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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,

Defendant.

Case No. 1:12-cv-00560-BLW

MEMORANDUM OF ST. LUKE'S HEALTH SYSTEM, LTD. IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs in this case seek to enjoin a transaction in which Saltzer Medical Group ("Saltzer") in Nampa has chosen to affiliate with St. Luke's Health System, Ltd. ("St. Luke's") because the Saltzer physicians concluded that this affiliation is the best way to give them the human and financial resources required to provide clinically-integrated care using evidence-based medicine – with the objective of improving the quality and lowering the cost of care for patients. St. Luke's wants to enter into the transaction in order efficiently to bring to the rapidly growing population of Canyon County a new and better system for delivering health care services. That system is based on the collaboration and financial alignment of physicians, hospitals, and other health care providers so that, working together, these health care providers can achieve what St. Luke's has adopted the "Triple Aim" – better health and better medical care at lower cost. As with any innovative product, St. Luke's plan to change the way health care is delivered in southern Idaho is perceived as a threat by market participants who are comfortable with the status quo – the plaintiffs in this case. However, neither that perception nor plaintiffs' unfounded speculation about anticompetitive effects warrants issuance of a preliminary injunction.

To begin, as we discuss in Part I(A), the Saltzer transaction will promote competition by bringing a new product into the market for health care delivery – 21st century medicine based on coordinated care using best medical practices, a uniform electronic medical record ("EMR"), and rigorous utilization and quality review. Indeed, the procompetitiveness of the Saltzer transaction is underscored by the fact that it accords with, and carries out, the federal policy, reflected in the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 1395jjj, of encouraging large, clinically-integrated physician-hospital networks designed to reduce the overall cost of health

care through the precise methods that will be implemented as a consequence of this transaction. Moreover, the procompetitive intent of the parties to the transaction gives strong reason to believe that the transaction will in fact have procompetitive effects. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (". . . knowledge of intent may help the court to interpret facts and to predict consequences").

Notably, the plaintiffs in this case – Saint Alphonsus Medical Center – Nampa, Inc.; the for-profit, physician-owned Treasure Valley Hospital ("TVH"); and various affiliated corporations – are not patients or payers. Rather, they are hospitals that compete with St. Luke's and that fear the competition that the transaction will inject into the market. To the extent that plaintiffs allege higher prices for medical care by virtue of the transaction, they should, as competitors of St. Luke's, benefit from these predicted higher prices. Thus, as explained in Part I(B)(1), they have no standing to assert such claims. But, in any event, as we also demonstrate in that Part, plaintiffs' concern about higher prices as a result of anticompetitive conduct will not withstand sound economic analysis.

The only claim that plaintiffs do have standing to assert is their claim that their viability as effective competitors will be destroyed by the foreclosure of referrals from Saltzer physicians after the affiliation with St. Luke's. But for the reasons discussed in Part I(B)(2), that claim is unpersuasive. To begin, unlike Saint Alphonsus ("Saint Al's"), St. Luke's has no policy of requiring its physicians to refer only to its own facilities. Declaration of John Kee ("Kee Decl.") ¶ 13. To the contrary, physicians affiliated with St. Luke's can and do retain staff privileges at other hospitals and can and do refer patients to other facilities when that course is medically

indicated, requested by the patient, or required by insurance considerations.[1] Thus, any post-transaction shift of patient referrals will be the result of better service from St. Luke's – not of anticompetitive conduct.

In any event, the data offered by plaintiffs on the issue of referral foreclosure is highly misleading. It ignores the fact that St. Luke's physicians refer to hospitalists at Saint Al's – who appear in the data as the admitting physician when, in reality, it is a St. Luke's physician who has referred the patient. Kaiser Decl. ¶ 5. In the circumstances, it strains credulity to argue that this transaction will remove Saint Al's-Nampa or TVH as a competitor in the relevant market – particularly given the economic strength of Saint Al's parent corporation and of the physician-owned and controlled TVH. But even if these two entities were totally removed from the Ada County-Canyon County market, the presence of other Saint Al's facilities and other providers in this market will prevent St. Luke's from engaging in anticompetitive conduct.

Quite apart from plaintiffs' unlikelihood of success on the merits, no irreparable injury will occur if the motion for a preliminary injunction is denied. This is so for several reasons set forth in Part II. First, the transaction is being structured to permit divestiture of Saltzer if that transaction were found, after full judicial consideration, to be unlawful. Kee Decl. ¶ 18. Second, there will be no material harm to plaintiffs during the pendency of their claims. Although the transaction is scheduled to close on December 21, the integration of Saltzer physicians into the St. Luke's system will take at least a year. *Id.* ¶¶ 62-63, 72. And the prices charged by both St. Luke's and Saltzer are governed by contracts whose terms (including price terms) cannot, in

[1] Declarations of Elaine Davidson, M.D. ("Davidson Decl.") ¶¶ 3-5; Harold Kunz, M.D. ("Kunz Decl.") ¶¶ 11-13; John Freeman, M.D. ("Freeman Decl.") ¶¶ 5-6; Michael Dee, M.D. ("Dee Decl.") ¶¶ 5-7; Randell Page, D.O. ("Page Decl.") ¶¶ 11-12; Richard Aguilar, M.D. ("Aguilar Decl.") ¶¶ 5-7; Thomas Patterson, M.D. ("Patterson Decl.") ¶¶ 8-11; John Kaiser, M.D. ("Kaiser Decl.") ¶ 3; Mark Rasmus, M.D. ("Rasmus Decl.") ¶¶ 8-9; Bayo Crownson, M.D. ("Crownson Decl.") ¶ 3.

almost all instances, be changed for at least a year. Declaration of Jeff Taylor ("Taylor Decl.") ¶ 3, 4. Thus, even assuming anticompetitive effects from the transaction (which St. Luke's strongly disputes), these effects will not be felt for many months – at the very least.

By contrast, as described in Part III, there will be enormous and irreparable injury if a preliminary injunction is issued. In particular, several surgeons have, since the announcement of the transaction, left Saltzer to join Saint Al's. Declaration of William Savage ("Savage Decl.") ¶ 11. Apart from demonstrating the well-informed belief of these surgeons (contrary to the theoretical conjecture of plaintiffs' economist) that the transaction will not in fact dry up referrals, these departures have made it economically impossible for Saltzer to continue as a viable independent entity. *Id.* ¶¶ 13-14. Thus, the practical effect of a preliminary injunction would not simply be to delay the transaction *pendente lite*; rather such an injunction would sound the death knell of the transaction.

And that result, as we show in Parts I and IV, would be directly contrary to the public interest of bringing to the people of southern Idaho clinically-coordinated, evidence-based medicine using the EMR and utilization review and controls – an interest reflected in the ACA. The Ninth Circuit has cautioned against issuing preliminary injunctions that might nip innovative, pro-patient medical developments in the bud. *Miller v. California Pacific Med. Ctr.*, 991 F.2d 536, 545 (9th Cir. 1993). This case provides a perfect example of the wisdom of that warning.

* * *

In *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995), Judge Posner wrote as follows:

> We live in the age of technology and specialization in medical services. Physicians practice in groups, in alliances, in networks

> utilizing expensive equipment and support. Twelve physicians competing in a county would be competing to provide horse-and-buggy medicine. Only as part of a large and sophisticated medical enterprise … can they practice modern medicine in rural Wisconsin.

The preliminary injunction that plaintiffs seek could cause the remaining Saltzer physicians to splinter apart, potentially relegating them to practice the sort of "horse-and-buggy medicine" Judge Posner described. This Court must decide whether the antitrust laws require that result, or instead permit St. Luke's and Saltzer to form a "large and sophisticated medical enterprise" practicing modern medicine for the benefit of patients and payers alike. For the reasons set forth below, the motion for a preliminary injunction should be denied.

ARGUMENT

To succeed on a motion for preliminary injunction, a plaintiff must establish that (1) it is likely to succeed on the merits, (2) it will likely suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Earth Island Inst. v. Carlton*, 626 F.3d 462 (9th Cir. 2010). The plaintiff bears the burden of proving each of these elements. *See Preminger v. Principi*, 422 F.3d 815, 823 n.5 (9th Cir. 2005); *see also Silvas v. G.E. Money Bank*, 449 F. App'x 641 (9th Cir. 2011) ("The party requesting a preliminary injunction must carry its burden of persuasion by a "'clear showing'" of these four elements." (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997))).

The Ninth Circuit follows a sliding scale approach under which, "a stronger showing of one element may offset a weaker showing of another." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, after *Winter*, which held that a movant must establish a likelihood and not just a possibility of irreparable harm, the Ninth Circuit clarified that the plaintiff must still meet the burden of proof on all four factors even under the

sliding scale approach. *See Alliance*, 632 F.3d. at 1135; *see also Villegas Lopez v. Brewer*, 680 F.3d 1068, 1072-73 (9th Cir. 2012) (finding that the district court had appropriately considered each of the factors in its denial of preliminary injunction).

A preliminary injunction is a drastic and extraordinary remedy, "one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Wright & Miller, *Fed. Prac. & Proc.* § 2948; *see also Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011) (quoting *Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right.")). Notably, "a showing of loss or damage due merely to increased competition does not constitute" the sort of injury on which relief can be granted in an antitrust case. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 (1986) (vacating preliminary injunction because respondent failed to make the required showing).

I. ST. LUKE'S IS LIKELY TO SUCCEED ON THE MERITS.

In determining whether the Saltzer transaction satisfies relevant antitrust requirements, this Court must balance the procompetitive effects of the transaction against any demonstrable anticompetitive effects – and make a determination of the likely overall competitive significance of the transaction. *See e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 768 (1984).[2] In Part A of this Section, we describe the procompetitive effects of the Saltzer transaction. In Part B, we explain why the dire anticompetitive effects predicted by plaintiffs are vastly overstated or highly unlikely to occur – and why plaintiffs lack standing to assert some of these effects.

[2] As plaintiffs agree, Br. at 5 n.2, the standard for relief under § 1 of the Sherman Act and § 7 of the Clayton Act are the same, despite the two statutes' different language. *E.g.*, *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990) ("Both statutes as currently understood prevent transactions likely to reduce competition substantially."). The Idaho antitrust laws likewise impose similar requirements. Br. at 5 n.2.

Preliminarily, however, we would note that St. Luke's is a hospital system while Saltzer is a physician group offering predominantly primary care. Declaration of David C. Pate, M.D. ("Pate Decl.") ¶¶ 3-4; Kee Decl. ¶ 11. The merger between Saltzer and St. Luke's is therefore primarily a vertical one – *i.e.*, one between firms that occupy "vertically related market positions" – albeit a transaction with certain horizontal effects due to the firms' overlap in the provision of primary care. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3d ed. 2010; updated 8/2012) (hereinafter "Areeda"). It is well-recognized that vertical mergers are generally procompetitive. *Id.* ¶ 1000 (noting that "some critics have concluded that the alleged harmful effects are so implausible and efficiency gains so likely that vertical mergers should be deemed per se lawful"). Thus, in order to show a likelihood of success on the merits, plaintiffs must show that the substantial procompetitive benefits of the affiliation between St. Luke's and Saltzer are clearly outweighed by cognizable anticompetitive effects.

Accordingly, plaintiffs are patently wrong to contend, Br. at 4, that "[t]he standard for an injunction in this context is not demanding." To the contrary, the standard in a case of this nature – where substantial procompetitive benefits are likely to arise from the transaction – is quite demanding. The antitrust laws are, after all, a "consumer welfare prescription." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). As the Ninth Circuit has recognized, courts should be careful not to issue preliminary injunctions against innovative arrangements that hold substantial promise of furthering that welfare. *Cf. Miller*, 991 F.2d at 545 (vacating preliminary injunction requiring dissolution of merger under federal labor laws where "[u]npacking the merger might … detract from the quality of medical care CPMC provides its patients" and mean that "innovative procedures" made possible by the merger "would have to be abandoned"). This

is particularly true where, as here, the transaction in question furthers federal policy as set forth in a federal statute. *See, e.g.*, *United States v. Brown University*, 5 F.3d 658, 675 (3d Cir. 1993).

A. The Saltzer Transaction Will Have Substantial Procompetitive Benefits.

St. Luke's acquisition of Saltzer will produce highly procompetitive benefits. Integrating the Saltzer group into the St. Luke's Clinic will permit St. Luke's to introduce a novel, high-quality, cost-effective health care delivery system in Canyon County -- and thereby to promote the goals of the antitrust laws. By acquiring Saltzer, St. Luke's is striving to implement the "Triple Aim" that it has adopted: (1) to improve the health of the populations that it serves; (2) to deliver better care for patients; and (3) to do so at a lower cost. Pate Decl. ¶ 6. To realize these goals, St. Luke's has focused its efforts on transforming health care delivery by aligning providers to deliver integrated, patient-centered, accountable care. *Id.* The success of these goals depends on a substantial network of physicians, working together across all medical specialties, to coordinate care and manage the health of a large, scattered population of patients. *Id.* Moreover, it demands a transformation of the economic incentives that currently cause physicians too often (a) to prescribe and perform unnecessary tests and procedures and (b) to use overly expensive supplies and medications. *Id.* ¶ 7.

As set forth below, the Saltzer transaction is integral to furthering these objectives. The benefits of that transaction will take principally two forms. First, it will allow physicians in Canyon County to practice better, lower-cost medicine – and thereby compete more effectively. Second, it is an important step in enabling St. Luke's to offer novel insurance programs that require providers to take financial risk for their patients' outcomes – and thereby reduce insurance premiums and promote competition in the market for health care insurance.

1. The Transaction Will Promote Competition By Facilitating Higher-Quality, Lower-Cost Care.

If the transaction is permitted to go forward, Saltzer physicians will be required to adhere to clinical initiatives and other efforts to improve the quality and lower the cost of care, and these physicians will be compensated based on their success on those measures. Kee Decl. ¶¶ 14, 47. They will participate in quality assessment and utilization management review. *Id.* ¶ 32. Because Saltzer will share its data, best practices, and protocols with the entire St. Luke's network, and vice versa, the synergies will be substantial.

Integration will also expand the opportunity for Saltzer and St. Luke's to share administrative resources in areas such as electronic health record development, claims processing, and financial expertise – and to gain cost and quality of care advantages through the effective sharing of these resources. Kee Decl. ¶ 34. By coordinating care with Saltzer physicians and investing in a fully integrated EMR system, St. Luke's will be able to offer patients a seamless health care experience using high-value, state-of-the-art infrastructure that the Saltzer physicians, as independent practitioners, could not afford without the benefit of St. Luke's financial wherewithal, as well as electronic medical records that follow them from the physician's office, to the outpatient center, and to hospital inpatient status.[3] Kee Decl. ¶ 35, 44. Courts have recognized that the network effects that occur when medical practitioners share resources in this way is a significant procompetitive benefit that is central to the antitrust analysis. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.).

[3] The affiliation with Saltzer will also result in expanded access to care. As part of the St. Luke's system, Saltzer physicians will commit to seeing patients regardless of the ability of those patients or their health plans to pay. Kee Decl. ¶ 33, 55.

Notably, moreover, the precise practices that the Saltzer transaction will effectuate are strongly encouraged by federal law. In particular, in the ACA, Congress directed the Department of HHS to "establish a shared savings program that promotes accountability for a patient population and coordinates items and services … , and encourages investment in infrastructure and redesigned care processes for high quality and efficient service delivery." 42 U.S.C. § 1395jjj(a)(1). The shared savings program created under the ACA would achieve these goals by having "groups of providers of services … work together to manage and coordinate care for Medicare fee-for-service beneficiaries through an accountable care organization" *Id.* § 1395jjj(a)(1)(A). A group qualifies as an "accountable care organization," or "ACO," under the Medicare Shared Savings Plan only if it is "willing to become accountable for the quality, cost, and overall care of the Medicare fee-for-service beneficiaries assigned to it," and "to promote evidence-based medicine and patient engagement, report on quality and cost measures, and coordinate care," among other requirements. *Id.* § 1395jjj(b)(2)(A), (G). The antitrust laws should not be interpreted to preempt a procompetitive transaction that is designed to, and will in fact, promote federal policy. *See Brown University*, 5 F.3d at 675 (reversing judgment against defendant because district court did not give adequate weight to challenged agreement's procompetitive benefits where "Congress has sought to promote the same" goals).

Significantly, the procompetitive goals and pro-patient effects of the Saltzer transaction will simply not occur if that transaction is not permitted to go forward. Putting in place a system of coordinated care using evidence-based medicine, strong utilization management, and a unified EMR that will minimize duplication of services and inappropriate tests and procedures requires an enormous investment in technology and infrastructure. Kee Decl. ¶¶ 4, 35, 44. Indeed, the Saltzer physicians voted to affiliate with St. Luke's in large part because they recognized that

they simply did not have the human and financial resources to establish such a system. Patterson Decl. ¶¶ 2-3; Kunz Decl. ¶ 3; Freeman Decl. ¶ 4. *See also Blue Cross & Blue Shield*, 65 F.3d at 1412 (citing the benefits of physicians' sharing of resources).

The benefits that consumers can expect to obtain from this transaction are not a matter of speculation. Patients in southern Idaho have already seen tremendous gains from St. Luke's efforts to provide clinically integrated care. For example, St. Luke's affiliation with a group of practicing gastroenterologists in the Magic Valley enabled these physicians to recruit two Board-certified gastroenterologists to the community, whose presence reduced the average wait-time for an appointment from 6-8 weeks to 1-2 weeks. Declaration of Robert Ward ("Ward Decl.") ¶¶ 1, 5. By virtue of the affiliation with St. Luke's, these physicians began using an EMR that allows them to coordinate care with primary care and other physicians so that unnecessary tests, procedures, and costs could be reduced. *Id.* ¶ 3. And they advanced the standard of care by transitioning to use of the sedative propofol during GI procedures, which is both safer and more comfortable for patients than other sedatives. *Id.* ¶ 6.

To take another example, St. Luke's affiliation with the Idaho Cardiology Associates has promoted innovative approaches to the treatment of cardiology patients that improve patient outcomes while lowering costs. Declaration of Marshall F. Priest ("Priest Decl.") ¶¶ 13-14, 16-19. Thus, a cardiologist is kept on staff in an attending capacity so that patients can obtain a same-day appointment that allows them to stay out of the emergency department, reducing the hospital admission and readmission rate. Priest Decl. ¶¶ 13-14. The affiliation has permitted St. Luke's to send trained nurses to the homes of patients identified as high-risk for readmission to the hospital to work one-on-one with the patient to understand their illness, medication, and dietary needs – at no cost to the patient. *Id.* ¶ 19. None of these would have been feasible

without the integration of the cardiology clinic into St. Luke's: "Neither I, nor independent groups of physicians, would be able to offer these … services without being a part of St. Luke's. An integrated network … is the only care structure that makes such services possible." *Id.* ¶ 20.

The St. Luke's Center for Spine Wellness provides yet another example. Implementation of the kind of measures that will be put in place as a result of the Saltzer transaction has resulted in fewer patients undergoing risky, costly back surgery to address back pain. Kee Decl. ¶ 60. Meanwhile, patients treated non-surgically in the Center report symptom relief on par or better than patients who undergo surgery. *Id.* This has lowered the cost of care: Data from September 2010 to August 2011 show that a patient who uses the Center costs on average $871 less to treat than a patient who does not use the Center. *Id.* Similar improvements to patient care have occurred from St. Luke's affiliation with Intermountain Orthopaedics. *See* Declaration of Erik Heggland, M.D. ("Heggland Decl.") ¶ 10.

These and other successes have given rise to a dramatic improvement in health outcomes across St. Luke's population. Thus, for example, since January 2010, St. Luke's risk-adjusted mortality index (in-hospital mortality rate adjusted for patient factors like age, sex, illnesses) has significantly and steadily decreased, as reflected in the first chart included in the Kee Declaration. As that chart illustrates, the risk-adjusted mortality index as of December 2011 had decreased by 43% compared to January 2010. Kee Decl. ¶ 38. This result is attributable to St. Luke's work in partnership with affiliated physicians in systematizing and standardizing care across the system in a variety of medical areas. *Id.*

Similarly, St. Luke's has experienced a dramatic, sustained decline in the risk-adjusted complication index. As the second chart included in the Kee Declaration reveals, the risk-adjusted complication index as of December 2011 had decreased by 69% compared to January

2010. Kee Decl. ¶ 39. This improvement is a result of identifying and implementing those best practices across the system, particularly in the care of surgery patients. *Id.* As a result, an additional 93 patients suffered no harm in the course of their treatment. *Id.*

The same trend appears in the incidence of patients who experienced defects in their care. Since January 2010, St. Luke's defect rate – deviations of actual care provided from evidence-based best practices for heart attack, heart failure, pneumonia, and surgical care – has steadily decreased. Kee Decl. ¶ 40. This conclusion is demonstrated by the third chart included in the Kee Declaration. Specifically, as of December 2011, St. Luke's defect rate had decreased by 45% compared to January 2010. *Id.* This improvement is a result of identifying best performers within the system and implementing their identified best processes across the system. *Id.* As a result, at least an additional 94 patients received defect-free care. *Id.*

Significantly, these changes in treatment practices, and the resulting decrease in costs, could not have been achieved without full integration of a critical mass of physicians into the St. Luke's Clinic. Without full integration, there would be no reason for St. Luke's to make the massive investment needed to transform the delivery of medical care. Moreover, full integration is necessary to alter incentives so that physicians will align with St. Luke's utilization, quality review, and cost control goals. Thus, for example, when left as independent fee-for-service practitioners, physicians have little incentive to reduce the number of procedures or to perform procedures that are less remunerative. Kee Decl. ¶¶ 45, 46. When St. Luke's has implemented physician compensation based on use of best practices and cost-control, however, it has been able to fulfill the Triple Aim of better health and better medicine at lower cost. *Id.* ¶ 6.

In short, St. Luke's efforts to provide a fully integrated health care delivery system by employing or closely aligning with physicians, and by sharing data, best practices, and protocols

across a broad, integrated, and accountable network has produced significant improvement in patient care. The affiliation between Saltzer and St. Luke's will produce just such results.

2. The Transaction Will Promote Competition By Putting St. Luke's In A Better Position To Offer Risk-Based Arrangements To Payers.

In addition, St. Luke's is working to offer a competitive alternative to the traditional fee-for-service insurance model that incentivizes overutilization. Specifically, St. Luke's is moving to a model by which it will assume utilization risk and thus be able to facilitate significantly lower insurance premiums. Kee Decl. ¶ 5; Taylor Decl. ¶¶ 16-17; Declaration of Patricia R. Richards ("Richards Decl.") ¶¶ 11-12. However, this form of risk-based insurance requires both a very large patient and physician base and physicians who are committed to controlling costs. Kee Decl. ¶¶ 26-28; Richards Decl. ¶ 13. The Saltzer transaction is critical to ensure the success of such a product in southern Idaho. Kee Decl. ¶ 26.

St. Luke's has taken the first step to offering such a product by partnering with SelectHealth, a non-profit health insurer with a philosophy that is similar to St. Luke's. Richards Decl. ¶ 8. Their goal is to offer an insurance product in which the health care provider network – anchored by St. Luke's – shares in savings that result from lowering the cost of health care for beneficiaries. Richards Decl. ¶ 11; Taylor Decl. ¶ 16. This shared savings plan differs significantly from traditional commercial insurance. Taylor Decl. ¶ 16. In those products, any premium that remains after payouts to providers goes back to the insurer. *Id.* Under this approach, providers have no financial incentive to decrease utilization or costs, as revenue access is solely dependent upon performing services. *Id.*

The agreement between St. Luke's and SelectHealth provides financial incentives to identify and reduce unnecessary or inappropriate utilization of services – and to perform services in the most appropriate cost environment – as the provider network is guaranteed any remainder

of the premium allocation that results from the savings. *Id.* At the same time, because the savings are distributed to a larger network rather than to individual physicians based on individual savings, there is no incentive to withhold care inappropriately. Richards Decl. ¶ 25. The mutual goal of St. Luke's and SelectHealth in entering this agreement is to align incentives between medical provider, insurer, and patient to reduce the underlying cost structure while providing higher-quality care. Richards Decl. ¶¶ 8, 24; Taylor Decl. ¶ 16.

The affiliation with Saltzer is important to the SelectHealth agreement and to other potential risk-based arrangements that St. Luke's will seek to enter. If the SelectHealth insurance product is to be successful, it will need substantial primary care physician coverage in Canyon County. Richards Decl. ¶ 13. And because the model depends on reduced costs and highly coordinated care, SelectHealth needs the participation of not just any physicians, but specifically, physicians dedicated to quality enhancement, use of best practices, and utilization control – like the Saltzer physicians. *Id.* In the future, St. Luke's will seek more risk-based arrangements with other commercial payers. Taylor Decl. ¶ 17; Kee Decl. ¶ 26.

The Saltzer transaction is essential to allowing such agreements to occur. In order for St. Luke's to be able to credibly offer risk-based contracts to payers, St. Luke's must have a sufficiently large group of physicians across many specialties who are dedicated to its vision of transforming health care delivery to provide care for patients covered by such contracts. Kee Decl. ¶¶ 26-27. In particular, St. Luke's needs sufficient numbers of primary care physicians across the entire geographic service area to meet the needs of patients, to coordinate care with specialists, and to utilize the services of practitioners who are equally committed to St. Luke's utilization management goals. *Id.* ¶¶ 26-29.

B. The Saltzer Transaction Will Not Have Anticompetitive Effects.

Plaintiffs allege that, through the Saltzer transaction, St. Luke's "threaten[s] to monopolize a broad series of markets in Idaho." Compl. ¶ 1. Specifically, they assert that "[c]ompetition in the primary care physician services market in Nampa, and the general acute [hospital] care services and outpatient surgery services markets in the Boise Area [will] be substantially lessened" with the likely effects that "[p]rices in those markets would likely increase to levels above those that would prevail absent the merger" and that "patient choice would be substantially reduced." *Id.* ¶ 127.

The mechanism by which the Saltzer transaction would allegedly create these harmful effects is said to be two-fold. The first is a "horizontal" theory which posits that St. Luke's and Saltzer together would represent "a near monopoly share in the Nampa … market for adult primary care physician services market." *Id.* ¶ 2.a. The second is a "vertical" theory which contends that competition among hospitals in the area will be harmed by "foreclosing virtually all competition for the hospital admissions of the physician practices [St. Luke's] acquires." *Id.* We address the horizontal theory in subsection (1) and the vertical theory in subsection (2).

1. Plaintiffs' Claim Of Higher Physician Prices By Virtue Of The Saltzer Transaction Will Not Withstand Analysis.

Plaintiffs claim that the Saltzer transaction will result in higher physician prices by virtue of St. Luke's market share in Nampa. Preliminarily, it should be noted that, as competitors of St. Luke's, plaintiffs lack standing to make this argument. On the merits, however, the argument is based on an incorrect geographic market definition and other flawed reasoning. To the extent that plaintiffs attempt to sidestep the task of properly identifying the geographic market by misconstruing as price increases changes in reimbursements associated with converting for-profit

clinics to not-for-profit, provider-based departments of the hospital, any such increases are the result of reimbursement policies – not anticompetitive conduct.

a. Plaintiffs Lack Standing To Challenge Any Purported Price Increase.

It is well-recognized that "[b]ecause a competitor opposes efficient, aggressive, and legitimate competition by its rivals, it has an incentive to use an antitrust suit to delay their operations." Areeda ¶ 348a. "For that reason, the courts are properly skeptical of many rivals' suits." *Id.* Such skepticism is warranted here – particularly with regard to plaintiffs' claim that if the Saltzer transaction is allowed to proceed, St. Luke's will be able to force payers to pay supra-competitive prices. *See, e.g.*, Br. at 15-17. As competitors of St. Luke's, plaintiffs would *benefit*, not suffer, from any of the supposed supra-competitive prices of which they complain because payers would shift to the lower cost providers.

For that reason, competitors may not obtain relief based on a claim that the defendant will "charge higher than competitive prices." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986). Whether or not such conduct violates the antitrust laws, "it could not injure" plaintiffs – who are the defendant's competitors – because such plaintiffs "stand to gain from any conspiracy to raise the market price." *Id.*; *see also ARCO v. USA Petroleum Co.*, 495 U.S. 328, 336-37 (1990) (plaintiff "was *benefited* rather than harmed" by defendant's alleged price-fixing, and thus did not "suffer[] '*antitrust* injury'") (emphasis in original); Areeda ¶ 348b ("When a horizontal merger … or similar collaboration among competitors substantially reduces competition, consumers suffer while existing rivals benefit. As the Supreme Court recognized, a plaintiff competitor is not injured in fact when rivals restrict their output, thus allowing the plaintiff to enjoy higher prices, greater output, or both.").

Thus, even if plaintiffs' allegations regarding supra-competitive prices were correct—which they are not, *see* Part I(B)(1)(b)-(c), *infra*, plaintiffs are not entitled to relief based on such allegations. *See Cargill*, 479 U.S. at 111 (holding that plaintiff did not have standing to obtain an injunction barring the merger of two of its competitors because any injury to the plaintiff did not constitute antitrust injury). Plaintiffs here would suffer no antitrust injury – or injury of any kind – if prices rose as a result of the merger. They therefore have no standing to challenge the Saltzer transaction based on the supposed likelihood of price increases, and the Court should simply disregard any such claims.

b. Plaintiffs' Claim Of A Price Increase Will Not Withstand Analysis

In any event, plaintiffs' claim that the Saltzer transaction will increase prices for primary care services is defective for at least three reasons. Initially, Nampa by itself is not a relevant geographic market. Further, anticompetitive effects are unlikely in any properly defined market. And to the extent that anticompetitive effects might otherwise occur, the threat of new entry will deter such effects.

(i) Nampa By Itself Is Not A Properly Defined Geographic Market

Plaintiffs bear the burden of proving that they have properly defined the relevant geographic market. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 143 (9th Cir. 1989). Moreover, defining a proper geographic market is "a necessary predicate to the finding of an antitrust violation." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999); *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) (relevant market is a threshold determination under the FTC Act and the Clayton Act). "Without a well-defined relevant market, a court cannot determine the

effect that an allegedly illegal act has on competition." *Se. Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011).

A proper geographic market is "an area of effective competition … where buyers can turn for alternate sources of supply." *Morgan, Strand v. Radiology Ltd.* 924 F.2d 1484, 1490 (9th Cir. 1991) (quotations omitted). For health care markets, both side's economic experts agree on the basic framework for defining the geographic market: one must determine where health plans and employers could reasonably send their insureds in order to defeat an attempt by the merging providers to raise prices above competitive levels. Argue Decl. ¶¶ 22-23; Declaration of Deborah Haas-Wilson ¶ 29. The first step in that analysis is to determine how far patients are currently willing to travel, in the absence of any incentive to avoid higher prices or lower quality. That determination is based on review of data showing the distances from which patients currently travel to seek treatment in the merging parties' locations, a region called the provider's "service area." *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) (citing *Freeman*, 69 F.3d at 263). All providers of relevant service in the service areas are considered part of the relevant market for purposes of determining the likely impact of the challenged conduct. *See Tenet*, 186 F.3d 1045, 1052 (8th Cir. 1999) (A "properly defined geographic market includes potential suppliers who can readily offer consumers a suitable alternative to the defendant's services.").

Plaintiffs have sought to define the relevant geographic market for primary care services as "no broader than Nampa," Compl. ¶ 72, because that definition is advantageous to their claim. However, that definition is too narrow, as demonstrated by Dr. Haas-Wilson's own calculations. She concludes only that "most" patients – less than 80% – who reside in Nampa and are treated by Saint Al's primary care physicians seek treatment with its Nampa-based physicians. Haas-

Wilson Decl. ¶ 74. Notably, however, the 80% threshold falls short of the generally accepted requirement that a geographic market analysis *begins* with at least the 90% service area of the merging providers. *See Tenet*, 186 F.3d at 1047 n. 4 ("A 'service area' is generally defined as the area from which a hospital derives ninety percent of its inpatients."); *Sutter Health*, 130 F. Supp. 2d at 1122 (rejecting geographic market definition in part because the expert applied an 85%, rather than 90%, threshold); *Pilch v. French Hosp.*, No. 98-9470, 2000 WL 33223382, at *4 n.5 (C.D. Cal. Apr. 28, 2000) (a threshold of 90% is required "to indicate a strong market definition").

A 90% threshold is required for two reasons. First, patients who travel from the outer edge of the service area are no less valuable to a provider than nearby patients, but the remote patients may also be located closer to alternative providers and, in any event, have demonstrated a greater willingness to travel some distance to receive care. Argue Decl. ¶ 37. The second reason is that a provider's service area reflects only how far patients are willing to travel in the absence of anticompetitive conduct. *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 268 (3d Cir. 2005) ("a primary service area does not equate to the relevant geographic market"). To avoid anticompetitive harm, patients can be expected to travel even farther than they currently do. Argue Decl. ¶ 32.

Applying a 90% threshold rather than her 80% threshold, Dr. Haas-Wilson's own calculations show that the relevant geographic market must include at least Caldwell – and likely a broader geographic area. For example, she calculates the 90% service for each Saint Al's primary care clinic in Nampa to include Caldwell. Haas-Wilson Decl., Exs. 2A-2D. Depending on the clinic site, the 90% service area for these clinics would reach north to Middleton and south to Melba in Canyon County, and west to Kuna and Meridian in Ada County. *Id.*

Moreover, Haas-Wilson's calculations show that the 90% service areas of the Saint Al's primary care clinics in Meridian – which she defines to be outside of the geographic market – also include the allegedly separate Nampa market. *Id.*, Exs. 3-4. With so many patients traveling out from Nampa to other areas for primary care, Nampa alone cannot represent a proper antitrust market.

Further, patient origin data for the Saltzer and St. Luke's primary care clinics in Nampa shows that, even accepting Haas-Wilson's 80% threshold, her artificially circumscribed geographic market definition is unsupportable. Thus, maps showing the 75% service market for each of the Saltzer primary care clinics in Nampa demonstrate that the relevant area for analysis extends to Caldwell and well beyond. Declaration of David A. Argue, Exs. 2B1-4. The same is true of maps for St. Luke's Nampa-based primary care clinics. *Id.*, Exs. 3B2 & 3B3. Meanwhile, the area from which Saltzer's primary care clinic in Caldwell draws 75% of its patients includes Nampa – as does that of Saltzer's and St. Luke's primary care clinics in Ada County. *Id.*, Exs. 2B4, 2B2, 3B4-9. The overlap of these service areas, even at the inappropriately low level of tolerance utilized by Dr. Haas-Wilson, demonstrates that she has mis-defined the relevant geographic market for primary care services.

To shore up Dr. Haas-Wilson's defective analysis, plaintiffs cite a number of declarations, mainly from employees of Saint Al's, who opine that patients and commercial health plans do not perceive providers outside of Nampa as viable alternatives for primary care services. Br. at 7. The bases for these opinions, when those bases are even articulated, reflect the declarant's generalized "sense" of the market. However, self-serving testimony from plaintiffs cannot refute data showing that substantial numbers of patients who reside in Nampa travel outside of the area for primary care services. *Sutter Health*, 130 F. Supp. 2d at 1120

(finding observations of market participants "insufficient" to support alleged geographic market definition in light of data showing actual patient draw areas); *cf. Freeman*, 69 F.3d at 270 (holding that in the absence of data indicating geographic market, district court was justified in refusing to credit market participant testimony).

In sum, plaintiffs have alleged a geographic market that fails to include areas to which patients in Nampa actually travel for primary care services. Moreover, that market fails to include the areas to which patients would travel to avoid anticompetitive increases in price or decreases in quality. Accordingly, the notion of a geographic market for primary care services limited to Nampa fails as a matter of law. *See Tenet*, 186 F.3d at 1051; *Freeman*, 69 F.3d at 268.

(ii) Anticompetitive Effects Are Unlikely In Any Properly Defined Geographic Market

On their motion for preliminary injunction, plaintiffs should be bound by the defective geographic market definition alleged in their complaint. *ITT v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 934 (9th Cir. 1975) (defective alleged market was binding on plaintiffs); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1481 n.19 (10th Cir. 1995) (same). But even if plaintiffs are permitted to jettison their alleged geographic market, they have no likelihood of success of proving anticompetitive effects in any properly defined geographic market for primary care services. With respect to primary care services, Dr. Argue concludes that the proper geographic market must include at least Canyon County and western Ada County. Argue Decl. ¶ 47. In this geographic area, the Saltzer transaction will leave St. Luke's with a less than 28% share of the market. *Id.* ¶ 61. That low post-affiliation share dooms plaintiffs' horizontal claim. *See Pilch*, 2000 WL 33223382, at *7 (finding post-merger share of 30% insufficient as a matter of law to establish market power).

Application of the federal antitrust agencies' analytical framework compels the same conclusion. DOJ & FTC, *Horizontal Merger Guidelines* (Aug. 19, 2010). For the reasons explained by Dr. Argue, Decl. ¶ 24, the agencies' HHI analysis significantly overstates the competitive significance of a transaction like the one at issue here. Nonetheless, the Saltzer transaction would result in a primary care market with an HHI of 1399 points, *id.*, Ex. 12, which qualifies as an "unconcentrated market" under the *Merger Guidelines*. *Id.* at 19. "Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis." *Id.*

Moreover, St. Luke's is constrained in raising prices for primary care services above the competitive level because it would lose more than patients who would shift away from the St. Luke's primary care physicians. Rather, under plaintiffs' own theory, St. Luke's would also lose the revenue stream generated by referrals of these patients to a St. Luke's hospital or specialty physician. Interestingly, this point was recently made by plaintiffs' lead counsel, Mr. Ettinger, in an article in which he was not speaking as an advocate:

> Where a hospital employs physicians, and then acquires groups of competing physicians, of course, the traditional horizontal antitrust concerns apply. But the hospital's incentives to charge supracompetitive prices for the physicians' services post-merger may be reduced as compared to a transaction that involves only physicians. That is because physicians and hospital services are complementary goods. If supracompetitive prices are charged for physicians, that will reduce the demand for both physician and hospital services.

See David A. Ettinger, *Unique Issues in Physician Mergers, Acquisitions, and ACO Participation* 11 (AHLA Member Briefing Nov. 2011) (hereafter, *Ettinger*) (attached as Ex. 1 to Declaration of J. Walter Sinclair). This telling observation of plaintiffs' counsel is, even more tellingly, ignored by plaintiffs' expert.

It is not St. Luke's responsibility to assess the proper scope of a geographic market when plaintiffs rely on a geographic market definition that is inconsistent with their own data. However, to the extent that the Court looks beyond plaintiffs' defective market definition, the evidence shows that plaintiffs have no likelihood of success, and certainly not a likelihood sufficient to justify a preliminary injunction, in any plausible geographic market.

(iii) The Threat Of New Entry Would Deter Any Attempt To Exercise Market Power

As Dr. Haas-Wilson acknowledges, even if the Saltzer transaction would result in St. Luke's having a high percentage of physicians in a properly defined market, that fact poses no threat to competition if sufficient numbers of new providers would enter the market in a timely manner in response to an attempt by St. Luke's to raise prices above competitive levels. Haas-Wilson Decl. ¶ 125. She maintains, however, that such entry is unlikely for three reasons: (1) it has taken Saint Al's a year or more to recruit a new physician to Nampa; (2) new physicians require a period of years to increase their productivity and become profitable to Saint Al's; and (3) Saint Al's could not recruit large numbers of physicians to replace the Saltzer providers who joined St. Luke's.

None of these arguments will withstand scrutiny. Preliminarily, Dr. Haas-Wilson overlooks several important facts about the Nampa and Canyon County area that make entry particularly likely. The population in this area is growing rapidly, meaning that new patients without loyalty to any existing physician will be available to new entrants. Argue Decl. ¶ 69. Thus, patients will likely be available to new entrants in these specialties. *Id.*¶ 69. Moreover, primary care physicians in Boise and Meridian would have incentives to open practices in Nampa if St. Luke's were to act anti-competitively. Argue Decl. ¶ 69.

Turning to the specific arguments raised by plaintiffs, a threat of new entry into a market within a year or two of the onset of anticompetitive conduct is generally considered a sufficient deterrent to existing providers contemplating such actions. Argue Decl. ¶ 17 n.19. Thus, even under plaintiffs' view, entry would be timely. Moreover, Dr. Haas-Wilson's implied assertion that Saint Al's will not be able to recruit adequate numbers of physicians into the market because those physicians will require "ramp up" time to become economically self-supporting fails to account for an additional benefit that would accrue to Saint Al's from recruiting new primary care physicians -- namely, additional referrals to the hospital.

This is a second point that has been made by plaintiffs' counsel, but ignored by plaintiffs' expert. Specifically, Mr. Ettinger recently wrote as follows:

> Hospitals would have a strong incentive to engage in such entry [by recruiting new physicians] if a merger in a specialty resulted in the exercise of market power. Because the hospitals provide complementary services (and depend upon physician referrals), the prospect of diversion of patients away from the hospital's medical staff in response to physician efforts to exercise market power can provide a powerful reason for the hospital to address the issue by sponsoring entry through recruitment.

Ettinger, at 14. By this observation, plaintiffs' counsel recognizes that Saint Al's incentive to recruit new primary care physicians to the Nampa market would be especially powerful, since Saint Al's claims that it will "foreclose" all of the referrals from the market's dominant primary care practice. Compl. ¶ 92. In this connection, it is noteworthy that Saint Al's just hired away from Saltzer several surgeons who, according to plaintiffs, will need to replace all of the referrals they typically receive from the remaining Saltzer physicians. *Id.* ¶ 93.

Finally, the argument that plaintiffs will be unable to recruit large numbers of primary care physicians that they claim they will lose access to in the Saltzer transaction is equally unpersuasive. As Dr. Argue explains, to deter and counteract anticompetitive conduct, the

number of new entrants into Nampa need only be sufficiently large, combined with existing non-St. Luke's physicians, for commercial payers to credibly threaten to steer a significant number of patients away from St. Luke's. *Id.* ¶ 69. Whatever the requisite number is, it is substantially less than the sum total of all Saltzer physicians. *Id.*

Thus, even if plaintiffs could show that St. Luke's stands to gain a high market share in a relevant geographic market, they have failed to show that new entry or the threat of new entry would be inadequate to deter or counteract any anticompetitive conduct.

c. Any Increase In The Price Of Specific Services Following The Saltzer Transaction Would Be The Result Of Reimbursement Policy – Not Market Power – And Would, In Any Event, Be Offset By Utilization Reductions

Plaintiffs contend that the difference between St. Luke's prices for certain services in the Magic Valley and those of independent providers is evidence that St. Luke's has engaged in anticompetitive conduct and will engage in such conduct again after the Saltzer transaction. Compl. ¶¶ 36-40. Significantly, however, the pricing differential to which plaintiffs refer has nothing to do with market power. Argue Decl. ¶ 79. Rather, when a previously independent clinic becomes part of a hospital, some services are reimbursed at a higher rate by payers. Kee Decl. ¶ 53. This phenomenon is referred to as "provider-basing." *Id.*

The increased payments when services formerly provided in a medical office or clinic become provider-based reflect the higher costs incurred by a hospital. For example, a hospital department is required to provide translation services to non-English-speaking patients, to comply with accreditation standards ensuring quality and safety of services, and, to treat patients regardless of their ability to pay. *Id.* ¶¶ 54-55. Not only does this transformation mean that hospital-based services are different in kind from those offered by independent physician clinics,

but it also means that provider-basing will help keep uninsured patients out of the emergency room – where care is more expensive and harder to clinically integrate. *Id.* ¶ 56.

While converting physician clinics to hospital departments may, as a result of provider-basing, increase the fee for specific services, two important points must be noted. First, although the price of a specific service may increase, the total payments for that service are likely to decrease as unnecessary services are eliminated and utilization is controlled. *Id.* ¶ 57; Argue Decl. ¶ 80. For example, a physician clinic that charges $100 for a scan but orders two scans when only one is needed will end up costing patients and payers more than a hospital that charges $150 but orders only one scan. Kee Decl. ¶ 58. The experience with clinics previously acquired by St. Luke's bears out this conclusion. *See* p. 12, *supra*.

Second, and importantly for this antitrust case, any increase in reimbursement from provider-basing is not the result of increased market share or anticompetitive conduct. Reimbursement increases attributable to provider-basing will occur whether the provider has a 1% market share or a 100% market share. The increase reflects payment policy – not antitrust violations. It does not implicate the antitrust laws when prices increase based on reimbursement policy.

2. Plaintiffs' Claim Of Anticompetitive Effects By Virtue Of Referral Foreclosures Will Not Withstand Analysis.

Plaintiffs' second claim is that St. Luke's will harm competition in the provision of hospital services by steering referrals from Saltzer physicians to St. Luke's and away from the Nampa hospital operated by Saint Al's and from TVH. Compl. ¶ 91-99. As Dr. Argue explains, for this theory of "vertical" foreclosure to make any sense, the competing hospitals must stand to lose so many referrals that they are eliminated as competitors in the market or be so substantially

diminished in the competitive capacity as to remove whatever competitive constraint they imposed on St. Luke's. Argue Decl. ¶ 108.

Plaintiffs cannot make this necessary showing for two independent reasons. First, they cite no credible evidence, beyond misinterpretation of their own data, to show that they stand to lose *any* referrals as a result of the Saltzer transaction, while the sworn declarations of Saltzer physicians prove that no such effect will occur. Second, even if these two hospitals were to lose some referrals, they would not go out of business. But even if they did, their departure from the market would not suppress competition.

a. There Is No Credible Evidence That Plaintiffs Will Lose Significant Referrals By Virtue Of The Saltzer Transaction

Plaintiffs contend that they can prove what Saltzer physicians will do following the transaction by purporting to show that other physicians who have joined St. Luke's have stopped admitting patients at, or referring patients to, their hospitals. Compl. ¶ 94. It is important to note, however that, unlike Saint Al's, St. Luke's has no policy dictating where its aligned physicians must or should refer or admit their patients. Kee Decl. ¶ 13; *see also* Crownson Decl. ¶¶ 3, 4, 8; Declaration of James Souza, M.D. ("Souza Decl.") ¶ 10.[4] In fact, as the sworn statements of the Saltzer physicians attest, St. Luke's has expressly assured the Saltzer physicians that they are free to make decisions on patient admissions and referrals based on the best interests of their patients and should continue to support Saint Al's – Nampa. Savage Decl. ¶ 20; Kaiser Decl. ¶¶ 3-4, 13; Page Decl. ¶¶ 11-12; Aguilar Decl. ¶¶ 6-7; Kunz Decl. ¶¶ 12-13; Freeman Decl. ¶ 6; Davidson Decl. ¶ 3; Dee Decl. ¶¶ 5-7; Rasmus Decl. ¶¶ 8-9; Patterson Decl. ¶¶ 8-10. As these statements reflect, that is precisely what the Saltzer physicians intend to do.

[4] Similarly, St. Luke's – unlike Saint Al's – does not restrict which hospitals its physicians may maintain privileges in or where its physicians may take call. *See* Declaration of Darby Webb, M.D. ("Webb Decl.") ¶ 3. Nor does St. Luke's – again, unlike Saint Al's – require its physicians to agree not to compete when their relationship ends. *See* Crownson Decl. ¶ 7.

Contrary to this evidence, Dr. Haas-Wilson maintains that she can predict what the Saltzer physicians will do based on an analysis that purports to show that, post-affiliation, other physicians dramatically shifted admissions and referrals away from Saint Al's. Haas-Wilson Decl. ¶ 110-20. Of these examples, the only one related to Canyon County concerns a supposed fall off in admissions to Saint Al's – Nampa by certain physicians who quit and joined St. Luke's Family Medicine in Nampa in 2011. *Id.* ¶ 118-20. But even a cursory review of the underlying data belies Haas-Wilson's claim.

As Dr. Argue shows, the admissions patterns of the physicians who left to join St. Luke's are substantially identical to those of the physicians who remained with Saint Al's. Argue Decl. ¶ 100. Both sets of physicians show a drop off in referrals over the same time period. *Id.* ¶ 101. The explanation of the purported drop-off in referrals is quite straightforward: hospitalists began making most of the admissions at Saint Al's-Nampa. Crownson Decl. ¶ 4. While working as a hospitalist, a physician sees only hospitalized patients and admits patients who are referred to the hospital by other physicians. *Id.* In this case, the actual referring physician sent the patient to a hospitalist at Saint Al's – who appeared as the admitting physician even though the referral may well have come from a physician affiliated with St. Luke's. *Id.* Thus, the data relied upon by Dr. Haas-Wilson are meaningless for the purpose for which she uses it.

Indeed, one of the striking examples that Haas-Wilson cites is the apparent precipitous decline in referrals by two physicians who joined St. Luke's – both of whom had, while employed by Saint Al's, served as hospitalists admitting patients referred by other physicians to the Nampa hospital. *Id.* ¶ 4-6. Not surprisingly, when they left the employment of Saint Al's, and therefore stopped serving as hospitalists in Saint Al's, the data show a steep decline in their admissions. In fact, these two physicians continue to make substantial referrals to Saint Al's –

Nampa. *Id.* ¶ 8. They no longer appear in the data, however, because the current hospitalists make those admissions.

Similar flaws riddle Haas-Wilson's alleged evidence of other steep reductions in referrals or admissions by physicians whose practices have been acquired by St. Luke's. For example, Haas-Wilson finds evidence of steep declines in admissions by the physicians of Mountain View Medical following their affiliation with St. Luke's. Haas-Wilson Decl. ¶ 116. Apart from the fact that Haas-Wilson attempts to blame affiliation with St. Luke's for changes in admissions that occurred fully three years later, Dr. Argue shows that her conclusion is a function of her tendentious selection of the time periods she uses for her analysis. *Id.* ¶ 99.

In other cases, Saint Al's has been the cause of the decline in admissions Haas-Wilson cites as evidence of St. Luke's steering practices. *See* Webb Decl. ¶ 4; Souza Decl. ¶¶ 8-9. For example, when one of only three physicians in Treasure Valley who are fellowship trained in trauma medicine joined St. Luke's, Saint Al's immediately removed the physician from its trauma call schedule. Webb Decl. ¶ 4. When the physician explained that she desired to continue taking trauma call at Saint Al's and that St. Luke's supported her in doing so, Saint Al's refused. *Id.* ¶ 5. Surely, having tossed the trauma specialist off its call schedule, Saint Al's should not be allowed to profit from the inevitable decline in her admissions there for purposes of showing that St. Luke's steers patients.

b. Even If There Were A Fall Off Of Referrals To Saint Al's-Nampa And TVH, Competition Would Not Be Affected

Initially, it is implausible to suggest that a drop-off in referrals from Saltzer physicians would trigger the demise of Saint Al's-Nampa or TVH. If it were to have this effect, why would five knowledgeable orthopedic surgeons who were with Saltzer decide to affiliate with Saint Al's and presumably maintain their investments in TVH? In any event, Saint Al's-Nampa is in a very

strong financial position – supported by Saint Al's parent corporation. Argue Decl. ¶ 103-04. And TVH is very profitable and has a continuing source of referrals from the physicians who own that hospital. *Id.* ¶ 105.

But even if Saint Al's-Nampa or TVH were somehow (contrary to all realistic assumptions) removed as competitors, it is difficult to see how competition in the market for hospital services in the Ada-Canyon County market would be suppressed. St. Luke's does not have a full-service hospital in Nampa that could fulfill payers' needs for a hospital in that part of Canyon County. If having a facility in Nampa is necessary for a health plan to assemble a marketable hospital network – as the plaintiffs imply – then St. Luke's is not able to fulfill that demand today and would not be able to fulfill that demand if Saint Al's – Nampa closed tomorrow as a result of the alleged foreclosure. *Id.* ¶ 87. Although the loss of Saint Al's – Nampa might hurt Saint Al's, it would not bestow market power on St. Luke's. *Id.* ¶¶ 87-93.

Competition could also be harmed under plaintiffs' theory if the loss of Saint Al's – Nampa and TVH enabled St. Luke's to gain market power in the provision of hospital services throughout the entire two-county market. *Id.* ¶ 88. For that to be true, these facilities must be critical constraints on both St. Luke's Regional Medical Center and St. Luke's Meridian Medical Center. *Id.* But this second variant of plaintiffs' theory is equally implausible, as it ignores the reality that Saint Al's main hospital is located within a few miles of both of the St. Luke's hospitals. *Id.* Much of Boise is equally close to Saint Al's Regional Medical Center and to at least one of St. Luke's hospitals. *Id.* Canyon County residents live closer to Saint Al's Regional Medical Center than to St. Luke's Regional Medical Center and are only a few miles more distant than to St. Luke's Meridian Medical Center. *Id.* Payers could reasonably rely on Saint

Al's Regional Medical Center to serve their enrollees in Ada County as well as those who travel from Canyon County to Ada County for hospital services. *Id.*

To the extent that these theories relate to TVH, they dramatically overstate that hospital's overall significance in the market. As Dr. Argue shows, in every zip code except one from which TVH received more than one inpatient, Saint Al's Regional Medical Center received many times more patients. *Id.* ¶ 93. In the Boise zip code in which TVH is located, for example, Saint Al's Regional Medical Center received 821 patients compared to 6 for TVH. *Id.* Even in orthopedics, one of TVH's specialty services, Saint Al's Regional Medical Center had more than 100 times as many Medicare cases as TVH. *Id.* The number of outpatient procedures provided by Saint Al's Regional Medical Center also greatly exceeds the number provided at TVH. *Id.* It is clear that as long as Saint Al's Regional Medical Center is available to payers, TVH is not essential to maintaining a competitive market. *Id.*

II. PLAINTIFFS HAVE FAILED TO ESTABLISH ANY LIKELIHOOD OF IRREPARABLE HARM.

As shown in Part I, plaintiffs have not demonstrated any likelihood that they will succeed on the merits. Consequently, this Court need not even consider the remaining factors. *See Doe v. Reed*, 586 F.3d 671, 681 n.10 (9th Cir. 2009). In any event, however, plaintiffs have failed to establish that they will suffer irreparable harm if the Court denies a preliminary injunction.

"Regardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm." *Am. Passage Media Corp. v. Cass Comms., Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). Indeed, plaintiffs must show that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Significantly, "a mere possibility of irreparable harm is not sufficient." *Earth Island*, 626 F.3d at 474; *see also Winter*, 555 U.S. at 22 ("[A] preliminary injunction will not be issued simply to prevent the possibility of

some remote future injury."). The required showing is substantial because irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." Wright & Miller, *Fed. Prac. & Proc.* § 2948.1. "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, … a preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief." *Id.*

Plaintiffs have not shown, and cannot show, irreparable harm from denial of a preliminary injunction. First, the transaction has been specifically structured so that it can be unwound if necessary. Second, there is no likelihood that any irreparable harm will occur before this Court can hear this case on the merits. To the contrary, the evidence establishes that Saltzer will be slowly integrated into St. Luke's over time. Thus, to the extent that plaintiffs will experience any harmful effects from the merger – which, as shown above, they will not – any such effects are unlikely to be felt in the brief period before this Court can hear the full merits of plaintiffs' claim, and, in any event, will be remediable in damages. Moreover, plaintiffs' own delay in seeking a preliminary injunction is itself sufficient grounds to deny preliminary relief.

A. Because The Transaction Can Be Unwound If Necessary And Because The Integration Will Occur Gradually, Any Harm Would Not Be Irreparable.

1. The Saltzer Transaction Can Be Unwound If Necessary.

Plaintiffs contend that their alleged harms from the Saltzer transaction are irreparable because "[i]f preliminary relief is not awarded and the acquisition is subsequently found to be unlawful, it *may be* exceedingly difficult to 'undo' the unlawful combination at the end of the case." Br. at 24 (emphasis added). Plaintiffs' use of the term "may be" is no accident: They cite no evidence in support of the claim that the transaction cannot be undone.

Any such claim would be wrong: St. Luke's and Saltzer carefully and deliberately structured their agreement so that the transaction could be unwound if necessary. Kee Decl. ¶ 18. Saltzer will continue to exist as a separate entity. Savage Decl. ¶ 7. The Professional Services Agreement between Saltzer and St. Luke's will be in effect for a five-year term with automatic renewal for successive three-year terms unless terminated in advance. Kee Decl. ¶ 17. Because the Agreement expressly provides for the possibility of termination, it also provides a specific process for unwinding the transaction. *Id.* ¶ 18. The focus of the unwinding process is to ensure that Saltzer physicians have continued access to the personnel, facilities, medical records, and other resources that it would need in order to provide uninterrupted care to patients if the transaction needed to be unwound. *Id.* Thus, if the courts were to order divestiture upon the conclusion of this case, then the transaction could be unwound at that time. Saltzer could return to its pre-merger status as an independent clinic.

2. The Integration Of Saltzer And St. Luke's Will Occur Gradually.

Apart from their unfounded assumption that the deal cannot be unwound, plaintiffs have offered no evidence of any harm that would arise between now and this Court's judgment on the merits that could not be remedied down the road. Indeed, all evidence is to the contrary. The integration of Saltzer into St. Luke's will be a long-term process, not a precipitous one. The effects of the transaction on the broader marketplace – which, in any event, will be fundamentally procompetitive, *see* Part I, *supra* – will accrue slowly.

St. Luke's does not intend to close any Saltzer facility, undertake any substantial personnel changes, dispose of any major equipment, or eliminate or change any lines of service that Saltzer currently provides. Kee Decl. ¶ 62. Although St. Luke's will purchase Saltzer's furniture, fixtures, and equipment, the agreement entitles Saltzer to repurchase all of these assets at fair market value should the agreement need to be unwound. *Id.* ¶ 64. Thus, Saltzer will be

able to transition back to independent practice in the event that its relationship with St. Luke's expires or is terminated.

The most significant integration steps will not be implemented for at least a year following the transition. *Id.* ¶ 72. Saltzer's current organizational structure and key personnel – including department directors, administrators, the chief nursing officer, and other similar positions – will remain unchanged for at least a year. *Id.* ¶ 63. Similarly, Saltzer will not be converted to St. Luke's email and telephone systems – nor will Saltzer's coding, billing, accounts receivable, and medical records systems be integrated into St. Luke's – for more than a year after the transaction. *Id.* ¶ 72. Although Saltzer patients may receive bills bearing St. Luke's name at an earlier date, these will be issued out of Saltzer's existing systems. *Id.* And, with limited exceptions, St. Luke's does not anticipate converting Saltzer to St. Luke's EPIC medical records system for more than a year after transition. *Id.*

The few changes that can be expected to occur promptly after the transaction becomes effective are reversible and will not harm plaintiffs, much less irreparably. For instance, St. Luke's will apply for new practice identifiers for government and commercial payers. *Id.* ¶ 65. It is St. Luke's intent to offer employment to all Saltzer employees in their current capacity. *Id.* ¶ 62. Those who accept will become St. Luke's employees, eligible for St. Luke's retirement and other benefit plans, as of January 1. *Id.* ¶ 67. St. Luke's will immediately assume responsibility for Saltzer's major accounting functions, such as general ledger, accounts payable, and payroll, but the Saltzer information technology systems currently supporting those functions will remain in place for at least a year after the transition. *Id.* ¶ 68. St. Luke's will also, in the first 30 days after the transaction, integrate certain branding and marketing efforts, such as modifying Saltzer's advertising, public signage, patient information, and educational materials

to reflect Saltzer's relationship with St. Luke's. *Id.* ¶ 69. Finally, St. Luke's will put into place policies, procedures, and practices to ensure that the Saltzer locations meet Joint Commission standards as part of St. Luke's.[5] *Id.* ¶ 70. Each of these changes can be undone if necessary. *Id.* ¶ 18.

3. Plaintiffs Are Unlikely To Experience Any Harm – Much Less Irreparable Harm – Before Their Claims Can Be Tried On The Merits.

Plaintiffs identify certain supposed irreparable harms that they contend would result from the Saltzer transaction. *See* Br. at 24-25 (citing layoffs, department and service reductions, and decreased rate of facility improvements by plaintiffs that would supposedly result from the merger). As shown in Part I, *supra*, no such "harms" are likely to occur as a result of the affiliation because nothing in the Professional Services Agreement or in St. Luke's policy requires any Saltzer physician to alter his or her referral practices. To the extent that Saltzer physicians choose to refer their patients to St. Luke's or to the extent that Saltzer patients request referrals to St. Luke's, that is evidence not of antitrust injury but of competitive success. Moreover, plaintiffs ignore such facts as that even if jobs are lost at plaintiffs by virtue of the competitive process, an equal or greater number of jobs may be created by competitors.

More importantly for present purposes, however, plaintiffs offer *no evidence* that any of these supposed harms would arise *imminently* – *i.e.*, before the parties have an opportunity to present, and this Court has an opportunity to consider, the merits of the case. Plaintiffs cite not a single fact that tends to show there will be an immediate, adverse effect on them from the Saltzer transaction. To the contrary, as shown above, very little of substance will change for at least the first full year after the transaction occurs. In particular, Saltzer patients – *i.e.*, plaintiffs' potential

[5] For example, St. Luke's will arrange for language translation services that are required of hospital practices, which will benefit many of Saltzer's patients, as Spanish-speakers make up roughly one quarter of the population of Canyon County. Kee Decl. ¶ 70.

referrals – will undergo little change in their healthcare experience. They will interact with the same Saltzer physicians and staff, and will be referred to specialists or admitted to plaintiffs' or other hospitals, in the same manner as they currently are.[6]

It is not only unlikely, but implausible that Saltzer patients and their referrals will be so severely and immediately affected before trial on the merits that the supposed irreparable harms plaintiffs point to will occur. Indeed, plaintiffs' own declarant Thomas Reinhardt contends that "most patients possess strong loyalties" to their healthcare providers and are unwilling to change from a known provider to a new one. Reinhardt Decl., Dkt. 22-20, ¶ 10. Consequently, there is simply no truth to the assertion that allowing the merger to go through will cause an instant, irreversible realignment of patient care in Nampa, such that plaintiffs will be forced – in the short time before this Court reaches judgment – to terminate "150 or more employees." Br. at 24.

Additionally, although it has no bearing on the potential for harm to plaintiffs, commercial payers are equally unlikely to see any material change in the near future. As is common practice, St. Luke's enters into annual or biannual contracts with major commercial payers. Taylor Decl. ¶ 3. For instance, St. Luke's will sign a contract with Blue Cross as of January 1, 2013, effective for two years. *Id.* Thus, even if the transaction were to have some effect on prices, as plaintiffs contend, commercial payers would experience no change for at least the terms of their current contracts. *Id.* ¶¶ 4-5.

Finally, not even plaintiffs contend that they will be forced out of business before the Court enters judgment. In this connection, it is noteworthy that the Ninth Circuit has held that lesser injury is necessarily remediable: As that court explained in affirming denial of a preliminary injunction in an antitrust claim, "[w]ithout a sufficient showing that [the challenged]

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[6] By contrast it is *entry* of a preliminary injunction that will harm Saltzer's patients—not denial of one. *See* Part III, *infra*.

contracts *threatened [plaintiff's] existence*, any loss in revenue due to an antitrust violation is compensable in damages." *Am. Passage Media*, 750 F.2d at 1473 (emphasis added); *see also Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003) ("Other harms that Tribune Publishing alleges can be easily undone when Tribune Publishing acquires the newspaper. … Because these "harms" can be reversed so easily, we find that they cannot be considered irreparable."). If this Court determines after trial on the merits that the merger is unlawful, it will still have ample "ability to grant an effective remedy," Wright & Miller, *Fed. Prac. & Proc.* § 2948.1 – namely, unwinding of the merger through a divestiture order. Plaintiffs have therefore failed to establish any need for immediate relief at this preliminary stage of the proceedings.

B. Plaintiffs' Delay In Filing Suit Underscores The Absence Of Irreparable Harm.

Quite apart from their failure to show irreparable harm, plaintiffs' actions undercut their own argument. Plaintiffs have been aware since at least early 2012 that Saltzer and St. Luke's intended to merge. Compl. ¶¶ 41, 45, 49, Ex. B. Yet they waited until November 16 to seek a preliminary injunction. Dkt. 1, 22. Numerous courts have held that substantially shorter delays were sufficient to warrant denial of a preliminary injunction. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (denying preliminary injunction where plaintiff waited ten weeks to seek preliminary injunction after being informed of defendant's plans); *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) (denying preliminary injunction where plaintiffs first sought preliminary injunction 6.5 months after they became aware of the alleged violation).

As the Second Circuit explained, "[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in

seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank*, 756 F.2d at 256. To be sure, plaintiffs have indicated that they delayed seeking an injunction based on their hope that governmental authorities would do so. *See* Dkt. 28 at 7. But nothing about the pendency of review by governmental agencies prevented plaintiffs from proceeding with their own action if they felt, as they now claim, a pressing need to do so.

In addition, plaintiffs' delay has prejudiced St. Luke's. The required showing for obtaining a preliminary injunction is high because "judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified." Wright & Miller, *Fed. Prac. & Proc.* § 2947. Here, nearly a year after becoming aware of the Saltzer transaction, plaintiffs filed a lengthy and highly detailed complaint and preliminary injunction motion that evince robust data collection efforts. Dkt. 1, 22. They also filed a 62-page expert report and affidavits from 16 different declarants. Dkt. 22-11–22-26. In contrast to the several months' preparation period that plaintiffs enjoyed, St. Luke's has had *only 18 days*—including the Thanksgiving holiday—in which to prepare a response. In these circumstances, to grant preliminary injunctive relief despite plaintiffs' delay would be contrary to the principles of equity. *See* Wright & Miller, *Fed. Prac. & Proc.* § 2947 (preliminary injunction is to be granted "in conformity with historic federal equity practice").

III. THE BALANCE OF HARMS STRONGLY FAVORS DENYING THE INJUNCTION.

A preliminary injunction should be denied for the further reason that it is likely to cause severe and irreparable harm to Saltzer and its patients – and to St. Luke's – that will substantially outweigh whatever harm, if any, would accrue to plaintiffs while their claims are pending. This Court "must balance the competing claims of injury and must consider the effect on each party of

the granting or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). "The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome." Wright & Miller, *Fed. Prac. & Proc.* § 2948.2. In particular, if granting preliminary injunctive relief is likely to cause more harm than it would forestall, then such relief must be denied. *See Winter*, 555 U.S. at 24 (reversing entry of preliminary injunction in light of "the burden the preliminary injunction would impose"); *Amoco Production*, 480 U.S. at 545; *Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113, 120 (4th Cir. 1993).

Here, if the closing is delayed by an injunction, it is quite likely that Saltzer will not be able to continue as a financially viable group. Savage Decl. ¶¶ 13-15; Rasmus Decl. ¶ 10. Thus, the most probable effect of a preliminary injunction would not be, as plaintiffs assert, merely to delay the transaction. *See* Br. at 27. Instead, granting a preliminary injunction would likely endanger Saltzer's continued existence – and any prospect for a merger, with all of its attendant procompetitive benefits.

At the outset, plaintiffs' assertion that "St. Luke's approached Saltzer" in 2009, "and has been 'courting' Saltzer ever since," Pl. SOF ¶ 11, is simply false. To the contrary, it was Saltzer that first approached St. Luke's about affiliating because Saltzer recognized that it lacked the financial resources to make the investment in technology and infrastructure that it needed to be competitive. Patterson Decl. ¶¶ 2-3; Kunz Decl. ¶¶ 3-4. Saltzer was at that time already struggling to compete against Saint Al's as an independent, unaffiliated practice. Patterson Decl. ¶¶ 2-3; Kunz Decl. ¶ 3. Since then, the situation has grown only bleaker for Saltzer.

Specifically, Saltzer spreads its overhead costs across its practice groups, proportionally allocating the costs by the amount of revenue each group produces. Savage Decl. ¶ 13. Traditionally, its large, high-performing orthopedics practice generated the greatest proportion of revenue for the group. *Id.* ¶¶ 13, 16. The orthopedics practice accordingly covered the largest proportion of Saltzer's overhead expenses. *Id.* ¶ 13. As of late October or early November, however, all five of Saltzer's orthopedic surgeons, one of its two general surgeons, and its only otolaryngologist left the group. *Id.* ¶ 11.

The departure of the surgeons cost Saltzer key group members and a large number of its patients. *Id.* ¶ 13. Equally destabilizing, the loss of these surgeons left Saltzer with $2 million in overhead expenses that the rest of its practices, composed of only a few dozen physicians, must attempt to absorb immediately. *Id.* ¶ 13. Absent the closing of this transaction, Saltzer will have no choice but to defray its $2 million exposure by cutting its physicians' pay by up to an estimated thirty percent and by downsizing the services its physicians offer. *Id.* ¶ 14. Reducing services would also entail decreasing the number of Medicare, Medicaid, and TriCare patients that Saltzer physicians treat. *Id.*

Refuting the proposition that Saltzer physicians are essential to any payer, Saint Al's is likely to remove Saltzer as an available network provider from the insurance plans it offers to its employees. Patterson Decl. ¶ 12; Dee Decl. ¶ 8; Rasmus Decl. ¶ 10. Saltzer's internal medicine, family practice, and pediatric physicians treat a high number of Saint Al's personnel, as well as their spouses and children. Patterson Decl. ¶ 12; Dee Decl. ¶ 8. Thus, if Saint Al's converts Saltzer into an out-of-network provider, individual Saltzer physicians will lose up to fifty insured patients, further reducing the firm's already significantly reduced revenue. Patterson Decl. ¶ 12.

In sum, Saltzer finds itself in a precarious financial situation. Savage Decl. ¶ 14; Patterson Decl. ¶ 6. If unable to affiliate with St. Luke's this year as scheduled and thus gain the benefit of St. Luke's financial stability, it likely will be thrust into a downward spiral as its physicians, faced with below-market earnings that are likely to decline even further and carrying a huge overhead, are forced to seek employment elsewhere. Savage Decl. ¶ 14. The most probable effect is that Saltzer will have to dissolve into small, more atomistic practices. *Id.* Thus, the grant of a preliminary injunction will, in all likelihood, mean the end of Saltzer as a functioning medical group. Savage Decl. ¶¶ 13-15; Patterson Decl. ¶ 6; Rasmus Decl. ¶ 10.

That result would be highly disruptive to Saltzer physicians, staff, and patients – especially patients who are poor and elderly. Significantly, moreover, it would likely cause the loss of well over 300 jobs. Savage Decl. ¶ 15. Importantly for present purposes, the demise of Saltzer would spell the end of the transaction at issue here and the elimination of the procompetitive benefits set forth above.

Plaintiffs, by contrast, face no such risk of imminent harm. *See* Part II, *supra*. Indeed, the contrast between Saltzer and the Saint Al's plaintiffs is striking. Saltzer is a small, independent physician group that, unless permitted to merge with St. Luke's, has no safety net. Saint Al's Nampa and Saint Al's Regional Medical Center are part of the broader Saint Al's Health System, which is in turn part of the nationwide Trinity Health – the second largest non-profit health system in the country. Savage Decl. ¶ 2. Thus, while the Saint Al's plaintiffs enjoy the financial protection that their parent health system can provide in the face of any decrease in revenue, Saltzer is on its own. And the fact is that any real delay in the transaction would cause Saltzer to lose many physicians and services on which its patients depend—to the detriment of those patients, its employees, and the viability of this transaction.

In analogous situations, federal courts have refused to grant a preliminary injunction.[7] For instance, in *Roche Diagnostics Corp. v. Medical Automation Systems, Inc.*, the court found that plaintiff was likely to succeed on the merits and faced the risk of irreparable harm absent a preliminary injunction barring the defendant from closing on the challenged transaction with a third party. 771 F. Supp. 2d 936, 948-49 (S.D. Ind. 2011). Nonetheless, the court denied the injunction on the ground that preventing the transaction would leave the defendant "in limbo with respect to its structure and ownership, . . . unable to provide either its employees or its customers certainty regarding the future of the company and its plans with regard to product development." *Id.* at 950. That possibility constituted a "significant and imminent" harm that outweighed the harms advanced by the plaintiff. *Id.* Similarly, in *Virginia Carolina Tools*, the Fourth Circuit affirmed denial of a preliminary injunction where the plaintiff faced loss of revenue, but the defendant "might be driven to insolvency by a preliminary injunction." 984 F.2d at 120. And in *In re Quest Communications International, Inc. Securities Litigation*, the court denied an injunction that would have caused the defendant's financing structure to collapse. 231 F. Supp. 2d 1066, 1070 (D. Colo. 2002).

As in these cases, a preliminary injunction here would foist upon Saltzer financial instability and uncertainty detrimental to its physicians, its employees, and its patients. Savage Decl. ¶¶ 13-15; Patterson Decl. ¶ 6; Rasmus Decl. ¶ 10. Saltzer's demise would not be

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[7] Significantly, *every case* plaintiffs cite in support of their balance-of-harms argument involves an action brought by the federal government. *See* Br. at 27-28. Those cases are not relevant here, however, because the FTC—unlike the private plaintiffs here—is not required to establish that the balance of harms favors its position. Indeed, one of the cases on which plaintiffs rely makes clear that "[p]rivate equities 'are not proper considerations for granting or withholding injunctive relief" in antitrust cases brought by the government. *F.T.C. v. ProMedica Health System, Inc.*, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011). By contrast, in this private action, the Court "*must* balance the competing claims of injury and *must* consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.*, 480 U.S. at 542 (emphasis added).

reversible. On the other hand, the affiliation with St. Luke's can be undone. *See* Part II, *supra*. The balance of harms, therefore, strongly counsels against a preliminary injunction.

IV. A PRELIMINARY INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.

The public interest is ill-served by restraint of innovation on the basis of abbreviated, preliminary proceedings. *See Miller*, 991 F.2d at 545 (reversing preliminary injunction under which "innovative procedures would have to be abandoned"). In the words of the leading antitrust treatise, "Innovation is risky and expensive enough …, and antitrust should not augment these costs without a clear prospect of social gains." Areeda ¶ 777d. *See also Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983) ("That the dominant firm in any market may through technological innovation expand its market share … is perfectly consistent with the competitive forces that the Sherman Act was intended to foster."); *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 814 & n.15 (C.D. Cal. 2010) (describing innovation as a "procompetitive effect" that "benefit[s] the consumer").

As established in this brief, the Saltzer transaction represents the effort of St. Luke's and Saltzer to bring to the people of Canyon County 21st century medical care based on coordinated care utilizing best medical practices, a unified EMR, and rigorous utilization and quality review. As the Seventh Circuit noted in *Blue Cross and Blue Shield of Wisconsin*, 65 F.3d 1406, the antitrust laws were not enacted to prevent such an effort. To the contrary, federal policy, as reflected in the ACA, strongly supports that effort. And it would be particularly contrary to the public interest to enjoin that effort on the basis of plaintiffs' speculation and conjecture – in the absence of a full-blown factual presentation.

Finally, the stifling of innovation is not the only harm to the public interest that would arise from enjoining the Saltzer transaction. The very viability of Saltzer likely turns on its

ability to obtain the financial support of St. Luke's as quickly as possible. If the transaction is enjoined, Saltzer may well cease to exist, more than 300 staff members may lose their jobs, and the transaction may have been killed. All of these consequences are directly contrary to the public interest.

By contrast, the sole public interest that plaintiffs contend would be furthered by an injunction is to "maintain vibrant competition." Br. at 28. But the injunction is not necessary to protect the plaintiffs' positions as competitors. Nothing in St. Luke's policy requires Saltzer physicians to refer to St. Luke's facilities if the best interests or the preferences of the patient counsel otherwise. To the extent that patients, along with their physicians, determine that they would prefer to obtain medical care from St. Luke's, that "harm" to plaintiffs would be a direct result of the precise sort of "vibrant competition" that the antitrust laws are designed to further. For all these reasons, the public interest strongly favors denial of the injunction.

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

DATED: December 4, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 4, 2012, I filed the foregoing **MEMORANDUM OF ST. LUKE'S HEALTH SYSTEM, LTD IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** 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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