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

REPLY IN SUPPORT OF APPELLANTS' MOTION FOR STAY PENDING APPEAL

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Plaintiffs demand that St. Luke's divest Saltzer before this Court reviews the district court's judgment.[1] They do so even though immediate divestiture would deprive defendants of a meaningful appeal. They do so even while they obtained a one-month extension to answer defendants' Brief, Doc. 48, 56—thereby ensuring that, absent a stay, Saltzer will have to be divested before this Court can rule on the merits. They do so even though they have offered absolutely no reason to believe that anticompetitive conduct will occur pending appeal. And they do so even though this is a case of first impression with enormous consequences for the people of Idaho and for the delivery of healthcare across America.

Several considerations militate in favor of a stay:

1. The decision of the district court was premised on the erroneous belief that the antitrust laws do not allow for innovation and experimentation—and is replete with other errors of law;

2. The district court did not find that any price increase above competitive levels or any other supposed anticompetitive effect of the Saltzer affiliation is imminent, and defendants would be profoundly self-destructive to engage in such conduct pending appeal;

3. Defendants have committed to do nothing during the pendency of the appeal that would hinder or prevent divestiture; and

[1] The government plaintiffs and private plaintiffs submitted separate oppositions. However, the private plaintiffs do not have standing to seek enforcement of the divestiture order, which was premised on a likelihood of increased prices. Ex. B, Conclusions ¶¶ 72-74; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (increased prices help—and do not injure—competitors). In any event, the two opposition briefs are largely duplicative. Accordingly, defendants primarily focus on the arguments as they are presented in the government plaintiffs' opposition, and address private plaintiffs' arguments only to the extent they are different.

4. Failure to issue a stay would be the death knell of a transaction that, as the district court found, will promote patient outcomes in that, once Saltzer is divested, Saltzer is likely to splinter apart and re-affiliation would therefore be impossible.

In short, there is no sound reason to insist upon divestiture prior to appellate review of the merits and the remedy—and every reason to grant a stay pending appeal.

I. Defendants Have Shown A Substantial Case For Relief On Appeal.

Plaintiffs are simply incorrect that defendants have not made out a substantial case for reversal. Gov't Opp. 5-13. Significantly, it is not defendants alone who make this point. Rather, multiple commentators have noted the serious and "cutting edge" legal questions raised in this appeal. *See* Stay Mtn. 4-6 & n.7.[2] As these independent observations—and the district court's own contemporaneous statements, *id.* at 4-5, 9—make clear, this appeal raises, at the very least, important and substantial issues.

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[2] *See also, e.g*, Robert F. Leibenluft & 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 …. Unfortunately, Judge Winmill's … findings of fact leave unaddressed many crucial questions both with respect to the horizontal allegations he did consider, and of course regarding the vertical allegations he did not."); 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) (noting that the district court's "methodology for defining the market—and therefore the associated market shares—leads to an incredibly narrow market," and observing that the district court's "logic broke down" when it focused not on anticompetitive effects in the product market at issue, but instead on St. Luke's supposed "opportunity to negotiate higher reimbursement rates" for other services; noting that the decision "reflects the 'big is bad' mentality that the U.S. Supreme Court has eschewed").

Notably, plaintiffs do not defend the district court's statement that the outcome in this case was "clear" because the antitrust laws are properly construed "to hinder innovation and resist creative solutions." Ex. A at 2; *see also* Stay Mtn. 12-13 (listing authorities to the contrary). That erroneous view taints the entire decision and underscores the need for a stay.

Moreover, plaintiffs' efforts to suggest that no substantial legal issues are presented are either irrelevant or unpersuasive. For example, in response to defendants' showing that the district court incorrectly found the town of Nampa to be the relevant geographic market, plaintiffs argue that "[h]ealth plans 'must offer Nampa Adult PCP services to Nampa residents to effectively compete.'" Gov't Opp. 6. However, this argument does not address the fundamental fact that the district court considered only how insurers and consumers *currently behave* in a competitive market—and not how insurers and consumers *would respond* to anticompetitive price increases for Nampa adult PCP services.

Likewise, plaintiffs cannot justify the failure of the district court to address the Micron natural experiment. They say that the Micron evidence relates only to "prices paid by patients, not the insurer who is negotiating those prices." Gov't Opp. 7. However, they ignore the critical point that Micron *successfully* established a network that excluded St. Luke's and Saltzer physicians. Instead of going outside the network to see Saltzer physicians, most Micron employees chose to obtain PCP services from in-network physicians, many of whom were outside of Nampa. This evidence demonstrates that insurers could defeat anticompetitive pricing by creating a network that excludes a large number of Nampa physicians.

Thus, "adult PCP services in Nampa" is not a properly defined market because Nampa residents could readily obtain such services elsewhere if prices there rose above competitive levels.

Plaintiffs have also failed to refute the conclusion that the district court's reliance on supposed price increases *outside* of the single product market at issue (adult PCP services) raises a substantial legal question. The government plaintiffs argue that it was proper to find that "St. Luke's could also exercise its market power elsewhere" because "St. Luke's negotiates with health plans on a systemwide basis, rather than service by service." Gov't Opp. 10. They thus appear to be advancing a "cluster market" theory—*i.e.*, that multiple health care services are properly clustered together in assessing anticompetitive effects because insurers typically negotiate with St. Luke's for multiple services at once. *See, e.g.*, Areeda & Hovenkamp ¶ 565c (discussing cluster markets); *see also ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014) (same). But that theory obligates plaintiffs to prove that the relevant product market was the broader *cluster* of services for which defendants and commercial insurers negotiated—not the single category of adult PCP services the district court held was the only product market at issue here. They did not even attempt to do so.

Plaintiffs' discussion of the district court's error in assessing the transaction's procompetitive benefits is also unpersuasive. *See* Gov't Opp. 11-13. The court found that defendants met their burden to establish that procompetitive benefits would flow directly from the transaction, which is sufficient to establish that the benefits were "merger-specific." *See* Ex. B at 2-3 (transaction would give

rise to improved patient outcomes "if left intact"). Moreover, the district court's own findings confirm that the Saltzer physicians' attempts to achieve similar benefits by means short of tight financial integration were unsuccessful. Ex. B Findings ¶¶ 25-29. The court not only ignored these findings, but wrongly placed an additional burden on defendants—to prove the absence of *any possible less restrictive alternative* that could create similar benefits. Plaintiffs' contention (Gov't Opp. 12-13) that this analysis was proper is simply incorrect. Indeed, this Court has rejected such an approach under the Sherman Act. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

Finally, plaintiffs make no attempt to come to grips with the point that an order of divestiture is an abuse of discretion where, as here, there is substantial reason to believe that divestiture would not reinject competition into the market and where divestiture would cause consumers to lose the benefit of the transaction. At the very least, the issues raised by all of these points are sufficiently substantial that divestiture should not be ordered before this Court can resolve them.

II. The Balance Of Hardships Tips Sharply In Favor Of A Stay Pending Appeal.

Plaintiffs claim that defendants are estopped by their statements at the preliminary injunction hearing from arguing that immediate divestiture would cause irreparable harm. Gov't Opp. 14. But defendants never suggested that they would not oppose divestiture pending appeal—or that divestiture would not cause irreparable harm. Instead, defendants have consistently taken the position that they would not oppose divestiture on the ground that the *process* of divestiture would be

infeasible. Dist. Ct. Doc. 49 at 88:5-10 (argument of St. Luke's counsel that "this transaction was carefully structured so that, in fact, there could be an unscrambling of the egg"). Rather, defendants have argued all along—from their successful opposition to a preliminary injunction through the present motion—that divestiture should not be ordered because, given that Saltzer's seven highest-earning physicians had left the group *before* the transaction occurred, a divested Saltzer would not be an effective competitor, *see* Dist. Ct. Doc. 34 at 40-42 (absent the affiliation, "it is quite likely that Saltzer will not be able to continue as a financially viable group"), and that a conduct remedy would address any concerns about anticompetitive consequences.

Notably, the district court did not question Saltzer's "weakness" post-divestiture. Ex. B, Conclusions ¶¶ 56-57. Nonetheless, plaintiffs now contend that there is no "factual basis" demonstrating that a divested Saltzer would likely dissolve, that Saltzer has been consistently "profitable," and that "a substantial and profitable revenue stream post-divestiture" is "all but guarantee[d]." Gov't Opp. 14-15. Those contentions are baseless.

First, multiple Saltzer physicians testified without dispute that dissolution would be the likely result of immediate divestiture. Reply Ex. E, Tr.2401:10-22 (J. Kaiser); *id.* at 3328:12-3329:23 (T. Patterson); *id.* at 3365:4-3368:4 (H. Kunz); Dist. Ct. Doc. 269 (M. Djernes Dep.) at 71:10-15; Tr.3093:8-3094:1, 3098:16-3100:9 (W. Savage).[3] And the relevant facts have become even clearer since trial.

[3] Plaintiffs misleadingly argue that defendants' "financial expert 'offered no opinion on whether divestiture would cause Saltzer to … go out of business" or

The loss of the seven surgeons is causing Saltzer to hemorrhage money. *See* Reply Ex. F (Affidavit of John Kaiser) ¶¶ 2-4.[4] Nevertheless, the government plaintiffs have recently demanded that divestiture be effectuated within thirty days of any order denying a stay. Reply Ex. G. If that occurs, Saltzer will simply not survive. Reply Ex. F ¶¶ 5-11; *see also* Stay Mtn. 14-16.

Plaintiffs also blithely assert that, if the decision below is reversed, defendants can "re-sign the Acquisition documents or negotiate a few new terms if necessary." Gov't Opp. 16. As shown above, however, there will be no Saltzer if immediate divestiture is ordered. And even if there were, the costs and burdens of reaffilation would likely be prohibitive. In sum, the effect of denial of a stay and divestiture within thirty days thereafter would be the dissolution of Saltzer and the loss of the improved patient outcomes the district court found would result from the affiliation, Ex. B at 3.

By contrast, the government plaintiffs do not dispute that the district court found no likelihood of *imminent* harm to competition or consumers. *See* Gov't Opp. 16-17. They simply assert that the Clayton Act "was intended to stop anticompetitive mergers in their 'incipiency.'" *Id.* at 16. However, that assertion does not support evisceration of a defendant's right to a meaningful appeal where,

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"lose physicians," Gov't Opp. 15, but they simply omit to mention the testimony of the Saltzer physicians on those very points.

[4] Defendants submit the affidavit of Dr. Kaiser in response to the unsupported assertion in plaintiffs' opposition that Saltzer has been operating profitably and will operate profitably if divested—and in light of the government plaintiffs' recent letter (Reply Ex. G) demanding divestiture within 30 days.

as here, substantial issues are presented on appeal, there is no imminent threat of anticompetitive conduct, and immediate divestiture would have irreparable and adverse effects on defendants and the public.

Plaintiffs further argue that a stay would cause harm because defendants will supposedly "demand more favorable terms—including higher reimbursements—from health plans," which a stay would somehow "lock … into place." Gov't Opp. 16-17. In fact, when Blue Cross previously negotiated new terms with St. Luke's *after* the Saltzer transaction was under way, pricing was fully in line with prior years and year-over-year trends. Stay Mtn. 17-19. Plaintiffs have identified no reason to believe that there would be any different result *during the pendency of the appeal*—much less articulated any basis for concluding that any price increase would somehow be "lock[ed] into place." Indeed, it would be completely self-defeating for defendants to try to increase prices above competitive levels, or engage in any anticompetitive conduct, while this appeal is pending.[5]

Plaintiffs also selectively cite the example of Micron—which they call a "local employer"—to argue that a stay would "prolong" supposed harm. Gov't Opp. 17-18. Notably, plaintiffs' reliance on Micron diverges from the district court, which recently confirmed that Micron "played no part" in its decision. Dist.

[5] Any theoretical risk of imminent anticompetitive conduct could be fully avoided by conditioning the stay on separate negotiation of fee-for-service contracts during the pendency of the appeal. Under that scenario, the rate and terms of fee-for-service services provided by Saltzer, including Saltzer's participation in networks, would be determined by negotiation with Saltzer alone, just as it was before the transaction took place.

Ct. Doc. 511 at 67. And plaintiffs' argument is not supported by the evidence. Mr. Otte of Micron nowhere suggested that Micron would suffer harm absent immediate divestiture. He testified instead that "at some point, it is conceivable" that further changes in the health care landscape in Treasure Valley could cause Micron to alter the "way" it "operate[s]"—not that delaying divestiture for a few months would lead to any substantial harm. Reply Ex. E, Tr.592:1-4 (P. Otte).

There is also no merit in the private plaintiffs' assertions of supposed harm to them from a stay. Initially, although the private plaintiffs' theory was that they would be so substantially harmed by the affiliation that competition would suffer, *see* Pr. Pl. Opp. 17 n.10, the district court did not adopt that theory. It did not enter a *single Finding of Fact* that the private plaintiffs would suffer cognizable harm, much less immediate harm. That is hardly surprising. Even crediting private plaintiffs' analysis of the evidence, the "worst-case scenario" is that Saint Al's would have to terminate certain employees *in 2016*. Reply Ex. E, Tr.3154:11-15 (L. Ahern). For its part, TVH was *more* profitable in 2013, after the transaction, than it was in 2012. Reply Ex. H (Ex. 2645); Reply Ex. E, Tr.1103:16-1104:10 (N. Genna). Moreover, Saint Al's made plans to invest more than $33 million in its hospital in Nampa, even before the trial was completed. Reply Ex. I (Ex. 2640). These facts dispel any notion that plaintiffs face imminent substantial injury.

III. The Public Interest Supports Staying Any Order Of Divestiture Pending Appeal.

The government plaintiffs argue that a stay would undermine "[e]ffective enforcement of the antitrust laws" because "St. Luke's may decide—based on its

own unsupervised judgment" to harm an independent Saltzer. Gov't Opp. 18. In fact, the opposite is true. St. Luke's has represented that it will do nothing that will prevent divestiture in the event of affirmance. And the undisputed evidence is that St. Luke's has enabled Saltzer to offer care to significantly greater numbers of Medicaid, uninsured, and other low-pay or no-pay patients—patients who may well go untreated if immediate divestiture is ordered. Stay Mtn. 19-20.

Plaintiffs belittle the value of Saltzer's offering care to vulnerable patients, contending that such patients can seek care from other physicians. Gov't Opp. 19. This claim is remarkable. Despite asserting that the largest commercial payers in Idaho will have no recourse but to accept supposedly anticompetitive prices, plaintiffs now say that Medicaid patients—unlike their commercially insured counterparts—somehow have "ample access" to alternative sources of care. *Id.*

The public interest will not be advanced by depriving defendants of their right to a meaningful appeal. It will not be advanced by enforcing a sweeping and irreversible remedy before this Court has reviewed the numerous important issues that this case presents. It *will* be advanced by staying the divestiture order until this Court can review the district court's decision as to both the merits and the remedy—a decision with immense implications, not just for the parties here, but for patients and health care consumers throughout southern Idaho and the nation.

CONCLUSION

For the foregoing reasons, this Court should stay divestiture pending appeal. If divestiture is not stayed, the Court should order plaintiffs to file their Answering Brief within seven days so that resolution of this appeal is not delayed.

Respectfully submitted,

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July 14, 2014

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 July 14, 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

Jack R. Bierig