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,
the Honorable B. Lynn Winmill, Presiding

ANSWERING BRIEF OF SAINT ALPHONSUS MEDICAL CENTER-NAMPA; SAINT ALPHONSUS HEALTH SYSTEM INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; AND TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP

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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, directly or indirectly 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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JURISDICTIONAL STATEMENT

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 (the "Private Appellees") do not dispute the jurisdictional statement filed by Appellants.

APPLICABLE STANDARD OF REVIEW

The district court's conclusions of law are reviewed de novo. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). The court's findings of fact are reviewed for clear error. *Husain*, 316 F.3d at 835. That standard "is significantly deferential;" the Court "will accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed." *N. Queen, Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002). The judgment below should be affirmed if "the trial court reached a decision that falls within any of the permissible choices the court could have made." *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009) (*en banc*). The Appellant must demonstrate that "no substantial evidence was presented which supports the District Court findings in favor of appellee." *Cataphote Corp. v. De Soto Chem. Coatings, Inc.*, 356 F.2d 24, 26 (1966).

The District Court's decision may be affirmed on any ground supported by the record. *See Cigna Prop. and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d

412, 418 (9th Cir. 1998); *Atel Fin. Corp., v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) ("[w]e may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.").

The District Court's choice of remedy should be affirmed unless it constituted an abuse of discretion. *United States v. Alisal Water Corp.* 431 F.3d 643, 654 (9th Cir. 2005).

STATEMENT OF ISSUES PRESENTED

This Brief will address the following issues:

1. Did the District Court properly apply a "dynamic analysis" in defining the relevant geographic market?
2. Was the District Court's conclusion that the relevant geographic market is limited to Nampa clearly erroneous, or was there substantial evidence in the record to support its conclusion?
3. Was the District Court's conclusion that the acquisition of Saltzer Medical Group ("Saltzer") would likely lead to anticompetitive effects clearly erroneous?
4. Was the District Court's finding that any claimed efficiencies were not merger-specific clearly erroneous?

5. Did the District Court abuse its discretion in ordering divestiture?[1]

STATEMENT OF THE CASE

After 80 depositions, the production of hundreds of thousands of documents, and a 19-day trial, the District Court found that the acquisition of the largest physician group in Idaho by the largest hospital system violated federal and state antitrust laws. The District Court's 52-page ruling was based upon the 80% market share resulting from the transaction, but also the merging parties' own documents, and extensive additional testimonial and documentary evidence, directly showing that prices would increase and consumers would be harmed as a result of the transaction.

After assessing the merging parties' primary defense, that their transaction would lead to improvements in health care quality, the District Court found that, while these efforts were an uncertain "experiment," the merging parties would likely ultimately succeed in achieving efficiencies. ER.12.[2] However, the District

[1] Other issues may be addressed in the Appeal Brief submitted by the Federal Trade Commission and Idaho Attorney General.

[2] Citations to "ER." refer to Appellants' Excerpts of Record. Citations to "SER." refer to Supplemental Excerpts of Record provided by Private Appellees. Supplemental Excerpts of the Record are contained in 5 Volumes. Volume 1 contains non-confidential material. Volumes 2 through 5 are subject to the District Court's protective order, and filed under seal. References to trial testimony are abbreviated as "Tr." References to deposition testimony designated for use in trial are abbreviated as "Dep.Tr." References to trial exhibits are abbreviated as "TrEX."

Court also found, based on extensive evidence, that these benefits were not "merger specific," because the very same efficiencies could be achieved through teamwork with independent physicians. ER.43, ¶ 185. Therefore, in a decision that the District Court later described as clear on the facts and law, Memorandum Decision and Order, District Court Dkt. No. 506, dated June 18, 2014 at p.3, it found the transaction unlawful. SER.3.

The District Court ordered divestiture, the preferred remedy in responding to an illegal merger. ER.2, ER.56, ¶¶ 50-51. The District Court rejected Appellants' claim that competition will be harmed by divestiture, because Saltzer will allegedly be weakened by the departure of certain of its surgeons. The District Court found that while Saltzer may, for a year, face a reduction in physician compensation, this is more than offset by the fact that the Saltzer physicians will be able to retain the majority of the consideration they received for the Acquisition even after the practice is unwound. ER.57, ¶ 58.

I. RELEVANT FACTS

A. The Parties

St. Luke's operates numerous hospitals and other health care facilities in Idaho, including St. Luke's Boise Medical Center and St. Luke's Meridian Medical Center. ER.14, ¶ 10. Between January 2007 and January 2012, St. Luke's acquired 49 physician clinics in the Treasure Valley of Idaho (surrounding Boise)

and at least 28 physician practices in the Magic Valley of Idaho. ER.27, ¶ 86; *See* SER.981-990, (TrEX.2148).

In 2007, according to Blue Cross of Idaho's statistics, St. Luke's Boise facility was receiving an average amount of reimbursement from BCI as compared to other facilities in Idaho. By 2012, after these acquisitions, St. Luke's had three of the five most expensive hospitals, and one of its hospitals was receiving reimbursements 21% higher than the average. ER.28, ¶ 88; SER.241, Tr.292 (Crouch); SER.841, (TrEX.1300).

Saint Alphonsus Health System, Inc. ("Saint Alphonsus") operates hospitals and other health care facilities in the Treasure Valley of Idaho and eastern Oregon. In Idaho, Saint Alphonsus owns and operates plaintiff Saint Alphonsus Regional Medical Center, Inc. in Boise and Saint Alphonsus Medical Center, Nampa, Inc. ("Saint Alphonsus Nampa") located in Nampa. ER.13, ¶¶ 1-2. Saint Alphonsus Nampa is located across the street from the main Saltzer offices and depends critically upon referrals from Saltzer physicians. SER.288, Tr.856:24-857:1, 857:18-25 (Keeler); SER.290, Tr.871:3-9 (Keeler); 934:4-9 (Checketts).

Plaintiff Treasure Valley Hospital Limited Partnership ("TVH") operates a physician-owned hospital in Boise, largely used for outpatient surgeries. ER.14, ¶ 8. TVH has received outstanding rankings from the federal Center for Medicare

and Medicaid Studies and ranked first among all hospitals in the United States under CMS's Hospital Compare metrics. SER.303, Tr.1041:16-1043:10 (Genna).

Saltzer is the largest independent, multispecialty physician group in Idaho. SER.257, Tr.465:2-14 (Duer). Saltzer is a prestigious group with a long history. *Id.* Saltzer consists of 41 physicians, nearly three quarters of whom provide adult or pediatric primary care services. ER.16, ¶ 18.

Saltzer is the dominant provider of primary care services in Nampa. Its other significant competitors are physicians employed by St. Luke's and Alphonsus. There are only a handful of other primary care physicians in Nampa. SER.257, Tr.465:2-466:22, 467:24-468:16 (Duer); SER.273, Tr.705:5-12, 709:21-710:25 (Powell).

The only hospitals in the area including Ada and Canyon counties (the counties encompassing Boise and Nampa) are owned by St. Luke's, Saint Alphonsus, TVH, and West Valley Medical Center. West Valley is a small community hospital located in the western portion of Canyon County. SER.973. (TrEX.1695).

B. The Acquisition And The Competitive Landscape

In December of 2008, Saltzer and St. Luke's executed a memorandum of understanding ("MOU") establishing an informal partnership to begin a series of

joint initiatives aimed at improving health care delivery. ER.17, ¶ 27; SER.401, Tr.2225:18-2227:19 (Roth); SER.111, (TrEX.2196).

In 2009, Saltzer initiated discussions with St. Luke's regarding a tighter affiliation. ER.1830, ¶ 30. Effective December 31, 2012, St. Luke's acquired the assets of Saltzer for an amount not to exceed $16,000,000. ER.18, ¶ 31. See St. Luke's Answer at ER.110-11, ¶ 18. Pursuant to this transaction (the "Acquisition"), St. Luke's received Saltzer's intangible assets, personal property, and equipment and entered into a Professional Services Agreement ("PSA") with the Saltzer physicians. ER.18, ¶¶ 31, 32; ER.560 (TrEX.24).

In the fall of 2011, seven Nampa primary care physicians left Saint Alphonsus and joined St. Luke's. ER.15, ¶ 16.

Thus, the Acquisition combined two of the only three significant competitors in the provision of primary care physicians' services in Nampa. SER.331, Tr.1339:17-21 (Dranove). It created a highly dominant entity with a nearly 80% market share. SER.331, Tr.1340:9-15 (Dranove); SER.110, (TrEX.1789). The only remaining competitor is Saint Alphonsus Medical Group, which has had great difficulty in either recruiting additional primary care physicians to Nampa or (in the few cases where it was successful) in attracting enough patients to keep them busy. SER.275, Tr.713:18-716:4 (Powell).

C. The Anticompetitive Goals Of The Merging Parties

While the Acquisition was motivated, in part, by a desire to improve health care quality, the parties were also keenly aware of its implications for the reduction of competition and enhancement of market power. Saltzer leadership believed that they would benefit from St. Luke's market dominance and would gain increased leverage with health insurers. In a document discussing potential affiliation partners, Dr. Page, chair of the Saltzer contracting committee, said of St. Luke's, "we all know they are and will likely remain the dominant provider in the valley." SER.68, (TrEX.1366); SER.438, Tr.2858:13-18 (Page). Dr. Page expected the transaction to provide Saltzer with more "clout," which could allow it to negotiate better terms with payors such as Blue Cross. SER.845, (TrEX.1361).

In an internal meeting at Saltzer to discuss the St. Luke's transaction, Saltzer's leaders listed the "fundamental reasons" why Saltzer should do a deal with St. Luke's. SER.281, Tr.736:15-737:7, 738:4-739:6 (Powell); SER.861-862, (TrEX.1369). The first reason listed was "control market share." Among the other reasons listed were "one competition compared to two." SER.281, 739:11-21 (Powell). Saltzer's transaction consultant recognized that gaining greater numbers of total physicians created the prospect of enhanced leverage. SER.636, (TrEX.1143).

In a letter circulated and signed by most Saltzer physicians, Saltzer acknowledged that a purpose of the transaction was to "control and co-develop" services in Canyon County. SER.69, (TrEX.1366).

The same factors – market share and market power – motivated St. Luke's. A Saltzer "transaction update" prepared for the St. Luke's Treasure Valley board included an analysis of "Nampa Physician Market Shares," showing that St. Luke's Mercy Group and Saltzer would have the majority of the PCPs in Nampa after the acquisition. SER.925, (TrEX.1473).

As the District Court noted, St. Luke's performed extensive modeling of how the Acquisition would generate increased reimbursement from (among others) commercial insurers. SER.584, Dep.Tr.74:10–16 (LaFleur); ER.33, FOF ¶ 126. It planned to fund a 30% pay raise for the Saltzer physicians by obtaining "higher hospital based reimbursement" from the health plans. *See* SER.834, (TrEX.1262); ER.33, ¶ 127. St. Luke's projected that it could gain an extra $750,000 from commercial payers for lab work and $900,000 extra for diagnostic imaging. *See* ER.588, 594, (TrEX.1277); *see also* SER.333, Tr.1347:17-21 (Dranove). The billings were projected to be more than 60% higher than pre-Acquisition. *See* SER.957-958, (TrEX.1480); ER.33, ¶ 126.

One physician executive commenting on the Acquisition stated:

> [T]his whole "physician led" mantra is a bunch of propaganda without real meaning. Why are we working

> on Standards and Expectations for the system when the system is making decisions based on dollars and strategy regardless of quality?

SER.53, (TrEX.1136).

Two St. Luke's senior executives referred explicitly to anticompetitive goals in their discussion of St. Luke's "end game." SER.634, (TrEX.1105).

II. RELEVANT PROCEDURAL HISTORY

Case No. 1:12-cv-00560-CWD, *Saint Alphonsus, et al. v. St. Luke's*, was filed in November 2012. The Private Plaintiffs in that case (the Private Appellees here) sought to preliminarily and permanently enjoin the Acquisition. Private Plaintiffs alleged that the Acquisition would reduce competition in: (1) adult primary care markets; (2) pediatric primary care markets; and (3) relevant inpatient hospital and outpatient surgical facility markets. ER.235-242, ¶¶ 83-105.

The Private Plaintiffs moved for a preliminary injunction against consummation of the Acquisition. The District Court denied the motion, based on its "critical assumptions" that an accelerated trial could occur, that divestiture could readily occur after the accelerated trial and that referrals would not shift pending the trial. SER.24, (Memorandum Decision and Order dated 12/20/12).

On March 12, 2013, the Federal Trade Commission and Idaho Attorney General (the "Government Plaintiffs") filed Case No. 1:13-cv-00116-BLW, also challenging the Acquisition. ER.132. Their complaint included only the first

claim brought by the Private Appellees. ER.146-152, ¶¶ 37-54. The two cases were consolidated. ER.130-131.

The District Court ultimately ruled on the claims brought by both the Government Plaintiffs and Private Plaintiffs, finding that the Acquisition was highly likely to lead to anticompetitive effects in the Nampa market for primary care physician services provided to commercially insured patients. ER.36-37, ¶¶ 141-146, ER.59, ¶ 64. Since it found the Acquisition to be illegal on this basis, the District Court did not find it necessary to rule on the additional claims brought only by the Private Plaintiffs. ER.58-59, ¶¶ 63-65.

The District Court ordered that Saltzer be divested by St. Luke's. ER.2, Judgment, Dkt. No. 431. The Judgment was issued in the Private Plaintiffs' case, the "lead" case, and was awarded to "plaintiffs." ER.1.

SUMMARY OF ARGUMENT

The District Court properly analyzed the issues based upon an exhaustive factual record. There was substantial and compelling evidence supporting every one of the District Court's conclusions, much of it from the merging parties' own documents and testimony.

The District Court properly defined the relevant geographic market, applying a "dynamic" analysis. Extensive testimony from a wide variety of sources supported the conclusion that there are no adequate substitutes for Nampa

primary care physicians in health insurers' networks, and therefore that Nampa is a relevant market.

The District Court's conclusion that the Acquisition was likely to cause anticompetitive effects was also supported by substantial and highly persuasive evidence. The District Court relied on: (1) the 80% combined market share of the merging parties, (2) unrebutted evidence that entry into the market would be difficult (an issue not raised on appeal), (3) substantial evidence that the Appellants' own executives believe that their high market shares enhance their ability to negotiate higher prices, and (4) extensive direct evidence that the acquisition will lead to greater bargaining power and higher prices, including evidence from the more than 40 previous physician acquisitions engaged in by St. Luke's.

The District Court's finding that the Acquisition will not result in merger-specific efficiencies was supported by substantial and specific evidence that the claimed efficiencies can be equally effectively achieved through teamwork with independent physicians. Therefore, there is no need for a hospital to own and control physicians to gain these benefits. This evidence included a host of specific examples of efforts involving independent physicians. Additionally, St. Luke's was unable to explain why it needs to employ more physicians than its existing complement of 500 in order to achieve these goals.

The District Court did not abuse its discretion in ordering divestiture, which is the preferred remedy to address anticompetitive mergers. There was substantial evidence to support the District Court's finding that competition would not be harmed if Saltzer were divested, notwithstanding Saltzer's loss of certain surgeons.[3] In fact, Appellants' "Saltzer weakness" argument was almost completely unsupported. They provided no evidence regarding likely market conditions after divestiture; no evidence that significant numbers of physicians would leave Saltzer or the area; and no specific evidence that any financial shortfalls facing Saltzer could not be successfully addressed.

ARGUMENT

I. THE DISTRICT COURT'S RULING WAS LEGALLY AND FACTUALLY CORRECT

Appellants' arguments—that market definition was not supported by a proper dynamic analysis; that the District Court relied unduly on evidence of a high market share; and that the District Court improperly analyzed the efficiencies defense—are all completely inconsistent with the broad range of evidence that supported the District Court's conclusions. They cannot possibly be viewed as clearly erroneous or legally unsound. The Court's decision on remedy also reflects the proper exercise of its discretion.

[3] In order to avoid duplication, the Private Appellees are not addressing most of the legal issues in the appeal, which we expect will be addressed by the Federal Trade Commission and Idaho Attorney General in their Appeal Brief.

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

The District Court's analysis of the relevant geographic market was soundly based in both the facts and the law. Contrary to Appellants' assertions, the District Court performed a proper "dynamic" analysis.

1. The District Court Applied A Proper "Dynamic" Analysis

Appellants claim that the District Court undertook a "static" analysis of market definition, failing to consider what would happen if prices were increased by a hypothetical Nampa monopolist. In support of their argument, Appellants focus on a so-called "natural experiment" involving Micron. But they are wrong on both counts.

The Plaintiffs' evidence on geographic market was based, in significant part, on the "two stage competition" model. This model, which has been adopted in the recent health antitrust case law, explains that pricing decisions are made at the level at which health plans negotiate with providers. Providers compete in "Stage 1 competition" to be selected as "in-network" by healthcare payers. SER.323, Tr.1296:20-1301:24, 3421:2-3422:19 (Dranove); ER.91, ¶ 21, (Saltzer's Answer); ER.111, ¶21 (St. Luke's Answer). *See, e.g.*, *F.T.C. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083-85 (N.D. Ill. 2012); *F.T.C. v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *5-9 (N.D. Ohio, Mar. 29, 2011); *In the*

Matter of Evanston Nw. Healthcare Corp., No. 9315, 2007 WL 2286195, at *5-7 (F.T.C. Aug. 06, 2007).

Within a health plan network, in "Stage 2 competition," patients are largely insulated against prices paid to providers and do not make decisions on the basis of price. SER.325, Tr.1302:17-1303:20 (Dranove).

The evidence strongly supports the relevance of this approach to competition in Idaho. For example, patients of Blue Cross and Regence do not choose physicians on the basis of price differences. SER.445, Tr.3031:20–3032:16 (Argue). Reimbursements for healthcare services are not transparent, making it difficult for patients to comparison shop on the basis of price. SER.478, Tr.3422:4–9 (Dranove). A survey discussed by both parties' experts indicated that only about one percent of patients switched PCPs because of price. SER.479, Tr.3447:18-3447:23 (Dranove). *See also* SER.335, Tr.1361:15–21, SER.337, Tr.1373:10–15 (Dranove). *ProMedica*, 2011 WL 1219281, at *8.

With this background, the District Court properly applied a dynamic analysis to market definition, citing the very same language that Appellants do in their Brief on Appeal. *See e.g.*, ER.21, ¶ 50 (geographic market is area "where buyers *can* turn for alternate sources of supply.") (emphasis added); ER.22, ¶ 56 (must assess "the likely response of insurers to a hypothetical demand by all the PCPs in a market..."). But the District Court, reflecting the two stage competition

model, properly defined the "buyer" as the insurer. *See* ER.22-23, ¶¶ 55-58; *F.T.C. v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1299 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (depublished) ("managed care organizations . . . may be viewed as 'consumers'"); *OSF Healthcare., supra*; *Evanston, supra.*

For these reasons, Appellants' characterization of the relevant issue as "how *consumers* would respond" to a price increase, Appeal Brief at 30 (emphasis added), misstates the issue. The relevant question is how would health plans respond to a price increase. *See, e.g., OSF Healthcare., supra* at 1083-85; *ProMedica*, 2011 WL 1219281, at *5-9; *Evanston, supra* *5-7. If all Nampa primary care providers could cause health plans to accept a price increase, then Nampa is a relevant market, because it is an area within which market power could be exercised. *See, e.g., Behrend v. Comcast Corp.*, 655 F.3d 182, 211 (3rd Cir. 2011), *rev'd on other grounds* 133 S.Ct. 1426 (2013).

Appellants' focus on patient outmigration statistics, *see* Appeal Brief at 32-33, is itself an improper "static" analysis. The use of "static" patient flow data has been judged unreliable in health care mergers, because the fact that a minority of patients currently travel for care (generally for non-price reasons) says nothing about whether the remaining majority might or might not do the same if prices increased. This is what is called the "silent majority fallacy." *See Evanston, supra* at *63-66. (Patient flow data should be reviewed "with a high degree of caution.")

Since the *Evanston* case, in which Dr. Elzinga, the author of the classic test including outmigration, testified that it is not appropriate for health care, no court has relied on the test in any health care merger.

Thus, the District Court, not the Appellants, properly analyzed the definition of the market.

2. The Evidence Of "Natural Experiments" And Purchaser Choices In The Market Support The District Court's Analysis Of Market Definition

The District Court properly did not rely on Appellants' interpretation of the Micron experience. In fact, the evidence as a whole strongly supported the District Court's conclusion that the geographic market was confined to Nampa.

Appellants argue that Micron was able to shift patients away from Saltzer physicians by the use of financial incentives. They claim that this indicates that other payors could shift their patients outside of Nampa if all Nampa primary care physicians attempted to raise prices above competitive levels. But Appellants' rendition of the facts leaves out an important part of the story. The Micron program penalizes employees who use doctors other than the preferred providers. SER.267, Tr.588:2-16, 590:2-24 (Otte); SER.523, Dep.Tr.57:8-58:23, 121:21-122:24, 123:7-20 (Butterbaugh). *See, e.g.*, SER.137, (TrEX.2240) (employee copay under the Standard Plan is $20 for physician in preferred network, $40 for physician in secondary networks). Five years after the program began, virtually no

other employers had followed its lead and adopted similar incentives. In fact, 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 . . ." SER.447, Tr.3054:4-13, 3055:9-14 (Argue).

In Idaho, employers have generally not embraced such "narrow" or "tiered" networks, which limit the providers to be utilized or penalize the use of certain providers. SER.330, Tr.1326:12–22 (Drake); SER.551, Dep.Tr. 22:13–23:4 (Drake); SER.568-569, Dep.Tr.76:21-77:10 (Jeffcoat) (narrow networks terminated by employers); SER.243, Tr.313:1-315:2 (Crouch) (lower price did not attract substantial business to narrow network); SER.317, Tr.1239:5-7 (Petersen).[4]

The evidence shows that health plans need Saltzer (and therefore certainly need Nampa primary care providers) to offer an attractive network. St. Luke's executives explained that if Saltzer physicians were not in Saint Alphonsus' network, that "would cripple [the] network." SER.507-508, Dep.Tr.96:16-97:3 (Billings); SER.59, (TrEX.1224). Idaho Physicians Network could not "successfully market a network to self-funded employers in Nampa that did not include Saltzer primary care physicians . . ." SER.257, Tr.465:2-465:5 (Duer).

[4] The employers identified by Appellants are either irrelevant or insignificant. The Paul's Market and Woodgrain agreements are "narrow," only applicable to hospitals, not doctors. Woodgrain has "a wrap with IPN" which provides a broad network of physicians. Thomas Cuisine has only "about 80 employees." SER.317, Tr.1239:17-1241:2 (Petersen).

Regence Blue Shield "wouldn't be able to field a competitive product if they [Saltzer] weren't in it." SER.534, Dep.Tr.71:20-72:3 (Clement). 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. SER.537, Dep.Tr.184:13-17 (Clement). "Select Health needs Saltzer in its provider network . . ." SER.366, Tr.1763:4-21 (Richards). 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.[5]

Appellants also ignore the "natural experiments" in the record that establish that Saltzer, as the dominant Nampa provider, was viewed as important to a network's success, even at higher prices or lower perceived quality. Regence Blue Shield maintained a higher 5-6% price for Saltzer, though it dropped the prices for almost all other providers across the state, because "we . . . wouldn't be able to field a competitive product if they [Saltzer] weren't in it." SER.534, Dep.Tr.71:20-72:3 (Clement); SER.277, Tr.721:5-25 (Powell); SER.531, 535, Dep.Tr.17:18–18:5, 18:14–19:9, 155:4–25 (Clement); SER.532, Dep.Tr.43:12–44:4 (Clement); SER.539-540, Dep.Tr.192:24–193:1 (Clement).

[5] Even Micron had a number of Nampa primary care providers in its network. SER.265-266, Tr.557:18-558:9 (Otte).

Select Medical Network, St. Luke's own network, added Saltzer primary care physicians to its network, despite "concerns over quality," because its board felt it was necessary for Select Medical to have providers in Nampa "in order to market itself to employers." SER.54, (TrEX.1196); SER.553, Dep.Tr.181:19-183:3 (Drake).[6]

If Saltzer could obtain, and retain, business under these circumstances, then a hypothetical monopolist in Nampa could certainly do so.

There was substantial evidence in the record indicating that the Micron example is an outlier, reflecting its unusual circumstances. Micron faced significant financial challenges, had engaged in a wide range of cost-cutting measures and had cut employment substantially. SER.264-265, Tr.552:18-554:16, 556:18-557:17 (Otte). That gave Micron significant reasons to impose these unusual financial incentives, and its employees unusual motivation to utilize Micron's preferred, lower cost providers. SER.334, Tr.1357:7-25 (Dranove); SER.538, Dep.Tr.186:8-22 (Clement). Additionally, the financial incentives imposed by Micron involved the doubling of out-of-pocket costs. *See* discussion

[6] Of course, the fact that Saltzer has a degree of market power makes the elimination of further competition through the Acquisition even more concerning. *See* SER.845, (TrEX.1361) (Acquisition will create more "clout."); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 279 (1964) ("[I]f concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great.").

supra at 17, SER.137, TrEX.2240 ($20 v. $40). This was far more than the 5-10% increase addressed by the Horizontal Merger Guidelines and the case law. FTC/DOJ 2010 Horizontal Merger Guidelines, at § 4.1.2, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

The overwhelming weight of the evidence thus supports the conclusion that health plans "would not attempt to steer their members or employees, respectively, away from [Nampa] in response to a 5-10% price increase by the merged entity." *Butterworth*, *supra* at 1292, *aff'd*, 121 F.3d 708 (6th Cir. 1997).

If, as Appellants contend, primary care physicians from Boise were adequate substitutes for Nampa primary care physicians, then a health plan could offer a successful network containing only primary care physicians from Boise. Appellants' economist admits that no payor has ever done that. SER.448, Tr.3057:9-12 (Argue). The market participant witnesses uniformly testified that they needed Saltzer, and therefore Nampa, primary care physicians. *See* discussion, *supra* at 18-19. Therefore, communities outside of Nampa are not part of the relevant market. *ProMedica*, 2011 WL 1219281, at *10 (defining the geographic market as "Lucas County," because, among other things, health plans "would not be able to market health plan networks to Lucas County residents that

consist solely of hospitals outside of Lucas County."). The District Court's analysis was not clearly erroneous.[7]

B. The District Court's Conclusion On Likely Anticompetitive Effects Was Strongly Supported By The Evidence

Appellants claim that the District Court unduly relied upon the 80% market share that results from the Acquisition. But this ignores both the law and the "smoking gun" evidence in the record from the Appellants themselves establishing that: (1) they associated the merging parties' high market shares with greater bargaining power and higher prices, and (2) they fully expected that prices would increase after the Acquisition. Appellants also ignore the other substantial evidence of likely anticompetitive effects.

1. Appellants Themselves Believe That Their High Market Shares Are Linked To Anticompetitive Effects

Appellants' argument that an 80% market share in this case will not lead to anticompetitive effects not only contradicts a very strong presumption under the prevailing law, *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364-65 (1963), but also is inconsistent with the expectations of the merging parties themselves.

[7] Appellants also argue that the District Court unduly relied on Blue Cross. But, as the foregoing indicates, the testimony of Blue Cross' Vice President was echoed at length in testimony from executives of Regence Blue Shield, Idaho Physicians Network, the Saint Alphonsus Health Alliance, and even St. Luke's joint venture partner, Select Health Network, and St. Luke's Select Medical Network. And IPN provides its independent PPO network to many self-insured employers and smaller payors, including out of state payors. SER.255, Tr.460:6-25 (Duer).

Appellants' executives concluded, based upon their own contemporaneous analysis of the markets in which they operate, that there is a clear link between their higher shares and greater bargaining power with payors.[8] Of course, obtaining that bargaining power by eliminating competition, leading to higher prices, is precisely what the antitrust laws seek to prevent. *In the Matter of ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 1155392, at *54 (F.T.C. Mar. 28, 2012), *aff'd sub nom. ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014).

One St. Luke's document cited by the District Court stated that "market share in primary care is a key success factor, critical to sustaining a strong position in payor contracting." SER.101, (TrEX.1461). Consultants for both St. Luke's and Saltzer have identified a causal connection between Saltzer's market share and its strength in payor negotiations. SER.779, (TrEX.1261); SER.632, (TrEX.8). St. Luke's executives linked Saltzer's market share to its "dominance." SER.835, (TrEX.1281).

In 2010, St. Luke's then CFO explained that it needed "critical mass" in order to "push back" with payers. SER.705, (TrEX.1181). Its Director of Payor Contracting admitted that St. Luke's ownership of popular physician groups

[8] 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 quite difficult, ER.47-48, ¶¶ 209-214, ER.54, ¶¶ 31-33, and this finding has not been challenged by Appellants.

(largely acquired since 2010) has "improved [St. Luke's] bargaining position." SER.554, Dep.Tr.226:21-227:3 (Drake).

Appellants cannot run away from these documents. *See Evanston*, *supra* at *55 ("Respondent's efforts to downplay the significance of its documents are not persuasive . . . The documents are probative because they reflect the merging parties' unvarnished contemporaneous analyses of the parties' market positions by their most senior officials.").

2. The District Court Relied On Substantial Direct Evidence Of Anticompetitive Effects

a. Likely Effects On Prices

The District Court cited numerous other bases for its findings of anticompetitive effects. As the District Court specifically found, both Saltzer and St. Luke's made clear that they fully expected this transaction to lead to greater bargaining power and higher prices:

1. Saltzer stated that, while it would currently be forced to concede certain reimbursement issues to Blue Cross, once the transaction was completed, there would be the "clout of the entire network," which could change the result. ER.30-31, ¶ 113.

2. 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. ER.33, ¶¶ 123-126.

3. 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." ER.33, ¶ 127.

The District Court also found that St. Luke's was able to raise its prices substantially after its previous acquisitions. ER.27-28, ¶¶ 86-88. Moreover, the District Court supported its conclusion by detailed findings on the likely increase in bargaining leverage, including the fact that St. Luke's and Saltzer were each other's closest substitutes, ER.27-32, ¶¶ 85-116; St. Luke's experience in Twin Falls, ER.32, ¶¶ 117-120; and past increases in ancillary service prices, ER.32-34, ¶¶ 121-131. This was more than sufficient evidence to support the District Court's conclusions.

b. Effects On Referrals

i. Evidence Of Shifting Referrals

In addition, the District Court found direct evidence of likely anticompetitive effects as a result of "dramatic" changes in referral patterns. ER.35-36, ¶¶ 136-139. The District Court found that "[a]fter the Acquisition, it is *virtually certain* that this trend [of shifting referrals] will continue . . ." ER.36, ¶ 140 (emphasis added); see also ER.34-36, ¶¶ 132-138.

The District Court's findings were based on overwhelming evidence in the record:

(1) A host of documents from St. Luke's and Saltzer indicating that the parties fully expected that the Acquisition would shift referrals. *See e.g.* SER.599, Dep.Tr. 97:4–97:23, 97:25–99:1 (Reiboldt) (expectation that Saltzer's work would

largely go to St. Luke's); SER.680, (TrEX.1155) (St. Luke's declined to allow Saltzer autonomy in referrals).

(2) Testimony and documents from numerous St. Luke's physicians indicating that they shifted referrals after St. Luke's acquired their practices. *See e.g.*, SER.72, (TrEX.1445) (St. Luke's physicians "first attempt to make a referral to St. Luke's providers"); SER.574, Dep.Tr.73:16-24 (Johnson) (absent patient preference, "I'll typically have [patients] admitted at St. Luke's"); SER.496-497, Dep.Tr.75:9-25, 77:18-24 (Baressi) (after employment by St. Luke's, switched from 70-80% of cases at Saint Alphonsus to all cases at St. Luke's).

(3) Substantial expert testimony and statistical analysis establishing the relationship between acquisitions and referrals, and addressing and rejecting possible alternative explanations for the data. *See e.g.* SER.345, Tr.1498:17-25 (Haas-Wilson); SER.160, Haas-Wilson Demonstrative 23 (expert relied on testimony, documents, five different data sources); SER.346, Tr.1501:17-22 (Haas-Wilson); SER.106, 108, 109, (TrEX.1668, 1705, 1741); SER.161-163, Haas-Wilson Demonstratives 31, 33-34; SER.346, Tr.1502:4-25; 1503:5-13 (Haas-Wilson) (evidence of dramatic declines in cases at Saint Alphonsus after employment by St. Luke's); SER.346-347, Tr.1500:21-1505:15 (Haas-Wilson); SER.106-109, (TrEX.1668, 1669, 1705, 1741); SER.161-165, Haas-Wilson Demonstratives 31, 33-36 (expert accounted for alternative explanations for data).

Indeed, according to Saltzer's own admissions, referrals have already begun to shift. Outpatient referrals from Saltzer to Saint Alphonsus have already declined. SER.300, Tr.961:3-962:7 (Checketts). Several Saltzer physicians testified that their referrals to St. Luke's have increased, and/or referrals to Saint Alphonsus have decreased, since the acquisition. SER.474, Tr.3378:19-25; 3379:1-3 (Kunz); SER.591-592, Dep.Tr.220:9-221:4 (Page).[9] 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. SER.419, Tr.2497:15-2498:5 (Williams); SER.474, Tr.3379:7-9 (Kunz); SER.579, Dep.Tr.251:16-23 (Kaiser).[10]

ii. Anticompetitive Effects Of Shifting Referrals

These shifts in referrals will likely cause numerous anticompetitive effects. Most significantly, the District Court found that they will result in higher prices. ER.37, ¶ 145. Blue Cross has estimated that its outpatient surgery costs increase

[9] 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. SER.24, Memorandum Decision and Order dated December 20, 2012, Dkt. No. 47.

[10] Appellants argue that the District Court never found that the Saltzer acquisition was likely to cause referrals to shift *from* Saint Alphonsus and Treasure Valley, only that it would cause referrals to shift *to* St. Luke's. Appeal Brief at 17, 20. This assertion is untrue (as it must be, since a shift *to* St. Luke's necessarily entails a shift *from* its competitors). The District Court described the massive shifts of referrals *away from* Saint Alphonsus after past acquisitions. See ER.35-36, ¶¶ 136-139.

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. SER.250, Tr.425:10-426:3 (Crouch).

Appellants' own documents and testimony further establish that such shifts in referrals would significantly harm purchasers and patients. St. Luke's physicians shift their referrals to St. Luke's facilities and providers even when other facilities are substantially more convenient and other providers are regarded as providing high 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. SER.67, (TrEX.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*. The Executive Medical Director of St. Luke's Heart (Dr. Priest) "dropped using [his] go-to guy who did a good job on pacemakers and defibrillators" after becoming employed by St. Luke's, because that physician had joined Saint Alphonsus. SER.377, 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. SER.291, Tr.875:25-876:12 (Keeler).

The loss of referrals to TVH specifically also harms consumers who would otherwise benefit from TVH's "significantly lower" prices and unusually high

quality. SER.352, Tr.1524:18-1525:10 (Haas-Wilson); SER.1000, Haas-Wilson Demonstratives 50; SER.972, (TrEX.1682); SER.303-304, Tr.1041:16-1042:10, 1042:21-1043:10 (Genna); SER.104, (TrEX.1649). Harm to low-price, high-quality competitors is generally viewed as anticompetitive. *See e.g. Virgin Atlantic Airways, Ltd. v. British Airways PLC*, 257 F.3d 256, 264-265 (2d Cir. 2001); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011); *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 146 (D.D.C. 2004).

The evidence also establishes that these shifts in referrals will harm Saint Alphonsus and TVH, who are virtually the only competitive constraints on St. Luke's. This will enable St. Luke's to raise prices even further.

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. SER.349, Tr.1514:15-24 (Haas-Wilson); SER.976, (TrEX.1702); SER.168, Haas-Wilson Demonstratives 43. Even St. Luke's executives stated that "Saint Alphonsus Mercy will be imploding" if it lost Saltzer referrals. SER.601, Dep.Tr.117:22-118:9 (Reiboldt). Saint Alphonsus' would lose millions of dollars from the loss of Saltzer referrals, and would need to undertake major job and service cuts. SER.297-299, Tr.947:12-948:1, 948:11-949:1, 949:25-950:17, 954:3-955:9 (Checketts); SER.997-998, Checketts Demonstrative 6, 7. 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. SER.350, Tr.1517:25-1518:19 (Haas-Wilson); SER.977-978, (TrEX.1703, 1704); SER.169-170, Haas-Wilson Demonstratives 45, 46.

The evidence shows that this harm to Saint Alphonsus and TVH would likely damage overall competition in the hospital and surgical facilities markets. These are markets in which St. Luke's is already dominant (with 59% and 54% market shares), and in which Saint Alphonsus and TVH are its only significant rivals. If the only hospitals significantly constraining St. Luke's are weakened, that will allow St. Luke's to further raise prices. SER.349, Tr.1511:2-1512:11, 1512:19-1513:17 (Haas-Wilson); SER.973, (TrEX.1695); SER.974, (TrEX.1696); SER.975, (TrEX.1697); SER.166-167, Haas-Wilson Demonstratives 40, 41. *See also* SER.34, (TrEX.1082). This is consistent with St. Luke's existing strategy. SER.351, Tr.1520:16-1521:5 (Haas-Wilson); SER.509, 510, Dep.Tr.104:3-17, 140:5-140:16 (Billings); SER.757, (TrEX.1225).

While the antitrust laws are generally said to 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). *See Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir.

1996) ("[I]t is difficult to imag[in]e a more typical example of anti-competitive effect than higher prices . . .").

c. Effects On Network Competition

Substantial additional evidence, which the District Court did not need to address, shows that if divestiture does not occur, it is highly likely that St. Luke's will withdraw the Saltzer physicians (and its other employed physicians) from competing provider networks. Again, the bulk of this evidence is from St. Luke's own documents. SER.508, Dep.Tr.99:10-99:23 (Billings); SER.757, (TrEX.1225); SER.556, Dep.Tr.254:7-255:14 (Drake); SER.707, (TrEX.1207); SER.712, (TrEX.1208). St. Luke's "goal was to get rid of all PPO networks." SER.258, Tr.471:5-24 (Duer); SER.550, Dep.Tr.8:6-8 (Drake). It has not taken these steps to date only because of the involvement of the Federal Trade Commission. SER.555, Dep.Tr.241:5-8, 10-17; 244:7-16 (Drake).

This is highly significant, because provider networks assemble, and contract on behalf of, a range of providers, including hospitals and physicians. The availability of such networks is especially important for employers, smaller payors and national payors without a substantial presence in Idaho, for whom the transaction costs of assembling their own network would be too great. SER.343-344, Tr.1486:19-1488:14 (Haas-Wilson); SER.158-159, Haas-Wilson

Demonstratives 13, 14; SER.255, Tr.460:6-25 (Duer). Thus, these efforts are likely to specifically harm smaller and out of state payors and employers.

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, in St. Luke's own words, become "crippled." SER.507-508, Dep.Tr.96:16-97:11 (Billings); SER.59, (TrEX.1224). *See also* discussion, *supra* at 18-19 regarding importance of Saltzer to successful networks.

Appellants' documents support the conclusion that their 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. SER.68, (TrEX.1366). Two St. Luke's senior executives referred explicitly to their anticompetitive goals in their discussion of their "end game." SER.634, (TrEX.1105). The evidence certainly supports the conclusion that anticompetitive effects are likely here.

d. <u>The Arguments Made By Appellants Do Not Support A Contrary Conclusion</u>

Appellants purport to cite evidence that they claim rebuts the evidence of likely anticompetitive effects cited by the District Court. In fact, there was a substantial basis for the District Court to reject their contentions.

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. SER.277, Tr.722:1-23 (Powell); SER.245, Tr.331:11-23, 332:23-333:3 (Crouch). Regence has also made exceptions to its fee schedules for Saltzer. SER.535, Dep.Tr.155:4-156:4 (Clement). Physician fees were also increased in the Magic Valley. SER.617-618, 620, Dep.Tr.214:3-6, 214:12-17, 215:21-24, 216:1-2, 220:24-221:11, 227:18-22 (Seppi).[11]

Appellants claim that St. Luke's "could not count on" increased Saltzer rates for ancillary services (such as lab and x-ray). Appeal Brief at 41-42. But substantial evidence supports the contrary conclusion. Nancy Powell, Saltzer's then CFO, testified that St. Luke's consultant Peter LaFleur told her that the higher ancillary service rates were estimated because Mr. LaFleur "was trying to come up with, you know, enough money to pay the additional compensation [to the Saltzer physicians] and one bucket of that money was the increase in ancillary rates . . ." SER.280, Tr.735:23-736:7 (Powell). Mr. LaFleur's own document says that "[f]unding for compensation increase is provided through higher hospital based

[11] Even if two of the largest payors had been able to resist certain price increases, that would not avoid anticompetitive effects on smaller payors and employers. *See* FTC/DOJ 2010 Horizontal Merger Guidelines, at § 8 ("[E]ven if some powerful buyers could protect themselves the Agencies also consider whether market power can be exercised against other buyers."). Courts have routinely applied the government's *Merger Guidelines* in their analyses. *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 432 n.11 (5th Cir. 2008); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001).

reimbursement." SER.834, (TrEX.1262). Clearly, St. Luke's had to "count on" the increases to justify greater compensation for Saltzer.

Moreover, other, unrebutted evidence established that such increases have been a regular result of past acquisitions by St. Luke's. SER.240, Tr.277:8-278:22 (Crouch). Blue Cross of Idaho estimates that costs under its commercial contracts would increase as a result of the Acquisition by 30 to 35 percent. SER.237-238, Tr.252:12-254:17 (Crouch). ER.33, ¶ 125.

Appellants criticize the District Court's reliance on evidence of price increases for ancillary services 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. SER.506, Dep.Tr.89:19-90:1 (Billings); SER.552, Dep.Tr.79:23-80:10 (Drake); SER.750, (TrEX.1213). Its goal in these negotiations is to achieve a total dollar increase for all services. SER.443, 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. SER.251, Tr.430:21-431:19 (Crouch); SER.333, Tr.1346:18-1347:21 (Dranove).

Appellants argue that any anticompetitive impact would be limited because Blue Cross has an agreement with St. Luke's that prohibits price increases by more than 10% as a result of an acquisition. SER.248, Tr.394:16-21 (Crouch). Appeal Brief at 43. But a 10% increase is certainly a "small but significant increase in price" (SSNIP) sufficient to reflect the exercise of market power. *See* FTC/DOJ 2010 Horizontal Merger Guidelines at §4.1.2 ("small but significant increase" is most often 5%), §4.1.2 (SSNIP reflects a "post-merger exercise of market power significantly exceeding that existing absent the merger."). SER.327, Tr.1311:22-1312:21 (Dranove). Jeff Crouch of Blue Cross explained that the 10% cap did not prevent shifts in referrals to higher-priced hospital services. SER.248, Tr.394:16-21 (Crouch).

Under the circumstances, the District Court's conclusions were amply supported by the record.

C. The District Court Properly Found That Any Efficiencies Were Not Merger-Specific

1. Introduction

Appellants challenge the District Court's finding that their claimed efficiencies were not "merger specific," i.e. dependent upon the merger. "[A] 'cognizable' efficiency claim must represent a type of cost saving that could not be achieved without the merger. . . ." *H & R Block*, *supra* at 89.

Appellants' criticisms include three elements. First, they allege that the burden of proof on merger specificity was improperly placed on the defendants. Second, they claim that the District Court's findings were not supported by specific evidence. Third, Appellants argue that the evidence did not establish that the efficiencies to be achieved without physician acquisitions would occur quickly.

Each of these arguments is based on critical factual errors.[12] First, Appellants argue their position as if it is self-evident that they will achieve substantial efficiencies very quickly, and attempt to compare the evidence of efficiencies from other alternatives with this idealized result. But the evidence establishes that the efficiencies sought by St. Luke's are highly uncertain and likely to be remote in time. Any alternatives, of course, need to be compared to this prospect, not the unsupported claims that Appellants assert.

Second, the evidence of what can be accomplished with independent physicians, i.e. physicians not owned and employed by a hospital, is compelling, comprehensive, detailed, and specific.

Third, Appellants' argument founders on their inability to even explain, much less prove, *how many* employed physicians St. Luke's needs to accomplish its goals. The issue here is not merely the efficiencies that can be achieved by

[12] To avoid duplication, the Private Appellees will defer to the Federal Trade Commission and Idaho Attorney General regarding legal argument on the burden of proof.

employing *some* physicians. It is whether it is necessary in order to achieve efficiencies to employ *Saltzer* physicians, or *any* physicians in numbers sufficient to create antitrust problems. The record does not include the slightest shred of evidence that St. Luke's needs to employ the Saltzer physicians or physicians in such numbers.

The overwhelming weight of the evidence makes clear that the efficiencies sought by St. Luke's are not merger-specific. Health care quality is improved when physicians work willingly with hospitals to achieve their mutual goal of improving patient care. The "command and control" approach that is permitted by owning and employing physicians is in fact a "classic blunder." SER.154, (TrEX.3040). There is no need to acquire physicians and control market share in order to improve patient care.

2. The Merging Parties' Claimed Efficiencies Are Uncertain And Remote

Appellants assume that the Acquisition will result in significant and immediate efficiencies. The record does not remotely support that conclusion. The District Court found that St. Luke's is engaged in an uncertain, albeit promising, "experiment." ER.59, ¶ 70, ER.60, ¶¶ 76-77. These findings were supported by St. Luke's own CEO. SER.362, Tr.1685:24-1686:3 (Pate). St. Luke's own experts have been unable to quantify *any* efficiencies to date resulting

from its 40 previous physician practice acquisitions. SER.445, Tr.3029:4-8 (Argue); SER.427, Tr.2687:12-15 (Enthoven).[13]

As a result, unsurprisingly, Appellants' efficiency expert admitted that St. Luke's efforts to improve quality are far from established. Instead, they involve a "long and complicated path," a "perilous route," which would take 10 years or more and which might not succeed. SER.427, Tr.2686:24-2687:11 (Enthoven). St. Luke's efficiencies claims rely virtually entirely, using its own phrase, on "aspirational generalities."

Under the circumstances, Appellants' contention that teamwork with independent physicians will achieve efficiencies more slowly than St. Luke's will achieve through employment rings especially hollow. Their own expert believes that efficiencies through employment are uncertain and may take 10 years or more. 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.

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[13] The academic literature on efficiencies from employment is "ambiguous," SER.336, Tr.1364:10-13, SER.480-481, 3460:25-3461:18 (Dranove); and only "exploratory," SER.426, Tr.2668:23-2669:3 (Enthoven). St. Luke's expert Professor Enthoven was unaware of any studies with statistically significant results which compared employed physician groups' cost or quality to other organizational forms. SER.425, Tr.2665:15-2666:23 (Enthoven). To the contrary, a 2013 study—McWilliams, et al.,—found that independent physician groups provided higher quality, lower cost care compared to physicians employed by hospitals. SER.484, Tr.3535:23-3536:7 (Kizer).

3. The Evidence Of Efficiencies Achievable Without Employment Is Specific And Substantial

a. A Wide Range Of Evidence Shows That Teamwork With Independent Physicians Will Achieve Efficiencies

Appellants claim that the District Court found that efficiencies could be achieved without employment only by "unspecified means." Appeal Brief at 5. In fact, these means were spelled out, in detail, again and again, through extensive evidence in the record.

Scores of hospitals nationally have worked with independent physicians to improve care. SER.389, Tr.2020:18-2021:6 (Kee); SER.626-627, Dep.Tr.128:24-130:18 (Seppi); SER.375, Tr.1845:2-18 (Priest). Independent physician practices such as Primary Health have led the way in improving immunization rates, asthma care, diabetes care and appropriate use of antibiotics. SER.310-311, Tr.1133:13-1137:7 (Peterman), SER.313, Tr.1154:12-1155:20 (Peterman). St. Luke's employed physicians such as Boise Surgical Group applied the same quality methods as independents that they utilize today. SER.498-499, Dep.Tr.96:4-97:4, 98:1-14 (Baressi). And St. Luke's chronic disease management, Center for Spine Wellness and Orthopedic Management Services Organization initiatives all involve prominent roles by independent physicians. SER.386, 391, Tr.2000:10-17; 2038:19-2039:1 (Kee); SER.362, Tr.1688:2-5 (Pate); SER.631, Dep.Tr.23:12-24:22 (Walker). Virtually all of St. Luke's quality achievements in the orthopedics

area were achieved by its MSO, not through employment. SER.560, Dep.Tr.28:13-19 (Heggland). Indeed, several independent physician groups practicing at St. Luke's are virtually fully "clinically aligned" with St. Luke's. SER.409-410, Tr.2333:18-2334:19 (Roth).

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 programs around the country, including those which involve independent physicians. SER.66, (TrEX.1320); SER.626-627, Dep.Tr.125:22–24, 126:2-4, 126:13-16, 128:12-15, 128:24-131:7 (Seppi Dep. Tr. Rebuttal).

St. Luke's efforts to compensate its employed physicians for quality and cost improvements have not yet been implemented for the "vast majority" of employed physicians, SER.609, Dep.Tr.78:20-79:9 (Roth); SER.410, Tr.2336:17-22, 2337:12-18 (Roth), including Saltzer. Yet Saint Alphonsus has adopted such payment methods for independent orthopedists, pulmonologists, ER physicians and anesthesiologists SER.490, Tr.3625:18-3626:25 (Polk); SER.398, Tr.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. SER.504-505, Dep.Tr.13:3-14:9, 17:3-18 (Billings). In fact, quality incentives are being applied to all independent

physicians by the federal Medicare program. SER.489-490, Tr.3623:21-3625:17 (Polk). St. Luke's provided quality-based compensation to independent cardiologists before it employed any cardiologists. SER.375, Tr.1844:5-20 (Priest).

The District Court's finding that advances in electronic medical records are not "merger-specific," *see* ER.46-47, ¶¶ 200-205, is equally supported by substantial evidence. St. Luke's efforts with electronic health records ("EHR") and data analytics are an incomplete work in progress. SER.435, Tr.2826:8-2827:8 (Chasin); SER.381, Tr.1919:4-6 (Kee); SER.388, Tr.2014:17-20 (Kee); SER.410, Tr.2334:23-25 (Roth). Other, proven, systems, adopted by hundreds of hospitals, work with the multiple platforms used by independent physicians. SER.491-492, Tr.3631:9-3632:25, 3634:21-3635:4 (Polk); SER.388, Tr.2015:3-7 (Kee). St. Luke's own EHR system is being offered to independent, as well as employed, physicians and 15 groups of independent physicians have expressed interest. SER.382, Tr.1961:7-12 (Kee), SER.383, Tr.1964:13-18 (Kee), SER.386a, 2006:14-17 (Kee), SER.436, Tr.2832:2-6 (Chasin).

The evidence also supports the District Court's conclusion that risk-based contracting is not merger-specific. ER.43, ¶¶ 182-183. St. Luke's is still "getting geared up" for risk-sharing, SER.357-358, Tr.1627:12-15, 1629:5-19 (Pate), and is not ready to assume full risk. SER.358, Tr.1629:5-13 (Pate); SER.368, Tr.1781:2-

12 (Richards). Its efforts involve both employed and independent physicians. SER.359, Tr.1661:10-1662:7 (Pate); SER.976, (TrEX.1510). Saltzer itself participated in St. Luke's BrightPath network *prior* to the Acquisition. This is the network utilized by Select Health. SER.384-385, Tr.1989:21-1992:9 (Kee). Saltzer would have been subject to St. Luke's risk-based Select Health even without the acquisition. *Id*. Saint Alphonsus Health Alliance, consisting of predominantly independent physicians, is pursuing the same goals, and anticipates full risk contracts by 2014 or 2015. SER.979-980, (TrEX.2140); SER.517, Dep.Tr.222:20-223:8 (Brown); SER.486, Tr.3612:3-10 (Polk).

Indeed, the idea that risk contracting is merger-specific is directly contradicted by St. Luke's own statements. St. Luke's states on its website that "[c]linical integration with *independent* providers is clearly the *essential* building block of accountable care." (Emphasis added). SER.57, (TrEX.1212). In fact, St. Luke's believes that it is not "necessary for a physician to make referrals exclusively within one system or another in order to participate effectively in coordinated care and clinical integration." SER.362-363, Tr.1688:22 - 1689:14 (Pate).

b. Appellants' Contrary Arguments Are Inconsistent With The Evidence

Appellants' counter-arguments are inconsistent with the facts. They assert that "undisputed evidence from other previously independent groups" allegedly

shows a "lack of results from efforts short of direct affiliation." Appeal Brief at 10. This is simply false. St. Luke's witnesses were forced to admit that their anecdotal assertions were contradicted by their own experience. St. Luke's Dr. Souza (cited by Appellants) claimed in his direct testimony that employment had allowed his group to enter into quality-based compensation arrangements, SER.394, Tr.2052:4-12. But he admitted on cross examination that his (then independent) group had entered into such an arrangement with Saint Alphonsus *before* it was acquired by St. Luke's. SER.398, Tr.2091:8-15 (Souza). Dr. Souza also touted the benefits of St. Luke's EPIC electronic health record, SER.392-393, Tr.2043:2-2044:7, 2048:22-24 (Souza), but did not disclose that his group's inpatient hospital work still utilized paper records. SER.410, Tr.2335:8-17, 2336:8-14 (Roth).

In particular, Appellants cite Dr. Souza for the claim that his group, while independent, was unable to recruit physicians until they were employed. Appeal Brief at 10. In fact, on cross examination, Dr. Souza admitted that his group had successfully recruited 9 physicians while they were independent. SER.397, Tr.2085:14-2086:8 (Souza).

Appellants also cite to John Kee, St. Luke's Vice President for network operations. SER.379, 1879:7-12 (Kee). But Mr. Kee testified that he couldn't think of any quality initiative at St. Luke's "that doesn't involve at least some

independent physicians . . .” SER.386, Tr.2000:18-2001:1 (Kee). In fact, Mr. Kee at the time of his testimony had just been appointed to a new position “as part of [St. Luke’s new] effort to devote adequate resources to clinical integration with independent doctors . . .” SER.389, Tr.2019:24-2020:2 (Kee). In this new position, Mr. Kee’s job was to work specifically with independent physicians to “apply[] shared analytics . . . to adopt standardized ways of practicing medicine . . . [to] adopt best practices . . . to achieve care coordination . . . [and to] participate in value based contracting . . .” SER.389, Tr.2018:22-2019:18 (Kee). Mr. Kee agreed that those “goals are consistent with the intent of Triple Aim,” St. Luke’s overall quality goal. SER.389, Tr.2019:19-23 (Kee).[14]

The District Court was certainly justified in not relying on this evidence. *See, e.g., H & R Block, supra* at 90 (Efficiencies estimates based on “management judgments” were inadequate, because, if such evidence was credited, “the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act

[14] Other examples are similar. St. Luke’s Dr. Priest testified that St. Luke’s employed cardiologists are now paid significantly based on quality, SER.371, Tr.1829:18-1830:7 (Priest), but admitted on cross examination that his cardiology group had had a quality-based compensation agreement with St. Luke’s itself before being acquired. SER.375, Tr.1844:5-20 (Priest). Dr. Priest also testified on direct examination regarding the benefits of having employed clinical directors at St. Luke’s. SER.372, Tr.1834:5-1836:8 (Priest). But he admitted on cross examination that the same functions could be fulfilled by an independent physician employed part time as a service line director. SER.375-376, 1845:19-1847:17 (Priest).

because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.").

Appellants' arguments about Saltzer are also unsupportable. St. Luke's also achieved pre-acquisition efficiencies with Saltzer despite the very short period (from December 2008 to 2009) between the beginning of their efforts and the commencement of talks about a more complete affiliation. *See* ER.17, ¶ 27; ER.18, ¶ 30; SER.401-402, Tr.2227:24-2228:15 (Roth); SER.414, Tr.2373:11-16 (Kaiser). There was "immediate success" in the area of cardiovascular services, and "meaningful outcomes" with respect to "program integration." SER.402, Tr.2228:3-15 (Roth); SER.414, Tr.2373:11-12 (Kaiser).

Therefore, the claim that Saltzer "tried and failed" to achieve efficiencies without acquisition by St. Luke's is (at the very least) a considerable overstatement. Indeed, Peter LaFleur, St. Luke's consultant for the Saltzer acquisition, told Nancy Powell "that he was having a hard time finding any efficiencies" that Saltzer would gain from the Acquisition, because it was *already so efficient*. SER.282, Tr.742:2–14 (Powell).

Moreover, any past failures were due to St. Luke's inadequacies, not caused by Saltzer's independence. St. Luke's CEO acknowledged that it was not until 2013 that St. Luke's started to "devote sufficient resources" toward working with independents. SER.363, Tr.1690:4-7 (Pate). So Saltzer's 2008 efforts to work as

an independent group with St. Luke's involved a St. Luke's that was then—but is apparently no longer – an inadequate partner.

Teamwork 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.

4. The Merging Parties' Claimed Efficiencies Are Not Specific To *This* Merger

Appellants' third error arises from their failure to explain how the efficiencies that they wish to achieve are necessitated not merely by physician acquisitions, but by the Saltzer acquisition specifically, or by *any* acquisition that requires that they achieve unduly high market shares and market power. Of course, if similar results can be achieved through other, fewer, or smaller acquisitions, then the efficiencies are certainly not "merger specific," i.e. 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 . . ." ER.43, ¶ 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. SER.363, Tr.1691:14-1692:5 (Pate). Yet St. Luke's already employs 500. ER.15, ¶ 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." SER.424, Tr.2661:1-2662:11; SER.430, Tr.2737:8-16 (Enthoven). He ultimately admitted that his assertion was "a judgment out of unsupported opinion." SER.430, Tr.2737:8-16 (Enthoven). *See also* SER.615, Dep.Tr.88:2-88:9 (Seppi) (no facts that would dispute conclusion that "core" theory requires management of only 5% of patients by employed doctors); SER.363, 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. SER.363-364, Tr.1692:25-1693:8 (Pate).

5. There Are No Cognizable Efficiencies Relating To Medicare And Medicaid Patients

Appellants' claim of "Medicare and Medicaid" efficiencies were also properly rejected by the District Court. Their assertions that the Acquisition caused more of these patients to be treated by Saltzer are unaccompanied by evidence that any of these patients were unable to obtain care elsewhere.

Certainly, many other independents don't provide such care. SER.404, Tr.2290:14-22 (Armstrong); SER.311, Tr.1138:2-22 (Peterman).

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." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

Finally, any such efficiencies are irrelevant as a matter of law. The undisputed relevant product market here involves services provided to commercially insured patients. ER.21, ¶ 48. So these alleged benefits are not in the relevant market. Courts have rejected the claim that anticompetitive effects in one market can be offset by potential procompetitive benefits in another market. *Phila. Nat'l Bank*, 374 U.S. at 370–71; *RSR Corp. v. F.T.C.*, 602 F.2d 1317, 1325 (9th Cir. 1979); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1288-89 (N.D. Ill. 1989)

As the Supreme Court stated in *Philadelphia National Bank*, an anticompetitive merger is "not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence and, and in any event, has been made for us already by Congress, when it enacted the amended Section 7." 374 U.S. at 371.

6. Appellants' "Public Policy" Arguments Are Unsupported By The Evidence

As a result of these errors, Appellants' efforts to invoke broad public policy goals are completely unsupportable. Appellants argue that the antitrust laws should consider innovation. But the same innovations are 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.

Appellants also make the broad public policy claim that the District Court's decision will interfere with health care innovation, because (allegedly) in midsize markets, providers need substantial market shares in order to achieve necessary scale. Appeal Brief at 52. But this assertion, which is not supported in Appellants' brief by any citation, has absolutely no support in the record. Appellants'

argument is conclusively rebutted by their complete inability to explain the volume of "core" employed physicians allegedly needed to achieve their goals.

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. ER.27, ¶ 86.

Antitrust concerns will not disappear as the health care environment evolves. The incentives for, and benefits of, competition remain the same regardless of whether the payer contracts in question are risk-based or fee-for-service. SER.351, Tr.1521:6–24 (Haas-Wilson). Nor does the Affordable Care Act change the analysis. SER.351, Tr.1521:25–1522:14 (Haas-Wilson).

II. THE COURT PROPERLY ORDERED DIVESTITURE

A. The Court Followed The Correct Legal Standard In Ordering Divestiture

Appellants' attacks on the divestiture remedy involve fundamental legal and factual errors, and certainly do not establish that the District Court abused its discretion. Where "the Government has successfully borne the considerable burden of establishing a violation of the law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S.

316, 334 (1961). Divestiture is "the remedy best suited to redress the ills of an anticompetitive merger." *California v. Am. Stores Co.*, 495 U.S. 271, 285 (1990). "Courts are required to . . . decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *DuPont*, *supra* at 326.

Appellants' proposed alternative, separate "negotiating teams" for St. Luke's and Saltzer, would be completely inadequate, and was properly rejected by the District Court. ER.58, ¶¶ 59-62. *ProMedica*, 749 F.3d at 573 (6th Cir. 2014) (FTC did not abuse its discretion in rejecting "separate negotiating team" remedy). Even if there was a separate Saltzer "negotiating team," as Appellants have suggested, as long as Saltzer ultimately was part of St. Luke's, it could be expected to act in St. Luke's interest. As the Supreme Court made clear in *Copperweld v. Independence Tube, Corp.*, 467 U.S. 752, 769 (1984), "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests." "[W]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Id.* at 771. If St. Luke's bottom line is benefited whether negotiating team "Saltzer" or negotiating team "St. Luke's" succeeds in getting more business, there is no incentive for a separate Saltzer negotiating team to vigorously compete.

B. The District Court Properly Rejected Appellants' "Weakened Saltzer" Argument

Appellants' argument that divestiture will result in less competition from a weakened Saltzer does not square with the facts. Substantial evidence supported the District Court's conclusion that Saltzer would be competitively viable post-divestiture, despite its loss of several surgeons. In the opinion of Saltzer's former CFO, if Saltzer were unwound, the management team would be able to regroup, replace the departed physicians, and remain together without dissolving. SER.284, Tr.757:16–24 (Powell). Saltzer would not have difficulty recruiting surgeons to replace those who left, because Saltzer has a strong primary care base to provide referrals to new surgeons. SER.283, Tr.753:2–14 (Powell).[15] Dr. Djernes of Saltzer's Executive Committee agreed that if St. Luke's divests Saltzer, Saltzer will be able to cover the financial impact of the surgeons who left for Saint Al's by hiring additional surgeons to replace them. SER.545, Dep.Tr.58:1–11, 59:6–9, 59:24–61:6 (Djernes); SER.970, (TrEX.1538).

Indeed, Saltzer has recently been able to recruit two new physicians, including a new ENT surgeon. SER.460-461, Tr.3220:6–16, 3239:5–18 (Ahern).

[15] Saltzer has had years before where five or six doctors left, and the remaining physicians were able to absorb the overhead costs until they could replace those physicians. SER.283, Tr.753:25–754:14 (Powell). To remedy such a situation, Saltzer would recruit new physicians, reduce overhead, and get the current physicians to work a little harder so that there would be more revenue. *Id.* at 754:15–22 (Powell).

This is despite the fact that the current uncertainty about Saltzer's ultimate status was likely an impediment to recruitment of new physicians. SER.451, Tr.3103:9-15 (Savage).

The District Court had an ample factual basis on which to reject Appellants' arguments to the contrary. As the District Court found, ER.57, ¶ 58, the Saltzer-St. Luke's agreement provides important protections for Saltzer against any financial shortfall. Most importantly, in the event of unwinding, the Saltzer physicians will retain $9 million of the consideration paid in the Acquisition. This is the majority of the purchase price. ER.18, ¶ 31. Therefore, divestiture will actually provide Saltzer's owners with a large windfall.

The expert testimony cited by Appellants does not support any different conclusion. Appellants' financial expert testified *only* to: (1) a shortfall in compensation for Saltzer physicians, (2) in the first year following divestiture, (3) compared to pre-acquisition levels, (4) *if* Saltzer was unable to recruit additional surgeons. She could not say whether any particular number (or even any) Saltzer physicians would leave the area in the event of an unwinding. SER.463, Tr.3282:25–3283:15 (Ahern).[16] Her opinion does not address the formulation of a

[16] The only evidence Appellants can offer that even indirectly touches on this issue is testimony from two Saltzer physicians that they *might* have to consider leaving the community if divestiture were to occur. SER.467, Tr.3330:6-23 (Patterson); SER.472-473, Tr.3367:21-3368:4 (Kunz). One of these physicians was Dr. Kunz, who had previously described these concerns as "overly dramatic." *See* discussion,

physician recruiting plan by Saltzer. SER.463, Tr.3280:19–24 (Ahern). She offered no opinion on Saltzer's competitiveness, other than compensation. SER.463, Tr.3282:10-13 (Ahern).

Significantly, the $9 million retained by Saltzer physicians is *three times* the shortfall in compensation that Appellants' expert said would occur in the first year after divestiture if Saltzer were unable to recruit additional surgeons. SER.464, Tr.3285:5-17 (Ahern); SER.996, Ahern Demonstrative 61. Therefore, with this large sum, the Saltzer physicians will have at least three years of subsidies to cover any declines in compensation while they recruit and/or restructure.

Appellants' assertions of weakness are also simply not credible in light of Appellants' past statements and inaction, and the District Court was certainly justified in not crediting them. Saltzer's Chairman of the Board Dr. Kunz, before asserting a claim of weakness, dismissed such ideas as "doomsday scenarios" and further noted that such notions were "overly dramatic." SER.473, Tr.3368:19–3371:3 (Kunz). Saltzer never saw this issue as sufficiently serious to even plan for divestiture. SER.451-452, Tr.3102:2–22, 3104:2–6, 3105:2–6 (Savage). The CEO of Saltzer admitted that Saltzer has "never substantively discussed a contingency plan" and "never hired consultants to consider it." SER.454, Tr.3127:1–7

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infra. The District Court certainly did not abuse its discretion in not relying on such speculative statements from only two physicians.

(Savage). When asked why not, he could only say "I don't know." SER.454, Tr.3127:1-7 (Savage). *See also* SER.594, Dep.Tr.233:23–234:12 (Page).

In fact, there has never even been a "substantive discussion" of "how to deal with an unwind" in Saltzer's Finance Committee. SER.452, Tr.3105:13-3106:5 (Savage). Saltzer's CEO admitted that he "never sat down, rolled up [his] sleeves, and made a serious effort to think about what could we do to solve whatever problems we might have if there were an unwind." SER.452, Tr.3104:2-6 (Savage).

The merging parties' statements outside of the courtroom have been inconsistent with the fears expressed within it. Dr. Kaiser, Saltzer's CEO, said in an email to his staff after this lawsuit was filed: "For each of our employees I would like to emphasize that you will continue to have your jobs no matter what course these investigations and legal challenges take." SER.71, (TrEX.1386). This was sent after the surgeons had left Saltzer, and at the time that Saltzer was claiming (as it does now) that an injunction would cause its dissolution.

Nor did St. Luke's executives express the concern regarding the departure of the Saltzer surgeons that Appellants now raise with this Court. When St. Luke's CEO Dr. Pate learned in October 2012, that the surgeons would leave Saltzer, his only email response was "wonderful." SER.64, (TrEX.1268).

Appellants' position is also contrary to several of St. Luke's statements earlier in this litigation. St. Luke's counsel stated that a preliminary injunction would be unnecessary because "it would be quite possible to unscramble this egg if, after full factual development ... and review, it were found to be unlawful." SER.13, Dkt. No. 49 (Tr. of Prelim. Inj'n Proceedings) at 87–88. "[I]f ultimately this court . . . were to hold that this transaction is unlawful," counsel continued, "we will not oppose divestiture on grounds that divestiture cannot be accomplished." *Id.* at 88.

St. Luke's made similar representations to the FTC and the Attorney General, in a December 20, 2012 letter. SER.991-993, (TrEX.2625). St. Luke's assured the government that "St. Luke's will not argue, in any subsequent challenge to the Saltzer transaction, that the transaction should not be unwound because doing so would be costly or burdensome." *Id.* These statements were made well after St. Luke's knew that the surgeons were leaving Saltzer. SER.64, (TrEX.1268).

If there were any merit to Defendants' weakened competitor argument, the Court's equitable powers would give it discretion to fashion an appropriate remedy to restore competition, including requiring that St. Luke's provide Saltzer with additional assistance. *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The District Court is clothed with large discretion to fit the decree to the

special needs of the individual case") (quotation omitted); *see also Chicago Bridge*, *supra* at 441–42 (order requiring divestiture of more than the acquired assets was appropriate because it restored "two competitors capable of competing on an equal footing"). But Saltzer has not requested, or even "given any thought" to, or discussed, the "sort of assistance [it] would need" in the event of an unwind. SER.452, Tr.3105:2-3106:5 (Savage). How can Appellants say divestiture would be catastrophic, when they hadn't bothered to even consider how to fix it? This further belies Appellants' claims of financial weakness.

Appellants' argument is not only factually unsupported, but not even clearly articulated. Absent divestiture, the District Court correctly found that the relevant market would be dominated by an entity with an 80% market share. Do Appellants contend that the relevant market structure would be more concentrated post-divestiture? Less competitive in some other way? They didn't say, and presented no evidence on any likely changes in market structure or competitive dynamics post-divestiture.

C. The District Court Correctly Found That Any Injuries Were Self-Inflicted By The Merging Parties

The District Court also found, as an alternate basis for its conclusion on divestiture, that any financial hardship was "caused by the acquisition," and therefore was not a proper defense. ER.57, ¶¶ 56-57. The record strongly supported this conclusion. The surgeons left Saltzer only because of the St. Luke's

transaction, and due to St. Luke's insistence that the surgeons give up their practices at other facilities such as TVH or receive less compensation. The executive in charge of St. Luke's Clinic told the surgeons that St. Luke's needed *all* their business. SER.418, Tr.2492:20- 2493:16 (Williams). When the surgeons refused to commit to give up their practice at TVH, they were offered a significantly less attractive compensation arrangement by St. Luke's than were other Saltzer physicians, for this reason. SER.602-603, Dep.Tr.136:7-138:5 (Reiboldt); SER.690, (TrEX.1160). After a majority of the Saltzer group had endorsed the Acquisition, Saltzer's President said that use of TVH and Saint Alphonsus "was not the direction that the majority of the group had decided." Dr. Williams (one of the surgeons) concluded that "I needed to find a new job." SER.419, Tr.2495:4-2497:2 (Williams).

Saltzer management knew, well in advance of the Acquisition, that going ahead with the St. Luke's transaction and penalizing the surgeons for working at TVH would likely cause the surgeons to leave, and also knew those departures would have a significant financial impact. In fact, in 2011, a year before the transaction, Saltzer paid a consultant to analyze the impact on the group if the surgeons left. SER.452, Tr.3106:21-3108:1 (Savage). Nevertheless, Saltzer decided to proceed with the transaction. SER.453, Tr.3108:2–3110:24 (Savage). "The shareholders knew the consequences." SER.453, Tr.3110:17 (Savage). The

courts do not consider such self-inflicted wounds in fashioning the appropriate remedy. *See, e.g.*, *Sierra Club v. United States Army Corps of Eng'rs*, 645 F.3d 978, 996–97 (8th Cir. 2011); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998).

Appellants argue that even "self-inflicted wounds" can affect competition and should be considered. However, if Appellants' arguments were to be credited, this would create serious perverse incentives. Allowing St. Luke's and Saltzer to benefit from alleged impediments of their own creation would encourage other merging parties to take similar steps to defeat the efforts of antitrust enforcement officials.

It is not an exaggeration to suggest that St. Luke's and Saltzer undertook their merger with such a goal firmly in mind. As described *supra* at p.57-58, St. Luke's effectively drove the surgeons out by its insistence on exclusive referrals or lesser compensation. Then, prior to the consummation of the Acquisition, in connection with their response to the Private Appellees' Motion for Preliminary Injunction, St. Luke's and Saltzer argued that any effort to prevent the merger would leave Saltzer in a weakened state, because of the recent departure of the surgeons. SER.15-16, (Preliminary Injunction Hearing Transcript) at p. 140-141. Thus, even before they consummated the Acquisition, Saltzer and St. Luke's were making the argument that the transaction had to be permitted because Saltzer was

now weaker, even though any negative effects were as a *result of* St. Luke's entirely avoidable decisions. It would cause serious harm to the merger enforcement process to permit such tactics to succeed.

CONCLUSION

For the foregoing reasons, the District Court's decision and Judgment should be affirmed.

DATED this 16th day of July, 2014.

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STATEMENT OF RELATED CASES

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 are aware of the following related cases pending in this court, which arises out of the same case in the district court: *The Associated Press v. USDC-IDB*, No. 13-73931 (9th Cir.).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 12,733 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2010.

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July 16, 2014

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 16, 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