J. Walter Sinclair, ISB #2243
jwsinclair@hollandhart.com
HOLLAND & HART LLP
800 West Main St, Ste 1705
Boise, ID 83702
(208) 383-3928

Attorneys for Defendants St. Luke's Health System, Ltd. and St. Luke's Regional Medical Center, Ltd.

Jack R. Bierig *(pro hac vice)*
jbierig@sidley.com
Scott D. Stein *(pro hac vice)*
sstein@sidley.com
Charles K. Schafer *(pro hac vice)*
cschafer@sidley.com
Tacy F. Flint *(pro hac vice)*
tflint@sidley.com
Ben Keith *(pro hac vice)*
bkeith@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Brian K. Julian, ISB #2360
bjulian@ajhlaw.com
ANDERSON, JULIAN & HULL, LLP
C.W. Moore Plaza
250 South Fifth Street, Ste. 700
Post Office Box 7426
Boise, ID 83707-7426
(208) 344-5800

Attorney for Saltzer Medical Group, P.A.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER, NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD, and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants.	Case No. 1:12-cv-00560-BLW (Lead Case) **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL**
FEDERAL TRADE COMMISSION; STATE OF IDAHO Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A. Defendants.	Case No. 1:13-cv-00116-BLW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Defendants St. Luke's Health System, Ltd., St. Luke's Regional Medical Center, Ltd. (collectively, "St. Luke's") and Saltzer Medical Group, P.A. ("Saltzer") respectfully move for a stay of the effective date of the Court's order of divestiture of Saltzer pending appeal. As the Court has recognized, this case presents issues of both exceptional importance and substantial difficulty. Accordingly, divestiture should not be required until those issues can be reviewed by the Court of Appeals. Moreover, the balance of hardships strongly favors a stay. There is no evidence that competition will be suppressed if Saltzer remains affiliated with St. Luke's during the pendency of the appeal—while there is substantial evidence that patients and Saltzer physicians and employees will be harmed if Saltzer is wrongly required to be divested.

Immediate divestiture would, as a practical matter, undercut defendants' right of appeal in that it would be impossible to undo the effects of divestiture if the Court of Appeals were to reverse on either substantive or remedial grounds. To the contrary, the record makes clear that divestiture prior to a decision by the Ninth Circuit will lead to substantial harm to Saltzer (including the likely loss of physicians from the group) and its elimination as an effective competitor. By contrast, a delay of divestiture pending appeal would have little or no adverse effect on the parties or the public. Indeed, there is no evidence that St. Luke's has engaged in any anticompetitive pricing during the period of more than a year since the affiliation was effectuated, and nothing in the findings of fact of this Court supports a conclusion that any anticompetitive effects from the affiliation are imminent.

Recognizing that this Court has ruled against them, defendants believe nonetheless that an appeal has a likelihood of success both on the merits and on the Court's choice of remedies. At the very minimum, however, an appeal will raise serious legal questions. Where, as here, the balance of hardships strongly favors the appellants, that is enough to warrant a stay. *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008) (court need only find that defendants can show that the case raises "serious legal questions" for a stay to be granted).

BACKGROUND

On January 24, this Court entered its Findings of Fact and Conclusions of Law, concluding that the affiliation between St. Luke's and Saltzer violates § 7 of the Clayton Act. Dkt. 464 Conclusions ¶ 78. The Court found that the transaction was intended "primarily to improve patient outcomes" and "would have that effect if left intact." *Id.* at 3. It also concluded that "[i]n a world that was not governed by the Clayton Act, the best result might be to approve the Acquisition," *id.* Conclusions ¶ 76. Nevertheless, the Court held that the transaction violated the Clayton Act—and stated that it would, therefore, order the divestiture of Saltzer.

In particular, the Court ruled that the government plaintiffs had established a prima facie case that the transaction was anticompetitive and would lead to price increases in what the Court regarded as the market for primary care physician services in Nampa. Dkt. 464 Conclusions ¶¶ 23-26. The Court rejected the defense that any anticompetitive effects would be outweighed by the procompetitive benefits of the transaction. *Id.* Conclusions ¶¶ 27-49. It declined to "resolve the issues raised by the private plaintiffs." *Id.* Conclusions ¶ 64.

As to remedy, the Court indicated that it would permanently enjoin the Saltzer affiliation under § 7 of the Clayton Act and corresponding Idaho law, and "will order St. Luke's to fully divest itself of Saltzer's physicians and assets and take any further action needed to unwind the Acquisition." *Id.* Conclusions ¶¶ 79-80. On February 28, 2014, the Court so ordered. It entered Judgment requiring St. Luke's to "fully divest itself of Saltzer's physicians and assets and take any further action needed to unwind the Acquisition." Dkt. 471. St. Luke's and Saltzer now seek to delay the effective date of the Court's order of divestiture in order to preserve their appeal rights.

ARGUMENT

Determination of whether a stay pending appeal should be granted is "guided by the following legal principles": "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)) (internal quotation marks omitted). These are the same four factors that govern the preliminary injunction analysis. *Id.* at 1203 n.2. However, these factors are weighed differently in the stay context.

In particular, whether a stay pending appeal is warranted is determined through a sliding scale:

> At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. … At the other end of the continuum, the moving party must demonstrate that *serious legal questions are raised and that the balance of hardships tips sharply in its favor*. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. Further, we consider where the public interest lies separately from and in addition to whether the applicant [for stay] will be irreparably injured absent a stay[.]

Golden Gate Rest. Ass'n, 512 F.3d at 1115-16 (citations and internal quotation marks omitted; emphasis added).

Significantly, as the Ninth Circuit has emphasized, the likelihood-of-success factor "does not require the petitioners to show that it is more likely than not that they will win on the merits," but instead only that "there is a substantial case for relief on the merits." *Lair*, 697 F.3d at 1204 (citation and internal quotation marks omitted). Indeed, as one district court explained, "[w]hen the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather, with regard to the first prong …, the movant need only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998).

Although the propriety of a stay pending appeal and injunction are determined based on similar factors, the Supreme Court has noted an important difference:

> A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct. A stay "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention…."

Nken, 556 U.S. at 428-29 (citation omitted). In the words of the Ninth Circuit, "a flexible approach is even *more* appropriate in the stay context" than in the injunction context, because "stays are typically less coercive and less disruptive than are injunctions." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Here, each of the relevant factors weighs in favor of staying the Court's order pending appeal.

I. Defendants Have A Substantial Case For Relief On Appeal.

This Court has recognized that this case presents important and difficult questions of law. While ultimately ruling in favor of the government plaintiffs, the Court explicitly recognized both the legal difficulty and uncertainty of the case. Specifically, after all the evidence had been presented and immediately before closing arguments, the Court stated as follows:

> [T]his is, undoubtedly, one of the most difficult cases that I think I've had to wrestle with. I can't think of a time when I've sat through a trial or even an evidentiary hearing and not at the end had a very clear fix in my mind as to what is the right answer. This case is difficult, plus I know the stakes are extremely high for not only all of the entities here, but even the community, and that makes the problem even that much more difficult.

Trial Tr. 3669:13-21. The Court further explained that the evolving healthcare landscape makes the decision in this case particularly uncertain: "[T]he very serious problem is whether or not what might have been viewed five or ten years ago as having very substantial anticompetitive effects, whether our view today has to be very different because we have a different world we're not only in now, but we're facing in the future." Trial Tr. 3670:20-25.

One factor that makes this case difficult is the fact, as found by the Court, not only that the transaction was entered into for the purpose of improving health care in the Treasure Valley, but also that the transaction *will* actually have such beneficial effects. In the Court's words, "[t]he Acquisition was intended by St. Luke's and Saltzer primarily to improve patient outcomes. *The Court believes that it would have that effect if left intact*." Dkt. 464 at 3 (emphasis added). As the Court recognized, "[h]ealth care is at a crisis point," and "[t]he Acquisition is an attempt by St. Luke's and Saltzer to improve the quality of medical care." Dkt. 464 Conclusions ¶¶ 66, 71. At the same time, while the Court found a "substantial risk of anticompetitive price increases" as a result of the merger, it recognized that whether prices would "actually" rise was uncertain. Dkt. 464 Conclusions ¶¶ 72, 76.

For that reason, the Court stated that it might have ruled differently but for its conclusion that the result it reached is compelled by the Clayton Act. *See* Dkt. 464 Conclusions ¶ 76. Thus, the Court determined that the Clayton Act does not permit the transaction because, in the Court's view, "the particular structure of the Acquisition—creating such a huge market share for the combined entity—creates a substantial risk of anticompetitive price increases." Dkt. 464

Conclusions ¶ 72. By contrast, "[i]n a world that was not governed by the Clayton Act, the best result might be to approve the Acquisition and monitor its outcome to see if the predicted price increases actually occurred. In other words, the Acquisition could serve as a controlled experiment." Doc. 464 Conclusions ¶ 76. The Court found, however, that "best result" to be outside its discretion—holding that "the Clayton Act is in full force, and it must be enforced." Dkt. 464 Conclusions ¶¶ 76-77. As the Court's statements reflect, the case presents serious legal questions—many of which will be subject to *de novo* review on appeal.

To begin, there is a substantial issue as to whether the Court applied the correct methodology in reaching its conclusions regarding anticompetitive effects. Specifically, the Court held that the transaction must be unwound because the "huge market share for the combined entity … creates a substantial risk of anticompetitive price increases," Dkt. 464 Conclusions ¶ 72—even though the transaction is also expected to result in improved patient outcomes, Dkt. 464 at 3. But the subordination of considerations of improved medical care to market concentration statistics stands in tension with the statements of other courts and authorities.

For example, the Eighth Circuit has ruled that a prima facie case based on market concentration *can be* rebutted by evidence that the transaction will lead to "integrated delivery" of care and, ultimately, "better medical care." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999). That court also emphasized that innovative measures designed to promote consumer welfare should not be prematurely squelched in the name of reducing market concentration: "[i]n view of 'the significant changes experienced by the hospital industry in the recent past and the profound changes likely facing the industry in the near future, ... a merger, deemed anticompetitive today, could be considered procompetitive tomorrow.'" *Id.* at 1054-55 (citation omitted). Somewhat similarly, in *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 545 (9th Cir. 1993), *vacated on other grounds*, 19 F.3d 449 (9th Cir. 1994) (en banc), the Ninth Circuit vacated a preliminary injunction requiring dissolution of merger under the federal labor laws where "[u]npacking the merger might … detract from the quality of medical care CPMC provides its patients" and would mean that "innovative procedures" made possible by the merger "would have to be abandoned."

In the more general antitrust context, the Ninth Circuit has cautioned against interpreting the Clayton Act to unwind transactions that might promote consumer welfare. Thus, that Court has explained that district courts should tread lightly when asked to disrupt movements toward innovation that themselves may promote competition. *See United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) (if market forces can potentially "cure the perceived problem," then "a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent"); *accord* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2-7 (1984) (suggesting that judicial "[w]isdom lags far behind the market" and firms must be allowed to experiment with innovative practices).

Relatedly, an appeal from the Court's decision will require the Ninth Circuit to examine the role of market concentration statistics in establishing a prima facie case at all. This Court, in its Conclusions of Law, stated that "[a] fundamental purpose of § 7 is 'to arrest the trend toward concentration,'" quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 367 (1963). Dkt. 464 Conclusions ¶ 12. The Court relied on *Philadelphia National Bank*, and the concentration-focused analysis utilized in that decision, in determining that the government plaintiffs had established a prima facie case of anticompetitive harm. Dkt. 464 Conclusions

¶¶ 16, 24-25, 72-74. But a host of subsequent decisions and other authorities have questioned *Philadelphia National Bank*'s focus on market concentration, opining instead that "[e]vidence of market concentration simply provides a convenient *starting point* for a broader inquiry into future competitiveness." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (emphasis added); *see also id.* at 990 (*Philadelphia National Bank* has been "cut … back sharply" by later case law); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.) (stating that it is "prudent" to "inquire into the probability of harm to consumers" rather than "rest[] on the very strict merger decisions of the 1960s"); Remarks of Joshua D. Wright, Commissioner, "The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets," at 15-17 (Sept. 24, 2013) ("[T]he structural presumption endorsed by *Philadelphia National Bank* does not make economic sense. Modern economic learning and empirical evidence does not support the notion that mergers that generate a post-merger firm with greater than 30 percent share are systematically more likely to be anticompetitive."), online at http://www.ftc.gov/public-statements/2013/09/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets.

But even assuming that this Court applied the correct methodology, an appeal will also call upon the Ninth Circuit to assess this Court's finding that Nampa is a relevant geographic market. Dkt. 464 Findings ¶ 73. While the Court found that "health plans must offer Nampa Adult PCP services to Nampa residents to effectively compete," Dkt. 464 Findings ¶ 71, defendants respectfully submit that that finding was clearly erroneous. For example, it is inconsistent with the Court's own finding that more than 30% of Nampa residents already leave Nampa for adult primary care services—even without the imposition of an anticompetitive price increase. Dkt. 464 Findings ¶ 65 ("68% of Nampa residents get their primary care from providers who are located in Nampa").[1] Moreover, the ruling totally ignores the natural experiment provided by Micron Technology. When Micron provided its employees a narrow network plan that caused visits to Saltzer physicians to be more expensive than Micron Health Partners Network ("MHPN") physicians, there was a dramatic shift of Micron employees in Nampa from Saltzer physicians to MHPN providers in Boise and Meridian. *See* Def. Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 414, ¶¶ 232-36.

Apart from the issue of proof of anticompetitive effects in the first instance, a serious legal question is raised as to the burden of proof on whether the transaction's procompetitive effects could, or could not, be achieved by less restrictive means—or, to put it in the terms utilized by the Court, whether those effects are "merger-specific." *See* Dkt. 464 Findings ¶ 185. The Court itself identified this as a significant legal question, stating, "I have been wrestling in my mind kind of the issue of who has that burden … to establish that, in fact, not only that there will be benefits, but that the benefits cannot be obtained without this type of a close, not only clinical but financial integration envisioned by the acquisition?" Trial Tr. 3794:3-17.

As the Court's comment reflects, the law on this issue in the context of the Clayton Act is relatively undeveloped. However, in the analogous context of the Sherman Act, it is firmly established that *plaintiffs* bear the burden of establishing a less restrictive alternative. That is, if plaintiffs establish anticompetitive effects, and defendants in turn establish countervailing procompetitive benefits, the burden returns to the *plaintiffs* to establish that those benefits could be achieved by a less restrictive alternative. *See, e.g., Clorox Co. v. Sterling Winthrop, Inc.*, 117

[1] The Court's finding on this score reflects the fact that, in addition to Boise, Meridian and Caldwell provide alternative geographic sources of primary care physician services for Nampa-based patients. *See* Trial Tr. 2938:18-2939:11 (D. Argue).

F.3d 50, 56 (2d Cir. 1997) ("Should the defendant carry this burden [to establish procompetitive effects], the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.") (citation omitted); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (same).

The issue is of substantial importance in this case because plaintiffs' own expert witness on this subject, Dr. Kenneth Kizer, conceded that it is, at most, uncertain whether an affiliation of physicians looser than that effectuated by the Saltzer transaction could produce the same or greater benefits of clinical integration and transition to value-based delivery of care than the employment of physicians as the transaction is actually structured. Trial Tr. at 3584:14-3585:1 ("The evidence to date does not show that employment" is either superior or inferior to "other models") (K. Kizer); *id.* at 3585:15-18 ("[T]he question of the relative importance of employment in terms of leading to clinically integrated care has not been answered in the empirical literature") (K. Kizer); *id.* at 3585:3 ("The jury is still out") (K. Kizer). Moreover, the plaintiffs made no effort to identify any contract or non-employment relationship that the Saltzer physicians could enter into with St. Luke's, or with any other network, to achieve the benefits of providing clinically integrated, value-based care. Trial Tr. 3596:17-3597:24 (statement of Dr. Kizer that he was "not asked to opine on the topic of what Saltzer could or should do if unwound so that it would be in a position to deliver integrated care"). Similarly, plaintiffs did not identify any such relationship that would enable the Saltzer physicians to continue the substantially increased community outreach, and enhanced ability to take Medicaid, uninsured, and other low-pay (or no-pay) patients, that the affiliation with St. Luke's has made possible. *See id.*; *see also, e.g.,* Trial Tr. 3312:22-3313:4, 3320:3-3321:2, 3329:9-3330:5 (T. Patterson); Trial Tr. 3082:22-25 (W. Savage).

How the evidence on such procompetitive benefits as defendants here demonstrated is to be weighed has been specifically recognized by commentators as an "issue [that] is likely to be important in future cases." Ex. A, Robert F. Leibenluft and Leigh L. Oliver, *The Antitrust Challenge to the St. Luke's/Saltzer Medical Group Transaction: Implications for Hospital/Physician Consolidations*, 23 Health L. Rep. (BNA) 301 (Feb. 27, 2014); *see also id.* ("Judge Winmill's struggle with the issues in this case raises the question of whether the test for merger specific efficiencies that he applied is too stringent in this current environment of innovation and change in health care. Missing from the court's decision is any discussion of whether (1) an integrated system with employed physicians may actually generate greater efficiencies and quality than one that is integrated through contract relationships, and (2) that employment may be a more efficient and timely way of achieving the integrated care.").

Quite apart from the merits, an appeal will also call for review of this Court's conclusion that the Clayton Act requires the drastic remedy of divestiture. *See* Dkt. 464 Conclusions ¶¶ 50-62. The Court acknowledged defendants' evidence that Saltzer would be severely harmed by divestiture and that a divested Saltzer would likely be unable to function as a strong competitive force. *See* Dkt. 464 Conclusions ¶¶ 55-56. Notably, the Court did not find to the contrary. Rather, it dismissed the significance of that evidence on the ground that Saltzer's precarious financial state "was caused by the Acquisition," and thus could not be "raise[d] … as a reason to hold together the Acquisition."[2] Dkt. 464 Conclusions ¶ 57. In other words, the Court gave little weight to the actual competitive conditions in the Treasure Valley following divestiture—*i.e.*,

[2] Defendants also dispute the Court's finding that the surgeons' departure from Saltzer prior to the transaction was "caused" by the transaction. The evidence demonstrated that neither St. Luke's nor Saltzer imposed any requirement that the surgeons leave Saltzer as a condition of the transaction; to the contrary, the departure was the surgeons' independent choice. *See* Dkt. 393 (A. Curran Dep.) at 106:17-107:6; Dkt. 396 (S. Williams Dep.) at 111:10-13, 112:3-10; *see also* Trial Tr. 2245:25-2246:7 (C. Roth).

that the market is likely not to include Saltzer in its current form as a competitor at all—in view of this finding. Moreover, the Court did so despite its finding that the affiliation will in fact *promote* improved patient outcomes.

Other courts have looked to the actual competitive conditions that divestiture will bring about. *See FTC v. PepsiCo, Inc.*, 477 F.2d 24, 29 n.8 (2d Cir. 1973) (divestiture is "not necessarily the most appropriate means for restoring competition. A primary concern is whether the offending line of commerce, if disassociated from the merged entities, can survive as a viable, independent entity"); *Nat'l Ass'n of Chain Drug Stores v. Express Scripts, Inc.*, Civ. A. No. 12-395, 2012 WL 1416843, at *3 (W.D. Pa. Apr. 25, 2012) (in § 7 case, declining to enter preliminary injunction ordering divestiture of one merged entity from another where the divested entity "would likely be unable to survive on its own, much less compete against" the divesting entity); *Garabet v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172 (C.D. Cal. 2000) ("divestiture … should not be entered into lightly or without substantial evidence that the benefit outweighs the harm"). Under this line of authority, the fact that Saltzer is unlikely to be a strong competitive force following divestiture (assuming it survives), taken together with the Court's finding that the effect of the transaction is to promote the quality of care of patients, leads to the conclusion that every effort should be made to find a conduct remedy that protects competition, instead of imposing a structural remedy that is unlikely to promote competition and that will detract from quality of care.

Defendants do not here attempt to identify every serious legal question that is raised by this case. However, the examples set forth above—and the Court's own statements—establish that a number of such questions exist. Indeed, the case has already drawn national attention because of those serious legal questions—and will certainly affect the practices of hospitals and physicians nationwide. *See, e.g.*, Ex. A, Leibenluft & Oliver, *supra* ("Judge Winmill's decision was highly anticipated and the first to address several cutting edge antitrust issues implicated by a hospital acquisition of physicians amid the recent wave of provider consolidation. … Unfortunately, Judge Winmill's … findings of fact leave unaddressed many crucial questions both with respect to the horizontal allegations he did consider, and of course regarding the vertical allegations he did not."); Ex. B, Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, NY Times B1 (Feb. 5, 2014) ("The ruling against St. Luke's Health System's 2012 purchase of the Saltzer Medical Group underlined a potentially important conflict between the nation's antimonopoly laws and the Affordable Care Act."); Ex. C, Brent Kendall, *FTC Wins Challenge Against Idaho Hospital Deal*, Wall Street J. (Jan. 24, 2014) (this Court's ruling "is likely to 'create more caution among health-care providers when looking for partners …. It's going to result in transactions being heavily vetted'"). In short, the outcome of this case is certain to have a substantial impact on national health policy. In these circumstances, the Court should not undermine defendants' right to appeal by ordering immediate divestiture.

II. The Balance Of Hardships Tips Sharply In Favor Of A Stay Pending Appeal.

An order requiring immediate divestiture would effectively undermine the value of a reversal on appeal. Simply put, once Saltzer is divested, there will be no going back. The immense adverse effects on Saltzer and its employees of divestiture, and the enormous costs and burdens that would be involved in unwinding and then recreating the affiliation, would preclude any potential for undoing the divestiture if the Court of Appeals were to reverse on any ground. And that is assuming, contrary to substantial evidence in this case, that an unwound Saltzer would survive as an effectively functioning competitor during the pendency of the appeal. Where, as here, a stay is necessary to preserve the practical value of an appeal, a stay should be granted. *See, e.g.*, *Townley v. Miller*, 693 F.3d 1041, 1044 (9th Cir. 2012) (stay appropriate "when a district judge's actions might serve to deprive the appellate court of meaningful judicial review"); *Michael v. I.N.S.*, 48 F.3d 657, 664 (2d Cir. 1995).

The evidence put forth at trial establishes that divestiture would cause Saltzer to suffer immediate and irreparable harm. *See* Def. Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 414, ¶¶ 518-49 (summarizing evidence). In particular, Saltzer physicians would be likely to suffer a reduction of compensation in the range of 30 percent. Saltzer would be highly unlikely to be able to recruit new physicians to replace the physicians who have departed since 2012 and whose departure has upended the practice's financial soundness. This combination of factors would force the remaining Saltzer physicians to consider leaving the group and possibly leaving the community altogether. *Id.* For all of these reasons, Saltzer would very likely not survive as an independent practice. Notably, this evidence was largely uncontested by plaintiffs,[3] and the Court's Findings of Fact do not discredit it.

The harm to Saltzer alone is sufficient grounds to stay any order of divestiture. The hugely adverse effects of divestiture on Saltzer—including its potential destruction—are precisely the form of irreparable harm that justifies a stay. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 & n.2 (D.C. Cir. 1977) (granting stay pending appeal where movant corporation would otherwise suffer "its destruction in its current form"—*i.e.*, "[t]he destruction of [its] business").

[3] Indeed, the private plaintiffs fully recognize the precariousness of a stand-alone, divested Saltzer. Before Saltzer affiliated with St. Luke's, Saint Alphonsus attempted to acquire Saltzer for itself, and threatened to drive Saltzer out of business if it declined to affiliate with Saint Alphonsus. Trial Tr. 2511:17-24 (S. Williams). Of course, given Saint Alphonsus's dominant position in Nampa, Dkt. 464 Findings ¶¶ 2-6, such a transaction would have caused a greater increase in concentration in primary care physician services in Nampa than did the Saltzer/St. Luke's affiliation.

But the harm of immediate divestiture would be irreparable for another reason: It would effectively preclude Saltzer and St. Luke's from reentering into the transaction enjoined by this Court if they are successful on appeal. It took Saltzer and St. Luke's some three years to negotiate the affiliation, Trial Tr. at 2237:18-22 (C. Roth), and the integration of Saltzer into St. Luke's has been and, if permitted, will continue to be a long-term and costly process. While the parties deliberately structured the transaction so that it could be unwound if necessary, the process of starting over after divestiture if the Court's judgment is reversed on appeal would be so costly and so burdensome as to effectively preclude that possibility.

Significantly, the costs and burdens would extend far beyond St. Luke's bottom line. *Cf.* Dkt. 464 Conclusions ¶ 58 (stating that the "financial hardship to Saltzer will be mitigated by St. Luke's payment of $9 million"). The Saltzer physicians and non-physician employees would suffer tremendous harm and disruption through the back-and-forth of affiliation, then divestiture, then re-affiliation—as each in turn affects not only their daily work lives, but also their retirement plans, health care benefits, and so on. For example, St. Luke's has provided Saltzer employees with merit pay raises in the time since the affiliation—yet a divested Saltzer likely could not maintain those raises, thus imposing a direct and immediate adverse impact on the affected individuals. For all of these reasons, immediate divestiture would cause St. Luke's, Saltzer, and their employees to suffer irreparable harm, and would effectively vitiate defendants' right to appeal. *See, e.g., Flowers Indus. v. FTC*, 849 F.2d 551, 552 (11th Cir. 1988) ("Flowers would suffer irreparable injury if its assets were divested."). Moreover, as we discuss below, divestiture would deprive the patients of Canyon County of what the Court has found to be the benefits of the transaction. *See* Part III, *infra*.

By contrast, delay of divestiture pending appeal would have little or no adverse impact on health care consumers or the private plaintiffs. Notably, the Court declined to preliminarily enjoin the merger at the outset of the case when it considered and rejected the argument of the private plaintiffs that the transaction would lead to immediate harm to the private plaintiffs or "higher premiums for consumers." Dkt. 47 at 5, 8. As set forth below, the evidence presented at trial has served only to confirm that that conclusion was correct, and that it remains true today.

This Court has determined that the transaction should be enjoined based on its conclusion that the transaction creates a "substantial risk" of price increases. Dkt. 464 Conclusions ¶ 72. However, the Court made no finding that any such price increases—or any other form of harm—would be *imminent*. Indeed, the Court suggested just the opposite when it indicated that "the best result might be to approve the Acquisition and monitor its outcome to see if the predicted price increases actually occurred." *Id.* ¶ 76.

And the evidence makes clear that there is no likelihood of any immediate increase in prices for primary care physician services, which is the sole product market on which the Court based its opinion.[4] *See* Dkt. 464 Findings ¶¶ 48-49; *id.* Conclusions ¶¶ 64-65. The two largest commercial insurers in Idaho, Blue Cross of Idaho ("BCI") and Regence, have statewide physician fee schedules that set forth amounts that those payers will pay physicians in the state for their professional services. Trial Tr. 331:11-332:2 (J. Crouch); Dkt. 252 (S. Clement Dep.) at 42:24-43:3, 44:19-22. The services of St. Luke's physicians, including without limitation the

[4] The Court stated in its Findings of Fact that defendants could, as a result of the transaction, impose "higher hospital-based billing rates" for "ancillary services," such as X-rays and laboratory tests. Dkt. 464 Findings ¶¶ 121-31. However, the plaintiffs neither alleged nor proved that the transaction would lead to market power in any market for "ancillary services." *See id.* ¶¶ 48-49. Indeed, no such showing could have been made because consumers in Nampa have ample alternatives for obtaining ancillary services. *See, e.g.*, Dkt. 47 at 6 (statement of the Court: "If St. Luke's raises prices to supra-competitive levels after the merger, patients will likely get their CT Scans and other imaging procedures at [Saint] Al's Nampa hospital.").

Saltzer physicians, are reimbursed according to BCI's and Regence's statewide fee schedules. Transcript at 331:11-332:2, 333:4-8, 377:11-14, 414:20-22 (J. Crouch); Dkt. 252 (S. Clement Dep.) at 44:19-22, 46:6-10. In fact, the transaction has caused payments for physician services to *decrease* in the case of Regence, as Regence will pay lower fees for Saltzer primary care physician services under that insurer's agreement with St. Luke's than it previously did. Dkt. 252 (S. Clement Dep.) 46:16-24.

This is equally consistent with BCI's experience: BCI examined every prior St. Luke's acquisition of a physician practice and determined that each such acquisition either resulted in *no change* in reimbursement amounts (because St. Luke's and the acquired practice were both on the statewide fee schedule) or a *decrease* in the amount paid by BCI (because the acquired practice went from a reimbursement rate *above* the statewide fee schedule to the St. Luke's (statewide fee schedule) amount). Trial Tr. 412:3-12 (J. Crouch); Exhibit 2148. Additionally, St. Luke's and BCI's current two-year contract took effect on January 1, 2013, at a time when the Saltzer affiliation was already in effect and had been considered in negotiations between St. Luke's and BCI—yet the price increases in that contract were entirely in line with prior year-over-year increases, when Saltzer played no role. Trial Tr. 349:7-23 (J. Crouch); Exhibit 1301; Exhibit 2634. Significantly, the plaintiffs offered no evidence to suggest that St. Luke's current contract with BCI involved above-market prices—or that any supracompetitive price increases have occurred in the more than a year that has passed since the Saltzer transaction.

Indeed, it would be the height of folly for St. Luke's or Saltzer to seek to engage in supracompetitive pricing in the coming months, while both parties will be under the close watch of the FTC, the State of Idaho, this Court, and the Ninth Circuit. However, if the Court nonetheless concludes that there exists some risk of *immediate* price increases from defendants' supposed enhanced bargaining leverage, St. Luke's and Saltzer can, if the Court so orders, engage in separate negotiations as to fee-for-service contracts with commercial payers while the appeal is pending so as to avoid any such risk.

The Court's findings of fact do not identify any other form of either immediate or irreparable harm. In particular, the Court did not find that the private plaintiffs would suffer any harm—much less irreparable or immediate harm—from the transaction. To the contrary, the undisputed evidence establishes that the private plaintiffs' businesses have been financially sound since the transaction occurred. Def. Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 414, ¶¶ 387-94, 433-44 (summarizing evidence). Indeed, as the Court recognized, Saint Alphonsus is owned by, and benefits from the financial strength of, Trinity Health, which is "one of the largest Catholic health care systems in the United States," and which "operates approximately 50 hospitals across the country." Dkt. 464 Findings ¶ 7. Moreover, the Court rejected any contention that the private plaintiffs would suffer an irreparable injury as a result of any "immediate loss of referrals" when it declined to preliminarily enjoin the Saltzer transaction at the outset of the case. Dkt. 47 at 6-7. The evidence presented at trial has only provided further support for the Court's conclusion.

Thus, just as this Court denied the private plaintiffs' request for a preliminary injunction,[5] it should now decline to order immediate divestiture. *See Rodriguez ex rel. Rodriguez v.*

[5] Defendants agreed, during the pendency of the case in this Court, not to engage in significant changes to Saltzer, such as closing any Saltzer facility or altering its organizational structure. *See* Dkt. 47 at 7. Defendants have abided by their representations. However, Defendants now intend, during the pendency of the appeal, to make certain changes that will not hamper divestiture, but that will cause Saltzer to be more financially sound and therefore enhance the ability of Saltzer to continue operations if divestiture is ultimately required. For example, since the departure of the seven surgeons before the transaction, Saltzer holds more office space than is needed for its current roster of physicians. Defendants will therefore seek to align Saltzer's

DeBuono, 175 F.3d 227, 235 (2d Cir. 1999) (equating the harm inquiries under the standards for preliminary injunctions and stays pending appeal). While the Court held that divesture was warranted to avoid the risk of anticompetitive price increases, the Court did not find—and the evidence precludes any finding—that any price increase would immediately result. *See Nat'l Ass'n of Chain Drug Stores*, 2012 WL 1416843, at *3 (in § 7 case, denying preliminary injunction where plaintiffs failed to "demonstrate how, if they ultimately are successful …, a brief delay in the divestiture … would cause them any additional immediate and irreparable harm"). The balance of harms therefore tips sharply in favor of a stay.

III. The Public Interest Supports Staying Any Order Of Divestiture Pending Appeal.

The Court's Findings of Fact and Conclusions of Law demonstrate that the public interest supports delaying divestiture in order to preserve St. Luke's and Saltzer's right to appeal. As set forth above, the Court concluded that the transaction was intended to, and will, lead to improved patient outcomes. Dkt. 464 at 3. The Court also found that the transaction would lead away from the perverse incentives of the fee-for-service method of payment for health care and toward the benefits of risk-based, or capitated, payment mechanisms. Dkt. 464 Conclusions ¶¶ 70-71. What is more, as a result of its affiliation with St. Luke's, Saltzer has been able to expand its community outreach and to take on Medicaid, uninsured, and other low-pay (or no-pay) patients in greater numbers—efforts that a divested Saltzer could not maintain. *See* Trial Tr. 3312:22-3313:4, 3320:3-3321:2, 3329:9-3330:5 (T. Patterson); Trial Tr. 3082:22-25 (W. Savage). And despite a contrary suggestion in the Court's Findings of Fact, undoing the transaction would deprive patients of the benefits of access by Saltzer physicians to St. Luke's state-of-the-art

---

office space to match its current needs. Defendants represent that they will not undertake any change that would impede divestiture or weaken a divested Saltzer.

electronic health record and WhiteCloud analytics tool. *Compare* Dkt. 464 Findings ¶¶ 204-05, *with* Def. Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 414, ¶¶ 464-83.

If, on appeal, it is concluded that the Saltzer transaction violates federal or state antitrust law, and that divestiture is the required remedy, then divestiture will occur. But pending appeal, the benefits of the transaction to patients, both as described in the findings of fact and as otherwise demonstrated by the record, strongly counsel in favor of a stay pending appeal. *See Holiday Tours*, 559 F.2d at 843 (granting stay pending appeal where the defendants' challenged conduct had been found to violate regulations, but not to be "contrary to the public interest").

CONCLUSION

For the foregoing reasons, the Court should not order that St. Luke's immediately divest Saltzer. Instead, any divestiture should be stayed pending appeal.

Respectfully submitted,

s/ Brian K. Julian
Brian K. Julian
ANDERSON, JULIAN &
HULL LLP
C.W. Moore Plaza
250 S. Fifth St., Ste. 700
P.O. Box 7426
Boise, ID 83707
(208) 344-5800

Attorney for Saltzer Medical Group, P.A.

s/ J. Walter Sinclair
J. Walter Sinclair
HOLLAND & HART LLP
800 West Main Street, Ste 1750
Boise, ID 83702
(208) 383-3928

Jack R. Bierig
Scott D. Stein
Charles K. Schafer
Tacy F. Flint
Ben Keith
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Attorneys for St. Luke's Health System, Ltd. and St. Luke's Regional Medical Center, Ltd.

Dated: March 4, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 4, 2014, I filed the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

Brett T. Delange - Atty General	brett.delange@ag.idaho.gov
Brian K. Julian - Saltzer	bjulian@ajhlaw.com
Bryan Nickels - St Al's	ban@dukescanlan.com
Carl Withroe - Atty General	Carl.Withroe@ag.idaho.gov
Chris Boisvert - TVH	crb@powerstolman.com
Colleen Funk - Atty General	colleen.funk@ag.idaho.gov
Danica Noble - FTC	dnoble@ftc.gov
David Ettinger - St Al's	dettinger@honigman.com
Douglas E. Litvack - FTC	dlitvack@ftc.gov
Eric J. Wilson - SD Atty General	ewilson@gklaw.com
Henry C. Su	hsu@ftc.gov
J. Thomas Greene - FTC	tgreen2@ftc.gov
Jack Alan Rovner	jrovner@hlconsultancy.com
Jennifer Schwartz - TVH	jls@powerstolman.com
JSM - TVH	jsm@powerstolman.com
Kadye Bird - St. Al's	klb@dukescanlan.com
Kay Lynn Moorhouse	klm@dukescanlan.com
Keely Duke - St Al's	ked@dukescanlan.com
Kevin J. O'Connor - SD Atty General	koconnor@gklaw.com
Kevin Scanlan - St Al's	kjs@dukescanlan.com
Lara Phillip - St Al's	lara.phillip@honigman.com
Matthew P. Accornero	maccornero@ftc.gov
Michael J. Perry	mperry@ftc.gov
N. Roberts - St Al's	nroberts@honigman.com
Paul Fabien - St Al's	pfabien@honigman.com
Peter C. Herrick - FTC	pherrick@ftc.gov
Portia L. Rauer - TVH	plr@powerstolman.com
Raymond Powers - TVH	rdp@powerstolman.com
Robert J. Schroeder	rschroeder@ftc.gov
S. Hakim - St. Al's	shakim@honigman.com
S.Sajewski - FTC	ssajewski@ftc.gov
Sandee Stogsdill - St Al's	sls@dukescanlan.com
Teresa Taylor - Atty General	teresa.taylor@ag.idaho.gov
Wendy K. Arends - SD Atty General	warends@gklaw.com
Syrena C. Hargrove – FTC	syrena.hargrove@usdoj.gov
Colleen D. Zahn	colleen.zahn@ag.idaho.gov
Charles A. Brown - Press	CharlesABrown@cableone.net
Matthew L. Walters - Regence	mlw@elamburke.com
Erik F. Stidham - Primary Health	EFStidham@hollandhart.com

Scott E. Randolph - PH & Micron SERandolph@hollandhart.com

By: s/ J. Walter Sinclair
J. Walter Sinclair