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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) **REPLY 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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INTRODUCTION

In its opening Memorandum, St. Luke's established that Saint Alphonsus and Treasure Valley Hospital, as direct competitors of St. Luke's, lack standing to challenge the Saltzer transaction on the ground that that transaction will lead to increased prices. *See* Dkt. 144-1. The private plaintiffs' Memorandum in Opposition ("Opp."), Dkt. 151, cannot and does not refute this conclusion. Accordingly, it appears to be undisputed that the private plaintiffs may not seek relief based on the theory that, by virtue of the Saltzer transaction, St. Luke's will be able to raise prices above competitive levels.

However, having conceded that they do not have standing to pursue any antitrust claims based on supposed price increases, the private plaintiffs seek to reinject their price-increase claims in two different ways. First, they contend that St. Luke's motion for partial summary judgment as to their price-based claims is "superfluous" because they have now withdrawn their claim to damages. Opp. at 4.[1] But the private plaintiffs' withdrawal of their damages claim (stated for the first time in their Opposition) does not permit them to advance price-based claims in support of a request for injunctive relief. To the contrary, the private plaintiffs may obtain neither monetary *nor* injunctive relief on the ground that the challenged transaction will lead to increased prices.

Second, the private plaintiffs argue that, even though they cannot obtain any form of relief based on supposed price increases by St. Luke's, they should nonetheless be permitted to introduce all of the same "pricing evidence" because such evidence will supposedly establish that the transaction will give St. Luke's market power—which, according to these plaintiffs, St.

[1] The page numbering in the Opposition begins with the cover page, such that what is labeled as page 4 is actually the first page of text. St. Luke's citations to the Opposition use the page numbers as they have been labeled by the private plaintiffs.

Luke's "will likely use to harm the Private Plaintiffs" by excluding them from the market. Opp. at 5. But evidence of St. Luke's *past* pricing practices—particularly in markets outside the Treasure Valley—are not probative of whether the Saltzer transaction will cripple the ability of Saint Alphonsus or TVH to compete by drying up referrals to these hospitals or by causing them to be unlawfully excluded from various physician networks. The fact is that the private plaintiffs' proffered evidence of supposed price increases unrelated to the challenged transaction, particularly in other markets, does not show that the Saltzer transaction is likely to result in "exclusionary behavior" by St. Luke's. Opp. at 7.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF WHATSOEVER PREMISED ON A FINDING THAT THE CHALLENGED TRANSACTION WILL LEAD TO INCREASED PRICES.

The private plaintiffs cannot dispute that settled law holds that they, as St. Luke's competitors, are not harmed by any increase in prices that may result from the challenged transaction. Thus, although their position is not clearly stated, the private plaintiffs appear to concede that they are foreclosed from obtaining any relief based on a finding that the challenged transaction will lead to increased prices. *See* Opp. at 6 (acknowledging as "uncontested" the principle that increases in price "visit no antitrust injury upon competitors"); Resp. to St. Luke's Statement of Undisputed Material Facts ("Resp."), Dkt. 150, ¶¶ 1-10 (acknowledging as undisputed that private plaintiffs are St. Luke's competitors). These concessions demonstrate that St. Luke's is entitled to partial summary judgment that the private plaintiffs may obtain no relief based on any purported increase in price from the challenged transaction.

Instead of disputing St. Luke's entitlement to summary judgment on their price-based claims, the private plaintiffs contend that such judgment would be "superfluous." Opp. at 4. That is because the private plaintiffs, in their opposition brief, renounce their previously asserted

claim to damages, including any damages from supposedly increased prices. *Id.* at 4; *see also* Resp. ¶ 11, *compared with* Amended Complaint for Preliminary and Permanent Injunction and Damages, Dkt. 63, ¶ 153(C). While St. Luke's welcomes the private plaintiffs' withdrawal of their meritless damages claim, that withdrawal does not moot St. Luke's motion for partial summary judgment or render that motion "superfluous."

The private plaintiffs are entitled to *no relief*—injunctive relief or damages—that is premised on a finding that the challenged transaction would lead to supracompetitive prices. *E.g.*, *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 52 n.14 (2d Cir. 2010) (bar on competitor challenges based on allegedly supracompetitive prices "appl[ies] equally to suits at law and equity"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 356a (3d ed. 2007) ("Areeda & Hovenkamp"). To the contrary, as competitors of St. Luke's, the private plaintiffs have standing to challenge the transaction, and may obtain relief, only on the ground that the transaction creates a substantial potential for "exclusionary acts" against them in violation of the antitrust laws. Areeda & Hovenkamp ¶ 356a ("an illegal merger among competitors does not ordinarily injure rivals, for the feared rise in prices or reduction in output resulting from the merger benefits rivals with greater sales, higher prices, or both"; competitors can obtain relief only "[i]n the rare case condemning a merger because of a substantial potential for predatory pricing or other exclusionary acts against rivals").

Thus, unless plaintiffs establish that the transaction will lead to "exclusionary acts" against them that violate the antitrust laws, they are entitled to no relief, monetary or injunctive. The Court should therefore enter partial summary judgment that the private plaintiffs may not obtain relief on grounds that the challenged transaction will lead to increased prices.

II. EVIDENCE OF PURPORTED HISTORICAL PRICE INCREASES DOES NOT SUPPORT AN INFERENCE THAT THE CHALLENGED TRANSACTION WILL LEAD TO UNLAWFUL EXCLUSIONARY ACTS AGAINST THE PRIVATE PLAINTIFFS.

Even though the private plaintiffs apparently concede that they are entitled to no relief based on supposed supracompetitive prices resulting from the challenged transaction, they nonetheless assert that they are entitled to proffer evidence on St. Luke's supposed "history of price increases" based on prior, unrelated transactions. *See* Opp. at 16. The private plaintiffs contend that this supposed evidence is relevant to establishing that St. Luke's is likely to engage in unlawful "exclusionary behavior" if the challenged transaction is permitted to stand. *Id.* at 7. In particular, the private plaintiffs' theory is that "both increased prices and exclusionary behavior are manifestations of market power." *Id.* Accordingly, the private plaintiffs assert, "evidence of price increase is proof of the ability to exclude competition." *Id.*

Put differently, the private plaintiffs contend that they are entitled to prove that the Saltzer transaction violates federal antitrust laws by (1) showing, through evidence of past price increases, that the challenged transaction gives St. Luke's market power in the alleged market, and (2) inferring from St. Luke's supposed market power that St. Luke's will likely engage in exclusionary acts that cripple the ability of these hospitals to compete. However, both steps of the private plaintiffs' analysis are fundamentally flawed.

First, contrary to plaintiffs' argument, one cannot infer the likelihood of exclusionary acts from a showing of higher prices. Price increases, standing alone, do not create any concern under the antitrust laws. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Instead, in a competitive market, if one firm increases its prices above competitive levels, the result is a shift of business to the firm's lower-priced competitors. *See Rebel Oil*, 51 F.3d at

1434; Areeda & Hovenkamp ¶¶ 501, 506. So long as consumers can obtain substitute services or goods from competitors, then consumers are not compelled to pay supracompetitive prices. Price increases become a matter of concern only if the firm in question has "market power"—that is, the ability to increase prices without losing sales, and to do so "for a significant period *without erosion by new entry or expansion" from competitors*. *Id.* ¶ 501 (emphasis added); *see also Rebel Oil*, 51 F.3d at 1434.[2]

Thus, as relevant here, if the private plaintiffs are to prove that the Saltzer transaction is likely to give St. Luke's market power and to cause injury to the private plaintiffs, they must prove that they (St. Luke's competitors) will likely be excluded from the alleged market as a result of the transaction. Only if they have successfully made that predicate showing of the likelihood of exclusion of St. Luke's competitors can the private plaintiffs prove that the transaction will give St. Luke's market power, and thereby harm them. *See* Areeda & Hovenkamp ¶ 348a (private plaintiff may challenge the conduct of its competitor only on the ground that that conduct "tends to exclude rivals from the market, *thus leading to reduced output and higher prices*") (emphasis added). If the private plaintiffs fail to show that they are likely to be excluded from the alleged market as a result of the Saltzer transaction, then they will have

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[2] As the Areeda & Hovenkamp treatise explains, "[t]his is the meaning" of the cases that the private plaintiffs cite for the proposition that "monopoly power is the power to control prices or exclude competition." Areeda & Hovenkamp ¶ 501; *see also* Opp. at 5, 7, 11 (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946)). These cases do not hold—as the private plaintiffs misleadingly argue—that the ability to exclude competitors is a "manifestation" of market power. Instead, although the words used in this "standard formulation" are "literal[ly] imprecis[e]," the cases cited by the private plaintiffs are correctly read to hold that market power exists only if "the defendant can price monopolistically without prompt erosion from rivals' entry or expansion." Areeda & Hovenkamp ¶ 501.

shown neither the likelihood that St. Luke's will have market power nor the likelihood that they will be injured by the transaction—regardless of any supposed price increases.[3]

Significantly, the pricing evidence that the private plaintiffs seek to introduce is not probative of whether the Saltzer transaction will give St. Luke's the ability to exclude the private plaintiffs from the alleged market. Indeed, the private plaintiffs' argument, if accepted, would eviscerate the uncontested principle that competitors lack standing to challenge their rivals' conduct on the ground that that conduct will lead to higher prices. If the private plaintiffs' analysis were correct, any competitor could simply allege that a merger would lead to supracompetitive prices, and subsequently allege that its injury (exclusion) could be inferred from the alleged higher prices. That would render the well-established limits on competitor standing meaningless. And, as St. Luke's showed in its opening Memorandum, that is decidedly not the law. *See* St. Luke's Memorandum at 4-9 (citing extensive case law). Instead, the law requires that courts reject competitors' claims under the antitrust laws, unless the competitor can show "*significant foreclosure*"—*i.e.*, that the challenged conduct will cause the competitor to be unlawfully excluded from the alleged market. Areeda & Hovenkamp ¶ 348d (emphasis added).

Controlling case law confirms the point that a competitor cannot use evidence of supposed harm to consumers to establish harm to itself. Thus, in *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001), for example, the Ninth Circuit affirmed the district court's decision on summary judgment that private plaintiffs did not have standing to challenge one competitor's acquisition of another competitor. In that case, before the plaintiffs filed their

[3] Any supposed increase in St. Luke's prices in those circumstances would be of no consequence under the antitrust laws—because consumers could simply use the private plaintiffs' supposedly lower-priced services instead. *See* Areeda & Hovenkamp ¶ 506b (the existence of rivals who are able to provide substitute goods or services "offset[s] any output reduction by the defendant and frustrat[es] any price increase").

private action, the FTC had determined in an administrative proceeding that the acquisition was unlawful and had ordered divestiture, which was affirmed by the Ninth Circuit. *Id.* at 1029.

In the private suit, the plaintiffs argued that they had "proved antitrust injury as a result of the [challenged] acquisition, because this acquisition was determined to be illegal by the FTC and they suffered injury from the anticompetitive acts that were made possible by the acquisition." *Id.* at 1036. However, the private plaintiffs failed to show any injury to themselves that was cognizable under the antitrust laws, such as any unlawful exclusion from the alleged market. *See id.* at 1035-36 (evidence did not support plaintiffs' theory of predatory pricing). In these circumstances, even giving full weight to the FTC's earlier judgment, the previously established likelihood of competitive harm from the transaction did not support an inference (*i.e.*, did not create a triable issue of fact) that the private plaintiffs had suffered a cognizable injury. Similarly here, the private plaintiffs cannot rely on a showing of harm to consumers in the form of supposedly increased prices to create an inference that they too are likely to suffer injury through any alleged exclusionary acts.

And 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 South alleged that the merger would eliminate T-Mobile as a competitor to AT&T and would cause Sprint to be "'marginalize[d],'" thus leading to "an illegal concentration of market power and … higher retail wireless rates." *Id.* at 319. However, these allegations did not, "without more," establish the likelihood of "injury-in-fact to Sprint and Cellular South." *Id.* at 320. In other words, the plaintiffs' allegations that the post-merger AT&T would have the capacity to raise prices did not support an inference, sufficient to survive

AT&T's motion to dismiss, that the plaintiffs would suffer injury in the form of exclusion from the market. Likewise, here, the private plaintiffs' "pricing evidence" does not support an inference that they will be excluded from any alleged market.

Additionally, the absence of any connection between the alleged "historical price increases" that the private plaintiffs point to, on the one hand, *see* Opp. at 13-17, and the required showing of likely exclusionary conduct, on the other, is particularly apparent here. Plaintiffs seek to offer evidence of supposed price increases by St. Luke's in the past, unrelated to the Saltzer transaction, in *different* markets from the geographic and product markets that they have alleged in this case. *See* Opp. at 12-14; Ex. 1 to St. Luke's Memorandum, Haas-Wilson Rept. ¶¶ 35-38, 225-27. But any alleged changes in prices elsewhere in the past do not speak to whether the Saltzer transaction is likely to enable St. Luke's to exclude Saint Al's and TVH from the alleged market.

An example illustrates the point. The private plaintiffs contend that they will suffer injury from the Saltzer transaction based on price increases that supposedly occurred in the Magic Valley after acquisitions of physician groups by St. Luke's predecessor. *E.g.*, Haas-Wilson Rept. ¶¶ 226-27. However, any change in prices that supposedly occurred in the Magic Valley in no way supports an inference that Saltzer physicians will refer their patients away from the private plaintiffs as a result of the transaction. Put differently, whether or not prices have increased in the Magic Valley[4] does not bear on whether Saint Al's and TVH will be precluded

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[4] Another flaw in the private plaintiffs' analysis of the significance of their supposed evidence of price increases is that they do not purport to show that the supposedly higher prices charged in Magic Valley are *supracompetitive* prices. In other words, the private plaintiffs have not even argued that any price increase in the Magic Valley was a result of any St. Luke's market power in that region—as opposed to any of the other myriad reasons that the price of health care has increased nationwide. *See, e.g.*, *Brooke Group*, 509 U.S. at 232; *Rebel Oil*, 51 F.3d at 1434.

from competing for referrals from the Saltzer physicians, or whether these private plaintiffs will be prevented from marketing competing networks. *See* Opp. at 9.

The private plaintiffs describe at length their theory that the Saltzer transaction will cause them harm because it will allegedly lead to a reduction in referrals from Saltzer physicians or to Saltzer physicians being removed from the private plaintiffs' networks. Opp. at 9-11. Of course, the mere fact that, under their theory, referrals to the private plaintiffs will be reduced or the private plaintiffs will not have access to all the networks that they like does not establish injury to competition. *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). More to the point for present purposes, however, the private plaintiffs have failed to establish how their supposed "pricing evidence" tends to prove the likelihood of either of those alleged forms of exclusion.

The private plaintiffs acknowledge that if St. Luke's were able to sustain prices at supracompetitive levels in the alleged market, it would be only as a result of the private plaintiffs' no longer qualifying as "good alternatives" for consumers in that market. Opp. at 13 ("*If* there are few good alternatives to Saltzer and St. Luke's, *then* employers and payors have no choice but to meet St. Luke's price demands.") (emphasis added); *see also id.* at 5-6 (stating that alleged exclusionary behavior "will, in turn, lead to increased prices and injury to consumers, *after* the Private Plaintiffs' competition is reduced and so (as a result) are the choices available to purchasers") (emphasis in original). In other words, they identify no basis from which "exclusionary behavior" against the private plaintiffs can be inferred from evidence of supposed *past* price increases—but rather concede that they must show the likelihood of exclusionary behavior *in the future* in order to establish any harm to themselves.

It is also notable that the private plaintiffs cite no case that holds that the likelihood of unlawful exclusionary acts can be inferred from purported "pricing evidence" of the sort that the private plaintiffs point to. Instead, the private plaintiffs cite only cases that hold that competitors *do* have standing to challenge a defendant's exclusionary conduct under the antitrust laws. *See* Opp. at 8-9 (citing cases). St. Luke's has not disputed this unexceptionable principle and has not sought summary judgment as to the private plaintiffs' claims of harm from supposed exclusionary behavior. Instead, St. Luke's asks only that summary judgment be granted as to any claim by the private plaintiffs that is premised on an increase in prices.

CONCLUSION

For the foregoing reasons and the reasons set forth in St. Luke's opening Memorandum, partial summary judgment should be entered in favor of St. Luke's on the price-based claims of the private plaintiffs.

DATED: August 16, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2013, I filed the foregoing **REPLY 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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