FILED
SUPREME COURT
STATE OF WASHINGTON
3/6/2023 2:25 PM
BY ERIN L. LENNON
CLERK

No. 1016832

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 82687-5-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court Case No. 19-2-24376-7 SEA

THE EVERETT CLINIC, PLLC,
Plaintiff/Appellant,

v.

PREMERA and PREMERAFIRST, INC.,
Defendants/Counterclaim Plaintiffs/Respondents.

ANSWER TO PETITION FOR REVIEW

David R. Goodnight
WSBA #20286
Rachel D. Groshong
WSBA #47021
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
Email:
david.goodnight@stoel.com
rachel.groshong@stoel.com

Attorneys for Plaintiff/Appellant
The Everett Clinic, PLLC

Thomas M. Peterson
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-1000
Facsimile: (415) 442-1001
Email:
thomas.peterson@morganlewis.com

Pro Hac Vice Attorneys for
Plaintiff/Appellant
The Everett Clinic, PLLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

I. INTRODUCTION

The Court of Appeals carefully reviewed the relevant contracts and the underlying record and issued an unpublished decision favoring The Everett Clinic ("TEC"). The court determined that Premera agreed to pay "TEC Rates" for services provided at all TEC facilities and breached that agreement by refusing to pay those rates for services at a facility TEC opened as its "Bellevue Clinic." The court also held that TEC is not a successor to the clinic that operated at the Bellevue location before TEC opened its clinic there. (Court of Appeals Opinion ("Op.") 6-21.)

Premera does not challenge these rulings. Rather, it seeks review of the ruling on Premera's Consumer Protection Act ("CPA") claim, RCW Chapter 19.86. The Court of Appeals decided that TEC was entitled to summary judgment. The court did not resolve any disputed questions concerning the applicable law. It did not blaze any new legal trail. It decided instead that Premera failed to establish, or create triable issues of fact

concerning, two well-settled factual prerequisites for a claim of unlawful, anticompetitive tying: (i) the existence of distinct tied and tying products; and (ii) the seller (TEC) coerced the buyer (Premera) into purchasing the allegedly tied product.[1]

Thus, the Court of Appeals decision is a case-specific application of settled law based on this particular record. It creates no conflict with any other decision—precedential or otherwise. It does not involve any constitutional issue. And it does not implicate any issue of significant public interest. It simply means that Premera, a large, sophisticated health insurer, is held to its agreement to pay TEC rates for services provided to Premera enrollees at all TEC locations. Premera no longer disputes this contract obligation, now that the Court of Appeals has settled it. Premera drafted key parts of the contract that led

[1] Premera linked its CPA claim to establishing an unlawful tying arrangement under state and federal antitrust laws. The only other theory of a CPA violation that Premera argued to the Court of Appeals was not presented in the trial court and was further forfeited on appeal because of Premera's inadequate briefing. (Op. 25 n.17.) Premera does not dispute these determinations.

to the decision. The resulting enforcement of Premera's agreement does not increase rates on any broad basis. Instead, it brings the rates at TEC's modestly-sized Bellevue Clinic into line with those Premera has agreed to pay at all other TEC clinics and prevents Premera from continuing to renege on its promise that it would pay in the same way for services at all TEC locations. And, of course, it clarifies the parties' contract rights, namely, Premera agreed to pay the same rates for the same kinds of healthcare services at all of TEC's approximate, thirty locations. Except insofar as the Bellevue Clinic is concerned, Premera's lawsuit has never challenged the lawfulness of those rates.

None of these circumstances raise review-worthy concerns relating to antitrust law, tying, consumer protection or free competition. There are established bodies of state and federal law that are available to address, when appropriate, anticompetitive consolidation in the health care industry. The decision here does not concern or intrude upon any of them.

Premera attempted here a novel and inapt theory of unlawful tying which it proved unable to support with appropriate evidence. The CPA ruling is nothing more than that. No further appellate court resources should be devoted to it.

II. STATEMENT OF THE CASE

A. Basic Facts

Premera is one of Washington's largest health insurers, serving more than 2 million Washingtonians. (Op. 2.) TEC is a physician group providing health care services in Washington at approximately 30 locations, including in Snohomish and King Counties. (*Id*.). In 2009, TEC and Premera entered a contract (the "Premera-TEC Contract") pursuant to which Premera agreed to pay specified rates ("TEC Rates") for services TEC provides to Premera enrollees at TEC's facilities in Washington. (*Id*.) In that agreement, Premera reserved the rights to unilaterally promulgate new rates and to terminate without cause following 90-days' notice.[2] (CP 2334 (Section 7.01).)

[2] TEC may push-back on any new rates Premera promulgates, in

In 2015, Premera entered into a provider agreement (the "Premera-EFMC Contract") with the Eastside Family Medical Clinic ("EFMC"), a medical practice owned and operated by three physicians in Bellevue. The rates under this contract ("EFMC Rates") were lower than the TEC Rates. (CP. 3.)

In 2018, TEC acquired many, but not all, of EFMC's assets. (Op. 3.) The Premera-EFMC Contract was not among the acquired assets. (*Id*.) Following the acquisition, TEC began operating its own Bellevue Clinic and sought to charge TEC Rates. (*Id*.) Premera refused to pay them, insisting TEC could only charge EFMC Rates. (*Id*.)

B. Trial Court Proceedings

TEC sued for breach of contract. (Op. 4.) In response, Premera asserted, among other things, that TEC is bound by the Premera-EFMC Contract under successor liability doctrines. (*Id*.) Premera also filed counterclaims, asserting breach of

---

which case the parties must either negotiate or terminate their contract. (CP 2334-35 (describing dispute resolution process).)

contract against TEC and EFMC, tortious interference with the Premera-EFMC Contract against TEC and the prior owners of EFMC, and a violation of the CPA. (*Id*.) The CPA claim was primarily premised on an alleged "per se tying arrangement."[3] (CP 227.)

[3] A tying violation may also be pursued under the "[R]ule of [R]eason," which requires "a fact-specific assessment of market power and market structure" in order to determine a restraint's actual effect on competition. *Ohio v. Am. Express*, 138 S. Ct. 2274, 2284 (2018). The plaintiff has the initial burden of showing the restraint has substantial anticompetitive effects that harm consumers. The defendant must then show procompetitive justifications. The plaintiff then rejoins by showing procompetitive justifications may be achieved by less anticompetitive means. *Id*. at 2284. Premera did not invoke the Rule of Reason.

In the Court of Appeals, Premera's only other theory of a CPA violation was that, when TEC negotiated to buy EFMC assets, it allegedly received information about EFMC's rates. According to Premera, the acquisition and use of that information violated the Sherman Act, 15 U.S.C. §1. But Premera has not pursued this theory in this Court and it is without merit. As the Court of Appeals recognized, Premera effectively forfeited this argument when it failed to pursue it in the trial court and presented on appeal "conclusory arguments that are unsupported by citation of authority." (Op. 25 n.17.)

After claims against EFMC were dismissed, Premera and TEC filed competing motions for summary judgment. (Op. 5.) The trial court—without explanation or reasoning—granted Premera's motion and denied TEC's. (CP 1457-1463.) The court then awarded Premera more than $1.25 million in attorneys' fees and costs as the prevailing plaintiff on the CPA claim. (CP 2044.)

C. The Court of Appeals Decision

In an unpublished opinion, the Court of Appeals reversed the summary judgment for Premera on the claims for declaratory relief, breach of contract, and a CPA violation (along with the associated attorney's fee/cost awards). The court directed the trial court to grant TEC's motion for summary judgment on the issues of liability relating to claims for breach of the Premera-TEC Contract, for a violation of the CPA, and for declaratory relief. (Op. 25-26.)

1. Successor Liability

The Court of Appeals rejected Premera's contention that TEC was required to accept EFMC Rates for services provided to Premera enrollees at the Bellevue Clinic. Only the Premera-EFMC Contract used EFMC Rates. Thus, the Court of Appeals correctly recognized a determinative issue to be whether the doctrine of successor liability applied to make TEC liable as the "Provider" under that contract with those EFMC Rates. The court rejected both of Premera's arguments for imposing such liability, holding the record failed to establish either a de facto merger of TEC and EFMC or that TEC was a mere continuation of EFMC. (Op. 10-16.)

2. Breach of Contract

Next, the court rejected Premera's argument that TEC breached the Premera-TEC Contract, specifically Section 9.02A, by failing to obtain Premera's consent before applying the contract's TEC Rates to services provided at the Bellevue Clinic. (Op. 17-21.) Section 9.02A requires written consent before any

"attempt to apply the terms of this Agreement, in whole or in part, to Covered Services provided to Enrollees by another Provider, Practitioner, person or entity, without Plan's prior written consent." Because Premera drafted this provision — and many other relevant ones — "any ambiguities …. are construed against it." (Op. 19.) The Court of Appeals correctly reasoned that TEC's acquisition of EFMC assets, which it used to open its own Bellevue Clinic, did not cause "another Provider, Practitioner, Person or Entity" to operate TEC's Bellevue Clinic. (Op. 18.) TEC's Bellevue Clinic has at all times been owned and operated by TEC, not "another Provider." That means Section 9.02A and its consent mechanism is inapplicable. (Op. 19.)

In addition to relying on the contract language Premera drafted, the Court of Appeals invoked undisputed evidence of the parties' course of dealing. The Premera-TEC Contract provides that TEC may add new practitioners at its clinics and charge TEC Rates for their services. (Op. 19.) Accordingly, TEC opened clinics in Edmonds, Woodinville, Bothell and Kirkland after the

Premera-TEC Contract was signed. Premera paid TEC Rates for services provided at these clinics, confirming what the plain language of the contract established: the parties intended to apply TEC Rates to services at *all* TEC locations, including those opened after the Premera-TEC Contract took effect. (Op. 20.)

Because Premera agreed to pay TEC Rates for services at *all* TEC locations, it breached the Premera-TEC Contract when it refused to pay those rates for Bellevue Clinic services. Thus, the Court of Appeals held, the trial court erred when it did not grant summary judgment to TEC on both its and Premera's breach of contract claims.[4] (Op. 20-21.)

3. The CPA Claim

Turning to Premera's claim that "TEC violated the CPA by engaging in unlawful tying," (Op. 21.) the court determined "that the record does not establish a question of fact regarding unlawful tying." (Op. 21.) "[T]he essential characteristic of an

[4] The damages Premera owes for its breach are an issue to be resolved in the trial court on remand.

invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." (Op. 22 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006)).

Starting with the requirement of separate products, the Court of Appeals held that Premera failed to carry its burden of proving its theory that "TEC physician services in Snohomish County and physician services at EFMC in Bellevue are two different products." (Op. 23.) As the court noted, establishing distinct products turns "on the character of the demand for the two items." (*Id*. at 23 (quoting *Jefferson Parish*, 466 U.S. at 19).) The record lacked sufficient evidence to show that TEC's "physician services" being provided at its different clinical locations should be considered separate products. (Op. 24-25.)

Turning to the requirement of coercion necessary for a tying claim, the court correctly perceived insufficient evidence that TEC pressured Premera into agreeing to purchase any service it did not want. (Op. 24.) "The presence of 'forcing' is a key indicator of restraint on competition in the market for the tied item." (Op. 22, discussing *Jefferson Parish*, 466 U.S. at 12.) Through the Premera-TEC Contract, Premera purchased TEC's services at all TEC facilities as a bundle that it could then market to its insureds and prospective insureds. With no evidence that Premera was coerced into making this purchase, Premera's CPA claim boils down to mere dissatisfaction with the financial impact of the contractual bargain it struck when it agreed to pay TEC rates at *all* TEC locations. This situation of Premera's own making is neither unlawful tying nor a violation of the CPA. (Op. 24.) Consequently, the Court of Appeals held that "TEC was entitled to summary judgment and dismissal of the CPA claim." (Op. 25.)

III. REASONS TO DENY REVIEW

Under RAP 13.4, "[a] petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." (RAP 13.4(b).) Premera's petition only seeks review under (b)(4). But Premera fails to establish any issue of "substantial public interest."

A. The Issues Premera Presents For Review Are Not Those Decided By The Court of Appeals And They Do Not Concern Matters of Substantial Public Interest.

As already noted, Premera does not challenge the Court of Appeals' determinations that TEC was not bound by the Premera-EFMC Contract or that Premera agreed, in the Premera-

TEC Contract, to pay TEC Rates for services at all TEC locations, including the Bellevue Clinic.

With respect to the court's CPA ruling, Premera frames two issues: whether the Court of Appeals erred when it determined that "as a matter of law (1) similar services offered in different geographical markets cannot represent different products for purposes of a tying claim, and (2) TEC did not utilize unlawful 'coercion' because Premera and consumers continued to use EFMC's services after the 50% rate increase." (Pet. 4.)

But, contrary to Premera's misrepresentations, the Court of Appeals announced no generally applicable rule of law. It applied settled jurisprudence to conclude that "the record" failed to establish a question of fact regarding two essential requirements of the "tying" claim Premera alleged. (Op. 21.) That decision does not concern any matter of substantial public interest. And given the narrowness of the Court of Appeals'

decision, this case is not a suitable vehicle for announcing any broadly applicable rules of law.

1. Separate Products

Premera has maintained since the trial court proceedings that "the tying product is TEC's services in Snohomish County, and the tied product are [sic] services at the EFMC location at TEC rates." (CP 227.) Establishing these services to be distinct products for a tying claim depends on the existence of sufficient demand for these services separately. (Op. 23; *Jefferson Parish,* 466 U.S. at 19-22.) Premera, as the operative consumer in this case, purchased TEC's services throughout Washington as "one product," by way of the Premera-TEC Contract. (Op. 23.) It did so in order to make its health insurance more attractive to consumers by offering them choice and flexibility when it comes to consulting doctors. The record, however, is devoid of evidence of demand among health insurers for TEC services unbundled on a county-by-county or clinic-by-clinic basis. *See Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1014-15

(N.D. Cal. 2021) (describing the detailed demand analysis needed to establish distinct product markets).

Indeed, the record evidence pertaining to demand – what Premera negotiated for and obtained itself – contradicts Premera's assertion of distinct product markets. Rather than negotiating separately for TEC's services in different areas, Premera sought and secured in the Premera-TEC Contract TEC's services throughout Washington. That allows Premera's customers to receive state-wide access to TEC services, including from new practitioners and clinics that become available through TEC after the contract's inception. Notably, the contract has no geographic limits. This is consistent with Premera's business model, which is to offer its customers and potential customers a broad network of medical services. This allows Premera to compete with other health insurers in securing customers. As one of Premera's own witnesses testified, Premera members, who are situated in many different locations,

desire to have the ability to obtain services from TEC. (CP 759, *see also* CP 806-07.)

The Court of Appeals, therefore, correctly held that the record lacks sufficient evidence to establish separate products when, as here, TEC offers similar physician and clinical services at different locations. In so deciding, the Court of Appeals did not close the door to future situations where, using the demand test, a different record might show that similar products offered at different locations are capable of being separate products for tying purposes. But that is not the record here.

2. Coercion Of The Purchaser By The Seller

Tying also requires the exploitation of market power to coerce customers into purchasing tied products. (Op. 24.) Here, as the Court of Appeals noted, "TEC's acquisition of EFMC does not force Premera to buy a service it does not want." (Op. 24.) Thus, Premera's grievance is not with the bundled contract of TEC clinical services – Premera has always wanted, and still wants, the entire bundle. Premera just wants to pay less for a

small part of the services included in that bundle – those available at the modest-sized Bellevue Clinic. That preference to pay less is not sufficient to establish the coercion needed for a tying claim. (Op. 24.) Indeed, Premera's lawsuit has never challenged the legality of TEC Rates when they are applied to services obtained at its thirty clinics other than Bellevue, and the record lacks evidence that Premera was coerced into purchasing anything.

Moreover, it is well established that the coercion element of tying is lacking where the obligation to purchase at specific rates arises "from a contractual relationship that the plaintiff has entered into voluntarily." *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 973 (9th Cir. 2008) (citing multiple cases). "Purchases under a legal contract do not constitute a 'sellers' exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to

produce elsewhere on different terms." *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984).

The circumstances of the Premera-TEC Contract belie any notion of coercion. As already noted, Premera sought and contracted for all TEC services. It drafted key parts of the contract that led the Court of Appeals to decide that Premera agreed to one set of rates for all TEC locations. The contract is not exclusive. Premera is free to contract with other providers of medical services. It is not locked-in with TEC for an extended period. Premera even drafted the contract to allow it to unilaterally change the rates (CP 2334 [Section 7.01]), and terminate without cause on 90 days' notice. (CP 2333 [Section 601 & 602].) The TEC Rates set out in the contract were not unilaterally imposed by TEC but negotiated with Premera. [CP 187, 2341.2343 [Ex. A]). Contracts of "short duration and easy terminability…negate substantially their potential to stifle competition." *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997).)

Nothing about the court's coercion decision merits review. As with the separate products issue, the Court of Appeals simply applied settled legal principles to case-specific facts.

* * *

In short, nothing about the Court of Appeals' decision merits review.

B. Speaking More Generally, This Case Is Not Review-Worthy; It Does Not Concern Matters of Significant Public Interest.

Much of Premera's petition has little or nothing to do with the issues Premera identifies for review. Premera's petition attempts to distort the court's narrow decision to make it appear to be something it is not.

First, both governmental and private parties have tools available to address acquisitions in the health care industry that actually threaten competition. These remedies include pre-acquisition and post-acquisition scrutiny by regulators and, when appropriate, court challenges based on theories that a transaction will substantially lessen competition in an anticompetitive way.

See, e.g., 15 U.S.C. §§ 1, 18. This case has nothing to do with these remedies. They are available in appropriate cases, as the Court of Appeals acknowledged. (Op. 25 & n.16.) Premera has never even tried to pursue a claim under such theories of monopolization, attempted monopolization, or the like.

Second, for all Premera's bluster about TEC's size, and its affiliations with other large enterprises, Premera is one of Washington's largest health insurers. Its market prowess allowed it to draft and secure in the Premera-TEC Contract all sorts of favorable terms and prerogatives, as described earlier. And this same market prowess allowed Premera to extract extremely favorable payment terms in the Premera-EFMC Contract, which it was able to present to the three doctors who operated the small, EFMC practice on a take-it-or-leave-it basis.

Third, the consequences of applying TEC Rates to Bellevue Clinic services will not be significant changes in health care pricing. Bellevue is a single clinic of modest size. Aligning its rates with those Premera agreed to pay at approximately thirty

other locations is not going to result in any dramatic changes or broad price increases.

Moreover, even evidence of higher prices resulting from a transaction is not enough to establish the transaction is anticompetitive. (*Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796 (1st Cir. 1988) ("the 'market power' hurdle is moderately high" requiring more than mere ability to raise prices within competitive levels).) Better products often fetch higher prices. Premera knows from its own experience that its members seek to have TEC as a care option. Such loyal patronage reflects the quality and patient satisfaction associated with what TEC offers. Premera's myopic focus on price differences between TEC and EFMC Rates does not confront all the reasons for the differences. Nor does it supply evidence of what other market participants are charging for comparable services, which is necessary for an assessment of whether TEC Rates are supra-competitive or just more than what Premera would like to pay.

Fourth, for all of Premera's focus on TEC's supposed "market power" (Pet. 20) it fails to acknowledge that the Court of Appeals did not need to reach TEC's many arguments demonstrating that no such market power was ever established. (*See* AOB 53-62.) Insofar as the trial court may have thought otherwise — there is no way to know because the court's rulings lack any explanation — this demonstrates still more trial court error.

Market power is the ability "to raise prices significantly above the competitive level without losing all of one's business." *Valley Liquors, Inc. v. Renfield Importers, Ltd.,* 678 F.2d 742, 745 (7th Cir. 1982). Premera never even tried to satisfy this test. The purported market shares it touts for TEC in select locations, (Pet. 8), are below the ranges that may signify market power under a swath of case law. (AOB 57.) More importantly, Premera's figures are not probative of either relevant market shares or market power. A properly defined market must include competing products and services. *Syufy Enterprises v. Am.*

Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986). Premera's "market share" figures only address the percentages of Premera enrollees who prefer to patronize TEC providers and clinics. These figures do not explore any other insurers or providers, which is what any competent economic analysis of market shares or market power would need to do. Relying on these ersatz figures, Premera made no attempt to show market shares or market power using the techniques most courts sanction and apply, like the Herfindahl-Hirschman Index. (*See, e.g.*, *Saint Adolphus Med. Ctr. - Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775 786 (9th Cir. 2015)). It did not examine all those in the market—or capable of joining the market—as any competent analysis would do.

Fifth, there is an enormous disconnect between the issues Premera presents for review and its discussion of supposed reasons to grant review. (*Compare* Pet. 4 *with* Pet. 17.) Pages 18-22 of the petition never once uses the word tying. Therefore, not surprisingly, the discussion has nothing to do with the issues

presented for review. The discussion also assumes contested factual matters the Court of Appeals never had to address, like the existence—or not—of TEC market power.

Pages 22 to 24 of the petition address general principles of tying law though Premera injects an assertion it has never before made in this case, namely, that Premera was not required to establish a violation of the Sherman Act in order to maintain a CPA claim. (Pet. 22-23.) Premera never argued such a theory in either the trial or appellate court. It is too late for Premera to make such a contention for the first time now. While a CPA violation need not always require proof of an antitrust violation, Premera rested this case on proving such a *per se* tying violation.

When Premera finally gets around to a discussion with arguable bearing on its two, tying law issues, it cites an inapt review article about mergers (something not involved here). (Pet. 26-27.) Premera acknowledges that the existence of separate products for tying purposes is measured by gauging demand – across all participants in an established geographic

market. As discussed above, however, the record contains no evidence to even establish a distinct market, let alone market participant demand. And the only evidence of demand reveals that Premera demanded and contracted for all of TEC services at all locations as a bundled, single product. The record therefore stands in stark contrast to the precedent Premera cites in its petition where, on different facts, parties viewed services as separate and contracted for them in that way. (Pet. 26, discussing *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 469 (7th Cir. 2020.))

Turning finally to its discussion of coercion (Pet. 29-32), Premera suggests a court could find the compulsion necessary for tying even if the purchaser of a tied product would want to buy that product despite coercion and a tying arrangement. (Pet. 31.) But the Court of Appeals did not exclude that theoretical possibility. It recognized that a defendant with market power might be properly called to account if it "use[d] its market power to drive up prices…" (Op. 24. 25.) But Premera did not show

that occurred here, under a contract with rates it negotiated — and drafted in important respects — for a bundle of TEC services it has always wanted, and still wants now. There is nothing coercive or anticompetitive about this common aspect of contract negotiation. Indeed, there's no evidence that the TEC Rates are above market rate levels, given that Premera failed to introduce evidence of market rates.

Succinctly, Premera failed to establish a record that even resembled a prima facie case of the tying theory upon which it premised its CPA claim. The Court of Appeals recognized this obvious deficiency. Having determined that Premera agreed to pay TEC Rates for services at all TEC facilities, including the Bellevue Clinic – a determination which Premera does not challenge – the Court of Appeals correctly determined Premera could not use the CPA to escape its bargain, and Premera has not identified any reason for this Court to review that decision.

IV. CONCLUSION

The Court should deny Premera's petition.

I certify that this document contains 4,525 words, pursuant to RAP 18.17.

DATED this 6th day of March, 2023.

Respectfully submitted,

By: */s/ Thomas M. Peterson*
Thomas M. Peterson
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-1000

By: */s/ Rachel D. Groshong*
David R. Goodnight, WSBA #20286
Rachel D. Groshong, WSBA #47021
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
Email: david.goodnight@stoel.com
rachel.groshong@stoel.com

CERTIFICATE OF SERVICE

I, Malaika R. Thompson, hereby certify under penalty of perjury under the laws of the State of Washington that on March 6, 2023, I caused to be served a true and correct copy of the foregoing document via the Appellate Courts' Portal which will send notice to the following persons:

Gwendolyn Payton, WSBA No. 26752
John Neeleman, WSBA No. 19752
KILPATRICK TOWNSEND & STOCKTON LLP
1420 Fifth Avenue
Suite 3700
Seattle, WA 98101

Adam H. Charnes, admitted *pro hac vice*
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201-2924

Attorneys for Petitioner Premera Blue Cross

DATED this 6th day of March 2023, at Kent, Washington.

/s/Malaika R. Thompson
Malaika R. Thompson
Litigation Practice Assistant
Stoel Rives LLP

STOEL RIVES LLP

March 06, 2023 - 2:25 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,683-2
Appellate Court Case Title:	The Everett Clinic v. Premera

The following documents have been uploaded:

- 1016832_Answer_Reply_20230306142007SC590761_3043.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 20230306 TEC Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- GPayton@kilpatricktownsend.com
- acharnes@kilpatricktownsend.com
- anne.dorshimer@stoel.com
- david.goodnight@stoel.com
- heidi.wilder@stoel.com
- irountree@kilpatricktownsend.com
- jessica.sparks@stoel.com
- jill.bowman@stoel.com
- jneeleman@kilpatricktownsend.com
- thomas.peterson@morganlewis.com

Comments:

Sender Name: Rachel Dunnington - Email: rachel.groshong@stoel.com
Address:
600 UNIVERSITY ST STE 3600
SEATTLE, WA, 98101-4109
Phone: 206-386-7545

Note: The Filing Id is 20230306142007SC590761