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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. Defendant.	Case No. 1:12-CV-00560-BLW **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiffs Saint Alphonsus Medical Center – Nampa, Inc. ("Saint Alphonsus Nampa"), Saint Alphonsus Regional Medical Center, Inc., and Saint Alphonsus Health System, Inc., (together "Saint Alphonsus"), and Treasure Valley Hospital Limited Partnership ("Treasure Valley") (collectively "Plaintiffs"), seek to preliminarily enjoin Defendant St. Luke's Health System's ("St. Luke's") proposed acquisition of Saltzer Medical Group ("Saltzer"). In the absence of such relief, the proposed acquisition would enhance St. Luke's monopoly power, raise prices and threaten the care provided by Saint Alphonsus Medical Center and Treasure Valley.

Unfortunately, this is a pattern that Idaho communities have seen before. Over the last two years, St. Luke's has engaged in a series of acquisitions in the Boise, Idaho area that are unprecedented in their magnitude, scope, and rapidity. St. Luke's has acquired more than 20 physician practices. St. Luke's is now seeking to acquire Saltzer, the largest and oldest medical practice in Idaho.

If not enjoined, St. Luke's acquisition will create a clear violation of Section 7 of the Clayton Act, because it will give St. Luke's a market share of 67% of primary care physician services. Where an acquisition would "produce[] a firm controlling an undue percentage share of the relevant market, and result[] in a significant increase in the concentration of firms in that market," the likelihood that competition will be substantially lessened is so great "that it must be enjoined in the absence of evidence clearly showing that the [acquisition] is not likely to have such anticompetitive effects." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *see also FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1219 (11th Cir. 1991) (concluding that the plaintiff had "clearly established a prima facie case of anticompetitive effect" where the merged healthcare entity would control approximately 43% of the market); *FTC v. ProMedica*, No. 3:11-

cv-47, 2011 WL 1219281, at *12 (N.D. Ohio Mar. 29, 2011) (finding, "[b]y a wide margin," that the proposed hospital acquisition was "presumptively anticompetitive" where the merged entity would control 58.3% of the market).

The evidence shows that St. Luke's will also use such power to foreclose competition for referrals of patients to the hospital market, where it is dominant with a 58% market share. When St. Luke's has acquired physician practices in the past, the physicians have generally treated at least 90% (in several cases 100%) fewer patients at Saint Alphonsus and Treasure Valley. Similar foreclosure can be expected after a Saltzer acquisition.

The transaction also threatens to cause substantial and irreparable harm to Saint Alphonsus Nampa, Treasure Valley and the Nampa community as a whole. Saltzer physicians are currently responsible for a significant number of the patients at Saint Alphonsus Nampa and Treasure Valley. The Saltzer acquisition threatens to reduce dramatically the hospitals' revenues, force layoffs that will cost the community more than 150 jobs, and compel the reduction or elimination of many critical programs and services. This will be especially devastating to a community that depends on Saint Alphonsus Nampa as the "safety net" for the poor and uninsured. Both hospitals will also be forced to reduce or eliminate efforts to expand and improve care.

Moreover, the transaction will irreparably harm all the Plaintiffs, because it will provide St. Luke's with a greater ability to obtain exclusive or preferential treatment from payors and employers and disrupt Plaintiffs' provider networks offered to managed care and employers.

There is only one way to forestall this threatened irreparable harm – the Court should enjoin St. Luke's from acquiring Saltzer.

II. STATEMENT OF FACTS

The pertinent factual background providing full support for Plaintiffs' claims against St. Luke's and Plaintiffs' request for injunctive relief is set forth in the Statement of Material Facts.[1]

III. ANALYSIS

A. Preliminary Injunctive Relief Under the Clayton Act

Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. In determining whether to provide injunctive relief under § 16, courts apply the "same principles as generally applied by courts of equity." *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1472 (9th Cir. 1985); *see also* 15 U.S.C. § 26; *California v. Am. Stores Co.*, 495 U.S. 271, 281-82 (1990). "Injunctive remedies under section 16 may be as broad as necessary to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur." *IT&T Corp. v. Gen. Tele. & Elec. Corp.*, 518 F.2d 913, 925 (9th Cir. 1975), *overruled on other grounds by Am. Stores Co.*, 495 U.S. 271.

A court must consider the following four factors when exercising its power to issue preliminary injunctive relief: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable injury in the absence of preliminary relief; (3) that the balance of equities tips in plaintiff's favor; and (4) the public interest favors such relief. *Toyota Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). In the Ninth Circuit "[a] preliminary injunction is

[1] While certain of Plaintiffs' statements of fact are supported by limited hearsay, such evidence may be considered at this stage of the proceedings. *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) ("A district court may, however, consider hearsay in deciding whether to issue a preliminary injunction").

[also] appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-35 (9th Cir. 2011) (internal quotations omitted). As set forth below, Plaintiffs amply satisfy each of the requirements for injunctive relief.

B. Plaintiffs Will Succeed on the Merits of Their Claims

St. Luke's proposed acquisition of Saltzer would clearly violate Section 7 of the Clayton Act and Section 1 of the Sherman Act. The acquisition combines the two largest primary-care physician practices in Nampa, leaving only one remaining significant competitive physician practice, and creates an entity with a near monopoly-level market share. Under relevant case law and the federal government's *Merger Guidelines*, the acquisition is clearly unlawful.

This transaction will also foreclose competition at the hospital level by controlling the key source of referrals from Nampa, Saltzer's physicians. St. Luke's history and statements also make clear that the transaction will give it substantial market power, which it can and will use to harm consumers.

1. The Clayton Act Is Intended to Prohibit Restraints of Trade in Their Incipiency

The standard for an injunction in this context is not demanding. The Clayton Act prohibits an acquisition when "the effect of such acquisition *may be* substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). Congress purposefully used the phrase "may be" because the Clayton Act was designed to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 & n.39 (1962). Indeed, § 7 "requires a prediction, and

doubts are to be resolved against the transaction." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (citations omitted); *see also Am. Stores Co.*, 495 U.S. at 282 n.8.[2]

Transactions that result in "undue" concentration in a relevant market are presumed to be unlawful. *Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963). "[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n.42. "[M]ergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." Horizontal Merger Guidelines § 1.

2. The Relevant Markets Impacted by St. Luke's Proposed Acquisition

a. Primary Care Physician Services in Nampa

i. The Relevant Product Market is Primary Care Physician Services Sold to Commercial Third Party Payers

In order to analyze a proposed acquisition, the relevant product and geographic markets must first be identified. St. Luke's actions are anticompetitive, initially, in a product market consisting of adult primary care physician services sold to commercial third party payers. (Declaration of Deborah Haas-Wilson ("Haas-Wilson Decl.") ¶¶ 15(b), 61-64). Primary care physicians, including family practice physicians and general internists, provide day-to-day care for patients, referring them to specialists for more intensive or complex care. General

[2] The standard for analyzing acquisitions under the Sherman Act is the same. *See, e.g., Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp.*, 224 F. Supp. 2d 657, 666-67 (S.D.N.Y. 2002) ("Despite the utilization of different verbiage in the two Acts, standards of liability under the Clayton Act largely mirror those under the Sherman Act.) (*citing* Phillip Areeda, Hovenkamp, & Blair, Antitrust Law ¶ 637 (2d ed.2002).

Saint Alphonsus' and Treasure Valley's claims under the Idaho Competition Act will succeed for the same reasons as its federal claims. The Idaho Competition Act, Idaho Code §§ 48-104 and 48-106, generally tracks the language of the federal antitrust laws and the Idaho Competition Act is, therefore, "interpreted coextensively with the Sherman Antitrust Act." *Arrow Rock Int'l, Inc. v. DEX Media, Inc.*, No. CV05-339-S-EJL, 2006 WL 1793554 (D. Idaho, June 28, 2006) (citing *State v. Daicel Chemical Indus., Ltd*., 106 P.2d 428, 432 (Idaho 2005).

pediatricians provide primary care to children, but do not do so for adults, and OB/GYN physicians only occasionally do so for adults. (*Id.* at ¶ 63; Declaration of Nancy Powell ("Powell Decl.") ¶ 2). Therefore, no reasonable substitutes exist for family medicine physicians and general internists, and such primary care physicians represent a distinct product market. *Itasca Clinic and Grand Rapids Med. Assocs*., 1996 WL 285712, *DOJ Bus. Rev. Letter* (Mar. 19, 1996) (evaluating "the likely competitive effects of the proposed merger . . . in two relevant health care product markets," including "primary care services provided by family practice doctors and internists")*.*

The health care antitrust cases have recently focused on commercially insured patients as a separate product market, because it is those patients who are affected by the critical antitrust question – can a provider, by gaining market power, demand higher prices? This is not a concern for Medicare or Medicaid patients, since the government sets the rates. (Haas-Wilson Decl. ¶ 15(a).)[3] Moreover, people who are commercially insured and do not meet the age or poverty requirements of Medicare or Medicaid cannot turn to Medicare or Medicaid as a substitute for commercial insurance. (*Id.*) Therefore, these commercially insured patients are a distinct product market. *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012); *ProMedica*, 2011 WL 1219281, at *9.

ii. The Relevant Geographic Market for Primary Care Physician Services is Nampa

Here, the relevant geographic market is no broader than Nampa, because most patients do not desire to travel outside of their local community for primary care physicians' services. "The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute some products…" FTC/DOJ *Horizontal*

[3] Medicare Advantage plans and Medicaid HMOs fall within the commercially insured market.

Merger Guidelines § 4.2.[4] "Market definition focuses solely on demand substitution factors, *i.e.*, on customers' ability and willingness to substitute away from one product to another in response to a price increase…." *Id. at* § 4. "[C]ustomer convenience and preference can narrow the geographic scope of a market . . ." Phillip E. Areeda et al., IIA Antitrust Law ¶ 553, at 278 (2d ed. 2002).

Patients do not wish to travel significant distances to see a primary care physician for routine visits such as a checkup or treatment of a cold. (Haas-Wilson Decl. ¶¶ 73-82; Powell Decl. ¶ 4; Declaration of Michael Roach, M.D. ("Roach Decl.") ¶ 2.) As a result, employees expect their employer to choose a health care plan which offers primary care physicians in their home town. It is critical for primary care physicians to be convenient and located close to where their patients live. (Powell Decl. ¶¶ 4-7.) It is therefore important for a successful managed care network to provide reasonable access to a sufficient number of primary care providers in each local community. A network that requires a large number of its members to travel significant distances for primary care physician services is likely to be unattractive and unsuccessful. (Declaration of William Eggbeer ("Eggbeer Decl.") ¶ 7.)

For this reason, if a particular provider owns or controls most of the primary care physicians in a local community, that provider may become a "must have" provider for managed care plans, and gains significant leverage, with the ability to raise prices. (Eggbeer Decl. ¶ 10; Haas-Wilson ¶¶ 18(a), 33.)

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[4] Courts have routinely applied the government's *Merger Guidelines* in their analyses. *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 432 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws); *United States v. H&R Block*, 833 F. Supp. 2d 36, 52 n.10 (D.D.C. 2011) ("The *Merger Guidelines* are not binding upon this Court, but courts in antitrust cases often look to them as persuasive authority."); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) ("Although the *Merger Guidelines* are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues.").

This conclusion certainly applies to Nampa. Nampa residents especially wish to receive primary care physicians' services very locally, whenever possible. (Declaration of Randy Hutchings ("Hutchings Decl.") ¶ 2; Declaration of Susan Bundgard ("Bundgard Decl.") ¶¶ 3-4; Powell Decl. ¶¶ 4-7.)

The pattern of admissions by Saint Alphonsus Medical Group ("SAMG") primary care physicians illustrates the very short distances that patients wish to travel for routine primary care. (Haas-Wilson Decl. ¶¶ 74-80, Exhibit 2.) SAMG has offices in Meridian, Nampa and Caldwell. Seventy-eight percent of the Nampa residents treated by SAMG primary care physicians utilize the SAMG Nampa clinics. (*Id.* at ¶ 74, Exhibit 2.)[5] Only 15% utilize the Caldwell or Meridian offices. (*Id.* at Exhibit 2.) Seventy-eight percent of the patients at SAMG's Nampa clinics reside in Nampa. *Id.* In fact, most patients in Nampa utilizing SAMG primary care physicians travel 11 miles or less for their care. (*Id.* at Exhibit 2A.)

The relevant geographic market does not include other communities in Canyon County, such as Caldwell. SAMG's data indicates less than 10% of Nampa residents using SAMG physicians go to SAMG's Caldwell clinics for primary physician care (Haas-Wilson Decl., Exhibit 2), and most Nampa employees would not be satisfied if their employer only offered them Caldwell and Meridian physicians in their primary care network. Nor would they be satisfied with a network that included Nampa primary care physicians only upon payment of a financial penalty, such as a greater co-pay, deductible or premium. (Bundgard Decl. ¶ 4; Declaration of Blaine Petersen ("Petersen Decl.") ¶ 3.)

[5] SAMG data is utilized because other data, from St. Luke's and from payors, cannot be obtained without discovery. St. Luke's has opposed expedited discovery.

Caldwell primary care physicians do not regard Nampa as part of their market. (Roach Decl. ¶ 3.) Even the SAMG Caldwell physicians do not possess admitting privileges at Saint Alphonsus Nampa. (Powell Decl. ¶ 8.)

As a result, primary care physicians in Caldwell are not a reasonable substitute for such physicians in Nampa. As the federal antitrust agencies warn, "[d]efining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes from the market is unlikely to be commensurate with their shares in a broad market." *Horizontal Guidelines* § 4.

Here, the "customer" is also in a relevant sense the managed payors, such as Idaho Blue Cross, the entity that pays for commercial insured health care services. (Haas-Wilson Decl. ¶¶ 21-33); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1083-85; *ProMedica*, 2011 WL 1219281, at *5-9.[6] Every significant payor marketing in the Boise area, including Blue Cross and Regence Blue Shield, among others, has in its network substantial numbers of primary care physicians in Nampa. (Haas-Wilson Decl. ¶ 83.)

This reflects the payors' recognition of the need for Nampa primary providers to treat Nampa patients. In fact, Nampa area employees have demanded that payors include the local Saltzer physicians in their networks. (Affidavit of Counsel in Support of Motion for Preliminary Injunction ("Counsel Aff."), Ex. A, Deposition of Nancy Powell ("Powell Dep.") at pp. 29-32;

[6] The more recent health care cases involve a recognition that health care is now characterized by "two stage competition", where price competition involves negotiation with managed care plans, and decisions of consumers are likely based not on price but on convenience and preference. *See, e.g., OSF Healthcare Sys.*, 852 F. Supp. 2d at 1083-85; *ProMedica*, 2011 WL 1219281, at *5-9; *In the Matter of Evanston Northwestern Healthcare Corp.*, 2007 WL 2286195, *5-7 (F.T.C. Aug. 06, 2007). The analysis in some of the earlier health antitrust cases does not reflect this pattern. *See, e.g.*, *FTC v. Freeman Hospital*, 69 F.3d 260, 70, n. 14 (8th Cir. 1995); *In United States v. Mercy Health Services*, 902 F. Supp. 968, 981-81 (D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997); *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1049-50 (8th Cir. 1999).

Petersen Decl. ¶ 3; Bundgard Decl. ¶ 5.) The importance of Saltzer to Nampa area employees is illustrated by a November 2010 communication from Saint Alphonsus to its own employees, noting that, [i]f you use a Saltzer Medical Group physician, you may have been advised that he or she would no longer be participating in the Saint Alphonsus provider network as of January 1, 2011. We're pleased to announce that our agreement with Saltzer has been extended at least through June 30, 2011…." (Counsel Aff., Ex. H, Saint Alphonsus Newsletter Story, Saltzer Group Agreement Extension, dated November 19, 2010).

Any managed care plan or network that only offered primary care physicians in Meridian and Caldwell and not in Nampa, or only offered Nampa physicians upon payment of a financial penalty, would certainly not be acceptable to any employer with significant numbers of Nampa employees. (Powell Decl. ¶ 3; Bundgard Decl. ¶ 4.)

As a result, employers would be willing to pay a higher price for health care in order to obtain an adequate network. (Petersen Decl. ¶ 3.) Of course, this would give a provider, such as a combined St. Luke's/Saltzer, with a dominant position in primary care in Nampa, the ability to raise prices based on the confidence that payors have very few alternatives.

These constraints on managed care payors are critical to market definition. "The costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the … geographic market" are highly relevant in assessing the bounds of the relevant geographic market. *Horizontal Merger Guidelines* § 4.2.1. Here, payors would not readily switch away from Nampa providers because they are too important to their networks. Thus, in *ProMedica*, 2011 WL 1219281 at *10, the court found that the geographic market for hospital services was Lucas County because, among other things, health plans "would not be able to market health plan networks to Lucas County residents that consist solely of hospitals outside of Lucas

County." The same logic that led the *Promedica* court to find that Lucas County is a relevant hospital market leads to the conclusion that Nampa is a relevant market for primary care physicians.

b. General Pediatric Services in Nampa

St. Luke's actions will also give it market power in a product market consisting of general pediatric services sold to commercial third party payers. (Haas-Wilson Decl. ¶ 100, Exhibit 5.) The medical specialty of general pediatrics focuses on the medical care of infants, children, and adolescents. (Haas-Wilson Decl. ¶¶ 65-67.) It is critical for the success of any managed care plan that the networks it offers include, among other things, a broad range of primary care physicians, including physicians specializing in family medicine, general internal medicine, and general pediatrics. Many, if not most families, depend on these doctors as their first source for routine care, and have a regular family medicine physician, general internist, and/or general pediatrician on whom they rely. They expect to find these doctors in their network, and will typically express dissatisfaction with health plans that do not include their personal physicians in their networks. (Eggbeer Decl. ¶ 6.) *Children's Healthcare, P.A.*, 1996 WL 103381, DOJ Letter (Mar. 1, 1996) ("primary care provided by pediatricians appears to be the relevant service market….")

Like the geographic market for primary care physicians, the geographic market for general pediatric services is local as well. (Haas-Wilson Decl. ¶ 82.) *See Children's Healthcare, P.A.*, 1996 WL 103381, DOJ Letter (Mar. 1, 1996).

c. General Acute-Care Inpatient Services in the Boise MSA

The acquisition also threatens substantial harm to competition in a separate product market – general acute-care inpatient hospital services sold to commercial health plans ("general acute-care services"). (Haas-Wilson Decl. ¶¶ 15(b), 69-71.) General acute-care services

encompass a broad cluster of medical and surgical diagnostic and treatment services that include an overnight hospital stay. (*Id.* at 69.) The courts have consistently recognized that general acute-care services constitute a relevant product market. *See, e.g., OSF Healthcare Sys.*, 852 F. Supp. 2d at 1075-76; *ProMedica*, 2011 WL 1219281, at *54 ("This is a 'cluster market' of services that courts consistently have found when analyzing hospital mergers.").

The relevant geographic area in which to analyze the effects of St. Luke's actions in the general acute-care services market is no broader than the Boise City-Nampa Metropolitan Statistical Area. (Haas-Wilson Decl. ¶ 87). Patients will travel farther for (more serious and less frequent) hospital care than to see a primary care physician, but the services are still generally provided locally. *See, e.g., ProMedica*, 2011 WL 1219281, at *10 (defining the relevant geographic market as a single county); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1077 (defining the relevant geographic market as the "30–minute drive-time radius from Rockford.").

Due to the lack of competitive hospital alternatives within any reasonable distance outside of the Boise MSA, there is no conceivable broader geographic market. The nearest significant general acute-care hospitals not already owned by St. Luke's or Saint Alphonsus are more than 100 miles from the Boise area. (Haas-Wilson Decl. ¶ 87.) No court has ever found a hospital geographic market that approaches the size that would be necessary to encompass such distant alternatives.

3. The Acquisition Would Result in Anticompetitive Effects in the Primary Care Physician Market

a. Concentration

The proposed acquisition, if permitted to go forward, will result in a highly concentrated primary-care physician services market with one dominant firm – St. Luke's. St. Luke's post-acquisition market share in the primary care physician services market will be at least *67%*.

(Haas-Wilson Decl. ¶ 97, Exhibit 5.)[7] This will be effectively a "3 to 2" merger, leaving only two significant competitors, St. Luke's and (the much smaller) SAMG. (*Id.* at Exhibit 5.)[8]

Such concentration is far in excess of the levels considered unlawful under the case law. *See* discussion, *infra* §§ III.B.3.a & b. The same is true under the FTC/DOJ *Horizontal Merger Guidelines*. The *Merger Guidelines* measure market concentration using the Herfindahl-Hirschman Index ("HHI"). "The HHI is calculated by summing the squares of the individual market shares of all the participants," thereby giving "proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions." *Horizontal Merger Guidelines* § 1.5. The courts have approved of the use of the HHI index to measure market concentration. *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1079; *see also United States v. JDS Uniphase Corp*., No. COO2227, 2000 WL 33115892, at *6 (N.D. Cal. Oct. 3, 2000) (noting that the HHI is a "commonly used" measure of market concentration).

In the horizontal context, an acquisition is presumed likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the acquisition increases the HHI by more than 200 points. *Horizontal Merger Guidelines* § 1.51; *ProMedica*, 2011 WL 1219281, at *12. The market concentration levels here exceed these thresholds by a wide margin. The post-acquisition HHI in the primary-care physician services market will increase by over 2,100 points to over 5,000. (Haas-Wilson Decl. ¶ 102.)

Moreover, preliminary injunctions are frequently granted in transactions, like this, that lead to a "merger to duopoly," that is, a 3-to-2 merger. *See, e.g., FTC v. H.J. Heinz Co.*, 246

[7] In fact, the combined market share of St. Luke's and Saltzer is likely to be significantly higher than these entities' share of physicians by head count. The Saltzer physicians see significantly more patients per physician than do other doctors in the area, such as the SAMG physicians. (Powell Decl. ¶ 12.)

[8] Indeed, St. Luke's personnel have indicated that they wish to make the Saltzer deal in order to gain market share. (Statement of Facts ("SOF"), *supra* at 23.

F.3d 708, 717 (D.C. Cir. 2001); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 547 (7th Cir. 1999) (a likely Clayton Act Section 7 violation warranting a preliminary injunction was found where "the merger would reduce the worldwide number of firms that design and manufacture landing gear for each of these three markets from three to two"); OSF Healthcare System, 852 F. Supp. 2d at 1071 (preliminary injunction granted where merger would reduce number of competing hospitals from three to two).

b. The Acquisition Would Result in the Loss of Price Competition and Increased Bargaining Power for St. Luke's

These anticompetitive effects will certainly not be limited to market share. Once St. Luke's – which has already acquired many of the most popular physician groups – has acquired Saltzer, St. Luke's will further enhance its status as a "must have" provider.

The Idaho healthcare community has already seen the effects of St. Luke's anticompetitive actions. As a result of the acquisitions of all of the hospitals and numerous physician practices in the Magic Valley, St. Luke's currently controls (through employment or professional service agreement) 100% of the specialists in pediatrics, urology, radiology, pathology and obstetrics/gynecology in Twin Falls. (Declaration of Peter Doble, M.D. ("Doble Decl.") ¶ 2.) St. Luke's has a dominant (more than 50%) share of internists, primary care physicians, orthopedic surgeons, gastroenterologists and general surgeons in the area. (*Id.)*

As a result of this consolidation, St. Luke's has been able to charge supra-competitive prices. For example, the price for MRIs has increased from around $900-$1,000 to $2,000-$3,000 in the last five years. (Doble Decl. ¶ 3.) Similarly, the price for CT Scans has increased from approximately $600-$700 to approximately $1,200 to $1,400 over this same period. (*Id.*) Visits to the emergency room have increased from approximately $1,300-$1,400 to $5,000. (*Id.*) As a result of these supra-competitive prices, physicians in Twin Falls are forced to send patients

to medical centers in Burley (40 miles away) and Rupert (48 miles away) for MRIs and CT Scans, respectively, to save their patients anywhere from between $400-$500 for CT Scans and $1,000 - $2,000 on MRIs. (*Id.* at ¶ 4.)

As John Kee of St. Luke's has admitted, St. Luke's strong network in the Magic Valley area has allowed it to raise prices above Saltzer's level. (Powell Decl. ¶ 23.) Mr. Kee has stated that Saltzer had more negotiating power with managed care than it realized. (Powell Decl. ¶ 23.) There is no doubt (as Mr. Kee implied) that St. Luke's, owning Saltzer, will be able to raise prices as well in the Treasure Valley. (*Id.*) Health plans will no longer have the ability to drop St. Luke's or Saltzer from their networks, or even credibly threaten to do so. (Haas-Wilson Decl. ¶¶ 18(a), 29-33, 100.) Without that ability, they will be unable to resist St. Luke's demands. (*Id.* at ¶ 100; Counsel Aff., Ex. A, Powell Dep. p. 28.)[9]

The evidence here goes far beyond the predictions of potential harm that is typical in the merger cases. There is hard evidence of past conduct, and current intentions, that make the dangers all too clear.

Saltzer's already existing strength with managed care is illustrated by its experience with Regence Blue Shield. When Regence was trying to move the Nampa School District from traditional to PPO insurance coverage, the "Nampa school district told [Regence that it] wouldn't sign . . . the PPO product unless Saltzer was in the network . . . . Regence came back and offered [Saltzer] traditional rates in the PPO product to get [Saltzer] to be in the PPO network." The traditional rates were 5 to 6 percent higher than the PPO rates. (Counsel Aff., Ex. A, Powell

[9] This past example is strong evidence of what will occur in the future. "The Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative." *Horizontal Merger Guidelines* §2.1.2.

Dep. 31, 66-67.) A combination with St. Luke's will result in even more power, and higher prices. (Powell Decl. ¶¶ 23, 27.)

This dynamic creates a "Hobson's choice" for payors: "inflated rates" or "an unmarketable network." Such an outcome would clearly be anticompetitive. *United States v. Fed'n of Certified Surgeons and Specialists*, No. 99-cv-167, Compl. ¶ 22 (M.D. Fla.) (consent decree entered on June 1, 1999); *see also ProMedica*, 2011 WL 1219281, at *27 (finding that the proposed acquisition would "provide ProMedica with increased bargaining leverage against health plans, enabling ProMedica to raise rates at St. Luke's and ProMedica's other Lucas County Hospitals[,] . . . [which] would result in higher healthcare costs for employers and their employees").

Indeed, the anticompetitive effects here could be even greater. St. Luke's personnel have discussed their goal of ending any relationship with Blue Cross. (Powell Decl. ¶¶ 24.)

Anticompetitive effects will also arise from the elimination of close substitutes. There are only three competitors with significant primary care clinics in Nampa: Saltzer, St. Luke's and SAMG. St. Luke's is certainly one of only two geographically close substitutes for Saltzer's Nampa offices, and the elimination of their competition provides only one significant nearby alternative for commercially insured patients. (Haas-Wilson Decl., Ex. 5, 6A.)

Where a merger eliminates one of a few close substitutes, that in and of itself creates undue market power and therefore anticompetitive effects. *In the Matter of ProMedica Health System, Inc.*, 2012-1 Trade Cases P 77840, 2012 WL 1155392, *32 (F.T.C. 2012) ("Combining competitors for which consumers view the firms' products as significant substitutes may enable the merged firm profitably to increase prices. It reduces the value of an MCO's walk-away network and consequently reduces its bargaining leverage.").

This power will also allow St. Luke's to succeed in its campaign to interfere with Saint Alphonsus' and Treasure Valley's competitive efforts. (SOF ¶¶ 21-26.) St. Luke's efforts to obtain volume at Micron by using its acquired physicians as leverage failed when Micron was informed that the result would be a huge cost increase, on the order of 30%.[10] (Declaration of Allison Robbins ("Robbins Decl.") ¶ 10.) As St. Luke's acquires more power from the Saltzer acquisition, this and similar demands are more likely to be successful.

Saltzer has already informed Saint Alphonsus that it plans to withdraw from the network that Saint Alphonsus and Saltzer currently provide for subscribers of the "True Blue" Medicare Advantage product offered by Idaho Blue Cross. Saltzer provides the only physicians to the True Blue network in Nampa. (Petersen Decl. ¶ 4.)

4. Anticompetitive Effects in the General Acute Care Services Market

Harm in the general acute-care services market will result from "vertical" effects, the impact of physician acquisition in the "downstream" hospital market. The potential for anticompetitive effects resulting from vertical transactions has long been a concern of the antitrust laws. In *Brown Shoe*, for example, the Supreme Court declared, "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, . . . which deprive[s] . . . rivals of a fair opportunity to compete." 370 U.S. at 323-24 (internal quotation marks omitted); *see also Ash*

[10] Such an increase is far beyond the "small but significant" increase which is indicative of undue market power under the antitrust laws. *See F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1052 (D.C. Cir. 2008) ("Because '[m]erger enforcement, like other areas of antitrust, is directed at market power,' ... the FTC therefore needs to make a sufficient showing that the merged company could exercise market power and profitably impose a 'small but significant and nontransitory increase in price,' typically meaning a five percent or greater price increase.") (internal citations omitted).

Grove Cement Co. v. FTC, 577 F.2d 1368, 1379 (9th Cir. 1978) (upholding FTC determination that acquisition of two purchasers violated § 7); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 445-46, 463 (N.D. Cal. 1967) (finding acquisition of paper distributor by leading paper maker unlawful).

These concerns have arisen specifically in health care. For example, the FTC/DOJ *Statements of Antitrust Enforcement Policy in Health Care* state that "a hospital might use a multiprovider network to block or impede other hospitals from entering a market or from offering competing services." FTC/DOJ, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 9 http://www.ftc.gov/bc/healthcare/industryguide/policy/statement9.htm); *Cason-Merenda v. Detroit Med. Ctr.*, 2012 WL 995293, *33 (E.D. Mich. Mar. 22, 2012) (citing the FTC/DOJ Policy Statements).

There is no doubt that St. Luke's acquisition of Saltzer will result in the foreclosure of a critical source of patients – the Saltzer physicians. (Declaration of Karl Keeler ("Keeler Decl.") ¶¶ 10-13, 17.) Saltzer referrals are vital to the economic well-being of Saint Alphonsus Nampa and Treasure Valley. (*Id.* at ¶¶ 6-7, 14-16; Declaration of Lannie Checketts ("Checketts Decl.") ¶¶ 4-7; Declaration of Nicholas Genna ("Genna Decl.") ¶¶ 4-6.) But the behavior of St. Luke's and Saltzer leaves no doubt that these admissions will cease – almost as quickly as a spigot can be turned off – after an acquisition. The evidence is overwhelming:

- When St. Luke's has acquired practices in the past, this has typically reduced admissions by those practices at Saint Alphonsus and at Treasure Valley by **90-100%.** (SOF at ¶ 12.)
- When St. Luke's acquired seven physicians employed by SAMG in Nampa, their admissions at Saint Alphonsus Nampa declined to virtually **zero**. (Haas-Wilson Decl. ¶¶ 118-119, Exhibit 12.)
- When Saint Alphonsus acquired Mercy Medical Center, the St. Luke's oncologists located *across the street* from Saint Alphonsus Nampa nevertheless

ceased practicing at that hospital. (Keeler Decl. ¶ 12; Counsel Aff., Ex. B, Keeler/Checketts Dep. pp. 72-74.)

- St. Luke's Nampa cardiologists, who are located within feet of the Saint Alphonsus Nampa hospital, nevertheless, also send their patients outside the community for hospitalization, presumably to St. Luke's Meridian or Boise. (*Id.*)

There are already strong indications that Saltzer will follow the same pattern. Salter employees have already been instructed to refer orthopedic cases to St. Luke's, rather than to the orthopedic surgeons who recently left Saltzer rather than participate in the St. Luke's acquisition. (Counsel Aff., Ex. G, Saltzer Medical Group Referral Information Memorandum.) Patients have already been informed that Saltzer will be recruiting new orthopedic surgeons. (Keeler Decl. ¶ 13, Exhibit A.) Indeed, the President of Saltzer has said that any referrals to Saint Alphonsus or Treasure Valley would be contrary to Saltzer's interests. (Declaration of Clark Robinson ("Robinson Decl.") ¶ 12.)

Indeed, statements made by St. Luke's personnel to Saltzer indicate that its goal is to completely foreclose competition for the business of the providers they acquire. St. Luke's wishes to have its patients seen by its own primary care physicians, have their surgeries performed by its specialists in its facilities, and have the ancillary services also performed at its facilities. (SOF at ¶ 25.) Substantial foreclosure here is not a mere possibility. It is a certainty.

Of course, foreclosure is not necessarily anticompetitive. It is foreclosure of a significant portion of a market or important sources of business that creates antitrust problems. But the shares of the markets affected here are substantially higher than is necessary to find an unlawful vertical combination. In *Ash Grove*, shares of the acquiring and the acquired firms in their respective "upstream" and "downstream" markets were 13-18% and 18% respectively. 577 F.2d at 1371. In *Kimberly-Clarke*, the relevant shares were 52-59% and 15%. 264 F. Supp. at 442-43. Here, Saltzer and St. Luke's will have a combined share in the Nampa primary care

physician market of well over 67%, a share in the Nampa pediatrician market of over 75%, and St. Luke's has a share in the general acute-care market of 58%. This transaction will result in foreclosure of the greater portion of the primary care physician and general pediatrician markets in Nampa, thereby providing even more power to the dominant player in the general acute-care market.[11]

The same conclusion applies under the FTC/DOJ *Merger Guidelines*. The *Merger Guidelines* state that vertical transactions will raise significant concerns in markets with HHI levels greater than 1,800. *Non-Horizontal Merger Guidelines* § 4.131. Here, as noted, in the primary care physician and pediatrician markets, the relevant post-acquisition HHI will exceed 5,000 and 8,000, respectively. In the relevant general acute-care services market, the HHI exceeds 4,500. (Haas-Wilson Decl. ¶¶ 18(a), 18(b), 102-104, Exhibits 5, 7.) These are clearly levels at which substantial harm from foreclosure is quite likely.

The competitive harm from foreclosure here will be even greater than the market shares would suggest, for two reasons. First, Saint Alphonsus Nampa critically depends upon physicians from the Nampa area. Admissions of Saltzer patients are the difference between the hospital's success and unprofitability. Saltzer physicians accounted for more than $15 million of Saint Alphonsus Nampa's net revenues in fiscal year 2012. (Checketts Decl. ¶¶ 2-6.)

Second, the Saltzer transaction cannot be viewed in isolation. St. Luke's has acquired more than 20 physician practices in the last two years. The cumulative effect of this foreclosure is even more anticompetitive than the foregoing numbers would suggest.

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[11] Moreover, one of the vertical anticompetitive effects here is the impact on barriers to entry from foreclosure of the admissions from the Saltzer physicians. If the Saltzer physicians are unavailable to admit to a new hospital, the likelihood of a new hospital competitor in the Nampa area would be severely reduced. (Haas-Wilson Decl. ¶¶ 130, 136.)

The harm to Saint Alphonsus Nampa and Treasure Valley from foreclosure will result in substantial harm to competition. Virtually, the only alternatives a payor has to St. Luke's in a Treasure Valley hospital network are Saint Alphonsus and Treasure Valley;[12] anything that weakens them makes them less viable alternatives for payors. This would be especially true in Nampa, where the harm to Saint Alphonsus Nampa makes it less likely that consumers (and payors) will see it as a viable substitute for St. Luke's Meridian in the eyes of local residents. (Petersen Decl. ¶ 5.)

Moreover, this foreclosure of competition for the referrals and admissions of Saltzer physicians will shift even more market share from Saint Alphonsus and Treasure Valley to St. Luke's. This threatens to increase St. Luke's already dominant 58% share to a near monopoly. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924-25 (9th Cir. 1980) ("market shares on the order of 60 per cent to 70 per cent have supported findings of monopoly power.").

Finally, the victims of foreclosure are not limited to the Plaintiffs. Independent specialists have lost referrals once St. Luke's acquired primary care groups who had previously provided them with substantial numbers of cases. (Doble Decl. ¶ 6.); (Declaration of Stephen Asher ¶ 4). These same specialists obtain significant business today from the Saltzer primary care physicians, and fear that that business will be lost after a Saltzer acquisition. The harm here permeates health care in the Treasure Valley.

5. Barriers to Entry Are High

Barriers to entry into the relevant markets are too high to offset any anticompetitive effects from the acquisition. For entry to counter market concentration, it must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive

[12] The only other alternative is West Valley Medical Center in Caldwell, at the far western end of the Treasure Valley.

effects" of a proposed acquisition. *Horizontal Merger Guidelines* § 9; *see also FTC v. Proctor & Gamble, Co.*, 386 U.S. 568, 579 (1967). Here, the prospect of new entry cannot come close to offsetting the competitive effects of an acquisition of Saltzer.

Entry is limited in two ways, by the difficulties in recruiting new primary care physicians to the Treasure Valley, and (especially) by the difficulties such new physicians face in attracting patients and thereby becoming competitive. Recruitment into Nampa is especially difficult and is a money-losing proposition, given the rural nature of the community, the less lucrative (high Medicare/Medicaid) payor mix, and Saltzer's dominance.[13] (Counsel Aff., Ex. A, Powell Dep. 18, 61; Ex. B, Deposition of Karl Keeler/Lannie Checketts ("Keeler/Checketts Dep.") at 65-68).

Most importantly, new primary care physicians in the Nampa area face formidable barriers to ever developing a fully successful practice. For a new physician practice to be successful, it needs to attract patients already in the area. (Declaration of Thomas Reinhardt ("Reinhardt Decl.") ¶¶ 10-11.) But these patients typically already see other primary care physicians, with whom they have developed a loyal relationship. (*Id.* at 10.) That is particularly true in Nampa, where Saltzer enjoys outstanding patient loyalty. (Powell Decl. ¶ 14.) It would be very difficult for doctors to come to Nampa and establish a primary care practice because "Saltzer [has] been in Nampa for 50 years . . . [and has] a very strong reputation in the community . . . they are the provider that you go to." (Counsel Aff., Ex. A, Powell Dep. pp. 14-15.)

[13] Recruitment of general internists is especially difficult. (Counsel Aff., Ex. A, Powell Dep. 20.) Only about 200 internal medicine residents in the United States each year choose to practice primary care general internal medicine. (Reinhardt Decl. ¶ 9). The vast majority go on to become sub-specialists or hospitalists. *Id.* Therefore the potential base for recruitment of new general internists is tiny. *Id.* Saltzer has all the general internists in Nampa. (Counsel Aff., Ex. B, Keeler/Checketts Dep. pp. 69-70.)

The slow growth of the practices of primary care physicians (even outside of Nampa) is reflected in data for the new primary care physicians hired by SAMG. After two years, these physicians are at volume levels worse than 75% of the doctors in the region. (Haas-Wilson Decl. ¶¶ 128-130, Exhibit 14.) Even after four years, all are performing below average regional levels. *Id.* When added to the six months to one year necessary to recruit a primary care physician (Reinhardt Decl. ¶ 14), this is simply too long a delay to permit timely effective entry. *H&R Block*, 833 F. Supp. 2d at 73 n.28 ("For entry to be considered timely, it typically must occur within approximately two years post-merger."); *Horizontal Merger Guidelines* at 28 ("In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects . . . .").

Of course, the problem is even greater when successful entrants would have to "take" patients from the very popular Saltzer Group in sufficient numbers to offset the loss of the Saltzer business. That is simply impossible. (Counsel Aff., Ex. B, Keeler/Checketts Dep. pp. 143-144.)

Barriers to entry into the general acute-care inpatient services market are certainly significant, and entry could not proceed within the time frames set forth in the Merger Guidelines and the case law. *ProMedica*, 2011 WL 1219281, at * 32. For example, "[i]t would take significantly longer than the two-year timeframe prescribed by the Merger Guidelines to plan, obtain zoning, licensing, and regulatory permits, and construct a new hospital…." *Id.* Furthermore, "[c]onstructing a new hospital requires an extraordinarily large, up-front capital investment, and the pay-off is risky and deferred into the future, which makes it highly unlikely that a new hospital competitor will enter the … hospital market." *Id.* This corresponds to the facts presented here. (Haas-Wilson Decl. ¶¶ 136-137.)

C. Preliminary Injunctive Relief Is Necessary to Prevent Immediate and Irreparable Harm that Cannot Be Adequately Compensated by Damages

Without an immediate order to enjoin this acquisition, Saint Alphonsus, Treasure Valley and the Nampa community will be irreparably harmed. Irreparable injury occurs where monetary damages "would come too late to remedy the harm" or the nature of the injury "renders damages too difficult to calculate." *Timberline Drilling, Inc. v. Am. Drilling Corp., LLC*, No. CV-09-18-N-EJL, 2009 WL 529627, at *6 (D. Idaho Mar. 2, 2009).

A preliminary injunction is especially appropriate in the antitrust context. If preliminary relief is not awarded and the acquisition is subsequently found to be unlawful, it may be exceedingly difficult to "undo" the unlawful combination at the end of the case. *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1332 (E.D. Mich. 1985); *see also discussion infra* § III.D.

Saint Alphonsus Nampa and Treasure Valley would face the need to lay off 150 or more employees as a result of the acquisition. (SOF ¶¶ 28, 33.) This is certainly an irreparable injury to Plaintiffs and their staffs. *Ferrero v. Assoc. Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (noting that the "likelihood of layoffs" is a factor in determining whether irreparable harm would ensue absent a preliminary injunction).

The staff layoffs would inevitably require that key departments and services be reduced or eliminated. (Keeler Decl. ¶ 14.) Such reductions have also often been found to constitute irreparable injury. *See, e.g., Cal. Med. Ass'n v. Douglas*, 848 F. Supp. 2d 1117, 1137-38 (C.D. Cal. 2012) ("the Ninth Circuit has held that as long as there is evidence showing that at least some Medi–Cal beneficiaries might lose services as a result of a rate reduction, irreparable harm is adequately demonstrated."); *ProMedica*, 2011 WL 1219281 at *29 (recognizing that "with

lessened competition, ProMedica will have diminished incentives to provide better services or improved quality").

Moreover, the loss of the Saltzer business threatens to seriously interfere with the significant improvements at Saint Alphonsus Nampa that have resulted in better service and award winning quality. It will also be difficult to justify further substantial investments given the reduction in business. (Keeler Decl. ¶ 15.) The same effects are likely at Treasure Valley, where the hospital will likely be unable to continue its plans to expand and improve its services. (Genna Decl. ¶¶ 5-6.); *see Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37–38 (2d Cir.1995) (deprivation of opportunity to expand business is irreparable harm).

Furthermore, the transaction, if consummated, will also irreparably injure all the Plaintiffs, because it will increase the power of St. Luke's to (a) demand exclusivity and/or preferential treatment from payors and employers, (b) deny the Plaintiffs' competing networks access to the Saltzer physicians and thereby impede their effectiveness, and (c) disrupt other arrangements which Plaintiffs have obtained through competitive pricing and quality care. St. Luke's has already attempted such actions, and will be more effective when armed with the "clout" of Saltzer. *See* discussion, *supra*. Indeed, Saltzer has already announced its desire to withdraw from a Saint Alphonsus Network. *Supra* at 18. Such actions threaten to substantially harm the market position of all of the Plaintiffs on an ongoing basis into the indefinite future.

Courts in this circuit have concluded that "[b]ecause … harm to the competitive position and market share of [competitors] is difficult to quantify, this also supports a finding of irreparable harm." *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 943, 949 (N.D. Cal. 2009); *see also Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Moreover, the recurring nature of this harm contributes to the conclusion that it is irreparable. *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 349 (M.D. Tenn. 1993) (finding irreparable harm where the "recurrent nature of Defendants' misappropriations indicates that legal remedies alone would be inadequate"); *In re Alert Holdings, Inc.*, 148 B.R. 194, 200 (S.D.N.Y. 1992).

D. The Balance of Hardships Weighs Heavily in Favor of Plaintiffs and the Issuance of Injunctive Relief

The "balance of injury" also strongly favors injunctive relief. The harm that would result from inaction is clearly compelling. *See* discussion *supra*. If a preliminary injunction does issue, St. Luke's will certainly not suffer a comparable injury. In fact, there is no evidence that it will suffer at all. If the benefits of an acquisition are available after a trial on the merits, such benefits do not weigh against a preliminary injunction. *ProMedica*, 2011 WL 1219281, at *60 ("If the merger makes economic sense now, the [defendants] have offered no reason why it would not do so later." (citation omitted)).

Under similar circumstances, federal courts have recognized that the harm to market participants from inaction would be far greater than any harm the injunction would cause to the prospective acquiring company. For example, as the district court explained in *OSF Healthcare System*, the public has a strong interest in the "effective enforcement of the antitrust laws"—in fact, the interest "is of primary importance." 852 F. Supp. 2d at 1094. The risk of higher prices, as evidenced by the "economic realities" of the geographic market, outweighed the more speculative justifications for the merger. *Id.* at 1095.

In any event, St. Luke's bears a heavy burden if it wishes to argue that the acquisition has procompetitive effects. No court has ever found that purported efficiencies can rescue an otherwise unlawful transaction. *See, e.g., Proctor & Gamble Co.*, 386 U.S. at 580; *RSR Corp. v.*

FTC, 602 F.2d 1317, 1325 (9th Cir. 1979) ("RSR argues that the merger can be justified because it allows greater efficiency of operation. This argument has been rejected repeatedly."); *see also FTC v. HJ Heinz Co.*, 246 F.3d 708, 711-12 (D.C. Cir. 2001); *ProMedica*, 2011 WL 1219281, at *57.

In this case, St. Luke's will be unable to show that the acquisition will lead to any "merger-specific efficiencies," as the law requires. *FTC v. H.J. Heinz Co*. 246 F.3d at 721-22. Efficiencies that are "merger-specific" are those "that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Id.*; *see also Horizontal Merger Guidelines* § 10.

St. Luke's has effectively *admitted* that any claimed efficiencies resulting from this acquisition would not be merger-specific, because St. Luke's is taking the same actions, and expects the same benefits, for both employed and independent physicians. For example, St. Luke's Health System Vice President of Payor and Provider Relations stated that "St. Luke's Health System is spending tens of millions of dollars and committing other valuable resources to implement an electronic medical record across *all our providers*" and that "a clinically integrated network is *not* necessarily a network of providers under common financial ownership..." (http://drpate. stlukesblogs.org/2012/05/14/the-value-in-integration/) (emphases added); *see* Horizontal Merger Guidelines at p. 30.

There is certainly no reason to believe that significant efficiencies will arise from a St. Luke's-Saltzer transaction. There is no evidence in the economic literature that physician groups become more efficient at a size beyond 10 physicians, much smaller than Salter. (Haas-Wilson Decl. ¶ 50.) Further, Saltzer operates very efficiently, has lean staffing and a very effective billing office. (Powell Decl. ¶ 25.) Moreover, Saltzer is already so efficient that St. Luke's

representatives have expressed their skepticism regarding the availability of further efficiencies. During negotiations to acquire Saltzer, a St. Luke's consultant told Saltzer that Saltzer was "very efficient and so [St. Luke's was] having a hard time finding additional dollars to pay the providers." (Counsel Aff., Ex. A, Powell Dep. pp. 44-46.)

St. Luke's cannot show any procompetitive effects, let alone meet the high burden to justify opposition to an injunction.

E. Preliminary Injunctive Relief Is in the Public Interest

It is unquestionably in the public interest to maintain vibrant market competition. Section 16 was enacted "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100, 130-31 (1969). Courts in this district have "recognize[d] that the public has an interest in a competitive marketplace." *Melaleuca*, 2012 WL 1677449, at *7.

The uncertainty of the availability of a divestiture remedy at the end of a case makes the public interest even more strongly favor injunctive relief. The "scrambling of the eggs" that often occurs after an acquisition severely hampers the ability to order effective equitable relief, such as divestiture, following a trial. *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1094-95 (finding "significant" the fact "that the difficulty of unscrambling merged assets often precludes an effective order of divestiture" (internal quotation marks and brackets omitted)).

This has been a particular problem in one recent health care case. In *In the Matter of Evanston Northwestern Healthcare Corp.*, the transaction was found illegal, but the Federal Trade Commission found that divestiture was not a practical remedy, given that the length of time that had already "elapsed between the closing of the merger and the conclusion of the litigation . . . make[s] divestiture much more difficult, with a greater risk of unforeseen costs and failure." *In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, Opinion of the

Commission at 89. The Commission imposed an alternate remedy that has been widely criticized as ineffective. *See* Brief Amicus Curiae of Economics Professors, *In the matter of Evanston Nw. Healthcare Corp.*, FTC No. 9315 (Oct. 16, 2007), available at http://www.ftc.gov/os/adjpro/d9315/071017econprofsamicusbrief.pdf.

If granted, injunctive relief will simply maintain the parties in their proper competitive positions in the healthcare marketplace. The public will benefit from the promotion of competition.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs ask the Court to grant their motion for a preliminary injunction

Respectfully submitted,

Dated: November 16, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2012, I electronically filed the foregoing with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System:

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