IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., et al., Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD. and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants.	)	No. 1:12-cv-00560-BLW (Lead Case)
	)	**PUBLIC**
FEDERAL TRADE COMMISSION and STATE OF IDAHO, Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD. and SALTZER MEDICAL GROUP, P.A., Defendants.	)	No. 1:13-cv-00116-BLW

PLAINTIFFS' JOINT PRE-TRIAL MEMORANDUM

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INTRODUCTION

Vibrant competition between healthcare providers leads to lower prices, more choice, higher quality services, and greater medical innovation. St. Luke's Health System's acquisition of Saltzer Medical Group eliminates that competition. By combining the two largest providers of adult primary care physician services in Nampa, the merged St. Luke's/Saltzer will command nearly 80 percent of that market, giving it substantial new bargaining leverage with health plans. Indeed, in Defendants' own words, St. Luke's is the "dominant" health system in the Treasure Valley, and Saltzer is the "dominant" medical group in Nampa. The newfound leverage from combining these dominant providers will allow St. Luke's/Saltzer to extract higher reimbursement from health plans, ultimately at the expense of local employers and healthcare consumers. To prevent this harm to competition, the Acquisition should be enjoined.

Courts analyze mergers among head-to-head competitors (known as "horizontal" mergers) under a burden-shifting framework. Plaintiffs meet their initial burden by showing that the Acquisition will result in undue concentration in a relevant market, creating a rebuttable presumption of illegality. Here, Defendants do not dispute that adult primary care physician services is a relevant service market. And under any plausible reading of the evidence, Nampa is the proper geographic market, which means the Acquisition results in market concentration that is more than double the level needed to create a presumption of competitive harm under established antitrust law. Based on this presumption alone, Plaintiffs could rest, shifting a heavy burden to Defendants.

But beyond the strong presumption of competitive harm, the evidence confirms that St. Luke's will be able to exploit its newfound market power to extract higher reimbursements in negotiations with health plans. Indeed, ordinary-course documents and sworn testimony from

Defendants reveal that they expect the merger to increase their bargaining leverage with health plans, giving them the ability to seek higher rates and resist health plans' efforts to control healthcare costs for their members. Health plans agree: the merger of Nampa's largest and most desirable adult primary care groups weakens their ability to resist leaves St. Luke's rate demands. The result will be higher healthcare costs for Idaho consumers.

In light of the evidence of extraordinary market concentration and likely anticompetitive effects, Defendants now must present compelling evidence that the Acquisition is unlikely to harm competition. In hopes of doing so, Defendants have thus far raised various theoretical justifications for the Acquisition, none of which meets the standards for a cognizable defense under the antitrust laws. While Defendants invoke the laudable goals of providing higher quality, lower cost care, for example, they have failed to provide evidence that the Acquisition will generate any efficiencies that are verifiable and merger-specific, as the law requires. St. Luke's has had ample opportunity to demonstrate that its strategy of acquiring physician practices will generate measurable benefits for consumers, but has yet to substantiate its speculative claims with tangible evidence. Nor has St. Luke's shown that acquiring Saltzer is necessary to accomplish the various goals it has outlined.

Defendants also raise the hypothetical possibility that the Acquisition's likely anticompetitive effects would be thwarted by new providers entering the market or by existing providers expanding their operations. But again, they have failed to make any showing that entry and expansion would be "likely, timely, and sufficient," as the law demands. Defendants' other novel "defenses" have not been recognized by any court.

In addition, as alleged in Private Plaintiffs' complaint, the Acquisition is also unlawful because it forecloses them from essential patient referrals, severely weakening their ability to

compete with St. Luke's. Strong evidence shows that the Acquisition harms competition in the markets involving inpatient hospital services and outpatient surgery facility services because it will shift critical Saltzer referrals away from Saint Al's and TVH. Indeed, the latter shift has already occurred. The Acquisition also gives St. Luke's the ability to cripple competing networks of hospitals and physicians, which provide health plans and employers with the only real alternative to St. Luke's. The documentary evidence shows that St. Luke's already has this plan in place, and the Acquisition makes its effects even more devastating.

Importantly, to enjoin the Acquisition under the antitrust laws, the Court need only find in Plaintiffs' favor on either one of Plaintiffs' two independent legal grounds. For each of these reasons, the Acquisition should be permanently enjoined, and Saltzer should be separated from St. Luke's immediately.

ARGUMENT

I. THE ACQUISITION WILL SUBSTANTIALLY LESSEN HEAD-TO-HEAD COMPETITION FOR PRIMARY CARE PHYSICIAN SERVICES IN NAMPA

A. Legal Standard Under Clayton Act Section 7

Section 7 of the Clayton Act prohibits any acquisition "where in any line of commerce . . . the effect of such acquisition *may be* substantially to lessen competition, or tend to create a monopoly."[1] "Congress used the words 'may be' . . . to indicate that its concern was with probabilities, not certainties" and to "arrest restraints of trade in their incipiency and before they

[1] 15 U.S.C § 18 (emphasis added); *see also United States. v. Pabst Brewing Co.*, 384 U.S. 546, 547 (1966). Like Section 7 of the Clayton Act, the Idaho Competition Act prohibits acquisitions that may substantially lessen competition. Idaho Code § 48-106. Because the provisions of the Idaho Competition Act "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes," the antitrust analysis under the Clayton Act applies equally to the Idaho Competition Act. Idaho Code §§ 48-102(3), 48-106.

develop into full-fledged restraints."[2] "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future."[3] Indeed, Section 7 "requires a prediction, and doubts are resolved against the transaction."[4]

As noted, to analyze whether an acquisition is likely to substantially lessen competition under Section 7 of the Clayton Act, courts use a burden-shifting framework.[5] Under this structure, Plaintiffs establish a *prima facie* case of a Section 7 violation – and a presumption of illegality – by showing that the transaction will result in undue concentration in a relevant market.[6] Once Plaintiffs' *prima facie* case is established, the burden shifts to Defendants to rebut the presumption of illegality with evidence clearly showing that the market's concentration inaccurately predicts the likely competitive effects of the acquisition.[7] Importantly, the stronger the *prima facie* case, the greater Defendants' burden of production on rebuttal.[8] "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effects shifts to the [plaintiffs], and merges with the ultimate burden of persuasion, which remains with [plaintiffs] at all times."[9]

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[2] *Brown Shoe, Inc. v. United States*, 370 U.S. 294, 323 n. 39. (1962).
[3] *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986).
[4] *FTC v. Elders Grain Inc.*, 868 F.2d 901, 906 (7th Cir. 1986) (citations omitted).
[5] *See, e.g., Olin Corp. v. FTC*, 986 F.2d 1295, 1298-99 (9th Cir. 1993); *California v. American Stores Co.*, 872 F.2d 837, 842 (9th Cir.1989), *rev'd on other grounds*, 495 U.S. 271 (1990), *reinstated in relevant part*, 930 F.2d 776, 777 (9th Cir.1991); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-93 (D.C. Cir. 1990).
[6] *Baker Hughes*, 908 F.2d at 982-83.
[7] *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974); *see also United States v. Philadelphia. National Bank*, 374 U.S.321, 363 (1963) at 363.
[8] *Baker Hughes*, 908 F.2d at 991.
[9] *FTC v. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quotation marks omitted).

B. Plaintiffs More Than Satisfy Their *Prima Facie* Burden

Plaintiffs establish their *prima facie* case – and a presumption of illegality – by "defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in the relevant market."[10] A showing of undue concentration in any relevant market is sufficient to meet Plaintiffs' *prima facie* burden.[11]

1. *There Is No Material Dispute Over The Relevant Service Markets*

To define a relevant service market, courts assess whether two services are substitutes for one another in the eyes of purchasers.[12] Courts also consider whether a hypothetical monopolist in the relevant service market could increase price profitably by a "small but significant non-transitory increase in price" (also known as a "SSNIP"); if so, the set of services is a relevant service market.[13]

Defendants do not dispute that adult primary care services sold to commercial health plans ("Adult PCP Services") is an appropriate relevant service market in this case.[14] Adult PCP Services includes physician services provided to commercially insured patients aged 18 and over by physicians practicing internal medicine, family practice, and general practice.[15] Defendants also do not dispute that general pediatric physician services sold to commercially insured

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[10] *In re ProMedica Health Sys., Inc.*, No. 9346, 2012 WL 1155392, at *12 (F.T.C. Mar. 28, 2012) (citing *Phila. Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982-83).
[11] *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d. 26, 67 (D.D.C. 2009).
[12] *United States v. H & R Block*, 833 F. Supp. 2d. 52, 50-51 (D.D.C. 2011) (citations and quotations omitted).
[13] *See* Trial Ex. ("TX") 1834 § 4.1.
[14] Def.'s Answer To Gov. Pls.' Compl. for Perm. Inj'n at 3, No. 1:12-cv-00560-BLW, Dkt. No. 100; Expert Report of David Argue ¶ 100.
[15] TX 1848 ¶ 134. *See also HTI Health Servs., Inc., v. Quorum Health Group, Inc.*, 960 F. Supp. 1104, 1116 (S.D. Miss. 1997). Defendants' economic expert, Dr. David A. Argue, suggests that nurse practitioners and physician assistants may also be in the relevant service market, but that has no material effect on the analysis. TX 1849 ¶ 155.

patients ("General Pediatric Services") is a second relevant service market. General Pediatric Services includes physician services provided to commercially insured patients under the age of 18 by pediatricians with expertise in treating infants and children.[16]

2. *The Relevant Geographic Market Is Conclusively Established*

The geographic market for both of these relevant service markets is Nampa, Idaho. Under the case law and *Merger Guidelines*, the process for analyzing the geographic market is similar to the process of analyzing the relevant service market. The question for geographic market definition is whether a hypothetical monopolist controlling *all* of the services in that market could profitably implement a SSNIP.[17] As noted by the most recent district court to resolve a litigated healthcare merger, a properly defined geographic market must "correspond to the commercial realities of the industry."[18]

In this case, the commercial realities of the healthcare industry provide important context for understanding the scope of the geographic market. Commercial health plans negotiate with providers to determine the price of healthcare services and the terms on which those services will be offered to the health plans' members.[19] Employers choose insurance plans on behalf of their employees, who prefer to have a choice from a variety of providers in convenient locations particularly close to home. So when a provider gains control of a large percentage of an

[16] Defendants argue that some family practitioners should be included in the market for General Pediatric Services, but because most adult PCPs lack this expertise, they are not effective substitutes for providing such services. In any event, this minor disagreement does not materially change the economic analysis.
[17] *H & R Block*, 833 F. Supp. 2d at 52.
[18] *FTC v. OSF Healthcare*, 852 F. Supp. 2d 1069, 1076-77 (N.D. Ill. 2012) (quoting *Brown Shoe*, 370 U.S. at 336); *accord RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979).
[19] *FTC v. ProMedica Health Sys.*, No. 3:11 cv 47, 2011 WL 1219281, at *5 (N.D. Ohio, Mar. 29, 2011); *see also OSF Healthcare*, 852 F. Supp. 2d at 1083-84; TX 1848 ¶¶ 3-6 & Part IV.

important market – like Adult PCP Services in Nampa – that provider will have greater bargaining leverage with health plans.[20]

- **Testimony And Documentary Evidence Confirm That Nampa Is A Relevant Geographic Market**

The evidence shows that residents of Nampa demand health plans whose provider networks include PCPs located in Nampa. Documents and testimony from a broad range of market participants – health plans, physicians, and numerous witnesses employed by or working closely with St. Luke's – confirm that consumers in Nampa value access to local PCPs, and that health plans cannot assemble attractive provider networks without Nampa PCPs. For example:

- Blue Cross of Idaho's Jeffery Crouch testified that [redacted] "Nampa is far enough removed from any other population center that it – it is its own community."[21]

- Dr. Kurt Seppi – St. Luke's Executive Director of Physician Services – testified, "we have patients that live in Nampa that have access to St. Luke's Health System outside of the Nampa area and **we really believe that is important to have access points for those patients close to home**. And in that regard, the Saltzer clinic is . . . mainly a primary care base. It would improve access for those patients close to home."[22]

- A Saint Al's physician – Dr. Scott Shappard – wrote to St. Luke's that one of his Nampa patients was refusing a referral to Meridian "BECAUSE HE WANT[ED] A PROVIDER IN NAMPA" and "**folks in Nampa want care in Nampa, generally**." Dr. James Souza (St. Luke's Vice President of Medical Affairs, Treasure Valley Region) agreed, writing that "[t]he point that Dr. Shappard makes is a good one, I think. For patients, primary care should be easy to access."[23]

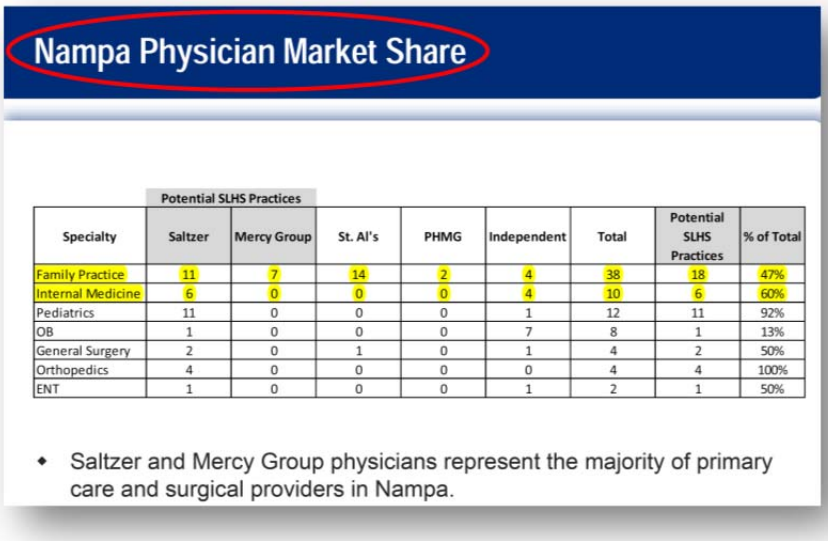
- Peter LaFleur, a St. Luke's deal consultant, testified that it makes "business sense" to serve Nampa patients with PCPs in Nampa **"[b]ecause patients would prefer not to**

[20] TX 1849 ¶¶ 48-59. For an overview of "two-stage" competition in healthcare markets, see *ProMedica*, 2011 WL 1219281, at **5-8.
[21] Jeffrey Crouch (BCI) Dep. Tr. at 41:3-17.
[22] Kurt Seppi (St. Luke's) Dep. Tr. at 118:14-22 (emphasis added).
[23] TX 1113 (SLHS001181408 to 09) (emphasis added); *see also* Kathy Moore (St. Luke's) Dep. Tr. at 46:2-7.

have to travel large distances – to receive services."[24]

Consistent with this documentary and testimonial evidence, health plans in the Treasure Valley consistently include Nampa-based PCPs in their provider networks.[25]

Moreover, notwithstanding its assertions in this case, St. Luke's recognizes the importance of Nampa-based PCPs. For example, Steve Drake – St. Luke's System Director of Payer Contracting – testified that the Board for St. Luke's Select Medical Network decided it should include Saltzer in the network because it "needed providers in Nampa in order to market itself to employers."[26] And St. Luke's ordinary-course documents confirm his assertion analyzing Nampa physician market share separately from other markets in which it offers services:[27]



Nampa Physician Market Share

	Potential SLHS Practices							
Specialty	Saltzer	Mercy Group	St. Al's	PHMG	Independent	Total	Potential SLHS Practices	% of Total
Family Practice	11	7	14	2	4	38	18	47%
Internal Medicine	6	0	0	0	4	10	6	60%
Pediatrics	11	0	0	0	1	12	11	92%
OB	1	0	0	0	7	8	1	13%
General Surgery	2	0	1	0	1	4	2	50%
Orthopedics	4	0	0	0	0	4	4	100%
ENT	1	0	0	0	1	2	1	50%

- Saltzer and Mercy Group physicians represent the majority of primary care and surgical providers in Nampa.

[24] Peter LaFleur (Consilium) Dep. Tr. at 196:11-18 (emphasis added); *see also* John Dao (Wipfli) Dep. Tr. at 102:13-24.
[25] TX 1848, fig. 11.
[26] Steve Drake (St. Luke's) Dep. Tr. at 182:19-23.
[27] TX 1115 (SLHS0000003075 at Slide 6) (emphasis added). St. Luke's acquired the "Mercy Group" physicians in 2011 and Saltzer in 2012. As noted, there is no dispute that the Adult PCP Services Market includes family practice and internal medicine.

Likewise, Patricia Richards, CEO of SelectHealth – the Utah-based health plan that has partnered with St. Luke's in Idaho – stated, "my experience with past plans is that consumers would like very much and they value having their primary [care] physician close to home, within a few miles, ten to five minutes."[28] All of this documentary and testimonial evidence points to one conclusion: a hypothetical monopolist of Adult PCP Services in Nampa would have substantial bargaining leverage with health plans and could profitably impose a SSNIP.

- **Empirical Evidence Further Supports Nampa As A Distinct Geographic Market**

Empirical evidence confirms that Nampa is a distinct geographic market. The data reveals a stark bifurcation between patients living in Nampa and Canyon County compared to patients living in Boise and Ada County – in both cases, patients receive Adult PCP Services close to home.[29] Indeed, an overwhelming majority (84 percent) of patients residing in Nampa select a primary care physician located in Nampa or an adjacent zip code.[30] An analysis of drive times provides practical context – this group of patients faces an average drive time that is nearly half that of those who visit primary care services further away.[31] Taken together, the empirical, documentary, and testimonial evidence collected in this case demonstrates conclusively that Nampa represents a well-defined geographic market.

- **Defendants Can Advance No Plausible Alternative Geographic Market**

Contrary to common sense and the substantial evidence noted above, Defendants'

[28] Patricia Richards (SelectHealth) Dep. Tr. at 156:25-157:17.
[29] TX 1848, fig. 13.
[30] TX 1848, fig. 12.
[31] TX 1848 ¶ 76. For those Nampa residents who do select a primary care physician outside of Nampa, the evidence shows that they do so for idiosyncratic reasons. Patients who live in Nampa but work in Boise, for example, are much more likely to see a primary care physician in Boise than patients who live and work in Nampa. TX 1848, fig. 22.

economic expert, Dr. David Argue, has conjectured an expansive geographic market that "includes at least the primary care physicians located in Canyon County plus the western portion of Ada County,"[32] and calculated market shares based on providers ranging from Caldwell to select portions of Boise.[33] But Dr. Argue admitted during his deposition that the primary criticism he levied against a Nampa market – leading him to assert that it "cannot constitute a properly defined geographic market" – applied with equal force to his own proposed market.[34] Faced with this inconsistency, Dr. Argue retreated to the convenient refrain that the market must be "at least as big" as the broad market postulated in his report while admitting that he had not performed any analysis of what that market might actually be.[35] Indeed, Dr. Argue testified that he has "not specified the exact parameters of the geographic market," and he could not even say whether the market would include all of Boise, rather than some arbitrary portion of it.[36]

Fundamental to Defendants' expansive geographic market is Dr. Argue's attempted "critical loss" analysis. As the *Merger Guidelines* explain, a complete critical loss analysis requires a comparison of two numbers: the "critical loss," and the "predicted loss" (or "actual

[32] Expert Report of David Argue ¶ 129.
[33] Expert Report of David Argue, Ex. 56; David Argue (Expert) Dep. Tr. at 181:3-183:17.
[34] David Argue (Expert) Dep. Tr. at 178:3-182:2. Dr. Argue's criticism is rooted in an analysis of patient flow data – that is, the number of patients who utilize providers outside the proposed geographic market. In some hospital cases, courts have relied on patient flow data in the form of an "Elzinga-Hogarty" test. *See, e.g.*, *California v. Sutter Health Sys.*, 130 F. Supp 2d. 1109, 1120-24 (N.D. Cal. 2001). But the application of Elzinga-Hogarty to healthcare services markets has been thoroughly discredited. One of its creators, Professor Kenneth Elzinga, testified in a recent hospital merger case that the test, which was developed in the coal and beer industries, was not appropriate for healthcare provider markets. *In re Evanston Nw. HealthCare Corp.*, No. 9315, 2007 FTC LEXIS 210, at 206-07 (FTC Aug. 6, 2007). Even Dr. Argue disclaims reliance on Elzinga-Hogarty. Suppl. Decl. of David A. Argue, Ph.D. ¶¶ 3-4, Dkt No. 40 (Dec. 13, 2012).
[35] David Argue (Expert) Dep. Tr. at 178:23-179:4.
[36] David Argue (Expert) Dep. Tr. at 180:19-185:10.

loss").[37] In his deposition, Dr. Argue agreed with the approach outlined in the *Merger Guidelines*, explaining that the critical loss, on its own, is "just a number."[38] But Dr. Argue never completed the second essential step of the critical loss analysis, calculating the predicted or actual loss.[39] Even for the first step in his analysis, Dr. Argue admitted that the calculation in his opening report was incorrect, and that his analysis had not been "thorough enough" in the first instance.[40] For these and other reasons, Dr. Argue's incomplete critical loss analysis is highly flawed and unreliable, and Defendants' alternative geographic market lacks any defensible basis.

3. *The Acquisition Is Presumptively Unlawful*

Acquisitions that result in "undue" concentration in a relevant market – like the one now before the Court – are presumed illegal. As the Supreme Court explained in *Philadelphia National Bank*, a merger that allows a firm to control an "undue percentage" of a relevant market and causes a "significant increase in . . . concentration" is "*so inherently likely to lessen competition substantially* that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[41] Courts typically measure market concentration using the Herfindahl-Hirschman Index ("HHI").[42]

Where, as here, an acquisition increases the HHI by over 200 points resulting in a highly-concentrated market (*i.e.*, where the post-merger HHI exceeds 2,500), it is presumed likely to

[37] TX 1834 § 4.1.3.
[38] David Argue (Expert) Dep. Tr. at 98:12-19.
[39] David Argue (Expert) Dep. Tr. at 99:2-20, 150:6-152:18.
[40] David Argue (Expert) Dep. Tr. at 137:9-18.
[41] *Phila. Nat'l Bank*, 374 U.S. at 363 (emphasis added); *accord American Stores*, 872 F.2d at 842.
[42] *CCC Holdings*, 605 F. Supp 2d. at 37; *see also, e.g., H & R Block*, 833 F. Supp. 2d at 71; *OSF Healthcare*, 852 F. Supp. 2d at 1078-79. The higher the post-merger HHI and the increase in the HHI, the greater the competitive concerns. TX 1834 § 5.3.

enhance market power and to be illegal.[43] In fact, the Supreme Court in *Philadelphia National Bank* found that a post-merger market share of only *30 percent* with many remaining competitors violated the Clayton Act. Here, the Acquisition produces significant market concentration in the Adult PCP Services market, far surpassing the HHI levels and combined market shares that other courts have found sufficient to warrant injunctive relief:

Case[44]	Combined Share	Pre-Merger HHI	HHI Increase	Post-Merger HHI	Holding
Phila. Nat'l Bank (Supreme Court 1963)	30%	N/A	N/A	N/A	Enjoined
Rockford Mem'l (N.D. Ill. 1989)	68%	2789	2322	5111	Enjoined
Univ. Health Inc. (11th Cir. 1991)	43%	2570	630	3200	Enjoined
Cardinal Health, Inc. (D.D.C. 1998)	37% 40%	1648	1431	3079	Enjoined
H&R Block, Inc. (D.D.C. 2011)	28%	4291	400	4691	Enjoined
ProMedica (N.D. Ohio 2011)	58%	3313	1078	4391	Enjoined
OSF Healthcare (N.D. Ill. 2012)	59%	3353	2052	5406	Enjoined
***St. Luke's* (Adult PCP) (D. Idaho 2013)[45]**	**78%**	**4612**	**1600**	**6219**	**TBD**

Indeed, the Acquisition results in a post-merger HHI that is nearly *two-and-a-half times* and a change in HHI that is *eight times* the levels needed to establish a presumption of illegality.[46]

Moreover, even if the geographic market were expanded to include Caldwell and

[43] *See, e.g., Phila. Nat'l Bank*, 374 U.S. at 364; *H & R Block*, 833 F. Supp. 2d at 73-74.
[44] *Phila. Nat'l Bank*, 374 U.S. at 364; *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1278, 1280-82 (N.D. Ill. 1989); *FTC v. Univ. Health Inc.*, 938 F. 2d 1206, 1211 n.12 (11th Cir. 1991); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 53-54 (D.D.C. 1998); *H & R Block*, 833 F. Supp. 2d at 73-74; *FTC v. ProMedica Health Sys.*, No. 3:11 cv 47, 2011 WL 1219281, at *12 (N.D. Ohio, Mar. 29, 2011); *OSF Healthcare*, 852 F. Supp. 2d at 1079.
[45] TX 1848, fig. 18.
[46] *H & R Block*, 833 F. Supp. 2d at 71-72 (citing *Merger* Guidelines, TX 1834 § 5.3).

Meridian, St. Luke's/Saltzer's combined market share would still create a strong presumption of illegality. Using this broad market definition, St. Luke's/Saltzer's combined share of the market would be 56.3 percent, with a post-merger HHI of 3,606, and an HHI increase of 1,437, still well above the levels needed to establish a presumption of anticompetitive harm.[47] Furthermore, if the geographic market were expanded beyond Nampa, it is undisputed that St. Luke's and Saltzer's market shares for General Pediatric Services create a presumption of anticompetitive effects in that market as well.[48]

Applying any reasonable definition of the relevant geographic market – for which Defendants have identified no defensible alternative – the transaction is presumptively anticompetitive by a wide margin.[49] Accordingly, the Acquisition must be enjoined unless Defendants bring forth "evidence *clearly* showing that the merger is not likely to have such anticompetitive effects."[50] Defendants cannot do so.

C. Defendants Cannot Overcome The Strong Presumption And Evidence Of Anticompetitive Effects

1. *The Evidence Confirms That The Acquisition Enhances St. Luke's Market Power And Will Likely Lead to Higher Healthcare Costs*

The presumption of illegality alone is sufficient to shift a heavy burden to Defendants. On top of that, ordinary-course documents, testimony from market participants, and data on how patients choose among competing providers all confirm that the Acquisition will enhance St. Luke's market power and increase healthcare costs for local residents and businesses.

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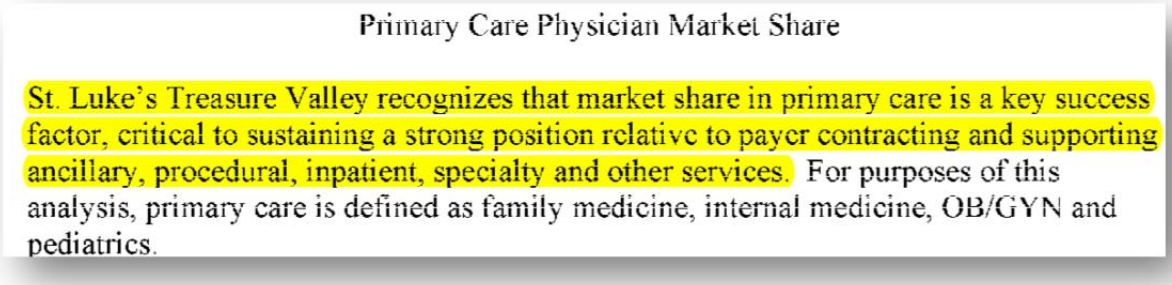
[47] TX 1848, fig. 20.
[48] *See* TX 1854, Exhibit 7a; Expert Report of David Argue, Ex. 61-65.
[49] *See H.J. Heinz*, 246 F.3d at 716-17.
[50] *Phila. Nat'l Bank*, 374 U.S. at 363 (emphasis added).

- **The Acquisition Will Enhance St. Luke's Negotiating Leverage**

Before closing the transaction, representatives of both St. Luke's and Saltzer recognized that the merger could enhance the combined firm's negotiating leverage with health plans. St. Luke's own ordinary-course documents emphasize the importance of primary care market share in its negotiations with health plans:[51]


Primary Care Physician Market Share

St. Luke's Treasure Valley recognizes that market share in primary care is a key success factor, critical to sustaining a strong position relative to payer contracting and supporting ancillary, procedural, inpatient, specialty and other services. For purposes of this analysis, primary care is defined as family medicine, internal medicine, OB/GYN and pediatrics.

And Peter LaFleur, a St. Luke's consultant who was heavily involved in the Acquisition, noted that Saltzer has enjoyed a "dominant market position in Nampa for decades," and that Saltzer had "developed leverage with payers [*i.e.*, health plans]."[52] Likewise, in a letter signed by 25 Saltzer physicians discussing whether Saltzer should align with St. Luke's or Saint Al's, Dr. Randy Page, Saltzer's Contracts Committee Chair, highlighted St. Luke's dominant position in the Treasure Valley: "We have to be concerned with aligning if appropriate with the strongest partner. No one would disagree that St. Al's is not the dominant provider in the valley . . . . St. Luke's . . . will likely remain the dominant provider."[53] In another email, Dr. Page expressed the hope that if the proposed transaction with St. Luke's went forward, Saltzer may be able to re-

[51] TX 1461 (SLHS000039794).
[52] TX 1475 (CON0004972 at 993); Peter LaFleur (Consilium) Dep. Tr. at 203:13-18.
[53] TX 1366 (SMG000033688).

open rate negotiations with BCI, citing "the clout of the entire [St. Luke's] network."[54]

Professor Dranove explains how the Acquisition will enhance the negotiating leverage of the combined St. Luke's/Saltzer. The relative bargaining leverage of these negotiations depends on each side's "outside option" – *i.e.*, the alternative if the parties are unable to reach an agreement.[55] As Professor Dranove's analysis shows, St. Luke's and Saltzer are each other's closest competitors for Adult PCP Services in Nampa.[56] For a large number of Nampa residents, Saltzer and St. Luke's offer the first and second most preferred provider options. If both were excluded from a health plan's network, these patients would be forced into their third choice.[57] In other words, such a health plan is much less attractive and less marketable to patients.[58]

Before the Acquisition, a health plan negotiating with either St. Luke's or Saltzer had the outside option of offering a network that included one of them but not the other, meaning it had the ability to offer a marketable network of adult PCPs in Nampa if it failed to reach an agreement with either one. This gave the health plans a credible threat and some negotiating leverage in its contract negotiations. After the Acquisition, that option disappears, leaving health plans with a Hobson's choice: they must either accept St. Luke's rate demands or attempt to market a network without the two most preferred adult primary care physician groups in Nampa.

Testimony from the largest health plans in the state demonstrates how this enhanced bargaining leverage will likely influence their contract negotiations with St. Luke's. REDACT ED

[54] TX 1361 (SMG000315458).
[55] TX 1849 (Dranove Reply Report) ¶¶ 45-59; *see also ProMedica*, 2011 WL 1219281, at *6.
[56] TX 1848 ¶¶ 192-208. This type of analysis, known as a "diversion analysis," has been recognized as an effective tool for predicting the likely competitive effects of a merger. *See* TX 1834 § 6.1.
[57] TX 1849 ¶ 55.
[58] TX 1848 (Dranove Report) ¶¶ 69-75; *see also ProMedica*, 2011 WL 1219281, at *8.

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As Jeffery Crouch of BCI, put it, St. Luke's "success at increasing negotiated payment allowances . . . is entirely a result of their market power" from "their acquisition of primary care physicians in each market and of hospitals across the state."[61]

- **St. Luke's Newfound Leverage Will Allow It To Extract Higher Reimbursements**

Here, St. Luke's will be able to exploit its increased market power in several different ways. Most obviously, St. Luke's can use its newfound market power to extract higher reimbursements from health plans. Because St. Luke's negotiates with health plans for all services system-wide, higher negotiated rates could, but will not necessarily, involve increased rates for Adult PCP Services in Nampa.[62] St. Luke's could also realize an overall increase in revenue by raising other reimbursements, such as those for inpatient hospital services or outpatient surgical procedures, while leaving the rates for PCP services unchanged.[63]

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[59] REDACTED

[60] Scott Clement (Regence Blue Shield) Dep. Tr. at 156:13-24.

[61] Jeffrey Crouch (BCI) Dep. Tr. at 152:3-14; *see also id.* at 160:22-161:19, 193:15-194:6, 260:4-14.

[62] *See* TX 1848 ¶¶ 87-99.

[63] *ProMedica*, 2011 WL 1219281, at *8 ("A hospital with enhanced bargaining power for certain services can also exploit the bargaining power across additional services, leading to higher rates for any number of the hospital's services.").

For example, St. Luke's analysis of the Acquisition highlighted its ability to insist that commercial health plans pay higher "hospital-based" rates for routine ancillary services, such as X-rays and laboratory tests, even when those services are performed in the same physical location as before the Acquisition.[64] As St. Luke's deal consultant, Peter LaFleur, explained, St. Luke's ability to charge these higher hospital-based rates is determined by contractual negotiations.[65] Recognizing this mechanism for generating additional reimbursement, St. Luke's estimated that implementing this change with Saltzer could generate significant additional revenue from commercial health plans, including $750,000 annually from labs alone.[66] While such increases may be permitted under existing health plan contracts, St. Luke's added market power enhances its ability to make those increases "stick" in future contract negotiations.[67]

- **Micron's Experience Confirms That St. Luke's Has Market Power And That It Will Be Enhanced By The Acquisition**

Defendants and their economic expert, Dr. Argue, rely extensively on Micron to suggest that that employers will successfully resist any attempt by St. Luke's to raise reimbursement rates. But Micron demonstrates how St. Luke's has exercised its existing market power, and that the Acquisition will enhance St. Luke's bargaining leverage in future negotiations with other employers and health plans. In 2008, Micron faced immense financial difficulties in an

[64] "Hospital-based" or "facility-based" rates refer to the frequently higher rates health plans pay for services performed in a hospital setting than for the same services performed in a non-hospital setting (*e.g.*, an independent physician clinic). TX 1848 ¶ 91.
[65] Peter LaFleur (Consilium) IH Tr. at 36:1-38:5.
[66] TX 1277 (SLHS000820291 at 295-98). *See also* Def.'s Motion *In Limine* To Exclude Expert Opinions That Provider-Based Billing To Medicare is Evidence of Market Power, St. Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-cv-00560 BLW, Dkt. No. 159; Peter LaFleur (Consilium) Dep. Tr. at 282:16-287:21 (confirming TX 1480).
[67] TX 1849 ¶¶ 57-58; TX 1855 ¶¶ 162-63.

extremely competitive global industry.[68] As part of a firm-wide effort to lower costs, Micron sought bids from St. Luke's and Saint Al's for a less expensive, but non-exclusive network. On the eve of the Micron network's launch, however, St. Luke's backed out, telling Micron that it did not want to compete with Saint Al's on price.[69] As a result, St. Luke's did not participate in Micron's health plan, but Saint Al's did. That dynamic remains in place today, despite Micron's strong preference to have St. Luke's in its network.[70]

Since then, St. Luke's has engaged in a series of physician acquisitions, making it more and more difficult for Micron to fill "gaps" in its physician network. Micron enrollees seeking primary care services in Nampa have always had in-network access to either the Saltzer physicians or the Nampa-based Mercy Physician Group physicians who are now part of St. Luke's.[71] Now, faced with the possible absence of both St. Luke's and Saltzer, Micron's Vice President of Human Resources, Patrick Otte, testified that "[s]ince they're large, [Saltzer is] important. And since Luke's had been purchasing other doctors along the way, I mean, that was kind of a big domino for us was to get that back in to where we had access."[72]

Because of the Acquisition, an employer seeking to follow Micron's example would have even fewer options to build a viable provider network for its employees. Indeed, despite the savings Micron has been able to achieve, its experience has been a cautionary tale to other employers. REDACTED

[68] Pat Otte (Micron) Dep. Tr. at 18:6-19:23, 51:17-52:25, 54:13-55:15; *see also* Scott Clement (Regence Blue Shield) Dep. Tr. at 186:8-22 (explaining Micron's "very unique circumstances").
[69] TX 1229 (SLHS000152677); *see also* TX 1228 (SLHS000153569 at 571).
[70] TX 1231 (SLHS000543157 at 159); *cf.* Pat Otte (Micron) Dep. Tr. at 43:4-11.
[71] Micron's network has several provider "tiers," each with its own co-payment requirements. Saltzer is currently in Micron's "PPO" tier, which requires members to pay higher co-pays than, for example, they would pay for services at Micron's on-site clinic.
[72] Pat Otte (Micron) Dep. Tr. at 66:3-25.

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- **The Acquisition Will Likely Increase Healthcare Costs For Consumers**

As reimbursements paid by health plans increase, so do the healthcare costs shouldered by local employers and employees, who ultimately foot the bill.[74] Self-insured employers will directly pay the increased costs of their employees' care, seriously impacting their ability to offer healthcare benefits to their employees. Health plans likewise have no choice but to pass on some or all of the increases to their fully-insured members in the form of higher premiums. For both self- and fully-insured employers, individual employees will likely face higher co-payments, co-insurance payments, and deductibles. Indeed, St. Luke's recognizes that employers have expressed their concerns that the Acquisition will further increase healthcare costs that already are spiraling out-of-control.[75]

2. *Defendants' Purported Efficiencies Are Not Verifiable Or Merger-Specific*

No court has held that potential benefits from a transaction, commonly known as "efficiencies," are sufficient to rescue an otherwise unlawful acquisition.[76] To rebut the strong presumption of illegality, Defendants must show that their claimed efficiencies are not only extraordinary, but also substantiated, verifiable, and would not be achieved without the merger (*i.e.*, merger-specific). Indeed, high market concentration levels, such as those present here, "require 'proof of *extraordinary efficiencies*'" to "ensure that those 'efficiencies' represent more

[73] REDACTED
[74] *See* TX 1848 ¶¶ 219-220.
[75] TX 1164 (SLHS001053775).
[76] *ProMedica*, 2011 WL 1219281, at *57 ("No court in a 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger.").

than mere speculation and promises about post-merger behavior."[77] Specifically, Defendants must "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[78] In this case, Defendants have offered little more than hopeful speculation that the Acquisition might hasten St. Luke's transition to a care delivery model that will allow it to provide higher quality care, at a lower cost. These claims fall well short of establishing a valid efficiencies defense, let alone proving the remarkable efficiencies needed to overcome the strong presumption of anticompetitive harm in this case.

- **Defendants' Efficiencies Claims Are Speculative And Unsubstantiated**

Defendants' purported cost and quality benefits are far too speculative to count as cognizable efficiencies under the antitrust laws.[79] As Professor Alain Enthoven – St. Luke's primary efficiencies expert – testified, it will take St. Luke's at least ten years to achieve the benefits of integrated care (*i.e.*, higher quality, lower cost care),[80] while noting that he "wouldn't hold out any guarantee of success, because as I say, it's complex, it's perilous."[81] As noted above, the case law makes clear that mere hope and speculation are insufficient to rescue an otherwise anticompetitive acquisition.

St. Luke's has also asserted that its prior physician group acquisitions have led to

[77] *H & R Block*, 833 F.Supp.2d at 89; *see also OSF Healthcare*, 852 F. Supp. 2d at 1089 (stating "[h]igh market concentration levels require proof of extraordinary efficiencies").
[78] *H & R Block*, 833 F. Supp. 2d at 89.
[79] *See Univ. Health*, 938 F.2d at 1223 ("speculative, self-serving assertions" will not suffice); *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997) (rejecting claimed efficiencies that were "unverified" and not supported by "credible evidence").
[80] Alain Enthoven (Expert) Dep. Tr. at 69:3-70:1.
[81] Alain Enthoven (Expert) Dep. Tr. at 72:6-12.

efficiencies.[82] Yet, Defendants have offered no credible evidence to support such a claim. Indeed, Defendants' executives admitted that they lack the necessary data to verify any purported cost and quality improvements that may or may not have followed those acquisitions.[83] In its ordinary-course business activities and in this litigation, St. Luke's has had ample opportunity to demonstrate that its strategy of acquiring physician practices generates verifiable benefits for consumers, given that it has acquired over twenty primary care physician practices just since 2007. But St. Luke's has failed to do so. As a St. Luke's Board Member put it: [84]

> Better cost is a worthy goal and I totally back that. I also understand market forces involved. But- let's be realistic. Employing physicians is not achieving better cost, it's achieving better profit.

Consistent with that Board Member's candid assessment, an analysis of the total cost of care to patients treated by PCPs acquired by St. Luke's shows that its prior acquisitions in fact *did not reduce healthcare costs*. As Professor Dranove found, after analyzing heath plan claims data, "St. Luke's past acquisitions resulted in either *no significant spending changes or increased total spending*."[85] Accordingly, St. Luke's speculation that prior acquisitions led to efficiencies is inconsistent with quantitative evidence.

Defendants claim that St. Luke's needs to employ a certain number of physicians – a so-

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[82] *See, e.g.*, Def.'s Mem. in Opp. to Pls.' Mot. for Prelim. Inj'n at 9-13, St. Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-cv-00560 BLW, Docket No. 34. *See also H & R Block*, 833 F. Supp. 2d at 91 ("Particular scrutiny of HRB's efficiencies claims is also warranted in light of HRB's historical acquisitions.").
[83] Bart Hill (St. Luke's) Dep. Tr. at 103:2-17; John Kee (St. Luke's) Dep. Tr. at 21:11-19; Kurt Seppi (St. Luke's) Dep. Tr. at 65:9-66:10; Alain Enthoven (Expert) Dep. Tr. at 112:1-115:2.
[84] TX 1052 (SLHS000054076 at 78).
[85] TX 1849 ¶ 242 (emphasis in original).

called "core" or "nucleus" – to achieve its cost and quality goals.[86] But neither St. Luke's nor its experts can provide any concrete support for this novel theory, let alone agree on the requisite number of employed physicians to comprise a "core" or "nucleus."[87] In fact, Defendants' efficiencies expert testified that he thought *four* employed physicians would provide a sufficient "core" under his version of this theory, perhaps not realizing that St. Luke's already employed *seven* PCPs in Nampa alone before the Acquisition.[88]

The Acquisition's purported benefits for Saltzer are similarly speculative. For example, St. Luke's asserts that Saltzer's use of an electronic medical record system ("EMR") will be enhanced by the Acquisition. But Saltzer already uses its own EMR, providing its physicians and patients with the benefits of EMR regardless of whether it is acquired by St. Luke's.[89] And of course, neither Defendants nor their experts have measured the purported benefits from Saltzer switching from its existing EMR to St. Luke's EMR,[90] but even if they had, St. Luke's admits that Saltzer will not realize any such benefit for at least another five years.[91]

Defendants have also claimed that the Acquisition will transform the incentives faced by Saltzer physicians, but under the terms of the Professional Services Agreement, they will continue to be compensated based on volume and productivity, rather than quality.[92] An amendment executed a few weeks before trial, offering vague assurances that Defendants would

[86] Expert Report of Alain Enthoven ¶ 208.
[87] *Compare* David Pate (St. Luke's) Dep. Tr. at 327:1-6, *with* Kurt Seppi (St. Luke's) Dep. Tr. at 17:3-18, *and* Alain Enthoven (Expert) Dep. Tr. at 132:13-133:1.
[88] Alain Enthoven (Expert) Dep. Tr. at 132:13-133:1.
[89] TX 1850 ¶ 94.
[90] David Argue (Expert) Dep. Tr. at 32:13-21; Alain Enthoven (Expert) Dep. Tr. at 141:20-23.
[91] TX 1850 ¶ 91. *See also* Geoffrey Swanson (St. Luke's) Dep. Tr. at 103:6-19; Marc Chasin (St. Luke's) Dep. Tr. at 18:4-21:12.
[92] TX 1378 at Exhibit 5.1; Kee Dep. 38:22-41:15.

"work together in good faith" to "incentivize value over volume" by implementing an unspecified form of "Quality Compensation," fails to include any concrete provision to change these incentives.[93]

- **Defendants' Efficiencies Claims Are Not Merger-Specific**

Even assuming counterfactually that Defendants' efficiencies claims were verifiable, none of the Acquisition's purported benefits is merger-specific. The evidence does not support Defendants' argument that the Acquisition is necessary to improve the quality and lower the cost of healthcare. Defendants' own expert, Dr. Argue, confirms this reality, testifying "perhaps [St. Luke's] would" achieve its claimed goal of providing integrated care without acquiring Saltzer.[94] And Defendants' experts never considered any of the viable alternative alignment options that Saltzer could pursue if the Acquisition were unwound.[95] Meanwhile, St. Luke's own executives acknowledged the existience of such alignment altneratives for Saltzer, noting that physician groups can even provide integrated care without aligning with a hospital.[96]

Furthermore, St. Luke's own executives and physician leaders freely admit that the system can pursue its cost and quality goals working with independent providers.[97] According to St. Luke's CEO, David Pate, if the acquisition were unwound, it would seek "a joint venture" with Saltzer, adding "we want to work with physicians that want to work with us in however we

[93] TX2624.
[94] David Argue (Expert) Dep. Tr. at 7:5-20.
[95] Alain Enthoven (Expert) Dep. Tr. at 123:23-124:7.
[96] John Kee (St. Luke's) Dep. Tr. at 96:24-97:10; Kurt Seppi (St. Luke's) Dep. Tr. 26:20-27:2.
[97] *See, e.g.,* Gary Fletcher (St. Luke's) Dep. Tr. at 64:17-24, 61:19-61:23; Marc Chasin (St. Luke's) Dep. Tr. at 67:14-21; Chris Roth (St. Luke's) Dep. Tr. at 132:8-134:21; Gregory Orr (St. Luke's) Dep. Tr. at 66:6-13; Bart Hill (St. Luke's) Dep. Tr. at 100:15-24.

can."[98] Indeed, St. Luke's has rolled out its EMR to independent physicians through its "Affiliate EMR Program."[99] Saltzer therefore could achieve any purported benefits of using St. Luke's EMR by subscribing to the Affiliate EMR Program, even if it remained independent.

3. *Entry Is Unlikely To Be Timely or Sufficient To Preserve Competition*

Defendants' other potential defenses also fall short of the requirements of the antitrust laws. Defendants argue that the threat of entry by new providers or expansion by existing providers would constrain the exercise of market power, but they have offered no evidence that such entry or expansion would be "timely, likely, or sufficient" to counteract or deter the Acquisition's likely anticompetitive effects.[100] As the *Merger Guidelines* explain, "for entry to be considered likely, it must be a profitable endeavor, in light of the associated costs and risks."[101] Numerous factors can serve as barriers to successful entry and expansion, including the strong market reputation enjoyed by incumbent firms.[102] In addition, the "history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future."[103] And "for entry or expansion to be sufficient, it must replace *at least the scale and strength* of one of the merging firms in order to replace the lost competition from the Acquisition."[104]

Here, any claim that entry or expansion will somehow constrain St. Luke's exercise of market power is inconsistent with the facts on the ground and the testimony of Defendants' own

[98] David Pate (St. Luke's) Dep. Tr. at 167:16-168:1; *see also* John Kee (St. Luke's) Dep. Tr. at 64:14-65:9.
[99] Women's Health Associates, an independent physician group, is the first physician group to participate in St. Luke's Affiliate EMR Program. John Kee (St. Luke's) Dep. Tr. at 129:12-21. Indeed, they will have the "full capability" to use St. Luke's EMR. *Id.* at 181:5-23.
[100] *See ProMedica*, 2011 WL 1219281, at *31; *see also* TX 1834 § 9.
[101] *ProMedica*, 2011 WL 1219281, at *31.
[102] *Cardinal Health*, 12 F. Supp. 2d at 57.
[103] *Cardinal Health*, 12 F. Supp. 2d at 56.
[104] *ProMedica*, 2011 WL 1219281, at *34.

economic expert. First, numerous sources confirm that providers in Nampa have faced difficulty recruiting new PCPs to practice there.[105] In addition, to the extent any recruitment has occurred, nearly all of it over the past several years has been by established physician groups – like St. Luke's and Saltzer – rather than by new entrants.[106] Second, the evidence shows that it takes significant time and resources for new entrants to build successful practices.[107] Among other things, Saltzer and St. Luke's enjoy reputational advantages that other providers, particularly new entrants, would find difficult – if not impossible – to replicate.[108] Even after several years, new physicians have practices that are much smaller than those of established physicians, likely because of patients' loyalty and preference for physicians with established reputations in the area.[109] Indeed, Defendants' economic expert, Dr. Argue, admitted that physician practices face high fixed costs that may prevent profitable entry.[110] Perhaps most tellingly, Dr. Argue also admitted in his deposition that he has not analyzed whether any new entrants could timely attract enough patients to constrain St. Luke's exercise of market power.[111] Defendants' unsubstantiated and speculative claims that entry or expansion would counteract the Acquisition's likely anticompetitive effects should be rejected.

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[105] *See, e.g.*, Karl Keeler (Saint Al's) Dep. Tr. at 208:18-209:13; Nancy Powell (Saint Al's) IH Tr. at 18:2-11; David Peterman (PHMG) Dep. Tr. at 77:17-78:3, 88:20-89:7; Linda House (St. Luke's) Dep. Tr. at 185:4-187:15; John Kee (St. Luke's) Dep. Tr. at 290:15-291:5; 232:7-15; David Pate (St. Luke's) Dep. Tr. at 194:13-195:11; John Dao (Wipfli) Dep. Tr. at 114:19-21.
[106] TX 1848, fig. 27.
[107] TX 1251 (SLHS000522518 at 29); Nancy Powell (Saint Al's) Dep. Tr. at 373:1-374:2; Joni Stright (St. Luke's) Dep. Tr. at 162:11-15.
[108] Nancy Powell (Saint Al's) Dep. Tr. at 139:23-140:24; *see also Cardinal Health*, 12 F. Supp. 2d at 57 (noting that the "strength of reputation that the Defendants already have over these wholesalers serve as barriers to competitors as they attempt to grow significantly in size").
[109] Tom Reinhardt (Saint Al's) Dep. Tr. at 47:15-50:11; Nancy Powell (Saint Al's) Dep. Tr. at 138:22-139:3.
[110] David Argue (Expert) Dep. Tr. at 99:24-101:19.
[111] David Argue (Expert) Dep. Tr. at 217:7-220:15.

II. THE ACQUISITION IS ALSO UNLAWFUL BECAUSE IT SUBSTANTIALLY LESSENS COMPETITION IN TWO ADDITIONAL MARKETS[112]

A. St. Luke's Added Market Power In Adult PCP Services Undermines Competition In Other Markets

The market power St. Luke's has gained in Adult PCP Services gives it the ability to direct necessary referrals and physician affiliations away from Private Plaintiffs and independent networks. By redirecting those referrals and physician affiliations, St. Luke's will effectively shut out competition in two additional markets: (i) general acute care hospital services provided to commercially insured patients in Ada and Canyon counties; and (ii) facility services for orthopedic and general surgery provided to commercially insured patients in these counties.[113] A provider's ability to compete in these markets depends heavily on referrals from PCPs.[114] Specifically, three different kinds of competitive harm are likely to occur in these markets:

- The Saltzer transaction will foreclose referrals from Saltzer physicians to Saint Al's and TVH, thereby seriously weakening these facilities, the primary rivals to St. Luke's. This will seriously harm overall competition, since St. Luke's possesses a dominant position in these markets.

- The acquisition of Saltzer will give St. Luke's control of another critical provider in the market, and make it even more difficult for competing networks of physicians and hospitals to provide satisfactory alternatives to payors and employers. This behavior will harm competition in all the relevant markets.

- Coupled with the more than 20 other recent physician practice acquisitions by St. Luke's, successful acquisition of Saltzer will send a powerful message to the remaining physicians in the market that St. Luke's is on a path to control primary care referrals into the relevant markets. This will lead to even more physician

[112] Government Plaintiffs do not join this section of Plaintiffs' Joint Pre-Trial Memorandum.
[113] General acute-care services encompass a broad cluster of medical and surgical diagnostic and treatment services that include an overnight hospital stay. Orthopedic and general surgery facility services involves the services provided by hospitals and surgery centers in connection with orthopedic and general surgery procedures. Defendants do not contest the definition of these two markets.
[114] *See* TX 1854 ¶ 26.

acquisitions, as specialists see a need to join St. Luke's or risk the loss of referrals.[115]

B. The Acquisition Will Foreclose Competition

The potential for anticompetitive effects from foreclosure of competition 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."[116] 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."[117]

The case law does not require proof of foreclosure of the acquired business, and the cases (which are often decided pre-acquisition) generally presume the existence of foreclosure without

[115] It has long been accepted that "the likelihood that a given merger will trigger other mergers and give impetus to further concentration is a relevant factor in assessing the anticompetitive effect of that merger." *General Foods Corp. v. F.T.C.*, 386 F.2d 936, 946 (3rd Cir. 1967) (citing *Brown Shoe*, 370 U.S. at 343-344. *See* Roberto Baressi (St. Luke's) Dep. Tr. at 45:23-46:24 (Boise Surgical considered potential for increased referrals when agreeing to acquisition). The consequences will include (among other transactions) the acquisitions St. Luke's has put on hold pending the results of the government's actions. Joni Stright (St. Luke's) Dep. Tr. at 122:17-125:10.

[116] *Brown Shoe*, 370 U.S. at 323-24 (internal quotation marks omitted); *see also Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1379 (9th Cir. 1978), *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Cal. 1967).

[117] FTC/DOJ, Statements of Antitrust Enforcement Policy in Health Care, Statement 9 http://www.ftc.gov/bc/healthcare/industryguide/policy/statement9.htm).

discussion.[118] The common sense idea that an acquired company will buy or sell from its parent to the extent desired by the parent has rarely been disputed, and then unsuccessfully.[119]

The evidence overwhelmingly shows that St. Luke's acquisition of physician practices forecloses competition. St. Luke's own physicians acknowledge that their patients generally follow their recommendations.[120] After St. Luke's acquisition of their practices, St. Luke's physicians have routinely recommended that their patients utilize St. Luke's facilities.[121] Indeed, referrals to internal St. Luke's sources are the "default" option under St. Luke's computer systems.[122] These results are further confirmed by St. Luke's documents and depositions, which make clear that St. Luke's expects greater numbers of referrals from physicians after their groups

[118] *See Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978); *see also United States v. Kimberly-Clark*, 264 F. Supp. 439, 448 (N.D. Cal. 1967) ("It is not part of the Government's burden to show actual foreclosure; however, the evidence in this case goes beyond the statutory test . . . BMT's increasing purchases from K-C in a relatively short time establish the probability of future foreclosure.").

[119] *See Harnischfeger Corp. v. Paccar, Inc*., 474 F. Supp. 1151, 1158 (D. Wis. 1979) (finding that, although the defendant manufacturer claimed it had "no intention of foreclosing" the plaintiff competitor, "[i]t is more likely than not that a manufacturer that owns a significant purchaser would prefer to utilize the advantages of having a captive market.").

[120] *See, e.g.*, Robert Walker (St. Luke's) Dep. Tr. at 62:1-7; Mark Rutherford (St. Luke's) Dep. Tr. at 82:19-83:1; Jon Schott (St. Luke's) Dep. Tr. at 141:6-142:12; David Argue (Expert) Dep. at 236:19-237:6.

[121] *See, e.g.,*. Scott Huerd (St. Luke's) Dep. Tr. at 95:11-17; Mark Johnson (St. Luke's) Dep. Tr. at 73:16-24; Souza (St. Luke's) Dep. Tr. at 79:24-80:5; Marshall Priest (St. Luke's) Dep. Tr. at 95:9-96:6.

[122] See TX 1257 (SLHS0000007583); Darby Webb (St. Luke's) Dep. Tr. at 106:2-7; Robert Walker (St. Luke's) Dep. Tr. at 102:9-103:18.

are acquired.[123]

Most importantly, these expectations existed with regard to the Saltzer transaction.[124] This is because, in the words of one Saltzer physician leader, St. Luke's "declined to allow us autonomy in patient referral patterns"[125] As Saltzer's consultant acknowledged, "once they are aligned with St. Luke's, there was the expectation that their work would largely . . . go to St. Luke's."[126]

These admissions are confirmed by the data, from multiple sources, which shows that after acquisitions, physicians switch the vast majority of their referrals to St. Luke's facilities. Professor Haas-Wilson found the same results when using Saint Al's data;[127] Blue Cross and Regence data;[128] whether analyzing inpatient admissions or use of outpatient facilities; whether or not the patient was originally referred to a specialist by a Saint Al's medical group ("SAMG") physician;[129] and for PCPs as well as specialists.[130] St. Luke's offers a series of explanations for

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[123] *See, e.g.,* TX 1139 (SLHS000025963 at 65); Gary Fletcher Dep. Tr. at 155:1-20 (St. Luke's made plans "to provide sufficient capacity for all cases [of Intermountain Orthopaedics] to be performed at St. Luke's" after the acquisition of the group.); TX 1398 (SLHS0000009078 at 83) ("Patient referrals from Boise Surgical Group have significantly increased since their affiliation with St. Luke's."); TX 1347 (SLHS000474024 at 25) ("Cardiovascular and Chest Surgical Associates . . . Integration Proposal": "Incremental hospital-based revenue could be significant.").

[124] *See* TX 1120 (SLHS001182816) ("If Saltzer spins off General and Ortho specialties . . . will . . . refer to . . . St. Luke's aligned docs.").

[125] TX 1155 (COKER0006581).

[126] Max Reiboldt (Coker) Dep. Tr. at 97:21-99:1.

[127] *See* TX 1723 (admissions at Saint Al's declined by 48%, 90%, 91%, 100% and 100% at practices acquired by St. Luke's); *see also* TX 1724 (Decline of 77%-100%.).

[128] *See* TX 1705 (Declines of 1%, 89%, 95%, and 98%).

[129] *See* TX 1673 (Declines of 35%, 56%, 58%, 77%, and an increase of 6% (in one case) for patients seeing a SAMG physician, and TX 1674 (declines of 0% (in one case), 17%, 31%, 43%, and 49% for patients not seeing a SAMG physician).

[130] *See* TX 1673, 1674, 1705, and 1723.

this evidence, but none of them can withstand any scrutiny.[131]

The overwhelming conclusion is that substantial foreclosure will occur here.

C. The Acquisition Will Remove Competitive Constraints On St. Luke's

Of course, foreclosure is not necessarily anticompetitive. It must have the potential to harm overall competition in a market to be of concern. But that conclusion is readily found under these facts. First, this foreclosure will cause substantial harm to Private Plaintiffs. The loss of critical Saltzer referrals (representing 40% of the hospital's volume) will be devastating to Saint Al's. The Saltzer acquisition threatens to reduce dramatically Saint Al's 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 harm to Saint Al's will in turn reduce the ability of Saint Al's-based networks to provide significant competition for St. Luke's-based networks, because it will limit the effective geographic breadth of any such network, an important factor to payors and employees.[132]

Such effects harm overall competition, since they threaten to increase St. Luke's already dominant shares[133] to a near monopoly.[134] Courts recognize harm to competition in violation of Section 7 of the Clayton Act when the only major competitors of a dominant player in a highly concentrated market are injured. "If concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual

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[131] *Compare* David Argue (Expert) Dep. Tr. at 256:14-25, *with* Roberto Baressi (St. Luke's) Dep. Tr. at 52:2-6; Expert Report of David Argue ¶¶ 367, 376, 394; David Argue (Expert) Dep. Tr. at 255:21-256:13; Expert Report of David Argue at ¶ 392, David Argue (Expert) Dep. Tr. at , 246:5-249:14.

[132] *See* Steve Drake (St. Luke's) Dep. Tr. at 71:12-73:23, 78:17-79:7.

[133] 63% in general acute care and 55-57% in the surgery facilities markets. TX 1758, 1759.

[134] *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924-25 (9th Cir. 1980) ("market shares on the order of 60 percent to 70 percent have supported findings of monopoly power.").

deconcentration is correspondingly great."[135]

TVH has already been harmed by foreclosure. The Saltzer surgeons practicing at TVH did not participate in the St. Luke's-Saltzer transaction, and, instead, chose to contract with Saint Al's. As a result, these surgeons have lost most of the referrals from their ex-colleagues at Saltzer.[136] This has resulted in the loss of substantial referrals to TVH.[137]

This harm is highly important to overall competition, because TVH's reimbursement rates are substantially lower than St. Luke's, and by recognized federal measures, TVH provides higher quality care than St. Luke's.[138] St. Luke's recognizes that independent surgical facilities, such as TVH, are substantially cheaper than it is, and that St. Luke's needs to reduce its outpatient rates in order to meet this competition.[139] TVH is also one of very few independent surgery centers in the market, and the only one with a market share greater than 20 percent.[140] For these reasons, TVH provides an important competitive constraint in the relevant surgery markets. Courts recognize harm to competition in violation of Section 7 of the Clayton Act

[135] *United States v. Aluminum Co. of America*, 377 U.S. 271, 279 (1964); *see also Phila. Nat'l Bank, 374* U.S. 321 at 365 n.42.
[136] Andrew Curran (TVH) Dep. Tr. at 123:1-123:18 (referrals from Saltzer physicians have been "reduced by 80 to 90 percent"); Keith Holley (TVH) Dep. Tr. at 140:12-17 ("actual number of new referrals [from Saltzer] is down 90 percent"); Steven Williams (TVH) Dep. Tr. at 115:24-116:3 ("I don't really get Saltzer referrals anymore").
[137] Nick Genna (TVH) Dep. Tr. at 43:1-10 ("lost 50 percent of the Saltzer physicians' volume"), 93-96.
[138] Andrew Curran (TVH) Dep. at 49:2-15; Decl. of Nick Genna, ¶10, Ex. A; Jeffrey Hessing (TVH) Dep. at 12, 69:9-71:10.
[139] Jeffrey Taylor (St. Luke's) Dep. Tr. at 108:21-111:21, 260:3-8; TX 1055(SLHS000804978).
[140] TX 1759.

when a low price competitor is injured.[141]

Moreover, a combined St. Luke's/Saltzer is very likely to have the ability to use its dominance to seriously weaken any competitive alternatives.[142] For example, St. Luke's can and will harm competitors by pulling its critical providers, such as Saltzer, from the networks that include Saint Al's. Indeed, St. Luke's has already stated that Saltzer's contract with one commercial payor "should be reviewed and put into the exit queue just like we are contemplating with Wise, ACN, and even IPN eventually."[143] And St. Luke's has approved (and not rescinded) a plan to "[e]xit the [Saint Al's] ACN agreement for all clinics by July 1, 2013."[144]

St. Luke's planned actions will make alternative networks less competitive, and reduce or eliminate the choices possessed by customers. St. Luke's own Vice President for Payer Relations observed that Saltzer's absence from Saint Al's ACN network would "cripple" it.[145]

These concerns are even greater given the series of acquisitions by St. Luke's that preceded the Saltzer transaction. To succeed under Section 7 of the Clayton Act, Plaintiffs need only show that St. Luke's acquisition of Saltzer is a contributing cause of the cumulative harm that St. Luke's numerous acquisitions have brought upon Saint Al's and competition in general

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[141] *See H&R Block*, 833 F.Supp.2d at 79 (noting that proposed "merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects") (quotation marks omitted); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d at 146 (D.C. 2004).
[142] TX 1854 ¶¶ 206-212, ¶¶ 224-231.
[143] See TX 1225 (SLHS000892455). (St. Luke's executive states that Saltzer's then current First Choice Health contract "should be reviewed and put into the exit queue just like we are contemplating with Wise, ACN, and even IPN eventually.").
[144] TX 1207 (SLHS000458067); Steve Drake (St. Luke's) Dep. Tr. at 253:23-255:14. The only reason St. Luke's has not yet withdrawn its physicians from these networks is the pendency of the FTC investigation. *See* Steve Drake (St. Luke's) Dep. Tr. at 241:19-244:16.
[145] TX 1224 (SLHS001222471). *See also* Randy Billings (St. Luke's) Dep. Tr. at 96:16-97:11 (Saint Al's would have a "revolt on their hands" without Saltzer).

in the relevant market. The Ninth Circuit has noted that, under Section 7 of the Clayton Act, "a substantial lessening of competition was to be prohibited whether the acquiring corporation accomplished these results by one immense gobble of another large producer or whether it set out to produce the same results by nibbling away at small producers."[146] This is the case because "Congress had to see to it that no dominant operator in any industry should be permitted to frustrate the purposes of the Act by absorbing its rivals bit by bit."[147]

The Supreme Court has likewise determined that "the objective [of the Clayton Act] was to prevent accretions of power which "are individually so minute as to make it difficult to use the Sherman Act test against them."[148] The Saltzer transaction is certainly anything but minute, but the issue here is accentuated by St. Luke's growing accretion of power from multiple transactions.[149]

III. DIVESTITURE IS REQUIRED TO RESTORE AND PROTECT COMPETITION

Defendants have thus far not advanced a failing or "flailing" firm defense. Nevertheless, they appear to attempt to avoid the strict requirements of those defenses in favor of a "weakened competitor" remedy argument. Plaintiffs strongly disagree with any assertion that a divested Saltzer would not be a competitive force in Nampa. But even if that were not the case, full

[146] *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 822 (9th Cir. 1961). *See also E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473, 479 (9th Cir. 1958).
[147] *Crown*, 296 F.2d at 822.
[148] *Aluminum Co.*, 377 U.S. at 280 (citation omitted).
[149] St. Luke's managed care executives have acknowledged that its acquisition of popular physician groups has "improved [its] bargaining position. Steve Drake Dep. Tr. at 142:1-147:1, 226:21-227:3 (potential "further advantage in negotiations.").

divestiture of Saltzer from St. Luke's is the only appropriate remedy here.[150] "The very words of Section 7 [of the Clayton Act] suggest that an undoing of the acquisition is a natural remedy."[151] Indeed, "divesture has been called the most important of antitrust remedies" and "should always be in the forefront of a court's mind when a violation of Section 7 has been found."[152] "Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a Section 7 violation."[153] Divestiture therefore is "the remedy best suited to redress the ills of an anticompetitive merger."[154] Once Plaintiffs have established a violation of Section 7, "all doubts as to the remedy are to be resolved in [their] favor."[155]

No special circumstances exist to warrant an alternative remedy for this Section 7 violation here. During the preliminary injunction hearing, St. Luke's represented to this Court that it could easily unwind the Acquisition (*i.e.*, order divestiture) if the Court found after the merits trial that the Acquisition violated Section 7.[156] For this very reason, it was unnecessary for the Court to preliminarily enjoin the Acquisition during the pendency of this litigation to avoid "scrambling the eggs" that would later limit the Court's ability to order effective relief if the Acquisition were found to be unlawful. Any argument by Defendants now that unwinding the Acquisition would not fully restore competition would be disingenuous. Moreover, any remedy short of full divestiture would create the perverse incentive for an acquirer, like St.

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[150] Of course, if the Court has any doubts about Saltzer's post-divestiture viability, it has the authority to order St. Luke's to provide financial assistance to Saltzer to fully restore competition to its pre-Acquisition state.
[151] *United States v. E.I. du Pont*, 366 U.S. 316, 329 (1961).
[152] *E.I. du Pont*, 366 U.S. at 330-31.
[153] *American Stores*, 495 U.S. at 284.
[154] *American Stores*, 495 U.S. at 287.
[155] *E.I. du Pont*, 366 U.S. at 334.
[156] Transcript of Prelim. Inj'n Proceedings at 87-88, No. 1:12-cv-00560 BLW, Docket No. 49.

Luke's, to weaken its acquired competitor, with the knowledge that doing so could cement an otherwise unlawful merger.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter the following relief:

(i) Permanently enjoin the Acquisition under Section 7 of the Clayton Act and the Idaho Competition Act;

(ii) Order St. Luke's to fully divest Saltzer's physicians and assets and take any further action needed to establish the competition that would have existed but for the unlawful Acquisition;

(iii) Order St. Luke's to notify Government Plaintiffs in advance of any future acquisitions of physician groups; and

(iv) Award reasonable costs and attorney's fees to the Office of the Idaho Attorney General, Saint Al's, and TVH.

/s/ Brett T. DeLange
Lawrence G. Wasden,
Attorney General
Brett T. DeLange
Chief, Consumer Protection Division
Carl J. Withroe
Deputy Attorney General
Colleen Zahn
Deputy Attorney General
Office of the Attorney General
State of Idaho
700 West Jefferson Street
Boise, ID 83720
Tel: 208-334-2400
brett.delange@ag.idaho.gov
carl.withroe@ag.idaho.gov
colleen.zahn@ag.idaho.gov

Kevin J. O'Connor
Eric J. Wilson
Wendy K. Arends
Special Deputy Attorneys General
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
Madison, WI 53703
Tel: 608-257-3911
ewilson@gklaw.com
koconnor@gklaw.com
warends@gklaw.com

Counsel for Plaintiff State of Idaho

/s/ J. Thomas Greene
J. Thomas Greene
Peter C. Herrick
Henry C. Su
Michael Perry
Douglas E. Litvack
Matthew Accornero
Attorneys
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Tel: 415- 848-5196
tgreene2@ftc.gov
pherrick@ftc.gov
hsu@ftc.gov
mperry@ftc.gov
dlitvack@ftc.gov
maccornero@ftc.gov

Deborah L. Feinstein, Director
Norman A. Armstrong, Jr., Deputy Director
Bureau of Competition
Federal Trade Commission

Robert J. Schroeder, Director
Northwest Region
Federal Trade Commission

Jonathan E. Nuechterlein, General Counsel
Federal Trade Commission

Counsel for Plaintiff Federal Trade Commission

/s/ David A. Ettinger
Keely E. Duke
Duke Scanlan Hall PLLC
1087 West River Street, Suite 300
Boise, ID 83702
Tel: 208-342-3310
ked@dukescanlan.com

David A. Ettinger
Lara Festco Phillip
Honigman Miller Schwartz and Cohn LLP
660 Woodward Avenue
2290 First National Building
Detroit, MI 48226-3506
Tel: 313-465-7368
dettinger@honigman.com
lara.phillip@honigman.com

Counsel for Plaintiffs Saint Alphonsus Medical Center - Nampa, Inc.; Saint Alphonsus Health System, Inc.; and Saint Alphonsus Regional Medical Center, Inc.

/s/ Raymond D. Powers
Raymond D. Powers
Portia L. Rauer
Powers Tolman Farley, PLLC
345 Bobwhite Ct., #150
Boise, ID 83706
Tel: 208-577-5100
rdp@powerstolman.com
plr@powerstolman.com

Counsel for Plaintiff Treasure Valley Hospital Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2013, I filed the foregoing with the clerk of the Court.

/s/ Douglas E. Litvack
Douglas E. Litvack
Attorney for Plaintiff Federal Trade Commission

I HEREBY CERTIFY that on September 10, 2013, I served the foregoing on the following counsel via electronic mail:

J. Walter Sinclair
Stoel Rives, LLP
101 S. Capitol Blvd, Suite 1900
Boise, ID 83702
(208) 389-9000
jwsinclair@stoel.com

Jack R. Bierig
Scott D. Stein
Ben Keith
Sidley Austin, LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com
sstein@sidley.com
bkeith@sidley.com

Counsel for Defendant St. Luke's Health System, Ltd.

Brian K. Julian
Anderson, Julian & Hull, LLP
C.W. Moore Plaza
250 South Fifth Street, Suite 700
PO Box 7426
Boise, ID 83707
(208) 344-5800
bjulian@ajhlaw.com

Counsel for Defendant Saltzer Medical Group, P.A.

/s/ Douglas E. Litvack
Douglas E. Litvack
Attorney for Plaintiff Federal Trade Commission