UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9315

IN THE MATTER OF

EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

MOTION OF JOINT COMMISSION ON ACCREDITATION OF HEALTH CARE ORGANIZATIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

[PUBLIC]

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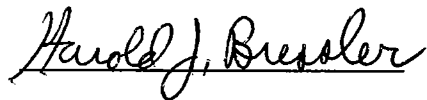
Dated: December 16, 2005

The Joint Commission on Accreditation of Healthcare Organizations ("Joint Commission") respectfully moves, under 16 C.F.R. §3.52(j), for leave to file the accompanying *amicus curiae* brief. The purpose of it doing so is to avoid having the Federal Trade Commission inappropriately rely on certain of the Joint Commission's activities in deciding this matter, when the Administrative Law Judge appears to have misunderstood the relevance of those activities.

The Joint Commission is an Illinois not-for-profit 501(c)(3) tax exempt corporation with the mission to help improve the quality and safety of health care. It is governed by a 29-member Board of Commissioners that includes nurses, physicians, consumers, medical directors, administrators, providers, employers, a labor representative, health plan leaders, quality experts, ethicists, a health insurance administrator and educators. The Board of Commissioners brings to the Joint Commission countless years of diverse experience in health care, business and public policy. The Joint Commission's corporate members are the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association and the American Medical Association. The Joint Commission employs more than 1,000 people in its surveyor force, at its central office in Oakbrook Terrace, Illinois, and at a satellite office in Washington, DC.

For this one reason, to prevent a misunderstanding, the Joint Commission requests that the Commission grant its motion to file the attached brief *amicus curiae*.

Respectfully Submitted,



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In the matter of	)	Docket No. 9315
Evanston Northwestern Healthcare Corporation	)	Public Record

ORDER

Upon consideration of the Motion of the Joint Commission on Accreditation of Healthcare Organizations 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 Joint Commission on Accreditation of Healthcare Organizations hereby is granted leave to file the proposed amicus curiae brief.

By the Commission

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Issued:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9315

IN THE MATTER OF

EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

BRIEF OF *AMICUS CURIAE* JOINT COMMISSION ON ACCREDITATION OF HEALTH CARE ORGANIZATIONS IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

[PUBLIC]

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Dated: December 16, 2005

Interest of the Joint Commission

The Joint Commission on Accreditation of Healthcare Organizations ("the Joint Commission") is a private not-for-profit 501(c)(3) tax exempt corporation formed pursuant to the laws of the state of Illinois with its headquarters located in Oakbrook Terrace, Illinois. Its mission is to help enhance the safety and quality of health care provided to the public. In pursuit of this mission, the Joint Commission promulgates standards it believes health care organizations should meet to best facilitate the provision of safe and high quality care. It surveys through onsite visits more than 15,000 health care organizations and programs in the United States for compliance with those standards, including hospitals and other health care organizations that provide home care, long term care, behavioral health care, laboratory, and ambulatory care services. The Joint Commission's accreditation is recognized by federal law, 42 U.S.C. § 1395bb, as resulting in eligibility of accredited organizations to participate in Medicare, albeit there are alternatives and Joint Commission accreditation is not necessary for participation in Medicare.

The Joint Commission is not expressing any opinion in this Brief on the merits of the pending antitrust case, nor does it have as an organization any financial or other interest in the outcome.[*] However, evidence was submitted about the Joint Commission and its accreditation activities at the hearing, and findings relating to it were made by the Administrative Law Judge in the Initial Decision. The Joint Commission does have an interest in making sure there is no misunderstanding of it or its activities. Accreditation is a complicated activity, and the Administrative Law Judge has apparently relied on certain accreditation results with regard to comparative evaluations of quality in a manner in which the Joint

[*] One member of its 29-person Board of Commissioners has been President and Chief Executive Officer of Highland Park Hospital, an executive with Evanston Hospital, and is President of ENH Foundation, Evanston Northwestern Healthcare.

Commission itself would not rely. The Joint Commission recognizes the complexity of its process, and the fact that there can be good faith misunderstandings about its accreditation implications. The Joint Commission takes very seriously its responsibility to do what it can to avoid courts or administrative agencies relying on any such misunderstandings.

<u>The Joint Commission's Concern</u>

Apparently of relevance in the case was the question whether Highland Park Hospital was a hospital of higher quality after the merger than before the merger. The Joint Commission has not engaged in any effort to determine whether Highland Park Hospital was or was not a higher quality institution after the merger, and expresses no opinion on that issue. (Although it has expertise in evaluating organizational quality and safety, it would not have agreed to supply expert witnesses to make that evaluation, because the Joint Commission is neutral in litigation and believes it is inappropriate and not consistent with its mission to provide expert witnesses.)

Even though the Joint Commission has expressed no opinion, the Administrative Law Judge, with regard to the Joint Commission's accreditation (referring to the Joint Commission as JCAHO), stated as follows:

> "JCAHO regularly evaluates overall hospital quality nationally, including at Highland Park and Evanston. JCAHO accreditation is necessary to quality for Medicare, as well as most managed care plans. F.853, 858. In 1999, in its last year before the merger, Highland Park received a preliminary score of 95 and a final score of 96. F.853. In 1999, Evanston received a preliminary score of 94 and a final score of 95 in 2000 under the same standard.

F.854. These scores are based on approximately 1200 elements of hospital performance. F.856. In 2002, Highland Park received a JCAHO score of 94. F. 853. Accordingly, based on the JCAHO standard, there is no evidence that the overall quality of care at post-merger

Highland Park improved relative to other hospitals. In fact, Highland Park's JCAHO score declined slightly. Thus, the JCAHO evidence, at least from 1999 to 2002, does not support Respondent's argument that overall quality of care improved at Highland Park. Rather, Highland Park's overall quality of service before the merger was excellent and was not declining, as Respondent depicts. After the merger with Evanston, Highland Park continued to maintain its reputation for quality."

The bottom line is that the Joint Commission would not consider in any way the use of such "summary grid" scores cited by the Administrative Law Judge appropriate in evaluating comparative quality before and after the merger. In other words, the Joint Commission would not have done what the Administrative Law Judge did with the Joint Commission's information. A brief explanation of the accreditation decision-making process, and, more specifically, scoring methodology will illuminate why this is true.

The Joint Commission promulgates standards based on expert guidance as to how health care organizations should manage their activities and compliance with which it believes will help improve the safety and quality of care. Those standards are not outcome measures reflecting the actual outcomes of individual patients. Survey teams then make onsite visits to evaluate compliance. In 1999 and 2002, the years of the surveys at issue, these standards were grouped into "grid element" categories. The method for determining the grid element score

for accredited hospitals was to select the worst score of all the standards making up the grid element. The scores ranged from 1 to 5 with 1 being the best score and 5 being the worst.

Then the summary grid score, the scores cited by the Administrative Law Judge, were calculated. According to the Joint Commission's 2002 Comprehensive Accreditation Manual for Hospitals: The Official Handbook, determining the summary grid score involved the following:

"Step 1: Convert each grid element score into points.

Step 2: Add the points for each converted grid element score. Do not include grid elements marked "N." The total is the sum of the converted actual grid element scores and represents the numerator in the equation.

Step 3: Total the number of scored grid elements, and multiply the result by four. A "scored grid element" is a grid element assigned a numeric score of 1,2,3,4, or 5 ("N"s are not counted). For example, if all grid elements on the accreditation decision grid are scored, then the multiplier would be 44 grid elements x 4 = 176. This number is the total of converted perfect grid element scores and represents the denominator in the equation.

Step 4: Divide the sum of the converted actual grid element scores by the total of the converted perfect grid element scores (divide the numerator by the denominator), and multiply the result by 100. The resulting number is the summary grid score. If the resulting number includes a decimal value, round up to the next decimal value of .5000 and above; round down to the next lower whole number for a decimal value of .4999 and below. For example, a score of 88.523 would be rounded up to 89 and a score of 72.487 would be rounded down to 72...."

It may be of interest to note that in 2004, as part of a full revamping of the accreditation process, this entire scoring system was changed. The new

system eliminated grid element and summary grid scores in an attempt to deemphasize organizations' efforts to "ramp up" or cram for the survey. Rather, the new accreditation process focuses on ongoing standards compliance, and is based primarily on the number of standards that are scored not compliant. It simplifies the compliance screening process in determining an accreditation decision, and the "grid" score is eliminated.

With regard to the earlier system in place, two questions immediately arise. To what use did the Joint Commission put these scores and what were the ranges of scores?

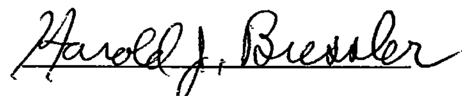
The answer to the latter question is that in 2002, 79% of full hospital surveys resulted in scores between 90 and 100, 20% between 80 and 89, and 1% between 70 and 79. In other words, there was a very narrow range. With regard to the former question, how did that narrow range impact the use by the Joint Commission of these scores? One critical challenge in an accreditation process is to have as clear and consistently applied decision rules as possible for any given year for the standards then in place. The Joint Commission utilizes a series of "decision rules" to guide it in determining whether an organization should be accredited, conditionally accredited, or denied accreditation. The key rules relate now to the number of standards found to be out of compliance, and earlier in 2002 and 1999 related to the number of grid elements with a less than good score. In 2002, the decision rules did state that a summary grid score below 80 would drive the conditional accreditation procedure and a score below 50 would drive a preliminary denial decision. As stated above, in 2002 no hospital received a score of less than 50, and other rules were far more important than these rules. The point is that the narrow range of actual scores and these decision rules reflect the fact that, as the Joint Commission has concluded, the summary scores are only relevant evidence of comparative performance when there is such a gross variation

as to actually result in different accreditation status or categories. Different scores in the 90s of two different hospitals or of one hospital over a period of time, in the Joint Commission's view, do not lend themselves to help determine whether one hospital is substantially better or worse or the same than the other or whether the one hospital has become substantially better or worse or is still the same over time. Such normative accreditation scores are fully consistent with any of those alternative comparative postures.

CONCLUSION

Evaluating the safety and quality of the care a health care organization has provided and will likely provide, whether overall or in particular areas, is a complicated challenge. The Joint Commission has strongly asserted that there can be no simple test, such as, for example, solely a set of outcome measures. This Brief is not the place to engage in a lengthy discourse on the Joint Commission's philosophy on how safety and quality evaluations should be conducted. This Brief is, however, to be redundant, the place where the Joint Commission is fulfilling its responsibility to inform the Federal Trade Commission that, to extent the comparative quality of Highland Park Hospital before and after the merger is relevant to it, the Federal Trade Commission should not use the 1999 and 2002 Joint Commission grid scores cited by the Administrative Law Judge in making that comparative judgment.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2005, true and correct copies of the Motion of the Joint Commission on Accreditation of Healthcare Organizations for Leave to File *Amicus Curiae* Brief were served by mailing first class mail, postage prepaid to

The Honorable Stephen J. McGuire
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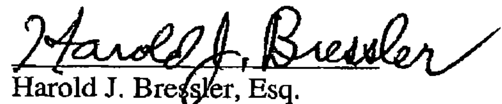

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