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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER, NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.,

Plaintiffs,

v.

ST. LUKE'S HEALTH SYSTEM, LTD, and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD.,

Defendants.

Case No. 1:12-cv-00560-BLW (Lead Case)

MEMORANDUM OF POINTS AND AUTHORITIES OF ST. LUKE'S HEALTH SYSTEM, LTD. AND ST. LUKE'S REGIONAL MEDICAL CENTER, LTD. IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PRIVATE PLAINTIFFS' PRICE-BASED CLAIMS

FEDERAL TRADE COMMISSION; STATE OF IDAHO

Plaintiffs, v.

ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A.

Defendants

Case No. 1:13-cv-00116-BLW

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Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3d ed. 2007) 6, 7

Defendants St. Luke's Health System, Ltd. and St. Luke's Regional Medical Center, Ltd. (collectively, "St. Luke's") respectfully submit this memorandum in support of their motion for partial summary judgment as to the claims asserted by plaintiffs Saint Alphonsus Medical Center, Nampa, Inc., Saint Alphonsus Health System, Inc., Saint Alphonsus Regional Medical Center, Inc. (collectively, "Saint Al's"), and Treasure Valley Hospital Limited Partnership ("TVH"), to the effect that the challenged affiliation between Saltzer Medical Group ("Saltzer") and St. Luke's will result in higher prices as a result of the exercise of market power. As competitors of St. Luke's who would benefit from any price increase, Saint Al's and TVH lack standing to assert claims based on alleged price increases.

This litigation began with the complaint filed by Saint Al's and TVH (the "private plaintiffs"). A subsequent suit was filed by the Federal Trade Commission and Idaho Attorney General (the "government plaintiffs"). Both suits challenge the Saltzer transaction under federal and state antitrust laws. *See* Saint Al's/TVH Amended Complaint ("Am. Compl.," Dkt. 63) ¶¶ 131-52 (alleging violation of 15 U.S.C. §§ 1, 18, and Idaho Code Ann. §§ 48-104, 48-106); Government Plaintiffs' Complaint ("Gov't Compl.," Dkt. 98) ¶ 66 (alleging violation of 15 U.S.C. § 18 and Idaho Code Ann. § 48-106). They were, therefore, consolidated. Notably, however, the private plaintiffs and the government plaintiffs are pursuing two very different theories of liability.

The basic theory of the government plaintiffs is that the Saltzer transaction will give St. Luke's so much market power that it will be able to exercise that power to raise prices above competitive levels—to the detriment of payers. *E.g.*, Gov't Compl. ¶ 1. By contrast, the private

plaintiffs are competitors of St. Luke's who, like St. Luke's, provide health care services in southern Idaho. As relevant to this motion, the private plaintiffs claim that the challenged transaction between St. Luke's and Saltzer will harm *them* so severely that the harm that they—competitors of St. Luke's—will suffer, which will harm the process of *competition*. *See, e.g.*, Am. Compl. ¶ 2(c) ("St. Luke's acquisition of Saltzer will deal a crippling financial blow to Saint Alphonsus Nampa hospital…"). In addition, they allege that the affiliation will result in increased prices for certain health care services in certain parts of southern Idaho. *See id.* ¶¶ 2(b), 133(b), 144(b). All plaintiffs seek injunctive relief. *Id.* ¶ 153; Gov't Compl. ¶ 67. The private plaintiffs also seek damages. Am. Compl. ¶ 153(C).

As explained more fully below, the private plaintiffs lack standing to challenge the transaction on the ground that that transaction will cause an increase in price. Both the Supreme Court and the Ninth Circuit have explained that a private plaintiff does not have standing to sue a competitor under the antitrust laws based on allegations that the competitor's conduct will cause prices to rise. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999). As these and numerous other courts have made clear, a plaintiff's claims of higher prices charged by a competitor do not allege injury-in-fact to the plaintiff, because the plaintiff does not suffer from any such price increase by their competitors. To the contrary, the plaintiff competitor would directly benefit from a price increase by the defendant because higher prices charged by its competitor make the plaintiff more attractive to purchasers.

Not surprisingly, the private plaintiffs in this case have not alleged that they will suffer injury from any supposed increase in prices by defendants. Rather, they have acknowledged, as they must, that "*higher prices will not harm Plaintiffs*." Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Dkt. 37, at 6 (emphasis added). This fact dooms the ability of the private plaintiffs to make their price-related claims. While the government plaintiffs are free to maintain a claim based on alleged price increases, the law does not permit the private plaintiffs to do so.

For this reason, St. Luke's is entitled to partial summary judgment as to the private plaintiffs' claims that the Saltzer transaction will result in anticompetitive price increases. Accordingly, the private plaintiffs should not be permitted to present evidence intended to show supposed anticompetitive price increases by virtue of the Saltzer transaction. Moreover, they are not entitled to any damages based on any showing of supposed price increases.

BACKGROUND

St. Luke's is a health system headquartered in Boise. Am. Compl. ¶ 14. St. Luke's owns and operates six hospitals in Idaho, and has outpatient centers and clinics in Idaho and Oregon. *Id.* Saint Al's is also a health system headquartered in Boise, Idaho. *Id.* ¶ 13. Saint Al's owns four hospitals in Idaho and Oregon, *id.*, including a 381-bed facility in Boise. *Id.* at *¶* 11. Saint Al's also owns and operates medical centers in Idaho, Oregon, and Nevada. *Id.* TVH is a nine-bed, physician-owned, for-profit hospital in Boise. *Id.* at ¶ 9.

It is undisputed that the private plaintiffs are competitors of St. Luke's in the provision of health care services. *See* Am. Compl. ¶ 90 ("This enhancement of St. Luke's market power will

also be used to exclude competition by rivals, including all of the Plaintiffs"); *id.* at ¶ 94 ("Similarly, this additional power will give St. Luke's an even greater ability . . . to stymie procompetitive offers by competitors such as Saint Alphonsus and TVH."); *id.* at ¶ 104 (describing the private plaintiffs as "hospital alternatives a payor has to St. Luke's"); *id.* at ¶ 120 (describing Saint Al's as "St. Luke's most significant competitor in the general acute-care services market"). The private plaintiffs have alleged that they compete with St. Luke's for referrals from Saltzer physicians. *Id.* at ¶¶ 23-24, 98-99. St. Luke's and the private plaintiffs are also alleged to compete for inclusion on payer networks. *Id.* at ¶¶ 90-93, 104.

The private plaintiffs challenge the transaction between St. Luke's and Saltzer on the ground that that transaction will suppress competition. They allege three purported anticompetitive effects of the transaction: (1) reduced admissions to the private plaintiffs, Am. Compl. ¶¶ 2(a), 2(c), 2(d); (2) exclusion of competing providers from health care networks, Am. Compl., ¶ 2(e); and (3) higher prices for medical services, Am. Compl. ¶ 2(b). The expert witness proffered by the private plaintiffs has purported to opine on each of these three supposed anticompetitive effects. *See* Corrected Expert Report of Deborah Haas-Wilson (June 5, 2013) ("Haas-Wilson Rept.") (Ex. 1) ¶¶ 183-212 (referrals), ¶¶ 213-23 (exclusion from networks), ¶¶ 224-31, 247-58 (increased prices).

ARGUMENT

I. THE PRIVATE PLAINTIFFS LACK STANDING TO ASSERT CLAIMS OF PRICE INCREASES.

"[T]he irreducible constitutional minimum of standing" requires that "the plaintiff must have suffered an injury in fact— an invasion of a legally protected interest which is (a) concrete

and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008) (same). Injury in fact is "an indispensable part of the plaintiff's case," and a plaintiff's failure to establish standing as to a claim causes the claim to fail as a matter of law. *Lujan*, 504 U.S. at 561. The Ninth Circuit has made clear that, in order to satisfy standing requirements in antitrust cases, the plaintiff must show that it has suffered injury caused by the defendant's conduct. *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). In particular, "[t]here can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct." *Id.* at 1056 (citing *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 539 (1983)).[1]

Any increase in prices charged by a defendant does not injure competitors of that defendant. Instead, competitors actually *benefit* from increased prices that result from allegedly unlawful conduct by a defendant. *Matsushita*, 475 U.S. at 583 ("[A]s petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price. . . ."). Therefore, courts, including the Ninth Circuit, have denied a defendant's competitors the ability to sue in antitrust on the basis of alleged price increases. *See, e.g.*, *Big Bear Lodging Ass'n*, 182 F.3d at 1102 ("[Plaintiffs] are competitors to, rather than customers of, Defendants in the sale of these services. Thus, Plaintiffs stand to benefit from the fact that prices for those services are

[1] The Idaho antitrust laws are to be "construed in harmony with federal judicial interpretations of comparable federal antitrust statutes." Idaho Code Ann. § 48-102. Thus, the analysis set forth herein applies equally to the private plaintiffs' claims under both federal and state law.

inflated."); *MacPherson's, Inc. v. Windermere Real Estate Servs. Co.*, 100 F. App'x 651, 654 (9th Cir. May 25, 2004, unpub.) (even assuming that defendants fixed prices, competitor could not challenge the agreement because the "price fix would actually aid [plaintiff's] business by exerting upward pressure on the market price"); *Gatt Commc'ns, Inc. v. PMC Assocs.*, 711 F.3d 68, 77–78 (2d Cir. 2013) (affirming dismissal of antitrust claim by competitor because the only alleged harm to competition was increased prices, and explaining that the antitrust laws "are not concerned with injuries to *competitors* such as Gatt resulting from their participation in or exile from such schemes") (emphasis in original); *O.K. Sand & Gravel v. Martin Marietta Techs.*, 36 F.3d 565, 573 (7th Cir. 1994) (affirming summary judgment against competitor-claimant on theory of higher prices, as competitor "failed to show that it has suffered the type of injury the antitrust laws seek to prevent"); *Stewart Glass & Mirror v. U.S.A. Glass*, 940 F. Supp. 1026, 1036 (E.D. Tex. 1996) (granting motion to dismiss on competitor's claim of above-market price-fixing as plaintiffs did not allege antitrust injury since they "st[ood] to gain from any conspiracy to raise prices"); *Pope v. Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 277-78 (N.D. Miss. 1988), *aff'd*, 872 F.2d 127 (5th Cir. 1989) ("'price fixing ordinarily helps … competitors by allowing them to capture a larger share of the market than they would if the prevailing price were lower'"). *Cf. Atl. Richfield*, 495 U.S. at 337 (finding that competitor did not allege antitrust injury in part because it suffered no injury due to maximum price-fixing agreement).

The point was summed up in a leading antitrust treatise:

> [A] rival is actually benefitted if its rivals merge, fix prices, or divide markets with the result that prices in the market increase. Such rivals lack injury-in-fact and are denied standing….

> Because a competitor opposes efficient, aggressive, and legitimate competition by its rivals, it has an incentive to use an antitrust suit to delay their operations or to induce them to moderate their competition. For that reason, the courts are properly skeptical of many rivals' suits, particularly when the practices are not obviously "exclusionary." Although consumers almost always have the correct incentives for suit, rivals do not….
>
> When a horizontal merger, price fixing, market division, or similar collaboration among competitors substantially reduces competition, consumers suffer while existing rivals benefit. As the Supreme Court recognized, a plaintiff competitor is not injured in fact when rivals restrict their output, thus allowing the plaintiff to enjoy higher prices, greater output, or both.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 348a-b (3d ed. 2007) (footnotes omitted); *see also id.* ¶ 335f ("[I]njury-in-fact or antitrust injury is absent when a plaintiff complains that its competitors' merger was illegal because it increased market concentration unduly."). The treatise goes on to explain the very limited situations in which competitors *do* have standing to sue under the antitrust laws: if the defendant has engaged in "bona fide exclusionary conduct" of the sort that would harm competition by foreclosing the plaintiff's participation in the market. *Id.* ¶ 348d ("The rival supplier harmed by an illegal foreclosure clearly has standing, but the courts should reject claims of loss and antitrust injury based on 'leverage' without significant foreclosure or 'undesirable' efficiencies.") (citations omitted). Other types of harm that can support a consumer's antitrust claim will not support a competitor's. For these reasons, courts have routinely rejected antitrust claims brought by competitors if those claims rest on an allegation that the alleged anticompetitive effect will be higher prices.

In *Atlantic Richfield*, for example, USA Petroleum Company (USA) sued Atlantic Richfield Company (ARCO), alleging a vertical, maximum-price-fixing agreement barred by the Sherman Act. 495 U.S. at 341. Both the plaintiff and the defendant were oil companies. *Id*. The plaintiff "compete[d] directly with ARCO dealers at the retail level." *Id* at 342. The district court granted summary judgment to the defendant, finding no allegation of antitrust injury, *id*, but the Ninth Circuit reversed, *id* at 343. The Supreme Court reversed the Ninth Circuit and reinstated the district court decision, holding that the plaintiff had failed to allege an antitrust injury, even though it had alleged a per se antitrust violation. *Id.* at 346. The Supreme Court made clear that even if the challenged conduct constituted an unlawful minimum-price-fixing scheme, the plaintiff still "would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage." *Id* at 337.

Similarly, in *Big Bear Lodging Association*, the Ninth Circuit dismissed a price-fixing claim brought by ski resorts against their competitors. The plaintiff ski resorts alleged that the defendant ski resorts, competitors of the plaintiffs, had "agree[d] on uniform rates and charges for lodge accommodations, ski packages and resort services." 182 F.3d at 1100-01. The Ninth Circuit affirmed dismissal of the claims: "Plaintiffs have not alleged antitrust injury resulting from the price-fixing of ski packages and lodging accommodations. They are competitors to, rather than customers of, Defendants in the sale of these services. Thus, Plaintiffs stand to benefit from the fact that prices for those services are inflated." *Id.* at 1102.

In *O.K. Sand & Gravel*, the Seventh Circuit applied this same principle. 36 F.3d at 573. O.K. Sand & Gravel ("O.K. Sand") and Martin Marietta owned "competing sand and gravel

companies in Indianapolis." *Id* at 566. Martin Marietta alleged that an agreement between O.K. Sand and a third sand and gravel company violated antitrust laws in part because the agreement would raise prices. *Id.* at 572. The Seventh Circuit affirmed summary judgment in favor of Martin Marietta on the ground that it had failed to allege antitrust injury: "Clearly, price increases could not be considered an antitrust injury to competitors." *Id.* at 572-73.

In particular, courts have made clear that a plaintiff may not challenge a merger or acquisition by its competitor on the theory that the transaction will increase price or reduce output. For example, in *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308 (D.D.C. 2011), the court dismissed claims brought by Sprint and Cellular South under the Clayton Act to prevent the merger of AT&T and T-Mobile, their competitors in the market for wireless phone services. *Id.* at 312, 319-20. Sprint and Cellular "allege[d] that AT&T's acquisition of T-Mobile would affect [sic] an illegal concentration of market power and lead to higher retail wireless rates." *Id.* at 319. The court held that the claim failed as a matter of law:

> At issue here are Sprint's and Cellular South's allegations regarding the injuries that *they* will suffer if the merger is consummated. Alleging harm to consumers, while relevant to showing an antitrust violation, is not sufficient to demonstrate antitrust injury; harm to *consumers* by way of increased prices is the type of injury the antitrust laws were designed to prevent, but it is not an injury-in-fact that *competitors* suffer. When allegedly anticompetitive behavior "[has] the effect of either raising market price or limiting output" and is therefore "harmful to competition," it "actually *benefit[s]* competitors by making supracompetitive pricing more attractive." Put plainly, "injury-in-fact ... is absent when a plaintiff complains [only] that its competitors' merger [would be] illegal because it [would] increase[ ] market concentration unduly."

Id. (citations omitted; alterations in original). *See also Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235, 1242 (3d Cir. 1987) ("Alberta, as a competitor, is in no position to claim compensable injury from [its competitor] Du Pont's elimination of a potential increase in output [through the acquisition of another corporation].").

Here, it is undisputed that the private plaintiffs are competitors of St. Luke's. *See* p. 3, *supra*. As such, they cannot be harmed by—and have no standing to challenge—any supposed increase in prices. Indeed, the private plaintiffs have conceded—as they must—that "*higher prices will not harm Plaintiffs*." Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Dkt. 37, at 6 (emphasis added). These points are dispositive of the private plaintiffs' price-based claims.

II. PARTIAL SUMMARY JUDGMENT AS TO THE PRIVATE PLAINTIFFS' PRICE-BASED CLAIMS IS REQUIRED BY THE FEDERAL RULES AND WILL MATERIALLY ADVANCE THIS LITIGATION.

The Federal Rules of Civil Procedure require a court to grant summary judgment when there is no genuine dispute as to material fact and when the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Here, the undisputed facts make clear that the private plaintiffs lack standing to assert claims based on any supposed increase in prices from the transaction between Saltzer and St. Luke's. Accordingly, partial summary judgment is warranted as to their claims that rest on supposed price increases.

Additionally, granting partial summary judgment at this point will narrow the issues for trial in this litigation. To be sure, the government plaintiffs, unlike the private plaintiffs, do have standing to challenge any supposed price increases on behalf of consumers. Thus granting

partial summary judgment as to the private plaintiffs' price-based claims will not resolve the price-based claims asserted by the government plaintiffs. However, regardless of the *government plaintiffs'* standing to bring price-based claims, the private plaintiffs' lack of standing means that they may neither present evidence of supposed price increases, nor be granted relief based on their price-based claims.

Entering partial summary judgment on the private plaintiffs' price-based claims, and thus excluding the private plaintiffs' price-related evidence, will streamline the presentation of evidence at trial. The private plaintiffs' expert, Deborah Haas-Wilson, has offered an opinion that goes directly to the issue of supposed price increases in providing health care.[2] Haas-Wilson Rept. (Ex. 1) ¶¶ 35-40, 224-31. She has also identified at least four separate purported product markets at issue. *Id.* ¶¶ 89-136. Significantly, however, the government plaintiffs have put forward a different market definition from their expert witness, David Dranove.

Specifically, unlike Dr. Haas-Wilson, Dr. Dranove identifies only a single product market. Expert Report of David Dranove, PhD (June 4, 2013) (Ex. 2) ¶¶ 131-41. Because the private plaintiffs lack standing to challenge the transaction on the basis of supposed price increases, they should not be permitted to offer separate evidence related to price increases. In particular, if partial summary judgment is granted, Dr. Haas-Wilson's expert testimony should be

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[2] Dr. Haas-Wilson has also opined that St. Luke's supposed ability to exclude other physicians from networks will cause prices to rise for third-party payers negotiating insurance contracts. Haas-Wilson Rept. (Ex. 1) ¶ 33 ("As its physician network becomes even more dominant, St. Luke's would have the ability to further raise prices to commercial third-party payers."). To the extent that the private plaintiffs' network-exclusion theory rests on a claim that the transaction with Saltzer will lead to an increase in prices—including prices paid by third-party commercial payers—partial summary judgment should be granted on that claim as well.

limited to exclude her price-related opinions. This will help streamline the trial.

Additionally, while the government plaintiffs seek only injunctive relief, the private plaintiffs have also sought damages. Am. Compl. ¶ 153(C). Because the private plaintiffs lack standing to press their price-based claims, they cannot be entitled to any damages or other relief based on those claims. A holding that the private plaintiffs lack standing to pursue damages based on a price-increase theory will further limit the scope of the trial.

CONCLUSION

For all of the foregoing reasons, St. Luke's motion for partial summary judgment as to the private plaintiffs' claims, to the extent those claims are based on supposed increases in price as a result of the Saltzer transaction, should be granted. The private plaintiffs should not be permitted to introduce evidence that the Saltzer transaction will harm consumers by raising price in an anticompetitive fashion. Nor should they be permitted to seek damages on a theory of an increase in price resulting from that transaction.

DATED: July 23, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2013, I filed the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES OF ST. LUKE'S HEALTH SYSTEM, LTD. AND ST. LUKE'S REGIONAL MEDICAL CENTER, LTD. IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PRIVATE PLAINTIFFS' PRICE-BASED CLAIMS** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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