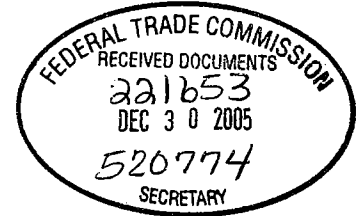


ORIGINAL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz



_____)
In the Matter of _____)
_____)
Evanston Northwestern Healthcare _____)
Corporation. _____)
_____)

Docket No. 9315
Public Version

**COMPLAINT COUNSEL’S RESPONSE TO MOTIONS
FOR LEAVE TO FILE AMICUS CURIAE BRIEFS**

Pursuant to 16 C.F.R. §§ 3.22 and 3.52(j), Complaint Counsel respond to the motions of the Advisory Board Company, the Joint Commission on Accreditation of Healthcare Organizations (the “Joint Commission”), the American Hospital Association (the “AHA”), the Business Roundtable, and the City of Highland Park to file *amicus curiae* briefs.

The motions to file *amicus* briefs should be evaluated against the backdrop of the regulations governing Part 3 proceedings. When a case is pending before the administrative law judge and the administrative record is open, the parties share the protection of important procedures and evidentiary rules – the opportunities to take discovery, to present rebuttal evidence and to cross-examine witnesses, and the hearsay rule, to name a few – each of which is vital to the integrity of the adjudicative process. To guarantee the efficacy of these rules, the regulations also specify that the administrative law judge must close the record upon the completion of the hearing. *See* 16 C.F.R. § 3.44(c).

These general principles should guide the Commission in its consideration of the *amicus*

curiae briefs of the Advisory Board, the Joint Commission, and the AHA.¹ The Advisory Board makes numerous factual representations now insulated from rebuttal.² The Joint Commission submits out-of-court statements now immune to cross-examination.³ And, the AHA presents a thirty-four page brief rife with unsubstantiated assertions it hopes will counterbalance sworn testimony that weathered the tests of discovery and trial.⁴

Notably, Respondent itself has always enjoyed ready access to the resources of these three “friends-of-the-court.” One executive of Respondent is a director of the Advisory Board and another is a director of the Joint Commission; both of these gentlemen testified at trial.⁵ And, Respondent itself is a dues-paying member of the AHA.⁶ Thus, Respondent easily could have developed this evidence for trial – through either informal business contacts or formal discovery – subject, of course, to the applicable rules of procedure and rules of evidence.

¹ Although Complaint Counsel disagree with their views, the Business Roundtable and the City of Highland Park have filed *amicus* briefs that do not compromise the evidentiary and procedural protections afforded the parties and, therefore, we do not oppose their motions.

² *E.g.*, Advisory Board Company’s *Amicus Curiae* Brief at 6 (bald assertions that studies were based on data that are “insufficient” to draw any general conclusions).

³ *E.g.*, *Amicus Curiae* Brief of the Joint Commission on Accreditation of Healthcare Organizations at 3 (assertion that JCAHO data may have limited probative value).

⁴ *E.g.*, American Hospital Association’s *Amicus Curiae* Brief, at at 8 n.8 (unsubstantiated assertion that patient flow analysis is determinative factor in defining geographic markets for hospital services, notwithstanding record testimony to the contrary); *id.* at 12 n.12 (unsubstantiated assertion that patient flow data is better than survey data in defining geographic markets).

⁵ Advisory Board Brief at 1; Joint Commission Brief at 1.

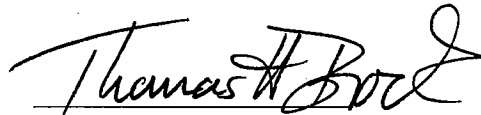
⁶ AHA Guide to the Health Care Field at A178 (2005).

Complaint Counsel appreciate the Commission's commitment to considering the views of *amicus curiae* but that commitment should not extend to *amicus* briefs that present evidence, untested by the litigation process, that a party had the full opportunity to present at trial.⁷ If the Commission grants these motions of the Advisory Board, the Joint Commission, and the AHA, Complaint Counsel respectfully suggest that the Commission should duly consider the portions of these three memoranda that truly serve the traditional purposes of *amicus* briefs but give little if any consideration to the portions of the briefs that sidestep the Commission's own evidentiary and procedural rules.

Dated: _____

12/30/05

Respectfully submitted,



Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2813 Fax: (202) 326-2286
Email: tbrock@ftc.gov
Complaint Counsel

⁷ Complaint Counsel notes that *amicus* briefs filed by a third party affiliated with a respondent can effectively trump other rules governing proceedings before the Commission. Section 3.52(b)(2) – and, in this case, the Commission's Order dated December 8, 2005 – set specific word limitations on the briefs of both Respondent and Complaint Counsel. Here, however, Respondent's brief and these three supplementary *amicus* briefs, together, exceed the Commission's exacting word limit by more than 50 percent.

Complaint Counsel also notes that *amicus* briefs that present new evidence may compromise the process beyond the proceedings before the administrative law judge and the Commission itself. The Commission's final decision may be reviewed by a court of appeals. See 15 U.S.C. § 45(b). Obviously, the Commission will be wary of the procedural and evidentiary defects in the *amicus* briefs in this case, but an appellate court might be less cognizant of these problems if the *amicus* briefs are made part of the record.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing papers was served today

(a) by hand-delivery to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

(b) by emailing and by mailing a copy, first class postage prepaid, to:

Stephen M. Shapiro, Esq.
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606-4637

Michael L. Sibarium, Esq.
Winston & Strawn LLP
1400 L Street NW
Washington, DC 20005

Duane M. Kelley
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601-9703

(c) and by mailing a copy, first class postage prepaid, to:

Harold J. Bressler
Joint Commission on Accreditation of Healthcare Organizations
One Renaissance Boulevard
Oakbrook, IL 60181

Dan W. Goldfine
Snell & Wilmer, L.L.P.
One Arizona Center
Phoenix, Arizona 85004-2202

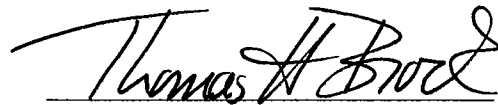
Sharis Arnold Pozen
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Melinda Reid Hatton
American Hospital Association
325 Seventh Street, N.W.
Washington, D.C. 20004

Terry Calvani
Freshfields Bruckhaus Deringer LLP
701 Pennsylvania Ave., NW
Suite 600
Washington, DC 20004-2692

John Edward Porter
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

12/30/05
Date



Thomas H. Brock
Complaint Counsel