svc., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558-62 (8th Cir. 1998) (rejecting alleged geographic market limited to "one particular [Supervalu] warehouse" in Urbandale, Iowa); *Michigan Div.-Monument Builders of N. Am. v. Michigan Cemetery Ass'n*, 524 F.3d 726, 734 (6th Cir. 2008) (rejecting alleged geographic market as limited exclusively to defendant's cemetery locations). In this case, all the geographic markets were defined not by plaintiff preference, but by *The Dartmouth Atlas,* using an entirely objective methodology. Moreover, in this case, unlike in the cases referenced by the District Court, plaintiffs concede that there are competitors that exist in the relevant markets. *See e.g.,* ER 178-79 (¶ 8) ("the conduct at issue has resulted in the lower-cost, non-Sutter hospitals in the tied markets serving far fewer patients than they otherwise have had competition

& HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307d2 at 143 (4th ed. 2014) ("[T]he question of market definition . . . is typically left to economic experts, and their reports are rarely made until after a complaint has been filed. Nor should a plaintiff be required to do a complete technical report on market definition prior to filing its complaint"). *See also United States et al. v. Blue Cross Blue Shield of Mich.,* 809 F. Supp. 2d 665, 673 (E.D. Mich. 2011) (quoting *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669, (1974)) (denying motion to dismiss) (holding that, before factual discovery, "geographic markets need not be alleged or proven with 'scientific precision,' nor be defined 'by metes and bounds as a surveyor would lay off a plot of ground'").

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS' SUPPORTING FACTUAL ALLEGATIONS WERE "CONCLUSORY" FOR PLEADING PURPOSES

The factual allegations set forth in the TAC supporting plaintiffs' geographic market definition claims (and antitrust theories) must be deemed to be true for

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prevailed"), ER 201 (¶ 87) ("In each of the tied markets, Sutter's conduct has caused hospitals that compete with Sutter to suffer substantial foreclosure . . ."); ER 202 (¶ 90) (noting that Sutter accounts for "an approximate 50% share in the Modesto HSA and about 35% share in" other tied markets); ER 202 (¶ 91)(noting foreclosure of potential competition in tying markets). Finally, this case is very different than *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101-03, 1104-05 (9th Cir. 1999). There, plaintiff failed to provide any supporting allegations that demonstrated that there were no economic substitutes for ski related products and services in the Big Bear Valley. Here, by contrast, ¶¶ 48-61 of the TAC (ER 189-94) all state that health plans have no economic substitutes for Inpatient Hospital Services provided within each of the HSA-wide relevant markets.

purposes of this appeal. Those allegations are not "conclusory," as the District Court held, inasmuch as they are not mere recitations of any claim's legal element. 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04[1][f] (3d ed. 2014) (equating "conclusory" allegations with "formulaic recitation of the elements") (quoting *Iqbal*, 556 U.S. at 681); *Starr*, 652 F.3d at 1216. The District Court's holding that these factual allegations need additional "support" at this stage is therefore erroneous. ER 25, 27 (Order at 19, 21). This is especially true given the authorities that plaintiffs have relied upon to buttress their allegations.

Plaintiffs did not conclusorily allege that any of the elements of their antitrust and unfair competition claims were satisfied with nothing more. For instance, plaintiffs did not merely assert that Sutter wields "appreciable economic power" -- also referred to as market power -- an element of its *per se* tying claim.[11] Rather, plaintiffs' contention that Sutter wields market power is supported by specific allegations (from well-recognized third-party sources) that show that Sutter has (a) priced its Inpatient Hospital Services sold to health plants in a supra-

[11] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market . . ." *Eastman Kodak*, 504 U.S. at 462-63 (citations omitted).

competitive fashion and (b) forced health plans to accept its tying and anti-steering arrangements. *See infra* Part IV; ER 199-200 (¶¶ 78-85).

Likewise, plaintiffs did not merely allege that each of the referenced HSAs constitutes a relevant geographic market without any supporting allegations. Plaintiffs alleged specific factual detail that not only delineates the precise scope of the relevant geographic markets (down to the zip code level), but also explains why each of these HSAs constitutes a relevant geographic market. Among other things, and contrary to the District Court's holding, plaintiffs' allegations stating the following are not conclusory and must be deemed to be true: (a) Inpatient Hospital Services markets are local (ER 188 (¶ 45)); (b) a "well-established industry authority" -- *The Dartmouth Atlas* -- has defined HSAs as "local health care market[s] for hospital care," and that these HSAs are used "to assess the economics of hospital markets" by "legal and economic authorities" (*id.;* ER 13 (Order at 7)); (c) most residents in these HSAs use hospitals in these HSAs for their Inpatient Hospital Services (ER 188 (¶ 45)); (d) there are "no economic substitutes to commercial health plans for Inpatient Hospital Services" provided in each of these HSAs (ER 189-94 (¶¶ 48-61)); and (e) "commercial health plans would pay a [SSNIP] for Inpatient Hospital Services to a hypothetical (or actual) monopolist of Inpatient Hospital Services located in" each of the HSAs (*id.*).

Unfortunately, the District Court decided that plaintiffs must provide proof to substantiate these supporting allegations. This was a fundamental error that is highlighted by the District Court's discussion of *Saint Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, No. 1:12-CV-00560-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014), *appeal docketed*, No. 14-35173 (9th Cir. Mar. 7, 2014) ("*St. Luke's*"). That case supports the plausibility of plaintiffs' geographic market theory in this case -- a theory that relies on health plan (as opposed to only patient) substitution options in defining the geographic dimensions of health care markets. *See infra* Part III.A.

The District Court's Order acknowledged the relevance of *St. Luke's,* but attempted to distinguish its applicability by noting that the geographic market definition theory there was supported by evidence admitted to the record. That evidence, however, was submitted at a full blown merits trial, well after discovery was completed and not at the embryonic pleading stage.

The District Court acknowledged that in *St. Luke's* the FTC claimed that the relevant market consisted of only a single city -- Nampa, Idaho. It further noted that the *St. Luke's* court, in accepting the FTC's alleged geographic market:

> *relied on testimony* from health plan representatives that in order to compete in the Nampa, Idaho market they needed to include Nampa physicians in their networks, and could not substitute providers in West Boise, Idaho. The court then *cited statistics and testimony* that

> showed that most consumers preferred to obtain primary care in Nampa, rather than in Boise . . .

ER 27 (Order at 21) (emphasis added) (citations omitted). The District Court then argued that *St. Luke's* is not applicable here because "[t]he court in *St. Luke's* did not [. . .] base its geographic market determination solely on where health plan members actually went. Instead, the *evidence* of where consumers sought treatment merely 'confirmed' *direct testimony* that there were no substitutes." *Id.* (emphasis added).

The District Court's discussion of *St. Luke's* misses the point. The fact that *St. Luke's* defined the geographic dimension of a health care market by ascertaining health plan substitution options demonstrates that plaintiffs' geographic market claims are plausible here. Contrary to the District Court's suggestion, *St. Luke's* does not hold that plaintiffs need to provide evidence and testimony supporting its claims at the pleading stage.

The only question for the District Court to tackle with respect to plaintiffs' supporting geographic market definition allegations was whether they plausibly supported the alleged markets. *See infra* Part III.B. As they did, the TAC should not have been dismissed.

III. THE DISTRICT COURT ERRED BY HOLDING THAT PLAINTIFFS' GEOGRAPHIC MARKET ALLEGATIONS DID NOT MEET PLAUSIBILITY STANDARDS.

The District Court readily admitted that "the problem is ***not*** that Plaintiffs' geographic market definition is ***based on faulty logic***." ER 27 (Order at 21) (emphasis added). It nonetheless held that the TAC's "allegations fail to plausibly define the geographic markets for the sale of Inpatient Hospital Services to commercial health plans . . ." ER 25 (Order at 19) (emphasis added). The District Court's plausibility conclusion is both inconsistent and in error.

Plaintiffs have provided factual allegations that amply and plausibly support their claims that the geographic dimensions for the relevant Inpatient Hospital Services markets alleged are HSA-wide. For example, plaintiffs have alleged that (1) hospital markets are localized, (2) health plans compete for members/subscribers by offering them hospital care near their homes or place of work, and (3) *The Dartmouth Atlas* HSAs show where most members/subscribers actually go for care. *See supra* Part II; ER 188, 195 (¶¶ 45-46, 64). Following this, "the TAC alleges that 'in order to compete for members that reside [in each HSA], commercial health plans would pay a [SSNIP] for Inpatient Hospital Services to a hypothetical (or actual) monopolist of such services located in that HSA." ER 25 (Order at 19) (citing ER 188-94 (¶¶ 48-61)). When accepting these allegations as true, one can only come to the conclusion that plaintiffs' geographic

market definitions are plausible, as they follow the accepted economic test for evaluating geographic markets for Inpatient Hospital Services sold to health plans. That test is endorsed by federal and state antitrust enforcers and multiple courts. For this reason alone, the District Court's Order should be reversed.

The TAC provides much more, however. Plaintiffs also allege facts showing how the commercial realities of the industry render the market definition claims plausible, namely that health plans cannot substitute for dominant Sutter hospitals outside of these HSAs in light of Sutter's tying and anti-steering arrangements and the Knox-Keene Act -- a regulation that requires certain health plans to provide member access to hospitals in all local markets. And plaintiffs allege facts demonstrating industry recognition of these markets, including by *The Dartmouth Atlas*. *See supra* Part II. Such practical indicia supports the HSA-wide markets alleged.

The District Court's holding that plaintiffs have not alleged plausible geographic markets is therefore both contrary to its own statement that they are not "based on faulty logic" and in error.

A. The Tests for Defining Relevant Geographic Markets

A geographic market is defined as "the area of effective competition where buyers can turn for alternative sources of supply." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002) (affirming district court finding for

plaintiffs); *see also Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327-28 (1961). The contours of a geographic market involve delineating an area "within which the defendant's customers who are affected by the challenged practice can practicably turn to alternative suppliers if the defendant were to raise its prices or restrict its output." *Kolon Indus.*, 637 F.3d at 441. *See Tampa Elec.*, 365 U.S. at 327.[12]

Antitrust enforcers utilize a test to define geographic markets that takes into account economic substitution patterns. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *2010 Horizontal Merger Guidelines* ("*Merger Guidelines*"). This test asks whether a hypothetical monopolist could profit if it imposed a SSNIP on its product or service. *See Merger Guidelines* § 4.1.1. Courts have consistently accepted this test to define the contours of antitrust geographic markets. *See e.g., In re Se. Milk Antitrust Litig*., 739 F.3d 262, 277-83 (6th Cir. 2014) *cert. denied sub nom. Dean Foods Co. v. Food Lion, LLC*, No. 13A1083, 2014 WL 3817366 (U.S. Nov. 17, 2014) (reversing grant of summary judgment to defendant and employing *Merger Guidelines* analysis on issue of geographic market definition); *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C.Cir. 2008)

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[12] Some geographic markets "may encompass the entire Nation" and others "may be as small as a single metropolitan area." *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962). No one size fits all. Here, the HSA-wide markets pled by plaintiffs vary in their scope: "The 14 alleged geographic markets include as few as 4 zip codes . . . and as many as 160 zip codes." ER 24 (Order at 18).

(acknowledging use of *Merger Guidelines'* hypothetical monopolist test); *St. Luke's*, 2014 WL407446, at **6-7; *Pecover v. Elec. Arts Inc.,* 633 F. Supp. 2d 976, 981 (N.D. Cal. 2009) (denying motion to dismiss where plaintiffs defined a product market in accordance with the *Merger Guidelines*); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 550 F. Supp 2d 575, 580-81 (E.D. Pa. 2008) (same).

Under the *Merger Guidelines* market test, if buyers respond to a SSNIP by purchasing from another supplier located outside of the alleged geographic market, rendering the SSNIP unprofitable, the geographic market is too narrowly defined. *See Merger Guidelines* § 4.1.1. *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 n. 11 (8th Cir. 1999). If buyers cannot defeat a SSNIP because there are no practical alternatives in the defined area, the alleged relevant geographic market is deemed valid. *Merger Guidelines* § 4.

When determining the validity of alleged geographic markets in cases concerning health care provider market power, courts have considered the extent to which health plans would substitute for health care providers outside of the alleged relevant market in the wake of a SSNIP. *See St. Luke's,* 2014 WL 407446, at *7 ("[T]he SSNIP test examines the likely response of insurers to a hypothetical demand by all the [primary care physicians] in a particular market for a significant non-transitory reimbursement rate hike"); *see* Gregory S. Vistnes & Yianis Sarafidis, *Cross-Market Hospital Mergers: A Holistic Approach*, 79 ANTITRUST

L.J. 253, 291 n. 98 (2013). This is particularly appropriate here, as plaintiffs have alleged that health plans are direct purchasers of Inpatient Hospital Services. ER 187-88 (¶¶ 39-44). The health plans are the consumers at issue, over whom plaintiffs allege Sutter to be leveraging its market power. *Id.*[13]

B. Plaintiffs Have Alleged Facts that Demonstrate that HSAs Are Economically Plausible Geographic Markets.

The District Court correctly acknowledged that "a reasonable way to assess the sufficiency of the relevant geographic market allegations" is to consider health plan willingness to substitute hospitals in the wake of a SSNIP. *See* ER 25 (Order at 19). Plaintiffs have pled facts that specify why health plans would not substitute with hospitals outside of the identified HSAs should a SSNIP be imposed. These allegations rely on the unremarkable and recognized fact that health plans are

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[13] The plausibility of plaintiffs' local geographic market allegations are directly supported by the *amicus* brief submitted by the State of California and 15 other states to the Ninth Circuit in *St. Luke's*. There, the States confirmed that, in order to compete, "commercial health insurers must offer [members/subscribers] provider networks of hospitals and physician groups that are located near the[ir] homes . . ." Brief for States of California, *et al.* as *Amicus Curiae*, p. 2, *St. Luke's Health Sys., Ltd. v. F.T.C. & State of Idaho,* No. 14-35173 (ECF Dkt. 81) (9th Cir. Mar. 7, 2014). The States also confirmed that, if "health care costs to payors increase, this increase does not result in individual, insured consumers seeking lower-cost health care further [sic] from where they live and work." *Id.* at 17. (emphasis added). Indeed, these States have all found that large hospitals such as Sutter can "successfully impose price increases on payors without risking significant patient defection to markets located farther away." *Id.* at 6 (emphasis added).

unable to resist contracting with hospitals that actually service a large number of actual or potential health plan members in a given area. *See e.g., ProMedica Health Sys., Inc. v. F.T.C.,* 749 F.3d 559*,* 570 (6th Cir. 2014) ("a network which does not include a hospital provider that services almost half the [] patients in one relevant market, and more than 70% of [] patients in another relevant market, would be unattractive to a huge swath of potential members").

Following are key facts that have been pled which show that health plans cannot look to hospitals outside the alleged geographic markets as economic substitutes.

1. Plaintiffs Have Pled that Most People Seek Medical Care Close to Their Homes or Workplaces.

Plaintiffs have alleged that "patients typically seek medical care close to their homes or workplaces." ER 197 (¶ 69); ER 16 (Order at 10) ("health plans compete by providing" "access" to "Inpatient Hospital Services close to their home or work"). Accordingly, plaintiffs have alleged that markets for hospital care are local in nature -- an allegation confirmed by *The Dartmouth Atlas*. ER 13 (Order at 7); ER 188 (¶ 45) (alleging that *The Dartmouth Atlas* has concluded that there are "local health care market[s] for hospital care").

2. Plaintiffs Have Pled that Health Plan Members in the Alleged Geographic Markets Receive the Bulk of Their Inpatient Hospital Services in Those Markets.

Plaintiffs have alleged that most health plan members located in the HSA markets receive their Inpatient Hospital Services in those geographic markets. *The Dartmouth Atlas* is the source of the data underpinning this allegation. It defines HSAs by aggregating areas by ZIP code "whose residents receive most of their hospitalizations from hospitals in that area." ER 14 (Order at 8); ER 188 (¶ 45). *The Dartmouth Atlas* defines its HSAs by looking at where patients actually go to receive Inpatient Hospital Services.

3. Plaintiffs Have Pled that Health Plans Compete by Offering Their Members Access to Hospitals that They Actually Visit.

Plaintiffs have alleged that "[h]ealth plans compete to be chosen by individuals and employers based on the provider configuration of their provider networks," among other things. ER 16 (Order at 10); ER 195 (¶ 64). In particular, "[h]ealth plans in California compete by offering their actual and potential members access to a provider network that includes hospitals providing Inpatient Hospital Services close to their homes or place of work." *Id.* (emphasis added).

4. Plaintiffs Have Pled that, to Remain Competitive, Health Plans Cannot Substitute with Hospitals Outside the Alleged HSAs.

In recognition of the fact that health plans need to provide local hospitals to members in order to remain competitive, plaintiffs have alleged that "to compete

for members that reside in [a given HSA], commercial health plans would pay a [SSNIP] to a hypothetical monopolist of such services located in [that] HSA." ER 189-94 (¶¶ 48-61). This demonstrates that health plans cannot look to hospitals outside each of the alleged HSAs as "economic substitutes" for hospitals that provide Inpatient Hospital Services within these HSAs. Indeed, the TAC notes that health plans have not been able to substitute for hospitals outside of HSAs where Sutter facilities are located despite the supra-competitive rates that Sutter charges.

C. Allegations Concerning the Commercial Realities of the Industry Support Plaintiffs' Geographic Market Definition.

When determining a relevant market, one must also take into account the "commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336-37. These commercial realities include the impact of Sutter's anticompetitive conduct on health plan ability to substitute with Inpatient Hospital Services provided by hospitals outside of the alleged Tying Markets where Sutter is often the only provider of such services. *See* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 173 (2007) ("[M]arket definition does not take place in a vacuum . . . [but] must be evaluated with reference to the specific allegations of anticompetitive effect in the matter under review"); *Merger Guidelines* § 4 ("Evidence of competitive effects [at issue in a particular case] can inform market definition"); *supra* Part III.B.; ER 183-85 (¶¶ 28-33).

Plaintiffs cite statements from health plan executives confirming that health plans have, in fact, paid increase rates for Sutter's Inpatient Hospital Services. *See infra* Part IV.[14] They have paid these increased rates because, due to Sutter's tying arrangements, they have been unable to substitute for those services with, among other things, Inpatient Hospital Services provided by hospitals located outside the HSAs where Sutter hospitals are located.

Those commercial realities also include the impact of the Knox-Keene Act. That Act shows that many health plans cannot substitute for hospitals outside of extremely localized markets without violating the law. *See supra* Part III.B.

D. Industry Recognition of HSAs as "Markets," as Pleaded in the TAC, Support Plaintiffs' Geographic Market Definition.

Courts should also consider "practical indicia [such] as industry or public recognition of the [market] as a separate economic entity . . ." in the market definition analysis. *Brown Shoe*, 370 U.S. at 325; *Newcal Indus.,* 513 F.3d at 1045. Here, the TAC alleges that *The Dartmouth Atlas* is a "well-established industry source compiled by the Dartmouth Institute for Health Care & Clinical Practice." ER 176 (¶ 30). Further, it goes on to state that "[p]olicy makers and other legal and economic authorities have looked to Dartmouth Institute-defined

[14] *See* ER 203 (¶ 96) (*L.A. Times* article quoting health plan executives saying that "Sutter's size and dominant position in many local markets give it the upper hand in contract negotiations . . .[over] which of its hospitals are included in insurers' networks").

HSAs in order to assess the economics of hospital markets." *Id.* The TAC also notes that *The Dartmouth Atlas* has recognized that HSAs are 'local health care *market[s]* for hospital care." ER 188 (¶ 45) (emphasis added). These allegations show that there is industry recognition of these HSAs as independent markets. For this additional reason, plaintiffs' geographic market definitions are plausible.

The District Court wrongfully rejected the authority of *The Dartmouth Atlas*, noting that plaintiffs "do not cite a single instance in which the Dartmouth HSAs have been accepted in an antitrust case." ER 25 (Order at 19). Plaintiffs do not have the burden of showing that *The Dartmouth Atlas* was accepted in an antitrust case in order for it to buttress the plausibility of plaintiffs' geographic markets. Nor does the appearance *vel non* of *The Dartmouth Atlas* in published opinions in any way detract from its conclusions or the facts underlying its analysis. Those facts, irrespective of their citations in legal opinions, must be taken as true on this Rule 12(b)(6) motion and fully support the plausibility of the alleged geographic markets.

In any event, plaintiffs did identify a case where *Dartmouth Atlas*-defined markets were accepted as plausible. That is *Steward Health*, 997 F. Supp. 2d 142 (D.R.I. 2014). There, a district court denied defendant's motion to dismiss on

geographic market definition grounds when plaintiffs relied on *The Dartmouth Atlas* to establish the boundaries of its proposed geographic market.[15]

IV. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER THE DIRECT EVIDENCE OF SUTTER'S MARKET POWER.

Tying is about the anticompetitive effects caused by the exercise of market power by dominant sellers. As the Supreme Court has explained:

> the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hosp. Dist. No. 2 Et. Al. v. Hyde, 466 U.S. 2, 12 (1984) (emphasis added). *Accord, Illinois Tool Works Inc.*, 547 U.S. 28, 34-35 (2006). When it is established that a seller possesses market power, it is presumed that the tying arrangement in question was forced upon the purchaser and that anticompetitive

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[15] In *Steward Health*, the plaintiffs alleged a geographic market for the commercial purchase of all hospital services, including both outpatient and inpatient hospital services. Plaintiffs alleged that the State of Rhode Island was the relevant geographic market. Holding that "common sense suggests that most consumers of medical services would choose to receive those services at locations proximate to their home or work," the court found that plaintiffs' allegations passed pleading muster. 997 F. Supp. 2d at 162-63. Notably, the parties in this case stipulated to file the Complaint in *Steward Health* with the District Court for purposes of the instant motion. ER 91-92. That Complaint shows that the *Steward Health* plaintiffs relied on *The Dartmouth Atlas* definition of Hospital Referral Regions to substantiate their geographic market claims or outpatient and inpatient services, which, as stated, were held to be plausible. ER 158 (¶53).

impact has been caused. *Illinois Tool*, 547 U.S. at 42-43. No further allegations are required to demonstrate that the antitrust laws have been violated.

The District Court's Order to dismiss the case with prejudice, based solely on a "metes and bounds" analysis, did not consider plaintiffs' claims of Sutter's market power over health plans -- a contention not disputed by Sutter -- or plaintiffs' allegations that such market power is substantiated by direct evidence. This also demonstrates that the Order was erroneous.

Plaintiffs can prove that a defendant possesses market power via direct proof, such as the defendant's power over price or power to foreclose competition, without reference to the alleged relevant market. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) ("Market power . . . may be proven through evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price or exclude competition"); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ("Market power can be proven by [] direct [] evidence" of anticompetitive impact). *See also Se. Milk*, 739 F.3d at 275 ("Plaintiffs do not necessarily need to show geographic market evidence to defeat summary judgment" under a "quick look" analysis). Indeed, "[s]ince the purpose of the inquiries into market definition and market power is to determine . . . the potential for genuine adverse effects of competition, 'proof of

actual detrimental effects[’] can obviate the need” for a market definition analysis. *F.T.C. v. Indiana Fed’n. of Dentists,* 476 U.S. 447, 460-61 (1986).[16]

Here, the TAC recites numerous facts, substantiated by well-recognized and widely-disbursed sources quoting health plans, administrators, a Sutter executive and an economist that show that Sutter has pricing power over health plans. ER 18 (Order at 12); ER 176 (¶ 1) (identifying December 3, 2013 *New York Times* article quoting professor of health care economics at USC saying “Sutter is a leader – a pioneer – in figuring out how to amass market power to raise prices and decrease competition”); ER 199-200 (¶¶ 78-84). These sources identify that Sutter commands a price of as much as approximately 70% more per procedure than its hospital rivals. Moreover, the allegations of the TAC identify how Sutter has caused anticompetitive impact, particularly through its forcing of health plans to accede to its “all or nothing” tying arrangements and anti-steering provisions. ER 177-78, 183-87, 200(¶¶ 5-6, 28-38, 85); *see Fortner Enterprises v. U.S. Steel Corp*., 394 U.S. 495, 504 (1969) (In determining economic power in tying cases, “the proper focus of concern is whether the seller has the power to raise prices, or

[16] In analyzing whether market definition allegations are plausible, a court should consider why markets are defined in the first place -- that is, to determine the existence and extent of defendant’s market power. *Kolon Indus.*, 637 F.3d at 441 (“[M]arket definition . . . serves as a tool to determine defendant’s market power”); *Visa,* 344 F.3d at 239 (“[Ma]rket power may be presumed if the defendant controls a large enough share of the relevant market”); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, §§ 3.1, 3.1a (4th ed. 2011).

impose other burdensome terms such as a tie-in . . ."); *supra* Part II. As the TAC plausibly demonstrates that Sutter wields market power, the District Court should not have dismissed this case.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CASE WITH PREJUDICE.

The TAC should not have been dismissed. The Court's dismissal with prejudice compounds further the error of the Order. "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on *de novo* review that the complaint could not be saved by amendment." *Eminence Capital, L.L.C. v. Aspeon, Inc*., 316 F.3d 1048, 1052 (9th Cir. 2003). Rule 15 of the Federal Rules of Civil Procedure sets a policy of "extreme liberality" establishing that "leave [to amend] shall be freely given when justice so requires." *Id.*; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that Rule 15(a) "mandate" that leave to amend "shall be freely given" is "to be heeded"). In determining whether to grant leave to amend, the Supreme Court commands the consideration of factors—*i.e.*, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman*, 371 U.S. at 182. However, in the *Foman* analysis, "the consideration of prejudice to the opposing party [] carries the greatest weight." *Eminence*, 316 F.3d at 1052; *Howey v. United States*, 481 F.2d 1187, 1190 (9th

Cir. 1973). "The party opposing amendment bears the burden of showing prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *Howey*, 481 F.2d at 1190 ("Unless undue prejudice to the opposing party will result, a trial judge should ordinarily permit a party to amend its complaint").

Here, neither the District Court nor Sutter advanced any argument articulating how Sutter would be prejudiced by amendment. Rather, the District Court justified its dismissal with prejudice merely on the number of opportunities that plaintiffs had to previously amend. ER 28 (Order at 22). The Ninth Circuit disfavors denying leave based on such logic. *See Eminence*, 316 F.3d at 1053 (reversing denial of leave based solely on fact that plaintiffs were given multiple opportunities to replead). This is particularly true where the "plaintiffs had not filed substantially similar complaints alleging substantially similar theories." *Id.*

The TAC, like the complaint at issue in *Eminence,* was not "substantially similar" to prior Complaints filed by plaintiffs here. The prior Complaints filed in this action were not filed by counsel with a specialty in antitrust litigation, they alleged product markets not alleged in the TAC (such as markets for various outpatient services), and they did not rely on a trusted, industry source for defining hospital markets, namely *The Dartmouth Atlas*. The District Court expressly acknowledged this at its March 6, 2014 hearing when it noted that the TAC "was a very different Complaint." ER 32 (Tr. at 4:4) (emphasis added).

The District Court's Order dismissing the TAC should be reversed. As should the District Court's Order dismissing the case with prejudice.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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December 19, 2014

STATEMENT OF RELATED CASES

Plaintiffs-Appellants Sidibe, Dewey, and Jankowski are aware of a case pending before the Superior Court of California, San Francisco, captioned *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC-14-538451. C.R. 28-6. It is unclear whether this is a "related case"; however, that case raises similar issues brought by and on behalf of a different set of entities than those on whose behalf this case is brought.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 11,944 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 it has been prepared in proportionally-spaced typeface, 14-point Times New Roman, using Microsoft Word 2007 processing software.

December 19, 2014

/s/ Matthew L. Cantor
Matthew L. Cantor

ADDENDUM

ADDENDUM

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15 U.S.C. § 15:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term “commercial activity” shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term “foreign state” shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. § 16:

§ 16. Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States

shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite--

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct--

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes

of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

(e) Public interest determination

(1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider--

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court

deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may--

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the

proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Suspension of limitations

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 1:

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> § 2. Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Cal. Bus. & Prof. Code § 16720, *et seq.*:

§ 16720. Trust

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or

transportation of any such article or commodity, that its price might in any manner be affected.

Cal. Bus. & Prof. Code § 17200, *et seq.*:

> § 17200. Unfair competition; prohibited activities
>
> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Matthew L. Cantor
Matthew L. Cantor