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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) **ST. LUKE'S AND SALTZER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR ATTORNEY'S FEES AND COSTS AND BILLS OF COSTS**
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

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INTRODUCTION

Saint Alphonsus, Treasure Valley Hospital, and the State of Idaho ("Moving Plaintiffs") ask this Court to award them $10,382,079, broken down as follows:

Moving Plaintiff	*Hours (rounded)*[1]	*Fees*	*Costs*	*Total*
Saint Alphonsus	19,331	$7,853,050	$961,182	$8,814,233
TVH	2,716	$369,203	$112,252	$481,455
State of Idaho	3,597	$972,994	$113,397	$1,086.391
Total	25,646	$9,195,247	$1,186,831	$10,382,079

Most of the requested fees and costs are not "reasonable" within the meaning of 15 U.S.C. § 26 and the Idaho Competition Act, § 48-108, for specific reasons discussed below. One fact in particular is quite telling, however: the 25,646 hours for which Moving Plaintiffs seek reimbursement, which they represent is only a fraction of the total time they spent, is more than 30% higher than *all* of the hours spent by Defendants' counsel in this litigation. And those 25,646 hours are in addition to the time spent by timekeepers for the FTC, the principal plaintiff in this litigation. Assuming conservatively that the FTC spent as many hours as counsel for Saint Alphonsus, Plaintiffs' counsel spent well over twice as much time – 229% – as Defendants' counsel.

This extraordinary disparity is explained primarily by two related factors. First, the Private Plaintiffs have included in their request every hour they spent pursuing their four unsuccessful claims alleging anticompetitive effects in the markets for pediatric services in Nampa, inpatient hospital services in Ada and Canyon counties, and two outpatient hospital services markets in Ada and Canyon counties. The improper inclusion of such time in Private

[1] Defendants have created a master spreadsheet that incorporates all of the time detail sought by all of the Moving Plaintiffs, in chronological order, and numbered those entries for ease of reference. That spreadsheet is Exhibit 1 to the Declaration of Scott D. Stein ("Stein Decl.") submitted herewith. A legend summarizing information about the timekeepers for whom fees are sought is Exhibit 2 to the Stein Declaration.

Plaintiffs' fee petitions, which comprises the vast majority of their requests, is grounds for denial of their petition. At a minimum, it requires a substantial reduction in any award. Second, having four different plaintiffs employing six different firms and 161 different timekeepers (including 98 contract attorneys – but excluding any timekeepers with the FTC) resulted in substantial duplication of effort.

The fee petitions also contain numerous other categories of excessive or otherwise unreasonable time. For example, the petitions include over a quarter of a million dollars in fees for unproductive "travel time" – on top of Moving Plaintiffs' travel costs. Similarly, it appears that the practice of Saint Alphonsus' counsel has been to bill for six minutes of time – $77-$80 for one timekeeper – for every e-mail or voicemail read or reviewed, resulting in substantial overbilling of tasks that took a fraction of that time. In the remainder of this memorandum, we describe the categories of unreasonable time and expenses sought in Moving Plaintiffs' fee petitions. Those arguments are supported by detailed exhibits and other documents identifying the specific time entries at issue.

As set forth below, we believe that Private Plaintiffs' failure to exclude (or even identify) which of their tens of thousands of time entries were associated with their unsuccessful claims justifies outright denial of their entire fee request. At the conclusion of this brief, we explain how any fee award, should the Court determine one is appropriate, should be calculated. Briefly, we contend that Moving Plaintiffs' fee award should be no greater than the following:[2]

[2] While Defendants disagree with this Court's determination that the Private Plaintiffs are "prevailing parties" entitled to any award of fees, the arguments in this motion assume that Private Plaintiffs appropriately are characterized as prevailing parties.

Plaintiff	*Fees*	*Costs*	*Total*
Saint Alphonsus	$1,369,108.20	$177,612.80	$1,546,721.00
TVH	$77,246.62	$2,818.80	$80,065.42
State of Idaho	$453,793.63	$82,680.76	$536,476.39
Total	$1,846,123.45	$263,112.36	$2,109,235.81

Before turning to the specific critiques of Moving Plaintiffs' petitions, we respectfully submit that in determining what fees and costs are "reasonable," this Court should recognize that St. Luke's and Saltzer are, respectively, a non-profit health care system and a group of physicians who entered into the challenged affiliation in good faith and defended it because they believed that it was in the interests of better health care and lower costs for the people of the Treasure Valley. This Court found that the Saltzer transaction "was intended by St. Luke's and Saltzer primarily to improve patient outcomes," and that "it would have that effect if left intact." FOF/COL at p. 3. In these circumstances, ordering Saltzer and St. Luke's to pay a massive fee award to three different plaintiffs, including a for-profit competitor (TVH), would discourage antitrust defendants who have acted in good faith from defending conduct that, as this Court found, was intended to benefit patients and the community. Defendants respectfully ask this Court to keep these considerations in mind as it determines the reasonableness of the more than $10,000,000 sought largely by the Private Plaintiffs.

LEGAL STANDARD

Prevailing plaintiffs are entitled to a "reasonable" attorney's fee." 15 U.S.C. § 26; Idaho Competition Act, § 48-108. Plaintiffs have the burden of proof to establish reasonableness and must substantiate their claims with detailed supporting documentation. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995); *Monsanto Co. v. PacifiCorp*, No. CV 01-607-E-LMB, 2006 U.S. Dist. LEXIS 27565, at *11 (D. Idaho Apr. 24, 2006).

The district court has broad discretion to determine what constitutes reasonable attorney's fees "under the circumstances of the case." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). A district court may determine reasonableness using two methods. "First, the court may conduct an 'hour-by-hour analysis of the fee request,' and exclude those hours for which it would be unreasonable to compensate the prevailing party." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013) (citation omitted). "Second, 'when faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figures as a practical means of [excluding non-compensable hours] from a fee application.'" *Id.* (citation omitted). *See also Schwarz*, 73 F.3d at 906; *J.R. Simplot Co. v. Nestle USA, Inc.*, No. 06-141-S-EJL-CWD, 2009 U.S. Dist. LEXIS 62439, at *33-34 (D. Idaho July 20, 2009) (applying percentage reductions).[3]

ARGUMENT

I. PRIVATE PLAINTIFFS' FEE REQUEST IMPROPERLY SEEKS REIMBURSEMENT FOR TIME SPENT ON THEIR FOUR UNSUCCESSFUL CLAIMS

The Court found the Saltzer transaction to be unlawful because it determined that the affiliation of Saltzer with St. Luke's created a "substantial risk of anticompetitive price increase" in the market for adult primary care services sold to commercial payers in Nampa. FOF/COL (DN 464) ¶¶ 72, 74. This was the sole theory of liability pursued by the Government Plaintiffs,

[3] This Court's statement in *Idaho Bldg. & Constr. Trades Council, AFL-CIO v. Wasden*, No. 1:11-cv-253-BLW, 2012 WL 1313253, *2 (D. Idaho Apr. 16, 2012) (citation omitted) that courts are tasked to consider the reasonableness of the documented hours "without resort to blanket measures such as 'an across-the-board reduction or rejection of all hours'" should therefore not be understood to prohibit use of percentage reductions. Such a reading would be incompatible with *Gonzalez* and *Schwarz*. This Court was citing the Ninth Circuit's opinion in *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109 (2008), which addressed the specific issue of block billing. *Id.* at 1129 ("the use of block billing does not justify an across-the-board reduction or rejection of all hours."), *overruled on other grounds by Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014).

but it was only one of the five antitrust claims pursued by the Private Plaintiffs – and one that they did not have standing to pursue. In addition to the market for adult PCP services in Nampa, the Private Plaintiffs also alleged that the Saltzer transaction would have anticompetitive effects in four additional markets: (1) the market for pediatric services in Nampa; (2) the market for inpatient hospital services in Ada and Canyon counties; (3) the market for outpatient general surgery facilities in Ada and Canyon counties; and (4) the market for outpatient neuro+orthopedic surgery facilities in Ada and Canyon counties. *See* Plaintiffs' Corrected Proposed FOF/COL (DN 429, hereafter "Plaintiffs' Proposed FOF/COL") ¶ 12.

The Private Plaintiffs did not succeed on the four claims made exclusively by them. FOF/COL ¶ 64 (expressly declining to "resolve the issues raised by the private plaintiffs"); 4/29/15 Order (DN 607) at 4 (acknowledging that the FOF/COL "did not . . . consider arguments of the private plaintiffs that the merger would exclude competitors"). Yet Private Plaintiffs have sought reimbursement for every dollar spent pursuing those unsuccessful claims. Because the unsuccessful claims are legally and factually distinct from the adult PCP claim in Nampa, Private Plaintiffs are not entitled to reimbursement for such time. Private Plaintiffs' failure to exclude (or even identify) which those of their tens of thousands of time entries were associated with their unsuccessful claims justifies denial of their entire fee request – or, at a minimum, a substantial reduction in fees.

A. The Legal Standard For Determining The Relatedness Of Successful And Unsuccessful Claims.

When a lawsuit asserts distinct claims based on different legal theories and different facts, "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate results achieved.' The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and

therefore no fee may be awarded for services on the unsuccessful claim." *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983) (citation omitted). *See also Idaho Bldg. & Constr. Trades Council*, 2012 WL 1313253, at *2 ("a movant should not recover for efforts spent on unfounded claims or unsuccessful endeavors.").

Once the district court determines that plaintiffs have pursued unsuccessful, unrelated claims, the hours spent on those claims must be excluded from the reasonable hours figure. This can be accomplished by attempting to identify specific hours spent on an unsuccessful claim and then refusing to award fees for those hours. Alternatively, "when faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee application." *Schwarz*, 73 F.3d at 906 (citation omitted).[4]

B. Private Plaintiffs' Four Unsuccessful Vertical Claims Are Not Related To The Adult PCP Claim.

The test for whether claims are "related" or "unrelated" is a pragmatic one, based on whether the unsuccessful and successful claims are either based on the same legal theories or the same facts. *Schwarz*, 73 F.3d at 903. The mere fact that all of the Plaintiffs' claims arose out of the Saltzer transaction, broadly speaking, is not a sufficient basis on which to conclude that all of the claims are "related." For example, in *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270 (1st Cir. 2000), the heirs of a man who died shortly after his arrest brought claims of civil rights

[4] Private Plaintiffs quote *Hensley*'s statement that where "excellent results" are obtained, the fact that a Court did not "reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435 (cited in Saint Al's Br. (DN 617-1) at 12). But the Ninth Circuit, referring specifically to *Hensley*'s "excellent results" language, has explained that "this rule has to do with *related* claims and to the situation where a plaintiff, who has achieved excellent results, has lost skirmishes along the way. . . . '[I]f the district court were to determine that the [unsuccessful] claims are unrelated, then *Hensley* prohibits an award of fees . . . that includes work performed on the unsuccessful [claims]'". *Schwarz*, 73 F.3d at 905-06 (citation omitted).

violations against the arresting officers and their supervisors. These plaintiffs succeeded in their claims against one of the officers, but the court dismissed the claims of supervisory liability. In assessing attorney's fees, the First Circuit found that although "the claims all stemmed from a common incident," the facts and legal theories needed to prevail against the arresting officers were "wholly different than those relating to supervisory liability," and discovery relating to the unsuccessful claims "would almost certainly entail a much wider and more diverse set of facts" than the discovery related to the successful claims. *Id.* at 278-279. *See also Eshelman v. Agere Sys., Inc.*, No. Civ.A. 03-CV-1814, 2005 U.S. Dist. LEXIS 29123, at *8 (E.D. Pa. Nov. 16, 2005) (finding that Americans with Disabilities Act and age discrimination claims arising out of plaintiff's termination were "factually and legally distinct," as they required the jury "to focus on separate and distinct motivations, actions, and conduct," and plaintiff's counsel "were required to tailor their trial presentation, discovery, and pre-trial filings to reflect the distinct ADA and ADEA theories").

1. Plaintiffs' Unsuccessful Claims Were Based On Different Legal Theories And Facts Than The Adult PCP Claim.

The four unsuccessful claims of the Private Plaintiffs were based on different legal theories and different facts than the adult PCP claim. The adult PCP theory that prevailed in this case was based on a traditional "horizontal" legal theory of antitrust liability, arising out of the combination of St. Luke's and Saltzer's adult PCPs in Nampa. The Saltzer affiliation was deemed to be unlawful based on the predicted occurrence of certain conduct – increased prices to private payers; for a certain product – adult PCP services; in a specific geographic market – Nampa.

The four remaining claims made exclusively by the Private Plaintiffs, by contrast, were based on very different theories. Specifically, they were "vertical" claims alleging that the

affiliation would have impacts, not in the market for adult PCP services, but in downstream markets for referrals of inpatient and outpatient hospital services.[5] The alleged conduct with which those claims were concerned was not increased prices to private payers – something Private Plaintiffs conceded they have no standing to complain about – but rather harm to their own profits.

The evidence on which the vertical theories was based consisted of evidence relating to over a dozen other, unrelated transactions involving specialty practices of cardiologists, surgeons, pulmonologists, and others; and the purported effect of those transactions on referrals to Saint Alphonsus and TVH for hospital services. The vertical claims also relied heavily on evidence relating to the purported financial impact on the Private Plaintiffs of the Saltzer transaction – evidence that was completely irrelevant to the adult PCP claim in Nampa.

Liability on Private Plaintiffs' unsuccessful claims would have had to have been based on "a much wider and more diverse set of facts" than the adult PCP claim, *Figueroa-Torres*, 232 F.3d at 279, including factual findings that the Private Plaintiffs would have been unlawfully foreclosed from markets for inpatient and outpatient hospital services, and on proposed findings of anticompetitive effects in markets quite different from the adult PCP market in Nampa on which the Court based its conclusions. *See* Plaintiffs' Joint Pre-Trial Memorandum (DN 196, *compare* § I vs. § II); Plaintiffs' Proposed FOF/COL pp. 136-157. The Court made no such findings.

[5] Because St. Luke's did not employ any pediatricians in Nampa, the affiliation would have had no effect on market shares or concentration in that market. As Private Plaintiffs' economic expert explained, their theory was that the affiliation of Saltzer pediatricians with St. Luke's would result in decreased referrals for hospital services from the Saltzer pediatricians. *See* Trial Tr. at 1485-86; *id.* at 1486:2-4 ("My main concern is the concentration in pediatric primary care will affect how competition works in the market for outpatient and inpatient [hospital] services").

Notably, counsel for Saint Alphonsus highlighted the analytical and factual distinctness of the unsuccessful claims in his opening statement:

> [T]he part of the case that is unique to the private plaintiffs really concerns ways in which the Saltzer acquisition will result in other anticompetitive conduct, conduct that will be enabled, conduct that will be forwarded by the acquisition of – and that will include two major categories, harm to network competition in the Treasure Valley and the steering of patients to St. Luke's and the resulting foreclosure of competition. . . . Our case concerns the markets - the primary care markets, as does the government's case, but it also concerns the hospital and outpatient surgical facilities markets because these events will affect all those markets, both inpatient hospital care and outpatient surgical facilities. So that's another way in which we go beyond the government's case."

Trial Tr. at 61. *See also* Ettinger Decl. (DN 617-3) ¶ 26 ("there are substantial claims in the Private Plaintiffs' cases that relate to markets not addressed in the government case, including the pediatric primary care, inpatient hospital services, and outpatient surgical facility services markets. Our efforts involved substantial work on . . . the claims that were pursued only by the Private Plaintiffs.")

The Court did not find in favor of the Private Plaintiffs on their foreclosure claims or on their theories of liability predicated on anticompetitive effects in markets other than the market for adult PCP services in Nampa. Indeed, this Court acknowledged that the judgment did not "consider arguments of the private plaintiffs that the merger would exclude competitors" at all – either in the adult PCP market or any of the other product or geographic markets underlying the Private Plaintiffs' unsuccessful claims. 4/29/15 Order at 4.

The opinion in *New York v. Microsoft Corp.*, 297 F. Supp. 2d 15 (D.D.C. 2003) is instructive. In that case, the plaintiff asserted seven antitrust theories, but succeeded on one. The court, analyzing the unsuccessful claims, found that two "involved different products, markets and anticompetitive conduct from the claim upon which Plaintiff established liability,"

and applied both specific and percentage reductions to the fees requested. *Id.* at 34.[6] *See also See H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (affirming 50% reduction of fees where plaintiff did not prevail on all of its antitrust claims).

2. The Court's Reference To Referrals Does Not Transform Unrelated Claims Into Related Claims.

This Court, in its FOF/COL, found that referrals to St. Luke's might increase after the transaction. It did not, however, find that there would be any anticompetitive foreclosure – *e.g.*, that any corresponding reduction in referrals from Saltzer physicians to Private Plaintiffs would not be made up in sufficient referrals from other sources. Nor could it have, since even Private Plaintiffs' own expert expressly disclaimed having done any such analysis. Trial Tr. at 1553:20-1557:2. Such a finding of foreclosure was a necessary prerequisite to finding liability on Private Plaintiffs' vertical claims, as a spokesperson for Saint Alphonsus recently confirmed.[7]

Any argument that the reference to referrals in the Court's FOF/COL makes the vertical claims "related" to the adult PCP claim should be rejected. Such an argument would misapprehend the Court's findings, Private Plaintiffs' own arguments, and the Ninth Circuit's ruling. Importantly, the referral evidence was introduced *solely* in support of the *vertical* claims of the Private Plaintiffs. *See, e.g.*, Ettinger Decl. (DN 617-3) ¶ 29 (characterizing "referrals" as

[6] The court reduced the fee award by 10% for the two claims reflecting that they "were abandoned early on in the litigation." *Id.* at 35. It further held that the fee award should be reduced to reflect all time exclusively devoted to the unsuccessful claims. *Id.* Here, of course, Private Plaintiffs pursued their unsuccessful claims all the way through trial and, as we explain below, those unsuccessful claims accounted for a substantial volume of the work for which fees are being sought.

[7] "[W]e never contended in the lawsuit that referring patients within a hospital system is bad. [We contended that] control of too many referrals by one system does harm competition.'" Audrey Dutton, "Once-secret documents show why Idaho hospitals care about which doctors you see," *Idaho Statesman*, August 8, 2015 (quoting Saint Alphonsus spokesman Joshua Schlaich) (http://www.idahostatesman.com/2015/08/08/3930770_once-secret-documents-show-why.html?rh=1#storylink=cpy).

one of the "exclusive issues of the Private Plaintiffs" as distinct from "the common issues in the case"). Private Plaintiffs have never even argued that the referrals evidence was relevant to any alleged anticompetitive effects in the adult PCP market in Nampa. Indeed, all of the evidence regarding referrals is set forth in the section of Plaintiffs' Proposed FOF/COL titled "The Acquisition Substantially Lessens Competition in *Other* Markets" – *i.e.*, markets *other than* the adult PCP market. DN 429 at vii (emphasis supplied). The Court has acknowledged that its FOF/COL "did not go on to consider arguments of the private plaintiffs that the merger would exclude competitors" in these other (hospital services) markets. 4/29/15 Order at 4.

The Ninth Circuit's opinion does not mention Private Plaintiffs' referral foreclosure theory. In fact, it did not consider the impact of the transaction on the Private Plaintiffs at all in rendering its decision. But to the extent this Court intended to suggest that the Saltzer transaction is likely to reduce competition because it is likely to harm Private Plaintiffs in the downstream markets for inpatient and outpatient hospital services, the Ninth Circuit's ruling regarding ancillary services precludes such a conclusion because the Court made no findings regarding St. Luke's market power in those other markets.

The Court of Appeals characterized this Court's finding "that St. Luke's would raise prices in the hospital-based ancillary services market" as "problematic" because "the district court made no findings about St. Luke's market power in the ancillary services market. Absent such a finding," the Ninth Circuit noted, "it is difficult to conclude that the merged entity could easily demand anticompetitive prices for such services." *Id.* at 19, 20. The Ninth Circuit characterized the ancillary services finding as "not supported by the record," and thus rejected the theory that predicted effects in *other* markets as to which this Court made no findings could support the finding of likely anticompetitive effects in the market for adult PCP services in

Nampa. *Id.* at 21. That logic applies equally to the downstream hospital markets as to the downstream ancillary services market.[8]

3. Private Plaintiffs' Failure To Separate Out Time On The Unsuccessful Claims Warrants Denial Of Their Petition Outright – Or At A Minimum A Substantial Reduction In Any Award.

The vast majority of the time for which Private Plaintiffs seek reimbursement relates to efforts spent on their unsuccessful claims. Yet Private Plaintiffs have adopted a "throw it against the wall and see what sticks" strategy, including in their petition every hour spent on the "issues unique to the Private Plaintiffs" in addition to "the common issues contained both in the Private Plaintiffs' and the Government Plaintiffs' complaints." Saint Al's Br. at 10. Private Plaintiffs' approach to seeking fees for time spent on claims on which they did not prevail extends to every facet of this litigation.

Witness Testimony. Private Plaintiffs' referral theory focused on several prior St. Luke's acquisitions involving specialty physicians, and required the addition of numerous witnesses who provided deposition and trial testimony to respond to Private Plaintiffs' allegations regarding changes in referral patterns. Examples of time entries associated with discovery and testimony relating to witnesses who would not have been called but for Private Plaintiffs' unsuccessful vertical theories are included in Stein Decl. Ex. 4.[9]

Written Discovery. Private Plaintiffs' unsuccessful claims also accounted for a substantial portion of the written discovery. Most of the documents relevant to the adult PCP

[8] This view is supported by Judge Hurwitz's colloquy with Saint Alphonsus's counsel at oral argument, in which he made clear his view that this Court's FOF/COL did not establish that any harm would result to Private Plaintiffs as a result of any alleged loss of referrals. *Infra*, at 37.

[9] This includes, by way of example, time associated with the testimony of St. Luke's specialists – cardiologists, orthopedic surgeons, pulmonologists, etc. – associated with the practices that were the subject of Professor Haas-Wilson's specialty referral analyses.

claim were produced by Saltzer and St. Luke's to the Government Plaintiffs well before the inception of the litigation. *See* Ettinger Decl. (DN 487-1) ¶ 10 ("While the FTC and Idaho Attorney General did send additional requests during the course of the case, most of their document discovery occurred in their investigation before they filed their Complaint. St. Luke's responded to the Government Plaintiff's investigatory subpoena before document discovery began in the litigation.") St. Luke's turned over all of those documents to Private Plaintiffs on the day that discovery began. Case Management Order (DN 48) at 2.

Therefore, the vast majority of the document discovery related to the Private Plaintiffs' unsuccessful vertical claims, rather than adult PCP claims. As counsel for Saint Alphonsus notes, "[t]he Private Plaintiffs sent out five sets of document requests, including 181 separate requests, to St. Luke's and a subpoena to Saltzer with 66 separate requests." Ettinger Decl. (DN 487-1) ¶ 10). "St. Luke's then produced at least 240,000 pages of documents in the litigation which it identified as responsive to Private Plaintiffs' document requests and another 115,000 pages of documents before the Government Plaintiffs' first document requests in the litigation." *Id.* Private Plaintiffs, however, seek reimbursement for 100% of their document production and review fees and costs.[10]

Experts. In support of their unsuccessful theories, Private Plaintiffs also engaged an expert economist, Deborah Haas-Wilson. Professor Haas-Wilson's focused largely on Private Plaintiffs' vertical theories.[11] Even though most of Professor Haas-Wilson's work, and counsel's

[10] Private Plaintiffs' fee detail does not enable a determination of all of the time associated with document discovery, but that time included, at a minimum, the $1,171,608 sought for the work of the Gnoesis contract attorneys, as well as $530,444 for time entries described generally as "document review." Stein Decl. Ex. 11.

[11] While her reports also addressed the adult PCP theory (duplicating the analysis of Government Plaintiffs' expert economist, David Dranove), that was only a small portion of her reports. At

input and support for that work, related to the unsuccessful theories (and not the adult PCP claim in Nampa), Private Plaintiffs seek reimbursement for 100% of their fees and costs associated with her work. Similarly, Private Plaintiffs seek reimbursement for 100% of the time associated with their response to the work of Defendants' expert, Lisa Ahern, even though half of her report was devoted exclusively to Private Plaintiffs' vertical claims.

Briefing. Private Plaintiffs' fee request also includes a substantial amount of time spent drafting proposed findings of fact and conclusions of law focused solely on the Private Plaintiffs' unsuccessful claims. *See* Ettinger Decl. (DN 487-1) ¶ 21 ("Honigman took the lead in drafting Proposed Findings ¶¶ 621-917 and Proposed Conclusions of Law ¶¶ 1047-1063"); Plaintiffs' Proposed FOF/COL at 133 n. 1 and 241 n. 9.

* * *

Private Plaintiffs made no effort to identify (let alone exclude) time associated with their unsuccessful vertical claims, and their vague time descriptions make it impossible for Defendants to do so. Using a basic search for terms associated with vertical witnesses and other terms associated with the vertical claims (e.g. "referral"), Defendants have identified many time entries associated exclusively with Private Plaintiffs' unsuccessful claims. *See* Stein Decl. Exs. 3 and 4. While this exhibit necessarily understates the time spent on the vertical claims, it confirms that Private Plaintiffs' time detail is comprised substantially of such time.[12]

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trial, Professor Haas-Wilson testified solely on the unsuccessful theories, not on the adult PCP theory. Trial Tr. at 1476:16-20.

[12] Indeed, TVH's time on this case is related *exclusively* to the unsuccessful vertical claims. Unlike Saint Al's, TVH has never employed any adult PCPs. Had TVH filed a separate complaint alleging only a horizontal claim based on concentration in the market for adult PCP services in Nampa, such a claim would have to be thrown out for lack of even basic Article III standing. The convention in this case of referring to Saint Al's and TVH collectively as the "Private Plaintiffs" should not obscure the fact that TVH has never had even basic standing to

The Ninth Circuit has not yet decided whether a fee petition that is so excessive can be denied in its entirety, but numerous other courts have concluded that it can. *See Mendez*, 540 F.3d at 1127 ("We need not decide whether it would ever be appropriate for a court entirely to deny fees and costs under § 1988 purely on the excessiveness of the request, however, because those circumstances are not present here."). *See, e.g., Lewis v. Kendrick*, 944 F.2d 949, 957-58 (1st Cir. 1991) (upholding an outright denial of attorney's fees where "counsel ma[d]e no 'good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.'") (citation omitted). The policy rationale for such outright denials of fees is to incentivize counsel to "maintain adequate records and submit reasonable, carefully calculated, and conscientiously measured claims when seeking statutory counsel fees." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980). It discourages counsel from "submit[ting] an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees" – a concern particularly apt here. *Scham v. Dist. Courts Trying Criminal Cases*, 148 F.3d 554, 559 (5th Cir. 1998) (citation omitted), *abrogated on other grounds by Bailey v. Mississippi*, 407 F.3d 684 (5th Cir. 2005). *See also Fair Hous. Council v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993) (denying entire fee petition where plaintiff "fail[ed] to make a good faith effort to exclude fees attributable to unsuccessful claims"); *Toussie v. Cnty. of Suffolk*, No. 01-CV-6716 JS ARL, 2012 WL 3860760, at *5 (E.D.N.Y. Sept. 6, 2012) (denying plaintiff's fee petition in its entirety where plaintiff failed to remove time for unrelated claims).

Granting Private Plaintiffs' fee petitions would improperly reward them for inflating those petitions with unreasonable fee requests. Accordingly, the Court should deny their

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pursue claims alleging any anticompetitive effects in the market for adult PCP services in Nampa – a market in which it does not even compete.

petitions. At a minimum, it should substantially reduce the fee award to exclude time attributable to the unsuccessful claims.

C. Even If The Unsuccessful Theories Were "Related" To The Prevailing Theories, The Court Should Nevertheless Reduce The Fees For Those Theories.

Where courts have determined that unsuccessful and successful theories are "related," courts must still assess "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435. Here, Private Plaintiffs did not obtain complete relief. While the Court did order that the Saltzer transaction be unwound, it denied Private Plaintiffs' Complaint request for injunctive relief in the form of an order prohibiting *all* future acquisitions by St. Luke's (FOF/COL ¶ 81) – relief that could have been justified only as a remedy for the unsuccessful vertical claims.

It cannot reasonably be disputed that the scope of this case would have been significantly narrower had the sole claim been whether the transaction was likely to reduce competition in the market for adult PCP services in Nampa. Private Plaintiffs' "kitchen sink" approach to the case, asserting numerous distinct claims, involving distinct product and geographic markets, accounted for a significant amount of the expenditures by both sides. Allowing Private Plaintiffs to recover the full amount expended pursuing these unsuccessful theories would result in a windfall, as Private Plaintiffs would be recovering for time spent that did not contribute to the victory obtained. *See State of Arizona v. Maricopa Cnty. Med. Soc'y*, 578 F. Supp. 1262, 1264 (D. Ariz. 1984) ("Fees allowed in cases such as this should be adequate to attract competent counsel; they should not produce windfalls to attorneys"). *Cf. Microsoft Corp.*, 297 F. Supp. at 35-36 (reducing fee award by 30% for plaintiffs' unsuccessful antirust claims that were deemed related to successful antitrust claim).

II. THE SUBSTANTIAL DISPARITY BETWEEN MOVING PLAINTIFFS' HOURS AND DEFENDANTS' HOURS REFLECTS SUBSTANTIAL WASTE AND UNNECESSARY DUPLICATION OF EFFORT.

"Billed time that includes unnecessary duplication of effort should be excluded from the lodestar." *Cruz v. Alhambra Sch. Dist.*, 601 F. Supp. 2d 1183, 1191-92 (C.D. Cal. 2009). *See also Kim v. Fujikawa*, 871 F.2d 1427, at 1434-36 (9th Cir. 1989) (fees should be reduced if multiple lawyers are unreasonably performing the same work). As the Ninth Circuit has made clear, "[i]f the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates that too much time is claimed. " *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004). That observation applies to this case.

The Moving Plaintiffs are seeking reimbursement for 25,646 hours of work, which they represent is only an (undisclosed) subset of all the time they recorded on this litigation. Saltzer's and St. Luke's counsel, by contrast, recorded a total of 19,632 hours during the same time period. Thus, a subset of the Plaintiffs' counsel billed over 30% more time than Defendants' counsel during the same period. *See* Stein Decl. ¶3, 5.

Notably, however, these data understate dramatically the true disparity between Plaintiffs' and Defendants' hours. This is because Moving Plaintiffs' hours do not include any of the time spent by timekeepers for the FTC, which has been the primary plaintiff in this litigation. Eight FTC attorneys entered appearances in this case, and "six attorneys from the Federal Trade Commission worked full-time on the case for the entire duration of the trial." DeLange Decl. (DN 481-2) ¶ 19. Assuming, conservatively, that the FTC recorded at least as many hours as Saint Alphonsus's attorneys (*i.e.* 19,331 hours), then counsel for the Plaintiffs, collectively, spent *at least* 44,977 hours on this litigation – 229% more than Defendants.

In some cases, a significant discrepancy between the parties' hours may be explained by legitimate factors, such as the fact that opposing parties do not always have the same responsibilities under the applicable rules, or are not "similarly situated with respect to their access to necessary facts, the need to do original legal research to make out their case, and so on." *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1151 (9th Cir. 2001). This, however, is not such a case. Both sides had burdens of proof on significant issues (Plaintiffs on anticompetitive effects, Defendants on efficiencies). And if anything, it was Plaintiffs who had superior access to necessary facts at the outset. The Government Plaintiffs' conducted a year-long investigation prior to the time they filed suit, during which time they had unique access to scores of third-parties. And Saint Alphonsus's lead counsel emphasizes that "at the time [his] efforts in this case began, [he] already had substantial knowledge of the area, its history and many of the major players" from prior engagements. Ettinger Decl. (DN 617-3) ¶ 7.[13] Accordingly, there are no factors other than unnecessary duplication, and the inordinate time spent by Private Plaintiffs on their unsuccessful vertical theories, that reasonably explain the extraordinary discrepancy between the hours spent by Plaintiffs' counsel and Defendants' counsel.

With 21,394 time entries submitted by the Moving Plaintiffs, it is impossible to identify every instance of duplication – particularly when we have no detail from counsel for the FTC. However, the substantial discrepancy between the hours spent by Plaintiffs' counsel and the hours spent by Defendants' counsel, coupled with the numerous specific examples of duplication set forth in Stein Decl. Ex. 11, belies Moving Plaintiffs' assertions that the work done by six

[13] Nor is this a case in which it can reasonably said that "the prevailing party's attorney . . . spent more time because she did better work." *Ferland*, 244 F. 3d at 1151. Throughout the trial, the Court commended the quality of legal representation on all sides. *See, e.g.* Trial Tr. At 3868:21-22 ("I just cannot say enough about the quality of the lawyering. . .").

different sets of lawyers was non-duplicative. As a result, a substantial percentage reduction in the amount of any fee award is appropriate here. Precedent supports this conclusion.

For example, in *J.R. Simplot Co. v. Nestle USA, Inc.*, No. 06-141-S-EJL-CWD, 2009 U.S. Dist. LEXIS 62439, at *33-34 (D. Idaho July 20, 2009), this Court commented that counsel for defendants (the party seeking fees) spent 38% more time than plaintiffs' counsel, and decided that a 20% reduction in the fee award would account for the "duplication of work and/or unnecessary time charged by the legal 'team;' and strike[] a balance between the number of hours expended by [defendants'] attorneys as compared to [plaintiff's] attorneys." *Id.* at *35. *See also Pascuiti v. New York Yankees*, 108 F. Supp. 2d 258, 273-74 (S.D.N.Y. 2000) (reducing private plaintiffs' fee award by 25% where government served as lead counsel, in addition to reductions made for specific instances of excessive, duplicative, or otherwise unreasonable time). Here, the disparity between time spent by the two sides is substantially greater than in *Simplot* and *Pascuiti*. Thus, a substantially greater across-the-board reduction in Moving Plaintiffs' fee request is warranted to account for the duplication of effort evidenced by the disparity between the hours for which Moving Plaintiffs seek reimbursement and the hours spent by Defendants' counsel.

III. PLAINTIFFS' TIME DETAIL REFLECTS WASTE AND UNNECESSARY DUPLICATION OF EFFORT

A review of the time detail in the Moving Plaintiffs' petitions confirms what the overall hours disparity shows: that the fees sought by the Moving Plaintiffs are unreasonable. Defendants ultimately proposed an across-the-board percentage reduction to account for the waste and unnecessary duplication of effort, since it is otherwise impossible to identify each individual time entry in this category (particularly without the FTC's time detail). The following

sub-sections highlight examples of time in this category that Defendants have been able to identify from the time detail.

A. Moving Plaintiffs' Practice Of Billing A Minimum Of Six Minutes For Every Task Has Resulted In Substantial Overbilling.

Over 8,600 of Moving Plaintiffs' time entries –a third of the total – consist of tasks for which one tenth of an hour (six minutes) was billed. *See* Stein Decl. Ex. 5. Over 92 percent of these entries were billed by Saint Alphonsus's counsel.

Many law firms (Defendants' counsel included) appropriately bill in tenths of an hour. For example, if in the course of a day it takes six minutes to read six e-mails, it is perfectly appropriate to bill one tenth of an hour – six minutes – for that effort. What is not appropriate, however, is billing a minimum of six minutes for each of the one minute periods it took to read each e-mail – resulting in a bill for 36 minutes of time – merely because one tenth of an hour is the smallest billing unit. Such billing, in this example, would result in a charge 600% higher than the actual time spent reviewing the six e-mails.

Numerous courts have recognized that the practice of billing a minimum of one-tenth of an hour for every discrete task, no matter how much time it actually took, leads to inflated bills – and have reduced fee requests for such time entries accordingly. *Smith v. Altman*, No. 12 C 4546, 2015 WL 4381332, at *8 (N.D. Ill. July 15, 2015) (finding "billing in increments of .1 of an hour, or six minutes, for email review" excessive); *United States v. Caratachea*, No. 12 CR 4556-LAB, 2014 WL 6469431, at *4 (S.D. Cal. Nov. 7, 2014) (noting that "since the minimum billing for any event is .1 hours (6 minutes), the vouchers are severely bloated by parsing each event into its smallest part and presenting each as a 6 minute charge," and reducing each 6 minute charge to one minute); *Delgado v. Colvin*, No. 1:09-cv-1819 GSA, 2014 WL 2465546, at *6 (E.D. Cal. May 30, 2014) (reducing tenths of an hour to one minute charges, noting that "the

cumulative effect of many individual entries such as these – which should take only a glance to perform but are billed at 0.1 hours each – greatly inflates the time billed and potentially saddles the [defendant] with hundreds of dollars of unjustified fee payments."); *Carr v. Tadin*, 51 F. Supp. 3d 970, 982-83 (S.D. Cal. 2014) (summarizing numerous cases finding billing in tenth-hours for e-mails and administrative tasks unreasonably inflates fee requests). *Cf. Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007) ("Having reviewed the firm's summary time sheet, the court found the hours were inflated because counsel billed a minimum of 15 minutes for numerous phone calls and e-mails that likely took a fraction of the time. . . . We therefore affirm the district court's [20 percent across-the-board] reduction for quarter-hour billing").

The fee detail submitted by the Moving Plaintiffs' appears to be rife with such improper billing. It appears that it has been the routine practice of Saint Alphonsus's lawyers to bill a minimum of one-tenth of an hour for every individual task, including reading or writing any e-mail, no matter how long it actually took to do so. For example:

- On January 8, 2013, lead counsel for Saint Alphonsus billed $77 for one-tenth of an hour for "E-mail with S. Stein (Sidley) regarding protective order." Entry 2985. That e-mail reads – in its entirety – "Are all your CID responses data including PHI?" Stein Decl. Ex. 6.

- Lead counsel for Saint Alphonsus billed another $77 for sending the following e-mail, further down in that same e-mail string: "Ben, when will you be ready to discuss these issues?" *See* Entry 2988, "E-mails with B. Keith (Sidley) regarding FTC documents"; Stein Decl. Ex. 6.

- On March 4, 2013, lead counsel for Saint Alphonsus billed $77 for reading this e-mail: "David, we are checking on dates. Scott Stein will get back to you." – and sending this response: "Thanks." Entry 5294 ("E-mails with J. Bierig (Sidley) regarding depositions."); Stein Decl. Ex. 7.

- On June 1, 2014, lead counsel for Saint Alphonsus billed $78, one tenth of an hour, for reading an "E-mail from W. Sinclair (Sidley) to D. Metcalf (Judge Winmill's clerk) regarding reply to supplemental brief." Entry 19809. That e-mail states in its entirety: "David - in light of Saint Alphonsus' filing a Motion for

> Leave to File Supplemental Brief in Opposition to Motion for Stay, should the Court grant said request, could you please advise us what the Court's preferred briefing schedule is for our Reply? Thank you." Stein Decl. Ex. 8.

These are not isolated examples. For instance, the following lists one attorney's one tenth hour time entries for sending or receiving e-mails on a single day:

D. Ettinger One-Tenth-Hour E-mail Entries on 3/25/13

Entry #	Date	Hours Worked	Amount	Description
6363	3/25/2013	0.10	$ 77.00	E-mail to B. Keith (Sidley) regarding M. House, S. Drake depositions.
6364	3/25/2013	0.10	$ 77.00	E-mail with A. Parks (Coker) regarding M. Reiboldt (Coker) deposition.
6365	3/25/2013	0.10	$ 77.00	E-mail with B. DeLange (Attorney General) regarding proposed schedule.
6366	3/25/2013	0.10	$ 77.00	E-mail with B. DeLange (Idaho Attorney General) regarding schedule.
6367	3/25/2013	0.10	$ 77.00	E-mail with B. Jackson (Saltzer) regarding M. Reiboldt (Coker) deposition.
6368	3/25/2013	0.10	$ 77.00	E-mail with B. Keith (Sidley) regarding Blue Cross deposition.
6369	3/25/2013	0.10	$ 77.00	E-mail with B. Petersen (Saint Alphonsus) regarding Dakota Care.
6370	3/25/2013	0.10	$ 77.00	E-mail with C. Bossnert (Treasure Valley Hospital) regarding Dr. Robinson (Saint Alphonsus) deposition and preparation.
6371	3/25/2013	0.10	$ 77.00	E-mail with counsel for third party regarding transcript.
6372	3/25/2013	0.10	$ 77.00	E-mail with E. Wilson (FTC) regarding Blue Cross deposition.
6373	3/25/2013	0.10	$ 77.00	E-mail with G. Rizzo (KPMG) regarding subpoena response.
6374	3/25/2013	0.10	$ 77.00	E-mail with J. Bierig (Sidley) regarding schedule.
6375	3/25/2013	0.10	$ 77.00	E-mail with J. Kowieski (WIPFLI) regarding subpoena compliance.

6376	3/25/2013	0.10	$	77.00	E-mail with J. Rovner (Blue Cross) regarding Blue Cross data.
6377	3/25/2013	0.10	$	77.00	E-mail with K. Duke (Duke Scanlan) regarding Dr. Asher deposition.
6378	3/25/2013	0.10	$	77.00	E-mail with M. Reiboldt (Coker) regarding deposition date.
6379	3/25/2013	0.10	$	77.00	E-mail with R. Powers (Treasure Valley Hospital) regarding efficiency documents.
6380	3/25/2013	0.10	$	77.00	E-mail with S. Stein (Sidley) regarding Regence.
6381	3/25/2013	0.10	$	77.00	E-mail with S. Westermeier (Saint Alphonsus) regarding deposition dates.
6382	3/25/2013	0.10	$	77.00	E-mail with T. Chipty (Analysis Group) regarding Blue Cross data.
6383	3/25/2013	0.10	$	77.00	E-mail with T. Greene (FTC) regarding conduct of depositions.
6384	3/25/2013	0.10	$	77.00	E-mail with T. Greene (FTC) regarding Saltzer finance issue.
6385	3/25/2013	0.10	$	77.00	E-mail with third party counsel.
6386	3/25/2013	0.10	$	77.00	E-mails A. Parks (Coker) regarding M. Reiboldt (Coker) deposition.
6387	3/25/2013	0.10	$	77.00	E-mails to P. Herrick (FTC) regarding J. Taylor (St. Luke's) deposition.
6388	3/25/2013	0.10	$	77.00	E-mails with J. Puckett (Saint Alphonsus) regarding deposition schedule.
		2.60	**$**	**2,002.00**	

Defendants' counsel do not have access to most of these e-mails since they were not sent to or from Defendants. But we were able to locate two of them. Entry 6363, described as "E-mail to B. Keith (Sidley) regarding M. House, S. Drake depositions," states in its entirety: "These [dates] should work, though I'll need to move the Tom Reinhardt dep to open my schedule up for them. Working on a new date for Reinhardt." *See* Stein Decl. Ex. 9. The second, entry 6368, described as "E-mail with B. Keith (Sidley) regarding Blue Cross deposition," states in its

entirety "We will put it off until a date to be determined." *See* Stein Decl. Ex. 10. These e-mails, like the other examples described above, did not take anywhere close to six minutes to read or write. Numerous six-minute time entries like these on the same day is indicative of inflated billing.

This issue is not limited to e-mails. There are 85 separate tenth-hour (six minute) entries for leaving a voicemail, and hundreds for a "review" of a document, including minute orders and routine court notices. For example:

Entry #	Date	Hours Worked	Amount	Description
8292	4/30/2013	0.10	$ 77.00	Review Court's minute order.
11870	7/12/2013	0.10	$ 77.00	Review minute order.
12486	7/26/2013	0.10	$ 77.00	Review minute order.
14334	8/30/2013	0.10	$ 77.00	Review minute entry for hearing.
20444	7/14/2014	0.1	$ 78.00	Review 9th Circuit docket entry.
20843	8/21/2014	0.1	$ 78.00	Review Ninth Circuit amicus brief docket entries.
20890	10/2/2014	0.1	$ 78.00	Review notice of hearing.
20893	10/3/2014	0.1	$ 78.00	Review hearing acknowledgement.
21108	11/13/2014	0.1	$ 78.00	Review latest calendar.

There are even more egregious examples. For instance, on February 15, 2013, Moving Plaintiffs charged a tenth of an hour for clerical work to "Revise [a] subpoena (changed date from 02/18 to 02/19 due to the President's Day Holiday)." Entry 4540. And on April 29, 2013, lead counsel

for Saint Alphonsus charged a tenth of an hour – $77 – to "Review Dr. Pate (St. Luke's) Tweet." *Id.* Entry 8233. Presumably, this was the "Tweet" referenced in the entry: "Trinity Health (Saint Al's parent) – 10th largest health system & the fourth largest Catholic health care system in the country!"[14] That sentence should not have taken anyone anywhere close to six minutes to read.

B. Excessive Time Spent On Witness Preparation And Related Activities

Plaintiffs' time detail reflects excessive amounts of hours spent on deposition preparation for various witnesses and related tasks. Examples include the following:

- Excessive time preparing witnesses for deposition and/or trial:
  - 212 hours preparing for the deposition of Saint Alphonsus CEO Sally Jeffcoat;
  - 175 hours preparing for the deposition of Directors Deal and Armstrong (Idaho agency witnesses);
  - 78 hours preparing for the deposition of Saint Alphonsus-Nampa CEO Karl Keeler;
  - 147 hours preparing for the deposition of Nancy Powell – plus another 145 hours preparing for her trial testimony;
  - 73 hours preparing for the trial examination of Saint Al's-Nampa CFO Lannie Checketts; and
  - 43 hours preparing for the cross-examination of St. Luke's PCP Dr. Adebayo Crownson;
- Unnecessary time spent preparing trial examinations of witnesses who reside outside the Court's trial subpoena authority, who did not volunteer to appear at trial, and who did not in fact appear at trial.
- 145 hours ($16,628) spent by TVH paralegals "abstracting" depositions of their own employees and of third-parties. This "abstracting" typically took longer than the actual depositions themselves. Examples include:
  - Nancy Powell (Saltzer/Saint Alphonsus) – 25 hours

[14] https://twitter.com/drpatestlukes/status/328882154568298499

- Jeff Hessing (TVH Medical Director) – 14.5 hours
- Steve Williams (TVH Surgeon) – 14.5 hours
- Nick Genna (TVH CEO) – 10 hours
- Jeff Crouch (Blue Cross) – 19.5 hours
- Linda Duer (Idaho Physicians Network) – 14.5 hours
- Jim Souza (St. Luke's Pulmonologist) – 18 hours
- Geoffrey Swanson (St. Luke's physician/executive) – 12.5 hours

C. Multiple Attorneys Unnecessarily Attending Depositions Or Hearings

Plaintiffs' time detail also includes numerous instances of multiple attorneys for the same party needlessly attending the same deposition, hearing, or meeting. These entries are noted in Stein Decl. Ex. 11 under the sub-heading "Staffing." Examples include:

- Numerous attorneys for the State unnecessarily attending the same depositions;
- Time billed by Kevin Scanlon, who never appeared at any meeting, hearing, or day of trial, and which appears to be for exactly the same tasks for which Keely Duke also billed time.

See Democratic Party of Wash. State, 388 F.3d at 1286 ("[C]ourts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation for such needless duplication as when three lawyers appear for a hearing when one would do."); *Cruz*, 601 F. Supp. 2d at 1191-92 ("It is clear that Plaintiffs' counsel decided to take a 'team' approach to handling this matter. Nonetheless, that explanation is insufficient to show that it was necessary to have four attorneys attend the mediation").

D. Attorneys Or Paralegals Performing Tasks That Should Have Been Performed By Lower-Billing Timekeepers Or Clerical Staff

Stein Decl. Ex. 12 sets forth approximately $115,400 in time billed by attorneys, paralegals, and others that either should have been performed by lower-billing timekeepers, or

that is clerical in nature and as such should be included in the Moving Plaintiffs' firms' normal overhead. Examples of these kinds of entries include:

- Creating "hyperlinked" copies of briefs;
- Uploading, downloading, or "accessing" electronic files and documents;
- "File management";
- Converting documents to PDF or other electronic formats;
- Creating and updating document logs;
- Highlighting deposition designations in deposition transcripts;
- Driving around to deliver boxes of documents;
- Reviewing calendars, maintaining calendars, and the like;[15] and
- E-mails and conferences relating to these tasks;

The Ninth Circuit has held that "purely clerical or secretarial tasks should not be billed at a paralegal [or lawyer's] rate, regardless of who performs them." *Davis v. San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992) (citation omitted). Fees for such work "are generally not compensable even if performed by attorneys or paralegals," unless the party can demonstrate that billing separately for such work "is the custom in the relevant area, as opposed to such costs being incorporated in attorneys' or paralegals' hourly rates." *Balla v. Idaho State Bd. of Corr.*, No. CV81-1165-S-BLW, 2013 U.S. Dist. LEXIS 17627, at *10-11 (D. Idaho Feb. 8, 2013) (disallowing clerical paralegal work which was "not substantively legal in nature" because plaintiffs failed to demonstrate that billing clerical work separately was the custom in the

[15] *Lemus v. Burnham Painting & Drywall Corp.*, 426 Fed. Appx. 543, 545 (9th Cir. 2011) (finding that the court below had properly excluded fees for time spent reviewing the docket and monitoring filing deadlines); *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009) (finding that tasks including filing, transcript, and document organization were clerical and reducing the fee award accordingly)

relevant community, the Treasure Valley); *McCormack v. Herzog*, No. 4:11-cv-00433-BLW, 2013 U.S. Dist. LEXIS 116710, at *8 (D. Idaho Aug. 16, 2013) ("The Supreme Court has excluded the recovery of clerical and administrative tasks performed by both paralegals and attorneys. . . . Because the plaintiff has failed to show that the 16.5 hours Hill billed are not clerical or administrative, the Court will not allow recovery for these hours."); *Jones v. Wild Oats Mkts., Inc.*, 467 F. Supp. 2d 1004, 1016 (S.D. Cal. 2006) ("Time spent on [clerical matters] should instead be accounted for by a law firm's overhead and deemed to be included in the attorney's hourly rate."). "It simply is not reasonable for a lawyer to bill, at her regular hourly rate, for tasks that a non-attorney employed by her could perform at a much lower cost." *Davis*, 976 F.2d at 1543. When clerical work is erroneously "billed at hourly rates, the court should reduce the hours requested to account for the billing errors." *Nadarajah*, 569 F.3d at 921.

This category also includes time billed by the Honigman firm for the work of individuals, for whom no information has been provided, with the titles "law clerk," "law librarian," and "summer associate." These fees are akin to firm overhead and should not be separately compensable. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (explaining that an attorney's fee must take into account the work of secretaries, messengers, and librarians); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004) (denying fees where plaintiff "failed to overcome the assumption that 'work done by librarians, clerical personnel and other support staff . . . [is] generally considered within the overhead component of a lawyer's fee.'") (citation omitted).

E. Excessive Legal Research

One of the arguments the State of Idaho makes in support of its use of private counsel, and that Saint Alphonsus makes for its use of specialized antitrust counsel, is their intense familiarity with the relevant legal issues, eliminating the need for "substantial legal research."

Ettinger Decl. (DN 617-3) ¶¶ 8, 54(b). Yet as set forth in Stein Decl. Ex. 11, Moving Plaintiffs seek reimbursement for extensive legal research. Examples include:

- Over 36 hours researching the rules on hearsay;
- 13 hours researching Federal Rule of Civil Procedure 32;
- Almost 15 hours of other time reviewing various "rules";
- 18 hours researching executive privilege by the State of Idaho – a figure that appears vastly out of proportion to any reasonable need, considering the referenced state government expertise of the AG and G&K. To the extent the State's lawyers felt the need to bone up on the privilege in connection with the testimony of the two Idaho agency head witnesses, that should not have taken anywhere close to the hours for which reimbursement is sought;
- 150 hours on other general research.

This time is excessive, especially when one considers that it doesn't reflect any of the time on legal research done by the FTC. *Willis v. City of Fresno*, No. 1:09-CV-01766-BAM, 2014 WL 3563310, at *24 (E.D. Cal. July 17, 2014) (reducing fees for legal research where, for example, plaintiff "on many occasions, billed over four hours 'researching' a relatively ordinary legal standard."); *Wynn v. Chanos*, No. 14-CV-04329-WHO, 2015 WL 3832561, at *5 (N.D. Cal. June 19, 2015) (reducing fees for "research into the law surrounding defamation and privilege" where counsel had a First Amendment expert on the team, finding "little work was needed to determine the contours of state and federal law on defamation").

F. Other Examples Of Excessive Time

Other discrete examples of excessive time are set forth in the subcategory "Task" in Stein Decl. Ex. 11. Examples include:

- 1,680 hours of "document review," in addition to the million dollars in document review fees sought for the work of contract attorneys.
- 266 hours on the preliminary injunction reply brief
- 128 hours preparing closing argument slides

- 95 hours "hyperlinking" briefs
- Unnecessary review by a dozen attorneys of various expert reports
- Manipulation of "load files" for electronic productions
- Excessive time spent preparing privilege logs, creation of which should have been largely automated through the use of Plaintiffs' document review platforms and coding. This includes 135 hours for Saint Alphonsus, and 96 hours for TVH – for a privilege log with a total of 317 entries.
- Overbilling for voicemails (e.g. 12- and 18- minute voicemails)
- More than 50 hours spent on the research and retention of expert witnesses who either were never retained, or never testified at trial.

IV. PLAINTIFFS' TIME DETAIL INCLUDES NUMEROUS ENTRIES THAT ARE TOO VAGUE TO SUBSTANTIATE THEIR REASONABLENESS

Moving Plaintiffs "bear[ ] the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Rowland,* 39 F.3d 1439, 1449 (9th Cir. 1994) (citation omitted). Where there is insufficient information to substantiate the reasonableness of the fees requested, the request should be denied. *In re Linde*, No. 09-21178-TLM ,2010 Bankr. LEXIS 2902, at *10-11 (Bankr. D. Idaho Sept. 9, 2010); *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 769 (2004). Stein Decl. Ex. 13 sets forth numerous time entries for which Moving Plaintiffs have failed to provide information sufficient to demonstrate the reasonableness of the request. Examples of these entries include:

A. Tasks Related To Unspecified Third Parties

Numerous entries are described as involving interactions with an unspecified "third party," "witness," or "potential expert." Without knowing who exactly these individuals are, and with no other information provided, neither Defendants nor the Court can determine whether the time was litigation-related or otherwise reasonable.

Saint Alphonsus suggests that these time entries have been generalized "so as not to reveal privileged information." Saint Al's Br. at 8 n.11. However, Saint Alphonsus has not explained or established how the mere identity of a third-party with whom its counsel has communicated is privileged. And without that basic information, the Court cannot determine whether this time was reasonable. *See Santiago v. Equable Ascent Fin.*, No. C 11-3158 CRB, 2013 U.S. Dist. LEXIS 97762, at *18 (N.D. Cal. July 12, 2013) ("[W]ork billed for . . . telephone calls with unknown parties is too vague to be reviewed."); *Role Models Am., Inc.*, 353 F.3d at 971-72 (making a 50 percent reduction in hours requested where, among other deficiencies, plaintiff failed to explain roles of individuals in time records); *Osterweil v. Bartlett*, No. 1:09-cv-825 (MAD/CFH), 2015 U.S. Dist. LEXIS 29576, at *27 (N.D.N.Y. Mar. 11, 2015) ("[T]ime entries that refer to unspecified communications with unidentified outside counsel or colleagues are plainly inadequate") (internal quotation marks and citation omitted).

B. Other Vague Time Entries

Plaintiffs' time detail also includes numerous time entries that are too vague to substantiate their relevance or reasonableness. Examples include:

- Entries that fail to provide sufficient information to ascertain what precisely is being done, and therefore the reasonableness of the time (*e.g.*, "litigation planning," "review documents," "trial preparation").
- Entries where the information is insufficient to demonstrate that the task is reasonably related to the litigation and otherwise reasonable (*e.g.*, "Review IAA meeting agenda," "real estate issues," entries relating to "LifeFlight")

A complete list of these vague time entries is set forth in Stein Decl. Ex. 13.

V. PLAINTIFFS' FEES FOR "TRAVEL TIME" SHOULD BE DENIED.

Moving Plaintiffs seek almost a quarter of a million dollars in attorney's fees for "travel time" (*see* Stein Decl. Ex. 14):

Firm	*"Travel Time"*
Honigman	$223,353.50
DSH	$6,365.00
G&K	$6,556.50
Idaho AG	$9,737.50
Powers Tolman	$1,225.00
TOTAL	$247,237.50

The Court should disallow Moving Plaintiffs' request for "travel time" in its entirety. This court has previously disallowed travel expenses as "unreasonable" where attorneys claimed travel costs, as Moving Plaintiffs have here, while at the same time billing for unproductive time spent traveling. *J.R. Simplot*, 2009 U.S. Dist. LEXIS 62439, at *41-44; *see also Latta v. Otter*, No. 1:13-cv-00482-CWD, 2015 U.S. Dist. LEXIS 102635, at *14 (D. Idaho Aug. 3, 2015) (finding that counsel "did not exercise billing judgment" in charging for non-productive travel time, and reducing fee award accordingly); *Mays v. Stobie*, No. 3:08-CV-00552-EJL, 2012 WL 914928, at *9 (D. Idaho Feb. 14, 2012) (reducing an attorney's travel time by 35 hours on the grounds that the attorney had made multiple eight-hour driving trips to visit the client when the trip could have been made in only five hours). While Saint Alphonsus' declarants assert that lawyers typically charge clients for travel *expenses*, neither of them avers that clients typically pay for unproductive travel time – particularly on top of travel expenses. *See, e.g.*, Westermeier Decl. (DN 617-2) ¶ 12; Ettinger Decl. (DN 617-3) ¶ 59; Duke Decl. (DN 617-21) at ¶13. That is because they do not. *See* Declaration of J. Walter Sinclair ¶¶ 3-4 (submitted herewith).[16] Moving Plaintiffs have provided no evidence that would demonstrate they could not have been

[16] While some clients may reimburse attorneys for truly "lost" time while traveling, such as time spent going to and through airport security, that time represents only fraction of a typical airplane trip. *Id.* Moreover, Moving Plaintiffs have not identified or limited their "travel time" entries to such lost time.

working productively during the 441 hours for which they billed "travel time," or explained what exactly it is they were doing during that time that would warrant reimbursement of these fees.

VI. PLAINTIFFS SHOULD NOT BE REIMBURSED FOR TIME THAT WAS NOT NECESSARY TO ADVANCE THE LITIGATION

Plaintiffs seek reimbursement for a substantial amount of time for time spent on activities that were not necessary to advance the litigation.

A. Private Plaintiffs' Time Spent Responding To The Government's Investigation

Private Plaintiffs are not entitled to fees incurred in responding to investigative requests by the FTC and Idaho AG during the investigation that preceded Government Plaintiffs' lawsuit. Such efforts were not necessary for, or undertaken in support of, commencement of the Private Plaintiffs' lawsuit. *See, e.g., Webb v. Bd. of Educ. of Dyer Cnty., Tenn.*, 471 U.S. 234, 243 (1985) (claim under 42 U.S.C. § 1983, costs incurred in administrative proceedings years before complaint was filed were not recoverable; need to argue that earlier work is "both useful and of a type ordinarily necessary to advance the . . . litigation"); *Bogan v. City of Boston*, 489 F.3d 417, 427 (1st Cir. 2007). Saint Alphonsus concedes that it would not be appropriate to include time relating to the FTC/AG investigation that preceded the litigation. Ettinger Decl. (DN 617-3) ¶¶ 15, 24. In fact, however, the fee detail submitted by Saint Alphonsus includes entries relating to work being done in response to that investigation, as does the time detail submitted by counsel for TVH. Stein Decl. Ex. 15 ("Investigation") Fees for this time should be denied.

B. Preparation Of Budgets, Reviewing Invoices, And Client Status Updates

Plaintiffs' time detail includes over $81,000 in fees (159 hours) relating to preparation of budgets, review of invoices, and status reports to clients. This time is not properly compensable and these fees should therefore be denied. *Rosenfeld v. U.S. Dep't of Justice*, 903 F. Supp. 2d 859, 875 (N.D. Cal. 2012) (reducing fee award for time that attorneys spent with clients such as

"conference with client re: case status and strategy" and "telephone conference with client" rather than actually litigating the case); *Gen. Motors Corp. v. Villa Marin Chevrolet, Inc.*, 240 F. Supp. 2d 182, 189 (E.D.N.Y. 2002) ("time spent by counsel in formulating budgets for the litigation is not properly compensable."); *Silver v. Primero Reorganized Sch. Dist. No. 2*, No. 06–cv–02088–MSK–BNB, 2008 WL 280847, at *4 (D. Colo. Jan. 30, 2008) (holding that "client development efforts, work setting up a file, or the preparation of a budget for the client . . . should be considered unrecoverable law firm overhead" and disallowing time for those activities).

C. The Honigman Firm's Fees For Representing Third-Parties

It appears that the time for which Saint Alphonsus seeks reimbursement includes time that its counsel incurred in connection with counsel's representation of certain third-parties, including Trinity Health (a third-party that owns Saint Alphonsus), Imagine Health (which arranged Micron's network), BDC Advisors, and other third-parties. *See* Ex. 15. These third-parties are not "prevailing parties," and Defendants are aware of no authority (nor does Saint Alphonsus cite any) suggesting that, because those third-parties used the same counsel as Saint Alphonsus, those *third parties'* attorneys fees are recoverable. This category of time is improper and should be denied.

D. Time Spent On Redacting, Sealing, And Unsealing

Moving Plaintiffs' time detail includes $224,066.50 (693 hours) on various tasks relating to redacting documents and sealing/unsealing of information – not including time spent by the Gnoesis contract attorneys making confidentiality designations for produced documents. *See* Stein Decl. Ex. 15 (subcategory sealing/unsealing/redaction). This time should be viewed as akin to client status updates, invoicing, and other categories of expenditures that were not necessary to advance the litigation. Rather, this time appears to have been focused substantially

on Private Plaintiffs' efforts to maintain secrecy over their internal operations. Even if some subset of this time were properly compensable, the amount of time spent on these tasks – equivalent to a single individual working over four months just on matters relating to sealing and unsealing – is excessive on its face.

E. Other Categories Of Non-Compensable Time

Additional examples of time that is non-compensable because it was not necessary to advance the litigating include:

- Reviewing newspaper and magazine articles;
- Reading the blog of St. Luke's CEO, Dr. David Pate;
- Training lawyers and legal assistants; and
- Time spent by TVH's current lawyers on ministerial tasks related to their substitution for TVH's prior counsel.

VII. PRIVATE PLAINTIFFS SHOULD NOT BE AWARDED ATTORNEY'S FEES FOR THEIR UNNECESSARY AND DUPLICATIVE EFFORTS ON APPEAL.

Private Plaintiffs' requested fees for work on the appeal (Stein Decl. Ex. 16) should be denied because the Private Plaintiffs did not fully prove *any* of their claims in this Court. As explained above, this Court did not rule in Private Plaintiffs' favor on their vertical theories. And the Private Plaintiffs' participation in Defendants' appeal from the decision the Court did enter—the decision that the Government Plaintiffs had proved their claims—was both unnecessary and superfluous.

The Court's judgment in this case required St. Luke's to divest Saltzer on the ground that the transaction would "raise costs to consumers" in the adult PCP market in Nampa. FOF/COL ¶ 74. The Court expressly declined to address the alternate theory of liability raised by the Private Plaintiffs in that market — *i.e.*, the theory that the transaction would permit Defendants to engage in exclusionary conduct in the adult PCP market in Nampa. *Id.* ¶ 64 ("The Court need

not resolve the issues raised by the private plaintiffs."). Describing its findings and judgment, this Court explained that "the Court ruled that the merger 'will raise costs to consumers,' and did not go on to consider arguments of the private plaintiffs that the merger would exclude competitors." 4/29/15 Order at 4 (internal citations omitted).

Defendants appealed the judgment. The Private Plaintiffs did not cross-appeal or otherwise challenge the Court's decision not to rule on their claims. And Defendants likewise did not address the Private Plaintiffs' vertical theories in their brief to the appellate court because no final decision had been entered on those theories. As such, the sole product market at issue on appeal was the adult PCP market, and more specifically the Court's finding that the transaction would likely lead to an increase in prices to private payers. Because this Court did not actually decide the Private Plaintiffs' claims, and because those claims were not before the appellate court, there was no reason for Private Plaintiffs to participate in the appeal.

To be sure, this Court previously determined that the Private Plaintiffs were "substantially prevailing parties" entitled to attorney's fees for their work litigating *in this Court*. 4/29/15 Order. But that decision does not support awarding Private Plaintiffs fees *on appeal*.[17] In ruling on Private Plaintiffs' entitlement to fees at the trial stage, the Court explained that they had "succeeded on a significant issue" before this Court—namely, that the transaction would enable the Defendants to raise prices. *Id.* at 4. The Court acknowledged and did not question Defendants' argument that the Private Plaintiffs, as Defendants' competitors, lacked standing to pursue judgment based on a likelihood of price increases. *Id.* at 3-4. But that did not affect Private Plaintiffs' entitlement to fees, in the Court's view, because the Private Plaintiffs had "presented evidence demonstrating that the merger would result in higher prices" not as "direct

[17] By filing this opposition to the amount of fees requested by the Moving Plaintiffs, Defendants do not intend to waive their position that the Private Plaintiffs are not prevailing parties at all.

proof" of antitrust liability, but in order "to argue that if St. Luke's had the market power before the merger to raise prices when it purchased physician practices, it would have the market power after the merger to exclude competitors." *Id.* at 4. As the Court made clear, Defendants' supposed ability to raise prices was "only part" of the Private Plaintiffs' case, "and the Court did not address in full their claims." *Id.* at 5. Specifically, "the Court did not address [Private Plaintiffs'] claim that higher prices demonstrated an ability to exclude competitors." *Id.*

Thus, in the Court's view, the Private Plaintiffs were entitled to fees at the trial stage because they contributed to persuading the Court on an *issue* that was an element of their case (Defendants' alleged ability to raise prices). But the Court did not determine that the Private Plaintiffs had proved their ultimate claim that Defendants would have "an ability to exclude competitors" as a result of the transaction, because the Court awarded "the full relief [the Private Plaintiffs] sought—the unwinding of the merger" based on its conclusion that the Government Plaintiffs had proved their antitrust claims. *Id.* at 4-5. Accordingly, the Private Plaintiffs' claims were not subject to final judgment, and thus were not at issue in the appeal.

Indeed, the author of the Ninth Circuit's panel opinion raised this point at oral argument, questioning why the Private Plaintiffs had appeared in the Ninth Circuit at all. Judge Hurwitz specifically noted the *absence* of any finding of harm to Private Plaintiffs when he addressed counsel for Saint Alphonsus at oral argument as follows:

> You're the monopolist hospital in Nampa. And so the notion, the notion that that this is going to, you know—that there's some great antitrust violation that's going to hurt you … I find that a little bit hard to buy on this record. … I don't see anything in this, in this record that suggests that they're required to send patients to Boise rather than the nearby Saint Alphonsus hospital, or that you're going to be affected in any way.
>
> I see findings that the insurers are going to be affected, and I take it that the finding is through that, consumers are going to be

> affected. But I sure don't see the judge making any finding that you're going to be hurt.[18]

Consistent with this questioning from Judge Hurwitz, the opinion affirming the Court's judgment spoke only to the likelihood of price increases—not the Private Plaintiffs' foreclosure theory.

In short, as both Judge Hurwitz and this Court have recognized, this Court made no finding that Private Plaintiffs had proved their ultimate claim of harm *to them* through exclusionary conduct. Because the Court did not conclude that the Private Plaintiffs' had prevailed on any of their claims, Defendants did not—and could not—appeal any such judgment in Private Plaintiffs' favor. Because the Private Plaintiffs' undecided claims were not even at issue, their brief – indeed, their participation in the appeal – was unnecessary. For that reason alone, they are not entitled to fees in connection with the appeal.

Addressing the claims that *were* at issue, the FTC and Idaho AG filed a brief in which they addressed each of the issues raised by Defendants on appeal. *See* Government Plaintiffs' Brief (Stein Decl. Ex. 17), Private Plaintiffs' Brief (Stein Decl. Ex. 18). As the Court can readily observe just from their respective tables of contents, Saint Alphonsus' assertion that the two briefs were not duplicative is simply not true. Nor do Private Plaintiffs explain why, if their characterization were accurate (which it is not), it was necessary for the Plaintiffs to file two separate briefs.

The Court should deny Private Plaintiffs' appeal fees in their entirety. *See Donovan v. CSEA Local Union 1000, Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO*, 784 F.2d 98, 106 (2d Cir. 1986) ("[Counsel for private plaintiff's] efforts on the appeal duplicated the work of the Secretary . . . . We do not view the work done by counsel in argument of the appeal to be

[18] This statement appears at approximately the 1 hour and 21 minute mark of the audio recording of the oral argument, which can be accessed here: http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013569

sufficiently distinct from the Secretary's representation or beneficial to the [private plaintiff] to warrant compensation for such work. Once a record has been made in the district court, the Secretary's need for additional assistance is minimal"). Alternatively, even if it this Court were to find that it was appropriate for Private Plaintiffs to participate in some fashion in the appeal, the requested fees are excessive. Those fees were incurred to defend a judgment that did not even decide the merits of Private Plaintiffs' claims, and the work done was simply a duplicative defense of the judgment entered on Government Plaintiffs' claims. Moreover, these fees are *in addition to* those incurred by the Government Plaintiffs. Private Plaintiffs' fees on appeal should therefore be denied.

VIII. PRIVATE PLAINTIFFS' REQUESTED COSTS ARE UNREASONABLE

Plaintiffs seek a total of $1,186,831 in taxable and non-taxable costs. The Ninth Circuit has recognized the "'narrow scope of taxable costs'" under 28 U.S.C. § 1920, noting that "'[t]axable costs are limited to relatively minor, incidental expenses[.]'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 926 (9th Cir. 2015) (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, ___ U.S. ___, 132 S.Ct. 1997, 2005-06 (2012)). Whether to award non-taxable costs (i.e., costs not listed as taxable under §1920) as "reasonable attorney's fees" is within the court's discretion. *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010) (quoting *Davis*, 976 F.2d at 1541). However, those costs must be of the sort of expenses "incurred during the course of litigation which are normally billed to fee-paying clients." *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991), *superseded by statute by Davis v. San Francisco,* 976 F.2d 1536 (9th Cir. 1992). *See also Goff v. Wash. Cnty.*, No. CV 03-268-S-MHW, 2006 U.S. Dist. LEXIS 27134, at *5 (D. Idaho Apr. 24, 2006). As set forth below, certain of Moving Plaintiffs' requests for costs should be denied because they are excessive or otherwise non-compensable.

A. Pro Hac Vice Fees Are Not Recoverable As Costs.

Saint Al's seeks $450 and the Idaho AG seeks $900 for *pro hac vice* application fees. *See* Duke Decl. para. 13(i); DeLange Decl. Ex. B page 7. The Ninth Circuit has held that *pro hac vice* fees are not recoverable as taxable costs, *Kalitta Air L.L.C. v. Cent. Tex. Airborne Sys. Inc.*, 741 F.3d 955, 958 (9th Cir. 2013). Nor are *pro hac vice* fees considered out-of-pocket expenses. *Competitive Techs. v. Fujitsu Ltd.*, No. C-02-1673 JCS, 2006 WL 6338914, at *4 (N.D. Cal. Aug. 23, 2006). Accordingly, these Plaintiffs' request for $1,350 in *pro hac vice* fees should be denied.

B. Secretarial Overtime Is Not A Recoverable Cost.

Saint Alphonsus seeks $29,829.37 for secretarial overtime. *See* Ettinger Decl. (DN 617-3) ¶¶ 52, 54. However, secretarial overtime is not compensable as part of an award of attorney's fees. *See e.g., Good Earth Corp. v. M.D. Horton & Assoc.*, No. C-94-3455-CAL, 1997 WL 702297, at *10 (N.D. Cal. Aug. 4, 1997); *Barrella v. Vill. of Freeport*, 43 F. Supp. 3d 136, 193 (E.D.N.Y. 2014); *Yule v. Jones*, 766 F. Supp. 2d 1333, 1348 (N.D. Ga. 2010); *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983), *disapproval noted on other grounds*, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). Nor are such costs separately awardable; they should be considered part of the attorney's overhead. *J.R. Simplot*, 2009 U.S. Dist. LEXIS 62439, at *32.

C. Additional Costs Should Be Disallowed For Insufficient Itemization, Description, Or Explanation.

1. Expert Consulting Fees

The State of Idaho seeks reimbursement of $10,800 for expert consulting fees. DeLange Decl. ¶ 38(b). In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a

litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." 482 U.S. 437, 445 (1987) (finding court had no authority to award expert witness fees beyond those permitted by § 1821 absent statutory or contractual authority). The Clayton Act does not give this authority, merely allowing for recovery of "cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 26. And the Ninth Circuit has followed the Supreme Court in holding that "'reasonable attorney's fees' do not include costs that, ***like expert fees***, have by tradition and statute been treated as a category of expenses distinct from attorney's fees" that therefore cannot be awarded as out-of-pocket expenses. *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (emphasis added) (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99-100 (1991)). Thus, the AG may not recover expert consulting fees.

2. Excessive Travel Expenses

Moving Plaintiffs seek $139,000 in travel expenses:

Firm	*Travel Expenses*
Honigman	$111,822.12
G&K	$20,414.79
Idaho AG	$6,729.44
TOTAL	$138,966.35

They have failed, however, to submit documentation establishing the reasonableness of these expenses. Many of the travel expenses sought by Honigman, for example, are airfares that exceed $1,200, which appears to reflect either first-class fares or last-minute bookings – although we cannot tell for certain because they have provided no supporting documentation. Because neither the Court nor Defendants can substantiate that the requested airfares are for ordinary coach tickets booked sufficiently in advance to avoid excessive charges, the Court should deny these requested costs, or reduce the requested airfares by 70%, to approximate the cost of coach

airfares. *Apple Inc. v. Samsung Elecs. Co.*, No. 5:11-cv-1846-LHK(PSG), 2014 WL 2854994, at *3 (N.D. Cal. June 20, 2014) (reducing amount sought for business- and first-class airfares by 70% to approximate coach prices).

3. 2010 Fed Ex

The Idaho AG seeks $15.44 for a Federal Express sent in March 2010, which is clearly unrelated either to this litigation or the investigation that preceded it. That expense should be denied.

IX. NO INTEREST ON FEES CAN ACCRUE BEFORE APRIL 29, 2015

Private Plaintiffs request that the Court award interest on their fees. As they acknowledge, "[i]nterest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set." *Friend v. Kolodzieczak*, 72 F.3d 1386, 1391-92 (9th Cir. 1995). The "date of entitlement" is not analogous to the date of judgment, but rather the date on which the Court determines that the Moving Plaintiffs are entitled to fees. *Id.* Here, that date is no earlier than April 29, 2015, the date on which the Court ruled that Private Plaintiffs qualify as "prevailing parties." *See, e.g.*, *Cruz*, 601 F. Supp. 2d at 1197–98 (holding that post-judgment interest on an attorney's fee award began to accrue on the date the district court entered an Initial Fee Order); *Prison Legal News v. Schwarzenegger*, 561 F. Supp. 2d 1095, 1106 (N.D. Cal. 2008) (holding that interest began accruing on the date of the district court's order awarding attorney's fees); *Ogelsby v. W. Stone & Metal Corp.*, 230 F. Supp. 2d 1184, 1188 (D. Or. 2001).

X. SUMMARY

Private Plaintiffs' deliberate failure to exclude the substantial amount of time associated with their unrelated, unsuccessful claims, plus the numerous other significant examples of improper and excessive billing set forth above, shocks the conscience such that denial of their

petition is warranted. *Lewis*, 944 F.2d at 957–58 (upholding an outright denial of attorney's fees where "counsel ma[d]e no 'good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary'").

Should the Court decline to make such a finding, however, it should reduce the fee award as follows: First, the Court should deduct from the time entries for each of the Moving Plaintiffs' firms the applicable specific time entries that are too vague to demonstrate their reasonableness (§ IV), travel time (§ V), tasks that were not necessary to advance the litigation (§ VI), and Private Plaintiffs' time associated with the appeal (§ VII):

	Honigman Miller	Duke Scanlan	Powers Tolman	Attorney General	Godfrey & Kahn
Fees Requested	$6,979,725.50[19]	$873,325.50	467,361.10[20]	$346,997.50	$625,996.00
Specific Deductions (§§ IV,V,VI,VII)[21]	$938,719.50	$68,790.50	$81,128.00	$46,636.25	$18,770.00
Subtotal	$6,041,006.00	$804,535.00	$386,233.10	$300,361.25	$607,226.00

In order to account for unnecessarily duplicative and excessive time and, in the case of Private Plaintiffs, time devoted to the unsuccessful claims (§§ II and III, *supra*), the Court should apply an across-the-board percentage cut. *Gonzalez*, 729 F.3d at 1203 ("when faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figures as a practical means of

[19] This is the sum of the $5,808,117.50 sought by Honigman Miller for its own timekeepers and $1,171,608 sought by Honigman Miller for fees paid to the Gnoesis contract attorneys.

[20] This is the sum of the $369,202.60 sought by Powers Tolman for attorney's fees and $98,158.50 for "paralegal fees" incorrectly characterized by TVH as expenses rather than fees.

[21] Because some time entries appear in multiple categories, Defendants have removed duplicative entries from the totals. That explains why the total deductions for these categories across all of the Moving Plaintiffs' firms is less than the total amount of time for these categories reflected in the exhibits showing the time detail for each individual category.

[excluding non-compensable hours] from a fee application.") We propose different percentage reductions for the Private Plaintiffs and the State of Idaho.

For the Private Plaintiffs' firms, the Court should reduce the remaining fees by 80%. Private Plaintiffs succeeded on only 1 of their 5 claims, and 80% is a reasonable approximation of the hours that they, alone, devoted to the claims that were unique to them. *Gomez v. Reinke*, No. CV91–299–S–LMB, 2008 WL 3200794, at *10 (D. Idaho Aug. 7, 2008) (ordering an 80% across-the-board reduction for unsuccessful claims); *Schwarz*, 73 F.3d at 905-06 (affirming 75% reduction to the number of hours billed where plaintiff succeeded on only 25% of his claims); *Confederated Tribes of Siletz Indians of Oregon v. Weyerhauser Co.*, No. CV 00-1693-A, 2003 WL 23715982 (D. Or. Oct. 27, 2003), *judgment vacated by* 484 F.3d 1086 (2007) (in antitrust case, deducting hours that could be specifically identified as pertaining to unrelated claims, then applying percentage reductions to remaining hours to account for additional time pertaining to unrelated claims).[22] The 80% reduction is also separately justified as a reduction for the unnecessary duplication of effort reflected in the gross disparity between Plaintiffs' hours and Defendants' hours. *Democratic Party of Wash. State*, 388 F.3d at 1287 ("If the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates that too much time is claimed").

Applying this reduction results in the following fee total for Private Plaintiffs:

[22] As explained above, it would actually be more appropriate to deny 100% of TVH's time. Unlike Saint Alphonsus, TVH does not even compete in the market for adult PCP services in Nampa, and all of TVH's contributions were related solely to the unsuccessful, unrelated claims.

	Honigman Miller	Duke Scanlan	Powers Tolman
Fees Requested	$6,979,725.50	$873,325.50	467,361.10
Specific Deductions (§§ IV,V,VI,VII)[23]	$938,719.50	$68,790.50	$81,128.00
Subtotal	$6,041,006.00	$804,535.00	$386,233.10
80% of remaining	$4,832,804.80	$643,628.00	$308,986.48
TOTAL	**$1,208,201.20**	**$160,907.00**	**$77,246.62**

With respect to the State of Idaho's counsel, we propose a 50% reduction to account for the unnecessary duplication reflected in the disparity between Plaintiffs' hours and Defendants' hours. Our proposed percentage reduction is conservative given the estimated 229% difference in the two sides' hours. Applying this reduction results in the following fee total for the State of Idaho:

	Attorney General	Godfrey & Kahn
Fees Requested	$346,997.50	$625,996
Specific Deductions (§§ IV,V,VI,VII)	$46,636.25	$18,770
Subtotal	$300,361.25	$607,226
50% of remaining	$150,180.63	$303,613
TOTAL	**$150,180.63**	**$303,613**

With regard to costs and expenses, the Court should deny recovery of the costs set forth in Sections VIII(A), (B), (C)(1), and (C)(3), and should reduce by 70% the travel expenses for which insufficient documentation has been provided. Then, as to the Private Plaintiffs, the Court should apply the same 80% reductions proposed above for fees to account for the unidentified costs associated with Private Plaintiffs' vertical claims. Applying these deductions results in the following revised cost award:

[23] The specific deductions are set forth in Stein Decl. Ex. 19.

	Honigman Miller	Duke Scanlan	Powers Tolman	Attorney General	Godfrey & Kahn
Expenses Requested	$907,019.59	$54,162.22	$14,093.99	$88,389.38	$25,007.78
Specific Deductions (§§VIII(A), (B), (C)(1), (C)(3))	$72,667.81	$450	--	$16,426.05	$14,290.35
Subtotal	$834,351.78	$53,712.22	$14,093.99	$71,963.33	$10,717.43
80% of Remaining	$667,481.42	$42,969.78	$11,275.19	--	--
Total Costs & Expenses	**$166,870.36**	**$10,742.44**	**$2,818.80**	**$71,963.33**	**$10,717.43**

If the Court determines that some but not all of the categories of adjustments should be made, Defendants will promptly submit revised figures summarizing the specific entries associated with the categories of deductions that the Court determines are warranted.

Respectfully submitted,

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Dated: August 19, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 19, 2015, I filed the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR ATTORNEY'S FEES AND COSTS AND BILLS OF COST** electronically through the CM/ECF system, which caused all counsel registered with the CM/ECF system to be served automatically.

By: /s/ Scott D. Stein