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 PUBLICATIONS INC.,

Intervenors,

v.

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

Defendants-Appellants.

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

**MOTION OF APPELLANTS FOR STAY PENDING APPEAL
URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
Action Necessary By: July 24, 2014**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and Circuit Rule 28-1, Defendants-Appellants St. Luke's Health System, Ltd., St. Luke's Regional Medical Center, Ltd., and Saltzer Medical Group, P.A. make the following disclosure:

St. Luke's Regional Medical Center, Ltd. is an Idaho nonprofit corporation, wholly owned by St. Luke's Health System, Ltd., an Idaho nonprofit corporation. St. Luke's Health System, Ltd. has no parent corporation. No publicly held corporation owns 10% or more of the stock in St. Luke's Regional Medical Center, Ltd. or St. Luke's Health System, Ltd.

Saltzer Medical Group, P.A. does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Defendants-Appellants St. Luke's Health System, Ltd., St. Luke's Regional Medical Center, Ltd. (collectively, "St. Luke's"), and Saltzer Medical Group, P.A. ("Saltzer") have appealed the final judgment of the United States District Court for the District of Idaho. Dist. Ct. Doc. 471.[1] That judgment holds that the affiliation between St. Luke's and Saltzer violates § 7 of the Clayton Act, 15 U.S.C. § 18, and analogous state law, and orders St. Luke's to divest Saltzer. *Id.* Defendants moved the district court to stay its order of divestiture while this appeal was pending, on the same grounds advanced in this motion. Dist. Ct. Doc. 473. The district court denied the stay in a Memorandum Decision and Order (attached hereto as Exhibit A) entered on June 19, 2014.[2] Dist. Ct. Doc. 506.

On the same day, defendants asked the district court to stay divestiture while defendants seek a stay pending appeal from this Court. Dist. Ct. Doc. 507. In response, plaintiffs[3] consented to a stay limited to 30 days, regardless of the time required for this Court to adjudicate this motion. Dist. Ct. Doc. 508. The district court has not yet ruled on defendants' most recent motion.

[1] Defendants filed their opening Brief on the merits in this Court on June 12. Doc. 20. The brief of Plaintiffs-Appellees is due on July 14.

[2] The district court's order is dated June 18, 2014, but was entered on the docket on June 19, 2014. *See* Fed. R. Civ. P. 79(a).

[3] Plaintiffs are the Federal Trade Commission and State of Idaho ("government plaintiffs"); Saint Alphonsus Health System, Inc. and related entities ("Saint Alphonsus"); and Treasure Valley Hospital Limited Partnership ("TVH"; with Saint Alphonsus, "private plaintiffs").

In these circumstances, defendants file this Urgent Motion under Circuit Rule 27-3(b) and Federal Rule of Appellate Procedure 8(a)(2) for a stay of divestiture while this appeal is pending. In order to avoid irreparable harm that would result from immediate divestiture before their appeal is resolved, defendants need relief by July 24—*i.e.*, 30 days from the filing of this motion.[4] Defendants will promptly advise this Court when the district court rules on their motion for a stay pending this Court's adjudication of this motion.

PRELIMINARY STATEMENT

This lawsuit challenges the affiliation between St. Luke's, a health system centered in Boise, Idaho, and Saltzer, a physician group in Nampa, Idaho. The court found that the challenged transaction "was intended by St. Luke's and Saltzer primarily to improve patient outcomes," and would accomplish that objective "if left intact." Findings of Fact and Conclusions of Law (attached hereto as Exhibit B) at 3. The court recognized that the transaction would promote the "broad if slow movement" occurring nationwide toward integrated, value-based healthcare, and away from fragmented, fee-for-service care. *Id.* at 2 (noting that integrated care is viewed as a "consensus … solution to the cost and quality concerns nationwide" regarding healthcare). The court also recognized that the transaction

[4] Defendants notified plaintiffs on June 19, 2014 of their intent to file this motion. *See* Dist. Ct. Doc. 507.

would allow Saltzer and St. Luke's together to "increase access to medical care for the significant population of Medicaid and Medicare patients in Canyon County[, Idaho] by enabling Saltzer to move away from providing fee-for-service care as an independent group, which required many Saltzer physicians to manage their patient populations to limit the number of Medicaid or uninsured patients they could accept." *Id.* Findings ¶ 46. Indeed, the transaction furthers federal policy as set forth in the Affordable Care Act—which established "accountable care organizations" to provide integrated, value-based care to Medicare beneficiaries. 42 U.S.C. § 1395jjj(a)(1)(A), (b)(2)(A), (b)(2)(G).

In ordering divestiture of Saltzer, the district court noted 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.* Conclusions ¶ 76.[5] However, the court concluded that the antitrust laws compel a finding of liability because the affiliation would "creat[e] … a huge market share for the combined entity" and, in turn, "a substantial risk of anticompetitive price increases." *See id.* ¶¶ 72, 76-77. In the court's view, the resulting market share alone required divestiture despite the procompetitive benefits of the transaction and despite the absence of any proof of actual

[5] In denying defendants' motion for a stay, the court explained that, in its view, the antitrust laws leave little room for flexibility or experimentation, which it described as "virtues that are not emphasized in the antitrust law." Ex. A at 2.

anticompetitive pricing or other conduct as a result of the transaction. The court also concluded that the benefits of the transaction could have been achieved in a manner less restrictive of competition—notwithstanding the court's recognition that Saltzer's previous attempts to provide integrated care through a looser affiliation had failed. *Id.* Findings ¶¶ 25-29.

The irreparable injury to defendants and to the public, including Nampa consumers, from immediate divestiture are well documented in the record. Such divestiture would cause Saltzer physicians to have to substantially curtail their treatment of patients covered by Medicare and Medicaid and other low or no pay patients. Moreover, it would most probably lead to the break-up of Saltzer shortly after divestiture and thereby eliminate the possibility that the transaction could be reinstated if this Court reverses the decision below. *See* p. 14-16, *infra*.

Beyond these immediate facts, the district court, *amici curiae*, and commentators around the country have recognized the national implications of this case. As the district court put it, "we're thrust right into the middle of a debate which really may be one of the two or three most significant challenges, both economic, social, and what have you, that our country is facing." Trial Tr. (excerpts attached hereto as Exhibit C[6]) at 3869:2-5. Three groups—America's

[6] Exhibit C is subject to the district court's protective order. Defendants have accordingly filed paper copies of Exhibit C under seal.

Essential Hospitals, the International Center for Law & Economics, and the Medicaid Defense Fund—joined briefs *amici curiae* urging this Court to reverse the district court's judgment in light of the chilling effect that the decision will have on integration in healthcare nationwide. Br. of America's Essential Hospitals as *Amicus Curiae*, Doc. 28, at 5 (the decision below "will transcend the particular transaction in dispute and have national implications for the delivery of care to vulnerable populations and health care equity"); Br. of Int'l Ctr. of Law & Econ. and Medicaid Defense Fund as *Amici Curiae*, Doc. 37-1, at 2 (this case "will have a substantial effect on the availability and quality of care to underserved individuals in the affected market, and across the country").

The decision below has also been covered extensively in major publications nationwide.[7] To cite one example, the New York Times recited that "[t]he ruling

[7] *See, e.g.*, Phil Galewitz, *A Challenge to Consolidation in American Medicine*, Wash. Post G01 (Apr. 20, 2014) (noting that this case will "'confuse[] the industry'" and "make hospitals more cautious" in pursuing integration with physician practices); Colin Kass & John R. Ingrassia, *Better vs. Cheaper? Court Says Cost Trumps Quality in Health Care; Orders Undoing of Physician Group Tie-Up*, Metropolitan Corporate Counsel (Mar. 2014) (criticizing the district court's decision and explaining that the case is "particularly notable" as "[t]he health care industry is in the midst of a revolution caused by demographic changes, advancements in medical understanding and, of course, Obamacare"); 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) ("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

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" and explained that "St. Luke's is not alone in pursuing" the strategy that was challenged here. Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, N.Y. Times B1 (Feb. 5, 2014).

In view of the case's importance—not only to the parties, but also to medically underserved patients in Idaho and nationwide—it is essential that defendants have a meaningful opportunity to appeal the district court's ruling. As shown in Part I, *infra*, and in the opening Brief of Appellants, the district court's decision errs in several key respects—including elevating the importance of increased concentration in an improperly defined market over and beyond the substantial benefits that the court found the transaction would produce. Defendants have therefore presented a substantial case for relief on the merits.

Moreover, the balance of harms tips sharply in favor of defendants. Ordering immediate divestiture will deprive defendants of meaningful exercise of

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unaddressed many crucial questions both with respect to the horizontal allegations he did consider, and of course regarding the vertical allegations he did not."); *see also* Robert Weisman, *Opposing Forces; Partners' Hospital Merger Bid Underscores a Policy Dilemma: Will It Take More or Fewer Players to Control Health Care Costs?*, Boston Globe G,1,2 (Feb. 23, 2014); Monica Noether, *The St. Luke's-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?*, 2 CPI Antitrust Chronicle at 4 (Apr. 2014); Brent Kendall, *FTC Wins Challenge Against Idaho Hospital Deal; Judge Rules Hospital Acquisition Is Anticompetitive*, Wall St. J. (Jan. 24, 2014).

their right to appeal. Likewise, it will impose irreparable harm on Saltzer's employees and patients—while neither any finding of the district court nor evidence supports the notion that any irreparable harm will result from temporary delay of divestiture. Finally, the public interest strongly favors a stay. For all of these reasons, this Court should stay the district court's judgment pending appeal.

ARGUMENT

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). The inquiry is a flexible one. In particular, whether a stay is warranted is determined through a sliding scale in which "the relative equities of the stay factors" are balanced. *Leiva-Perez v. Holder*, 640 F.3d 962, 965-66 (9th Cir. 2011) (per curiam). Although the party seeking a stay must make a "certain threshold showing" regarding both irreparable harm and likelihood of success on the merits, *id.* at 965; *Nken*, 556 U.S. at 434, all of the factors are considered "on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases," *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008).

As for likelihood of success, "[t]he standard does not require the petitioners to show that it is more likely than not that they will win on the merits." *Lair*, 697 F.3d at 1204 (internal quotation marks and citation omitted). Instead, the party seeking a stay need only show that "'serious legal questions [are] raised'"—in other words, that "there is a substantial case for relief on the merits." *Id.* (internal quotation marks and citation omitted). As for harm, the party seeking a stay must show more than "some possibility of irreparable injury," *Nken*, 556 U.S. at 434-35 (internal quotation marks and citation omitted)—but rather "that there is a *probability* of irreparable injury if the stay is not granted," *Lair*, 697 F.3d at 1214 (emphasis in original). "In analyzing whether there is a probability of irreparable injury, [the Court] also focus[es] on the individualized nature of irreparable harm and not whether it is 'categorically irreparable.'" *Id.* (citation omitted).

The four factors considered in connection with a stay pending appeal are the same factors that govern preliminary injunctions. *Id.* at 1203 n.2 (citing *Nken*, 556 U.S. at 434). However, there is an important difference: "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). As this Court has explained, "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*, 640 F.3d at 966 (9th Cir. 2011) (emphasis in original). Here, each of the relevant factors weighs in favor of staying divestiture pending appeal, and the balance of the equities tips sharply in favor of defendants.

I. Defendants Have Established a Substantial Case for Relief on the Merits.

The district court recognized that this case presents important and difficult questions of law. Immediately before closing arguments, it 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.

Ex. C, Trial Tr. at 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." *Id.* at 3670:20-25.

As these statements make clear, the district court itself recognized that this case, at a minimum, presents serious legal questions. Indeed, as demonstrated in the Brief of Appellants ("Br.") (Doc. 20), filed on June 12, the judgment of the district court should be reversed for several reasons.

First, the district court erred in concluding that the transaction would likely have anticompetitive effects. This conclusion was predicated on the court's view that the relevant market is adult primary care physician ("PCP") services in the town of Nampa. However, the court failed to assess whether Nampa consumers would have practicable alternatives for adult PCP services if Nampa PCPs raised prices above competitive levels. This is a particularly relevant inquiry since nearly one-third of Nampa residents already see adult PCPs elsewhere. The court also completely ignored evidence of a natural experiment in which a regional employer, Micron, adopted a tiered network plan that caused Saltzer and St. Luke's PCPs to be marginally more expensive than providers outside Nampa—and that resulted in Nampa patients obtaining care outside that purported "market." Br. 28-36.

The court also erred by concluding that the plaintiffs had established a likelihood of anticompetitive effects in what it regarded as the relevant market. It made no finding of a likely anticompetitive price increase in the market for adult PCP services. Rather, its findings on this point were limited to supposed increased prices for *ancillary services*. Yet the court never assessed whether there exists a Nampa market for ancillary services, much less whether defendants have market power in any such market. *Id.* at 36-45.

Second, the district court erred in disregarding the transaction's procompetitive benefits. Having found a likelihood of anticompetitive effects, the court was required to assess whether those effects were outweighed by the procompetitive benefits that it acknowledged the transaction would produce. But it did not do so. Instead, the court dismissed the transaction's procompetitive effects by deeming them not "merger-specific." Although it believed that procompetitive benefits would result directly from the transaction, it concluded that defendants did not carry what the court regarded as defendants' "burden" to prove the absence of less restrictive alternatives—*i.e.*, the absence of means through which the same procompetitive benefits could be achieved with less market concentration.

In so ruling, the district court erred in two fundamental ways. First, it applied an incorrect definition of "merger-specific." It recognized that the benefits of the transaction flowed directly from that transaction. However, it concluded that the mere possibility of achieving some form of integration someday by alternative means rendered the benefits not "merger-specific"—without regard to (a) the existence of any alternative means available to the Saltzer physicians, or (b) its own finding that Saltzer had previously tried and failed to achieve the same benefits through looser affiliations. Second, it imposed on defendants the burden of proving the *absence* of any such alternatives—rather than requiring plaintiffs to prove the existence and likely effectiveness of such alternatives. Br. 46-57.

Third, the court ordered divestiture on grounds that divestiture is the presumptively appropriate remedy. However, it failed to consider the reasons why any such presumption is overcome here. The goal of divestiture—*i.e.* reinjecting competition into the market—would not be served. Moreover, divestiture is inappropriate where the challenged transaction has significant procompetitive benefits that could be preserved through a less drastic remedy. Br. 57-62.

In denying a stay, the court concluded that defendants had not shown a substantial case for relief on the merits. Ex. A at 3. However this ruling was based on the same fundamental mistakes that formed the basis for the erroneous judgment in the first instance. To begin, the court made explicit its view, which also underlies its original decision, that the antitrust laws "seem[] to hinder innovation and resist creative solutions," and that "flexibility and experimentation" are "two virtues that are not emphasized in the antitrust law." Ex. A at 2-3.

But that view is simply incorrect. The antitrust laws give courts the flexibility to promote best outcomes for consumers. *See Reiter v. Sonotone Corp*., 442 U.S. 330, 343 (1979) (antitrust laws are "a consumer welfare prescription"); *Nw. Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 98 n.42 (1981) ("In antitrust, the federal courts enjoy more flexibility … than in other areas governed by federal statute."); *Silver v. New York Stock Exch.*, 373 U.S. 341, 360-61 (1963); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust*

Principles and Their Application ¶ 655b (antitrust laws are "a flexible instrument by which courts of equity promote competitive policy."); *Appalachian Coals v. United States*, 288 U.S. 344, 359-60 (1933) (restrictions imposed by the antitrust laws "are not mechanical or artificial").

Moreover, the antitrust laws are interpreted to promote innovation. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (explaining that judicial action that would "reduc[e] the incentive … to innovate, invest, and expand" would be "inconsistent with the goals of antitrust"); *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (vacating preliminary injunction entered in antitrust lawsuit and stating that the antitrust laws are "aimed at encouraging innovation"); *United States v. FCC*, 652 F.2d 72, 132 n.204 (D.C. Cir. 1980) (among the goals of the Clayton Act is to "stimulate innovations for better service at a lower cost") (citation omitted); *cf. 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), (vacating injunction requiring dissolution of merger under 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").

Second, the court again failed to recognize that it is not defendants' burden to prove the absence of less restrictive alternatives. *See Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). It likewise failed to recognize that placing that burden on defendants essentially prevents any tight affiliation between a health system and a substantial physician group in a mid-sized market because a plaintiff can always assert, without persuasive proof, that a looser affiliation would result in the same benefits. And it failed to give any consideration to the effect of its decision on federal policy encouraging integration in healthcare. In short, there are, at the very least, serious grounds for appeal—and, indeed, good reason to believe that the decision below will be reversed on the merits.

II. Defendants Have Established a Probability of Irreparable Harm.

An order requiring immediate divestiture would seriously jeopardize the value of a reversal on appeal. To begin, there is substantial evidence that a divested Saltzer would not long survive.[8] But even if it somehow did survive, the costs and burdens involved in recreating the affiliation in the event of reversal would make it highly unlikely that defendants could do so. 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) (Reinhardt, J.,

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[8] Before the challenged transaction, Saltzer lost its seven most profitable physicians when those seven surgeons chose to join private plaintiff Saint Alphonsus. *See* Ex. B Conclusions ¶ 55. Because the remaining Saltzer physicians were still required to pay the overhead the departing surgeons' revenues had covered, the loss left Saltzer financially unsound—and likely to lose even more physicians and eventually break up. Ex. C, Trial Tr. 3233:21-3237:12 (L. Ahern); Transcript at 3328:12-3329:23 (T. Patterson).

concurring) (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 district court did not dispute that Saltzer would face "hardship caused by the unwinding." Ex. A at 4. Rather, according to the court, "Saltzer's 'financial peril'" could not "satisfy the irreparable harm standard" because it was supposedly "self-inflicted," in that the surgeons chose to leave Saltzer "in large part *because of* the impending acquisition." *Id.* at 3. However, the undisputed evidence shows that neither St. Luke's nor Saltzer imposed any requirement that the surgeons leave Saltzer as a condition of the transaction. To the contrary, joining Saint Alphonsus was the surgeons' *independent choice*. *See* Ex. C, Dkt. 393 (A. Curran Dep.) at 106:17-107:6; Dkt. 396 (S. Williams Dep.) at 111:10-13, 112:3-10; Trial Tr. 2245:25-2246:7 (C. Roth). More fundamentally, the real issue is not why independent individuals chose to take certain actions, but rather whether divestiture prior to appellate review is necessary to avoid irreparable harm—to the parties, to competition, and to the broader community.

The harm to Saltzer, its physicians, and its hundreds of non-physician employees is alone sufficient grounds to stay any order of divestiture. The hugely adverse effects of divestiture on Saltzer—including its potential breakup—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").

But the harm of immediate divestiture would be irreparable for another reason: It would make it highly unlikely that Saltzer and St. Luke's could reaffiliate if they are successful in this appeal. It took Saltzer and St. Luke's some three years to negotiate the affiliation, Ex. C, 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 judgment is reversed on appeal would be so costly and so burdensome as to make that possibility extremely improbable.

Significantly, the harms from immediate divestiture would extend far beyond the parties. The access to Saltzer physicians by the underserved patients of southern Idaho, as well as access to integrated care in Canyon County, would be substantially diminished. For all of these reasons, immediate divestiture would cause St. Luke's, Saltzer and its employees, and Idaho patients 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.").

III. A Stay Will Not Substantially Harm Other Parties.

A delay of divestiture pending appeal would have little or no adverse impact on other parties. With respect to the government plaintiffs, no evidence introduced at trial—and no finding of the district court—indicates that any anticompetitive price increases, or any other form of harm, would be *imminent*. *See Nat'l Ass'n of Chain Drug Stores v. Express Scripts, Inc.*, No. 12-395, 2012 WL 1416843, at *3 (W.D. Pa. Apr. 25, 2012) (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"). 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." Ex. B, Conclusions ¶ 76.

In denying a stay, the district court stated only that "a stay would lock into place the anticompetitive bargaining advantage that St. Luke's could continue to use to its advantage." Ex. A at 5. The court did not explain, however, how the stay would serve to "lock into place" any such bargaining advantage—much less how it would do so irreparably. Indeed, the evidence makes clear that there is no likelihood of any immediate increase in prices for adult PCP services, which is the sole product market on which the Court based its opinion. *See* Br. 36-45. The two largest commercial insurers in Idaho, Blue Cross of Idaho ("Blue Cross") and

Regence Blue Shield ("Regence"), have statewide physician fee schedules that set forth amounts that those payers will pay physicians in the state for their professional services. Ex. C, 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 Saltzer physicians, are reimbursed according to Blue Cross's and Regence's statewide fee schedules. Ex. C, 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.

Despite being nearly a year and a half old, there is no evidence that this transaction—or any other St. Luke's transaction—has caused reimbursement amounts for adult PCP services to rise above competitive levels. Ex. C, Trial Tr. 412:3-12 (J. Crouch); Exhibit 2148 (attached hereto as Exhibit D[9]). Additionally, St. Luke's and Blue Cross'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 Blue Cross—yet the price adjustments in that contract were entirely in line with prior year-over-year increases, when Saltzer played no role. Ex. C, Trial Tr. 349:7-23 (J. Crouch). Significantly, the plaintiffs offered no evidence to suggest that St. Luke's current

[9] Exhibit D is subject to the district court's protective order. Defendants have accordingly filed paper copies of Exhibit D under seal.

contract with Blue Cross 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.[10]

With respect to private plaintiffs, the court found that referrals to St. Luke's might increase after the transaction. Ex. B, Findings ¶ 140. Notably, however, the court did not find that any corresponding reduction in referrals from Saltzer physicians to private plaintiffs Saint Alphonsus and TVH would not be made up in referrals from other sources. Most importantly, the court did not conclude that any reduction in referrals would so harm these hospitals that their viability or ability to compete would be threatened in any way—*i.e.*, that competition would be harmed.[11] The balance of harms therefore tips sharply in favor of a stay.

IV. The Public Interest Supports Staying Divestiture.

As set forth above, the court concluded that the transaction was intended to, and will, lead to improved patient outcomes. Ex. B 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 value-based payment

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[10] Likewise, although the district court's Findings of Fact referred to price increases in a separate geographic market after an unrelated transaction, Ex. B, Findings ¶ 120, plaintiffs conceded that there was no evidence that those changes reflected pricing above competitive levels, Ex. C Trial Tr. 1383:4-8 (D. Dranove).

[11] There was substantial evidence to the contrary—including from private plaintiffs' own expert. *See* Ex. C, Trial Tr. 1565:14-22, 1582:2-25 (D. Haas-Wilson).

mechanisms. *Id.* Conclusions ¶¶ 67-71. Moreover, 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. *Id.* Findings ¶ 46; Ex. C, Trial Tr. 3312:20-3313:4, 3320:3-3321:2, 3329:9-3330:5 (T Patterson).

Although it reaffirmed these benefits in its order denying a stay, the district court declared the public interest to be "a wash" in view of the possibility that the transaction would raise healthcare prices. Ex. A at 5. But the court failed to take into account the irreparability of immediate divestiture—and the importance of the transaction's benefits to underserved patients. This Court should simply not permit any immediate divestiture that would undermine the potential value of an appeal.

If, on appeal, it is ultimately concluded that the affiliation is unlawful and that divestiture is the required remedy, then divestiture will occur. But pending appeal, the benefits of the transaction to patients 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, this Court should stay the district court's divestiture order pending appeal.

Respectfully submitted,

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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 24, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jack R. Bierig

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