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UNITED STATES DISTRICT COURT

IN 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

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

St. Luke's Response relies on a series of legal and factual errors. Once those are corrected, it is apparent that this transaction will violate the antitrust and cause immediate and irreparable injury to Plaintiffs, their employees, and the Nampa community.

II. RELEVANT GEOGRAPHIC MARKET AND MARKET SHARE

A. Relevant Geographic Market

St. Luke's correctly says the relevant market is "where buyers can turn for alternate sources of supply." *Morgan, Strand v. Radiology Ltd.* 924 F.2d 1484, 1490 (9th Cir. 1991) (quotations omitted). But it misidentifies the buyer as the patient. (Opp. at 19.) The buyer is the health insurance plan. (Init. Brf. at 9, n 6.); s*ee also, FTC v. Butterworth Health Corp.*, 947 F. Supp. 1285, 1299 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (depublished) ("managed care organizations . . . may be viewed as 'consumers'"). Wilson Reply Decl. ¶¶ 17-18.

With that error, St. Luke's argument unravels. If, as St. Luke's contends, primary care physicians from Caldwell or Boise were adequate substitutes for Nampa primary care physicians, then a health plan could offer a successful network containing only primary care physicians from Caldwell or Boise. St. Luke's offers no evidence that any payor has ever done that, and the undisputed evidence is that they could not. *See* Bundgard Decl. ¶ 4; Powell Decl. ¶ 9; Petersen Decl. ¶ 3. Therefore, communities outside of Nampa are not part of the relevant market. *F.T.C. v. ProMedica Health System, Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *5-9 (N.D. Ohio, Mar. 29, 2011) (defining the geographic market as "Lucas County," because, among other things, health plans "would not be able to market health plan networks to Lucas County residents that consist solely of hospitals outside of Lucas County.")

St. Luke's argues that the market must include all areas within which 90% of Nampa patients reside, on the theory that otherwise, financial incentives could cause patients to shift to other providers in this area. But this argument ignores both current case law and the facts about current health care competition. All the cases relied upon by St. Luke's (Opp. Brf. at pp. 19-20) pre-date the recognition that health care is now characterized by "two-stage" competition, in which providers compete to contract with payors for price, and compete for patients based primarily on service, *not* price. *See, e.g., F.T.C. v. OSF Healthcare System*, 852 F.Supp.2d 1069, 1083-85 (N.D. Ill. 2012); *ProMedica*, 2011 WL 1219281, at *5-9; *In the Matter of Evanston Northwestern Healthcare Corp.*, 2007 WL 2286195, *5-7 (F.T.C. Aug. 06, 2007).[1] Wilson Reply Decl. ¶¶14-36.

St. Luke's "90%" cases employ the outdated Elzinga-Hogarty ("E-H") test. *See, e.g., California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001); *Pilch v. French Hosp.*, No. 98-9470, 2000 WL 33223382, at *8 (C.D. Cal. Apr. 28, 2000). But use of the E-H Test has been judged unreliable in hospital mergers. *See Evanston* at *63-66 (F.T.C. Aug. 6, 2007). Since the *Evanston* decision, in which Dr. Elzinga, the author of the test, testified that it is not appropriate for health care, no court has relied on the test in any health care merger.

In the world of managed care competition, the relevant concern is not where the last 10%-20% of the patients served by a provider will go. The health care plan must worry about

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[1] St. Luke's cites to three examples of financial incentives being imposed by employers. But none of them imposed penalties for any use of a Nampa primary care physician, as they would have to permit the argument that patients could be induced to shift outside Nampa and use "outside" physicians as substitutes. Petersen Reply Decl. ¶ 2-9. In fact, both the Boise schools

whether it is meeting the preferences of the 70-80% of Nampa subscribers who want to use a Nampa primary care provider. Wilson Reply Decl. ¶¶19-20, 36. Therefore, a plan cannot substitute out of area providers for Nampa providers in its network, and primary care providers outside of Nampa are not in the market. *Id.*

B. <u>Market Share</u>

Another fatal flaw in St. Luke's analysis arises when market shares are calculated. St. Luke's does not dispute that the market shares are well beyond the levels that create liability if Nampa is a relevant geographic market. However, even if one includes in the market almost all of the alternative locations identified in St. Luke's expert's analysis, i.e. all of Canyon County and Meridian, the properly calculated post acquisition shares and HHIs for adult primary care are still at levels ranging from 40% to 67.5% (market share) and from approximately 2,700 to almost 5,000 (post-acquisition HHI) (with changes in HHI up to 1,900). *See* Wilson Reply Decl., Ex. 4.[2] All of these are levels at which the market is deemed "highly concentrated" and the transaction is "presumed to be likely to enhance market power." Merger Guidelines at p.19.

Even higher shares and concentration ratios apply to pediatrics. Wilson Reply Decl., Ex. 4. Moreover, Dr. Argue's analysis raises reasons for additional competitive concerns about pediatrics. If the pediatric geographic market is defined consistently with Dr. Argue's adult primary care market, then it involves the elimination of competition between St. Luke's and Saltzer pediatricians, and further significant horizontal issues are raised. *Id.*

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program and Idaho Power program referenced by St. Luke's have been terminated by these employers. *Id.*

[2] Dr. Argue's market share calculations reflect multiple errors. They include 26 physicians who are no longer practicing, either at all or in the area (including several who are dead or retired), nine physicians who practice in a different specialty, and 38 physicians who are "trainees" in the Family Medicine Residency program, which educates potential primary care physicians, in part, through treatment of low income individuals. Wilson Reply Decl. ¶¶40-46, Exhibit 2.

There is only one market definition that results in shares that are even arguably too low for antitrust concern; an adult primary care physician geographic market including Boise and Eagle, as well as all of Canyon County and Meridian. Then, the post-merger share is 37% and the post-merger HHI is approximately 2,000 with a change of 541. But even these numbers are in the moderately concentrated market category, where mergers "potentially raise significant competitive concerns." Horizontal Merger Guidelines at p. 19.

Moreover, a definition including Boise is completely unjustified even under St. Luke's outmoded "90%" rule. The undisputed evidence shows that primary care physicians in Nampa receive over 98% of their patients from areas that do not include Eagle or Boise. Moreover, only 6% of the Nampa residents receive primary care from physicians in Eagle or Boise. Wilson Reply Decl., Ex. 1A. To suggest that Boise and Eagle primary care physicians are adequate substitutes, when they have such a trivial impact on Nampa residents, is unsupportable under any antitrust theory. Indeed, St. Luke's own payor witness effectively conceded that Boise primary care physicians are not a substitute when she said that SelectHealth needs primary care physicians "in Canyon County." Richards Decl. ¶ 13. And without including Boise and Eagle, the illegality of this transaction is irrefutable. [3]

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[3] St. Luke's is incorrect in saying that these alternative market definitions cannot support relief simply because they were not listed in Saint Alphonsus' Complaint. The Court is certainly able to determine whether the law is violated even under markets broader than that proposed by Plaintiffs. *See, e.g. United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1271 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.1990); *Southern Pacific Communications Co. v. American Tel. and Tel. Co.*, 556 F.Supp. 825, 878 (D.D.C. 1982) (monopoly power found "under any market definition"). St. Luke's cases are inapplicable. (Opp. Brf. at 22.) In *Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1481 n.19 (10th Cir. 1995), plaintiffs tried to abandon their alleged geographic market and propose a yet narrower market once it became clear their antitrust claims would not succeed. In *ITT v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 934 (9th Cir. 1975), the plaintiff made admissions that excluded certain products from the relevant market and, after a factual analysis, the appeals court found that those products were correctly excluded.

III. ANTITRUST INJURY

In arguing that the horizontal effects of the Saltzer acquisition will not cause Plaintiffs antitrust injury, St. Luke's completely ignores the effect of this transaction on Plaintiffs' ability to compete for managed care business. (Initial Brf. p. 25.) The possession of a dominant market share among primary care physicians in Nampa will allow St. Luke's to demand exclusive or preferred positions in employer and managed care networks. Alternatively, it could defeat efforts by Plaintiffs to obtain such status where they offered a lower price and better quality. That is exactly what it has previously attempted to do, so far unsuccessfully, with Micron. *See* Petersen Decl. ¶ 7-9, Robbins Decl. ¶ 5, 8-10. This will, of course, harm overall competition, customers and the Plaintiffs.[4]

This clearly constitutes antitrust injury. *See e.g., Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, Inc., 753 F.2d 1354, 1357 (6th Cir. 1985) (competitor alleged antitrust injury where the evidence "suggest[ed] that a more predatory and anticompetitive consequence may be threatened" by the merger); *see also Union Carbide Corp. v. Montell N.V.*, 944 F.Supp. 1119, 1148 (S.D.N.Y. 1996).

While higher prices will not harm Plaintiffs, they are nevertheless highly relevant to the injunction test. There is a "strong public interest in the lowest possible prices," *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 505 (8th Cir. 1987); *see also Smith v. Chanel, Inc.*, 402 F.2d 562, 567 (9th Cir. 1968).

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[4] St. Luke's does not dispute substantial evidence of its anticompetitive intent. This includes the fact that St. Luke's threatened two PPO networks to keep them from participating in the Micron program, Robbins Decl. ¶ 5; that St. Luke's demanded what amounted to a 30% increase from Micron in order to add its providers to the network, *id.* at ¶¶ 9-10; that St. Luke's goal in acquiring Saltzer is to "secure the primary care base in Nampa" as well as market share, Robinson Decl. ¶ 6, Powell Decl. ¶ 20; and that St. Luke's personnel have expressed a goal of trying to end their relationship with Blue Cross of Idaho, *id.* at ¶ 24.

IV. VERTICAL ISSUES

A. Foreclosure

St. Luke's efforts to dispute the overwhelming evidence of foreclosure presented by Plaintiffs is most revealing for what it does *not* say. Plaintiffs offer evidence of foreclosure from the consistent pattern of nine different acquisitions by St. Luke's; two examples of losses of referrals by independent physicians and facilities; and two examples of shifting referral patterns after Saint Alphonsus purchased Mercy Medical Center. Wilson Decl. ¶116, Ex. 10-12, (Counsel Aff., Ex. A , Keeler/Checketts Dep. at 62-68), Genna Decl. ¶ 8, Asher Decl. ¶ 4, Doble Decl. ¶ 6. St. Luke's (partially) addresses only 5 of these 13 examples, and those efforts miss the mark. See Wilson Reply Decl. ¶¶ 62-76, Kirk Decl.¶ 2-8.

Moreover, St. Luke's fails to offer any evidence of the *absence* of foreclosure or steering. If physician transactions by St. Luke's do not foreclose competition, St. Luke's ought to be able to provide quantitative evidence of physician groups who, after the acquisition, continued to admit patients at Saint Alphonsus, TVH and St. Luke's at substantially the same rate. St. Luke's has not come forward with a single such example.

St. Luke's conclusory denials harm its case more than they help it. St. Luke's says it will send patients elsewhere when (and, implicitly, *only* when) that "course is medically indicated, requested by the patient, or required by insurance considerations." Response at pp. 2-3. However, since St. Luke's offers a full range of health care services, virtually no patients must be sent elsewhere because of medical need. Petersen Reply Decl. ¶ 23. The health care literature makes clear that patients tend to follow the hospitalization decisions of their doctors, Wilson Decl. at ¶ 37, and St. Luke's doctors have been very active in aggressively articulating their preferences. Burgess Decl. ¶ 4. Finally, "insurance considerations" virtually never preclude the use of St. Luke's. Petersen Reply Decl. ¶ 24. See Kirk Decl. ¶ 8 (affected at most 4 of Webb's cases). Souza Decl. ¶ 10 (affects less than 5% of cases).

It is undisputed that St. Luke's physicians described its goal to Saltzer as "control over the patient from beginning to end" in a system in which patients utilize only St. Luke's physicians and facilities. Robinson Decl. ¶ 8. Under the circumstances, St. Luke's claim that this transaction will not foreclose competition rings completely hollow.

Saltzer has already taken steps to switch its surgical referrals away from those doctors who left the group. Those surgeons have received almost no surgical referrals from Saltzer physicians since they left. Curran Decl. ¶ 5, Williams Decl. ¶ 14, Holley Decl. ¶ 9, Robinson Decl. ¶ 2, 12. St. Luke's has installed its own employed surgeons in Saltzer's office, effectively "jumping the gun" on this transaction. Curran Decl. ¶ 5. Further foreclosure is inevitable.

B. Competitive Impact

St. Luke's response regarding competitive impact relies on the wrong standard. Dr. Argue says, Decl. ¶ 18, that any foreclosure must render plaintiffs "competitively insignificant" for anticompetitive harm to ensue. The heading in Dr. Argue's declaration before ¶ 21 refers to "Alleged Monopolization of Physician Services Markets." Thus, the standard St. Luke's attempts to apply here is the one applicable to monopolization under Section 2 of the Sherman Act, not the far more lenient standard applicable under Section 7 of the Clayton Act and Section 1 of the Sherman Act. *See e.g. Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 621 (9th Cir. 1990) (defining monopoly power under Section 2 as the "power to *control* prices or *exclude* competition"); Section 7 of the Clayton Act, 15 U.S.C. §18 ("the effect of such acquisition *may to* be substantially *lessen* competition...."). (Emphases added.)

The existence of significant shares which can lead to foreclosure is more than enough for competitive harm, especially if the defendant is already approaching dominance. *See* Plaintiffs' Initial Brf. at 20-22. Here, such dominance is present, there is a pattern of anticompetitive acquisitions, foreclosure is not merely assumed but has been proven, and there is substantial evidence of St. Luke's anticompetitive aims. This goes far beyond what the law requires.

V. ST. LUKE'S HAS NOT REBUTTED THE COMPELLING EVIDENCE OF IRREPARABLE INJURY

Once the pattern of foreclosure from St. Luke's past acquisitions is recognized, there can be no doubt that further foreclosure and irreparable injury will occur. St. Luke's argues only that it will take a long time to "integrate" Saltzer. That may be true of St. Luke's alleged efficiencies, but those actions that threaten to harm competition and plaintiffs will begin on the first day after closing. St. Luke's admits that it will immediately switch Saltzer over to its managed care contracts and charges. Kee Decl. ¶¶ 65, 68. That is highly significant because employers are, throughout the year, making decisions as to what networks they will join. Petersen Reply Decl. ¶ 12. St. Luke's ability to deny Saltzer to other networks can change those decisions at any time.

St. Luke's will also be in a position to switch Saltzer's referrals instantly:

- When Saint Alphonsus bought Mercy Medical Center, the St. Luke's oncologists immediately resigned their privileges. Keeler Decl. ¶ 12.
- When St. Luke's acquired the 9 physician groups studied by Dr. Wilson, after six months, the referrals had already shifted by 90%-100%. Wilson Decl. ¶ 116, Exs. 10-12. In fact, these shifts largely occur within the first quarter. Wilson Reply Decl. ¶ 77, Ex. 8.
- The Saltzer surgeons have already been foreclosed. *See* discussion *supra*.

The irreparable injury here will be immediate and substantial.

VI. THE BALANCE OF HARMS FAVORS AN INJUNCTION.

St. Luke's offers a series of arguments as to why the balance of harm militates against an injunction here. None survive legal or factual scrutiny.

A. Efficiencies

St. Luke's ignores the law applicable to its efficiencies defense, perhaps because the courts have already rejected it. *See OSF Healthcare Sys.*, 852 F. Supp. 2d at 1094-195 (rejecting merging parties' claims "of improving patient quality of care" because the parties could not show "that these goals would be realized with, and only with, the proposed merger). "[S]avings achieved by an ACO can be shared via contractual relationships, joint ventures, and other methods besides mergers, joinders, or acquisitions." *Promedica* , 2011 WL 1219281 at *41. Indeed, "[n]o court in a 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger." *Id.* at *57.

Most importantly, St. Luke's alleged efficiencies are not a defense because they do not require the acquisition of physician practices (much less anticompetitive acquisitions) in order to be achieved. The same benefits are being accomplished throughout the United States (including by Saint Alphonsus) without primary reliance on employed or acquired physicians.

As a result, none of St. Luke's purported efficiencies are "merger-specific," as the law requires. *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001). "A 'cognizable' efficiency claim must represent a type of cost saving that could not be achieved without the merger...." *U.S. v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.C. Cir. 2011). Furthermore, "defendants must establish by clear and convincing evidence that the efficiencies provided by the merger produce a significant economic benefit to consumers, even in light of the possible anticompetitive effects of the merger." *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278, 1289 (7th Cir. 1990).

There are a host of examples of the efficiencies claimed by St. Luke's occurring without acquisition of physician practices. For example, the FTC's and DOJ's "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program" states that it only "applies to collaborations among otherwise *independent* providers and provider groups" and "does *not* apply to mergers" or "single, fully integrated entities." (Counsel Aff., Ex. B, p. 3.) (emphases added).[5]

It is apparent from St. Luke's own statements that it does not believe that physician acquisitions are necessary to achieve the efficiencies it seeks. Randy Billings, St. Luke's Health System Vice President of Payor and Provider Relations, has pointed out on St. Luke's website that "a clinically integrated network is *not necessarily* a network of providers under common financial ownership. . . Clinical integration with *independent* providers is clearly the essential building block of accountable care." (Counsel Aff., Ex. C, St. Luke's website) (emphasis added). John Kee explains in his declaration that a stated goal of St. Luke's network in the Magic Valley is "to clinically integrate the *independent* provider community . . ." Kee Decl. ¶ 6. Patricia Richards of SelectHealth, explains that the BrightPath network provides "good access" for SelectHealth. But Saltzer is already in that network, as are other independent groups such as Primary Health. (Counsel Aff., Ex. D, BrightPath website).

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[5] *See also* "Will the Affordable Care Act Stand? Assessing the Constitutional and Competitive Concerns Raised by Healthcare Reform," J. Thomas, Rosch, Commissioner, Federal Trade Commission (March 22, 2012) ("ACOs may be formed from a variety of entities, including networks of individual practices, partnerships, hospitals, and other health care professionals.") (Counsel Aff, Ex. E).

Saint Alphonsus is obtaining the same kinds of efficiencies that St. Luke's claims, but with the help of independent physicians. Polk Decl. ¶ 2-10; Keeler Reply Decl. ¶¶ 2-8, Petersen Reply Decl. ¶ 15-21, Writer Decl. ¶¶ 2-8. These advances have occurred in programs around the country where hospitals work with independent physicians. Eggbeer Reply Decl. ¶ 3-8.

The benefits from a Saltzer transaction are especially unlikely. It is undisputed that Saltzer already "operates very efficiently, has a lean staff and a very effective billing office," Powell Decl. ¶ 25, and that St. Luke's lead consultant said that St. Luke's was having difficulty in justifying a high enough payment rate for Saltzer because there were so few efficiencies to be obtained from a Saltzer transaction. (Counsel Aff., Ex. F, Powell Dep. at 44-46.) Moreover, Saltzer has had an advanced, robust EMR system in place for years. Williams Decl. ¶ 4; Holley Decl. ¶ 10.

What St. Luke's calls innovation is simply the same thing widely being performed by others, but (unlike them) in an anticompetitive manner. It does not provide the slightest reason to allow this transaction to go forward.[6]

B. <u>Saltzer's Financial Condition</u>

St. Luke's argues that because its surgeons have left Saltzer, the group is now in a weakened position, and will have difficulty competing if it is not acquired by St. Luke's. But the harm St. Luke's claims is indisputably due to its *own* actions in driving away the Saltzer surgeons by demanding that they give up their relationship with Treasure Valley Hospital or

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[6] The other efficiencies arguments are equally irrelevant. Several declarations claim that Saltzer will benefit from access to St. Luke's specialists. Of course, there is absolutely nothing to prevent Saltzer physicians from referring to St. Luke's specialists today. In addition, St. Luke's claims that even if it charges higher prices or demands higher reimbursement rates, that will be offset by lower utilization. But this ignores the fact that lower utilization can be, and is being, achieved by a variety of providers without the need to acquire the physician groups who participate. Petersen Reply Decl. ¶ 15-21.

accept less compensation. Robinson Decl. ¶ 7, Williams Decl. ¶ 3, 8, Curran Decl. ¶ 2-3, Holley Decl. ¶ 3, Savage Decl. ¶ 13.

Such a "self-inflicted wound" is not cognizable harm. See e.g. *Davis v. Mineta*, 303 F.2d 1104, 1116 (10th. Cir. 2002) (costs incurred because parties "jumped the gun" on challenged actions were "self-inflicted" and therefore irrelevant to consideration of injunctions); *Pappan Enterprises, Inc. v. Hardee's Food Sys, Inc.*, 143 F.3d 800, 806 (3rd Cir. 1998), *Sierra Club v. U.S. Army Corps. of Engineers*, 645 F.3d 978, 996-97 (8th Cir. 2011). [7]

St. Luke's depiction of Saltzer as "struggling to compete" since 2009, Response at p. 40, ignores reality. It is undisputed that Saltzer is the largest independent physician group in Idaho; it is significantly more productive and successful than SAMG; it has been highly profitable until its recent actions with St. Luke's; it receives extremely high ratings from its loyal patients; and patients have demanded that payors add it to their networks. See Powell Decl. ¶¶ 10-12, 14-15, Williams Decl. ¶ 2, Robinson Decl. ¶ 3, Petersen Reply Decl. ¶ 10.

C. <u>There Was No Laches Here</u>

St. Luke's laches argument deserves little attention. St. Luke's complains because Plaintiffs sued on November 12 – 39 days before the day on which St. Luke's wishes to close this transaction. However, Plaintiffs have provided St. Luke's with more than the 30 days that it agreed to provide the government. (Counsel Aff., Ex. G.)

Plaintiffs have proceeded promptly given the information they possessed about this transaction and the status of the government investigations. *See* Jeffcoat Decl. Decl. ¶¶ 2-8.

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[7] Moreover, the problems Saltzer faces are short term and entirely remediable. Like any business that has lost a significant revenue source, it would need to make some adjustments in its cost structure. But there is absolutely no reason why it could not do so. Petersen Reply Decl. 11. No one at Saltzer has provided any evidence to the contrary.

Significantly, St. Luke's laches cases, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) and *Gonannies, Inc. v. Groupair.Com, Inc.*, 464 F. Supp. 603, 609 (N.D. Tex. 2006), involved requests for preliminary injunctive relief months *after* the unlawful conduct had commenced. *See also, State of California v. American Stores Co.*, 697 F. Supp. 1125, 1135 (C.D. Cal. 1988) (It was not "unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval"). Under the circumstances, Plaintiffs cannot be accused of undue delay.

VII. <u>ALTERNATIVE REMEDY</u>

The foregoing amply justifies preliminary injunctive relief. Alternatively, a "hold separate" order could permit the transaction to close while requiring that Saltzer be operated totally separately pending a final decision on the merits.

Such orders have been considered in actions brought by both private parties and the government. *See e.g., Consolidated Gold Fields, PLC v. Anglo American Corp. of South Africa Ltd.*, 713 F. Supp. 1457, 1462 (S.D.N.Y. 1989), *F.T.C. v. PPG Industries, Inc.*, 798 F.2d 1500, 1506 (C.A.D.C. 1986). In *PPG*, the court found that a hold separate order could be appropriate where "significant equities favor the transaction and the less drastic restraint of a hold separate order realistically can be expected (a) to safeguard adequate eventual relief if the merger is ultimately found unlawful, and (b) to check interim anticompetitive harm." *Id.* at 1506. Courts often appoint Hold Separate Trustees to maintain the separation of operations. U*.S. v. WorldCom, Inc.*, No. 100CV02789RWR, 2001 WL 1057902 (D.D.C. Aug. 30, 2001).

A hold separate order here would need to forbid St. Luke's from taking over Saltzer operations or switching Saltzer physicians to its managed care contracts or charge master. It would also prohibit Saltzer and its physicians from changing their referral patterns unless justified because of adverse changes in the medical practice. *See e.g. F.T.C. v. Weyerhauser Co.*, 665 F.2d 1072, 1089 (C.A.D.C. 1981) (hold separate order required that "the [acquired] medium mill may not give [the buyer's] container plants any preference"). Since St. Luke's argues that there will not be any change in Saltzer's referral patterns, it should have no objection. Moreover, given St. Luke's claims about the separation of these entities in the short term, Kee Decl. ¶¶ 62-73, such a remedy should not impose any significant burden on St. Luke's.

Plaintiffs are not advocating a "hold separate" order here. The courts generally prefer preliminary injunctive relief, given concerns about the effectiveness of such orders. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2nd Cir. 1989) ("A preliminary injunction is … the remedy of choice for preventing an unlawful merger"). But it is another option for the Court.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

Dated: December 11, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December, 2012, I electronically filed the foregoing with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System:

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