

I. INTRODUCTION AND SUMMARY

In evaluating a merger challenged under Section 7 of the Clayton Act, courts are required to make a prediction of the proposed transaction's likely competitive effects. In so doing, courts routinely consider the merging Parties' prior conduct and similar events in other markets to inform their analysis, even where the conduct and markets may have material differences from those directly at issue in the case.

Here, Plaintiffs should be permitted to introduce relevant evidence of Defendants' conduct not only in the markets at issue but also in other markets as well. Specifically, evidence concerning reimbursement increases following St. Luke's series of physician acquisitions in the Magic Valley will provide useful context for predicting the effects of St. Luke's acquisition of Saltzer. Witnesses from the state's major health plans will explain that St. Luke's employment of the vast majority of PCPs in local communities in the Magic Valley gave it additional bargaining leverage to successfully extract higher reimbursements. Similarly, St. Luke's control over PCP services in another local community – *i.e.*, Nampa – give it the market power to extract higher reimbursement from health plans. Evidence concerning St. Luke's acquisition of surgery practice groups will likewise help the Court here by shedding light on St. Luke's direction of referrals away from non-St. Luke's facilities following its physician acquisitions, as well as its actions directed at competing physician networks. Both types of evidence are directly relevant to Plaintiffs' claims and St. Luke's defenses.

Just as importantly, Defendants have “opened the door” to evidence relating to St. Luke's prior acquisitions, including those in other markets. Defendants predicate their central “quality” defense on examples from other acquisitions and different markets. Indeed, they defend the acquisition by asserting that prior acquisitions – in a variety of other markets – have led to

improved quality and lower costs. The inequity of Defendants' position is manifest. They should not be permitted to cherry-pick examples from their prior acquisitions in other markets to justify the acquisition, while foreclosing Plaintiffs from offering contrary evidence from those same markets. At a minimum, if the Court decides to exclude evidence from markets not directly at issue here, it should apply that ruling with equal force to Defendants' case.

II. ARGUMENT

A. Competitive Effects Of Analogous Events In Other Markets Are Relevant To Merger Analysis Under Section 7 Of The Clayton Act

Courts frequently consider the merging parties' prior conduct and analogous events, in different markets, to inform their analysis of whether a transaction violates the antitrust laws.¹ Section 7 of the Clayton Act requires a prediction of a merger's likely impact on future competition rather than absolute proof that a merger has caused competitive harm in the relevant market.² Accordingly, "evidence that the posited harm has occurred under circumstances similar to the proposed transaction are relevant to merger analysis."³ Other markets need not be identical to the relevant market at issue to be relevant and informative to a court's analysis.⁴ Indeed, in *H & R Block*, (a transaction between two tax software companies) the court went as far as to consider evidence from the airplane travel market, an industry bearing little resemblance

¹ *FTC v. Whole Foods, Inc.*, 502 F. 2d 1, 20 (D.D.C. 2007). *See also*, e.g., *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1086-88 (N.D. Ill. 2012) (relying on evidence of prior coordinated activity among healthcare providers in Rockford, Illinois, as one basis for granting motion for preliminary injunction blocking merger); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C. 2011) ("Particular scrutiny of HRB's [H & R Block's] efficiencies claims is also warranted in light of HRB's historical acquisitions.").

² *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966).

³ *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *39 (D.N.M. May 29, 2007).

⁴ *See, e.g., United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 58 (D.D.C. 2011); *see also United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 332, 338 (S.D.N.Y. 2001).

to the tax software market.⁵ And when evaluating the admissibility of evidence, courts interpret the threshold for relevance as exceedingly low.⁶

▪ **Evidence Concerning Increased Reimbursement in The Magic Valley Is Relevant**

St. Luke's has a track record of using its acquisitions of PCPs in local communities to negotiate higher reimbursements from health plans. Those actions foreshadow the likely competitive effects from an acquisition that gives St. Luke's a similar share of PCPs in Nampa.

St. Luke's past negotiations with health plans provide a real world example of how St. Luke's dominant control of PCPs gives it greater bargaining leverage.⁷ In the Magic Valley, St. Luke's acquired approximately 30 physician practice groups starting in 2004, and by 2008, St. Luke's employed the vast majority of the PCPs there.⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁹ [REDACTED]

[REDACTED].¹⁰

[REDACTED]

[REDACTED].¹¹ [REDACTED]

⁵ *H & R Block*, 833 F. Supp. at 58.

⁶ *Rambus Inc. v. Samsung Elecs. Col. Ltd.*, No. C-05-02298 RMW, 2008 WL 2944892, at *1 (N.D. Cal. July 16, 2008).

⁷ Gov. Pl.'s Complaint for Perm. Inj'n at ¶ 45, (Dkt. No. 97, Exhibit A).

⁸ [REDACTED]

[REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

[REDACTED]

[REDACTED]¹² [REDACTED]

[REDACTED]

[REDACTED]¹³

Here, the acquisition provides St. Luke's with nearly 80 percent of the PCP market in another local community: Nampa.¹⁴ As in Twin Falls, the acquisition will give St. Luke's significant additional negotiating leverage because health plans cannot offer a marketable product to consumers without local PCPs.¹⁵ With this newfound negotiating leverage, St. Luke's will be able to extract higher reimbursements, increasing the healthcare costs borne by employers and consumers.¹⁶ Even if the Magic Valley is not a perfect match to the Treasure Valley in all respects, the evidence from BCIs Experience there – particularly in Twin Falls – is instructive of what likely will happen now that St. Luke's controls the vast majority of PCP services in Nampa. For this reason, evidence of reimbursement increases in the Magic Valley is relevant and should be admitted at trial.

▪ **Evidence Concerning St. Luke's Prior Acquisitions Of Surgical Practice Groups Also Is Relevant**

Despite St. Luke's assertion, evidence of its various surgical practice group acquisitions is highly relevant here for a number of reasons.¹⁷ *First*, referrals from these physicians occur in

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ TX 1848 ¶ 209.

¹⁵ TX 1848 ¶ 156.

¹⁶ TX 1848 ¶ 209; TX 1854 ¶ 35.

¹⁷ It is unclear whether Defendants are attempting to exclude evidence that applies *only* to surgical practices or also to the acquisition of other specialty practices. However, the same arguments apply in both cases.

the two additional relevant markets alleged by Private Plaintiffs: general inpatient hospital services and outpatient facility services for orthopedic and general surgery.¹⁸ While physicians are not sellers or competitors in these markets, they participate in them through their referrals of patients to hospital and surgical facilities. Patients choose what facility to use for services in these relevant markets based on recommendations from their treating PCP or specialist. On that basis alone, evidence concerning St. Luke's surgical acquisitions should be admissible at trial.

Second, St. Luke's surgical acquisitions provides substantial evidence of how physicians dramatically shift their referrals away from the Private Plaintiffs' facilities after St. Luke's acquires them.¹⁹ Such evidence is highly relevant to demonstrate what will happen to the Saltzer PCP referrals after the acquisition. The evidence shows that when St. Luke's acquires a physician group, that group's loyalties and incentives change, causing a wholesale shift in referrals to St. Luke's. That pattern and logic applies equally to surgeons, other specialists, and PCPs. Indeed, evidence that this change affects surgeons and other specialists makes it likely that the same will hold true for the Saltzer PCPs now employed by St. Luke's.

Testimony in this case confirms that referrals by St. Luke's clinic physicians follow the same patterns, whatever the category of physicians. [REDACTED]

¹⁸ Private Plaintiffs' Amended Complaint, at 20 – 23 (Dkt. No. 63).

¹⁹ See Hass-Wilson Expert Report ¶¶ 197-199, Ex. 16, TX 1705. See also Haas-Wilson Expert Reply Report ¶ 67, Exhibit 3, TX 1673; ¶ 71, Exhibit 6, TX 1676. The law does not require that the Private Plaintiffs actually prove that this change in referrals occurred. It is presumed under the case law that when one business acquires another, that the second business will shift its purchases to the first. See *Harnischfeger Corp. v. Paccar, Inc.*, 474 F. Supp. 1151, 1158 (D.Wis. 1979). See also *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978). Nevertheless, since St. Luke's is contesting the issue, it is important for the Private Plaintiffs to present their (extremely substantial) evidence on this issue.

[REDACTED].²⁰

[REDACTED].²¹ Again, this default

referral entry is the same for PCPs, surgeons, or other specialists.

St. Luke's counsel claimed at the pre-trial conference, however, that specialists are different from PCPs, primarily because they need hospital privileges to admit patients, whereas PCPs may admit patients through "hospitalists" who focus on hospital care. While this is true, it does not change the effect of St. Luke's surgical acquisitions on referrals. A number of St. Luke's physicians, including both PCPs and specialists, have indicated that their patients tend to follow their lead in terms of choice of hospitals.²² Again, the evidence is no different as between PCPs and surgeons, or other specialists. When St. Luke's expert, Dr. Argue, was asked about differences between PCPs as compared to specialists with respect to their incentives to refer and the likelihood that patients will follow the physician's referrals, Dr. Argue could only say, "I can't think of any" and "I don't have any information on that."²³

²⁰ See TX 1257; Ex. B, Darby Webb (St. Luke's) Dep. Tr. at 106:2-7.

²¹ Ex. C, Gregory Orr (St. Luke's) Dep. Tr. at 120:17-121:16; 92:23-93:5; TX 1015.

²² See Ex. D, Jon Schott (St. Luke's) Dep. Tr. at 141:6-142:12 ("Usually, patients want to know who you know or who you have some personal contact with, rather than just picking a name . . . I think that ultimately the patients want to know who you trust and who you work with."); Ex. E, Mark Rutherford (St. Luke's) Dep. Tr. at 82:22-83:1 ("I would probably say the majority value my opinion on where they are seen, which specialists they are seen by."); Ex. F, Robert Walker (St. Luke's) Dep. Tr. at 62:4-7 ("Most patients would ask me, 'Where will we be having this procedure done?' rather than 'I would like to have my procedure done at such-and-such location.'").

²³ Ex. G, David Argue (Expert) Dep. Tr. at 255:13-256:13.

Moreover, the evidence of changes in surgeons' and other specialists' referrals is especially relevant because it provides significantly more examples, and therefore more data, to evaluate whether in fact acquisitions by St. Luke's cause a shift in referrals. This is important because of St. Luke's (incorrect) efforts to explain away specific examples.²⁴ Professor Haas-Wilson's reports address evidence of shifting referrals from data, documents, and testimony, including at least four examples involving PCPs and nine examples involving specialists.²⁵ All but one of these examples point to substantial declines at Saint Al's as a result of St. Luke's physician acquisitions. It is impossible to explain away so many examples, demonstrating such a clear and obvious pattern.

Third, St. Luke's acquisitions of surgical practices, and the resulting effects on network competition, are relevant to Private Plaintiffs claims here. The evidence shows that when St. Luke's has acquired both surgical and primary care practices, it has pulled those groups from the Micron network and from Saint Al's' Advantage Care Network ("ACN").²⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷ This will seriously damage the rivals

²⁴ See Memorandum of St. Luke's Health System, Ltd. in Opposition to Plaintiffs' Motion for Preliminary Injunction, pp. 27 – 30 (Dkt. 34).

²⁵ See Haas-Wilson Expert Reply Report ¶¶ 67, 84-88, 91-102, Ex. 3-9; Haas-Wilson Decl. Ex. 10-12; Haas-Wilson Expert Report ¶¶ 189, 195, 200, Ex. 16; TX 1673, TX 1138 – 39.

²⁶ See, e.g., Ex. H, Randy Billings (St. Luke's) Dep. Tr. at 99:10-100:21; Ex. I, [REDACTED]

See, e.g., Ex. H, Randy Billings (St. Luke's) Dep. Tr. at 99:10-100:21; [REDACTED]

to the St. Luke's-based networks, further cementing St. Luke's dominance in the relevant hospital and surgery facilities markets, and significantly harming competition.²⁸

These facts are also relevant because the antitrust laws make clear that the Court should not view the Saltzer acquisition in isolation, but as the latest, and most important, in a series of anticompetitive acquisitions, including the surgical acquisitions.²⁹

For all these reasons, evidence concerning St. Luke's surgical acquisitions is relevant and therefore admissible.

B. St. Luke's Has "Opened The Door" By Predicating Their Defenses On Evidence From Other Acquisitions And Different Markets

Defendants base much of their efficiencies defense on events in various markets not at issue in this case. Specifically, they claim that St. Luke's prior acquisitions over many years across the state have led to higher quality care at a lower cost, asking the Court to consider a wide range of evidence from a host of different markets. Meanwhile, Defendants take the position that Plaintiffs should be not be allowed to introduce contrary evidence – from those very same markets – showing, among other things, that St. Luke's prior acquisitions resulted in higher

See Plaintiffs' Joint Pre-Trial Memorandum, pp. 15-16 (Dkt. 196). *See also* Amended Complaint, p. 28 (Dkt. No. 63).

²⁹ *See, e.g., United States v. Aluminum Co. of America*, 377 U.S. 271, 280, 84 S.Ct. 1283, 1289 (1964) ("the objective [of the Clayton Act] was to prevent accretions of power which are individually so minute as to make it difficult to use the Sherman Act test against them") *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 822 (9th Cir. 1961) ("a substantial lessening of competition was to be prohibited [by Section 7 of the Clayton Act] whether the acquiring corporation accomplished these results by one immense gobble of another large producer or whether it set out to produce the same results by nibbling away at small producers"); *E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473, 479 (9th Cir. 1958) (noting that under Clayton Act "a plaintiff may recover for loss to which a defendant's wrongful conduct substantially contributed, notwithstanding that other factors also contributed").

costs and reimbursements, rather than efficiencies. Put simply, Defendants cannot have it both ways.

Perhaps the most glaring illustration of this imbalance is St. Luke's reliance on purported quality improvements in the Magic Valley to suggest that this acquisition likely will lead to similar results. To pick but one example, St. Luke's argued at the preliminary injunction stage that "St. Luke's affiliation with a group of practicing gastroenterologists in the Magic Valley enabled these physicians to recruit two Board-certified gastroenterologists to the community, whose presence reduced the average wait-time for an appointment from 6-8 weeks to 1-2 weeks."³⁰ And a review of Defendants' witness and exhibit list confirms their intention to introduce evidence concerning purported quality improvements in the Magic Valley at trial. For example, Defendants will call John Kee – former CEO of Magic Valley Regional Medical Center – at trial to testify about "the nature and the benefits of the integration of physicians and facilities in the Magic Valley."³¹

Moreover, St. Luke's has repeatedly defended the acquisition with purportedly analogous events from markets bearing little resemblance to the ones at issue here. For example:

- "[T]he evidence will show that the Saltzer transaction will have substantial procompetitive benefits in two different markets – the market for delivery of medical care in the two-county area *and the market for health insurance in this State*."³²
- By purportedly using and sharing best practices across the St. Luke's system following its recent *physician* acquisitions, St. Luke's claims to have improved in

³⁰ Def.'s Memo in Opp. To Pls.' Motion for Prelim. Inj'n at 11, Dkt. No. 34

³¹ Ex. J, Defendants' Revised Provisional Witness List at 4.

³² Def.'s Pretrial Memorandum at 2; Dkt. No. 194.

three metrics measuring the quality of *inpatient care*: Risk Adjusted Mortality Index, Expected Complications Rate Index, and the Defect Rate.³³

- St. Luke's professes to have achieved quality improvements at its "Spine Wellness Center" because of its prior physician acquisitions of orthopedic surgery groups.³⁴
- St. Luke's acquisitions of Idaho Cardiology Associates and Intermountain Orthopedics Group ostensibly led to improved quality.³⁵

These examples all reflect Defendants' heavy reliance on evidence from markets that are materially different from the markets at issue here to suggest that the acquisition does not violate Section 7 of the Clayton Act. Accordingly, Defendants have put St. Luke's past acquisitions and the results of those acquisitions squarely at issue. Basic fairness dictates that Plaintiffs should be given the opportunity to rebut those claims with evidence showing that St. Luke's prior acquisitions either failed to lower costs or led to higher reimbursements. And if the Court decides to preclude Plaintiffs from introducing evidence from different markets, the same principle should apply to Defendants' claims.

IV. CONCLUSION

Plaintiffs respectfully request that the Court allow them to introduce evidence concerning St. Luke's acquisitions in the Magic Valley and of surgery centers. If the Court, however, excludes this evidence, then Defendants should likewise not be permitted to introduce evidence concerning purported benefits from other acquisitions and in different markets.

³³ TX1310 (Def.'s Memo in Opp. To Pls.' Motion for Prelim. Inj'n at 9, Dkt. No. 34; White Paper (Feb. 20, 2013) at 15).

³⁴ Def.'s Memo in Opp. To Pls.' Motion for Prelim. Inj'n at 12, Dkt. No. 34; Kee Decl. ¶ 60.

³⁵ Def.'s Memo in Opp. To Pls.' Motion for Prelim. Inj'n at 11-12; Ex. K, Heggland Decl. ¶ 10; TX 1980 (Kee Decl. at ¶ 60).

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