No. 14-35173

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ST. ALPHONSUS MEDICAL CENTER - NAMPA, INC., *et al*.
Plaintiffs/Appellees,

v.

ST. LUKE'S HEALTH SYSTEM, LTD., *et al*.,
Defendants/Appellants.

On Motion For Stay Pending Review

OPPOSITION OF THE FEDERAL TRADE COMMISSION AND THE STATE OF IDAHO TO MOTION FOR STAY PENDING REVIEW

LAWRENCE G. WASDEN
Attorney General

BRETT T. DeLANGE
Office of the Attorney General
State of Idaho

Of Counsel:
DEBORAH L. FEINSTEIN
Director, Bureau of Competition

J. THOMAS GREENE
PETER C. HERRICK
HENRY C. SU
Federal Trade Commission

JONATHAN E. NUECHTERLEIN
General Counsel

JOHN F. DALY
Deputy General Counsel

JOEL MARCUS
Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3350

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Appellants' motion to stay the district court's order directing St. Luke's to divest its interests in Saltzer fails on all fronts and should be denied. On the merits, Appellants fall far short of meeting their burden to show a likelihood of success. Their claim that the "district court recognized that this case presents important and difficult questions of law" is flatly wrong. In fact, in denying a stay of its order, the court wrote that in this case, "[t]he law itself was clear, and the facts equally so." Dkt. No. 506 at 3. Indeed, the district court's decision is grounded in well-established Supreme Court and Ninth Circuit precedent applying Section 7 of the Clayton Act.

St. Luke's acquisition of Saltzer (the "Acquisition") gave the combined firm a nearly 80 percent market share and increased market concentration by *eight times* the amount needed to establish a presumption of illegality. On top of that presumption, the court found extensive evidence of anticompetitive effects, including unrebutted economic evidence that Saltzer and St. Luke's were each other's closest substitutes in the relevant market. As a result, their merger enhanced St. Luke's market power and made it highly likely that the combined firm will use that market power to extract higher payments from health plans. Those higher payments will be passed on to consumers through larger premiums and deductibles.

Appellants are highly unlikely to prevail on their claim that the district court erred in defining the geographic market. That fact-intensive determination relied on a wide range of empirical, documentary, and testimonial evidence showing that primary care markets are highly localized. Appellants are equally unlikely to

succeed in their claim that the court erroneously allocated the burden of proof. In fact, it followed an established burden-shifting framework for Clayton Act cases. Contrary to Appellants' assertions, courts have required merging parties advancing an efficiencies defense to show that those efficiencies are merger-specific; indeed, it is essentially hornbook law.

Appellants have not shown that they will suffer any harm, let alone irreparable harm, if divestiture occurs. They offer only speculative assertions that Saltzer "would not long survive" independently and that reconstituting the deal would be difficult if they were to prevail on appeal. Those claims cannot be squared with their promises to the district court, made in successfully opposing a preliminary injunction to block the Acquisition, that the Acquisition could be unwound easily. By contrast, the passage of time will inevitably blur the line between St. Luke's and Saltzer, impeding any hope of "unscrambling the eggs" and restoring competition to the market. At the same time, a stay would allow St. Luke's to fully exercise its newfound market power for months or even years to come, while Idaho consumers and employers bear the financial consequences.

BACKGROUND

Section 7 of the Clayton Act, 15 U.S.C. § 18, makes unlawful any acquisition "where . . . the effect of such acquisition may be to substantially lessen competition" in a given market.[1] In December 2012, shortly after the district court denied a preliminary injunction to block the Acquisition from closing, St. Luke's

[1] The analysis for the Idaho Competition Act, Idaho Code §§ 48-102(3), 48-106, mirrors that of the Clayton Act.

acquired Saltzer, the largest independent physician group in Idaho. After an 18-day trial on the merits that included more than 50 witnesses and more than a thousand exhibits, the district court entered extensive findings of fact and conclusions of law and a final judgment that the Acquisition was unlawful and must be unwound. Dkt. 464, 471. The court first determined that the relevant product market is Adult Primary Care Physician (Adult PCP) Services. FOF 48-49.[2] Based on a wide range of evidence, the court then found that the relevant geographic market is Nampa, Idaho. FOF 73.

The Acquisition gave the combined firm a nearly 80 percent share of that market. FOF 80. By showing extremely high market concentration, Appellees established a prima facie case and presumption of illegality under the Clayton Act, 15 U.S.C. § 18. *See California v. Am. Stores Co.*, 872 F.2d 837, 842 (9th Cir. 1989) ("Statistics that indicate excessive post-merger market share and market concentration create a presumption that the merger violates the Clayton Act."); *see also* COL 24-26, 72-74. In addition to that strong presumption, the court found substantial evidence demonstrating the Acquisition's likely harmful effects and the combined firm's power to obtain higher payments from health plans than it could have absent the Acquisition. *See* FOF 74-146; COL 25-26.

Appellants' defense consisted largely of claims that the Acquisition would lead to greater efficiency in the delivery of healthcare. After a thorough analysis,

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[2] Record evidence is identified by docket entry number ("Dkt."). Pertinent materials are reproduced in the exhibits. "COL" refers to the district court's conclusions of law, "FOF" to its findings of fact.

the court found "that St. Luke's has not carried its burden of showing convincing proof of significant and merger-specific efficiencies arising as a result of the Acquisition." COL 49. Accordingly, the court concluded that Appellants failed to rebut Appellees' prima facie case and the strong presumption of harm and ordered St. Luke's to divest its interest in Saltzer. COL 80. The court also held St. Luke's to its earlier promises that it would "not oppose divestiture on grounds that divestiture cannot be accomplished," or that it "would be costly or burdensome." COL 53.

On June 18, 2014, the district court denied a stay of its judgment. Dkt. 506. In so doing, it reaffirmed its findings and conclusions—noting that "[t]he law itself was clear, and the facts equally so." *Id.* at 6. The court warned that "a stay would lock into place the anticompetitive bargaining advantage that St. Luke's could continue to use to its advantage." *Id.* at 5.

ARGUMENT

To justify a stay, Appellants bear the burden to show that: (1) they are likely to succeed on the merits of their appeal; (2) they will be irreparably injured absent a stay; (3) issuance of a stay will not substantially injure other parties interested in the proceeding; and (4) the public interest favors a stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). In particular, they must meet the "bedrock requirement" of showing "that irreparable harm is *probable*," and a stay "must be denied" if they fail to carry that burden. *Leiva-Perez v. Holder*, 640 F.3d 962, 965, 968 (9th Cir. 2011) (emphasis added). Because, as shown below, Appellants cannot demonstrate that the "balance of hardships tips sharply in [their] favor,"

they must also establish "a strong likelihood of success" on the merits. *Id.* at 970. Appellants fail to meet their burden on any of those factors.

A. Appellants Have Not Established A Likelihood Of Success On The Merits.[3]

1. The District Court Correctly Defined The Geographic Market.

Appellants contend that the district court erred in defining the relevant geographic market. Mot. 10. That claim faces a high hurdle: "[t]he definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved and [the Court] will not disturb such findings unless clearly erroneous." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1299 (9th Cir. 1982). The district court's findings on geographic market are not erroneous, let alone "clearly" so.

The evidence at trial strongly supported Nampa as the relevant geographic market. The issue requires an explanation of competition in healthcare markets, which occurs in two interrelated stages.[4] In the first stage, providers compete to be included in health plan networks. In this stage, health plans negotiate the payments—known as reimbursements—they will make to providers over the contract term. In the second stage, health plans compete with each other to attract employers and members, typically by offering a wide range of "in network"

[3] Appellants make only token legal arguments, relying instead on cross-references to their merits brief totaling 32 pages of text.

[4] For an extensive discussion of two-stage competition in healthcare markets, see *FTC v. ProMedica Health Sys., Inc.*, 3:11 CV 47, 2011 WL 1219281, at **5-8 (N.D. Ohio Mar. 29, 2011).

providers at substantially lower costs than "out of network" providers, with which the health plan does not have a contract. *See* FOF 55, 103. In order for a health plan to successfully sell policies, it must offer in-network PCPs in the locality where subscribers live. FOF 60-70. As the evidence showed in this case, "patients like to get their medical care close to home," and the large majority of Nampa residents receive primary care from local doctors. FOF 64-67. If a health plan lacks local primary care physicians in its network, many employers would not even consider it to be an eligible vendor. FOF 62.

The relative bargaining leverage of the negotiating parties determines the total reimbursements the health plan will pay. The higher the provider's relative leverage, the higher reimbursements will be. Bargaining leverage in healthcare "consists largely of the ability to walk away" from the negotiating table. FOF 105-06. The greater a health plan's ability to craft a marketable network that excludes the provider with which it is negotiating, the stronger the health plan's negotiating position. FOF 43. The health plan's bargaining leverage thus depends on its ability to build a network of attractive alternative providers. FOF 105-109.

The court assessed the market using the "hypothetical monopolist test," a standard economic tool that Appellants do not dispute. Health plans "must offer Nampa Adult PCP services to Nampa residents to effectively compete." FOF 71. A hypothetical monopolist in Nampa thus would have sufficient bargaining power to profitably impose a "significant, non-transitory increase in price" ("SSNIP") of 5 to 10 percent in negotiations with health plans. FOF 52, 71-72. The court found as a matter of fact that Nampa is "the relevant geographic market." FOF 73.

Appellants' challenges to that finding fail. They claim that the court "failed to assess whether Nampa consumers would have practicable alternatives for adult PCP services if Nampa PCPs raised prices above competitive levels." Mot. 10. But prices in this market are set in negotiations between providers and health plans, not consumers. In that situation, "the SSNIP test examines the likely response of *insurers* to a hypothetical demand by all the PCPs in a particular market for a significant nontransitory reimbursement rate hike." FOF 56 (emphasis added).

For a similar reason, Appellants' reliance on Idaho employer Micron as a geographic market "natural experiment" is misplaced. Mot. 10. Again, Appellants improperly focus on prices paid by patients, not the insurer who is negotiating those prices. But even if that were the right inquiry, undisputed evidence shows that Micron patients faced price differences far exceeding the 5 to 10 percent price differences used for the SSNIP test. *See*, *e.g.*, Trial Tr. at 1355:25-1356:18, 1412:10-18 (David Dranove). Micron therefore sheds no light on the relevant geographic market. *Id.*; *see also* Trial Tr. at 3043:7-16 (David Argue).

A far more pertinent example occurred in Twin Falls, Idaho. There, St. Luke's controlled the dominant provider of PCP services. For years, Blue Cross of Idaho ("BCI") resisted demands for higher rates for that PCP group, hoping that its in-network PCPs in neighboring areas 15 to 30 miles away would be sufficient. But because patients did not want to drive that far for primary care, employers purchased "very little" insurance from BCI in that market, and BCI eventually gave in to St. Luke's demands for an 8 percent rate increase for PCP services.

FOF 117-20; Trial Tr. at 246:9-247:18 (Jeff Crouch). The Twin Falls experience demonstrates that the geographic market for PCP services is highly local.

In any event, even if Appellants could show some error in the court's geographic market definition, that error was harmless. Under any plausible geographic market, the Acquisition is presumptively unlawful by a wide margin. The standard economic tool to assess market concentration is the Herfindahl-Hirschman Index, or "HHI." A market "is considered highly concentrated if the HHI is above 2,500, and a merger that increases the HHI by more than 200 points will be presumed to be likely to enhance market power." FOF 79. Here, the presumption was not a close call. Post-Acquisition, the Nampa market for Adult PCP Services had an HHI of 6,219 and an increase of 1,600 points over the pre-merger HHI, far surpassing the thresholds for presumptive harm. FOF 82; *see also ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) (describing comparable HHI figures as "bl[owing] through those barriers in spectacular fashion"). But even if one were to expand the geographic market substantially beyond Nampa, market concentration would *still* be well above presumptively unlawful levels after the Acquisition. TX 1790 at Fig. 19; TX 1791 at Fig. 20; Trial Tr. at 1341:11-1342:15 (David Dranove). Indeed, Appellants never advanced an alternative geographic market that would *not* meet that presumption. Trial Tr. at 1331:11-12 (David Dranove).

2. The District Court Found Ample Evidence Of Enhanced Market Power And Competitive Harm.

Appellants erroneously claim that the court relied on "market share alone"

and found no competitive effects in the Adult PCP Services market. *See* Mot. 3-4, 10. Of course, St. Luke's overwhelming market share and the enormous increase in market concentration caused by the Acquisition cannot simply be swept aside. FOF 80, 82. The court did not stop there, however; it also found extensive evidence of likely anticompetitive effects that further bolstered its conclusion that the Acquisition would harm consumers. FOF 85-140.

Unrebutted economic analysis demonstrated that Saltzer and St. Luke's were each other's closest substitutes in Adult PCP Services for Nampa patients, greatly enhancing the combined firm's ability to demand higher reimbursements. FOF 99-102, 110-11. Documentary and testimonial evidence reinforced that economic evidence. Before the Acquisition, a health plan bargaining with Saltzer could create a network that included St. Luke's, and a health plan bargaining with St. Luke's could create a network that included Saltzer. FOF 109. The Acquisition took away health plans' best fallback option in negotiations with each firm, weakening their negotiating position and giving Appellants the "superadditive" ability to demand higher reimbursements than they otherwise could have, but for the Acquisition. Trial Tr. at 1305:15-1306:15 (David Dranove); FOF 109. St. Luke's and Saltzer's internal documents explicitly recognized that increased market power from the Acquisition would allow them to obtain higher reimbursements from health plans. *See*, *e.g.*, FOF 112-14. This evidence all pointed in one direction: "[t]he Acquisition will increase substantially St. Luke's bargaining leverage with health plans." FOF 98.

The Twin Falls experience is informative here as well. As noted, BCI could

not market its plan to employers there without St. Luke's PCPs and eventually gave in to St. Luke's demands for an 8 percent rate increase for PCP services. FOF 117-20; Trial Tr. at 246:9-247:18 (Jeff Crouch). Here, past is prologue.[5]

Importantly, St. Luke's negotiates with health plans on a systemwide basis, rather than service by service. Both sides agreed that negotiations thus focus on the total expected reimbursements during the contract term, rather than the rate for each individual service. Trial Tr. at 1302:4-11, 1347:1-1348:9 (David Dranove); Trial Tr. at 2899:16-2900:14, 3021:16-18 (David Argue). Because of its enhanced market power, St. Luke's *could* insist on higher reimbursements for Adult PCP Services, as it did in Twin Falls. But St. Luke's could also exercise its market power elsewhere. For example, St. Luke's internal analysis of the rates it would charge to commercial health plans for some services previously performed at Saltzer estimated a *60 percent* rate increase for the exact same services after the Acquisition. FOF 128. There is no dispute that the rates St. Luke's charges to commercial health plans for these services are the product of negotiations. And, as the court found, the market power St. Luke's gained from the Acquisition gives it the ability to make these rate increases "stick" in the next round of negotiations

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[5] Appellants misleadingly claim that "plaintiffs conceded that there was no evidence that those changes reflected pricing above competitive levels." Mot. 19 n.10. In the passage cited by Appellants, Government Plaintiffs' economic expert merely stated that he had not performed an economic analysis of that question. Trial Tr. 1383:14-18 (David Dranove). In fact, the evidence demonstrates that St. Luke's physician employment leads to higher rates for physician services than in the "but for" world where physicians practice—and negotiate with health plans—independently. *See*, *e.g.*, Trial Tr. at 246:9-247:18 (Jeff Crouch).

with health plans. FOF 129.[6]

3. The District Court Properly Placed The Burden On Appellants To Demonstrate Merger-Specific Benefits

Appellants claim that the court erred in defining the term "merger specific" and placing the burden of this defense on them. Mot. 11.[7] This claim fails for several reasons. As the D.C. Circuit has held, any "asserted efficiencies must be 'merger-specific' to be cognizable as a defense." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001). If the merging parties do not show merger-specificity, "the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Id.*; *see also FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991) (holding that "a defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers"). The leading antitrust treatise agrees. As that treatise explains, once the plaintiff has established its prima facie case, "the burden shifts to the defendant to provide evidence of either 'significant' or 'extraordinary' efficiencies that are both 'merger-specific' and of the appropriate type." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their*

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[6] As the court found, the Acquisition also makes it "virtually certain" that former Saltzer doctors will refer patients within the St. Luke's system for specialty care rather than to other, non-St. Luke's providers. FOF 140.

[7] Appellants have not raised any claim of error on the district court's analysis of potential entry and have therefore waived any challenge on that issue.

Application ¶ 976d (3d ed. 2009); *see also* U. S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 10 (2010).[8]

This makes sense because the premise of the Clayton Act is that competition promotes consumer welfare. Nevertheless, Appellants seemingly contend that the Clayton Act should apply differently to healthcare, and by extension, to them. *See* Mot. 12-13. The Supreme Court, however, has rejected this very argument, determining instead that "[t]he early cases . . . foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress . . . ." *Nat'l Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 689-90, 692 (1978). Here, the district court found that Appellants could achieve the Acquisition's purported benefits without the risks associated with reduced competition. FOF 147-206. Appellants offer no good reason for this Court to ignore those findings or jettison well-established law.

Appellants get no support from *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404 (9th Cir. 1991), the Sherman Act case they cite for their proposition that the burden should be on the plaintiffs to show that efficiencies are *not* merger-specific. The plaintiff in that rule of reason case "fail[ed] to clear the first hurdle" of establishing a restraint of trade, so the court had no need to evaluate any claimed benefits from

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[8] While Appellants suggest that the burden-shifting framework "essentially prevents any tight affiliation between a health system and a substantial physician group in a mid-sized market," it is self-evident that very few such affiliations would result in an 80 percent market share and substantial additional evidence of competitive harm, as the district court found here.

the alleged anticompetitive conduct. *Id.* at 1413. Notably, in that same case, this Court relied on the *Areeda* treatise for its recitation of the parties' burdens under the Sherman Act. *Id.* As described above, that treatise calls for a different approach under the Clayton Act, reflecting the two Acts' differing purposes. In applying the Sherman Act, courts look retrospectively at prior conduct to determine whether past restraints of trade were in fact unreasonable. The Clayton Act, in contrast, is prophylactic and forward looking, prohibiting acquisitions in their incipiency that *may* harm competition. Once a plaintiff has established a presumption of harm to competition under the Clayton Act, the burden rightfully falls on the defendant to show otherwise.

In any event, even if Appellants could show error, it was harmless. Appellants assert that the court relied on the "mere possibility" of alternatives to the Acquisition in finding that their claimed efficiencies were not merger-specific. Mot. 11. But in reality, the court undertook an extensive analysis—with nearly 60 findings of fact on efficiencies alone—before finding that none of Appellants' claimed efficiencies required that St. Luke's own Saltzer. *See* FOF 147-206; COL 46. For example, Appellants pointed to a shared electronic medical record system as one of the Acquisition's key benefits. But St. Luke's "Affiliate Electronic Medical Records" program "would allow independent physicians"—*i.e.*, doctors not employed by St. Luke's—to share St. Luke's electronic record system just like an employed physician. FOF 202, 206. Similarly, risk-based contracts with health plans (*e.g.*, where providers receive fixed monthly amounts for each patient) can be achieved without employing doctors. FOF 185.

B. Appellants Have Failed to Show Irreparable Injury.

As a threshold matter, Appellants should not be permitted to argue that divestiture would result in irreparable injury. When Appellants opposed a preliminary injunction blocking the Acquisition, they vowed that if it were later found unlawful, divestiture would be available as a remedy. Among other things, Appellants promised that "the transaction has been specifically structured so that it can be unwound if necessary," and the agreement between St. Luke's and Saltzer "provides a specific process for unwinding the transaction." Dkt. No. 34 at 34. Moreover, "the integration of Saltzer into St. Luke's will be a long-term process." *Id*. Thus, in the event of an order of divestiture, "Saltzer could return to its pre-merger status as an independent clinic." *Id*. As St. Luke's counsel put it, "it would be quite possible to unscramble this egg." Dkt. No. 49 at 87:7-8. Relying on those representations, the district court denied the preliminary injunction, explicitly counting on its ability to order "an immediate and complete divestiture if that is the result compelled at trial." Dkt. No. 47 at 8. As this Court recently explained, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Baughman v. Walt Disney World Co*., 685 F.3d 1131, 1133 (9th Cir. 2012) (internal quotations and brackets omitted).

Even if they may raise this claim, Appellants' assertion that Saltzer "would not long survive" as an independent practice is not credible. Mot. 14. Appellants offer only hyperbole and unsubstantiated assertions of financial upheaval without

any factual basis in support of this claim. *See* Mot. 14-16. This deficiency is unsurprising given that an independent Saltzer controlled over 65 percent of the Adult PCP Services market in Nampa, all but guaranteeing a substantial and profitable revenue stream post-divestiture. TX 1789. Indeed, Saltzer has been profitable every year since at least 1980, including 2012, the last full year before it was acquired. Trial Tr. at 3372:9-14 (Harold Kunz).

Most importantly, Appellants anticipated divestiture and negotiated specific terms to ensure Saltzer's smooth transition back to independence. Dkt. No. 34-18 (Decl. of John Kee) ¶ 18; Dkt. No. 47 at 7-8. For example, as the court found, "any financial hardship to Saltzer will be mitigated by St. Luke's payment of *$9 million* for goodwill and intangibles as part of the Acquisition, a payment that does not have to be paid back if the Acquisition was undone." COL 58 (emphasis added). Tellingly, Appellants' own financial expert "offered no opinion on whether divestiture would cause Saltzer to (1) go out of business, (2) be unprofitable, (3) be unable to compete, or (4) lose physicians." Dkt. No. 506 at 4. Instead, their expert's opinion boiled down to a conclusion that Saltzer doctors will make less money, but even that conclusion was limited to a one-year period. Trial Tr. at 3280:7-13 (Lisa Ahern). And even that temporary decrease was self-inflicted, and therefore should be given no weight. Dkt. No. 506 at 3. In consummating the Acquisition in the face of two government investigations, a request for a preliminary injunction, and ongoing litigation, Appellants knowingly

assumed the risk of divestiture down the road.[9]

Appellants also claim that divestiture "would make it highly unlikely that Saltzer and St. Luke's could reaffiliate if they are successful on appeal" and speculate that reconstituting the deal would be "costly" and "burdensome." Mot. 16. Appellants offer no evidence for their claim or any explanation of why it would be difficult to re-sign the Acquisition documents or negotiate a few new terms if necessary. *See Heinz*, 246 F.3d at 726 ("If the merger makes economic sense now, the appellees have offered no reason why it would not do so later."). That sort of inconvenience does not constitute irreparable harm.

C. A Stay Will Harm Third Parties And Consumers.

Appellants claim that the court found no "imminent" threat of harm to competition. Mot. 17. The Clayton Act, however, was intended to stop anticompetitive mergers in their "incipiency." *Ford Motor Co. v. United States*, 405 U.S. 562, 567 n.4 (1972); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962). Beyond that, the court's 70-plus findings on anticompetitive effects demonstrate that the Acquisition creates ongoing harm to Nampa-area consumers and employers. FOF 74-146. Among other things, the Acquisition gives St. Luke's the ability to demand more favorable terms—including higher

[9] Appellants' reliance on *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 539, 545 (9th Cir. 1993), *vacated*, 19 F.3d 449 (9th Cir. 1994) (en banc), is misplaced. There, the court made no "finding of illegality" as to the merger in question but ordered the unwinding of part of a merger that had been consummated years earlier and in which the changes in the merged entity's "structure were complete." *Id*. at 545. Here, in contrast, after an 18-day trial, the district court found the Acquisition unlawful, and Appellants assured the court that the deal could be unwound.

reimbursements—from health plans, as it has done following past acquisitions of medical practices. FOF 117-20. Increased reimbursements mean higher healthcare costs for Idaho consumers. FOF 144. Appellants attempt to deflect this by suggesting that they have not increased rates while under Government investigation or this litigation has been underway, Mot. 18-19, but that proves nothing. Trial Tr. at 3499:17-25 (David Dranove); *United States v. Gen. Dynamics Corp*., 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending."). Moreover, as the court noted, "[t]here are a myriad of ways to use this [bargaining] advantage other than price increases, and it could cause substantial injury to consumers." Dkt. No. 506 at 5. This harm is both real and ongoing, and a stay would lock it into place. *See* Dkt. No. 506 at 5.

A stay would pose a particular risk of harm to at least one local employer and its employees. One of Idaho's largest employers has constructed a self-insured health plan network under which St. Luke's is "out of network" but Saltzer is "in network." That health plan has dramatically reduced the employer's healthcare costs, preserving jobs that otherwise may have been lost. Dkt. No. 321 at 102:5-8, 102:12-103:2; Trial Tr. at 575:4-21, 578:4-9. But it has been this employer's consistent experience that whenever St. Luke's acquires a physician practice, it removes the acquired practice from the employer's health plan. Because the employer fears that the removal of Saltzer from the network could make its health

plan "untenable," Trial Tr. at 592:1-4; *see also* Trial Tr. at 591:2-8, it put its health plan decisions in a holding pattern pending the outcome of this case. A stay would prolong the uncertainty and its attendant harm to this employer and its employees.

A stay could also reduce, if not eliminate, Appellees' ability to obtain effective relief. "[A]ntitrust laws serve the public interest by encouraging effective competition." *Image Technical Svcs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218 (9th Cir. 1997). Effective enforcement of the antitrust laws means preserving competition pending appeal, *see Heinz*, 246 F.3d at 726, and ensuring that effective relief will remain available if the divestiture order is confirmed, *FTC v. Warner Commc'ns*, 742 F.2d 1156, 1159, 1165 (9th Cir. 1984). While the appeal is pending, St. Luke's interests conflict with Saltzer's (a likely future competitor) both in the near- and long-term. For example, St. Luke's may decide—based on its own unsupervised judgment—to: (i) delay or forgo recruiting new surgeons to Saltzer; (ii) add new physicians to Saltzer under terms that an independent Saltzer would not agree to; (iii) transfer or downsize Saltzer employees; (iv) shut down or relocate services currently offered by Saltzer; and (v) prevent Saltzer from clinically integrating with other providers.[10] Indeed, St. Luke's has already moved its own physicians into Saltzer's Nampa facility, intertwining St. Luke's and Saltzer even further. Trial Tr. at 875:25-876:12 (Karl Keeler). Each such decision undercuts the potential return of a vibrant, fully independent Saltzer.

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[10] Appellants entered into an "Interim Management Agreement" the day before filing their motion to stay. Given its timing and numerous omissions and loopholes, it should be given no weight in evaluating St. Luke's influence over Saltzer's decision making while the appeal is pending.

A stay offers no benefits to consumers that could not be achieved following divestiture. St. Luke's CEO testified that "we would want to work with Saltzer Medical Group … even if it had to be divested, as long as it was consistent with the judge's order." Trial Tr. at 1674:1-1675:12 (David Pate). And as noted above, none of the Acquisition's purported benefits is merger-specific. Moreover, Appellants' own expert admitted that any efficiencies might not occur for at least a decade or more, so there is little reason to believe that allowing the Acquisition to stand pending appeal would yield benefits to consumers in the near term. Trial Tr. at 2686:24-2687:11 (Alain Enthoven). Such speculative benefits do not offset the significant harm to consumers and employers that a stay would impose.

Appellants claim throughout their motion that divestiture would diminish healthcare access for Medicaid patients. *See also* Br. of Amicus Curiae Medicaid Defense Fund. There is no evidence, however, that indigent patients currently lack access to healthcare in Nampa. To the contrary, the Director of Idaho's Department of Health and Welfare testified that Medicaid patients in Nampa have ample access to healthcare services and that many independent physicians in Nampa offer care to Medicaid patients. Trial Tr. at 2290:14-22 (Richard Armstrong). Indeed, another independent physician group in Nampa accepts any Medicaid patient; its president testified that "if a patient is at our door and they need to be seen, we see them." Trial Tr. at 1138:2-22 (David Peterman). There is no reason to suspect that divestiture will cause any harm at all to Medicaid patients in Nampa.

CONCLUSION

For the foregoing reasons, the Court should deny St. Luke's motion for a stay pending appeal.

Respectfully submitted,

s/ Brett T. DeLange

Lawrence G. Wasden
Attorney General

Brett T. DeLange
Chief, Consumer Protection Division
Office of the Attorney General
State of Idaho
700 West Jefferson Street
Boise, ID 83720
208-334-2400

Counsel for Plaintiff State of Idaho

Of Counsel:

Deborah L. Feinstein, Director
Director

J. Thomas Greene
Peter C. Herrick
Henry C. Su
Attorneys
Bureau of Competition
Federal Trade Commission

s/ Joel Marcus

Jonathan E. Nuechterlein
General Counsel

John F. Daly
Deputy General Counsel

Joel Marcus
Counsel
Federal Trade Commission

Office of General Counsel
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3350

Counsel for Plaintiff Federal Trade Commission

Case No. 14-35173

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opposition to Motion for Stay 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 July 7, 2014.

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

/s/ Joel Marcus