UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	Docket No. 9315
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	Public Record
a corporation.	)	

MOTION OF THE BUSINESS ROUNDTABLE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE

The Business Roundtable respectfully moves, under 16 C.F.R. § 3.52(j), for leave to file the accompanying *amicus curiae* brief in support of Evanston Northwestern Healthcare.

The Business Roundtable is an association of chief executive officers of leading U.S. corporations with many millions of shareholders, a combined workforce of more than 10 million employees in the United States, and about $4 trillion in revenues. The executives who created The Business Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into the public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The Business Roundtable has a single objective: to promote policies that will lead to sustainable, non-inflationary, long-term growth in the U.S. economy. It is only through such growth that American companies will be able to remain competitive around the world and thus provide the technology and jobs that will continue to improve our standard of living and extend

the benefits of that standard to all Americans. To promote growth, competitiveness, and exports, the United States must create the right environment for American companies at home and abroad.

The questions presented by this case are of particular concern of The Business Roundtable because they carry substantial practical importance for its members nationwide. The Business Roundtable members are major consumers of health care in the United States, including hospital services, because they bear the cost of health plans that cover their many employees across the country. Accordingly, The Business Roundtable is very sensitive to increases in health care costs, including those that may result from increases in market concentration, but is also sensitive to the consequences of governmental remedial efforts.

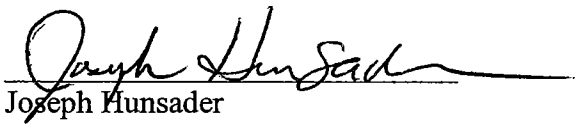
The Business Roundtable thereby has a strong interest in the proper use of divestiture orders, and the legal and policy limits applicable to such orders in cases arising under the Clayton Act. In particular, the accompanying brief addresses the appropriateness of the divestiture remedy in the post-consummation merger situation where there has been not only significant integration, but also substantial post-merger investment by the acquiring firm. The accompanying brief also considers the risk of loss of consumer benefits arising from a successful merger in the event that a divestiture remedy, rather than a less draconian remedy, is imposed. These issues have policy implications reaching across the entire United States economy because of the potential impact of a divestiture order in this case will have on future: (1) mergers, (2) post-merger integration, and (3) and post-merger investment -- all of which may be highly socially beneficial and in the public interest.

For these reasons the Commission should grant leave.

Date: December 16, 2005

Respectfully submitted,

Terry Calvani



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[PROPOSED] ORDER

Upon consideration of the Motion of The Business Roundtable for Leave to File Brief *Amicus Curiae* In Support of Evanston Northwestern Healthcare Corporation, the Commission finds that the proposed brief amicus curiae may assist in the determination of the matters presented by this appeal.

Accordingly, IT IS ORDERED that The Business Roundtable hereby is granted leave to file the proposed amicus curiae brief.

By the Commission

_____

Issued:

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2005, I caused copies of the **Motion of The Business Roundtable For Leave to File *Amicus Curiae* Brief In support of Evanston Northwestern HealthCare** and **Proposed Order** to be served upon all parties required to be served in this action, by the means indicated below:

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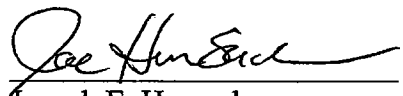

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BRIEF *AMICUS CURIAE* OF THE BUSINESS ROUNDTABLE IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

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Dated: December 16, 2005

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $4 trillion in revenues. The executives who created The Business Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The Business Roundtable has a strong interest in the questions presented by this case, which have substantial practical importance for its members nationwide. The Business Roundtable members are major consumers of health care in the United States, including hospital services, because they bear the cost of health plans that cover their employees. Accordingly, The Business Roundtable is very sensitive to increases in health care costs, including those that may result from increases in market concentration. Nevertheless, the Administrative Law Judge's ("ALJ") divestiture ruling is of particular concern. His view that divestiture is virtually mandatory in Section 7 cases (Initial Decision ("ID") at 202), if upheld, is likely to chill socially valuable mergers, and equally important, will deter socially valuable post-merger integration, in healthcare and elsewhere. The risk that such mergers may be undone years after the event, and without careful attention to the quality and efficiency benefits of the transaction, is a cost that responsible companies must take into account when weighing the costs and benefits of a

proposed merger. The ALJ's remedial order, if upheld, will significantly increase merger costs and will reduce the incentive to make investments in efficient post-merger integration and expansion. The Business Roundtable therefore has a compelling interest in the outcome of this proceeding and believes that its unique perspective will aid the Commission in reaching a just result.

ARGUMENT

I. The ALJ's Mechanical Imposition Of Divestiture Was Contrary To Precedent And Factually Unwarranted.

A. Divestiture Is Not an Automatic Remedy.

Liability under Section 7 is insufficient to require the remedy of divestiture. The ALJ failed to give effect to governing precedent providing that antitrust remedies are discretionary and "flexible." *California v. American Stores Co.*, 495 U.S. 271, 284 (1990). The Supreme Court has criticized the notion that the FTC must "order divestiture whenever [it finds] a violation of Section 7." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 n.9 (1961). And in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 601 (1951), the Court rejected the government's requested divestiture remedy despite upholding the finding of an antitrust violation. The Court's treatment of this issue in *du Pont* and *Timken* is particularly instructive since there have been few divestiture cases since the advent of premerger notification. These cases, decided prior to the Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, demonstrate the Court's sensitivity as to when divestiture is an appropriate remedy. The Commission too has rejected the notion that divestiture is an automatic sanction, mechanically invoked in merger cases, particularly where the merged firms' "operations have become hopelessly

commingled." *In re Retail Credit Co.*, 92 F.T.C. 1, 1978 FTC Lexis 246, *338 (1978), *vacated on other grounds, Equifax, Inc. v. F.T.C.*, 618 F.2d 63 (9th Cir. 1980). The ALJ's suggestion that the statute compels divestiture is simply wrong.

The touchstone is the public interest. As the Supreme Court explained in *du Pont*, an antitrust remedy must address the problem at hand "with as little injury as possible to the interest of the general public." 366 U.S. at 327 (quoting *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911)). On that basis, the Supreme Court denied the government's request for divestiture in *United States v. United States Steel Corp.*, 251 U.S. 417, 457 (1920), holding that divestiture would carry "a risk of injury to the public interest," which it called "of paramount regard." Thus, the remedial question before the Commission is whether requiring Evanston Northwestern Healthcare, Inc. ("ENH") to divest Highland Park Hospital serves the public interest.

B. Imposition of a Divestiture Obligation Is Not Always in the Public Interest.

While divestiture may generally be the preferred remedy in a Section 7 case, *California v. American Stores Co.*, 495 U.S. at 280-81, it is not always the optimal remedy and should not be ordered when unnecessary to maintain competition or when it would adversely affect the public interest. As Judge (later Chief Justice) Burger explained, the "harsh remedy" of divestiture should not be ordered unless "necessary to the restoration of the competitive situation altered by the acquisition." *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962); *see also Timken Roller Bearing*, 341

U.S. at 604 (Reed, J., concurring) ("any splitting up of a consolidated entity" should not be ordered "unless necessary"); *U.S. Steel*, 251 U.S. at 457.[1]

Imposing divestiture where it is not necessary to restore competition, *e.g.*, where a less drastic alternative can achieve the same purpose, is certain to have adverse consequences. As the Commission has recognized, if the "drastic" remedy of divestiture were imposed where it is not warranted, "the cure would be worse than the disease." *In re Ekco Prods.*, 65 F.T.C. 1163, 1964 FTC Lexis 115, at *126 (1964). In particular, divestiture may do more harm than good where substantial investments and integration have taken place. In *U.S. Steel*, for example, the Supreme Court rejected divestiture in part because large investments and internal corporate developments had taken place post-merger. 251 U.S. at 453. Tearing apart a fully integrated hospital system presents enormous difficulties because "it is difficult to 'unscramble the egg.'" *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991). In many cases, "'[u]nscrambling the eggs' after the fact is not a realistic option." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997). Unscrambling eggs is not simply a vivid metaphor but a real-world problem that adjudicators may not responsibly disregard.

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[1] Divestiture better fits some situations than others. For example, the divestiture order in *du Pont* only required that du Pont divest the General Motors stock it controlled; no disintegration of du Pont facilities or operations was entailed. The Supreme Court noted that "complete divestiture is peculiarly appropriate in cases of stock acquisitions," where the stock divestiture would be relatively easy to accomplish; but that is far removed from the significant disintegration that a divestiture would entail here. *Du Pont*, 366 U.S. at 328.

Congress specifically noted the difficulties involved in undoing consummated mergers when it encouraged pre-merger antitrust challenges under the Hart-Scott-Rodino Act:

> During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.
>
> In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.

H.R. Rep. No. 94-1373, at 8 (1976); *accord* S. Rep. No. 94-803, at 61 (1976). Congress's concerns carry special weight in this case because divestiture not only would be costly and difficult, but may also undo a vast array of benefits brought to Highland Park by the merger.

The record evidence establishes, and the ALJ recognized, that after the 2000 merger, ENH poured $120 million into improvements at Highland Park. It upgraded the hospital in many respects, including greatly improved oncology, cardiac, emergency room, maternity, pharmacy, psychiatric, and nursing services. *See* ID109-118. Premerger ENH and Highland Park Hospital have fully integrated their facilities, systems, quality improvement and training programs, management, and practice groups, and Highland Park now benefits from affiliation with one of the best medical schools in the Midwest. *See* ID118-119. It is widely recognized that "[a]cquiring a badly run firm and installing better management produces gains," precisely what occurred here. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 21 (4th ed.

2005). What was once a substandard and declining community hospital is now widely recognized as one of the best hospitals in Illinois and a specialist in such critical areas as cardiac surgery and ambulatory care. The benefits, efficiencies, and improvements produced by a merger are vital elements of the remedial inquiry. In *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918), the Court rejected the government's request for divestiture, despite acknowledging some harm to competition from the challenged acquisition, because divestiture would destroy the customer "benefits" and "improvements" gained through the merger. *Id.* at 55-56.

Loss of the benefits produced by a merger represent a "hardship" to competition as well. Antitrust law should be solicitous of consumer benefits, not only because they carry life-and-death consequences in the health care context, but also because quality improvements force competitors to attempt to match them, thereby promoting non-price competition. *See Flegel v. Christian Hospital*, 4 F.3d 682, 687 (8th Cir. 1993) (hospitals "provide more efficient, higher quality services in order to compete against other hospitals") (quoting *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991)).

Not only will the cost savings and other economies generated by the merger be lost, but the supposed benefit of re-established competition via divestiture is far from guaranteed. "[D]ivestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain." *United States v. Microsoft*, 253 F.3d 34, 80 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001). As Complaint Counsel's own expert has explained, the impact of post-acquisition remedies is rarely what the

government intended. Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. L. & Econ. 43, 51-52 (1969).

In the leading scholarly article on divestiture, Dean E. Thomas Sullivan traces Supreme Court precedent and concludes that divestiture is improper when it is not "the least restrictive alternative" available or when "divestiture of the corporation's assets will create a public risk." E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 Minn. L. Rev. 565, 598 (2002). "From its earliest jurisprudence, the Supreme Court has weighed the benefits of the remedy against its potential harms," and this jurisprudence requires serious attention "to conduct-based remedies such as injunctions" which can ameliorate competitive risks without causing injury to the public. *Id.* at 612.[2]

II. Where the Commission Attacks a Merger Years After Consummation, It Should Always Consider Alternative Remedies

The ALJ's divestiture order should be vacated because the record fails to reflect consideration of whether a divestiture is appropriate under the facts of this case. As the Seventh Circuit has explained, divestiture should not be ordered without "*convincing*

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[2] Indeed, interventionist remedies may be premature at this time. In *United States v. General Dynamics Corp.*, 415 U.S. 486, 511 (1974), the Court acknowledged that in some instances "divestiture would not benefit competition," and that market forces may overcome any market concentration concerns raised by the challenged merger. The Commission, too, in *In re National Tea Co.*, 69 F.T.C. 226, 278 (1966), deemed it appropriate "to give those natural forces of competition a chance to correct the imbalances in those markets before turning to the more stringent remedy of divestiture." If the Commission believes that immediate remedial action is warranted, a conduct-based injunctive remedy is likely to be far more effective than the blunt instrument of divestiture. *See Timken Roller Bearing*, 341 U.S. at 601-605. As the Seventh Circuit explained in *Switzer*, "the harsh remedy of divestiture should not be employed whenever injunctive relief is adequate to prevent continued wrongdoing." 297 F.2d at 48 (opting for an injunctive remedy). Any such injunction should be fashioned narrowly to address particular anticompetitive concerns to avoid a chilling effect on business decisionmaking that may derail rather than promote competition.

reasons why that remedy is necessary to prevent continued violations of the antitrust laws." *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39, 49 (7th Cir. 1961) (emphasis added). Where a transaction is not challenged until years after its consummation, this is particularly important and very careful consideration must be given to whether divestiture is the appropriate remedy. It is insufficient to conclude that "respondent has failed to meet its burden by identifying any hardship which would entitle it to an exception to the divestiture rule." ID203.

As the legislative history of the Antitrust Improvements Act of 1976, 15 U.S.C. §18a, and the cases discussed above demonstrate, the imposition of a divestiture order in a consummated transaction is costly. These costs include not only the loss of efficiencies (merger specific and otherwise) achieved as a result of the underlying acquisition. They also include the costs of disintegrating an established going concern—which increase with the level of integration and the length of time the entity has been integrated.

We do not suggest that divestiture can never be a realistic remedy after consummation of a merger. But it should not be blindly imposed without determining whether it fits the problem at hand. As explained in *Timken Roller Bearing*, 341 U.S. at 603, divestiture may not "be used indiscriminately" where "less harsh" methods are available. In the circumstances of this case, remedies less drastic than divestiture should take priority.

Although laches does not apply to the Commission, the Supreme Court has noted the sheer unfairness of imposing such a remedy so long after the merger took place. *See U.S. Steel*, 251 U.S. at 453 (ten-year delay in bringing litigation weighed against

divestiture).[3] This is not to say that the Commission must take action within a certain period of time following consummation of a merger, but that it must carefully consider the appropriateness of the divestiture remedy in such cases.[4] This was not done.

In re Hospital Corp. of America, 106 F.T.C. 361 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) ["*HCA*"], is the last litigated hospital merger case decided by the Commission. While this precise point was not put in issue in that matter[5], the Commission went to great length to insure that its order in that matter was consistent with the public interest. Relying on its earlier decision *In re American Medical International, Inc.*, 104 F.T.C. 177 (1984), the Commission rejected the Staff's prayer for a broad prior approval provision. Prior to *American Medical International*, the Commission had routinely imposed prior approval provisions in merger remedial orders. But in that case, the Commission, focusing on the public interest, determined that such a provision would hinder the efficiency of the hospital acquisition market and rejected the

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[3] This case is unlike other cases where post-consummation divestiture was ordered. *See, e.g., Chicago Bridge & Iron*, Dkt. 9300; *In re Olin Corp.*, 113 F.T.C. 400 (1990). In those cases, Commission action swiftly followed consummation. Here, the Commission waited much longer before initiating the instant action until the eggs were thoroughly scrambled.

[4] The severe prejudice inherent in such a belated challenge to a merger is not limited to the costs of undoing a consummated merger. It also extends to the Respondent's ability to mount a full defense. As time passes, it becomes increasingly difficult to locate information bearing on such critical issues as price justification and quality enhancement. When businesses merge, computer systems get integrated or replaced, files are lost or destroyed, and quality measures are transformed. Hence, a timely merger challenge is integral to a fair defense.

[5] As to proposed remedies, HCA relegated any argument regarding disintegration to an unsubstantiated one-sentence footnote, instead choosing to focus on its objection to a nationwide prior notice requirement. *In the Matter of HCA (Docket No. 9161)*, Respondent's Brief on Appeal from Initial Decision, January 7, 1985, pp. 56-59 & n.53. *See also In the Matter of HCA (Docket No. 9161)*, Respondent, Brief in Response to Complaint Counsel's Appeal Brief, March 8, 1985, pp. 28-31 (addressing prior approval remedial provision).

blanket use of prior approval orders. The wholesale use of such a remedy without exploring whether it was in the public interest in the specific context of the case at bar was rejected.

As noted above, this precise issue was not raised by the parties in *HCA* and one cannot honestly state what the Commission would have done. However, it is safe to say that the Commission would not have imposed a remedy without considering whether it was in the public interest in the context of that case.

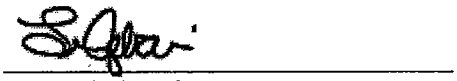
CONCLUSION

If caution is called for before ordering divestiture even in merger cases involving for-profit businesses, surely extraordinary caution is required in this case involving two non-profit hospitals committed to the welfare of the general public. The merging hospitals have devoted substantial time and resources to transform a declining community hospital into an up-to-date facility of outstanding quality on Chicago's North Shore. Much of this effort will be wasted if the divestiture order here is affirmed. Unscrambling the eggs now would be exceedingly difficult and would entail large private and social costs. Large amounts of charitable funds, used to serve the health care needs of the people of this area, also would be wasted by such an undertaking. Looking forward, Highland Park Hospital would lose a necessary source of funding and the supervision and academic affiliation needed for its future viability. Neither antitrust precedent nor common sense supports a divestiture remedy in this context.

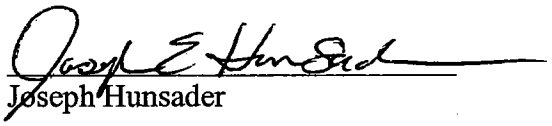
For the foregoing reasons, the Initial Decision should be reversed.

Date: December 16, 2005

Respectfully submitted,



Terry Calvani



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By Hand

December 16, 2005

Re: ***In the Matter of Evanston Northwestern HealthCare Corporation***
Docket No. 9315

Dear Mr. Clark:

Pursuant to 16 C.F.R. §4.2, enclosed please find the original and twelve copies of the following documents being filed in the above entitled matter on behalf The Business Roundtable:

1. Motion of The Business Roundtable For Leave to File *Amicus Curiae* Brief In support of Evanston Northwestern HealthCare (with Proposed Order), and

2. Brief *Amicus Curiae* of The Business Roundtable in Support of Evanston Northwestern HealthCare.

As these are public record documents, we are also providing an electronic copy of these two documents via e-mail to: secretary@ftc.gov. A proof of service is attached to each document.

Thank you for your consideration; please call with any questions at (202) 777-4539.

Sincerely,

Joseph Hunsader

Enclosures