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14  
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 FOR THE CITY AND COUNTY OF SAN FRANCISCO

17 UFCW & Employers Benefit Trust, on behalf  
of itself and all others similarly situated

18 Plaintiffs,

19 vs.

20 Sutter Health, et al.,

21 Defendants.

22  
23 People of the State of California, ex. rel.  
Xavier Becerra,

24 Plaintiff,

25 vs.

26 Sutter Health,

27 Defendant.  
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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

**06/24/2019**  
Clerk of the Court  
BY: VANESSA WU  
Deputy Clerk

**Case No. CGC 14-538451**  
**Consolidated with**  
**Case No. CGC-18-565398**

**PLAINTIFFS' NOTICE OF MOTION AND  
UNOPPOSED MOTION TO MODIFY THE  
CLASS DEFINITION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT**

Date: July 10, 2019  
Time: 9:15 A.M.  
Dept.: 304  
Judge: Hon. Anne-Christine Massullo

Action Filed: April 7, 2014  
Trial Date: August 12, 2019

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1 **NOTICE OF MOTION**

2 TO THE COURT AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE THAT, on July 10, 2019, at 9:15 a.m., or as soon thereafter as the  
4 parties may be heard, in Department 304 of the Superior Court, County of San Francisco, 400  
5 McAllister Street, San Francisco, California 94102, Plaintiffs UFCW & Employers Benefit Trust, et  
6 al. (“Plaintiffs”) will and hereby do move for an order modifying the class definition to exclude  
7 certain claims, namely, those (1) paid to Sutter in connection with Blue Shield’s Flex Funded  
8 products; (2) paid through UMR, a subsidiary of UnitedHealthcare; (3) paid by class members who  
9 were not part of the class prior to specific dates in 2016 (with the exact date dependent on the date  
10 of prior health plan data productions as specified herein); and/or (4) paid later than 2018-2019 (with  
11 exact date dependent on date of the health plan data productions as specified herein).

12 This motion is made pursuant to the California Code of Civil Procedure section 382,  
13 California Rules of Court, rule 3.764(a)(3), and the stipulated briefing schedule for this motion, and  
14 is based on this Notice of Motion, the Memorandum of Points and Authorities in Support filed  
15 herewith, the declaration of Sarah Grossman-Swenson and exhibits filed in support of this motion,  
16 the pleadings and documents on file in this action, and such argument and evidence as the Court  
17 may permit at the hearing.

18  
19 Dated: June 24, 2019

Respectfully submitted,

20 By: /s/ Richard L. Grossman

21 Richard L. Grossman  
22 Attorney for Plaintiff Class

23 By: /s/ Emilio E. Varanini

24 Emilio E. Varanini  
25 Attorney for Plaintiff People of the State of  
26 California  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Upon motion by a certified class of plaintiffs, courts routinely modify class definitions to  
4 narrow the class definition and conform the definition to the evidence available prior to trial.  
5 Indeed, one federal court recently commented that it was not aware of any case where a court had  
6 rejected a plaintiff’s request to narrow a class definition after certification. *In re Whirlpool Corp.*  
7 *Front-Loading Washer Prod. Liab. Litig.*, 302 F.R.D. 448, 465 (N.D. Ohio 2014). Modifying the  
8 class definition pursuant to a request from plaintiffs is particularly appropriate where the motion is  
9 unopposed and would eliminate the need for the parties to devote time and resources to discovery  
10 and motion practice. *See Ades v. Omni Hotels Mgmt. Corp.*, No. 13-2468-CAS (MANx), 2015 U.S.  
11 Dist. LEXIS 126121, \*5 (C.D. Cal. Sept. 21, 2015).

12 Here, Plaintiffs UFCW & Employers Benefit Trust et al. (“Plaintiffs”) seek Court approval  
13 to modify the class definition in this case to exclude certain newly-identified claims and class  
14 members in order to streamline issues in the case and to ensure that the case may proceed to trial in  
15 September 2019. The Court recently denied Sutter’s motion to decertify the class, holding that the  
16 class was properly certified and continues to be properly certified. *See* June 20, 2019 Order on  
17 Decertification. Plaintiffs seek a minor modification of the class definition, excluding certain  
18 claims based on more recently-available evidence, in order to streamline the issues and ensure the  
19 case is ready for trial in September 2019. Sutter does not oppose the modification. Plaintiffs’  
20 motion should be granted.

21 **SUMMARY OF FACTS AND PROCEDURE**

22 After extensive discovery and briefing, this Court issued an order certifying a class of self-  
23 funded payor plaintiffs on August 14, 2017, that had compensated Sutter for services between 2003  
24 and the present pursuant to contracts between Sutter and six different health plans that provided  
25 network access to self-funded payors. *See* Aug. 14, 2017 Class Certification Order at 2. Plaintiffs  
26 proposed the following class definition in connection with their motion:

27 All self-funded payors that are (a) citizens of California for purposes of 28 U.S.C.  
28 § 1332(c)(1) or (d)(10) or (b) arms of the State of California and that compensated  
Sutter for general acute care hospital services or ancillary products at any time

1 from January 1, 2003 to the present at prices set by contracts between Sutter and  
2 Aetna, Anthem, Blue Shield, Cigna, PacifiCare, or United Healthcare.

3 *Ibid.* In granting the motion for class certification, the Court stated that it anticipated “a further  
4 order on class certification which includes a precise definition of the class.” Aug. 14, 2017 Order  
5 at 32. The Court then modified the class definition as follows:

6 All self-funded payors that are citizens of California for purposes of 28 U.S.C.  
7 § 1332(d) or arms of the State of California and that compensated Sutter for  
8 general acute care hospital services or ancillary products at any time from January  
9 1, 2003 to the present at prices set by contracts between Sutter and Aetna, Anthem,  
Blue Shield, Cigna, Pacificare or United Healthcare.

10 *See* September 29, 2017 Order Regarding Inclusion of Governmental Entities in the Class at 3.

11 On August 31, 2018, on the last day of fact discovery, in accordance with the Court’s case  
12 management orders, Plaintiffs served their expert reports on Defendants, including a report on the  
13 damages incurred by the plaintiff class that was authored by Dr. Jeffrey Leitzinger. Dr.  
14 Leitzinger’s damages report analyzed damages for self-funded payors that had claims arising  
15 between January 1, 2003, and various dates in 2016, depending on the last available date of the data  
16 production from each health plan prior to the close of discovery.<sup>1</sup>

17 ***Production of Additional Claims Data:*** One month before Plaintiffs’ expert reports were  
18 due, on July 30, 2018, Blue Shield produced a data file that enabled identification of certain “Flex  
19 Funded” claims data for the first time. Plaintiffs understood such claims to be self-funded with  
20 respect to hospital claims. There was not enough time, however, for Dr. Leitzinger to analyze this  
21 data and include it in his August 31, 2018 damages report. He included a footnote explaining that  
22 he was unable to include the Flex Funded claims at that time.

23 \_\_\_\_\_  
24 <sup>1</sup> The report included self-funded payors (who were California citizens or arms of the State) that  
25 compensated Sutter for services for the following dates: (1) Aetna: for services between January  
26 1, 2003 and July 25, 2016 at prices set by contracts between Sutter and Aetna; (2) Anthem: for  
27 services between January 1, 2003 and December 31, 2016 at prices set by contracts between  
28 Sutter and Anthem; (3) Blue Shield: at any time between January 1, 2003 and June 25, 2016 at  
prices set by contracts between Sutter and Blue Shield; (4) Cigna: for services between January  
1, 2003 and April 30, 2016 at prices set by contracts between Sutter and Cigna; and (5) United  
Healthcare/PacifiCare: at any time between January 1, 2003 and June 30, 2016 at prices set by  
contracts between Sutter and United Healthcare/PacifiCare. *See* Swenson Decl. at Exh. 1.

1 In October 2018, after the close of discovery and the production of Plaintiffs' initial expert  
2 reports, United produced additional data relating to claims processed by its wholly-owned third-  
3 party administrator, UMR. Although these claims were self-funded, data relating to these claims  
4 had been omitted from United's prior data production. Following the August 31, 2018 close of  
5 fact discovery, all the health plans produced updated claims data to both parties. The updated  
6 claims data produced by the health plans covered the period between the last data analyzed in Dr.  
7 Leitzinger's merits report and various dates in late 2018 or early 2019, depending on the health  
8 plan.<sup>2</sup> See generally Plaintiffs' Opp. to Sutter's Motion to Exclude the Second Supp. Report of Dr.  
9 Leitzinger (filed June 19, 2019) at 14-15.

10 On May 10, 2019, Plaintiffs provided an updated damages report by Dr. Leitzinger, as  
11 permitted by the Court. In June 2019, Sutter sought leave to re-open discovery to obtain discovery  
12 regarding UMR, Flex Funded claims, and the new class members. Swenson Decl. ¶ 7. Sutter  
13 asserted that it would need to take extensive discovery. See *id.* Exh. 5. Sutter also filed a motion  
14 to exclude Dr. Leitzinger's May 10, 2019 report, claiming that the data could have been produced  
15 earlier, and that Flex Funded claims were not self-funded.

16 On June 20, 2019, the Court denied Sutter's motion for decertification, finding that there  
17 were no changed circumstances justifying decertification of the Plaintiff Class. On June 21, 2019,  
18 Sutter informed Plaintiffs that they would not object to a motion by Plaintiffs to certify the  
19 following narrowed class definition (without waiving their right to appeal the decertification order):

20 All self-funded payors that (1) are citizens of California for purposes of 28 U.S.C. §  
21 1332(d) or arms of the State of California and (2) compensated Sutter for general acute care  
hospital services or ancillary products:

- 22 • For services between January 1, 2003 and July 25, 2016 at prices set by contracts  
23 between Sutter and Aetna;
- 24 • For services between January 1, 2003 and December 31, 2016 at prices set by  
25 contracts between Sutter and Anthem;

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26 <sup>2</sup> The updated data productions from the health plans included data through the following dates:  
27 (1) Aetna produced data for services provided through October 27, 2018; (2) Anthem produced  
28 data for services provided through October 31, 2018; (3) Blue Shield produced data for claims  
paid through December 31, 2018; (4) Cigna produced data for services provided through August  
25, 2018; and (5) United produced data for claims paid through January 26, 2019.

- At any time between January 1, 2003 and June 25, 2016 at prices set by contracts between Sutter and Blue Shield;
- For services between January 1, 2003 and April 30, 2016 at prices set by contracts between Sutter and Cigna; or
- At any time between January 1, 2003 and June 30, 2016 at prices set by contracts between Sutter and United Healthcare/PacifiCare.

If you qualify as a member of the class, your claims will include alleged overcharges paid to Sutter:

- For services provided between January 1, 2003 and October 27, 2018 at prices set by contracts between Sutter and Aetna;
- For services provided between January 1, 2003 and October 31, 2018 at prices set by contracts between Sutter and Anthem;
- At any time from January 1, 2003 to December 31, 2018 at prices set by contracts between Sutter and Blue Shield;
- For services between January 1, 2003 and August 25, 2018 at prices set by contracts between Sutter and Cigna; or
- At any time from January 1, 2003 to January 26, 2019 at prices set by contracts between Sutter and United.

Your claims will not include any alleged overcharges: (1) paid to Sutter in connection with Blue Shield’s Flex Funded products; (2) paid through UMR, a subsidiary of UnitedHealthcare; or (3) in connection with services or payments (whichever is applicable) later than the dates listed in the preceding paragraph.

See Swenson Decl. at ¶¶ 9-10 & Exh. 1.

## ARGUMENT

### **A. Legal Standard.**

Class actions are authorized by statute in California “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court....” Code Civ. Proc. § 382. “The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ ” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326 (2004) (internal citation omitted). “[T]his state has a public policy which encourages use of the class action device.” *Id.* at 340 (internal citation omitted).

California courts may modify class definitions as warranted. See September 29, 2017 Order Regarding Inclusion of Governmental Entities in the Class at 3; *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 916 (2001), as modified on denial of reh’g (July 3, 2001).



1 The California Rules of Court provide that a party may file a motion to “[a]mend or modify an  
2 order certifying a class.” Cal. Rules of Court, rule 3.764. As the Court of Appeal explained,  
3 “Drafting class descriptions is not an easy task. Amendments are permitted so that class cases  
4 may proceed on their merits.” *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1462  
5 (2011). “As it is the court’s duty to certify an identifiable and ascertainable class, the court is not  
6 limited ... to the class description contained in plaintiff’s complaint.” *Id.* (alterations in original)  
7 (*quoting Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 748 (2009)).

8 Federal rules similarly permit modification of an order certifying a class, and, upon  
9 motion by plaintiffs, favor narrowing class definitions in accordance with requests by the plaintiff  
10 class.<sup>3</sup> Trial courts do not abuse their discretion “by reducing the size of a class prior to a  
11 decision on the merits where all members of the recertified class were also members of the  
12 original class.” *Perryman v. Johnson Prod. Co.*, 698 F.2d 1138, 1148 (11th Cir. 1983)  
13 (recertifying the class after post-trial briefing). *See also Garcia v. Tyson Foods, Inc.*, 890 F.  
14 Supp. 2d 1273, 1298 (D. Kan. 2012), *aff’d*, 770 F.3d 1300 (10th Cir. 2014) (approving  
15 modification of the class definition after conclusion of the trial where plaintiffs sought to narrow  
16 the class); *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 302 F.R.D. at 465  
17 (“Whirlpool has not identified any case where a court rejected a plaintiff’s request to *narrow* a  
18 class definition after certification”) (emphasis in original). Modifying the class definition  
19 pursuant to a request from plaintiffs is particularly appropriate where the motion is unopposed  
20 and would eliminate the need for the parties to devote time and resources to discovery and motion  
21 practice. *See Ades*, No. 13-2468-CAS (MANx), 2015 U.S. Dist. LEXIS 126121, \*5.

22 **B. Modification of the Plaintiff Class Definition Is Appropriate to Ensure This**  
23 **Case May Proceed to Trial in September 2019.**

24 In light of the extensive discovery that Sutter has demanded regarding the claims included  
25 in Dr. Leitzinger’s May 10, 2019 report, and the impact of that discovery on the trial date,

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26 <sup>3</sup> Fed.R.Civ.P. 23(c)(1)(C) provides that “[a]n order that grants or denies class certification may  
27 be altered or amended before final judgment.” California courts draw on federal precedent  
28 analyzing class certification where that precedent does not otherwise conflict with California  
law. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

1 Plaintiffs believe it is in the best interests of the Class to exclude from the Class the Flex Funded  
2 claims, UMR claims, and the claims of new class members who became class members after  
3 various dates in 2016. *See* Swenson Decl. at Exh. 1 & 5. Plaintiffs seek a modification of the  
4 class definition to exclude new class members that would otherwise be included in the certified  
5 class definition, which did not contain an end date.<sup>4</sup> *Id.* at Exh. 1. As the Court previously  
6 recognized, because of the complicated nature of claims analysis in this case, damages cannot be  
7 updated through the date of the trial, and so some date cut-off will be required for damages.  
8 Swenson Decl., ¶ 4 & Exh. 3 (July 13, 2018 Case Management Conf. Hrg. Tr. at 53:14-54:20)  
9 (“we’re going to need a cutoff date, I think, on damages”) & *id.* ¶ 5 & Exh. 4 (Aug. 17, 2018 Case  
10 Management Conf. Hrg. Tr. 35:5-6 (“we need some sort of a cutoff date here”).

11 Accordingly, Plaintiffs have proposed a reasonable cutoff date for damages, cutting off  
12 damages for the class members identified through 2016 by including their damages through 2018-  
13 early 2019, depending on their health plan’s data production.<sup>5</sup> Additionally, Plaintiffs have  
14 proposed excluding Flex Funded and UMR claims from the class definition, given the late  
15 production of information relevant to these categories of claims. Because Plaintiffs are simply  
16 narrowing the class, and all members of the proposed recertified class are members of the original  
17 class, certification of Plaintiffs’ amended class definition is appropriate. *See Perryman*, 698 F.2d  
18 at 1148; *Garcia*, 890 F. Supp. 2d at 1298; *In re Whirlpool*, 302 F.R.D. at 465; *see also Cho*, 177  
19 Cal. App. 4th at 748. As the Court previously suggested, a reasonable cutoff of damages had to  
20 occur prior to trial. Plaintiffs’ proposed class definition conforms to the available evidence and  
21 constitutes a reasonable cut-off for damages.

22

23

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24 <sup>4</sup> This would exclude self-funded payors who first had claims arise after the following dates: (1) Aetna: services provided after July 25, 2016; (2) Anthem: services provided after December 31,  
25 2016; (3) Blue Shield: claims paid after June 25, 2016; (4) Cigna: services provided after April  
30, 2016; and (5) United Healthcare/PacifiCare: claims paid after June 30, 2016.

26 <sup>5</sup> Claims for existing class members would be included as follows: (1) Aetna: claims services  
27 provided through October 27, 2018; (2) Anthem: claims for services provided through October  
31, 2018; (3) Blue Shield: claims paid through December 31, 2018; (4) Cigna: claims for  
28 services provided through August 25, 2018; and (5) United/PacifiCare: claims paid through  
January 26, 2019.

1 Modification of the class is particularly appropriate because Sutter does not oppose the  
2 motion,<sup>6</sup> and the modification will eliminate the need for the parties to devote time and resources  
3 to discovery and motion practice. *See Ades*, No. 13-2468-CAS (MANx), 2015 U.S. Dist. LEXIS  
4 126121, at \*5. Because Plaintiffs’ proposed class definition is simply a narrowing of the class to  
5 eliminate newly-produced data on damages, the revised class definition meets the same class  
6 action requirements as the prior class definition, and certification is warranted for the same reasons  
7 stated in the Court’s two orders granting certification. *See* Aug. 14, 2017 Order; June 20, 2019  
8 Order. Shortening the time period for damages, and excluding damages for newly-discovered  
9 claims, does not undermine any of the Court’s prior findings regarding the suitability of this case  
10 for resolution on a classwide basis. Plaintiffs’ request to narrow the class definition should be  
11 granted.

12 **CONCLUSION**

13 For all the foregoing reasons, Plaintiffs’ motion to modify the class definition should be  
14 granted.

15 DATED: June 24, 2019

Respectfully submitted,

17 By: /s/ Richard L. Grossman  
Richard L. Grossman  
Attorney for Plaintiff Class

19 By: /s/ Emilio E. Varanini  
Emilio E. Varanini  
Attorney for Plaintiff People of the State of  
21 California<sup>7</sup>

22  
23 \_\_\_\_\_  
24 <sup>6</sup> In agreeing to not oppose the motion, Sutter has reserved its right to appeal the recent order  
25 denying Sutter’s motion for decertification/phasing. If a Sutter appeal results in delay of the trial  
date, Plaintiffs reserve their right to seek further modification of the class definition.

26 <sup>7</sup> As part of consolidation, the People agreed that their claim for disgorgement would be  
27 coterminous with the claims of the UEBT class for damages; the People also agreed to treat the  
jury’s verdict on class-wide damages as an advisory verdict on their claim for disgorgement.  
28 Therefore, the People have a substantial interest in the certification of the UEBT class, an interest  
strengthened by the solicitude of the Cartwright Act for private class actions. *See Clayworth v.*  
*Pfizer, Inc.*, 49 Cal.4th 758, 783–84 (2010).