

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

v.

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

Defendants-Appellants.

On 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

**FEDERAL TRADE COMMISSION, IDAHO ATTORNEY GENERAL’S OFFICE, SAINT
ALPHONSUS MEDICAL CENTER-NAMPA; SAINT ALPHONSUS HEALTH SYSTEM
INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; AND TREASURE
VALLEY HOSPITAL LIMITED PARTNERSHIP’S MOTION FOR LEAVE TO FILE
SUR-REPLY IN OPPOSITION TO MOTION OF APPELLANTS FOR STAY PENDING
APPEAL**

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
Action Necessary Before: July 24, 2014

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Appellees respectfully move for leave to file the attached four-page Sur-Reply to address allegations in the Declaration of John Kaiser, M.D., attached to St. Luke's Reply. The Kaiser Declaration was filed after Appellees had filed their Responses to Appellants' Motion for Stay. It contains assertions never made at trial, in support of Appellants' Motion for Stay to the District Court, or accompanying their Motion for Stay to this Court. Absent an opportunity to file their Sur-Reply, Appellees will be unfairly denied the chance to respond to these new assertions.

The unfairness here is compounded by the fact that the Kaiser Declaration's allegations about Saltzer's financial status provide no context and no supporting documentation – and, as shown in the lodged Sur-Reply, are inconsistent with the substantial evidentiary record considered by the District Court at trial.

Should the Court deny leave to file the Sur-Reply, it should in the alternative strike the Kaiser Declaration.

This Motion is urgent, because it relates to an Urgent Motion for Stay filed by Appellants on June 24, requesting a ruling within 30 days. Unless this Motion is resolved very quickly, the Sur-Reply will not be available for consideration in connection with Appellants' Urgent Motion for Stay prior to its resolution. Appellees will therefore face irreparable harm if this Motion is not resolved promptly.

DATED this 16th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 16, 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/Joel Marcus

No. 14-35173

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FOR THE NINTH CIRCUIT**

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

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ST. LUKE’S HEALTH SYSTEM, LTD.; ST. LUKE’S
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SAINT ALPHONSUS MEDICAL CENTER-NAMPA; SAINT ALPHONSUS HEALTH
SYSTEM INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; AND
TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP’S SUR-REPLY IN
OPPOSITION TO MOTION OF APPELLANTS FOR STAY PENDING APPEAL**

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Appellees file this Sur-Reply to respond to the Declaration of John Kaiser, M.D., filed by Appellants in support of their Reply Brief. The Kaiser Declaration is misleading, incomplete, and inconsistent with the evidence presented in depositions and at trial in several respects:

1. Dr. Kaiser claims, without any explanation or financial or documentary support, that Saltzer Medical Group is losing money at an “annual rate of \$7.4 million.” Kaiser Decl. at ¶ 2 (attached to Reply in Support of Appellants’ Motion for Stay Pending Appeal as Exhibit F). That figure is misleading. As the record below indicates, St. Luke’s excludes from the financial statements of its wholly owned physician practices all revenues generated by ancillary services such as x-rays and blood tests. Those revenues can add up to millions of dollars per year. If Saltzer were operating as an independent practice, all of that revenue would be reflected in its bottom line. Thus, the accounting figure provided by Dr. Kaiser likely substantially misstates Saltzer’s actual financial condition.

The evidence in this case similarly showed that the financial statements of St. Luke’s Clinic, the accounting entity that includes St. Luke’s employed physicians, do not at all accurately reflect its bottom line. St. Luke’s books show that the physician practice incurs tens of millions of dollars of losses. But as St. Luke’s CFO testified, that information “is not correct,” and is based on a “narrow

look,” because it excludes ancillary service revenues, which are credited to the hospital and not to the physician practice. Ex. 6, Taylor Dep. at 198:1-8, 201:6-202:9;¹ Ex. 7, Plaintiffs’ Deposition Exhibit 70 at SLHS000476506. See Ex. 1, Declaration of David A. Ettinger.

Dr. Kaiser’s claim is also likely misleading for many other reasons relating to St. Luke’s operational and accounting policies that provide little insight on whether an *independent* Saltzer would incur any financial losses at all. For example, Dr. Kaiser’s calculations likely reflect the 30 percent pay raise given to Saltzer doctors funded by higher hospital-based billing charges imposed on health plans. FOF ¶ 127. Saltzer’s current books likely reflect these enhanced salary expenses but not those higher revenues.

Dr. Kaiser’s assertions also contradict Saltzer’s own sworn testimony and actions. Saltzer’s Chairman of the Board dismissed claims of financial weakness as “doomsday scenarios” and “overly dramatic.” Ex. 2, Trial Tr. 3368:19–3371:3 (Kunz). Dr. Kaiser himself reassured his staff by email after this lawsuit was filed, saying, “I would like to emphasize that you will continue to have your jobs no matter what course these investigations and legal challenges take.” Ex. 3, TX 1386 at SMG000288177. Dr. Kaiser’s allegations also ignore the fact that in the event

¹ Exhibits 6 through 10 are subject to the district court’s protective order. Appellees have accordingly filed paper copies of Exhibits 6 through 10 under seal.

of an unwinding, the Saltzer physicians will retain \$9 million of the consideration paid for the Acquisition. FOF ¶ 47 (attached as Exhibit A to Motion of Appellants for Stay Pending Appeal [DktEntry 41:1]).²

2. Dr. Kaiser claims that Saltzer cannot readily recruit new surgeons. Testimony at trial from present and former Saltzer management and leadership indicated, however, that Saltzer would not face the obstacles described in his declaration. That testimony showed that the strong primary care practice – 65 percent of the market in Nampa – provides a solid base for surgical referrals, making it a natural draw for surgeons. Ex. 4, Trial Tr. 753:2–14 (Powell). Ex. 8, Dep.Tr.58:1–11, 59:6–9, 59:24–61:6 (Djernes); Ex. 10, TX 1538 at SALTZER177706.³

3. To the extent that Dr. Kaiser now claims that Saltzer needs more time to plan for divestiture, it can only blame itself for its lack of progress. Saltzer has

² Notably, Appellants vowed to the district court not to advance a “failing firm” defense. Yet, that is precisely the argument Appellants make here under the guise of Dr. Kaiser’s declaration. *See* Kaiser Decl. ¶¶ 8, 10.

³ Saltzer has had years before where five or six doctors left, and the remaining physicians were able to absorb the overhead costs until they could replace those physicians. Ex. 4, Trial Tr. 753:25–754:14 (Powell). Moreover, Saltzer has been able to recruit two new physicians, including a new ENT surgeon, since the Acquisition was consummated. Ex. 9, Trial Tr. 3220:6-16, 3239:5-18 (Ahern). Saltzer’s CEO admitted that recruitment could be expected to be more difficult while Saltzer is owned by St. Luke’s, given the uncertainties as to who ultimately would employ the recruited physician. Ex. 5, Trial Tr. 3103:9-15 (Savage). That will no longer be true after divestiture.

had 18 months since this lawsuit was filed and more than four months since the district court entered its final judgment to plan for divestiture. Saltzer's CEO admitted at trial that it has "never substantively discussed a contingency plan" and "never hired consultants to consider it." Ex. 5, Trial Tr. 3127:1-7 (Savage). When asked why not, he could only say "I don't know." Ex. 5, Trial Tr. 3127:1-7 (Savage). To underscore this lack of planning, the Declaration does not even support the relief Appellants request, i.e., a stay of divestiture pending resolution of their appeal. Rather, Dr. Kaiser seeks just enough time to permit Saltzer to undertake sufficient restructuring to allow Saltzer to be viable. Kaiser Decl. at ¶ 11. He never says how much time that would entail.

4. Finally, even if Saltzer were somehow unable to operate effectively, the District Court has ample equitable discretion to fashion ancillary relief, including requiring that St. Luke's provide Saltzer with additional assistance. *See Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) (approving the district court's use of additional injunctive provisions "designed to give the divested plant an opportunity to establish its competitive position"); *Chicago Bridge & Iron Co. v. FTC*, 539 F.3d 410, 441-42 (5th Cir. 2008) (order requiring divestiture of more than the acquired assets was appropriate because it restored "two competitors capable of competing on an equal footing"). But Saltzer's CEO testified that it has not requested, or even "given any thought" to, or discussed, the "sort of assistance

[it] would need” in the event of an unwind. Ex. 5, Trial Tr. 3105:2-3106:5
(Savage).

DATED this 16th day of July, 2014.

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INDEX OF EXHIBITS

Exhibit	Description
1	Declaration of David A. Ettinger
2	Trial Testimony of Harold Kunz, M.D.
3	Trial Exhibit 1386
4	Trial Testimony of Nancy Powell
5	Trial Testimony of William Savage
6	Deposition Testimony of Jeffrey Taylor [FILED UNDER SEAL]
7	Plaintiffs' Deposition Exhibit 70 [FILED UNDER SEAL]
8	Deposition Testimony of Michael Djernes [FILED UNDER SEAL]
9	Trial Testimony of Lisa Ahern [FILED UNDER SEAL]
10	Trial Exhibit 1538 [FILED UNDER SEAL]

EXHIBIT 1

No. 14-35173

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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.

On 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

DECLARATION OF DAVID A. ETTINGER

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DECLARATION OF DAVID A. ETTINGER

1. I am an attorney for Appellees Saint Alphonsus Medical Center–Nampa Inc., Saint Alphonsus Health System Inc., and Saint Alphonsus Regional Medical Center, Inc. I have personal knowledge of the facts set forth herein, and, if called as a witness, I would be competent to testify thereto.

2. Exhibit 6 to Federal Trade Commission, Idaho Attorney General Office’s, Saint Alphonsus Medical Center-Nampa; Saint Alphonsus Health System Inc.; Saint Alphonsus Regional Medical Center, Inc.; and Treasure Valley Hospital Limited Partnership’s Sur-Reply in Opposition to Motion of Appellants for Stay Pending Appeal (“Appellee’s Sur-Reply”) is an excerpt of deposition testimony from the March 28, 2013 deposition of Jeffrey Taylor, St. Luke’s CFO, taken in this matter.

3. Exhibit 7 to Appellee’s Sur-Reply is a document produced by St. Luke’s in this matter, and marked as Plaintiff’s Exhibit 70 during the March 28, 2013 deposition of Jeffrey Taylor in this matter.

4. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of July, 2014.



David A. Ettinger

EXHIBIT 2

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UNITED STATES DISTRICT COURT
IN THE DISTRICT OF IDAHO

----- x Case No. 1:12-cv-00560-BLW
SAINT ALPHONSUS MEDICAL CENTER - :
NAMPA, INC., TREASURE VALLEY : Bench Trial
HOSPITAL LIMITED PARTNERSHIP, SAINT : Witnesses:
ALPHONSUS HEALTH SYSTEM, INC., AND : Lisa Ahern
SAINT ALPHONSUS REGIONAL MEDICAL : Thomas S. Patterson
CENTER, INC., : Harold V. Kunz
Plaintiffs, : Greg Sonnenberg

vs.

ST. LUKE'S HEALTH SYSTEM, LTD., and :
ST. LUKE'S REGIONAL MEDICAL CENTER, :
LTD., :
Defendants. :

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

FEDERAL TRADE COMMISSION; STATE OF :
IDAHO, :
Plaintiffs, :

vs.

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

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge

Held on October 18, 2013

Volume 17, Pages 3140 to 3397

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<p style="text-align: right;">3368</p> <p>1 kind of medicine that I think I need to practice, then it's</p> <p>2 going to be really hard to stay, especially if I can't -- if</p> <p>3 all of these things with divestiture really happen the way I</p> <p>4 see that they -- they can, I don't know that I could stay.</p> <p>5 MR. BIERIG: Thank you. Thank you very much.</p> <p>6 Thank you, Your Honor. No further questions.</p> <p>7 THE COURT: Mr. Ettinger.</p> <p>8 MR. ETTINGER: Thank you, Your Honor.</p> <p>9 THE COURT: Counsel, we're going to go a little</p> <p>10 beyond 2:30 so we can get the cross of --</p> <p>11 MS. DUKE: Sonnenberg.</p> <p>12 THE COURT: Yes. Go ahead and proceed,</p> <p>13 Mr. Ettinger.</p> <p>14 MR. ETTINGER: Thank you, Your Honor.</p> <p style="text-align: center;">15 CROSS-EXAMINATION</p> <p>16 BY MR. ETTINGER:</p> <p>17 Q. Good afternoon, Dr. Kunz.</p> <p>18 A. Good afternoon.</p> <p>19 Q. I was listening very carefully, and I think you</p> <p>20 used the following words to describe the consequences of a</p> <p>21 divestiture or unwind. You said "disastrous"; correct?</p> <p>22 A. Yes, sir.</p> <p>23 Q. You said "concern regarding whether you could stay</p> <p>24 open and viable"; correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">3369</p> <p>1 Q. And you said eventually your doors would close;</p> <p>2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. Now, you, in fact, believe that those kinds of</p> <p>5 views are, quote, "overly dramatic," close quote, don't you?</p> <p>6 A. No.</p> <p>7 Q. And you, in fact, dismiss them as doomsday</p> <p>8 scenarios, don't you, Doctor?</p> <p>9 A. I do not.</p> <p>10 MR. ETTINGER: Why don't we play clip 106, Keely.</p> <p>11 Your Honor, this is page 78, lines 14 to 23, from</p> <p>12 Dr. Kunz's deposition.</p> <p>13 (Video clip played as follows:)</p> <p>14 Q. "What do you recall about the discussion</p> <p>15 of contingency plans in the Finance Committee?</p> <p>16 A. "Well, as I recall this email,</p> <p>17 Dr. McKinnon was concerned about our clinic</p> <p>18 becoming financially insolvent if the PSA were</p> <p>19 blocked and we were left without the surgeons</p> <p>20 who had then left our group and that would</p> <p>21 increase our overhead to a point that our group</p> <p>22 would implode basically or collapse.</p> <p>23 "These are sort of doomsday scenarios.</p> <p>24 Sometimes Ryan has a little penchant to do</p> <p>25 that."</p>
<p style="text-align: right;">3370</p> <p>1 (Video clip concluded.)</p> <p>2 BY MR. ETTINGER:</p> <p>3 Q. Was that your testimony, Dr. Kunz?</p> <p>4 A. Yes.</p> <p>5 MR. ETTINGER: And why don't we play clip 107,</p> <p>6 Keely.</p> <p>7 Your Honor, this is page 81, lines 5 through 16, of</p> <p>8 Dr. Kunz's deposition.</p> <p>9 (Video clip played as follows:)</p> <p>10 Q. "Who was Ryan McKinnon?</p> <p>11 A. "Ryan is an ophthalmologist who is a</p> <p>12 partner at Saltzer Medical Group.</p> <p>13 Q. "And were you saying that he has a</p> <p>14 penchant for being overly dramatic or</p> <p>15 doomsday-ish?</p> <p>16 A. "That's my opinion, yes. He has a</p> <p>17 penchant for not attending meetings and then</p> <p>18 listening to rumors and then worrying and</p> <p>19 coming up with doomsday scenarios about what</p> <p>20 might happen.</p> <p>21 "So, I've had a long history with</p> <p>22 Dr. McKinnon. He's a good friend and a</p> <p>23 wonderful doctor. And he just has that</p> <p>24 penchant, in my opinion, to do those things."</p> <p>25 (Video clip concluded.)</p>	<p style="text-align: right;">3371</p> <p>1 BY MR. ETTINGER:</p> <p>2 Q. And was that your testimony?</p> <p>3 A. Yes.</p> <p>4 Q. And you have not conducted any financial analysis</p> <p>5 to support your conclusion about divestiture, have you,</p> <p>6 Doctor?</p> <p>7 A. No, but I am the chairman of the finance</p> <p>8 committee. I do know what our finances are.</p> <p>9 Q. I understand. Thank you.</p> <p>10 And you did in the finance committee talk about selling</p> <p>11 off assets if divestiture were to occur and you needed to</p> <p>12 cover some short-run costs; isn't that right?</p> <p>13 A. That was one thought.</p> <p>14 Q. Were specific assets identified?</p> <p>15 A. What assets we have we would sell.</p> <p>16 Q. Were specific assets identified, Doctor? That's</p> <p>17 my question. Yes or no.</p> <p>18 A. I think I mentioned laboratory. I don't remember</p> <p>19 which other ones.</p> <p>20 Q. Okay. And there have been no concrete plans put</p> <p>21 in place as to what would be done with regard to any</p> <p>22 divestiture; isn't that right?</p> <p>23 A. There have not.</p> <p>24 Q. And your view that problems would occur on</p> <p>25 divestiture is based on the assumption that there would not</p>

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1 be any successful recruitment of new orthopedic surgeons;
 2 correct?
 3 **A.** I do not believe we could --
 4 **Q.** Isn't it right that your conclusion is based on
 5 the assumption that you could not successfully recruit
 6 orthopedic surgeons? Yes or no, please, Doctor.
 7 **A.** Yes.
 8 **Q.** Thank you.
 9 Now, Saltzer was profitable in the fiscal year ending
 10 2012; correct, Doctor?
 11 **A.** Yes.
 12 **Q.** And, in fact, it's been profitable in every year
 13 that you've been at Saltzer; correct?
 14 **A.** Yes.
 15 **Q.** Did you mention -- turning to another topic,
 16 Doctor. Did you mention in your direct, did I hear
 17 correctly, that one reason that you decided to do a deal
 18 with St. Luke's was that it had the only ACO in the state?
 19 **A.** I believe that's what I said.
 20 **Q.** Do you know when St. Luke's became an ACO?
 21 **A.** Within the last year.
 22 **Q.** Was it before Saltzer made its decision?
 23 **A.** I'm not entirely sure. It was near the same time.
 24 **Q.** And you talked about the reasons why from your
 25 perspective the St. Luke's deal was done. Were you one of

3374

1 St. Luke's; isn't that right?
 2 **A.** It has a quality assurance committee. I'm not
 3 aware of any quality metrics.
 4 MR. ETTINGER: Keely, could you play clip 14.
 5 Your Honor, this is page 84, line 25 through page 85,
 6 line 9 of Dr. Kunz's deposition.
 7 (Video clip played as follows):
 8 **Q.** "Prior to entering into the PSA with
 9 St. Luke's, did Saltzer use any metrics to
 10 assess its quality?
 11 **A.** "We did patient questionnaires and
 12 satisfaction surveys. We tried to do the
 13 Meaningful Use of the medical records. We were
 14 involved in that. So, we -- to the
 15 extent that we could, we tried to measure
 16 ourselves for quality.
 17 "We have a quality -- a QA Committee that
 18 handles that and other kinds of quality sorts
 19 of metrics. So, yeah, we try to do that."
 20 (Video clip concluded.)
 21 BY MR. ETTINGER:
 22 **Q.** Was that your testimony, Doctor?
 23 **A.** Yes.
 24 **Q.** Now, you mentioned Meaningful Use in that clip.
 25 What is the Meaningful Use Program, Doctor?

3373

1 the physicians who signed Dr. Page's letter where he
 2 explained his reasoning for doing the deal?
 3 **A.** Yes.
 4 **Q.** It's the case, is it not, Doctor, that about
 5 \$9 million which were paid to Saltzer physicians as part of
 6 the St. Luke's deal is money that the doctors get to keep if
 7 there is an unwind; isn't that right?
 8 **A.** That is correct.
 9 **Q.** And for you, is that a couple hundred thousand
 10 dollars personally?
 11 MR. JULIAN: Objection, Your Honor. Compensation
 12 of a physician is AEO. Asking that question probably was as
 13 well, but we can supply the figures. It's already in an
 14 exhibit. I don't think his compensation --
 15 MR. ETTINGER: Well, I think it's relevant,
 16 Your Honor. But it's in the document. We don't need to
 17 clear the courtroom for it.
 18 THE COURT: Very well.
 19 BY MR. ETTINGER:
 20 **Q.** You talked about quality, Dr. Kunz. St. Luke's
 21 has only had positive comments about Saltzer's quality;
 22 correct?
 23 **A.** That I'm aware of.
 24 **Q.** And Saltzer had a quality assessment committee
 25 with quality metrics in place before it was acquired by

3375

1 **A.** The Meaningful Use Program is a federal program
 2 where electronic medical records are measured and how the
 3 clinics and doctors who use them comply with certain
 4 standards that are set by the government. And if they
 5 comply with those standards and those metrics, then they are
 6 eligible to receive compensation from the government.
 7 **Q.** And that includes a large number of quality
 8 metrics, does it not?
 9 **A.** Well, not in the same extent that I'm talking
 10 about quality metrics from the other -- the metrics that are
 11 in Meaningful Use have something to do, I guess, with do I
 12 ask my patient if -- or do I counsel my patient to stop
 13 smoking. I suppose that's a quality metric.
 14 **Q.** That's a quality metric that this court has heard
 15 about in connection with WhiteCloud. But, in fact, that
 16 quality metric has been in the Meaningful Use program for
 17 some years, has it not, Doctor?
 18 **A.** For two years that I know of.
 19 **Q.** Yeah. And Saltzer qualified for Meaningful Use,
 20 did it not?
 21 **A.** It did.
 22 **Q.** Prior to being acquired by St. Luke's; correct?
 23 **A.** Yes.
 24 **Q.** And are you aware that St. Luke's has not
 25 qualified for meaningful use on the inpatient side?

EXHIBIT 3

From: John Kaiser
Sent: Tuesday, November 20, 2012 12:54 PM
To: SMG Everyone
Subject: Saint Luke's Alignment

I am writing this email to keep you informed of our position on the recent legal actions taken by Saint Alphonsus Health System and Treasure Valley Hospital to attempt to stop the proposed transaction between Saint Luke's and Saltzer. First we are very disappointed that a hospital system that we provide care for patients at would take such an action. Next I would like to assure you that every legal avenue available will be pursued by Saint Luke's and our legal counsel to have this case dismissed. We have chosen the partner that we feel provides our patients with the best opportunity to enhance the medical care we can offer; we have evaluated this transaction carefully and thoughtfully over a very long period of time and feel very comfortable in our decision. The Saint Luke's Board and the entire executive and legal team have expressed to us their full support in this matter. The allegations in the lawsuit are not accurate and we hope to prevail in the request to dismiss this case. We continue to work with the State Attorney General's office and the Federal Trade Commission to help them complete their analysis and will continue to do so. Finally Saltzer will continue to provide our patient with the best care possible even if the transaction is delayed. For each of our employees I would like to emphasize that you will continue to have your jobs no matter what course these investigations and legal challenges take.

Thank you for taking the time to read this brief email and I hope this helps explain our situation and plans, I what to wish each of you a very Happy Thanksgiving!



CONFIDENTIAL

SMG000286177

Plaintiffs' Exhibit 1386

EXHIBIT 4

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UNITED STATES DISTRICT COURT
IN THE DISTRICT OF IDAHO

----- x Case No. 1:12-cv-00560-BLW
 SAINT ALPHONSUS MEDICAL CENTER - :
 NAMPA, INC., TREASURE VALLEY : Bench Trial
 HOSPITAL LIMITED PARTNERSHIP, SAINT : Witnesses:
 ALPHONSUS HEALTH SYSTEM, INC., AND : Randall Billings (Video)
 SAINT ALPHONSUS REGIONAL MEDICAL : Joni S. Stright (Video)
 CENTER, INC., : Geoffrey N. Swanson (Video)
 Plaintiffs, : Robert Walker (Video)
 vs. : Nancy D. Powell
 : Ed Castledine (Video)
 ST. LUKE'S HEALTH SYSTEM, LTD., and : Mark Johnson (Video)
 ST. LUKE'S REGIONAL MEDICAL CENTER, :
 LTD., :
 Defendants. :
 ----- : Case No. 1:13-cv-00116-BLW
 FEDERAL TRADE COMMISSION; STATE OF :
 IDAHO, :
 Plaintiffs, :
 vs. :
 :
 ST. LUKE'S HEALTH SYSTEM, LTD.; :
 SALTZER MEDICAL GROUP, P.A., :
 :
 Defendants. :
 ----- x

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge
Held on September 27, 2013
Volume 5, Pages 632 to 840

Tamara I. Hohenleitner

Idaho Certified Shorthand Reporter No. 619
Registered Professional Reporter
Certified Realtime Reporter
Federal Certified Realtime Reporter

United States Courts, District of Idaho
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752

1 indicate that based upon her experience as the --
 2 Was it chief financial officer?
 3 THE WITNESS: Yes, sir.
 4 THE COURT: -- with Saltzer and now as kind of the
 5 CEO of SAMG. Did I get --
 6 THE WITNESS: Correct.
 7 MR. SCHAFFER: If I may, I don't mean to test that,
 8 but I don't know if the foundation has been laid for her. I
 9 think the premise of the question was based on her
 10 experience in recruiting at Saltzer, and I don't think that
 11 foundation has been laid, what -- what her experience in
 12 recruiting at Saltzer was.
 13 THE COURT: All right. Overruled. She testified
 14 earlier that she compared the recruiting and indicated that
 15 she was having much more difficult time at SAMG than she had
 16 at Saltzer. So I think that has come in, so I'll overrule
 17 the objection.
 18 You may go ahead and answer.
 19 Perhaps you ought to rephrase the question just to make
 20 sure we have it properly before the witness.
 21 MR. ETTINGER: I will, Your Honor.
 22 BY MR. ETTINGER:
 23 Q. So you know, in fact, that a number of surgeons
 24 have left Saltzer and indeed some of them work for SAMG
 25 today; isn't that correct?

754

1 the number of physicians at Saltzer declined from year to
 2 year because people left and weren't immediately replaced?
 3 A. Yes, of course.
 4 Q. And what was the most that that number declined in
 5 any given year when you were at Saltzer?
 6 A. I believe five, maybe six, but I think five.
 7 Q. Okay. And when that happened, were there fewer
 8 doctors to, in effect, absorb the overhead expenses of the
 9 practice?
 10 A. Correct.
 11 Q. Did that mean the remaining doctors had more
 12 overhead they had to -- they had to cover?
 13 A. Right. Until we could get those physicians
 14 replaced, yes.
 15 Q. Okay. So what did Saltzer do in response to that
 16 problem?
 17 A. They recruited.
 18 Q. Anything else?
 19 A. Well, you definitely have to cut your belt. So,
 20 you know, downsize. You reduce your overhead, and, quite
 21 honestly, you try to get the doctors to work a little harder
 22 so you have more revenue.
 23 Q. Did any physicians leave the group because they
 24 were upset at the additional overhead they would have to
 25 absorb at least for a while?

753

1 A. That's correct.
 2 Q. So based on your experience at Saltzer and SAMG
 3 and your experience in recruitment and your knowledge of
 4 Saltzer, do you think if Saltzer were unwound, if it would
 5 have any difficulty in recruiting surgeons to replace those
 6 surgeons who left?
 7 A. No. I don't believe that they would have
 8 difficulty recruiting the physicians because they have a
 9 strong primary care base to support the surgeons.
 10 Q. When -- when you -- and how does that relate to if
 11 I'm an orthopedic surgeon and Saltzer is trying to recruit
 12 me, why do I care if Saltzer has a strong primary care base?
 13 A. Well, that's -- because that's where your
 14 referrals come from is from your primary care base.
 15 Q. When you started with Saltzer in the '90s,
 16 Ms. Powell, about how many physicians did it have?
 17 A. Approximately 40.
 18 Q. And how many orthopedic surgeons did it have then?
 19 A. When I first started?
 20 Q. Right.
 21 A. Two.
 22 Q. Was the group, in your -- in your judgment,
 23 financially successful at that time?
 24 A. Yes.
 25 Q. When you were at Saltzer, were there years when

755

1 A. No.
 2 Q. If, in fact, Saltzer were unwound and it had to go
 3 out -- and it decided it had to go out and recruit surgeons
 4 to replace the surgeons who left, do you think the group
 5 would -- would dissolve or regroup and deal with the
 6 problems?
 7 MR. SCHAFFER: Object to foundation.
 8 MR. ETTINGER: Your Honor, we're going to
 9 hear -- if this issue is allowed, and again, we're perfectly
 10 happy from the plaintiffs' side if it is not, we're going to
 11 hear a lot of testimony on this issue from St. Luke's. It's
 12 a -- they purport to say it's a major defense. It's an --
 13 it's an appropriate question.
 14 THE COURT: Would you rephrase the question. If
 15 we're getting into details as to how -- what may actually
 16 happen in terms of groups dissolving or regrouping, that may
 17 be going a little bit beyond what the witness has testified
 18 to as to her background.
 19 Rephrase the question. I want to make sure I
 20 understand the question and exactly how broad you're asking
 21 the witness to -- well, the issue that you're asking the
 22 witness to testify concerning.
 23 MR. ETTINGER: And, Your Honor, let me just say
 24 that I am virtually certain that you're going to hear the
 25 defendants ask Saltzer witnesses essentially the same

EXHIBIT 5

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UNITED STATES DISTRICT COURT

IN THE DISTRICT OF IDAHO

----- x Case No. 1:12-cv-00560-BLW
 SAINT ALPHONSUS MEDICAL CENTER - :
 NAMPA, INC., TREASURE VALLEY : Bench Trial
 HOSPITAL LIMITED PARTNERSHIP, SAINT : Witnesses:
 ALPHONSUS HEALTH SYSTEM, INC., AND : David Argue
 SAINT ALPHONSUS REGIONAL MEDICAL : William E. Savage
 CENTER, INC., : Gregory Sonnenberg (Video)
 Plaintiffs, : Jeffrey Hessing (Video)
 vs. :
 ST. LUKE'S HEALTH SYSTEM, LTD., and :
 ST. LUKE'S REGIONAL MEDICAL CENTER, :
 LTD., :
 Defendants. :
 ----- : Case No. 1:13-cv-00116-BLW
 FEDERAL TRADE COMMISSION; STATE OF :
 IDAHO, :
 Plaintiffs, :
 vs. :
 ST. LUKE'S HEALTH SYSTEM, LTD.; :
 SALTZER MEDICAL GROUP, P.A., :
 Defendants. :
 ----- x

* * * SEALED * * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge

Held on October 17, 2013

Volume 16, Pages 2928 to 3139

Tamara I. Hohenleitner

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Registered Professional Reporter
Certified Realtime Reporter
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United States Courts, District of Idaho
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3100

1 **A.** We couldn't have even funded his guarantee let
2 alone his comp.
3 **Q.** And in terms of the bank -- the money in the bank
4 that Saltzer has today to try to weather the storm, is that
5 different, more or less, than what it would have had in
6 December 2012?
7 **A.** No. We have very little.
8 **Q.** In both cases?
9 **A.** Yes.
10 MR. KEITH: No further questions, Your Honor.
11 THE COURT: Mr. Ettinger.
12 MR. ETTINGER: I don't know if -- I intend to be a
13 while. I don't know if you --
14 THE COURT: Yeah. I lost track of the time.
15 MR. ETTINGER: My stomach was calling me,
16 Your Honor.
17 THE COURT: Yeah. It's one of those unusual times
18 when mine wasn't. We'll take a 15-minute recess at this
19 time.
20 (Recess.)
21 *****COURTROOM REMAINS OPEN TO THE PUBLIC*****
22 THE COURT: Mr. Savage, I'll remind you, you are
23 still under oath.
24 Mr. Ettinger, you may conduct your cross-examination of
25 the witness.

3102

1 **A.** Not that I can recall.
2 **Q.** Okay. Now, Saltzer has never developed a plan to
3 deal with the possibility of an order that it be unwound
4 from St. Luke's; correct?
5 **A.** Yes.
6 **Q.** And, in fact, you have really never thought about
7 such a plan, have you?
8 **A.** No, I don't know that's true. You know, doctors
9 have mentioned it.
10 MR. ETTINGER: Why don't you play, Keely, cross
11 clip 11.
12 This is Mr. Savage's deposition, Your Honor, at page
13 165, lines 14 through 22.
14 (Video clip played as follows:)
15 **Q.** "Have you sat down with your colleagues
16 and tried to develop a plan B?
17 **A.** "No.
18 **Q.** "Why not?
19 **A.** "I -- I don't know.
20 **Q.** "You never thought about it; is that
21 right?
22 **A.** "Not at this juncture."
23 (Video clip concluded.)
24 BY MR. ETTINGER:
25 **Q.** Now, you -- was that your testimony, Mr. Savage?

3101

1 MR. ETTINGER: Thank you, Your Honor.
2 CROSS-EXAMINATION
3 BY MR. ETTINGER:
4 **Q.** Mr. Savage, if this transaction were unwound,
5 there is an agreement that St. Luke's would loan money to
6 Saltzer that could be paid back much like a lease; isn't
7 that right?
8 **A.** Yes, at fair market value.
9 **Q.** And are there current equipment -- are there
10 current operating leases involving assets between Saltzer
11 and St. Luke's?
12 **A.** No.
13 **Q.** Let me --
14 MR. ETTINGER: Keely, could you pull up JX24. Do
15 you have page 14?
16 MS. DUKE: I don't have page 14.
17 BY MR. ETTINGER:
18 **Q.** Let me just read you some language.
19 THE COURT: That's Joint Exhibit 24; correct?
20 MR. ETTINGER: Right, right. Well, we do have
21 page -- we have page 13 up, but --
22 BY MR. ETTINGER:
23 **Q.** Is there -- is there an op- -- let me just ask you
24 this, Mr. Savage: Is there an operating lease executed by
25 the parties, Saltzer and St. Luke's?

3103

1 **A.** Oh, yes, it was.
2 **Q.** Now, and your deposition was in June; is that
3 right?
4 **A.** I believe so.
5 **Q.** And that was six months after you filed a
6 declaration with the court raising the concerns about a
7 possible unwind; correct?
8 **A.** Yes.
9 **Q.** Okay. Now, it's difficult to recruit physicians
10 to a practice if they don't know who's going to own the
11 practice; isn't that right?
12 **A.** Yes.
13 **Q.** And that's certainly true today for Saltzer;
14 correct?
15 **A.** Yes.
16 **Q.** You're also aware that if you came into court and
17 said, "We have now successfully recruited three orthopedic
18 surgeons," that would be hurting the arguments being made by
19 Saltzer and St. Luke's in this case; correct?
20 **A.** Possibly.
21 **Q.** You mentioned in response to Mr. Keith's questions
22 about trimming the fat. Has Saltzer hired any outside
23 consultants or experts on physician practices to see if they
24 could suggest ways that you could trim the fat in the event
25 that there were an unwind?

3104

1 **A.** No, we haven't.
 2 **Q.** So fair to say you have never sat down, rolled up
 3 your sleeves, and made a serious effort to think about what
 4 could we do to solve whatever problems we might have if
 5 there were an unwind; correct?
 6 **A.** Yes.
 7 **Q.** Now, has -- has Saltzer sought legal advice on the
 8 nature of the remedy that it might seek from the court in
 9 the event of an unwind to make sure that it can operate as a
 10 successful independent entity?
 11 **MR. JULIAN:** Objection, calls for privilege. It's
 12 an inappropriate question.
 13 **MR. ETTINGER:** Your Honor, it's a yes-or-no
 14 question. I'm not going to ask for the substance of the
 15 legal advice; I just want to know whether Saltzer has looked
 16 into the issue.
 17 **MR. JULIAN:** It is still -- the nature of the
 18 question is going to bring up privilege if they sought a
 19 certain type of advice.
 20 **THE COURT:** Well, I think the -- well, Counsel, I
 21 think -- to me, it does get us into a rather precarious
 22 area. And I'm not sure that it adds anything to the issues
 23 in this case, so I think I'm going to sustain the objection
 24 at this time. Yeah. I think I'll leave it at that. I'll
 25 sustain the objection.

3106

1 **A.** I think the -- it's been brought up in our finance
 2 committee.
 3 **Q.** Has there been a substantive discussion of the
 4 issue in your finance committee?
 5 **A.** No.
 6 **Q.** Would recruiting guarantees from St. Luke's help
 7 Saltzer to recruit if it were unwound?
 8 **A.** We would have the -- we have the problem of being
 9 an independent group still, but we would not have money to
 10 support guarantees at that point.
 11 **Q.** So recruiting guarantees from St. Luke's would
 12 help Saltzer to recruit?
 13 **A.** Possibly.
 14 **Q.** How many doctors of any specialty has Saltzer
 15 recruited in the last four years, say, roughly?
 16 **A.** Oh --
 17 **Q.** Successfully.
 18 **A.** I would say four, up to four maybe. One year we
 19 merged a practice in with ours, and I think that there was
 20 two physicians in addition to several that we had recruited.
 21 **Q.** Now, you looked at this overhead issue that
 22 Mr. Keith has asked you about, first in 2011; isn't that
 23 right? And "you," meaning Saltzer.
 24 **A.** Would you -- I'm not sure what you're -- looked at
 25 the overhead issue?

3105

1 **BY MR. ETTINGER:**
 2 **Q.** Mr. Savage, have you given any thought to the
 3 kinds of assistance that St. Luke's might be able to provide
 4 Saltzer to help it through an unwind?
 5 **A.** No. I'm not sure in the unwind what sort of
 6 assistance I would need.
 7 **Q.** Okay. Has anyone at Saltzer, to your knowledge,
 8 discussed that subject?
 9 **A.** Not with me.
 10 **Q.** So you're not aware of anyone discussing that
 11 subject at Saltzer?
 12 **A.** They have not discussed it with me.
 13 **Q.** Okay. And do you attend meetings of the finance
 14 committee?
 15 **A.** Some of them. I don't attend all of them.
 16 **Q.** Does Saltzer still have a finance committee?
 17 **A.** Yes, it does.
 18 **Q.** And does it still have an executive committee?
 19 **A.** Yes, it does.
 20 **Q.** And do you attend meetings of the executive
 21 committee?
 22 **A.** Yes, I do.
 23 **Q.** And, to your knowledge, have either of those
 24 committees discussed the issue of how to deal with an
 25 unwind?

3107

1 **Q.** Wasn't there a financial analysis done by Kathy
 2 Maggard of what the implications --
 3 **A.** Now I understand.
 4 **Q.** -- for Saltzer would be if the surgeons left in
 5 terms of overhead and compensation?
 6 **A.** In 2011 we looked at the -- if the orthopedists
 7 left.
 8 **Q.** Right, right. And so -- and did you share that
 9 result with other people at Saltzer?
 10 **A.** I -- I don't recall having -- Dr. Kaiser and Kathy
 11 Maggard and myself.
 12 **Q.** So you saw it, Ms. Maggard saw it, Dr. Kaiser saw
 13 it; correct?
 14 **A.** Yes.
 15 **Q.** And that analysis suggested that there be a
 16 financial implication for Saltzer if the surgeons left and
 17 were not replaced; isn't that right?
 18 **A.** Yes.
 19 **Q.** And after having done that analysis, Saltzer went
 20 ahead and agreed -- well, strike that. Let me back up for a
 21 second. Sorry.
 22 And you did the analysis then because you were aware
 23 that the surgeons were not happy about the St. Luke's deal,
 24 and if it was consummated in the form that was being
 25 discussed, that might cause them to leave; correct?

3124

1 **A.** Excuse me. Can you rephrase that, which funds?
 2 **Q.** Sure. The loan that St. Luke's would make to
 3 Saltzer, for what purpose could those funds be used?
 4 **A.** To -- specifically, to reacquire the equipment.
 5 **Q.** So could -- could those funds be used simply to
 6 increase the salaries of the Saltzer physicians to
 7 compensate for the additional overhead?
 8 **A.** It's my recall from the agreement that those funds
 9 are specifically designated to reacquire the equipment.
 10 **Q.** And counsel for the private plaintiffs also asked
 11 a number of questions about whether there had been
 12 significant effort expended on generating a contingency plan
 13 in the event that the court unwound the transaction.
 14 And my question is: Why? Why has Saltzer not expended
 15 or conducted a formal process with consultants and the like
 16 to devise a plan in the event of an unwind?
 17 **A.** We don't exactly know what the conditions would be
 18 of an unwind, if we would be totally forbidden from dealing
 19 with either system. We didn't know what scenarios to draw.
 20 **Q.** And is there, in your mind, a realistic plan for
 21 keeping Saltzer together in the event of an unwind if
 22 the -- if the court orders Saltzer not to enter into
 23 agreements with -- other agreements with St. Luke's or Saint
 24 Alphonsus?
 25 **MR. ETTINGER:** Objection, Your Honor. I don't

3126

1 Go ahead and proceed.
 2 **MR. KEITH:** And, I understand, Your Honor. I
 3 would not have asked it, and didn't ask it, except
 4 Mr. Ettinger raised it on his cross.
 5 **THE COURT:** I understand. Let's go ahead and --
 6 **BY MR. KEITH:**
 7 **Q.** So, in your mind, is there a viable plan for
 8 keeping Saltzer together in the event of an unwind?
 9 **A.** No.
 10 **MR. KEITH:** Thank you, Your Honor. No further
 11 questions.
 12 **THE COURT:** Mr. Ettinger.
 13 **MR. ETTINGER:** Since the door is opened,
 14 Your Honor, I have to walk through it just a little bit
 15 more.
 16 **RE-CROSS-EXAMINATION**
 17 **BY MR. ETTINGER:**
 18 **Q.** So let me just make sure I'm clear, Mr. Savage.
 19 You've not substantively discussed a contingency plan. When
 20 asked in June why you hadn't, you didn't know. And yet
 21 you're, nevertheless, quite sure that there is no such plan
 22 possible. Do I have it right?
 23 **A.** It's my opinion --
 24 **Q.** Do I have that right? Yes or no.
 25 **A.** Would you repeat what I have right?

3125

1 think there is any lack of foundation. We've established
 2 they have not seriously considered it, so how the witness
 3 can opine about whether it's doable, I don't know.
 4 **MR. KEITH:** Well, he's the CEO of the group, and
 5 I'm asking for his personal opinion. He understands
 6 Saltzer's finances. I think he can testify as to that.
 7 **THE COURT:** But if it wasn't considered, why is it
 8 relevant?
 9 **MR. KEITH:** Well, Your Honor, I'm -- I'm trying to
 10 get at the point that one reason there is not a formal
 11 contingency plan is that the -- the -- there is not a good
 12 option for rescuing the group in the event of an unwind, so
 13 planning for the downing of the Titanic may not be a good
 14 use of resources.
 15 **THE COURT:** Well, that sounds a lot like a failing
 16 firm defense, Mr. Keith. I'm a little nervous that -- well,
 17 Counsel, again, just to keep the record clear, I'm going to
 18 allow it, but to be -- to offer the testimony. But to me,
 19 that sounds an awful lot like exactly the defense which I
 20 understood was not part of the case.
 21 **MR. KEITH:** It is --
 22 **THE COURT:** So let's just keep the record so it's
 23 there, but I have -- at this point, have no intention of
 24 considering it. We'll just essentially treat it as a
 25 proffer.

3127

1 **Q.** You've never substantively discussed a contingency
 2 plan. You've never hired consultants to consider it. When
 3 I asked you in June why not, you said, "I don't know." And,
 4 nevertheless, today in response to Mr. Keith, you say that
 5 it's impossible to develop one. Do I have that right? Yes
 6 or no.
 7 **A.** Yes.
 8 **MR. ETTINGER:** Nothing further.
 9 **THE COURT:** Mr. Wilson, anything else?
 10 **MR. WILSON:** No, thank you, Your Honor.
 11 **MR. KEITH:** Nothing further.
 12 **THE COURT:** All right. You may step down.
 13 **THE WITNESS:** Thank you.
 14 **THE COURT:** Mr. Savage, thank you.
 15 Call your next witness.
 16 **MR. SCHAFFER:** Your Honor, we call Gregory
 17 Sonnenberg by his video deposition.
 18 **THE COURT:** Counsel, did we work out getting
 19 Dr. Sonnenberg available for cross by -- as a live witness?
 20 Was that worked out?
 21 **MR. SCHAFFER:** Yes, Your Honor. It's my
 22 understanding he is available.
 23 **THE COURT:** And we will publish the deposition of
 24 Dr. Sonnenberg.
 25 **MR. ETTINGER:** Your Honor, among other things, we