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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.

FEDERAL TRADE COMMISSION; STATE
OF IDAHO

Plaintiffs,

v.

ST. LUKE'S HEALTH SYSTEM, LTD.;
SALTZER MEDICAL GROUP, P.A.

Defendants.

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

**DEFENDANTS' OPPOSITION TO
PRIVATE PLAINTIFFS' MOTION FOR
LEAVE TO FILE SUPPLEMENTAL
BRIEF IN OPPOSITION TO MOTION
FOR STAY PENDING APPEAL**

Case No. 1:13-cv-00116-BLW

INTRODUCTION

Private plaintiffs have moved for leave to reopen briefing on the motion for a stay pending appeal. They have done so in order to introduce a declaration of Lannie Checketts, Chief Financial Officer of Saint Alphonsus Nampa, in which he reports his conclusion that Saltzer physicians are performing fewer outpatient cases at Saint Alphonsus Nampa since Saltzer's affiliation with St. Luke's. Declaration of Lannie Checketts, Dkt. 502-2, ¶¶ 2-4. Mr. Checketts concludes, without elaboration, that he has ruled out any explanation for the purported decline in outpatient cases "other than decisions or referrals by the Saltzer physicians, their staff or other St. Luke's personnel." *Id.* 3. The brief that private plaintiffs want to file pushes Mr. Checketts' analysis much further—arguing that it provides "new evidence" that St. Luke's has supposedly decided to "exploit its control of Saltzer" to steer Saltzer patients away from Saint Alphonsus. Private Pls.' Supp'l Br. in Opp'n to Mot. for Stay, Dkt. 502-1, at 2.

Defendants reject private plaintiffs' unfounded assertion that St. Luke's has changed its longstanding policy that its aligned physicians should choose where to refer patients and provide care based on the best interests of their patients. Moreover, defendants believe that Mr. Checketts' analysis is grossly misleading in its description of Saltzer physicians' practice patterns. It also omits to mention a number of actions taken by Saint Alphonsus that have made it more difficult or impossible for Saltzer physicians to care for their patients at Saint Alphonsus facilities in Nampa.

However, putting aside the accuracy of private plaintiffs' assertions, their motion to reopen briefing on the motion for stay should be denied for two independent reasons. First, the injunction in this case was issued in favor of the government plaintiffs – not Saint Alphonsus. It was based on a concern about harm to competition from possible pricing above competitive

levels. Private plaintiffs do not have standing to pursue that theory. But even on the theory of private plaintiffs that the Saltzer transaction would suppress competition by crippling them as competitors, nothing in the brief or the Checketts Declaration purports to indicate that referrals to Saint Alphonsus have so diminished that competition is being harmed.

Second, apart from the Declaration's irrelevance, allowance of the motion would require significant additional discovery into the validity of Mr. Checketts' purported facts and the conclusions that he draws. His conclusions are based on an analysis that defendants have never seen and on data that has never been produced. As was the case with Mr. Checketts' analysis in support of plaintiffs' motion for preliminary injunction, his summary declaration cannot be taken at face value. Defendants have strong reason to question the conclusions advanced by Mr. Checketts and counsel for Saint Alphonsus. But to present an informed response to the Declaration and brief would require access to and review of the underlying data, a deposition of Mr. Checketts, and development of the arguments that refute his position. This process would cause substantial delay and expense that would far outweigh any minimal relevance that plaintiffs' submission may have with respect to the Court's determination of whether to stay the order of divestiture.

ARGUMENT

I. Private Plaintiffs' Supplemental Submission Is Irrelevant To The Motion For Stay Pending Appeal

Private plaintiffs contend that Mr. Checketts' declaration provides "new evidence" that supports their argument that a stay would cause them "serious harm" by allowing St. Luke's to "exploit its control" of Saltzer to steer patients away from their facilities. Even if plaintiffs' factual assertions were accurate, which defendants dispute, they do not speak to the motion to

stay the Court's injunction. That injunction was not based on harm to Saint Alphonsus from lost referrals; it was based on what the Court saw as the potential for harm to competition resulting from higher prices. Nothing in the Checketts Declaration or the brief in any way suggests that competition will be harmed pending appeal by virtue of a reduction in referrals to Saint Alphonsus.

Indeed, there is substantial evidence to the contrary in the record. Despite private plaintiffs' protestations that the Saltzer transaction, along with past affiliations of physicians with St. Luke's, had resulted in substantial steering of patients away from them, both private plaintiffs remained financially sound and even grew over the same time period. Def. Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 414, ¶¶ 387-94, 433-44 (summarizing evidence). Moreover, 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. In fact, notwithstanding dire prophecies by the private plaintiffs about the impact of the Saltzer transaction on their ability to compete, Saint Alphonsus plans to invest more than \$33 million in its hospital in Nampa (*see* Trial Ex. 2640) and has continued to invest and expand its operations in the Treasure Valley.¹

Significantly, Mr. Checketts' supplemental data analysis does not even attempt to show that a stay would cripple Saint Alphonsus as a competitor or would harm *competition* in any way. Mr. Checketts declares that outpatient cases for which a Saltzer physician is identified as

¹ See <http://www.idahostatesman.com/2014/05/30/3209858/saint-alphonsus-opens-expanded.html>; <http://www.idahostatesman.com/2014/02/20/3040463/saint-alphonsus-opens-new-medical.html?sp=/99/103/1744/>; <http://www.saintalphonsus.org/body.cfm?id=1010&action=detail&ref=91>.

the attending physician declined by 29% from 2012 to 2013 and by 37% in the first four months of 2014 as compared to the same time period in 2013. Checketts Decl. ¶¶ 3-4. Defendants have reason to believe that Mr. Checketts' analysis does not reflect the reality of where Saltzer physicians choose to perform their outpatient procedures. Regardless, he reports only percentages, not the numbers of outpatient procedures performed by the Saltzer physicians. It is quite telling that Mr. Checketts does not reveal the financial significance (if any) of those outpatient procedures to Saint Alphonsus-Nampa, let alone to Saint Alphonsus as a whole.

Likewise, Mr. Checketts does not report the overall number of outpatient procedures at Saint Alphonsus Nampa over the same time periods, which would be necessary to determine whether Saint Alphonsus has effectively made up for the alleged reductions in cases performed by the Saltzer physicians. In short, Mr. Checketts makes no claim and provides no facts from which to conclude that the alleged loss of outpatient procedures performed by Saltzer physicians at Saint Alphonsus will impair competition during the period of a stay.

II. Granting Private Plaintiffs' Motion Would Impose Significant Unnecessary Costs And Cause Undue Delay In Resolving The Motion

Private plaintiffs contend that the purported changes in Saltzer physicians' practice patterns reported by Mr. Checketts are caused by St. Luke's purported decision to "exploit its control of Saltzer"—and could, therefore, be reversed by an order of divestiture. At the outset, it should be noted that these plaintiffs have offered nothing to suggest that St. Luke's has altered its policy of allowing Saltzer physicians to make referrals as they deem to be in the best interests of patients. And they could not offer anything – because that policy remains in effect.

In these circumstances, it would be fundamentally unfair to permit private plaintiffs to submit their supplemental brief without providing defendants access to Mr. Checketts' analysis and the data underlying it and an opportunity to respond. As this Court knows, the use of hospital data to discern physician referral and practice patterns and the reasons for any changes in those patterns is not nearly as simple as Mr. Checketts' one-page declaration seems to suggest. For each analysis that plaintiffs introduced at trial attempting to show patient steering resulting from physicians' alignment with St. Luke's, the Court heard from experts and fact witnesses on both sides about the reliability of the underlying data, the validity of the assumptions and techniques used to analyze the data, and competing explanations for any referral or practice trends that the analysis purported to show. *See* Pls.' Corr. Proposed Findings of Fact and Conclusions of Law, Dkt. 414, ¶¶700-724 (summarizing evidence of purported steering); Defs.' Corr. Proposed Findings of Fact & Conclusions of Law, Dkt. 429, ¶¶ 395-432 (summarizing evidence refuting plaintiffs' steering analyses).

Defendants have reason to believe that Mr. Checketts' analysis is misleading to the extent it suggests an improper change in outpatient procedures performed by Saltzer physicians at Saint Alphonsus Nampa. Rather, to the extent there has been any diminution in Saltzer's volumes of procedures at that facility, there are likely a number of legitimate reasons for such changes that St. Luke's and Saltzer would seek to present in their opposition to private plaintiffs' filing. For example, the voluntary closing of its neonatal unit by Saint Alphonsus probably accounts in large measure for any drop in work performed at Saint Alphonsus Nampa by Saltzer physicians. Moreover, it is hardly surprising that physicians who have been sued by Saint Alphonsus would not go out of their way to perform procedures at Saint Alphonsus.

Thus, in order to frame an informed response, defendants would need access to Mr. Checketts' analysis and data, a deposition of Mr. Checketts to understand the nature of his data and the assumptions and techniques that he employed, and the opportunity to have Mr. Checketts' work reviewed both by Saltzer physicians and by knowledgeable experts. Defendants would then submit to the Court evidentiary submissions of their own to address Mr. Checketts' claims. In turn, private plaintiffs would undoubtedly argue that they should be afforded an opportunity to test defendants' submissions through depositions, expert analyses, and further submissions to the Court.

As this summary suggests, the work required to adequately address Mr. Checketts' claims would be costly and would require significant delay in resolution of the motion for a stay pending appeal. Neither the cost nor the delay is justified given the marginal relevance (at best) that Mr. Checketts' analysis has to the issues before the Court on defendants' motion.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that private plaintiffs' motion to reopen briefing on the motion for stay should be denied. If the motion is granted, however, defendants request that they be given adequate time to obtain and review Mr. Checketts' data, take Mr. Checketts' deposition, and provide an informed response and analysis.

Respectfully submitted,

s/ Brian K. Julian

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Dated: June 6, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 2014, I filed the foregoing **DEFENDANTS' OPPOSITION TO PRIVATE PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR STAY** 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:

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