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UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

DEJENEBA SIDIBE and DIANE DEWEY,
on Behalf of Themselves and All Others
Similarly Situated,

No. C 12-04854 LB

**ORDER GRANTING MOTION TO
DISMISS**

Plaintiffs,

[Re: ECF Nos. 15, 17]

v.

SUTTER HEALTH, and DOES 1 through 25,
inclusive,

Defendants.

INTRODUCTION

In this putative class action, Plaintiffs Djeneba Sidibe and Diane Dewey sued Sutter Health, a company that owns and operates hospitals and other health care service providers, alleging that Sutter’s anticompetitive conduct in the health care services industry in Northern California violates federal and state antitrust laws and California’s unfair competition law. *See generally* First Amended Complaint (“FAC”), ECF No. 15.¹ The allegedly anticompetitive conduct includes imposing tying arrangements that require health plans to use Sutter providers or affiliated physician

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the page.

1 groups (even if there are lower-priced alternatives) or be denied the ability to have contracted access
2 to any of them (even in areas where Sutter has monopolies). *Id.* ¶ 143. Plaintiffs also complain that
3 Sutter’s contracts require health plans to incentivize and encourage the use of Sutter’s services and
4 penalize plan members who fail to use them. *Id.* ¶ 144. These arrangements allow Sutter to impose
5 supracompetitive pricing, meaning, pricing above what could be sustained in a competitive market,
6 and to maintain and enhance its monopoly power in Northern California. *Id.* ¶ 143.

7 Sutter moved to dismiss for lack of standing and for failure to state a claim. *See* Motion, ECF
8 No. 15. The court grants Sutter’s motion to dismiss without prejudice and with leave to amend.

9 **STATEMENT²**

10 **I. THE PARTIES**

11 **A. Sutter Health**

12 Defendant Sutter Health is a non-profit corporation organized and existing under California laws,
13 with its principal place of business in Sacramento, California. FAC, ECF No. 11, ¶ 19. Sutter
14 provides health care and related services³ in Northern California through contracts with “health
15 plans” (insurance, employer-sponsored plans, and managed care plans such as health maintenance
16 organizations and preferred provider organizations), including Blue Cross, Blue Shield, Aetna,
17 CIGNA, HealthNet, Interplan, United HealthCare, and others. FAC, ECF No. 11, ¶¶ 2, 35. It
18 “controls the largest and most dominant hospital chain and provider of health care services in
19 Northern California.” *Id.* ¶ 19. Sutter is the parent company of various non-profit and for-profit
20 entities and organizations that operate primarily in Northern California and that are controlled
21
22

23 ² Except for the procedural history, the statement is composed of allegations from the
24 complaint in furtherance of the analysis under Federal Rule of Civil Procedure 12(b)(6).

25 ³ “The provision of health care and related services” includes “inpatient hospital services;
26 outpatient hospital services or ambulatory care; physician services; the services of other health
27 professionals such as nurses, optometrists, psychologists or nutritionists; diagnostic laboratory
28 services; home health services; rehabilitation, physical or occupational therapy; preventive health
services; emergency services; hospice services; chemical dependency services; and psychiatric
services.” *Id.* ¶ 36.

1 directly or indirectly through intermediaries.⁴ *Id.* ¶ 19. “Each Sutter Health Northern California
2 region consists of at least one hospital corporation and a medical foundation corporation.”⁵ *Id.* ¶ 20.
3 Other Sutter entities are members of Sutter’s “Obligated Group,” a financial arrangement that
4 combines the revenues, expenses, assets, and liabilities of the Obligated Group Members. *Id.* ¶ 26.
5 There are other entities affiliated with Sutter, including some in Hawaii and the Cayman Islands.
6 *See id.* ¶¶ 27-30. “[Sutter], its managers and/or directors currently or previously own or owned and
7 control in-whole or in-part” more than 30 additional for-profit entities. *See id.* ¶ 31.

8 The FAC makes allegations about Sutter’s non-profit status, *see id.* ¶¶ 109-123, but also states
9 that “[t]his action does not concern Sutter Health’s non-profit status.” *Id.* ¶ 113. Plaintiffs allege
10 that Sutter “styles itself as a ‘non-profit’” to avoid taxes, but it really is one of the most profitable
11 health care operations in the country. *Id.* ¶ 109. Sutter generates over \$9 billion in annual revenue
12 and as of September 30, 2011, it had accumulated \$4.4 billion in cash and investments. *Id.* ¶ 109.
13 Sutter’s true profits may be higher than this. *Id.* ¶ 111. Sutter also has a “*de facto* network” beyond
14 its “publicly disclosed network” that includes numerous for-profit entities. *Id.* ¶ 110. Sutter
15 provides its managers and directors with “massive salary and benefit packages.” *Id.* ¶ 109. Many of
16 the same individuals have occupied key positions of control at Sutter for the last two decades and
17 that their conduct is “unaccountable and non-transparent.” *Id.* ¶¶ 119-23.

18 **B. Plaintiffs and the Putative Class**

19 Since around October 2005, Plaintiff Djeneba Sidibe is and has been enrolled in a licensed health
20 care plan that has a contractual relationship with Sutter for health care services. *Id.* Sidibe lived in
21 San Mateo County before November 2009, Alameda County from November 2009 to January 2012,
22 and Marin County since January 2012. *Id.* Plaintiff Diane Dewey has lived in San Francisco

23
24 ⁴ A Sutter Health “Affiliated Entity,” as that term is defined in the FAC, is “any organization
25 that directly or indirectly through one of more intermediaries, is controlled by, or is under common
26 control with, Sutter Health. *Id.* ¶ 20. The FAC lists many of these allegedly affiliated entities. *See*
id. ¶¶ 20-31.

27 ⁵ The FAC does not explain the corporate or legal significance of these “regions” but lists
28 Sutter’s alleged holdings in the Central Valley Region, East Bay Region, Peninsula Coastal Region,
Sacramento Sierra Region, and the West Bay Region. *Id.* ¶¶ 21-25.

1 County since 1994. *Id.* ¶ 18. At various times during the relevant period, including the present,
2 Dewey has been enrolled in a licensed health care plan that has a contractual relationship with Sutter
3 for health care services. *Id.*

4 Sidibe and Dewey claim that they and other members of the class have been injured as a result of
5 Sutter’s allegedly anti-competitive conduct by paying more for health care services than they
6 otherwise would have paid. *Id.* ¶¶ 17-18. Plaintiffs allege that Sutter’s conduct “deprive[s] every
7 resident of Northern California of at least several thousand dollars per year.” *Id.* ¶ 101. These
8 higher costs are the result of (1) Sutter’s “contracts with health plans that impose tying,” (2) Sutter’s
9 “contracts with health plans that force those plans to impose exclusivity on their enrollees,” and (3)
10 Sutter’s “contracts with physician groups that force the doctors to refer to Sutter service providers.”
11 *Id.* ¶¶ 98-100.

12 Plaintiffs seek to represent a class, defined as:

13 Any person in the Northern California counties of Alameda, Contra Costa, San Francisco,
14 Marin, Sonoma, Napa, San Mateo, Santa Clara, Santa Cruz, Solano, Yolo, Sutter, Yuba,
15 Nevada, Sacramento, Amador, Placer, El Dorado, San Joaquin, Stanislaus, Merced and Lake,
16 who during all or part of the period beginning September 17, 2008, and continuing until the
17 present (the “Class Period”) was (or is): (1) enrolled in a licensed health care service plan;
18 and (2) the licensed health care service plan simultaneously had (or has) a contractual
19 relationship with Sutter Health or any of its Affiliated Entities for access to health care
20 services.

21 *Id.* ¶ 130.⁶

22 **II. PRICING AND PROVISION OF HEALTH SERVICES**

23 Health care providers such as Sutter typically charge retail prices that are three to ten times
24 higher than their contract prices. *Id.* ¶ 3. As a result, if a health plan does not have contracted
25 access to a hospital or provider, the health plan cannot afford to include the provider in the provider
26 network it makes available to members. *Id.* If the health plan cannot contract with a provider, the
27 provider must remain “outside-of-plan.” *Id.* In order to comply with the requirements of

28 ⁶ Excluded from the Class are defendant, the parent, defendant’s subsidiaries, affiliates,
officers, directors, employees, legal representatives, heirs or assigns, and co-conspirators, and any
federal governmental entities, any judicial officers presiding over this action and the members of
his/her immediate family and judicial staff, and any juror assigned to this action. *Id.* ¶ 131.

1 California’s Knox-Keene Health Care Service Plan Act of 1975 (the “Knox-Keene Act”),⁷ health
2 plans frequently must include a provider even where the provider’s prices are exorbitant. *Id.*

3 Sutter engages in anti-competitive agreements or combinations with health plans that eliminate
4 competition in the market for health care services. *Id.* ¶ 4. Specifically, Sutter

5 engage[s] in conduct designed to severely limit competition by imposing supra-competitive
6 prices through, *inter alia*, the imposition of: (1) tying arrangements that require health plans
7 to use ALL Sutter Health providers or affiliated physicians’ groups (even where less
8 expensive options are available) OR suffer the devastating consequences of having
9 contracted access to NONE of them; and (2) exclusive dealing arrangements that have the
consequence of forcing health plans to require plaintiffs and other members of the class to
obtain all their health care services through Sutter Health providers, Sutter Health affiliated
entities or Sutter Health affiliated physicians’ groups and to penalize members that use non-
Sutter Health providers.

10 *Id.* ¶ 4. By engaging in this conduct, Sutter has intentionally destroyed competition for health care
11 services in Northern California in order to impose prices on the ten million Northern California
12 residents that are 40% to 80% greater than they could obtain in a competitive market. *Id.* ¶ 5. Sutter
13 executed an expansion strategy designed to increase its geographic concentration, local market
14 dominance, and functional reach by acquiring hospitals, physicians’ groups, and providers of
15 ancillary medical services, such as laboratories, radiation services, in-home care, and skilled nursing
16 facilities. *Id.* ¶ 6.

17 Sutter’s expansion strategy and its other anti-competitive practices – including coercive market
18 domination, tying, and unreasonable exclusionary agreements – have stifled competition for health
19 care services in Northern California. *Id.* ¶ 9. For example, purchasers of health care services on
20 behalf of consumers cannot select among the providers in a given region based on quality and price.
21 *Id.* ¶ 9. If a health plan were to insist on selecting providers based on quality and price, they would
22 be denied contracted access to any part of Sutter’s network, which would effectively mean that the
23 health plan could not do business in Northern California at all. *Id.* ¶ 9.⁸ This would have the effect

24
25 ⁷ As described later in the complaint and below on page 6, the Act and its regulations define
26 standards such as time-and-distance accessibility for plan enrollees to access health care providers.
27 *See* FAC ¶ 38.

28 ⁸ As described later in the complaint and below on pages 8 and 9, this results from the tying
and accessibility provisions in Sutter’s contracts with health plans. *See, e.g.*, FAC ¶ 60.

1 of denying some Northern California residents access to any health care services because some parts
2 of the Sutter network are indispensable to health plans attempting to offer a network that complies
3 with California regulations. *Id.* ¶ 9. As a result of Sutter’s alleged conduct, every resident of
4 Northern California, including Plaintiffs and the putative class, have been charged higher prices for
5 health care services than they would have been absent Sutter’s conduct. *Id.* ¶¶ 10-12.

6 **III. THE RELEVANT MARKET**

7 The health care market is unique because purchases can be a matter of life or death. *Id.* ¶ 34.
8 Close substitutes do not exist and the barriers to entry are high. *Id.* Sutter primarily operates in a
9 relevant geographic market defined as “the provision of health care and related services in the
10 following counties: Alameda, Contra Costa, San Francisco, Marin, Sonoma, Napa, San Mateo,
11 Santa Clara, Santa Cruz, Solano, Yolo, Sutter, Yuba, Nevada, Sacramento, Amador, Placer, El
12 Dorado, San Joaquin, Stanislaus, Merced and Lake.” *Id.* ¶ 35.

13 There also is “a relevant market for the provision of contracted access to health care services in
14 Northern California through health plans. *Id.* ¶ 37 (emphasis omitted). This market excludes all
15 parts of the Kaiser network because Kaiser Permanente is a closed system and its services are not
16 available on a contracted basis to health plans. *Id.* ¶ 37 n.3. Health plans in the relevant market
17 “must comply with relevant laws and regulations, including the Knox-Keene Act and the regulations
18 promulgated thereunder.” *Id.* ¶ 37.

19 The Knox-Keene Act and its regulations define the minimum scope of services and accessibility
20 standards for health plans to operate in California. The Plan License Application under the Knox-
21 Keene Act states:

22 The applicant is required to demonstrate that, throughout the geographic regions designated
23 as the plan’s Service Area, a comprehensive range of primary, specialty, institutional and
24 ancillary services are readily available at reasonable times to all enrollees and, to the extent
feasible, that all services are readily accessible to all enrollees.

25 . . .

26 An applicant for plan license must demonstrate compliance with the accessibility
27 requirement in each of the areas specified in paragraphs (i) through (iv) below, either by
28 demonstrating compliance with the guideline specified in such paragraphs or, in the
alternative, by presenting other information demonstrating compliance with reasonable
accessibility. . . .

1 i. Primary Care Providers. All enrollees have a residence or workplace within 30
2 minutes or 15 miles of a contracting or plan operated primary care provider in such
3 numbers and distribution as to accord to all enrollees a ratio of at least one primary
4 care provider (on a full-time equivalent basis) to each 2,000 enrollees.

5 ii. Hospitals. In the case of a full-service plan, all enrollees have a residence or
6 workplace within 30 minutes or 15 miles of a contracting or plan-operated hospital
7 which has a capacity to serve the entire dependent enrollee population based on
8 normal utilization, and, if separate from such hospital, a contracting or plan-operated
9 provider of all emergency healthcare services.

10 iii. Hospital Staff Privileges. In the case of a full-service plan, there is a complete
11 network of contracting or plan-employed primary care physicians and specialists each
12 of whom has admitting staff privileges with at least one contracting or plan-operated
13 hospital equipped to provide the range of basic health care services the plan has
14 contracted to provide.

15 iv. Ancillary Services. Ancillary laboratory, pharmacy and similar services and
16 goods dispensed by order or prescription on the primary care provider are available
17 from contracting or plan-operated providers at locations (where enrollees are
18 personally served) within a reasonable distance from the primary care provider.

19 *Id.* ¶ 38.

20 **IV. SUTTER'S ALLEGED MARKET POWER AND ANTI-COMPETITIVE CONDUCT**

21 Sutter's size and dominant position in the Northern California health care market allow it to
22 exercise market power through its contracts and combinations with health plans in the relevant
23 market. *Id.* ¶ 40. Sutter does this

24 by imposing tying arrangements that require health plans to use ALL Sutter Health providers
25 or affiliated physician's groups in all geographic markets (even where less expensive options
26 are available) OR suffer the devastating consequences of having contracted access to NONE
27 of them; and exclusive dealing arrangements that have the consequence of forcing health
28 plans to require its members to obtain all their health care and related services through Sutter
Health providers, Sutter Health affiliated entities or Sutter Health affiliated physicians'
groups and penalizes members that use non-Sutter Health providers.

Id. ¶ 39.

A. Sutter's Alleged Market Power

Sutter is dominant in the Northern California health care market. *Id.* ¶ 40. Excluding closed
systems such as Kaiser Permanente, Sutter has amassed the following: 100% of the hospital beds in
Placer and Amador counties; 60% of the beds in Alameda and Contra Costa counties; and over 50%
of the beds in San Francisco and Sacramento. *Id.* ¶ 41. Sutter has 35% of the revenue and 36% of
the hospital beds that compete for patients in Northern California. *Id.*

1 Different sources corroborate that Sutter charges more than other hospitals and that this has
2 increased health care costs throughout Northern California. *See generally id.* ¶¶ 42-49. These
3 sources include the Federal Trade Commission, ¶ 42, the California Public Employees’ Retirement
4 System (“CalPERS”) and its officers, ¶¶ 43-44, Blue Cross of California, ¶ 44, Bloomberg, ¶ 45, the
5 Los Angeles Times, ¶ 46, the California Public Interest Research Group (“CALPIRG”), ¶¶ 47-49 &
6 figs. 1-2. The portions of California “exhibiting abnormally high hospital prices and the region
7 comprising Sutter Health’s territory precisely correspond.” *Id.* ¶ 48.

8 **B. The Anti-Competitive Conduct**

9 The “‘systemwide contracts’ negotiated by Sutter Health on an ‘all or none’ basis . . . artificially
10 inflate every dollar of revenue that Sutter Health collects.” *Id.* ¶ 50. Sutter’s strategy is as follows:
11 first, to establish monopolistic market power in certain regions . . . and particular services . . .
12 that are indispensable to health plans seeking to assemble a network that complies with
13 California law and is a credible network to their customers. Second, Sutter Health ties other
14 regions and services to the indispensable ones. Health plans must purchase a laundry list of
15 geographies and services that they do not want in order to purchase the geographies and
16 services that they need. Third, Sutter Health creates a self-reinforcing dynamic by imposing
17 (1) contracts on health plans that force the health plans to penalize the enrollees that use non-
18 Sutter Health services; and (2) contracts on medical groups that include mandatory-referral
19 provisions that force the physicians to refer to Sutter Health even if better or less expensive
20 services are readily available.

17 *Id.* ¶ 50.

18 A “second prong” of Sutter Health’s strategy is to

19 acquire physician groups through Sutter Health’s five medical foundation corporations
20 Sutter Health is the sole member of each of these corporations which contract with multi-
21 specialty medical groups on an exclusive basis to provide physician services to the Sutter
22 Health system’s medical foundation patients. . . . The foundations’ contracts with the medical
23 groups require the physicians in the groups to make referrals to Sutter Health hospitals and
24 its Affiliated Entities. This restraint of trade prevents the doctors from referring their patients
25 to non-Sutter Health facilities or services even when those competing facilities would offer
26 lower prices or higher quality.

24 *Id.* ¶¶ 53-54. For example, the Palo Alto Medical Foundation has contracts with medical groups that
25 include approximately 1,098 physicians. *Id.* ¶ 55. They directed visits, procedures, tests, and
26 surgeries away from non-Sutter hospitals, physicians, and laboratories, even when those competitors
27 offered lower prices or superior quality. *Id.* ¶ 56.

28 In addition, “a commercial reality” related to Sutter’s market power is that its “more potentially

1 formidable competitors, such as Kaiser Permanente, simply shadow price Sutter Health.” *Id.* ¶ 58.
2 According to excerpts from a December 2012 presentation by “HSS, the largest employer in San
3 Francisco,” “Sutter charges the highest fees,” other providers in the “Bay area market . . . shadow
4 Sutter’s prices,” and the lack of competition causes increased premiums. *Id.* ¶¶ 58-59.

5 **1. Tying Allegations**

6 Sutter includes the following tying language in its agreements with health plans:

7 Each payer accessing Sutter Health providers shall designate ALL Sutter Health providers
8 (see Sutter Health provider listing) as participating providers unless a Payer excludes the
entire Sutter Health provider network.

9 *Id.* ¶ 60. This “all or none language . . . in its contracts with health plans is the mechanism through
10 which Sutter Health effectuates its anti-competitive tying conduct.” *Id.* ¶ 61. The intended
11 objective of such language is to prevent health plans from using Sutter facilities only in regions or
12 for services the health plan needs. *Id.* ¶ 62. Absent such language, where Sutter has less market
13 power, the health plans could use non-Sutter facilities. *Id.* Thus, “[t]he effect of such tying is to
14 impose supra-competitive prices and lower quality on the plaintiffs and members of the class.” *Id.*

15 The accessibility standards discussed previously effectively force the health plans to agree to
16 these tying contracts. *Id.* ¶ 63. Under California regulations governing the scope of services that a
17 California health plan must provide, “health plans are obligated to assemble a comprehensive
18 network of a broad spectrum of medical services providers that must be available within a 15-minute
19 radius of every enrollee.” *Id.* ¶¶ 63-64 (quoting Cal. Code Regs. tit. 28, § 1300.67 (2012)). Market
20 pressures also encourage health plans to have as large a coverage area as possible. *Id.* ¶ 64.

21 The health plans’ need to provide as large a coverage area as possible and the accessibility
22 regulations mean that “anyone who is the only provider in a 15-mile radius of one of the required
23 services has a pure monopoly.” *Id.* ¶ 65. Sutter “possesses many hundreds of such monopolies” that
24 allow it to exercise an “under the radar” market power. *Id.* ¶ 65.

25 For example, Sutter owns all but one non-Kaiser hospital in Alameda, and the non-Sutter
26 hospital is 17 miles from the center of Oakland. *Id.* ¶ 66. The result is that any health plan without
27 access to Sutter’s hospitals must require its members to travel to a hospital outside the 15-mile / 30-
28 minute regulatory limit. *Id.* ¶ 66. Thus, the health plans “arguably have a legal obligation under

1 California laws and regulations to gain contracted access to Sutter Health hospitals in Alameda
2 County.” *Id.* ¶ 67.

3 The FAC provides additional examples to show that Sutter “forces health plans to choose
4 between ‘all’ and ‘none,’ and ‘none’ would be a disaster.” *Id.* ¶ 68. These include the failure of “the
5 City of San Francisco’s experiment beginning July 2011 to create to competing Accountable Care
6 Organizations (“ACO”) for city employees.” *Id.* ¶ 68. Plaintiffs assert that this experiment at
7 increasing competition failed because Sutter “limited the availability of contracted rates for
8 emergency room services at Sutter Health hospitals to Sutter Health members,” which forced the
9 non-Sutter ACO to pull out of the experiment and sign a contract with Sutter. *Id.* ¶¶ 68-70. Thus,
10 Sutter “used its market power to scuttle the City of San Francisco’s attempt to create real
11 competition.” *Id.* ¶ 71. Sutter’s tying agreements also affect the market for acute inpatient services
12 in Amador and Placer Counties, and Sutter has substantial market power for various services in
13 “large swatches of the East Bay, . . . Tracy, San Francisco County, and Solano County.” *Id.* ¶ 73.

14 Sutter also engages in tying across regions. *Id.* ¶¶ 74-75. Thus, a health plan that needs access
15 to, for example, Sutter’s Alameda County hospitals, must contract with all of Sutter’s hospitals
16 across Northern California, and all of Sutter’s “affiliated physician groups, laboratories, skilled
17 nursing facilities, home care facilities, device suppliers, and so on.” *Id.* ¶ 74. Furthermore, all of
18 these entities “must in turn refer any patient who needs acute care to Sutter Health hospitals, any
19 patient who needs blood work to Sutter Health labs . . . and so on.” *Id.* ¶ 74. The effect of this is to
20 deprive competing hospitals of customers (even in otherwise competitive areas). *Id.* ¶ 75.

21 Sutter’s own strategic planning document states that its “tying services and regions are
22 ‘indispensable’ to health plans attempting to comply with the minimum scope of services and
23 accessibility standards for California health plans.” *Id.* ¶ 76. Another effect of these practices is that
24 Sutter’s network “does not compete on quality any more than it competes on price.” *Id.* ¶ 77
25 (quoting a California Health Care Coalition report about Sutter).

26 Sutter’s anti-competitive tactics have been successful only because of:

- 27 a. the structure of the relevant market, specifically the fact that the market for contracted
28 access to Sutter Health’s health care services in Northern California is organized on the basis
of the purchase of entire networks of geographic and service coverage by health plans or

1 employers, as opposed to purchases by the patients themselves;

2 b. the lack of price transparency that characterizes the relevant market, a lack of
3 transparency that is fostered and enforced by Sutter Health itself in various ways including
4 contractual prohibitions against health plans publishing Sutter Health’s prices; and

5 c. the trust that patients traditionally place in their doctors, trust that Sutter Health hijacks
6 and subverts for economic gain by forcing health plans and providers to refer and
7 recommend Sutter Health providers, regardless of the quality of care or prices that they offer.

8 *Id.* ¶ 78.

9 Several Sutter strategic planning documents became public during a 1999 trial in which the
10 California Attorney General sought to enjoin Sutter’s purchase of Summit hospital. *See id.* ¶¶ 86-88.

11 Plaintiffs assert that these documents show Sutter’s plan for “market share growth” to obtain a
12 “critical presence” in certain geographic markets and how it uses its market share to stifle
13 competition, increase prices, and “eliminate the health plans’ option to buy services at the margin.”

14 *Id.* ¶¶ 86-88. Hospitals (including Eden Medical Center and Summit Medical Center) that were
15 subsequently acquired by Sutter substantially increased their prices. *Id.* ¶¶ 89-91.

16 2. Exclusivity Language

17 Sutter “also typically includes language such as the following” in its agreements with health
18 plans:

19 *Sutter Health shall require each group health payer accessing Sutter Health providers
20 through the [health plan] network to actively encourage members obtaining medical care
21 to use Sutter Health providers. . . . “[A]ctively encourage” or “active encouragement”*
22 *means incentivizing members to use participating providers through the use of one or more
23 of the following: reduced co-payments, reduced deductibles, premium discounts directly
24 attributable to the use of a participating provider, financial penalties, or requiring such
25 members to pay additional sums directly attributable to the non-use of a participating
26 provider.*

27 *If Sutter Health or any provider learns that a payer either does not actively encourage its
28 members to use network participating providers, . . . Sutter shall have the right upon not less
29 than thirty (30) days’ written notice to terminate that payer’s right to the negotiated rates.
30 In the event of such termination, the terminated payer shall pay for covered services rendered
31 by providers at 100% of billed charges until such time as Sutter reasonably believes and
32 notices that the payer does in fact actively encourage its members to use network
33 participating providers*

34 *Id.* ¶ 92 (emphasis in original). This “exclusivity language” and the “mandatory referral provisions
35 reinforce and spread the anti-competitive effects” of Sutter’s monopolies and tying. *Id.* ¶¶ 93-97.

36 C. Harm to Competition and Consumers Outweighs Pro-Competitive Justifications

1 Sutter’s conduct of “tying and exclusive dealing has resulted in illegal restraints on trade and
2 dramatically increased price[s] paid by consumers for contracted access to health care in Northern
3 California.” *Id.* ¶ 124. Multiple sources corroborate that Sutter’s prices are higher, and its own
4 documents demonstrate the lack of justification or pro-competitive effects of its conduct. *Id.*
5 ¶¶ 124-29.

6 **V. PROCEDURAL HISTORY**

7 Plaintiffs filed an original complaint and then the FAC, which Sutter moved to dismiss. *See* ECF
8 Nos. 1, 11, 15. The FAC alleges the following claims: (1) unreasonable restraint of trade in
9 violation of the Sherman Act Section 1, 15 U.S.C. § 1; (2) monopolization in violation of Sherman
10 Act Section 2, 15 U.S.C. § 2; (3) unreasonable restraint of trade in violation of the Cartwright Act,
11 Cal. Bus. & Prof. Code Section 16720, *et. seq.*; (4) unfair competition, in violation of California’s
12 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code Section 17200, *et. seq.*; and (5) unjust
13 enrichment. FAC, ECF No. 11 at ¶¶ 139-188. Plaintiffs seek the following relief: (1) injunctive
14 relief under the Sherman Act; (2) treble monetary damages, injunctive and declaratory relief, and
15 attorney’s fees and costs under the Cartwright Act; (3) “equitable relief including restitution and/or
16 disgorgement of all revenues, earnings, profits, compensation, and benefits that may have been
17 obtained by Sutter Health as a result of” the UCL violation; and (4) “disgorgement of all profits
18 resulting from [the alleged] overpayments and establishment of a constructive trust from which
19 plaintiffs and members of the Class may seek restitution.” *Id.* ¶¶ 149, 159, 168, 181, 187.

20 **VI. JURISDICTION**

21 This court has subject matter jurisdiction over the Sherman Act claims under 28 U.S.C. §§ 1331
22 and 1337 and supplementary jurisdiction over the state law claims under 28 U.S.C. § 1367. *See id.*
23 ¶¶ 13-14. The court has subject matter jurisdiction over the claims under the Class Action Fairness
24 Act, (“CAFA”), 28 U.S.C. § 1332(d) because the amount in controversy exceeds \$5 million. *Id.*
25 ¶ 15.

26 **ANALYSIS**

27 **I. PLEADING STANDARD**

28 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim showing that

1 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint therefore must provide a
2 defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic*
3 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

4 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does
5 not contain enough facts to state a claim to relief that is plausible on its face. *See id.* at 570. “A
6 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
7 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
8 129 S.Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’
9 but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting
10 *Twombly*, 550 U.S. at 557). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does
11 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
12 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the
13 elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief
14 above the speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals
15 omitted). As to Sherman Act claims, “proceeding to antitrust discovery can be expensive.” *Id.* at
16 558 (addressing pleading standard in Sherman Act Section 1 claims). Thus, the court must “insist
17 upon some specificity in pleading before allowing a potentially massive factual controversy to
18 proceed.” *Id.* The decision explained,

19 stating such a claim requires a complaint with enough factual matter (taken as true) to suggest an
20 agreement was made. Asking for plausible grounds to infer an agreement does not impose a
21 probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable
22 expectation that discovery will reveal evidence of illegal agreement.

22 *Id.*

23 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true
24 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551
25 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In
26 addition, courts may consider documents attached to the complaint. *Parks School of Business, Inc.*
27 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). If the court dismisses the complaint, it should
28 grant leave to amend even if no request to amend is made “unless it determines that the pleading

1 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127
2 (9th Cir. 2000) (quotation omitted).

3 **II. SHERMAN ACT CLAIMS**

4 Plaintiffs allege violations of sections 1 and 2 of the Sherman Act.

5 Section 1 prohibits (1) a contract between two or more unrelated persons or distinct businesses
6 entities (2) that the persons or entities intend to harm or unreasonably restrain competition and (3)
7 that actually injures competition. *See Twombly*, 550 U.S. at 548; *Kendell v. Visa U.S.A., Inc.*, 518
8 F.3d 1042, 1047 (9th Cir. 2008). Section 2 prohibits monopolies. A section 2 claim has two
9 elements: “(1) the possession of monopoly power in the relevant market; and (2) the willful
10 acquisition or maintenance of that power as distinguished from growth or development as a
11 consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell*
12 *Corp.*, 384 U.S. 563, 570-571 (1966).

13 Plaintiffs charge that Sutter’s contracts with health plans are unlawful tying or exclusive dealing
14 arrangements that violate section 1 by injuring competition and section 2 by enabling Sutter to
15 maintain and enhance its monopoly power for health-care services. *See* FAC ¶¶ 143, 152-55.

16 An exclusive dealing arrangement is when a seller agrees with a buyer to sell its products or
17 services only to that buyer, or the buyer agrees to buy only from the seller. *See Allied Orthopedic*
18 *Appliances v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). To violate section 1 as
19 an unlawful exclusive-dealing arrangement, a threshold requirement is that the contract foreclose a
20 substantial percentage of the market as a whole from competition. *See id.*

21 Tying involves an agreement by the seller to sell a product (the “tying” product) only if the buyer
22 also will buy a different product (the “tied” product) (or at least agree not to buy it from anyone
23 other than the seller). *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). An
24 unlawful tying arrangement requires an anticompetitive effect. *See Cascade Health Solutions v.*
25 *PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008) (seller must possess appreciable economic power in
26 the tying product market to coerce purchase of the tied product, and the tying arrangement must
27 affect more than an insubstantial volume of commerce in the tied product market).

28 In addition to establishing the elements of the Sherman Act claims, plaintiffs must plead “that

1 they were harmed by the defendant’s anticompetitive contract . . . and that this harm ‘flowed from an
2 anti-competitive aspect of the practices under scrutiny.’” *Brantley v. NBC Universal, Inc.*, 675 F.3d
3 1192, 1197 (9th Cir. 2012) (quoting *Atlantic Ritchfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344
4 (1990)); accord *Allied Orthopedic*, 592 F.3d at 998. “This fourth element is generally referred to as
5 ‘antitrust injury’ or ‘antitrust standing’” (as is explained in more detail in the next section). See
6 *Brantley*, 675 F.3d at 1197 (citing as an example *Atlantic Ritchfield Co.*, 495 U.S. at 344).

7 Sutter challenges Plaintiffs’ antitrust standing⁹ and also argues that they fail to state a claim.

8 **A. Standing**

9 Sutter argues that Plaintiffs do not have antitrust standing under the Sherman Act because (a)
10 they did not allege sufficiently that they were customers of Sutter, and (b) they are not parties to the
11 contracts and instead are only indirect purchasers of Sutter’s services. See Motion, ECF No. 15 at
12 13-18.

13 *Associated General Contractors* set forth factors that a court should consider when evaluating
14 antitrust standing:

- 15 (1) the closeness or the causal connection between the violation and the harm to the plaintiff;
- 16 (2) whether the defendant intended to cause the harm to the plaintiff that it caused;
- 17 (3) the nature of the plaintiff’s alleged injury, including whether the plaintiff was a customer or
18 competitor in the relevant market affected by the violation;
- 19 (4) the directness or indirectness of the injury, including whether there are other victims whose

20
21 ⁹ Sutter does not challenge Plaintiffs’ constitutional or prudential standing. Article III’s
22 constitutional requirements are as follows: (1) the party invoking federal jurisdiction must have
23 suffered some actual or threatened injury; (2) the injury must be fairly traceable to the challenged
24 conduct; and (3) a favorable decision would likely redress or prevent the injury. See *Friends of the*
25 *Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC)*, 528 U.S. 167, 180-81, 185 (2000). The prudential
26 limitations on federal court jurisdiction require the following: (1) a party must assert his own legal
27 rights and interests, not those of others; (2) courts will not adjudicate “generalized grievances;” and
28 (3) a party’s claims must fall within the zone of interests that is protected or regulated by the statute
or constitutional guarantee in question. See *Valley Forge Christ. College*, 454 U.S. at 474-75;
Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122 (9th Cir. 2009). The court finds that Plaintiffs
sufficiently pleaded Article III standing based on their allegations about paying more for services.
See FAC ¶¶ 17, 18, 171. Also, as discussed below, in any amended complaint, they can add
allegations about the out-of-pocket expenses that they incurred. See Opposition, ECF No. 20 at 11
& n.3 (additional allegations).

- 1 injury was more direct and who are likely to sue;
- 2 (5) whether Plaintiff's damages are highly speculative;
- 3 (6) the risk of duplicative recovery; and
- 4 (7) the complexity in apportioning damages.

5 *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-
6 46 (1983); *American Ad Mgmt., Inc. v. General Telephone Co. of Cal.*, 190 F.3d 1051, 1054-55 (9th
7 Cir. 1999) (listing the factors somewhat differently by joining closeness and causal connection with
8 directness and characterizing the nature of the alleged injury as whether it was the type of injury
9 antitrust laws were designed to forestall). The only factor that a plaintiff must show is antitrust
10 injury. *See Associated Gen. Contractors*, 459 U.S. at 535. Otherwise, the other factors are not
11 absolute requirements and instead are balanced by the court to determine antitrust standing. *Id.*; *see*
12 *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997). "No single factor is decisive." *R.C. Dick*
13 *Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc).

14 In a case – such as this one – that involves only a claim for injunctive relief under the Sherman
15 Act, the factors regarding complex issues of damages or speculative or duplicative recoveries do not
16 apply. *See Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467 (9th Cir. 1995); *Bubar v. Ampco Foods,*
17 *Inc.*, 752 F.2d 445, 449 n.2 (9th Cir. 1985); Reply, ECF No. 24 at 8 (acknowledging the point); FAC
18 ¶¶ 139-159 (injunctive relief only).

19 Plaintiffs allege that they have been enrolled in a licensed health care plan that has a contractual
20 relationship with Sutter for health care services." FAC ¶¶ 17-18. Sutter argues that they should
21 plead more facts to establish their connection with Sutter and points to their failure to allege the
22 following:

- 23 • Where plaintiffs purchased their health plans or what health plans they had;
- 24 • Any details as to the nature of the specific health plans and whether those health plans
25 contain the "tying" or "exclusive dealing" language that plaintiffs allege to violate the
26 Sherman Act;
- 26 • Whether Plaintiffs ever received medical care from a Sutter provider (or, for that matter, any
27 other provider);
- 27 • Whether Plaintiffs ever paid Sutter directly for any medical care;
- 28 • Any details that would demonstrate that the price that plaintiffs paid to any healthcare

1 provider other than a Sutter provider might somehow have been affected by Sutter’s so-
2 called antitrust violations.
3 Motion at 15-16. Sutter’s larger argument is that Plaintiffs are not parties to the contracts between
4 Sutter and their health plans. They did not pay money to Sutter; their health plans did. Thus, any
5 injury to them is indirect, and as “indirect purchasers,” they lack standing under *Illinois Brick co. v.*
6 *Illinois*, 431 U.S. 720 (1977)). *Id.* at 16-17.

7 The Ninth Circuit has parsed “antitrust injury” into four requirements: (1) unlawful conduct,
8 (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and
9 (4) that is of the type the antitrust laws were intended to prevent.” *American Ad Mgmt., Inc.* 190
10 F.3d 1051, 1055 (9th Cir. 1999). Sutter’s preliminary argument is really about requirements 2
11 through 4, and this section addresses only those requirements and discusses in the next section
12 whether Plaintiffs sufficiently pleaded unlawful conduct (and concludes that they did not).

13 Assuming unlawful conduct in the form of tying and exclusive dealing that reduced competition
14 from independent medical service providers and other medical provider networks, *see* FAC, ECF
15 No. 11 at ¶¶ 54-56, 60, 80, 98-100, Plaintiffs allege that they were harmed because they are
16 “enrolled in a licensed health care plan that has a contractual relationship with Sutter Health for
17 health care services” and – as a result of the unlawful conduct – incurred inflated health care
18 expenses in the form of higher premiums, co-payments, and out-of-pocket costs for other services.
19 *See id.* ¶¶ 17, 18, 171. At the pleadings stage, the allegations are sufficient.

20 First, the court observes that Plaintiffs had more robust allegations in their opposition brief about
21 their deductibles, co-pays, out-of-pocket expenses as direct purchasers of services that are consistent
22 generally with their allegations already in the complaint. *See* Opposition, ECF No. 20 at 11 & n.3.
23 In response to this proffer and the clarification that Plaintiffs seek only injunctive relief on the
24 Sherman Act claims, Sutter points out that the allegations are not in the complaint,¹⁰ Plaintiffs never
25 alleged that they visited a Sutter facility, and plaintiffs do not allege an injury (such as increased co-
26 payments) that plausibly is antitrust injury. *See* ECF No. 24 at 7-11.

27
28 ¹⁰ The court considers the allegations in the opposition only to illuminate what the
complaint’s allegations mean, not to supplement the complaint.

1 In *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (*overruled on other grounds by*
2 *Lacey v. Maricopa Co.*, 693 F.3d 896, 925 (9th Cir. 2012)), the Ninth Circuit found standing on
3 summary judgment when the plaintiffs established that the practice of diverting indigent patients to
4 other hospitals and threatening physicians who did not support its monopoly resulted in higher
5 prices for hospital services that “translated into higher copayments and premium payments.” *Id.*
6 “Such an increase in consumer prices caused by the asserted conduct would constitute antitrust
7 injury of the type the antitrust laws were designed to prevent.” *Id.*

8 Sutter points out that the *Forsyth* plaintiffs received care from the defendant hospital and paid
9 co-payments for those services. Reply, ECF No. 24 at 10. The court appreciates that receipt of
10 services presents a different antitrust injury. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 468
11 (1982) (plaintiff was denied reimbursement for costs of psychotherapy services that she received).
12 But the *Forsyth* court found antitrust injury based not only on increased copayments but also on
13 increases in premium payments, see 14 F.3d at 925, and Plaintiffs here alleged that higher premiums
14 (and increased costs) resulted from Sutter’s allegedly anti-competitive conduct. See FAC ¶¶ 17
15 (refers to paying more for health care services), 18, 171.

16 Second, as to Sutter’s argument that Plaintiffs are not parties to the contract and do not
17 participate in the relevant market because they are not health plans or medical providers, certainly
18 “the injured party [must] be a participant in the same market as the alleged malefactors.” *In re*
19 *Dynamic Random Access Memory (DRAM) Antitrust Litig.* (“*DRAM I*”), 536 F. Supp. 2d 1129,
20 1137-38 (N.D. Cal. 2008) (collecting cases). But foreclosed physicians, patients, and health plans
21 have challenged exclusive arrangements between hospitals and hospital-based physicians as
22 unlawful tying arrangements or unlawful exclusive-dealing arrangements, and the standing analysis
23 is not different merely because the challenged conduct is about exclusive arrangements with health
24 plans and health-care service providers. Courts “routinely recognize the antitrust claims of market
25 participants other than consumers or competitors.” *American Ad. Mgt.*, 190 F.3d at 1057; see also
26 *DRAM II*, 536 F. Supp. 2d at 1140. Here, Plaintiffs allege that Sutter, through its allegedly
27 anticompetitive conduct in the market for the health care services that they received through their
28

1 health plans, caused them to pay higher prices for health care services,¹¹ premiums, and co-pays.
2 *See, e.g.*, FAC ¶¶ 148-58. These allegations of injury are sufficient at this stage of the case to show
3 injury that is directly related to Sutter’s actions for purposes of Plaintiffs’ Sherman Act claims for
4 injunctive relief only. *Cf. Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers lack
5 standing to seek damages against a manufacturer for alleged violations of federal antitrust laws);
6 *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1145 (9th Cir. 2003) (“*Illinois Brick*
7 doesn’t apply to equitable relief”).

8 **B. Failure to State a Claim**

9 ***1. Unlawful Tying or Exclusive Dealing Arrangements***

10 Both Sherman Act claims are about unlawful tying or exclusive dealing arrangements. *See* FAC
11 ¶¶ 143, 152-55. Sutter argues that Plaintiffs did not identify either. Motion, ECF No. 1 at 18-19.

12 Plaintiffs allege Sutter’s “strategy” to establish monopoly power and acquire physician groups.
13 FAC ¶¶ 50-59 (summarized on page 8). Plaintiffs’s introduction refers to Sutter’s (1) imposition of
14 all-or-nothing “tying arrangements” that require health plans to use Sutter health providers or
15 affiliated physicians or lose contracted access to any of them and (2) exclusive dealing arrangements
16 between plans and Sutter providers or affiliated entities. FAC ¶ 4. They also point to the following
17 “tying” language that Sutter includes in its agreements with health plans: “Each payer accessing
18 Sutter Health Providers shall designate ALL Sutter Health Providers . . . as participating providers
19 unless a Payer excludes the entire Sutter Health provider network.” *Id.* ¶ 60. They explain that the
20 exclusive dealing arrangements require health plans to “actively encourage” patients who use a
21 Sutter provider to use other Sutter providers. *Id.* ¶ 92; *see supra* pages 9-11 (excerpting allegations).

22 As Sutter points out, this is managed care.¹² Opposition, ECF No. 15 at 20. The “exclusive
23

24 ¹¹ As discussed above, the FAC defines “the provision of health care and related services” as
25 including a wide range of medical services including inpatient and outpatient hospital services and
26 physician services. FAC ¶ 36.

27 ¹² Sutter submitted a Request for Judicial Notice with reports by “five of California’s largest
28 health plans – Aetna, Blue Cross, Blue Shield, Cigna, and Heath Net – that [Sutter asserts]
demonstrate that” “all major health plans have contracts with many of Sutter’s competitors.”
Motion, ECF No. 15 at 20-21 & n.2; Request for Judicial Notice, ECF No. 17 at 3-5 (asking for

1 dealing” allegations do not show substantial foreclosure or a requirement to purchase services only
2 from service providers with an exclusive contract. *See Allied Orthopedic Appliances*, 592 F.3d at
3 996. The tying allegations – contracting with one Sutter provider requires contracting with the other
4 Sutter providers – do not allege a requirement that patients can choose only Sutter providers, and the
5 complaint alleges no facts about anticompetitive effect in the form of, for example, an effect on more
6 than an insubstantial volume of commerce. *See Cascade Health Solutions*, 515 F.3d at 913.
7 Plaintiffs allege that Sutter’s conduct “destroys” and “stifles” competition, *see* FAC ¶¶ 3-12
8 (summarized *supra* on page 5) and “dramatically increased price[s],” *id.* ¶ 124, but these allegations
9 are conclusory. Also, as Sutter points out, high prices alone are not necessarily anticompetitive.
10 Opposition, ECF No. 15 at 27-28; *see Grinnell Corp.*, 384 U.S. at 570-71. The allegations do not
11 show predatory conduct resulting in or enhancing monopolization.

12 Plaintiffs must provide some factual support for each essential element of the violations they
13 allege. They did not do so.

14 **2. The Relevant Market**

15 Plaintiffs’ Sherman Act claims require Plaintiffs to establish market power in a “relevant
16 market,” meaning a relevant product market and a relevant geographic market. *See Omega*
17 *Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1169 (9th Cir. 1997) (exclusive dealing);
18 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42-43 (2006) (tying); *Spectrum*
19 *Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (monopolization); *Newcal Industries, Inc. v.*
20 *Ikon Office Solutions*, 513 F.3d 1038, 1044-45 & n.3 & n.4 (9th Cir. 2008) (standards the same
21 under Sections 1 and 2). The relevant product market identifies the products or services that

22 _____
23 judicial notice because the reports were filed with the California Department of Managed Health
24 Care (“DMHC”) pursuant to the plans’ statutory obligations under the Knox-Keene and DMHC
25 regulations; analogizing to cases taking judicial notice of public disclosure documents required to be
26 filed with the U.S. Securities and Exchange Commission and cases involving recording of real-estate
27 public records); *see supra* pages 6-7 (describing Knox-Keene Act’s 15-minute/30-mile scope of
28 service and accessibility requirements for California health plans). Plaintiffs oppose the motion as
an impermissible attempt to determine factual issues on a motion to dismiss. Opposition to Request
for Judicial Notice, ECF No. 22 at 4-11. The court does not need to take judicial notice to grant the
motion to dismiss and thus denies as moot the request for judicial notice.

1 compete with each other, and the relevant geographic market identifies the area where the
2 competition in the relevant product market takes place. *See Los Angeles Mem'l Coliseum Comm'n*
3 *v. NFL*, 726 F.2d 1381, 1392 (9th Cir. 1974). A complaint may be dismissed under Rule 12(b)(6) if
4 its “relevant market definition is facially unsustainable.” *Newcal Indus.*, 513 F.3d at 1044-45 & n.3.

5 Plaintiffs allege that the relevant market is “the provision of health care and related services” in
6 22 counties in Northern California. FAC ¶ 35. They define “health care and related services” as
7 including but not limited to the following: inpatient hospital services; outpatient hospital services;
8 physician services; services of other providers such as nurses, optometrists, psychologists, or
9 nutritionists; diagnostic laboratory services; home health services; rehabilitation; physical or
10 occupational therapy; preventive health services; emergency services; hospice services; chemical
11 dependency services; and psychiatric services. *Id.* ¶ 36. Plaintiffs also allege, “[m]ost importantly
12 for this action, there is a relevant market for the provision of contracted access to health care
13 services through health care plans” (except for the closed-system Kaiser network) that must comply
14 with the Knox-Keene Act. *Id.* ¶ 37.

15 As to the definition of the “product market,” it is broad, and it is not apparent on the face of the
16 complaint why it is a plausible market. This is not a case where all the services may be combined
17 into a single relevant market. *See Morgan, Strand, Wheeler & Biggs v. Radiology*, 924 F.2d 1484,
18 1489-90 (9th Cir. 1991) (in determining relevant product market for, and who competed with,
19 private radiologists, the court included office interpretations of radiology tests by nonradiologists
20 and services provided by osteopathic radiologists and radiologists working at university hospitals);
21 *Weiss v. York Hosp.*, 745 F.2d 786, 826 (3d Cir. 1984) (“inpatient health care services” are a
22 legitimate cluster market because a consumer of hospital services makes one purchase decision
23 where to be hospitalized and subsequent treatment decisions are insulated from competitive effect).
24 By contrast, the services here are not substitutes or related services “that enjoy reasonable
25 interchangeability of use and cross-elasticity of demand.” *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d
26 1440, 1446 (9th Cir. 1988); *see also Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir.
27 2001). The only broad thing that Plaintiffs allege – without any factual support – is that it is one
28 product market because it is all about contracted access to all health care services through health

1 plans.

2 The geographic market similarly is defined broadly: 22 counties where Sutter provides services.
3 The only support for that definition is the same argument that it is one market because it is about
4 contracted access to services through health plans. If patients and their health plans are the
5 purchasers, the relevant geographic market should be local, particularly given the interplay with the
6 Knox-Keene Act's 15-minute/30-mile scope of service and accessibility requirements. Patients (or
7 their physicians or health plans involved in the choice of where the medical services are provided)
8 do not travel over large geographic areas for services. This suggests that the providers located
9 outside the relatively small geographic area cannot foreclose a substantial percentage of the market
10 from competition, *see Allied Orthopedic Appliances*, 592 F.2d at 996, or affect more than an
11 insubstantial volume of commerce in the tied product market, *see Cascade Health Solutions*, 515
12 F.3d at 913.

13 Even assuming that some kind of 22-county regional geographic market could be established for
14 managed care through health plans (which is all that Plaintiffs have alleged), Plaintiffs do not allege
15 facts showing Sutter's market power either in the entire region or in particular counties.

16 In sum, Plaintiffs do not allege specific products (and instead allege products in the form of
17 contracted access to health care services through health plans), and they do not allege any specific
18 geographic areas (and instead allege an amorphous region of 22 counties that is not tethered to any
19 factual allegations about Sutter's market power). The allegations about the relevant market do not
20 identify the services that compete with each other or the geographic area where competition takes
21 place. *See Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1392. The allegations thus are
22 facially unsustainable. *See Newcal Industries, Inc.*, 513 F.3d at 1044-45 & n.3.

23 **III. CARTWRIGHT ACT CLAIM**

24 Plaintiffs allege that Sutter violated California's Cartwright Act, which prohibits any
25 combination "[t]o prevent competition in . . . the sale or purchase of merchandise . . . or any
26 commodity. FAC, ¶¶ 160-168; Cal. Bus. & Prof. Code § 16720(c); *Knevelbaard Dairies v. Kraft*
27 *Foods*, 232 F.3d 979, 986 (9th Cir. 2000). Plaintiffs' claim rests on the same allegations of tying
28 and exclusive dealing arrangements. *See, e.g.*, FAC ¶ 162. Sutter challenges Plaintiffs' antitrust

1 standing and also argues that they fail to state a claim. Opposition, ECF No. 15 at 21-22. The court
2 holds that Plaintiffs fail to state a claim.

3 **A. Standing**

4 Antitrust standing under the California Cartwright Act is broader than under the federal Sherman
5 Act. See *Knevelbaard Dairies*, 232 F.3d at 987, 991. The parties disagree about whether the
6 *Associated General Contractors* factors apply and – if they do – whether Plaintiffs have standing.
7 Motion, ECF No. 15 at 29; Reply, ECF No. 24 at 8-12; Opposition, ECF No. 20 at 12-13. The
8 California courts have not decided the issue (although intermediate appellate courts have applied the
9 factors). See *In Re Flash Memory Antitrust Litig.*, 643 F.Supp. 1133, 1151-52 (N.D. Cal. 2009); *In*
10 *re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007) . The
11 Ninth Circuit has not addressed the issue. Courts in this district have reached different conclusions.
12 The court’s view is that the cases that do not require the factors are persuasive. See *In re Graphics*
13 *Processing Units Antitrust Litig.*, 540 F. Supp. 2d at 1097 (N.D. Cal. 2007) (“some California
14 appellate courts have used the AGC test . . . [but t]his is not the same as showing that AGC has been
15 adopted”; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1120-24 (N.D. Cal.
16 2008) (need clear directive from state legislature or high court; plaintiffs had standing under factors
17 anyway; *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143 RS, 2011 WL 3894376, at *11-
18 12 (N.D. Cal. Aug. 3, 2011) (finding plaintiff had standing based on reasoning in *In re TFT-LCD*).

19 Because Plaintiffs fail to state a claim, the court does not decide the standing issue but likely
20 would find standing. The analysis under the Sherman Act about nature of the injury is the same.
21 The issue about Plaintiffs’ status as indirect purchasers might be relevant to a Sherman Act damages
22 claim under *Illinois Brick*, but they are not dispositive under the Cartwright Act because California
23 courts have allowed indirect purchasers to pursue Cartwright Act claims that arise from agreements
24 to restrain trade. See *In Re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp.
25 2d 1072, 1087 (N.D. Cal. 2007); Opposition, ECF No. 15 at 29 n.7. The allegations about damages
26 appear sufficient at the pleadings stage. The risk of duplicative recovery does not appear to be an
27 issue in this kind of case where no direct purchasers are bringing claims, and it seems unlikely that
28 they will.

1 **B. Failure to State a Claim**

2 Plaintiffs' claim rests on the same allegations about tying and exclusive dealing. Thus, Plaintiffs
3 fail to state a Cartwright Act claim for the same reasons that they failed to state a section 1 Sherman
4 Act claim.

5 **IV. THE UNFAIR COMPETITION LAW CLAIM**

6 Plaintiffs also charge that the tying and exclusive dealing is unfair competition in violation of
7 California's Unfair Competition Law ("UCL"), which prohibits unlawful or unfair business
8 practices. *See* FAC ¶ 172; Cal. Bus. & Prof. Code § 17200.¹³ As to the "unlawful" prong, the claim
9 fails for the same reasons as the antitrust claims fail. As to the unfairness prong, as discussed above,
10 Plaintiffs' allegations about tying and exclusive dealing challenge managed care and do not allege
11 facts that enable the court to conclude that the complaint plausibly states an unfairness claim. In any
12 event, the court would decline to exercise supplemental jurisdiction over the claim. *See* 28 U.S.C.
13 § 1367.

14 **V. UNJUST ENRICHMENT**

15 Plaintiffs claim for unjust enrichment is based on Sutter's retention of their overpayments and it
16 is predicated on the same allegations about tying and exclusive dealing. *See* FAC ¶¶ 183-88. Sutter
17 argues that unjust enrichment is not an independent cause of action under California law. Motion,
18 ECF No. 15 at 30.

19 If a plaintiff invokes a valid theory of recovery, California courts allow claims for "unjust
20 enrichment" to proceed, regardless of the label attached to the cause of action. *See In re TFT-LCD*
21 *(Flat Panel) Antitrust Litig.*, No. C 10-5616 SI, MDL No. 1827, 2012 WL 506327, at *4 (N.D. Cal.
22 Feb. 15, 2012). "To state a claim for restitution, a plaintiff 'must plead receipt of a benefit and the
23 unjust retention of the benefit at the expense of another.'" *Walters v. Fid. Mortg. of Cal.*, No. 2:09-
24 cv-3317 FCD/KJM, 2010 WL 1493131, at *12 (E.D. Cal. Apr. 14, 2010) (quoting *Lectrodryer v.*
25 *SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)). Courts in this district hold that California law
26 permits restitution to be awarded for unjust enrichment "either (1) in lieu of breach of contract
27

28 ¹³ The "fraudulent" prong of the UCL is not implicated by the lawsuit.

1 damages, where an asserted contract is found to be unenforceable or ineffective, or (2) where the
2 defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct, but
3 the plaintiff has chosen not to sue in tort.” *Oracle Corp. v. SAP AG*, No. C 07-1658 PJH, 2008 WL
4 5234260, at *8 (N.D. Cal. Dec. 15, 2008)).

5 For the same reasons that Plaintiffs fail to state antitrust or UCL claims, they fail to state a claim
6 for unjust enrichment. The court also would decline supplementary jurisdiction.

7 **CONCLUSION**

8 The court grants Sutter’s motion to dismiss and denies as moot its request for judicial notice.
9 Plaintiffs have 28 days from the date of this order to file a second amended complaint.

10 This disposes of ECF Nos. 15 & 17.

11 **IT IS SO ORDERED.**

12 Dated: June 3, 2013


LAUREL BEELER
United States Magistrate Judge

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