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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER, NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., 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 Case) **ST. LUKE'S SUR-REPLY IN OPPOSITION TO PRIVATE PLAINTIFFS' MEMORANDUM ON ENTITLEMENT TO FEES AND COSTS**
FEDERAL TRADE COMMISSION; STATE OF IDAHO Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A. Defendants.	Case No. 1:13-cv-00116-BLW

In their Reply, the private plaintiffs address for the first time the question of whether they are prevailing parties under the now-governing standard set forth in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health*, 532 U.S. 598 (2001). Because these plaintiffs failed even to address the issue in their opening brief, they have made arguments and cited cases that St. Luke's has not had an opportunity to address. Accordingly, this brief responds to these newly raised points.

Much of the private plaintiffs' Reply mischaracterizes St. Luke's position—asserting that St. Luke's reads *Buckhannon* to require the Court "to parse individual elements of the claims, and determine if all of them were addressed by the Court." Pl. Reply Br. 4. That, of course, is not what St. Luke's argues. Instead, St. Luke's position is quite simple: *Buckhannon* holds that in order to "prevail," a plaintiff must win at least some judicially enforceable relief on a claim that it has brought. 532 U.S. at 603 ("a 'prevailing party' is one who has been awarded some relief by the court").

The private plaintiffs here won no such relief. The only relief ordered by the Court was premised exclusively on a claim that court not, as a matter of law, have been brought by the private plaintiffs – the claim that the Saltzer transaction would lead to increased prices. As St. Luke's competitors, the private plaintiffs would not suffer injury from any such prices. Thus, they have no standing to obtain relief on the issue on which the Court ruled. As a matter of law, therefore, the judgment was not, and could not have been, entered in their favor.

As relevant to St. Luke's actual argument, the private plaintiffs appear to advance two alternative positions: (1) they were not required to obtain judicially enforceable relief in their favor in order to be entitled to fees (Pl. Reply 3-7); and (2) they did supposedly obtain judicially enforceable relief in their favor (Pl. Reply 2, 7-8). Both positions are wrong.

First, no case cited by the private plaintiffs supports their contention that a plaintiff may be deemed to "prevail" even if no judicially ordered relief is granted in that plaintiff's favor. In every case cited by the private plaintiffs, the party seeking fees obtained judicially enforceable relief.[1] That is because *Buckhannon* makes clear that a party has not prevailed unless it—and not some other party to the litigation—has obtained judicially enforceable relief.

The case principally relied on by the private plaintiffs, *Sierra Club v. Hamilton County Bd. of County Comm'rs*, 504 F.3d 634 (6th Cir. 2007), is not to the contrary. There, the Sierra Club gave federal, state, and county governments notice that it intended to file suit to challenge a county's practices under the Clean Water Act. In order to block the Sierra Club's suit, the federal and state governments sued the county. One day later, all parties filed proposed consent decrees to resolve the government suits.

The Sierra Club filed a citizen suit and intervened in the governments' actions to challenge the proposed consent decrees, claiming that it had not been given a sufficient opportunity to comment on the proposed consent decree. *Id.* at 639. The county moved to dismiss the Sierra Club's claims, but the district court granted a stay of that motion, granted the Sierra Club an opportunity to obtain discovery, and ordered the government parties to provide the Sierra Club with an opportunity to comment on the proposed consent decree. *Id.* at 639-40. When the district court ultimately entered a revised consent decree, it ordered that the county

[1] *Hensley v. Eckerhart*, 461 U.S. 424, 427-28 (1983) (plaintiffs won judgment in their favor that treatment during involuntary confinement violated constitutional requirements); *Carbonell v. INS*, 429 F.3d 894, 899-900 (9th Cir. 2005) (plaintiff obtained stipulated court order in his favor barring INS from deporting him); *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803 (9th Cir. 2005) (plaintiff won judgment in its favor that federal statute was impliedly preempted); *Alliance for Property Rights & Fiscal Responsibility v. City of Idaho Falls*, No. 4:12-cv-146-BLW, 2013 WL 551028 at *2 (D. Id. Feb. 12, 2013) (summary judgment granted in favor of plaintiffs).

provide quarterly reports on compliance with the consent decree to the Sierra Club to enable the Sierra Club to "monitor efforts to enforce the decrees." *Id.* at 641. Thus, although the Sierra Club was not a signatory to the consent decree, it won judicially enforceable relief in its favor: the right to comment on the consent decree before it was entered and the right to receive regular reports on compliance with the consent decree that was entered.

No such relief was granted in favor of the private plaintiffs here. This Court entered one judicially enforceable order[2]: its judgment requiring St. Luke's to "divest itself of Saltzer's physicians and assets." Dkt. 471 at 2. That judgment does not purport to be in favor of the private plaintiffs—and, in view of this Court's Findings of Fact and Conclusions of Law, it cannot be in favor of the private plaintiffs as a matter of law. The judgment was premised exclusively on the Court's finding that the transaction would lead to increased prices—a claim that the private plaintiffs have no standing to bring. *See* St. Luke's Opp. 10-16.

The private plaintiffs argue that the judgment was entered in their favor because "the Court's Findings that prices will rise do establish harm to the Private Plaintiffs." Pl. Reply 7. Initially, that statement is a flat contradiction of the private plaintiffs' own previous representations to the Court. *See, e.g.*, Dkt. 37 at 6 ("higher prices will not harm Plaintiffs"). It is also directly contrary to decades of case law holding that increased prices *do not harm competitors*. *See* St. Luke's Opp. 11 (citing cases).

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[2] The private plaintiffs assert that they obtained the "judicial imprimatur" required under *Buckhannon* when this Court recited representations made by St. Luke's in its order denying a preliminary injunction. Pl. Reply Br. 4 n.3. This argument makes clear how fundamentally the private plaintiffs misunderstand the law. As the Supreme Court explained in *Buckhannon*, a prevailing party is "one who has been awarded some relief by the court." 532 U.S. at 603. A court order *denying relief* cannot be construed as "award[ing] some relief" to the private plaintiffs.

Nor is there any support for the private plaintiffs' notion that an increase in prices somehow establishes harm to them because "a price increase reflects the creation or enhancement of market power, which can also be used to exclude competition." Pl. Reply 7-8. If private plaintiffs were right that price increases are sufficient to show harm to competitors because those increased prices reflect the power to exclude, then it would be entirely improper for courts to dismiss claims brought by competitors alleging price increases—that allegation alone would be sufficient to raise an inference of harm to the competitor plaintiff. Yet courts have repeatedly dismissed such claims throughout decades of settled case law. *See* St. Luke's Opp. 11-12; *see also, e.g.*, *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 319-20 (D.D.C. 2011) (dismissing Clayton Act complaint brought by competitors alleging that challenged transaction would raise prices: "Whether the result of an increase in market concentration or the oligopolistic price coordination that excessive concentration … portends, an increase in market prices alone does not harm competitors") (citation and internal quotation marks omitted; ellipsis in original).

The private plaintiffs also argue that the Court's judgment was entered in their favor because the Court supposedly "found for the Private Plaintiffs" on their claim that they would suffer "antitrust injury from the threat of loss of referrals." Pl. Reply 7. In connection with this argument, the private plaintiffs assert (at 7) that St. Luke's "ignore[d] an entire section of the Court's Findings" in its Opposition brief, but that is simply false. As St. Luke's explained in its Opposition, this Court found only that St. Luke's would see an increase in referrals after the transaction—not that any of the private plaintiffs would be harmed by loss of referrals, much less that they would be so substantially harmed that competition would be suppressed. St. Luke's Opp. 13-14. The private plaintiffs do not, and cannot, rebut this crucial point.

There is no doubt that this Court entered an enforceable judgment, and that the judgment was against St. Luke's. But the judgment was in favor of, and enforceable by, the government plaintiffs only. It was only the government plaintiffs who had standing to advance a claim on the ground that the transaction would increase prices—and that was the only claim that this Court found to have been proven. The Court did not resolve any claim the private plaintiffs had standing to advance. Those claims were mooted by the government plaintiffs' victory. *E.g.*, Dkt. 464 Conclusions ¶¶ 64-65; St. Luke's Opp. 13-14.

It is by no means clear that the private plaintiffs materially contributed to the result obtained by the government plaintiffs. Rather, the actual findings of this Court suggest that the government plaintiffs would have prevailed without any involvement of the private plaintiffs. But even if the private plaintiffs made some contribution (a conclusion that St. Luke's disputes), it makes no difference. Without judicially enforceable relief on a claim that they had standing to bring, the private plaintiffs did not "substantially prevail" and cannot be entitled to attorney's fees under controlling Supreme Court Precedent.

CONCLUSION

For the foregoing reasons, the Court should deny the private plaintiffs' motions for attorneys' fees and costs.

Dated: May 5, 2014

Respectfully submitted,

/s/ J. Walter Sinclair

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2014, I filed the foregoing **ST. LUKE'S SUR-REPLY IN OPPOSITION TO PRIVATE PLAINTIFFS' MEMORANDUM ON ENTITLEMENT TO FEES AND COSTS** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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