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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DJENEBA SIDIBE; et al., Plaintiffs - Appellants, v. SUTTER HEALTH, Defendant - Appellee.	No. 14-16234 D.C. No. 3:12-cv-04854-LB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted July 8, 2016
San Francisco, California

Before: SILVERMAN and NGUYEN, Circuit Judges, and ANELLO,** District Judge.

Djeneba Sidibe and other health plan members appeal the dismissal of their third amended antitrust class action complaint under §§ 1 and 2 of the Sherman Act against Sutter Health, an owner and operator of hospitals and other healthcare

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Michael M. Anello, District Judge for the U.S. District Court for the Southern District of California, sitting by designation.

service providers in Northern California. We have jurisdiction under 28 U.S.C. § 1291, and we review de novo. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). We reverse the district court's judgment and remand for further proceedings.

Sutter sells inpatient hospital services to commercial health insurance plans. Plaintiffs allege that Sutter forced illegal tying arrangements and anti-steering clauses upon the health plans, causing plaintiffs to pay higher health insurance premiums and other healthcare charges. They allege that the relevant geographic markets for the sale of inpatient hospital services are hospital service areas, or "HSAs," as defined in the *Dartmouth Atlas of Health Care*. Each HSA is a collection of specifically-defined zip codes whose residents receive most of their hospitalizations in that local area. Within the tying HSAs, plaintiffs allege that there are no economic substitutes for Sutter's inpatient hospital services sold to health insurance plans. In particular, plaintiffs allege that "Sutter now owns the only acute care hospitals"or offers "the only available hospital facilities to health plan members" in several Northern California HSAs, including Antioch, Burlingame, Roseville, Davis, and Vallejo. Because the market for inpatient hospitalizations is purportedly local, plaintiffs further allege that health plan members residing in an HSA generally do not go outside that HSA to seek

inpatient hospital services; and, even if a hypothetical or actual monopolist raised prices, health plans could not feasibly contract with hospital services providers outside the HSA in these tying markets. *See Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys. Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (explaining that a common method for determining the relevant geographic market "is to find whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ('SSNIP') in the proposed market"). Sutter allegedly leverages its market power in the tying markets to force the health plans to include inpatient services in five other HSAs (the "tied" markets)—such as San Francisco, Oakland, and Sacramento—and to pay supra-competitive rates for these services.

Plaintiffs' geographic market allegations are sufficiently detailed. A geographic market is the area "where buyers can turn for alternative sources of supply." *Id*. Here, the third amended complaint describes the purported "tying" markets, specifically avers that Sutter owns the only inpatient hospital facility in these markets, and alleges that the health plans (and their members) cannot obtain alternative sources of inpatient care in these areas. At the pleading stage, plaintiffs were not required to allege evidentiary facts such as what percentages of patients from inside and outside a particular HSA use the hospitals in that HSA, or to

otherwise rebut every purported flaw in the *Dartmouth Atlas of Healthcare*'s methodology. *See Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1044-45 (9th Cir. 2008). "[T]he validity of the 'relevant market' is typically a factual element rather than a legal element," and inquiry into the commercial realities faced by consumers is more appropriately addressed at summary judgment or trial. *Id*. at 1045; *see also Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 853 (1st Cir. 2016); *Lucas Auto Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762 (9th Cir. 2002) (reversing summary judgment on the basis of a genuine issue of material fact regarding market definition).

Similarly, at this stage, we also cannot say that plaintiffs' geographic market allegations were inherently implausible. *See Newcal*, 513 F.3d at 1045. The third amended complaint explains that HSAs are areas within which the residents obtain most of their inpatient hospital services; it is not inherently implausible that these residents also would be unwilling to seek treatment elsewhere, and that health plans therefore could not purchase hospital services outside of the alleged HSAs. *See Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 183-84 (3d Cir. 2015) (holding that complaint sufficiently alleged facts suggesting that defendant could raise prices without causing consumers to drive elsewhere for full-service supermarkets), *cert. denied*, 2016 WL 1046885 (U.S. May 23, 2016) (No.

15-1156); *cf. Concord Assocs., L.P. v. Entm't Props. Trust*, 817 F.3d 46, 53-55 (2d Cir. 2016) (affirming dismissal of complaint on the basis that plaintiffs' proposed racing/gaming market in the Catskills region was inherently implausible). The district court, employing its judicial experience and common sense, was not bound to conclude that plaintiffs' geographic market allegations were untenable on their face. *See Ebner v. Fresh, Inc.*, 818 F.3d 799, 803 (9th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

REVERSED and REMANDED.[1]

[1] Appellee's request for judicial notice of hospital data from California's Office of Statewide Health Planning and Development, and other facts and matters of public record, is denied.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk