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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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

Plaintiffs,

vs.

Sutter Health, et al.,

Defendants.

Case No. CGC 14-538451

Assigned for All Purposes to:
Hon. Curtis E. A. Karnow, Dept. 304

MEMORANDUM IN SUPPORT OF PLAINTIFF UEBT's MOTION FOR DISCOVERY SANCTIONS (C.C.P § 2023.030)

Date: October 27, 2017
Time: 10:30 a.m.

Complaint Filed: April 7, 2014
Trial Date: None Set

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I. INTRODUCTION

More than one year after Plaintiff UEBT filed this lawsuit and served its first set of document requests, the most important witness in this case, Melissa Brendt, told her executive assistant to destroy 192 boxes of Sutter Managed Care Department documents created during the period when Sutter adopted the anticompetitive restraints at the heart of UEBT's claims. Ms. Brendt's assistant, Sina Santagata, also received approval to destroy these documents from Sutter's in-house lawyer who directly manages this lawsuit and who assists the Managed Care Department in negotiating the contracts that impose the anticompetitive restraints. Sutter's "Records of Deposit" describing the contents of these boxes show that many of them contained unique documents that can never be replaced, including Ms. Brendt's handwritten notes, "diaries" from Sutter's negotiations with Network Vendors, and "negotiation notes." Immediately after destroying the documents, Ms. Santagata sent an email to Ms. Brendt saying that she was "running and hiding" and that she had her "[f]ingers crossed that I haven't authorized something the FTC will hunt me down for."

Ms. Brendt's decision to destroy ten years' worth of her department's documents was not the product of any automatic or routine document destruction protocol—it was intentional. She discussed the destruction with Ms. Santagata several times; she personally selected the ten-year timeframe for documents to be destroyed, encompassing all boxes of Managed Care documents that her department put in storage between 1995 and 2005; and to execute the destruction, Ms. Santagata signed a form verifying—inaccurately—that there was no litigation preservation notice that applied to the documents. Ms. Brendt's decision to destroy these boxes also was unprecedented; her assistant could not recall any time before or since that the Managed Care Department had destroyed documents held in Sutter's archives.

Sutter's willful destruction of ten years' worth of documents, many of which were irreplaceable, justifies discovery sanctions; it is "a grave affront to the cause of justice and deserves our unqualified condemnation." *Cedar-Sinai Med. Ctr. v. Super. Ct.*, 18 Cal. 4th 1, 4 (1998). The Court should prohibit Sutter from making factual assertions and arguments about events through 2005 and the intended effects of its shift to a systemwide contracting approach and

its adoption of the relevant contract provisions since Sutter's conduct has deprived UEBT of the means to challenge such assertions. Although there is no way to restore relevant handwritten documents that Sutter destroyed or to ensure that copies of all destroyed documents have been produced, the Court should also order Sutter to restore its 1995–2008 electronic document backup tapes to at least partially remedy Sutter's intentional spoliation. In the alternative, the Court could defer ruling on the scope of the necessary issue preclusion sanctions pending its review of the results of Sutter's electronic document recovery efforts. UEBT also asks that the Court approve an adverse inference jury instruction under Evidence Code § 413.

II. FACTS

A. UEBT's Claims & Case Background

UEBT filed this action on April 7, 2014, alleging claims under the Cartwright Act and the Unfair Competition Law. (Apr. 7, 2014 Compl. ¶¶ 137–70.) UEBT alleged that Sutter violated state antitrust and unfair competition laws by forcing insurance companies (called "Network Vendors") into "anticompetitive written Healthcare Provider agreements" with Sutter that contain a combination of anticompetitive clauses. (*Id.* ¶ 14.) In particular, Sutter's contracts with Network Vendors include some combination of three types of anticompetitive clauses: (1) "All-or-None" clauses effectively requiring that if any Sutter provider is included in a particular network, all Sutter hospitals must be included; (2) "Anti-Tiering" clauses that prohibit offering "incentives to patients that encourage them to utilize the healthcare facilities of Sutter's competitors"; and (3) "Price Secrecy" clauses that prohibit Network Vendors from disclosing Sutter's pricing "to anyone before the service or product is utilized and billed." (*Id.* ¶ 20.) These terms allow Sutter "to illegally maintain and increase its market power" and to "illegally insulate itself from the price competition" that would otherwise drive Sutter's exorbitant prices down. (*Id.* ¶¶ 21–22.) Importantly for the purposes of this motion, UEBT also alleged in April 2014 that Sutter has engaged in anticompetitive contracting practices "[s]ince at least 2002." (*Id.* ¶ 14.)[1]

[1] Based on this allegation, the Court has ordered that documents dating back at least to 2002 are discoverable, noting that "[f]urther discovery *may* reveal that earlier documents should be retrieved." (May 4, 2016 Order at 4 n.3 (italics original).)

UEBT submitted evidence in connection with its granted Motion for Class Certification demonstrating that, as alleged in the Complaint, Sutter dramatically changed its approach to contracting with Network Vendors in the 2001 to 2004 time period. Before 2001, Sutter contracted with Network Vendors on an individual basis—that is, "each Sutter hospital or provider negotiated its own contract with network vendors." (Apr. 14, 2017 Brendt Decl. ¶ 8; *see also* Feb. 10, 2017 Mot. for Class Cert. at 4–5 and supporting declarations of Joyner ¶¶ 7–8, Katz ¶ 7, Melody ¶ 5, Welsh ¶ 11, Lundbye ¶ 8, and Lacroix-Milani ¶ 12.) Sutter eliminated this practice between 2001 and 2004 and instead forced all major Network Vendors to contract with Sutter on a "systemwide" basis under a single contract covering all Sutter providers. (Apr. 4, 2017 Decl. of M. Brendt ¶ 9; *see also* Feb. 10, 2017 Mot. for Class Cert. at 4–5 and supporting declarations of Joyner ¶¶ 7–8, Katz ¶ 7, Melody ¶ 5, Welsh ¶ 11, Lundbye ¶ 8, and Lacroix-Milani ¶ 12.)

At the same time it initiated systemwide contracting, Sutter imposed explicit All-or-None and Price Secrecy clauses in all its contracts with the major Network Vendors.[2] In the years that followed, Network Vendors came up with new strategies for trying to restore the effects of price competition on Sutter—such as tiering—but Sutter's systemwide contracting strategy allowed it to impose additional anticompetitive contract clauses to prevent these pro-competitive efforts as well. (*See* Feb. 10, 2017 Mot. for Class Cert. at 6–10 and supporting evidence.) In particular, Sutter began imposing the Anti-Tiering clauses identified in UEBT's Complaint in 2005. (*See* App'x A to Feb. 10, 2017 Mot. for Class Cert., fn. 19–23.)

UEBT served its first set of Requests for Production of Documents on Sutter on April 25, 2014, which included many requests targeting the contracting practices that Sutter initiated in the early 2000s. (Reese Decl. Ex. 2.) For example, UEBT requested "[a]ll documents relating to any 'All-or Nothing Terms'" and documents relating to any "strategy regarding[] Sutter's pricing" for hospital services; whether Sutter allows "any Network Vendor to offer access to some—but not all—Sutter hospitals"; and documents regarding Sutter's market share. (*Id*. Definition 12 &

[2] Appendix A to UEBT's Motion for Class Certification demonstrates that Sutter imposed these clauses on each of the five major Network Vendors between January 1, 2001 and January 1, 2003. *See* App'x A to Feb. 10, 2017 Mot. for Class Cert., fn. 4–8 & 24—28.

Requests 3, 6, 8, 12.) Because the Federal Trade Commission ("FTC") and the California Attorney General also had investigated Sutter for its anticompetitive behavior, UEBT requested "[a]ll documents relating to any governmental investigation relating to any agreement with any Network Vendors or Sutter's compliance with antitrust or unfair competition laws." (*Id*. Request 16.)

Two years later, after Sutter's unsuccessful appeal regarding its arbitration motion, UEBT moved to compel further responses to its document requests. In opposition, Sutter argued that emails from before 2005 (and, for some custodians, before 2008) were inaccessible because they were stored on "backup tape systems" that would be very expensive to restore. (Apr. 21, 2016 Brosnahan Decl. ¶¶ 4–6.) As a result, Sutter's production of pre-2008 emails and attached documents has been limited to those emails that Sutter employees chose to save on their systems.

Recently, Sutter itself has argued that the history and context of the anticompetitive contract provisions identified in UEBT's Complaint will be important evidence in this action. In the August 30, 2017 Joint Case Management Statement, Sutter argued that the "the industry history behind these provisions" is required evidence for UEBT to prove the "causal relationship" between the anticompetitive provisions and class injury. (Aug. 30, 2017 Joint Case Mgmt. Stmt. at 9:26–27 & 9:21–22.) Sutter also argued that UEBT will have to prove that the Network Vendors "'agreed' to the inclusion of those provisions willingly or under coercion," presumably at the time Sutter first required the provisions in its Network Vendor contracts. (*Id*. at 10:5–6.)

B. Sutter's Managed Care Department and Key Personnel

Sutter's Managed Care Department "negotiates the network vendor contracts" at issue in this case. (Reese Decl. Ex. 3 at 13:15.) This department also "manages the relationships between Sutter healthcare providers and the major health plans that do business in Northern California"—i.e., the Network Vendors—"including, without limitation, negotiating contracts with those plans, managing Sutter's relationships with those plans, and managing resolutions of disputes with them." (May 21, 2014 Brendt Decl. ¶ 2.)

Melissa Brendt has worked for Sutter since 1992 and began working in the Managed Care Department in 1997. (Apr. 14, 2017 Brendt Decl. ¶ 1; Reese Decl. Ex. 3 at 12:19–13:6.) She

became a "Vice President of Managed Care Contracting" in 2001 and currently serves as Sutter's "Vice President and Chief Contracting Officer—Sutter Health Managed Care Department," the "head" of the Managed Care Department. (May 21, 2014 Brendt Decl. ¶ 2; Aug. 9, 2016 Brendt Decl. ¶ 5.) Since 1997, Ms. Brendt has "negotiated contracts, managed Sutter-health plan relationships, and managed dispute resolution processes with health plans." (May 21, 2014 Brendt Decl. ¶ 2; *see also* Reese Decl. Ex. 3 at 12:19–13:6.) As the declarations cited here show, Ms. Brendt has been personally involved in this lawsuit almost since its filing. Since 2001, Sina Santagata has been Ms. Brendt's executive assistant. (Reese Decl. Ex. 4 at 19:6–11.)

Ms. Brendt and the Managed Care Department rely on Sutter's in-house counsel to play a "support role" in contract negotiations with all Network Vendors. (Reese Decl. Ex. 3 at 73:8–11.) For the past five years, Daniela Almeida has been the "point person" in Sutter's in-house counsel department dedicated to supporting the Managed Care Department. (*Id*. at 71:22–72:1 & 73:12–17.) Ms. Almeida is also responsible for "managing this lawsuit" (Reese Decl. Ex. 5 at 11:11–12), and has attended several depositions in this case (*id.* Ex. 6 at 5 & Ex. 7 at 4.)

C. Sutter's Destruction of Evidence from the 1995–2005 Time Period

Although she could not remember the exact date, Ms. Brendt has confirmed that, sometime in 2014, she received a litigation hold notice instructing her not to destroy documents that could be relevant to this lawsuit. (Reese Decl. Ex. 3 at 198:6–200:12.) In March 2015, nearly a year after UEBT filed this lawsuit and served its first set of document requests on Sutter, Ms. Brendt's assistant, Ms. Santagata, received a packet from the Sutter Health Records Management department listing thousands of boxes of documents that the Managed Care Department had placed in storage. (*Id*. Ex. 8; *see also id*. Ex. 4 at 78:19–79:9.)

After receiving this packet, Ms. Santagata met with Ms. Brendt to discuss which boxes of Managed Care Department documents she wished to destroy. (*Id*. Ex. 4 at 83:9–16.) At this meeting, Ms. Brendt instructed Ms. Santagata to have all boxes of Managed Care department documents placed in the archive between 1995 and 2005 destroyed, which Ms. Santagata confirmed by email on March 24, 2015. (*Id*. Ex. 9.) Later emails show that Ms. Santagata discussed the document destruction with Ms. Brendt several times in the following months. (*Id*.

Ex. 10 (April 13: "I'll have our department VP review and sign."); Ex. 11 (April 28: "[O]ur intent is to authorize the destruction of the below records in the immediate future. Again, I will verify."); Ex. 12 (June 17: "My boss is back in the office next week and my plan is to sit down with her and wrap this up."); Ex. 13 (July 13: "please forward the formal email with signature lines. I will share that with our VP/Chief Contracting Officer for her review/signature.")

On July 28, 2015, more than 15 months after UEBT filed this lawsuit, Ms. Santagata instructed the Records department to destroy the documents that Ms. Brendt selected.[3] (*Id*. Ex. 4 at 118:13–119:12.) To do so, Ms. Santagata had to sign a form stating that "THERE ARE NO DOCUMENT PRESERVATION HOLDS ON THE RECORDS TO BE DESTROYED." (*Id*. Ex. 14 at DEF000093620.) Ms. Santagata testified that she does not know if she ever received a litigation hold to preserve documents relevant to this lawsuit. (*Id.* Ex. 4 at 103:4–7.) She further testified that, before signing that portion of the document destruction form, she obtained the approval of Sutter's in-house counsel, Ms. Almeida. (*Id*. at 96:18–97:15.) She later testified that she proceeded with the document destruction because she had "direction from Melissa Brendt and Daniela Almeida. I look – I'm taking their direction." (*Id*. at 171:15–18; *see also id*. at 70:1–5 ("I would never approve destruction without checking with my supervisor."))

In total, Ms. Brendt selected and instructed Ms. Santagata to destroy 192 boxes of Managed Care documents. (Reese Decl. Ex. 14 at DEF000093590.) Ms. Santagata testified that, to her knowledge, this was the only time the Managed Care Department had ever approved the destruction of any boxes of documents kept in the Records department since she started at Sutter in 2001. (*Id*. Ex. 4 at 70:1–71:13.)

The day Ms. Santagata sent her signed authorization to the Records department for the 192 boxes of documents to be destroyed, she wrote an email to Ms. Brendt that read:

> I've pushed the button . . . if someone is in need of a box between 3/15/95 & 11/23/05 . . . I'm running and hiding. I did give Jan an 'fyi' as if anyone needed a box . . . it would be Ms. Voge. "Fingers crossed" that I haven't authorized something the FTC will hunt me

[3] The Records of Deposit identify a "setup date" on which each box was received by the Records department. Ms. Santagata relied on that date to determine whether a box fell inside the time frame that Ms. Brendt selected. (Reese Decl. Ex. 4 at 79:15–22.)

down for.

(Reese Decl. Ex. 15 at DEF000108219 (ellipses original).) Ms. Santagata testified that she was "being sarcastic" when she wrote those words, and she further testified that she could not recall what she meant by the acronym "FTC" in that email, despite having used the acronym in other documents and having an email folder that she labeled "FTC." (*Id*. Ex. 4 at 135:21; 141:12–16; 168:1–20; 192:11–19.)

D. Many of the Destroyed Documents Were Relevant and Irreplaceable

There are two types of documents that describe what was inside the 192 destroyed boxes. The first is the index attached to the "Box Destruction Query" that Ms. Santagata sent to the Records department along with the signed form authorizing their destruction, which describes the contents of the boxes at a high level. (Reese Decl. Ex. 14.) The second is entitled "Records of Deposit," which is a record that Sutter kept for most (but not all) boxes held in storage. These Records of Deposit often provide more detail regarding the contents of each box than the Box Destruction Query. (*Id*. Ex. 4 at 142:25–143:10.) The index and the Records of Deposit demonstrate that at least 94 of the destroyed documents were responsive to UEBT's document requests, served more than a year before, and were (1) irreplaceable, (2) described in such a way that Sutter cannot represent with any confidence that it has found copies of all the destroyed documents elsewhere, or (3) both.[4] For example, some of the boxes that Ms. Brendt and Ms. Almeida chose to destroy contained:

- "handwritten notes" regarding Sutter's negotiation with Cigna in 2002 (Reese Decl. Ex. 1 at DEF000107760);
- Della Bresina's files from negotiations with Health Net in 2002, including her "handwritten notes" (*id*. at DEF000107806)[5];
- documents relating to "MCD [Managed Care Department] staff meeting[s]," including "meeting agenda notes" (*id*. at DEF000107859);

[4] *See* Reese Decl. Ex. 19 at 1 and attached index identifying 94 specific boxes with relevant documents.

[5] Ms. Bresina has been a Contract Manager for Sutter since 1995.

- Ms. Brendt's files from Blue Cross negotiations between 2002 and 2004, including "Meeting Notes 8/8/03" (*id*. at DEF000107905);
- Todd Smith's documents from 2005, including a "Binder" containing Blue Cross "Negotiation Notes"[6] (*id*. at DEF000107986);
- Ms. Bresina's files regarding HealthNet negotiations from 2002, including "Della's handwritten notes" (*id*. at DEF000107808);
- "Blue Cross Documents, Notes" and "Blue Cross 2004 Renewal Notes" (*id*. at DEF000107991);
- Ms. Brendt's binder entitled "Cigna / Sutter Health negotiation team 2002" and a "Cigna 2003-2004 System-wide amendment presentation" (*id*. at DEF000107771.)
- Ms. Brendt's Blue Cross negotiation files including a "Binder" called "Blue Cross/Sutter Health 2002 Negotiations for 2003" (*id*. at DEF000107791);
- "Melissa Brendt's files" including documents described merely as "Health Net 2004 Nego." (*id*. at DEF000107911);
- Ms. Brendt's Blue Cross negotiation files from 2002–2004, including documents described as "Negotiations 2003"; "Misc. Correspondence 2003;" and "2004 Negotiations (Binder)" (*id*. at DEF000107905); and
- a "binder" entitled "Contracting Strategy 1999 K. Vine" (*id*. at DEF000107936).[7]

Ms. Brendt also chose to destroy six boxes of documents labeled simply "FTC." (Reese Decl. Ex. 14 at DEF000093613.)[8] In addition, it is likely that unique documents were contained in other destroyed boxes because, as Ms. Santagata testified, the type of documents that Managed Care Department employees regularly sent to the archive were hard copy typed documents with handwritten notes on them. (Reese Decl. Ex. 4 at 30:23–32:4 & 39:5–8.) Ms. Santagata further testified that she was unaware of any duplicate copy of any of the materials in the 192 boxes of

[6] Mr. Smith was a Vice President of Sutter's Managed Care division.

[7] Kris Vine was Ms. Brendt's predecessor as head of the Managed Care department.

[8] A copy of all Records of Deposit that Sutter has located and produced for the 192 destroyed boxes are Exhibit 1 to the Reese Declaration.

destroyed documents. (*Id*. at 131:4–9; *see also* 160:1–161:1.)

E. UEBT's Efforts to Meet and Confer Regarding Sutter's Evidence Destruction

UEBT began meeting and conferring with Sutter regarding potential remedies for its document destruction on May 2, 2017. Based on Sutter's representations regarding pre-2005 emails and documents, UEBT asked that Sutter agree to restore its email backup tapes and attempt to find copies of as many of the destroyed documents as possible. (*Id*. Ex. 16 at 1.) UEBT also asked Sutter to identify the destroyed documents for which it had been unable to find copies so that UEBT could understand the extent of the evidentiary prejudice it had suffered. (*Id*.)

Sutter refused to restore its electronic document backup tapes, claiming that "the costs of restoring disaster recovery tapes for the 1995–2005 window is extraordinary." (*Id*. Ex. 17 at 2.) UEBT repeatedly asked how Sutter proposed to remedy its destruction of evidence. (*Id*. Ex. 18 at 6 & Ex. 19 at 1, 2, 4, 5, 9, & 10.)[9] Sutter never proposed any process to address this problem.[10]

III. ARGUMENT

A. Sanctions Should Be Imposed For Sutter's Intentional Destruction of Evidence

The California Supreme Court describes spoliation of evidence as follows:

> The intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation. . . . Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.

Cedar-Sinai Med. Ctr. v. Super. Ct., 18 Cal. 4th 1, 4, 8 (1998).

Because evidence destruction is a "grave affront to the cause of justice," the Court has discretion in fashioning powerful issue and evidentiary sanctions against Sutter for "misuse of the

[9] Counsel also conferred by phone regarding these issues on May 9, 15, 22, and 31.

[10] During the meet and confer process, Sutter asked that UEBT prioritize a subset of boxes for Sutter to focus on during its initial document recovery efforts. With the understanding that after this initial effort, Sutter also would attempt to recover any relevant destroyed documents from the remaining boxes, UEBT prioritized 94 boxes and asked Sutter to explain what it would do to remedy its destruction of evidence. (Reese Decl. Ex. 19 at 1 and attached index beginning after page 10.) Sutter has never done so.

discovery process" under Code of Civil Procedure § 2023.030. "Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request." *Cedars-Sinai*, 18 Cal. 4th at 12.

When a party destroys evidence, the Court may impose sanctions, including terminating sanctions, even in the absence of a prior court order regarding the evidence, because obtaining an order for the production of destroyed evidence would be futile. *Vallbona v. Springer*, 43 Cal. App. 4th 1525, 1546 (1996); *accord New Albertsons, Inc. v. Super. Ct.*, 168 Cal. App. 4th 1403, 1426 (2008) ("[A] prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile.") "Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be wilful [sic]." *Vallbona*, 43 Cal. App. 4th at 1545 (ellipses in original) (citation omitted).

1. Sutter "Failed to Comply" With Its Discovery Obligations by Destroying Key Evidence, Resulting In Prejudice To UEBT.

Sutter had a duty to preserve evidence relevant to this lawsuit as soon as the Complaint was served, and certainly no later than April 25, 2014, when it received UEBT's first set of Document Requests. *Cedars-Sinai*, 18 Cal. 4th at 12. As discussed above, Sutter "failed to comply" with its obligation by destroying evidence that was both core to this case and that was specifically called for by UEBT's then-pending discovery requests.[11]

Because UEBT has "ma[de] an initial prima facie showing" that Sutter "in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense," the burden shifts to Sutter to demonstrate that there is no prejudice to UEBT. *Williams v. Russ*, 167 Cal. App. 4th 1215, 1227 (2008). Sutter cannot meet this burden. First, Sutter's destruction of evidence significantly prejudices UEBT's ability to prove Sutter's conduct and intentions during the crucial 2000–2005 time frame, especially given

[11] Sutter's own argument that UEBT will need to prove that the Network Vendors "'agreed' to the inclusion of those provisions willingly or under coercion" demonstrates prejudice; Sutter destroyed evidence from the very negotiations where the coercion occurred. (Aug. 30, 2017 Joint Case Mgmt. Stmt. at 10:5–6.)

Sutter's refusal to restore emails and other electronic documents during the relevant time period. Moreover, much of the evidence Sutter destroyed is irreplaceable even if the backup tapes are restored. As discussed above, much of the evidence—including handwritten documents—that Sutter destroyed was directly relevant to the intended effects of the challenged contract terms and Sutter's communications with Network Vendors about those terms.[12] Indeed, Sutter has asserted that, at trial, it will "establish its business justification and intent for the use of the contract provisions." (Aug. 30, 2017 Case Mgmt. Stmt. at 9:28–10:1). Sutter's conduct, however, has deprived UEBT of the evidence that would most directly allow UEBT to challenge Sutter's assertions regarding its justifications and intent. This will severely prejudice UEBT.

2. Sutter's Conduct Was Willful.

Sutter's decision to destroy 192 boxes of Managed Care documents from a crucial time period in this case was willful. In *Williams v. Russ*, 167 Cal. App. 4th 1215 (2008), the court imposed terminating sanctions for spoliation that was far less intentional than Sutter's actions here. In *Williams*, a client requested his file from his former attorney and placed it in a storage unit, then later filed a malpractice suit against the attorney. *Id.* at 1222. The client failed to pay his storage unit bill, so the facility destroyed the file in his unit. The court found that terminating sanctions were proper because the client "was knowledgeable about litigation, particularly about the facts of this case," he was "on notice that nonpayment of his storage rental fee would result in destruction of the file," and after filing the lawsuit, "he caused [the file] to be destroyed by allowing the destruction to happen." *Id*. at 1222.

Sutter acted with much more deliberate intent than the sanctioned party in *Williams*. Ms. Santagata confirmed that her boss, Ms. Brendt—a Sutter Vice President and the head of the Managed Care Department—personally selected the ten-year timeframe for boxes to be destroyed. (Reese Decl. Ex. 4 at 50:9–24.) Before the "destruction date" for the 192 boxes was changed at the direction of Ms. Brendt and Ms. Almeida, the "packet" cataloguing all Managed Care

[12] Sutter itself has argued that UEBT will have to prove "the industry history behind" the anticompetitive contract provisions, yet it destroyed a great deal of this historical evidence. (Aug. 30, 2017 Joint Case Mgmt. Stmt. at 9:26–27.)

Department boxes that Ms. Santagata received in March 2015 listed a destruction date 20 years later (in 2035) for every single box. (*Id.* Ex. 8; *see also id.* Ex. 4 at 82:17–83:7.)

If knowingly allowing storage unit fees to lapse can be considered "willful" evidence destruction, then certainly Ms. Brendt's decision to hand pick ten years' worth of documents to be destroyed—documents that otherwise would have been preserved until at least 2035—is willful.

3. Sutter Should Be Precluded From Making Factual Assertions Regarding Pre-2005 Conduct And Motives.

Sutter's failure to comply with its discovery obligations and its willful destruction of evidence warrant issue preclusion sanctions. *See* Cal. Code Civ. P. § 2023.030(b) (authorizing "an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses"). Here, Sutter's document destruction has deprived UEBT of the best evidence of what transpired at Sutter during the time period when it was enacting the anticompetitive contract terms. The willful nature of the destruction supports an inference that the documents were harmful to Sutter's defenses in this case.

This significant gap in evidence will make it extremely difficult for UEBT to fully depose or cross examine Sutter's witnesses about this crucial time period. Their memories of events from the early 2000s will have faded, and there will be a great deal of missing evidence that UEBT could use to refresh their memories or contradict their testimony about this key time period. Sutter should therefore be prohibited from making factual assertions about events through 2005 and from presenting evidence of its intentions for adopting its systemwide contracting approach and the relevant contract clauses—assertions that UEBT cannot now fully challenge.

Specifically, UEBT requests that Sutter be precluded from arguing or presenting evidence regarding its motive for adopting the anticompetitive contract terms, including arguing that they were adopted for "pro-competitive" reasons. UEBT also asks that the Court prohibit Sutter from relying on evidence or arguments regarding what transpired at any internal Managed Care Department meeting, negotiation with a Network Vendor, or communication regarding its contracting practices through 2005.

These issue sanctions are justified since Sutter has deprived UEBT of the best evidence of

its motives for adopting its anticompetitive practices, and it has destroyed the contemporaneous records of the pre-2005 meetings, negotiations, and communications. The involvement of key players for Sutter, their apparent knowledge of wrongdoing, the types of documents destroyed, and the time period of the destroyed evidence all support an inference that Sutter intentionally chose to destroy evidence that would have shown that it adopted its systemwide contracting approach and All-or-None, Price Secrecy, and Anti-Tiering clauses for anticompetitive purposes. Although the Court may impose issue preclusion sanctions without finding that Sutter knew the destroyed evidence would be harmful, these facts further support imposing strong sanctions here.

4. Sutter Should Be Ordered To Restore Its Electronic Document Backup Tapes For The Relevant Period.

Sutter's refusal to restore its electronic document backup tapes during the relevant time period has compounded the prejudice of its evidence destruction. As a result of Sutter's actions, UEBT is likely to receive a small fraction of the documents that show what that happened through 2005—a critical time period in this case.[13] Hence, at the very least, Sutter should be required to immediately restore its backup tapes for email and other electronic documents created during the relevant time period and search them for documents responsive to all of UEBT's document requests.

As discussed above, many of the destroyed documents were handwritten notes and hard copy versions of typed documents with handwritten notes on them, and other documents are described in the Records of Deposit in such a way that identifying copies is likely impossible. None of these documents can be fully recreated. However, by restoring its emails and other electronic documents, Sutter may be able to at least partially mitigate its evidence destruction by producing those documents that are identifiable from the Records of Deposit and the typewritten portions of the destroyed documents that were not entirely handwritten.

[13] Sutter has asserted that it has already produced numerous emails from the pre-2005 period. UEBT understands, however, that such emails were available without restoring backup tapes only if a Sutter custodian happened to save it in his or her individual email inbox. These will, of course, be far from comprehensive and almost certainly will not contain the type of candid, potentially incriminating information one would find in notes or informal communications.

Sutter should not be heard to complain about the difficulty and cost of restoring and searching the backup tapes for its email and other electronic records. The least costly method of producing the relevant material would have been to search the readily accessible documents that Sutter had previously decided were important enough to preserve in hard copy files. It is entirely Sutter's fault these documents no longer exist to review and produce. Sutter should be given no more than 45 days to produce all of the responsive documents from its electronic document backup tapes.

B. Alternatively, The Court Could Defer Ruling On The Scope of the Necessary Issue Preclusion Sanctions Until It Determines The Success Of Sutter's Restoration Of Backup Tapes In Mitigating Its Document Destruction

Because many of the destroyed documents were unique, any production from Sutter's electronic document system cannot fully remedy the prejudice that Sutter has caused UEBT, and issue sanctions are warranted now. However, if the Court does not wish to rule on the scope of the necessary issue preclusion sanctions until it can determine the success of Sutter's production of relevant documents from its backup tapes, it could defer its final judgment on the scope of the issue preclusion sanctions until a future date.

C. The Court Should Issue a Jury Instruction Regarding Sutter's Willful Suppression of Evidence at Trial

Regardless of other forms of relief, the Court should issue a jury instruction regarding Sutter's willful suppression of evidence under Evidence Code § 413, which provides that, in "determining what inferences to draw from the evidence or facts in the case against a party," a jury may consider a party's "willful suppression of evidence." *See also* Cal. Civil Jury Instruction 204; *see also Barry v. Raskov*, 232 Cal. App. 3d 447, 458 (1991) (the "trial court must instruct the jury on every theory of the case supported by substantial evidence") (citation omitted). Circumstantial evidence of willful suppression of evidence is sufficient to support a jury instruction. *Bihun v. AT&T Info. Sys., Inc.*, 13 Cal. App. 4th 976, 994 (1993) (disapproved on other grounds by *Lakin v. Watkins Associated Indus.*, 6 Cal. 4th 644, 664 (1993)). Granting such an instruction now is appropriate because all the facts needed to support the instruction are already known.

In *Bihun*, an employment sexual harassment case, there was no evidence that the defendant

had actually destroyed the relevant evidence (the employment file of a manager accused of harassment). Instead, the defendant was merely unable to locate the file. *Bihun*, 13 Cal. App. 4th at 994. The court found that this evidence plus the fact that the defendant "covered up" the disappearance of the file and the fact that the defendant had policies requiring it to maintain such files meant it was "reasonably probable" that the missing file had relevant evidence, which was enough to support a willful suppression jury instruction. *Id*.

The facts here support a willful suppression instruction even more strongly than in *Bihun*. As in *Bihun*, Sutter's policies—i.e. its litigation hold—required it to maintain the evidence it destroyed. The document destruction was willful, and many of the destroyed documents were the subject of UEBT's then-pending document requests. And although Sutter's *outside* counsel informed UEBT about the destruction on July 8, 2016, the Sutter in-house lawyer responsible for managing this litigation authorized the destruction one year earlier and failed to disclose it to UEBT. On top of this protracted failure to disclose the evidence destruction, there is powerful evidence of Sutter's consciousness of guilt in the form of Ms. Santagata's email the day she okayed the destruction: "'Fingers crossed' that I haven't authorized something the FTC will hunt me down for." (Reese Ex. 15 at DEF000108219.)

The state Supreme Court has affirmed that an adverse inference instruction under section 413 can be an additional appropriate remedy for spoliation, and that "[t]rial courts, of course, . . . are free to adapt" the standard instruction "to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation." *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 18 Cal. 4th 1, 12 (1998). Here, the egregiousness of Sutter's evidence destruction supports a strong willful suppression instruction.

IV. CONCLUSION

For the foregoing reasons, UEBT respectfully requests that the Court order issue preclusion sanctions and the restoration and production of responsive documents from Sutter's electronic document backup tapes as described in the Proposed Order. UEBT further requests a willful suppression of evidence jury instruction.

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