UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 93 15

IN THE MATTER OF

EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

REPLY OF AMICUS CUNAE
THE ADVISORY BOARD COMPANY
TO COMPLAINT COUNSEL'S RESPONSE TO MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

[PUBLIC]

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Dated: January 1 1,2006

The Advisory Board Company ("the Advisory Board") submits this Reply to

("ALJ") relied does not support the conclusion that there was a "nationwide trend of improved quality" among hospitals from 1997 to 2004. ALJ Initial Decision at 180. This conclusion raised a serious question within the Advisory Board given its years of experience in conducting "50 major studies and 3,000 customized research briefs each year on progressive management in health care." More importantly for the Commission, the studies cited by Complaint Counsel and the ALJ did not tend to prove the rather-significant "nationwide trend" conclusion made by the ALJ. The Advisory Board Amicus Brief at 5-7. In other words, the Advisory Board challenged evidence in the record that gave rise to a conclusion that the Board's experience flatly contradicted. This is typical fodder for an amicus brief.
"The function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." 4 AM. JUR. 2d Amicus Curiae 5 6, at 326 (2d ed. 1995).
Some amicus briefs collect background or factual references that merit
judicial notice. Some hends of the court are entities with particular
expertise not possessed by any party to the case. Others argue points
deemed too far-reaching for emphasis by a party intent on winning a
particular case. Still others explain the impact a potential holding might
have on an industry or other group. Amicus briefs give a voice to persons
who are not parties but who may be affected by a decision.
Luther T. Munford, When Does the Curiae Need an Amicus? 1 J. of Appellate Prac. & Proc. 279,281 (1999); e.g., Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603 (1984); see also Robert L. Stem, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, SUPREME COURT PRACTICE 663 (8th ed. 2002) (stating that "the amicus who has a legitimate interest in a case does not face too great a hurdle in being allowed to file a brief ').

Moreover, the Advisory Board noted that in its experience no basis for concluding
that the "nationwide trend of improved quality" exists. At its heart, this is a policy-driven or legislative fact2 on which no absolute conclusion can be reached, because current data and techniques for evaluation are inadequate, rather than an adjudicative fact subject to determination through the adversarial process. Legislative facts are facts on which courts, and presumably the Commission, can rely to inform their decisions. Fed. R. Evid.
201. The Advisory Committee Note to Rule of Evidence 201 explains the significance of legislative facts to decisionmaking and why such facts are not subject to the adversarial process nor the rules with respect to judicial notice.
Finally, Complaint Counsel criticizes the Advisory Board as an interested person.
This criticism sorely misses the point. See 16 C.F.R. fj 3.520') (Commission rules envision interested persons by requiring the disclosure of interests); Neonatology Assocs., P.A. v. Commissioner ofInternal Revenue, 293 F.3d 128, 131-32 (3d Cir. 2002) (rejecting the argument that an amicus must be an impartial person not motivated by pecuniary concerns). But for interested persons, there would be no amicus curiae.
In sum, for the reasons set forth in the motion for leave and above, the Advisory
Board respectfully requests leave to file its amicus brief.

2 "[Llegislative facts" are "those whch have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201(a), advisory committee note. "Legislative facts are ordinarily general and do not concern the immediate parties." Unitedstates v. Gould, 536 F.2d 216, 220 (8th Cir. 1976).

DATED this 1 I th day of January, 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11,2006, I caused true and correct copies
of the foregoing Motion for Leave to File Amicus Curiae Brief and accompanying 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
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-135
Washington, DC 20580

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

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