No. 14-35173

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAINT ALPHONSUS MEDICAL CENTER–NAMPA, INC.; SAINT ALPHONSUS HEALTH SYSTEM, INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP; FEDERAL TRADE COMMISSION, STATE OF IDAHO,

Plaintiffs-Appellees,

and

IDAHO STATESMAN PUBLISHING, LLC; THE ASSOCIATED PRESS; IDAHO PRESS CLUB; IDAHO PRESS-TRIBUNE LLC; LEE PUBLICATIONS, INC.,

Intervenors,

v.

ST. LUKE'S HEALTH SYSTEM, LTD.; ST. LUKE'S REGIONAL MEDICAL CENTER, LTD.; SALTZER MEDICAL GROUP,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Idaho, Case Nos. 1:12-cv-00560-BLW (Lead Case) and 1:13-cv-00116-BLW

SAINT ALPHONSUS MEDICAL CENTER-NAMPA; SAINT ALPHONSUS HEALTH SYSTEM INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; AND TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP'S RESPONSE TO MOTION OF APPELLANTS FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and Circuit Rule 28-1, Plaintiffs-Appellees Saint Alphonsus Medical Center–Nampa, Inc., Saint Alphonsus Health System, Inc., Saint Alphonsus Regional Medical Center, Inc., and Treasure Valley Hospital Limited Partnership make the following disclosure:

Saint Alphonsus Medical Center–Nampa, Inc., Saint Alphonsus Health System, Inc., and Saint Alphonsus Regional Medical Center, Inc., are Idaho nonprofit corporations, wholly owned by CHE Trinity, Inc., an Indiana nonprofit corporation. CHE Trinity, Inc., has no parent corporation. No publicly held corporation owns 10% or more of the stock in Saint Alphonsus Medical Center–Nampa, Inc., Saint Alphonsus Health System, Inc., Saint Alphonsus Regional Medical Center, Inc., or CHE Trinity, Inc.

Treasure Valley Hospital Limited Partnership is a limited partnership organized under the laws of the State of Idaho. The ultimate corporate parent of Treasure Valley Hospital Limited Partnership is Surgical Care Affiliates, Inc., which is a publically held corporation.

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I. INTRODUCTION

Appellees Saint Alphonsus Medical Center–Nampa Inc., Saint Alphonsus Health System Inc., Saint Alphonsus Regional Medical Center, Inc., and Treasure Valley Hospital Limited Partnership ("TVH") (the "Private Appellees") file this Response to the Motion of Appellants for Stay Pending Appeal, DktEntry 41-1, ("Appellants' Motion for Stay").[1] This Response will focus on (1) critical deficiencies in Appellants' challenge to the merits, and (2) the significant harm that will be suffered as a result of any delay in divestiture. As a result, the balance of injuries and public interest "tip decidedly" against the grant of a stay. The District Court's denial of a stay here was entirely proper.[2] A transaction that has been found unlawful should not be permitted to continue for two years after judgment, when competitive harm is not only highly likely, but is already occurring.

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[1] Appellants claim that the Private Appellees are not proper parties to this appeal. But the lead case in this appeal was brought solely by the Private Appellees. That is the case in which the District Court issued its judgment. Ex. 34, Judgment, Dkt. No. 471. References to the District Court docket are abbreviated as "Dkt. No." References to the Appellate Court docket are abbreviated as "DktEntry."

[2] The review of a motion for stay after a District Court denial should reflect some deference to the District Court's decision, particularly its Findings of Fact. *See, e.g., Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986); *Goldie's Book Store, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 470 (9th Cir. 1984).

II. APPELLANTS DO NOT RAISE SERIOUS QUESTIONS GOING TO THE MERITS

Appellants' request fails, first, because they do not raise serious questions on the merits. The District Court's conclusions were based on substantial evidence, and cannot possibly be viewed as clearly erroneous.

A. Appellants' Criticisms Of The District Court's Geographic Market Analysis Are Contradicted By The Record

The District Court's definition of the geographic market was sound and based on substantial evidence. The Court properly applied a "dynamic" analysis. *See e.g.* Ex. B to Appellants' Motion for Stay, Findings of Fact, DktEntry 41-3 ("FOF") ¶ 50 (geographic market is area "where buyers can turn for alternate sources of supply."). But the Court, unlike Appellants, properly defined the "buyer" as the insurer, not the patient. *See* FOF ¶¶ 57-58. The two stage competition model adopted by the District Court, which Appellants do not dispute, explains that pricing decisions are made at the level at which health plans negotiate with providers for inclusion in their networks, because patients rarely face financial incentives to choose among providers in a network. FOF ¶¶ 55, 103; In the Matter of *ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 1155392 at *5 (F.T.C. June 25, 2012), *aff'd* 749 F.3d 559 (6th Cir. 2014).

Appellants emphasize what they refer to as a Micron "natural experiment", but the evidence of "natural experiments", in its entirety, strongly supports the

District Court's analysis. Appellants argue that Micron was able to shift patients out of Nampa by the use of financial incentives, and claim that this indicates that other payors would do the same if Nampa primary care physicians attempted to raise prices. But this leaves out a critical part of the story. Five years after the Micron program began, virtually no other employers had followed its lead. Ex. 1, Trial Tr.[3] 588:2-16; 590:2-24 (Otte); Ex. 5, Dkt. No. 318 (Butterbaugh Dep. Tr.) 57:8-58:23, 121:21-122:24, 123:7-20. Appellants' economist admitted that he could not say whether a substantial number of area employers and payors would adopt such incentives "in five or ten more years . . . if ever . . .". Trial Tr. 3054:4-13; 3055:9-14 (Argue). The Micron example is an outlier, reflecting its unusual circumstances. Trial Tr. 1357:7-25 (Dranove); 1491:23-1492:21 (Haas-Wilson).[4]

The evidence from multiple insurer witnesses establishes that local networks need Nampa primary care providers (particularly Saltzer) to be successful. Idaho Physicians Network could not "successfully market a network to self-funded

[3] All trial transcripts are contained in Exhibit 1. Exhibits 1 through 33 are subject to the District Court's protective order. Plaintiffs have accordingly filed paper copies of Exhibits 1 through 33 under seal.

[4] Micron faced significant financial challenges, and had cut employment substantially. Trial Tr. 552:18-554:16, 556:18-557:17 (Otte). That could certainly have affected employee behavior. Trial Tr. 1357:7-25 (Dranove). Additionally, the financial incentives imposed by Micron involved the doubling of out of pocket costs. Ex. 5, Dkt. No. 318, (Butterbaugh Dep. Tr.) 78:16-80:1. This was far more than the "small but significant" increase addressed by the Horizontal Merger Guidelines and the case law.

employers in Nampa that did not include Saltzer primary care physicians . . .” Trial Tr. 465:2-5 (Duer). Saltzer is “a must-have provider for Blue Cross in Nampa.” FOF ¶ 84. Scott Clement of Regence 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. Ex. 6, Dkt. No. 252 (Clement Dep. Tr.) 184:13-17. If financial incentives for patients could eliminate this need for Saltzer, much less all Nampa primary care providers, the testimony would have been very different.

Appellants also ignore the “natural experiments” that establish that Saltzer, as the dominant Nampa primary care provider, was viewed as essential, even at higher prices or lower perceived quality. Regence maintained a higher price for Saltzer, though it dropped the prices for almost all other providers, because “we . . . wouldn’t be able to field a competitive product if they weren’t in” its network. Ex. 6, Dkt. No. 252 (Clement Dep. Tr.) 71:20-72:3. St. Luke’s Select Medical Network added Saltzer, despite “concerns over quality”, because it was necessary to have providers in Nampa “in order to market itself to employers.” Ex. 7, Dkt. No. 322 (Drake Dep. Tr.) 181:19-183:3.

B. The District Court's Reliance On The Merged Entities' High Market Share Was Entirely Appropriate

Appellants argue that the District Court unduly relied upon their 80% market share.[5] But this ignores the substantial evidence that (1) Appellants themselves associated the parties' high shares with greater bargaining power and the ability to raise prices, (2) they expected that prices would increase and (3) prices have increased as a result of this and St. Luke's 40 previous acquisitions.

The Appellants' own documents conclude that "market share in primary care is a key success factor, critical to sustaining a strong position relative to payor contracting." FOF ¶ 116. Consultants for both St. Luke's and Saltzer identified a causal connection between Saltzer's market share and its strength in payor negotiations. Ex. 22, TX 1261 at SLHS0000005427, Ex. 17, Joint TX 8 at 1. In 2010, St. Luke's needed "critical mass" in order to "push back" with payers. Ex. 19, TX 1181 at SLHS000592012. St. Luke's recent ownership of popular physician groups has "improved [St. Luke's] bargaining position". Ex. 7, Dkt. No. 322 (Drake Dep. Tr.) 226:21-227:3.

The District Court also relied on direct evidence from St. Luke's and Saltzer documents that this transaction would lead to higher prices:

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[5] Here, high market shares cannot be rebutted by the likelihood of entry. The District Court specifically found that recruitment of primary care physicians, and therefore entry, into the relevant market would be difficult, FOF ¶¶ 209-214, (Ex. B to Appellants' Motion for Stay, "Conclusions of Law," DktEntry 41-3) at ¶¶ 31-33 (p. 45), and this finding has not been challenged by Appellants.

1. Documents prepared by St. Luke's consultants indicate that after the transaction, St. Luke's could increase reimbursement rates on ancillary services, including at least $1.6 million in increases from commercial payors. FOF ¶¶ 123-126.

2. St. Luke's based its decision that it could provide the Saltzer physicians with a 30% pay increase on the prospect of "higher hospital reimbursement." FOF ¶ 127.

3. A statement from Saltzer that, while it was currently forced to concede certain reimbursement issues to Blue Cross, once the transaction was completed, the "clout of the entire network" could change the result. FOF ¶ 113.

The District Court also found that St. Luke's was able to raise its prices substantially after its previous acquisitions. FOF ¶¶86-88. Moreover, the District Court supported its conclusion by detailed findings on the likely increase in bargaining leverage, FOF ¶¶ 85-116; St. Luke's experience in Twin Falls, FOF ¶¶ 117-120; increases in ancillary service prices, FOF ¶¶ 121-131; and shifts in referrals, FOF ¶¶ 132-140.

Appellants assert that purchasers will not be harmed by higher physician professional fees because two payors have statewide fee schedules. But the Blue Cross schedules have been changed in the past in order to accommodate Saltzer. Trial Tr. 722:1-23 (Powell); 331:11-23, 332:23-333:3 (Crouch). There have been exceptions to the Regence fee schedules for Saltzer. Ex. 6, Dkt. No. 252 (Clement Dep. Tr.) 155:4-156:4. Similar steps were taken in the Magic Valley. Ex. 13, Dkt. No. 371 (Seppi Dep. Tr.) 214:3-6, 214:12-17, 215:21-24, 216:1-2, 220:24-221:11, 227:18-22.

Appellants criticize the District Court's reliance on evidence of price increases for ancillary services, such as lab and x-ray, because there was no separate relevant market defined for these services. But they mischaracterize the District Court's findings as relating to "tying" or "leveraging" professional physicians' services to these ancillary services ordered by physicians. The evidence establishes that St. Luke's negotiates with payors for all its services on an "all or nothing" basis. Ex. 2, Dkt. 321 (Billings Tr.) 89:19-90:1; Ex., Dkt. No. 322 (Drake Dep. Tr.) 79:23-80:10, TX 1213 at Slide 31. Its goal in these negotiations is to achieve a total dollar increase for all services. Trial Tr. 3021:16-19 (Argue). Under the circumstances, whether a price increase is taken, nominally, in physician fees or in ancillary services fees, doesn't matter. Trial Tr. 430:21-431:19 (Crouch); 1346:18 – 1347:21 (Dranove).

C. Appellants' Analysis Of Efficiencies Is Inconsistent With The Record Evidence

Appellants' challenge to the District Court's finding that any efficiencies were not merger-specific is based on three critical factual errors. First, Appellants assume that the Saltzer merger will result in substantial and immediate efficiencies. The record does not remotely support that conclusion. The District Court found that St. Luke's is engaged in an uncertain "experiment". FOF ¶¶ 70, 76-77. These findings were supported by St. Luke's own CEO. Trial Tr. 1685:24-1686:3.

Appellants' efficiency expert admitted that St. Luke's efforts to improve quality involve a "long and complicated path," a "perilous route," which would take *10 years or more* and which might not succeed. Trial Tr. 2686:24-2687:11 (Enthoven). St. Luke's experts have been unable to quantify *any* efficiencies to date resulting from its 40 previous physician practice acquisitions. Trial Tr. 3029:4-8 (Argue); 2687:12-15 (Enthoven). Therefore, St. Luke's efficiencies claims rely virtually entirely, using its phrase, on "aspirational generalities." Even if the possibility of a successful "experiment" is credited, the efficiencies to be achieved utilizing independent physicians should not be held to a higher standard.[6]

Second, Appellants mischaracterize the efficiencies achieved with independent physicians as a "mere possibility." Appellants' Motion for Stay at 11. The record establishes that in every specific area in which St. Luke's utilizes employed physicians, equal, if not greater, progress has been made toward the same innovative goals through independents. The evidence strongly supports the

[6] Ironically, while Appellants (wrongly) complain about an allegedly misplaced burden of proof on efficiencies, they attempt to tilt the burden improperly, by assuming (incorrectly) that their efficiencies are certain and immediate, and that any alternatives are inadequate unless the record establishes the same. Since, in fact, St. Luke's claimed efficiencies are experimental, uncertain, and far in the future, it would be improper to require that evidence of efficiencies from teamwork with independent physicians meet a more rigorous standard.

District Court's finding that teamwork with physicians and efficiency-enhancing clinical integration do not require ownership and control. FOF ¶¶ 185, 204-06.[7]

For example, Saint Alphonsus operates successful quality programs directed by independent physicians serving as part time medical directors. Trial Tr. 3620:12-3621:10; 3621:24-3623:16 (Polk). Scores of hospitals nationally have worked with independent physicians to improve care. Trial Tr. 2020:18-2021:6 (Kee); Ex. 14, Dkt. No. 400 (Seppi Dep. Tr. Rebuttal) 128:24-130:18; Trial Tr. 1845:2-18 (Priest). The independent Primary Health Medical Group has improved immunization rates, asthma care, diabetes care and appropriate use of antibiotics. Trial Tr. 1133:13-1137:7, 1154:12-1155:20 (Peterman). Many of St. Luke's own initiatives involved prominent roles by independent physicians. Trial Tr. 2000:10-17; 2020:3-9; 2038:19-2039:1 (Kee); 1688:2-5 (Pate), Ex. 16, Dkt. No. 255 (Walker Dep. Tr.) 23:12-24:22. Ex. 8, Dkt. No. 291 (Heggland Dep. Tr.) 28:13-19. Indeed, several independent physician groups practicing at St. Luke's are virtually fully "clinically aligned" with St. Luke's. Trial Tr. at 2333:18-2334:19.

St. Luke's Executive Medical Director identified 11 specific quality initiatives undertaken by St. Luke's. In every case, these initiatives either (1) significantly involved independent physicians, and/or (2) were matched by similar

[7] As a result, the Court's conclusions on merger specificity were supported by substantial evidence, regardless of the burden of proof.

programs around the country, including those which involve independent physicians. TX 1320; Dkt. No. 400 (Seppi Dep. Tr. Rebuttal) 130:24–131:7, 125:22–24, 126:2-4, 126:13-16, 128:12-15, 128:24-131:2, 131:6-7.

St. Luke's also achieved pre-acquisition efficiencies with Saltzer despite the short period (from December 2008 to 2009) between the beginning of their efforts and the commencement of talks about a more complete affiliation. See FOF ¶¶ 27, 30, Trial Tr. 2227:24-2228:15 (Roth), 2373:11-16 (Kaiser).

St. Luke's efforts to compensate its employed physicians based on quality and cost have not been implemented for the "vast majority" of physicians. Ex. 12, Dkt. No. 286 (Roth Dep. Tr.) 78:20-79:9, Trial Tr. 2336:17-22, 2337:12-18 (Roth). But Saint Alphonsus has adopted such payment methods in contracts with numerous independent physicians. Trial Tr. 3625:18-3626:25 (Polk); 2091:8-15 (Souza). The Advocate system, whose network is dominated (75%) by independent physicians, has entered into contracts with payors involving compensation based on quality metrics. Ex. 2, Dkt. No. 321 (Billings Tr.) 13:3-14:9, 17:3-18. In fact, quality incentives are being applied to all independent physicians by the federal Medicare program. Trial Tr. 3623:21-3625:17 (Polk). St. Luke's provided quality-based compensation to independent cardiologists before it employed any cardiologists. Trial Tr. 1844:5-20 (Priest).

The District Court's finding that advances in electronic medical records are not "merger-specific" is equally supported by substantial evidence. See FOF ¶¶ 200-205. St. Luke's efforts with electronic health records and data analytics are an incomplete work in progress. Trial Tr. 2826:8-2827:8 (Chasin); 1919:4-6, 2014:17-20 (Kee); 2334:23-25 (Roth). Other, proven, systems, adopted by hundreds of hospitals, work with the multiple platforms used by independent physicians. Trial Tr. 3631:9-3632:25, 3634:21-3635:4 (Polk); 2015:3-7 (Kee).

The evidence also supports the District Court's conclusion that risk-based contracting is not merger-specific. FOF ¶¶ 182-183. St. Luke's is still "getting geared up" for risk-sharing, Trial Tr. 1627:12-15, 1629:5-19 (Pate), and is not ready to assume full risk. Trial Tr. 1629:5-13 (Pate); 1781:2-12 (Richards). Its efforts involve both employed and independent physicians. Trial Tr. 1661:10-1662:7 (Pate), Ex. 24, TX 1510. St. Luke's states that "[c]linical integration with *independent* providers is clearly the *essential* building block of accountable care." Ex. 2, Dkt. No. 321 (Billings Tr.) 24:21-25, 28:2-7 (emphasis added); Trial Tr. 1665:4-9 (Pate); Ex. 37, TX 1212 at p.2. Saint Alphonsus Health Alliance, consisting of predominantly independent physicians, is pursuing the same goals, and anticipates full risk contracts by 2014 or 2015. Ex. 31, TX 2140 at BDC0023651-652; Ex. 4, Dkt. No. 366 (Brown Dep. Tr.) 130:20-131:15, 222:20-223:8; 230:22-231:4; Trial Tr. 3612:3-10 (Polk).

Work with independent physicians is thus at least as likely to achieve efficiencies as are physician acquisitions. The District Court's findings could not possibly be considered clearly erroneous.[8]

Appellants' third error arises from their failure to explain how the claimed efficiencies are necessitated not merely by physician acquisitions, but by the Saltzer acquisition specifically, or by *any* acquisition involving unduly high market shares. If similar results can be achieved through other, fewer or smaller acquisitions, then any efficiencies are certainly not specific to *this* merger.

Appellants argue that there is a "core" group of employed physicians who are necessary to drive the process. But the District Court found that "[t]here is no empirical evidence to support the theory that St. Luke's needs a core group of employed primary care physicians beyond the number it had before the Acquisition . . ." FOF ¶ 181. The evidence strongly supports this conclusion.

St. Luke's was unable to consistently articulate, much less prove, the number of employed physicians necessary for this "core." Its CEO referenced successes critically involving only three dozen physicians statewide. Trial Tr. 1691:14-1692:5 (Pate). Yet St. Luke's already employs several hundred. FOF ¶

[8] Appellants argue that the antitrust laws should consider innovation. But the innovations here are also occurring without employment of physicians. And the use of the "innovation" buzzword does not justify the accumulation of market power through this merger, today, based on the hope that there *might* be innovative efficiencies from employment at some time in the future.

12. St. Luke's efficiencies expert said that only "four to six" physicians per specialty were necessary, and then said that he misspoke, and changed the number to "30 or something". Trial Tr. 2661:1-2662:11,2737:8-16 (Enthoven). He ultimately admitted that his assertion was "a judgment out of unsupported opinion." Trial Tr. 2737:8-16 (Enthoven). See also Ex. 13, Dkt. No. 371 (Seppi Dep. Tr.) 88:2-88:9; Trial Tr. 1690:23-1691:8 (Pate) (not aware of even the "quantitative range" of physicians needed for core). Moreover, St. Luke's never explained why Saltzer in particular is necessary to the "core". St. Luke's CEO testified that the seven primary care physicians already employed in Nampa would be an adequate part of the core group. Trial Tr. 1692:25-1693:8 (Pate).

Under the circumstances, the argument that ordering divestiture would have a "chilling effect" on health care integration is without merit. Such integration can proceed without employment of physicians, and even through employment, as long as it is not the rare case that results in the possession of market power. Even St. Luke's had made more than 40 previous acquisitions of physicians before the Saltzer transaction was challenged. FOF ¶ 86.

III. THE BALANCE OF HARM TIPS DECIDEDLY AGAINST APPELLANTS

Substantial harm *will* occur, and in fact *already is* occurring, as a result of the continued operation of Saltzer by St. Luke's. Issuance of a stay is

inappropriate where it "will substantially injure other parties interested in the proceeding". *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

A. Harm From Changes In Referrals

1. 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 St. Alphonsus and TVH to St. Luke's. The District Court found that "[a]fter the [Saltzer] Acquisition, it is *virtually certain* that this trend [of shifting referrals after acquisitions] will continue . . ." FOF ¶ 140 (emphasis added). The District Court had previously found that there were "dramatic" shifts of referrals *away from* Saint Alphonsus after past acquisitions. See FOF ¶ 136-139. *See also* Ex. A to Appellants' Motion for Stay, Memorandum Decision and Order, DktEntry 41-2 dated June 18, 2014 at 4-5. (Such shifts could cause "injury to the private plaintiffs . . .")

The evidence strongly supports the District Court. Indeed, this shift had already begun at the time of trial, despite the District Court's "critical assumption" in denying preliminary injunctive relief that referrals would not shift pending trial. Ex. 35, Memorandum Decision and Order dated December 20, 2012 at 8, Dkt. No. 47. Outpatient referrals from Saltzer to Saint Alphonsus have already declined. Trial Tr. 961:3-962:7 (Checketts). Saltzer physicians testified that their referrals to St. Luke's increased, and/or referrals to Saint Alphonsus decreased. Trial Tr.

3378:19-3379:3 (Kunz). Ex. 10, Dkt. No. 270 (Page Dep. Tr.) 220:9-221:4. Saltzer referrals have shifted away from the former Saltzer surgeons who have practiced at TVH, even where they were previously the preferred choice of the Saltzer referring physicians. Trial Tr. 2497:15-2498:5 (Williams); 3379:7-9 (Kunz); Ex. 9, Dkt. No. 323 (Kaiser Dep. Tr.) 251:16-23.

2. Harm From Loss Of Referrals

The trial record further established that such shifts in referrals would significantly harm purchasers and patients, as well as Saint Alphonsus and TVH.

St. Luke's physicians refer to St. Luke's facilities and providers even when others are substantially more convenient and provide higher quality care. St. Luke's physicians "have to refer to" doctors who "offer a far inferior product" if they are employed by St. Luke's. Ex. 38, TX 1357. Saltzer primary care doctors have shifted referrals away from their former surgeon colleagues despite the admittedly high quality of the surgeons' care. See discussion, *supra*. See also, Trial Tr. 1851:23-1852:3, 1853:9-1854:1 (Priest). Numerous St. Luke's employed specialists now practice in the Saltzer offices located a few feet from Saint Alphonsus Nampa, but none has sought privileges to practice there. Trial Tr. 875:25-876:12 (Keeler).

These shifts in referrals will also result in higher prices. Blue Cross has estimated that its outpatient surgery costs increase dramatically after physician

groups are acquired by St. Luke's, because surgery, specialty and ancillary services referrals are shifted to higher cost St. Luke's providers and facilities. Trial Tr. 425:10-426:3 (Crouch). The District Court so found. FOF ¶ 145.

Moreover, the evidence shows that St. Luke's has *already* raised Saltzer's charges for ancillary services to its hospital rates. Ex. 3, Billings Dep. at 94:17-23. *See* Ex. 36, Declaration of David A. Ettinger. Even more price changes can be expected. The current St. Luke's-Blue Cross contract, for example, expires at the end of 2014. Ex. 23, TX 1301.

The loss of referrals to TVH also harms consumers who would otherwise benefit from TVH's "significantly lower" prices and unusually high quality. Trial Tr. 1524:18-1525:10 (Haas-Wilson); Ex. 32, Haas-Wilson Demonstratives 49, 50. Trial Tr. 1041:16-1042:10; 1042:21-1043:10 (Genna).

Saint Alphonsus and TVH are critically dependent on Saltzer. 47% of patients admitted to Saint Alphonsus Nampa saw a Saltzer primary care physician in the previous year.[9] Trial Tr. 1514:15-24 (Haas-Wilson), Ex. 28, TX 1702, Ex. 32, Haas-Wilson Demonstratives 43. St. Luke's executives stated that "Saint Alphonsus Mercy will be imploding" if it lost the Saltzer referrals. Ex. 11, Dkt.

[9] Similarly, 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. 1517:25-1518:19 (Haas-Wilson); Ex. 29, TX 1703, Ex. 30 1704; Ex. 32, Haas-Wilson Demonstratives 45, 46.

No. 271 (Reiboldt Dep. Tr.) 117:22-118:9. Saint Alphonsus would lose millions of dollars, and would need to undertake major job and service cuts, after Saltzer referrals shifted. Trial Tr. 947:12-948:1, 948:11-949:1, 949:25-950:17, 954:3-955:9 (Checketts); Ex. 33, Checketts Demonstrative 6, 7.

The harm to Saint Alphonsus and TVH would also damage overall competition in the inpatient hospital and outpatient surgical facility services markets, in which St. Luke's is already dominant and in which Saint Alphonsus and TVH are its only significant rivals. Trial Tr. 1511:2-1512:11, 1512:19-1513:17 (Haas-Wilson); Ex. 25, TX 1695; Ex. 26, TX 1696; Ex. 27, TX 1697; Ex. 32, Haas-Wilson Demonstratives 40, 41. *See also* Ex. 39, TX 1082 at p. 8. A weakening of the only hospitals significantly constraining St. Luke's will allow it to further raise prices. *Id.*[10] This is consistent with St. Luke's existing pricing strategy. Trial Tr. 1520:16-1521:5 (Haas-Wilson); Ex. 2, Dkt. 321 (Billings Tr.) 104:3-17, 140:5-140:16, Ex. 21, TX 1225 at SLHS000892455.

St. Luke's goal is control of the market. Saltzer leaders saw the transaction as allowing them and St. Luke's to "control and co-develop" Canyon County. Ex. 40, TX 1366 at SMG000033689. Two St. Luke's senior executives referred

[10] While the antitrust laws protect competition, not individual competitors, under appropriate circumstances "injury to competitors may be probative of harm to competition." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987), *aff'd sub nom. Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

explicitly to anticompetitive goals in their discussion of their "end game." Ex. 18, TX 1105 at SLHS000581969. A stay would substantially aid them in achieving these goals.

IV. HARM TO NETWORK COMPETITION

Harm to network competition is among the "myriad of ways," Mem. Dec. and Order (Dkt. No. 506) at p.5, in which St. Luke's can use its market power while a stay is pending. If divestiture is stayed, St. Luke's will likely withdraw Saltzer physicians from all other networks. Ex. 2, Dkt. No. 321 (Amended Billings Dep. Tr.) 99:10-99:23; Ex. 21, TX 1225 at SLHS000892455. St. Luke's stated "goal was to get rid of all PPO networks." Trial Tr. 471:5-24 (Duer).

Saltzer physicians are critical to the ability of other networks to compete. If Saltzer physicians were not in Saint Alphonsus' network, that "would cripple [the] network." Ex. 2, Dkt. No. 321 (Billings Tr.) 96:16-97:11; Ex. 41, TX 1224 at SLHS001222471. See also discussion, *supra* at 3-4. The "crippling" of other networks, which provide a critical vehicle for smaller payors and self-insured employers, will further increase St. Luke's dominance and contribute to yet higher prices. Trial Tr. 1486:19-1488:14 (Deborah Haas-Wilson).

V. APPELLANTS' COUNTER ARGUMENTS ARE CONTRADICTED BY THE RECORD

Appellants claim that Saltzer physicians will treat fewer Medicare and Medicaid recipients if a stay is not granted. But they offer no evidence that these

recipients will not receive care. *See Wisconsin Gas Co. v. F.E. R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (to support an injunction, injury must "be both certain and great; it must be actual, not theoretical.").

Moreover, Appellants' argument that St. Luke's can afford to serve these patients, while Saltzer cannot, is inconsistent with the basic premises of the antitrust laws. Appellants must argue that the transaction will allow St. Luke's to charge higher prices to commercial insurers, so that it can afford to subsidize treatment of Medicare and Medicaid patients. This "benevolent monopolist" philosophy has been rejected by the Supreme Court, which has held that the Sherman Act's "statutory policy precludes inquiry into the question whether competition is good or bad." *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978). *See also Freeman v. San Diego Assoc. of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003).

VI. THE PUBLIC WILL BENEFIT FROM GREATER EFFICIENCIES IF A STAY IS DENIED

Finally, a stay will *interfere* with innovation. St. Luke's has explained that pending a decision, St. Luke's has committed to "not . . . take . . . integrative steps that would make divestiture impossible . . ." Trial Tr. 3792:1-3792:8 (Bierig). Therefore, there is no opportunity for St. Luke's to achieve significant efficiencies while the appeal is pending.

But a stay will impede Saltzer's ability to engage in risk-based contracting with other networks. St. Luke's has already declined to have its physicians participate in one such contract. Trial Tr. 1243:7-12, 1245:8-13 (Petersen). An independent Saltzer would be free to pursue such contracts. It would also be free to participate, like other independents, in St. Luke's networks. Trial Tr. 2444:12-21 (Kaiser).

VII. CONCLUSION

For these reasons, the District Court's conclusion that a stay is unjustified under the facts and law was certainly appropriate.

The grant of a stay would send a message that the parties to anticompetitive mergers can delay any remedy, and reap the anticompetitive benefits of their transaction, for years while they battle in the courts. They should not be given that opportunity.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 7, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Keely E. Duke
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