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UNITED STATES DISTRICT COURT

IN THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., et al., Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD. AND ST. LUKE'S REGIONAL MEDICAL CENTER. LTD. Defendants.	Case No. 1:12-CV-00560-BLW (Lead) **SAINT ALPHONSUS' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR APPROVAL OF REASONABLENESS OF LEGAL FEES**

I. INTRODUCTION

St. Luke's Response to Saint Alphonsus' Motion for Approval of Reasonableness of Legal Fees and Costs is wrong on the facts and law. St. Luke's arguments are based on legal assertions which have already been rejected by this Court. Its factual comparisons ignore St. Luke's own admission in a related case that its attorneys' fees in *this* case exceeded $17 million, more than double the amount sought by Saint Alphonsus. St. Luke's other arguments are based on mischaracterizations and blanket assertions for which it offers no support or rationale.

Significantly, St. Luke's misstates the burden of proof. The Ninth Circuit has explained that once the fee applicant documents its hours, "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1393 (9th Cir. 1993). St. Luke's repeated reliance on unsupported allegations falls far short of this standard.

The Ninth Circuit has repeatedly emphasized the importance of awarding attorneys' fees "to encourage private enforcement of the antitrust laws" and "to deter violations of the antitrust laws by requiring the payment of that fee by a losing defendant as part of his penalty for having violated the antitrust laws." *Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir. 1998). *See also Twin Cities Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982). This Court should implement that policy by fully awarding to Saint Alphonsus all of its reasonable fees and costs. Under the circumstances, that is virtually all the fees and costs which it has requested.

II. SAINT ALPHONSUS IS ENTITLED TO RECOVER FOR ALL ITS CLAIMS

St. Luke's first claims that Saint Alphonsus is not entitled to recover legal fees related to its claims that were not decided by this Court. But the Supreme Court's decision in *Hensley v.*

Eckerhard, 461 U.S. 424 (1983), conclusively establishes the contrary. *Hensley* made clear that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. . . . *In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.*" 461 U.S. at 435. (Emphasis added). "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the Court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." 461 U.S. at 435.

St. Luke's characterization of *Hensley* is completely inaccurate. *Hensley* states that full compensation should not be made only where a claim is "unsuccessful," 'unrelated" to the successful claims *and* "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" 461 U.S. 435 (citations omitted).[1]

None of the three *Hensley* exceptions apply here. This Court has already ruled that "[t]he private plaintiffs obtained all the relief they sought – a judicial ruling from this Court requiring St. Luke's to unwind the Saltzer merger." April 29, 2015 Memorandum Decision and Order [Dkt. 607] ("Mem. Dec. and Order") at 3. The Private Plaintiffs' additional claims were not unsuccessful; the Court did not address them. And all of the claims arise out of the same course of conduct, the acquisition of Saltzer. They were certainly not unrelated.

St. Luke's attempt to rely on the Ninth Circuit's decision in *Schwartz v. Secretary of Health & Human Services*, 73 F.3d 895 (9th Cir. 1995), further demonstrates why its argument must fail. *Schwartz,* unlike the instant case, involved an attempt to obtain attorneys' fees with respect to "dismissed claims." 73 F.3d at 902. Moreover, the Ninth Circuit in *Schwartz* said there that "the focus is to be on whether the unsuccessful and successful claims arose out of the

[1] *See also* 461 U.S. at 434 (relevant question is "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?")

same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." 73 F.3d at 903. Here, of course, the "course of conduct" is exactly the same - the acquisition of Saltzer. *See also Thorne v. City of El Sugundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) ("the test is whether relief sought on the unsuccessful claim 'is intended to remedy *a course of conduct entirely distinct and separate* from the course of conduct that gave rise to the injury on which the relief granted is premised.'") (emphasis added) (citation omitted).[2]

In fact, here, not only was the course of conduct not "distinct and separate," neither was the work performed. Virtually all the work that Saint Alphonsus' counsel undertook involved witnesses whose testimony primarily related to the "adult primary care case" which was the subject of this Court's decision or was split between testimony related to that case and the "vertical case." Reply Declaration of David A. Ettinger ("Ettinger Reply Decl.") ¶¶ 2-7, Declaration of Lara Fetsco Phillip ("Phillip Decl.") ¶ 2. Only 6 of the 71 depositions in which Saint Alphonsus' counsel participated and 1 of the 20 trial witnesses who Saint Alphonsus' counsel examined or defended involved evidence exclusively or primarily devoted to the "vertical case." *Id.*

A host of issues involved in the Private Plaintiffs' "vertical" claims overlapped with the issues the Court decided. This included geographic market, which Private Plaintiffs alleged was identical as between adult primary care and pediatric primary care services; barriers to entry; the efficiencies defense; and even competitive effects. As this Court has already held, "both sets of

[2] St. Luke's reference to *New York v. Microsoft Corp.*, 297 F. Supp. 2d 15 (D.D.C. 2003), is thus completely inapposite. In Microsoft, the reduction in fees was made to "unsuccessful claims," *id.* at 36, that "were obviously aimed at a more robust result" in terms of remedies, which were not obtained. *Id.* Similarly, *Gomez v. Reinke*, No. CV91-299-5-LMB, 2008 WL 3200794 (D. Idaho Aug. 7, 2008), reduced fee claims for issues on which the plaintiffs were specifically defeated.

plaintiffs presented evidence demonstrating that the merger would result in higher prices. . ." Mem. Dec. and Order [Dkt. 607] at p.4.

St. Luke's assertion (contrary to this Court's holding) that the Private Plaintiffs did not receive complete relief because this Court did not order a prohibition against future acquisitions is unjustified. The request was contained in a single proposed conclusion of law, and was not the subject of any testimony or briefing. Plaintiffs' Proposed Findings of Fact and Conclusions of Law [Dkt. 429] at ¶ 1062. To suggest that the Court's failure to grant this relief means that the Private Plaintiffs did not fully succeed on their claims ignores the history of this case.

III. ST. LUKE'S "ALLOCATIONS" ARE BASELESS

Given this legal analysis, St. Luke's effort to reduce Saint Alphonsus' recovery by the amount of its efforts on "vertical" claims is irrelevant. In any event, the argument bears no resemblance to the facts.

St. Luke's argues that Saint Alphonsus' fee claim should be reduced by 80%, a figure that is virtually plucked out of the air. The only basis for the number is that four of the five counts in the Private Plaintiffs' Complaint involved markets which the Court did not address in its decision. But, it would be ridiculous to claim (and St. Luke's never alleges) that even remotely equal effort was devoted to each of the five counts in Saint Alphonsus' Complaint.

The cases cited by St. Luke's certainly do not support its arbitrary figure. In *Gomez*, *supra*, the court reduced fees for *unsuccessful* claims by 80% when the plaintiffs themselves "suggested that their fees on the retaliation claims be reduced by 66%" and "Defendants suggest that the reduction should be closer to 90%." In *Schwartz*, *supra*, the hours were reduced, again, for *unrelated*, *unsuccessful* claims because the "district court correctly followed the mandate of *Hensley* to identify the hours Schwartz's attorney spent litigating the dismissed claims, and to reduce the compensable hours accordingly." 73 F.3d at 905.

When St. Luke's does attempt to (incorrectly) "identify hours," it dramatically undercuts its own claim. It classified 27% (not 80%) of Honigman's and Duke Scanlan's hours (5,170 of 19,331) as devoted to the "vertical" case. Ex. 4 to Declaration of Scott Stein.

But even this calculation is wrong. St. Luke's conclusory and unsupported chart (Stein Ex. 3) characterizes 40 depositions and witnesses' testimony as "exclusively or primarily" related to the vertical claims, by virtue of selective and misleading descriptions of their testimony. An actual analysis of this testimony reveals that 30 of the 40 either primarily addressed the common issues relating to the "adult primary care" market decided by this Court, or involved significant evidence on both those issues and the vertical issues. Ettinger Reply Decl. ¶¶ 4-6 (18 witnesses identified), Phillip Decl. ¶¶ 4-6 (12 additional witnesses identified).

Thus, no more than 10% of the efforts of Honigman and Duke Scanlan related to tasks that were "primarily or exclusively" unrelated to the claims decided by the Court. Ettinger Reply Decl. ¶1. And the vast majority of the "vertical" evidence related to the referrals issue, which this Court addressed. *See* Ettinger Reply Decl. ¶ 11, Findings of Fact and Conclusions of Law [Dkt. 464] at ¶¶ 132-140.

IV. ST LUKE'S CRITICISM OF THE PRIVATE PLAINTIFFS' TOTAL HOURS IS UNFOUNDED

St. Luke's only attack on the overall amount of the Saint Alphonsus' fees involves a comparison of the Defendants' *alleged* hours with those combined of the Private Plaintiffs, the Idaho Attorney General and St. Luke's *guess* as to the FTC's hours. But this calculation is completely flawed, for numerous reasons:

First, the comparison St. Luke's makes is highly questionable, given its failure to provide any backup for its assertions, and its apparently very different assertions in its filings in *St. Luke's Health Sys. v. Allied World Nat. Ins. Co.*, No. 1:14-cv-00475 (D. Idaho) [Dkt. 32]. In *this*

case, St. Luke's asserts that defendants' total hours are substantially less than the combined hours of the plaintiffs who seek their attorneys' fees. In its case against Allied World, St. Luke's counsel asserts that its attorneys' fees in this case are "$17,104,367", a figure that is almost twice that of the amount sought by the combined Plaintiffs here. Is the difference because of rates? Or is it because St. Luke's counts its hours differently when it is arguing against Plaintiffs' fees as compared to when it is seeking to collect its own fees? Since we don't have backup for either number, we don't know. Under the circumstances, St. Luke's certainly has failed to prove that its purported comparison is either accurate or relevant.

Second, St. Luke's comparison is not remotely "apples to apples," since Defendants' time does not include the substantial work they did defending the investigation of the FTC and Idaho Attorney General, most of which was used in this case. For example, most of St. Luke's document production in this case resulted from work it performed in the investigation.

In fact, a review of the "White Papers" St. Luke's submitted in connection with the investigation shows that virtually every argument St. Luke's made in this case was developed in detail in response to the investigation. *See* in particular TX 1310.

This White Paper argued in great detail that efficiencies would be achieved by the Saltzer transaction; that the transaction would not result in higher prices; that Nampa is not a relevant geographic market; that easy entry would defeat any anticompetitive effects; that the presence of strong buyers such as Blue Cross would prevent anticompetitive effects; that St. Luke's non-profit board would not permit anticompetitive effects; a proposal for a "non-structural" remedy in this case, and that a standalone Saltzer would no longer be an effective competitor. *Id.* These arguments were supported by patient origin analysis by its expert economist David Argue, who later made the same arguments at trial, and even a rebuttal to the analysis performed in this case

by Deborah Haas-Wilson with respect to the geographic market. Yet none of the hours devoted to this work, all of which was used in this case, were included in the total that St. Luke's utilizes for its inapt comparison here.[3]

St. Luke's also restricts its hours to exclude contract attorneys. But Honigman's "contract attorneys" (within the firm) contributed 6,771 hours to this case. Declaration of Paul Fabien ("Fabien Decl.") ¶ 3. If those contract attorneys are excluded, then Honigman's total hours are 52% of Sidley Austin's hours. *Id.*

Third, the comparison between Defendants' hours and any alleged total number for Plaintiffs is both meaningless (because there is no actual number for the FTC) and irrelevant. Each parties' counsel must represent its client, even if other parties are also represented. While substantial efforts were made to reduce duplication in this matter, a multi-plaintiff case will inevitably involve more efforts than would a case involving a single plaintiff.

St. Luke's comparison is also strongly affected by the fact that Saltzer's counsel played a virtually passive role in this case. Saltzer's counsel asked questions in only 1 deposition and to 1 witness at trial. *Id.* at ¶ 2. No one would argue that the Private Plaintiffs should have taken the "hands off" approach of Saltzer's counsel.

Significantly, even without any of these adjustments, Sidley Austin's hours on this case slightly exceeded Honigman's, 16,092 hours versus 15,132. Stein Decl. ¶¶ 3, 5. Thus, St. Luke's lead counsel spent more time losing this case than the Private Plaintiffs' lead counsel spent winning it.

Not surprisingly, the case law does not support St. Luke's meaningless comparison. *See Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1151 (9th Cir.2001) ("Comparison of the hours

[3] We don't know the degree to which the $17 million figure cited in *St. Luke's Health Sys. v. Allied World Nat. Ins. Co.*, reflects a different approach to these issues than St. Luke's took here.

spent in particular tasks by the attorney seeking fees and by the attorney for the opposing party . . . does not necessarily indicate whether the hours expended by the party seeking fees were excessive."); *Deocampo v. Potts*, No. Civ. 2:06-1283 WBS, 2014 WL 788429, at *2 (E.D. Cal. Feb. 25, 2014) (such "comparisons do not support the conclusion that plaintiffs' counsel billed an excessive number of hours."). Indeed, even in the case relied upon by Defendants, *Democratic Party of Washington State v. Reed*, 388 F. 3d 1281, 1287-88 (9th Cir. 2004), the Ninth Circuit refused to reduce an attorney fee award where the prevailing parties' counsel billed 1041.8 hours, to the defendant's 383.3 hours.[4]

An analysis of the (unchallenged) precedents relied on by Saint Alphonsus in its initial brief at 8-9 shows that the 19,331 total hours expended by its counsel here were quite comparable to those in the other cases examined. *See e.g. McKesson Corp. v. Islamic Republic of Iran*, 935 F. Supp. 2d 34 (D.D.C. 2013), *vacated on other grounds*, 753 F.3d 239 (D.C. Cir. 2014) (18,537 hrs.), *In re Flonase Antitrust Litigation*, 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013) (more than 40,000 hrs.), *Hall v. AT & T Mobility LLC*, No. 07-5325. 2010 WL 4053547, at *20 (D.N.J. Oct. 13, 2010) (18,618 hrs.), *Meijer, Inc. v. Barr Pharmaceuticals, Inc.* No. 1:05-cv-

[4] St. Luke's cases involve quite different facts. In *J.R. Simplot Co. v Nestle U.S.A., Inc.*, No. 06-141-S-EJL-CWD, 2009 U.S. Dist. LEXIS 62439 (D. Idaho July 29, 2009), while Judge Dale did rely in part on a comparison between the plaintiffs' and the defendants' hours, she also noted that "the legal issues . . . were not particularly novel or complex" and that the "staff met regularly as a team and each timekeeper billed individually for the time spent." Neither is true here. *See* Ettinger Original Decl. at ¶ 6, 17, 28, 31-37 (novel issues in case; efforts to avoid duplication). In *Pascuiti v. New York Yankees*, 108 F. Supp. 2d 258, 273-274 (S.D.N.Y. 2000), fees were reduced for a multitude of reasons, including the fact that the private plaintiff there was seeking compensation for effort which "did not represent a distinct contribution," 108 F. Supp. 2d at 274, as well as the private plaintiffs' minimal role in the significant motion practice and its relatively minor role in the negotiations that produced a settlement order." *Id.* That characterization could not possibly apply here. *See* Mem. Dec. and Order [Dkt. 607] at 5 ("Counsel for the private plaintiffs did not duplicate the work of Government counsel, and played a major role in discovery, pre-trial proceedings, and the trial itself in providing evidence that the Court used in finding that the merger would result in higher prices.").

02195 [Dkt. 210] at 6 (D.D.C. Apr. 20, 2009) (17,489 hrs.), *In re Nifedipine Antitrust Litigation*, Case No. 1:03-MC-323 [Dkt. 333] at 2 (D.D.C. Jan. 31, 2011) (18,464 hrs.). Saint Alphonsus' total hours were entirely appropriate.

V. SAINT ALPHONSUS' SPECIFIC EFFORTS WERE NEITHER DUPLICATIVE NOR EXCESSIVE

St. Luke's also seeks to disallow 13% of Saint Alphonsus' attorneys' fees claim ($1,007,510) based on criticisms of particular entries. These criticisms are equally baseless. Even a brief review of the Declaration of Scott Stein illustrates the unsupported nature of most of St. Luke's criticisms. Mr. Stein simply attaches, with virtually no comment, a series of spreadsheets which include conclusory and unsupported allegations with regard to a wide variety of time entries. As described herein and in the Reply Declaration of David Ettinger, those unsupported allegations are commonly either false or significantly misleading. And St. Luke's "cherry-picked" examples are both atypical and inaccurate.

A. Confidentiality

St. Luke's asserts without any factual or legal support that time spent addressing confidentiality issues should not be recovered. But "a prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of anti-trust damages." *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 638 (9th Cir. 1989). That standard is certainly met as to confidentiality. It is undisputed that efforts relating to confidentiality were undertaken by *every* private party to protect its interests, that such efforts are routinely made in cases of this sort, and that this Court's own significant efforts indicate the relevance of the issue. Ettinger Reply Decl. ¶¶ 40-41; Pretrial Order [Dkt. 209]; September 18, 2013 Memorandum Decision and Order Re Additional

AEO Designations [Dkt. 217]; October 18, 2013 Memorandum Decision and Order [Dkt. 357]; January 28, 2014 Memorandum Decision and Order [Dkt. 468]; July 3, 2014 Memorandum Decision and Order [Dkt. 511]; February 13, Memorandum Decision and Order [Dkt. 598].

B. Time Spent In Deposition And Trial Preparation

St. Luke's criticisms of alleged excessive time spent in deposition preparation for 7 witnesses are based on false and misleading calculations in numerous respects. First, St. Luke's "double" and "triple counted" a number of entries, thus substantially overstating the number of hours spent on these witnesses. Fabien Decl. ¶ 5. Second, in most of the examples it identifies, St. Luke's combines all the hours by all the Plaintiffs. But it is improper to refuse payment for the hours spent by one Plaintiff's counsel based on the work done by another.

This is perhaps best illustrated in the case of the preparation for two state witnesses, Mr. Deal and Mr. Armstrong. The total time spent preparing for these depositions by Saint Alphonsus' counsel was only eight hours. Ettinger Reply Decl. ¶ 12.

Third, St. Luke's inappropriately combines different tasks, performed primarily by different attorneys, at different rates. For example, Saint Alphonsus' counsel devoted a total of 66 hours to preparation for Karl Keeler's deposition. Fabien Decl. ¶ 7. However, only 20 of those hours were spent actually meeting with Mr. Keeler. *Id.* The remainder were primarily devoted to review of documents potentially related to Mr. Keeler's testimony, a review that was conducted in large part by lower-priced attorneys supporting Saint Alphonsus' lead counsel David Ettinger. Ettinger Reply Decl. ¶ 14. Given the more than 230,000 documents produced by Saint Alphonsus which had to be reviewed as part of deposition preparation, this was not an unreasonable effort.

Similarly, the preparation for Nancy Powell's deposition included 90 of 108 hours devoted to document review. Fabien Decl. ¶ 8. A lengthy document review was especially

necessary in Ms. Powell's case, because documents both from Saint Alphonsus and from Saltzer were potentially relevant to her testimony. Ettinger Reply Decl. ¶ 14. *See also id.* ¶ 16 (other witnesses addressed by St. Luke's). And multiple Saint Alphonsus lawyers were *never* present at a deposition. Amended Declaration of David A. Ettinger in Support of Motion for Approval of Reasonableness of Legal Fees and Costs ("Ettinger Initial Decl.") [Dkt. 620] ¶ 34.

C. Tenths Of An Hour

St. Luke's attacks on "tenth of an hour" billing are contrary to both the law and the facts. Courts from within the Ninth Circuit have held that billing in increments of six minutes is reasonable (in fact superior to the use of quarter hours). *See, e.g.*, *Barech v. City of Portland*, No. 3:14-CV-00328, 2015 WL 920025, at *7 (D. Or. March 3, 2015); *Bailey ex rel. Pace v. Colvin*, No. 3:12-CV-01092-BR, 2013 WL 6887158, at *4 (D. Or. Dec. 31, 2013).

St. Luke's assertions on this issue are a prime example of its misleading approach. After taking 90 days to review Plaintiffs' time entries, St. Luke's discovered a grand total of 17 entries which it claims should have taken significantly less than six minutes. This is 0.2% of the total tenth of an hour entries made by Saint Alphonsus' counsel. Ettinger Reply Decl. ¶ 21.

An even more misleading example is St. Luke's statement, Response at p. 24, that there are "hundreds [of tenth of an hour entries] for a 'review' of a document, including minute orders and routine court notices." In support of this comment, St. Luke's cites exactly *nine* entries involving such minute orders and notices which it could find over an *eight month* period. Obviously, the overwhelming majority of the "hundreds" of tenth of an hour entries reviewing documents did not involve such simple documents.

And there is no reason to believe that even these few entries reflect "overbilling." St. Luke's makes no effort to determine how many entries were entered at a tenth of an hour when the time involved took more than a tenth, but less than two tenths of an hour, thus, "balancing

out" the (very few) entities St. Luke's identifies. In fact, this practice was very common. Ettinger Reply Decl. ¶ 19. Therefore, these few "cherry-picked" examples prove nothing at all.[5] *See e.g. Barech*, 2015 WL 920025 at *7 (noting that "[i]nstead of billing fifteen minutes for each email and phone call, [ ]counsel billed only six minutes. Some emails undoubtedly required less than six minutes to complete, but others assuredly took longer to research, draft, revise, and send"); *Grabowski v Commr. of Soc. Sec.*, No. 13-10699, 2015 WL 1808475, at *3-4 (E.D. Mich. Apr. 21, 2015) (refusing to reduce fee award for .1 billing entries for reviewing simple notices and orders).

Even the sample day that St. Luke's tries to pick out as its best possible example of improper conduct involved 2.6 hours devoted to 25 separate tasks. Response Brief at 22-23. To suggest that this involves "overbilling" is nonsense.

D. Allegedly Unnecessary Research

St. Luke's claim that plaintiffs engaged in unnecessary research is only supported by a false characterization of the research as "general." Of the 120 hours of such research criticized by St. Luke's, the vast majority was focused on narrow and specific issues. Ettinger Reply Decl. ¶ 24. The only issues that involved substantial time were the question of the appropriate remedy (a hotly contested issue in this case), and a variety of inquiries concerning Ninth Circuit rules on appeal (10 hrs.). The remainder involved at least 20 different discrete research topics, most involving less than an hour's time. *Id.*

[5] St. Luke's criticizes excessive time spent on voicemails. It identifies a grand total of three voicemails billed in .2 hours and one voicemail billed at .3 hours. Ex. 11 to Stein Declaration. The general descriptions St. Luke's provides of entries also proves nothing. Of course, the drafting of an email can take substantially more than a tenth of an hour. A long voicemail can do so as well. See Ettinger Reply Decl. ¶ 22 (routine use of voicemails for substantive messages).

E. Appeal

St. Luke's argument that Saint Alphonsus should not recover fees on appeal amounts to a reiteration of its already rejected claim that Saint Alphonsus did not prevail in this case. The Court's Memorandum Decision and Order [Dkt. 463] states that "the Court finds for the Plaintiffs and will order divestiture. . ." Saint Alphonsus was therefore unquestionably a proper party to the appeal. St. Luke's never questioned the propriety of that role before the Ninth Circuit or moved to dismiss Saint Alphonsus from the appeal. Indeed, as before the district court, the case on appeal was described as *Saint Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, since the case brought by the Private Plaintiffs was the lead case at issue on appeal.[6]

St. Luke's argument is also based on another false premise - – that Saint Alphonsus' case was based entirely on its vertical theories. Saint Alphonsus undertook substantial efforts on the issues that were decided by the Court, including the relevant geographic market for the adult PCP market, competitive effects, and efficiencies. See April 29, 2015 Mem. Dec. and Order [Dkt. 607] at 5; Private Plaintiffs' Memorandum on Entitlement to Attorney Fees and Costs [Dkt. 487] at 8-18; Ettinger Initial Decl. ¶¶ 27-30, 50-51. It was entirely appropriate for Saint Alphonsus to continue to work on appeal to contribute to the defense of the rulings which resulted significantly from its efforts at trial. Virtually all of the Private Plaintiffs' brief on appeal concerned the issues decided by this Court and by the Ninth Circuit. See Answering Brief of Saint Alphonsus et al [Dkt. 60-1], No. 14-35173.

St. Luke's also alleges without a shred of factual support that the work done by Saint Alphonsus on appeal was duplicative and "not significantly distinct." As explained in Saint

[6] St. Luke's offers the even stranger argument that the Private Plaintiffs did not "cross appeal." A "cross appeal" would assume that the Private Plaintiffs lost their vertical claims. Of course, those claims were not decided by the Court. Since there was no loss, there was no need for a cross appeal.

Alphonsus' initial brief at 11-12 and Ettinger Initial Decl. ¶¶ 50-51, Saint Alphonsus filed an appeal brief which was quite distinct from that filed by the government, addressing, in particular, substantial evidence that the government's brief did not address. Additionally, David Ettinger made significant contributions at oral argument that were reflected in the Ninth Circuit's decision. Ettinger Initial Decl. ¶ 51. The undisputed evidence thus supports the conclusion that Saint Alphonsus' efforts on appeal were not duplicative and substantially contributed to the successful outcome in this case at the Ninth Circuit.

F. Time Spent In Communication With Client

St. Luke's criticism of time spent on budgets, invoices, and client updates is factually and legally erroneous. The first two categories are simply mischaracterized. Ettinger Reply Decl. ¶¶ 32-35.

Contrary to St. Luke's argument, it is well established the time that an attorney spends communicating with his client is recoverable as attorneys' fees. Indeed, the court in *Quade ex rel. Quade v. Barnhart*, 570 F. Supp. 2d 1164, 1167 (D. Ariz. 2008), noted that "[a] lawyer has an ethical responsibility to communicate with a client. This responsibility includes keeping the client reasonably informed about the status of the matter and explaining the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See also Grabowski v Commr. of Soc. Sec.*, 2015 WL 1808475, at *3-4; *Vargas v. Commr. of Soc. Sec.*, No. 6:13-CV-1683-ORL, 2015 WL 4722619, at *2 (M.D. Fla. Aug. 7, 2015); *Cummings v. Connell*, No. CIVS99-2176 WBS KJM, 2006 WL 3951867, at *4 (E.D. Cal. Nov. 27, 2006). The time spent on this issue was not at all excessive. Ettinger Reply Decl. ¶ 30.

St. Luke's mischaracterizes its own cases on this issue. In *Rosenfeld v. United States Dept. of Justice*, 903 F. Supp. 2d 859, 875 (N.D. Cal. 2012), fees were reduced, not because time was spent consulting with a client but because this was part of a broader category of time "spent

monitoring defendants' FOIA compliance," which was not "time spent actually litigating the 2006 challenge. . ." The other cases cited by St. Luke's on this issue related solely to time spent on the preparation of attorney budgets, not at issue here.

G. Privilege Logs

St. Luke's also improperly criticizes the time spent creating privilege logs, including 50 hours of document review for privilege, which St. Luke's also includes in its totals for document review by Saint Alphonsus' counsel. Fabien Decl. ¶ 6. Once that time and the time spent addressing St. Luke's challenges to Saint Alphonsus' privilege log are deducted, the total time devoted by Saint Alphonsus to the privilege log involved less than 60 hours. *Id.* at ¶¶ 9-10. The time spent on this issue was not at all unreasonable for a privilege log with over 7,000 entries.

H. Travel

Contrary to St. Luke's argument, it is well accepted that attorneys are entitled to bill at their full hourly rate while traveling for a case. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992); *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984). ("When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling.").

It is particularly justifiable to award attorney fees for travel time where, as here, both sides needed to retain out-of-town lead counsel to address the specialized issues in the case. *Marbled Murrelet v. Pacific Lumber Co.*, 163 F.R.D. 308, 327 (N.D. Cal. 1995) (refusing to disallow travel time where it would "deter out-of-town attorneys from undertaking this type of representation in the future").

St. Luke's cases do not dispute that it is appropriate to recover attorney fees for travel time where specialized out-of-state counsel is needed. In *Mays v. Stobie*, No. 3:08-cv-00552-EJL, 2012 WL 914928, *9 (D. Idaho Feb. 14, 2012), the court noted that "[t]he fact that [out of

town counsel] traveled to North Idaho to prepare for this case is not in itself unreasonable." In *J.R. Simplot Co. v. Nestle U.S.A., Inc.*, 2009 U.S. Dist. LEXIS 62439, at *41-44 (D. Idaho July 20, 2009), the court awarded attorney fees for time spent traveling.

St. Luke's cites to the Declaration of Walter Sinclair to argue that the practice in this district is not to pay for travel time. But Mr. Sinclair's declaration is disputed (see Supplemental Reply Declaration of Keely E. Duke ("Duke Reply Decl.") ¶¶ 4-6); and in any event only addresses the general practice, not what is appropriate where, as here, both parties have found it necessary to retain specialized out-of-town counsel. And Mr. Sinclair says that "unproductive" travel time may be billed – that is all that is being sought here. Ettinger Reply Decl. ¶ 29.

Compensation for travel time is certainly appropriate where it represented less than 2.5% of the total hours worked. *Id*. *See Transbay Auto Serv., Inc. v. Chevron, U.S.A., Inc.*, No. C 09-04932 SI, 2013 WL 843036, at *7 (N.D. Cal. Mar. 6, 2013) (Less than 10% "ratio of travel time to litigation time is reasonable.").

St. Luke's unsupported criticism of Saint Alphonsus' travel expenses is also wide of the mark. See Ettinger Reply Decl. at ¶¶ 27-29, Phillip Decl. ¶¶ 7-8. Moreover, the remedy suggested by St. Luke's – a 70% reduction in travel expenses – is based upon a case which applied that reduction to first class and business class airfares. *Apple Inc. v. Samsung Elecs. Co.*, No. 5:11-cv-1846-LHK (PSG), 2014 WL 2854994, at *3 (N.D. Cal. June 20, 2014). Since (except during Ms. Phillip's recovery from knee surgery) Honigman always or virtually always traveled coach (Ettinger Reply Decl. ¶ 27, Phillip Decl. at ¶ 80, this reduction is completely inappropriate. Moreover, St. Luke's applies this improper number to all travel expenses, not just airfare.

I. Non-Disclosure Of Third Parties

St. Luke's attacks entries that do not identify third party witnesses with whom it communicated. But the case law supports the provision of limited information where more detail would disclose work product. *See Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004). Saint Alphonsus' entries were otherwise quite specific. Ettinger Reply Decl. ¶¶ 47-48. If there are questions regarding any of these entries, Saint Alphonsus would certainly be willing to provide them to the Court for in camera review.

J. Miscellaneous

St. Luke's other conclusory and unsupported "rifle shot" criticisms are equally baseless. For example, St. Luke's claims that expert reports were reviewed by a dozen attorneys. In fact, only three Honigman attorneys and one legal assistant other than David Ettinger reviewed expert reports. Keely Duke spent less than an hour doing so. *Id.* at ¶ 46.

Other numbers are simply not at all unreasonable, when viewed in the context of this massive case. St. Luke's criticizes approximately 1,700 hours of document review by Saint Alphonsus' counsel. But substantial review by Honigman after an initial review by outside document review lawyers was reasonable and necessary to make the final assessments on relevance, privilege and usefulness of these documents identified by the outside reviewers. Ettinger Reply Decl. ¶ 18. Given the approximately 830,000 documents produced by all the parties in this case (Ettinger Initial Decl. ¶¶38, 43), this amounts to only an average of less than 10 seconds per document, or five minutes spent on every 30th document. *See* Ettinger Reply Decl. ¶ 18. *See, e.g. Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 970 (N.D. Cal. 2014) (finding approximately $250,000 in attorney fees for time spent by attorneys reviewing documents on top of document review performed by contract attorneys "not excessive").

St. Luke's also attacks entries because they refer to "document review" but don't specify the particular documents that were being reviewed. While most such entries were more specific, that specificity should not be necessary in order to evaluate the reasonableness of the review. If the total number of hours spent reviewing documents is, as we believe, more than reasonable given the enormous volume of documents to be reviewed, it should not matter in every case which documents it was that were reviewed. *See Banas*, 47 F. Supp. 3d at 969 (entries for items such as "document review" are sufficiently specific to allow the Court to determine if the time spent on such tasks). As one district court, quoting *Hensley*, recently explained, "[w]hen submitting entries for attorneys' fee awards, attorneys are 'not required to record in great detail how each minute of [their] time was expended.' Attorneys need only 'keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.'" *O'Bannon v. Natl. Collegiate Athletic Assn.*, No. 09-CV-03329-CW (NC), 2015 WL 4274370, at *7 (N.D. Cal. July 13, 2015).

St. Luke's other criticisms are no more accurate. St. Luke's claim that excessive time was spent on Saint Alphonsus' Reply Brief in support of its Motion for Preliminary Injunction also misses the mark, since the work actually involved a wide variety of different tasks. Ettinger Reply Decl. ¶ 45. St. Luke's claims that 50 hours (among all plaintiffs) were excessively contributed to efforts to identify and potentially retain experts who ultimately did not testify at trial. As explained in the Ettinger Reply Decl. at ¶¶ 36-38, this expenditure was more than reasonable, given the importance and magnitude of the task of retention of experts, and the several categories in which experts were retained.

St. Luke's also opposes recovery of secretarial overtime costs. But none of St. Luke's cases involve the circumstances here, an intense, expedited schedule which created unusual demands for staffing and therefore necessitated unusual expenses. *Id*. at ¶ 23.

Finally, St. Luke's also attacks a large series of entries by claiming they are improper because the "purpose" of the work is "vague." This is simply incorrect, and another example of St. Luke's unfounded allegations. See Ettinger Reply Decl. ¶ 26.[7]

Other issues are addressed in the Ettinger Reply Decl. ¶¶ 15, 17, 25, 39, 42-44, 48 and Duke Reply Decl. ¶ 3.

VI. CONCLUSION

For the foregoing reasons, St. Luke's challenges to Saint Alphonsus' fee request are almost entirely baseless. Saint Alphonsus should be awarded its attorneys' fees and costs.

Respectfully submitted,

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Date: October 19, 2015

Attorneys for Saint Alphonsus Medical Center-Nampa, Inc., Saint Alphonsus Health System, Inc., and Saint Alphonsus Regional Medical Center, Inc.

[7] St. Luke's is correct that Saint Alphonsus inadvertently included in its claim time spent responding to the FTC/Idaho AG investigation, $4,641.00 fees devoted to representation of third parties relating to discovery in this case, $1,258.00 devoted to LifeFlight issue, and $985.50 devoted to training. These deductions reduce the total claim for attorneys' fees by $6,884.50 to $7,846,166.75.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2015, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System.

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