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UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

SAINT ALPHONSUS MEDICAL CENTER, NAMPA, INC., TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP, SAINT ALPHONSUS HEALTH SYSTEM, INC., AND SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD, and ST. LUKE'S REGIONAL MEDICAL CENTER, LTD., Defendants.	Case No. 1:12-cv-00560-BLW (Lead Case) DEFENDANTS' MEMORANDUM REGARDING ADMISSIBILITY OF EVIDENCE RELATED TO OTHER MARKETS
FEDERAL TRADE COMMISSION; STATE OF IDAHO Plaintiffs, v. ST. LUKE'S HEALTH SYSTEM, LTD.; SALTZER MEDICAL GROUP, P.A. Defendants.	Case No. 1:13-cv-00116-BLW

The Court permitted the parties to submit briefs regarding the relevance and admissibility of evidence plaintiffs seek to present related to St. Luke's past transactions and pricing outside of Nampa—including its acquisition of the Magic Valley Regional Medical Center (MVRMC) in the Magic Valley and its acquisition of various specialty physician practices in the Treasure Valley. As set forth below, and as defendants will demonstrate at trial, the evidence is not relevant.¹

Plaintiffs acknowledge, as they must, that evidence of transactions in the Magic Valley and transactions involving specialty groups relates to geographic and product markets that are not at issue in this case. Such evidence is not probative as to the Saltzer transaction unless plaintiffs establish a foundation of similarity between those other markets and the alleged geographic and product markets at issue here.² Indeed, the FTC's own Horizontal Merger Guidelines explain that the agencies will look at past transactions only "in the relevant market" or "in *similar* markets." *Horizontal Merger Guidelines* § 2.1.2 (2010) (emphasis added). Yet plaintiffs have not even attempted to lay the necessary foundation to establish that what occurred in the Magic Valley, or with regard to surgical practices in the Treasure Valley, is probative of the likely competitive effects of the Saltzer transaction. To the contrary, the geographic and product markets are so *dissimilar* that the evidence is not probative—and thus, if admitted, will require defendants to spend their limited trial time addressing irrelevant material. Accordingly, the evidence in question should be excluded under Federal Rules of Evidence 401 and 403.

¹ As counsel for St. Luke's explained at the pretrial conference, defendants do not currently seek a blanket, pretrial ruling that all such evidence is inadmissible. Instead, defendants intend to challenge the admissibility of such evidence at trial, at which point the Court will have an opportunity to determine whether plaintiffs have laid the necessary foundation.

² Ex. 1, Aug. 26, 2013 Tr. at 37:25-38:9; Ex. 2, Sept. 12, 2013 Tr. at 103:19-104:25.

I. Evidence of Supposed Price Increases from the Magic Valley Is Inadmissible

Plaintiffs will seek to introduce evidence of negotiations between Blue Cross of Idaho (“BCI”) and St. Luke’s related to physician services in the Magic Valley. In particular, plaintiffs intend to offer evidence of the following through the testimony of Jeffrey Crouch, a BCI representative.³ In the 2000s, BCI offered two insurance products in the Magic Valley—a “traditional” product and a PPO product that provided lower reimbursement to physicians than the traditional product. For many years, Magic Valley primary care physicians (“PCPs”) affiliated with MVRMC declined to accept BCI’s proposed reimbursement for the PPO product and therefore remained out of network for that product. In 2008, St. Luke’s acquired the MVRMC, bringing the hospital and affiliated physicians under the St. Luke’s umbrella. According to BCI, St. Luke’s eventually told BCI that if it did not reach an accommodation with the PCPs, St. Luke’s would not participate in BCI’s network for hospital services.⁴ After negotiations,⁵ the parties reached an agreement: The Magic Valley PCPs would join BCI’s PPO network at a rate that was discounted from what the physicians received for patients under the traditional plan, but higher than the level that BCI had initially offered them.

These facts add nothing to the analysis of whether *the Saltzer transaction* is likely to cause anticompetitive effects in any market alleged by plaintiffs. Indeed, the evidence is

³ See generally Ex. 3, Crouch Dep. 56:24-62:10.

⁴ St. Luke’s witnesses dispute this account of the negotiations. However, the essential point for admissibility purposes is that the evidence—even accepting plaintiffs’ view of the world—is irrelevant.

⁵ Other, non-economic factors also motivated BCI to reach an agreement that would allow the Twin Falls PCPs to be in its PPO network. For example, State Senator Coiner put significant pressure on BCI to include the Twin Falls PCPs in the PPO. Ex. 3, Crouch Dep. 58:1-12.

irrelevant for two fundamental reasons. First, it does not establish any anticompetitive conduct by St. Luke's. And second, plaintiffs have not even attempted to show that market conditions in the Magic Valley are in any way comparable to those in any geographic market at issue in this case—and in fact, they are not.

First, it is black-letter law that mere evidence of an increase in price is not evidence of anticompetitive conduct. *See, e.g., Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Price increases are problematic under the antitrust laws only if the increased price is shown to be *above competitive levels*. That showing requires proof, by econometric evidence, that the increased prices result from the exercise of market power in a defined market, rather than any of the other myriad circumstances consistent with a competitive market that cause prices to rise. *See Rebel Oil*, 51 F.3d at 1434. Thus, the fact that BCI negotiated to pay PCPs higher rates in the Magic Valley is not—without more—evidence of pricing above competitive levels.

Yet plaintiffs' experts have made *no effort* to examine whether prices in the Magic Valley are supracompetitive. Indeed, plaintiffs' experts were quite clear that they have undertaken *no economic analysis* of whether St. Luke's has market power in the Magic Valley, or whether St. Luke's prices in the Magic Valley are above competitive levels. Ex. 4, Dranove Dep. 45:13-16, 122:21-23; Ex. 5, Haas-Wilson Dep. 44:9-14. Without such an analysis, it is simply impossible for plaintiffs to show that any price increases in the Magic Valley were anticompetitive, or that St. Luke's engaged in anticompetitive conduct through its actions there. For this reason alone, evidence of price negotiations in the Magic Valley is not probative of whether the Saltzer transaction will produce anticompetitive effects in any alleged market.

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Second, even if there were some basis for concluding that pricing in the Magic Valley was anticompetitive, that would be relevant here only if market conditions in the Magic Valley were sufficiently similar to those in Nampa (or other alleged geographic markets) that there is a reasonable basis for inferring that events in the Magic Valley are predictive of events in the very different market alleged here. Yet plaintiffs have made no effort to show or even analyze whether conditions in the Magic Valley and the markets alleged here are materially similar.

The only evidence on this point is the un rebutted testimony of David Argue, St. Luke's expert economist, that there are "differences in the structure of the provider markets in Nampa and the Magic Valley that make the latter an invalid proxy for the former." Ex. 6, Argue Rept.

¶ 280. In particular, Dr. Argue explains:

The patient flows into and out of Twin Falls are not at all like those into and out of Nampa. ... [A] significant amount of the adult and pediatric primary care physician services received by residents of Nampa is provided by physicians located outside of Nampa. ... [N]o such pattern exists in Twin Falls. A very small portion of patients who live in Twin Falls (less than 10%) travel to providers located outside of the city for adult and pediatric primary care services. Similarly, Twin Falls providers receive a much larger portion of the patients from surrounding areas, which patients travel outside of their home zip codes for these physician services. Thus, both the patient populations and competitive dynamics in the Magic Valley are substantially different than in Nampa. Simply put, Nampa patients have a lot more alternatives for physician services than patients in ... Twin Falls.

Id. Neither plaintiffs' experts nor any fact witness for plaintiffs has disputed this analysis. And it is determinative here: Even if there had been anticompetitive conduct in the Magic Valley (which plaintiffs have not shown anyway), the difference in market conditions between Nampa and Magic Valley establishes that such conduct could not be replicated in Nampa.

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Plaintiffs contend that excluding their pricing evidence from the Magic Valley would create a “goose-gander” problem, because St. Luke’s has pointed to the procompetitive benefits that it is achieving in southern Idaho—including in the Magic Valley—by transforming into an integrated delivery system, which benefits are enhanced through its transaction with Saltzer. In other words, plaintiffs argue that if St. Luke’s can submit evidence of improvements from its integration of care in the Magic Valley and elsewhere, then plaintiffs must be permitted to introduce pricing evidence—even irrelevant pricing evidence—from the Magic Valley.

But this is a non sequitur. St. Luke’s has, over the last several years, undertaken great effort and invested substantial resources to integrate and improve the value of care throughout its system—including in the Magic Valley and more recently in Nampa. Describing St. Luke’s efforts, and the success of those efforts, necessarily involves evidence related to that entire system. And, unlike pricing evidence, the relevance of St. Luke’s transformation of the delivery of care in southern Idaho does not turn on the market conditions in any particular market. Thus, whether the provider market in the Magic Valley is or is not a proxy for the provider market in Nampa, residents of both regions benefit if St. Luke’s succeeds in creating integrated, value-based—rather than fragmented, fee-for-service—care. In short, there is no “goose-gander” problem here; the irrelevance of plaintiffs’ pricing evidence is not cured simply because St. Luke’s evidence of integration *is* highly relevant.

II. The Hospital Plaintiffs’ Evidence of Past Transactions Involving Specialty Physician Groups Is Inadmissible.

The Hospital Plaintiffs also intend to submit evidence regarding St. Luke’s affiliations with specialty physician practices in the Treasure Valley, which they contend is relevant to their theory that the Saltzer transaction will supposedly harm competition in three hospital services

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markets by foreclosing referrals to the Hospital Plaintiffs from Saltzer PCPs.⁶ The Hospital Plaintiffs' expert, Dr. Haas-Wilson, reviewed a half-dozen acquisitions of specialty physician practices by St. Luke's, including orthopedic surgeons, cardiovascular surgeons, and pulmonologists, between 2007 and 2012. Ex. 7, Haas-Wilson Corr. Rept. ¶¶ 195-99. She contends that after these specialty groups became affiliated with St. Luke's, admissions of patients to the Hospital Plaintiffs from the physicians in these groups decreased. She further contends, based on this analysis, that St. Luke's affiliation with Saltzer—a primary care practice whose services are provided in clinics—will result in a reduction of referrals from Saltzer PCPs to the Hospital Plaintiffs. The Hospital Plaintiffs claim that this reduction in referrals from Saltzer PCPs will give rise to foreclosure of a legally sufficient volume of referrals in the alleged hospital services markets to create liability under the antitrust laws.

The evidence that the Hospital Plaintiffs seek to introduce, however, does not support their claims. It is therefore irrelevant for two reasons.

First, the Hospital Plaintiffs have failed to establish that the effects of the past transactions between St. Luke's and specialty physician groups who work primarily in hospitals are probative of the likely effects of St. Luke's affiliation with Saltzer, a group of PCPs who work primarily in clinics. As noted above, the Hospital Plaintiffs' theory is that the Saltzer *primary care* physicians will reduce their referrals to Saint Al's—but Dr. Haas-Wilson examined only admissions to Saint Alphonsus from *specialty* physicians who affiliated with St. Luke's, not PCPs. Notably, Dr. Haas-Wilson recognized that some 45 percent of the transactions that St.

⁶ See generally Dkt. 203 at 28-30. The Government Plaintiffs do not assert this theory. *Id.* at 26 n.112.

Luke's engaged in during the time period she examined were with primary care groups, yet she chose not to examine any change in referrals from those groups. *See id.* ¶¶ 193, 195.

The choice appears to have been deliberate: Specialists' admission patterns fundamentally differ from the referral patterns of PCPs like the Saltzer physicians, in a manner that is highly significant here. In order to maintain admitting privileges at Saint Alphonsus, a specialist must agree to take call at that hospital.⁷ A specialist (such as a surgeon) who becomes affiliated with St. Luke's may choose to terminate or reduce privileges at other hospitals in order to avoid the burden of taking call in multiple places. Thus, while admissions to Saint Alphonsus from a surgeon who has ceased covering call there will decrease, any such declines are not indicative of what would occur as a result of affiliation of *primary care* physicians, who need not take call or have privileges at a particular hospital to refer their patients there.⁸ For this reason, the Hospital Plaintiffs' reliance on changes in admissions from specialty physicians that have affiliated with St. Luke's is entirely misplaced.

Second, even if the evidence of St. Luke's past transactions were in some way predictive of the effects of the Saltzer transaction on the Hospital Plaintiffs, the evidence is irrelevant for an even more fundamental reason. It is axiomatic that antitrust law is concerned only with harm to competition—not harm to competitors. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001).

⁷ *See* Ex. 8, Ahern Rept. ¶ 74; Ex. 9, Baressi Dep. at 47:21-49:21; 51:9-53:6.

⁸ During the pretrial conference, counsel for Saint Al's argued that "the evidence on the record shows there is no relevant difference" between PCPs and specialists for purposes of this analysis. Ex. 2, Sept. 12 Tr. 113:4-6. As shown here, that is incorrect. The evidence makes clear that specialists and PCPs *are* materially different due to specialists' obligation to take call at a hospital if they seek to maintain privileges there.

Thus, for the Hospital Plaintiffs to succeed on their foreclosure theory, they cannot simply show that the Saltzer transaction will harm them. Instead, they must establish two elements: *both* (1) that they will be harmed as a result of the Saltzer transaction by loss of referrals, *and* (2) that they will be so severely harmed that they will be effectively crippled as competitors of St. Luke's such that competition as a whole will suffer. But the Hospital Plaintiffs have not established either of these elements, and thus cannot show harm to competition from foreclosure. The evidence of past transactions with specialty physicians therefore does not tend to show that the Saltzer transaction violates the antitrust laws.

As to the first element, the Hospital Plaintiffs have failed to establish that they suffered any *net loss* in admissions as a result of St. Luke's past transactions. This failure is significant, because the evidence will show that when previously independent specialty physician groups affiliated with St. Luke's, Saint Alphonsus PCPs reduced their referrals to those St. Luke's-affiliated specialists—and in at least some cases instead directed their referrals to other specialists who continued to admit their patients at Saint Alphonsus. In other words, it is entirely consistent with Dr. Haas-Wilson's findings that the Hospital Plaintiffs lost admissions from the specialty practices that affiliated with St. Luke's, but *gained* admissions overall.

For example, Dr. Haas-Wilson contends that Cardiothoracic and Vascular Associates (CVA) stopped admitting or admitted fewer patients to Saint Alphonsus after CVA affiliated with St. Luke's. Ex. 7, Haas-Wilson Corr. Rept. ¶ 195. However, referrals from Saint Alphonsus PCPs to CVA surgeons went from 113 in the one-year period prior to their affiliation with St. Luke's to 37 in the one year-period after they affiliated with St. Luke's. Ex. 10, Haas-Wilson Rebuttal Rept. Ex. 3. As Professor Haas-Wilson conceded in her deposition, she has made no effort to determine whether Saint Alphonsus actually "lost" admissions as a result of

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CVA's affiliation with St. Luke's—or whether the change simply reflects that Saint Al's PCPs started sending their referrals to *other* cardiothoracic surgeons, who then continued to admit those patients to Saint Alphonsus. Ex. 5, Haas-Wilson Dep. 112:21-113:3.

In fact, undisputed evidence demonstrates that the latter explanation is exactly what happened. Dr. Huerd of CVA testified that the referrals he received from Saint Alphonsus cardiologists went to zero in the years after CVA's affiliation with St. Luke's. Ex. 11, Huerd Dep. 96:23-97:8. And Saint Alphonsus itself confirmed that it had not experienced any actual loss from St. Luke's acquisition of CVA in a letter to the Federal Trade Commission in July 2012.⁹ In the words of Saint Alphonsus's counsel, Saint Alphonsus has achieved “success through recruitment ... in cardiothoracic and vascular surgery, where *the recruited physicians' patient count has exceeded those of the acquired physicians they were intended to replace.*”¹⁰ In other words, even if the Hospital Plaintiffs have shown that some specialty physicians that affiliated with St. Luke's reduced their admissions to the Hospital Plaintiffs, they have not shown any overall harm to the Hospital Plaintiffs.

Even more fundamentally, the Hospital Plaintiffs have not shown that any harm to them—if any exists—constitutes harm to competition. Harm to or even elimination of a competitor does not necessarily harm competition. *See, e.g., McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 812 (9th Cir. 1988). Foreclosure of a competitor from the market harms competition only if it leads to a shortage of competitors in the market, so that “the few remaining existing competitors might then be able to conspire or otherwise misbehave without being

⁹ Ex. 12 (TX 2231).

¹⁰ *Id.*

disciplined by competition.” *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 66 (1st Cir. 2004); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1010 (3d ed. 2007) (if “the number of firms, though reduced, remains sufficient for effective price competition,” there has been no competitive harm actionable under the antitrust laws).¹¹

Here, however, the Hospital Plaintiffs have undertaken no analysis to show that any harm they might suffer from a supposed loss of referrals from the Saltzer physicians will substantially cripple competition in any alleged market. The Hospital Plaintiffs—and in particular, the evidence of St. Luke’s past transactions—offer no probative information as to whether the *Saltzer transaction* is likely to result in foreclosure of a legally significant volume of referrals. Even assuming *arguendo* that the evidence relating to prior acquisitions supports an inference that 100 percent of Saltzer referrals of inpatient and outpatient surgeries in the defined markets would be lost (which it does not), Professor Haas-Wilson offers *no evidence* on which the Court could conclude that the loss of all Saltzer referrals—either alone or in combination with referrals associated with other St. Luke’s physicians—would exceed the benchmark for establishing competitive harm from foreclosure.

Finally, the Hospital Plaintiffs also contend that there is a “goose-gander” problem with exclusion of their irrelevant evidence. As with the Magic Valley evidence, however, this argument fails. The Hospital Plaintiffs’ inability to establish the foundation necessary to make

¹¹ The Hospital Plaintiffs have contended that they need not show foreclosure, because it is “presumed.” Dkt. 208 at 27-28. That assertion is incorrect. In *Stop & Shop*, for example, the First Circuit affirmed entry of judgment as a matter of law where the plaintiffs failed to establish foreclosure—just as the Hospital Plaintiffs here have failed to do. *See* 373 F.3d at 66-68 (noting that foreclosure of the relevant provider market “ha[s] to be proved”).

evidence of St. Luke's past transactions relevant here likewise cannot be cured by reference to St. Luke's highly relevant evidence of the benefits of integrated care in southern Idaho.

CONCLUSION

For the foregoing reasons, plaintiffs' evidence related to pricing in the Magic Valley and St. Luke's past transactions with specialty physician groups should be excluded as irrelevant. Moreover, any supposed probative value of that evidence is severely outweighed by its prejudicial nature. The Court should therefore exclude the evidence under Rules 401 and 403.

DATED: September 20, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2013, I filed the above-named document electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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