

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

**APPELLANTS’ OPPOSITION TO
PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION
TO APPELLANTS’ MOTION FOR STAY PENDING APPEAL**

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Defendants-Appellants' St. Luke's Health System, Ltd., St. Luke's Regional Medical Center, Ltd. ("St. Luke's") and Saltzer Medical Group, P.A. ("Saltzer") filed an urgent motion to stay the district court's judgment pending appeal under Federal Rule of Appellate Procedure 8(a)(2). Doc. 41. Briefing on that motion was completed with the filing of defendants' Reply in support of the stay on July 14. Doc. 57.

Defendants attached as Exhibit F to their Reply the Declaration of John Kaiser, M.D., President of Saltzer. Doc. 57-2 ("Kaiser Decl."). As explained in the Reply, Dr. Kaiser's Declaration was filed with the Reply in order to address (1) factual claims raised in the government plaintiffs' Opposition to defendants' motion for stay, and (2) the government plaintiffs' demand, after defendants' motion for stay was filed, that Saltzer be divested within 30 days of any order denying a stay. Doc. 57-1 at 7 n.4. In particular, Dr. Kaiser's Declaration responded directly to plaintiffs' assertion that Saltzer has been consistently profitable and that profitability of a divested Saltzer would be "all but guarantee[d]." Gov't Pl. Opp., Doc. 49, at 15. It likewise responded to plaintiffs' assertions that St. Luke's caused Saltzer's poor financial state, and that an independent Saltzer could resolve its own financial problems. *Id.* at 15, 18.

Plaintiffs now seek leave to file a Sur-Reply in order to respond to Dr. Kaiser's Declaration. Recognizing that plaintiffs had no prior opportunity to

address that Declaration, defendants would not oppose the filing of a sur-reply responding only to factual statements actually made in Dr. Kaiser's Declaration. However, as set forth below, plaintiffs' Proposed Sur-Reply (1) goes beyond the scope of the Declaration, (2) relies on false and unsupported speculation, and (3) contains material inaccuracies. Accordingly, plaintiffs' motion for leave to file the Proposed Sur-Reply should be denied.

1. Plaintiffs' contention that Saltzer's annualized losses described by Dr. Kaiser are "misleading" because they "exclude[] ... all revenues generated by ancillary services such as x-rays and blood tests," Proposed Sur-Reply 1, is simply wrong.¹ In fact, Dr. Kaiser's figures *do* account for revenues from ancillary services. *See* Kaiser Decl. ¶ 3. The provision of ancillary services is *not* currently generating substantial income after expenses for Saltzer because of low utilization of those services in the absence of the seven surgeons who left prior to the affiliation. As Dr. Kaiser attested, those seven surgeons—who are now employed by private plaintiff Saint Alphonsus—were "responsible for a substantial percentage of Saltzer's revenue, especially from MRI, x-ray, and physical rehabilitation." *Id.*

¹ Plaintiffs base this speculation about the profitability figures in Dr. Kaiser's Declaration on testimony related to accounting for St. Luke's Clinic. Proposed Sur-Reply at 1-2. That testimony had nothing to do with Saltzer, however, and plaintiffs' speculation that the same accounting practices were applied in Dr. Kaiser's analysis is incorrect.

Plaintiffs also speculate that Dr. Kaiser’s description of Saltzer’s unprofitability is premised on a “30 percent pay raise” for all the Saltzer physicians—*i.e.*, that the Saltzer group is unprofitable only as a result of increases in compensation to the individual physicians. In fact, however, as Dr. Kaiser made clear in his Declaration, “[e]ven if Saltzer physician compensation were cut across the board by 30%—and all physicians still chose to remain—Saltzer would be operating at an annual loss of approximately \$3.2 million.” Kaiser Decl. ¶ 2 (emphasis added).

Plaintiffs’ statement that “the Saltzer physicians will retain \$9 million of the consideration paid for the Acquisition,” Proposed Sur-Reply at 2-3, is also highly misleading. It is true that \$9 million of the payments made by St. Luke’s in connection with the Saltzer transaction do not have to be repaid to St. Luke’s if the transaction is unwound. Dist. Ct. Findings of Fact, Ex. A to Motion for Stay, ¶ 47. However, that money will not help Saltzer to stave off financial catastrophe in the event that a stay is denied. For one thing, \$6 million of the total \$9 million payment was paid to the physicians individually—not to the Saltzer Medical Group. Ex. A, Tr. 3094:15-3095:8 (W. Savage). Individual physicians may have spent the funds or may have retained some or all of them—but regardless, that money does not belong to *Saltzer* and will not help to make *Saltzer* profitable.

Of the \$3.3 million that *was* paid to Saltzer, the vast majority had already been spent on a variety of financial obligations by the time of trial. *See* Ex. A, Tr. 3095:9-3098:15 (W. Savage) (funds went to paying for various Saltzer liabilities including taxes, retirement liability, payroll, extended sick leave, and paid time off, as well as a share buyback). Even by the time of trial—almost a year ago now—only \$400,000 remained of the original \$3.3 million payment to Saltzer. *Id.* at 3097:3-5.

Finally, plaintiffs are wrong to contend that Dr. Kaiser’s Declaration “contradict[s] Saltzer’s own sworn testimony and actions.” Proposed Sur-Reply at 2-3. Saltzer’s Chairman, Dr. Kunz, did not “dismiss[] [Saltzer’s] claims of financial weakness” resulting from divestiture. *Id.* at 2.² In fact, he testified that divestiture would be “disastrous for Saltzer,” Ex. A, Tr. 3364:7-11 (H. Kunz), and that its “doors would close” as a result, *id.* at 3365:15-17. Likewise, Dr. Kaiser’s email (TX 1386) seeking to reassure Saltzer’s employees that they would not be fired simply because Saint Alphonsus had filed suit—an email sent almost two years ago, *before* the affiliation had even taken place—hardly contradicts Dr. Kaiser’s current assessment of Saltzer’s unprofitability.

² The deposition testimony plaintiffs cite (Tr. 3368:19-3371:3) describes Dr. Kunz’s opinion, expressed before the affiliation even took place, of concerns that were stated at that time by one Saltzer physician.

2. Plaintiffs challenge Dr. Kaiser's description of the difficulties Saltzer has had in recruiting new surgeons to replace the seven surgeons who departed before the transaction. Proposed Sur-Reply at 3. Plaintiffs do not and cannot refute the facts to which Dr. Kaiser has attested: that *four different surgeons* with whom Saltzer has entered negotiations just in the past year and a half have declined to join Saltzer. Kaiser Decl. ¶ 7. Instead, plaintiffs simply speculate that a divested Saltzer "would not face the obstacles described in [Dr. Kaiser's] declaration." Proposed Sur-Reply 3. In support of their speculation, plaintiffs cite the testimony of Nancy Powell, a former Saltzer employee who now works for plaintiff Saint Alphonsus, relating to Saltzer's *past* efforts to recruit physicians. Proposed Sur-Reply 3 (citing Tr. 753:2–14 (N. Powell)).

Recruiting surgeons to replace the seven who left for Saint Alphonsus is a substantially more difficult task, however. For one thing, Saltzer's financial viability is in grave doubt. For another, the surgeons previously with Saltzer are still practicing in the area, so it is not clear whether additional surgeons brought to Saltzer could be kept sufficiently busy. Ex. A, Tr. 3084:16-22 (W. Savage). What is more, as multiple witnesses testified at trial, most young physicians entering the workforce prefer to work within a larger health system, with the infrastructure and opportunity to provide more advanced, higher-quality care that such a system offers. Ex. A, Tr. 2049:12-15 (J. Souza); *id.* at 2391:4-15 (J. Kaiser); *id.* at

3088:19-3089:4 (W. Savage). Indeed, contrary to plaintiffs’ assertion that recruitment has become more difficult because “Saltzer is owned by St. Luke’s,” Proposed Sur-Reply 3 n.3, the evidence at trial made clear that Saltzer’s only success in recruiting *any* new physicians recently has been as a result of its affiliation with St. Luke’s. Ex. A, Tr. 3099:15-3100:2 (W. Savage) (without St. Luke’s financial assistance, Saltzer “couldn’t have even funded [a new ENT physician’s] guarantee let alone his comp”); *see also* Kaiser Decl. ¶ 6.

3. Plaintiffs argue that Dr. Kaiser’s Declaration should be disregarded because Saltzer “can only blame itself” for its supposed “lack of planning” in preparing for divestiture. Proposed Sur-Reply at 3-4. In fact, as Dr. Kaiser attested—and plaintiffs cannot dispute—Saltzer has been hard at work in the months since the district court’s decision in an attempt to find a path that would allow it to “achieve financial viability” in the near term. Kaiser Decl. ¶¶ 5, 8. It has found no such path, despite diligent work. Thus, ordering divestiture within the timeframe demanded by the government plaintiffs would in all probability mean the dissolution of Saltzer and the prevention of a re-affiliation between Saltzer and St. Luke’s, even if this Court were to reverse the district court’s judgment.

4. Finally, plaintiffs contend that “the District Court has ample equitable discretion to fashion ancillary relief, including requiring that St. Luke’s provide

Saltzer with additional assistance.” Proposed Sur-Reply at 4. This assertion has no bearing on the factual material of Dr. Kaiser’s Declaration and is accordingly improper material for a Sur-Reply. In any event, plaintiffs have identified no ancillary relief St. Luke’s could be ordered to provide that would cause Saltzer to gain financial viability—and there is none.

CONCLUSION

For the foregoing reasons, plaintiffs’ motion for leave to file a sur-reply should be denied.

Respectfully submitted,

s/ Brian K. Julian

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July 17, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 17, 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