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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. AND  
ST. LUKE’S REGIONAL MEDICAL CENTER.  
LTD.

Defendants.

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

**SAINT ALPHONSUS MEDICAL  
CENTER-NAMPA, INC., SAINT  
ALPHONSUS HEALTH SYSTEM, INC.  
AND SAINT ALPHONSUS REGIONAL  
MEDICAL CENTER, INC.’s BRIEF IN  
SUPPORT OF MOTION FOR  
APPROVAL OF REASONABLENESS  
OF LEGAL FEES AND COSTS**

**SAINT ALPHONSUS MEDICAL CENTER-NAMPA, INC., SAINT ALPHONSUS HEALTH SYSTEM,  
INC. AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.’S BRIEF IN SUPPORT OF  
MOTION FOR APPROVAL OF REASONABLENESS OF LEGAL FEES AND COSTS**

The Saint Alphonsus Plaintiffs<sup>1</sup> (“Saint Alphonsus”) hereby submit their briefing in support of the reasonableness of the amount of attorneys’ fees and costs they seek from Defendant St. Luke’s Health System, Ltd.<sup>2</sup> Saint Alphonsus seeks \$7,853,051.25 for its reasonable attorneys’ fees, \$197,958.39 for taxable costs and an additional \$763,223.42 for non-taxable costs accrued at the trial stage.<sup>3</sup> This includes \$317,070 in attorneys’ fees relating to the appeal, including the issue of the stay on appeal.<sup>4</sup> For the reasons discussed below, Saint Alphonsus’ requested attorneys’ fees and costs are reasonable and should be awarded.

**I. APPLICABLE LEGAL STANDARD IN ASSESSING AMOUNT OF RECOVERABLE ATTORNEYS’ FEES**

The fees sought by Saint Alphonsus are entirely reasonable given the magnitude of this case and the outstanding result obtained by the Plaintiffs. This Court discussed the relevant standard for assessment of legal fees in *Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls*, 2013 WL 551028, at \*4-6 (D. Idaho, Feb. 12, 2013) (Winmill, J.). The standard requires determination of a “lodestar” reasonable hourly rate and number of hours, coupled with consideration of other factors which can “reduce or enhance” the lodestar amount:

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<sup>1</sup> Saint Alphonsus Medical Center-Nampa, Saint Alphonsus Health System, Inc., and Saint Alphonsus Regional Medical Center, Inc.

<sup>2</sup> Section 16 of the Clayton Act, 15 U.S.C. § 16, calls for the award of “the cost of suit, including a reasonable attorney’s fee.” Of course, St. Luke’s and Saltzer are jointly and severally liable for any award of attorneys’ fees and costs. Nor is there any available contribution under the antitrust laws. *Texas Indus, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). Saint Alphonsus intends to, and commits to, seeking these fees and costs only from St. Luke’s.

<sup>3</sup> We are seeking the award of our legal fees through Mar. 31, 2015. If other issues arise relating to this case after that time, we would consider whether to make a supplemental filing.

<sup>4</sup> The Ninth Circuit Court of Appeals has transferred consideration of these fees to this Court. Order, *Saint Alphonsus v. St. Luke’s*, No. 14-35173 (DktEntry: 133) (9th Cir. May 7 2015).

First, the Court must calculate the “lodestar figure” by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *See, e.g., Fischer v. SJB–P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). Second, the Court must decide whether to enhance or reduce the lodestar figure based on several factors—known as the *Kerr* factors—to the extent those factors are not already subsumed in the initial lodestar calculation. *Id.* The relevant *Kerr* factors are: (1) time limitations imposed by the client or the circumstances; (2) the amount involved and the results obtained, (3) the experience, reputation, and ability of the attorneys, (4) the “undesirability” of the case, (5) the nature and length of the professional relationship with the client, and (6) awards in similar cases. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975).<sup>3</sup>

FN<sup>3</sup> There are six additional *Kerr* factors: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, and (6) whether the fee is fixed or contingent. *Kerr*, 526 F.2d at 70. Factors one through five, however, are subsumed in the lodestar calculation. *See Morales v. City of San Rafael*, 96 F.3d 359, 364 n. 9 (9th Cir.1996).

Application of these principles supports the award to Saint Alphonsus of at least the full amount of the fees it seeks herein.

## **II. THE HOURLY RATES HERE WERE REASONABLE**

Saint Alphonsus has been represented in this action by Honigman Miller Schwartz and Cohn LLP as lead counsel, Duke Scanlan & Hall, PLLC as local counsel, and Gnoesis, which provided attorneys engaged in review of the hundreds of thousands of documents produced in this case.<sup>5</sup> Saint Alphonsus is seeking the recovery of legal fees incurred by Honigman, Duke Scanlan and Gnoesis as follows: Honigman (\$5,508,117.50 before the district court and

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<sup>5</sup> Fees incurred by contract attorneys for document review are recoverable as attorneys’ fees. *See Gabriel Technologies Corp. v. Qualcomm, Inc.*, Case No. 08cv1992, 2013 WL 410103, at \*9-10 (S.D. Cal. Feb. 1, 2013). It is “appropriate to bill a contract attorneys’ time at market rates and count these time charges toward the lodestar.” *In re Tyco Intern. Ltd. MDL*, 535 F. Supp. 2d 249, 272 (D.N.H. 2007) (rejecting the objection that expenses for contracting attorneys at document review firms should be treated as costs and not attorneys’ fees because “an attorney . . . is still an attorney.”).

\$300,000 on appeal); Duke Scanlan (\$856,255.50 before the district court and \$17,070 on appeal); and Gnoesis (\$1,171,608.25 before the district court). Ettinger Decl.¶ 12, Duke Decl.¶ 10.

All of Saint Alphonsus' lawyers utilized reasonable hourly rates. Honigman's hourly rates ranged from \$150 to \$800 (for David Ettinger's work),<sup>6</sup> with an average rate of \$384.68. Duke Scanlan's hourly rates ranged from \$120 to \$250 (for Keely Duke's rate). Gnoesis' average hourly rate was \$35. Ettinger Decl.¶ 13. In each case, their rates are at or below those in the relevant "legal community."

"To determine a reasonable hourly rate, the district court looks to hourly rates prevailing in the relevant legal community for similar work performed by attorneys of comparable skill, experience, and reputation." *See Alliance, supra* at \*4-6 (Winmill, J.) (citations omitted). *See also Stevedoring Services of Am, Inc. v. Dir, Office of Workers' Comp. Programs*, 445 F. App'x 912, 913 (9th Cir. 2011) (citations omitted). The determination of what is "similar work" necessarily varies depending on the role of counsel. The applicable "relevant legal community" for determination of a reasonable hourly rate for lead counsel in this case is the national community of lawyers engaged in complex antitrust litigation in federal court.

While the rates prevailing in the *local* community of the court usually provide the applicable standard for assessing hourly rates, "[a] narrow exception to this rule provides that rates from another community are acceptable where local counsel are unwilling or unable to provide the necessary legal services because they lack the experience, expertise or specialization

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<sup>6</sup> Virtually all the time was in 2012-14, during which Honigman's top hourly rate ranged from \$740 to \$770.

required to properly handle the matter.” *United States, ex rel. Suter v. Nat’l Rehab Partners Inc.*, No. CV-03-15-S-BLW, 2007 WL 2790397, at \*3 (D. Idaho Sept. 24, 2007) (Winmill J.). *See also Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992) (district court did not abuse its discretion in awarding fees at San Francisco rates where the evidence established that law firms in Sacramento (the forum) “with the requisite expertise and experience to handle this type of complex . . . litigation were unavailable”). Because the “District of Idaho has a far smaller pool of attorneys from which to choose for specialized matters ...it takes less of a showing ... than it would in larger jurisdictions to justify out-of-forum rates.” *Hash v. United States*, No. 1:99-cv-00324, 2012 WL 1252624, at \*5 (D. Idaho Apr. 13, 2012).

In fact, there is no “similar work” to the health antitrust advocacy performed by lead counsel in this case that is performed by attorneys in Idaho. There are no health antitrust specialists in Boise, and no lawyers with the experience to address the range of complex health care and antitrust issues raised in this case. Westermeier Decl. ¶¶ 5, 6, Duke Decl. ¶ 3, Ettinger Decl. ¶ 9.<sup>7</sup>

Honigman’s average rates of \$384.68 are below the rates approved as reasonable in a wide range of federal antitrust cases nationally. *See e.g. McKesson Corp. v. Islamic Republic of Iran*, 935 F. Supp. 2d 34 (D. D.C. 2013), *vacated on other grounds*, 753 F.3d 239 (D.C. Cir.

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<sup>7</sup> Virtually all of the other parties in this case have relied on out-of-town counsel, including St. Luke’s (Chicago), the Idaho Attorney General (Madison, Wisconsin) and, of course, the FTC.

Courts in this circuit have reached the same conclusion in ERISA cases, because they “involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts. Furthermore, the Court observes that ERISA cases are often considered to be complex, ERISA plaintiff cases are often undesirable, and plaintiffs’ attorneys possess extensive experience in ERISA law.” *Mogck v. Unum License Co. of Am.*, 289 F. Supp. 2d 1181, 1190-91 (S.D. Cal. 2003). Of course, virtually all these factors apply in this case and to antitrust cases generally.

2014) (\$10 million antitrust fee awarded on 18,500 hours of work, reflecting an average hourly rate of approximately \$540); *In re Oxycotin Antitrust Lit.*, No. 1:04-md-01603 (Dkt. 360) at 8 (S.D.N.Y., Jan. 25, 2011) (reasonable lodestar of \$5.2 million for 10,174 hours; average hourly rate of approximately \$510 per hour) (Ex. 1 hereto); *Shames v. Hertz Corp.*, Case No. 07-CV-2174, 2012 WL 5392159, at \*17-18 (S.D. Cal. Nov. 5, 2012) (holding, in antitrust action, that lodestar calculation of \$6.4 million at an average hourly rate of \$440 was “presumptively reasonable”); *In re Flonase Antitrust Litigation*, 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013) (awarding \$50 million in attorneys’ fees, more than triple the lodestar of \$16.8 million that was calculated at an average billable rate of \$407 per hour); *Hall v. AT & T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at \*20 (D.N.J. Oct. 13, 2010) (\$7.7 million lodestar calculated at an average hourly rate of \$411 per hour); *In re Ins. Brokerage Antitrust Lit.*, 2:04-cv-05184 (Dkt. 483) at 35 (D.N.J., Oct. 22, 2004) (average hourly rate of approximately \$411.16 found to be reasonable) (Ex. 2); *Meijer, Inc. v. Barr Pharmaceuticals, Inc.* No. 1:05-cv-02195 (Dkt. 210) at 6 (D.D.C. Apr. 20, 2009) (reasonable lodestar of \$7,226,504 over 17,488.7 hours for an average hourly rate of \$413.21) (Ex. 3); *In re Nifedipine Antitrust Litigation*, Case No. 1:03-MC-323 (Dkt. 333) at 2 (D.D.C. Jan. 31, 2011) (Ex. 4) (reasonable lodestar of \$14.1 million over 31,030 hours for an average hourly rate of \$454); *MM Steel, LP v. Reliance Steel & Aluminum Co.*, No. 4:12-CV-1227 (Doc. 551; 649) (S.D. Tex. Jun. 12, 2014) (\$7.12 million antitrust fee award for 18,464 hours of work, reflecting an average hourly rate of approximately \$384) (Ex. 5).<sup>8</sup>

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<sup>8</sup> Significantly, several of these awards are as much as 10 years old. Each precedent should be properly compared to this case only after making an adjustment for inflation in the relevant hourly rates. Moreover, these calculations include all counsel – lead and local – and therefore understate the average hourly rate charged by lead counsel. Nevertheless, the reasonable “average” rates in these cases even without such adjustments exceed the Honigman rates here.

The same conclusion is appropriate when assessing the hourly rate of Mr. Ettinger (\$740-770 per hour, depending on the year, for virtually all the entries). The proper level of hourly rates should reflect the “experience, reputation and ability of the attorneys. . .” *Alliance for Property Rights, supra*. Mr. Ettinger’s experience and reputation in the health antitrust area are at the highest level. He has been practicing health antitrust law across the United States for more than 30 years, and has litigated a number of landmark cases in the field. He has worked on many health care mergers and litigated more than 20 health care antitrust cases. Mr. Ettinger and Honigman also have significant experience on the precise issues addressed in this case. Ettinger Decl. ¶¶ 3-5.

Under the circumstances, Mr. Ettinger’s rate should be assessed against those charged by the most senior antitrust attorneys. His hourly rates are well below those of many senior antitrust lawyers in New York and Washington. *See* Ettinger Decl. ¶¶ 19-20. (Hourly rates of \$750 (2010) - \$1,135 per hour for antitrust attorneys approved in bankruptcy court orders). Moreover, Mr. Ettinger’s rates are below those of senior antitrust attorneys at Sidley Austin, St. Luke’s counsel. *See e.g.* Order Approving Final Fee Applications and corresponding Fee Applications in *In re Dynege Holdings, LLC*, Case No. 11-38111 (S.D.N.Y. 2013) (John Levelle; \$850) (Ex. 6 to Ettinger Decl.); *In re Tribune Company*, Case No. 08-131141 (D. Del Bankr. Jun. 18, 2013) (John Treece; \$850) (Ex. 7 to Ettinger Decl.). Indeed, many Sidley attorneys in a variety of specialties charge substantially above Mr. Ettinger’s hourly rate. *See e.g.* Sidley Austin LLP,

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The average hourly rates for Godfrey Kahn, on behalf of the Iowa Attorney General, were \$365 per hour, very similar to the Honigman rate. *See* Declaration of Kevin O’Connor (submitted by Idaho Attorney General) (Doc. 481-5) at ¶¶ 15, 23. (Total dollars of \$625,996 and 1710.6 total hours).

**SAINT ALPHONSUS MEDICAL CENTER-NAMPA, INC., SAINT ALPHONSUS HEALTH SYSTEM, INC. AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.’S BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF REASONABLENESS OF LEGAL FEES AND COSTS-6**



*Proposal and Qualifications for Legal Services – City of Detroit, MI* at 19 (Mar. 7, 2013) (James F. Conlan, \$1,100; Larry J. Nyhan, \$1,100; Jeffrey E. Bjork, \$900; Paul S. Caruso, \$875) (Ex. 8 to Ettinger Decl.); *In re Tribune Company*, No. 08-13141 (KJC) (Doc. 13634) (D. Del. Bank. Jun. 24, 2013) (James F. Bendernagel, Jr.; \$900; Scott R. Lassar; \$1000) (Ex. 9 to Ettinger Decl.).

Mr. Ettinger's rate is also below the rates charged by many senior lawyers in Chicago, New York and Washington, D.C. *See* National Law Journal's 2012 survey of hourly billing rates at AmLaw 250 firms (Ex. 5 to Ettinger Decl.), utilized by Honigman in setting rates. This survey reported hourly rates of \$835 for senior partners at two of the three participating Chicago firms; hourly senior partner rates ranging from \$960 - \$1,200 at Washington DC firms; and hourly senior partner rates as high as \$1,200 per hour at New York firms. *Id.* ¶ 20. *See also id.* at ¶ 22 and Exs. 10 - 13 thereto.<sup>9</sup>

The same conclusion applies to the rates of Duke Scanlan, though those rates (for local counsel) are appropriately compared to prevailing rates in Boise. Duke Decl. ¶ 7. The hourly rates paid by Saint Alphonsus to Duke Scanlan range from \$120 to \$250 per hour. Duke Decl. ¶ 9. The rates are significantly below prevailing Boise rates. Westermeier Decl. ¶ 8; Duke Decl. ¶ 12. Certainly, the experience and ability of Ms. Duke and Mr. Scanlan justify these rates. Westermeier Decl. ¶ 4; Duke Decl. ¶ 3 & 7.

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<sup>9</sup> Courts rely on billing rate survey data to establish prevailing market hourly billing rates. *See, e.g., Blue Growth Holdings Ltd. v. Mainstreet Limited Ventures LLC*, No. cv 13-1452 CRB, 2014 WL 3318885, at \*3 (N.D. Cal. Jul. 16, 2014) (relying on National Law Journal Billing survey to establish reasonableness of hearing rates); *Gutowski v. McKesson Corp.* No. C 12-6056 CW, 2013 WL 3242265, at \*2 (N.D. Cal. Jun. 24, 2013); *McKesson Corp.*, 935 F. Supp. 2d at 41 (relying on survey of billing rates at AmLaw 100 firms to establish reasonableness of hourly rates).



The rates for the document review attorneys at Gnoesis, supervised by Honigman, are certainly reasonable.<sup>10</sup> They range from \$35 to \$45 per hour. Ettinger Decl. ¶ 13. Courts have approved substantially greater rates for document review firms. *See, e.g., Gabriel Tech. Corp. v. Qualcomm, Inc.*, Case No. 08cv1992, 2013 WL 410103, at \*10 (S.D. Cal. Feb. 1, 2013) (\$55 to \$67 per hour); First and Final Fee Application (Dkt 1802) and Order Granting First and Final Fee Application (Dkt 1887) in *In re TCI Holdings, LLC*, Case No. 09-13654, (D.N.J. Bankr. Oct. 19, 2010) (attached hereto as Ex. 6) (\$48.30 to \$100 per hour). Gnoesis has extensive experience in conducting large scale document reviews and have conducted more than 100 document reviews in the past two years alone, and in more than 20 antitrust matters specifically. Ettinger Decl. ¶ 38.

### **III. THE HOURS EXPENDED IN THIS CASE BY SAINT ALPHONSUS' ATTORNEYS WERE REASONABLE**

#### **A. Overall Considerations**

The number of hours and total dollars expended in this case by Saint Alphonsus counsel, while quite substantial, was reasonable, given the magnitude of the case and its rapid prosecution. *See* Ettinger Decl. ¶ 6, Duke Decl. ¶¶ 4, 10-12, and spreadsheets attached thereto.<sup>11</sup> This case involved more than 80 depositions, production and review of more than 600,000 documents, and a four week bench trial. Ettinger Decl. ¶ 28 & 38. It also involved a series of

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<sup>10</sup> All Gnoesis attorneys were billed at \$35 per hour except for Jeffrey Roush, an attorney who managed the effort, who was billed at \$45 per hour.

<sup>11</sup> A small number of time entries in the spreadsheets regarding communications with prospective third party witnesses and other privileged matters have been generalized so as not to reveal privileged information. The courts permit redaction of time entries in order to avoid disclosure of information protected by attorney work-product privilege. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1285-86 (9th Cir. 2004). Other entries were revised to provide context and more detail in order to assist the Court in assessing the reasonableness of the time expended.

complex factual issues, ranging from electronic medical records to health care quality measurement to physician referral patterns.<sup>12</sup>

Given the scope of the case, Saint Alphonsus' attorneys conducted it in an extremely efficient fashion, avoiding duplication and conducting work at the lowest available rates. Honigman and Duke Scanlan lawyers played complementary roles and avoided duplication, either at depositions or at trial. *Id.* ¶ 17. A single lawyer for Saint Alphonsus attended each deposition and only two lawyers for Saint Alphonsus attended the trial. Ettinger Decl. ¶ 36. Document review attorneys were utilized to reduce costs.<sup>13</sup> *See id.* ¶ 38; Westermeier Decl. ¶ 12. Decisions as to tasks to be performed were carefully supervised by Saint Alphonsus' General Counsel to avoid unnecessary expense. Westermeier Decl. ¶ 10.

The number of hours and total dollars here (\$5,508,117.50 before the district court and \$300,000 on appeal) are not at all unusual when compared to other antitrust cases, which often involve similar or even substantially greater expenditures deemed reasonable. *See, e.g., McKesson, supra* (\$10 million fee award); *Oxycotin, supra* (\$5.2 million); *Meijer, Inc., supra* (\$7.2 million lodestar); *Flonase, supra* (\$16.8 million lodestar); *Shames, supra* (\$5.1 million fee award); *Hall, supra* (\$7.7 million lodestar) and *Nifedipine, supra* (\$14.1 million lodestar).

**B. The Involvement of Government Plaintiffs Does Not Affect the Reasonableness of Saint Alphonsus' Hours Expended Before the District Court**

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<sup>12</sup> St. Luke's states that it recovered from its insurer at least \$7,974,879.84 in attorneys' fees defending this litigation and has submitted requests to its insurer for additional reimbursements "totaling millions of dollars more." *See* Plaintiffs' Rule 12(c) Motion for Judgment on the Pleadings Regarding Defendants' Duty to Reimburse Defense Costs, *St. Luke's Health Sys., Ltd. v. Allied World Nat'l Assurance Co.*, No. 1:14-cv-00475 (Doc. 19) at ¶ 24 (D. Idaho Feb. 2, 2015).

<sup>13</sup> Gnoesis' fees averaged less than \$1.40 per document reviewed. Ettinger Decl. ¶ 40.

The work done by Saint Alphonsus' counsel appropriately addressed both the issues unique to the Private Plaintiffs and the common issues contained both in the Private Plaintiffs' and the Government Plaintiffs' complaints.<sup>14</sup> As this Court has held, "Counsel for the private plaintiffs did not duplicate the work of Government counsel, and played a major role in discovery, pre-trial proceedings, and the trial itself in providing evidence that the Court used in finding that the merger would result in higher prices." Memorandum & Order (Doc. 607) at 5 (Apr. 29, 2015).

Private plaintiffs' and their counsel's involvement resulted in significant contributions to this proceeding. These included testimony by Saint Alphonsus witnesses on the common issues, including geographic market, entry, managed care negotiations, quality gains achieved without employing physicians, and Saltzer's competitive strength; work done by Honigman based on the insights it received from Saint Alphonsus; areas in which David Ettinger provided specific expertise; and the efforts undertaken by Saint Alphonsus before the Government Plaintiffs joined the case. *See* Ettinger Decl. ¶ 27. *See also* Declaration of J. Thomas Greene in Support of Fee and Cost Petitions by the Private Plaintiffs (Doc. 487-3) at ¶¶ 4-5; Declaration of Brett DeLange (Doc. 487-4) at ¶ 4.

Many specific findings by the Court were based directly on testimony elicited by Saint Alphonsus' counsel. *See* Ettinger Decl. ¶ 30. Additionally, Mr. Ettinger cross-examined key defense witnesses on the "quality" defense (Enthoven, Pate, Priest, Kee and Souza), on defendants' contentions regarding the alleged harm to Saltzer from divestiture (Ahern, Kaiser,

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<sup>14</sup> The Federal Trade Commission is not seeking its attorneys' fees, though the Idaho Attorney General is doing so.

Kunz and Savage) and on the likely competitive harm from the acquisition (Page). *Id.* Mr. Ettinger addressed the quality defense at length in closing argument. The employment by Saint Alphonsus of a staff of document review attorneys provided important support for the efforts of all the Plaintiffs. *Id.* ¶ 41.

For all these reasons, the amount of hours spent here, while certainly substantial, were reasonable given the scope of this case.

**C. The Involvement of Government Plaintiffs Does Not Affect the Reasonableness of Saint Alphonsus' Hours Expended on Appeal**

Similarly, Saint Alphonsus' counsel did not duplicate the work of Government Plaintiffs on appeal, and made significant, nonduplicative contributions to the appellate process. Ettinger Decl. ¶¶ 49-51. The Private Plaintiffs and Government Plaintiffs filed separate appeal briefs, consistent with FTC policy. *Id.* at ¶ 49. The Government Plaintiffs' merits brief focused on the legal standard and legal issues, while the Private Plaintiffs' merits brief focused on the specific evidence that supported this Court's Findings of Fact and Conclusions of Law. *Id.* The Private Plaintiffs' stay brief before the Ninth Circuit focused primarily on the harm from the absence of a stay, while the Government Plaintiffs' stay brief primarily addressed the other legal and factual issues.

Counsel for Government Plaintiffs and counsel for Private Plaintiffs (Mr. Ettinger) each participated at oral argument before the Ninth Circuit panel, and Mr. Ettinger contributed significantly to the outcome. For example, one of the judges questioned whether remand to this Court was necessary if the panel adopted St. Luke's contention that plaintiffs have the burden to demonstrate that efficiencies may be achieved by a less restrictive alternative. *Id.* at ¶ 50. Mr. Ettinger argued and documented in a post-argument submission that this Court specifically found

that St. Luke's claimed efficiencies were not merger specific, and so there was a substantial evidentiary basis for this Court's rejection of St. Luke's efficiencies claims regardless of who possessed the burden of proof. *Id.* The Ninth Circuit ultimately found that this Court "expressly [] conclude[d] . . . that the claimed efficiencies were not merger-specific" and that "[t]hese factual findings were not clearly erroneous." 778 F.3d 775, 791 (9th Cir. 2015).

Similarly, the Ninth Circuit panel questioned at oral argument whether a reversal of this Court's findings on ancillary services would require remand. Ettinger Decl. ¶ 51. Mr. Ettinger argued that remand would be unnecessary because this Court's findings on high market share, barriers to entry, and Defendants' belief that the merger would produce higher prices amply supported the finding that Plaintiffs had established a prima facie case, with or without consideration of the evidence on ancillary services. *Id.* The Ninth Circuit agreed, finding that "absent the ancillary services finding, the district court's conclusion that a prima facie case was established is amply supported by the record." 778 F.3d at 787-88.

The hours expended by Private Plaintiffs' counsel on appeal are therefore reasonable given their significant involvement in the successful defense of this Court's decision on appeal.

**D. The Fact That Some Issues Were Not Decided Does Not Affect Saint Alphonsus' Entitlement To Fees**

The fact that the Court did not need to reach all the additional issues raised by the Private Plaintiffs should not in any way reduce the fees which should be awarded to Saint Alphonsus' counsel. The Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) makes clear that where excellent results are obtained, the fact that a Court did not "reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Id.* at 435. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not

have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Id.* at 440.

The Supreme Court's words in *Hensley* apply squarely to this case. There is no doubt that Saint Alphonsus obtained "substantial relief," divestiture. As this Court held, "the private plaintiffs achieved all the benefit they sought in bringing the suit . . ." Memorandum & Order (Doc. 607) at 4 (Apr. 29, 2015). The Court did not find it necessary to reach the Private Plaintiffs' evidence of effects on alternative markets, though it did address, and rely upon, the evidence brought by Private Plaintiffs on referrals. Of course, since the parties did not know in advance that this would be the case, they needed to present all their evidence. Therefore, under this controlling law, all their efforts should be reimbursed.

This same conclusion is supported by another established legal principle. "[I]f a plaintiff files separate claims arising out of the same 'common core of facts' or that are based on 'related legal theories,' the request for attorneys' fees should not be divided on a 'claim-by-claim basis.'" *Alliance, supra* at \*5 (D. Idaho, Feb. 12, 2013) (Winmill, J.) (citing *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009)). *See also Hensley*, 461 U.S. at 435 (where claims are based upon a "common core of facts," the lawsuit "cannot be viewed as a series of discreet claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff . . .). The additional claims brought by the Private Plaintiffs certainly arose out of the same "common core of facts," the acquisition of Saltzer Medical Group by St. Luke's.<sup>15</sup>

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<sup>15</sup> The Ninth Circuit has typically found such a "common core" where, as here, different claims arise out of the same conduct. *See, e.g., McCown*, 565 F.3d at 1103 (common core was plaintiff's arrest); *Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003) (common core was Plaintiff's arrest, detention and prosecution").

They were also certainly based on “related legal theories,” theories under the antitrust laws. Therefore, there is no basis for dividing the attorneys’ fees on a claim-by-claim basis.

This conclusion also applies to efforts, such as opposition to the motion for stay before the Ninth Circuit, or Private Plaintiffs’ Motion for Preliminary Injunction, which were not completely successful.<sup>16</sup> “[A]n ultimately successful plaintiff should be compensated for steps along the path to victory, even if every step is not successful, where the motion constituted ‘a method of pursuing her ultimately successful claims.’” *Freitag v. Calif. Dep’t of Corr.*, No. C 00-02278 TEH, 2003 U.S. Dist. LEXIS 26579, at \*18 (N.D. Cal. Oct. 17, 2003) (citing *O’Neal v. City of Seattle*, 66 F.3d 1064, 1069 (9th Cir. 1995)). The Ninth Circuit in *O’Neal* affirmed the award of attorneys’ fees for an unsuccessful class certification motion because “[t]he motion itself was not a separate claim, but rather a method of pursuing [plaintiff’s] ultimately successful claims.”

#### **IV. OTHER FACTORS ALSO JUSTIFY THE CONCLUSION THAT THE FEES HERE WERE REASONABLE**

##### **A. Novelty And Difficulty Of The Case**

The other factors identified in *Alliance* also support the conclusion that the fees charged by Saint Alphonsus’ lawyers are reasonable. This includes consideration of the “novelty and difficulty of the questions presented” and “skill requisite to perform the legal services properly,” *Alliance, supra*. This was one of the first litigated antitrust cases involving acquisition of a physician practice. It was also the first case in which a defendant argued that the needs of health

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<sup>16</sup> Of course, both these efforts also involved significant successes. The Ninth Circuit granted a stay, but expedited the appeal. Order, No. 14-35173 (DktEntry: 70) (9th Cir. Jul 25, 2014). This Court denied the preliminary injunction, but only after St. Luke’s agreed to keep Saltzer separate, critical in achieving divestiture here. See Memorandum Decision and Order (Doc. 47) at 8 (D. Idaho Dec. 20, 2012).



care reform justify hospital acquisition of physician practices. As this Court noted, “it seems like we're thrust right into the middle of a debate which really may be one of the two or three most significant challenges, both economic, social, and what have you, that our country is facing.” Trial Tr. 3869:2-5. Litigation on these issues required a firm with substantial experience in both the health care industry and antitrust law.

**B. Time Limitations**

The fees charged were also justified in light of the “time limitations imposed by . . . the circumstances.” *Alliance, supra*. The Court set the case on a very rapid schedule requiring completion of massive discovery in a few months, followed by a four week trial. The case required a great deal of intensive work performed by highly competent counsel, skilled in both the substantive issues and in the management of complex litigation. The volume of effort also precluded lead counsel from conducting significant other work. *See Alliance, supra* (“The preclusion of other employment by the attorney due to acceptance of the case. . .”).

**C. Amounts Involved And Results Obtained**

**1. The Issues At Stake Justified The Expenditure In This Case**

The “amount involved” in this case, *Alliance, supra*, also justifies recovery by Saint Alphonsus of its actual attorneys’ fees here. Saint Alphonsus’ competitive and financial position were in significant jeopardy as a result of this transaction. Saint Alphonsus’ projections revealed that it stood to lose millions of dollars annually at its Saint Alphonsus Nampa facility if Saltzer were acquired by St. Luke’s. *See* Plaintiffs’ Corrected Proposed Findings of Fact (Doc. 430) ¶¶ 880-891. Additionally, it faced the risk that its Saint Alphonsus Health Alliance network would lose Saltzer, thereby significantly impeding its ability to offer a competitive network to payors and employers. *Id.* ¶¶ 739-740; 794-808. Finally, Saint Alphonsus faced the risk that this

acquisition of substantial numbers of primary care physicians by St. Luke's would lead other specialists to refer their cases to St. Luke's rather than to Saint Alphonsus or to become acquired by St. Luke's. *Id.* ¶¶ 910-916. Given what was at stake, the efforts made here, and the employment of expert national counsel, were certainly justified.

**2. The Results Obtained Involved Virtually Complete Relief**

The “results obtained” here, *Alliance supra*, complete and full divestiture, also support the fees sought. Divestiture was exactly what Saint Alphonsus sought, and it eliminates the prospect of serious harm to Saint Alphonsus.<sup>17</sup>

The Private Plaintiffs also argued specifically for divestiture in closing argument, Trial Tr., 3851:17-3852:4, and in their separate Plaintiffs' Corrected Proposed Findings of Fact and Conclusions of Law (Doc. 430) ¶¶ 1059-1062. That relief was obtained and was affirmed on appeal. 778 F.3d at 792-93. The expenditures to achieve that result were certainly justified.

**V. SAINT ALPHONSUS SHOULD BE AWARDED NON-TAXABLE COSTS**

In addition to its taxable costs, addressed in its Bill of Costs (Doc, 480) Saint Alphonsus is entitled pursuant to the Idaho Competition Act, I.C. 48-113, to its reasonable non-taxable costs. Section 48-113 of the Idaho Competition Act specifically provides that any person injured by anything prohibited by the act may “bring an action for injunctive relief, damages, and, as determined by the court, reasonable costs and attorney's fees.”

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<sup>17</sup> All the Plaintiffs also sought a notice requirement for future acquisitions. The Court did not provide this relief. However, it was not a focus of the efforts of any of the Plaintiffs.

Saint Alphonsus incurred the following reasonable non-taxable costs in connection with this case, some by Honigman and some by Duke Scanlan:<sup>18</sup>

Airfare - Honigman	\$61,212.06
Computer Research - Honigman	\$76,759.25
Courier/Fed Ex Service - Honigman	\$6,599.47
Electronic Discovery – Honigman (Non-Taxable Portion)	\$460,554.28
Outside Document Production - Honigman	\$3,103.26
Other Document Production - Honigman	\$18,311.00
Public Access to Court Electronic Records - Honigman	\$614.88
Secretary Overtime Charges - Honigman	\$29,829.37
Telephone Charges - Honigman	\$1,467.57
Other Travel Expenses - Honigman	\$50,610.06
Federal Express Charges –DSH	\$11,200.12
Attorney Travel Charges- DSH	\$1,019.33
Other transcripts-DSH	\$1,127.27
Copies -DSH	\$23,446.70
Other Service Charges-DSH	\$5,479.16
Messenger and Mileage-DSH	\$387.01
Telephone Charges-DSH	\$1,169.66
PACER Charges-DSH	\$57.50
Pro Hac Fees-DSH	\$450.00
Westlaw Charges -DSH	\$1,216.69
Software and Media Charges-DSH	\$8,589.28
Journal Charges-DSH	\$19.50
<b>Grand Total (Honigman &amp; DSH)</b>	<b>\$763,223.42</b>

Each of the foregoing costs were reasonably and necessarily incurred during the course of this action. *See* Ettinger Decl. ¶ 54; Duke Decl. ¶ 13. The largest item relates to electronic discovery. Although many categories of electronic discovery are not recoverable under 28 U.S.C. 1290 as a taxable cost, such costs can be reasonable and necessary litigation expenses and thus are recoverable where a statute authorizes a party to recover its reasonable costs. *See*

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<sup>18</sup> Saint Alphonsus is not seeking to recover its expert witness costs as nontaxable costs, though those costs represent a significant seven figure number.

*Lockheed Martin Idaho Tech. Co. v. Lockheed Martin Advanced Environmental Systems, Inc.*, Case No. CV-98-316, 2006 WL 2095876, at \*2 (Winmill, J.) (awarding plaintiff \$4.6 million in costs relating to the creation of litigation database, noting that, “the litigation database was necessary due to the extreme complexity of the case” and volume of documents to be reviewed and produced).

Electronic discovery was clearly a necessary expense here. St. Luke’s, Saltzer and the third parties produced over 600,000 documents. Saint Alphonsus produced over 230,000 documents. Ettinger Decl. ¶ 41. In order for Saint Alphonsus to timely and efficiently produce documents under the accelerated schedule in this case, it was necessary to store the documents electronically in a searchable format where they could then be reviewed and coded for responsiveness, confidentiality and privilege. *Id.* ¶ 56.

Electronic discovery was also necessary to efficiently search and code (and later retrieve) documents produced by defendants and third parties based on responsiveness, importance, issue and witness. This significantly cut down on lawyer time in preparing for depositions and trial. *Id.* Additional information about the necessity and reasonableness of Saint Alphonsus’ other non-taxable costs is provided in Mr. Ettinger’s Declaration. *Id.*

Saint Alphonsus’ counsel endeavored, wherever feasible, to keep all these costs to a minimum. *Id.* ¶ 54. It is the practice of lawyers in Boise to separately bill their clients for such litigation expenses. *See* Duke Decl. ¶ 13; Westermeier Decl. ¶ 12. These “reasonable” costs should be awarded to Saint Alphonsus.

**VI. SAINT ALPHONSUS SHOULD BE AWARDED SUPPLEMENTAL TAXABLE COSTS**

In the interim period since Saint Alphonsus first began seeking costs, the Ninth Circuit has addressed what costs associated with e-discovery are taxable. The Ninth Circuit in *In Re Online DVD-Rental Antitrust Litigation*, 779 F.3d 914 (9th Cir. 2015), for the first time set forth a standard for the inclusion of electronic discovery costs as taxable costs. The court concluded that “electronic production of documents can constitute making copies under Section 1920(4),” the statute governing taxable costs. 779 F.3d at 926. In order to qualify, it must be the case that “costs are awarded for making copies.” *Id.* at 928. Moreover, the test is whether “a copy will be deemed ‘necessarily obtained’ for use in a case” through the electronic process at issue. *Id.* at 930.

In the context of our case, this corresponds to those electronic discovery processes that were required for production of documents by this Court’s Stipulated Order for Discovery of Electronically Stored Information (Dkt. 70) (“ESI Order”). Those items include Tiff images (ESI Order at ¶III.B), OCR text files (¶III.B), and bates numbering (Order at ¶III.H). The costs associated with producing copies of documents in the form required by the ESI Order are included as taxable costs in a Supplemental Bill of Costs, Ex. 16 to the Ettinger declaration. The additional taxable costs equal \$112,624.41, so that total taxable costs equal \$197,958.39.

#### **VII. SAINT ALPHONSUS SHOULD BE AWARDED INTEREST ON ITS ATTORNEYS’ FEES**

Saint Alphonsus is also entitled to interest on its award of attorneys’ fees and costs. The Ninth Circuit has held that 28 U.S.C. § 1961 “permits interest on attorney’s fees awards in antitrust actions . . . .” *Spain v. Mountanos*, 690 F.2d 742, 748 (9th Cir. 1982) (citing *Perkins v. Standard Oil Co.*, 487 F.2d 672, 675-76 (9th Cir. 1973)). “Interest runs from the date that

entitlement to fees is secured, rather than from the date that the exact quantity of fees is set.”

*Friend v. Kolodziejczak*, 72 F.3d 1386, 1391-92 (9th Cir. 1995).

DATED this 21st day of May, 2015.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21st day of May, 2015, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System.

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SAINT ALPHONSUS MEDICAL CENTER-NAMPA, INC., SAINT ALPHONSUS HEALTH SYSTEM, INC. AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.'S BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF REASONABLENESS OF LEGAL FEES AND COSTS-21



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