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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) **ST. LUKE'S OPPOSITION TO PRIVATE PLAINTIFFS' MEMORANDUM ON ENTITLEMENT TO FEES AND COSTS**
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

Claiming to be prevailing parties in this litigation, plaintiffs Saint Alphonsus Medical Center – Nampa, Inc., Saint Alphonsus Regional Medical Center, Inc., and Saint Alphonsus Health System, Inc. and Treasure Valley Hospital Limited Partnership (collectively "private plaintiffs") seek from St. Luke's Health System, Ltd. and St. Luke's Regional Medical Center, Ltd. (collectively, "St. Luke's") more than $8.6 million in attorneys' fees and costs pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and Section 48-113 of the Idaho Code. *See* Dkt. 478-1, 483-1. These plaintiffs, however, did not prevail at all—let alone "substantially prevail" as required under the Clayton Act and governing Idaho law.

The Court had before it in this case the consolidated claims of the private plaintiffs, on the one hand, and the claims of the FTC and Idaho Attorney General (the "government plaintiffs"), on the other. While they sought the same relief, the two sets of plaintiffs advanced significantly different theories: The government plaintiffs contended that the transaction between defendants St. Luke's and Saltzer (the "Saltzer transaction") would lead to increased prices in the product and geographic markets that they alleged. The private plaintiffs, however, did not have standing to advance that theory because, as St. Luke's competitors, they would be helped rather than injured by supracompetitive pricing by the combined entities. Accordingly, the private plaintiffs instead contended that the transaction would give St. Luke's sufficient market power to engage in exclusionary conduct such that the private plaintiffs and their networks would be so crippled as effective competitors that competition as a whole would be harmed.

This Court held that the transaction violated the Clayton Act and the Idaho Competition Act because, in the Court's judgment, the transaction would likely give rise to increased prices. It ordered divestiture on that basis alone. Thus, the Court entered judgment *only on the*

government plaintiffs' claims—i.e., claims that the private plaintiffs did not have standing to raise. Indeed, the judgment entered by the Court could not, as a matter of law, have been entered in favor of the private plaintiffs because of their lack of standing to assert antitrust claims based on price increases. The Court explicitly declined to reach the claims that the private plaintiffs did advance. Put differently, it did not enter an enforceable judgment in favor of the private plaintiffs.

That fact is determinative of the private plaintiffs' claimed entitlement to fees. Only a plaintiff who secures judicial relief in its own favor "substantially prevails" within the meaning of the Clayton Act. Where multiple plaintiffs advance interrelated claims, but not all of them secure judicially enforceable relief, only those who have secured relief—*i.e.*, only those who have obtained the "necessary judicial *imprimatur*"—are entitled to attorneys' fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-06 (2001). The private plaintiffs' protestations that they made "highly significant contributions" to the judgment that was entered in favor of the government plaintiffs are irrelevant. Because the only claims found by this Court to support a judgment were those of the government plaintiffs, the private plaintiffs did not "substantially prevail." They are therefore not entitled to attorneys' fees.

BACKGROUND

I. THE PLAINTIFFS AND THEIR CLAIMS.

On November 11, 2012, the private plaintiffs filed a Complaint challenging St. Luke's affiliation with Saltzer and requesting preliminary and permanent injunctive relief. *See* Dkt. 1; *see also* Dkt. 63. They alleged that the affiliation violated the Clayton Act, the Sherman Act, and Idaho law, in three product markets defined by one of two potential geographic markets—

(1) primary care physician services (Nampa market); (2) general acute-care inpatient services (Boise-Area market); and (3) outpatient surgery services (Boise-Area market). Dkt. 1 ¶¶ 125-28; Dkt. 63 ¶¶ 131-34. On December 20, 2012, the private plaintiffs' motion for a preliminary injunction was denied.

After investigating St. Luke's proposed affiliation with Saltzer for more than a year, Dkt. 63 ¶ 48, the FTC and the State of Idaho on March 12, 2013 filed a separate Complaint challenging Saltzer's affiliation with St. Luke's and requesting a permanent injunction. Dkt. 1 (Case No. 1:13-cv-00116-BLW) (hereinafter "FTC Compl."). The government plaintiffs alleged that the affiliation violated the Clayton Act and the Idaho Competition Act in a single market—adult primary care physician services in the Nampa area. FTC Compl. ¶¶ 1, 24, 27, 66. Their Complaint challenged the affiliation on the basis of price increases that would supposedly result from the absence of competition between St. Luke's and Saltzer. *E.g.*, FTC Compl. ¶¶ 37, 47. The Court consolidated the private and government plaintiffs' actions. *See* Dkt. 92.

Before trial, St. Luke's moved for partial summary judgment against the private plaintiffs on grounds that these plaintiffs lacked standing to allege a violation of the antitrust laws on the basis of price increases. St. Luke's argued that the private plaintiffs would *benefit* from a direct competitor charging payors and consumers higher prices. *See* Dkt. 144-1. The private plaintiffs responded that they did not seek to advance any claim premised on the likelihood of price increases. Dkt. 151 at 4-6. Taking the private parties at their word that they were alleging only "the harm to them from exclusionary behavior" and *not* "the harm to them from increased prices," Dkt. 230 at 2, the Court allowed the private plaintiffs to present evidence related to *past* price increases in order to support their claims of the likelihood of exclusionary conduct in the relevant markets. Dkt. 230 at 2-3.

II. THIS COURT'S JUDGMENT.

On February 28, 2014, this Court issued a Judgment ruling that St. Luke's affiliation with Saltzer violates Section 7 of the Clayton Act and the Idaho Competition Act. The Judgment permanently enjoins St. Luke's from acquiring Saltzer and orders St. Luke's to divest Saltzer's physicians and assets. Dkt. 471. The Findings of Fact and Conclusions of Law underlying that judgment, Dkt. 464, issued on January 24, make clear that that the Court found a violation of the Clayton Act only because "a substantial risk [exists] that the combined [St. Luke's-Saltzer] entity will use its dominant market share (1) to negotiate higher reimbursements with health plans, and (2) charge more services at the higher hospital billing rates," which, in turn, "will raise costs to consumers." Dkt. 464 Conclusions ¶ 74; *see also id.* Findings ¶¶ 121, 130-31, 143-46, Conclusions ¶ 25. In short, the Court ordered divestiture because the "particular structure of the Acquisition—creating such a huge market share for the combined entity—creates a substantial risk of *anticompetitive price increases*." Dkt. 464 Conclusions ¶ 72 (emphasis added). The Court thus ruled only on the price-based claim advanced by the government plaintiffs.

Indeed, in fashioning its findings and judgment, this Court focused solely on the likelihood of price increases in the alleged Nampa market for adult primary care services—*i.e.* the injury and market alleged by the government plaintiffs. *See* Dkt. 464 Findings ¶¶ 48, 73. It specified that the "Acquisition [was] being unwound due to its effects in the Nampa market for primary physician services." Dkt. 464 Conclusions ¶ 64. And the Court explicitly declined to "address whether the Acquisition would have violated § 7 in other markets"—*i.e.*, those raised by only the private (but not the government) plaintiffs. Dkt. 464 Conclusions ¶¶ 63-65. It expressly declined to "resolve the issues raised by the private plaintiffs," Dkt. 464 Conclusions ¶ 64, ruling only on the government plaintiffs' allegations of anticompetitive price increases.

Nowhere in its Findings of Fact and Conclusions of Law or in its Judgment did this Court hold that St. Luke's affiliation with Saltzer forecloses the private plaintiffs from accessing Saltzer physicians and referrals or from competing in any relevant product or geographic market. *See* Dkt. 464, 471.

ARGUMENT

I. A PLAINTIFF "SUBSTANTIALLY PREVAILS" ONLY IF ENFORCEABLE JUDICIAL RELIEF IS GRANTED IN ITS FAVOR.

The private plaintiffs are entitled to fees under § 16 only if they can establish that they "substantially prevail[ed]" in this litigation. 15 U.S.C. § 26 ("the cost of suit, including a reasonable attorney's fee" is to be awarded in "any action under this section in which the plaintiff substantially prevails").[1] The Supreme Court set forth the standard for determining whether a party has "prevailed" for purposes of entitlement to attorneys' fees under federal law in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).[2] The Court in that case held that a plaintiff is entitled to fees as a

[1] As private plaintiffs agree (Pl. Br. 6-7), the same standard applies in determining entitlement to attorneys' fees under the Idaho Competition Act. *See* Idaho Code § 48-113 (providing for attorneys' fees); § 48-102(3) (providing that the Idaho Competition Act "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes…"). The private plaintiffs must also demonstrate that they prevailed in order to obtain taxable costs. 28 U.S.C. § 1920; Pl. Br. 7.

[2] While *Buckhannon* involved different federal statutes from the one at issue here, the Court made clear that its analysis applied to all federal statutes providing for attorneys' fees for plaintiffs who "prevail." 532 U.S. at 602-03. Circuit courts, including the Ninth Circuit, have applied the *Buckhannon* standard equally to statutes, like the Clayton Act, that use the "substantially prevails" formulation. *Synagogue v. United States*, 482 F.3d 1058, 1063 (9th Cir. 2007); *Pres. Coal. of Erie Cnty. v. Fed. Transit Admin.*, 356 F.3d 444, 450 n.3 (2nd Cir. 2004) ("the terms 'prevailing party' and 'substantially prevails' are fundamentally the same for purposes of determining whether a plaintiff can recover under a fee-shifting statute"); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 455 (D.C. Cir. 2002) ("We have seen nothing to suggest that Congress sought to draw any fine distinction between 'prevailing party' and 'substantially prevail.'"). Thus, plaintiffs' suggestion that "the standard for award of attorneys' fees in an antitrust injunction case ('substantially prevail') should be

"prevailing" party only if it obtained an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]"—*i.e.*, judicial relief in its favor. *Id.* at 604.

In reaching this conclusion, the *Buckhannon* Court explicitly rejected the "catalyst" theory for awarding attorneys' fees, under which a plaintiff was deemed a "prevailing party" if it took some action that contributed to obtaining the result it sought—even where no judicial relief was entered in the plaintiff's favor. *Id.* at 604. The *Buckhannon* Court held instead that the mere fact that a plaintiff's desired result has been achieved is insufficient. *Id.* at 605. Likewise, the mere fact that some action taken by the plaintiff has contributed to that desired result is insufficient. *Id.* Instead, a plaintiff "prevails" only if a *court order* establishes that the plaintiff's claim has legal "'merit.'" *Id.* at 606. Thus, the *Buckhannon* Court rejected the notion that "the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a … potentially meritless lawsuit … has reached the 'sought-after destination' without obtaining any judicial relief." *Id.*; *see also P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1172-73 (9th Cir. 2007) (applying *Buckhannon* and explaining that "for a litigant to be a 'prevailing party' for the purpose of awarding attorneys' fees, he must meet two criteria: he must achieve a material alteration of the legal relationship of the parties, and that alteration must be judicially sanctioned") (citations and quotation omitted).

Remarkably, the plaintiffs' brief does not discuss this standard—or even cite *Buckhannon* or any case decided since *Buckhannon*. Plaintiffs instead rely exclusively on pre-*Buckhannon*

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more lenient than the standard applicable to actions for damages, which requires that a party prevail," Pl. Br. 3, finds no support in the case law—including the one case that plaintiffs cite, *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1313 (9th Cir. 1982), which does not even address the distinction between the two terms. To the contrary, to the extent there is any difference between the two formulations, a greater showing is necessary to establish that a plaintiff has *substantially* prevailed. *See Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1138 (9th Cir. 2008) (remanding for determination of whether plaintiff "substantially prevailed" where plaintiff succeeded on only some of its claims).

case law to assert that "[t]he test [for determining prevailing party status] under Section 16 is whether the party 'substantially contributed' to, or was a 'substantial factor' in, the benefit sought." Pl. Br. 4 (quoting *Grumman Corp. v. The LTV Corp.*, 533 F. Supp. 1385, 1390 (E.D.N.Y. 1982)).

For instance, plaintiffs cite *Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480 (11th Cir. 1989), for the proposition that the "test is whether private plaintiffs 'contributed, substantially, to the failure of the challenged acquisition[].'" Pl. Br. 4; *see also id.* at 5-6. *Royal Crown Cola*, however, is a prime example of pre-*Buckhannon* law, stating that "*even in the absence of judicial relief*, a plaintiff may still be a prevailing party if the plaintiff can show that his or her lawsuit was a causal link prompting some remedial action. Such a causal connection or link is established by evidence that the lawsuit was *a substantial factor or a significant catalyst* in motivating the defendants to end their unlawful behavior." 887 F.2d at 1486 (citations omitted; emphases added). *Buckhannon* rejected exactly that standard, holding instead that a "judicial *imprimatur*" is "necessary" for a plaintiff to be deemed to have "prevailed." 532 U.S. at 605. Indeed, a district court in the Eleventh Circuit has recognized that *Royal Crown Cola* is no longer good law. *Matthew V. ex rel. Craig V. v. Dekalb Cnty. Sch. Sys.*, 244 F. Supp. 2d 1331, 1341 (N.D. Ga. 2003) (identifying *Royal Crown Cola* as a case that adopts the "catalyst theory" that was "foreclosed" in *Buckhannon*).

Similarly, plaintiffs cite *Posada v. Lamb County, Tex.*, 716 F.2d 1066 (5th Cir. 1983), as "appl[ying] [a] 'substantial factor' test" for determining prevailing party status. Pl. Br. 4. Again, *Posada* is a pre-*Buckhannon* case holding that "[a] 'prevailing party' is one whose 'ends are accomplished as the result of the litigation *even without formal judicial recognition*.'" 716 F.2d at 1071 (citation omitted; emphasis added). The *Posada* court considered whether the plaintiff's

role in filing suit was a "substantial factor" or "catalyst" for obtaining the relief sought, even though the plaintiff did not obtain judicial relief, *id.*—in other words, the precise analysis that *Buckhannon* rejected.

The private plaintiffs' "substantial contribution" standard cannot be reconciled with *Buckhannon* and post-*Buckhannon* case law. Under *current* law, the only relevant question in determining whether a plaintiff has "prevailed" is whether it has secured enforceable judicial relief—not whether its contributions were valuable. *See, e.g.*, *Citizens for Better Forestry v. U.S. Dep't of Agr.*, 567 F.3d 1128, 1134 (9th Cir. 2009) (under *Buckhannon*, plaintiff did not prevail even though its prosecution of its claim "contributed" to obtaining the relief sought); *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123-24 (2d Cir. 2002) (reversing, under *Buckhannon*, award of attorneys' fees where plaintiff had obtained relief sought and plaintiff's lawsuit "'was a material contributing factor'" in obtaining that relief).

Notably, this Court's local rules track the *Buckhannon* standard. In particular, District of Idaho Local Rule 54.1(b) provides that "[g]enerally, the prevailing party is the one who successfully prosecutes the action …, prevails on the merits of the main issue, and the one in whose favor the decision or verdict is rendered and judgment entered." Consistent with *Buckhannon* and subsequent case law, the rule does not characterize a litigant as a prevailing party simply because another litigant on its side prevailed or because it "contributed" in some sense to the result. Rather, the rule requires that to be a prevailing party, a litigant must be one who prevails on the merits of claims that it has raised and in whose favor enforceable judicial relief is entered. That is a standard that the private plaintiffs have not met.

Moreover, the standard for "prevailing" party status under current law is "a test of 'unmistakably legal terms,'" *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*,

484 F.3d 1230, 1232 (9th Cir. 2007) (citation omitted), "a question of law that does not depend on the factual record," *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1259 n.3 (9th Cir. 2010). It is not, as is suggested by the private plaintiffs' argument and the cases they cite, "an intensely factual, pragmatic" inquiry into the value of a particular plaintiff's contributions, *Posada*, 716 F.2d at 1072. It is thus insufficient—and, fundamentally, beside the point—for the private plaintiffs to tally up the hours they spent "contributing" to the outcome of this case and present declarations describing the supposed value of their contributions. Simply put, the private plaintiffs cannot be deemed to have "substantially prevailed" because they did not win an enforceable judgment on at least one of their claims—regardless of how "substantial" their "contribution" to the government plaintiffs' efforts may have been.

The fact that the government plaintiffs secured the same relief sought by the private plaintiffs does not entitle the private plaintiffs to attorneys' fees. The private plaintiffs must show that *they*—not the government plaintiffs—obtained the "necessary judicial *imprimatur*" demonstrating that *their* claims had "'merit,'" and that *they* "ha[ve] been awarded some relief by the court." *Buckhannon*, 532 U.S. at 603, 605-06; *Oil, Chem. & Atomic Workers*, 288 F.3d at 458 ("The discussion in *Buckhannon* also makes clear that there must be some sort of 'judicial relief' *in favor of the party seeking an award of fees*.") (emphasis added). The mere fact that some co-plaintiffs have succeeded in winning a judgment does not mean that all plaintiffs can be said to have prevailed. *See, e.g.*, *Naucke v. City of Park Hills*, 284 F.3d 923, 928-29 (8th Cir. 2002) (where three plaintiffs alleged factually interrelated violations of 42 U.S.C. § 1983, but only two won enforceable judgments, only those two plaintiffs were held to be "prevailing parties" entitled to attorneys' fees). Here, the fact that the *government* plaintiffs prevailed on their price-related claims does not make the *private* plaintiffs prevailing parties, because a

plaintiff cannot "prevail" on a claim that it has no standing to raise. *E.g.*, *Stewart v. Hannon*, 675 F.2d 846, 848 (7th Cir. 1982); *Odneal v. Pierce*, 2011 WL 2678940, at *6 (S.D. Tex. July 7, 2011) (attorneys' fees unavailable where plaintiff obtained result sought but was held to have "no standing to pursue injunctive relief" from the court). As set forth below, under the correct standard, the private plaintiffs cannot show that *they* substantially prevailed.

II. THE PRIVATE PLAINTIFFS DID NOT WIN ENFORCEABLE JUDICIAL RELIEF.

A. The Court's Holding That Divestiture Is Needed To Prevent An Increase In Prices Is Not A Judgment In Favor Of The Private Plaintiffs.

This Court found that the Saltzer transaction violates the Clayton Act for one reason: The affiliation is likely, in the Court's view, to increase prices in the market for primary care physician services in Nampa. *See* Dkt. 464 Conclusions ¶¶ 72-74 ("[T]he Acquisition … creates a substantial risk of anticompetitive price increases. More specifically, there is a substantial risk that the combined entity will use its dominant market share (1) to negotiate higher reimbursements with health plans, and (2) charge more services at the higher hospital billing rates. This will raise costs to consumers.").[3] Because of the risk of price increases—and only because of the risk of price increases—the Court ordered divestiture. *Id.* ¶¶ 76-80.

The Court's judgment that the transaction violates the Clayton Act because it risks increasing prices is not a judgment in favor of the private plaintiffs. Indeed, as a matter of law, it cannot be. That is because the private plaintiffs do not have standing, as required under Article III of the Constitution, to challenge the transaction on the ground that it will increase prices.

[3] *Accord id.* ¶¶ 24-26 (concluding that the FTC's prima facie case was successfully made because the transaction "will result in a post-merger HHI of 6,219 and an increase in HHI of 1,607," and "it is highly likely that the combined entity will use its substantial market share (1) to negotiate higher reimbursements with health plans, and (2) charge more services at the higher hospital billing rates. This will raise costs to consumers").

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, because competitors are *benefited*—not injured, as required for Article III standing—by their rivals' price increases. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) ("[A]s petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price."); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999).[4] In particular, competitors have no standing to challenge a merger on the ground that the merger would increase concentration or raise prices for consumers. *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 319 (D.D.C. 2011) ("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.") (citations and internal quotation marks omitted; alterations in original); Areeda ¶ 335f (same). The private plaintiffs here do not and cannot dispute this point. *See* Dkt. 37 at 6 (recognition by private plaintiffs that "higher prices will not harm Plaintiffs"); Dkt. 151 at 5-6 (statement by private plaintiffs that they are not "complaining about the harm to them from increased prices").

Because the private plaintiffs are not injured by increased prices, they could not advance any claim to enjoin the Saltzer transaction on the ground that it would cause increased prices.

[4] *See also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 348a-b (3d ed. 2007) ("Areeda") ("[A] rival is actually benefitted if its rivals merge … with the result that prices in the market increase. Such rivals lack injury-in-fact and are denied standing….").

Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1056 (9th Cir. 1999) ("[t]here can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct"). Under the law, they had no Article III standing to seek divestiture based on any claim that the transaction would lead to increased prices. *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"); *Sprint Nextel Corp.*, 821 F. Supp. 2d at 319-20 (dismissing private plaintiffs' suit to enjoin merger of two competitors for lack of standing, and explaining that "[w]hether the result of an increase in market concentration, or the oligopolistic price coordination that excessive concentration … portends, an increase in market prices alone does not harm competitors") (citation and internal quotation marks omitted; ellipsis in original).

The Court's judgment that the Saltzer transaction should be unwound because it is likely to lead to increased prices thus is not a judgment on any claim that was or could have been advanced by the private plaintiffs. In other words, if the government plaintiffs' claims had not been consolidated with those of the private plaintiffs, and if the Court had adjudicated the private plaintiffs' claims alone, the Court could not have entered—and would not have had jurisdiction under Article III to enter—the judgment that it did. That judgment thus is not in favor of the private plaintiffs. The private plaintiffs, therefore, did not prevail and are not entitled to fees. *See Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007) ("attorney's fees awards are available only to plaintiffs who prove an antitrust injury") (quotation marks and citation omitted).

B. The Court Did Not Grant Judgment On Any Claim The Private Plaintiffs Had Standing To Advance.

Nothing else in the Court's Findings of Fact or Conclusions of Law can be construed as a judgment in favor of the private plaintiffs. As competitors to St. Luke's, the only theory on

which the private plaintiffs could, as a matter of law, "prevail," is the theory that they would be harmed by exclusionary conduct—and that competition would in turn be harmed by foreclosure of the private plaintiffs' effective participation in a relevant market. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("[o]nly those arrangements whose 'probable' effect is to 'foreclose competition in a substantial share of the line of commerce affected' violate" the antitrust laws); Areeda ¶ 348d. The private plaintiffs sought to make this showing by establishing two forms of likely exclusionary conduct that would supposedly result from the transaction: (1) the Saltzer physicians would allegedly direct a sufficient volume of their referrals from private plaintiffs to St. Luke's that the private plaintiffs would be so financially crippled that competition itself would be harmed; and (2) St. Luke's would allegedly cripple private plaintiffs' networks by withdrawing Saltzer physicians from those networks, thereby harming both the private plaintiffs and competition in that way as well. *See generally* Pl. Pretrial Br., Dkt. 196, 26-33. In connection with their theories, the private plaintiffs contended that the transaction would produce anticompetitive effects in four additional product markets beyond the single market alleged by the government plaintiffs. *See* Dkt. 464 Conclusions ¶ 63. And they asserted that the transaction violated not only the Clayton Act, but also the Sherman Act. Dkt. 63 ¶¶ 131-41.

The Court's judgment did not adopt, or make factual findings sufficient to sustain, any of the private plaintiffs' theories. With respect to the market for adult primary care physician services, the Court did not make any finding that competition would be harmed by any form of exclusionary conduct. To be sure, the Court did find that referrals to St. Luke's would likely increase after the transaction. Dkt. 464 Findings ¶ 140. But the Court made no finding or conclusion that any of the private plaintiffs would be harmed as a result of any such referral shift,

let alone findings that plaintiffs would be so harmed that competition would be suppressed.[5] Nor did the Court hold that the transaction would lead to substantial foreclosure of competition in the market as a whole. Indeed, the private plaintiffs have conceded that their claim on this score played no role in the Court's decision. *See* Dkt. 493 at 5 ("the Court did not need to address this issue [the harm to private plaintiffs from loss of referrals] in its Findings of Fact and Conclusions of Law"). Nor did the Court enter any finding or conclusion on the private plaintiffs' claim that the transaction would lead to any adverse effect on network competition—another point the private plaintiffs have conceded had no effect on the Court's decision. *Id.* at 11 ("the Court did not need to reach this issue [harm to network competition] in its Findings of Fact and Conclusions of Law").

What is more, the Court expressly declined to make any ruling or findings concerning the four additional markets that the private plaintiffs alleged. Dkt. 464 Conclusions ¶¶ 63-65 ("The Court need not resolve the issues raised by the private plaintiffs because the Acquisition is being unwound due to its effects in the Nampa market for primary physician services."). The Court also did not enter judgment on the Sherman Act claim advanced only by the private plaintiffs. *See* Dkt. 471. Instead, the Court concluded only that the "FTC's Prima Facie Case" under the Clayton Act had been established, Dkt. 464 Conclusions ¶¶ 23-26, that the asserted defenses did not overcome that prima facie case, *id.* ¶¶ 27-49, and that divestiture was the appropriate remedy, *id.* ¶¶ 50-62; *see also id.* ¶¶ 78-80.

The private plaintiffs attempt to connect the claims *they* advanced with the judgment that the Court actually entered. They argue that "[t]he Court's findings that after a Saltzer acquisition St. Luke's would be in a position to raise prices … corresponds [sic] to allegations in the Private

[5] There was substantial evidence to the contrary—including from private plaintiffs' own expert. *See* Trial Tr. 1565:14-22, 1582:2-25 (D. Haas-Wilson).

Plaintiffs' Complaint." Pl. Br. 9. They also emphasize that the Court allowed them to present evidence related to "St. Luke's ability to control prices." Pl. Br. 9 (internal quotation marks omitted; quoting Dkt. 230 at 3). But the Court did not hold—and under the law could not have held—that the private plaintiffs had standing to seek judicial relief based on an expected increase in prices as a result of the transaction. *See* p. 10-12, *supra*. The Court merely permitted the private plaintiffs to present "evidence of St. Luke's past acquisitions that led to price increases," because such evidence was potentially relevant to the private plaintiffs' claim that a combined St. Luke's-Saltzer would have "market power, a crucial element of [Saint] Al's claim under § 1 of the Sherman Act," Dkt. 230 at 3-4—a claim on which the Court did not rule in the private plaintiffs' favor.

Actually proving that St. Luke's did engage or would likely engage in exclusionary conduct to the private plaintiffs' detriment, and proving that such conduct would suppress competition by foreclosing private plaintiffs from the market, would have required the plaintiffs to do more than merely allege or present evidence related to price increases. *See Sprint Nextel Corp.*, 821 F. Supp. 2d at 319-20 (allegation that merged entities would have power to increase prices was insufficient, "without more," to establish the likelihood of "injury-in-fact to" competitor plaintiffs; "an increase in market prices *alone* does not harm competitors") (emphasis added). While evidence of the power to increase prices may be relevant to proving the power to exclude competitors, showing that *these private plaintiffs* would in fact be substantially foreclosed from the market for primary care physician services in Nampa as a result of exclusionary conduct by St. Luke's required significantly more. *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1033-34 (9th Cir. 2001) (rejecting private plaintiffs' antitrust claims against merger of competitors where, even though prior FTC administrative action had

determined merger to be unlawful, private plaintiffs failed to show cognizable injury to themselves sufficient "to maintain a private antitrust action"). Indeed, the private plaintiffs' statements to the Court left no doubt that they were not claiming harm to themselves from increased prices *per se*. Dkt. 151 at 6 (recognition by private plaintiffs that "price increases, in and of themselves, visit no antitrust injury upon competitors"); Dkt. 37 at 6 (recognition by private plaintiffs that "higher prices will not harm Plaintiffs").

Here, the *only* ground for divestiture cited in the Court's Findings of Fact and Conclusions of Law was the likely effect on prices—a theory that the private plaintiffs could not pursue. That is fatal to their request for attorneys' fees, because the private plaintiffs cannot "prevail" on the merits of a claim they did not have standing to raise. *See Hannon*, 675 F.2d at 848. To be sure, the Court has ordered St. Luke's to divest Saltzer—but the Court's judgment was not entered in favor of the *private plaintiffs* on any claim that *they* advanced. The Court's conclusion that the transaction violated the Clayton Act, therefore, did not confer the "necessary judicial *imprimatur*" on the *private plaintiffs'* claims—and they accordingly did not "prevail." *Buckhannon*, 532 U.S. at 605.

C. The Case Law Cited By Private Plaintiffs Does Not Help Them.

No case cited by the private plaintiffs supports any other conclusion. Apart from having been decided prior to *Buckhannon*, the cases on which private plaintiffs rely do not address the question of whether a party "prevails" if the only judgment entered is one that it had no standing to seek. Instead, in the cited cases where the claimant was awarded fees,[6] the plaintiff—unlike private plaintiffs here—*actually obtained judicially ordered relief*.

[6] As explained above, p. 7-8, *supra*, both *Posada* and *Royal Crown Cola* (cited at Pl. Br. 4-6) applied the catalyst theory that was foreclosed in *Buckhannon*—but even so, neither case held that the plaintiff was entitled to fees.

Some of the cases cited by the private plaintiffs address the question of what fees are available to plaintiffs who obtain relief on only some of the claims they pressed rather than all. *See Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983) (cited at Pl. Br. 3-4) ("The issue in this case is whether a *partially* prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.") (emphasis added); *Sable Commcn's of Cal., Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 192 (9th Cir. 1989) (cited at Pl. Br. 4) (same). Here, however, the private plaintiffs did not obtain relief on *any* claim they had standing to advance, and thus have not crossed the "threshold" of prevailing party status. *Hensley*, 461 U.S. at 433.

Other pre-*Buckhannon* cases cited by the private plaintiffs hold that a party can be said to have "prevailed" even where government actors *also* contribute to obtaining relief. *See* Pl. Br. 4-6 (citing *United States v. Marengo Cnty. Comm'n*, 667 F. Supp. 786 (S.D. Ala. 1987); *Grumman*, 533 F. Supp. 1385; *United States v. Terminal Transport Co., Inc.*, 653 F.2d 1016 (5th Cir. 1981); *Juaridez v. Holyoke Housing Auth.*, 1988 WL 106014 (D. Mass. 1988)). But this argument, too, is irrelevant. Regardless of whether government plaintiffs *also* prevail, a private plaintiff must itself *obtain judicial relief in its own favor* in order to "prevail" for purposes of attorneys' fees. *See, e.g.*, *Marengo Cnty. Comm'n*, 667 F. Supp. at 799 (cited at Pl. Br. 4-5) (fees awarded where "plaintiffs' counsel did succeed in obtaining declaratory and injunctive relief"); *Grumman*, 533 F. Supp. at 1390 (cited at Pl. Br. 5) (fees awarded where "plaintiff successfully obtained preliminary injunctive relief"). None of the cases cited by private plaintiffs supports awarding fees to the private plaintiffs here—where no judgment or other judicially enforceable relief was entered in their favor, and where the *only* enforceable judgment was entered in favor of government plaintiffs alone.

III. NONE OF THE EVIDENCE PRIVATE PLAINTIFFS POINT TO SUPPORTS THE CONTENTION THAT THEY PREVAILED.

The majority of the private plaintiffs' brief is directed to evidence of their supposed "contributions" to various aspects of the case. Pl. Br. 7-18. As set forth above, *see* Part I, *supra*, whether a plaintiff has "substantially prevailed" is a "question of law that does not depend on the factual record." *Weissburg*, 591 F.3d at 1259 n.3. The degree of perceived significance of a plaintiff's "contributions" to a desired result are, at bottom, irrelevant to the legal question of whether the plaintiff has or has not secured enforceable judicial relief. Accordingly, the evidence of supposed "highly significant contributions" to which the private plaintiffs point is simply beside the point.

First, the private plaintiffs argue that the Court's Findings of Fact and Conclusions of Law "closely track[] … the allegations of the Private Plaintiffs." Pl. Br. 8. Without judicial relief in their favor, however, the mere fact that the Court agreed with various allegations of the private plaintiffs is irrelevant. The Supreme Court made this clear in *Hewitt v. Helms*, 482 U.S. 755 (1987). There, the Court held that a plaintiff alleging constitutional violations was not a "prevailing party"—even though the lower court had stated in an interlocutory ruling that the plaintiff's constitutional rights were in fact violated—because no judgment was entered in favor of the plaintiff, and the plaintiff accordingly "received no judicial relief." *Id.* at 760; *see also Matthew V.*, 244 F. Supp. 2d at 1340 ("the moral satisfaction of a favorable statement of law cannot bestow prevailing party status"). Similarly, with no "judicial relief" granted on the private plaintiffs' claims here, any consistency between this Court's findings and the private plaintiffs' allegations does not mean that the private plaintiffs have "substantially prevailed."

Second, the private plaintiffs contend that their "Motion for Preliminary Injunction substantially contributed to the outcome in this case." Pl. Br. 9. That is so, the private plaintiffs

say, because the motion caused St. Luke's to make "concessions," and because the private plaintiffs offered evidence and argument "on the specific issues on which the Court ultimately ruled." *Id.* at 10-12. Neither contention has merit.

Private plaintiffs' motion for a preliminary injunction was *denied*. Dkt. 47. Moreover, the representations made by St. Luke's at the preliminary injunction hearing to the effect that St. Luke's would not further integrate Saltzer pending a hearing on the merits had already been offered to the FTC in order to give the FTC more time to evaluate the transaction. Thus, the private plaintiffs not only failed to obtain judicial relief, but also achieved nothing that had not already been obtained by the FTC during its lengthy investigation of the Saltzer transaction. At the very most, the preliminary injunction hearing was a catalyst for St. Luke's representations to this Court—and not sufficient to cause the private plaintiffs to "prevail" within the meaning of the statute. *Buckhannon*, 532 U.S. at 605-06. And the argument of the private plaintiffs that they are entitled to fees because they offered evidence and argument on issues on which the government plaintiffs prevailed fails to take account of the standard set forth in *Buckhannon*. That standard requires judicial relief in favor of the private plaintiffs—and there is none.

Finally, the private plaintiffs recount the efforts of their counsel during the discovery phase, the trial, and closing argument. They contend that these efforts amount to "contributions" that were "highly significant." Pl. Br. 14-18. The private plaintiffs purport to support their argument with declarations from counsel for the government plaintiffs offering their impressions of the private plaintiffs' contributions. Decl. of B. DeLange ¶ 4 ("In my opinion, the Private Plaintiffs made important and substantial contributions to the ultimate outcome of this case."); Decl. of T. Greene ¶ 5 ("the contributions of the private plaintiffs were significant"). Even the private plaintiffs' attorneys have submitted declarations describing their own "extensive

experience," "substantial knowledge," "key insights," "expertise," and "importan[ce]." Decl. of D. Ettinger ¶¶ 2-4; Decl. of K. Duke ¶¶ 2-4. However, neither the scope of the private plaintiffs' efforts, nor the subjective impressions of counsel for the government plaintiffs, nor the self-regard of private plaintiffs' counsel has any bearing on whether the private plaintiffs secured an enforceable judgment—a question of law. However "significant" private plaintiffs' "contributions" may have been, they were not the basis of any judgment in favor of the private plaintiffs. Accordingly, the private plaintiffs did not substantially prevail.

St. Luke's has expended tremendous resources in defending a transaction that this Court has found was entered into in order to promote patient outcomes—and that, if allowed to go forward, would have that effect. Dkt. 464 p. 3. This Court has found that transaction to be unlawful. But it should not now interpret the governing law to force St. Luke's to pay millions of dollars to private plaintiffs who are not prevailing parties in this litigation—and who only stand to gain if St. Luke's were somehow to charge prices above competitive levels.

CONCLUSION

For the foregoing reasons the Court should hold that the private plaintiffs did not "substantially prevail," and should therefore deny the private plaintiffs' motions for attorneys' fees and costs.

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Respectfully submitted,

s/ J. Walter Sinclair

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2014, I filed the foregoing **ST. LUKE'S OPPOSITION TO PRIVATE PLAINTIFFS' MEMORANDUM ON ENTITLEMENT TO FEES AND COSTS** 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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