**UNITED STATES DISTRICT COURT**

**IN THE DISTRICT OF IDAHO**

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| SAINT ALPHONSUS MEDICAL CENTER - NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., Plaintiffs, vs. ST. LUKE'S HEALTH SYSTEM, LTD., and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants. | Case No. 1:12-cv-00560-BLW<br>Bench Trial<br>**Closing Arguments** |
| FEDERAL TRADE COMMISSION; STATE OF IDAHO, Plaintiffs, vs. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A., Defendants. | Case No. 1:13-cv-00116-BLW |

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**before B. Lynn Winmill, Chief District Judge**

**Held on November 7, 2013**

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# I N D E X

PROCEEDINGS

November 7, 2013

THE CLERK: The court shall now hear the closing arguments in Civil Case 12-560-S-BLW, Saint Alphonsus Medical Center, Nampa, et al., versus St. Luke's Health Systems, et al.

THE COURT: Good morning, Counsel.

MR. GREENE: Good morning, Your Honor.

THE COURT: Before we start, Mr. Greene, I know you're chomping at the bit, but I'm going to take just a few minutes to lay out some thoughts or concerns I've got, which may give counsel some direction about some areas that I'm still -- you know, I will have to say that this is, undoubtedly, one of the most difficult cases that I think I've had to wrestle with. I can't think of a time when I've sat through a trial or even an evidentiary hearing and not at the end had a very clear fix in my mind as to what is the right answer. This case is difficult, plus I know the stakes are extremely high for not only all of the entities here, but even the community, and that makes the problem even that much more difficult.

I'm going to lay out just a couple of comments and questions, and then -- I'm not asking any specific response, only to make you mindful of some things that are kind of nagging at me and that I -- and the first is -- and I guess



this is indirectly a question about the merger-specific benefits of the Saltzer deal, and that is: Is the Saltzer-St. Luke's deal necessary to achieve an integrated, risk-based healthcare delivery system?

There's -- it strikes me, from the literature that I've read, the Berkeley Forum study and some other things that I've read that were part of the -- in the briefing and in the evidence presented -- that although there are some who are not certain, that the trend certainly is towards the integrated, risk-based healthcare delivery system as a model to help us get out of this almost catastrophic situation that we're headed towards in terms of healthcare costs.

The question -- and I think it's a major question in this case. I don't think there's a whole lot of doubt that the acquisition itself has, to a substantial extent, brought together a pretty massive economic force in the healthcare market in Canyon County. Now, we'll talk about -- and I'm sure you're going to be arguing about how we define the market, but it seems to me that clearly is the case.

What I think is -- the very serious problem is whether or not what might have been viewed five or ten years ago as having very substantial anticompetitive effects, whether our view today has to be very different because we have a different world we're not only in now, but we're facing in the future. And, therefore, I think that, to me, to at



least some extent, this case may well turn upon that question, as I posed it. So that's one thing I would like counsel to be mindful of as you're addressing the arguments.

And kind of tied to that, and I think a second major question is one of remedy. Is there anything, is there any possibility of the court settling upon some intermediate remedy which would blunt the anticompetitive effects of the merger in today's world, in other words, the way that insurance contracts are currently negotiated and the market power that the merger will necessarily give St. Luke's and yet allow some form of a transaction to go forward and achieve, again, the integrated healthcare system that we have talked about. No one has proposed anything but a winner-take-all. And, of course, the difficulty here is that the winner-take-all approach means that someone is going to be injured as a result. Someone is going to suffer in some fashion no matter which way I come down. And, of course, I will do what I think is right without regard for that, but, of course, I have to be mindful of those concerns.

And then I guess a third and final point, and we didn't talk a lot about the Kaiser Permanente experience, and I focus on that more than the Mayo Clinic, which I think are kind of the two models that have been cited as being examples of where there has been success in developing these



risk-based, integrated care systems. But from the briefing I noted, if I read it correctly, Kaiser Permanente has, roughly, 40 percent of the California healthcare market, and California, despite having pretty substantially above-average cost of living, has reduced healthcare costs, which does suggest, in broad brush, that there is something to the argument that integrated healthcare can result in decreased costs.

And, actually, Mr. Greene, it's appropriate that you're up first because one of the questions I had was: How did Kaiser Permanente get 40 percent of the California market without FTC involvement? I would think, inherently, in some smaller markets that would have to be a much higher percentage, 60, 70 percent. And was that challenged or scrutinized by the Federal Trade Commission? Was it found to be acceptable despite the fact that it does result in a very concentrated market? And so I think that is something I would like counsel to at least address if it has any relevance.

Now, there are a lot of other questions I may have as we go along. Those are three things that I thought I would just lay out because all three -- well, all four or five parties here or six parties -- I haven't added them all up -- may have some thoughts on those issues.

Mr. Greene.

MR. GREENE: Thank you very much, Your Honor. Let me express my appreciation, and I'm sure the appreciation of all counsel here, for you sharing your candid perspectives on what the important questions for you might be. Certainly, for me, that's helpful guidance. I'm sure it will be true for others.

Just a couple of housekeeping issues. I will be covering the general issues. My colleague Mr. Ettinger will be covering those issues focused more particularly on the private plaintiffs and, in light of your comments just made, Mr. Wilson will be covering remedy for us, so it will be one, two, three, but Mr. Wilson will be focusing particularly on precisely one of the questions.

THE COURT: Mr. Wilson is the person, I guess, I was focusing on when I made those comments.

MR. GREENE: One other additional housekeeping matter consistent with our prior practice; there are some AEO materials in my slide deck. There are four slides, so I will be asking Your Honor to darken the screen, but --

THE COURT: Well, we won't need to clear the courtroom, I hope.

MR. GREENE: No. That is -- I'm hoping I'm telling you, Your Honor, at least from our side of this, we don't think you need to clear the courtroom, particularly since this is --



THE COURT: Mr. Metcalf and I had that discussion before we came in. And I was just hoping that counsel had figured out a way to avoid sending anyone out of the courtroom.

MR. GREENE: Very good.

Let me turn to my closing argument, Your Honor.

I think the fair question before us is what have we learned after four weeks of trial? We've heard dozens of witnesses. We've heard from expert witnesses. You've seen and deliberated on massive amounts of evidence. I think for plaintiffs, there are a handful of major high-level takeaways.

The first is that this case is about power and money. This deal substantially increases concentration in an already highly concentrated market. It creates a strong presumption of anticompetitive effects under the antitrust laws. The deal combines the two largest providers of primary care patient services in the Nampa arena. It eliminates each other's closest competitor. So this is a situation in which my most important competitor I now buy, which is significant from an antitrust perspective.

Overall, the documents, from our perspective, the testimony, and economic analysis all lead to a single conclusion, Your Honor, that this deal will increase the cost of care for the people of Idaho.



Secondly, apropos of some of the questions that Your Honor raised with us is that we also -- we also believe that this is a case that's largely about rhetoric versus reality. Our colleagues on the other side have been very articulate on this notion that there are these efficiencies -- Your Honor spoke to some of them -- but from our perspective, it just ain't so.

The kinds of initiatives that they are pursuing represent broad national consensus on what is appropriate in healthcare. These kinds of things are being done across the United States, as Dr. Kizer spoke to Your Honor about. It's also national policy reflected in the Accountable Care Act. The over $30 billion under the federal HITECH Act that have been committed to independent physicians, hospitals all across the nation to increase their ability to manage electronic medical records and to use that information in an effective, pro-consumer clinical way.

So this is the policy of the United States. This is not something that's unique to St. Luke's; indeed, the Triple Aim they borrowed from Medicare. So the idea is a good one, but it is an idea that is broadly embraced by physicians, healthcare providers, and healthcare policymakers throughout the United States.

Specifically --

THE COURT: So part of what you're saying is that



it's not necessary to approve this merger because the momentum is so great in that direction it's going to happen anyway?

MR. GREENE: I think that's right, Your Honor. I mean, certainly, that's our position, and I think when you unpack that, you see that the things that St. Luke's has spoken to as being positive, electronic medical records, for example, I think is a physical example of the new world of healthcare. In that new world, we treat populations as distinct from specific patients.

So we heard throughout the trial the A1c measure, which is a measure of blood sugar, which is something that is important if somebody is close to or is a diabetic -- that is a specific quality metric that Medicare uses. Every doctor and hospital in the United States that is worried, that gets federal money, which is all of them, including St. Luke's and Saltzer, are now being asked to measure those -- measure that metric and treat patients consistent with what they see from those tests. It's embedded in the electronic medical records that they create. It's embedded in the requirements under the Meaningful Use doctrine. It's embedded in the Physician Quality Reporting System, which is yet another federal program that pays physicians specifically to do certain things and analyze data.

We heard a great deal about WhiteCloud. WhiteCloud is

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essentially a data management or data analysis system. You heard in this courtroom, Your Honor, that there are a variety of these kinds of systems. Dr. Kizer said -- ticked off six or eight in a nanosecond. You heard from Dr. Polk from Saint Alphonsus that they're using something called Explorys, very cool technology. It's basically platform indifferent. They can access EMR, they can access EMRs from across the Idaho space and use that information in order to analyze the healthcare data that they do have access to.

This is our world of healthcare. This is a good thing for America, but it is not a unique invention of St. Luke's of Idaho. It just is not. So that context and those -- those forces are very much in play in this healthcare market and every healthcare market in the United States. So I think to identify St. Luke's as somehow a unique actor is to ignore, I think, what you heard in the trial and, I think, what we've seen with respect to what's actually happening in Idaho itself.

For example, Dr. Polk also spoke to the fact that Saint Alphonsus interoperates with independent physicians. They also pay independent physicians for quality of care. That's also the case with Advocate, for example, in Chicago. Mr. Billings of St. Luke's, who you heard by video testimony, is actually originally from that system, and he was quite precise. Sure, we had independent physicians, we

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had quality of care metrics, and we paid them if they hit those marks. So there is absolutely no requirement, none, to get to the kinds of things that Your Honor has spoken to that are important, which are ultimately -- I think you've identified some of the major goals, fundamentally, of the U.S. healthcare system, as we stand here.

But let me turn to a bit more detail. At least from our perspective, from an overarching perspective, employment not a superior organizational model. Benefits of IT tools are not keyed to employment. St. Luke's and Saltzer can engage in risk-based contracting without the acquisition, either directly -- or in Saltzer's case either directly or by way of participation in various networks. The core theory, which we've heard about off and on, there is simply no real basis for that. Fundamentally -- and I think this is really one of our key points, Your Honor -- there is no evidence that St. Luke's prior acquisitions of physician groups have resulted in either higher-quality or lower-cost care. They have actually been engaged in a quite substantial acquisition boom over the last several years, and, simply, we've not seen much positive from that.

Bargaining leverage. I think that Your Honor already spoke to your views about the power involved in this thing, so I'll go quickly here. But I think one of the major insights that I think we learned here, both from the payor

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witnesses and from Dr. Dranove in particular, is that the way prices go up in this kind of a market is in the bargaining context. And in that bargaining context, it's the existence of an outside option. Mr. Crouch of Blue Cross spoke of that as the BATNA, the best alternative to a negotiated agreement. Dr. Dranove spoke about it more simply as the outside option.

This case, if Your Honor allows this to go forward, is going to essentially eliminate a substantial outside option for payors in this market, which means, necessarily, and based on the history of these kinds of negotiations, that prices will go up in the form of reimbursement rates going up or the shifting of services from independent settings to hospital settings, which are more expensive. So I think that's really important.

On the question of rhetoric versus reality, we do have one of the -- an independent physician who actually is a board member of St. Luke's, and in one of his emails: "Let's be realistic. Employing physicians is not achieving better costs; it's achieving better profit." So even internally, there is a lot of dissent on whether or not this acquisition wave, represented most recently by the proposed purchase of Saltzer, really is in the best interests of patients.

We do believe that we have met our prima facie burden

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in this case, Your Honor. This, as you know, is an exercise that involves determining markets. The two-dimensional situation we have here is that the adult PCP services from the perspective of the government plaintiffs is the right product market, and, from our perspective, the geographic market is Nampa. When you take those markets and examine the increases in concentration, we well exceed the thresholds under the law to create a presumption of illegality. Indeed, that presumption is breached by a wide, wide margin.

We also believe, Your Honor, that looking fairly at the documents, books, records, and testimony that we have demonstrated there will be substantial competitive harm from this agreement.

Section 7 of the Clayton Act, just very briefly, Your Honor, this is the operative law that we deal with. Three points here. One is this deals with an acquisition which has a competitive effect in any line of commerce in any section of the country, so primary care physician services, an appropriate product market, Nampa, an appropriate geographic market.

This also embeds a very, very important policy judgment on the part of the Congress of the United States that the law should be used in a way to foreclose, to stop monopoly power, greater market power in its incipiency. The

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incipiency standard is what is embedded in the statute and its follow-on case law.

One aspect of the incipiency standard is this presumption that we spoke to Your Honor about from *Philadelphia National Bank*. This is the seminal examination of what -- how a court should approach this. So the court in *Philadelphia National Bank* says, "Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such competitive effects."

That is the law. Defendants have actually tried to muddy this, from our perspective. We did, of course, examine with great care their proposed conclusions of law. They appear to be suggesting that the court can kind of glide past these cases and, essentially, use some sort of rule of reason balancing test. That is simply not the law. *Philadelphia National Bank*, of course, is the United States Supreme Court.

The law of this circuit is best exemplified, I think, by *California versus American Stores*. This is a case that involves supermarkets in Southern California. This is the

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Ninth Circuit decision, which is quite crisp. And this case ultimately went up to the United States Supreme Court and was affirmed. Same structural analysis in recent healthcare cases in the *Rockford Memorial* decision by the Seventh Circuit also reflects this idea of a presumption followed by an analysis rather than some sort of balancing -- a sort of unbounded balancing test.

Couple more examples I've mentioned: *American Stores*, *H. J. Heinz* is also specifically to this point. And with respect to *H. J. Heinz*, that uses the Herfindahl Indexes as a way to determine and come to some conclusions about what concentration looks like.

With respect to the markets, there is no dispute, really, I think between the parties on the fact that adult PCP services is a distinct service market. Dr. Argue and Professor Dranove agree on this. I think the real interesting issues are in the area of geographic market.

One of the questions that Your Honor adverted to, the way we look at this -- I mean, the discipline that allows us to sort out, from an econometric perspective, whether there is a market. The way we proof a market, if you will, is embedded in the horizontal merger guidelines we've talked a lot about and also in the case law. The idea here is that if a hypothetical monopolist in a chosen market could increase prices by a small but permanent amount, generally

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5 to 10 percent -- this is frequently referred to as the 5 percent test -- if a monopolist, someone who has all of the market share in a chosen geographic market, can increase the price and sustain that price, then you have an appropriate geographic market.

We believe that when you look at the actual evidence, there are multiple, consistent points of support for Nampa, and Nampa alone, as the appropriate market. It is undisputed evidence, from our perspective, that patients demand care locally. That is supported by those that serve them -- health plans, health payors, if you will, including St. Luke's, interestingly, recognize the importance of including Nampa PCPs in network. This is also supported by the analytics that were done by Dr. Dranove. There is a clear dividing line between Nampa and the rest of the Treasure Valley with respect to where people choose to get care.

With respect to the points about patients wanting to be treated locally, I mean, it just makes sense that if you're ill, you don't want to drive 20 miles to get care and then drive 20 miles back. If your child is ill, you don't want to have the kid with the earache in the back of the car going 20 miles and then going 20 miles back. This is recognized by Dr. Argue. This is recognized by John Kee, a vice president for St. Luke's. And it's also recognized by

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Nancy Powell, the former Saltzer CFO, she being a mom. If they have to take a child out of school, they don't want to spend their entire day -- her day trying to get to a physician's office.

At the end of the day, Your Honor, this whole notion of market definition is one of what's reasonable, what are the reasonable alternatives for real people. I mean, we have provided, as has the other side, an enormous amount of econometric information, but the real question is where would people go, reasonably, to get care if the prices in this market went up 5 percent?

This slide I find absolutely fascinating. This is from Dr. Seppi, and he is -- he asked the question of, well, you're at St. Luke's and you have doctors in Boise, Meridian, and Eagle, in Ada County, why can't you just use those doctors to serve people in Nampa? This is precisely the question that Dr. Argue finds a completely different answer to. But with respect to Dr. Seppi, he says patients would like to see physicians in their immediate vicinity. So he is rejecting, in this statement, that Boise, Meridian, and Eagle provide -- provide a basis for concluding that Nampa should not be the market.

I think we need to close this one, Your Honor.

Similarly, we have payor testimony. One of the -- the payor on the left on your screen was obviously quite

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articulate in terms of what would be required. Nampa PCPs are critical to a viable network product and, interestingly -- interestingly, it's St. Luke's when it is considering what it wants it do in terms of its own insurance product; it says it needs local providers in Nampa.

All right. I think we can undo the screen, Your Honor.

This reflects what payors are doing now. They provide primary care physicians in virtually every ZIP code. When you look at -- and, indeed, BCI does it for every ZIP code in which they have patients; Regence, virtually everybody; and PacificSource only slightly less. This suggests how important local access is to those that actually spend millions of dollars on this, the question of whether or not you could provide a reasonable option to people in Nampa without -- without having physicians in that locale in significant numbers.

St. Luke's, itself, talks about the Nampa physician market. We saw this document before, but this is their internal analytics.

We also have, however, Dr. Argue suggesting, based on essentially a flow analysis. This is the -- sort of a left-handed Elzinga-Hogarty test, which has been largely dismissed in the literature. But, in any case, he basically says, look, there's outflow, we should take that into

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account. So this is a chart that reflects that view of the world.

There is outflow out of Nampa, but the first point with respect to this chart is that the outflow currently has nothing to do with price. It looks to Dr. Dranove as if these are idiosyncratic, people who got their care where they work, people go to -- they have a preexisting relationship with a doctor, so they go out of the Nampa area. But this shows nothing about what the remaining people in Nampa would do if there was a 5 percent increase in the price of their care.

It is interesting that when you look to the far right of this chart that the outflows out of Dr. Argue's market are actually even larger than the outflows out of Dr. Dranove's Nampa market.

There are a couple of perspectives on that, Your Honor. One is the notion that you could have a monopolist in Nampa, Nampa-Meridian, all the way through West Boise and that monopolist not be able to increase price by 5 percent successfully is just an absurd result. It is just not possible that that would not be -- could not be sustained.

The other thing about this chart, interestingly, is that -- and one of the criticisms of this kind of analysis is there is a daisy-chain problem. If you have outflows at every level, you keep going from one market to the next

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market to the next market, and, analytically, because of outflows, I think I could probably successfully get to Jack Bierig's front door using this analysis. So we just don't think that this has any significant implication for the antitrust question, which is: Would a significant number of patients leave Nampa in the event that prices were increased by the hypothetical monopolist test of 5 percent?

Dr. Argue also performed a critical loss analysis or a partial critical loss analysis. One could spend hours talking about this. Dr. Argue concluded, after he faced some criticisms from Dr. Dranove -- his number went from 6-ish percent to almost 9 percent. Dr. Dranove suggested the figure should probably be 21 percent. But the problem here -- and I think there is a fundamental failure of proof, if you will. To do this analysis, Dr. Argue would have had to have actually calculated the actual loss. If there is no actual loss calculation, we have no idea what these numbers may mean.

THE COURT: The actual loss becomes problematic because that would be an indication of how many patients would, in fact, leave?

MR. GREENE: Yes, I think that's correct, Your Honor.

THE COURT: Requires some speculation.

MR. GREENE: Yeah. If you were to actually do

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that calculation, you would have to make a judgment as to how many people would leave. In the literature that's -- and not to get geeky here -- but what that reflects is what's called the "elasticity of demand," which would be how price sensitive are people. And since Dr. Argue was unable to do that calculation, we were unable to criticize it or ask questions about it in his deposition.

So I think, fundamentally, this is a failure of proof, and I just think, fundamentally, the court can simply ignore it because he didn't do the analysis that's required.

THE COURT: Well, the 8.8 percent was easy because that's just a matter of figuring out --

MR. GREENE: That's pretty arithmetic. At itself -- I mean, again, one could spend hours on these things. But you may recall, Your Honor, that there was a discussion with Dr. Dranove about the impact -- this is very sensitive to the degree to which there are variable costs involved, so that's where -- that's why you can get from, you know, 6 to 8 to 20 to -- actually, 32 would be not a totally inappropriate number here.

But you know the problem, though, is on the question mark side, the basic analysis has not been completed, so no conclusions can be drawn from the fact that this was discussed or presented to the court, from our perspective.

There is no -- there are other problems with

Dr. Argue's critical loss analysis. I think there are a couple of things that I would highlight here. Economic research and practical experience show that patients rarely choose providers based on price. I mean, not to project our own interests in this, but typically it's location and reputation; it's not because it's 5 percent cheaper or 5 percent more expensive. That's really where most people -- how people make their real decisions.

Dr. Argue also relied, in part, on a Deloitte study, which indicated that less than 1 percent of patients in that study changed because of price. So we just don't think there is any -- we do think that the price is -- it would have to go up very dramatically in order to incent people to leave Nampa to take that sick child, to take their sick selves to another part of Idaho.

Market concentration, HHIs, thresholds. I think we've gone through that in the proposed conclusions of law and findings of fact. But I did want to share, again, Your Honor, some alternatives here. From our perspective, we believe the proper market is Nampa. If it's that market, this is a huge change. The combination of Saltzer and St. Luke's in the primary care services arena creates a behemoth, a juggernaut in that area that has an 80 percent share, just slightly south of that. This exceeds the current guidelines by a wide, wide margin.



The HHI, the most -- the highest you can go in the HHI is 10,000, which is a perfect monopoly. This jumps them to 6,200 points, and the delta, or the change, which is also part of the test, is eight times the presumptive illegal threshold. So this is a very, very dramatic and very, very problematic transaction.

But the problems don't go away if you actually step back and widen the geographic market somewhat. I think this is very important that Dr. Dranove has given the court some alternatives here to look at, all of which, from our perspective, are problematic. So if you use Nampa and Caldwell, then the HHI jumps to over 4,000, and then the delta, the change, jumps 900 points, and that's four times the presumptive illegal threshold with respect to the delta. Still problematic, still more than sufficient to provide the burden shift that we talked about at the front end of this conversation.

Likewise, if you do Nampa, Caldwell, and Meridian, which we think is a very wide-sweeping market and too broad for these purposes, but we did have it calculated, the HHIs are still well above the presumptive thresholds and the guidelines and those guidelines that have been accepted by other courts throughout the United States. In this case, it's over 3,000. It's nearly 1.5 times the concentration that would yield at presumption and seven times the delta.



So this is, I think, completely problematic. And when you look at the case law, this is a situation in which these numbers are well above thresholds, you can easily presume, both practically and legally, that this is a -- this is an extremely problematic merger and should be -- should be enjoined.

Anticompetitive effects, we have spoken to this a number of times, but in the interest of time I think I'm going to move forward with those.

Can I get to 41?

Given Your Honor's particular interest in efficiencies -- obviously, the slide will be available to the court -- but we did want to just go to efficiencies briefly.

The standard here, again, arising from the original *Philadelphia National Bank* considerations as well as this whole notion of how do we deal with the incipiency problem, how do we address that from a policy perspective. Defendants need to demonstrate really quite extraordinary efficiencies. That is the calculus that this court will be asked to use as its making decisions. *FTC versus ProMedica,* this is a relatively new -- this is a two-year-old decision. "No court" -- "No court has found efficiencies sufficient to rescue an otherwise illegal merger."

With respect to high market concentration levels



require extraordinary efficiencies, and indeed the more -- the more significant the concentration, the more efficiencies and the more extraordinary those efficiencies must be in order to meet the burden. This requires a rigorous analysis. It requires the rejection of mere speculation and promises. And apropos I think of some of the things you have heard both from percipient witnesses in this case as well as the experts delayed benefits, something five years out or, in Professor Enthoven's case, ten years out, delayed benefits are less proximate and more difficult to predict and thus are entitled to little weight, both under the guidelines and federal law.

There are a number of points here that are high level. Let me just very quickly touch on them, Your Honor. St. Luke's and Saltzer executives and their expert agree that it is uncertain whether St. Luke's will provide integrated patient care in the next few years. That is the evidence they have presented to Your Honor. Despite a lengthy track record of acquiring physician practices, St. Luke's failed to demonstrate cost savings or other benefits from its prior acquisitions. Ordinary course documents indicate and confirm that the motivation for this acquisition is not cost or quality but opening up Canyon County, developing the ability to control development in that county; that's what this case is all about. And,

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finally, there is no showing that the core theory has any basis in the social science or in really much else.

Is that AEO?

If you would darken the screen for the next one, Your Honor.

This goes to the point that, according to the VP for clinical integration, he's not even sure that this gets done by 2020. This goes to the question of delay and the necessity for this deal to go forward. I mean, a lot happens between now and 2020, and given the background of national policy all going in the same direction, this kind of statement is just devastating, I think, to their side of the case.

The next one is not AEO, Your Honor.

Dr. Enthoven, in his testimony, "And in your view, many others have tried to take this route have tripped and fallen; correct?

"Correct.

"And you think it will take ten years or more for St. Luke's to achieve the results it seeks; correct?

"Correct."

When you map that against the case law, that is just devastating.

Physician employment is not a panacea. I mean, the notion that they have repeated and repeated and repeated

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here is they need to employ doctors in order to get certain results. The social science of this, the economics of this does not support the notion that the employment of physicians is a superior organizational form. Physicians are in various structures all across the United States. They are all going in the same direction, they are improving quality, they are using EMRs. That is not related to, necessarily, whether they are employed or independent. Defendants' view is unsupported by the empirical evidence.

And, finally, the real deciders here appear to be organizational functionalities that are not specific and not particularly related to employment.

We do have some ability to look at the prior history of St. Luke's. Recall that Dr. Dranove did what's called a difference-in-difference analysis, which is to basically compare what happened after with respect to prior groups acquired by St. Luke's with essentially standardized test groups, so it's a compare-and-contrast kind of deal. And I think the unrebutted findings -- we find it interesting that this was unrebutted by the other side -- but the findings of Dr. Dranove are that with respect to St. Luke's past PCP acquisitions -- this is the last bullet on the slide -- some of them resulted in increased healthcare spending; that is, over a comparison to other independent physicians. And that defendants -- that when it did not increase it did not

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decrease. So the notion that employment results in cheaper care is simply not supported by the analysis that we have been able to do nor is it supported by the evidence presented by St. Luke's.

The structure of the deal here is inconsistent with what most people think should happen in healthcare. The deal proposed to Saltzer, I mean, we do know that it's a 40 percent increase in pay, so it embeds high costs into the Idaho healthcare system. It also is based on a wRVU system, which means that it's a volume-based structure.

Just before trial, they did enter into, at least, a preparatory or aspirational agreement that says we're going to try and work towards quality pay, but it is also the case that quality pay is also being given today and has been given for a long time in other contexts, including contexts in this precise market.

Core theory, very briefly, we've charted here the various statements about the size of the core, so it's gone from several hundred to maybe six. So, obviously, my -- St. Luke's has not gotten its act together in terms of what the core should be. But I think the more particular statement is the one that's embedded in the bottom of the slide, from Dr. Enthoven, which is simply: "What's the basis for it, the number of core physicians?

"All I can say is it's a judgment out of unsupported

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opinion."

Given the case authority and the law, that is simply inappropriate.

Turning to merger specificity. This acquisition is not necessary for a variety of reasons, but let's start with this. The first is, it is not necessary for St. Luke's or Saltzer to provide higher-quality, lower-cost care. It just ain't. It's not required for Saltzer to transition away from fee-for-service payments to risk-based contracting. They can both do it individually. They are both actually involved in Medicare Shared Savings Plans. In the case of Saltzer, it can participate by way of the networks it currently participates in.

And with respect to IT, IT is being supported by the federal government to the tune of over $30 billion, and there are metrics and requirements that are imposed by federal regulations.

This is not necessary for Saltzer and St. Luke's to work together. Both sides have indicated in sworn testimony that if this deal is unwound, they will continue to try and work together to improve costs and improve quality.

St. Luke's could reward independent physicians for quality. I mean, the notion that somehow you have to employ physicians is literally a little nutty, actually. I mean, it is actually so odd based on what's happening in the rest

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of the United States that it's surprising, Your Honor.

Firstly, commercial healthcare plans, as Dr. Kizer explained to you, are doing this across the United States. They are building pay-for-performance systems, pay for performance is built into Medicare. Other health systems, including Advocate that I mentioned here. Advocate is one of the best systems in all of the United States, and they, as a matter of ordinary course, have pay-for-performance contracts with independent physicians. Saint Alphonsus, one of their major competitors in the Idaho market, has been paying its independent physicians since 2004 quality bonuses based on meeting or exceeding certain quality metrics. This is not new news. This is not innovative. This is not something that's unique to St. Luke's. It is the standard, increasingly, in the U.S. market and certainly in the Idaho market.

Defendants can engage in risk-based contracting without the deal. That is clearly the case. They can engage with the Medicare Shared Savings Plan. St. Luke's can -- or Saltzer can certainly participate in any risk-based structures created by the other networks in which it's involved, including the Select network, which is being created by St. Luke's. St. Luke's, itself, could engage in risk-based contracting without -- without Saltzer. I think the -- both Patricia Richards spoke to this quite

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articulately, and then Dr. Argue admitted St. Luke's could pursue risk-based contracting without Saltzer, boom, full stop. So that takes away this notion that this employment relationship is required.

THE COURT: Counsel, I suspect there are different types of risk-based contracting. And to have a true, I guess, capitation-based contracting, you've got to spread the risks sufficiently broadly that you can write out, you know, I guess the outliers who are going to have inordinately high medical care expenses.

So there is at least some value in larger clinically and financially integrated healthcare systems to achieve risk-based contracting; isn't that true?

MR. GREENE: I think that there probably is a minimum number. I mean, the -- Mr. Crouch spoke to a risk-based contract with two physicians that he thought was quite good.

THE COURT: But how could a risk -- how could a two-physician practice engage in a fully risk-based contract?

MR. GREENE: Well, what they do is basically gainsharing. So I think there are a couple of perspectives on this first thing, Your Honor. As Dr. Kizer in his testimony explained, there is no social science or econometrics that suggest that a gainsharing contract is any

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less effective than a full-risk contract, so the fact that people are engaged currently in, say, a Medicare Shared Savings Plan, which is a gainsharing plan, it is not the case that that means that less money is being saved or that does not create incentives to improve care and reduce costs.

I'm originally from California. Your Honor mentioned Kaiser. Kaiser has a 40 percent share. Separate and apart from Kaiser, 45 percent -- in addition to Kaiser's 40 percent -- of people in California are served under risk-based, fully capitated contract. I mean, the per-member/per-month contract is a very standard contract in the state of California. That's one of the things that I think Dr. Kizer was trying to speak to: that this is very common, very ordinary. It doesn't take 500 doctors to do it.

THE COURT: Was that almost mandated by some state policy? Either encouraged or --

MR. GREENE: It is encouraged. The ability to take on risk -- very briefly, the California law is called the Knox-Keene statute, so there are Knox-Keene IPAs, which are given the opportunity to engage in contracts on a per-member/per-month basis. The downside from a policy perspective from this kind of a contract is it may incent physicians to provide -- or whatever the contractee might be -- provide less care than is appropriate.

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So the concern of policymakers in the California Legislature is that you didn't want to create a situation in which patients would be getting cheaper care because it would create more profit for the doctors. So there is a structure that is designed into the Knox-Keene statute to make sure that doesn't happen. But that statute very much facilitates the taking on of risk. And capitated contracts, actually, have been very much the standard since the 1980s and '90s in California.

THE COURT: So does that suggest that this problem that everyone here is facing ultimately cries out for some type of a -- kind of a social policy, state legislature response to put everyone on the same course rather than doing it piecemeal as appears to be happening now?

MR. GREENE: I think that probably would make a lot of sense. I mean, I don't want to arrogate to myself being somebody that suggests things to the Idaho Legislature, but, certainly, there could be statutory changes that would incent managed care and the taking of risk in terms of capitated contracts.

It is also the case that -- that the Medicare program under CMS guidelines is expecting, in the next two years -- we have Medicare savings plans now. We will be moving to full-risk plans very soon. So there is a national effort -- again, the context is important here, Your Honor.

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The whole system is arcing towards the kinds of things that St. Luke's has been talking about. That's why it is not the case that this deal is necessary for these kinds of benefits to be -- to be obtained.

And on that point, Your Honor, let me turn to my colleagues because we do want to reserve a bit more time for rebuttal. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Ettinger. Counsel, we'll probably take a break in about half an hour.

MR. ETTINGER: Okay. My target, Your Honor, is to be done in a half an hour and save the rest for rebuttal, so --

THE COURT: Then that would be great timing.

MR. ETTINGER: -- I believe that will work.

Your Honor, I've got a number of things to say, but I'm going to focus, as well, on your questions. It probably makes a lot of sense. Since they apply, certainly, to all the cases, the private plaintiffs' case, as well as the common case. And so let me work with my slides but kind of move around them a little bit.

Your Honor, the first point, though, I want to address is credibility. A lot of the testimony on all of the issues -- including the quality issue, Your Honor, I'm going to get to it -- depend upon the credibility of the

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witnesses. And, frankly, what you've seen a lot of in this case is ordinary-course documents of the defendants that plaintiffs have presented versus self-serving testimony from the defendants in court. Now, there's nothing wrong with being self-serving; everybody's testimony is self-serving. The question is is it credible.

And here we have dramatic examples of where the defendants' testimony is completely at odds with their own documents, with their own depositions, the direct and cross-examination. And I think as Your Honor thinks about these quality issues, as well as others, it's important to keep that in mind. So I'm going to go through these quickly.

But, you know, for example, we have witnesses who say dominant doesn't mean to dominate. Control means input. It's almost as much as black means white. Witnesses saying something would be disastrous for Saltzer unwinding, and then calling that overly dramatic, in a doomsday scenario, in their depositions. So there are a series of these, Your Honor, that we have in our slides. Some of them on quality. Claims that just started measuring quality with St. Luke's; whereas, in fact, Dr. Souza and his group had quality metrics years before with Saint Al's when they were owned by nobody.

The most important one, though, Your Honor, and I think

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this goes to -- this goes to what your questions raise, is John Kee. And it's a little bit more subtle, but it's more dramatic, and it really points to a lot of the key flaws in the quality story.

Mr. Kee said on direct: You know, if I were running Saltzer and Saltzer were unwound, there would be no point in doing any of this. We just could forget about these quality innovations and practice the old way. Mr. Kee explained that his job as of August 2013, his sole reason for being at St. Luke's, is to do these things with independents. His goals are to develop a network that integrates clinically between St. Luke's clinics and the independent medical community, and goes on and explains it in the last line, apropos of Your Honor's questions, "to establish value-based insurance contracting relations with the payor community."

So Mr. Kee, one of the most senior executives at St. Luke's, has as his sole job to do exactly what St. Luke's says doesn't work. Your Honor, this makes no sense. Why did Mr. Kee take this job if he thinks it's impossible? It just shows the lack of credibility in their whole story, Your Honor.

And I want to go on to get to some more specifics in that.

Why is Mr. Kee's statement on direct, why is St. Luke's wrong? Well, because risk-based contracting is going on in

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lots of different ways around the country. One example Mr. Greene mentioned is Advocate. What's interesting here is Randy Billings, one of the senior vice presidents at St. Luke's, said these things because he was at Advocate previously. Advocate is three-quarters independent physicians, and they are doing these risk-based contracts, and they are widely regarded as one of the hallmarks of it, and Mr. Billings, in his resume, touted it. This is a St. Luke's official.

Saint Al's is working at doing the same things. It's in process, but, of course, so is St. Luke's. And Saltzer is free to join a Saint Al's network or to join a Select network with BrightPath. SelectHealth, of course, that St. Luke's touts, is going to have contracts with BrightPath, and BrightPath is mostly independent doctors. So everything everybody is doing, including St. Luke's, is depending upon independent doctors in the networks to do risk-based contracting. And when St. Luke's says you can't do it that way, it's inconsistent with their own statements and their own behavior.

Your Honor, finally, Professor Enthoven on this point was -- I asked him about clinically integrated networks of independent providers, and after he touted how you've got to have everybody effectively owned, he said, well, that's in his gray zone. You know, 15 years ago, IPAs, independent

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provider associations, tended to be pretty loose. That's much less true today. You have people like Advocate. As Mr. Greene said, everybody is moving to this. And Dr. Enthoven admitted: That's my gray zone. I haven't kept up with that.

And so the answer is that you -- it's not just a Kaiser. It's not the only way to go. But you know Kaiser is very interesting, Your Honor, because I asked Professor Enthoven about Kaiser, and he admitted -- and this is at pages 2656, line 25, to 2657, line 22, of his cross-examination -- he admitted, and in his deposition, that Kaiser, the physician group, is not owned by Kaiser, the hospital, and it doesn't even contract with Kaiser, the hospital. So there is a large group there, but it's not the Luke's model, and so it doesn't support the Luke's model. And he said every other example he talked about with no specifics, no data, whether it's Geisinger or Mayo or whoever is half fee-for-service. And so they're in a gray zone, as well.

Your Honor, your question to Mr. Greene a minute ago about full risk. Full risk meaning share in the insurance premium, meaning capitation, can be done by any kind of network, and the network then has to work out the specific arrangements of how it shares with the physicians, independent or employed, which can be through a variety of

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mechanisms, a risk hold, there could be -- a risk withhold, there could be formulas.

Your Honor, I represented HMO, IPA models that worked with HMOs. They took capitation, and then they worked it out with the independent doctors in about 1988. This is not a new idea. It's been around for a long time. And you can do it. And, indeed -- and Mr. Petersen's testimony speaks to this -- in some ways, it's easier to do it with independents because the independent doctor you can contractually put him at risk directly. The St. Luke's doctors are not at risk directly. They are, right now, under, as we know, wRVU contracts that are slowly, slowly moving to some kind of quality-based mechanism. But those doctors are not sharing the premium. They are not taking the risk; there is an intermediary. And so there are financial challenges any way you cut it. And, indeed, arguably, it's harder when you employ the doctors.

Which brings me, Your Honor, to what I'm calling five fatal flaws in St. Luke's quality defense. And I think they are fatal because any one of them destroys this defense, legally or factually. Let me go through them quickly.

First, Your Honor, the defense is legally misplaced. And this starts with the *Rockford* case, the original *Rockford* case in 1988, where a hospital merger was declined. They raised a quality defense. And the court said that

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quality improvement would have a positive impact, but the court said it's not relevant. And I think it's not relevant here for the same reason. The court said its exclusive role is to evaluate the merger's effect on competition and no more.

Does that -- Your Honor, am I saying that that means that quality is irrelevant, necessarily? I am not saying that. I am saying unless you relate it to effects on competition, unless you can show that because of the efficiencies, the anticompetitive effects are not going to occur, then it's irrelevant. And here there has been no such showing. No effort, no serious effort, at any such showing.

THE COURT: Does 24 years make that statement not as perhaps -- I mean, I think there has been a realization in at least the last 10 or 15 years that there is a healthcare crisis that has to be addressed. Does that make it any less or more relevant today?

MR. ETTINGER: Your Honor, I would say two things. First of all, Congress has not amended the antitrust laws, and this is based on the core antitrust principle going ahead to some other old cases, but the United States Supreme Court in *Philadelphia National Bank* said, we are not allowed to make a value choice between competition and some other value. It's apples and oranges. And, Your Honor, I would

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question how do you even make that choice? What guidance do you have under the law to make that choice? How do you weigh the two? I mean, the question is unanswerable, and that's why it's not permitted.

In the *National Society of Professional Engineers* case, Your Honor, the argument there was it was a bid-rigging organization to try to limit low prices for architectural bids. And the defense was, if people bid too low to put up these buildings, our buildings are going to fall down. We've got to have a floor. And the Supreme Court didn't say "You're wrong." The Supreme Court said, "It doesn't matter."

THE COURT: Well, the burden-shifting -- I'll call it "the burden-shifting analysis" -- that once the prima facie case has been established, then there has to be some justification provided of the procompetitive effects of the merger. And your argument, then, is that quality arguments are not procompetitive arguments; they're just apples and oranges. Is that --

MR. ETTINGER: My argument is a little narrower, Your Honor. My argument is Luke's quality arguments are not procompetitive arguments. And that's a very important point. Is it possible that one could argue, in theory, that, for example, certain quality gains are going to occur and, therefore, the quality-adjusted prices are going to be

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no higher despite the dominant market position than they otherwise would be?

I hesitate to start making up arguments for the defendants, but if one went down that road, one -- and could prove it -- one might be heading, at least, in the right direction to say that there are no anticompetitive effects left once you consider the quality defense.

But Luke's hasn't tried to show that.

THE COURT: Okay.

MR. ETTINGER: That's the problem, Your Honor.

THE COURT: In other words, even if you talk quality, it has to be phrased in language which is truly procompetitive in terms of pricing and the market?

MR. ETTINGER: Yeah. And more than language. I think that they have to -- you have to show that the anticompetitive effects aren't going to occur.

THE COURT: Okay.

MR. ETTINGER: In essence, what Luke's is saying here, Your Honor, is: So what if we have a monopoly. It will be a benign monopoly doing good things. And the antitrust laws flat-out don't permit that argument.

THE COURT: It would have to be rephrased in that if we have a monopoly, it will result in quality, which in some way will actually yield such procompetitive effects that would outweigh whatever anticompetitive consequences

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may flow from the merger, or something like that.

MR. ETTINGER: Well, you would have to show that there are no net anticompetitive effects. And here, of course, we've got a series of different anticompetitive effects, Your Honor -- you know, pricing, foreclosure, harm to network competition, growth in dominant shares. You have to show somehow that the quality benefits would address these issues and you wouldn't net have these kinds of problems.

And, you know, again, I don't want to try to create a roadmap; it's not my job. But you'd have to address these issues, and St. Luke's simply hasn't done so. They said two things that they might argue pass on this issue; I don't think it goes farther. Professor Enthoven said, "Well, sometimes, you know, maybe we'll get other people doing more of the same thing in response to St. Luke's." Well, that doesn't say that you're not going to have anticompetitive effects from this deal, and it's a big maybe.

Secondly, St. Luke's has pointed to SelectHealth as a procompetitive benefit. But the whole point is, SelectHealth is going to deal with BrightPath. Saltzer was in BrightPath before the acquisition and, therefore, with or without this acquisition, SelectHealth is in this market. That doesn't depend on the Saltzer acquisition at all. So that's not a procompetitive effect. You just don't have one

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that's been articulated and certainly not proven here.

So that's the first legal flaw here, Your Honor. They've got to relate it to the procompetitive effects and prove it, and they haven't.

The second fatal flaw, Your Honor, is, in great detail, I think the evidence shows that, you know, independents -- it can be done with independents, and all the kinds of benefits that St. Luke's has pointed to are being done with independents. And we presented substantial evidence to this effect. In some cases, St. Luke's own activities with independents, like their MSOs, which, by the way, the evidence says -- St. Luke's evidence, St. Luke's witnesses -- virtually all the orthopedic benefits have come through the MSOs.

Data analytics. Your Honor, I just want to make one quick point there, and that is, you know, Explorys does this on multiple platforms, which means you can have different independents on different EMRs. It's already in 295 hospitals, so it's an established system. So, clearly, that's an alternative that can work with independents.

Your Honor, St. Luke's has tried to argue it's more of the same. St. Luke's has also tried to argue that independents don't have an incentive to improve quality, and, Your Honor, that's speculation that is contrary to all the evidence in the record.

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First of all, doctors are like anybody else. If they have higher quality and they treat their patients better -- Dr. Fortuin's example of the woman he saved is going to get around, and you're going to have more patients. The market, in general, works, and healthcare is no different.

Even the Saltzer witnesses admitted they advertise their EMR on their website. They think it helps them. The government is going to be providing quality incentive payments. There is a whole series of reasons why these incentives exist for independents. And if they didn't, and independents are never going to do any of this, then why was Mr. Kee appointed, taken from his important job running the St. Luke's clinic to solely work with the independents?

Your Honor, the next problem, the next fatal flaw is that St. Luke's has been telling you for two weeks, at least, maybe more in this case, that it won't work with independents, and they admit they've never tried it sufficiently. Dr. Pate admitted until 2013, give or take a few weeks, St. Luke's did not devote sufficient resources to its efforts with independents. And, of course, Mr. Kee wasn't appointed until August. So how can they meet their burden to show that this is merger specific, that you can't do it with independents when they did not try?

Your Honor, the core issue, one point on this, Mr. Greene talked about it, and the point is this: Unless

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St. Luke's can say we need X doctors who are employed to make things work or we need a specific scale involving Y doctors, then how can they say we need to have a market share of 80 percent? And unless they can connect those dots, unless they can say that in order to achieve the efficiencies they need a particular share, they can't justify what they're doing.

So, Your Honor, I think -- and then, finally, Your Honor, this is really a speculative defense. Dr. Enthoven -- Professor Enthoven said ten years or more, perilous, as Mr. Greene said. Dr. Pate called this an experiment. There are no quantified benefits from what St. Luke's has done based on all of the prior acquisitions. So given this, how can you say they've met their burden when by their own expert's testimony, their own CEO's testimony, this is just a big question mark?

And, Your Honor, I would characterize this -- without making too much light of it, but occasional humor helps -- this is the Wimpy defense, Your Honor. Your Honor, you and I and Mr. Bierig are old enough to remember the Popeye cartoons, and Wimpy was famous for saying, "I will gladly pay you Tuesday for a hamburger today." And, Your Honor, that is St. Luke's case in a nutshell. They are saying in the future, might be ten years, according to Professor Enthoven, it might be 2020, according to Dr. Swanson, we're

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going to achieve these great benefits, so let us merge today, and the anticompetitive effects are going to start today. And that simply doesn't work under the antitrust laws, under the case law, and it simply doesn't work under common sense, either, Your Honor.

So, Your Honor, let me go on and spend a few minutes on the market issues, if I may. First of all, on market definition, just one quick point, and that is, here, as well, it's kind of a Wimpy defense -- again, capital W not small W, Your Honor -- Dr. Argue's whole market definition argument is that -- is that people will switch for financial incentives. But Dr. Argue admitted today there are very few people in the Treasure Valley, Micron and not much else, who are actually experiencing these financial incentives, and he doesn't know when they will get widespread. He doesn't know if they will get widespread. He doesn't know if it will be five more years, ten more years or whatever. So, today, you don't have those incentives in place to cause people to switch.

And Your Honor recalls Dr. Argue said, "Well, if the critical loss is 8.8 percent, to exceed that, if only 10 percent actually face financial incentives, then 88 percent of that 10 percent would have to switch." And I would suggest, though, St. Luke's has not given us a number; with one major employer with financial incentives, that number is

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in the 10 percent or lower range today. So you were talking about a market situation where you're never going to get that kind of switching. So, again, it's: Let us merge today and maybe there will be incentives to offset market power sometime in the future; we don't know when. So it's another "pay you Tuesday" defense, Your Honor, that just doesn't work.

Your Honor, very briefly, and I'm going to just flip through these charts quickly because they're AEO. We could blank the screen. Why don't we do that. Could we blank the screen, Your Honor?

THE COURT: Yes.

MR. ETTINGER: What those two charts show, Your Honor, is St. Luke's argues pretty aggressively that market share isn't the answer here. Well, their problem is that there are document after document where St. Luke's and Saltzer witnesses say that market share does matter, that they base their analysis on market share, and so I think they really can't make that stick. That's all I really want to say on that, Your Honor.

We can unblank the screen now.

Your Honor, this is a critical point on the market issue, and that is this network competition defense.

MR. STEIN: David, I don't believe we can blank the screen for this.

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MR. ETTINGER: You think that should be blanked?

MR. STEIN: Yes.

MR. ETTINGER: Okay, okay.

THE COURT: Let me just ask -- this is more of an observation, but when -- I think I mentioned, at maybe even at a pretrial conference, that I've become kind of a fan of the writing of Clayton Christensen, and I referred to his book, *The Innovator's Prescription*. But his first book talked about disruptive technology and how that is changing the business world. And one of the things that strikes me is that whenever you're in a state of transition, you are going to have people who are still thinking about the way the old world was structured, the old business world, and their market was structured, and people who are thinking about the way it is going to be structured going forward. And when I see comments like people -- the last slide that you showed where an individual referred to kind of the need to have market power in our negotiations, that sounds like an old -- the old-school thinking, and perhaps others in the same organization are thinking about how do we need to position ourselves going forward.

And I'm not suggesting that you just ignore those inconsistencies but that within an organization, you're always going to have people thinking about, in the same way that the -- you know, in the Pentagon, half the generals are

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fighting the last war and half of them are thinking about, hopefully, the next war, and the war we're currently in. Just an observation. And I'm not saying that that's -- go ahead. I assume you want to respond to that.

MR. ETTINGER: I'm glad you made it because it's a point I meant to make, and it's a very important one, and I could not disagree more, respectfully. And let me tell you why.

THE COURT: Okay.

MR. ETTINGER: All of the witnesses, including Dr. Argue, agree in a world of risk, market power is still an equally big problem.

THE COURT: Okay.

MR. ETTINGER: If you're a monopoly and there is a risk-based contract to be negotiated, you're going to get a better price. It's still a price; it's just a different kind of price. Whether it's a fee-for-service price or it's a percent of the premium, it is still a price. The merger guidelines don't depend on one kind of price. You read them; they talk about bargaining markets and auction markets. You know, there's a zillion kinds of prices in the economy, and the merger guidelines and the antitrust laws weren't written for fee-for-service healthcare, Your Honor. And the principles are exactly the same.

So if we end up in a new world of risk-based

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contracting, it's still going to be the case that if somebody has too much power and there are too few alternatives, then prices are going to go up. I don't think that changes even a little bit.

THE COURT: That's a good response. Thank you.

MR. ETTINGER: Thank you, Your Honor.

So let me go on to the next slide. I guess -- well, I don't want to take time discussing what should be AEO or not, so we'll keep it blank, Your Honor.

The network competition point is, of course, one of the critical elements of the private plaintiffs' case. And I think what's really compelling here is it's basically been given up by St. Luke's, with a couple small exceptions, Your Honor.

None of their managed care witnesses have come in to try to defend their strategy. They have not disputed, at all, the documents we have shown that said they have a strategy to cripple everybody else's networks. They have not disputed the importance of network competition. And, Your Honor, you put those together, this alone establishes the kind of harm to competition that we need to establish to -- in the hospital and facility -- surgical facilities markets to prove our case because everybody is using these networks.

And to go on to the next slide, Your Honor, which I

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don't believe is AEO, IPN is one of these networks. It represents the second largest number of lives. It represents the national payors. St. Luke's uses BrightPath for SelectHealth and considers Select Medical critical. Network competition is critical, and it is vitally threatened by the behavior here, and it will be -- that threat will be substantially enhanced with the Saltzer transaction, Your Honor.

And, Your Honor, there is substantial evidence of that in the record, and I'm going to just go through these quickly because I'm running out of time, but we've got lots of evidence to show that that's true from lots of witnesses.

The next slide, I think -- let me go through those very quickly so we didn't need to blank them.

We've got lots of evidence that St. Luke's plan is to create this harm. And, Your Honor, what St. Luke's is left with, basically, is the following somewhat oxymoronic position. This is St. Luke's proposed finding 451, and I call it, *Through the Looking-Glass*. At least I am moving up, Your Honor, from cartoons to novels now. But what St. Luke's says here is even if the Saltzer physicians are withdrawn from competing networks, that is not anticompetitive. And what they say is people compete by trying to make their network look more attractive.

Well, Your Honor, making your network look more

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attractive is one thing. Trying to torpedo the other guy's network is a horse of an entirely different color, and that's what St. Luke's is, undisputedly, planning to do. And that's anticompetitive. And there is no case that says this is right. There is no testimony. Professor Haas-Wilson was asked, "Do networks compete by trying to look more attractive?"

She said, "Sure."

Nobody asked her, "Do they compete by trying to pull the key providers from their competitors?" Because that cannot work.

Your Honor, just a couple quick additional points, and then I better sit down and save for rebuttal, and that relates to harm to competition.

And I think I want to go to my slide -- why don't we go to 44. Is this 44? Okay.

So, Your Honor -- actually, let's back up. Let's go to 36 real quickly.

Your Honor, so there are many -- a couple of legal points I want to make real quickly. There are many different prongs to our claim of harm to competition in the hospital and surgical facilities markets. And, you know, you've seen these before. I won't address them now. The key point is St. Luke's has tried to set up some kind of bright-line test in terms of foreclosure, but when

foreclosure is only one of many elements, the Supreme Court has made clear, in *Continental Orr*, you don't compartmentalize the proofs, you look at the cumulative effect.

And Dr. Argue said it right here. He said the test is whether St. Luke's actions diminished substantially the competitive constraint that competitors have on St. Luke's. And that's the test that ought to be looked at, Your Honor, in terms of assessing harm in these markets.

And because St. Luke's is dominant, because there are only a couple rivals, you hurt those rivals, and you're harming competition. I won't go through the evidence of the harm now, Your Honor.

I do want to point out that the law is also quite clear that you've got to look at this in the context of past acquisitions, and you've got to look at it in the context of future transactions, which is critically important because we know the evidence shows that St. Luke's has a whole bunch of transactions on hold right now, pending this litigation. Indeed, their activity with regard to network competition is on hold right now pending the FTC investigations in this litigation. That's St. Luke's testimony.

So Your Honor's actions affect more than Saltzer. They affect other acquisitions and their effect on the marketplace. And so that's an important thing that I think



you need to keep in mind as you look at this evidence, Your Honor.

Your Honor, the last point I guess I would like to make -- and we need to blank the screen -- is go to slide 56 -- 57.

Keely, this is the Dr. Swanson; have we got the right one? Yeah.

Your Honor, I just want to remind the court --

MS. DUKE: It's slide 58, just for the record.

MR. ETTINGER: 58. Sorry, Your Honor. We changed the slide numbers at the last minute.

This is a slide we used at opening. I said, "Neither of these witnesses, the sender or receiver, Dr. Swanson or Mr. Billings, could remember what they said here. They had no explanation for this monopoly endgame." And I said, "Maybe we'll hear from them at trial and we'll learn." Well, neither of them testified, so we still don't know. But what the document says is that senior executives of St. Luke's are talking about this endgame, and that is the concern in the relevant markets here, including the hospital and facilities markets.

Your Honor, finally, before I sit down for now, we have several slides here which go to the accuracy of some of St. Luke's findings. In a few cases, there is less to them than meets the eye, and they are at odds with the evidence



they cite, and we've listed those in the slides.

But that's all for right now, Your Honor.

THE COURT: Mr. Ettinger, let me ask a question, and let's not take this off your time. Somewhere, and it may have even been in the briefing or the posttrial submissions that have been made -- and, certainly, I think I asked some questions along these lines -- but it seems as if, you know, that the -- I guess kind of the "arc of history," to kind of borrow Mr. Greene, the phrase he was using, seems to bend towards perhaps a world in which, at least in the Treasure Valley, there are going to be two players.

First of all, I assume you disagree that that's inevitable. And when I say "two players," I don't mean only two players, but two very dominant players with, you know, cumulative market shares of 90 percent, something along that order. If that is the case, does that make any difference? You've referred to that I need to be aware of not only what's happened in the past but what's going to happen in the future should the crystal ball extend out 10 and 15 years to try to predict where the market is going to end up with or without this acquisition.

MR. ETTINGER: Well, Your Honor, I would say, number one, crystal balls are pretty unreliable.

THE COURT: They certainly are.



MR. ETTINGER: And I would not say something that is otherwise illegal under the antitrust laws should be allowed because on a crystal-ball viewing you might get there anyhow.

Number two, I'd be very cautious about what might and might not be inevitable. There are two major hospitals in this market, but there are many networks. There are independent networks, like IPN. There are many thriving independent physician practices today, like Primary Health; Dr. Peterman testified here. Until St. Luke's bought some of them, there used to be many independent outpatient surgery facilities, and there's still one, Treasure Valley, so -- and Treasure Valley Surgery Center, which is open. So there are -- there may be, in many of the relevant product markets, many players, and if there are many players, there can be many combinations of players in different networks, and that can create competition.

So I don't think the arc of history takes us anywhere in particular, and the antitrust laws say, you know, you ought not to assume a result.

Indeed, Your Honor, the cases I cited about trends toward concentration, those cases don't say if there is a trend towards concentration say, okay, let it go. Those cases say exactly the opposite. They say if there is a trend towards concentration, we have to be extra vigilant,

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and we need to stop more acquisitions.
And so what they say, and I think it's the law, Your Honor, clearly, is that if you're afraid that the arc of history is pointing away from competition, you better do something about it, not say that's inevitable.
THE COURT: Okay. All right. Thank you. Actually, I should apologize to Reverend Martin Luther King. I think he said it was "the arc of the moral universe" not "the arc of history," but I don't know where -- and we certainly don't want to get into the moral universe here, I don't think.
Let's take a 15-minute recess. We'll be in recess.
(Recess.)
THE COURT: Mr. Wilson.
MR. WILSON: Thank you, Your Honor.
Good morning, Your Honor. You asked at the outset whether there was a middle ground with regard to remedy. In our view, divestiture is a middle ground because it would allow Saltzer to compete in whatever network it wants. It's already in the St. Luke's BrightPath network, it's already in the Saint Al's Alliance. And, in our view, divesting Saltzer wouldn't make Saltzer compete in the old world. To the contrary, it would allow them to compete in the new world.
And, really, the objective with remedy is to help

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restore the benefits of competition that have been eliminated by the acquisition. So, in other words, we need to do the best we can to put Saltzer in a place where it has the best incentive to make independent choices about things like referrals. It has the best incentive to make independent choices on what network it wants to be in. Really, where it has the best incentive to compete with St. Luke's. And, respectfully, the only way to accomplish that is through divestiture of Saltzer from St. Luke's and recision of the professional services agreement.
Unlike the remedy that's been proposed by the defendants, divestiture is easy to administer. The court simply orders the transaction unwound. And the case law makes clear, Your Honor, that the court really should only consider alternative remedies when divestiture is not an option. And in this case, the parties have deliberately not integrated their operations, and, in addition, they promised this court, and they promised the government plaintiffs, that divestiture would remain an option.
And so, respectfully, Judge, we think the court should implement that option without hesitation.
And you asked if that's a sort of winner-take-all position. The Idaho Attorney General's Office is not in this case to win. The winner of that result, Your Honor, would be competition.

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And we also submit that the court should create safeguards to protect against some of the things that Mr. Ettinger was talking about, future anticompetitive acquisitions. To accomplish that, we respectfully suggest the court should require notice to the government regarding future acquisitions, akin to the notice that the FTC routinely gets in its consent decrees.
And then, lastly, should the court find that plaintiffs have proven their case, it's important that the court also award reasonable costs and attorney fees to the Idaho Attorney General and the private plaintiffs. So that's the remedy we seek, Judge.
There are two arguments that I would like to briefly address with regard to the remedy that, frankly, the defendants are making and have me a bit baffled. The first argument that I don't understand is all of this evidence about Saltzer's financial condition. In fact, it appears to be the only argument against divestiture that the defendants are making: That is that the financial condition of Saltzer after the unwinding is a reason that the court should not order it unwound. We have said it before. We'll say it again. We really think that this is a Trojan horse, failing-firm defense.
And before the deal closed, St. Luke's promised the government plaintiffs that it would not come into court and

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argue that it would be too costly or burdensome to unwind this transaction, but yet that's exactly what they're doing. So that's my first question: Exactly how is all of this evidence about Saltzer's financial condition not a failing-firm argument? How is it not an argument that unwinding the transaction will be too costly?
My second question relates to the particular evidence that they have chosen to present about Saltzer's financial condition. The cornerstone of that argument is the purported harm resulting from the divestiture that has been caused by the surgeons who departed Saltzer. The court probably noticed that when Lisa Ahern testified, when their expert testified, her entire unwind analysis really was based on the harm caused by those departed surgeons. The indirect overhead, the ancillary services, almost all of it was based on the harm caused by those surgeons leaving.
But here's the thing: Those surgeons would not have left Saltzer if Saltzer had not decided to do the deal with St. Luke's. What makes it worse is that Saltzer knew that the St. Luke's deal would cause the surgeons to leave. They knew this deal was subject to antitrust challenge, and they did it anyway. The CEO of Saltzer, Bill Savage, testified the shareholders knew the consequences. Indeed they did. No one forced the parties to forge ahead with this deal before finding out what the FTC, the Idaho Attorney General

or, more importantly, this court thought about whether the deal would be unlawful. And so they come in here to court, and they tell this court that Saltzer's financial condition is a problem.

Your Honor, if the problem occurred because of the merger, the merger ought not to be sustained because of the problem. So that's my second question. Why should the court give any credence to a purported problem that the parties themselves created? I'm certainly going to be listening closely for an answer.

In any event, even if the court gives some credence to that evidence, the court has the equitable power to fix the problem through ancillary relief accompanying the divestiture.

So having proven our case, Your Honor, even if there were a question about remedy, the cases make clear that the court should resolve that favor in favor of the government. The law also makes clear that divestiture is the best remedy to cure the anticompetitive impact of an unlawful acquisition.

But here's the rub, really, when it comes to remedy: Even if you buy their evidence about the financial condition of Saltzer, a weakened Saltzer is a much, much better option than the remedy they propose, and it's not even close. The remedy they propose, these separate negotiating teams, it



wouldn't work. It's ripe for potential collusion, it's been criticized by economists, and it would involve this court in monitoring this case for years to come. Without question, the appropriate remedy here is complete divestiture. The facts warrant it, the law favors it, and, respectfully, the court should order it.

Thank you.

THE COURT: Thank you.

Mr. Bierig.

Mr. Bierig, I understood you wanted to, maybe, take a break around 11:45 or so. But I'm completely flexible, so we can either go later or earlier than that.

MR. BIERIG: Well, I didn't really have a specific time in mind, Your Honor. There is just one part of my presentation where it would be appropriate to break. I'm not sure what time that we will reach that because I don't know what questions the court is going to ask. So it will be roughly an hour from now is my guess.

THE COURT: Okay. That should work.

MR. STEIN: Can we turn the screen on, Your Honor?

THE COURT: Yes.

MR. BIERIG: Good morning, Your Honor. I want to begin by thanking Mr. Metcalf, Ms. Hohenleitner, and Ms. Gearhart, in absentia, and most of all this court for the time and attention that have been devoted to this case



both before commencement of the trial on September 23rd and subsequently. On that date, I represented that the Saltzer affiliation is highly procompetitive in both intent and effect. It is an important part of St. Luke's efforts to compete more effectively in Canyon County and to transition from volume-based to value-based delivery of healthcare in Southern Idaho.

For Saltzer, the transaction was essential in enabling it to provide 21st Century medicine to its patients through access to an infrastructure and a compensation arrangement that are available only as part of an integrated delivery system. Without the transaction, Saltzer simply could not have participated as effectively or as meaningfully in the transition to value-based care.

The goal for both parties was to effectuate the Triple Aim, to provide better health and better care at a lower cost. Now, I heard Mr. Greene talk about all these things that are going on in other parts of the country. They haven't worked; that's why we have a crisis in this country. And what we are trying to do, what St. Luke's and Saltzer are trying to do, is to solve that problem in our own unique way in the Treasure Valley. And I believe that the evidence adduced at trial strongly suggests that if allowed to go forward, the transaction will have precisely the procompetitive effects that the parties envision.



Yet despite the extremely procompetitive intent of the parties to the transaction, the proposed findings submitted by plaintiffs convey the impression that the affiliation was a nefarious plot by St. Luke's and Saltzer to increase concentration in a supposed market for adult primary care physician services in Nampa in order to raise prices above competitive levels. That misguided view is simply not supported by the facts.

At the time the discussions of an affiliation were initiated by Saltzer in 2009, St. Luke's had no pediatricians, no adult primary care physicians, and no acute care hospital in Canyon County. During the course of those discussions, St. Luke's, in late 2011, largely by happenstance, hired seven primary care physicians associated with the Mercy Medical Group when those physicians left Saint Alphonsus and approached St. Luke's in order to avoid a highly restrictive covenant not to compete that Saint Alphonsus was seeking to impose upon them. That is the only reason that there is any horizontal aspect to this case. Absent the hiring of the seven Mercy physicians, this case would involve an entirely vertical transaction. As such, it is readily distinguishable from the cases on which plaintiffs rely, cases such as *Philadelphia National Bank* where two banks sought to merge, and other cases where two hospitals sought to merge. This is not that kind of case.

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Plaintiffs -- plaintiffs put up a slide in their opening statement showing transactions purportedly similar to this one that have been struck down. However, as this slide demonstrates, all of the cases relied upon by plaintiffs involved exclusively horizontal arrangements. Plaintiffs' cases might be on point if St. Luke's had sought to merge with Saint Alphonsus or even with TVH, but they are of only marginal relevance to the largely vertical transaction before this court.

Plaintiffs have done their best to take out of context a document here and a statement there to try to cobble together a case of unlawful conduct. But the evidence is overwhelming that the purpose of the Saltzer transaction was not to gain or to abuse market share, but to transform the delivery of healthcare in this state by bringing essentially a new product to market. And the evidence is equally overwhelming that this will be the effect of the transaction if it is not nipped in the bud in this lawsuit.

The evidence has made clear that competition in the delivery of healthcare is alive and well and thriving in the Treasure Valley and that plaintiffs' claims of supracompetitive pricing or vertical foreclosure of competition are entirely without foundation. Two strong systems, St. Luke's and Saint Alphonsus, are vigorously competing against one another, and entities such as TVH and

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the Primary Health Medical Group are providing yet additional competition. Physician networks of all stripes, broad networks, narrow networks, networks formed by insurers, networks formed by employers and networks formed by providers are all competing, as well. And now with the entry of SelectHealth into the insurance market and its offering in conjunction with St. Luke's risk-based contracts, there is going to be intense competition in the market for healthcare insurance. There is absolutely no reason to be concerned that the affiliation of Saltzer with St. Luke's will suppress such vibrant competition. Quite to the contrary as the evidence has shown that affiliation has had the effect of causing other providers and insurers, such as Blue Cross, to become more innovative and more competitive.

Now with those general observations as background, let me turn to the specific evidence. Resolution of this case requires the court to balance the asserted anticompetitive effects of the transaction against the likely procompetitive effects: So I will begin by discussing the supposed anticompetitive effects, first the government's pricing claims and then the private plaintiffs' foreclosure claims. I will then go on to the procompetitive effects of the transaction and plaintiffs' efforts to minimize those effects.

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On the first of these issues, the bottom line is that plaintiffs' claim of a likely anticompetitive price increase by virtue of the Saltzer transaction is simply not borne out by the facts. Plaintiffs' evidence on this point consists primarily of a showing that after the Saltzer affiliation, St. Luke's accounts for a very high percentage of services performed by adult primary care physicians in the city of Nampa or, alternatively, in a market consisting of Caldwell, Nampa, and Meridian. But that showing does not meet plaintiffs' burden of establishing likely anticompetitive effects in a properly defined market. And that is so for two reasons.

First, the geographic market is not so limited. As David Argue testified, a geographic market includes providers who act as competitive constraints on one another. Here the evidence shows that Nampa physicians and physicians elsewhere in the Treasure Valley act as competitive constraints on each other. It is not disputed -- it's not disputed at all -- that one-third of residents of Nampa already travel outside of Nampa for primary care and that roughly one-third of the patients of primary care physicians in Nampa do not reside in that city.

Plaintiffs have also discounted and have not even mentioned this morning the testimony of Micron executive Pat Otte and others that when Saltzer was out of network

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with Micron the vast majority of Micron patients left. It is, of course, true -- it is, of course, true that the defendants -- and defendants have never disputed that all else being equal, people would rather see primary care physicians who practice near their home or near their work, but that fact does not establish Nampa or Nampa and the two adjacent towns along I-84 as the relevant market. Rather, the proper inquiry is this: What would patients do if prices increased by a small but significant amount above competitive levels? And both the fact that a substantial percentage of Nampa residents already leave Nampa for primary care and the fact that Micron employees in Nampa flocked away from Nampa when Saltzer was out of network belies the notion that the relevant market is limited to Nampa.

THE COURT: Counsel, isn't there a bit of a problem? I probably should have asked this when we were hearing testimony on this issue. But the problem is that at least those who are covered with insurance, the only economic impact upon them is the amount of the copay or their deductible, I guess. But it strikes me that just, generally speaking, because of that fact, people typically are influenced by a lot of noneconomic factors in selecting a physician. And so I'm curious as to how that perceived reality on my part, which is that the -- an increase in the

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copay from $15 to 20 or $25 or my annual deductible from 250 to 3- or $400 is not as noticeable if it's going to require that I have to go somewhere else or change doctors. That's just a commonsense observation. And --

MR. BIERIG: That's my point, that a 10- or 15-dollar increase in copayment led people to leave Nampa and go elsewhere.

THE COURT: Based upon Micron's experience as much as anything.

MR. BIERIG: That's based upon Micron's experience, which is the only real experiment we have. The rest is all theory. But we know from real experience that a 10- or 15-dollar increase in copayment causes patients to leave Nampa to go to Boise, to go to Meridian. That we know from Micron. It's true that even if the market were to include Boise, we still would have a not-insignificant number of -- not-insignificant market share. But the law is clear that the burden is on plaintiffs to establish a properly defined market, and this they have not done. As the Eighth Circuit held in *FTC versus Tenet Healthcare,* failure to prove a well-defined geographic market is fatal to a plaintiff's case.

Now, second -- and this is very important, Your Honor -- more fundamentally, plaintiffs rely very heavily on structural presumption as reflected in

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market-share numbers, but that approach overemphasizes the market definition exercise and fails to examine what's really important, which is the actual competitive effects of the transaction. And, in this connection, I would cite for Your Honor the following statement:

Quote, the Federal Trade Commission should encourage courts to abandon the use of structural presumption first announced by the Supreme Court in *Philadelphia National Bank*. Such a change would considerably improve courts' analysis of mergers and better reflect modern economic thinking and empirical evidence."

Now, that might sound like an argument put forth by counsel for defendants in this case, but its author is Joshua D. Wright, a commissioner of the Federal Trade Commission. Commissioner Wright made this statement on the second day of the trial of this case, September 24th, 2013.

The two reasons that he put forward in support of his conclusion are directly relevant to Your Honor's consideration of this case. These are his words. These are the words of a commissioner of the Federal Trade Commission: "First, the structural presumption endorsed by *Philadelphia National Bank* does not make economic sense. Modern economic learning and empirical evidence does not support the notion that mergers that generate a postmerger firm with greater than 30 percent share are systematically more likely to be

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anticompetitive. Of course, the presumption is a convenient litigation tool" -- and I want to emphasize this -- "and one that confers some valuable advantages to the antitrust agencies and private plaintiffs in their litigation efforts to shift the burden to defendants when courts are not otherwise persuaded by a competitive effect story. But the lodestar of the antitrust laws is not litigation victories; it is consumer welfare."

Commissioner Wright then gave a second reason: "The second reason to abandon the presumption is that it is far too sensitive to the market-definition exercise. Indeed, it is difficult to justify the structural approach when the critical lesson of the modern economic approach to mergers is that postmerger changes, pricing incentives, and competitive effects analysis are what matters."

Commissioner Wright's thoughts echo similar judicial criticism of *Philadelphia National Bank* that -- the case that FTC counsel has relied on so heavily this morning. And I would urge Your Honor to consider the judicial criticism. As the D.C. Circuit said in *Baker Hughes*, in a panel decision that included two current justices of the Supreme Court, that decision, that is, *Philadelphia National Bank,* has been, quote, cut back sharply. And as Judge Posner observed in *HCA versus FTC*, courts no longer rest on the very strict merger decisions of the 1960s, like *Philadelphia*

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*National Bank,* but instead, quote, inquire into the probability of harm to consumers.

Nevertheless, in their quest for a litigation victory in this case, plaintiffs have offered little more than a superficial market-share analysis that depends on Nampa as the relevant geographic market and on strained efforts to distort the actual facts.

By contrast, defendants have presented concrete proof that the Saltzer transaction will not result in supracompetitive prices or in crippling the ability of the private plaintiffs to compete either through loss of referrals or otherwise. Most importantly, we have presented concrete evidence relating to what consumer -- Commissioner Wright referred to as, quote, the lodestar of the antitrust laws, consumer welfare. I will address consumer welfare in greater detail when I discuss the procompetitive benefits.

But let me start with the government's pricing theory. There are at least seven reasons, actually there are eight. I'll get to another one later. But there are at least seven reasons to conclude that on the actual facts of this case, the sterile HHI approach on which plaintiffs rely does not portend supracompetitive pricing of healthcare services to commercial payors.

First, the purpose of this transaction was not to increase price. To the contrary, it was to enable Saltzer

to practice 21st Century medicine for its patients and to enable St. Luke's to take care forward in Canyon County and to transition to value-based healthcare delivery throughout its service area.

Second, when Saltzer was independent, it employed virtually all of the pediatricians and the majority of adult primary care physicians in Nampa, yet there is no, no evidence that it was able to raise prices above competitive levels.

THE COURT: Now, it did -- it was able to negotiate an increase in reimbursement rates from Blue Cross, but it -- on a statewide basis because Blue Cross did not differentiate.

MR. BIERIG: It was able to get the same that everyone else in the state got. That's correct. That's what it got; it got the same that everyone -- that, we don't think, bespeaks market power.

Third, economic theory, which I'll discuss in a moment, suggests that St. Luke's could not profitably raise prices above competitive levels.

Fourth, the Micron natural experiment, which plaintiffs have not alluded to today, confirms that St. Luke's could not profitably raise prices above competitive levels.

Fifth, plaintiffs have produced no evidence that any past integration of a physician practice by St. Luke's has



led to supracompetitive price increases.

Sixth, the contract price for 2013-2014 that Blue Cross negotiated with St. Luke's, even after Blue Cross knew of the Saltzer transaction, further demonstrates that prices will not increase above competitive levels.

And, seventh, the board of St. Luke's regards price increases above competitive levels as contrary to the Triple Aim and is committed to keeping prices down.

Before proceeding, I want to digress briefly to confront the red herring of increased reimbursement from Medicare. This case is not about receiving increased reimbursement from Medicare, in accordance with the provider-basing regulations which govern payment when a previously independent physician practice becomes a hospital department in accordance with the Medicare regulation. Increased payment, when the regulations have been met, reflects Medicare's recognition that a hospital's cost for providing services are significantly greater when the costs of a physician practice are -- than the cost of a physician practice in providing the same services. Any increased reimbursement or prediction of increased reimbursement from Medicare is not the result of the exercise of market power, and any reference to St. Luke's ability to get higher payments from Medicare through compliance with the provider-basing regulations does not in any way support or



even speak to plaintiffs' claims about the market for commercial insurance.

So now let me address each of the seven reasons why abstract references to market-share numbers do not support a conclusion that an anticompetitive price increase as a result of the Saltzer transaction is likely.

First, motive. As I noted in my opening statement, the Supreme Court has taught, quote, the history of the restraint, the evil believed to exist, the reason for adopting a particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences."

Here, the testimony of Dr. John Kaiser, Tom Patterson, and Harold Kunz demonstrates that Saltzer initiated the discussion that led to the challenged affiliation for absolutely the best of reasons: To become part of an integrated delivery system in order to provide comprehensive, coordinated, high-value care to patients.

For its part, St. Luke's has demonstrated through the testimony of Dr. David Pate, Skip Oppenheimer, Chris Roth, and John Kee, among others, saw the transaction as a way to compete more effectively in Canyon County and as an



important step toward transitioning to value-based delivery of care. Dr. Pate summarized the points succinctly, quote, our consideration was how was this going to advance accountable care and the Triple Aim.

Notably, Saint Alphonsus's own documents reveal that it cited much of the same procompetitive reason when it sought to acquire Saltzer in 2012. At that time, Saltzer was already part of the Saint Alphonsus Health Alliance and, therefore, already had a loose affiliation with Saint Alphonsus. Yet Sally Jeffcoat, CEO of Saint Alphonsus, wrote on January 31st of that year, quote, a more formal alignment would accelerate these possibilities and facilitate development of a solid integrated model of healthcare delivery at the Nampa campuses throughout Canyon County and westward."

Now, despite Ms. Jeffcoat's understanding of the procompetitive reasons for an affiliation with Saltzer, Saint Alphonsus and its coplaintiffs have, as I predicted they would, cherry-picked a handful of documents from among the terabytes of data produced in discovery to try to twist the facts to fit their erroneous theory that the Saltzer transaction was intended to raise prices to commercial payors.

However, selective citations to a few documents that don't tell the real story cannot overcome the overwhelming

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weight of the evidence regarding the procompetitive purpose of the Saltzer transaction. Moreover, upon close inspection, none of the documents relied upon by plaintiffs evidences anticompetitive intent.

Plaintiffs point to documents which contain references to St. Luke's clout or that mention leverage. Notably, the vast majority of these documents were the works of third parties at Saltzer's consultants, the Coker Group, but there was no testimony at trial that any Saltzer physician agreed that the reason for the transaction was to acquire clout or leverage or to be able to charge prices above competitive levels. Rather, it's just what I said it was: It was to try to become part of an integrated delivery system that was going to improve the quality of care for patients.

Now, at trial, plaintiffs -- and today -- plaintiffs sought to make much of a document, written by Dr. Randy Page of Saltzer and signed by several Saltzer physicians, in which it is stated that St. Luke's is the dominant provider of healthcare services in the Treasure Valley and that an affiliation with St. Luke's would help Saltzer, quote, control and codevelop, end quote, St. Luke's services in Canyon County.

For want of anything better, plaintiffs have seized upon that document as supposed proof of the anticompetitive intent of the transaction. But Dr. Page has explained that

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all he meant was that St. Luke's was the preeminent provider in the region with whom Saltzer could best partner to provider better care and that plaintiffs' fixation on the word "dominant" or the word "control" to suggest anticompetitive motive does not reflect what he intended by those words. Regardless, references to "dominant" and "control" as they appear in the context of that letter hardly establish that St. Luke's or Saltzer had either the purpose or the power to act anticompetitively.

Plaintiffs have also made reference to a PowerPoint presentation to the St. Luke's Treasure Valley board showing, quote, Nampa physician market share. Notably, that document was not presented to the System Board, but much more significantly that document was not intended to be a market-share analysis for antitrust purposes. Reference to a Nampa physician market share in one document hardly establishes that Nampa is a relevant market for purposes of antitrust analysis or that the parties entered into the Saltzer transaction for anticompetitive purposes.

Plaintiffs have further relied on documents which suggest that St. Luke's and Saltzer anticipated that the transaction would lead to increased revenues. Most of those documents refer to anticipation of increased revenues as a result of compliance with the Medicare provider-basing regulations. As I just explained, Your Honor, the parties'

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expectations of increased revenues from Medicare has no bearing on the issue in this case.

Plaintiffs can cite to only one set of documents that even remotely reflect the possibility of increased prices to commercial payors. These documents contain the financial modeling performed by St. Luke's consultant, Peter LaFleur. Those documents mechanically applied St. Luke's existing contract rates to certain of Saltzer's ancillary-services volume. Of course, what plaintiffs fail to note is that each of those documents includes the following disclaimer: Quote, Reimbursement differences represent the upper limit of potential changes. Actual results may be materially different due to chargemaster, contracting, and other factors, which may differ from assumptions used in this analysis."

In other words, all of these changes in that one document and series of documents would be subject to negotiation with commercial payors. Significantly, none of the revenue modeling by Mr. LaFleur speaks of any increase in payments from commercial payors for the professional services of Saltzer physicians. The only changes in commercial payments presented by Mr. LaFleur related to laboratory imaging and other ancillary services, but plaintiffs have not even made an argument and have not presented any evidence that suggested the Saltzer

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transaction will result in St. Luke's gaining market power in the market for laboratory imaging or other ancillary services.

Here is the important point, Your Honor. If St. Luke's or Saltzer had really entered into this transaction for the anticompetitive purposes that plaintiffs now ascribe to them, the relevant documents would be replete with references to such purposes. But the opposite is true. There are very few such documents. And that fact speaks volumes. As I noted at the outset of this trial, this is a case of the dog that did not bark. While good intent does not save anticompetitive effect, the procompetitive intent of both sides of the challenged transaction should support a prediction that anticompetitive consequences are likely to ensue.

Let me move now from intent and concentrate on effect. On plaintiffs' view of the geographic market, Saltzer had a clear monopoly in the number of pediatricians in Nampa prior to the affiliation and well over half the adult primary care physicians in that city. If plaintiffs' view of market realities were correct, one would expect to have seen proof that Saltzer was able to raise prices for primary care services above competitive levels before its affiliation with St. Luke's. But there is no evidence in this record to that effect.

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Saltzer negotiated, Saltzer threatened to go out of network, Saltzer did its best to get fees that it thought it deserved, but Blue Cross successfully resisted all of Saltzer's efforts to obtain higher payment or to enter into gainsharing contract in the commercial sector. Nancy Powell, who was Saltzer's CFO until October of 2011 when she became employed by Saint Alphonsus, summed up the situation:

"Question: Saltzer never received reimbursement above the statewide fee schedule at any point from Blue Cross, did it?

"Answer: For commercially insured, no."

So Your Honor is correct; they did get the statewide fee schedule, but that fact hardly bespeaks market power or anticompetitive conduct.

The other fact that plaintiffs rely upon is that Saltzer was able to resist a decrease in reimbursement from Regence for participating in Regence's PPO network. Saltzer resisted that decrease because participation in the PPO network was not going to result in steerage of more patients to it, which is the normal reason that providers will cut fees in order to participate in a PPO. In effect, Regence was attempting to force a significant decrease in payment with no basis for doing so. In the end, Regence recognized that participation in its PPO involved no additional benefit to Saltzer and, therefore, agreed to maintain fees where

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they had been. That incident hardly establishes that Saltzer had market power. Indeed, if Saltzer had had such power, it could have extracted all sorts of concessions from Blue Cross, but it never did.

The inability of Saltzer to raise prices when it had a supposed monopoly of pediatricians in Nampa belies the claim that Nampa is a relevant market. The fact is that patients in Nampa could always have turned to providers in Caldwell, Meridian, and Boise. And knowing this, payors like Blue Cross never paid Saltzer above market price. This history strongly suggests that St. Luke's, facing strong competition from Saint Alphonsus, SAMG, and others, would not be able to raise prices above competitive levels even if it wanted to.

The explanation for why Saltzer could not raise prices above competitive levels and why St. Luke's will not do so as a result of the challenged transaction was laid out by defendants' expert, David Argue. Dr. Argue showed that all of the evidence in this case points to the conclusion that a substantial number of Nampa residents already travel to Meridian and Boise for primary medical care and that more would do so if St. Luke's were to raise prices above competitive levels. He, likewise, showed that Nampa physicians draw a substantial number of patients from outside Nampa. As Dr. Argue explained, these facts

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demonstrate that providers outside of Nampa act as competitive constraints on Nampa providers or, in other words, a market limited to Nampa is not a proper relevant geographic market for antitrust purposes.

By the way, the product market alleged by the government plaintiffs is adult primary care physicians. If it is pediatricians, there is no case here because St. Luke's had no pediatricians in Canyon County prior to the affiliation. That's why I had to chuckle as I listened to counsel for the FTC this morning when he talked about carrying babies from Nampa to Boise. The pediatric market is not even at issue in the government plaintiffs' case.

Now, using critical loss analysis, Dr. Argue explained that it would be uneconomic for St. Luke's to raise prices by even 5 percent over market levels if the price increase led to a loss of more -- not 8.8 percent, but more than 1.5 percent of patients because when you lose the 8.8 percent of patients, you also lose the revenues from the ancillary services and the hospitalization that goes with that loss. And Dr. Argue testified that based on the fact in the Treasure Valley it is very likely that even a 5 percent increase above market would result in an unacceptably high loss of patients for St. Luke's.

Now, plaintiffs point out that he did not offer a prediction as to exactly how many would be lost. No one

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could do that. It would be completely ill-founded to make an exact prediction, but it is very clear that greater than 1.5 percent of patients would be lost if St. Luke's were to raise prices more than 5 percent over market levels.

Plaintiffs never refuted Dr. Argue's analysis. They did point out that Dr. Argue did not define the outer boundary of what he regards as the relevant market. But there are two answers to that point: First, the burden is on the plaintiffs, not on defendants, to define a proper geographic market. Second, the precise outer boundaries of the market don't really matter. What Dr. Argue showed is that whatever those limits might be, the competitive situation in the Treasure Valley makes an anticompetitive price increase highly unlikely.

Rather than come to grips with Dr. Argue's analysis, the government plaintiffs relied on the testimony of their own expert, David Dranove. I can summarize the thrust of Dr. Dranove's testimony in a single sentence. Here's that sentence: Any development that increases the bargaining strength of a provider against an insurer is anticompetitive. That was basically what Dr. Dranove said. But increases in bargaining leverage do not determine whether a transaction is anticompetitive. If they did, any combination of providers would be unlawful, and that proposition cannot be correct. Indeed, Dr. Dranove conceded

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that there was no objective benchmark to determine when increases in leverage become anticompetitive.

Ultimately, he returned to the basic, sterile HHI analysis. His testimony is particularly suspect, given that his former client, Blue Cross of Idaho, has a very large share of the insurance market and can exercise significant countervailing power against any proposed price increase. The basic point here is that Dr. Dranove is incorrect. A transaction is not anticompetitive just because it gives a provider increased leverage with payors; rather, a transaction is anticompetitive if it gives the provider power to raise price above competitive levels.

The Ninth Circuit actually stated the correct standard in the *Rebel Oil* case. It said, "An act is deemed anticompetitive only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."

Significantly, in the four weeks of trial, plaintiffs have never presented any market-based evidence, never presented any market-based evidence, as opposed to HHI numbers, that the Saltzer transaction gives St. Luke's the power to do any of those things. To the contrary, Your Honor. There is important evidence in this case of a natural experiment that provides empirical support for the conclusion that St. Luke's does not have market power, and

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that is the Micron experience.

In 2008, as this court heard, Micron formed a tiered network that incentivizes patients to see providers in a narrow provider network, known as the Micron Health Partners Network or MHPN. As the Micron presentation on the screen reveals, the incentives of the Micron network resulted in a dramatic shift of patients away from Saltzer and from other non-MHPN providers. Indeed, as Dr. Argue testified and as the next slide will show, the percentage of visits to Nampa pediatricians by Micron employees in Nampa dropped from 48 percent to 7 percent. In other words, the financial incentives that Micron implemented didn't just cause patients to switch providers; they led Nampa residents to leave Nampa for pediatric care.

The testimony of Dr. Harold Kunz reveals that the same phenomenon occurred with respect to adult primary care physicians. When Saltzer was not included in the MHPN, the number of his Micron patients plummeted from 60 to 1. As he testified, those patients went to Meridian and to Boise. The Micron experiment provides real-world evidence that patients in the Treasure Valley will react to small but significant price increases by shifting away from the provider that imposes the increase and will, thereby, defeat an anticompetitive price rise in accordance with the critical loss analysis.

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But the Micron story is important not only for Saltzer and for physician practices; it's also important for the lesson it teaches St. Luke's. The Micron network also excluded St. Luke's hospital. As this slide shows being out of network caused St. Luke's to experience a dramatic decrease in usage by Micron employees. Specifically, that usage dropped from 75 percent to 10 percent. St. Luke's is well aware that it can expect a similar result, but only on a dramatically larger scale, if it were to go out of network for Blue Cross. After all, Blue Cross represents a far greater portion of St. Luke's revenues than Micron did.

As Dr. Argue testified, if St. Luke's has to contract with Blue Cross, as clearly it must, then any incremental bargaining leverage that St. Luke's may realize from the Saltzer transaction is irrelevant. As this graphic shows, St. Luke's, quote, best alternative to a negotiated agreement with Blue Cross is no alternative at all."

Now, plaintiffs offer two explanations for the Micron experiment; neither is persuasive. First, they say that Micron is unique, that Micron was so desperate in 2008 that it took draconian measures that no one else would take. Well, there are two short rejoinders to that theory, Your Honor: Micron and Walmart. Even after Micron's economic situation improved dramatically, it has continued to offer its narrow network. Saltzer was not included in

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any tier of the Micron health plan from 2008 to 2011, and it is still not today in the MHPN.

In these circumstances, any suggestion that without Saltzer Micron is going to continue its plan -- discontinue its plan or that networks cannot function without Saltzer is completely incorrect and not credible.

Further, if Micron is so unique, why has Walmart recently joined the Micron network? And going beyond Walmart, if Micron and Walmart are so unique, why have Thomas Cuisine and Paul's Markets recently implemented narrow network products that direct patients to Saint Alphonsus? It's, undoubtedly, true that narrow networks are currently outnumbered by broad networks, but as counsel for Saint Alphonsus wrote to the Federal Trade Commission in the summer of 2012, quote, Healthcare reform and clinical advancement are inextricably linked to narrow networks, end of quote.

Plaintiffs' second argument, advanced by Dr. Dranove, is that Micron tells us nothing because the percentage price increase to patients was greater than 5 percent. That, however, is the exact wrong way to look at it, and this is what Your Honor was asking. If a copayment went from one dollar to two dollars, it would have increased by 100 percent. But so what? The better question is the question that Your Honor posed: How much more money, in absolute

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terms, would a price increase cost the patient? And here, as we've discussed, that increase in absolute terms for purposes of seeing a Saltzer physician was on the order of 10 or $15 per visit, yet this differential was enough to cause a monumental loss to Saltzer.

The lesson is clear relatively small price increases for primary care physicians will not be tolerated in this area. I remember Mr. Deal, Director Deal, saying how price conscious consumers in Nampa are. As Dr. Argue explained, all that it takes to make a price increase unprofitable is loss of a relatively small volume of patients, 1.5 percent or so.

As Dr. Argue also explained, payors have the power to set copayments and deductibles so as to incentivize patients to use certain providers. That is exactly what Micron, Walmart, Paul's Market, Thomas Cuisine, and others are doing.

One more point before I leave Micron, Your Honor. Plaintiffs argue that St. Luke's has resisted competing on price for the Micron business. That is just not true. What the evidence shows is that since St. Luke's was excluded from the Micron network, it has competed vigorously to try to get back into that network. It has offered discounted fee-for-service arrangements, and as Mr. Otte himself acknowledged, it even offered a full risk-based arrangement

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in which St. Luke's would guarantee Micron that its healthcare costs would not increase for several years. The fact is that competition from St. Luke's has required Saint Alphonsus to offer the discount that it has offered to the benefit of Micron.

But this is the first of plaintiffs' three Catch-22 arguments. If St. Luke's gets Micron's business, plaintiffs will say that it has market power because it is a must-have provider. If St. Luke's doesn't get Micron's business because it chooses not to get into a fee-for-service bidding war but rather offers to move to a value-based contract, plaintiffs say St. Luke's has market power because it disdains competition. According to plaintiffs, no matter what St. Luke's does, it proves that St. Luke's has market power. Joseph Heller would be very proud of plaintiffs.

The history of physician practices that have joined St. Luke's further undermines plaintiffs' theories. The lesson of those affiliations is quite simple. There is no evidence, absolutely none, that any past integration of physician services in the Treasure Valley has led to anticompetitive price increases to commercial payors.

When St. Luke's hired the physicians with the Mercy Medical Group in Nampa in 2011, there was no increase in price to commercial payors. Indeed, Blue Cross's own internal analysis shows -- and this is on slide 28 -- that

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every single affiliation of a physician practice with St. Luke's has resulted either in no change or a decrease in commercial reimbursement for physician services. You can see that from the -- from the chart, Your Honor.

THE COURT: When you say there was no increase to commercial payors, are you excluding insurance companies from that?

MR. BIERIG: I am including insurance companies. There was no increase.

THE COURT: There was no change in the way the doctors were --

MR. BIERIG: There was either no change or a decrease, in some situations.

THE COURT: All right.

MR. BIERIG: As to the Magic Valley, there is, once again, absolutely no proof of any anticompetitive price increase after affiliation with St. Luke's. To the contrary, after St. Luke's merger with Twin Falls hospital and its affiliation with the aligned physicians of that hospital, St. Luke's actually persuaded those physicians to accept lower reimbursement and to join the Blue Cross PPO there. With respect to IPN, I'll quote plaintiffs' own proposed corrected finding of fact No. 244, which is set forth on slide 29, quote, here is how they put it, St. Luke's was able to negotiate a favorable deal with IPN

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in the Magic Valley securing a raise in fees up to the maximum allowed by the statewide fee schedule."

To put the point in slightly more objective terms, IPN agreed that it would pay Magic Valley providers the same as it paid everyone else in the state. That's far from evidence of negotiating above-market payments.

In any event, there is a critical difference between the Treasure Valley and the Magic Valley such that the Magic Valley is not a reliable predictor of competitive effects here in the Treasure Valley where the demographics are very different, where St. Luke's faces intense competition from Saint Alphonsus, and where Saint Alphonsus owns the only hospital in Nampa.

In short, Your Honor, the history of physician practices that have joined St. Luke's gives absolutely no reason to believe that prices will increase to anticompetitive levels by virtue of the Saltzer affiliation.

In this connection, as shown on slide 30, it is quite noteworthy that plaintiffs' experts were unable to testify that they had done an analysis showing that any physician practice -- that after any physician practice joined St. Luke's, the prices for physician services to commercial payors increased above competitive levels. That question was put directly to them, and they both acknowledged that they had done absolutely no analysis as to whether any price

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increase was anticompetitive.

Now, let me invoke an oxymoron -- I kind of like this one -- future history. No one can, of course, foretell the future with certainty. But we do know the rates that Blue Cross negotiated with St. Luke's at the end of 2012 for the years 2013 and 2014 in full contemplation and with full knowledge of the Saltzer transaction. Those rates supersede the speculative projections of the impact of the Saltzer transaction that Blue Cross prepared in the summer of 2012, projections that did not take into account the contractual protections that Blue Cross extracted from St. Luke's for increases resulting from the addition of any physician practices.

Significantly, none of plaintiffs' experts have even tried to take the position that the price increases that were negotiated with full knowledge by Blue Cross of the Saltzer transaction are supracompetitive. That's another dog that is not barking. To the contrary, Dr. Argue demonstrated that St. Luke's reimbursement rates from Blue Cross are consistent with previous contracts and well within the range of what Blue Cross is paying to other providers in the region. The fact that there has not been an anticompetitive price increase in contracts that have been signed, even when the full facts of the Saltzer transaction were known, should say something.

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Plaintiffs' efforts to explain this inconvenient truth produces their second Catch-22 scenario. According to plaintiffs, there was no anticompetitive price increase because, as they put it, quote, the cop was on the beat, end of quote. So a showing of anticompetitive price increases, according to the plaintiffs, is not necessary. Even if St. Luke's doesn't raise prices above competitive levels, it has market power. As I said before, Joseph Heller would be proud, indeed.

Now, let me say a word about Blue Cross. Blue Cross has vigorously opposed the Saltzer affiliation, and no wonder: It is extremely threatened by SelectHealth and the value-based plans that it will offer through its alliance with St. Luke's, which is very much advanced by the Saltzer affiliation.

Let's look at Blue Cross's own document from August 20th -- oh, this is AEO. Sorry. Take a look, Your Honor. Sorry.

Just take a look at Blue Cross's own document from August 20th, 2012. Your Honor will see that they are very, very concerned about the entry of SelectHealth, and that they are trying to figure out how to --

THE COURT: What is the source of -- that apparently is a Saint Al's document?

MR. BIERIG: This is a Blue Cross document.

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THE COURT: All right. I'm sorry. It's obvious from the context. I just -- I couldn't -- it wasn't obvious from -- until I read it. Thank you.

MR. BIERIG: Notably, plaintiffs have offered nothing to support the conclusion that the Saltzer transaction will diminish Blue Cross's strength in the market, and they have offered no proof that the transaction has led to supracompetitive pricing.

So, thus far, I've talked about motive, and I've talked about effect. I've reviewed the evidence of why St. Luke's could not implement above-market prices even if it wanted to. But the fact is that it does not want to. We know this from the procompetitive purpose of the Saltzer transaction, as discussed above. And we also know it from St. Luke's System Board member, Skip Oppenheimer, who testified that raising prices above competitive levels would be contrary to St. Luke's goal of effectuating the Triple Aim. A key element of which is lower cost.

Now, I'm aware --

THE COURT: Can I bring it back up?

MR. STEIN: Yes, Your Honor.

MR. BIERIG: I'm aware, Your Honor, that during the trial, the court expressed skepticism as to whether nonprofits operate any differently from for-profits.

THE COURT: I asked that question about that, and

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the response was skeptical whether they did. I'm not --

MR. BIERIG: And people have rightly raised that issue. Courts have raised that issue. But the point I'm making here is not a function of St. Luke's nonprofit status; rather, it stems from the fact that anticompetitive pricing would be directly contrary to the third pillar of the Triple Aim, to which St. Luke's is completely committed: lower cost. And it also stems from the fact that St. Luke's is the only locally based and locally governed healthcare system in Idaho. Every member of the St. Luke's System Board lives in this state and is part of this community. Several are executives of Idaho companies which would have to absorb the cost of any supracompetitive prices.

In these circumstances, Your Honor, I would respectfully submit that the observation of the court in *FTC versus Butterworth* is fully applicable here. Quote, The involvement of prominent community and business leaders can be expected to bring real accountability for price structuring."

In short, for all seven reasons, and for an eighth reason that I will get to when we deal with procompetitive effects, it is highly improbable that the effect of the Saltzer transaction will be to raise prices above competitive levels as the government plaintiffs on the basis of little more than sterile HHI numbers and speculation ask

this court to find.

So let me move now to the theory of the private plaintiffs. These plaintiffs lack standing to assert a pricing claim since, as competitors of St. Luke's, they stand to benefit from any high prices that St. Luke's would allegedly charge. Their theory, therefore, is not based in any way on anticompetitive pricing; rather, their theory is that the Saltzer transaction will so cripple them that competition itself will be suppressed. Notably, the government plaintiffs have explicitly declined to join in this -- in this theory and with good reason. The record is devoid of any evidence that these plaintiffs will be so injured by the transaction that they will be unable to compete effectively.

The basic argument of the private plaintiffs is nothing more than that the Saltzer transaction will cause them to lose referrals from Saltzer physicians. But loss of referrals from one source is of no moment for antitrust purposes unless that loss is so great that it suppresses competition. The correct inquiry is whether as a result of the Saltzer transaction the private plaintiffs will lose and be unable to replace so much volume that they can no longer compete effectively.

Nothing in this record, Your Honor, even remotely indicates that this will occur; rather, the evidence reveals



that the private plaintiffs have not lost nearly as many referrals as they claim, that those referrals that they have lost have been more than made up for by referrals from other sources within the market, and that both private plaintiffs are in a very, very strong competitive position.

In an attempt to avoid these unavoidable conclusions, the private plaintiffs called Deborah Haas-Wilson as their expert. Dr. Haas-Wilson correctly acknowledged that the antitrust laws protect competition, not competitors. But she then made the astounding assertion that anything that harms Saint Alphonsus or TVH as competitors harms competition. Through this sleight of hand, she took the position that because a Saltzer transaction may result in fewer referrals to Saint Alphonsus, the transaction harms competition. Of course, competition always harms the less-effective competitor. In effect, Dr. Haas-Wilson is taking the position, the nifty position, that competition harms competition if it somehow harms Saint Alphonsus or TVH.

Plaintiffs proposed findings of fact go even farther. According to plaintiffs, anything that gives an advantage to St. Luke's harms competition.

Let's take a look at plaintiffs' proposed corrected finding 810, shown here on slide 37. Plaintiffs ask this court to find that, quote, Any greater competitive advantage



to St. Luke's will harm competition, end quote. This sort of contention reveals that plaintiffs regard any successful competition by St. Luke's as anticompetitive.

THE COURT: Well, Counsel, let me just ask a question about that. If -- in a market in which there are not a lot of players, in other words, not a lot of alternatives for a consumer, that statement could be fairly accurate, that if -- let's say that there are only two competitors, anything that would harm a single competitor in that market, assuming that there's not other alternatives -- so I guess it's that elasticity of demand -- that there's just not any other options to go to, that statement is fairly accurate, is it not?

MR. BIERIG: I don't think it would be accurate at all. The question is whether the competitor is so harmed that it can't compete. If it was marginally harmed, if it lost some referrals, that would not harm competition in the slightest bit.

So what they're saying is that anything that gives us a competitive advantage harms competition, the essence of competition is to try to harm your rival, is to try to do better than your rival. And what they're basically saying is for St. Luke's to be stopped from competing. We have in this market two very strong competitors, and several other competitors who are doing a very good job, and in this



market the thought that St. Luke's should not be allowed to try to gain competitive advantage is completely anticompetitive.

THE COURT: So if a player in the market with only two real competitors has 90 percent of the market share and they are still free to do anything they want to to make it more difficult for the small player to compete because that's just part of competition.

MR. BIERIG: No. They can't engage in unfair practices or predatory practices. They can't do that, but they can certainly try to compete effectively. And, of course, we're not dealing with a 90 percent player.

THE COURT: Well, I know. I realize that.

MR. BIERIG: As I was saying, Your Honor, the only circumstance in which vertical foreclosure actually harms the competitive process is when it forecloses a substantial share of the overall market. Here the private plaintiffs contend that the transaction will foreclose them from a competitively significant portion of the volume of available referrals for inpatient and outpatient services in all of Ada and Canyon County. But in order to assess that claim, the court must look not simply to Saltzer referrals, but to the significance of the Saltzer referrals relative to the overall referrals available in the market.

Plaintiffs have provided not a shred of evidence as to

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the percentage of overall referrals that Saltzer referrals represent. Dr. Haas-Wilson admitted that she didn't even look at the number of referrals available in the market overall. That admission alone is fatal to the claim of the private plaintiffs. And even more tellingly, these plaintiffs have made no effort to counter the fact that whatever losses and referrals they experienced from Saltzer were made up in referrals from other sources.

I'm about to show a couple of AEO slides, so I'm going to ask Your Honor to blank the screen.

The testimony of TVH CEO, Nick Genna, is very telling. Mr. Genna testified that surgeries at TVH have fallen off substantially since Saltzer affiliated with St. Luke's. What Mr. Genna failed to mention was that at approximately the same time that St. Luke's and Saltzer affiliated, TVH opened Treasure Valley Surgery Center. As slide 38 shows, Your Honor, many procedures formerly performed at TVH are now performed at TVSC. Indeed, we have shown that the total volume of surgeries performed at the Treasure Valley facilities has not dropped one iota. In fact, notwithstanding the decrease in surgeries by Saltzer surgeons, TVH and TVSC are on track to do far more procedures this year than last year.

And look at these financials. TVH is on pace to have its best year ever, financially, in 2013, the year after the

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Saltzer transaction. Under no reasonable interpretation of the antitrust laws does this evidence support a finding of anticompetitive foreclosure.

Saint Alphonsus's foreclosure claims suffer from the same defect -- I think we can bring the screen up now -- Saint Alphonsus's foreclosure claims suffer from the same defect. Professor Haas-Wilson's foreclosure opinion rests largely on her analysis showing that after surgical practices joined St. Luke's in the past -- yeah, I asked for the screen to come back.

THE COURT: You want it back on?

MR. BIERIG: Yes.

THE COURT: Okay.

MR. BIERIG: Her analysis rests on the showing that after surgical practices joined St. Luke's, the surgeons ceased doing surgeries as Saint Alphonsus. But as defendants have demonstrated, decreases in procedures at Saint Alphonsus by those surgeons were offset by increased procedures by other surgeons -- as this document shows -- largely because Saint Alphonsus's primary care physicians stop referring cases to St. Luke's surgeons and started referring them to other surgeons at Saint Alphonsus. Thus, the analysis of surgery practices does not support a finding that past physician integrations led to foreclose at all. All it shows is that different people are doing the same

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amount of surgeries. It's certainly doesn't show anticompetitive foreclose.

Unlike Professor Haas-Wilson, Dr. Argue and Lisa Ahern analyzed whether there has been any significant change in referrals to Saint Alphonsus by primary care groups who affiliate with St. Luke's, which is really the more relevant inquiry here. Their analyses based on both payor data, as shown on slide 41, and Saint Alphonsus's internal data demonstrate that there has been no significant change. Dr. Argue's analysis using payor data demonstrated that there was virtually no change in the volume of referrals by primary care physicians to Saint Alphonsus after affiliations with St. Luke's. Ms. Ahern's analysis showed only slight decreases, ranging from 9 percent to 23 percent of referrals by such physicians.

THE COURT: Counsel, apart from what the numbers show, there is an intuitive sense that if the -- at least one of the goals of the merger, or any merger, is to obtain clinical integration, that concept of clinical integration suggests there is going to be steering towards physicians within the group with which you're integrated. Isn't that a fair assumption that that's at least one of the objectives? And if that is the case, why would that not result in, somehow, a change in referral patterns that would have some impact upon non-St. Luke's specialists?

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MR. BIERIG: Well, over the long term, Your Honor, the hope is -- and it will not be through steerage -- the hope is that physicians who are associated with St. Luke's will send their patients to St. Luke's because it's better for those patients. That is going to be a long-term development. And, of course, Saint Alphonsus is going to do the same thing. They are building their own system, and they will be expecting their physicians to -- to basically make referrals within their system. But that's a long-term development, which is really competition at work. There is nothing -- there is absolutely nothing that St. Luke's has done to require or even encourage its physicians to steer patients away from Saint Alphonsus or Saint Alphonsus physicians. So --

THE COURT: Well, I understand that. But part of my concern, of course, is that -- you know, again, I don't know all of the time frames in which these acquisitions took place, but the fact that the -- there was at least some suggestion of the State of Idaho's concern, the Federal Trade Commission's concern, Saint Al's perhaps rattling sabers, I guess I'm a little concerned that maybe that's not a very good snapshot to take as far as what the patterns were over the last couple of years, and more -- we just need to look at, intuitively, that if the goal here is clinical integration, that is going to affect referral patterns.

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MR. BIERIG: Well, over time it certainly may. But if you look at this slide, Your Honor, these figures go back to 2007. These figures show that over a five-year period -- you know, over a five-year period there really has not been a significant loss of referrals to Saint Alphonsus facilities.

And I would note, Your Honor, that it is clear, it is absolutely -- it's not even disputed that St. Luke's has not imposed any restrictions on the freedom of Saltzer physicians to make referrals to plaintiff hospitals or to physicians associated with plaintiff hospitals; quite to the contrary. Numerous Saltzer physicians, Dr. Kaiser, Dr. Patterson, Dr. Kunz, have all testified that particularly with Saint Alphonsus owning the only hospital in Nampa, it was of utmost importance that they be able to make referrals as they saw fit in the best interests of their patients. And St. Luke's readily agreed that these physicians would have complete discretion to make referrals as they deem appropriate.

The evidence is incontrovertible that these physicians have continued -- these Saltzer physicians, who we're talking about in this case, have continued to send substantial numbers of patients to Saint Alphonsus Nampa, and the reason for that is so obvious. Saint Alphonsus Nampa is the only hospital in that whole area, so, of

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course, those physicians are free and should be free to make referrals as to what's in the best interests of their patients. Over time, some years from now, St. Luke's may be building a facility in Nampa or elsewhere in Canyon County, and we certainly hope that these doctors will realize that their patients will get better care in a St. Luke's facility. But that's competition. That's not anticompetitive.

If we can show that their care is -- that the care for their patients will be better because they're part of an integrated delivery system at St. Luke's, that's competition. That's not something that we are forcing doctors not to compete -- excuse me, not to refer to any Saint Alphonsus facility. And, indeed, this chart that we're talking about and this testimony of these physicians of Saltzer demonstrate that this is really not a problem.

Now, Dr. Haas-Wilson did a study purporting to show that when physician practices have joined St. Luke's, referrals to Saint Alphonsus dropped to essentially nothing and, thereby, threatened the ability of Saint Alphonsus to compete. However, as we showed at trial, that study is based on the assumption that if a St. Luke's physician is not listed as the admitting physician, he or she did not make the referral.

In fact, the evidence shows that most primary care

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physicians don't admit patients themselves to Saint Alphonsus Nampa but rather rely on a hospitalist at that facility. In these situations, a hospitalist at Saint Alphonsus is listed as the admitting physician even though and even when a St. Luke's physician made the referral to the hospitalist and even when the St. Luke's physician made the decision to send the patient to Saint Alphonsus. Indeed, the role of the hospitalist is to admit and see patients who have been referred for admission by the primary care physician, the specialist, or the emergency room. So Dr. Haas-Wilson's study is based on completely inaccurate assumptions and has no, zero probative value.

These facts and the fact that the Saltzer physicians are continuing to send patients to Saint Alphonsus Nampa in very significant numbers totally undermine the analysis by Saint Alphonsus CFO, Lannie Checketts, that purports to show that the loss of referrals from the Saltzer transaction would have a devastating impact on its ability to compete.

As defendants' expert Lisa Ahern persuasively demonstrated, that study, that is the Checketts study, was based on worst-case scenarios that have no grounding in reality. Specifically, that all referrals from Saltzer physicians to Saint Alphonsus Nampa would immediately, completely, and irrevocably cease as a result of the affiliation. The evidence has borne out that that

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assumption is not even close to being true.

We've heard testimony from many physicians who have testified that they are continuing to send lots and lots of patients to Saint Alphonsus Nampa, as you would expect, since that's the only hospital in that area.

This is significant because even Mr. Checketts and Dr. Haas-Wilson acknowledge that if the loss of referrals were 30 percent or less, they could not say what the effect on Saint Alphonsus would be. Thus, the Checketts analysis cannot be the basis of any legitimate finding that the Saltzer transaction will cripple Saint Alphonsus's ability to compete.

But even if it were true, even if it were correct -- which it clearly is not -- harm to one of the seven hospitals that compete in Ada and Canyon County, the one Saint Alphonsus outpost does not constitute harm to competition.

The hospital plaintiffs also say that St. Luke's will put Saltzer out of various networks and, thereby, destroy their ability to compete. This claim is quite ironic, indeed, given that Saint Alphonsus documents, for example the one shown on slide 43 -- this is AEO, too?

THE COURT: I'm sorry?

MR. BIERIG: We have to go onto AEO mode here.

THE COURT: And, Counsel, we're right at the

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lunch -- or noon, but we can go on for a bit more.
MR. BIERIG: I've got about five more minutes.
THE COURT: All right.
MR. BIERIG: This claim about pulling Saltzer out of the network is quite ironic, given that Saint Alphonsus's document, for example the one that Your Honor is seeing now, reveal that Saint Alphonsus has been seriously considering eliminating Saltzer from its network. But more basically, as I previously mentioned, and as the Micron natural experiment clearly demonstrates, a network doesn't need Saltzer or St. Luke's to be competitive. It may be that a network without St. Luke's providers is less attractive to some people than one with such providers, but that doesn't mean that St. Luke's has the power to foreclose competition in the market for adult primary care services, as the Micron experience clearly demonstrates.
So plaintiffs' network-foreclosure theory, like its referral-foreclosure theory, is meritless. Which brings me to my final point on the private plaintiffs' foreclosure claims. While these plaintiffs assert that the Saltzer transaction has foreclosed their ability to compete, the evidence at trial reveals the exact opposite. I have already shown that 2013 has been the most profitable year ever for TVH's physician investors.
Saint Alphonsus -- I love this -- Saint Alphonsus has

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announced -- while it's claiming that it's being foreclosed and that it won't be able to compete effectively, Saint Alphonsus has recently announced that it is investing 33-and-a-half-million dollars -- this can be up on the screen. Can we open the screen, Your Honor?
THE COURT: Yes.
MR. BIERIG: This competitor that claims that its ability to compete is being suppressed has recently announced that it is investing 33-and-a-half-million dollars to improve its hospital in Nampa. These are not the actions of entities whose ability to compete has been crippled; instead, they are vigorous competitive responses to the competition that the Saltzer transaction is injecting into the market.
In sum, Your Honor, the situation is precisely what I said in my opening statement. Saint Alphonsus and TVH are exceedingly concerned about the competition that they are facing as a result of the affiliation of Saltzer with St. Luke's and the likely subsequent construction of a St. Luke's hospital in Canyon County.
Let's look at what Saint Alphonsus said -- we may have to go AEO on this -- let's look at what Saint Alphonsus said in a capital submission document to its parent corporation, Trinity, in late 2011. Your Honor can see this on slide 45.
Many of plaintiffs' responses to the competition that

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is being injected by the Saltzer transaction, like the investment in Saint Alphonsus Nampa by the Saint Alphonsus system or the opening of Treasure Valley Hospital's new surgery center in Nampa, are very legitimate responses to competition, but this lawsuit designed to kill the Saltzer transaction before its procompetitive effects can be realized is not.
Plaintiffs have offered this court absolutely no evidence to support a conclusion that the likely effect of the transaction will be an anticompetitive increase in price or a foreclosure of the ability of the hospital plaintiffs to compete. None whatsoever. It is their case that is built entirely on speculation and on the notion of "trust me."
Having addressed the highly speculative and unproven nature of plaintiffs' claims of likely anticompetitive benefits, I want to move to the procompetitive effects of the Saltzer transaction, but I think the best time to do that would be after lunch, Your Honor.
THE COURT: All right. Counsel, let's take, then, a -- let's try to reconvene roughly at 1:30. We'll take roughly an hour and a half. All right. We'll be in recess until 1:30 this afternoon.
(Recess.)
THE COURT: Mr. Bierig. You may resume your

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argument.
MR. BIERIG: Good afternoon, Your Honor.
Turning to procompetitive effects of the Saltzer transaction, there are at least four such effects:
One: Substantially enhanced community outreach as part of a program of population health management to reduce the need for hospitalization and for acute care.
Two: Provision of care for all patients, including Medicaid and uninsured patients, regardless of their ability to pay.
Third: Delivery of fully integrated care using the best available electronic health record, evidence-based medicine protocols that are developed and implemented by physicians, and information on provider performance and patient outcomes that come only from an integrated system using very sophisticated measurement tools, such as WhiteCloud data analytics.
And fourth: Transitioning from the fee-for-service system that pays providers based on the volume of procedures to an alternative in which providers are rewarded for providing high-value care and avoiding unnecessary procedures.
During my opening statement, Your Honor asked whether these four effects are real or whether they are pie in the sky. I would respectfully submit that the evidence has

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shown that they are anything but pie in the sky.
Numerous physicians, including, for example, Dr. Tom Patterson, have testified that their affiliation with St. Luke's has enabled them to start or significantly to expand community outreach programs designed to keep people well, the better health pillar of the Triple Aim.
Likewise, numerous Saltzer physicians, for example, Dr. Harold Kunz, have testified that Saltzer's affiliation with St. Luke's has enabled Saltzer physicians to stop limiting the number of Medicaid and uninsured patients that they see and to accept all patients without regard to their financial or insurance status.
The evidence has also shown the enormous investment that St. Luke's has made and is making in the Epic EHR and in the WhiteCloud data analytics tool. These tools and the information they provide have already had a huge impact on physician practices, as Dr. Brian Fortuin testified when he demonstrated WhiteCloud to this court.
They have also enabled St. Luke's to align incentives by transitioning its physicians to our quality-based compensation, and they have permitted St. Luke's to identify and reach out to patients who will benefit from additional outreach or more intensive services.
These efforts have already begun to bear fruit in the form of programs, such as CoPar, which seeks to reduce costs

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and improve quality of care and quality of life for some of the sickest patients.
Additionally, numerous physicians who previously worked in independent practices have testified that access to St. Luke's state-of-the-art health information technology and a compensation based on the fixed payment structure have fundamentally improved their ability to care for patients.
Thus, for example, Dr. Marshall Priest testified that he and his colleagues at Idaho Cardiology Associates were able to establish a congestive heart failure clinic, which significantly improved the quality of care for cardiac patients, only after their practice affiliated with St. Luke's.
Similarly, Dr. James Souza testified that Idaho Pulmonary Associates was able to implement an EICU, establish revenue-reducing protocols for sleep studies, and developed a lung nodule clinic only through its affiliation with St. Luke's.
But St. Luke's efforts will fully blossom in 2015, not in 2020, as plaintiffs suggest, when having gone further down the road to full clinical integration, St. Luke's, through its strategic partner, SelectHealth, will be able to offer full-risk contracts to commercial payors.
If this were pie in the sky, St. Luke's would be very foolish to have invested the tens of millions of dollars

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that it has in Epic and WhiteCloud. It would be very foolish to create programs like CoPar, whose purpose is to reduce the use of hospitals and other high costs and, in a fee-for-service world, high-revenue services.
In short, if this were pie in the sky, St. Luke's would not have taken these and the other steps it has taken and is taking to make value-based delivery of healthcare a reality.
There are two further pieces of evidence that demonstrate that these procompetitive effects are anything but pie in the sky. One comes from defendants, and one comes from plaintiffs.
First, defendants' expert, Professor Alain Enthoven, has testified how numerous integrated delivery systems, such as Kaiser and Geisinger Clinic, have already succeeded in achieving improved costs and quality measures by taking the same steps that St. Luke's is now taking to provide integrated care.
As Professor Enthoven has explained, working with employed physicians rather than with loosely affiliated physicians has made the transition quicker and more effective for those systems. Indeed, Professor Enthoven testified that Geisinger has specifically noted that its employed physicians are faster and more effective in adopting innovations than independent physicians are.
On the plaintiffs' side, Richard Armstrong, director of

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the Idaho Department of Health and Welfare, has testified that the four procompetitive effects that St. Luke's is trying to achieve are precisely the goals that the Department is seeking to achieve.
The Department's commitment to these goals demonstrates that they are anything but speculative. Indeed, the testimony of Director Armstrong sounded remarkably similar to the testimony of Dr. Pate regarding the need for clinical integration and a transition to value-based delivery of care.
Now, plaintiffs seek to counter St. Luke's procompetitive effects with three somewhat related arguments. They say that these efficiencies are not merger specific, have not been quantified, and are speculative in that they have not yet been fully realized. None of these criticisms has the slightest validity.
First, each and every one of the asserted procompetitive benefits is merger specific. The Saltzer transaction enables St. Luke's to offer community outreach programs in Canyon County. Absent the transaction, the economic constraints on the Saltzer physicians prevented them from seeing all Medicaid and uninsured patients.
The testimony of Dr. John Kaiser and other Saltzer physicians could not have been clearer that, without the affiliation with St. Luke's, Saltzer would simply not have

gotten access to the Epic EHR, could not and would not have made the investment needed to have access to WhiteCloud, would not have put in place a payment structure that enables them to develop evidence-based practice protocols to better serve the patients of Canyon County, and would, therefore, simply not have been able to move toward delivery of fully integrated care.

Perhaps most importantly, the evidence has shown that the affiliation with Saltzer has given St. Luke's the presence in Canyon County and the scale and type of financial arrangements with physicians that it needs in order to move to risk-based delivery of care.

So I want at this point, Your Honor, to answer the very first question that the court posed at the beginning of the discussion today. The Saltzer transaction is necessary to achieve a risk-based integrated healthcare delivery system in Canyon County on anywhere near the timeline that St. Luke's and Saltzer are on.

Saltzer simply did not have the resources or the infrastructure to create a system that could manage and bear downside risk. You heard testimony on that. And St. Luke's didn't have the presence in Canyon County needed to provide a product such as this one. Without the Saltzer affiliation with its seven Mercy physicians, it would have taken years for St. Luke's to develop the size and the scale needed to



do this successfully.

So the answer to the question that the court posed is emphatically yes. And that point leads me to explain the eighth reason that plaintiffs' reliance on market shares and HHI calculations rather than on actual competitive conditions is particularly misguided in this case.

Plaintiffs simply fail to recognize that in order to have a fully integrated delivery system that will take both upside and downside financial risks, the system must be of a size and scale that enables it to offer a full range of services across a population sufficiently large that the system can spread the costs of unduly expensive outliers across a large number of patients.

That issue was raised most directly in this case in the court's question to Professor Enthoven: Does the ability to offer an integrated delivery system that bears financial risk require that system to have a substantial number of the physicians in a market?

In a small or midsize market, the answer to that question is definitely yes. That is the lesson of such systems as Kaiser, Geisinger, and Intermountain.

Your Honor has already pointed out that Kaiser has 40 percent of the market in all of California. And that is one of the lessons of Judge Posner's decision in *Marshfield Clinic* nearly 20 years ago, where the Seventh Circuit



refused to break up the Marshfield Clinic even though that clinic employed all of the physicians in Marshfield and in several neighboring counties.

Notably, that was before the Marshfield Clinic and other integrated delivery systems moved, as they are moving now, to value-based delivery of care. Today, two decades later, the financial incentives offered in the Accountable Care Organization and Medicare Shared Savings Program provision of the Affordable Care Act demonstrate that the Congress of the United States has recognized the value of integrated risk-bearing systems such as the one that St. Luke's is building.

In large metropolitan areas, like Los Angeles or Chicago, there are so many physicians that there can be many competing integrated delivery systems. But in a midsize market, like the Treasure Valley, the need for scale is such that it is unlikely that there will be more than two integrated delivery systems of sufficient size to manage risk.

Saint Alphonsus's own documents recognizance this fact. Here is how Saint Alphonsus put it, quote: "A majority of physicians see alignment and integration occurring around Saint Alphonsus's and St. Luke's health systems throughout the region, with a few cross-over physicians."

And that is why it is neither surprising nor



anticompetitive that St. Luke's would have a larger percentage of primary care physicians in Canyon County than the merger guidelines, which are, after all, only guidelines which set forth as possibly posing anticompetitive concerns.

Plaintiffs' second criticism is that defendants have not been able to quantify each benefit of the transaction. In plaintiffs' words, defendants bear a, quote, "heavy burden," end quote, to, quote, "verify the magnitude of each asserted efficiency," end of quote.

Once again, plaintiffs are just plain wrong. Thus, in the *Staples* case, the court rejected the FTC's position that evidence of benefits must be, quote, "clear and convincing." The *Staples* court recognized -- and this is very important for purposes of this case -- quote, "a difference between efficiencies which are merely speculative and those which are based on a prediction backed by sound judgment." That's the words of the *Staples* court.

That's exactly what we have here. We have efficiencies that are based on predictions of benefits that are based on sound business judgment, backed by sound business judgment. That's what we have here.

In *Baker Hughes*, the D.C. Circuit ruled that a defendant cannot be required to produce evidence of procompetitive effects with a, quote, "degree of clairvoyance alien to Section 7, which...deals with

probabilities, not certainties," end of quote.

Here we have shown that the asserted benefits are very probable. They may not be certain, but the Section 7 doesn't require certainty; it requires probability. And that's what we have shown.

And in the *Tenet Healthcare* case, the Eighth Circuit ruled that evidence that a transaction will lead to integrated delivery of healthcare and ultimately better healthcare will rebut a prima facie case. The Eighth Circuit did not impose any quantification requirement at all.

It went on to make a statement that is very relevant -- and that really foreshadows the comment Your Honor made this morning -- when it said, "In view of the significant changes in healthcare delivery, a merger, deemed anticompetitive today, could be considered procompetitive tomorrow."

In view of *Marshfield Clinic* and *Tenet Healthcare*, I just do not see how plaintiffs can say with a straight face that the benefits of the Saltzer transaction -- community health outreach to try to keep people well, care for all patients regardless of ability to pay, full clinical integration to achieve the second pillar of the Triple Aim, better care, and a transition to value-based care -- are irrelevant to the antitrust analysis; yet, that is what I thought I heard today.



Plaintiffs' third attack is the most misguided of all. The law does not require that all the benefits of a transaction as complex as this one be proven at the outset of the transaction. If that were the case, no vertical integration could ever pass muster because it takes time both to realize the benefits and then to measure them. That's exactly what Director Armstrong said when he set that 2017 date. Rather, it is enough that the benefits are likely.

And that is why the Ninth Circuit in the *Miller* case cautioned against undoing a healthcare merger where doing so might detract from the quality of care for patients and would mean that, quote, "innovative procedures made possible by the transaction would have to be abandoned," end quote.

The defendants readily acknowledge that the movement to value-based delivery of care is a work in progress. It will take time. That is why the fact so heavily relied upon by the plaintiffs that the Saltzer physicians are compensated in part on the basis of RVUs is entirely irrelevant.

The testimony stands unrefuted that St. Luke's has already moved to quality-based compensation for cardiologists, pulmonologists, and internists, and that it will be transitioning the Saltzer physicians to a compensation approach in which 20 percent of their pay is based on quality measures.



Both sides to the transaction recognize that development of the proper quality measures is an iterative process in which the physicians must play an important role, and that neither party had enough experience or enough data to know how to set the appropriate quality measures at the time of the transaction. And both St. Luke's and Saltzer are still, after all, operating in a fee-for-service environment.

So, of course, the process is ongoing, but that doesn't make it any less competitive -- any less procompetitive.

At trial, as I just mentioned, Director Armstrong of the Department of Health and Welfare gave important testimony, very relevant testimony on this issue. He explained why the Department's plans just to implement evidence-based clinical preventive services would take until 2017.

And both Dr. Enthoven and Pat Richards of SelectHealth testified about all the actions that a delivery system must take in order to be able to transition to full value-based care and risk-based contract.

Surely, neither the Clayton Act nor the Idaho antitrust statute requires that all the benefits of a transaction be fully realized and measured at the time of the challenge.

And that brings me to the third and perhaps the most cynical of the Catch-22 scenarios that plaintiffs would



impose upon St. Luke's. Specifically, on one hand, the private plaintiffs succeeded in securing a commitment at the preliminary-injunction hearing that St. Luke's would not integrate Saltzer into the Epic EHR and would not take other integrative steps that would make divestiture impossible. Then, a year later, they argue the transaction is unlawful because its benefits have not fully materialized and have not been measured.

As I have said before, Joseph Heller would be extremely proud of these plaintiffs.

Plaintiffs resort to another tactic. They try to rely on facts that are not in evidence. What they do is they ask a witness a question as to whether the witness has heard "X." And then when the witness says, "No, I hadn't heard that," they then sort of, in their findings of fact, say that "X" is a fact when, in fact, it isn't.

And Your Honor had indicated that if that occurs, the court will not rely on that kind of testimony, and we urge that the court adhere to that statement.

In any event, the basic point here is that the procompetitive benefits of the Saltzer transaction are anything but speculative. They are not certain, but they are, in the words of the *Staples* court, a prediction backed by sound business judgment and by the models, such as Kaiser and Geisinger and others, which have indicated that they

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very much work.
Some of the benefits are farther along than others, but they are far more likely to occur than the anticompetitive price increases or vertical foreclosure of competition about which plaintiffs have done nothing but speculate.
And this brings me to plaintiffs' final argument, that the procompetitive benefits of the Saltzer transaction could have been realized with a much looser affiliation.
The first point to note here is that this is, again, a very ironic argument coming from Saint Alphonsus inasmuch as Saint Alphonsus made an offer to employ the Saltzer physicians in 2012 and, as this slide indicates, offered much the same procompetitive reasons that St. Luke's is offering for the need for employment.
Your Honor can read it. "Certainly, a more formal alignment would accelerate these possibilities and facilitate development of a solid integrated model..." This was said at a time when Saltzer was already in the Alliance.
The critical difference is that Saint Alphonsus's offer included an onerous 90-mile covenant not to compete and, if accepted, would have resulted in physician concentration numbers in Canyon County far greater than those associated with the St. Luke's affiliation.
But the larger point here is that plaintiffs have not shown and cannot show that Saltzer and St. Luke's could

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achieve these benefits as quickly or as efficiently by other means.
THE COURT: Well, Counsel, I have been wrestling in my mind kind of the issue of who has that burden. If I follow the kind of the classic model of requiring the plaintiffs to establish the anticompetitive effect of the merger, shifting the burden to the defense to establish that the procompetitive effects -- or that, overall, the transaction still has a procompetitive effect, if you're relying upon, you know, the vertical integration or the integration of -- I guess, clinical and financial integration as a means of promoting risk-based contracting and the other benefits, isn't that burden upon you to establish that, in fact, not only that there will be benefits, but that the benefits cannot be obtained without this type of a close, not only clinical but financial integration envisioned by the acquisition?
MR. BIERIG: That's a very good question, and that's one we have been wrestling with ourselves, Your Honor. That's not how I see it.
I think their burden is to prove that there are significant anticompetitive effects, which, as I've said, I don't think they have done other than showing the HHI numbers.
Then the burden shifts to us to show that what we are

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doing is -- that the procompetitive effects of what we are doing outweigh the anticompetitive effects. If we do that, I think the burden then shifts back to them to say that those procompetitive effects could have been achieved in a different manner less restrictive of competition.
That's the way I look at it, Your Honor.
THE COURT: So the idea is that simply -- well, carrying the burden, I guess persuading the court, that your motivation and what is intended and what will occur would be the risk-based contracting, the use of kind of integrated clinical healthcare systems, et cetera, et cetera, that's sufficient to carry your burden, whatever it is. And that if the plaintiffs challenge that, either the necessity or, in fact, the ability of that to achieve what is intended, that's their burden.
MR. BIERIG: That would be my position. I think that's done in *Baker Hughes* that says that the burden is always on the plaintiff. The burden of persuasion is always on the plaintiff.
And if you look at analogous cases in the Sherman Act context, the standard way to look at the issue is: The plaintiff has to prove anticompetitive effects. Okay. If they do that, the burden shifts to the defendant to prove that the procompetitive effects that they are setting forth outweigh the anticompetitive effects.

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We think we have done that. We think there are no real anticompetitive effects, but we think there are very strong procompetitive effects. Once we do that, then we think that the burden shifts back to them to prove that there is a reasonable, less restrictive alternative. But let's keep that in mind as we continue this discussion, Your Honor.
THE COURT: Okay.
MR. BIERIG: Because the most that the plaintiffs have done is to offer testimony from Dr. Kenneth Kizer and from Dr. Dranove to the effect that the jury is still out on whether tight affiliation is necessary to realize the benefits of fully integrated care or whether joint venture arrangements can do the job equally well.
Okay. If we're right about the burden of proof, then if the jury is still out, the plaintiffs have not met their burden on this point. But, in any event, the empirical evidence at trial pointed markedly in one direction: A greater degree of physician employment is associated with improved quality-of-care results.
And as Professor Enthoven testified, all the integrated delivery systems which St. Luke's is trying to emulate rely on a very large nucleus of employed physicians to develop the system's innovations and to put them in place.
In fact, Kaiser has adopted what FTC counsel this morning has characterized as the, quote, "nutty," end quote,

approach of employing all its physicians. That nutty approach has led them to have 40 percent of the market. I wish I could be so nutty in my practices.

In any event, outside of this litigation, Saint Alphonsus has recognized the point itself. Thus, in a letter dated December 20th -- this is one we're going to have to do AEO, for just Your Honor to see. Outside of this litigation, Saint Alphonsus, in a letter dated December 20th, 2011, to a primary care group that Saint Alphonsus was seeking to acquire, the director of primary care at Saint Al's, Dr. Michael Roach, wrote as follows. I'll read it without giving the identity of the entity.

Quote: "I believe" --

MR. ETTINGER: I don't know that solves the AEO problem if the language that's AEO is being read.

MR. BIERIG: Well, the language of AEO is not being read --

THE COURT: Counsel, I can read it on the screen.

MR. BIERIG: What I want to emphasize is the language that what we need is --

THE COURT: Well, tell me where it is.

MR. BIERIG: It says -- it starts out, "I believe our partnership and the opportunity to" --

THE COURT: Okay. That's enough.

MR. BIERIG: Okay. Then you can see the words



"employment" in there.

THE COURT: Okay. Just --

MR. BIERIG: "Will strengthen all aspects of" --

MR. ETTINGER: Your Honor --

THE COURT: Just a moment. It's what's highlighted in yellow on this screen.

MR. BIERIG: Yes.

THE COURT: Is this 58?

I assume, again, that the PowerPoint slides used in your closing will be made part of the record, so I'm going to refer to exhibit -- slide 58 of St. Luke's closing argument -- I guess -- I assume they are PowerPoint slides -- and that which is highlighted in yellow. So I think we've got a record as to what you're referring to. I can read it without having it quoted.

MR. BIERIG: Your Honor, when asked in this case whether he could identify any physician or physician practices that are deeply integrated with Saint Alphonsus outside an employment context, Dr. Roach answered with a one-word answer: "No."

Can we put that back on the screen? No. Okay.

Even if one assumes arguendo that full clinical integration could be achieved as quickly and as effectively without a tight affiliation with Saltzer physicians -- a conclusion which defendants strongly dispute -- the goal of



transitioning to risk-based contracts could not be. In order to do that, a system must have a firm handle on its costs.

And as long as a system is dealing primarily with independent physicians who are charging on a fee-for-service basis, it is more difficult to control costs sufficiently to offer value-based healthcare delivery on a per-patient, per-month basis. That's not to say it can't be done; it's just a lot harder.

In this connection, plaintiffs make the closely related argument that defendants have not produced sufficient studies with statistically significant results to demonstrate that employment of physicians enhances the transition to value-based healthcare delivery any more than joint ventures do.

Of course, as we just discussed, this argument overlooks the fact that, as the D.C. circuit noted in the *Baker Hughes* case, the burden of persuasion always remained on the plaintiffs, not on the defendant.

And it overlooks the fact that, as Professor Enthoven testified, evidence from other integrated delivery systems strongly suggest that employment of physicians is, in fact, the best way to move to risk-based healthcare delivery.

In any event, a study of the magnitude called for by plaintiffs would take years, if it could be done at all to



plaintiffs' satisfaction. If businesspersons waited for definitive studies with statistically significant results before taking actions, they would be left in the dust by their more innovative competitors.

Plaintiffs also fail to identify any realistic alternative to the Saltzer transaction that would produce anything approaching integrated value-based care in Canyon County on the timetable that St. Luke's and Saltzer are working to achieve.

While plaintiffs' experts, Dr. Kizer and Dr. Dranove, both vaguely pointed to Advocate in Chicago -- and we heard about Advocate again today in testimony from plaintiffs' counsel -- neither of those experts gave any specifics or sought to explain whether anything like the purported Advocate model would have any chance in the Treasure Valley.

No one from Advocate was called to testify in this case, and so plaintiffs' counsel's self-serving characterization of the Advocate model should be given no weight.

In this connection, it is significant that John Kee and others have testified that they tried over many years to form clinically integrated networks without tight financial and personal alignment of physicians in Southern Idaho, but they failed.

Plaintiffs' final effort on this point was to offer the

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testimony of its last witness, its chief medical officer, Dr. J.R. Polk, to the effect that Dr. Polk believes Saint Alphonsus can successfully achieve full clinical integration using a majority of independent physicians rather than employed physicians.

It's noteworthy that Dr. Polk, like plaintiffs' experts, is in complete agreement with St. Luke's about the value of integrated risk-based care. But it's even more noteworthy that Saint Alphonsus's efforts to transition to risk-based contracting are much less far along and much less developed than St. Luke's.

But most fundamentally -- and this is a point I would really like Your Honor to consider: Most fundamentally, the antitrust laws do not require this court to place a straitjacket on St. Luke's and to decree that there can be only one road to full clinical integration. FTC counsel stated this morning that many different approaches are being taken around the country.

It's not yet clear which road will lead to the best outcome for patients. Rather, the determination of the best road is the function of the market, not of this court. If Saint Alphonsus and its experts and if plaintiffs' counsel are correct that these other ways work better, the market, rather than judicial fiat, should be the way to sort things out.

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For that reason, I want to conclude my analysis of the merits by again citing what I still believe to be the most compelling judicial pronouncement for Your Honor to consider.

That pronouncement was made by the Ninth Circuit in -- we can put the screen on. That pronouncement was made by the Ninth Circuit court, whose decisions are binding in this court, in *United States vs. Syufy Enterprises*. There the Court of Appeals observed that if market forces can potentially cure the perceived problem, then, quote, "a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent."

Director Armstrong of the Department of Health and Welfare has testified that all of the anticipated benefits of the Saltzer transaction are results that will further the goals of the Department. The import of his testimony is that St. Luke's should be given a chance to deliver on the promise of that transaction.

Director Deal of the Department of Insurance has testified that if a healthcare provider is moving toward a system in which it is compensated based on outcome rather than on fee-for-service, that provider should be given a chance to do so.

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Defendants urge this court to heed this wise counsel of the heads of the two departments of this state who are most directly involved with the issues raised by this case and to follow the wise teaching of the appellate court. It should not enter an order that would, in the words of the Ninth Circuit, quote, "upset the balance of market forces," end quote, and thereby risk, quote, "bringing about the very ills the antitrust laws were meant to prevent," end of quote.

That said, should this court somehow decide that the Saltzer affiliation is unlawful, we urge the court not to order divestiture. We do not take this position because events since the preliminary injunction have made it impossible to divest Saltzer, and we do not take this position because it would be burdensome or costly for St. Luke's to divest Saltzer. Rather, we take this position because, on the facts of this case, divestiture would be a singularly inappropriate exercise of this court's equitable powers.

When this -- when the affiliation was announced in 2012, well before the preliminary-injunction hearing, seven surgeons -- Saltzer's greatest revenue producers -- left Saltzer and joined Saint Alphonsus. Contrary to what plaintiffs' counsel says, that result was not defendant's doing. It was a decision made of the surgeons, by the

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surgeons, and for the surgeons.

Dr. Kaiser and Mr. Bill Savage have testified that without these surgeons, Saltzer cannot be a viable competitive force. And defendants' expert Lisa Ahern has testified that if Saltzer is divested, its physicians will earn only two-thirds of what they earned pretransaction.

Moreover, it is no answer to say, as plaintiffs have glibly asserted, that Saltzer can just go out and recruit new surgeons. As several witnesses from Saltzer have testified, one of the principal reasons that Saltzer affiliated with St. Luke's was that it could not recruit new physicians as an independent clinic.

How much worse would its recruiting efforts be when its physicians are making a significantly lower income than they did before?

A divestiture order would seriously threaten the ongoing viability of Saltzer, without whom there would be a huge loss in continuity of care and harm to the community. But even if the downward spiral could be overcome, the effects on patients would be horrendous.

Divestiture would, as Dr. Kaiser has testified, eliminate Saltzer's access to the infrastructure that its physicians need to offer their patients the fully integrated 21st-century medicine that those patients deserve. It would require Saltzer physicians to curtail unprofitable community

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outreach services. It would force them to limit the number of Medicaid and uninsured patients that they see. And it would gut -- it would gut Saltzer's efforts to be part of the transition to value-based delivery of care.

This is not a result that this court should mandate. Instead, if this -- if this court concludes that there has been a violation and that some relief is required, there is a middle ground, as Your Honor suggested.

And that middle ground would be the approach that St. Luke's offered to the FTC and to the State of Idaho before this case was even filed. An order could require Saltzer to negotiate fee-for-service contracts independently of St. Luke's. Such an order, in our view, is entirely unwarranted by the facts of this case for all the reasons I have stated, but it would effectively address all the concerns about which plaintiffs have speculated.

If the plaintiffs are concerned that joint negotiations of St. Luke's and Saltzer give them too much power, the remedy is to have them negotiate separately. A firm barrier could be erected such that those negotiating for Saltzer, which does remain a separate independent entity, would not know what St. Luke's was doing with respect to fee-for-service contracting and vice versa.

The notion -- the notion put forward today that divestiture, the full remedy sought by plaintiffs, is a

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middle ground is nothing short of nonsense. Rather, as another court in the Ninth Circuit has put it, divestiture should not be entered into without substantial evidence that the benefit outweighs the harm.

Here, defendants have produced all sorts of evidence that the harm to patients and to the public from divestiture would be enormous. Plaintiffs, by contrast, have offered nothing as to the effect of divestiture on the people of Canyon County and nothing to support the proposition that divestiture is an appropriate remedy, except perhaps to punish St. Luke's and Saltzer for what plaintiffs regard as an unlawful transaction.

The mere fact that it's an easy remedy doesn't make it a good remedy, and it is hardly enough -- the arguments put forth by plaintiffs are hardly reason enough to issue an order that will inevitably produce all the harms that the Saltzer physicians and defendants' expert Lisa Ahern discussed.

Before concluding, Your Honor, I would like to make one final point. In my opening statement, I identified 13 mistakes that plaintiffs would make in this case. Having sat through the trial, I believe that plaintiffs, in fact, made each and every one of them. But they have made a 14th mistake that may transcend all the others. An explanation of that mistake will bring the wheel full circle to the very

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first day of trial.

On that day the first counsel to speak for plaintiffs said this, quote: "This case is not about the Affordable Care Act. This case is not a debate about how healthcare can or should be improved. This case is also not about what someone hopes to do in improving healthcare as a result of that debate. Rather, what this case is about is the proper application of laws enacted both by Congress and the Idaho Legislature which uphold competition," end of quote.

This case is, of course, about the antitrust laws of this state and of this nation. But it is also about the future of the delivery of healthcare to the people of the Treasure Valley. And because this case is being closely watched across the country, it is about the future of delivery of healthcare to people all across America.

This case calls upon the court to harmonize the antitrust laws with healthcare considerations, as *Marshfield Clinic* and *Tenet Healthcare* clearly hold.

The advocated divorce of the antitrust laws from healthcare considerations lies at the very heart of the problems with plaintiffs' case. Neither the Clayton Act nor the Idaho Antitrust Act requires this court to ignore the realities of the rapidly changing healthcare market, as plaintiffs would do by their formalistic incantation of HHI numbers, by their desperate efforts to minimize the

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innovation and improvements to healthcare that St. Luke's, in substantial part through the Saltzer affiliation, is bringing to Canyon County and to Southern Idaho in general, and by their refusal to acknowledge the profound, profound harm to the delivery of healthcare in Canyon County that their requested remedy would surely produce.

At the end of the day, Your Honor, this case will determine whether the antitrust laws stand as an insurmountable obstacle to the provision of 21st-century medicine to people in midsized markets. Specifically, whether, despite all the evidence of the benefits of large, fully integrated delivery systems that are endeavoring to transition to the provision of value-based care, people in such markets will be relegated to what the Seventh Circuit has termed "horse-and-buggy medicine."

Defendants respectfully submit that a ruling to that effect would stand the antitrust laws on their head. It would suppress the very innovative and procompetitive changes that St. Luke's and Saltzer have brought to the market, the precise sort of conduct that the antitrust laws properly understood as a consumer welfare prescription are intended to promote.

A ruling for plaintiffs, Your Honor, would be very, very bad medicine in two senses of that phrase, and it would be very bad law as well. It would be the wrong way to fill

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the antitrust prescription to advance consumer welfare in this valley. The right medicine is to enter judgment for defendants on all claims, and we respectfully ask this court to administer that medicine.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Julian.

MR. JULIAN: May it please the court and counsel. I wish to offer a few brief comments for my closing argument.

Mr. Bierig has outlined the defense very well. Saltzer Medical Group agrees and supports St. Luke's position stated earlier as to plaintiffs' failure to meet its burden of proof. I would simply like to take this opportunity to make a few observations for the assistance of the court.

For Saltzer Medical Group and its patients, this case has profound significance. The very livelihood of its physicians, 300 support staff, the medical care of tens of thousands of patients hang in the balance of this decision.

In my opening statement, I mentioned the government when administering antitrust laws, and the court in applying those laws, must do what every physician does every day of his or her life. First of all, do no harm. First, do no harm to the ultimate consumer. Second, do no harm to the good quality of medical practice in the community. And

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third, do no harm to physicians who have chosen to make integration of medical services a valuable tool for properly serving their patients with their chosen partner, St. Luke's Health System.

Let me address each of those three points briefly. First, do no harm to the ultimate consumer. The remedy sought by plaintiffs is so extreme that the court must weigh the benefit of divestiture versus the harm to the ultimate consumer, the patient.

It must be noted that the purpose of antitrust laws is to enhance consumer welfare. In this case, the plaintiffs have failed to prove any potential for consumer harm. In fact, there has not been one single witness -- not one single patient, even -- to speak on behalf of any consumer.

It is only with the proposition that what commercial insurance payors may perceive in the future as economically undesirable will also equate to harm to the ultimate consumer.

Prices for medical services are set by arms-length negotiations with commercial payors. The evidence in this case is that there are statewide contracts which, with very little deviation, make the same payment to all physicians. The short of the matter is neither St. Luke's nor Saltzer could survive without receiving payments from commercial insurers. Adding Saltzer and St. Luke's together does not

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change that fact.

The testimony of Drs. Kaiser, Patterson, and Kunz address the preaffiliation limitations on government-insured and uninsured patients. With this transaction, as best stated by Dr. Kaiser, the clinic is now, quote, "payor blind." In other words, they take all patients regardless of financial or insurance status.

If ultimately the mission of this lawsuit is to improve consumer welfare, but the court nevertheless orders full divestiture, how do we explain to the uninsured and the government-insured patients that they can no longer be seen by a physician of their choice and that their treatment at our clinic must be limited?

The second question ultimately should be: Why shouldn't patients in the Treasure Valley receive the same medical care as available at the Mayo Clinic, the Cleveland Clinic, the Kaiser Clinic system? With this affiliation, St. Luke's system is well on its way to offering that same standard of care.

All of the physicians who testified were very clear that if this relationship is unwound, Saltzer physicians would have to revert to the practice of screening patients on ability to pay.

It was Dr. Patterson who indicated these individuals are some of our community's most vulnerable, and they would

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have a limited access to care. There was a great concern to him due to the very high uninsured population in Canyon County.

As Dr. Kunz testified, this patient population already has difficulty obtaining healthcare. Bill Savage testified that Saltzer is now seeing a significant increase in the number of government and uninsured patients.

Second point: Let's talk about not doing harm to the good quality of medical practice in the community.

Saltzer Medical Group entered into this transaction for St. Luke's for the right reason: to improve medical care. As stated by Dr. Kunz, the practice of medicine has changed in the last 10 or 12 years. And while Saltzer had good tools, they simply weren't good enough.

He addressed that, through negotiations and prior interactions with St. Luke's, Saltzer physicians felt valued; they felt that they were listened to; they felt there was a strong level of trust.

In the relationship, the physicians' right to refer patients to any physician and admit to any hospital, specifically Saint Al's Nampa, was absolutely critical. In fact, Dr. Patterson testified that it was a deal-breaker if they weren't given that right.

Testimony from the Saltzer physicians has given the court ample evidence as to the reasons they sought out and

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chose to enter into the relationship with St. Luke's Health System. None of those reasons had anything to do with market leverage, increasing fees to patients or commercial payors.

All physicians testified that Saltzer could not implement risk-based contracting due to its limited size, limited number of specialists, and the inability to address the risk without financial reserves. Dr. Patterson added that, due to technology limitations, Saltzer was not even able to measure outcomes necessary to set up this type of system.

Finally, Dr. Patterson's testimony bottom-lined the entire issue: A value-based model really cannot be done in private practice. Dr. Kaiser indicated that, due to financial limitations and the limited number of physicians, Saltzer could not have had access to Epic or WhiteCloud or any other state-of-the-art electronic medical record system.

Dr. Kunz addressed his desire to have a robust medical records and health information technology system for his patients. He did not consider Saltzer's to be adequate in today's medical practice, and he expressed concern that Saltzer didn't have the money or the resources to buy the kind of IT that they needed.

Dr. Patterson referred to the current system as a plug-and-play system which did not have the extended ability

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to look at outcomes, did not have patient registry options.

Dr. Kunz provided this court specific testimony of how his access to WhiteCloud analytic tool positively impacted his patients and changed the way he approached his practice of medicine.

Remember also the testimony of Mr. Savage and former CFO Nancy Powell that the Epic medical records system would not even consider negotiating with Saltzer because they are simply too small.

All the physicians and Mr. Savage testified to recruitment problems for Saltzer associated with not being part of an integrated system. Without this affiliation, Saltzer would face huge obstacles and recruitment of new physicians who all wish to be part of an integrated system and for which Saltzer cannot compete in regards to compensation.

Dr. Kaiser testified that treatment of non-English-language patients had been improved through a formalized St. Luke's certified translator program. He also addressed how St. Luke's --

THE COURT: Just a minute. Whoever is listening in needs to put their phone on mute. We're getting a lot of feedback. If you could either hang up or put your phone on mute.

Let's go ahead and try to proceed. If that isn't

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resolved, we will just have to insist that they not listen in since it's interrupting the court and counsel.

MR. JULIAN: I appreciate that. I was afraid that was the court reminding me my red light was on.

THE COURT: No, no. I'm resisting a temptation to ask a number of questions here, Mr. Julian, because it strikes me that you're -- and I think you're doing a great job of pointing that out, that there is a different perspective that your client has even from St. Luke's. Because the concern I had at the outset -- that is, is this merger, this type of full, I guess, employment of the physicians, full financial integration necessary to accomplish the overall objectives? My sense is it probably is more important to you; in other words, more critical to your being able to obtain that than it is even for St. Luke's.

But then you raised the comment in terms of, I guess, a procompetitive or a prosocial effect, the fact that the Saltzer Medical Group physicians would no longer have to be concerned about the source of payment; they would simply take on whoever comes in the door, comes in the door.

But then I have to wonder -- and I can understand that's the economics. I mean, either there is no payment or limited payment provided. And in order to make sure that the compensation for the physicians and everything remains

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basically what the expectation would be for the community, those -- you would have to be careful about the either no-pays or the limited-pay patients.

Then how does that change when St. Luke's gets involved? And I tried to envision -- you can say: Well, they can spread that risk around through a lot more physicians. But at the bottom line they have the same -- as a not-for-profit, they still have to break even.

And so that means, presumably, that that cost of the uninsured or the limited compensation, the Tricare or the Medicaid patients and whatnot, that that presumably would be picked up by the consumer through increased prices negotiated with -- I'm just not sure where that gets us, because ultimately --

MR. JULIAN: Well, and I don't know if I can answer it from a pure accounting standpoint. I can tell you that a clinic that used to have 50 doctors that now has 40, that had its seven top producers taken by Saint Al's and is still paying for the overhead would have to look at only commercial payors. They could not look at others.

Now, we're comparing a clinic of 40 with 300 employees compared to the resources of an organization with 10,000 employees who is able to, maybe even through its own charity, give service and give treatment to the uninsured and to the payment. And I don't see any nexus or any real

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statistical evidence that that will lead to an increase in prices.

THE COURT: Okay. Now, kind of a related point. I think the plaintiffs in their joint brief suggested that there was a not-insignificant increase in the compensation which the doctors would receive as a result of the acquisition. In other words, their compensation, not the total purchase price -- which I think had to do with maybe intangibles, hard assets, and whatnot -- but the actual compensation rate that was guaranteed, as I recall, for three years would actually have been an increase in their compensation rate. Now, I could be wrong about that or -- or perhaps the plaintiffs were wrong.

I'm assuming the explanation is that the compensation would be brought up to a par with the other primary care physicians throughout the St. Luke's network, and that's what occurred. It was not an increase that went beyond just the average compensation rate for primary care physicians throughout the St. Luke's system. Is that accurate?

MR. JULIAN: I think that's absolutely correct, is that, by law, by federal law and other laws, that they are limited to fair market value. And there were all kinds of studies done. And some of the doctors at Saltzer were actually below the mean. Some were brought up, some weren't brought up as much. They have the potential to make more,

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but it is certainly limited to fair market value as far as their compensation.

THE COURT: Okay. And that isn't necessarily apropos to your argument except it does perhaps at least provide a footnote to my question, which is a suggestion that the doctors at Saltzer were being overcompensated because they were refusing Tricare, Medicaid patients. That would -- I would indicate that's not the case because they were actually, prior to the acquisition, being compensated at less than what other physicians in the Treasure Valley were receiving with --

MR. JULIAN: Yeah. There is no evidence of that. In fact, it's like any moderate-sized business. They have expenses and income, and there was an obligation to increase certain amounts of income by other doctors. And by taking the government-insured patients, it was impossible to actually make the levels they needed to keep the business going.

I want to go through some of this. We were talking about Dr. Kaiser. He was also able to deal with hearing-impaired patients. He never had that opportunity at Saltzer. He, in fact, had treated two deaf obstetrics patients through the entire course of their pregnancy.

Dr. Kaiser testified that technology and data analytics expertise available through St. Luke's is nothing that

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Saltzer could ever match on its own.

Dr. Kaiser and Dr. Kunz addressed Saltzer patients and said that they now have access to diabetes education and management tools which could not have been provided by Saltzer.

Dr. Kaiser testified that Saltzer's patients now have access to the St. Luke's Charity Care program, providing a new avenue for patient assistance.

But through Dr. Patterson's testimony, his passion for the practice of medicine was quite evident. This is a physician who has made child advocacy part of his life mission.

You'll recall how excited he was that under this affiliation, he is not only able to but he is encouraged to further this life mission. He detailed his participation in the Patient Centered Home Medical collaborative and how Saltzer was too small and economically not in a position to pilot a program. St. Luke's already had an ongoing pilot.

He addressed his community outreach and educational programs and his participation in Kids Congress. His testimony is that he can now expand his participation and further his goal of improving the health of Idaho's pediatric population.

Due to this affiliation, he is no longer worried about his service volume, which is so critical in a fee-for-

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service model.

Lastly, let's talk about harm to physicians who have chosen to make integration their chosen tool. As testified by Drs. Kaiser, Page, and Kunz, the physicians at Saltzer made a decision that an independent, standalone, fee-for-service model was not the appropriate model in today's healthcare.

Integrated healthcare systems, and especially those that emphasize value-based billing, have become the desire of the practicing physician. Dr. Kaiser, Dr. Patterson, Dr. Kunz all testified that, should divestiture occur, the practice will change and may well not even survive.

Dr. Patterson, Dr. Kunz have both personally stated they would strongly consider leaving Saltzer. A change in this relationship, and most certainly the requested entire divestiture, would result in significant economic harm to Saltzer, its physicians, employees.

As testified by Dr. Kaiser, Saltzer cannot and will not be in a position to invest in anything; in fact, will be cutting costs, not increasing overhead. In such a climate, the quality of medical care will suffer.

Dr. Kunz referenced his concerns of divestiture as lack of accounts receivable, enormous overhead burden, inability to recruit, and the obligation to pay competitive wages -- all of which will result in an unhealthy struggling medical

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practice.
As testified by Dr. Patterson, "We will be fighting so hard to survive, we're not going to be able to compete." And that is a very insightful statement, and that's why this is relevant, what their financial status is. They are not as strong at the end of 2012 as they had been before.
It is telling that both the Idaho Department of Health and Welfare and the Idaho Department of Insurance were brought by the defendants to testify in favor of the goals of this affiliation. The plaintiffs in this suit went so far as to attempt to impeach the Idaho executive branch when such officials testified that the affiliation was in the best interests of the healthcare of Idaho residents and was consistent with the Idaho Department of Health and Welfare's vision for future medical care.
The goals of Saltzer in entering into the St. Luke's relationship were the very same goals testified by the director of Department of Health and Welfare and the director of the Department of Insurance. Those include value-based billing over fee-for-service billing, expansion and encouragement of electronic medical records system, integrated healthcare, medical care access to all regardless of ability to pay, serving the significant Medicaid population in Canyon County.
If the court's concern is of maintaining competition,

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then we cannot ignore the fact that Saltzer Medical Group, in December 2012 and the few months following, lost 25 percent of its physicians. It is simply not the same group. It is going to have difficulty competing. And we will not be able to provide the type of medical care that's -- that's due these tens of thousands of patients.
If Saltzer is forced to go out of business due to divestiture, who benefits? Certainly not the tens of thousands of patients who have used Saltzer for over 50 years for primary care. In fact, it would appear the only benefiting party would be the competing hospital who desperately wants to unwind a deal, a deal it once attempted to transact on its own behalf.
Based on the foregoing, Your Honor, Saltzer Medical Group submits that plaintiffs' claims must be denied.
Thank you.
THE COURT: Thank you, Mr. Julian.
Let me -- before, I guess -- I guess I don't have an order. I might address Mr. Wilson. I'm going to guess that you had some concerns with some of Mr. Julian's last comments in terms of a clean-hands and failing-firm defense. I noted that. And as I noted earlier, I'm not going to regard that evidence except within the context that I indicated I would. And I'm not faulting Mr. Julian. He is making a pitch, but we certainly were talking about things

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that sounded a lot like unclean-hands and the failing-firm defense.
Now, I don't have an order, but I think there is some amount of time left. Plus, I know the defendants went over, and I'll give you the same time.
MR. ETTINGER: Your Honor, could we possibly impose on the court and get a five-minute break before so we can sort this out?
THE COURT: I think that would be a very good idea. Let's make it a ten-minute recess. This will be our second and last recess of -- not only of the day but I guess of the trial. We'll be in recess.
(Recess.)
THE COURT: Mr. Wilson.
MR. WILSON: Thank you, Your Honor.
Before I begin, Your Honor, the plaintiffs wanted to propose to the court that each side submit a proposed order following today's hearing. There is some nuance to, for example, what the plaintiffs are suggesting with notice and things like that that the court might benefit from having a proposed order.
THE COURT: I have no -- have you discussed that with counsel and there's an agreement?
MR. WILSON: No.
THE COURT: Mr. Bierig?

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MR. BIERIG: Well, our proposed order will be very simple: Judgment is entered for defendants. So I'll propose it right now. We have really no order to propose other than that.
If the court decides to impose an order, we would certainly be pleased to comment on it before it's made final. But, you know, going through this exercise, our order is going to be, you know, judgment for defendants.
THE COURT: Mr. Wilson.
MR. WILSON: Fair enough.
THE COURT: Let me dig in as we work through a decision. And if we feel the need for some further briefing -- and there is every possibility we may as we see issues that we're still trying to tease things out. It's a very complicated matter. And as I indicated earlier, this is an unusual case. I rarely, if ever, reach this point in a case without a pretty clear direction in my mind where I think I need to come out. This case defies that.
I think the writing is going to be where I'll finally figure out where -- at least I hope I'll finally figure out -- where I think it has to come down. But it's just a very difficult issue.
MR. WILSON: I'm sure that will change in the next 48 minutes, Your Honor.
May I proceed?

THE COURT: Yes, you may.

MR. WILSON: Your Honor, on the question of remedy, the case law is clear that when a violation is found, all doubts on remedy are resolved in the favor of the government. And the law is that divestiture is the most suitable remedy in a suit for relief from a Section 7 violation, and that divestiture should always be in the forefront of a court's mind when a violation of Section 7 has been found.

Now, in Mr. Bierig's presentation, he quoted some language from a district court opinion out of the Central District of California, the *Gabaret* case.

That language, Your Honor, as the court reviews it is latent dicta. It's not supported in any citation to authority, nor could it be because it's not the law.

Curiously, the defendants fail to quote this language from the *Gabaret* case that immediately follows the language they have quoted, and it quotes language from Professor Areeda's treatise that, "Of course, none of these concerns about divestiture is dispositive in a suit by a government plaintiff."

*Gabaret* was a case involving purely a private plaintiff, and that's obviously not what you have before you.

The case law makes clear that divestiture is the law of



the land, it's the law of this circuit, and there is nothing extraordinary about the court ordering it here.

With regard to the remedy that the defendants have proposed, Your Honor, they don't mention it in their argument today, but it's clear that the remedy they are proposing comes from the *Evanston* case a few years ago, a case that was -- an opinion that was rendered by the Federal Trade Commission. This case is not the *Evanston* case.

In the *Evanston* case, the FTC went to great pains in its opinion to say that the remedy that it chose there was not ideal and imposed only because the circumstances in that case presented what it regarded as highly unusual circumstances. And there were two reasons that made that case unusual.

First, in *Evanston*, one of the principal reasons the FTC did not want to unwind the transaction there was because the parties had already achieved a couple of concrete benefits as a result of the transaction. For example, Highland Park Hospital had a cardiac surgery program that the court didn't want to have go away as a result of a divestiture.

Here, in contrast, there is zero evidence that the parties have achieved any concrete benefit as a result of the transaction. As Mr. Bierig points out, that's not necessarily the defendants' fault -- because, after all,



they have promised they wouldn't integrate -- but it is a reason why divestiture is an appropriate remedy here.

Secondly, and the principal reason that the FTC chose the remedy that it did in *Evanston*, was that the parties had been merged together in that case and fully integrated for seven years in what the FTC described as a complex, lengthy, and expensive process. Essentially, as a practical matter, the eggs couldn't be unscrambled. Here, of course, the eggs have not been scrambled.

In fact, in a promise the defendants made to this court and to the government plaintiffs, that they wouldn't argue that you couldn't unscramble the egg, they essentially promised that the *Evanston* remedy would not apply.

And there is a nuance here that the court has probably picked up on. The defendants found themselves, I'm sure, in a little bit of a trick bag. Because they wanted to propose a remedy other than divestiture, they looked to the *Evanston* case, which proposed these two separate negotiating teams. And they said: Well, how can we propose the *Evanston* remedy of separate negotiating teams when the whole reason we're telling the court that we want to do this deal is because Saltzer needs St. Luke's to negotiate risk-based contracting?

The ingenious solution they came up with was that their remedy only applies to fee-for-service contracts. But the



whole premise of their defense is that the entire system is moving to risk-based contracting and that they don't want to do fee-for-service contracting anymore.

So if the court is to believe them, that the reason to do this deal is because everything is moving to risk-based contracting, according to Mr. Bierig today, by 2015, the remedy they propose is really no solution at all. Because very soon, according to their own argument, it won't apply.

It's really just -- just a remarkable argument they make. I'm tempted to say Joseph Heller came up with it, but --

And, of course, as I mentioned in our initial argument, a remedy like that, Judge, would require a significant amount of oversight and monitoring to be effective.

But, really, the most important point is the remedy that the court imposes has to cure the anticompetitive harm caused by the transaction, and the one that they have proposed doesn't.

Think about it this way: You have got one negotiating team from St. Luke's, one negotiating team from Saltzer. Who do they report to? It's the same company. They are still taking the orders from the same bosses. And, in fact, in the *Evanston* case, a group of economists filed an amicus brief ridiculing this solution as not really providing any solution at all.

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Think about it. If one of the two negotiating teams acts anticompetitively, the business is just shifted over to the other negotiating team. Either way, we both win. Well, what both of them will be thinking when they are on either side of the wall that the defendants propose the court should erect. It all goes with the same bottom line, so there is really no incentive in a situation like this to vigorously compete with each other. It's just a really, really bad idea.

Can we skip to the next slide.

We can black that out, please.

THE COURT: You want the -- is this AEO?

MR. WILSON: No. It's just an argument I'm not ready to make yet.

THE COURT: Oh.

MR. WILSON: With regard to Saltzer's financial condition, Your Honor, it's notable that there was testimony from several witnesses that Saltzer has no contingency plan whatsoever if the court orders a divestiture. There has been no discussion, no plan, no plan to have a plan.

These are very smart people, Your Honor. Why do they have no contingency plan? Is it because they forgot to do one, or is it because they think they will be just fine if divestiture is ordered?

Before the acquisition, Saltzer was a thriving,

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profitable business and turned a profit every year over the past three decades at least.

And why does Saltzer think it will be just fine? When this deal closed, Your Honor, Saltzer got a $9 million New Year's Day gift from St. Luke's. Almost 8 million of that went directly into the pockets of the Saltzer doctors.

And so, in a sense, even if the court were to credit some of this evidence about the financial condition of Saltzer, in a sense, the parties have already negotiated for you what an effective remedy would be. It's in their agreements.

There is a provision in the PSA, Section 6.9 and 6.10, about what happens if a court orders the transaction unwound. And it says Saltzer gets to keep that money. The parties signed that agreement on Christmas Eve, long after the lawsuit had been filed, when the government was breathing down their necks, threatening an antitrust challenge, after the preliminary-injunction hearing when Your Honor told the parties that you would have no problem ordering an unwinding if you found a violation.

So, in a sense, the parties have basically already bargained for what they think they need to stay afloat. And if Saltzer doesn't think that's enough, it's free to tell the court otherwise.

Let's go now to the evidence they did present about

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Saltzer's financial condition, and that was chiefly through the testimony of their expert Lisa Ahern.

What was her testimony? I think it's just as important to look at what she did not testify about. She did not testify that Saltzer will go under. She did not testify that Saltzer will not be profitable. She did not testify that Saltzer won't practice in Nampa. She didn't testify that Saltzer doctors will have to leave Nampa. She didn't testify that Saltzer doctors will not be able to increase their compensation over time. She, importantly, did not testify that Saltzer wouldn't be able to compete.

All she really said -- really, her only conclusion with regard to Saltzer's financial condition was that Saltzer doctors will make less money next year. That's the extent of it. That is all the defendants rely on to try to persuade this court not to adopt the most suitable, ordinary, and effective remedy in a Section 7 case, divestiture.

Even if the court did give some credit to that testimony, that's really beside the point. Because what this really is is a so-called weak company argument. That's never been adopted by any court. It's been characterized as probably the weakest ground of all to justify a merger.

In fact, a case from this circuit said that that defense should be rejected because it would expand the

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failing company defense, a defense which has strict limits.

I heard you again, Your Honor. I'm tempted to go there; I will not go there, but --

THE COURT: I sensed you were --

MR. WILSON: I think it bears repeating that the whole reason they promised they wouldn't make the argument is because we wanted to file a summary judgment motion that would have prevented all this evidence in the first place.

THE COURT: Well, I'm not sure it would have prevented the evidence. If this were a jury trial, it would be a different matter. But I trust myself to be able to compartmentalize and not allow it to affect -- if it finds its way into my decision, you can file whatever you want to with the court saying, "I told you so," but I can almost promise you that it won't. Nor will it affect my decision in any way.

So go ahead.

MR. WILSON: Understood.

There is good reason, Your Honor, why the antitrust law does not recognize a weak company defense. This is a good quote from a case from the Seventh Circuit. It basically says that this is the whole reason antitrust law is around. Because, really, loss of competition involves the acquisition of the small and the weak by the big and the strong.

I mean, we think this evidence of Saltzer's financial condition is speculative and, frankly, exaggerated. But even if you give the evidence some credit, as I said at the outset, a weakened Saltzer is way better than the remedy that they have proposed.

And I just want to mention while I'm up here, Your Honor, that -- and I feel comfortable saying this as outside counsel for the Idaho Attorney General -- Mr. Bierig said that this was a quest for a litigation victory. I couldn't disagree with him more on behalf of my client.

The Idaho Attorney General's Office saw evidence that the law was being violated, and so it really believed that a lawsuit was the right thing to do. Frankly, the Attorney General should be commended for his fortitude in bringing this case despite the very real and substantial cost of doing that.

If he prevails, St. Luke's and Saltzer, not the taxpayers of Idaho, should now bear that burden. And that's why we would request the court grant leave to the Attorney General and the private plaintiffs to file motions setting forth their costs and attorneys fees.

Lastly, Your Honor, I wanted to address one point that Mr. Bierig made with regard to the *Butterworth* case and the effect that a board might have on checking anticompetitive behavior. I think it's worth pointing out -- we have cited



to cases at paragraph 1024 of our conclusions of law -- that that case, the *Butterworth* case, has been roundly rejected by other courts.

And more importantly, with respect to the record here, Mr. Bierig's point was that market fact No. 7 was that the board is committed to keeping prices down.

You heard the evidence, Your Honor. You heard Mr. Oppenheimer's testimony. Apparently, the board never talks about pricing, ever. And, in fact, he testified that, quote, he "could not think of one discussion on pricing at the board or any committee level, anything I can remember being involved in, that had to do with pricing."

That is a curious way to provide a check on pricing. It certainly did not help in the Magic Valley.

And with that, I would turn the remainder of the argument over to my colleagues.

THE COURT: Thank you, Mr. Wilson.

Mr. Greene.

MR. GREENE: Thank you, Your Honor.

I'm going to try and provide some counterpoise to my colleague Mr. Bierig's commentary.

Firstly, he indicated that there were no decisions in the cases that we had cited that involved physician groups. That's actually not correct. The *OSF* decision, which is listed on slide 29 -- which is our series of bulleted case



decisions -- actually did involve a horizontal transaction involving a physician group and a hospital group. And it was resolved, however, on the basis of the hospital-versus-hospital portion of the transaction. But this is a very recent decision that we would certainly commend to the court's attention, but it did also involve a physician practice group.

Mr. Bierig also cited to one of my four bosses, Commissioner Wright. Commissioner Wright was part of the unanimous vote of the Federal Trade Commission to file this case and prosecute it vigorously. Commissioner Wright is an economist. He really does not like the presumption. He is not shy about that.

But even in the slide that Mr. Bierig showed, Mr. Wright made it clear that it will require a change of law -- a change of law in order to eliminate that presumption and that calculus or structure of decision-making which the court is about to embark upon.

THE COURT: I was going to at the time ask if there is any objection to my having the full text of his remarks. I assume that was made in a public setting or it was otherwise reported.

MR. GREENE: I assume that it was. Certainly if it's available, we will certainly supply it, Your Honor.

THE COURT: Mr. Bierig, any objection to that?



MR. BIERIG: We gave the URL site on our slide.

THE COURT: I noted that, but I didn't want to review it unless I had counsel's concurrence that that was appropriate.

MR. BIERIG: I think we're all in agreement that it would be fine for the court --

MR. GREENE: Yeah.

THE COURT: Thank you. I think what I will do is reduce that to a hard copy to make it part of the record because of -- what's that phenomena? -- link rot or something like that.

MR. BIERIG: I think I have a hard copy.

THE COURT: Either way would be fine.

MR. GREENE: I must advise Your Honor that, of course, the Commissioner is --

THE COURT: He is only one person.

MR. GREENE: -- one of four. And we have quite yeasty debates at the Commission. That's why the unanimous vote was so important, because it swept the complete etiological and economic spectrum of the Commission, with Commissioner Wright being at one edge of that and others being at the other side of it. But they all voted that this was an appropriate case to proceed using current authority.

It would be error to require and impose upon the plaintiffs a burden of showing effects. That is actually a

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form of changing the law; the incipiency standard by itself is at war with the idea that you would have to show effects. Because the whole idea of this is it's a forward-looking enterprise; you are trying to sort out potential effects in the future.

That said, we believe there is significant evidence of actual effects based on some of the historic activities of St. Luke's. And let me turn to that portion of our slide deck which we did not have the opportunity to run through earlier.

The quick overview of this is that defendants' ordinary-course documents predict that the acquisition will enhance St. Luke's and Saltzer's negotiating leverage. This may be somewhat contrary to that wonderful dog picture we saw, but it is the case that the ordinary-course documents do suggest quite strongly that leverage was certainly understood to be part of this transaction.

It's also the case that increased bargaining leverage can raise reimbursements for any of the negotiated services. Recall, if you will, Your Honor, Professor Dranove's right-hand cell. It can occur in the sale of ancillary services, it could be in the changes in physician fees, but it can be anywhere in the system.

The employer testimony -- and I'll be citing to some very specifically -- illustrates how the acquisition will

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increase healthcare costs. And finally, the diversion analysis that was done by Dr. Dranove reinforces the evidence of likely --

THE COURT: Could I ask you -- if you go back to that slide, the third bullet --

MR. GREENE: Sure.

THE COURT: -- the idea that it will increase healthcare costs. Now, increasing healthcare costs, in and of itself, is not a competitive concern. It's supracompetitive pricing that would be of concern.

And this kind of goes back to the discussion I think I had with probably Mr. Julian about the reality of our healthcare system; that in order to be able to provide services to those who are either uninsured or underinsured -- because we assume that at the end of the day, again, the bottom right-hand cell is going to have to balance out -- that that means that somewhere along the line, there is some subsidization, if you will, to support those uninsured or underinsured.

Now, the Affordable Care Act may take care of that or it may not; we don't know. I mean, obviously, the jury is still out if it ever gets implemented, which is of real concern.

But I'm -- for example, if -- assuming that St. Luke's were to go forward with this and Saint Al's were to proceed

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likewise and we end up with this kind of bifurcated, two primary healthcare mega entities providing the bulk of the healthcare in the Treasure Valley, it may be that healthcare costs will go up because it may be that those healthcare costs are going to be borne by Blue Cross of Idaho and others in somewhat increased rates because of the need to somehow account for people who are otherwise uninsured or underinsured.

Now, of course, if the Affordable Care Act works out the way it's supposed to and everybody is insured, that won't be as much of an issue.

But, just so we're clear, increasing healthcare costs by itself would not be a reason to find an anticompetitive effect unless it is a supracompetitive price. Do you agree?

MR. GREENE: I think that's correct, Your Honor.

I mean, the idea here, the elemental idea, is that prices which are the expression of increased market power -- which is what this whole activity has been about -- are, in essence, supracompetitive. But what is the result?

It is if the price happened to be because the cost of aluminum went up and aluminum foil prices go up, that's presumably neutral. If, however, it's a consequence of a merger of the two largest aluminum companies in America, that's a whole different kettle of fish.

THE COURT: If healthcare costs go up because of a

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kind of a restructuring of, I guess, the marketplace in healthcare, not -- that presumably would not be a reason to find this to be anticompetitive. But if it goes up, if the prices were to increase because someone has obtained a kind of a monopoly or a quasi-monopolistic position in the market, that would be the --

MR. GREENE: Yes. And I think Your Honor adverted to couple other ideas here, one of which sort of freaks us out. But let me just mention the idea that you harked to, which is the idea that, at the end of the day, they might conceivably be allowed to do this transaction and others on the assumption that on a forward-looking basis, there would be two very large systems in Idaho, and that would be the reason --

THE COURT: I understand -- I am just observing what seems to be happening in the marketplace, and it does seem to me that we are on a path where, you know, it may or may not be inevitable, but it certainly is looking that way; that there is a concentration I'm seeing in Eastern Idaho and various communities where consolidation seems to be the trend for a whole host of reasons, many of which we heard during this trial.

Anyway, go ahead.

MR. GREENE: I was going to suggest, Your Honor, not to be geeky about this, but conceptually what that's

referred to is a "duopoly." So you essentially have a shared monopoly situation. And in that -- sort of the neoclassical price theory of that is that that would drive up prices, reduce innovation.

I mean, it's a classic form of restrictive competition which has unfortunate aspects all the way around and would, of course, affect pricing of risk-based contracts and the willingness of St. Luke's and others to take what we think of as the right approach.

There is, however, you know, an alternate future here, which is a future of much more yeasty competition in which Saltzer could play a very big part. I mean, one of the things that Dr. Kizer talked about, as did Dr. Dranove, is this notion that smaller groups certainly could be themselves created as accountable care organizations.

Saltzer has, of course, indicated it is unwilling to do that, at least in its current configuration, but it turns out that a number of the ACOs that have been certified by the Centers for Medicare and Medicaid Services are the same size or smaller than Saltzer.

So, conceivably, we could have a world in which doctor-based as opposed to hospital-based competitors become the most powerful and most useful competitors in the market.

And one of the things that I think we are about is to create the possibility of that series of alternate futures



in which we don't merger -- merge to monopoly or to duopoly, but we provide an opportunity for yeasty competition and all of the advantages that competition yields.

Briefly, Your Honor, while we're on this point about duopoly and all that other stuff. It is the case, and I wanted to just briefly tag up on your question that started today, which was on Kaiser Permanente.

One of the most interesting aspects -- I'm a Kaiser member. I do like them. But one of the aspects of Kaiser which is completely different from St. Luke's is that Kaiser has largely built its growth on internal growth. It's not the case that they have gone off willy-nilly to buy out practices all across California or all across the service areas that they provide services to. They have basically started small. They have demonstrated their capacity to reduce costs and improve quality. They are a proven, proven standard of care.

And that did not come from the buy-up-the-market strategy which we think this represents. Kaiser is a completely different animal in that regard. It's also very different -- and I think -- I'm not sure how to parse this in terms of Idaho versus California, but I do know that Kaiser is a signal example of a health maintenance organization which depends upon limiting choice in order to decrease quality. I mean, that's really the -- it's



an HMO --

THE COURT: Decrease quality or cost?

MR. GREENE: Well, they improve both quality and cost, but what they do -- how they do that is to reduce your choice as a patient. So if you become a Kaiser member --

THE COURT: You said it "depends upon limiting choice in order to decrease quality."

MR. GREENE: No. You decrease choice in order to be able to demand a lower cost from your suppliers. And that -- at least until very recently, Kaiser's costs have actually started to rise now that they have 40 percent share of the market, candidly. But that model has proven to be very limited geographically. That has worked in California where HMO models are actually very popular.

If there were another poll of the debate, a place that has shown almost no interest in HMO modeling, it's the state of Idaho. So whether or not this kind of Kaiser notion could be transported to this state I think is dramatically an open question. And everything we know is contrary to the notion that this model easily could be transported to this particular state.

THE COURT: So the answer to that earlier question I asked is that the Federal Trade Commission did not get involved in Kaiser Permanente's growth?

MR. GREENE: We didn't have to.



THE COURT: Because it was happening naturally --

MR. GREENE: Neither did our colleagues at the Department of Justice. Neither did --

THE COURT: I was thinking rather than California versus Idaho, it was the Yankees versus the Cardinals; free agent acquisition or --

MR. GREENE: Right, right. Or the farm team.

THE COURT: Or the farm team, yeah.

MR. GREENE: Let me move on very briefly, Your Honor, because my time is short. The internal documents, again, this is a dog that does seem to bark. This is a document from St. Luke's. 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 payor contracting.

They very well know that what they're doing in Nampa is something that they expect to yield the kind of clout that Dr. Dranove spoke to I think so articulately.

Saltzer, itself, their outside contractor Mr. Reiboldt basically said that -- I should darken this slide, as a matter of fact, Your Honor. If you would darken it. I'll switch -- that there are opportunities for improved prices in managed care negotiations. I mean, it's very clear that that side understood it.

Saltzer also, through its physician Randell Page, the

head of the contracting committee, the clout of the entire network will be made available to us. This is not a small thing. That's a critical aspect of this transaction. It's understood. The dog is barking, perhaps inside his box, but he is certainly speaking on important issues, contrary to my colleague's suggestion.

I think that this is perhaps one of the most important slides that we can show you and just to remind you the story of a large self-insured employer in the -- in the state of Idaho. They have been cited over and over and over again as somehow some sort of model for what's possible and how market power can be -- can be sidestepped.

The problem here is that the person in charge of this says this is a game-changing -- game-changing sort of transaction. My colleague Mr. Bierig also suggested that the price differences between being in network and out of network were a couple of bucks. That is simply untrue.

We know from the testimony and cited on this slide are the portions of the findings of fact which go to that question. There are huge differences, 50 to over 100 percent differences, between in network and out of network. This is nothing like the 5 percent SSNIP test that we have been talking about. This is an enormous difference in price.

And the fact that there has been a shift from some



providers to other providers is not to be surprising given these enormous and dramatic shifts.

So we think this is -- this is not a -- this is not an example of a thing that will avoid the problem. We think this particular employer is an example of the kind of targets -- targeting done by St. Luke's.

Amongst other things, this court has heard, Your Honor, that when the supplier of healthcare services to this particular employer wanted to expand, they were cut off in the terms of as soon as St. Luke's would buy a practice, it would pull it out of the network that supplied this particular employer over and over and over again. This is an example of market power and market abuse in action, and we would commend it to Your Honor.

Let me turn very, very briefly to the Triple Aim, which is 58. I mentioned this in passing at the very beginning of my comments this morning. The testimony of Dr. Peterman I thought was quite powerful. The -- we can open this up, Your Honor. I'm so sorry.

The testimony here was really quite extraordinary. I mean, all of the -- and this goes, I think, directly to some of the concerns Your Honor expressed to us earlier today, which is: What about these clinical improvements that are so important?

This is a practice group, small. It's smaller than



Saltzer and dramatically smaller than St. Luke's, but this group basically monitors for care. It checks on whether you need a test. They have met the requirements for meaningful use. They get federal money in order to continue to sustain themselves in terms of providing the highest level of electronic technology to support their clinical work.

Just for reference, Your Honor, the -- it's 42 CFR part 495 where the meaningful-use regulations are located. And if you were to compare those regulations with what Dr. Peterman was talking about, evidence-based medicine being embedded in the system, the ability to score, the ability to monitor -- all of that is in it, and it all complies with federal regulations.

The other regulation to take into account is the patient -- the physician quality reporting system, which is 42 CFR 414.90, another system that pays physicians to provide high-quality -- high-quality care through the use of the best available technology in the United States.

That is the real world. This is going on today down the street. This is not something that you need to employ hundreds of physicians to do, nor is it something that requires us and the society here in Idaho to take a huge risk, this leap off the cliff of giving this firm an 80 percent share in the second largest -- second largest city in the state of Idaho.



And I appear to have run out of time, Your Honor. And I apologize. Thank you.

THE COURT: Thank you, Mr. Greene.

Mr. Ettinger.

MR. ETTINGER: Your Honor, I get the bat cleanup, and the first thing I wanted to do --

THE COURT: Trying to carry out the baseball analogy here.

MR. ETTINGER: I had a baseball bat case once, and the puns were just awful, Your Honor.

I wanted, I think on behalf of the plaintiffs, if I could, to really thank the court. This for me has been a terrific experience, and we really appreciate how the court has conducted the case.

And I wanted to say, since I am last, if the court has remaining questions, I wanted to, you know, invite them now or after I'm done with my argument, whatever the court prefers.

One mundane thing. We discovered that the proposed findings of fact citations on our slides are our uncorrected findings, and we will get the court by tomorrow a set with the corrected findings. The numbers changed very slightly.

So, with that, let me plunge in, Your Honor.

We heard from the defendants a lot of fairly heated rhetoric about the public interest and about quality. And I

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think that deserves a little bit of a reality check. And one way to get at that reality check is to look at who testified and, more importantly, who did not testify for the defendants here today.

Number one -- today or in this trial. Number one, no St. Luke's managed care executives were produced to testify. I saw some of them in the audience several times, but they weren't produced to testify, and that is remarkable in an antitrust case in healthcare where managed care is critical to the case.

So why didn't they think these most knowledgeable people had something to say? Apparently they had nothing good to say.

Number two, despite these quality defenses, the chief quality officer of St. Luke's did not testify. The vice president for clinical integration, Dr. Swanson, did not testify. Maybe it's because he was the author of that endgame document with the "M" word in it. But, again, it's remarkable that the people who are most responsible for these issues did not testify.

Finally, Your Honor, most significantly, you heard from a variety of witnesses for the plaintiffs, including, among others, payors, network -- independent network executives, employers. On behalf of the defendants, you did not hear from a single voluntary third-party witness, not a one. The

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only third-party witnesses were the two government officials who were subpoenaed.

So why couldn't they find a payor to support them? Why couldn't they find an employer? Why couldn't they find an independent doctor?

I think when you think about the public interest here, Your Honor, it's useful to think about who is standing up and who isn't standing up in this situation. That says a lot about the benefit to the public.

Your Honor, Mr. Julian talked at some length about the fundamental reasons why Saltzer wants to do this. And I won't belabor the point, but I talked about credibility earlier today. When we go to the documents, for example, if we go to Trial Exhibit 1369, page 16, these are Ms. Powell's notes. And the --

MS. DUKE: Blank out the screen.

THE COURT: Thank you.

MR. ETTINGER: Your Honor, she testified about a meeting with the Saltzer leadership, and they talked about the fundamental reasons for why we should do this. And it's about competition, and it's about one -- it's about one instead of two, and it's about the amount of money they're going to get from contracting. That's the kind of thing that Saltzer was considering according to these notes and according to its own ordinary-course documents.

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Your Honor, just a few quick comments on remedy. I am jumping around just because I get the last word, I guess.

On the financial incentive point Mr. Wilson addressed, I would just quote Your Honor to the *Copperweld* case, the United States Supreme Court in 1984, when the court explained in the context of the decision on what constitutes a conspiracy, that, quote, "The officers of a single firm are not separate economic actors pursuing separate economic interests. With or without a formal agreement, the subsidiary acts for the benefit of the parent, its sole shareholder."

For antitrust purposes, the Supreme Court has recognized you're going to do what's in the interest of your parent, whether you're in a subsidiary, whether you're an officer, whether you're on a separate negotiating team. That's just the economic reality.

And beyond the issue that Mr. Wilson focused on in particular, I would say in terms of the private plaintiffs' case, there are special concerns. And that is you would certainly expect whatever negotiating teams exist, that if Saltzer is owned by St. Luke's, that referrals are going to be made with that in mind. And I'm going to have more to say about that as we go on further.

You would also assume that decisions about what networks to be in and not to be in are going to be made with

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that fact in mind. So there is no way you can set up this Potemkin village of separate negotiating teams, Your Honor, and believe that it's going to achieve independence. The incentives just aren't there.

A couple other things on remedy, Your Honor. Suppose you did something like this. How many years would it be in place? And then what would happen when those years passed? At that point, the eggs are scrambled. At that point, is there no remedy at all? And at that point they can do whatever they want? It's too late to have another remedy at that point.

There are a lot of good reasons why divestiture is imposed, because these other -- these other kinds of remedies create a huge series of problems.

A couple other points, Your Honor, on remedy. Mr. Wilson pointed out if the $8 million that the parties agreed to on an unwind would stay with Saltzer is not enough, the court can order greater assistance. And the law says, Your Honor -- this is in our conclusions of law at paragraph 1037 -- that the court has discretion when it orders a divestiture to require the divesting party, St. Luke's here, to provide assistance to the divested party to make sure that it can fully compete effectively. And the courts have done that time and time again.

So if, in fact, Your Honor thought -- we don't think

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it's true -- but if Your Honor thought that Saltzer was going to be short something, the answer under the law is: Make St. Luke's give it to them. It's as simple as that.

And Your Honor may recall that I asked some Saltzer witnesses during the trial: What's your wish list for St. Luke's assistance if you have got this problem? They demurred; they didn't want to ask for anything.

But the fact is, if there is something they need -- again, we don't think so -- the court has the power and I think the duty under the case law to order St. Luke's to provide it.

Finally on remedy, Your Honor, paragraph 1062 of our conclusions of law talks about the issue that Mr. Wilson mentioned in terms of future acquisitions. We think that's a very significant issue in this case. It's addressed in detail in the findings. I talked about it briefly today, and it's a standard remedy, and we provide the case law in that paragraph.

Let me go on and respond briefly to Mr. Bierig on some of these quality issues. Mr. Bierig said twice that defendants must show that the procompetitive benefits here outweigh the anticompetitive effects. Well, that brings us full circle to my argument, I think.

Your Honor, how are you going to do that? How are you going to weigh one against the other and say, "Which is

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more?"

Mr. Bierig did not respond at all to my invitation, in effect, to say: Explain to us how these so-called efficiencies are going to eliminate anticompetitive effects. If St. Luke's and Saltzer could put it in those terms, could explain how the anticompetitive effects are going to be offset and are going to go away, then somebody could weigh it; say, on balance, prices are not going to go up; on balance, concentration is not going to rise; things like that. But defendants haven't even offered that.

So Your Honor would be faced with weighing apples and oranges. And I don't know how you do that, and that's why the antitrust laws don't permit that.

Maybe even more importantly, Your Honor, what you're left with is the task of becoming a social engineer. You are left with, under defendant's view, the task of deciding not what the antitrust laws require but what's the best healthcare public policy. What's more important, high prices, high market share, or these quality gains that defendants claim they're going to achieve?

Your Honor, number one, I would suggest you do not have the power to do that. Congress hasn't given it to you. They have said: Enforce the antitrust laws. Don't create benign monopolists, and don't weigh things outside of the scope of the antitrust laws, *National Society of*

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*Professional Engineers* and *Philadelphia National Bank*.

Number two, Your Honor, respectfully -- and I have a lot of respect -- this court is not the best-suited entity to create healthcare policy for the United States; I don't think any judge would be sitting in a trial. That's not how it's done. It's a job for the legislature.

And so what St. Luke's has given you, at most, is a request for social engineering that goes beyond the law and doesn't make a lot of sense.

Judicial restraint, which Mr. Bierig requested, calls for following the law and not going beyond it.

One final point on this, Your Honor. And that is, you know, the argument that healthcare is different is not a new one. Defendants have been making that argument -- I may have made it once; I don't remember -- since the 1980s.

In the *Arizona v. Maricopa* case in the 1980s, the Supreme Court rejected it, and they said: Every industry says it's different, but too bad. The antitrust laws apply. Because healthcare has always been an odd animal. There have always been different things going on in it. And that argument has always been rejected at the end of the day. And that's in effect what defendants are arguing.

THE COURT: But is it fair -- I'm not talking about healthcare being different, but that every industry is different. And it does seem that when you're trying to

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determine what is pro- or what is anticompetitive may depend upon the nature of the industry, whether it's car manufacturers, fast-food operations, the market -- it does make a difference, but the laws still apply.

MR. ETTINGER: Well, the law still applies, and that means the principles in the case law that have been developed over the last hundred years still apply, the market share rules still apply, HHI still applies, rules against price fixing still apply, the concern over high prices, supracompetitive prices still apply.

So the framework is the same. It's across all industries. And, you know, you have got to look at each industry to see how to apply that framework. But defendants are asking for to you throw out the framework in favor of their view about overriding benefits, and that is what we think is not permitted and not appropriate.

Mr. Bierig talked a lot about Kaiser and Geisinger and Intermountain. We already discussed Kaiser. As to these other entities, I think suffice it to say that there was no evidence presented that examined any of these entities in detail and said: This is exactly what they have achieved. We have done a controlled study, and this is why they have achieved it.

As Professor Enthoven said, these are all in his gray zone because they're half one thing and half another. So

you really can't draw a conclusion from that.

Mr. Bierig said that they rely on a large nucleus of employed physicians. Well, we have addressed the nucleus and core issue, and defendants are unable even to articulate what their position is on what that core needs to be here. Given that, I don't see how we get any guidance from Geisinger or others.

Mr. Bierig suggested you need a big scale here, but again, Dr. Pate admitted we don't have a number we can put on that scale. And if you don't have a number you can put on it, you can't say it needs a certain market share or a certain number of providers. What you're left with is a platitude, and platitude cannot create the defense here.

Mr. Bierig, Your Honor, referred to the *Tenet* case. I would just say briefly, the *Tenet* case, the Eighth Circuit reversed the findings on geographic market. That was the main holding of the *Tenet* case. And along the way, they said, "And there may be efficiencies here."

They did not say, as I think I heard Mr. Bierig suggest, that the efficiencies overrode a prima facie case. They knocked out the prima facie case in *Tenet*.

Your Honor, one more thing on this issue of -- you know, Mr. Bierig said, I think: Well, these other things have been tried around the country, and they have failed.

Well, there is no evidence for that. And, indeed,



Dr. Seppi, one of the top medical officers in St. Luke's who also wasn't asked to testify, said in his deposition -- he produced -- because he was their 30(b)(6) witness on quality. He was the company representative on quality who they didn't bring in here, Your Honor.

And maybe the reason they didn't was he produced a list of quality advantages. And I went through that list with him, and I asked him: Which of these things are being done elsewhere in the country?

And he went down the list. And virtually every single one he knew was being done elsewhere. And at page 130, lines 13 through 18 of his deposition, I said, "And some of these programs around the United States have involved independent physicians rather than employed physicians, haven't they?"

And he said, "Both independent and employed physicians, correct."

So Dr. Seppi testified on behalf of St. Luke's that these things are working for independent physicians.

Your Honor, one last point on quality, and then I'm going to try to race through some of the private plaintiffs' competitive issues. And that is, you know, I talked about the Wimpy defense. Mr. Bierig has adopted kind of the Wimpy-plus defense.

What he said was, quote, "It's not clear which road



will lead to the best outcome for patients," close quote. So, in essence, what Mr. Bierig is saying: Let's let the defendants do what they want to do, let St. Luke's do that. And maybe it will work, and maybe it won't. We'll find out in five or ten years.

In the meantime, we will have a dominant player, we will have a risk of a monopoly, we will have an antitrust violation. That just doesn't make sense.

In effect, it's like Wimpy saying, "I might pay you a dollar Tuesday for a hamburger today." It's even worse. And that can't be sufficient, Your Honor.

Your Honor, one last thing on quality, and that's on burden. We believe it is the burden of the defendants to prove their claimed efficiencies are verifiable and merger specific. That is their burden, and they clearly haven't met it.

Your Honor, briefly, on some of the private plaintiffs' issues. Mr. Bierig started out by trying to turn this back into a pure foreclosure case. And I addressed this, but I want to just hit it real quickly.

Going, Keely, to slide 2. We've put some slides together left over from this morning for our rebuttal case.

And the point here is Dr. Argue doesn't agree with Mr. Bierig's position. He said the test is: Do St. Luke's actions diminish substantially the competitive constraint



competitors have on St. Luke's? That's the relevant test here. There is no magic percentage of the market. Given the situation in this case with St. Luke's dominance, that's the test, and that's the test we're applying.

MS. DUKE: Your Honor, can we put the screen up?

THE COURT: Yes. Thank you for reminding me.

MR. ETTINGER: Sorry, Your Honor.

So going to the next slide, Your Honor, on this issue of foreclosure, it's important to start with the law. And the law is clear that we don't have to prove it. It's actually presumed in the case law that foreclosure will occur for the common-sense reason -- relates to what I said about divestiture a few minutes ago -- that if a manufacturer owns a purchaser, you know, they're going to work together, because they have a common financial incentive. It's just what you would expect.

That's what the case law says. And that's why, by the way, the two negotiating teams don't work. So one problem with St. Luke's argument is it's contrary to a presumption in the law.

When you read the vertical merger cases, for example, they rarely even discuss whether there is foreclosure. They assume there is foreclosure. In this case, maybe I made a big mistake in December when I presented all this evidence of foreclosure and then we started arguing about it, because

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it's not even our burden. Having said that, we have more than met our burden, Your Honor.

Indeed, going to the next slide, Your Honor, St. Luke's has admitted it. This is one proposed finding of St. Luke's, and this is -- this comes directly from Dr. Argue. And their point is -- because they were trying to argue the criminal loss is smaller. Their point is that if a St. Luke's primary care physician gets more patients, St. Luke's gets more lab work, more imaging work, more inpatient work, more outpatient work.

Well, gee, that's what I've been saying since December. And they say it themselves, that if they own the doctor, they are going to get the hospital cases. And Dr. Argue has said it now, and St. Luke's has made what may be a judicial admission, Your Honor, on the same point.

But that's not all, Your Honor. Going to the next slide, you know, there, is a host of different kinds of evidence to prove foreclosure: testimony, documents, and the data. And I'm going to get to the data.

Going on real quickly, the next slide, 6, may be AEO. Why don't we skip by it. But there is a whole series of documents that show that St. Luke's expected the Saltzer doctors to refer there, and the Saltzer doctors expected to refer there, and they were told to refer there.

And we present here the findings of fact on that, but

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there is a host of evidence. And if we had nothing else, that alone would prove the foreclosure case.

But let's go to some of the data, Your Honor. It's in the findings. I don't want to do all of it, but I do want to go to the chart that Mr. Bierig put up. Because this is a -- this chart is sleight of hand squared, Your Honor. And I think it's very important to realize that.

Mr. Bierig said this shows no significant decline in cases that go to -- that go to Saint Alphonsus facilities from primary care doctors.

Well, number one, it's got nothing to do with facilities. It's about referrals to specialists. But, number two, Your Honor, if you look at -- take a look at those percentages. The dark blue, the first column, is before these groups are acquired.

And you may be saying, as I did when I first looked at this chart: Why are they so low? Why is it that Mercy Physicians Group, Inc., the group on the far right, which was a SAMG group, was only making 5 percent of its specialty referrals to Saint Alphonsus specialists? Something must be wrong here.

Well, Your Honor, you know what's wrong? This has only got referrals to the employed specialists at SAMG, but most of the doctors who admit patients at Saint Alphonsus facilities are independent doctors. And this chart doesn't

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show any of it. All it shows is that narrow sliver of SAMG specialists.

And, sure, the change is small, because the numbers are tiny to start with. But if you go to the underlying Argue exhibits, 2464 and 2465, what you find is there is a significant drop in absolute numbers and a real drop in percentage numbers in the cases that go to independent specialists from these St. Luke's PCPs after they're acquired, and there is a big increase in the numbers that go to the St. Luke's specialists, about 40 percent.

So when you go under the hood of this data, you find that it proves exactly the opposite of what St. Luke's was trying to suggest, Your Honor. And I think it becomes consistent with all those charts from Professor Haas-Wilson that we have shown and --

THE COURT: So are you saying that the referrals here are the referrals pre and post acquisition by the primary care physicians to employed physicians at Saint Alphonsus?

MR. ETTINGER: Yes, Your Honor. Except it's less than that. Because, as you recall, the data that Dr. Argue used couldn't tell you who referred anything. These are just patients who happened to have these PCPs who happened to use these doctors, which is yet another problem with the data that we have spent a lot of time on.

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THE COURT: Right. That was the hospitalists?

MR. ETTINGER: No. This is the issue where I may self-refer to the specialist. I may have been referred to the specialist by the PCP three years before, but I happened to visit him after the acquisition.

THE COURT: But what you're saying is, regardless, the percentage of patients referred to a St. Luke's specialist post acquisition did go up considerably?

MR. ETTINGER: Yes. That's what the exhibits show, Your Honor.

THE COURT: All right.

MR. ETTINGER: So going on to slide 10, Your Honor, you know, if there is any issue about this referrals to specialists, we have got lots of testimony that says the doctors get acquired, and they shift their referrals to specialists. There is no doubt about this. It makes perfect sense.

The next slide, Your Honor, this one you have seen from Professor Haas-Wilson. And this illustrates the point -- the other flaw in the defendant's strategy that we were just talking about, which is that, again, the referral to the specialist could have happened long before the acquisition. But the way they look at the data, Dr. Argue and Ms. Ahern, if it happens that there is a visit to a specialist after the acquisition, it looks like something has changed, when

the relevant action by the PCP could have been years ago.

So it doesn't really tell you much, doesn't tell you anything at all, Your Honor. And that's a problem with Dr. Argue's and Ms. Ahern's data but not with the admitting data, which Professor Haas-Wilson relied on.

Your Honor may remember the admitting data, everybody agrees, doesn't catch every case because of the hospitalists, for example, but it's conservative.

Which brings us to the next slide, Your Honor. Professor Haas-Wilson found -- and Ms. Ahern had essentially the same numbers; she pulled a 40 percent number off a Saint Al's document -- that 47 percent of the Saint Alphonsus Nampa admissions, 55 percent of the neuro or orthopedic surgeries were from -- were with patients who had a PCP who works at Saltzer.

So if you believe the Argue-Ahern approach, you would say to yourself: Boy, Saint Al's Nampa is really vulnerable. Half their patients could go.

Now, Mr. Checketts' projections -- I'm not going to go into them in detail because there is no time -- he used, Your Honor may recall, admissions. He used the lower, more conservative number, and he found a huge problem.

So either way you slice it, Your Honor, there is going to be a huge problem here, whether you use the PCP data or you use the admissions data.



And as you recall, Your Honor, one thing Mr. Checketts said beyond the projections that is undeniable. And that is those marginal patients, gaining or losing them goes straight to the bottom line.

So if half your patients are at risk, even if you lose any sizeable chunk of them, you're in trouble; you're going into the red, and you're going to have the kinds of problems that we have talked about.

So, Your Honor, I think the data, on top of all the other evidence of referrals, is very strong on foreclosure on top of all the other elements that show harm to competition.

Your Honor, finally, I'll skip over slide 13. The *Barry* case is a case that St. Luke's cited. It's about procompetitive foreclosure because lower prices were part of the deal. So it's irrelevant here.

But to go to slide 14, Your Honor, Mr. Bierig suggested that Saint Al's can replace the lost referrals. Well, the fact is, if you look at Saltzer, there is lots of evidence on this, and it cannot. It can't recruit on the scale of Saltzer. Nobody has suggested you could. They have added no pediatricians, no internists, and a few family practice doctors who can't get busy because Saltzer is too popular.

There is nobody else to buy in Nampa. The expansion Mr. Bierig talked about is built into Mr. Checketts'



projections, and they still show a big loss. And the further relocation, the phase 2 program, the evidence shows it's in jeopardy if this transaction occurs because that $200 million will not be spent.

THE COURT: Mr. Ettinger, your time is up, and we did add in time that the -- so I'll give you just a few minutes to wrap up.

MR. ETTINGER: Okay. Your Honor, the last slide I was going to do -- and Mr. Powers -- was about Treasure Valley. And let me make one quick point on that, and I'll wrap up, Your Honor.

The quick point is this: St. Luke's tries to argue that there was no harm to Treasure Valley by combining Treasure Valley's numbers with Treasure Valley Surgery Center's numbers. The problem with that is, until about a year ago, Treasure Valley Surgery Center didn't exist.

Treasure Valley Surgery Center is in a different place, Nampa, significant part, different doctors, different procedures. And the goal was to get substantially more business. The fact is that as compared to projections, netting out the common doctors, they're down 800.

So Treasure Valley Hospital has been hurt. And Mr. Genna has testified, even more importantly, that that primary care base is shrinking. And he critically depends on just a couple of doctors who, if they go -- because



they're worried about the Saltzer PCP referrals -- will leave him in serious trouble.

So we think all the prongs of anticompetitive effect have been shown here, Your Honor. Thank you.

THE COURT: All right. Thank you.

Well, Counsel, I guess this is my last chance to address you. I want to echo the comments that have been made in terms of the very interesting nature of the proceeding and also the quality of the lawyering.

I think I may have alluded to that when we concluded the evidence, but I can't think of a time when I've had this level of consistently first-rate lawyering just across the board. It has been a delight from that point of view.

Writing a decision, perhaps not so delightful. It truly is going to be a daunting challenge. But we are going to work on it hard and aggressively. I am back in trial, so I'm going to have to be working on it in bits and pieces. But I'm hopeful that within a few weeks, we'll have a decision. I don't want to promise specifics, but that's going to be our objective, and we will be working on it.

Again, I just cannot say enough about the quality of the lawyering, and it does make this job truly delightful when I know each morning -- even though I know it may be a little contentious from time to time, I know that it's going to be just first rate in terms of the skills of the

attorneys and, frankly, the challenge of the issue itself. Because 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.

And, of course, we're focused just on the Treasure Valley. But I think it -- it clearly has to be viewed through this kind of broader -- with this broader perspective and understand where we are.

And while I don't want to suggest that healthcare is different, Mr. Ettinger, all I was -- what I was alluding to and I think is true is that we do have to look at -- again, I have a number of antitrust cases. Seems like right now I'm just handling quite a number of those cases, but I think competition means something a little different in every sector of the economy.

I don't think healthcare is any different, and it shouldn't be treated any different. The laws apply the same way. But I think when we analyze competitive effects and anticompetitive effects, procompetitive effects, it does require that we be mindful of how the market works in a particular sector of the economy.

That doesn't -- by saying that, I'm not in any way suggesting what the decision will be, only that I think this is a challenging issue that's going to require some very



serious thought and reflection.

We will hopefully have a written decision out in fairly short order. If I feel the need to invite further briefing, it will be very narrow, very focused on just a couple of issues that I'm not clear about. And when -- that may happen -- if that does occur, you may have a very short turn-around time, just a few days, because it means that we're hung up on something and we want that to help us kind of wrap up the final product.

In any event, we'll take the matter under advisement, issue a written decision in due course. And we will be in recess.

(Proceedings concluded at 3:59 p.m.)

REPORTER'S CERTIFICATE

I, Tamara I. Hohenleitner, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand November 11, 2013.

-s-
Tamara I. Hohenleitner
Official Court Reporter
CSR No. 619