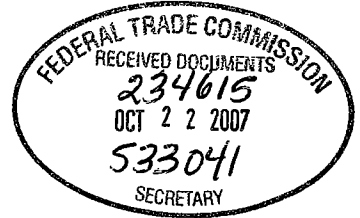


ORIGINAL

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch



In the matter of)
) **Docket No. 9315**
)
Evanston Northwestern Healthcare)
Corporation,) **PUBLIC**
 a corporation, and)
)
ENH Medical Group, Inc.,)
 a corporation)
)
)

RESPONDENTS' OPPOSITION TO AND MOTION TO STRIKE MOTION OF ECONOMIC PROFESSORS TO FILE *AMICUS CURIAE*

Respondents Evanston Northwestern Healthcare and ENH Medical Group (“ENH”) respectfully request that the Commission deny the motion of Economic Professors to file an *amicus curiae* brief in this matter and strike the motion from the record for at least three reasons. First, the *amicus* submission of the Economic Professors is two years too late and therefore untimely. Second, the Economic Professors’ motion is improper because they claim to be “acting independently” of “any interested parties.” However, the primary signatory, Professor David Dranove, worked to analyze this merger on behalf of one of the Managed Care Organizations (“MCOs”) that testified at

trial for Complaint Counsel. Finally, the Economic Professors' brief merely advances views that have previously been offered by the MCOs and Complaint Counsel. The issue raised by the Economic Professors has been extensively briefed, argued, and has already been decided by the Commission. The public interest will therefore not be served by considering the perspectives enunciated in the Economic Professors' brief.

I. The Economic Professors' Motion Is Untimely Because The Time For Filing *Amicus* Briefs Has Long Since Expired

The *amicus* submission by the Economic Professors is nearly two years delinquent. The Commission rules contemplate the proper filing of *amicus* briefs when a matter is pending on appeal before the Commission – not after a decision has been issued. *See* Rule 3.52.

Pursuant to Commission Rule 3.52(j), “an amicus curiae shall file its brief within the time allowed the parties whose positions as to affirmance or reversal the amicus brief will support.” *See also* Order Denying Motion for Leave to File Brief Amicus Curiae, *In re North Texas Specialty Physicians*, No. 9312, 2005 WL 1541535 (F.T.C. June 7, 2005) (denying motion for *amicus* brief filed one month after the time period permitted).

The Economic Professors had ample opportunity to make their views known when this appeal was pending before the Commission nearly two years ago in 2005. The Administrative Law Judge's (“ALJ”) initial decision in this matter was issued on October 17, 2005. Respondents' filed a Notice of Appeal on or about October 26, 2005, and filed their Appeal Brief on December 16, 2005. This case and Respondents' appeal were well-publicized and numerous independent parties filed *amicus* briefs within the time allowed

under the rules. Indeed, five separate independent parties filed *amicus* briefs in support of ENH.¹ Complaint Counsel filed their Answering and Cross Appeal Brief on February 3, 2006. There were no *amicus* briefs filed in support of Complaint Counsel. Finally, this Commission issued its Decision and Order on September 2, 2007.

Pursuant to Commission rules, the Economic Professors' *amicus* brief was required to be filed "within the time allowed the parties", i.e., at any time between October 26, 2005 and February 3, 2006. *See* Rule 3.52(j). The Economic Professors claim to be in support of neither party, in order to circumvent the timing constraints of Rule 3.52(j). Their submission, however, seeks to support the ALJ's initial decision divestiture ruling, a position advanced by Complaint Counsel on appeal and strongly disputed by Respondents. *See* Brief *Amicus Curiae* of Economic Professors at 3; *see also* Order Denying Motion for Leave to File Brief *Amicus Curiae*, *In re North Texas Specialty Physicians*, No. 9312, 2005 WL 1541535 (F.T.C. June 7, 2005) (finding that although *amicus* brief submission suggests that it "supports neither party," numerous statements indicated that the brief in fact supported the position of a party). Therefore, the Economic Professors' submission was required to be filed within the time provided to Complaint Counsel when this matter was on appeal. *See* Rule 3.52(j).

¹ *See* City of Highland Park's *Amicus Curiae* Brief in Support of Evanston Northwestern Healthcare, filed December 16, 2005; American Hospital Association Brief *Amicus Curiae* in Support of Evanston Northwestern Healthcare Corporation, filed December 16, 2005; Brief of *Amicus Curiae* Joint Commission on Accreditation of Health Care Organizations In Support of Evanston Northwestern Healthcare Corporation, filed December 16, 2005; Brief of *Amicus Curiae* The Advisory Board Company in Support of Evanston Northwestern Healthcare Corporation, filed December 16, 2005; Brief *Amicus Curiae* of the Business Roundtable In Support of Evanston Northwestern Healthcare Corporation, filed December 16, 2005.

Since the submission of the Economic Professors is nearly two years after the permitted time period, their motion should be denied as untimely.² Even further, the Economic Professors have failed to show any cause or explanation why their submission could not have been made during the permitted time period. *See* Rule 3.52(j).

II. The Economic Professors' Motion Is Improper Because They Failed To Disclose Their Interest

Pursuant to Rule 3.52(j), any motion seeking leave to file an *amicus* brief “shall identify the interest of the applicant.” The submission of the Economic Professors states that they are “acting independently of the Commission and any interested parties,” however documents collected during discovery in this matter establish that Professor David Dranove has previously worked to analyze the ENH merger on behalf of a Managed Care Organization (“MCO”) that testified at trial for Complaint Counsel. *See* Economic Professors’ Motion at 2.

During discovery, ENH served subpoenas on numerous third parties including [REDACTED]. As part of its document production in response to Respondents’ subpoena, [REDACTED] produced a report entitled [REDACTED] which was authored by Professor David Dranove. *See* [REDACTED] attached as Exhibit 1, *in camera*; *see also* [REDACTED]. This report analyzed the ENH merger as well as other hospital mergers on behalf of [REDACTED].

² The issue here is easily distinguished from the Commission’s decision in *Rambus* where an untimely *amicus* brief was permitted. The *amicus* submission was a mere *three days* late – not nearly *two years* as is the case here – and the public interest was served by the *amicus*

Professor David Dranove's failure to disclose that he previously performed an analysis of this merger on behalf of an MCO with a direct interest in this proceeding conflicts with the Economic Professors' claim that they are "acting independently" in submitting their *amicus* brief. At a minimum, the Dranove report demonstrates that the Economic Professors were well aware of this merger in 2004 and further highlights their failure to provide justification for the delinquency of their submission.

III. The Public Interest Will Not Benefit From Consideration Of The Economic Professors' Amicus Brief

The Economic Professors' submission will not benefit the public interest because it contains views already advanced by parties to this litigation and does not contain reliable information to support its conclusions. The Economic Professors' *amicus* brief contains numerous conclusory statements, all without citation to any authority whatsoever. For example, the Economic Professors claim to present "consensus views" supported by "systematic research and employer surveys" and "literature." See Economic Professors' *Amicus* Brief at 2-4. Each of these statements are made without providing any support or citation to authority. The Economic Professors fail to provide any explanation how these types of conclusory opinions are intended to assist the Commission or the public interest.

submission, an element which is also absent here. See Order Granting Motions For Leave to File Briefs *Amici Curiae, In re Rambus Inc.*, No. 9302 (F.T.C. October 19, 2006).

Conclusion

The Economic Professors' Motion for Leave to file an *amicus* brief is untimely and improper because it fails to disclose the true interest of the Economic Professors. For these reasons, the submission of the Economic Professors will not and does not benefit the public interest and should therefore be denied.

October 22, 2007

Respectfully submitted,

David E. Dahlquist
Duane M. Kelley *by permission JMD*
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Counsel for Respondent
Evanston Northwestern Healthcare
Corporation and ENH Medical Group,
Inc.

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

**COMMISSIONERS: Deborah Platt Majoras, Chairman
 Pamela Jones Harbour
 Jon Leibowitz
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In the matter of)	
)	Docket No. 9315
Evanston Northwestern Healthcare)	
Corporation,)	
a corporation, and)	PUBLIC
)	
ENH Medical Group, Inc.,)	
a corporation)	
_____)	

ORDER

Upon consideration of Motion of Economic Professors For Leave to File Brief as *Amicus Curiae* and Respondents' Opposition thereto, it is hereby ORDERED that Motion of Economic Professors is hereby DENIED.

It is further ORDERED that Respondent's Motion to Strike the Motion of Economic Professors' is hereby GRANTED.

DATED:

For the Federal Trade Commission

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by delivering
copies to:

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Thomas H. Brock
Federal Trade Commission
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Washington, D.C. 20580

(Public Version Only)
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Dated: October 22, 2007

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October 22, 2007

VIA HAND DELIVERY

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

Re: Evanston Northwestern Healthcare Corporation and ENH Medical
Group, Inc. Docket No. 9315

Dear Mr. Clark:

Enclosed please find for the filing an original and fourteen (14) copies of the following documents:

1. **Public** Version of Respondents' Opposition to and Motion to Strike Motion of Economic Professors to File *Amicus Curiae*;
2. **In Camera** Version of Respondents' Opposition to and Motion to Strike Motion of Economic Professors to File *Amicus Curiae*; and
3. Order Granting Respondent's Motion to Strike the Motion of Economic Professors.

Please file-mark and return two copies of each Motion to the awaiting courier. Thank you for your assistance. If you have questions, please fee free to call me.

Sincerely,



Joncilee M. Davis, CLA
NALA Certified Paralegal

/jmd
Enclosures

Clerk
October 22, 2007
Page 2

cc:

Via e-mail and first class mail, postage pre-paid

Thomas H. Brock *with enclosure of both motions*
Federal Trade Commission
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David Dranove *with enclosure of public version of motion*
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