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UNITED STATES DISTRICT COURT

IN 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)

**PRIVATE PLAINTIFFS' OPPOSITION  
TO ST. LUKE'S MOTION FOR LEAVE  
TO FILE SUR-REPLY BRIEF ON  
ENTITLEMENT TO ATTORNEYS'  
FEES AND COSTS**

The Private Plaintiffs oppose St. Luke's Motion for Leave to file Sur-Reply Brief in

Reply to Private Plaintiffs Reply Memorandum on Entitlement to Attorneys' Fees and Costs

PRIVATE PLAINTIFFS' OPPOSITION TO ST. LUKE'S MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF  
ON ENTITLEMENT TO ATTORNEYS' FEES AND COSTS - 1

[Dkt. 500]. The proposed Sur-Reply is unnecessary, unjustified, duplicative, and will not aid the Court in its deliberations. In support thereof, the Private Plaintiffs state the following:

1. The briefing schedule on entitlement to fees and costs was arrived at by a stipulation of the parties, entered as an order by the Court, see Exs. A and B. There is no reason to diverge from that agreement.

2. St. Luke's attempts to justify its proposed Sur-Reply by arguing that the Private Plaintiffs' Reply Memorandum on Entitlement to Attorneys' Fees on Costs [Dkt. 499] ("Reply Mem.") for the first time argued that they were entitled to prevail under *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001) as "substantially prevailing" parties. However, *Buckhannon* was discussed at length in St. Luke's Opposition to Private Plaintiffs' Memorandum on Entitlement to Fees and Costs [Dkt. 497]. The Private Plaintiffs discussed *Buckhannon* in their Reply Brief, in response to St. Luke's, to explain how it is *irrelevant* here. See Reply Mem. at 3-4. Moreover, the Private Plaintiffs discussed their status as a "substantially prevailing" party in their initial brief. See Private Plaintiffs' Memorandum on Entitlement to Attorneys' Fees and Costs [Dkt. 487] ("Initial Memorandum") at 7-18.

3. In fact, St. Luke's proposed Sur-Reply Brief for the most part does not discuss *Buckhannon*, but attempts to repeat and reargue its previous positions, continuing to ignore the Court's previous rulings:

a. St. Luke's repeats its incorrect assertions that the Court's Findings on pricing and referrals are irrelevant here. But it continues to ignore the Court's conclusion in denying St. Luke's Motion for Summary Judgment that enhancement of St. Luke's ability to raise prices will also enhance its ability to exclude competition. This can, of

course, include the exclusion of competition by the Private Plaintiffs through shifting referrals. St. Luke's also asserts that this Court did not conclude that shifts in referrals would harm the Private Plaintiffs, when this Court specifically found that referrals to Saint Alphonsus Boise "dropped dramatically" after St. Luke's had purchased other practices. Findings of Fact and Conclusions of Law [Dkt. 464] at ¶¶ 136-139. The Court specifically concluded that "this trend will continue." *Id.* at ¶ 140.

b. The proposed Sur-Reply continues to repeat the false statement in St. Luke's Opposition that this Court entered a judgment only in favor of the Government Plaintiffs, when the Court's Orders and Findings say exactly the opposite. See Reply Mem. at 2.

4. The proposed Sur-Reply offers two new arguments, both issues that St. Luke's could have, and failed to, address in its Response:

a. The proposed Sur-Reply attempts to (improperly) distinguish *Sierra Club v. Hamilton County Board of County Commissioners*, 504 F.3d 634 (6th Cir. 2007), which St. Luke's failed to address in its Opposition, even though the case is the only one that is on "all fours" with St. Luke's (incorrect) characterization of the events in this case. See Reply Mem. at 6.

b. After having failed in its Opposition to dispute in any way the extensive evidence presented by the Private Plaintiffs in their Initial Memorandum regarding their substantial contributions to the outcome in this case, see Initial Memorandum at 7-18, the proposed Sur-Reply now conclusorily asserts for the first time that St. Luke's disputes that "the Private Plaintiffs made [even] some contribution" to the outcome in this case.

Sur-Reply at p.6. This effort to belatedly fill a critical gap in St. Luke's argument, without any support is inappropriate and unavailing.

5. For these reasons, the Sur-Reply does not respond to new arguments, and will not aid the Court in any way in its deliberations.

DATED this 9th day of May, 2014.

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