

No. 14-35173

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAINT ALPHONSUS MEDICAL CENTER-NAMPA INC., SAINT ALPHONSUS HEALTH SYSTEM INC.; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.; TREASURE VALLEY HOSPITAL LIMITED PARTNERSHIP; FEDERAL TRADE COMMISSION; STATE OF IDAHO

Plaintiffs-Appellees,

and

IDAHO STATESMAN PUBLISHING, LLC; THE ASSOCIATED PRESS; IDAHO PRESS CLUB; IDAHO PRESS-TRIBUNE LLC; LEE PUBLICATION INC.,

Intervenors,

v.

ST. LUKE'S HEALTH SYSTEM, LTC.; ST. LUKE'S REGIONAL MEDICAL CENTER, LDT.; SALTZER MEDICAL GROUP,

Defendants-Appellants.

Appeal from the United States District Court for the District of Idaho, Case Nos. 1:12-c-00560-BLW (Lead Case) and 1:13-cv-00116-BLW, the Honorable B. Lynn Winmill, Presiding

BRIEF FOR *AMICUS CURIAE* MEDICAID DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLANTS URGENT MOTION FOR A STAY

LYNN S. CARMAN, SBN 028860
NATALIA MAZINA, SBN 2718234
Medicaid Defense Fund
404 San Anselmo Ave.
San Anselmo, CA 94960
Telephone: (415) 927-4023
Facsimile: (415) 256-9632
Email: lynns carman@hotmail.com
Email: nmazina@mazinalaw.com
ATTORNEYS FOR AMICUS CURIAE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and Circuit Rule 28-1, *Amicus Curiae* Medicaid Defense Fund make the following disclosure:

Medicaid Defense Fund is a tax-exempt public interest law foundation. Medicaid Defense Fund does not have a parent corporation and no entity or individuals owns any stock in the Medicaid Defense Fund.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION.....	2
ARGUMENT.....	4
I. Failing to Stay Divestiture of Saltzer Pending Appeal Will Cause Irreparable Harm to Patients in Idaho.....	4
II. Unless Stayed, The Lower Court’s Ruling Will Have a Chilling Effect on Other Providers Seeking Tight Integration With Physician Groups.....	8
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

CASES

<i>Lair v. Bullock</i> , 697, F.3d 120 (9th Cir 2012).....	4
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	7

STATUTES

42 U.S.C. §18001.....	8
-----------------------	---

OTHER AUTHORITIES

<i>AHA TrendWatch Chartbook 2013</i> , AM. HOSP. ASSOC. at 25 (2013), available at http://www.aha.org/research/reports/tw/chartbook/ch2.shtml	9
David Muhlestein, <i>Accountable Care Growth in 2014: A Look Ahead</i> , HEALTH AFF. (Jan. 29, 2014), available at http://healthaffairs.org/blog/2014/01/29/accountable-care-growth-in-2014-a-look-ahead	9, 10
Donald M. Berwick et al., <i>The Triple Aim: Care, Health, And Cost</i> , 27 HEALTH AFF. 759, 760 (2008).....	8
Eduardo Porter, <i>Health Law Goals Face Antitrust Hurdles</i> , N.Y. Times B1 (Feb. 5, 2014).....	9
Health Quality Planning Comm'n, <i>Creating a Health Idaho</i> at 15 (July 2013), available at http://healthandwelfare.idaho.gov/Portals/0/Medical/MedicaidCHIP/HQPC_AnualReport.pdf	5
In the Matter of Chicago Bridge & Iron Co. N.V., et al., FTC File No. 011-0015 (2008).....	7
In the Matter of Polypore International, FTC File No. 081-0131 (2011).....	7
In the Matter of ProMedica Health Systems, Inc., FTC File No. 101-0167 (2012).....	7

Karen Davis et al., *Mirror, Mirror on the Wall: How the Performance of the U.S. Health Care System Compares Internationally, 2014 Update*, COMMONWEALTH FUND (June 2014), available at <http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror>.....2

Leslie Clement, *Idaho Medicaid: A Future of Improved Health Outcomes Delivered by an Accountable Care System*, IDAHO DEP’T OF HEALTH AND WELFARE (2011), available at <http://healthandwelfare.idaho.gov/Portals/0/Medical/Managed%20Care/Leslie%20Clement%20MMC%20Forum%20Dec.%202011.pdf>.....5

Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits* (2014), available at <http://www.fticonsulting.com/global%20media/collateral/united%20states/hospital-realignment-mergers-offer-significant-patient-andcommunitybenefits.pdf>.....9

Meredith B. Rosenthal, *Paying for Quality: Providers’ Incentives for Quality Improvement*, 23 HEALTH AFF. 127, 127 (2004).....8

Monica Noether, *The St. Luke’s-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?* 2 CPI ANTITRUST CHRON. at 4 (2013).....8

INTEREST OF AMICUS CURIAE

Amicus Curiae Medicaid Defense Fund is a tax-exempt public interest law foundation founded to prosecute public interest cases to protect the civil and healthcare rights of patients. Medicaid Defense Fund's mission is to expand access to affordable and quality healthcare to Medicare, Medicaid and other underserved individuals. Since 2004 Medicaid Defense Fund has been litigating, and often appears before the Ninth Circuit Court of Appeals, to protect patients against inappropriate practices of state and private health plans which seek to improperly reduce the level of reimbursement to providers to the extent that providers' ability to furnish quality services is compromised. See, e.g., *Independent Living Center of S. Cal., Inc. (ILC) v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009), *rvs'd other grounds*; *Douglas v. ILC*, 132 S.Ct. 1204 (2011).

In this case, as a result of its affiliation with St. Luke's, Saltzer is now providing all uninsured and underserved individuals with primary care and other services in Canyon County, Idaho, whereas they could not, and did not do so before the affiliation due to financial restraints. See ER.465; ER.508. Medicaid Defense Fund has a vital interest in this matter because the direct impact of an immediate divestiture of Saltzer, before this Court can review the merits of the appeal, will have a substantial adverse effect on the availability and quality of care

afforded to underserved individuals both in Canyon County and across the country.¹

INTRODUCTION

American healthcare providers are striving to lower cost and improve quality of care for their patients. While operating the most expensive health system in the world, America also ranks last among a number of industrialized nations in healthcare quality, access, and efficiency. Karen Davis et al., *Mirror, Mirror on the Wall: How the Performance of the U.S. Health Care System Compares Internationally, 2014 Update*, COMMONWEALTH FUND (June 2014), available at <http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror>. Simply put, United States patients lack access to quality healthcare. *Id.*

In order to address the deficiencies of the current fragmented system, American healthcare providers have sought to utilize clinical integration to lower costs, expand access and improve quality of care. Healthcare policy demands that providers move towards a system that rewards quality and precision over total volume of services. In this case, St. Luke's acquisition of Saltzer was motivated by the providers' desire to "improve patient outcomes" (ER.5)² and "improve

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party or its counsel authored any part of this amicus brief, which was authored by *Amicus Curiae's* counsel. No one contributed money towards preparation or submission of this brief. All parties consent to the *Amicus Curiae* filing this brief.

² Citations to "ER." refer to appellants' Excerpts of Record.

quality and reduce costs by moving toward value-based or risk-based care and away from fee-for-service (‘FFS’) care.” ER. at 38 ¶150

Prior to this acquisition, many underserved individuals could not obtain healthcare services through Saltzer. Given its limited size and resources, Saltzer lacked the ability to transition to an integrated, patient-oriented healthcare model. ER.16-17, 20 ¶¶22-23, 44. Since the affiliation, however, Saltzer has expanded services to underserved consumers, regardless of insurance type or lack of insurance. Saltzer has also greatly expanded community outreach for the purpose of increasing overall wellness to the individuals of Canyon County. In these circumstances, forcing a divestiture at this stage before the Court has the opportunity to review the merits would be contrary to the public interest as low income patients continue to substantially benefit from the fruits of this transaction.

Moreover, opposition to staying immediate divestiture is inconsistent with the Federal Trade Commission’s (“FTC”) treatment of other consummated merger matters in which the FTC granted stays pending appeals of the mergers.

St. Luke’s and Saltzer are not the only ones effected by the lower court’s denial of the motion to stay the divestiture. Rather provider groups and healthcare systems across the country that are intent on integrating through tight affiliation to improve patient care, expand access to healthcare services, and lower the cost of delivery of quality care are well advised to put their plans on hold in light of the

precedent established by the lower court. Specifically that court acknowledged that St. Luke's acquisition was intended to improve quality and reduce costs. It did not dispute the numerous procompetitive efficiencies and improvements to patient care presented in this case; in fact, it concluded that the merger would "improve the quality of medical care" in Nampa, Idaho. ER. at 59 ¶71. Yet the court nonetheless ordered divestiture based on erroneous legal conclusions.

The result of this ruling is to cause other providers to reconsider efforts to integrate and pursue value-based and patient-oriented care models through tight affiliations with physician groups. The decision below is thus curbing advancement of healthcare reform and efforts to reduce the cost while maintaining and improving the quality of care. It is therefore imperative for the Court to intervene and stay immediate divestiture at least until it has had the opportunity to review the merits of this case.

ARGUMENT

I. Failing to Stay Divestiture of Saltzer Pending Appeal Will Cause Irreparable Harm to Patients in Idaho.

Among the considerations for staying a decision, courts must look to, *inter alia*, the public interest. *See Lair v. Bullock*, 697, F.3d 1200, 1203 (9th Cir. 2012). As is true throughout the United States, the public interest in this case is promoting patient access to quality healthcare. That is the foundation the affiliation at issue

was built on, and it is what St. Luke's and Saltzer have begun to collectively achieve.

The Treasure Valley of Idaho is a particularly difficult region to manage healthcare quality and costs. Ada and Canyon counties, the two counties contained within the Treasure Valley, have the highest number of Medicaid enrollees in the state of Idaho. Leslie Clement, *Idaho Medicaid: A Future of Improved Health Outcomes Delivered by an Accountable Care System*, IDAHO DEP'T OF HEALTH AND WELFARE (2011), available at [http://healthandwelfare.idaho.gov/Portals/0/Medical/Managed %20Care/Leslie%20Clement%20MMC%20Forum%20Dec.%202011.pdf](http://healthandwelfare.idaho.gov/Portals/0/Medical/Managed%20Care/Leslie%20Clement%20MMC%20Forum%20Dec.%202011.pdf). When compared to other insureds, Medicaid patients are “twice as likely” to be in fair or poor conditions and have far more instances of illness. *Id.* Managing a Medicaid population's health is of crucial importance in controlling costs and improving health outcomes.

It is also challenging for patients of all insurance backgrounds to receive care in parts of Idaho. Along with geographic barriers, there is an increasingly growing ratio of patients-to-practitioners within Idaho. In fact, according to the Idaho's Health Quality Planning Commission, 97 percent of Idaho, including significant portions of Treasure Valley, is designated as a “shortage area for primary care” services. Health Quality Planning Comm'n, *Creating a Health*

Idaho at 15 (July 2013), available at http://healthandwelfare.idaho.gov/Portals/0/Medical/MedicaidCHIP/HQPC_AnnualReport.pdf.

The current realities of healthcare access for Idahoans create tremendous pressure on healthcare providers to expand access to care and deliver quality, low-cost services. The St. Luke's affiliation with Saltzer attempts to address these pressing issues. As was recognized by the lower court and demonstrated in the record, the transaction was a response to these conditions and an attempt to improve quality and expand consumer access in the Treasure Valley.

Indeed, the affiliation has expanded patient access to primary care services in Canyon County, yielding results in the best interest of the public. Prior to this acquisition, Saltzer physicians were forced to manage their patient populations in a fee-for-service model. The fee-for-service model limited Saltzer's ability to provide care for Medicaid or uninsured individuals. ER. at 21 (citing *Trial Tr.* at 787 (N. Powell); *Trial Tr.* at 3323 (T. Patterson)). As such, Saltzer could not serve a large portion of the uninsured and underserved patients in the Treasure Valley. ER. at 465; ER. at 508. As a result of the acquisition, Saltzer is able to serve all patients, include Medicaid and low or no-pay patients. App. Brief at 15. Furthermore, the unwinding of the fee-for-service model has also led to greater community outreach designed to educate and promote population health. *See* Def.'s Proposed Finding of Facts at 491.

If the parties are forced to divest immediately, Saltzer would not have the capabilities or incentives to continue to provide access to these underserved patients. See Amicus Brief of International Center for Law & Economics and Medicaid Defense Fund in Support of Defendants-Appellants, Dkt. No. 37. By staying immediate divestiture of Saltzer, this Court would simply maintain the status quo, allowing patients to continue to access and receive quality healthcare. *Nken v. Holder*, 556 U.S. 418, 429 (2009) (Staying a case ““simply suspend[s] judicial alteration of the status quo[.]””) (internal citation omitted). However, by permitting immediate divestiture, this Court would create a substantial impediment to care on the part of low income patients in Canyon County and would impose a substantial obstacle to efficient integration of the delivery of healthcare in Idaho that is central to efforts to lower healthcare costs, obtain better results, and facilitate access to underserved consumers.³

³ It should also be noted that rejecting the stay is inconsistent with the FTC’s treatment of other consummated merger matters over the past decade, which were administratively challenged by the FTC, yet the FTC did not oppose a stay pending appeals. *See, e.g.*, In the Matter of ProMedica Health Systems, Inc., FTC File No. 101-0167 (2012); In the Matter of Polypore International, FTC File No. 081-0131 (2011); In the Matter of Chicago Bridge & Iron Co. N.V., et al., FTC File No. 011-0015 (2008). Consumers in Canyon County deserve equal treatment under the law.

II. Unless Stayed, The Lower Court’s Ruling Will Have a Chilling Effect on Other Providers Seeking Tight Integration With Physician Groups.

Sound healthcare policy reflects a triple aim: “improving the individual experience of care; improving health of populations; and reducing the per capita costs of care for populations.” (“Triple Aim”) Donald M. Berwick et al., *The Triple Aim: Care, Health, And Cost*, 27 HEALTH AFF. 759, 760 (2008). The current fragmented fee-for-service-model is unsustainable and unable to provide incentives to efficiently improve quality. See Meredith B. Rosenthal, *Paying for Quality: Providers’ Incentives for Quality Improvement*, 23 HEALTH AFF. 127, 127 (2004). But healthcare reform and related policies provide incentives for greater integration. For example, payment policy and initiatives within the Affordable Care Act (“ACA”), 42 U.S.C. §18001, promote integration through formation of accountable care organizations and value-based payments, and penalize non-integrated systems through a variety of means including reduced payments for hospital readmissions.

Additionally, providers are increasingly employing mergers and acquisitions to achieve integration of care in order to “bend the cost curve” and replace fee-for-service with value-based payments. See Monica Noether, *The St. Luke’s-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?* 2 CPI ANTITRUST CHRON. at 4 (2013). In 2012, 247 hospitals were involved in mergers

and acquisitions. *AHA TrendWatch Chartbook 2013*, AM. HOSP. ASSOC. at 25 (2013), available at <http://www.aha.org/research/reports/tw/chartbook/ch2.shtml>. The vast majority of these and other healthcare acquisitions are procompetitive. In fact, they often lead to the same integrated efficiencies achieved by Geisinger Health Systems, Mayo Clinic, and Intermountain Healthcare, including improvements in patient access, value of care, and physician efficiency, as well as increased quality and lower costs. See generally Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits* (2014), available at [http://www.fticonsulting.com/global/2/media/collateral/united states/hospital-realignment-mergers-offer-significant-patient-andcommunitybenefits.pdf](http://www.fticonsulting.com/global/2/media/collateral/united%20states/hospital-realignment-mergers-offer-significant-patient-and-community-benefits.pdf). The New York Times reported that “St. Luke’s is not alone in pursuing” the strategy that was challenged here. Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, N.Y. Times B1 (Feb. 5, 2014).

The continuation of provider groups to tightly affiliate is consistent with the goal of integration under the ACA. As of January 2014 there are 606 Accountable Care Organizations across the country, for example. David Muhlestein, *Accountable Care Growth in 2014: A Look Ahead*, HEALTH AFF. (Jan. 29, 2014), available at <http://healthaffairs.org/blog/2014/01/29/accountable-care-growth-in-2014-a-look-ahead>. To achieve the Triple Aim and reform healthcare delivery

services across the country, integration is the goal of hospital systems, physician groups and health insurers. *Id.*

The lower court's decision, and its denial of Defendants' motion to stay has set a dangerous precedent which can only deter providers from relying on affiliations and acquisitions to meet the outlined integration goals of health policy and the ACA. As discussed above, Appellants demonstrated the many efficiencies the transaction would and has achieved. But based on an erroneous legal conclusion, the court has required immediate divestiture of Saltzer. For providers intent on integrating care, the recognition that courts could rely on this precedent to block procompetitive integration, even where providers can demonstrate substantial procompetitive efficiencies, creates a chilling effect that could setback healthcare reform. Such an effect flies in the face of the current demands of healthcare and is detrimental to patient needs. It is therefore vital the Court grant Appellants' motion for stay.

CONCLUSION

For the foregoing reasons, the Court should grant Appellants' urgent motion for stay.

Respectfully submitted,

Dated: June 27, 2014

/s/ Lynn S. Carman
Lynn S. Carman

Lynn S. Carman
Natallia Mazina
Medicaid Defense Fund
404 San Anselmo Ave.
San Anselmo, CA 94960
Telephone: (415) 927-4023
Facsimile: (415) 256-9632
Email: lynns carman@hotmail.com
Email: nmazina@mazinalaw.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,287 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: June 27, 2014

By: /s/ Lynn S. Carman

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 27, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Lynn S. Carman

Attorney for Amicus Curiae