IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., et al.,

Plaintiffs,

v.

ST. LUKE'S HEALTH SYSTEM, LTD. and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD.,

Defendants.

No. 1:12-cv-00560-BLW
(Lead Case)

PUBLIC

FEDERAL TRADE COMMISSION and STATE OF IDAHO,

Plaintiffs,

v.

ST. LUKE'S HEALTH SYSTEM, LTD. and SALTZER MEDICAL GROUP, P.A.,

Defendants.

No. 1:13-cv-00116-BLW

GOVERNMENT PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

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PRELIMINARY STATEMENT

Defendants want a do-over. In support of their claim that they are likely to succeed on the merits of their appeal, Defendants tell the Court that it should second-guess its own thorough analysis based on an 18-day trial, thousands of pages of testimony, hundreds of exhibits, and more than 1,700 proposed findings of fact and conclusions of law. They tell the Court to disregard the well-established legal framework it followed for analyzing mergers under the Clayton Act and the Idaho Competition Act. They tell the Court that, despite the Court of Appeals' deference to the Court's fact-finding role, it should set aside its well-grounded findings that Nampa is the relevant geographic market, that the Acquisition is highly likely to lead to increased healthcare costs, and that none of the efficiencies touted by Defendants are merger-specific. But they have offered no valid reason for the Court to reject its sound conclusions and findings, or to believe that the Court of Appeals is likely to do so when Defendants present these same arguments on appeal.

The balance of the harms here tips sharply against granting Defendants' motion. If Defendants' violation of federal and state law were to persist, the harm to competition would be both immediate and irreparable. A stay would irreparably harm consumers and employers by permitting the combined entity's exercise of market power in ongoing negotiations with health plans and allowing the continued dramatic shift of Saltzer referrals away from lower cost providers to St. Luke's. Moreover, if St. Luke's retains control of Saltzer, every decision it makes regarding Saltzer's future will be guided by its own self-interest, to the detriment of Saltzer's future autonomy and the public interest in vibrant competition. A divested Saltzer, by contrast, would make its own critical business judgments, such as how best to compete with St. Luke's, with whom it should clinically integrate, whether to invest in state-of-the-art equipment and health IT systems, and which surgeons, PCPs, and staff to retain or recruit. Without that independence, the public loses not only the benefits of competition but also its best chance of having a vibrant Saltzer in the market when the appeal is resolved, likely in Plaintiffs' favor.

Defendants' suggestion that Saltzer cannot be unwound should be rejected. For starters, Defendants should be judicially estopped from claiming that Saltzer will not survive. This claim contradicts their numerous representations to this Court—dating all the way back to the December 2012 preliminary injunction hearing—that the Acquisition could be unwound if the Court so ordered. Moreover, substantial evidence demonstrates that Saltzer will be financially sound, profitable, and competitive if divested, just as it has been every year since at least 1980. Beyond that, Defendants' unsupported assertion that it would be "costly" and "burdensome" to reconstitute the Acquisition if they prevail on appeal lacks any basis. Indeed, if Defendants have a shared commitment to work together to improve healthcare delivery to Canyon County residents, they will always have the opportunity to reinstate the Acquisition by re-signing the same deal documents or renegotiating a few terms in the unlikely event they prevail on appeal.

For all of these reasons, Defendants' motion should be denied.

ARGUMENT

Defendants seek to stay a judgment that enjoins their continuing violation of the Clayton Act and the Idaho Competition Act. To justify such a stay, Defendants bear the burden of demonstrating that: (i) they are likely to succeed on the merits of their appeal; (ii) they will be irreparably injured absent a stay; (iii) issuance of a stay will not "substantially injure other parties interested in the proceeding;" and (iv) the public interest favors a stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotations omitted). In particular, Defendants must meet the "bedrock requirement" of showing "that irreparable harm is probable;" and their motion "must be denied" if they fail to carry that burden. *Leiva-Perez v. Holder*, 640 F.3d 962, 965, 970 (9th Cir. 2011).

Of course, a showing of irreparable harm alone is not enough. *Id.* at 965. Rather, Defendants "must show that irreparable harm is probable *and either*: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor." *Id.* at 970 (emphasis added, internal quotations and brackets omitted).[1] Defendants have failed to meet their burden under any of these formulations.

I. DEFENDANTS ARE HIGHLY UNLIKELY TO SUCCEED ON THE MERITS

Defendants contend that they need only show that this case "presents serious legal questions."[2] Because Defendants cannot demonstrate that the "balance of hardships tips sharply in their favor," however, they must establish "a strong likelihood of success." *Leiva-Perez*, 640 F.3d at 970. But no matter what standard is applied, Defendants cannot meet it.

A. The Court's Decision Is Grounded in Well-Established Law

Defendants advance four alleged errors that they claim will be subject to *de novo* review on appeal. Each of Defendants' arguments is baseless. First, Defendants suggest that the Court followed an incorrect legal framework and, in so doing, "subordinat[ed] . . . improved medical care to market concentration statistics."[3] This argument simply ignores the Court's analysis. Although, as discussed below, the Court applied longstanding precedent to determine that Defendants' market share established a prima facie case of anticompetitive harm, the Court did not stop there. Rather, relying on considerable additional evidence, the Court found that "[i]t is highly likely that St. Luke's will use its bargaining leverage over health plan payers to receive

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[1] Although not explicitly overturned, *Golden Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112 (9th Cir. 2008), cited by Defendants, is questionable authority in light of subsequent Supreme Court case law. *See, e.g.*, *San Francisco Unified School Dist. v. S.W.*, No. C-10-05211-DMR, 2011 WL 577413, at *2 n.3 (N.D. Cal. Feb. 9, 2011).

[2] Dkt. No. 473-1 (Mem. in Support of Defs.' Mot. for Stay Pending Appeal) ("Motion") at 6.

[3] Motion at 6. *But see* Dkt. No. 464 (Findings of Fact and Conclusions of Law) ("FOF" and "COL"), FOF ¶ 80; Trial Tr. 1340:9–1341:1 (David Dranove); TX 1789.

increased reimbursements that the plans will pass on to consumers in the form of higher health care premiums and higher deductibles."[4] That evidence included:

- A 2011 e-mail from Christopher Roth, St. Luke's Regional Medical Center CEO, calling for St. Luke's to use its bargaining leverage to "pressure" payors and increase reimbursements.[5]
- A Saltzer document confirming that the Acquisition will enhance its negotiating leverage, allowing it to regain lost reimbursements by negotiating with the "clout of the entire [St. Luke's] network."[6]
- A 2009 presentation to the Board of Directors discussing a plan to integrate physician practices with the hospital, in which St. Luke's officials wrote that "St. Luke's Treasure Valley recognizes that market share in primary care is a *key success factor, critical to sustaining a strong position relative to payer contracting*."[7]

Defendants fail to acknowledge this substantial, unambiguous evidence showing that the Acquisition is highly likely to lead to anticompetitive effects. And far from "subordinating" Defendants' efficiencies claims, the Court assessed those claims at length and determined, after considerable analysis of the evidence, that Defendants could achieve all of their claimed efficiencies and quality improvements without the unlawful Acquisition.[8]

The cases relied on by Defendants—*Tenet* and *Miller*—do not suggest that the Court erred. In *Tenet*, the court of appeals found that the FTC had failed to establish a prima facie case, so the passages cited by Defendants are, at most, dicta. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053–55 (8th Cir. 1999). More importantly, the Eighth Circuit did not suggest that claims of healthcare benefits trump anticompetitive market conditions; rather, it determined that the district court had failed to take efficiencies into account at all. *Id*. That cannot be said here. *Miller*, which concerned a preliminary injunction under section 10(j) of the National Labor

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[4] FOF ¶ 144. *See also* (Pls.' Corrected Proposed Findings of Fact and Conclusions of Law) ¶¶ 146–331 ("Pls.' FOFs and COLs").
[5] FOF ¶ 112.
[6] FOF ¶ 113; Exhibit 1361.
[7] FOF ¶ 116; Exhibit 1461 (emphasis added).
[8] FOF ¶¶ 85–206.

Relations Act, is inapposite here. Not only was that court considering a statute with no bearing in this case, but it also made no "finding of illegality" as to the merger in question; rather, the alleged violation of law was an unfair labor practice. *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 539, 545 (9th Cir. 1993), *vacated*, 19 F.3d 449 (9th Cir. 1994) (en banc). Here, in contrast, the Court found the Acquisition itself to be unlawful and that any claimed efficiencies could be achieved through other means.

Second, Defendants assert that the Court improperly relied on *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).[9] This does not present a "serious legal question." Quite the contrary, that case remains the law of the land and must be followed. *See In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 642 F.3d 685, 697 (9th Cir. 2011).[10] But even if *Philadelphia National Bank* were not binding, the Court followed a well-settled analytical framework that is consistent with myriad other merger cases. *See, e.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1279 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); *California v. Am. Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989), *rev'd and remanded on other grounds*, 495 U.S. 271 (1990), *on remand reinstated in relevant part*, 930 F.2d 776 (9th Cir. 1991); *Chicago Bridge & Iron Co., N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. CCC Holdings,* 605 F. Supp. 2d 26, 45−46 (D.D.C. 2009).

Third, Defendants claim that the Court erred by placing on them the burden to establish

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[9] Motion at 7. Defendants also cite comments by Commissioner Joshua D. Wright on the role of market share statistics, *id.*, but fail to mention that Commissioner Wright—and all of the other active Commissioners—voted in favor of the FTC's complaint in this case. *See* http://www.ftc.gov/news-events/press-releases/2013/03/ftc-and-idaho-attorney-general-challenge-st-lukes-health-systems. Likewise, Defendants' citations to articles from, among others, members of the defense bar should be disregarded. *See* Motion at 11, 13.

[10] *See also* COL ¶ 77 ("But the Clayton Act is in full force, and it must be enforced. The Act does not give the Court discretion to set it aside to conduct a health care experiment.").

the merger-specificity of the Acquisition's purported efficiencies. Rather than point to merger cases under the Clayton Act for this proposition, Defendants cite purportedly "analogous" case law concerning anticompetitive conduct under the Sherman Act.[11] Defendants excuse this omission by suggesting that this is a "relatively undeveloped" area of law. Nothing could be further from the truth. Indeed, it is hornbook law that, under the Clayton Act, once the plaintiff has established its prima facie case, "the *burden shifts to the defendant* to provide evidence of either 'significant' or 'extraordinary' efficiencies that are both '*merger-specific*' and of the appropriate type." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 976d (3d ed. 2009) (emphasis added); *see also, e.g.*, *FTC v. ProMedica Health Sys.*, No. 3:11 cv 47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011) (merging parties failed to satisfy their "burden of proving that [the] asserted efficiencies are . . . (3) merger-specific"); *United States v. Bazaarvoice*, No. 13-cv-00133-WHO, 2014 WL 203966, at *64 (N.D. Cal. Jan. 8, 2014) (defendant failed to show that merger "will result in cognizable, merger-specific efficiencies"); *Merger Guidelines* § 10. In any event, even if Defendants could show the Court erred, it was harmless.[12] The Court evaluated a substantial record and found the Acquisition was unnecessary to achieve any of the claimed efficiencies.[13]

Fourth, Defendants contend that the Court erred when it imposed the "drastic remedy of divestiture." Again, there is no serious legal question here; the Court merely applied well-established law. Where "the Government has successfully borne the considerable burden of establishing a violation of the law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. duPont de Nemours, Inc.*, 366 U.S. 316, 334 (1961). And divestiture is "the

[11] Motion at 9–10.
[12] COL ¶ 21.
[13] FOF ¶¶ 147–206.

remedy best suited to redress the ills of an anticompetitive merger." *California v. Am. Stores Co.*, 495 U.S. 271, 285 (1990). Contrary to Defendants' arguments, "those who violate the [Clayton] Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *DuPont*, 366 U.S. at 327. And, as discussed below, ample evidence shows that divestiture will not harm Defendants or the public.

B. The Court's Factual Findings Are Well-Grounded and Entitled to Substantial Deference

On appeal, the Court of Appeals' function is "narrow," and it will accept this Court's factual findings unless they are "clearly erroneous." *United States v. Syufy Enters*., 903 F.2d 659, 664−65 (9th Cir. 1990). Importantly, "both market definition and market power are essentially questions of fact." *Oahu Gas Serv. v. Pacific Resources, Inc.*, 838 F.2d 360, 363 (9th Cir. 1988). Defendants' attempt to re-litigate these adjudicated factual issues is highly unlikely to succeed on appeal.

1. The Court Correctly Found That Nampa Is the Relevant Geographic Market

Defendants claim that data on patient travel patterns and Micron's health plan experience demonstrate that the Court erroneously defined the geographic market. But the Court has already weighed that very same evidence—along with other empirical, documentary, and testimonial evidence on this topic—and found that Defendants' claims do not support a broader geographic market.[14] Rather, the Court found that Nampa is the appropriate relevant geographic market because a hypothetical monopolist of all Nampa Adult PCPs would have "the leverage with health plan networks to profitably impose a SSNIP."[15]

Current patient travel patterns do not undermine this conclusion; rather, as the Court

[14] FOF ¶¶ 50–73. *See also* FOF ¶¶ 55–108.
[15] FOF ¶ 71–73; *see also, e.g.*, FOF ¶¶ 61–63, 68; Trial Tr. at 230 (J. Crouch).

found, "[t]hose Nampa residents getting their primary care outside of Nampa 'are getting their physician services near where they work. And this is basically confirming that patients like to get their medical care close to home.'"[16] Defendants' reliance on Micron's health plan experience as evidence of a broader geographic market stands on even shakier ground. Micron patients choosing providers in less preferred tiers face costs that are double or even quadruple the cost of care from providers in the most preferred tier, far in excess of the 5 to 10 percent differences used for the SSNIP test.[17] That some Micron members may have sought providers elsewhere in response to those tiered price differences is simply uninformative in evaluating the relevant geographic market.

Of course, even if the Court erred in concluding that Nampa was the appropriate geographic market, that error was harmless because under any plausible geographic market, the Acquisition is presumptively unlawful. For example, if one were to expand the market greatly to include both Meridian and Caldwell, the market concentration levels from the Acquisition would still be well above presumptively illegal thresholds.[18] And, for their part, Defendants never advanced an alternative geographic market, as their expert never stated what he believes the relevant geographic market actually is.[19]

2. Defendants' Claimed Efficiencies Failed to Rebut the Strong Presumption of Anticompetitive Effects

Very high market concentration levels, such as those present here, "require proof of *extraordinary efficiencies*, . . . and courts generally have found inadequate proof of efficiencies

[16] FOF ¶ 67 (quoting Trial Tr. at 1320 (David Dranove)).
[17] Trial Tr. at 1355:25–1356:18, 1412:10–18 (David Dranove); Dkt. No. 318 (Butterbaugh Dep. Tr.) at 78:16–80:1. *See also* Pls.' FOFs and COLs ¶¶ 116–129.
[18] TX 1790 at Fig. 19; TX 1791 at Fig. 20; Trial Tr. at 1341:11–1342:15 (David Dranove).
[19] Trial Tr. at 1331:11–12 (David Dranove). Notably, Defendants' expert also did not dispute that the *Merger Guidelines'* hypothetical monopolist test was appropriate for defining the relevant market.

to sustain a rebuttal of the government's case." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (emphasis added); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721−22 (D.C. Cir. 2001); *FTC v. ProMedica Health Sys.*, No. 3:11 cv 47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011). Defendants fell far short of meeting that burden at trial, and their motion offers no reason to believe the Court of Appeals will revisit that failure.[20]

Defendants claim that if left intact pending appeal, the Acquisition would improve patient outcomes. As the Court found, however, "there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs."[21] Indeed, Defendants omit from their brief the extensive evidence adduced at trial—and recognized by the Court—showing that all of their claimed efficiencies can be achieved without this anticompetitive merger, including:

- St. Luke's desire to improve quality and reduce costs by moving toward value-based or risk-based care—and away from fee-for-service care—does not depend on this Acquisition.[22] In Idaho, independent physician groups are using risk-based contracting successfully.[23]
- There is no empirical evidence to support the theory that St. Luke's needs a core group of employed primary care physicians beyond the number it had before the Acquisition to successfully make the transition to risk-based contracting.[24]
- Employing physicians is not necessary to achieve integrated, team-based medicine. As Dr. Kenneth Kizer pointed out, physicians are committed to improving the quality of healthcare, and lowering its cost, whether they are employed or independent.[25]
- To ensure that the Epic EMR system is widely accessible, St. Luke's is developing the Affiliate Electronic Medical Records program that will allow independent physician to participate seamlessly in that system.[26] St. Luke's plans to roll out the

[20] COL ¶¶ 39, 49.
[21] FOF/COL at 3.
[22] FOF ¶ 150.
[23] FOF ¶ 183.
[24] FOF ¶¶ 181–82.
[25] FOF ¶ 180.
[26] FOF ¶ 201.

Affiliate program next month.[27]

Defendants' reliance on selective quotations from the testimony of Dr. Kizer to suggest that the "jury is still out" on the benefits of physician employment is unavailing.[28] Even if, contrary to established law, Plaintiffs were to bear the burden of demonstrating the *absence* of merger-specific efficiencies, the Court relied on abundant evidence in the record demonstrating that Defendants can achieve the Acquisition's purported benefits without this anticompetitive transaction. Accordingly, Defendants have failed to show even a minimal likelihood of success on the merits of their appeal.

II. THE BALANCE OF HARMS TIPS SHARPLY AGAINST A STAY

A. A Stay Would Irreparably Harm Competition, Third Parties, and Consumers[29]

The Court has already adjudicated that the Acquisition violates the Clayton Act and the Idaho Competition Act, and a stay will prolong the damaging effects—i.e., higher healthcare costs—from this illegal merger. Critically, a stay would irreparably harm local employers and consumers, who will bear the brunt of St. Luke's enhanced market power if the Acquisition is allowed to stand. Moreover, a stay of the Court's divestiture order for up to two and a half more years would irreparably harm Plaintiffs' ability to obtain effective relief.[30]

1. A Stay Would Irreparably Harm Consumers and Employers

Defendants claim that the Court did not find that immediate divestiture of Saltzer is required to avoid an imminent threat of harm to competition. But as the Court's 73 findings on

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[27] FOF ¶ 203; *see also* Pls.' FOFs and COLs ¶¶ 431–580.
[28] Motion at 10.
[29] Where the government is the plaintiff, the third and fourth *Nken* factors merge. *Nken*, 556 U.S. at 435; *Leiva-Perez*, 640 F.3d at 970.
[30] Although the Court of Appeals "has no time limit" in reaching a decision on Defendants' appeal, the court states that civil appeals take a total of 15 to 32 months from the notice of appeal to a decision. *See* United States Court of Appeals for the Ninth Circuit, Frequently Asked Questions, http://www.ca9.uscourts.gov/content/faq.php.

anticompetitive effects demonstrate, the Acquisition creates an ongoing harm to consumers and employers in Nampa and beyond.[31] As discussed below, ample evidence demonstrates the immediate and irreparable injury to third parties and consumers that will occur if a stay were to be granted.

a. St. Luke's Would Use Its Market Power to Increase Healthcare Costs While the Appeal Is Pending

Health plans cannot offer a marketable product without the combined entity,[32] and that dynamic will pervade negotiations between St. Luke's and health plans over the next few years.[33] For example, as the Court found, BCI considers Saltzer to be a "must have" provider in Nampa.[34] The Acquisition thus takes away the most attractive "outside option" for a health plan in its negotiations with St. Luke's, making its "BATNA" less desirable.[35] This gives St. Luke's the ability to demand more favorable terms—including higher reimbursements—from health plans, just as it has done following its past physician group acquisitions.[36] When those reimbursements increase, that means higher healthcare costs for Idaho consumers.[37]

Despite their track record in past acquisitions, Defendants assure the Court that St. Luke's will act against its own financial interests and not fully exert its market power to raise prices for *physician services* while on appeal.[38] But the Court should take no comfort in Defendants' promises. As BCI's Jeffrey Crouch explained, "[h]ospitals buy physician practices

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[31] FOF ¶¶ 74–146. Defendants' argument that there must be "imminent" harm, Motion at 16, is contrary to the Clayton Act's intent to stop anticompetitive mergers in their "incipiency." *Brown Shoe, Inc. v. United States*, 370 U.S. 294, 323 n.39. (1962).
[32] FOF ¶¶ 111–12.
[33] *See, e.g.*, TX 1301 (St. Luke's and BCI Mem. of Understanding and Agreement regarding commercial contracts through the end of 2014).
[34] FOF ¶ 84 (quoting Trial Tr. at 331 (J. Crouch)).
[35] FOF ¶ 109.
[36] FOF ¶¶ 117–20.
[37] FOF ¶ 144.
[38] Motion at 16.

not to increase *physician reimbursement*. They buy physician practices to increase *hospital reimbursement*," through increased referrals and hospital-based billing for "commodity" services.[39] The Court found that it is "virtually certain" that "Saltzer referrals to St. Luke's will increase" because of the Acquisition.[40] And St. Luke's likely "will exercise its enhanced bargaining leverage from the Acquisition to charge more services at higher hospital-based billing rates."[41] These findings are supported by ample evidence in the record. For example, BCI modeled that the Acquisition would increase the costs under its commercial contracts in a variety of ways, including a 30 to 35 percent cost increase from hospital-based billing of ancillary services.[42] And St. Luke's consultant "projected that it could gain an extra $750,000 through hospital-based billing from Saltzer from commercial payers for lab work" alone.[43] Importantly, "[t]he leverage gained by the Acquisition would give St. Luke's the ability to make these higher rates 'stick' in future contract negotiations."[44] As these and other services shift away from lower cost providers, health plans and their members pay more, causing them immediate and irreparable harm.[45]

Defendants' proposed "remedy" of having separate negotiating teams—i.e., "*Evanston* contracting"—during the appeal process does nothing to hinder St. Luke's ability or incentive to exercise its market power. Indeed, even with separate negotiating teams, St. Luke's and Saltzer would share the same ultimate economic incentives, encouraging the combined entity to use its leverage to seek higher reimbursements. At the same time, the proposal still deprives Nampa-

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[39] Trial Tr. 254:21–268:22; 425:15–426:6; 428:20–429:25 (Jeffrey Crouch) (emphasis added); *see also* TX 1302.
[40] FOF ¶ 140. *See also* FOF ¶¶ 135–39.
[41] FOF ¶ 121.
[42] FOF ¶ 125.
[43] FOF ¶ 126.
[44] FOF ¶ 129.
[45] FOF ¶¶ 121–40. *See also* Pls.' FOFs and COLs ¶¶ 834–36.

area residents and businesses of the robust competition on price and quality that an independent Saltzer would offer. The Court has already rejected this proposal, with good reason,[46] and there is no basis to conclude that it has any merit as a stopgap pending the appeal.

b. Treasure Valley Employers Would Be Harmed by a Stay

Local employers and their employees also face significant harm if a stay is granted. [redacted].[47] [redacted].[48] [redacted].[49] [redacted].[50]

[redacted].[51] [redacted].[52] [redacted].[53] As Micron continually evaluates its health plan, a stay would only prolong Micron's uncertainty and increase the risk that it will

[46] COL ¶¶ 59–62.

[47] [redacted]

[49] [redacted]

[50] [redacted]

[51] [redacted]

[52] [redacted]

[53] [redacted]

have to accept St. Luke's much higher healthcare costs going forward.

2. A Stay Would Undermine the Public Interest in Effective Enforcement of the Antitrust Laws

A stay would not only impede beneficial competition but also greatly reduce, if not eliminate, Plaintiffs' ability to obtain effective relief. "[T]he public interest in vigilant enforcement of the antitrust laws is indisputable." *United States v. Apple Inc.*, No. 12 civ. 2826 & 3394 (DLC), 2014 U.S. Dist. LEXIS 5794, at *72 (S.D.N.Y. Jan. 16, 2014) (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 344 U.S. 322, 329 (1955)); *see also Heinz*, 246 F.3d at 726. "[A]ntitrust laws serve the public interest by encouraging effective competition." *Image Technical Svcs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218 (9th Cir. 1997); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("Every precedent in the field makes clear that the interaction of competitive forces . . . is what will benefit consumers."); *cf. United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992) ("In statutory enforcement cases where the government has met the 'probability of success' prong for the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public."). Effective enforcement of the antitrust laws means preserving the benefits of competition during the pendency of the determination of the Acquisition's legality, *see Heinz*, 246 F.3d at 726, and ensuring that effective relief will remain available if the divestiture order is confirmed, *FTC v. Warner Commc'ns*, 742 F.2d 1156, 1159, 1165 (9th Cir. 1984).

Defendants ask the Court to take them at their word that they will make no further changes "that would impede divestiture or weaken a divested Saltzer" while the appeal is pending.[54] But St. Luke's own self-interest is at odds with what is best for Saltzer (a likely

[54] Motion at 18−19 n.5.

future competitor) both in the near- and long-term. Defendants admit that they intend to "make certain changes" to Saltzer while the appeal is pending, such as taking away some of Saltzer's office space to make Saltzer "more financially sound."[55] While Defendants fail to identify or explain what other "changes" to Saltzer they have in mind, St. Luke's may decide—based on its own unsupervised judgment—to: (i) delay or forgo recruiting new surgeons to Saltzer;[56] (ii) add new physicians to Saltzer under terms that an independent Saltzer would not agree to; (iii) transfer or downsize Saltzer employees; (iv) shut down services currently offered by Saltzer; and (v) prevent Saltzer from clinically integrating with other providers. Indeed, St. Luke's has already decided to have its own physicians practice in Saltzer's Nampa facility, blurring the lines between St. Luke's and Saltzer even further.[57] Each time St. Luke's makes one of these decisions (and countless others) with Saltzer under its roof, it undercuts the potential return of a vibrant, fully independent Saltzer once the appeal is resolved.

B. Defendants' Claims of Irreparable Harm Are Speculative and Should Be Barred

On the other side of the ledger, immediate divestiture will not harm Defendants or the public. To meet their burden of showing irreparable injury, Defendants need to demonstrate more than "some possibility of irreparable injury." *Lair*, 697 F.3d at 1214 (internal quotation marks omitted). Rather, Defendants must "show . . . that there is a *probability* of irreparable injury if the stay is not granted." *Id.*; *see also In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm."). Defendants have fallen well short of showing a probability of irreparable injury, let alone that the balance of harms "tips sharply" in their favor.

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[55] Motion at 18−19 n.5.
[56] For example, St. Luke's has little incentive to replace Saltzer's departed surgeons when it expects Saltzer to refer cases to St. Luke's physicians already on staff.
[57] Trial Tr. at 875:25–876:12 (Karl Keeler).

1. Defendants Should Be Judicially Estopped from Arguing That Saltzer Is Unable to Stand on Its Own or That Divestiture Cannot Be Accomplished

Defendants have repeatedly promised that divestiture would not be a problem if the Court so ordered. Defendants should be held to their word. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012) (internal quotations and brackets omitted). Judicial estoppel turns on three factors: "(1) Is the party's later position clearly inconsistent with its earlier position? (2) Did the party succeed in persuading a court to accept its earlier position, creating a perception that the . . . court was misled? and (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party?" *Id.* (internal quotations omitted). Among other things, Defendants told the Court that:

- In the event of a divestiture order, "Saltzer could return to its pre-merger status as an independent clinic."[58]
- "St. Luke's and Saltzer carefully and deliberately structured their agreement so that the transaction could be unwound if necessary."[59]
- "[W]e will not oppose divestiture on grounds that divestiture cannot be accomplished."[60]
- "[I]t would be quite possible to unscramble this egg."[61]

In denying a preliminary injunction, the Court specifically relied on Defendants' promises and permitted the Acquisition to close, an event without which divestiture would be unnecessary.[62]

[58] Dkt. No. 34 at 34 (Mem. of St. Luke's Health System, Ltd. in Opp'n to Pl.'s Mot. for Preliminary Inj.) (Dec. 4, 2012) ("St. Luke's Mem.").
[59] Dkt. No. 34 at 34 (St. Luke's Mem.).
[60] Dkt. No. 49 at 88:5-7 (Tr. of Preliminary Inj. Hr'g) (Dec. 14, 2012).
[61] Dkt. No. 49 at 87:7-8 (Tr. of Preliminary Inj. Hr'g) (Dec. 14, 2012).
[62] Dkt. No. 47 at 8 (Mem. Decision and Order) ("[T]he Court will have no difficulty in ordering an immediate and complete divestiture if that is the result compelled at trial.").

Defendants now take a new tack that conflicts directly with their prior promises to this Court. Contrary to their earlier position, they now claim that Saltzer is incapable of functioning independently and that "the process of starting over after divestiture if the Court's judgment is reversed on appeal would be so *costly* and so *burdensome* as to effectively preclude that possibility."[63] In hopes of forestalling that divestiture, Defendants seek to take unfair advantage of the Court's reliance, perpetuating the Acquisition's harm to consumers and employers for perhaps up to two and a half years. Defendants should be estopped from doing so.

2. The PSA Ensures That Saltzer Can Be Divested Now Without Being Harmed

Defendants also fail to mention in their motion that they planned for this eventuality. Indeed, they anticipated what they needed to accomplish divestiture and negotiated specific terms into the PSA to ensure Saltzer's smooth transition back to independence. As St. Luke's John Kee explained in his declaration to this Court:

> In the event of termination, the PSA provides a process for unwinding the transaction that gives Saltzer the right to repurchase tangible assets purchased by St. Luke's and ensures that Saltzer has access to the personnel, facilities, medical records, and *other resources that it would need to provide uninterrupted care to patients*. If the transaction is unwound as a result of the antitrust inquiry currently being conducted by the Federal Trade Commission or the Idaho Attorney General's Office, *these provisions allow and facilitate Saltzer's return to operation as an independent physician group*.[64]

Moreover, as the Court found, "any financial hardship to Saltzer will be mitigated by St. Luke's payment of $9 million for goodwill and intangibles as part of the Acquisition, a payment that does not have to be paid back if the Acquisition was undone."[65] And just in case that is not

[63] *See* Motion at 13–15 (emphasis added). *Cf.* TX 2625 (Letter to State of Idaho and FTC) (Dec. 20, 2012) ("St. Luke's will not argue . . . that the transaction should not be unwound because doing so would be *costly* or *burdensome*." (emphasis added)).
[64] Dkt. No. 34-18 (Decl. of John Kee) ¶ 18 (emphasis added). *See also* TX 24 (PSA) ¶¶ 6.9-6.10; Dkt. No. 47 at 7−8 (Mem. Decision and Order, citing and relying on Mr. Kee's Declaration).
[65] COL ¶ 58.

enough, the PSA also requires St. Luke's to provide a loan to Saltzer at fair market value.[66]

3. Additional Evidence Demonstrates That Saltzer Can and Should Be Independent While the Appeal Is Pending

As the Court explained, Defendants should not be permitted to use Saltzer's purported financial "weakness . . . as a reason to hold together the Acquisition."[67] *Warner*, 742 F.2d at 1164 ("[A] 'weak company' defense would expand the failing company defense, a defense which has strict limits."). Yet, Defendants seek to do exactly that, contrary to both the law and the facts of this case. The evidence at trial leaves no legitimate question of whether Saltzer is capable of operating independently while the appeal is pending. On the contrary, Defendants' financial expert admitted as much at trial when she acknowledged that she offered *no opinion* that if divestiture were ordered, Saltzer: (i) would go out of business; (ii) would not be profitable; (iii) doctors would not practice in Nampa; (iv) doctors would have to leave Nampa; (v) doctors would not be able to increase their compensation over time; or (vi) would not be able to compete.[68] Nor did her compensation calculations contemplate the possibility that Saltzer would add more physicians if it were unwound.[69] In essence, Defendants' expert's opinion boiled down to a conclusion that Saltzer doctors will make less money, but even that conclusion was limited to a one-year period.[70] Even if she is correct, a possible reduction in pay for one year—offset by a $9 million up-front payment—is insufficient to show the kind of irreparable harm needed to justify a stay. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough.").

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[66] TX 24 at SLHS000787884; Trial Tr. at 3101:4–8 (William Savage).
[67] COL ¶ 57.
[68] Trial Tr. at 3282:10–3283:15 (Lisa Ahern).
[69] Trial Tr. at 3280:14–18 (Lisa Ahern).
[70] Trial Tr. at 3280:7–13 (Lisa Ahern).

Defendants' assertion that Saltzer "would very likely not survive as an independent practice" is simply not credible. As an initial matter, it flatly contradicts Defendants' representation to this Court that they would not make a "failing firm" argument. But even if they had not made that representation, the evidence belies such an extreme claim:

- As Saltzer's Dr. Kunz testified, he dismissed such ideas as doomsday scenarios that were "overly dramatic."[71]
- Saltzer was profitable in fiscal year 2012, the last full year before it was acquired.[72] In fact, Saltzer has been profitable every year since at least 1980.[73]
- As Saltzer's Dr. Djernes testified, before the Acquisition, Saltzer was a "very strong and economically healthy group," and he could recall no discussion of Saltzer being in poor financial condition.[74]
- And as Dr. Djernes also testified, if St. Luke's divests Saltzer, it will be able to cover the financial impact of its departed surgeons by hiring additional orthopedic surgeons to replace them.[75]
- Tellingly, Saltzer knew that the Acquisition would likely cause those surgeons to leave and knew the financial impact that those departures would have, but decided to proceed with the Acquisition anyway.[76] Defendants now tell the Court that this self-inflicted financial impact justifies staying divestiture.

In contrast, Defendants cite no evidence in support of their claim that Saltzer cannot afford to pay its employees. Indeed, their assertion contradicts the assurances Saltzer's President Dr. John Kaiser made to Saltzer employees during the Government Plaintiffs' investigation, when he wrote: "[f]or each of our employees I would like to emphasize that you will continue to have your jobs no matter what course these investigations and legal challenges take."[77]

As noted above, Defendants also speculate that reconstituting the deal would be "costly"

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[71] Trial Tr. at 3369:7–3371:3 (Harold Kunz).
[72] Trial Tr. at 3372:9–11 (Harold Kunz).
[73] Trial Tr. at 3372:12–14 (Harold Kunz).
[74] Dkt. No. 269 (Djernes Dep. Tr.) at 32:14–24, 95:14–19; TX 1155 at COKER0006581.
[75] Dkt. No. 269 (Djernes Dep. Tr.) at 58:1–11, 59:6–9, 59:24–61:6.
[76] Trial Tr. at 3106:21–3110:24 (William Savage) ("The shareholders knew the consequences.").
[77] Dkt. No. 323 (Kaiser Dep. Tr.) at 202:23–203:22; TX1386 at SMG000288177.

and "burdensome" when the appeal is resolved.[78] Of course, the question of whether something may be more expensive or difficult is not the test for a stay; rather, Defendants must show irreparable harm. But even if that were the appropriate test, Defendants offer no evidence for their claim or any explanation of why it would be difficult to re-sign the Acquisition documents or negotiate a few new terms if necessary. *See Heinz*, 246 F.3d at 726 ("If the merger makes economic sense now, the appellees have offered no reason why it would not do so later.").

4. Defendants Can Still Achieve All of the Acquisition's Purported Benefits After Divestiture

A stay likewise offers no benefits—or protections—to consumers. As St. Luke's CEO testified, "I can tell you that we would want to work with Saltzer Medical Group, or whatever part of it survives, even if it had to be divested, as long as it was consistent with the judge's order."[79] And as noted above, none of the Acquisition's purported benefits are merger-specific, as the law requires. Of course, even if they were, Defendants' own expert, Professor Alain Enthoven, admitted that those efficiencies might not occur for at least a decade or more, so there is little reason to believe a stay would delay, let alone eliminate, them.[80] Such speculative benefits fall well short of offsetting the significant harm to consumers and employers that a stay would impose.

CONCLUSION

For these reasons, Government Plaintiffs respectfully request that the Court deny Defendants' Motion for Stay Pending Appeal and enforce its February 28, 2014 Judgment.

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[78] Motion at 15.
[79] Trial Tr. at 1674:1-1675:12 (David Pate).
[80] Trial Tr. at 2686:24–2687:2, 2687:9–11 (Alain Enthoven). *See also* COL ¶ 77 ("The Act does not give the Court discretion to set it aside to conduct a health care experiment."); Dkt. No. 254 (Swanson Dep. Tr.) at 112:8–113:3 ("Will we be done by 2020? I – I don't know the answer to that. That window is too far outside of my horizon from dealing with the details of how you accomplish this transformation.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 28, 2014, I filed the foregoing with the clerk of the Court under seal because it contains "attorneys' eyes only" information that the Court has held should be protected from public disclosure.

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