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UNITED STATES DISTRICT COURT

IN THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER -
NAMPA, INC., TREASURE VALLEY
HOSPITAL LIMITED PARTNERSHIP,
SAINT ALPHONSUS HEALTH SYSTEM,
INC., AND SAINT ALPHONSUS REGIONAL
MEDICAL CENTER, INC.

Plaintiffs,

v.

ST. LUKE'S HEALTH SYSTEM, LTD. AND
ST. LUKE'S REGIONAL MEDICAL
CENTER. LTD.

Defendants.

Case No. 1:12-CV-00560-BLW (Lead)

**PRIVATE PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR LEAVE
TO FILE SUPPLEMENTAL BRIEF IN
OPPOSITION TO STAY**

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I. INTRODUCTION

Defendants' Opposition to the Private Plaintiffs' Motion for Leave to File Supplemental Brief in Opposition to Motion for Stay inexplicably focuses its attack on the merits of the issues raised by the Supplemental Brief. Thus, Defendants join issue on the matters which they ask the Court not to address. Moreover, Defendants' arguments ignore and contradict the record, as well as the Court's rulings. Defendants' few procedural objections are easily resolved.

The Private Plaintiffs have submitted important information that relates directly to whether the balance of equities favors a continued stay in this case. That information should not be excluded from consideration because of the inadequate grounds raised by Defendants.

II. DEFENDANTS' MERITS ARGUMENTS ARE IN ERROR

Defendants' merits arguments, beside their inappropriateness at this stage, ignore the record and conflate the issues.

Defendants first argue that harm to Saint Alphonsus Nampa was not a basis for the Court's ruling on divestiture. This is both irrelevant and untrue.

It is irrelevant because the four part standard applicable to a request for a stay does not merely address the merits of the Court's decision, but also the effect that a stay would have on the parties. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (to justify such a stay, Defendants bear the burden of demonstrating that “. . . (iii) issuance of a stay will not “substantially injure other parties interested in the proceeding”) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *Leiva-Perez v. Holder*, 640 F.3d 962, 965, 970 (9th Cir. 2011). It is, of course, that element to which the shifts in referrals are most relevant. Defendants simply ignore this legal issue.

Defendants' assertion is untrue, because the Court did address shifts in referrals away from Saint Alphonsus as one of the "anticompetitive effects" cited in its Findings of Fact and Conclusions of Law. *See* Findings of Fact at ¶¶ 136-139 (shifts in referrals away from Saint Alphonsus after acquisitions); 140 ("After the Acquisition, it is virtually certain that this trend will continue and Saltzer referrals to St. Luke's will increase.").

Second, Defendants argue that Private Plaintiffs' evidence is incomplete, because it addresses only the harm to the individual plaintiffs and not the harm to overall competition in the market. That argument is irrelevant for the same reason shown above – the stay standard considers not only harm to the general public interest, but also the harm to particular parties. *Lair, supra* (presence of injury to party sufficient).

Defendants' assertion is also untrue, because the evidence already in the record shows that any harm to Saint Alphonsus Nampa or Treasure Valley Hospital, the only significant constraints on St. Luke's, would thereby harm overall competition. *See* Plaintiffs' Corrected Proposed Findings of Fact and Conclusions of Law ("PPFOF") (Dkt. 430) at ¶ 818. Indeed, this issue was already addressed in the Private Plaintiffs' Opposition to Defendants' Motion for Stay ("Private Plaintiffs' Opposition") (Dkt. No. 487) at 10-11.

Third, Defendants argue that loss of referrals is irrelevant, because Saint Alphonsus is financially viable and is part of a large nationwide system. But this, again, conflates harm to competition and harm to the Plaintiffs. Moreover, as explained at trial, Trinity's nationwide activities are irrelevant to what occurs in the relevant market, and the "competitive effects" issue does not turn on financial viability, but on the reduction in volume and market share of the remaining competitive restraints on St. Luke's, Saint Alphonsus and Treasure Valley Hospital. PPFOF at ¶ 818; PPFOF at ¶ 893.

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Fourth, Defendants argue without any evidentiary support that they have not changed their referral policies. But this Court found that even without any explicit policies, shifts in referrals are “virtually certain” to result from the acquisition. Findings at ¶ 140. The evidence in the Supplemental Brief shows that the shifts already seen, *see* Private Plaintiffs’ Opposition at pp. 3-4, have accelerated since trial. This establishes that this Court’s predictions as to what would occur if divestiture were *not* ordered has already started to occur while divestiture *has been* ordered, but not carried out.

Finally, Defendants completely fail to respond to one critical argument in the Supplemental Brief – that they have not promised that *after the trial has been completed*, that they would assure that this Court’s “critical assumptions” would continue to be followed, and that as a result “there will be no measureable reduction in referrals to St. Al’s from Saltzer physicians.” December 20, 2012 Memorandum Decision and Order at p. 8 (Dkt. No. 47). Indeed, they have not promised anything, except that they would not further integrate Saltzer into St. Luke’s in a way that would defeat future divestiture. As a result, there is every reason to believe that unless divestiture occurs immediately, St. Luke’s will fully exploit every advantage it can obtain from Saltzer, resulting in all the anticompetitive effects predicted by this Court’s Findings. That can only be prevented by immediate divestiture.

III. DEFENDANTS’ PROCEDURAL OBJECTIONS CAN EASILY BE ADDRESSED

Defendants’ only procedural objection to the filing of the Supplemental Brief is that they will need discovery, which will slow the process. But that need not occur, especially if the discovery is strictly limited to the new evidence presented and is not a license to relitigate other issues. Private Plaintiffs are prepared to (1) provide the spreadsheet on which Mr. Checketts’ calculations were based within 24 hours of any Court order, and (2) provide Mr. Checketts for

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his deposition (of no more than three hours, limited to the bases for his declaration) within three business days of the Court's ruling. This would allow Defendants to file a response, as previously agreed, within five business days of the Court's order.

Of course, any such discovery should be mutual. If Defendants rely on any written testimony in their response brief, the Private Plaintiffs should have an opportunity to, similarly, receive any backup data within 24 hours of the filing, and to depose any such affiants or declarants (each deposition of no more than three hours, limited to the bases for any testimony) within three business days of the response. The Private Plaintiffs would then be prepared to file their reply within five business days of the response, as previously agreed.

This schedule can permit discovery while not delaying in any way the Court's decision on the stay.

IV. CONCLUSION

For the foregoing reasons, Private Plaintiffs believe that they should be allowed to file their Supplemental Brief and supporting materials.

DATED this 10th day of June, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2014, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System.

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