

DOCUMENT NO. 0017

IN THE MATTER OF  
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

MOTION OF

Board”) respectfully moves for leave to file a brief *amicus curiae* in this matter. A copy of the Brief *Amicus Curiae* that the Advisory Board proposes to file is attached to this

Motion

The Advisory Board is a for-profit research organization that provides best practices research and analysis to the health care industry, focusing on business strategy,

operations and general management issues. The Advisory Board is a 501(c)(3) organization.

One of the only viable options was to have corporations that are smaller

nonprofit stand alone community hospitals to merge into a larger better capitalized

the ALJ ignored the actual improvement in quality of care post-merger, thus brushing aside significant evidence that the merger was procompetitive.

Because of its years of studying the hospital industry, the Advisory Board has particular insight into the ALJ's conclusion that there has been a nationwide trend of

improved quality. The Advisory Board's brief concludes that there is significant evidence



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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DOCKET NO. 9315

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IN THE MATTER OF  
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

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BRIEF OF *AMICUS CURIAE*  
THE ADVISORY BOARD COMPANY  
IN SUPPORT OF EVANSTON NORTHWESTERN  
HEALTHCARE CORPORATION

---

[PUBLIC]

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Dated: December 16, 2005

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**IDENTITY AND INTEREST OF *AMICUS CURIAE***

The Advisory Board Company (“the Advisory Board”) is a for-profit research

organization that provides best practices research and analysis to the health care industry.

focusing on business strategy, operations and general management issues. The Advisory

Board Company is a subsidiary of the Advisory Board Corporation.

communities all across the country that might otherwise face a reduction or even elimination of hospital services.

The Advisory Board is concerned that the decision in this case will threaten the ability of health agencies to continue to serve this critical role and believes that its means of

research into hospital management nationwide can be of assistance to the Commission. In

particular, the Advisory Board addresses what it believes to be a major issue in the

of more than \$100 million in post-merger quality improvements); Respondent's Posttrial Reply Brief at 69-98 (same). In other words, there were substantial quality of care improvements made post-merger. Such improvements negate inferences of market power that might arise from the presence of higher prices or increased market concentration.<sup>2</sup> See, e.g., *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996); VII Areeda, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1511, at 429 (1986); see also Complaint at ¶¶ 24 and 28 (making the corollary allegation that price increases absent quality improvements "reflect[] the market power exercised by the hospitals after the merger"). In fact, Complaint Counsel conceded that "if quality is increasing at one hospital relative to other hospitals,"

Advisory Board has particular insight into whether there has been a nationwide trend of improved quality, and, based on that insight and years of study, believes the ALJ's conclusion is simply wrong and not supportable by either evidence in the record or in the public domain, as set forth by federal agencies related to Complaint Counsel. *See Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 953-54 (9<sup>th</sup> Cir. 2000) (increasing the rigor that

“[o]ther studies also show that hospitals were improving their quality during the time

from 1997 through 2004.” ALJ Initial Decision. Finding of Fact 859 at 107 (citing

Noether simply does not support either finding of fact because Noether was discussing the fact that there has been “increased *focus* on quality nationwide” and not the fact that there had been studies showing “increased quality nationwide.” Noether Tr. at 6011

**b. No Nationwide Trend of Improved Quality**

As discussed above, the Jencks study simply does not support his conclusion that

elementary schools nationwide from 1987 to 2004. Moreover, the study also found that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Institute of Medicine, *Crossing the Quality Chasm: A New Health System for the 21<sup>st</sup> Century* (2001); Reports found at Institute of Medicine Website at <http://www.iom.edu>; 2003 and 2004 National Healthcare Quality Reports found at the Agency for Health Care Research and Quality, United States Department of Health and Human Services, at <http://www.chrc.gov/qual/moocvix.htm> "Until recently, however, we have looked only

which the ALJ could make any inference about Highland Park Hospital's investments in

quality *relative to national trends*.

Third, the data underlying the Jencks study does not support the conclusion reached by the ALJ. MedPac, the independent body charged with advising Congress on Medicare issues, evaluated the data employed by the Jencks study as well as other data and reached a different conclusion as to where quality trends are heading:

[D]ata on mortality, the appropriateness of care and adverse events provide *a mixed picture* of the clinical effectiveness, timeliness and safety of care in hospitals. Based on our data, measures of effectiveness of care such as mortality and the provision of clinically appropriate services in a timely manner show improvement, while the safety of patients, as measured by the rate of adverse events, does not.

MedPac 2004 Report to Congress at 26 (emphasis added) which can be found at





competitive significance of the acquisition).<sup>8</sup> In sum, Highland Park Hospital was not prepared financially to make the quality improvements that actually took place, and that fact appears to be overlooked by the AT.I who assumes that most of the improvements

would have taken place regardless of how irrational it would have been for Highland Park Hospital's Board and management to make such investments as a result of the acquisition.

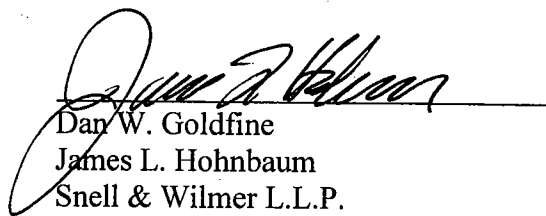
<sup>8</sup> Much of the "but for the merger" analysis is missing from the record. Defendant

- elevating operating margin performance to increase available capital, which often led to extending the time horizon on planned capital investments
- trimming the capital spending ambition, prioritizing “mission” critical physical plant reinvestment often at the expense of clinical or information technology investments
- accepting a lower bond rating which was a limited option given that many

uncomfortable with a lower rating

- selling the hospital asset to a better capitalized health system in order to fund the

Respectfully Submitted,



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Dated: December 16, 2005.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 16, 2005, I caused true and correct copies of the foregoing Motion for Leave to File Amicus Curiae Brief and \_\_\_\_\_

\_\_\_\_\_ Brief Amicus Curiae of The Advisors Board Company to be served as described below.

Service by overnight delivery of paper copies, including an original signed \_\_\_\_\_

\_\_\_\_\_ version, 12 photocopies, and an electronic version, was provided to:

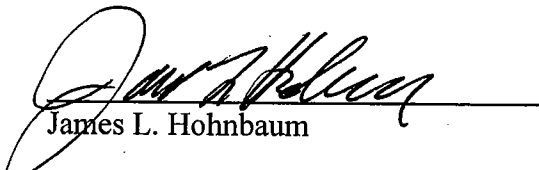
Office of the Secretary  
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Service of one copy was provided, by First Class mail, postage prepaid, to:

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