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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER, NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD, and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants.	Case No. 1:12-cv-00560-BLW (Lead Case) **REPLY IN SUPPORT OF STAY PENDING APPEAL**
FEDERAL TRADE COMMISSION; STATE OF IDAHO Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A. Defendants.	Case No. 1:13-cv-00116-BLW

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. Defendants Have A Substantial Case For Relief On Appeal. 1

II. The Balance Of Hardships Tips Sharply In Favor Of A Stay Pending Appeal. 4

A. Defendants and Saltzer Employees Will Suffer Irreparable Harm. 4

B. The Plaintiffs Have Not Established Any Likelihood of Irreparable Harm From Issuance Of A Stay. 6

III. The Public Interest Supports Staying Any Order Of Divestiture Pending Appeal. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

In re Korean Air Lines Co., Ltd. Antitrust Litig.,
642 F.3d 685 (9th Cir. 2011) 3

M.A.P. Oil Co., Inc. v. Texaco Inc.,
691 F.2d 1303 (9th Cir. 1982) 7

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)...9

Nat'l Ass'n of Chain Drug Stores v. Express Scripts, Inc.,
Civ. A. No. 12-395, 2012 WL 1416843 (W.D. Pa. Apr. 25, 2012)..6

State of Cal. v. Am. Stores Co.,
872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990)...........................3

United States v. Baker Hughes Inc.,
908 F.2d 981 (D.C. Cir. 1990) 3

United States v. General Dynamics Corp.,
415 U.S. 486 (1974)...3

United States v. Philadelphia National Bank,
374 U.S. 321 (1963)...3

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,
559 F.2d 841 (D.C. Cir. 1977) 6

STATUTES

42 U.S.C. § 1395jjj 3

OTHER AUTHORITIES

Robert F. Leibenluft and Leigh L. Oliver, *The Antitrust Challenge to the St. Luke's/Saltzer Medical Group Transaction: Implications for Hospital/Physician Consolidations*, 23 Health L. Rep. (BNA) 301 (Feb. 27, 2014) 2

Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, NY Times B1 (Feb. 5, 2014)............3

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3d ed. 2009) 3

INTRODUCTION

Both the government and the private plaintiffs demand that St. Luke's divest Saltzer before the Court of Appeals has reviewed this Court's ruling and remedial order. Plaintiffs do so even though this is a case of first impression that will have enormous consequences for the people of the Treasure Valley and for the delivery of health care across this country. And they do so in the face of several considerations that, taken together, militate to the contrary:

1. There is not a single finding of fact to the effect that any increase in price above competitive levels or any other supposed anticompetitive effect of the Saltzer affiliation is imminent;

2. Defendants have committed to do nothing during the pendency of the appeal that would hinder or prevent divestiture;

3. There is not a single finding of fact to the effect that the purpose of the affiliation was to be able to suppress competition, and St. Luke's would be profoundly self-destructive to act anticompetitively while its appeal is pending;

4. Failure to issue a stay will be the death knell of a transaction that, as the Court has found, will promote patient outcomes if permitted to go forward in that, once Saltzer is divested, it is likely to splinter apart and will therefore not be able to re-affiliate;

5. Immediate divestiture will imperil the jobs of hundreds of Saltzer employees and will have an immediate impact on their pay and benefits; and

6. Requiring divestiture now will, as a practical matter, subvert the value of an appeal in a case that raises substantial questions meriting review by the Court of Appeals.

In short, there is no sound reason to insist upon divestiture prior to appellate review—and every reason to grant a stay pending appeal.

ARGUMENT

I. Defendants Have A Substantial Case For Relief On Appeal.

The government plaintiffs contend that this Court "merely applied well-established law" and a "well-settled analytical framework" to supposedly "extensive" and "abundant evidence" and that defendants do not have "even a minimal likelihood of success on the merits of their

appeal." Gov't Opp. 3-10.[1] Their dismissive characterization of defendants' positions will not withstand scrutiny. As this Court has recognized, this case is a far cry from mere application of well-established law, but rather "undoubtedly, one of the most difficult cases" ever presented to the Court. Trial Tr. 3669:13-15; *see also id.* at 3869:2-5 (statement of the Court: "[W]e're thrust right into the middle of a debate which really may be one of the two or three most significant challenges, both economic, social, and what have you, that our country is facing."); Def. Br. 4-6; Def. Br. Ex. A, Robert F. Leibenluft and Leigh L. Oliver, *The Antitrust Challenge to the St. Luke's/Saltzer Medical Group Transaction: Implications for Hospital/Physician Consolidations*, 23 Health L. Rep. (BNA) 301 (Feb. 27, 2014) (describing the case as "the first to address several cutting edge antitrust issues implicated by a hospital acquisition of physicians amid the recent wave of provider consolidation"). Although the Court ruled in favor of the government plaintiffs, there can be no doubt that defendants have a significant case on appeal.

The government plaintiffs' attempts to disparage the legal questions identified by defendants (Def. Br. 6-12) cannot alter the fact that these questions are substantial. For one, the government plaintiffs seek to downplay the central role that market concentration, based on the Court's conclusion that Nampa is the relevant geographic market, played in the Court's decision. Gov't Opp. 3-5. However, as this Court explained, it was "the particular structure of the Acquisition—creating *such a huge market share* for the combined entity" that led the Court to conclude that the transaction "creates a substantial risk of anticompetitive price increases" that violated the Clayton Act. Dkt. 464 Conclusions ¶ 72 (emphasis added). Nor can it be disputed that the Court ruled that the transaction must in these circumstances be enjoined under the

[1] The private plaintiffs do not attempt to refute defendants' showing that this case presents serious legal questions.

Clayton Act—even though "the best result might be to approve the Acquisition," and even though the transaction would improve outcomes for patients. *Id.* ¶¶ 76-77.[2]

The government plaintiffs are also incorrect in arguing that there is no substantial legal question regarding the proper analysis and significance of the procompetitive benefits that will result from the transaction. Gov't Opp. 5-6, 8-10. The Court recognized that the transaction will "improve patient outcomes" in the Treasure Valley. Dkt. 464 p. 3. It also understood that the transaction was a step in the transition from volume-based to value-based payment—an important goal of the Affordable Care Act. *See* 42 U.S.C. § 1395jjj; Def. Br. Ex. B, Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, NY Times B1 (Feb. 5, 2014). In short, there are substantial questions relating to how the procompetitive benefits of a transaction like this one are weighed against possible anticompetitive effects; who has the burden with respect to possible less restrictive alternatives; and how the antitrust laws are to be harmonized with health care policy as reflected in Congressional legislation.[3]

[2] The government plaintiffs also argue that such a heavy focus on market share is proper because *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), "remains the law of the land and must be followed." Gov't Opp. 5. The case they cite for this proposition, *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 642 F.3d 685 (9th Cir. 2011), does not rely on or cite *Philadelphia National Bank*. In fact, the Ninth Circuit has not adopted *Philadelphia National Bank*'s approach of elevating concentration statistics above all other factors in more than 25 years. *See State of Cal. v. Am. Stores Co.*, 872 F.2d 837, 842 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990). Moreover, the government plaintiffs simply ignore the fact that, as Justice (then-Judge) Thomas explained for the D.C. Circuit, the Supreme Court itself has "cut … back sharply" on *Philadelphia National Bank* and similar 1960s decisions. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990) (explaining that *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), "began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence").

[3] The government plaintiffs are also wrong to assert that under "hornbook law," defendants have the burden to prove that procompetitive benefits are merger-specific. Gov't Opp. 6. The treatise on which the government plaintiffs rely, Areeda & Hovenkamp, describes that approach as a "suggest[ion]." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of*

Finally, there is no support for the argument that any opposition to divestiture is devoid of merit. Gov't Opp. 6. The government plaintiffs assert that divestiture may not be avoided "'on the plea of hardship or inconvenience,'" *id.* at 7, but they offer no response to defendants' actual argument—namely that divestiture will not improve competitive conditions in the Treasure Valley, but will instead deprive consumers of the procompetitive benefits of the transaction. Def. Br. 11-12. And they ignore numerous cases in which the propriety of divestiture has been questioned by the courts. *Id.* (citing cases).

II. The Balance Of Hardships Tips Sharply In Favor Of A Stay Pending Appeal.

A. Defendants and Saltzer Employees Will Suffer Irreparable Harm.

The government plaintiffs claim that defendants are estopped by their statements at the preliminary injunction hearing from arguing that immediate divestiture would vitiate their appeal rights. Gov't Opp. 16-17. However, all that defendants said at the preliminary injunction stage was that the Saltzer transaction had been "carefully and deliberately structured … so that the transaction could be unwound if necessary." Dkt. 34 at 34; Prelim. Inj. Tr. (Dkt. 49) at 88:5-10 ("[St. Luke's] will not oppose divestiture on grounds that divestiture cannot be accomplished. Because this—this transaction was carefully structured so that, in fact, there could be an unscrambling of the egg….").

Defendants never took the position that they would not argue that divestiture is an inappropriate remedy on the facts of this case. To the contrary, defendants repeatedly argued that a preliminary injunction should be denied on the ground that an independent Saltzer—as it existed before the transaction—would not be an effective competitor for reasons entirely

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Antitrust Principles and Their Application ¶ 976d (3d ed. 2009). The government plaintiffs identify no principled reason for applying a burden on *defendants* to show merger-specificity under the Clayton Act when the analogous burden to show the existence of less restrictive alternatives under the Sherman Act rests on the *plaintiff*. *See* Def. Br. 9-10.

unrelated to any costs associated with the process of divestiture. *See* Dkt. 34 at 40-42 ("if the closing is delayed by an injunction, it is quite likely that Saltzer will not be able to continue as a financially viable group"). Defendants now argue, consistent with their prior argument, that immediate divestiture would put Saltzer in financial peril—not because of the costs associated with unwinding the transaction, but because of the precarious financial position an independent Saltzer would be in. *See* Def. Br. 13-15. Moreover, immediate divestiture would irreparably harm defendants because—even if Saltzer survives as an independent entity—the costs and burdens of re-affiliating, which would have to be borne not only by St. Luke's but also by Saltzer's physicians and employees, would be prohibitive. *Id.* at 14-15. This argument, too, is fully consistent with defendants' prior positions.[4]

The irreparable harm to defendants if a stay is denied is anything but speculative. The undisputed evidence showed that Saltzer physicians would, in the event of divestiture, face an immediate reduction in compensation of more than 30 percent relative to the compensation they received before the transaction. *See* Trial Tr. 3233:21-3234:2 (L. Ahern). This reduction—which results from Saltzer's loss of seven orthopedic surgeons *before* the transaction closed—would cause Saltzer's overall practice profitability to shift from above the 25th percentile based on regional Medical Group Management Association benchmarks to less than the 10th percentile. *Id.* at 3235:3-13 (L. Ahern). As multiple Saltzer physicians testified, given the increased overhead burden they would be forced to shoulder, the significantly decreased compensation they would receive, and the expected difficulty in recruiting replacement physicians—particularly specialists—to replace the production of the departed surgeons, they

[4] Defendants have not advanced a "failing firm" defense. *See* Gov't Opp. 18-19. Defendants do not point to Saltzer's precariousness as a "defense" on the merits—but rather as evidence that denial of a stay would cause *irreparable harm* and that divestiture is an inappropriate remedy.

would consider leaving the group, and perhaps the community, in the event that Saltzer is divested from St. Luke's. Trial Tr. 2401:10-22 (J. Kaiser); *id.* at 3328:12-3329:23 (T. Patterson); *id.* at 3365:4-3366:13, 3367:21-3368:4 (H. Kunz); Dkt. 269 (M. Djernes Dep.) at 71:10-15. And disaffiliation from St. Luke's would have an immediate adverse impact on hundreds of Saltzer employees. *E.g.*, Def. Br. 13-14; Trial Tr. 3093:8-3094:1, 3098:16-3100:9 (W. Savage).

The government plaintiffs cannot dispute that immediate divestiture, followed by re-affiliation, would be tremendously burdensome and wasteful. *See* Gov't Opp. 18-19. Nor do they cite any evidence of how Saltzer might survive divestiture as a viable business if multiple Saltzer physicians leave the group and/or community, as they testified they might be forced to do—much less any evidence that Saltzer and St. Luke's could later *re*-affiliate in the event of a successful appeal.

These undisputed facts establish that a stay is necessary to preserve defendants' appeal rights. If divestiture is ordered before an appeal can be completed, defendants' appeal rights will, as a practical matter, be defeated—a point on which the plaintiffs simply offer no response. As courts have repeatedly held, the irreparable harms that defendants have shown here, and that plaintiffs cannot refute, strongly support a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 & n.2 (D.C. Cir. 1977); *Nat'l Ass'n of Chain Drug Stores v. Express Scripts, Inc.*, Civ. A. No. 12-395, 2012 WL 1416843, at *3 (W.D. Pa. Apr. 25, 2012).

B. The Plaintiffs Have Not Established Any Likelihood of Irreparable Harm From Issuance Of A Stay.

The government plaintiffs alleged, and the Court found, a single product market—for adult primary care physician services. Dkt. 464 Findings ¶ 48. But, as St. Luke's demonstrated, the evidence establishes that a combined St. Luke's and Saltzer *will not* engage in supracompetitive pricing in that market during the pendency of the appeal. Def. Br. 16-18.

Plaintiffs have offered no response *See* Gov't Opp. 11-12. Indeed, it would be completely self-defeating for defendants to try to increase prices above competitive levels in the sole market at issue in this case while the appeal is pending.

The government plaintiffs instead argue that granting a stay would cause irreparable harm because defendants will supposedly "'charge more services'"—*i.e.*, ancillary services—"'at higher hospital-based billing rates.'" Gov't Opp. 12. This argument cannot support denial of a stay. First and most fundamentally, the plaintiffs did not allege—much less prove—that defendants have market power in any market for ancillary services.[5] Nor did plaintiffs allege or prove any mechanism by which defendants could use market power in the market for primary care physician services to engage in supracompetitive pricing in any market for ancillary services. *See, e.g.*, *M.A.P. Oil Co., Inc. v. Texaco Inc.*, 691 F.2d 1303, 1305-06 (9th Cir. 1982) (to establish that defendant used power "in one market to gain an unwarranted competitive advantage in another," plaintiff must prove "the existence of two separate product or service markets"). These points are determinative: If St. Luke's is not shown to have market power in any market for ancillary services, then, by definition, it could not successfully engage in supracompetitive pricing of ancillary services because such services could always be obtained at competitive prices elsewhere—and commercial insurers could defeat supracompetitive pricing by directing their insureds to competitive providers. *See* Trial Tr. 1348:24-1349:3 (D. Dranove); 2888:10-20 (D. Argue).

The plaintiffs have thus not established any risk of anticompetitive pricing for ancillary services at any time. Even more important for present purposes, plaintiffs have not established any risk of anticompetitive pricing for ancillary services *during the pendency of the appeal*. The

[5] Nor did the plaintiffs allege (or prove) that ancillary services are tied to primary care physician services.

Court made no finding—and the plaintiffs have cited no evidence—that a combined St. Luke's/Saltzer would be able to engage in supracompetitive pricing of ancillary services in the next several months. There is no such evidence.[6]

Moreover, contrary to the government plaintiffs' argument, defendants' "self-interest" is served not by increasing prices while they appeal the Court's judgment of a likelihood of anticompetitive price increases—but instead by continuing to demonstrate, as they have in the 16 months since the transaction was completed, that *no such price increases* have resulted. *See* Def. Br. 17-18. To the extent there were any imminent risk of supracompetitive pricing, it could be fully avoided by separate negotiation of fee-for-service contracts during the pendency of the appeal. *See* Def. Br. 17-18. Under that scenario, the rate for fee-for-service ancillary services provided at Saltzer facilities would be determined by negotiation with Saltzer alone—not with the combined entity—just as it was before the Saltzer transaction took place. If Saltzer and St. Luke's negotiated separately in this way, they would not "share the same ultimate economic incentives," Gov't Opp. 12, but each would instead have every incentive to compete on price in order to stand in a better competitive position if the Court's divestiture order were affirmed. Thus, although the Court rejected separate negotiation as a permanent remedy, Dkt. 464 Conclusions ¶ 59, separate negotiation would fully address any supposed risk of immediate harm.[7]

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[6] As this Court said when denying a preliminary injunction, there is no risk of imminent anticompetitive pricing because consumers can "get their CT Scans and other imaging procedures at [Saint] Al's Nampa hospital." Dkt. 47 at 6.

[7] Separate negotiation would also eliminate any risk that employer Micron would suffer supposed irreparable harm as a result of "coverage gap[s]," Gov't Opp. 13-14, or that St. Luke's would "withdraw Saltzer physicians from competing networks," Priv. Pl. Opp. 2-3, as Saltzer would negotiate separately as to participation in networks. In any event, neither the government nor the private plaintiffs have shown that Micron or any other employer or network would suffer harm simply because divestiture was stayed during the pendency of the appeal. The government

There is also no merit in the private plaintiffs' assertions of supposed irreparable harm to them from a stay. Notably, as the private plaintiffs concede, Priv. Pl. Opp. 5, 11, this Court made no finding that the private plaintiffs had proved likelihood of injury to them of any kind[8]—much less likelihood of irreparable injury in the event that divestiture is stayed while the appeal is pending.

Nor does the private plaintiffs' argument find any support in the record. Even crediting private plaintiffs' analysis—which is itself deeply flawed, *see* Def. Corr. Prop. FOF & COL ¶¶ 433-44—the "worst-case scenario" is that Saint Al's would have to terminate particular employees *in 2016*. Trial Tr. 3154:11-15 (L. Ahern). And the record is undisputed that Saint Al's is planning to invest more than $33 million in its hospital in Nampa. Trial Ex. 2640. This is hardly the conduct of a plaintiff that is facing irreparable injury from a stay pending appeal.

Turning to plaintiff TVH, [redacted] Trial Ex. 2641. [redacted] Trial Ex. 2645; Trial Tr. 1103:16-1104:10 (N. Genna). Thus, a stay will not harm the private plaintiffs.

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plaintiffs misleadingly assert that "Mr. Otte [of Micron] believes it could become 'untenable' for Micron to continue offering its current network … if the Acquisition were allowed to stand," Gov't Opp. 13 (quoting Trial Tr. 592:1-4), but Mr. Otte's testimony in no way suggested that Micron's network would fail absent immediate divestiture. Quite to the contrary, he testified that "at some point, it is conceivable" that changes in the health care landscape in Treasure Valley could cause it to change the "way" it "operate[s]." Trial Tr. 592:1-4.

[8] While the Court concluded that the transaction would likely lead to increased prices, an increase in prices *helps* rather than harms competitors, such as the private plaintiffs. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986).

III. The Public Interest Supports Staying Any Order Of Divestiture Pending Appeal.

The government plaintiffs argue that a stay would "undermine the public interest in effective enforcement of the antitrust laws" because St. Luke's might take steps to "undercut[] the potential return of a vibrant, fully independent Saltzer once the appeal is resolved." Gov't Opp. 14-15 (capitalization altered). In fact, the opposite is true. St. Luke's has represented that it will do nothing that will prevent divestiture should this Court's order be affirmed. It intends to abide by that representation—just as it abided by its representation at the preliminary injunction stage that it would not make significant changes to Saltzer. Def. Br. 18 n.5. And the undisputed evidence is that St. Luke's has enabled Saltzer to offer care to significantly greater numbers of Medicaid, uninsured, and other low-pay or no-pay patients—patients who may well go untreated if immediate divestiture is ordered. *Id.* at 19-20. But if anticompetitive conduct occurs during the stay period, the Court can modify or terminate the stay at any time. *See* Dkt. 47 at 7 ("If the representations of St. Luke's counsel prove not to be true, … [plaintiffs] can bring that fact to the Court's attention….").

The "public interest in effective enforcement of the antitrust laws" will not be advanced by depriving defendants of their right to a meaningful appeal. It will not be advanced by enforcing a sweeping and irreversible remedy before the Ninth Circuit has reviewed the numerous important issues that this case presents. It will, however, be advanced by staying the divestiture order until this Court's decision as to both the merits and the remedy—a decision with immense implications, not just for the parties here, but for patients and health care consumers throughout southern Idaho and the nation—can be reviewed by the Court of Appeals.

CONCLUSION

For the foregoing reasons and the reasons set forth in defendants' opening memorandum, the Court should stay its divestiture order pending appeal.

Respectfully submitted,

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Dated: April 14, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2014, I filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF STAY PENDING APPEAL** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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