

PUBLIC

Closing Statement

*Federal Trade Commission & State of Idaho v.
St. Luke's Health System, Ltd. & Saltzer Medical Group, P.A.*

November 7, 2013



The Acquisition Substantially Lessens Competition



- Substantially increases concentration in a highly concentrated market, creating a strong presumption of anticompetitive effects
- Enhances market power by combining the two largest providers of Adult PCP Services in Nampa, eliminating each provider's closest competitor
- Documents, testimony, and economic analysis confirm that the Acquisition will increase healthcare costs to Idaho consumers

Defendants' Claimed Efficiencies Are Speculative and Not Merger-Specific



The Acquisition is **neither necessary nor sufficient** for St. Luke's or Saltzer to achieve higher quality, lower cost care:

- Employment of physicians is not a superior organizational model to other affiliation strategies
- Benefits of St Luke's Health IT tools are speculative, and Saltzer would have access to such tools if it remained independent
- St. Luke's and Saltzer can engage in risk-based contracting without the Acquisition
- Defendants' "core" theory is unsupported
- No evidence that St. Luke's prior acquisitions of physician groups have resulted in higher quality or lower cost care

Bargaining Leverage Overview

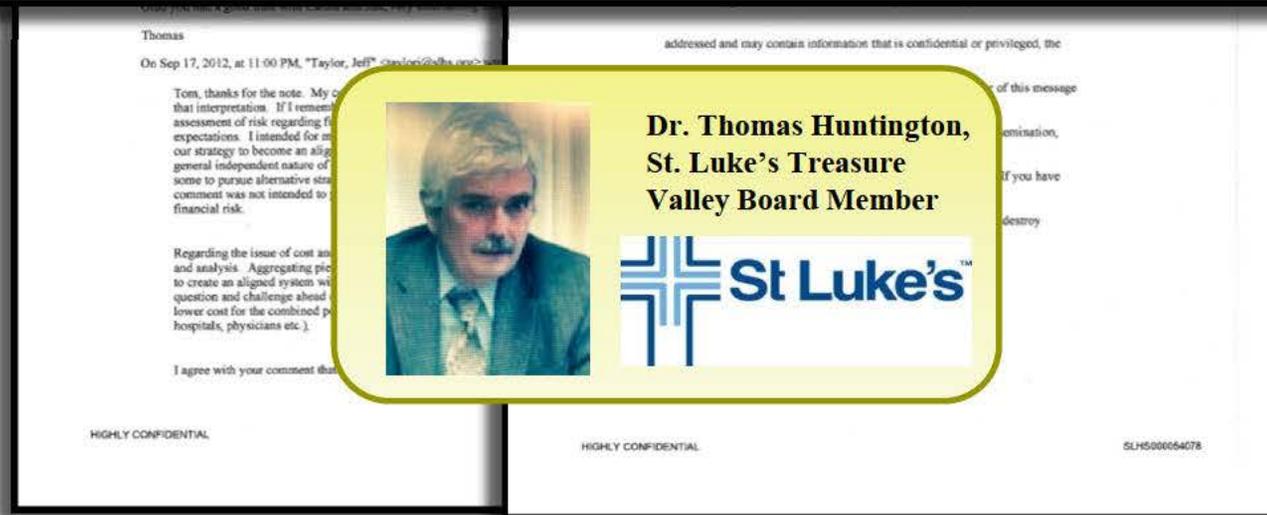


- Bargaining Leverage: Health Plans vs. Providers
 - Health plans and providers determine rates through bilateral negotiations
 - Each side's leverage is determined by the other side's "outside option"
- Health plans then market their networks to employers and patients
 - Patients choose among in-network providers and are generally not sensitive to small differences in price
- The Acquisition makes health plans' outside options much less attractive, giving St. Luke's/Saltzer the ability to extract higher reimbursements from health plans

Defendants' Rhetoric Versus Reality



Better cost is a worthy goal and I totally back that. I also understand market forces involved. **But- let's be realistic. Employing physicians is not achieving better cost, it's achieving better profit.**



Plaintiffs Have Met Their *Prima Facie* Burden

*The Acquisition will substantially
lessen competition*



Plaintiffs Have Met Their *Prima Facie* Burden



- Plaintiffs have conclusively established:
 - The relevant product market is Adult PCP services
 - The relevant geographic market is Nampa
 - Market shares and HHIs for Nampa—as well as much larger geographic markets—exceed thresholds for presumptive illegality by a wide margin
- In addition, documents, testimony, and empirical data confirm the Acquisition's likely competitive harm

Section 7 of the Clayton Act



“No person shall acquire, directly or indirectly . . . the assets of one or more persons engaged in commerce . . . *where in any line of commerce* or in any activity affecting commerce *in any section of the country*, the effect of such acquisition . . . *may be substantially to lessen competition*, or to tend to create a monopoly.”

Philadelphia Nat'l Bank Presumption Governs Merger Analysis



U. S. *v.* PHILADELPHIA NAT. BANK. 321

Syllabus.

UNITED STATES *v.* PHILADELPHIA NATIONAL
BANK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 83. Argued February 20—

behavior, or probable anticompetitive effects. 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 anticompetitive effects. See *United States v. Koppers Co.*, 202 F.Supp. 437 (D.C.W.D.Pa.1962).

Defendants Ask the Court to Disregard Established Law



- Supreme Court and Ninth Circuit precedent
 - *United States v. Phila. Nat'l Bank*, 377 U.S. 321, 363 (1963)
 - *California v. Am. Stores Co.*, 872 F.2d 837, 840 (9th Cir. 1989)
- Recent healthcare merger cases
 - *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1079-80 (N.D. Ill. 2012)
 - *FTC v. ProMedica Health Sys., Inc.*, No. 11-cv-47, 2011 WL 1219281, at *56 (N.D. Ohio Mar. 29, 2011)
- Cases cited by Defendants
 - *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (Defs.' Pretrial Mem. at 4)

Defendants Ask the Court to Disregard Established Law



- “Statistics that indicate excessive post-merger market share and market concentration create a presumption that the merger violates the Clayton Act.”
 - *California v. Am. Stores Co.*, 872 F.2d 837, 842 (9th Cir. 1989)
- “Sufficiently large HHI figures establish the FTC’s prima facie case that a merger is anti-competitive.”
 - *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)

The Relevant Markets

The relevant markets have been conclusively established



Relevant Product Market is Undisputed



- No dispute that Adult PCP Services is a distinct service market, even though some patients visit other specialists to receive primary care (*e.g.*, OB/GYN, cardiologists, pulmonologists)

Nampa is the Relevant Geographic Market



A hypothetical monopolist of all Adult PCPs in Nampa could profitably impose a small but significant non-transitory price increase (“SSNIP”) – i.e., 5-10%

- Multiple, consistent points of support for Nampa as a relevant geographic market
 - **Undisputed** evidence from broad range of market participants that patients prefer local access to primary care physicians
 - Every health plan, including St. Luke’s health plan partner, recognizes the importance of including Nampa PCPs in-network
 - Claims data reveal strong patient preference for local PCPs and a clear bifurcation between Nampa and other areas of the Treasure Valley, especially Ada County
 - All major health plans have PCPs very close to where their members live

There is No Dispute That Patients Demand PCP Access Close to Home



- “I’m sure it’s true that patients like to receive primary care services in a convenient location. **Many patients want to receive their services close to home**”
- Dr. David Argue, Defendants’ economic expert
- Providing services close to patients’ homes is a **“patient-centered approach”**
- John Kee, St. Luke’s Vice President of Physician Services
- “[Y]ou want your primary care clinic so that it’s convenient for your patients . . . **If they have to take a child out of school . . . [they] don’t want to spend their entire day trying to get to a physician’s office**”
- Nancy Powell, Former Saltzer CFO

Patients Demand Access to Nampa PCPs



FTC, et al. v. St. Luke's Health System

DEFS' OBJ FDN FORM

1 locations that can act to start to help
 2 and collaborate and coordinate that
 3 Q. Do patients in, for example
 4 prefer to see primary care physician
 5 located in Nampa?
 6 MR. SCHAFER: Object to form
 7 Also, outside the scope of the 30(b)(6)
 8 You can answer from your per
 9 perspective.
 10 THE WITNESS: From my pers
 11 I would.
 12 Q. BY MR. PERRY: I want t
 13 I want to understand the -- the rea
 14 St. Luke's believes that it needs a s
 15 number of acquired physician prac
 16 the communities that it serves.
 17 Do you understand that?
 18 A. Okay.
 19 Q. For purposes of that quest
 20 believe is within the scope of the r
 21 St. Luke's has designated you to
 22 trying to understand why St. Lu
 23 acquire additional physician p
 24 and in Caldwell when it alre
 25 of physician practices: that

1 Meridian, Eagle, in A
 2 A. So, generally
 3 see physicians in the
 4 if at all possible. P
 5 talking about prim
 6 necessarily want
 7 a primary care phys
 8 see a physician in
 9 particularly when
 10 care.
 11 We feel that we need to have an
 12 affiliated group of primary care physicians in
 13 our respective regions to be able to provide that
 14 collaborative and care coordination efforts.
 15 Therefore, the Saltzer Medical Group
 16 would be able to do that. And if they were
 17 financially aligned, we would be able to integrate
 18 them into the system to help improve care
 19 coordination, access to care, and quality --
 20 quality initiatives that we're implementing.
 21 Q. Let me turn you back to Plaintiff's
 22 Exhibit 386 and turn to page 10. The bottom
 23 paragraph on page 10 states, "Significantly, a
 24 health care system cannot achieve the
 25 well-recognized benefits of integration if it does

Q. I'm trying to understand why St. Luke's needs to acquire additional physician practices in Nampa and in Caldwell when it already employs a number of physician practices that are in Boise, Meridian, Eagle, in Ada County?

A. [P]atients would like to see physicians in their immediate vicinity . . . Patients don't want to travel 30 or 40 miles to see a primary care physician.

8 way -- strike that.
 9 Is it St. Luke's position it is
 10 necessary to acquire a significant number or a
 11 nucleus of primary care physicians in the
 12 Nampa/Caldwell area to achieve the benefits
 13 described in Plaintiff's Exhibit 386?
 14 A. I think it is our position that we
 15 need physicians that are aligned with the
 16 strategic goals of the organization to improve
 17 care coordination, improve access, improve
 18 quality, and decrease costs. We need those
 19 physicians to be aligned.
 20 In many cases, for that alignment to
 21 occur, they need -- they would benefit from being
 22 financially integrated. There are many things
 23 that we can provide a group that's financially
 24 integrated that we can't provide if they are not
 25 financially integrated simply because of the cost

6 (Pages 21 to 24)

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555



**Dr. Kurt Seppi,
Executive Medical
Director**



Health Plans and St. Luke's Agree: Networks Need Nampa PCPs

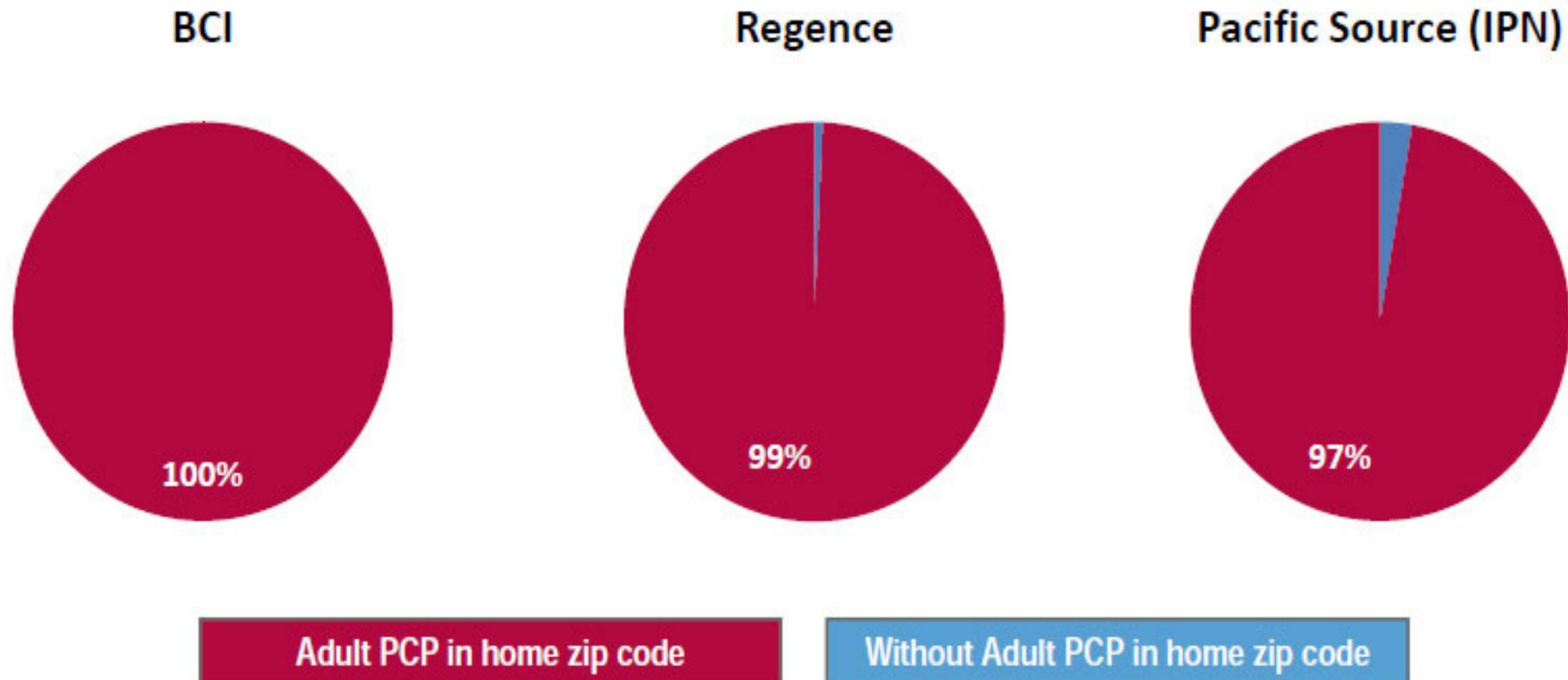


Attorneys' Eyes Only

Health Plan Networks Include Adult PCPs In Virtually Every Zip Code



Percentage of population with access to in-network PCPs in their home zip codes



St. Luke's Own Documents Analyze the "Nampa Physician Market"

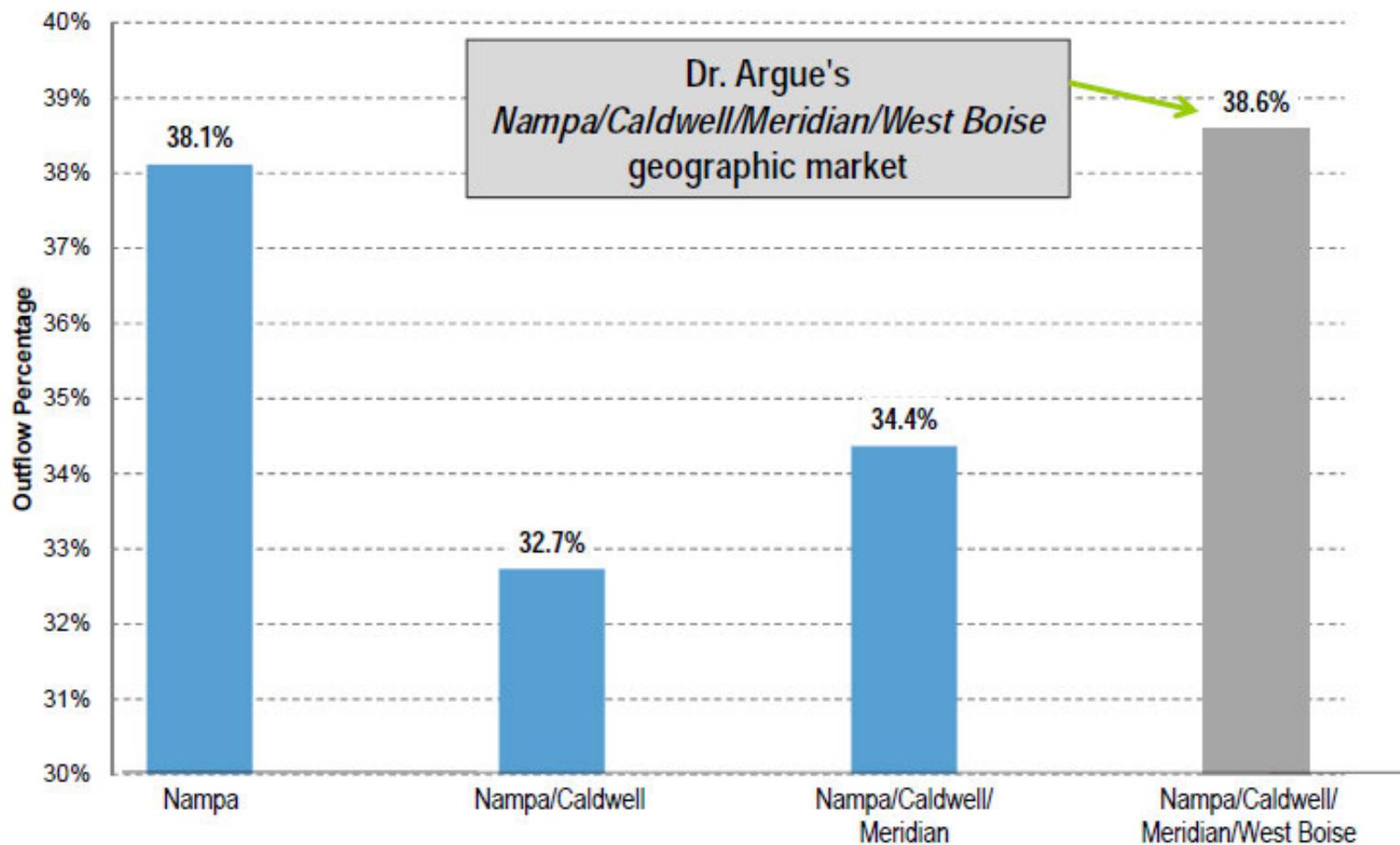


Nampa Physician Market Share

Specialty	Potential SLHS Practices					Total	Potential SLHS Practices	% of Total
	Saltzer	Mercy Group	St. Al's	PHMG	Independent			
Family Practice	11	7	14	2	4	38	18	47%
Internal Medicine	6	0	0	0	4	10	6	60%
Pediatrics	11	0	0	0	1	12	11	92%
OB	1	0	0	0	7	8	1	13%
General Surgery	2	0	1	0	1	4	2	50%
Orthopedics	4	0	0	0	0	4	4	100%
ENT	1	0	0	0	1	2	1	50%

- ◆ Saltzer and Mercy Group physicians represent the majority of primary care and surgical providers in Nampa.

Dr. Argue's Reliance on Outflow Percentages Leads to Absurd Results

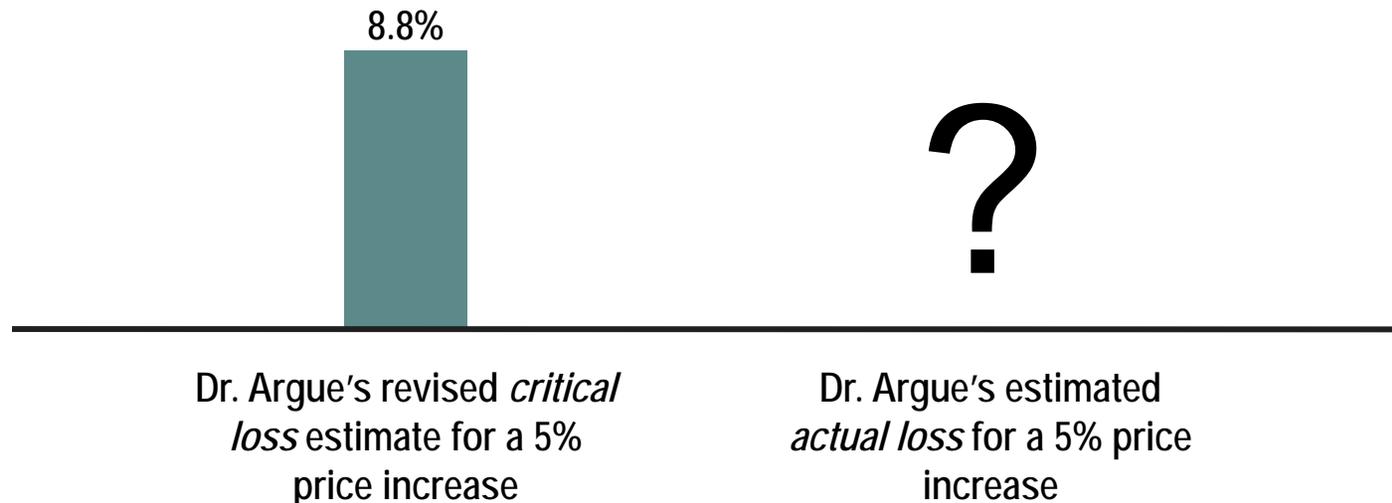


Dr. Argue's criticism of the Nampa market applies equally to his own proposed market of "at least" Nampa/Caldwell/Meridian/West Boise

Dr. Argue Did Not Perform a Complete Critical Loss Analysis



- As described in the *Horizontal Merger Guidelines*, must compare the critical loss with the **actual loss**
- Dr. Argue only calculated critical loss, not the actual loss
- Without an estimate for the actual loss, critical loss is “just a number”



Additional Flaws in Dr. Argue's Critical Loss Analysis



- **No evidence that a significant percentage of patients would switch providers in response to a small price increase**
 - Economic research and practical experience show that patients rarely choose providers based on price
 - Dr. Argue agrees: only a small fraction of patients are price sensitive (e.g., 10%), meaning a very high percentage (i.e., 88% of 10%) would have to switch providers to exceed the critical loss
 - According to Dr. Argue's Deloitte study, ***less than 1 percent*** of patients switched providers because of price
- "Multiplier effect" theory contradicts sworn testimony on referrals from Defendants' own witnesses

Argue's "Multiplier Effect"



- This theory contradicts sworn testimony from multiple defense witnesses that St. Luke's does not direct referrals
- Ignores the way prices are determined in health care markets
 - Prices are determined through negotiations between payers and providers
 - For all the reasons Professor Dranove explained (insurance, price opacity, decision-making under duress), pricing discipline does not come from patients
- Reinforces that Dr. Argue's critical loss analysis is inappropriate to analyze healthcare markets and is therefore not a reliable way to predict the likely competitive effects

Market Concentration

Market shares and HHIs exceed thresholds for presumptive illegality by a wide margin



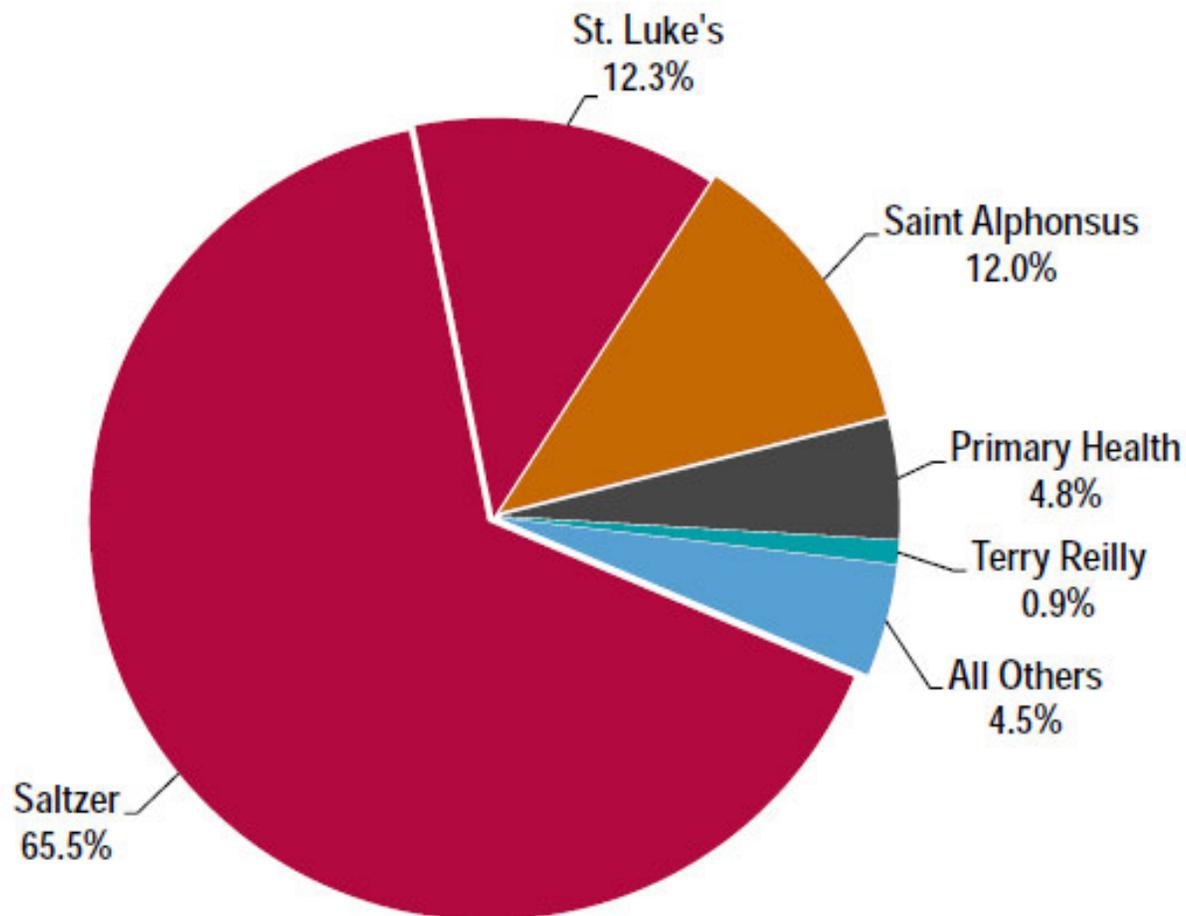
Courts Routinely Apply the *Merger Guidelines* Concentration Thresholds



“Sufficiently large HHI figures establish the government’s prima facie case that a merger is anticompetitive. Under the Horizontal Merger Guidelines, markets with an HHI above 2500 are considered ‘highly concentrated’ and mergers ‘resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.’”

- *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 71-72 (D.D.C. 2011) (quoting *Horizontal Merger Guidelines*, § 5.3). See also, e.g., *California v. Am. Stores Co.*, 872 F.2d 837, 842 (9th Cir. 1989); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1079-80 (N. D. Ill. 2012)

St. Luke's and Saltzer Account For Nearly 80% of PCP Services In Nampa



Market shares for Adult PCP Services in Nampa

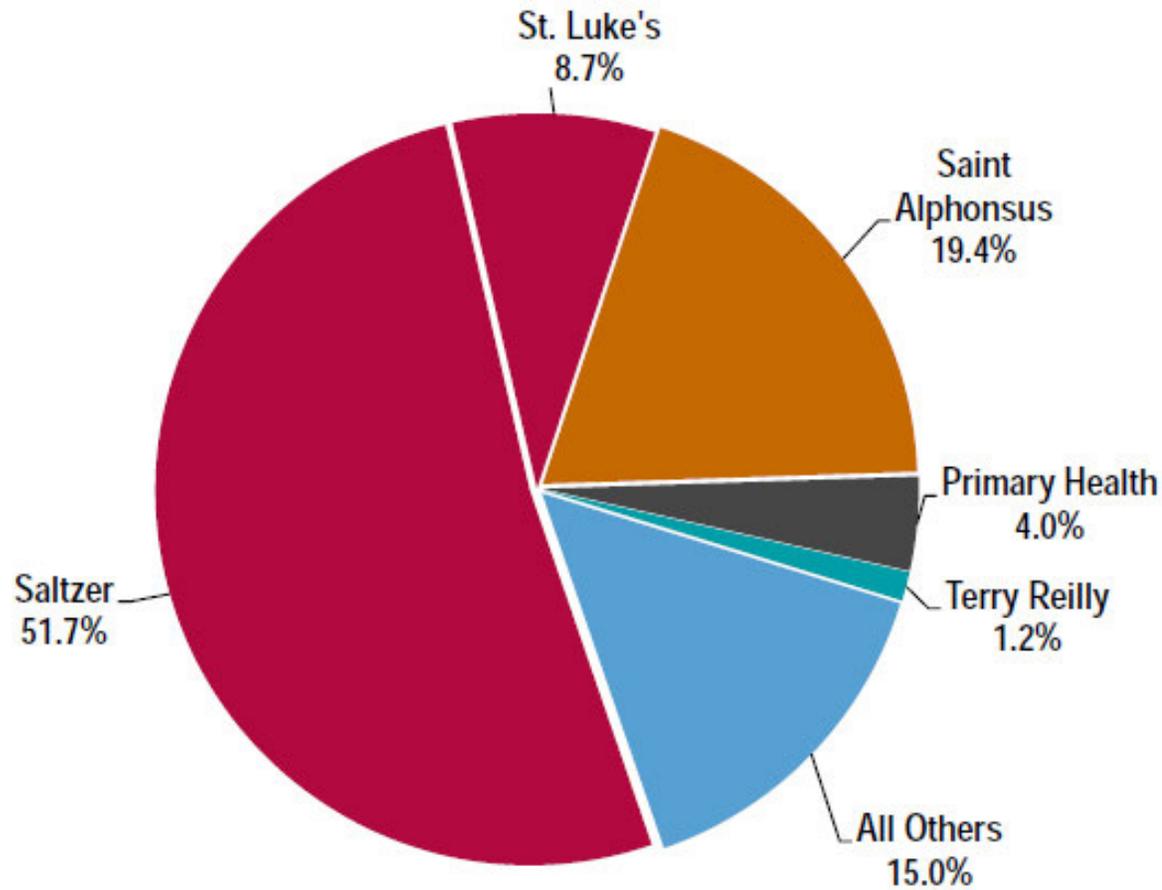
HHIs Exceed Presumptively Illegal Thresholds by a Wide Margin



Group	Visits	Pre-merger visits share	Post-merger visits share	Delta HHI
Saltzer	6,087	65.5%	77.7%	+1,607
St. Luke's	1,142	12.3%		
Saint Alphonsus	1,113	12.0%	12.0%	
Primary Health	451	4.8%	4.8%	
Terry Reilly	88	0.9%	0.9%	
All Others	419	4.5%	4.5%	
HHIs		4,612	6,219	

- The merger results in HHI of **6,219** with an increase of **1,607** points (i.e., **more than double** and **eight times** presumptively illegal thresholds, respectively)

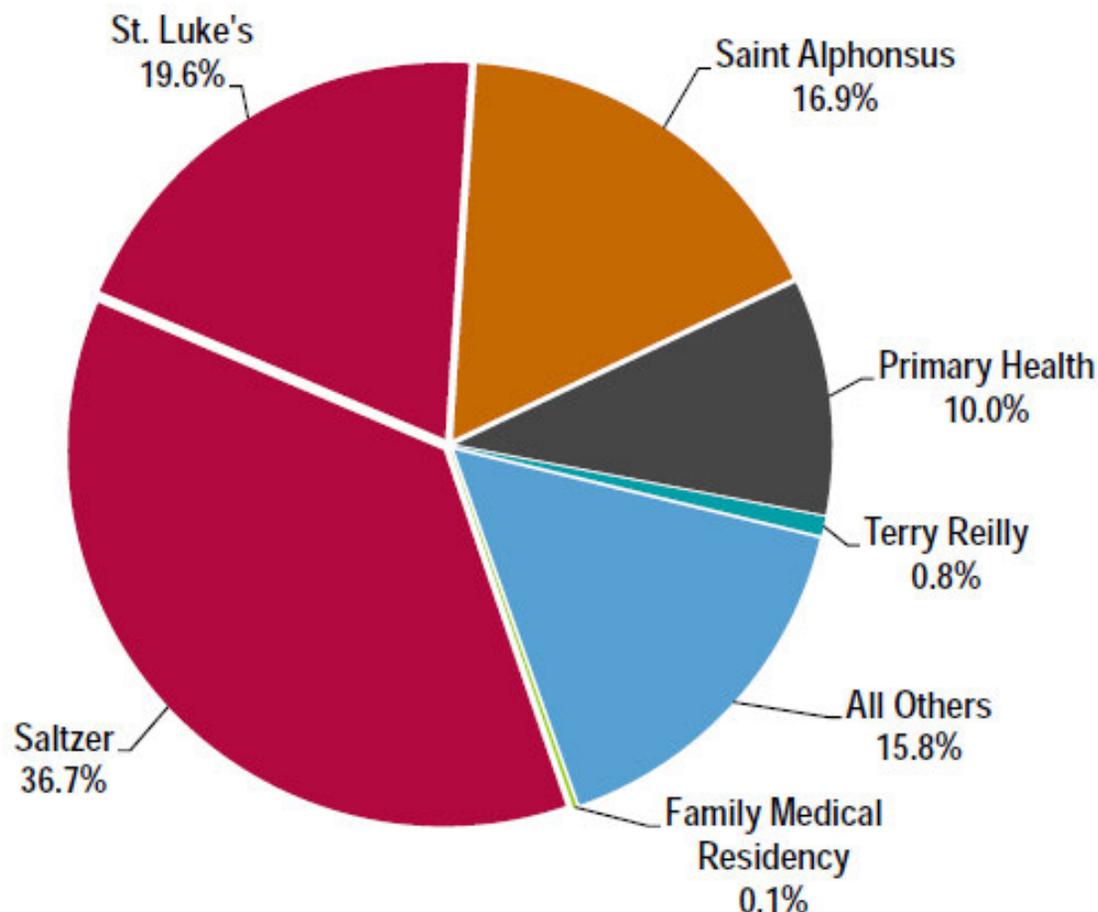
Even in Much Broader Markets, the Acquisition is Presumptively Illegal



- In Nampa/Caldwell, the merger results in HHI of **4,150** with an increase of **900** points (i.e., **1.5 times** and **four times** presumptively illegal thresholds, respectively)



Even in Much Broader Markets, the Acquisition is Presumptively Illegal



- In Nampa/Caldwell/Meridian, the merger results in HHI of **3,606** with an increase of **1,437** points (i.e., **nearly 1.5 times** and **seven times** the presumptively illegal thresholds, respectively)

Post-Merger HHIs Here Far Exceed Other Transactions Found Unlawful



Case	Combined Share	Pre-Merger HHI	HHI Increase	Post-Merger HHI	Holding
<i>Phila. Nat'l Bank</i> (Supreme Court 1963)	30%	N/A	N/A	N/A	Enjoined
<i>Rockford Mem'l</i> (N.D. Ill. 1989)	68%	2789	2322	5111	Enjoined
<i>Univ. Health Inc.</i> (11thCir. 1991)	43%	2570	630	3200	Enjoined
<i>Cardinal Health, Inc.</i> (D.D.C. 1998)	37% 40%	1648	1431	3079	Enjoined
<i>H&R Block, Inc.</i> (D.D.C. 2011)	28%	4291	400	4691	Enjoined
<i>ProMedica</i> (N.D. Ohio 2011)	58%	3313	1078	4391	Enjoined
<i>OSF Healthcare</i> (N.D. Ill. 2012)	59%	3353	2052	5406	Enjoined
<i>St. Luke's (Adult PCP)</i> (D. Idaho 2013)	78%	4612	1600	6219	TBD

Anticompetitive Effects

*Evidence confirms the Acquisition's
likely competitive harm*



Evidence Confirms Likely Anticompetitive Harm



- As Defendants' ordinary-course documents predict, the Acquisition will enhance St. Luke's and Saltzer's negotiating leverage
- Increased bargaining leverage can raise reimbursements for any of the negotiated services (the "bottom right-hand cell")
- Employer testimony illustrates how the Acquisition will increase healthcare costs
- Diversion analysis reinforces evidence of likely anticompetitive effects

St. Luke's Agrees PCP Market Share Gives "Strong Position" with Payers

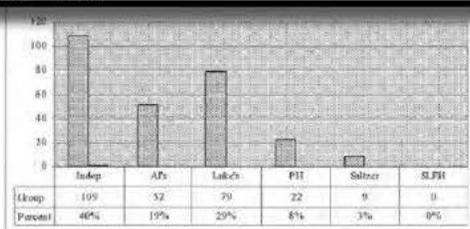


Primary Care Physician Market Share

St. Luke's Treasure Valley recognizes that market share in primary care is a key success factor, critical to sustaining a strong position relative to payer contracting and supporting ancillary, procedural, inpatient, specialty and other services. For purposes of this analysis, primary care is defined as family medicine, internal medicine, OB/GYN and pediatrics.

Primary Care Physician Market Share

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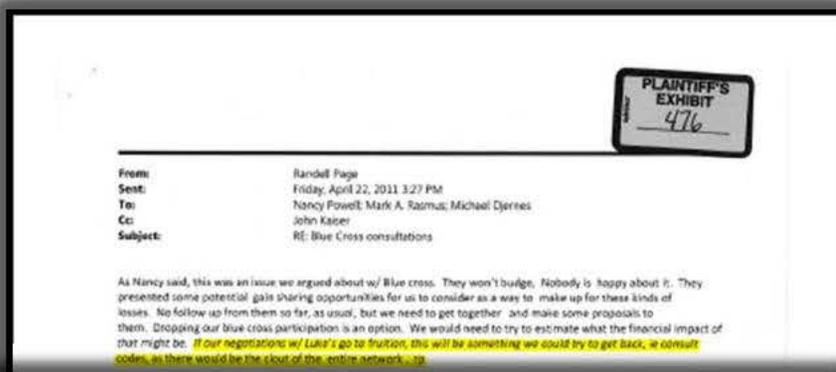
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Saltzer's Consultant Predicted the Deal Would Increase Negotiating Leverage

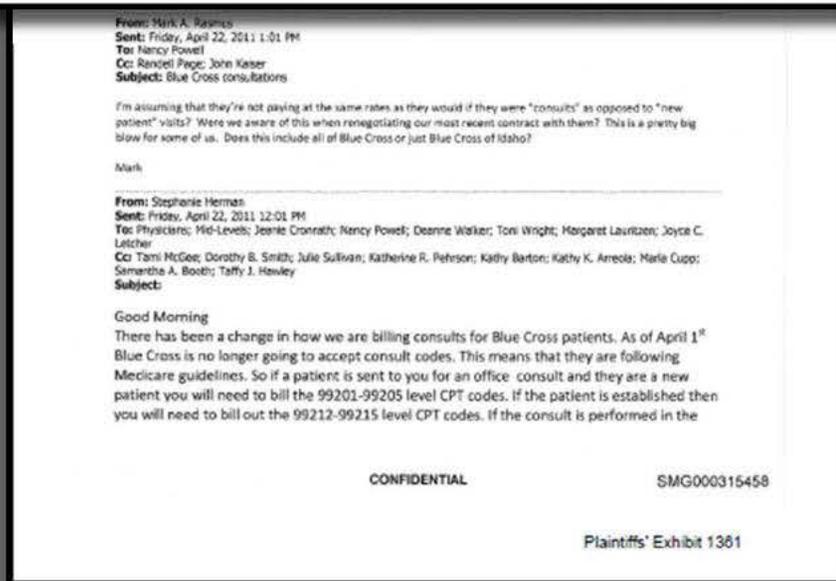


Attorneys' Eyes Only

The Acquisition Will Augment Negotiating “Clout” With Health Plans



that might be. If our negotiations w/ Luke's go to fruition, this will be something we could try to get back, ie consult codes, as there would be the **clout of the entire network . rp**



**Randell Page,
Chairman, Saltzer
Contracts Committee**



Attorneys' Eyes Only

Sees St. Luke's as a
Attorneys' Eyes Only



Attorneys' Eyes Only

Diversion Analysis Confirms Likely Anticompetitive Effects



- St. Luke's and Saltzer are each other's closest competitors for PCP services in Nampa
 - **Honda/Toyota vs. Honda/BMW**
- The Acquisition increases negotiating leverage by eliminating close substitutes
 - St. Luke's and Saltzer can force large share of patients into their third choice
 - E.g., if the combined firm is excluded from the network, 50% of St. Luke's Nampa patients would be forced to use their third choice
- **Reinforces likely anticompetitive effects**
 - Rebuts Defendants' claim that market shares and HHIs do not accurately reflect the market and is **not sensitive to geographic market**

Defendants' Rebuttal Case

*Defendants fail to rebut the
strong presumption of illegality*



Entry and Expansion

The merger's likely anticompetitive effects will not be offset by entry or expansion



Entry and Expansion Must Be Timely, Likely, and Sufficient



Timely

“It would take significantly longer than the **two-year timeframe prescribed by the Merger Guidelines** to plan, obtain zoning, licensing, and regulatory permits, and construct a new hospital in [the geographic market].”

Likely

“The Merger Guidelines explain that **for entry to be considered likely, it must be a profitable endeavor**, in light of the associated costs and risks.”

Sufficient

“Under the Merger Guidelines, **for entry or expansion to be sufficient, it must replace at least the scale and strength of one of the merging firms** in order to replace the lost competition from the Acquisition.”

Expansion and Entry Will Not Offset Acquisition's Anticompetitive Effects



- Difficult for existing in-network PCPs to expand their practices by cutting price
- Saint Al's has had little success expanding its Nampa PCP presence
- The need for an established reputation makes new entry unlikely and expansion difficult
 - No *de novo* entry in Nampa in years
 - Primary Health considers hiring one doctor per year a “tremendous success”

Efficiencies

*Defendants' efficiencies claims
are speculative and not
merger-specific*



Defendants Fail to Demonstrate “Extraordinary” Efficiencies



- “No court . . . has found efficiencies sufficient to rescue an otherwise illegal merger.”
 - *FTC v. ProMedica Health Sys.*, No. 3:11 cv 47, 2011 WL 1219281, at *57 (N.D. Ohio, Mar. 29, 2011)
- “High market concentration levels require proof of ***extraordinary efficiencies***, . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.”
 - *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001); *Horizontal Merger Guidelines*, § 10

Efficiencies

*Defendants' efficiencies claims
are speculative*



Defendants' Claimed Efficiencies Must Be Verifiable



“The court must undertake a **rigorous analysis . . .** to ensure that those ‘**efficiencies**’ represent more than mere speculation and promises”

- *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); see also *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1088-89 (N.D. Ill. 2012)

“**Delayed benefits . . .** are less proximate and more difficult to predict,” and thus are entitled to little weight.

- *FTC v. CCC Holdings, Inc.*, 605 F.Supp 2d 26, 73 (D.D.C 2009); see also *Horizontal Merger Guidelines* § 10

Purported Efficiencies Are Speculative



- 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
- 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 confirm that motivation for Acquisition was not quality or cost savings
- Defendants' "core" theory is unsupported

St. Luke's VP of Clinical Integration: Claimed Efficiencies Are Speculative



Attorneys' Eyes Only

Defendants' Expert: Claimed Efficiencies Are Speculative



2684
1 willing provider law, and I have also been told that people
2 find a way of getting around it.
3 Q. And it's your view that unless these conditions
4 for managed competition to work are met, efficient

2685
1 and in California, systems have been able to function pretty
2 well without that. I don't -- I don't know whether they
3 have any willing provider in Utah or not, but we do have
4 Intermountain.

24 Q. Let's talk about that, then. In your opinion,
25 St. Luke's has a long and complicated path before it can

1 provide integrated care; correct?

2 A. That's correct.

3 Q. And in your view, St. Luke's is taking a perilous
4 route, your words; correct?

5 A. Yes.

6 Q. And in your view, many others who have tried to
7 take this route have tripped and fallen; correct?

8 A. Correct.

9 Q. And you think it will take ten years or more for
10 St. Luke's to achieve the result it seeks; correct?

11 A. Correct.

22 successful integrated delivery system that you can point to
23 and say, employer, you can save money if you offer them.
24 Q. Let's talk about that, then. In your opinion,
25 St. Luke's has a long and complicated path before it can

22 the degree to which there is any opportunity for St. Luke's
23 to reduce hospital utilization in Idaho; correct?
24 A. Could you repeat the question, please?
25 Q. You're in no position to offer an opinion on the

United States Courts, District of Idaho



**Professor Alain
Enthoven**
Marriner S. Eccles
Professor, Emeritus
Stanford Graduate
School of Business



STANFORD
GRADUATE SCHOOL OF BUSINESS

Physician Employment Is Not a Panacea



- Employment of physicians has not been shown to be a superior organizational form for achieving integrated patient care
- Defendants' view is unsupported by empirical evidence
- The presence of certain organizational functionalities—not a specific organizational structure or form—are essential to integrate patient care

St. Luke's Past Acquisitions Have Not Generated Any Cost Savings



Experiment: A systematic, empirical analysis of the effects of St. Luke's past acquisitions of PCP groups

Methodology: "*Difference-in-differences*"

- Compare changes in overall healthcare spending for patients in two groups

Unrebutted Findings: ***No evidence*** of systematic reductions in healthcare costs following St. Luke's past acquisitions of PCP groups

- Indeed, results suggest that St. Luke's past PCP acquisitions may have resulted in ***increased*** healthcare spending
- Defendants' experts have made no attempt to measure efficiencies from prior acquisitions and have offered no contrary analysis at trial

The Saltzer PSA Reinforces Fee-for-Service Incentives



(a) **wRVU Compensation.** St. Luke's shall pay an amount to Saltzer per work RVU ("wRVU") generated by Saltzer physicians as indicated in Attachment A to this Exhibit 5.1.

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into effective December 31, 2012 ("Effective Date") by and between St. Luke's Regional Medical Center, Ltd., a tax-exempt Idaho nonprofit corporation ("St. Luke's"), and Saltzer Medical Group, P.A., an Idaho professional association wholly owned and operated by licensed physicians ("Saltzer"). St. Luke's and Saltzer are each referred to herein as a "Party" and are collectively referred to herein as the "Parties" to this Agreement. The term "Saltzer Physicians" as used herein shall refer to those physicians providing medical services as agents of Saltzer for the benefit of St. Luke's.

7.1 **Independent Contractors.** St. Luke's hereby engages Saltzer as an independent contractor to render Services through Saltzer Physicians, and Saltzer hereby accepts such engagement. **St. Luke's will not impose duties or constraints of any kind which would require Saltzer Physicians to infringe the ethics of the medical profession or which would compromise the independence of Saltzer Physicians' medical judgment.** It is understood and agreed that in the performance of all Services under this Agreement, **Saltzer and Saltzer Physicians shall at all times act as independent contractors of St. Luke's and the same are not agents or employees of St. Luke's for any purpose.** Further, it is expressly understood and agreed by the Parties that nothing contained

physician to have significant ongoing involvement in the day-to-day operation, operation and

PROFESSIONAL SERVICES AGREEMENT - SALTZER MEDICAL GROUP, PA PAGE - 1

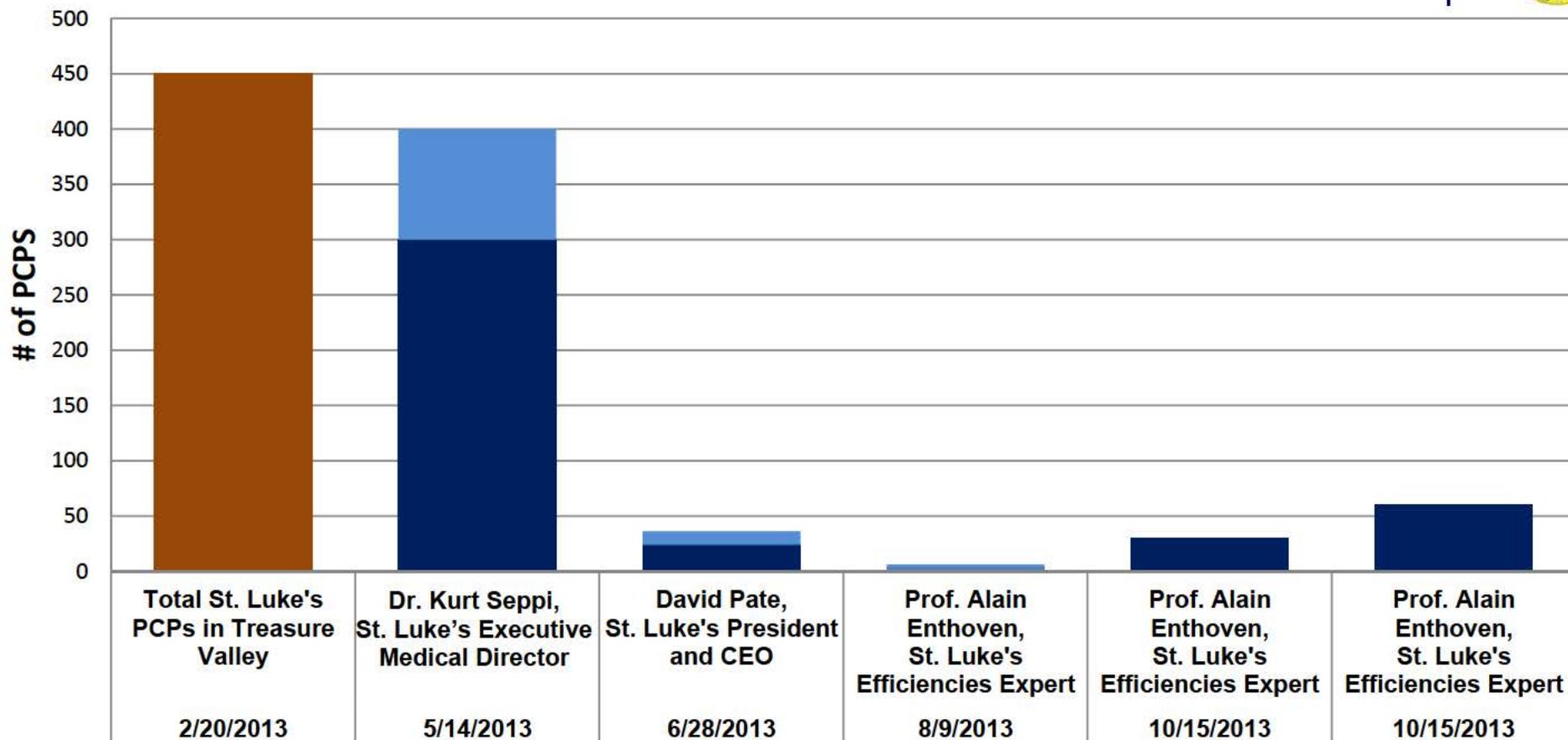
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Joint Exhibit 24

Defendants' "Core" Theory Is Inconsistent and Unsupported



“[W]hat’s the basis for it [the number of core physicians needed]? And all I can say is it’s a judgment out of unsupported opinion”

- Prof. Alain Enthoven, Defendants’ Efficiencies Expert

Efficiencies

Defendants' efficiencies claims are not merger specific



Defendants' Claimed Efficiencies Must Be Merger-Specific



“[E]fficiencies must be ‘**merger-specific**’ to be cognizable as a defense.”

- *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001); see also *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89; *FTC v. ProMedica Health Sys., Inc.*, No. 11-cv-47, 2011 WL 1219281, at **39-41 (N.D. Ohio Mar. 29, 2011).

Defendant's Efficiencies Are Not Merger-Specific



The Acquisition is not necessary:

- For Saltzer or St. Luke's to provide integrated patient care – i.e., higher quality, lower cost care
- For Saltzer or St. Luke's to transition away from fee-for-service payments to risk-based contracting
- For Saltzer to fully utilize and gain the purported benefits of St. Luke's health IT tools, including Epic and WhiteCloud

The Acquisition Is Not Necessary for Saltzer to Work with St. Luke's



I believe I've said if this is unwound, we would try to find opportunities to work with Saltzer. They have been a good community partner.

St. Luke's indicated to Saltzer that even if the transaction didn't work out, St. Luke's was still committed to working with Saltzer in whatever ways could be beneficial.

3 the methodologies by which patients can have the information
4 to provide them safe, timely, effective care when they need
5 it at the right time; correct?
6 A. That's correct.
7 Q. And clinical integration can occur in multiple
8 ways, right?
9 A. I assume there is multiple alternatives. Is that
10 a rhetorical — I guess, yes.
11 Q. For example, integrating healthcare can occur with
12 employed physicians, right?
13 A. Yes.
14 Q. And
15 independent
16 A. Yes.
17 you can integrate
18 Q. In
19 integrated do
20 physicians; n
21 A. I de
22 Q. Ind
23 clinical integ
24 Saltzer trans
25 A. Yes

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4 no
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2002
2003

THE COURT: Could we go to the courtroom?
A. We don't have the date.

... Saltzer was interested;
... I've said if this is unwound, we
... opportunities to work with Saltzer. They
... good community partner.

... Now, you testified during your direct exam with
... Keith about your experience at West Valley Regional
... Medical Center.

... mented EMR
... Regional
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... ical Center.
... your
... ter. And
... Regional
... e's acquired



John Kee, VP of
Physician Services



3 Q. Well, not in those words, but for example, why
4 don't we look at Exhibit 1366.
5 MR. ETTINGER: Your Honor, I think this is AEO. I
6 think Mr. Schafer knows the words I'm going to refer to. I
7 assume that those can be used in open court.
8 BY MR. ETTINGER:
9 Q. Okay. So you recall Exhibit 1366, an email you
10 wrote, Dr. Page? Actually, a letter you wrote to your
11 colleagues.
12 A. Yes.
13 Q.
14 by the
15
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17 before
18 A.
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20 called
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24 A.
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... could go --
... "preeminent" --
... said that --
... the word "dominant" did not -- was not
... thought even though it was your word in your
... ment; correct?
A. I didn't say it wasn't my thought. I said that if
I had known I was going to be testifying in court years



Dr. Randell Page,
Saltzer's Contracts
Committee Chair



St. Luke's Could Reward Independent Physicians for Quality Care



Defendants assert that the Acquisition is necessary to engage in pay-for-performance contracts with the Saltzer physicians, *BUT*:

- Commercial health plans across the United States are building pay-for-performance into independent physician contracts
- Other health systems—e.g., Advocate Health System—engage in pay-for-performance contracts with independent physicians
- Saint Al's has had pay-for-performance contracts with independent physicians since 2004 that paid independents a bonus dependent on achieving patient satisfaction, cost, and quality metrics

Defendants Can Engage in Risk-Based Contracting Without the Deal



- An independent Saltzer could engage in risk-based contracting
 - Saltzer would participate in St. Luke's risk-based relationship with SelectHealth through its membership in BrightPath
 - BCI has risk-based contracts with small independent physician groups (e.g., two physicians)
- St. Luke's plans to develop risk-based products do not depend on acquiring Saltzer
 - Patricia Richards of SelectHealth could not identify "any significant benefits from having Saltzer be directly affiliated and highly integrated with St. Luke's"
 - Dr. Argue admitted that St. Luke's could pursue risk-based contracting without Saltzer

Independent Physicians Can Fulfill the “Triple Aim”



- According to St. Luke’s CEO, David Pate, **Primary Health is “well on its way to fulfilling the Triple Aim”**
- Primary Health is achieving the Triple Aim with its eClinicalWorks-based health IT infrastructure
 - Engages in population health management
 - Performs quality scoring and health data analytics (e.g., diabetes care)
 - Engages in evidence-based medicine
 - Shares EMR data with St. Luke’s and Saint Al’s
 - Achieved meaningful use status under federal regulations

Saltzer Could Adopt or Interoperate with Epic if it Remained Independent



St. Luke's Affiliate EMR Program

- An independent physician participating in the Affiliate EMR program would be utilizing the Epic system **in exactly the same ways as an employed St. Luke's Clinic physician**
 - *Dr. Marc Chasin, St. Luke's Chief Information Officer*
- When the Affiliate EMR program is up and running, **independent groups will be as clinically aligned as employed groups**
 - *Chris Roth, St. Luke's Regional Medical Center CEO*

Idaho Health Data Exchange

- Costs less than \$200 per month and interface is easy to use
 - *Dr. Marc Chasin, St. Luke's Chief Information Officer*
- IHDE “enables cross region interoperability between Epic and non-Epic health record systems”
 - *St. Luke's ordinary course document*

Purported WhiteCloud Benefits Are Achievable Without the Acquisition



- WhiteCloud can be used by independent physicians
 - WhiteCloud currently is pulling data from Saltzer's eClinicalWorks EMR
 - St. Luke's plans to use WhiteCloud with the independent providers in Select Medical Network and its ACO
- An **independent** Saltzer would have access to **widely used and proven** data analytics tools
 - Saint Al's plans to roll out the Explorys data analytics tool to all members of the Health Alliance in December 2013

Other “Defenses”

Defendants’ other novel efficiency “defenses” do not overcome the Acquisition’s anticompetitive effects



Novel Defenses Do Not Justify an Anticompetitive Acquisition



- Regulations implementing the Affordable Care Act **encourage competition** as a way to promote higher quality, lower cost care
- Other independent physician groups in Nampa treat Medicaid patients
- Evolving healthcare marketplace warrants continued scrutiny of provider mergers

The “Healthcare Reform” Defense Is Contradicted by Affordable Care Act



Competition among ACOs can accelerate advancements in quality and efficiency. All of these benefits to Medicare patients would be reduced or eliminated if we were to allow ACOs to participate in the Shared Savings Program when their formation and participation would create market power.

November 2, 2011/Rules and Regulations

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ACO would be
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Program.
We explained in the proposed rule that the purpose of requiring Antitrust Agency confirmation that it had no present intent to challenge or recommend challenging the ACO as a condition of participation is two-fold. First, it would ensure that ACOs participating in the Shared Savings Program would not present competitive problems that could subject them to antitrust challenge that may prevent them from completing the term of their agreement with us. Second, it would maintain competition for the benefit of Medicare beneficiaries by reducing the potential for the creation of ACOs with market power. In this context market power refers to the ability of an ACO to reduce the quality of care furnished to Medicare beneficiaries and/or to raise prices or reduce the quality for commercial health plans and enrollees,

thereby potentially increasing incentives to provide care for enrollees of higher-paying health plans rather than for Medicare beneficiaries. We stated that competition in marketplace benefits Medicare Shared Savings Program because it promotes quality of care for Medicare beneficiaries and protects beneficiaries' access to care. Furthermore, it allows the opportunity for the formation of two or more ACOs in an area. Competition among ACOs accelerates advancements in quality and efficiency. All of these benefits to Medicare patients would be reduced or eliminated if we were to allow ACOs to participate in the Shared Savings Program when their formation and participation would create market power.

Comment: A significant number of commenters opposed mandatory review of ACOs, because an ACO is a business model designed to encourage collaboration and coordination among providers while still providing beneficiaries freedom of choice of providers in the FFS Medicare. The commenters stated the following points:

- The Social Security Act, as amended by the Affordable Care Act, does not authorize us either to promulgate regulations governing the application of antitrust laws or to delegate that authority to the Antitrust Agency. The authority to block participation in the Shared Savings Program by certain ACOs is not delegated to the Antitrust Agency. These commenters cited a need to suggest that the proposed rule review confers unreviewable authority on the Antitrust Agency to deny entities from participating in the Shared Savings Program and therefore the subdelegation doctrine.
- It is bad public policy to require a mandatory review of the nature of antitrust enforcement to require a mandatory review of applicants with PSA shares greater than 50 percent for common services. The mandatory review should be modified such that an ACO's size, should be monitored because if an ACO produces quality and cost savings, market share is an appropriate measure of anticompetitive behavior.
- Require mandatory notice to Medicare beneficiaries of ACOs with PSA shares greater than 50 percent to obtain a mandatory review.

Richard D. Reakin, Hon. J. Keith, & Brenda E. Jones, "Delegation: Oklahoma, Can I Now Reopen Medicare ACOs to Undergo Pre-Clearance by the Antitrust Agency?," 70 Health L. Rep. 361 (2011).

We propose our mandatory review requirement would apply to any newly formed ACO with a PSA share above 50 percent for any common service that two or more ACO participants provide to patients from the same PSA, and that did not qualify for the rural exception articulated in the proposed Antitrust Policy Statement. Those ACOs would be required to submit to us, as part of their Shared Savings Program applications, a letter from the reviewing Antitrust Agency confirming that it had no present intent to challenge or recommend challenging the proposed ACO. Absent such a letter, the proposed ACO would not be eligible to participate in the Shared Savings Program.

In addition, the proposed Antitrust Policy Statement explained that ACOs that are outside the safety zone and below the 50 percent mandatory review threshold frequently may be pro-



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Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services
42 CFR Part 425
Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations; Final Rule

Independent Nampa Physicians Treat Medicare/Medicaid Patients

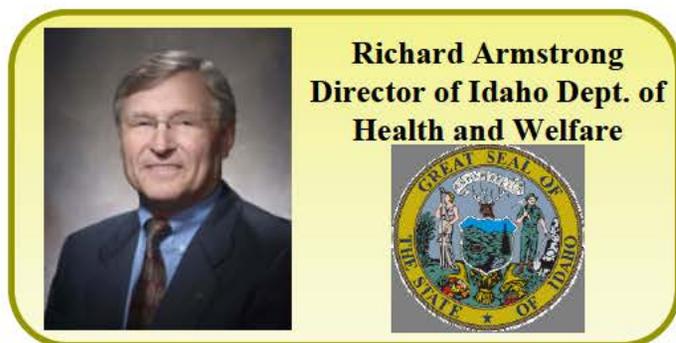


Q. And there are *many physician groups* that treat **Medicaid patients in the Nampa area** that aren't affiliated with a hospital; correct?

A. Correct.

Q. You mentioned, I think when Mr. Bierig was asking you questions, something about access by Medicaid patients in Nampa. **At present, are there any access issues for Medicaid patients in the Nampa area?**

A. We are not aware of access problems in that area.



Policy Experts Support Continued Scrutiny of Healthcare Mergers



“Enhance the current antitrust enforcement practice of imposing higher standards and greater scrutiny for mergers relative to clinical/financial integration contracts.”

ENGELBERG CENTER for
Health Care Reform
at BROOKINGS

BENDING THE CURVE

Person-Centered Health Care Reform:
A Framework for Improving Care and
Slowing Health Care Cost Growth



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Conclusion

The Acquisition is unlawful





Conclusion

- Post-merger HHI of 6,219 creates a strong legal presumption that this merger will have anticompetitive consequences
- Testimony, documents, and empirical evidence confirm the Acquisition's likely anticompetitive effects
- There are no verifiable, merger-specific efficiencies that justify taking the risk of this Acquisition

Remedy

Divestiture is the appropriate remedy





Divestiture is Appropriate

- Divestiture is the “most suitable remedy in a suit for relief from a § 7 violation”

California v. American Stores Co., 495 U.S. 271, 284 (1990)

- Divestiture “should always be in the forefront of a court’s mind when a violation of § 7 has been found”

Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1380 (9th Cir. 1978)

- Defendants do not quote this language from *Gabaret*:

“Of course, none of these concerns [about divestiture] is dispositive” in a suit by a government plaintiff

Garabet v. Autonomous Tech. Corp., 116 F. Supp. 2d 1159, 1172 (C.D. Cal. 2000)



Defendants' "Remedy" is Illusory

- St. Luke's-Saltzer is not *Evanston*
 - No merger-specific benefits have been achieved
 - Eggs not scrambled
- By promising that they could unwind, defendants promised that *Evanston* remedy would not apply
- According to defendants' own purported justification for the deal, their remedy would soon be inconsequential
- Requires monitoring and oversight
- Defendants' remedy does not incentivize competitive behavior



“Two Negotiating Teams” – At Most An Intramural Scrimmage

St. Luke's Health System



**St. Luke's
Negotiating Team**



**Saltzer
Negotiating Team**





What Lisa Ahern Did Not Say

- Saltzer will go under
- Saltzer will not be profitable
- Saltzer doctors will not practice in Nampa
- Saltzer doctors will have to leave Nampa
- Saltzer doctors will not be able to increase their compensation over time
- Saltzer will not be able to compete
- All defendants' expert really said was . . .

. . . Saltzer doctors will make less money next year



“Weak Company” is a Weak Argument

- Never adopted by any court
- “Weakest ground of all” to justify a merger
- “[A] ‘weak company’ defense would expand the failing company defense, a defense which has strict limits.”

FTC v. Warner Commc'ns, 742 F.2d 1156, 1164 (9th Cir. 1984)

- “History records and common sense indicate that the creation of monopoly and the loss of competition involve the acquisition of the small and the weak by the big and the strong.”

Kaiser Aluminum v. FTC, 652 F.2d 1324, 1341 (7th Cir. 1981)

The Law on Economic Hardship



“[T]he Government cannot be denied [divestiture] because economic hardship, **however severe**, may result. . . . This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.”

United States v. E.I. du Pont De Nemours and Co., 366 U.S. 316, 327 (1961) (emphasis added)