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-cv-00560-BLW (Lead Case) and 1:13-cv-00116-BLW, the Honorable B. Lynn Winmill, Presiding

---

BRIEF FOR PROFESSORS AND SCHOLARS OF LAW AND ECONOMICS AND INTERNATIONAL CENTER OF LAW AND ECONOMICS IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REHEARING EN BANC

David A. Balto
Attorney for Amici Curiae
Matthew C. Lane
James J. Kovaks
Law Offices of David A. Balto
1325 G Street, N.W., Suite 500
Washington, DC 20005
(202) 577-5424
david.balto@dcantitrustlaw.com

CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the undersigned certifies that the undersigned amici curiae scholars are not a publicly held corporation.

<u>Amici Curiae Scholars</u>

George Bittlingmayer, Wagnon Distinguished Professor of Finance and Otto Distinguished Professor of Austrian Economics, University of Kansas

Henry Butler, George Mason University Foundation Professor of Law and Executive Director of the Law & Economics Center, George Mason University

Daniel A. Crane, Associate Dean for Faculty and Research and Professor of Law, University of Michigan

Harold Demsetz, UCLA Emeritus Chair Professor of Business Economics, University of California, Los Angeles

Bernard Ganglmair, Assistant Professor, University of Texas at Dallas

Gus Hurwitz, Assistant Professor of Law, University of Nebraska-Lincoln

Keith Hylton, William Fairfield Warren Distinguished Professor of Law, Boston University

Thom Lambert, Wall Chair in Corporate Law and Governance, University of Missouri

John Lopatka, A. Robert Noll Distinguished Professor of Law, Pennsylvania State University

Geoffrey Manne, Founder and Executive Director of the International Center for Law and Economics and Senior Fellow at TechFreedom

Stephen Margolis, Alumni Distinguished Undergraduate Professor, North Carolina State University

Fred McChesney, de la Cruz-Mentschikoff Endowed Chair in Law and Economics, University of Miami

Tom Morgan, Oppenheim Professor Emeritus of Antitrust and Trade Regulation Law, George Washington University

David Olson, Associate Professor of Law, Boston College

Paul H. Rubin, Samuel Candler Dobbs Professor of Economics, Emory University

D. Daniel Sokol, Professor of Law, University of Florida

Mike Sykuta, Associate Professor and Director of the Contracting and Organizations Research Institute, University of Missouri

The International Center for Law and Economics ("ICLE") is a nonprofit corporation incorporated under the laws of Oregon. ICLE does not have a parent corporation and no entity or individuals owns any stock in ICLE.

/S/ David A. Balto
Attorney for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT...i

TABLE OF CONTENTS...iii

TABLE OF AUTHORITIES...v

INTEREST OF AMICI CURIAE AND INTRODUCTION..........................1

ARGUMENT..3

I. Rehearing is Necessary to Address the Panel's Treatment of the Efficiencies Defense in Section 7 Cases...3

A. An Efficiencies Defense Should Be a Robust Factor in Antitrust Analysis..3

B. The Panel's Decision Misunderstands Which Efficiencies Are Cognizable under the Antitrust Laws...6

1. Quality Efficiencies are Cognizable under the Antitrust Laws............6

2. The Decision Below Erroneously Applies the "Less Restrictive Alternative" Analysis in Such a Way That an Alternative Need Only Be Theoretically Possible in Order to Discount an Efficiencies Defense....9

C. The Panel Applies a Different Standard of Proof for Showing Efficiencies than for Showing Anticompetitive Effects, and this Disparate Standard is Unsound Competition Policy...13

II. Rehearing Is Necessary to Prevent the Creation of Unnecessary Obstacles to Integration Between Physician Groups and Health Care Systems............15

A. Health Care Integration is a Critical Priority in Controlling Costs and Improving Quality of Care...15

B. The Ruling Ignores Important Health Care Efficiencies and Will Deter Innovation on a National Scale……17

CONCLUSION……20

CERTIFICATE OF COMPLIANCE……21

CERTIFICATE OF SERVICE……22

TABLE OF AUTHORITIES

Bhan v. NME Hosps., Inc.,
929 F.2d 1404 (9th Cir. 1991)……………………………………………..9

FTC v. Butterworth Health Corp.,
946 F. Supp. 1285 (W.D. Mich. 1996)…………………………………….8

FTC v. H.J. Heinz Co.,
246 F.3d 708 (D.C. Cir. 2001)……………………………………….5, 7, 8

FTC v. Tenet Health Care Corp.,
186 F.3d 1045 (8th Cir. 1999)……………………………………….5, 7, 18

FTC v. Univ. Health, Inc.,
938 F.2d 1206 (11th Cir. 1991)……………………………………………5

National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,
468 US 85 (1984)……………………………………………………………..3

ProMedica Health Sys., Inc. v. FTC,
749 F.3d 559 (6th Cir. 2014)……………………………………………….5

Reiter v. Sonotone Corp.,
442 U. S. 330 (1979)……………………………………………………….3

United States v. Long Island Jewish Med. Ctr.,
983 F. Supp. 121 (E.D.N.Y. 1997)…………………………………….8, 18

United States v. Syufy Enters.,
903 F.2d 659 (9th Cir. 1990)………………………………………………15

<u>Statutes</u>

42 U.S.C. § 1395nn………………………………………………………..12

42 U.S.C. § 1320a-7b………………………………………………………...12

Other Authorities

2010 MERGER GUIDELINES……………………………………………...passim

Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978)……………………………………………………………………11

Brent C. James and Lucy A. Savitz, *How Intermountain Trimmed Health Care Costs Through Robust Quality Improvement Efforts*, 30 HEALTH AFF. 1 (2011)………………………………………………….16, 17

Bruce Japsen, *White House Plans to Shift Medicare Away From Fee-For-Service; 50% of Payments Tied to Quality By 2018*, Forbes.com, Jan. 26, 2015…………15

Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347 (2011)………………………………………………………14

Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (Apr. 11, 2014)……………………………………………13, 14

DOJ Press Release, Statement of The Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008)…………………………4

Donald M. Berwick et al., *The Triple Aim: Care, Health, and Cost*, 27 HEALTH AFF. 759 (2008)………………………………………………………………15

Fundamental Transformation of the Hospital Field, AM. HOSPITAL ASSOC. (2012)……………………………………………………..16

Hospitals: The Changing Landscape is Good for Patients & Health Care, AM. HOSP. ASSOC. (2013)……………………………………………………….....12

Julie Brill, Commissioner, Fed. Trade Comm'n, Keynote Address at 2014 Hal White Antitrust Conference: Competition in Health Care Markets (June 9, 2014)……………………………………………………………17

Kenneth L. Davis, *Hospital Mergers Can Lower Costs and Improve Medical Care*, Wall Street J., Sept 15, 2014………………………………………………...19

Leigh Page, *50 Integrated Delivery Systems to Know*, Becker's Hospital Review, Oct. 14, 2010…………………………………………………………………...16

Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits* (2014)…………………………17, 19

Monica Noether, *The St. Luke's-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?*, 2 CPI ANTITRUST CHRONICLE (2014)………...12

Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 THE AMER. ECON. REV. 18 (1968)…………………………………………5

Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PENN. L. REV. 699 (1977)…………………………………………………………………5

Peter R. Orszag and Ezeiel J. Emanuel, *Health Care Reform and Cost Control*, 363 NEW ENG. J. MED. 601 (2010)…………………………………………...15, 16

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*……………………………………………10

Roger D. Blair and D. Daniel Sokol, *Quality Enhancing Merger Efficiencies*, 100 IOWA L. REV. (Forthcoming)………………………………………………………8

Statement of Chairman Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004)………………………………….5

U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995)…………………………………………9

U.S. Dep't of Justice, Statement on the Closing of its Investigation of the T-Mobile/MetroPCS Merger (March 12, 2014)……………………………………4, 5

Wenke Hwang et al., *Effects of Integrated Delivery System on Cost and Quality*, 19 AM. J. MANAGED CARE e175 (2013)………………………………………………16

INTEREST OF *AMICI CURIAE*[1] AND INTRODUCTION

This brief is filed with a motion to leave to file under Fed. R. App. P. 29(b) and Cir. R. App. P. 29-2(b).

Amici Curiae scholars are law professors and economists at U.S. accredited law schools, business schools, and university economics departments who specialize in antitrust law and economics. ICLE is a nonprofit, non-partisan, global research and policy center that works together with academic affiliates and research centers to develop and disseminate targeted academic output to build the intellectual foundation for rigorous, economically-grounded policy. Together they share a common view that antitrust law should properly recognize efficiencies and allow defendants to demonstrate efficiencies under the same burden that plaintiffs have in making out a *prima facie* case. They are concerned that the decision of the Panel in this case will prevent or undo beneficial mergers and thereby have adverse effects on consumer welfare.

One of the core guiding principles of modern antitrust law is the focus on maximizing the welfare of consumers. This guiding principle should lead to the conclusion that the antitrust laws may be violated when a transaction reduces

[1] Under Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amici* certify that (1) no party to this action, nor their counsel, authored this brief in whole or in part; (2) no party or party's counsel contributed money to fund preparing or submitting this brief; and (3) no person other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

consumer welfare but not when consumer welfare is increased. The consumer welfare focus of the antitrust laws is a product of the same fundamental wisdom that underlies the Hippocratic Oath: *primum non nocere*, first, do no harm.

The decision of the Panel violates this principle and thus will harm consumers in the Ninth Circuit, and, insofar as it is followed in other Circuits, across the country. More specifically, the Panel takes several positions on proof of efficiencies that are contrary to the Horizontal Merger Guidelines and decisions in other Circuits. Chief among these positions are that "[i]t is not enough to show that the merger would allow St. Luke's to better serve patients" and that "[a]t most, the district court concluded that St. Luke's might provide better service to patients after the merger." These positions are inconsistent with modern antitrust jurisprudence and economics, which treat improvements to consumer welfare as the very aim of competition and the antitrust laws.

If permitted to stand, the Panel's decision will signal to market participants that the efficiencies defense is essentially unavailable in the Ninth Circuit, especially if those efficiencies go towards improving quality. Companies contemplating a merger designed to make each party more efficient will be unable to rely on an efficiencies defense and will therefore abandon transactions that promote consumer welfare lest they fall victim to the sort of reasoning employed by the panel in this case. Consequently, it is foreseeable that it will be a long time,

if ever, that another panel of this Court will be able to revisit this issue that is critical to correct antitrust enforcement.

Compounding this problem is the fact that the Panel's opinion fills something of a vacuum in efficiencies jurisprudence. Although efficiencies are recognized as an essential part of merger analysis, very little is written about them in most judicial decisions. The Panel's decision will thus not only preempt potentially beneficial mergers but also the development of sound efficiencies analysis under Section 7.

The *amici* respectfully submit that the decision of the Panel is contrary to modern thinking on efficiencies in antitrust analysis and therefore urge the Ninth Circuit to rehear the case *en banc* in order to correct the defects in the Panel's decision and to provide clearer guidance and analysis on the efficiencies defense.

ARGUMENT

I. Rehearing is Necessary to Address the Panel's Treatment of the Efficiencies Defense in Section 7 Cases

A. An Efficiencies Defense Should Be a Robust Factor in Antitrust Analysis

"Congress designed the Sherman Act as a 'consumer welfare prescription.'" *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 US 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U. S. 330, 343 (1979)). As such, the primary goal of the antitrust laws is to improve consumer welfare. The

efficiencies defense has arisen as a key tool in modern antitrust law to ensure that over-enforcement does not preclude arrangements that enhance consumer welfare.

The antitrust agencies began to recognize the importance of efficiencies beginning with the 1997 revisions to the 1992 Merger Guidelines and continuing with the 2010 Merger Guidelines ("the Guidelines"). *See* 2010 MERGER GUIDELINES § 10 [hereinafter "GUIDELINES"]. The Guidelines state that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, *improved quality, enhanced service*, or new products." *Id.* (emphasis added).

The antitrust agencies have given serious, if inconsistent, consideration to efficiencies in deciding to close investigations of mergers. In closing its investigation of the Sirius/XM Radio merger, the Department of Justice ("DOJ") stated that "[t]o the extent there w[as] some concern that the combined firm might be able profitably to increase prices in the mass-market retail channel, efficiencies flowing from the transaction likely would undermine any such concern." DOJ Press Release, Statement of The Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http:www.justice.gov/atr/public/press_releases/2008/231467.htm; *see also* U.S.

Dep't of Justice, Statement on the Closing of its Investigation of the T-Mobile/MetroPCS Merger (March 12, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2013/294555.htm.; Statement of Chairman Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), *available at* https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf ("on balance, rather than put patients at risk through diminished competition, the merger more likely created benefits that will save patients' lives.").

At least four circuit courts have also recognized the importance of post-merger efficiencies. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 571 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054–55 (8th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222–24 (11th Cir. 1991). However, in spite of the increasing role of efficiencies analysis as a tool in promoting consumer welfare, there remains little judicial guidance on the precise role efficiencies ultimately play in resolving antitrust litigation.[2]

---

[2] Scholars have long called for more judicial recognition of efficiencies in merger analysis. *See, e.g.*, Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 THE AMER. ECON. REV. 18 (1968); Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PENN. L. REV. 699 (1977).

The sparse analysis of St. Luke's efficiency defense in the Panel's decision does little to provide further judicial guidance. But there is enough jurisprudence on the efficiencies defense to know that the Panel's analysis diverges considerably from modern antitrust law and economics. In fact, the decision adopts several radical ideas about efficiencies that would render the efficiencies defense essentially unavailable to defendants in the Ninth Circuit, much to the detriment of consumers.

B. The Panel's Decision Misunderstands Which Efficiencies Are Cognizable under the Antitrust Laws

1. Quality Efficiencies are Cognizable under the Antitrust Laws

Of perhaps greatest significance, the Panel explicitly rejected quality efficiencies, stating that "[i]t is not enough to show that the merger would allow St. Luke's to better serve patients." A28. This statement is a radical and problematic departure from modern antitrust jurisprudence, which has long recognized the relevance of effects (both positive and negative) on quality in assessing the competitive effects of mergers and other conduct. The Panel implied that only price effects can be cognizable efficiencies, noting that the District Court "did not find that the merger would increase competition or decrease prices." *Id.* But price divorced from product characteristics is an irrelevant concept. The relevant concept is *quality-adjusted price*, and a showing that a merger would result in

higher product quality at the same price would certainly establish cognizable efficiencies.

On the enforcement side, antitrust agencies examine mergers for non-price harms in addition to price effects. The Guidelines state that "Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation." GUIDELINES § 1. In examining non-price harms, the agencies use "an approach analogous to that used to evaluate price competition." *Id.*

The Guidelines also assert that "purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value." *Id.* at § 10. Clearly the Guidelines consider quality as part of its efficiencies calculations. Indeed, if a drop in price without a corresponding drop in quality is considered a cognizable efficiency, then an *increase* in quality without a demonstrated anticompetitive price increase is analytically identical, and should also be a cognizable efficiency.

Several courts have also explicitly recognized quality efficiencies. In *FTC v. Tenet Healthcare Corp.*, the 8th Circuit criticized the lower court for not sufficiently analyzing the quality claim and also admonished it for placing "an inordinate emphasis on price competition." 186 F.3d at 1054-55; *see also FTC v.*

HJ Heinz Co., 116 F. Supp. 2d 190, 199 (D.D.C. 2000) (finding that the merger would result in improved recipes); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (allowing the merger in part because the non-profit hospital mission was "to provide high quality health care to economically disadvantaged and elderly members of the community."); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300 (W.D. Mich. 1996).

While quality efficiencies are undoubtedly cognizable, there is little in the Guidelines or jurisprudence on how to actually analyze them.[3] The Guidelines suggest only that "[e]fficiencies also may lead to new or improved products, even if they do not immediately and directly affect price." GUIDELINES § 10. The lack of further discussion is problematic because of the weight courts give to the Guidelines and the similar lack of in-depth discussion of efficiencies in the case law. *See* Roger D. Blair and D. Daniel Sokol, *supra*, 100 IOWA L. REV. (Forthcoming). The result, unfortunately, is confusion in the courts, as seen in the Panel's decision.

A rehearing *en banc* is necessary both to confirm that quality efficiencies are cognizable and to provide a framework for courts in the Ninth Circuit to analyze them.

---

[3] For a more in-depth discussion of this see Roger D. Blair and D. Daniel Sokol, *Quality Enhancing Merger Efficiencies*, 100 IOWA L. REV. (Forthcoming), *available at* SSRN: http://ssrn.com/abstract=2515112.

2. The Decision Below Erroneously Applies the "Less Restrictive Alternative" Analysis in Such a Way That an Alternative Need Only Be Theoretically Possible in Order to Discount an Efficiencies Defense

As the Merger Guidelines explain, "the Agencies do not insist upon a less restrictive alternative that is merely *theoretical*." GUIDELINES § 10 (emphasis added). Similarly, the DOJ/FTC Intellectual Property Guidelines caution that the agencies "will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *available at* http://www.usdoj.gov/latr/public/guidelines/0558.pdf. Yet that is precisely the error of the decision of the Panel.

By placing the ultimate burden of proving efficiencies on the defendants and by applying a narrow, impractical view of merger specificity, the Panel has wrongfully denied application of *known* procompetitive efficiencies. In fact, under the Panel's ruling, it will be nearly impossible for merging parties to disprove all alternatives when the burden is on the merging party to address any and every untested, theoretical less-restrictive structural alternative. This issue is dealt with in Sherman Act claims by placing the burden of proving less restrictive alternatives squarely on the plaintiff. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (if defendant establishes procompetitive benefits, plaintiff "must then try to

show that any legitimate objectives can be achieved in a substantially less restrictive manner"). As Areeda and Hovenkamp explain: "[p]lacing a general burden of 'no less restrictive alternative' on the defendant effectively requires it to prove a negative potentially covering an infinite number of possibilities. By contrast, once the plaintiff has suggested a particular alternative, the defendant has the more manageable obligation of showing its inadequacy." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1914c.

Claims under the Clayton Act should not be treated differently. It is ill-advised antitrust policy to force a Clayton Act claim defendant to address a limitless number of potential alternatives. Such a burden could ultimately destroy the efficiencies defense on its own. Rather, the same approach should be applied in Clayton Act cases as in Sherman Act cases – once a defendant has demonstrated countervailing procompetitive efficiencies, the burden shifts back to the plaintiff to prove that these efficiencies could reasonably have been achieved in a manner less restrictive of competition.

Furthermore, plaintiffs should not be able to do away with this burden by simply showing that a broad category of alternatives exists. Plaintiffs must show a purported alternative with enough specificity to allow the defendant to explain why that alternative would not achieve the efficiencies as quickly or as well as the

challenged transaction. In this case, the identified alternative was so broad that the defendant was faced with the precise impossibility that Areeda warned about. The district court did not analyze whether St. Luke's specifically could employ an alternative method to achieve the same efficiencies or whether that alternative was likely to succeed. A79. It simply found that other organizational structures exist and therefore these efficiencies aren't merger specific. *Id.* The Panel upheld these findings largely without analysis. A29.

Significantly, the Panel failed to consider the proffered significant advantages that health care acquisitions may have over contractual alternatives or how these advantages impact the feasibility of contracting as a less restrictive alternative. In a complex integration of assets, "the costs of contracting will generally increase more than the costs of vertical integration." Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297, 298 (1978). In health care in particular, complexity is a given. Health care is characterized by dramatically imperfect information, and myriad specialized and differentiated products whose attributes are often difficult to measure. Realigning incentives through contract is imperfect and often unsuccessful. Moreover, the health care market is one of the most fickle, plagued by constantly changing market conditions arising from technological evolution, ever-changing regulations,

and heterogeneous (and shifting) consumer demand. Such uncertainty frequently creates too many contingencies for parties to address in either writing or enforcing contracts, making acquisition a more appropriate substitute. *See* Monica Noether, *The St. Luke's-Saltzer Antitrust Case: Can Antitrust and Health Care Reform Policies Converge?*, 2 CPI ANTITRUST CHRONICLE at 5 (2014).

Furthermore, even if contracting were an alternative to acquisition, there are countless regulatory, structural, and legal hurdles preventing providers from readily using this approach. "Mergers may be the only recourse, as decades old regulatory barriers can keep hospitals and doctors from working closely together to improve care and reduce costs unless they are under the same ownership umbrella." *Hospitals: The Changing Landscape is Good for Patients & Health Care*, AM. HOSP. ASSOC. at 1 (2013), *available at* http://www.aha.org/content/13/changinglandscape.pdf. In contrast to direct employment or acquisitions, providers who jointly contract must comply with a complex and outdated regulatory system. Laws such as the Stark Law (preventing physician self-referrals of Medicare patients) and the Federal Anti-Kickback Statute complicate contracting and make it difficult for providers to properly incentivize the coordination of care. *See* 42 U.S.C. § 1395nn; 42 U.S.C. § 1320a-7b. These barriers to contracting stifle innovation, limit an entity's ability to inform structural change and, ultimately, result in lower quality of care.

Sound antitrust policy and law do not permit the theoretical to triumph over the practical. One can always envision ways that firms *could* function to achieve potential efficiencies. "For example, the merger specificity requirement could be interpreted *narrowly* to exclude any efficiency that can be recreated with any form of creative contracting." Dissenting Statement of Commissioner Joshua D. Wright at 5, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 at 5 (Apr. 11, 2014), *available at* http://www.ftc.gov/ system/files/documents/cases/140411ardaghstmt.pdf (emphasis added). But this approach would harm consumers and fail to further the aims of the antitrust laws.

C. The Panel Applies a Different Standard of Proof for Showing Efficiencies than for Showing Anticompetitive Effects, and this Disparate Standard is Unsound Competition Policy

The Panel's approach to efficiencies in this case demonstrates a problematic asymmetry in merger analysis. As FTC Commissioner Wright has cautioned:

> Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

Id. at 5 (emphasis in original).

In a recent article, Professor Daniel Crane examines the errors of asymmetric burdens. He notes that this approach can mistakenly condemn acquisitions that improve consumer welfare and concludes that "[t]he reasons offered for ignoring [efficiency claims] are weak and often contradictory. A principle of symmetrical treatment of predicted harms and efficiencies would improve merger policy, without necessarily liberalizing it in undesirable ways." Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 390 (2011).

In this case, the Panel effectively *presumed* competitive harm and then imposed unduly high evidentiary burdens on the merging parties to demonstrate actual procompetitive effects. The differential treatment and evidentiary burdens placed on St. Luke's to prove competitive benefits is "unjustified and counterproductive." *See Id.* at 349. Such asymmetry between the government's and St. Luke's burdens is "inconsistent with a merger policy designed to promote consumer welfare." *See* Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Group S.A., *supra*, at 7 (citing Crane, *Rethinking Merger Efficiencies*, *supra*, at 387-88).

The reasons for this are straightforward. Merger litigation is necessarily a matter of speculation in which the burden of proof appropriately rests with the plaintiffs. If that burden is set too low, merger litigation may prevent acquisitions

that are otherwise competitively neutral or procompetitive. A standard that deters or even prohibits these acquisitions deprives consumers of the benefits of an effectively functioning market. *See generally United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990).

II. Rehearing Is Necessary to Prevent the Creation of Unnecessary Obstacles to Integration Between Physician Groups and Health Care Systems

A. Health Care Integration is a Critical Priority in Controlling Costs and Improving Quality of Care

To improve America's health care system, health care delivery now requires a “triple aim" approach focused on improving the experience of care, overall health of populations, and reducing costs. Donald M. Berwick et al., *The Triple Aim: Care, Health, and Cost*, 27 HEALTH AFF. 759, 759 (2008). A central feature in this health policy shift is the abandonment of rewarding providers for the volume of services rendered. *See* Bruce Japsen, *White House Plans to Shift Medicare Away From Fee-For-Service; 50% of Payments Tied to Quality By 2018*, Forbes.com, Jan. 26, 2015, http://www.forbes.com/sites/brucejapsen /2015/01/26/medicares-bolt-from-fee-for-service-means-50-percent-value-based-pay-by-2018/. Instead, current best practices rewards providers for the reduction in duplicative or unnecessary services while simultaneously promoting value-based and patient-centered medicine. *See* Peter R. Orszag and Ezeiel J. Emanuel, *Health Care*

Reform and Cost Control, 363 NEW ENG. J. MED. 601, 601 (2010) (discussing the Affordable Care Act's ability to disincentivize fee-for-service payment).

As a result of these external pressures and the ongoing transformational change in health care, providers are exploring ways of adapting to the commensurate reductions in profitability and changes in incentives. *See Fundamental Transformation of the Hospital Field*, AM. HOSPITAL ASSOC. (2012), *available at* http://www.aha.org/content 13/fundamentaltransform.pdf. Among other things, health care providers are developing integrated delivery systems, defined as an "organized healthcare delivery system that coordinates care and has synchronized functioning." Wenke Hwang et al., *Effects of Integrated Delivery System on Cost and Quality*, 19 AM. J. MANAGED CARE e175, e175 (2013). Integrated delivery systems – including such renowned entities as the Mayo Clinic, Kaiser Permanente, and Intermountain Healthcare – have been highly successful in both improving care and lowering total costs. *See* Leigh Page, *50 Integrated Delivery Systems to Know*, Becker's Hospital Review, Oct. 14, 2010, http://www.beckershospitalreview.com/hospital-physician-relationships/50-integrated-delivery-systems-to-know.html; *see also* Brent C. James and Lucy A. Savitz, *How Intermountain Trimmed Health Care Costs Through Robust Quality Improvement Efforts*, 30 HEALTH AFF. 1, 4-5 (2011) (As an integrated provider

system, Intermountain has focused on" the processes of care delivery" leading to care improvements and millions in savings).

Many health care providers have found that they must acquire other providers in order to realign their organizations into integrated systems. Health care provider acquisitions tend to lead to significant improvements "in access, value, and efficiency." *See* Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits* (2014), *available at* http://www.fticonsulting.com/global2/ media/collateral/united states/hospital-realignment-mergers-offer-significant-patient-and-communitybenef its.pdf. Moreover, the vast majority of these acquisitions and mergers have been deemed procompetitive by the FTC. *See* Julie Brill, Commissioner, Fed. Trade Comm'n, Keynote Address at 2014 Hal White Antitrust Conference: Competition in Health Care Markets at 14 n.45 (June 9, 2014), *available at* https://www.ftc.gov/ system/files/documents/public_statements/ 314861/140609halwhite.pdf (noting that less than one percent of all hospital mergers are problematic).

B. The Ruling Ignores Important Health Care Efficiencies and Will Deter Innovation on a National Scale

In reaching its decision, the Panel dismissed these very sorts of procompetitive and quality-enhancing efficiencies associated with the merger that were recognized by the district court. Instead, the Panel simply decided that it would not consider the "laudable goal" of improving health care as a

procompetitive efficiency in the St. Luke's case – or in any other health care provider merger moving forward. A29. The Panel stated that "[i]t is not enough to show that the merger would allow St. Luke's to better serve patients."[4] A28. Such a broad, blanket conclusion can serve only to harm consumers.

It is undisputed that, through vertical integration, St. Luke's and Saltzer were able to improve health care within the Nampa region. In particular, the integration of Saltzer's physicians into St. Luke's has allowed Saltzer to move from a fee-for-service model to a system focused on population health. As acknowledged by the district court, these acquisitions were undertaken in order to "assemble a team committed to practicing integrated medicine in a system where compensation depended on patient outcomes." A34. Significantly, the St. Luke's transaction demonstrably allowed the parties to increase access to care for both Medicaid and no-pay patients. App. Brief at 15; *see also Long Island Jewish Med Ctr.*, 983 F. Supp. at 149 (noting the importance of access to "high quality care" for underserved individuals).

Much like the St. Luke's transaction, acquisitions and integrations of different health care provider groups across the country have led to improvements in quality of care and have eliminated unnecessary and costly services. *See*

---

[4] Such a ruling directly contradicts prior case law. *See Tenet Health Care*, 186 F.3d at 1054 (finding that efficiencies leading to integrated services and "better medical care" are important part of the merger analysis.).

Kenneth L. Davis, *Hospital Mergers Can Lower Costs and Improve Medical Care*, Wall Street J., Sept 15, 2014, http://www.wsj.com/articles/kenneth-l-davis-hospital-mergers-can-lower-costs-and-improve-medical-care-1410823048. In fact, improvements in quality are a key motivating factor in provider acquisitions. Provider realignment can increase the volume of certain procedures, "thereby increasing the experience level (and performance) of the physicians as well as increase utilization of other hospital resources and technologies." Margaret E. Guerin-Calvert & Jen A. Maki, *supra*, at 19.

By creating a barrier to considering quality-enhancing efficiencies associated with better care, the approach taken by the Panel will deter future provider realignment and create a "chilling" effect on vital provider integration and collaboration. If the Panel's decision is upheld, providers will be considerably less likely to engage in realignment aimed at improving care and lowering long-term costs. As a result, both patients and payors will suffer in the form of higher costs and lower quality of care. This can't be – and isn't – the outcome to which appropriate antitrust law and policy aspires.

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the case should be reheard by the *en banc* Court.

Respectfully submitted,

/S/ David A. Balto
David A. Balto
Attorney for Amici Curiae
Matthew C. Lane
James J. Kovaks
Law Offices of David A. Balto
1325 G Street, N.W., Suite 500
Washington, DC 20005
(202) 577-5424
david.balto@dcantitrustlaw.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,195 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 2013 in 14-point Times New Roman font.

Dated: April 6, 2015

By: /S/ David A. Balto
Attorney for Amici 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 April 6, 2015.

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/ David A. Balto
Attorney for Amici Curiae