

## The Aftermath of the FTC's Wins in ProMedica and St. Luke's: What is the Future of Provider Mergers?

July 11, 2014 | 12:00-1:15 pm EST

*This roundtable discussion is sponsored by the Antitrust Practice Group.*

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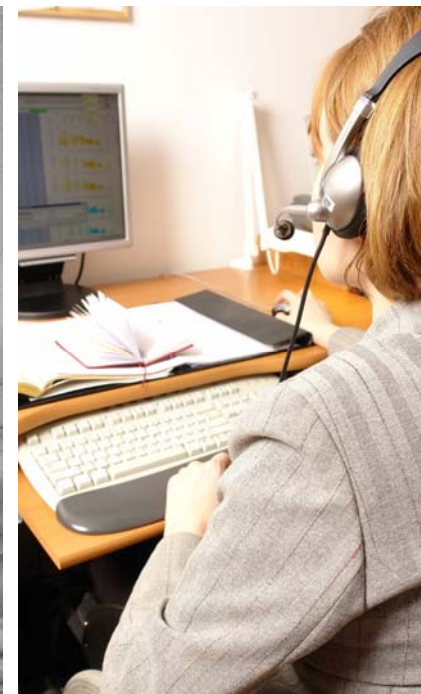
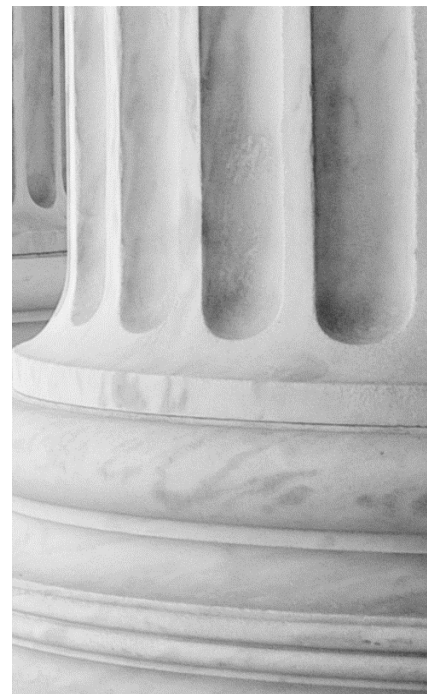
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# Background



# Mergers in the news...

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*The New York Times*

The Opinion Pages | EDITORIAL

## The Risks of Hospital Mergers

By THE EDITORIAL BOARD JULY 6, 2014

In retrospect, it looks as if Massachusetts made a serious mistake in 1994 when it let its two most prestigious (and costly) hospitals — Massachusetts General Hospital and Brigham and Women's Hospital, both affiliated with Harvard — merge into a single system known as Partners HealthCare. Investigations by the state attorney general's office have documented that the merger gave the hospitals enormous market leverage to drive up health care costs in the Boston area by demanding high reimbursements from insurers that were unrelated to the quality or complexity of care delivered.

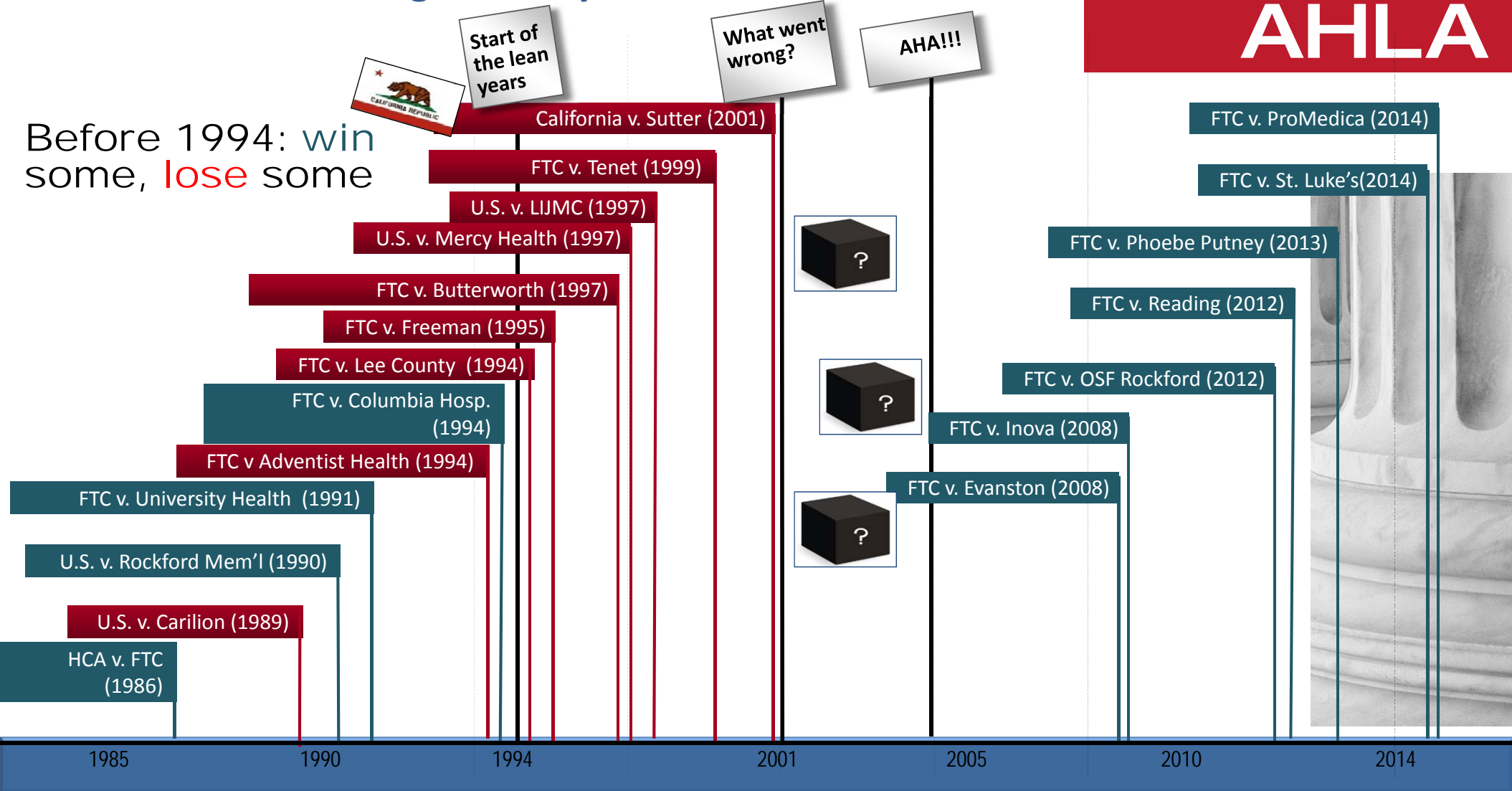
Now, belatedly, Attorney General Martha Coakley is trying to rein in the hospitals with a negotiated agreement that would at least slow the increases in Partners' prices and limit the number of physician practices it can gobble up, albeit only temporarily.

The experience in Massachusetts offers a cautionary tale to other states about the risks of big hospital mergers and the limits of antitrust law as a tool to break up a powerful market-dominating system once it is entrenched.



## Government merger history...

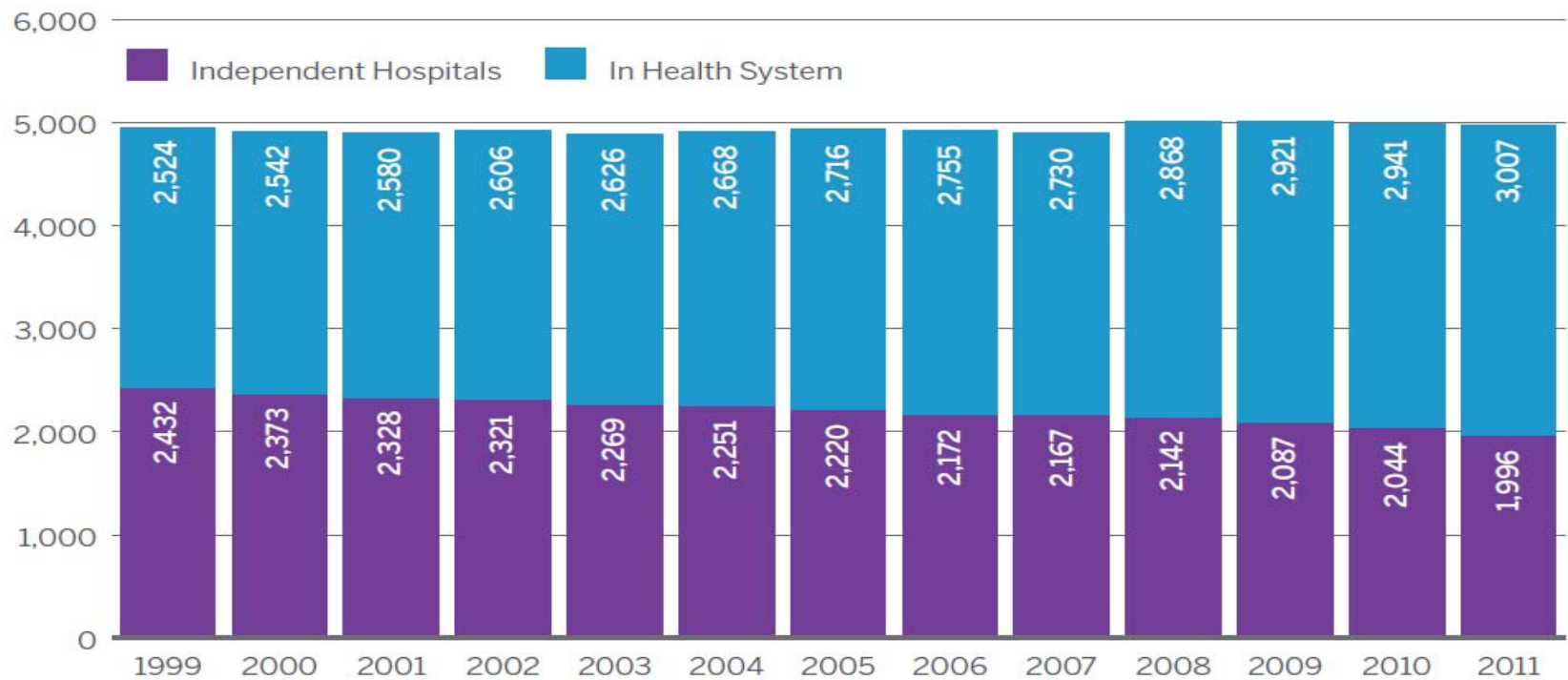
Before 1994: win  
some, lose some



# Growth in Hospital Systems

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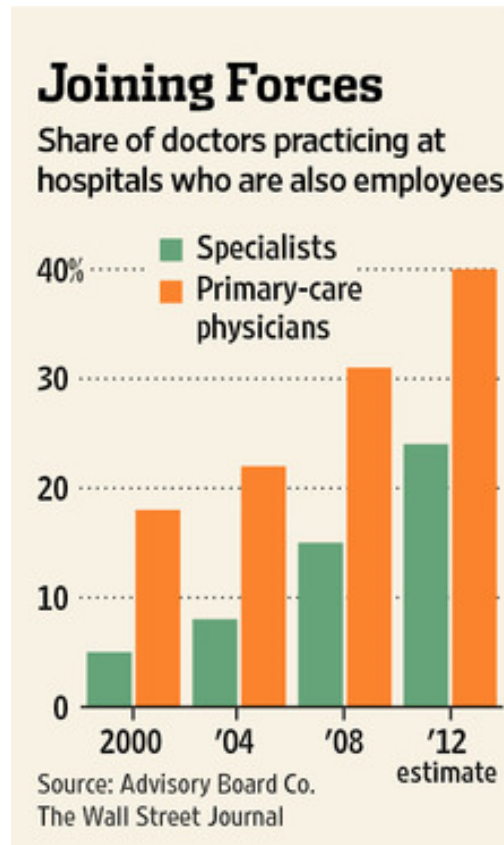
Figure 2: Number of Independent Hospitals and Hospitals in Health Systems in the US, 1999-2011



Source: AHA TrendWatch Chartbook 2013, Table 2.1: Number of Community Hospitals, 1991 – 2011

## Physician acquisitions

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**Wall Street Journal**  
September 13, 2012





## COMPETITION

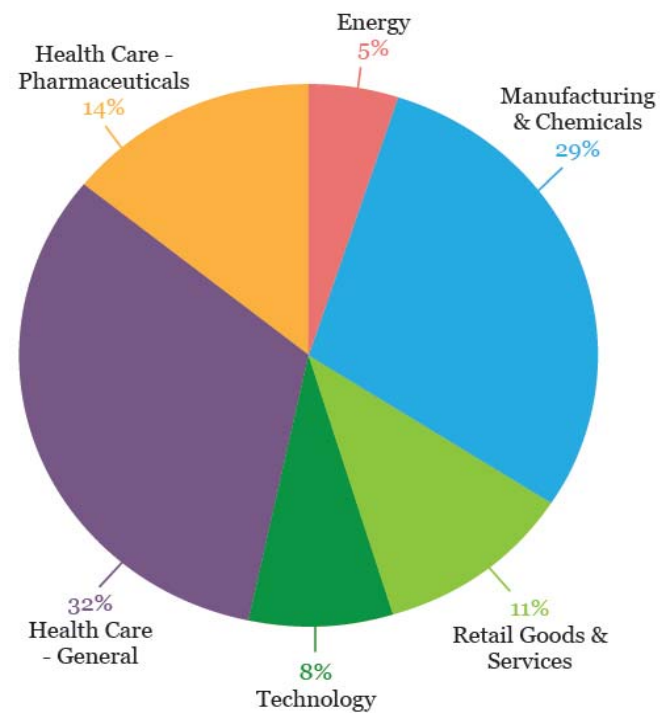
### ANTITRUST ENFORCEMENT

Merger Consent Orders	13
Filed Merger Cases	3
Abandoned Transactions	1
Non-Merger Actions	5
Civil Penalty Actions	2

### POLICY INITIATIVES

Workshops	1
Reports	8
Advocacy & Amicus Briefs	18

Enforcement Actions by Sector  
Fiscal Years 2009-2013



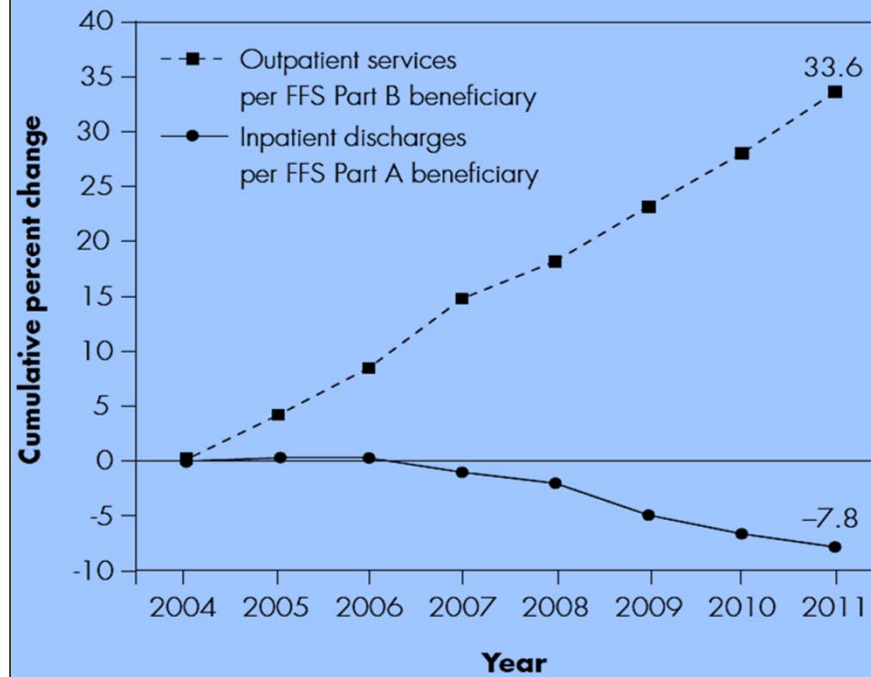
# Relevant Product Market





**FIGURE 3-2**

**Medicare inpatient discharges per beneficiary declined as outpatient visits per beneficiary increased**



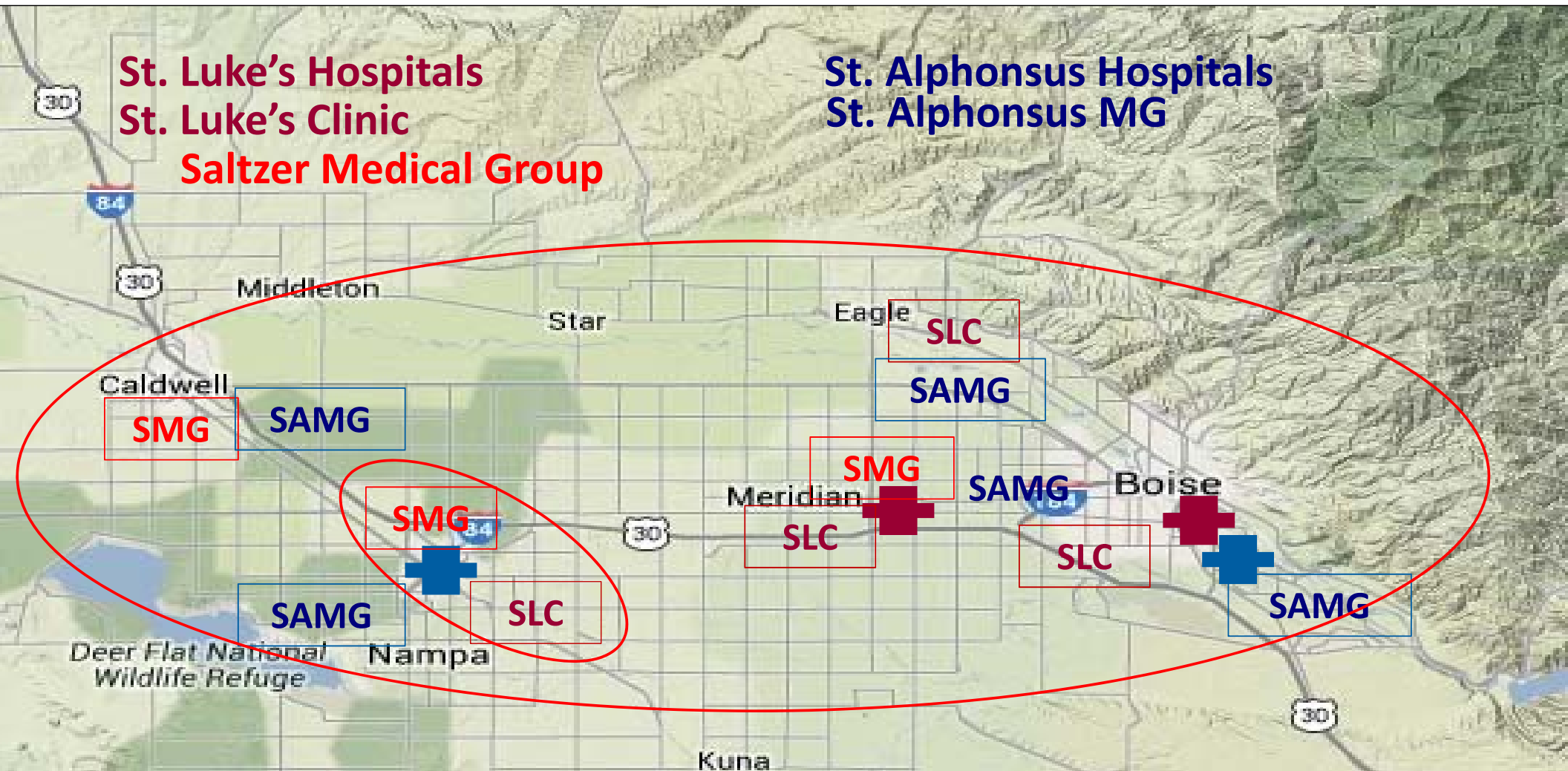
Note: FFS (fee-for-service). Data include general and surgical hospitals, critical access, and children's hospitals.

Source: Medicare hospital cost reports and Medicare outpatient claims data.

## Relevant Geographic Market







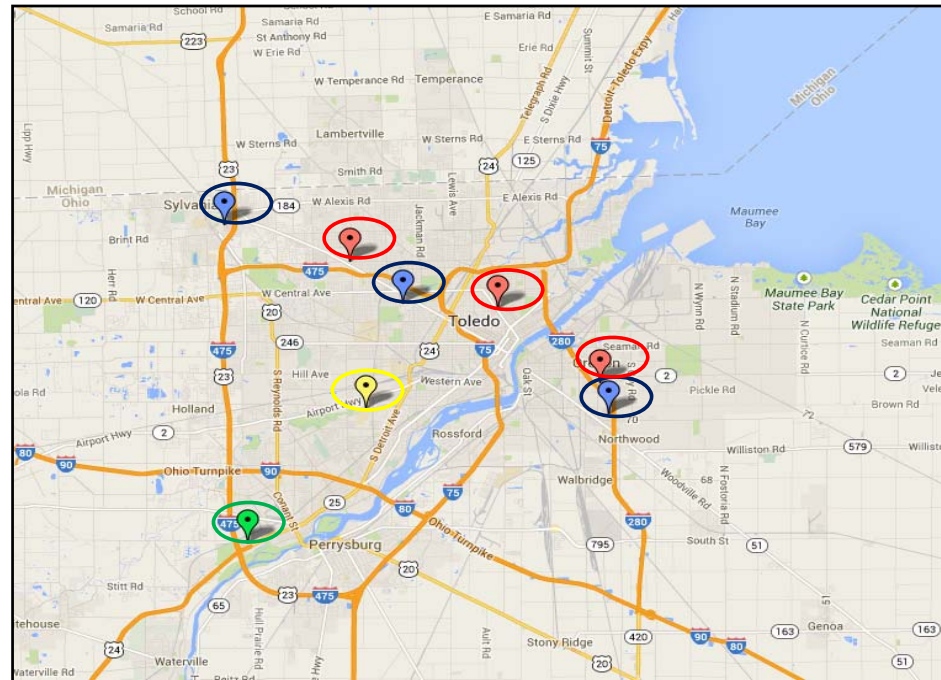
## Idaho's Treasure Valley



# ProMedica

- 4-3 hospital merger
- 3-2 OB

ProMedica	
St. Luke's	
Mercy	
UTMC	

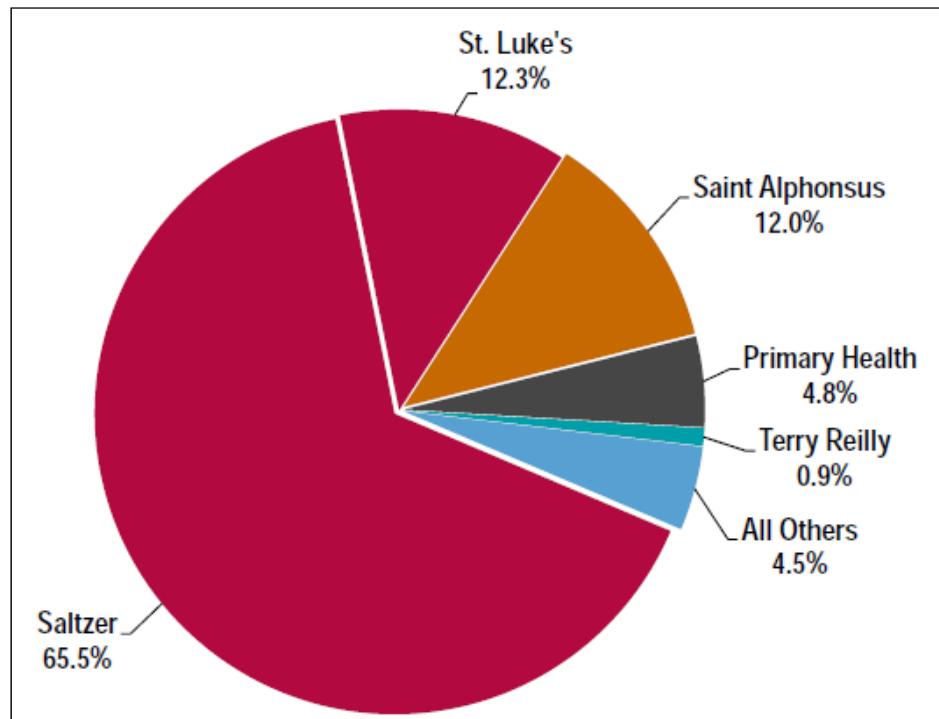


# Market Share



## FTC Trial Exhibit in St. Luke's

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St. Luke's and Saltzer Account for Nearly 80% of PCP services in Nampa

# Entry

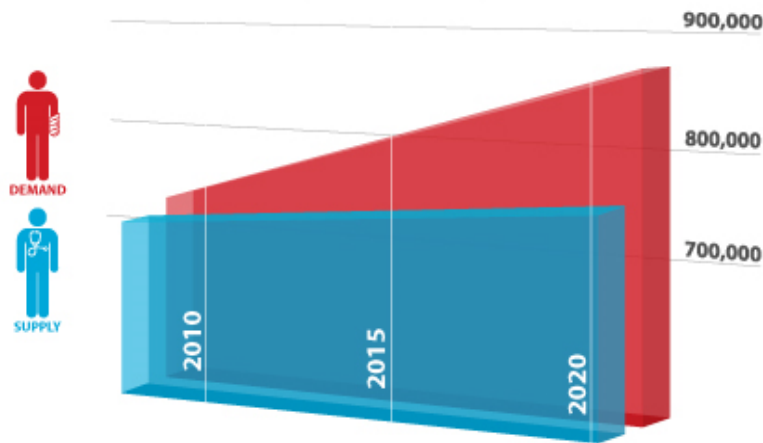




## Entry?

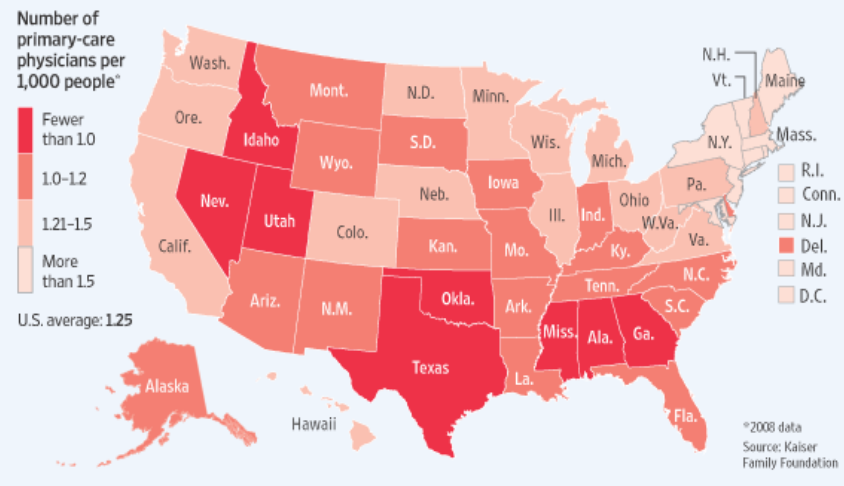
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### Projected Supply and Demand, Physicians, 2008-2020 (ALL SPECIALTIES)



Association of American Medical Colleges

### Waiting Room | A shortage of doctors could strain health-care services



Wall Street Journal



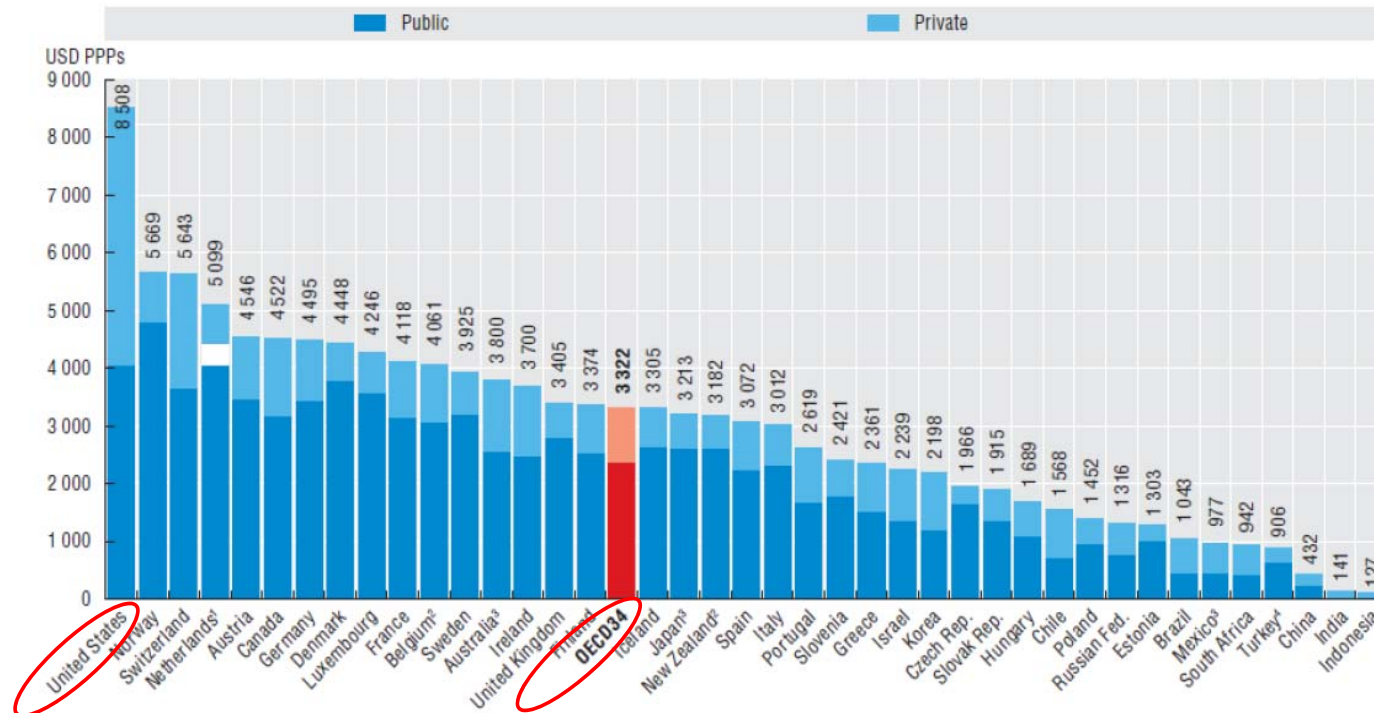
# Efficiencies



## Health expenditure per capita varies widely across OECD countries. The United States spends two-and-a-half times the OECD average

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Health expenditure per capita, 2011 (or nearest year)



1. In the Netherlands, it is not possible to clearly distinguish the public and private share related to investments.
2. Current health expenditure.
3. Data refer to 2010.
4. Data refer to 2008.

Source: OECD Health Statistics 2013, OECD (<http://www.oecd.org/health/healthdata>)



# Aligning Provider Incentives Does Not Require Employment

## **Defendants' Claim:**

- Provider incentives to provide quality care are more effectively aligned through employment

## **My Key Conclusions:**

- The St. Luke's/Saltzer PSA does not align physician incentives to provide quality care
- Employment of physicians does not *a priori* align incentives
- Alternative payment structures, including risk-based contracting and pay-for-performance, can be accomplished without employment

## St. Luke's Strategy of Employing Physicians Is About "Achieving Better Profit"



From: Taylor, Jeff <taylor@sluhs.org>  
Sent: Wednesday, September 19, 2012 9:35 AM  
To: Kuc, John <kuc@sluhs.org>  
Subject: Fwd: Two out of Three

Better cost is a worthy goal and I totally back that. I also understand market forces involved. But- let's be realistic. Employing physicians is not achieving better cost, it's achieving better profit.

Regarding the issue of cost and "achieving more profit", this requires more discussion and analysis. Aggregating pieces and parts of a fragmented environment in an attempt to create an aligned system will undoubtedly highlight examples as you describe. The question and challenge ahead of us is whether the combined system will lead to a lower cost for the combined population, with all parts playing a role (eg payers, hospitals, physicians etc.).

I agree with your comment that added transparency regarding provider based billing

is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this information is strictly prohibited.

received this message by error, please notify us immediately at the related message."

Plaintiff's Exhibit

St Luke's

Dr. Thomas Huntington, St. Luke's  
Treasure Valley Board Member



# Vertical Issues



## Not as new an issue as we think...

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“There has been a dramatic increase in vertical integration in other areas of the health care industry. For example, many hospitals and/or health plans are affiliating with medical clinics and physician practices.”

*Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (May 1995)*





## Not as new an issue as we think...

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“Provider networks are expected to achieve significant economies of scale and scope resulting in lower costs of providing care ...

“However, competitive harm may result from some types of vertical mergers.”

*Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (May 1995)*



## Director Deborah Feinstein (June 2014)

AHLA

“While the private plaintiffs challenged the transaction under a vertical theory ... the Commission’s challenge was based strictly on a horizontal theory. Indeed, antitrust challenges by the federal antitrust agencies based on vertical theories of harm are rare.”

*Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth National Accountable Care Organization Summit (June 19, 2014 )*



## Director Deborah Feinstein (June 2014)

AHLA

“a vertical provider transaction could raise concerns, e.g., if a hospital acquired so many physicians in a particular specialty that a competing hospital would be unable to provide that service because it lacks access to the needed physicians ...”

*Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth National Accountable Care Organization Summit (June 19, 2014 )*



## Director Deborah Feinstein (June 2014)

AHLA

“While we are attentive to the possibility of a transaction leading to vertical foreclosure, we have not yet challenged a purely vertical merger involving a hospital and a physician practice.”

*Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth National Accountable Care Organization Summit (June 19, 2014 )*

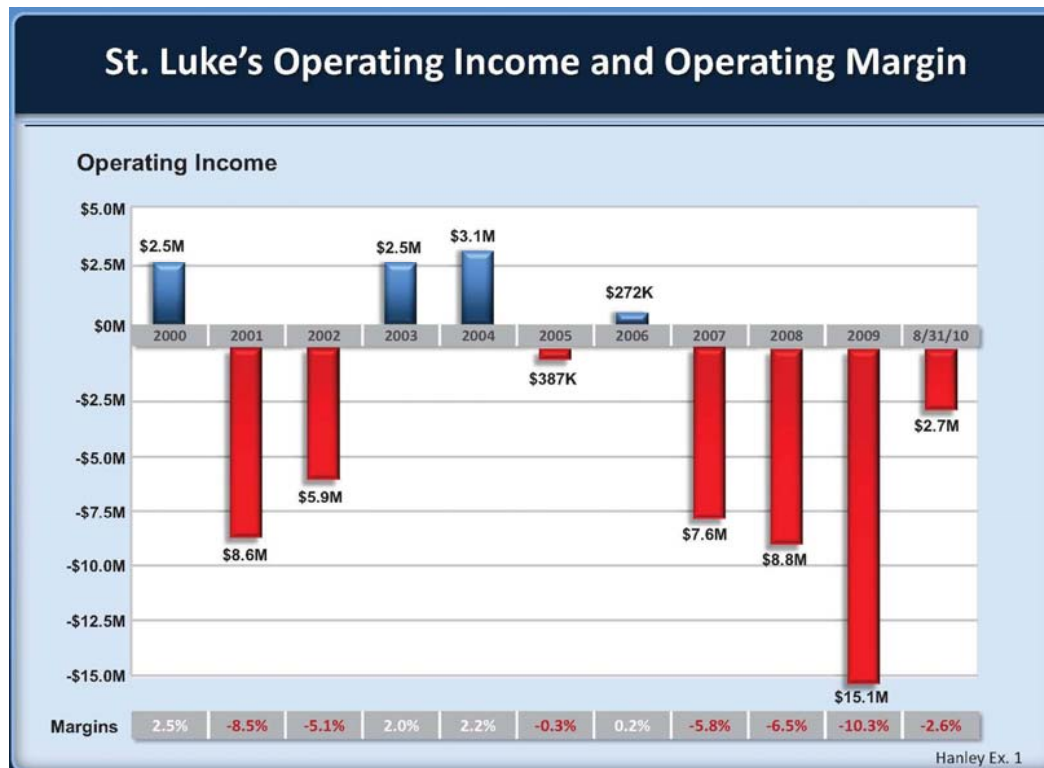


## Flailing Firm



## ProMedica ... flailing firm?

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*ProMedica slide*



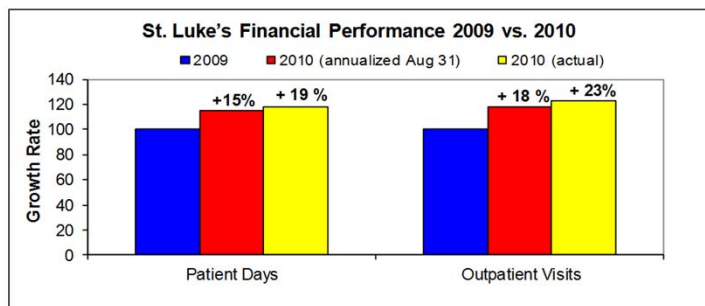
## ProMedica ... flailing firm?

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### St. Luke's Finances Were *Improving*

- Mr. Den Uyl admitted financial condition “improved” in eight months leading up to Acquisition (Den Uyl, Tr. 6562)
- Undisputed volume growth up to Acquisition:
  - Revenues
  - Market share
  - Inpatient admissions
  - Outpatient visits
  - Patient days
  - Occupancy rate

(see Resp't Reply  
Br. at 64-65)



**FTC slide**





# Remedies



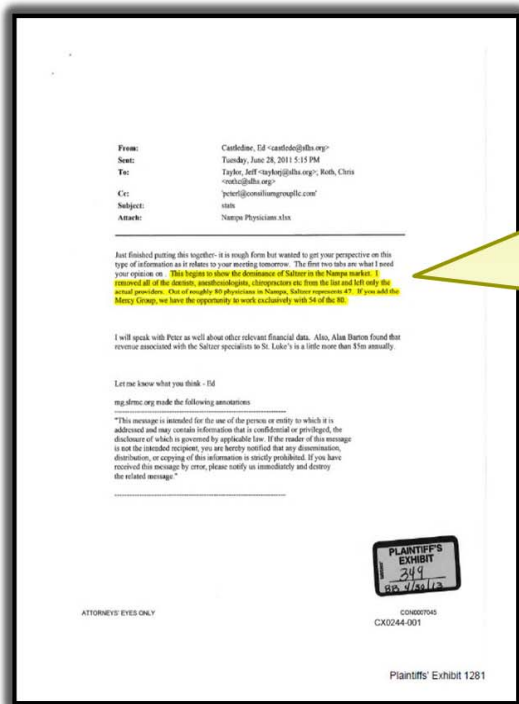


# Documents



## Saltzer is Dominant in the “Nampa Market”

6



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



Ed Castledine,  
Director of Business  
Development



TX 1281

# AHLA



## Record evidence confirms that the acquisition will likely result in anticompetitive effects

- Dr. Randell Page, Chair of Saltzer's Contracting Committee, wrote:
  - If Saltzer closed its pending deal with St. Luke's, it may be able to re-open contract negotiations with Blue Cross, "as there would be the **clout** of the entire network"

ATTORNEYS' EYES ONLY

TX 1361 (SMG000315458) at 458.

ATTORNEYS' EYES ONLY

October 2, 2013

AHLA



### Acquisition Leads to Increased Leverage and Higher Rates



- St. Luke's viewed increased bargaining leverage and access to higher rates as principal benefits of Acquisition:

#### ProMedica:

- An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-SLH partnership would have a lot of negotiating clout.

Presentation to St. Luke's Board of Directors, 10/30/09 (PX01030 at 20, i/c)

“An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. ... *a lot of negotiating clout.*”

“... ProMedica brings to the table ... incredible access to outstanding pricing on managed care agreements. *Taking advantage of these strengths may not be the best thing for the community in the long run.* Sure would make life much easier right now though.”







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