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Insider Perspective: Antitrust Treatment of Physician Practice Acquisitions

The Decision in *Saint Alphonsus, et al v. St. Luke's, et al*

February 13, 2014

Presenters:

Stephanie Westermeier, *Saint Alphonsus Health System*

Peter Herrick, *Federal Trade Commission*

David Ettinger, *Honigman Miller Schwartz & Cohn LLP*

Nancy Hawkins, *Practical Law Antitrust*

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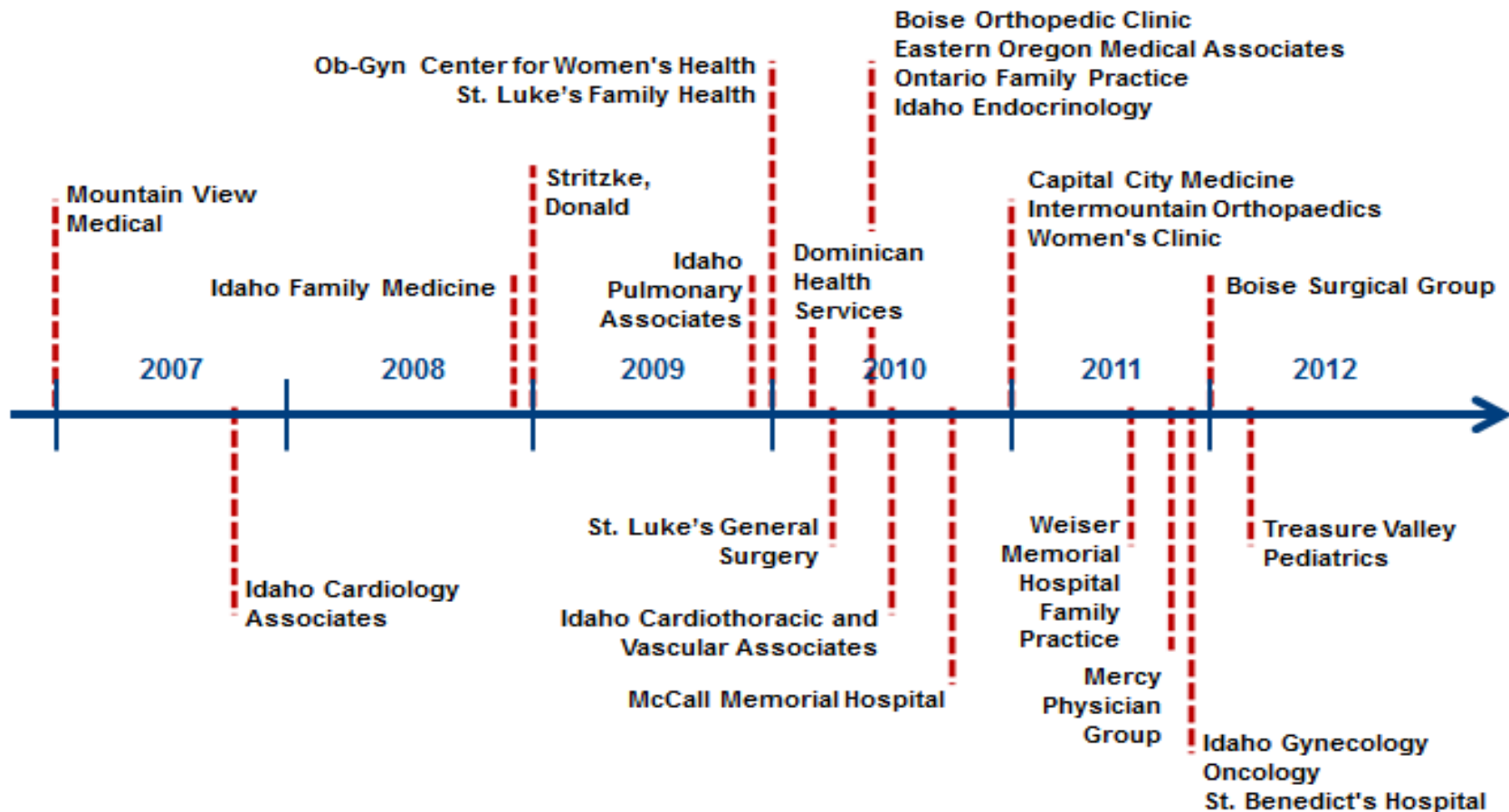
The screenshot shows the Practical Law website interface. At the top, there is a navigation bar with 'US' and 'Change country' on the left, and 'Login' on the right. The main header features the 'Practical Law' logo with the tagline 'A THOMSON REUTERS LEGAL SOLUTION'. Below the logo are navigation links for 'Practice Areas', 'Resources', 'International', and 'My Practical Law'. A search bar is positioned below the navigation, with 'SEARCH IN All US' and a search icon. A dark blue banner below the search bar contains the text 'New to Practical Law? We offer lawyers a better place to start.' and a green 'Sign Up for a Free Trial' button. Below the banner, there is a testimonial section featuring a quote from Eric Lee, a 'Practical Law Intellectual Property & Technology' specialist, with a 'Read more' button and a small portrait of him. To the right of the testimonial is a 'What Are You Working On?' section with a 'Get Started Now' button. Below the testimonial is a 'Browse our Content' section with a list of practice areas: Antitrust, Arbitration: International, Bankruptcy, Capital Markets & Securities, Commercial, Corporate and M&A, Employee Benefits & Executive Compensation, Finance, Intellectual Property & Technology, Labor & Employment, Litigation: Federal, Real Estate, and Tax. To the right of the content list is a 'Testimonials' section featuring a quote from Alan Berkeley, a 'Partner, K&L Gates LLP', with a 'View More' button.

Stephanie Westermeier:

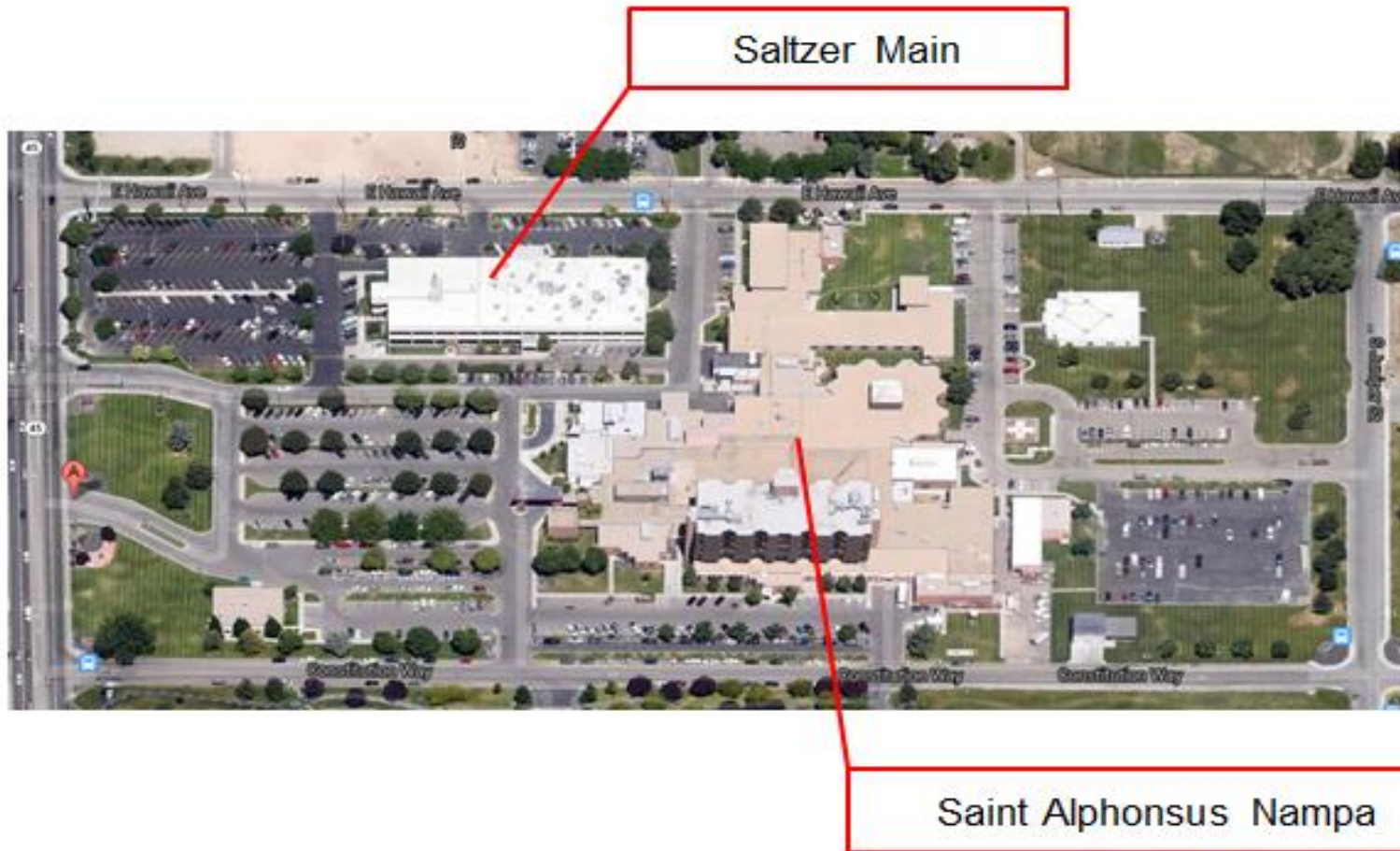
- The Role of Saint Alphonsus
- In-house Counsel's Perspective

Timeline of St. Luke's Prior Physician Group Acquisitions

Ada and Canyon County Acquisitions



Saint Alphonsus Nampa and Saltzer Main



Saint Alphonsus Nampa Post Saltzer Projections:

Reduce hospital's net margins in FY 2014 from \$3 million to **negative \$4 million.**

To maintain a 2% net margin, Saint Alphonsus Nampa would have to:

- Cut 140 FTEs (25% of its staff)
- Reduce or cut services

The Timing of the Government Investigation

Case 1:12-cv-00560-CWD Document 1-4 Filed 11/12/12 Page 2 of 2



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

February 24, 2012

VIA E-MAIL TRANSMISSION neuhoffc@slhs.org
and US POSTAL SERVICE

Christine Neuhoff
Vice President & General Counsel
St. Luke's Health System
190 E. Bannock Street
Boise, ID 83712

Re: *Investigation of St. Luke's Acquisitions*

Dear Christine:

As we discussed at our meeting earlier this week on Wednesday, the Federal Trade Commission is investigating certain acquisitions of St. Luke's under federal antitrust law. My office is also looking at these acquisitions under Idaho's Competition Act.

It has come to my attention that St. Luke's is presently involved in the purchase of the Saltzer Medical Group. This acquisition, if consummated, directly affects our current antitrust review. While there are various remedies available to address those acquisitions that substantially lessen competition, including divestiture, I would hope that upon conclusion of our investigation there would be an opportunity to share with you concerns we have, if any, and work to address them amicably and informally without the need for litigation and court participation. Having one more large acquisition in the mix complicates matters and would result in additional cost and expense for all parties involved. My hope is that St. Luke's will delay closing on its acquisition of the Saltzer Medical Group, and any other medical practice group it is considering acquiring, until our investigation is complete.

My senior staff and I remain willing to meet with you for further discussion.

Sincerely,

LAWRENCE G. WARDEN
Attorney General

LGW/btd:jc

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

February 24,
2012

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My hope is that St. Luke's will delay closing on its acquisition of the Saltzer Medical Group, and any other medical practice group it is considering acquiring, until our investigation is complete.



President's Update
David C. Pate, MD, JD

October, 2012
Page 2 of 3

October, 2012

Despite the uncertainties, St. Luke's is remaining focused on implementing our strategy and realizing our vision. We have submitted our application for the Medicare Shared Savings Program and we are awaiting word from CMS as to whether we will be accepted to begin participation in this program in January. If so, we will join 154 other organizations who currently participate in the program, plus however many other organizations are selected in this wave of applications. Though we don't expect this to be a significant financial boon for us, we do expect to gain the competencies and capabilities to manage the health, outcomes, and costs for a complex population of patients that should advance our organization greatly and prepare us for what is coming down the road, while we still have time to prepare for it. Additionally, though it is very early, SelectHealth is reporting better than expected interest from our community and now has received all the necessary approvals to issue insurance products in all commercial lines including individual, small group and large group segments as well as offerings for federal employees and Medicare Advantage. We will have a more detailed report at our next board meeting.

Financials

As you know, we did not make our cash flow target for the fiscal year just ended. While I won't have final numbers until Monday, Jeff and Pete have indicated that all signs so far indicate that we will not come in nearly as low as we had forecasted. As a result, we will far exceed the revised plan we submitted earlier in the year after a rough first quarter, and while we will not make the original plan, we may come reasonably close (perhaps within 5%).

Saltzer Medical Group ("Saltzer")

SLHS has provided notice to the FTC and state AG of our intent to proceed to closing with the Saltzer Medical Group ("SMG"). Of note, seven of the surgical specialists (1 General Surgeon, 1 ENT and 5 Orthopedic Surgeons) will be leaving SMG and joining Saint Alphonsus. Christy will provide another update at our next board meeting.

Fruitland

We had a marvelous ground breaking ceremony at Fruitland on October 17. Chris Roth did a great job and we had a wonderful speech from Jeff Sayer, Director of Commerce for Idaho. There was a very large turn-out including members of the Community Council that has been very engaged and helpful in developing our plans.

Saltzer Medical Group ("Saltzer")

SLHS has provided notice to the FTC and state of AG of our intent to proceed to closing with the Saltzer Medical Group ("SMG").



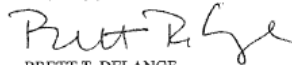
Boise Jerome Magic Valley McCall Moridian Wood River

Jack R. Bierig
November 8, 2012
Page 2 of 2

As you know, the Attorney General earlier wrote St. Luke's and asked that it hold off on closing its purchase of Saltzer pending his review of this acquisition. He later sent a similar letter to Saltzer. In August, our office served your client and Saltzer with CIDs to obtain relevant information regarding the transaction. The present incomplete status of the production greatly hampers our ability to review this transaction and determine whether it complies with the Idaho Competition Act. To proceed to close under such circumstances is not constructive and counter-productive. Indeed, such a strategy would appear designed to invite litigation.

We look forward to continued productive discussions regarding this matter.

Very truly yours,



BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Division

BTD/tt
cc: Brian Julian

November 8, 2012

As you know, the Attorney General earlier wrote St. Luke's and asked that it hold off on closing its purchase of Saltzer pending his review of this acquisition. . . The present incomplete status of the [document] production greatly hampers out ability to review this transaction and determine whether it complies with the Idaho Competition Act. To proceed to close under such circumstances is not constructive and counter-productive. Indeed, such a strategy would appear designed to invite litigation.

The Court's Critical Assumptions

“The Court’s decision is based on four **critical assumptions**:

- (1) This case will proceed on a fast track to trial;
- (2) **Prior to trial, there will be no measurable reduction in referrals** to St. Al’s from Saltzer physicians;
- (3) The integration of St. Luke’s and Saltzer will proceed gradually; and
- (4) The acquisition can be unwound and divestiture ordered if St. Al’s prevails on its antitrust claims.”

The Court's Critical Assumptions

“If these assumptions prove unfounded prior to trial, **St. Al's is free to seek a preliminary injunction** to freeze the integration process and/or unwind whatever steps have been taken to integrate Saltzer into the St. Luke's system.”

The Court's Critical Assumptions

“And, if referrals are reduced, St. Al’s may seek a preliminary injunction to bar any further steps towards integration of Saltzer into St. Luke’s until after a final decision has been issued.”

Peter Herrick:

- The Clayton Act and bargaining in healthcare markets
- Plaintiffs' *prima facie* case and the presumption of harm
- Additional evidence of anticompetitive effects

Court Found Acquisition Likely to Substantially Lessen 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.

Clayton Act § 7 Requires Prediction Of Acquisition's Likely Competitive Effects

- Court found that the Acquisition is “highly likely” to lead to higher healthcare costs, even if that were *not* Defendants’ intent

The antitrust laws essentially require the Court to predict whether the deal under scrutiny will have anticompetitive effects. The Court predicts that it will. Although possibly not the intended goal of the Acquisition, it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position which will enable it to (1) negotiate higher reimbursement rates from health insurance plans that will be passed on to the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates.

Findings of Fact and Conclusions of Law (“FOFs”) at 3


Court Adopted Bargaining Leverage Model to Analyze Acquisition's Competitive Effects

- Bargaining Leverage: Health Plans vs. Providers
 - Health plans and providers determine reimbursements through bilateral negotiations
 - Each side's leverage is determined by the other side's "outside option"—i.e., the "ability to walk away" or "BATNA"
- Plaintiffs argued that Acquisition makes health plans' outside option (or BATNA) much less attractive.
- Court agreed, finding that "[t]he Acquisition will increase substantially St. Luke's bargaining leverage with health plans."

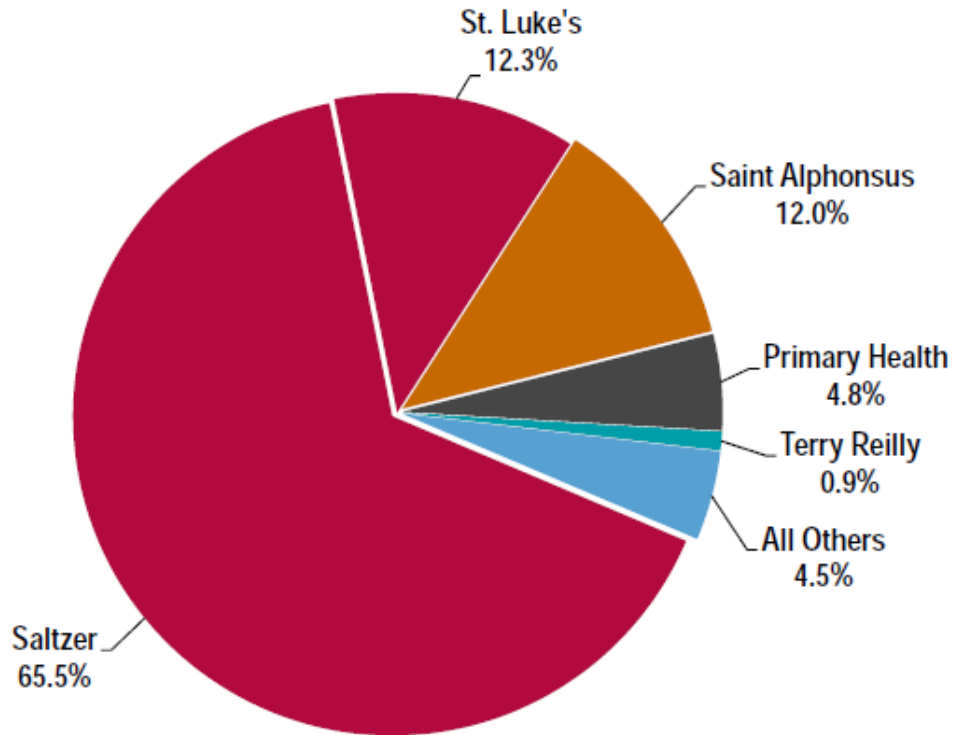
Plaintiffs Met Their Prima Facie Burden

- ***Undisputed*** relevant product market (Adult PCP Services)
- Geographic market was fiercely contested
 - Plaintiffs alleged that Nampa was the appropriate geographic market.
 - Defendants argued that geographic market extended to Boise, and possibly beyond, but ***never defined an alternative geographic market.***

Evidence Strongly Supported Conclusion That Nampa Is Relevant Geographic Market

- Court relied on wide range of evidence in applying “SSNIP” test, including:
 - Patient travel data.
 - Testimony from St. Luke’s own witnesses, largest health plan in Idaho, and FTC and State of Idaho’s economic expert.
- Hypothetical monopolist of Nampa PCPs would “have the leverage with health plan networks to profitably impose a SSNIP”  Nampa is appropriate geographic market.

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



Market shares for Adult PCP Services in Nampa

FOFs at ¶ 80

HHIs Exceeded Presumptively Illegal Thresholds by a Wide Margin

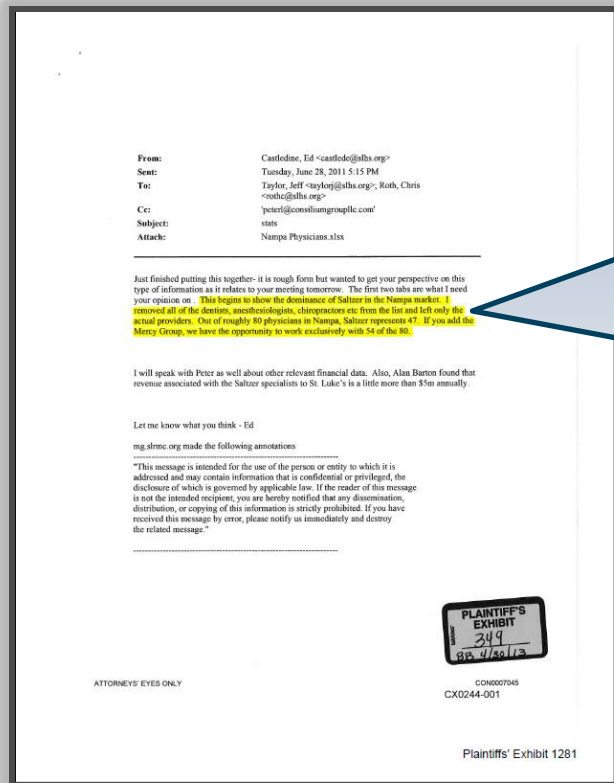
- Court relied on *Merger Guidelines*' HHI thresholds:

A market is considered highly concentrated if the HHI is above 2500, and a merger that increases the HHI by more than 200 points will be presumed to be likely to enhance market power. See *Merger Guidelines* § 5.3.

- In Nampa geographic market, Court found that Acquisition results in **HHI of 6,219** with an **increase of 1,607** points, far exceeding thresholds for presumptively anticompetitive merger

Additional Evidence Confirmed Likely Anticompetitive Effects

- Defendants' own ordinary-course documents confirmed that anticompetitive effects were likely to result from Acquisition. For example:



“This begins to show the *dominance of Saltzer in the Nampa market*. . . . Out of roughly 80 physicians in Nampa, Saltzer represents 47. If you add the Mercy Group, we have the opportunity to work exclusively with 54 of the 80.”



Ed Castledine
Director of Business
Development



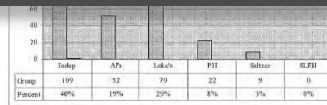
FOFs ¶ 85

Additional Evidence Confirmed Likely Anticompetitive Effects

- St. Luke's expected market share in PCPs to give it "strong position" for negotiations with insurers

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.



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SLHS000039821

FOFs ¶ 116

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Additional Evidence Confirmed Likely Anticompetitive Effects

- St. Luke's own executives believed the Acquisition would increase its ability to "pressure payors" for new agreements:

1093 at SLHS0000006605. The purpose of the e-mail, written in December of 2011, was to identify ways to improve St. Luke's financial performance in 2012. *Id.* The e-mail discussed revenue and volume shortfalls in 2011 and contained a plan for improvement. The e-mailed plan called for (1) reducing expenses, (2) increasing volume, and (3) a "Price Increase (\$ Unknown)." *Id.* Under that heading of "Price Increase" was a bullet point stating: "Pressure Payors for new/directed agreements."

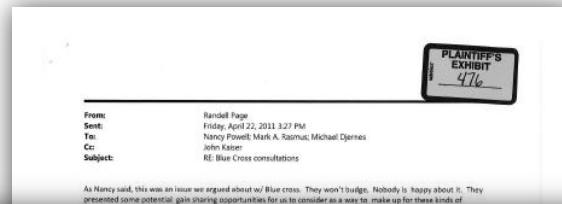
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of how to increase income. The point being made in the e-mail was that St. Luke's should use its bargaining leverage to increase reimbursements from health plans.

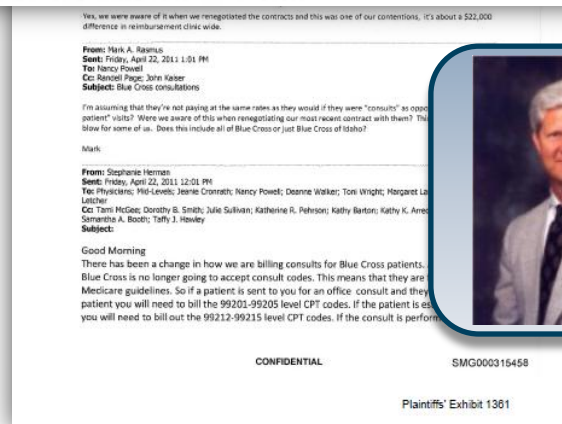
FOFs ¶ 112

Additional Evidence Confirmed Likely Anticompetitive Effects

- Saltzer's negotiating committee chairman predicted Acquisition would enhance its 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



Additional Evidence Confirmed Likely Anticompetitive Effects

- St. Luke's forecasted significant reimbursement increases from "hospital-based" billing

126. St. Luke's own analysis projected that it could gain an extra \$750,000 through hospital-based billing from Saltzer from commercial payers for lab work and \$900,000 extra for diagnostic imaging. See Exhibit 1277 at SLHS000820291, SLHS000820297; see also *Trial Tr.* at 1347 (Dr. Dranove) (testifying that St. Luke's "thought that hospital-based billing alone could generate an extra \$750,000 . . .").

* * *

129. The leverage gained by the Acquisition would give St. Luke's the ability to make these higher rates "stick" in future contract negotiations. *Trial Tr.* at 1347-49 (Dr. Dranove).

FOFs ¶ 126, 129

Additional Evidence Confirmed Likely Anticompetitive Effects

- Past is prologue
 - Numerous prior physician acquisitions gave St. Luke's bargaining leverage with health plans
 - Testimony from health plan that St. Luke's had three of five most expensive hospitals in state
- Data analysis
 - Diversions showing that St. Luke's and Saltzer were not only largest providers in Nampa but also each other's closest substitute
- Referrals
 - Evidence of prior referral shifts supported conclusion that same would occur here

FOFs ¶¶ 86-89, 99-102, 117-20, 132-40

David A. Ettinger:

- St. Luke's Defenses
- Referrals and Network Competition
- Lessons Learned

Judge Winmill's Findings on the “Quality Defense”

- “Independent physician groups are using risk-based contracting successfully.”¹
- “[T]he efficiencies of a shared electronic record can be achieved without the Acquisition. . .”²
- “The same efficiencies [sought to be achieved with employment] have been demonstrated with groups of independent physicians.”³
- “Because a committed team can be assembled without employing physicians, a committed team is not a merger-specific efficiency of the acquisition.”⁴

1. Findings of Fact at ¶183.
2. Conclusions of Law at ¶48.
3. *Id.* at ¶46.
4. Findings of Fact at ¶185.

The Same Quality Improvements Sought By St. Luke's Are Being Achieved By Independents

- Independent service line directors.
- Hospital payments to independents based on quality metrics.
- Use of data analytics by independents.
- Management services organizations.

The Same Quality Improvements Sought By St. Luke's Are Being Achieved By Independents

- Hospital-physician voluntary cooperation.
- State Health Data Exchanges.
- Network contracts with payors involving independent physicians.

St. Luke's "Hot Documents" on Efficiencies

The Value in Clinical Integration | Dr. Pate's Prescription for Change 4/21/2013

Clinical integration with independent providers is clearly the essential building block of accountable care. The federal government has not specified how clinical integration should take place, but has used an accountable care organization as characterized by:

- 1) A formal legal structure to receive and distribute payments for shared savings.
- 2) A leadership and management structure that includes clinical and administrative processes.
- 3) Processes to promote evidence based medicine and patient engagement.
- 4) Reporting on quality and cost measures.
- 5) Coordinated care for beneficiaries.

St. Luke's Health System has declared its intention to apply this fall to become a federally recognized Accountable Care Organization (ACO) through participation in the Medicare Shared Savings Program (MSSP). The System is committed not to an approved ACO structure for MSSP participation.

The Value in Clinical Integration | Dr. Pate's Prescription for Change 4/21/2013

Author: Randy Billings, VP of Payor and Provider Relations, St. Luke's Health System

So why am I writing about clinical integration? I'm not a doctor, or for that matter, a clinical provider of any type, except that I do at times attempt to manage my own health care. A little more than a year ago, I was leading the contracting efforts for Advocate Health Care, a clinically integrated provider network in the Midwest, which gives me some perspective and which puts me in a position to support our physician-led integration effort. The clinical perspective is brought by our provider. Most health care is delivered through provider networks that exist to provide a specific service, to create a single corporate entity, to combine similar provider types, or to deliver defined insurance benefits. Each network must deliver some measure of value.

But what's value?

For St. Luke's employees, value is conveyed through BrightPath, one example of a network with a panel of providers. The value is in providing access to the scope of medical services which St. Luke's Health System offers as covered benefits in our employee health plan.

For customers, another network example is of the physicians, hospitals, and delivery center health in a population and providing better care for individuals at a lower cost. This is our Triple Aim, which Dr. Pate and others have written about in past blogs.

I'm a numbers guy at heart, so the lower-cost dynamic intrigues me. In fact, balancing a checkbook is somewhat relaxing for me - even my own, as long as it's not in the red.

St. Luke's Health System is spending tens of millions of dollars and committing other valuable resources to implement an enormous medical record across all our providers. And while the new EMR system is a great tool, the value is not merely in its installation. The real value lies in how, or whether, it might become interoperable with other electronic information systems.

The value is in how our network will incorporate that tool with other tools and capabilities to integrate clinically, so that we can improve quality, eliminate costs, coordinate care, and standardize best practices to truly achieve and advance our Triple Aim.

The value of the Triple Aim will materialize to the degree that we integrate clinically.

St. Luke's has defined clinical integration as "health care providers in separate legal entities working together in an interconnected and mutually accountable fashion to pool infrastructure and resources, and develop, implement and monitor protocols, best practices, and various other organized processes that enable them to furnish higher quality care in a more efficient manner than could be achieved working independently."

It's a tall order. But the Triple Aim will be realized only within and dependent upon such a clinically integrated network.

And while the financial incentives of participating providers must be aligned, a clinically integrated network is not necessarily a network of providers under common financial ownership. The Patient Protection and Affordable Care Act allows for government-approved Accountable Care Organizations (ACOs) that can consist of otherwise financially independent provider competitors that are clinically integrated.

http://durate.stlukesblogs.org/2012/05/14/the-value-in-integration/

Plaintiffs' Exhibit 1212

AT EXHIBIT 374
Deposited 2/20/13
Date 4/24/13
Court CE
www.pact-cad.com

Randy Billings, VP of Payor and Provider Relations, St. Luke's



"Clinical integration with independent providers is clearly the essential building block of accountable care."

The “Wimpy” Defense

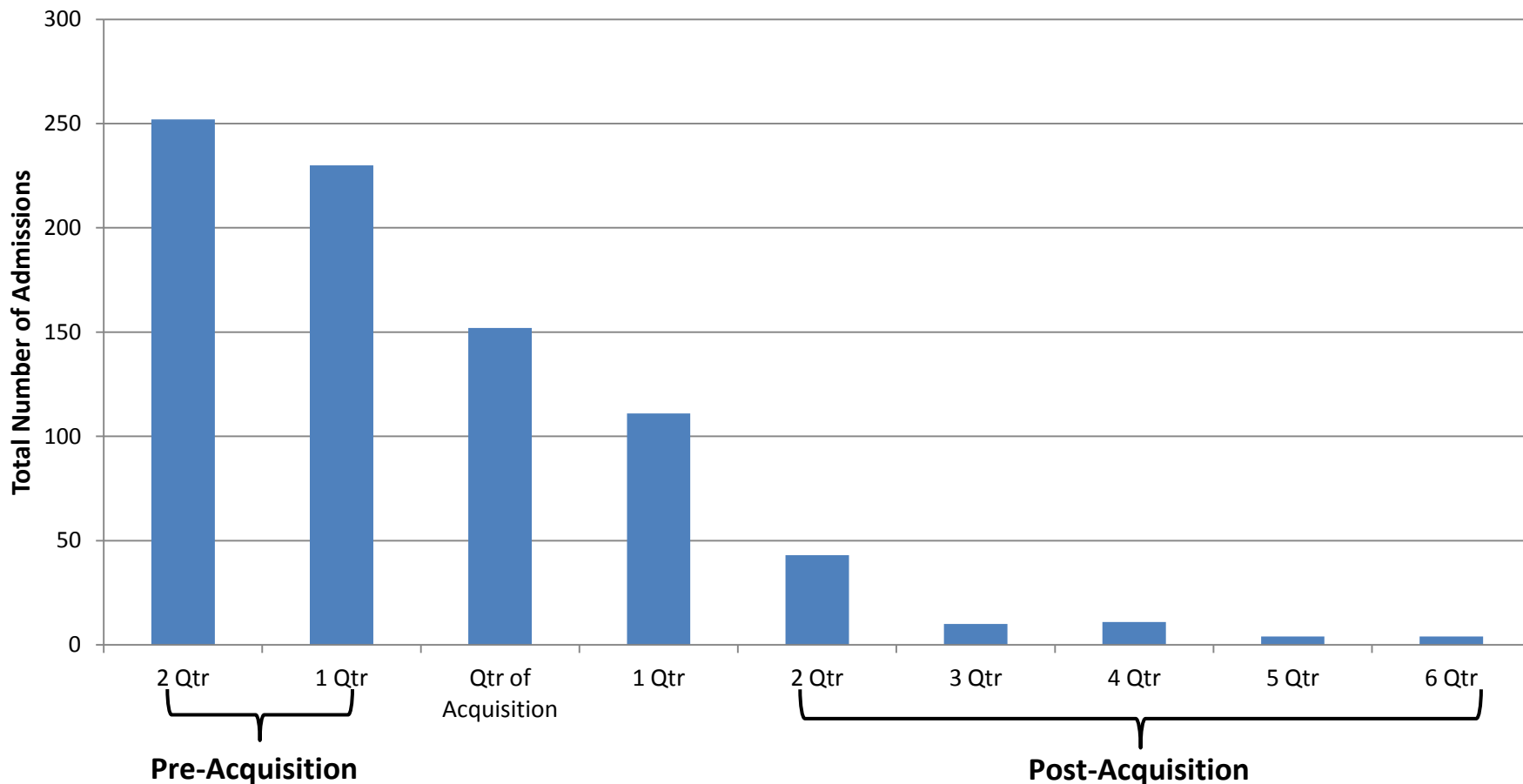


St. Luke's "Wimpy" Defense

- Alain Enthoven: St. Luke's efforts to improve quality involve a "long and complicated path" and "perilous route" which many others have failed at, and which will take 10 years or more.
- Dr. Pate: St. Luke's approach to changing health care is an "experiment."
- St. Luke's will be in a position to raise prices, foreclose competition and pull its physicians from competing networks **immediately**.

Cumulative Decline in Inpatient Admissions at Saint Alphonsus-Boise of the Five Acquired Specialty Practices

Quarterly Admissions Before and After St. Luke's Acquisitions
Blue Cross and Regence Data



St. Luke's "Hot Documents" On Referrals

Case 1:12-cv-00560-BLW Document 454 Filed 12/30/13 Page 165 of 265

expect will result in "greater use of the hospital." Dkt. No. 284 (Moore Dep. Tr. at) 79:9-80:1; 80:3-4; 81:23-82:4; 83:3-6.

692. St. Luke's expected that, post-acquisition, physicians at Cardiovascular and Chest Surgical Associates, Boise Orthopedic Clinic and the Women's Clinic would "end up doing most of their work" at St. Luke's. Dkt. No. 289 (Fletcher Dep. Tr.) at 148:3-9; 149:19-149:24, TX 1138.

693. Gary Fletcher, St. Luke's COO, acknowledged that St. Luke's made plans "to provide sufficient capacity for all cases [of Intermountain Orthopaedics] to be performed at St. Luke's after the acquisition of the group. Dkt. No. 289 (Fletcher Dep. Tr.) at 155:1-7.

694. In an internal email, Gregory Orr, St. Luke's former Director of Physician Services, referenced "St. Luke's historical willingness to preferentially direct patients to St. Luke's affiliated practices rather than equally among all on med staff." TX 1014 at SLHS0000004621.

695. St. Luke's physicians are expected to refer to St. Luke's specialists and facilities even when they regard them as inferior. Dr. Bathina, Vice President of St. Luke's Idaho Cardiology Associates, stated in an email that "[i]t will be very disappointing to us doctors who work on the west side to have to refer to these guys [Saltzer], because they are now part of [Luke's], when we are fully aware that they offer a far inferior product to what our colleagues at IPA can provide." TX 1357 at 0000004617; Trial Tr. at 2087:2-2088:11; Dkt. No. 290 (James Souza Dep. Tr.) at 150:15-151:4; 155:4-13.

696. St. Luke's tried to cover up the evidence related to shifting of referrals. In an internal St. Luke's email, Kathy Moore, the COO of St. Luke's Treasure Valley, instructed Joni Stright to delete the portion of a document addressing the Boise Surgical acquisition which

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Gregory Orr, St. Luke's Former Director of Physician Services, St. Luke's



In an internal email, Gregory Orr, St. Luke's former Director of Physician Services, referenced "St. Luke's historical willingness to preferentially direct patients to St. Luke's affiliated practices rather than equally among all on med staff."

St. Luke's "Hot Documents" On Referrals

Case 1:12-cv-00560-BLW Document 454 Filed 12/30/13 Page 166 of 265

stated: "Currently, the surgical volume is divided between St. Luke's and St. Alphonus hospitals. It is anticipated that surgical volume will migrate to St. Luke's over time as additional outpatient surgical capacity at St. Luke's becomes available." TX 1116 at SLHS000091783 - 91785. Ms. Moore explained in the email: "We can talk to this but I don't think we want it in the document."

(5) St. Luke's Actions to Control Referrals by St. Luke's Clinic Physicians

697. St. Luke's has also taken specific steps to assure that patients will remain within the system. St. Luke's Intermountain Orthopedics changed its order screening process to enable the ability to easily choose from several imaging centers." TX 1094 at SLHS0001040

698. The EPIC electronic medical records system causes "all referrals [to] auto-convert to internal referral [St. Luke's] type." TX 1257.

699. The "default lab" and default option for imaging for St. Luke's Clinic physicians are St. Luke's facilities. Dkt. No. 285 (Orr Dep. Tr.) at 123:20-125:5

(6) Analysis of Data

700. Dr. Haas-Wilson examined a broad range of data in addition to documents and testimony to support her conclusion that a Saltzer acquisition will result in substantial foreclosure. This included inpatient and outpatient data, payer and hospital data, and data concerning specialists and primary care physicians. Trial Tr. at 1498:17-25 (Deborah Haas-Wilson), TX 3000 at Slide 23.

701. Dr. Haas-Wilson's conclusions were supported by evidence that after five specialty practices were acquired by St. Luke's, "their business at Saint Alphonus Boise dropped dramatically [and] the amount of business that they did at St. Luke's facilities increased dramatically." The declines, which occurred for both inpatient and outpatient business, were

150

Kathy Moore, COO of
St. Luke's Treasure Valley



"Currently, the surgical volume is divided between St. Luke's and St. Alphonus hospitals. It is anticipated that surgical volume will migrate to St. Luke's over time as additional outpatient surgical capacity at St. Luke's becomes available."

"We can talk to this but I don't think we want it in the document."

Saltzer is Essential to Network Competition

Saint Alphonus v. St. Luke's 6/14/2013 Clement, Scott

Page 69 Page 71

1 one aspect of it.
 2 And then I think the reason I used the
 3 word confusion was really just around
 4 communication regarding the development of a
 5 statewide network.
 6 Q The regional network that you were referring to
 7 that Saltzer was in, what was the scope of that
 8 regional network?
 9 A As I recall, it was really a Boise Valley
 10 area network. Again, I wasn't involved directly
 11 in the development of it. That development
 12 occurred sometime prior to my arrival. And by the
 13 time I came on the scene, the decision had been
 14 made Regence-wide as to whether Idaho that our
 15 products were going to be supported by two
 16 statewide networks.
 17 Q So when you say the Boise Valley area, and I
 18 understand you weren't involved in creating that
 19 regional network, but can you give a sense for
 20 what the boundaries of that regional Boise area
 21 network are? In other words, is it just the city
 22 of Boise? Is it Ada County? Is it broader than
 23 that?
 24 A Honestly, I don't remember -- when I think of
 25 the participants, those I know that were

Page 70 Page 72

1 participating in those regional networks, whether
 2 I would describe it extending much beyond Boise
 3 maybe to Nampa. I wouldn't think of it as sort of
 4 a total Boise.
 5 I don't know
 6 enough to
 7 say.
 8 Q So that
 9 that region-
 10 PPO network
 11 traditional
 12 about the
 13 from a regional
 14 caused the
 15 Saltzer is
 16 to be. The
 17 segment of
 18 before
 19 networks
 20 they said
 21 A So my
 22 recall these
 23 connected
 24 regional
 25 best of my

Saint Alphonus v. St. Luke's 6/14/2013 Clement, Scott

Page 153 Page 155

1 percent, even taking into account those
 2 Charlemister changes. I felt reasonably
 3 comfortable the contract would produce a five
 4 percent increase.
 5 Q Would there be increases to offset the
 6 decreases in your experience?
 7 A In some cases there were.
 8 Q And the result of the increases and the
 9 decreases would be whatever was in the bottom
 10 right-hand corner of the ultimate spreadsheet?
 11 A Yes, that's correct.
 12 Q Was that always positive in your experience
 13 with St. Luke's?
 14 A What was positive about it was, again, the
 15 manner in which we engaged with one another around
 16 this and the degree of sharing of information. I
 17 couldn't say that I always felt positive about the
 18 outcome in terms of the net result.
 19 Q But from a financial perspective, was it the
 20 case that St. Luke's, year over year, was still
 21 getting increased every year?
 22 A They did, yes. I can't recall a single year
 23 when they got a decrease.
 24 MR. GREENE: Why don't we take a break
 25 and -- we can do a short one.

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1 THE VIDEOGRAPHER: Going off the record
 2 (Break in proceedings)
 3 THE VIDEOGRAPHER: We are on the record.
 4 Q BY MR. GREENE: So, Mr. Clement, what do you
 5 think about the negotiators from St. Luke's? Are
 6 they good ones?
 7 A Yes, I think so.
 8 Q Effective?
 9 A Yes.
 10 Q They do the best they can for their employer?
 11 A Yes.
 12 Q Have you observed them being less assertive
 13 because they work for a nonprofit?
 14 MR. STEIN: Object to foundation.
 15 A I don't know that I could judge that.
 16 Q BY MR. GREENE: Let's switch topics on you
 17 briefly.
 18 Q Circa 2005, did Regence introduce a PPO
 19 product to the Idaho market?
 20 A Yes, we did.
 21 Q And typically, how did PPO rates generally
 22 compare with traditional rates?
 23 A Well, they're intended to be lower. How much
 24 lower, I think varies pretty significantly.
 25 Q And how about payments to physicians

1 operating -- providing services under a PPO
 2 contract versus under a traditional contract?
 3 A Also would be lower.
 4 Q And did there come a time when you had a
 5 negotiation with Saltzer concerning whether or not
 6 they would accept the lower PPO rate?
 7 A Yes, there was.
 8 Q And can you describe that negotiation?
 9 A The -- early in my tenure, I had a meeting
 10 with a physician at Saltzer, Dr. Randall Page, and
 11 with Nancy Powell, the CFO at Saltzer, and talked
 12 about Regence -- our plan in terms of a
 13 development of a statewide network and their
 14 willingness or unwillingness, as it turned out, to
 15 participate in that statewide network under the
 16 terms that we had proposed.
 17 Q What rate did they ultimately get?
 18 A We ended up agreeing to reimburse Saltzer the
 19 same rate as they had been receiving for their
 20 participation in our traditional network. So
 21 there wasn't any reimbursement differential for
 22 them.
 23 Q And how much higher was that figure than the
 24 PPO rate that they rejected?
 25 A Between five and a half and six percent.

1 Q Could a smaller group in Nampa have secured
 2 that higher rate?
 3 MR. STEIN: Objection. Foundation.
 4 A I don't think it would be likely, no.
 5 Q BY MR. GREENE: Why is that?
 6 A The reason that we made any departures from
 7 the statewide fee schedule for anybody, when it
 8 came right down to it, had to do with how not
 9 having somebody in the network might impact our
 10 ability to sell products, and that would be
 11 directly related, at least one dimension that we
 12 consider, and that would be the size of group.
 13 Q And were there customers at this time that
 14 had expressed an interest in having Saltzer in a
 15 network that they would participate in?
 16 A There were customers for whom we knew, I
 17 knew, it was critical that Saltzer be part of the
 18 network.
 19 Q Do you essentially recollect which customers
 20 were those?
 21 A To the best of my recollection, the concern,
 22 at least that I had, was for some of the larger
 23 groups in Nampa, the Nampa School District and the
 24 City of Nampa employees.
 25 Q And what was the basis for this

39 (Pages 153 to 156)

Tucker & Associates, 605 W. Fort St., Boise, ID 83702 (208) 345-3704

Scott Clement, Care Oregon
 (Former Vice President for Provider
 Services for Regence Blue Shield
 of Idaho)



“Regence understood that it wouldn't
 be able to field the competitive product
 if they [Saltzer] weren't in it.” He added
 that “there were customers for whom
 we knew, I knew, it was **critical** that
 Saltzer be part of the network.”

St. Luke's "Hot Documents" on Networks

Case 1:12-cv-00560-BLW Document 454 Filed 12/30/13 Page 178 of 265

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Trial Tr. at

1491:6-22 (Deborah Haas-Wilson); TX 3000 at Slide 17.

747. Patricia Richards testified that "Select Health needs Saltzer in its provider network because [it] want[s] a robust provider network that would be attractive in the commercial market." Trial Tr. at 1763:4-21 (Patricia Richards).

3. St. Luke's Plans to Pull Doctors from Competing Networks

748. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Dkt. No. 321 (Billings

Dep. Tr.) at 99:10 - 99:23; TX 1225 at SLHS000892455.

749. [REDACTED]
[REDACTED] Trial Tr.

at 471:5-24 (Linda Duer); Dkt. No. 322 (Drake Dep. Tr.) at 8:6-8.

750. In February 2012, the St. Luke's Payor Contracting Committee approved a decision to "[e]xit the ACN agreement for all clinics by July 1, 2013." That approval has never been rescinded. Dkt. No. 322 (Drake Dep. Tr.) at 254:7-255:12; 255:14; TX 1207 at 2, TX 1208 at SLHS000656059.

751. [REDACTED]
[REDACTED]

**Steven Drake, St. Luke's System
Director of Payer Contracting**



In February 2012, the St. Luke's Payor Contracting Committee approved a decision to "[e]xit the ACN agreement for all clinics by July 1, 2013." That approval has never been rescinded.

Lessons for the Merging Parties

- The past is prologue.
- Primary care is the greatest antitrust concern.
- Don't live in the 1990s.
- Understand the payors and employers.
- You cannot hide behind the “health care reform” defense.

Lessons for “Sellers”

- St. Luke’s/Saltzer - February, 2012 - February 2014, and continuing.
- Get independent advice.

Lessons for Aggrieved Parties

- Antitrust can be a shield.
- The law protects competition, not merely competitors.
- Don't try to do it alone.

Questions

Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

- Considerations and Strategies in Non-HSR Reportable Transactions
- What's Market: Antitrust Federal Merger Enforcement Actions
- Antitrust Enforcement of Consummated Mergers
- Antitrust Enforcement of Consummated Merger Chart

About the Speakers

Stephanie Westermeier, General Counsel, Saint Alphonsus Health System

Stephanie is General Counsel for Saint Alphonsus Health System, Inc., a four-hospital health system composed of Idaho and Oregon hospitals, which is affiliated with Trinity Health, Inc. In addition, Stephanie serves as a Managing Counsel for Trinity Health in Idaho, Oregon and California. Stephanie has practiced law for twenty years in both private practice and in-house roles, primarily focusing on health care law, corporate governance, compliance and employment law issues. In 2001, Stephanie organized and implemented an in-house legal department for Saint Alphonsus Regional Medical Center. One of the major factors in Stephanie's decision to assume the General Counsel role in 2001 was that it would enable her to use her legal skills to help a client with a charitable mission of providing quality health care services to benefit the community. In 2010, she assisted in the formation of Saint Alphonsus Health System, including the creation of a governance structure and the integration of four hospitals into a new system. Prior to her in-house roles, Stephanie was a partner on the management and hiring committees at Givens Pursley LLP, in Boise, where she practiced from graduation from law school in 1991 to 2001. Stephanie enjoyed representing many small and large organizational clients, and working with high-caliber attorneys with a healthy esprit d'corps.

Stephanie has received professional recognition in the community, including the TWIN award (Tribute to Women in Industry) in 2000 and the Idaho Business Review 2007 Woman of the Year Award. In 2008, she was honored to be a panelist at the American Bar Association's *Rule of Law Forum* with the Honorable Stephen S. Trott of the United States Ninth Circuit Court of Appeals. She is a member of the Association of Corporate Counsel, the American Health Lawyers Association and serves on the Executive Committee of the Idaho State Bar Health Law Section.

(Continued on next page)

About the Speakers

(Continued)

Stephanie Westermeier, *General Counsel, Saint Alphonsus Health System*

Stephanie has been actively involved in leadership roles in various community affairs. One of her focuses has been to sustain the option of Catholic education locally. From 2006-2012, she served on the Bishop Kelly High School (BK) Foundation Board, including its Executive Committee. The BK Foundation provides an annual grant to BK, which helps provides need-based financial assistance to more than twenty-five percent (25%) of the students. During her tenure, Bishop Kelly was embarked on a capital campaign to implement \$5 million of improvements. She is a current member and an officer of the St. Joseph's Catholic School Home and School Association Board, which is the fundraising arm of St. Joes. Stephanie is also the current President of the Board of the Idaho Tort Liability Reform Coalition, which is engaged in tort reform efforts to reduce costs and help ensure fairness and efficiency of the judicial system.

Stephanie was admitted to the Idaho State Bar and the United States District Court for the District of Idaho in 1991, and to the Ninth Circuit Court of Appeals in 1995. She received her J.D. from the University of Utah in 1991, where she was a William H. Leary Scholar and a legal writing T.A. She received her B.A. from Boise State University in 1987, cum laude. At BSU, she was an Avery Petersen International Relations Scholar, and recipient of the LBJ Congressional Scholarship Internship in Washington, D.C.

Stephanie and her husband Steve Hippler, (a lawyer and avid Notre Dame college football fan) have two boys, Brady Quinn Hippler (8) and Jack Dublin Hippler (5). When she is not working, other than spending time with her boys, Stephanie most enjoys running on the trails in the Boise foothills, sun, rain, sleet or snow.

About the Speakers

Peter Herrick, Senior Trial Counsel, Federal Trade Commission

Peter Herrick is Senior Trial Counsel in the Federal Trade Commission's Bureau of Competition and was a key member of the FTC's trial team in *Saint Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health Sys. Ltd.*, Nos. 1:12–CV–00560–BLW, 1:13–CV–00116–BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014). Among his many responsibilities at trial, Mr. Herrick conducted the direct examination of the FTC's economic expert, Professor David Dranove, and cross-examined St. Luke's economic expert.

Before moving into the Bureau of Competition's trial group, Mr. Herrick was in the FTC's Mergers IV Division, where he was a member of the FTC's trial teams in two recent hospital merger challenges: *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012), and *FTC v. Phoebe Putney Health Sys. Inc.*, 793 F. Supp. 2d 1356 (2011), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 133 S. Ct. 1003 (2013). While in Mergers IV, Mr. Herrick also acted as the lead staff attorney on a variety of merger investigations, including *Grifols, S.A./Talecris Biotherapeutics Holdings Corp.*

Prior to joining the FTC, Mr. Herrick was Counsel in O'Melveny & Myers LLP's New York office and a member of the firm's Antitrust and Competition Practice. There, he represented clients in a wide range of antitrust and commercial litigation matters. For example, Mr. Herrick was a member of the defendants' trial team in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009), and represented a major financial institution in litigations alleging violations of the Sherman Act, including *In re Payment Card Interchange Fee & Merchant-Discount Antitrust Litig.*, 05-MD-1720 (E.D.N.Y.) and *Am. Express Travel Related Servs. Co. v. Visa U.S.A. Inc.*, No. 04-CV-0897 (S.D.N.Y.).

About the Speakers

David Ettinger, Partner, *Honigman Miller Schwartz & Cohn LLP*

David Ettinger was lead counsel for Saint Alphonsus in *Saint Alphonsus v. St. Luke's*. Mr. Ettinger has led Honigman's Antitrust and Trade Regulation practice for more than 30 years. He has represented clients in health antitrust matters in more than 30 states, and has successfully acted as lead counsel in a wide variety of major matters, including:

- A successful defense of a merger against Justice Department challenge
- Successful defense of one of the foundational cases on IPA and HMO antitrust liability
- Successful defense of a number of intensive "second request" investigations of hospital and physician mergers and acquisitions
- Defense of many government investigations of hospitals, physician groups and health care networks

Mr. Ettinger has written and spoken before national audiences on health antitrust topics on a regular basis for more than 20 years.

About the Speakers

Nancy Hawkins, *Head of Service, Practical Law Antitrust*

Nancy Hawkins joined Practical Law from Greenberg Traurig LLP, where she was a shareholder in the antitrust group handling a variety of merger, counseling and litigation matters. Previously she worked at Greenberg Traurig as an antitrust associate and counsel. Nancy is the head of Practical Law's Antitrust team.