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UNITED STATES DISTRICT COURT

IN 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)

**PRIVATE PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION FOR
STAY**

PUBLIC

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-000116-BLW

I. INTRODUCTION

Saint Alphonsus Medical Center - Nampa, Inc., Saint Alphonsus Health System, Inc., Saint Alphonsus Regional Medical Center, Inc. and Treasure Valley Hospital Limited Partnership (the "Private Plaintiffs") file this opposition to Defendants' Motion for Stay Pending Appeal. The Private Plaintiffs join in the opposition filed by the Federal Trade Commission and Idaho Attorney General (the "Government Plaintiffs"), but also write separately to address the many ways in which a stay would seriously harm both the Private Plaintiffs and consumers. As a result, the balance of harms would "tip sharply" *against* grant of a stay, *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011), and the "public interest does . . . weigh heavily against a stay." *Id.* For both these reasons, a stay should not be granted here.

This harm will arise from two highly likely courses of action by St. Luke's and Saltzer. First, if a stay is granted, Saltzer physicians will shift their referrals to St. Luke's and away from Saint Alphonsus and Treasure Valley Hospital ("TVH"), a shift that has already begun. This Court has already found that shifts in referrals of ancillary services will likely be anticompetitive. Second, St. Luke's will withdraw Saltzer physicians from competing networks, another

anticompetitive step that has been planned by St. Luke's. This will have dramatic consequences both for the Private Plaintiffs and for the state of overall health care in the Treasure Valley.

According to the Ninth Circuit's responses to Frequently Asked Questions, <http://www.ca9.uscourts.gov/content/faq.php>, the time from a notice of appeal to a decision in a civil case ranges from 15 to 32 months. Thus, any stay will allow these anticompetitive actions to proceed for as much as two years or more. Given the serious harm to the Private Plaintiffs and the public that would likely ensue from such actions, a stay should certainly not be granted.

II. HARM FROM CHANGES IN REFERRALS

A. Likely Loss Of Referrals

If a stay is granted, it is extremely likely that the Saltzer physicians will switch their referrals in substantial numbers from Saint Alphonsus Nampa, TVH and independent physicians to St. Luke's. This Court has already found that "[a]fter the Acquisition, it is *virtually certain* that this trend [of shifting referrals] will continue and Saltzer referrals to St. Luke's will increase." Findings of Fact and Conclusions of Law (Dkt. 464) ("FOF") at ¶ 140 (emphasis added); see also FOF at ¶¶ 132-138.

There is little doubt that this pattern will continue and increase while a stay is in place, since it has already begun. The undisputed testimony at trial establishes that [REDACTED]

[REDACTED] Trial Tr. at 961:3-962:7 (Lannie Checketts), Plaintiffs' Corrected Proposed Findings of Facts and Conclusions of Law ("PPFOF") at ¶ 675. Dr. Kunz (Chair of the Saltzer Executive Committee) testified that since Saltzer entered into its PSA with St. Luke's, his referrals to St. Luke's specialists have increased. Trial Tr. at 3378:19-25; 3379:1-3 (Harold Kunz); PPFOF ¶ 669. Dr. Page of Saltzer acknowledged that his outpatient cases at Saint

These shifts in referrals would certainly continue, and grow, if a stay is granted.

B. Harm To Private Plaintiffs From Loss Of Referrals

Though the Court did not need to address this issue in its Findings of Fact and Conclusions of Law, the trial record made clear that such a shift in referrals would significantly harm Saint Alphonsus and TVH. Saint Alphonsus Nampa is critically dependent on Saltzer. 47% of patients admitted to Saint Alphonsus Nampa saw a Saltzer primary care physician in the previous year. Trial Tr. at 1514:15-24 (Deborah Haas-Wilson), TX 1702, TX 3000 at Slide 43; PPOF at ¶ 885. 55% of Neuro+Ortho patients and 12% of general surgery patients who had an outpatient encounter at Saint Alphonsus Nampa had seen a Saltzer PCP in the previous year. Trial Tr. at 1518:5-19 (Deborah Haas-Wilson) TX 1703, 1704; TX 3000 at Slides 45, 46; PPOF at ¶ 856.

Even the loss of a fraction of these patients would be extremely damaging to Saint Alphonsus Nampa's ability to compete. St. Luke's executives told Saltzer's consultant that "Saint Alphonsus Mercy will be imploding if they kick Saltzer out." Dkt. No. 271 (Reiboldt Dep. Tr.) at 117:22-118:9; TX 1144 at COKER-P-0000013; PPOF at ¶ 857.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Trial Tr. at 954:3-955:9 (Lannie Checketts); TX 1661, Checketts Demonstrative 4, Demonstrative 7; PPOF at ¶ 880.

Williams); PPOF at ¶ 848. [REDACTED] TX 2168 at ALPH00120754. [REDACTED]

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These shifts in referrals would also jeopardize Saint Alphonsus Nampa's potential improvements in its facilities. [REDACTED]

[REDACTED] TX 2079 at p. ALPH00430304; TX 2079 at ALPH00430314; PPFOF at ¶ 872.

[REDACTED] TX 2172 at p. 1 (ALPH00009735); PPFOF at ¶ 873. [REDACTED]

[REDACTED] TX 2172 at p. 31 (ALPH00009765); PPFOF at ¶ 873. [REDACTED]

[REDACTED] TX 2172 at p. 4. (ALPH00009738); Trial Tr. at 885:1-887:7 (Karl Keeler); PPFOF at ¶ 873. If divestiture were stayed, a two year shift in Saltzer referrals could well have the same effect.

TVH is also critically dependent on Saltzer. 21% of Neuro+Ortho patients and 60% of general surgery patients who had an outpatient encounter at TVH had seen a Saltzer PCP in the previous year. Trial Tr. at 1517:25-1518:19 (Deborah Haas-Wilson); TX 1703, 1704; TX 3000 at Slides 45, 46; PPFOF at ¶ 843. By TVH's count, Saltzer referrals represented more than 40% of the TVH surgeon case count, with the case count growing consistently from 2008-2011. Trial Tr. at 1023:23-1024:3 (Nicholas Genna); PPFOF at ¶ 843.

[REDACTED] TX 2168 at ALPH00120754, TX 1963, TX 1964, TX 1965, TX 1966.

2 [REDACTED]

[REDACTED] Trial Tr. at 892:18-892:25 (Karl Keeler); PPFOF at ¶ 885

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Trial Tr. at 1059:19-1060:3 (Nicholas Genna); PPFOf at ¶ 851. Surgeons that TVH has tried to recruit in 2013 have expressed reticence to become associated with TVH in an atmosphere in which primary care physicians, who control referrals, are being employed by St. Luke's. Trial Tr. at 1063:18-1064:7 (Nicholas Genna); PPFOf at ¶ 852. "The biggest concern [to TVH] is the pool of surgeons is so much smaller than it was in 2008. And the number of independent referral sources not within the St. Luke's system is much, much smaller, as well." Trial Tr. at 1055:7-19 (Nicholas Genna); PPFOf at ¶ 853.

C. **The Harm To Consumers, Overall Competition And Therefore The Public Interest, From Loss Of Referrals**

Shifts in referrals would injure not only the Private Plaintiffs, but also consumers in a multitude of ways. First, the record evidence establishes that St. Luke's physicians shift their referrals to St. Luke's facilities and providers even when other facilities are substantially more convenient or other providers are regarded as providing high quality care. For example, there are St. Luke's urologists, general surgeons, ENTs and orthopedists now practicing in the Saltzer offices located a few feet from Saint Alphonsus Nampa, but none of these physicians has sought privileges to practice at Saint Alphonsus Nampa. Trial Tr. at 875:25-876:12 (Karl Keeler); PPFOf at ¶ 677.

Dr. Bathina, Vice President of St. Luke's Idaho Cardiology Associates, stated in an email that St. Luke's physicians "have to refer to" doctors who "offer a far inferior product" if they are employed by St. Luke's. TX 1357 at 0000004617; Trial Tr. at 2087:2-2088:11; Dkt. No. 290

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(James Souza Dep. Tr.) at 150:15-151:4; 155:4-13; PPFOF at ¶ 695.³ As noted *supra* at 4, Saltzer primary care doctors have shifted referrals away from their former surgeon colleagues despite the admittedly high quality of the surgeons' care.

Dr. Priest admitted that "prior to [his] employment at St. Luke's [he] referred 50 percent of [his] patients that needed pacemakers or defibrillators to Dr. Seale," one of his former partners. Trial Tr. at 1851:23-1852:3 (Marshall Priest); PPFOF at ¶ 684. When ICA was acquired by St. Luke's, Dr. Seale was one of the four former ICA physicians who joined Saint Alphonsus instead. Trial Tr. at 1853:9-17 (Marshall Priest); PPFOF at ¶ 684. Dr. Priest admitted that he thereafter "dropped using Dr. Seale even though [he] thought he was [his] go-to guy who did a good job on pacemakers and defibrillators." Trial Tr. at 1853:13-1854:1 (Marshall Priest); PPFOF at ¶ 684.

Second, these shifts in referrals will also result in higher prices. This court has specifically found that shifts in referrals to St. Luke's "will increase the cost to the patient." FOF at ¶ 145. As Jeff Crouch of Blue Cross testified, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Trial Tr. at 425:21-426:3 (Crouch).

This is consistent with the finding of the Berkeley Forum (February 2013) at p. 38, cited by this Court (FOF at ¶ 133) that "physicians may be influenced by hospitals to order more expensive care or increase referrals and admissions."⁴

³ In Dr. Bathina's opinion, this included Saltzer. *Id.*

Pate has stated in a published article that “when a specialist experiences a number of his or her referring physicians being hired by a hospital, this creates pressure for the specialist to consider employment with the hospital to preserve the referral base.” TX 44 at SLHS000075066; PPFOf at ¶ 910. Such transactions would, of course, even further increase concentration and reduce competition in the relevant hospital and surgical facility services markets.

III. HARM TO NETWORK COMPETITION

A. Threats To Networks

Though the Court did not need to reach this issue in its Findings of Fact and Conclusions of Law, the evidence also shows that if divestiture is not stayed, it is highly likely that St. Luke’s will withdraw Saltzer physicians from competing provider networks.⁶ This will seriously harm the Private Plaintiffs and other competitors, as well as severely restricting consumer choice, competition, and health care reform in the Treasure Valley. As such, it will significantly damage the public interest.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dkt.

No. 321 (Billings Dep. Tr.) at 99:10-99:23; TX 1225 at SLHS000892455 (emphasis added); PPFOf at ¶ 748. [REDACTED]

[REDACTED] Trial
Tr. at 471:5-24 (Linda Duer): Dkt. No. 322 (Drake Dep. Tr.) at 8:6-8; PPFOf at ¶ 749. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] TX 1989 at SLHS001394172; PPFOf at ¶ 751.

In fact, the St. Luke’s Payor Contracting Committee has approved a decision to “[e]xit the ACN agreement for all clinics by July 1, 2013.” That approval has never been rescinded. Dkt. 322 (Drake Dep. Tr.) at 254:7-255:12; 255:14; TX 1207 at 2, TX 1208 at SLHS000656059; PPFOf at ¶ 750. [REDACTED]

[REDACTED] Trial Tr. at 1243:7-12 (B. Petersen).⁷

B. Harm To Saint Alphonsus And Other Competing Networks

The withdrawal of Saltzer from competing networks would seriously harm Saint Alphonsus as well as consumers and overall competition in the markets in which networks provide services. St. Luke’s own testimony makes clear that the Saltzer physicians are critical to the ability of these networks to compete.

⁶ Saltzer’s managed care contracting is already controlled by St. Luke’s. JX 23 at p.3, Page Dep. at 250:6 – 250:10 (attached hereto as Exhibit A).

⁷ St. Luke’s did not dispute these conclusions in its Proposed Findings of Fact and Conclusions of Law. Instead, it attempted to minimize their significance by suggesting that these actions amount to “competition,” stating that:

Plaintiffs complain that St. Luke’s ultimately plans to remove St. Luke’s providers from competitors’ networks. Except as it relates specifically to the Saltzer physicians that complaint is “outside the scope of this case. Moreover, even if the Saltzer physicians are withdrawn from competing networks, that is not anticompetitive.

Defendants’ Corrected Proposed Findings of Fact and Conclusions of Law (“DPFOF”) at ¶¶ 450-451.

However, “crippling” competitors by purchasing critical referral sources at Saltzer and then denying them to any other network is hardly competition. It is classic anticompetitive behavior.

[REDACTED]

[REDACTED]

[REDACTED] Dkt. No. 321 (Amended Billings Tr.) at 96:16-97:3; TX 1224 at SLHS001222471; PPFOf at ¶ 185. [REDACTED]

[REDACTED] Dkt. No. 321 (Amended Billings Tr.) at 97:4-11; PPFOf at ¶ 185.

A host of independent witnesses at trial agreed with St. Luke's assessment. Linda Duer, Executive Director of Idaho Physicians Network, explained that she could not "successfully market a network to self-funded employers in Nampa that did not include Saltzer primary care physicians . . ." Trial Tr. at 465:2-465:5 (Linda Duer); PPFOf at ¶ 206. [REDACTED]

[REDACTED] Trial Tr. at 331:6-331:10 (Jeff Crouch); PPFOf at ¶ 738. Scott Clement of Regence explained that Regence paid Saltzer more than most other providers in its PPO network because "we . . . wouldn't be able to field a competitive product if they weren't in it." Dkt. No. 252 (Clement Dep. Tr.) at 71:20-72:3; PPFOf at ¶ 744. Clement was "not able to think of any" employers or health plans that have been able to sell products in the Nampa area without Saltzer in their network. Dkt. No. 252 (Clement Dep. Tr.) at 184:13-17; PPFOf at ¶ 742.

If St. Luke's moves forward with its planned actions, only St. Luke's networks will include the Saltzer physicians. As a result, every rival of St. Luke's, including the Saint Alphonsus Health Alliance and independent networks such as IPN, will, [REDACTED]

C. Harm To The Public Interest

The withdrawal of Saltzer from competing networks and contracts would adversely affect every aspect of health care in the Treasure Valley. First, since provider networks are heavily utilized by self-insured employers and national payors who do not have the resources to efficiently assemble their own networks, harm to network competition will seriously limit choices for consumers who obtain healthcare through these channels. St. Luke's actions will also disrupt competition in the relevant physician, hospital and outpatient surgical facility services markets, since providers in these markets compete for and access consumers, in significant part, through such provider networks. Trial Tr. at 1486:19-1488:14, 1489:11-1490:7, 1491:6-1493:15, 1518:20-1519:5, 1519:23-1520:15; TX 3000 at Slides 13-21, 47 (Haas-Wilson); PPFOf at ¶ 729, 746, 756.

Second, when St. Luke's withdraws the Saltzer doctors from competing networks, this will substantially increase costs to consumers. If physicians are not in a network, the subscribers utilizing that network who want to continue to see these doctors are forced to pay greater out-of-network costs. See Dkt. No. 318 (Butterbaugh Dep. Tr.) at 52:3-52:7. [REDACTED] Trial Tr. at 581:10-582:2 (Patrick Otte); PPFOf at ¶ 287.

This will be a particular problem to Micron, since Saltzer physicians are now in the Micron network through the Saint Alphonsus ACN network. Trial Tr. at 594:6-13, 585:20-22 (Patrick Otte); PPFOf at ¶ 289. If, as St. Luke's has decided to do, it pulls the Saltzer physicians out of the ACN network, no Saltzer physicians will be available to Micron employees.

Third, the withdrawal also threatens to result in an increase in prices if Micron concludes that its only option is to add St. Luke's facilities to its network. [REDACTED]

For example, the Saint Alphonsus Health Alliance is in the process of adoption of a population health management tool, Explorys, which will work with a variety of different medical records. Trial Tr. at 3630:11-3632:20 (Polk). Explorys is being implemented first for practices, like Saltzer, that have the eClinicalWorks electronic medical record. *Id.* at 3634:7-3634:12; PPFOF at ¶ 539.

In the event of a divestiture, Saltzer could pursue the Explorys opportunity. In the event of a stay, however, it is virtually certain that Saltzer will not do so, given St. Luke's plans to withdraw its physicians from competing networks, *supra*, [REDACTED] [REDACTED] Trial Tr. at 1243:7-1243:12 (Petersen). Therefore, a stay will result in the worst of all worlds for both Saltzer and the public: Saltzer will fail to make *any* progress towards population health management, either within or outside of St. Luke's.

Fifth, the balance of harm also tips decidedly against the award of a stay when the ability to assume risk-based contracts, another element of St. Luke's vision to improve clinical quality, is considered. The record evidence establishes that Saltzer can participate in risk-based contracting with St. Luke's whether or not it is employed by St. Luke's and (therefore) whether or not there is a stay. St. Luke's plans to assume risk through its Bright Path network, which includes large numbers of independent physicians. Trial Tr. at 2444:18-2444:21 (Kaiser). Saltzer was a member of Bright Path before the acquisition by St. Luke's. Trial Tr. at 2444:12-2444:17 (Kaiser).

However, a stay will interfere with the progress of Saltzer in engaging in risk-based contracting with other networks, including the Saint Alphonsus Health Alliance. [REDACTED]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of March, 2014, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System.

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