

Interlocutory Orders, Etc.

IN THE MATTER OF

**EVANSTON NORTHWESTERN HEALTHCARE
CORPORATION,
AND
ENH MEDICAL GROUP, INC.**

Docket No. 9315 – Order, April 29, 2008

**ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF
*AMICUS CURIAE***

On October 17, 2007, a number of Economics Professors filed a Motion for Leave to File Brief As *Amicus Curiae* In Support of Neither Party (“Motion”) in this matter, and attached to that motion a copy of the Brief they propose to file (“Proposed Brief”).¹ The Professors advise that they are professors at major universities who have researched and written extensively on health economics, industrial organization, and the economics of competition in health care, and that the Proposed Brief “describes what [they] believe are consensus views on some economic questions that arise in connection with the August 6, 2007 ruling by the . . . Commission in [this proceeding].” Motion at 2. They also state that they are

acting independently of the Commission and any interested parties [and] take no side in this matter, but believe that [their] brief may assist the Commission in addressing any appeals and future decisions.

¹ David Dranove, a Professor in the Department of Management and Strategy at the Kellogg School of Management at Northwestern University, has filed the Motion and the proposed Brief on behalf of himself and the other Economics Professors identified in the Motion.

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Id. On October 22, 2007, Respondents filed an Opposition To and Motion to Strike Motion of Economic Professors to File *Amicus Curiae* (“Opposition”). Respondents argue that the Motion is untimely because this matter is no longer pending on appeal, citing Commission Rule 3.52. Opposition at 2. Respondents also argue that the Motion is improper because it failed to disclose the Professors’ interest in the ENH merger. Opposition at 4. Finally, Respondents argue that the public interest will not benefit from consideration of the Proposed Brief, because it expresses views already advanced by parties to this litigation. Opposition at 5.

The Commission standard for determining whether to accept a particular proposed amicus brief rests on whether the public interest will benefit from Commission consideration of the brief.² The Commission has determined that the Proposed Brief satisfies that standard. Commission Rule 3.52(j) provides in relevant part:

Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed.

16 C.F.R. § 3.52(j)(2008). Respondents argue that the Professors therefore were required to file the Proposed Brief while this matter was pending on appeal and cross-appeal from the Initial

² See, e.g., *In the Matter of Realcomp II Ltd.*, Docket No. 9320, Order Granting Motion for Leave to File Brief *Amicus Curiae* on Issues of Remedy (F.T.C. April 8, 2008); *In the Matter of Evanston Northwestern Healthcare Corporation, et al.*, Docket No. 9315, Order Granting Motions For Leave to File Briefs *Amici Curiae* (F.T.C. January 24, 2006); *In the Matter of Telebrands Corp., et al.*, Docket No. 9313, Order Granting Motion for Leave to File Brief *Amicus Curiae* and Revising Briefing Schedule (F.T.C. Dec. 1, 2004); *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions for Leave to File Briefs *Amici Curiae* and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs *Amici Curiae* (F.T.C. June 21, 2004).

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Decision of the Administrative Law Judge; that is, between December 16, 2005, when Respondents filed their Appeal Brief, and February 3, 2006, when Complaint Counsel filed their Answering and Cross-Appeal Brief.³ However, the Commission has in the past permitted the filing of amicus briefs at later stages of administrative proceedings before the Commission.⁴ The crucial issue is not the stage of the proceedings at which a particular amicus brief may be filed, but rather whether its filing at that stage will assist the Commission in resolving the questions at issue at that stage. On August 2, 2007, the Commission issued an Opinion finding liability in this matter, and also issued an Order affirming the Initial Decision; vacating the Order issued as part of the Initial Decision; and directing Respondent Evanston Northwestern Healthcare Corporation (ENH) to file with the Commission a detailed proposal for implementing the type of injunctive relief that the Commission had selected, as prescribed in the Opinion of the Commission. In particular, the Order required Respondent Evanston Northwestern Healthcare Corporation to file a proposed order; required Complaint Counsel thereafter to file with the Commission any objections to or comments on that proposed order; and required Respondent thereafter to file any response it had to Complaint Counsel's filing.

The Proposed Brief was filed before Complaint Counsel filed their response to Respondent's detailed proposal for implementing the injunctive relief the Commission selected and expresses a number of concerns about the August 2, 2007 Order. The Proposed Brief was therefore relevant to the Commission's determination of how to implement the type of injunctive relief that the Commission

³ Opposition at 2-3. Respondents note that a number of independent parties filed amicus briefs during this period. *Id.*

⁴ For example, in *In the Matter of Rambus Inc.*, the Commission permitted the filing of amicus briefs after it issued its Opinion on Liability and Order -- but before it issued its Opinion on Remedy and Final Order. *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions For Leave to File Briefs *Amici Curiae*, (F.T.C. October 19, 2006). See also Order Denying Motion for Leave to File Brief *Amicus Curiae*, *In the Matter of North Texas Specialty Physicians*, Docket No. 9312 (F.T.C. June 7, 2005).

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ordered, and the Commission has determined that the Proposed Brief consequently satisfies the standard enunciated in Commission Rule 3.52(j). Accordingly,

IT IS ORDERED that the Motion of the Economics Professors for leave to file a brief *amicus curiae* be, and it hereby is, **GRANTED**.

By the Commission.

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IN THE MATTER OF

NINE WEST GROUP INC.*Docket No. C-3937 – Order, May 6, 2008***ORDER GRANTING IN PART PETITION TO REOPEN AND
MODIFY ORDER ISSUED APRIL 11, 2000**

On October 30, 2007, Nine West Footwear Corporation, successor to Nine West Group Inc. (“Nine West”), filed a Petition to Reopen and Modify Order (“Petition”) in Docket No. C-3937, pursuant to section 5(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(b), and section 2.51 of the Federal Trade Commission’s Rules of Practice (“Rules”), 16 C.F.R. § 2.51. Nine West supplemented its Petition with a Supplemental Memorandum and Supplemental Declaration on February 8, 2008, and with additional information on December 5, 2007, February 29, 2008, and March 26, 2008. Nine West asks the Federal Trade Commission (“Commission”) to reopen and modify the consent order issued by the Commission on April 11, 2000 (“Order”), *Nine West Group Inc.*, 129 F.T.C. 818 (2000), 2000 FTC LEXIS 48 (2000). Nine West requests that the Commission set aside Paragraph II of the Order, which prohibits Nine West from entering into agreements to fix, control, or maintain resale prices (“resale price maintenance agreements” or “RPM”). Nine West argues that the Supreme Court’s decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (“*Leegin*”),¹ changed the law governing resale price maintenance agreements so that agreements that were *per se* unlawful at the time the Order was issued must now be subject to a rule of reason analysis to determine their legality. Nine West asks that, in light of this change in the law, the Commission reopen the Order and set aside its prohibitions as no longer necessary or appropriate under the new law. Nine West also seeks reopening and modification under the public interest standard. Among other

¹ 551 U.S. ___, 127 S.Ct. 2705 (2007), 2007-1 Trade Cases ¶ 75,753, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911).