No. 14-35173

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAINT ALPHONSUS MEDICAL CENTER-NAMPA INC., SAINT ALPHONSUS HEALTH SYSTEM INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP; FEDERAL TRADE COMMISSION; STATE OF IDAHO

Plaintiffs-Appellees,

and

IDAHO STATESMAN PUBLISHING, LLC; THE ASSOCIATED PRESS; IDAHO PRESS CLUB; IDAHO PRESS-TRIBUNE LLC; LEE PUBLICATION INC.,

Intervenors,

v.

ST. LUKE'S HEALTH SYSTEM, LTC.; ST. LUKE'S REGIONAL MEDICAL CENTER, LDT.; SALTZER MEDICAL GROUP,

Defendants-Appellants.

Appeal from the United States District Court for the District of Idaho, Case Nos. 1:12-c-00560-BLW (Lead Case) and 1:13-cv-00116-BLW, the Honorable B. Lynn Winmill, Presiding

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BRIEF FOR *AMICI CURIAE* INTERNATIONAL CENTER OF LAW & ECONOMICS AND MEDICAID DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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Amicus Curiae International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center. ICLE's roster of more than fifty affiliated scholars and research centers from around the globe use evidence-based methodologies to build intellectual foundations for sensible, economically grounded policy that will enable businesses and innovation to flourish.

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Medicaid Defense Fund's mission is to level the medical playing field and expand public access to affordable and quality healthcare to Medicare, Medicaid and other underserved individuals. In this case, as a result of integration with St. Luke's, Saltzer now has the ability to provide uninsured and underserved

individuals with primary care and other services in Canyon County, Idaho, where they could not before the acquisition due to financial restraints. *See* ER.465; ER.508. Medicaid Defense Fund has a vital interest in this matter because the direct impact of the acquisition, as demonstrated, will have a substantial effect on the availability and quality of care afforded to underserved individuals in the affected market, and across the country, as the acquisition has substantial promises to improve the healthcare of those individuals.[1]

INTRODUCTION

Section 7 of the Clayton Act and analogous state laws are designed to halt in their incipiency transactions that, on balance, have a substantial likelihood of interfering with the effective functioning of the marketplace and thereby causing consumer harm. Courts and the antitrust enforcement agencies, however, have a limited ability to predict the ultimate competitive outcome of transactions that hold forth a reasonable possibility of yielding substantial consumer benefits. An approach that is too interventionist will have the perverse effect of restricting innovation and efforts that are likely to produce great efficiencies and consumer benefits. Judge Kozinski has cautioned that "judicial intervention in a competitive

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party or its counsel authored any part of this amicus brief, which was authored by *Amici Curiae's* counsel. No one contributed money towards preparation or submission of this brief. All parties consent to the *Amici Curiae* filing this brief.

situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent." *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1991).

In this case, the lower court's decision runs counter to this Court's prescient admonition. By imposing liability, the court created an obstacle to efficient integration of the delivery of healthcare that is central to efforts to lower healthcare costs, obtain better results, and facilitate access by underserved consumers. The transaction is part of a growing national trend aimed at moving to a value-based, patient-oriented model of care to effectuate better and higher quality healthcare service. Yet because of the trial court's narrow and incorrect view of the law, much of these essential efforts at improving healthcare are placed under a cloud of antitrust condemnation.

Not surprisingly, the court recognized many of the potential benefits of this acquisition and acknowledged the need for a major shift to more integrated healthcare system. Indeed, the court explicitly found a "rough consensus" that there is a tremendous need for integration focusing "on maintaining a patient's health and quality of life, rewarding successful patient outcomes and innovation, and encouraging less expensive means of providing critical medical care. Such a

system would move the focus of healthcare back to the patient, where it belongs." ER.4.[2]

Judge Winmill further noted that this transition "require[s] a major shift away from our fragmented delivery system toward a more integrated system where primary care physicians supervise the work of a team of specialists, all committed to a common goal of improving a patient's health." *Id.* Thus the court concluded that "[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." *Id.* at 51 ¶76.

Rarely has there been a more compelling basis to exercise judicial caution than in this case. Marketplace realities show that any competitive concerns are at most questionable and likely minimal. The underlying case is based on harm from the affiliation of 16 adult primary care providers with a practice of eight such providers in Nampa, Idaho, a town of 80,000 people, just a short drive from Boise -- where many of the town's residents work. The record demonstrates that nearly one third of these residents already receive care in Boise, most residents leave Nampa for care when prices increased by a small amount, and employers have a host of alternatives to keep costs down – e.g. the formation of narrow networks.

[2] Citations to "ER." refer to defendants' Excerpts of Record.

Notably, St. Luke's has an established record of efficiency and high quality care. When utilizing metrics to measure clinical performance, efficiency, and patient safety, St. Luke's is one the nation's top 15 health systems. Sabriya Rice, *Truven's 15 Top systems: Consistency boost quality*, MODERNHEALTHCARE.COM (Apr. 19, 2014, 12:01 AM), http://www.modernhealthcare.com/article/20140419/MAGAZINE/304199979. St. Luke's also offers substantial, and expanding, healthcare services to the underserved. Through this acquisition, Saltzer moved from a fee for service model and began to increase its service of uninsured patients.

Yet the court held that its hands were tied because St. Luke's had to demonstrate that there were no less restrictive means to achieve these efficiencies -- and that, conceivably, the same benefits could not have been achieved by St. Luke's simply contracting with physicians. But in so holding the court was incorrect about the law, the facts, and sound antitrust policy. The law does not require a merging party to demonstrate that there are no less restrictive alternatives; that would be a burden inconsistent with competition policy.

In fact, the market had already demonstrated that alternative arrangements were unlikely to succeed. There are numerous regulatory and practical barriers to such contractual arrangements. In contrast, there is a proven record that the type of integration at issue here can lower healthcare costs and improve healthcare

outcomes as demonstrated by systems including Kaiser-Permanente, Intermountain Health, and the Mayo Clinic. The Federal Trade Commission ("FTC") has permitted similar physician-hospital alliances, including a far larger system in Norman, Oklahoma. FTC Staff Advisory Opinion to Norman PHO, (Feb. 13, 2013), *available at* http://www.ftc.gov/sites/ default/files/documents/advisory-opinions/norman-physician-hospital-organizatio n/130213normanphoadvltr_0.pdf.

Antitrust merger enforcement turns on predictions of likely competitive effects. The government must demonstrate a substantial likelihood of anticompetitive effects and that these effects are not outweighed by likely consumer benefits. The court, however, did not engage in that weighing. Instead, it effectively shifted the burden by requiring the defendants to demonstrate that the claimed efficiencies were merger specific *only if it could rule out any alternative*. This asymmetric setting of burdens is inconsistent with sound antitrust policy. As FTC Commissioner Joshua Wright has observed "to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, [does] not make economic sense and [is] inconsistent with a merger policy designed to promote consumer welfare." Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, FTC File No. 131-0087 at 7 (April 11, 2014).

Finally, in a case with clear efficiencies, courts should proceed cautiously in ordering remedies. But the court did the opposite: it required divestiture without regard to the competitive effects of doing so, or to the adverse effects of divestiture on consumer welfare. In recent healthcare mergers, both the FTC and states have permitted acquisitions to occur by imposing some sort of behavioral remedy to prevent any competitive harm. Recently, the Massachusetts Attorney General entered into a proposed settlement with the dominant hospital in Boston over its acquisition of a 380-bed hospital and over 500 physicians with an agreement to permit the acquisition but require separate negotiating groups and other behavioral relief. Press Release, AG Coakley Reaches Agreement in Principle with Partners HealthCare (May 19, 2014), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014 -05-19-partners-agreement.html. The court erred by failing to consider a more limited remedy.

ARGUMENT

I. This Acquisition Furthers the National Trend Toward Healthcare Provider Consolidation, and Is Pro-Consumer and Consistent with Current Healthcare Policy Goals.

There are a multitude of compelling reasons why healthcare providers are increasing integration and coordination. Chief among these is the desire for providers to achieve healthcare's "Triple Aim—improve care quality and patient experience, improve population health and reduce per capita costs." American

Hospital Association, Your Hospital's Path to the Second Curve (Jan. 2014). Integration, including hospital systems acquiring general and specialized practice systems, provides the most cost effective and efficient way for providers to align incentives, share information, adopt higher value programs, and increase investments in patient-oriented care.

> Efforts to "bend the cost curve" advocate replacing traditional "fee-for-service" reimbursement of health care providers with mechanisms that "pay for value" and organize around population, rather than individual, health goals. Such efforts rely on integrated provider delivery systems that place incentives on their provider participants to coordinate to ensure that high-value care is delivered to a patient population.

Monica Noether, *The St. Luke's-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?* 2 CPI Antitrust Chronicle at 4 (2014).[3]

The integration and coordination of providers within the American healthcare system is of vital importance. Healthcare providers have long relied on a siloed approach to medicine in which providers work autonomously and are hampered in their ability to coordinate patient care with other providers. Because

[3] As noted by Noether, there is greater efficiency in the integrated model due to the use of value-based payments. California leads the way in providing value-based payments. In California, there are many integrated approaches including Kaiser Permanente, an integrated health plan-provider which owns hospitals and employs physicians. Thanks to these integrated approaches in California, 42 percent of commercial payments were value-based commercial payments, almost all of which were risk-based contracts, compared to a nationwide average of 11 percent value-based commercial payments, with only six percent utilizing financial risk. *Id.* at 6.

of the lack of integration, the United States is considerably less effective in providing patients access to high quality, efficient healthcare. *See* Karen Davis et al., *Mirror, Mirror on the Wall: How the Performance of The U.S. Health Care Systems Compare Internationally 2010 Update*, THE COMMONWEALTH FUND (June 2010), *available at* http://www.commonwealthfund.org/publications/fund-reports/2010/jun/mirror-mirror-update.

Such ineffective care has also become quite costly. Americans spend 18 percent of U.S. gross domestic product on healthcare, far more than any other industrialized country. Amitabh Chandra et al., *Is This Time Different? The Slowdown in Health Care Spending*, BROOKINGS INST. (2013), *available at* http://www.brookings.edu/~/media/Projects/BPEA/Fall%202013/2013b_chandra_healthcare_spending.pdf.

Integration is crucial to bending the cost curve and improving overall healthcare delivery. Healthcare policies and recently enacted laws[4] have begun to bring about a transformational change in healthcare: the decline of a volume-based, fee-for-service approach in favor of a value-based, patient-oriented one. This approach encourages delivery system reform and integration of care in a number of ways including formation of accountable care organizations, bundled payments,

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[4] For example the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010) ("ACA").

reduced hospital payments for readmissions, and valued-based payment systems in Medicare and Medicaid. *See generally*, Thomas L. Greaney, *The Affordable Care Act and Competition Policy: Antidote or Placebo*, 89 OR. L. REV. 811 (2011). However, there is a side-effect to these changes. These changes have a dramatically reduced profitability as providers face reductions in reimbursement, changes in incentives, and limited access to capital. *Fundamental Transformation of the Hospital Field*, *Am. Hospital Assoc.* (2012), *available at* http://www.aha.org /content/13/fundamentaltransform.pdf. There are increasing demands for investment and capital from hospitals and other provider groups to create appropriate infrastructure and economies of scale. To address these issues, many providers merge to achieve capital and operational efficiencies. Leemore Dafny, *Hospital Industry Consolidation—Still More to Come?*, 370 New Eng. J. Med. 198, 198 (2014).

The vast majority of healthcare provider mergers are viewed as procompetitive. *See* Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits* (2014), *available at* http://www.fticonsulting.com/global2/media/collateral/united-states/hospital-realignment-mergers-offer-significant-patient-and-community-benefits.pdf (study finding that mergers between hospital providers generally lead

to significant "improvements in access, value, and efficiency."). Since 2008, less than two percent of all hospital mergers have been challenged in court. *Id.*

Central to these efforts are vertical consolidations to integrate hospitals with providers. Integrated providers such as Intermountain Healthcare combine hospitals and employed physicians to align incentives leading to over 100 successful clinical improvement initiatives that have both improved care and saved roughly $100 to $150 million per year. Brent C. James and Lucy A. Savitz, *How Intermountain Trimmed Health Care Costs Through Roust Quality Improvement Efforts*, 30 HEALTH AFF. 1, 4-5 (2011).

Moreover, some of the most renowned American healthcare systems follow the fully vertically integrated provider model. Providers like Geisinger Health Systems and the Mayo Clinic have utilized integrated systems through employment of physicians to improve patient benefits, service quality, institute preventive health measures, and lower costs.

St. Luke's acquisition of Saltzer follows the national trend of attempting to use vertical integration to improve coordination and bend the cost curve to improve overall healthcare. According to the court, St. Luke's "is to be applauded for its efforts to improve the delivery of healthcare in the Treasure Valley." ER.5. St. Luke's efforts demonstrate its willingness to take business risks to fulfill its commitment as a healthcare provider. To order divesture is counter to the current

dynamics of healthcare policies that seek integration to improve quality and lower costs. It sets a precedent that will be harmful to consumers across the country.

II. The Acquisition has Led to Greater Benefits for Uninsured and Underserved Individuals.

Forcing a divestiture of Saltzer would harm the patients of Canyon County, Idaho. St. Luke's is the preeminent provider of healthcare services in Idaho. St. Luke's provides its patients "with unmatched care." *Case Example: St. Luke's Health System*, AM. HOSP. ASSOC. at 1 (2013), *available at* http://www.aha.org/content/13/13-01-cex-stlukes.pdf. St. Luke's patients stayed in St. Luke's affiliated hospitals 10 percent less time than standard hospitals and had eight percent fewer adverse patient-safety events. Sabriya Rice, *Truven's 15 Top systems: Consistency boost quality*, MODERNHEALTHCARE.COM (Apr. 19, 2014, 12:01 AM), http://www.modernhealthcare.com/article/20140419/MAGAZINE/30 4199979. Not surprisingly, St. Luke's has received national recognition as one of the nation's top 15 health systems. *Id.*

As the court recognized, the purpose of the acquisition was "primarily to improve patient outcomes." ER.5. Since the acquisition, St. Luke's and Saltzer have begun to improve healthcare by creating a tightly integrated affiliation in which consumer benefits are evident. For example, the integration has already led to greater accessibility to care for Medicare, Medicaid, and low or no-pay patients. App. Brief at 15.

The simple financial reality was that prior to the acquisition, Saltzer was not able to offer care to underserved patients in the community because it operated under a fee-for-service model. *Id*. at 15-16. The fee-for-service model pays physicians based on the volume of care provided, not the quality of that care. ER.40 ¶¶163-165. It incentivizes providers to see as many patients as possible, and focus on higher paying patients to maximize revenue. As a result Saltzer was forced to limit the number of new patients it accepted who were insured by "lower reimbursement" payors. (Def.'s Proposed Findings of Facts and Conclusions of Law, Docket Number 459 "Def.'s Proposed Finding of Facts" at ¶ 488). Saltzer physicians would not typically treat uninsured patients unless they were referred to a Saltzer on call physician from an emergency room. *Id*. But as an integrated part of St. Luke's, the Saltzer physicians' pay is no longer affected by the insurance status of its patients. The record below demonstrates that uninsured and underserved individuals have received expanded access for primary care and other services as a result of the merger. *See* ER.465; ER.508.

Moreover, the merger has led to greater outreach efforts designed to keep the population healthy. Under the previous fee-for-service model, Saltzer physicians viewed such efforts as a financial loss because time out of the office meant less patient volume. (Def.'s Proposed Finding of Facts at 491). Unwinding the

transaction will diminish the ability of Saltzer physicians to engage in these efforts to increase overall community wellness.

Value-based patient-oriented care is essential to controlling healthcare costs and providing consumers with quality overall care. This merger enables Saltzer physicians to focus on delivering high quality care and provide greater service to the underserved. As is already being seen, the merger will lead to better overall patient care, and the transition to value-based delivery of care should ultimately lower the cost of care.

III. The Court Erred by Applying an Incorrect Legal Standard of Efficiencies and Ignoring Practical Obstacles to Alternative Means of Achieving These Efficiencies.

This Court has a history of properly balancing procompetitive justifications of antitrust defendants against alleged anticompetitive harm. See, e.g. *California Dental Ass'n v. FTC*, 224 F.3d 942, 958 (9th Cir. 2000) (in recognizing defendant's potential efficiencies court concluded that the FTC "failed to demonstrate substantial evidence of a net anticompetitive effect."); *Paladin Associates v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003) (in considering a gas-supply transaction and taking into account efficiencies lowering transaction costs, the court held "any anticompetitive harm…were far outweighed by the [arrangement's] procompetitive benefits.").

In this case, the court simply failed to engage in a balancing of possible anticompetitive effects against likely consumer benefits. It recognized candidly that there were a number of crucial efficiencies which would improve care and lower costs. In fact, the court explicitly noted, "one of the driving forces behind the Acquisition is St. Luke's desire to improve quality and reduce costs by moving toward value-based or risk-based care and away from fee-for-service ('FFS') care." ER.38 ¶150. In particular, the merging parties cited efficiencies including the "elimination of fee-for-service reimbursement," "move to risk-based reimbursement," utilizing team based-medicine, and applying a "shared electronic record." *Id.* at 39-43. The court did not dispute these stated efficiencies, and in fact, concluded that the merger would "improve the quality of medical care" in Nampa, Idaho. *Id.* at 59 ¶71.

With that recognition of real world efficiencies, one would have expected the court to weigh those efficiencies against the risk of anticompetitive conduct. However, it did not do so. Instead, it required St. Luke's to affirmatively demonstrate there was no less-restrictive alternative to merger that could achieve the same efficiencies. In doing so the court ignored the law as well as sound antitrust policy.

A. The Court's Applied Efficiency Standard is an Ineffective Policy and an Improper Legal Standard.

In discussing competitive harm, the court relied on the structural presumption established in the *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), requiring only that a plaintiff make a showing of undue concentration in a relevant market, not actual anticompetitive effects. Further, when assessing competitive effects, the court relied on the Merger Guidelines to require that merging parties' efficiencies would be credited if they were "unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." ER.55 ¶43 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), *available at* http://www.justice.gov/atr/public/guidelines /hmg-2010.pdf) (hereinafter "Merger Guidelines").

The court's and FTC's approach to efficiencies is fundamentally flawed. "[T]he critical lesson of the modern economic approach to mergers is that post-merger changes in pricing incentives and competitive effects analysis are what matter." Joshua D. Wright, Commissioner, Fed. Trade Comm'n., The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets at 17-18 (Sept. 24, 2013). When analyzing potential efficiencies, the FTC's merger policy "has long been dominated by a focus on only one side of the ledger—anticompetitive effects." Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347,

390 (2011). Tim Muris, former FTC Chairman and antitrust scholar, observed "too often, the Agencies [FTC] found no cognizable efficiencies when anticompetitive effects were determined to be likely and seemed to recognize efficiency only when no adverse effects were predicted." Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729, 731 (1999). This is not an appropriate balancing. The Merger Guidelines, including the efficiencies defense, were intended to correct, not perpetuate, a defect of the pre-1997 Merger Guidelines era in which

> [i]t is unlikely that efficiencies were recognized as an antitrust defense…. Even if efficiencies were thought to have a significant impact on the outcome of the case, the 1984 Guidelines stated that the defense should be based on "clear and convincing" evidence. Appeals Court Judge and former Assistant Attorney General for Antitrust Ginsburg has recently called reaching this standard "well-nigh impossible." Further, even if defendants can meet this level of proof, only efficiencies in the relevant anticompetitive market may count.

MALCOLM B. COATE, ANDREW N. KLEIT, AND RENE BUSTAMANTE, FIGHT, FOLD OR SETTLE: MODELING THE REACTION TO FTC MERGER CHALLENGES at 6, fn. 6 (1993), *available at* http://www.ftc.gov/sites/default/files/documents/reports/fight-fold-or-settle-modeling-reaction-ftc-merger-challenges/wp200.pdf.

The data demonstrates the effect of the FTC's overly skeptical approach. From 1997-2007, the FTC's Bureau of Competition staff considered 342 efficiencies claims. Of these claims, only 29 were accepted by staff whereas 109

were rejected and 204 received "no decision." MALCOLM B. COATE & ANDREW J. HEIMERT, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997-2007 at 6-7 (2009), *available at* http://www.ftc.gov/os/2009/02 /0902merger efficiencies.pdf. The most common concerns among FTC staff were that stated efficiencies were not verifiable or were not merger specific. *Id.*

The court's efficiency analysis is also incompatible with legal precedent. As instructed by the Supreme Court, efficiencies analysis requires courts to examine the totality of circumstances surrounding an anticompetitive restriction to determine if it constitutes an unreasonable restraint of trade. *Rothery Storage and Van Co. v. Atlas Van Lines, Inc*., 792 F.2d 210 (D.C. Cir. 1986); *see also, N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (looking at asserted procompetitive virtues even after determining that defendant had monopoly power); *Broadcast Music Industries v. CBS,* 441 U.S. 1 (1979) (instructing lower court to take procompetitive virtues of blanket licensing into account even though defendants had huge market shares).

Moreover, in healthcare, there are clear efficiencies recognized by the courts. As Judge Posner has observed "[w]e live in an age of technology and specialization in medical services, Physician practices in groups, in alliances, in networks, utilizing expensive equipment and support. Twelve physicians competing in a county would be competing to provide horse-and-buggy medicine.

Only as part of a large and sophisticated medical enterprise such as the Marshfield Clinic can they practice medicine in rural Wisconsin." *Blue Cross v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995). In the past, courts relying on the role of health policy in merger analysis have found that efficiencies leading to integrated medicine and "better medical care" are significant. *See FTC v. Tenet Health Care*, 186 F.3d 1045, 1054 (8th Cir. 1999).

Efficiencies also come in the form of flexibility and experimentation by firms to improve consumer welfare. *Contra* Denial of Motion to Stay at 2, FTC v. St. Luke's Health System, LTD., 1:12-cv-00560-BLW (D. Idaho June 18, 2014), ECF No. 506 (stating "rapid changes in health care requires flexibility and experimentation, two virtues that are not emphasized in the antitrust law."). Indeed, the antitrust laws were designed not to hinder innovation but to protect consumers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the [federal antitrust laws] as a consumer welfare prescription") (internal citation omitted)). Unless providers can flexibly experiment, they will not be able to efficiently serve consumers. As such, the court's approach to efficiencies is improper and not supported by the case law.

B. The Court Erred in Placing the Burden of Demonstrating Merger Specificity on St. Luke's.

In the face of these clear cut efficiencies the court relied on the Merger Guidelines to hold that merging parties' efficiencies would be credited only if they

are "unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." ER.55 ¶43 (citing Merger Guidelines § 10 (2010)). The court rejected the efficiency claims because "there are a number of organizational structures that will create a team of unified and committed physicians other than that selected by the Acquisition." ER.56 ¶47. But the court's reliance on non-tested alternatives in a dynamic, ever-changing healthcare landscape was wrong both on the law and the facts.

First, there is no basis for placing the burden of demonstrating merger specificity on the merging parties. Under the Sherman Act the burden of demonstrating whether an efficiency claim is merger specific rests with the plaintiffs. *See Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manners."). And for good reason. It is the plaintiff who bears the ultimate burden of proof, and this is clearly true for merger cases. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990).

Second, as the Merger Guidelines explain, "the Agencies do not insist upon a less restrictive alternative that is merely *theoretical*." Merger Guidelines § 10 (emphasis added). Similarly, the DOJ/FTC Intellectual Property Guidelines caution that the agencies "will not engage in a search for a theoretically least

restrictive alternative that is not realistic in the practical prospective business situation faced by the parties." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *available at* http://www.usdoj.gov/latr/public/guidelines/0558.pdf.

By placing the ultimate burden of proving efficiencies on the Appellants and applying a narrow, impractical view of merger specificity, the court has wrongfully denied application of known procompetitive efficiencies. In fact, under the court's ruling, it will be nearly impossible for merging parties to disprove all alternatives when the burden is on the merging party to oppose untested, theoretical less restrictive structural alternatives.

Even if the court's proffered approach to merger specificity was correct, its conclusion that other arrangements were possible was nevertheless wrong as a matter of fact, because there was no organizational structure that would achieve the same stated efficiencies as the merger between Saltzer and St. Luke's. It is undisputed that the transaction, as proffered, would allow the newly formed, merged entity to offer "coordinated, patient-centered care" and reward "teamwork and value of care rather than volume of care; to accept risk and accountability for patients' outcomes and to manage population health." ER.37 ¶149 (citing *Proposed Findings and Conclusions* (*Dkt. No. 404*) at ¶ 646). These quality of care benefits accrue to all patients, not just the few managed care patients for

whom price negotiations might be relevant. Moreover, it is undisputed that vertically integrated entities such as Intermountain and the Mayo Clinic are demonstrated leaders in achieving these benefits. *Supra* Section I.

The facts also indicate that collaborations have failed to achieve results in Idaho. Prior to the acquisition, Saltzer attempted collaborative efforts with both Mercy Medical Center and St. Luke's. According to the record, these collaborative efforts took years to develop, did not accomplish "a whole lot," and were decidedly unable to promote coordination of care. ER.18 ¶29 (citation omitted); *see also* ER.25 ¶¶25-28. These "real world" results indicate that the court's theoretical structural alternatives have failed in application. Furthermore, these alternative arrangements can also face costly and lengthy scrutiny by the antitrust agencies. *See The Need for a New Antitrust Paradigm*, Hearing Before the H. Comm. on the Judiciary, 111th Cong. 8-9 (2010) (statement of David Balto) *available at* http://www.dcantitrust law.com/assets/content/documents/testimony /David%20Balto_House%20Judiciary_December%202010_FINAL%20TESTIMO NY (noting that it took the FTC on average over 436 days to approve these types of arrangements when they sought clearance).

Healthcare acquisitions also have significant advantages over contractual alternatives. In complex integration of assets, "the costs of contracting will generally increase more than the costs of vertical integration." Benjamin Klein,

Robert G. Crawford, and Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297, 298 (1978). In healthcare, there exists imperfect information, specialized and differentiated products whose attributes are often difficult to measure, and changing market conditions. Such uncertainty creates too many contingencies for parties to address in either writing or enforcing a contract, making an acquisition a more appropriate substitute. *See* Monica Noether, *The St. Luke's-Saltzer Antitrust Case, supra*, at 5 (2014).

Moreover, even if contracting was an alternative, there are countless regulatory, structural, and legal hurdles preventing providers from using this approach. "Mergers may be the only recourse, as decades old regulatory barriers can keep hospitals and doctors from working closely together to improve care and reduce costs unless they are under the same ownership umbrella." *Hospitals: The Changing Landscape is Good for Patients & Health Care*, AM. HOSP. ASSOC. at 1 (2013), *available at* http://www.aha.org/content /13/changinglandscape.pdf. In contrast to employment or acquisitions, providers who jointly contract must comply with a complex and outdated regulatory system. Laws such as the Stark Law, preventing physician self-referrals of Medicare patients, and the Federal Anti-Kickback Statute complicate contracting and make it difficult for providers to incentivize the coordination of care. *See* 42 U.S.C. § 1395nn; *See* 42 U.S.C. §

1320a-7b. These barriers to contracting stifle innovation and limit an entity's ability to inform structural change. Furthermore, neither the court nor Appellees can cite to a single example demonstrating that any of the touted organizational structures is a *more* effective alternative at achieving integrated care compared to the merger.

Sound antitrust policy and law do not permit the theoretical to triumph over the practical. One can always envision ways that firms can function to achieve potential efficiencies. "For example, the merger specificity requirement could be interpreted *narrowly* to exclude any efficiency that can be recreated with any form of creative contracting." Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 at 5 (Apr. 11, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140411ardaghstmt.pdf (emphasis added). That is precisely the error the court made in this case.

C. The Court's Standard Creates an Asymmetric Burden on Merging Parties that is Inconsistent with Sound Antitrust Policy.

The court's approach to efficiencies in this case demonstrates the problematic asymmetry in merger analysis. As FTC Commissioner Wright has cautioned:

> Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there

> is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A, *supra*, at 5 (emphasis in original).

In a recent article, Professor Daniel Crane examines the errors of the asymmetric burdens. He notes this approach can mistakenly condemn acquisitions that improve consumer welfare and concludes: "[t]he reasons offered for ignoring [efficiency claims] are weak and often contradictory. A principle of symmetrical treatment of predicted harms and efficiencies would improve merger policy, without necessarily liberalizing it in undesirable ways." Crane, *Rethinking Merger Efficiencies*, *supra*, at 390 (2011).

In this case, the court presumed competitive harm and then required high evidentiary burdens on merging parties to demonstrate actual procompetitive effects. The differential treatment and evidentiary burdens placed on St. Luke's to prove competitive benefits is "unjustified and counterproductive." *See Id.* at 349. Such asymmetry between the government's and St. Luke's burdens is "inconsistent with a merger policy designed to promote consumer welfare." *See* Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A., *supra*, at 7 (citing Crane, *Rethinking Merger Efficiencies, supra*, at 387-88).

The reasons for this are straightforward. Merger litigation is necessarily a matter of speculation in which the burden of proof appropriately rests with the plaintiffs. If that burden is set too low merger litigation may prevent acquisitions that are otherwise competitively neutral or procompetitive. A standard that prohibits these acquisitions deprives consumers the benefits of an effectively functioning market. *See generally United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990). The court's approach utilizing asymmetric burdens acts to effectively eliminate procompetitive transactions.

The court's decision on efficiencies is inconsistent with FTC precedent. In 2013, the Norman Physician Hospital Organization ("Norman PHO") sought an opinion from the FTC concerning the legality of a competitive collaboration for the purpose of integrated care between the Norman Physician Association's 280 physicians and Norman Regional Health System, the largest health system in Norman, Oklahoma. FTC Staff Advisory Opinion to Norman PHO, (Feb. 13, 2013), *available at* http://www.ftc.gov/sites/de fault/files/documents/advisory-opinions/norman-physician-hospital-organization/130213normanphoadvltr_0.pdf. In its advisory opinion, the FTC, assessing the efficiencies of the proposed venture, found that the groups could not "quantify… the likely overall efficiency benefits of [their] proposed program" nor "provide direct evidence of actual efficiencies or competitive effects." *Id.* at 11, 18. Furthermore, the FTC found that the Norman

PHO arrangement had the potential to "exercise market power." *Id.* at 18. But, despite these findings, the FTC nonetheless permitted the Norman PHO collaboration. *Id.* at 20.

The FTC's decision to permit the Norman PHO competitive collaboration serves as an example of the FTC's uneven approach to efficiencies. Whereas *St. Luke's* received no credit for known, quantified efficiencies which would improve care, the FTC's Norman PHO approval involves only *theoretical* efficiencies. The FTC did not ask if there were a less restrictive alternative or other structural options available to the Norman PHO. Instead, the FTC was more than willing to accept the Norman PHO's "potential to achieve greater efficiency, improved care, and, ultimately, lower costs for network patients." *Id.* at 18. It balanced this potential against the potential for anticompetitive harm and acted with restraint, giving equal weight to both, admittedly speculative possible outcomes. But such an even-handed approach concerning efficiencies was not applied in analyzing efficiencies in the *St. Luke's* merger.

IV. The Court's Remedy is Inconsistent with the Law and Sound Healthcare and Competition Policy.

The restoration of competition is the "key to the whole question of an antitrust remedy." *United States v. E.I. du Pont de Nemours & Co.*, 366 US 316, 326 (1961). The lower court ordered complete divestiture of Saltzer despite the

fact that it found no likelihood of anticompetitive effects in the relevant market for the adult primary care physician services.

As described above, consumers are benefiting from the integration of St. Luke's and Saltzer. The lower court erred by failing to take these account when it ordered divestiture. "Divestiture…is a harsh remedy which should not be ordered without an opportunity for the presentation and consideration of less drastic alternative forms of relief appropriate to remedy the antitrust violations." *Kennecott Copper Corp. v. Curtiss-Wright Corp*., 449 F. Supp. 951, 968 (S.D.N.Y.), *aff'd in part & rev'd in part*, 584 F.2d 1195 (2d Cir. 1978); *see Evanston Nw. Healthcare Corp*, No. 9315, slip op. at 11 (FTC Apr. 28, 2008) (opinion of the Commission on remedy) (divestiture was not ordered in consummated hospital merger because it would have had a negative impact on critical quality improvements).

A. Divestiture is a Presumptive Remedy Subject to Rebuttal when the Harms Outweigh the Benefits.

Divestiture is not always an appropriate remedy. The antitrust agencies note that "conduct remedies often can effectively address anticompetitive issues raised by vertical mergers," and that "[c]onduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies." Antitrust Division Policy Guide to Merger Remedies, Department of Justice, June 2011. Such is the case here.

Courts have also recognized that divestiture should not be entered into lightly. *E.g. Garabet v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1172 (C.D. Cal. 2000). Divestiture is at the "least accessible end of a spectrum of injunctive relief" and should not be entered into "without substantial evidence that the benefit outweighs the harm." *Id*. Fashioning a remedy requires "that courts balance the benefit to competition against the hardship or competitive disadvantage the remedy may cause." *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010). Courts have also cautioned against remedies that lead to an overall negative effect on competition. *See, e*.g. *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 587 (3d Cir. 1979).

Divestiture is especially disfavored when the transaction has been completed and unwinding the transaction would harm the community. *See United States v. First City Nat. Bank of Houston*, 386 US 361, 370-71 (1967). "Courts do not lightly issue injunctive relief that requires dissolution of completed mergers, because of the difficulty of separating merged corporations, or parts of them, back into distinct entities." *Miller for and on Behalf of N.L.R.B. v. California Pacific Medical Center*, 991 F.2d 536, 545 (9th Cir. 1993).

Forcing a divestiture in this case would impose hardships and would destroy the benefits to consumers recognized in the decision below. The court found that the acquisition was intended primarily to improve patient outcomes, structured to

maximize patient outcomes, and that efforts through looser affiliations failed. ER.12; ER.56 ¶¶44-45; ER.17-18 ¶¶25-29. Indeed, the transaction has already begun to produce benefits to Saltzer patients through the availability of new resources, like the WhiteCloud analytical tools, and the ability to take on all uninsured, and other low, or no-pay patients. App. Brief at 15.

Moreover, requiring divesture of Saltzer will harm consumers without creating countervailing benefits to competition. The transaction already led to the departure of seven surgeons from Saltzer to Saint Alphonsus. ER.57 ¶¶55-56. A divested Saltzer, without these surgeons, would not be a significant rival. In fact, Saltzer in its current form might not exist as a competitor at all. *Id.* The court dismissed this evidence on the ground that Saltzer's current position "was caused by the Acquisition." *Id.* ¶57. But even if Saltzer's poor financial condition was caused by a lack of sound judgment by the defendants in entering into the challenged transaction, it is consumers who are ultimately punished by rejecting this evidence. By not putting consumers first, the court failed to give appropriate weight to the fact that divestiture will disserve the public interest. *See Taleff v. Sw. Airlines Co.*, 554 F. App'x 598, 2014 WL 407449, at *1 (9th Cir. Feb. 4, 2014). Because the Clayton Act was not designed to be punitive, it is improper to order divestiture when such relief would "inure to no one's benefit." *United States v. Rice Growers Ass'n of California*, No. CIV S-84-1066-EJG, 1986 WL 12562, at

*13 (E.D. Cal. Jan. 31, 1986). Divestiture would only be effective as a remedy if Saltzer would be maintained in the market as a viable competitive entity. *Id.*

B. Divestiture in this Case is Severely Out of Line with Remedies in Other Similar Cases Addressed by the Antitrust Enforcement Agencies.

Antitrust enforcement agencies, in the face of merger and merger-like transactions frequently choose to impose more narrowly tailored remedies than divestiture. For example, earlier this year Massachusetts faced a merger with far greater competitive concerns when Partners Healthcare sought to acquire both South Shore Hospital and Hallmark Healthcare. Instead of blocking the merger, Massachusetts Attorney General Martha Coakley reached a settlement agreement that would allow the acquisition to proceed. Press Release, AG Coakley Reaches Agreement in Principle with Partners HealthCare, (May 19, 2014), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-05-19-partners-agreement.html.

In reaching the settlement, Coakley stated that "suing Partners would potentially block further expansion of its network, but would also maintain the status quo in the market. We believe this agreement will do much more." *Id.* Coakley determined that blocking the acquisition, an action equivalent to divestiture, was inappropriate when allowing the transaction to proceed under the proposed remedy could produce procompetitive benefits such as "control[ing] health costs for families and businesses and help[ing] level the playing field in the

market." *Id.* Such a conduct remedy, for example allowing payers to split the merged entities into separate contracting entities, would be more appropriate than divestiture in the circumstances presented in this case.

The FTC has also applied more nuanced remedies than divestiture. In 2012, the FTC charged Renown Health with violation of Section 7 of the Clayton Act for its acquisition of Sierra Nevada Cardiology Associates, Inc. and Reno Heart Physicians, Inc., two cardiology groups in Reno, Nevada. In the Matter of Renown Health, FTC File No. 111 0101 (Dec. 4, 2012). The FTC resolved the matter by consent decree under which Renown, for a period of time, would not enforce any non-compete provisions against cardiologists that chose to terminate their employment. *Id.* This creative remedy allowed the potential successful entry of new competition from cardiologists that chose to leave Renown's practices. *See, also*, In the Matter of Evanston Northwest Healthcare Corp., FTC File No. 011-0234 (Apr. 28, 2008) (consummated merger remedied by requiring two separate and independent contract negotiation teams to bargain with third party payors.)

CONCLUSION

For the foregoing reasons the court's decision should be reversed.

Respectfully submitted,

Dated: June 19, 2014

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 19, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2014.

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