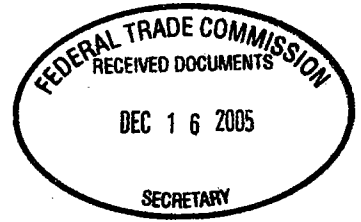


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



EVANSTON NORTHWESTERN)
HEALTHCARE CORPORATION)
)

Docket No. 9315

_____)
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

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~~

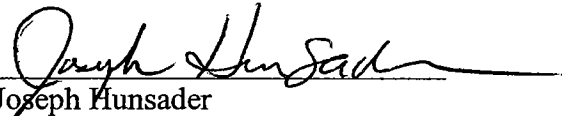
For these reasons the Commission should grant leave.

Date: December 16, 2005

Respectfully submitted,



Terry Calvani



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Attorneys for The Business Roundtable

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

EVANSTON NORTHWESTERN)

Docket No. 9315

HEALTHCARE CORPORATION,)
)
)

a corporation.)
)

Public Record

[PROPOSED] ORDER

U.S. Department of Justice, Federal Trade Commission, Washington, D.C. 20547

CERTIFICATE OF SERVICE

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BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

EVANSTON NORTHWESTERN
HEALTHCARE CORPORATION

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DATE: 1

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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

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

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,

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 is 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

is imposed where it is not necessary to restore competition, it is a

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

employees and other personnel are shifted, retained, or similarly discharged.

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

57 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

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

most appropriate alternative" available or when "divestiture of the corporation's assets will

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).

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

discretion) 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 consequences of the Commission's action in such cases. 4. This must be done

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

agreed to the statement that the Commission would have done. However, it is not to say.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2005, I caused copies of the

**Brief *Amicus Curiae* of The Business Roundtable in Support of Evanston
Northwestern Healthcare Corporation to be served upon all parties required to be**

served in this action, by the means indicated below:

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December 16, 2005

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