



AlaFile E-Notice

01-CV-2013-901119.00

Judge: JOSEPH L. BOOHAKER

To: HALE PHILLIP BRIAN
brian.hale@adph.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

STATE BOARD OF HEALTH V. ALL WOMEN'S, INC. ET AL
01-CV-2013-901119.00

The following matter was FILED on 8/8/2013 1:13:50 PM

Notice Date: 8/8/2013 1:13:50 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL 35203

205-325-5355
anne-marie.adams@alacourt.gov

ELECTRONICALLY FILED
8/8/2013 1:13 PM
01-CV-2013-901119.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

STATE BOARD OF HEALTH,)
Plaintiff,)
V.) Case No.: CV-2013-901119.00
ALL WOMEN'S, INC.,)
DIPAT, L.L.C,)
DIANE W. DERZIS,)
PATRICK H SMITH, BRUCE E.)
NORMAN ET AL,)
Defendants.)

ORDER

This matter comes before the Court for hearing on Plaintiff State Board of Health ("Board")'s petition for declaratory and permanent injunctive relief under the provisions of *Ala. Code §22-21-33(a) (1975)*. The Court, having received certain documents into evidence as well as the sworn testimony of witnesses during the course of an ore tenus proceeding during which the Court was able to observe the witnesses as they testified, making credibility determinations based thereon, hereby enters the following order based on the evidence, the law and the credibility determinations as set forth herein:

Pleading History

The State commenced this action on March 26, 2013, against Defendants All Women's, Inc., d/b/a New Woman All Women Health Care; Dipat, L.L.C.; Diane W. Derzis; Patrick Smith; and Bruce E. Norman, M.D.

Plaintiff alleges that it is authorized under the provisions *Ala. Code §§ 22-21-20 through -33 (1975)* to license hospitals, as that term is defined at *Ala. Code §22-21-20 (1975)*; that it is authorized, under the provisions of *Ala. Code §§22-21-22 & 25 (1975)*, to revoke or renew said licenses for hospitals; that it is enabled, under the provisions of *Ala. Code §22-21-28 (1975)*, to promulgate regulations with regard to the operation of hospitals; and that it is authorized under the provisions of *Ala. Code §22-21-33 (1975)*,

to seek declaratory and injunctive relief, against any individual or entity that operates a hospital, as defined in the Act, without having first obtained a license from the State.

Plaintiff further alleges that Defendants All Women's, Inc. and its officers, Defendants Derzis and Smith, are operating an "abortion or reproductive health center" at 1001 17th Street South in Birmingham, Alabama ("the Birmingham Facility"), which said health facility is defined under *Ala. Code §22-21-20 (1975)* as a "hospital", without proper license from the State and therefore seeks declaratory and injunctive relief from the Court.

On April 26, 2013, Defendants Derzis, Dipat, LLC, and Patrick Smith, filed their motion to dismiss Plaintiff's complaint.

On April 29, 2013, Defendant Bruce E. Norman filed his motion to dismiss Plaintiff's complaint.

On May 31, 2013, upon hearing on Defendants' motion to dismiss, all Defendants withdrew their motions, rendering all motions moot. Whereupon, the Court ordered all Defendants to file their answers to Plaintiff's complaint within fourteen (14) days and set this matter for trial on August 5, 2013.

On June 14, 2013, Defendant Norman filed his answer in which he pled the general issue, denying that his operation of the said facility was in violation of the State Board of Health's rules and regulations.

On June 17, 2013, Defendants All Women's, Inc., Diane W. Derzis; Dipat, LLC; and Patrick A. Smith denied the allegations of Plaintiff's complaint.

On July 12, 2013, Plaintiff filed its motion for summary judgment which was denied on April 5, 2013, prior to the commencement of the evidentiary hearing conducted on same date.

On July 22, 2013, an *amicus curie* brief was filed jointly by the Amicus Life Legal Defense Foundation, the Charismatic Episcopal Church for Life (CEC for Life), and by Operation Rescue in support of Plaintiff's petition seeking injunctive relief.

Evidence before the Court

The Board introduced the following documents into evidence without objection from Defendants:

A record from the Alabama Secretary of State evidencing the fact that Defendant All Women's Inc. was incorporated as a domestic Alabama Corporation on June 2, 1994, in Jefferson County, Alabama;¹

A record from the Alabama Secretary of State being the Annual Report for the year 2013 for Defendant All Women's, Inc. indicating that Defendant Derzis is the corporate agent of the entity as well as its President, and that Defendant Patrick Smith is the Secretary of the said corporation²;

A record from the Alabama Secretary of State evidencing the creation and existence of Defendant Dipat, L.L.C. as an Alabama limited liability company comprised of two members, Defendants Derzis and Smith³;

A record from the Georgia Secretary of State indicating the existence of an entity known as All Women's Healthcare of Columbus, Inc., formed under the laws of the State of Georgia in which Defendant Derzis is the sole officer⁴;

A real estate lease agreement entered into on February 5, 2013, by and between Defendant Dipat, L.L.C., as landlord, and Defendant Bruce E. Norman M.D., as tenant, for premises located at 1001 17th Street South in Birmingham, Alabama⁵. The said lease contains the following provisions, among others:

"2. Use of Premises: The Tenant agrees to use the premises herein described, for a medical office building and surgical center. The tenant shall obtain, at its own expense, all necessary governmental and business licenses and permits for such use of the premises."

"...

"4. Rent: The Tenant agrees to pay the Landlord a monthly rent as follows:

a. An amount equal to TWO THOUSAND DOLLARS and NO/100's (\$2,000.00)...

5. Utilities: In addition to the other rental payments set forth herein, Tenant shall pay utility bills for water, gas, electricity and telephone, provided for the Leased Premises during the term of the Lease Agreement. If Tenant does not pay the same, Landlord may pay the same and such payment shall be added to the rental of the Leased Premises. Nothing contained herein, however, shall impose any obligation upon Landlord to make any such payments for such utilities."

¹ Plaintiff Exhibit #1

² Plaintiff Exhibit #3

³ Plaintiff Exhibit #8

⁴ Plaintiff Exhibit #10

⁵ Plaintiff Exhibit #14

A document executed by Defendant Bruce E. Norman, contemporaneously with the execution of the above referenced real estate lease, whereby Defendant Norman purportedly agreed with All Women's of Columbus to "lease" to Defendant Norman individuals to staff the operation of his medical office located at the Birmingham Facility as well as to provide to Defendant Norman "order supplies, medications, medical malpractice coverage, workmen's compensation" and to in short, "manage his Birmingham practice"⁶.

The Court then received the oral testimony of Defendant Diane W. Derzis. Ms. Derzis testified that she has an ownership interest in Defendant Dipat, LLC and the All Women's Healthcare of Columbus, Inc. In addition, Ms. Derzis testified that she has an ownership interest in All Women's, Inc., an Alabama corporation, as well as in an entity known as Longhorn Farms.

Ms. Derzis testified that New Woman All Women Health Care was a wholly owned corporate subsidiary of All Women's, Inc. and that as of May of 2012, the said subsidiary corporation has become defunct and is no longer operational.

The facility in which New Woman All Women Health Care formerly operated, located at 1001 17th Street South in Birmingham Alabama, is now leased to Defendant Bruce E. Norman. Ms. Derzis testified that Defendant Norman has been a tenant in the said facility since February 2013, and that she does not have personal knowledge of the nature of his medical practice conducted at the said Birmingham Facility.

Ms. Derzis testified that New Woman All Women Health Care advertized in the Yellow Pages as well as on the internet. She testified that following entry of the Consent Decree of April 3, 2012⁷, to which All Women's, Inc. was a party along with the Alabama Board of Health, she did not renew the advertizing in the Yellow Pages for New Woman All Women Health Care. Ms. Derzis also testified that all advertizing, which New Woman All Women Health Care had created on the internet, was also "taken down" immediately after New Woman, Inc. entered into the said consent decree with the State.

Ms. Derzis testified that the internet contains websites wherein referral services provide information for certain abortion or reproductive health centers, and that the

⁶ Plaintiff Exhibit #17

⁷ Plaintiff Exhibit #7

contact telephone number for the said New Woman All Women Health Care clinic may still be provided, but that she has no control over those referral services or the content of their internet web postings. She testified that though New Woman, Inc. undertook to take down all such websites, that not all web pages have been removed due to these said referral websites over which New Woman has no control.

Ms. Derzis testified that one of her companies, Dipat, LLC, is the owner of the referral telephone number (205) 933-1118. She testified that as part of the lease agreement entered into between Dipat, LLC and Dr. Norman, the said telephone number was leased to Dr. Norman for his use in the operation of the Birmingham Facility.

Ms. Derzis testified that since the hearing conducted by this Court on May 31, 2013, at which the telephone number was an issue, the said telephone number is no longer leased to Defendant Norman. Ms. Derzis did testify, however, that the said telephone number remains operable and that from it referrals are made to potential patients seeking to terminate their pregnancies, including referrals to Defendant Norman at the Birmingham Facility.

Ms. Derzis testified that the telephone number (205) 933-1118 is currently available in the Yellow Pages and on certain referral web sites. She further testified that referrals are made to the Birmingham facility operated by Defendant Norman by the individuals who take calls from potential abortion patients who access the said referral telephone number.

Ms. Derzis testified that Columbus Women's Health has paid all utility bills for the 1001 17th Street facility in Birmingham, Alabama since February 5, 2013, up to the date of the hearing. She testified also that Columbus Women's Health has not billed Defendant Norman for reimbursement of utility expenses though the lease agreement between Dipat, LLC and Defendant Norman requires Defendant Norman to be responsible for payment of his utility expenses at the said Birmingham facility in addition to payment of rent.

Ms. Derzis also testified that Defendant Norman paid no rent for the first 3 months of the February 5, 2013, lease. She testified that this was not a matter of

abatement of the monthly installments, but due to a default by Defendant Norman which has since been cured.

Ms. Derzis testified that other than pay the utility expense for the said Birmingham facility, Columbus Women's Health also "leases" to the said facility its staff which consists of 4 to 5 health care providers. Other than the utilities and the staff, Ms. Derzis testified that the Columbus Women's Health entity does not provide any other aid or support to the said Birmingham Facility.

Ms. Derzis testified that though she has an ownership interest in several women's health corporations that none of the said corporations are owned by any of the other corporations. She testified that All Women's Healthcare of Columbus, Inc. is a separate corporation from All Women's, Inc. the Alabama corporation, which is separate from the Mississippi corporation known as the Jackson Women's Health corporation.

Ms. Derzis testified that following the May 31, 2013, hearing in this case that she contacted the Yellow Pages and directed the service to delete reference to the New Woman All Women Health Care clinic.

Ms. Derzis testified that Defendant Patrick Smith, a co-owner with her in Dipat, LLC, is an 86 year old retired physician who is no longer in the practice of medicine and has not engaged in any activity which Plaintiff seeks to enjoin. Ms. Derzis also testified that there are no plans to reactivate the now defunct corporate entity, New Woman All Woman Health Care, Inc.

Regarding the operation of the said Birmingham facility by Defendant Norman under his lease with Dipat, LLC, Ms. Derzis testified that neither she, nor any entity in which she has an ownership interest provides any services, supplies, malpractice insurance, workers compensation insurance, pays the tax for, supervises the employees nor suggests how the practice of medicine should be conducted on the said premises.

Regarding the referral telephone number, (205) 933-1118, Ms. Derzis testified that persons who access the said telephone number are referred to the Jackson, Mississippi abortion facility, the Columbus Georgia abortion facility, to a Montgomery Alabama abortion facility, or to Defendant Bruce Norman at the said Birmingham Facility. She testified that though Dipat, LLC owns the said referral number, that there

is no fee or other remuneration that flows to Dipat, LLC for the referrals that are made to the various named abortion facilities.

The Court then received the sworn testimony of Defendant Bruce Norman. Dr. Norman testified that he is an independent contractor providing abortion services in Jackson Mississippi and Montgomery Alabama as well as in Birmingham at the said Birmingham Facility. Dr. Norman testified that he was an independent contractor providing abortion services at the said Birmingham facility from 2001 – 2012, and that since February 2013, he has maintained a private doctor's office at the said Birmingham Facility.

In February 2013, Dr. Norman testified that he commenced practice at the said facility in his own name. Dr. testified that he did not commence performing abortion procedures at the said Birmingham Facility until later in the month of February 2013. He testified that he employs no staff, but rather leases 4 employees from Columbus Women's Health, Inc. of which Defendant Derzis has an ownership interest.

Dr. Norman testified that there is another entity in Columbus known as Columbus Women's Health PC, which is a professional corporation that is owned by himself and another physician. Columbus Women's Health, Inc., Dr. Norman testified, provides management services to the professional corporation and Defendant Derzis has the ownership interest in the corporation, that is, the management company, not the professional corporation.

Dr. Norman testified that Columbus Women's Health, Inc. does not provide management services for the said Birmingham facility, though the said Georgia entity does provide the nursing staff to the said Birmingham facility.

Dr. Norman testified that the Birmingham Facility, located at 1001 17th Street South, is operated for the sole purpose of providing abortions. He testified that other related services are also provided such as counseling regarding alternatives to abortion, legal counseling, and providing contraceptive services. Dr. Norman testified that only abortion procedures are performed at the said Birmingham Facility.

Dr. Norman testified that he is a gynecologist and plans to expand the reproductive services provided at the said Birmingham facility beyond providing

abortions to expectant mothers. However, he testified, presently the facility is used solely to provide abortion services for women who are pregnant up to 12 weeks or 12 weeks and 6 days. Dr. Norman testified that expectant mothers who are referred to the said facility and who do not wish to terminate their pregnancies are referred to other health care facilities for prenatal care. Dr. Norman also testified that, at times, patients who contact the Birmingham facility are referred out to other facilities that perform pregnancy termination procedures. When the patient has been pregnant for a period of 13 weeks or more, Dr. Norman testified that he refers such patients to another abortion clinic usually one in Atlanta, Georgia.

Dr. Norman testified that the said Birmingham facility is open 1 day per week, every other week. He testified that 20% of the patients do not follow through with the pregnancy termination procedure. Regarding the number of abortion procedures performed at the Birmingham Facility, Dr. Norman testified as follows:

“Q: How many days a week is your office open?

A: I'm open one day every other week.

Q: One day every other week in Birmingham?

A: Correct.

Q: And can you tell us what a standard day is for you what do you do?

...

A: A standard day is I come to the office, see the patients. Usually I completed the terminations within a couple of hours, wait until they're discharged and then I leave.

Q : About how many terminations do you perform in each day that you're there?

A: It varies. It's generally less than I would think probably 12 to 14 a day. It's a lot less than I did last week, I think I only this eight or nine.”

At another point in his testimony with regard to the number of abortions performed at the said Birmingham Facility, Dr. Norman testified that he was aware that he could not perform over 30 such procedures in any given month and that he had not performed more than 30 procedures in any month since he has been in operation. His testimony was as follows:

“Q: And the criteria for a doctor's office as it relates to the performing of terminations of pregnancy, what is your knowledge about how many terminations you can do per month in a calendar year?

A: My understanding is that it must be less than 30 per month.

Q: And you've certainly complied with that in each and every month that you've been operating as a doctor's office; is that correct?

A: Yes, I have.

For referral patients that come to the Birmingham facility from the (205) 933-1118 referral number, Dr. Norman testified that he pays no referral fee and that, since the May hearing in this case, he has secured his own telephone number, 933-2548, which is exclusively used for the said Birmingham Facility. Prior to obtaining this said telephone number, Dr. Norman testified that he leased the (205) 933-1118 telephone number from Dipat, LLC. Regarding the source of his patients to the Birmingham Facility, Dr. Norman testified as follows:

“Q: Do you know how a member of the public would be able to get in touch with your office?

A: To a limited extent. I've had a couple of patients that were actually referred by the Health Department to come to the clinic. People find out where you are. I've had patients obviously come to me through the abortion referral line. But I was really surprised that the Health Department actually referred me several patients.

Q: What referral line are you referring to?

A: The one that goes -- 1118 number, the 933-1118 number.

Q: And that was the number that you used until May of this year?

A: That would be correct.

Q: And now you have a new number?

A: Correct. I have an exclusive number now, that's correct.

Q: And how can people find out about that number?

A: I don't know how the Health Department gives that number out, but clearly they did. But also as I mentioned earlier, the 1118 number is the abortion referral line. And if a patient in Birmingham wants to have a termination and wants to go to a private physician's office, they're given my number. They call my number and then my staff answers that and arranges for the abortion.”

Findings of Law

The injunctive relief for which Plaintiff petitions is statutory. Ala. Code §22-21-33(a) (1975) provides in pertinent part as follows:

“(a) . . . The State Board of Health, upon determination that a facility or business is operating as a hospital, within the meaning of this article or any rules promulgated hereunder, and that the facility or business does not have a current and valid license granted by the State Board of Health, may apply to the circuit court of the county in which the unlicensed facility or business is located for declaratory and injunctive relief. The proceedings shall be expedited. *The sole evidentiary questions before the court in a proceeding shall be whether the facility or business that is the subject of the action meets the definition of a hospital, within the meaning of this article and any rules promulgated hereunder, and whether the facility or business has been granted a current and valid license to operate by the State Board of Health. If the State Board of Health prevails on these questions, then the court shall, upon request of the State Board of Health, forthwith grant declaratory and injunctive relief requiring the operator or operators to close the facility or business and requiring the operator or operators to move all residents or patients to appropriate placements. Any individual failing to obey an injunction to close a hospital shall be guilty of a Class A misdemeanor. . . .(emphasis added)*”

The statutory charge to the Court is rather clear. The burden of proof is with the Plaintiff State Board of Health to establish that the said Birmingham Facility is a hospital, as that term is defined by statute and the regulations promulgated thereunder, and further, that said hospital does not have a current and valid license to operate issued by Plaintiff State Board of Health. If so proven to the Court's reasonable satisfaction, then the Court, upon Plaintiff's petition, shall so declare and enjoin the said hospital from operating as such until the said facility first obtains a valid and current license from the Plaintiff State Board of Health.

Ala. Code §22-21-20(1) (1975) defines the term “hospital” as follows:

“(1) HOSPITALS. General and specialized hospitals, including ancillary services . . . *abortion or reproductive health centers* . . . Also included within the term are long term care facilities such as, but not limited to, skilled nursing facilities, intermediate care facilities, assisted living facilities, and specialty care assisted living facilities rising to the level of intermediate care. The term “hospitals” relates to health care institutions and *shall not include the private offices of physicians or dentists, whether in individual, group,*

professional corporation or professional association practice. This section shall not apply to county or district health departments.(emphasis added)"

I. Whether the Birmingham Facility is a "Hospital"

The only case decided by the Alabama Appellate Courts interpretive of this provision is ***Tucker v. State Dept. of Public Health***, 650 So.2d 910 (Ala.Civ.App. 1994). The case involved an OB-GYN who maintained a standard office practice but also performed over 1200 abortions per year in his office. The physician claimed the statutory exception of operating a doctor's office as opposed to being designated as a "hospital" under Ala. Code §22-21-20(1)(1975) in order to oppose the State Board of Health's claim that he was operating an unlicensed abortion clinic. The physician appealed to the Montgomery Circuit Court which affirmed the State Board of Health. In affirming the trial court, the Alabama Court of Civil Appeals, wrote the following:

"Section 22-21-21, Code 1975, provides for the 'Licensing of Hospitals, Nursing Homes and Other Health Care Institutions.' It states:

"The purpose of this article is to promote the public health, safety and welfare by providing for the development, establishment and enforcement of standards for the treatment and care of individuals in institutions within the purview of this article and the establishment, construction, maintenance and operation of such institutions which will promote safe and adequate treatment and care of individuals in such institutions.'

...
The legislature gave the State Board of Health the authority to adopt necessary rules and regulations to meet these statutory objectives. § 22-21-28, Code 1975. That section provides:

'(a) In the manner provided in this section, the state board of health, with the advice and after the approval by the advisory board, shall have the power to make and enforce, and may modify, amend and rescind, reasonable rules and regulations governing the operation and conduct of hospitals as defined in section 22-21-20. All such regulations shall set uniform minimum standards applicable alike to all hospitals of like kind and purpose in view of the type of institutional care being offered there and shall be confined to setting minimum standards of sanitation and equipment found to be necessary and prohibiting conduct and practices inimicable to the public interest and the public health.'

Beginning in 1980 the State Board of Health adopted specific rules and regulations concerning abortion and reproductive health centers. Rules of the Alabama State Department of Health, Division of Licensure and Certification, *Rule 420-5-1*. The rules set minimum uniform standards for the operation and regulation of abortion and reproductive health centers.

While § 22-21-20 defines an “abortion or reproductive health center” as a hospital, *the statute does not contain the definition of what is in fact an “abortion or reproductive health center.”* The State Board of Health remedied the void by promulgating a definition pursuant to the Alabama Administrative Procedure Act. The definition at issue is one that was refined and amended by the State Board of Health in 1990. *Rule 420-5-1.01*. That definition is as follows:

“(b) ‘Abortion or Reproductive Health Center’ means any health care facility operated *substantially for the purpose of performing abortions*. Such a facility must be a free-standing unit and not part of a hospital or other facility licensed for other purposes by the State Board of Health. A health care facility operates substantially for the purpose of performing abortions *if any* of the following conditions are met:

“1. The health care facility performs *thirty or more abortion procedures per month during any two months of a calendar year*;

“2. The health care facility *holds itself out to the public* as an abortion provider by advertising *by some public means*, such as a newspaper, telephone directory, magazine, or electronic media, that it performs abortions; or

“3. The health care facility applies to the State Board of Health for licensure as an abortion or reproductive health center.” (emphasis added)

As a consequence of this definition, the State Board of Health required facilities within the state which met any of these requirements to be licensed.

Dr. Tucker admitted that he performed approximately 1,200 abortions per year and that he advertised in the Yellow Pages. He insists, however, that his activities are not subject to regulation because the procedures are performed in his “private office” and that § 22-21-20 specifically excludes the “private offices of physicians” from regulation.

We find the trial court's judgment to be persuasive. We, therefore, adopt it as our own.” 650 So.2d at 912-13

The Court shall therefore consider the two relevant regulatory criteria established by the Plaintiff Board for determining whether a facility is an abortion or reproductive health center or not. Those two criteria are the numerical criteria and the “holding out” criteria.

- a. *Ala. Admin. Code Rule §420-5-1-.01(2)(b)(1)* “The health care facility performs thirty or more abortion procedures per month during any two months of a calendar year” – De Minimis or Delineable.

The Board has argued that the numerical aspect of the definition of an abortion or reproductive clinic, includes, by implication, a clinic such as the Birmingham Facility which exists *solely* for the purpose of providing abortion services. The argument raises

the issue of whether the said definition, as provided by regulations promulgated by the Plaintiff State Board of Health, is intended as a *de minimis* rule or a *delinialtional* rule. If *de minimis*, then the State's interest in regulating such clinics arises only when a certain level of activity is conducted in such facilities, defined as at least 30 abortion procedures per month for any two months of a calendar year. If delinialtional, then the number of procedures specified in the said regulation is used by the Court when the facility performs many prenatal services for pregnant women other than abortions. Then the Court would consider the numerical definition to determine that a facility that may be otherwise operated as an exempt doctor's office is in reality an abortion or reproductive health center, rendering it a "hospital" and therefore subject to regulation by Plaintiff.

Plaintiff State Board of Health argues that the definition is a *delinialtional* rule such that if abortion is the sole procedure undertaken at the facility, then the facility is an abortion or reproductive health center subject to licensure requirements. Defendants argue that the regulatory definition is *de minimis* and that since the number of abortions performed at the facility purportedly does not reach the minimum number required to bring the said facility under the scope of the Plaintiff's licensure requirements, that Defendants' Birmingham Facility is therefore exempt.

In resolving this dispute regarding the proper interpretation of the said regulation, The Court has considered the definitions other States have employed for "abortion or reproductive health centers" which involve a numerical criteria. For example in Mississippi, where Defendant Derzis has an interest in such a facility, *Miss. Code Ann. § 41-75-1(f)* defines an abortion facility as follows:

(f) "Abortion facility" means a facility operating substantially for the purpose of performing abortions and is a separate identifiable legal entity from any other health care facility. . . . An abortion facility operates substantially for the purpose of performing abortions if any of the following conditions are met:

(i) The abortion facility is a provider for performing ten (10) or more abortion procedures per calendar month during any month of a calendar year, or one hundred (100) or more in a calendar year.

(ii) The abortion facility, if operating less than twenty (20) days per calendar month, is a provider for performing ten (10) or more abortion procedures, or performing a number of abortion procedures that would be equivalent to ten

- (10) procedures per month, if the facility were operating twenty (20) or more days per calendar month, in any month of a calendar year.
- (iii) The abortion facility holds itself out to the public as an abortion provider by advertising by any public means, such as newspaper, telephone directory, magazine or electronic media, that it performs abortions.
- (iv) The facility applies to the licensing agency for licensure as an abortion facility.”

Thus, in Mississippi, the statute is drawn in a much more restrictive manner. Ten abortions in any month, or 100 during any calendar year renders the facility an abortion clinic.

In Texas, V.T.C.A. § 245.002 defines an “abortion facility to mean “a place where abortions are performed”. This definition would more closely describe the interpretation that the Plaintiff argues. However, even in Texas, wherein under the provisions of V.T.C.A. § 245.003 requires such a facility to obtain a license to operate, V.T.C.A. § 245.004 sets forth exceptions to the licensing requirement. For abortion clinics, § 245.002(a) and (b) provides:

“(a) The following facilities need not be licensed under this chapter:

...

(2) the office of a physician licensed under Subtitle B, Title 3, Occupations Code, unless the office is used *substantially for the purpose of performing abortions*. . .

(b) For purposes of this section, a facility is used substantially for the purpose of performing abortions if the facility:

(1) is a provider for performing:

(A) at least 10 abortion procedures during any month; or

(B) at least 100 abortion procedures in a year;

(2) operates less than 20 days in a month and the facility, in any month, is a provider for performing a number of abortion procedures that would be equivalent to at least 10 procedures in a month if the facility were operating at least 20 days in a month;

(3) holds itself out to the public as an abortion provider by advertising by any public means, including advertising placed in a newspaper, telephone directory, magazine, or electronic medium, that the facility performs abortions; or

(4) applies for an abortion facility license.”

The structure of the provisions are very similar to that employed by the Alabama State Board of Health, in that the phrase - “substantially for the purpose of performing abortions” - is used and that term is defined with the same three criteria, a numerical

criteria, a holding out criteria, and an application criteria. The Court notes with regard to the Texas Statute, the exemption provision of Sec. 245.004 (a)(2) previously read, prior to a 2003 amendment as follows:

“(a) The following facilities need not be licensed under this chapter:
(1) a hospital licensed under Chapter 241 (Texas Hospital Licensing Law); or
(2) the office of a physician licensed under Subtitle B, Title 3, Occupations Code, unless the office is used for the purpose of performing more than 300 abortions.”

The word “substantially” was added to the statutory language in the process of narrowing the exemption and adding more than a numerical factor to further reduce the instances wherein a doctor’s office could be exempted.

The Court is well familiar with the proposition in the interpretation of administrative regulations that deference is to be paid to the interpretation given those said regulations by the agency charged with implementing and enforcing the regulations. However, said deference is not absolute. The Court in ***Kids' Klub, Inc. v. State Dept. of Human Resources***, 874 So.2d 1075 (Ala.Civ.App. 2003) addressed the issue of deference which usually arises in a judicial review of an administrative decision wherein an interpretation of the agency’s rules and regulations are at issue. Though the case before this Court is not an appellate judicial review of an agency decision, the issue of deference is nevertheless addressed as follows:

Deference must be given an agency's interpretation of its own rules. ***Ex parte Board of School Commissioners***, 824 So.2d 759 (Ala. 2001). “An agency's interpretation of its own rule or regulation must stand *if it is reasonable*, even though it may not appear as reasonable as some other interpretation.” ***State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.***, 766 So.2d at 180–81.

...

The standard of review of an agency action set forth in ***Bradberry [v. Director, Office of Workers' Compensation Programs]***, 117 F.3d 1361 (11th Cir.1997)], is similar to that contained in the Alabama precedent already cited in this opinion. See ***Ex parte Board of School Comm'rs***, *supra*; ***State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.***, *supra*. In context, ***Bradberry*** states:
“We have held previously that ‘[i]t is well-established that courts must defer to an agency's consistent interpretation of its own regulation *unless it is plainly erroneous or inconsistent with the regulation.*’ ***Lollar [v. Alabama By-Products Corp.]***, 893 F.2d [1258,] 1262 [(11th Cir.1990)]

(internal quotation marks omitted). Such deference is due particularly when the agency 'has made a written interpretation of the regulation or has maintained a longstanding policy of the subject.' **McKee v. Sullivan**, 903 F.2d 1436, 1438 n. 3 (11th Cir.1990). However, we need not defer to a 'mere litigating position.' **William Bros., Inc. v. Pate**, 833 F.2d 261, 265 (11th Cir.1987) (finding no deference due when the Director adopted a novel litigating position on the definition of 'coal mine dust'); see also **McKee**, 903 F.2d at 1438-39 n. 3 (finding no deference due the Director's view on the evidence required to prove death when the agency cites only two district court cases to establish its position)." 117 F.3d at 1366 (emphasis added).

In **Idaho Department of Health & Welfare v. United States Department of Energy**, 959 F.2d 149, 152 (9th Cir.1992), the United States Court of Appeals for the Ninth Circuit also expressed a similar standard of review, stating, '[I]f an agency's interpretation is a reasoned and consistent view of its regulations, we will not substitute our own interpretation for that of the agency's.' In that case, however, the court concluded that, given the appellant agency's longstanding practices and the "extreme position" it had taken in the litigation before the court, as distinguished from litigation the agency had previously been involved in, the appellant agency's interpretation was entitled to no deference because that interpretation was merely a litigation position. 959 F.2d at 153. (emphasis added)" 874 So.2d at 1092 & 1098

Plaintiff has not presented the Court with an interpretation of the regulatory definition of *Ala. Admin. Code Rule §420-5-1-.01(2)(b)(1)* indicating that it has consistently interpreted the said rule to mean that if the facility is solely used to perform abortions, as the term is defined at *Ala. Admin. Code Rule §420-5-1-.01(c)*, then the numerical criteria may be disregarded.

Regarding the reasonableness of the said interpretation argued by Plaintiff, when carried to the extreme, would mean that a facility, open one day per week for the sole purpose of performing a single abortion would nevertheless be subject to regulation and licensure by Plaintiff Board. In considering whether such an application of the said regulation is a reasonable interpretation, the Court in **Standard Oil Co. v. State**, 55 Ala.App. 103, 313 So.2d 532 (Ala.Civ.App. 1975), instructs that this Court should consider the said provision in *para materia*. The Court wrote:

"In construing a statute, every word in each section thereof must be given effect, if possible, and construed with other sections in *Pari materia*. **Carroll v. Alabama Public Service Commission**, 281 Ala. 559, 206 So.2d 364. In construing a statute, the court must consider the entire statute

and not an isolated part, giving to every clause effect in light of the subject matter and purpose of the enactment. **Baggett v. Webb**, 46 Ala.App. 666, 248 So.2d 275, cert. den. 287 Ala. 725, 248 So.2d 284.” 313 So.2d at 111

The Court has, therefore, considered the balance of *Ala. Admin. Code Rule §420-5-1*, wherein all regulations promulgated by the Plaintiff as applied to abortion or reproductive health centers are set forth. *Ala. Admin. Code Rule §420-5-1.02* governs the administration of such facilities; *Ala. Admin. Code Rule §420-5-1.03* governs patient care; and *Ala. Admin. Code Rule §420-5-1.04* governs the construction specifications for the physical building, both interior and exterior, and such regulations are quite extensive. Therefore such an interpretation, as argued by the Plaintiff Board does not pass the reasonableness test. Rather Plaintiff's position would appear to be a litigation position taken with regard to this matter, due to the unique facts and circumstances presented that the sole activity undertaken at the said Birmingham Facility is the performance of abortion procedures.

When read, in *para material*, the interpretation is a reasonable one which provides that a facility which does not hold itself out to the public as an abortion clinic or which is not, *de jure*, an abortion clinic since it has not applied to be so certified, is nevertheless a *de facto* abortion clinic if the number of abortion procedures reaches a certain level, measured numerically. Then the State has an interest in regulating the activity through a licensing procedure that requires compliance with the cited regulations promulgated by the Plaintiff. *Ala. Admin. Code Rule §420-5-1.01(3)(a)* provides that a health care facility that is operated as an abortion or reproductive health care center must obtain a license in order to operate and in order to obtain the said license, must comply with the regulations cited herein regarding administration, patient care and specifications for the physical structure of the facility.

The Court therefore finds that the regulation setting forth a numerical criterion for defining an abortion or reproductive health center is a *de minimis* rule which establishes a *de facto* definition by setting a certain level of activity that must be present before the said facility comes within the scope of the regulatory authority of the Plaintiff Board of Health.

The Numerical Evidence

The sole evidence before the Court with regard to the number of abortion procedures performed at the Birmingham Facility is the testimony of Defendant Bruce E. Norman, who is the owner or proprietor of the said Birmingham Facility, and who actually performs all of the abortion procedures at the said Facility. He has testified that, numerically, he performs less than 12 to 14 abortion procedures per day and that the clinic is open one day per week, every other week. The evidence is that Defendant Norman entered into his lease with Defendant Dipat, LLC on February 5, 2013 but did not start performing abortion procedures until later in that month. Defendant Norman has also testified that he is aware that should he perform 30 or more such procedures during two months of a calendar year then his office would qualify as an abortion or reproductive health center and therefore he has not performed more than 30 such procedures during any month since the said facility opened in February, 2013.

The Court finds this testimony to be contradictory. For ten (10) months of the year, Dr. Norman's testimony that he performs less than 14 abortion procedures a day, one day a week every other week, that is, at most 28 procedures per month, would be consistent with performing less than 30 such procedures every month. Since Defendant Norman testified that the said Birmingham Facility is open for the purpose of providing abortion procedures "every other week", it operates bi-weekly rather than semi-monthly. A semi-monthly operation would result in the said Birmingham Facility being open and Defendant Norman performing abortion procedures 24 days per year, that is, 2 times per month and not more than 28 such procedures during any one calendar month. However, his testimony is that the clinic has operated "every other week" which means bi-weekly. In a 12 month period, this translates to 26 days per year. For two months of every year, according to Dr. Norman's testimony, the said Facility is open 3 days during the month.

The two months during the calendar year for which there are three bi-weekly periods has not been accounted for in Dr. Norman's testimony by which he has sworn that he performs less than 30 abortion procedures per month while performing 12 to 14

abortion procedures *every other week*. This conflict in the numerical evidence was not resolved by the parties during the course of the hearing.

The Court takes the view and is reasonably satisfied that Dr. Norman performs abortion procedures at the Birmingham Facility every other week. This was his unconditional testimony. While he testified that the number of procedures varied within a range of "less than 12 to 14", he did not testify that there was any variation in the number of days that the said Facility was open - one day every other week. Dr. Norman also did not qualify his testimony with regard to the numerical range of 12 to 14 procedures to say that he reduced the per/day number of those said procedures during the months when he was in the said Facility for a third day. He did testify that last week, the final week of July 2013, he performed 8 or 9 abortion procedures.

The Court can only conclude that Dr. Norman's reckoning that he performs less than 30 abortion procedures per month is based upon a mistaken belief that bi-weekly is the same as semi-monthly, and for 10 months of the year that reckoning is clearly correct. However, for 2 months every year, this clearly is not the case. The burden of proof being with the Plaintiff State Board of Health, the numerical evidence, though conflicted, the Court, charged with resolving conflicts in the evidence, is nevertheless reasonably satisfied, based on the testimony of Dr. Norman as to the number and frequency of the procedures he performed, that, more likely than not, for 2 months during the calendar year, the Defendant has already performed 30 or more abortion procedures rendering the Birmingham Facility an abortion or reproductive health center under the numerical definitional criteria set forth in Ala. Admin. Code Rule §420-5-1-.01(2)(b)(1)

b. Ala. Admin. Code Rule §420-5-1-.01(2)(b)(2) – The Advertisement Criteria⁸

The testimony before the Court is that Defendant Dipat, LLC, is the owner of the referral telephone number (205) 933-1118 and that this number may be accessed by persons using the internet seeking referral to access an abortion or reproductive health

⁸ 2. "The health care facility holds itself out to the public as an abortion provider by advertising by some public means, such as a newspaper, telephone directory, magazine, or electronic media, that it performs abortions"

center. The testimony is that an individual, rather than a recording, receives calls from potential patients and directs the patient to such centers operated by Defendant Derzis, or one of the other entities named as parties Defendant in which she has an ownership interest in either Jackson Mississippi, Columbus Georgia or Montgomery Alabama, in addition to the Birmingham Facility operated by Defendant Bruce E. Norman.

While the Court does not have before it the operation of the reproductive health centers located in neighboring states, or in Montgomery, Alabama, the Court does consider that this referral service is a means of holding the Birmingham Facility out to the public as an abortion provider. The testimony before the Court is that Defendant Norman is aware of the referral service and acknowledges that a significant portion of his clientele comes to the said Birmingham Facility through the said referral telephone number. The referral telephone number is owned, manned and operated by Defendant Norman's landlord, Dipat, LLC, to whom Defendant Norman remits \$2,000 per month in lease payments derived from the proceeds of the said referrals to the Birmingham Facility. The Court is therefore reasonably satisfied that the said Birmingham Facility operated by Defendant Norman meets the criteria for being an abortion or reproductive health center, set forth in Ala. Admin. Code Rule §420-5-1-.01(2)(b)(2), with regard to the said Facility holding itself out to the public as an abortion provider.

With regard to Plaintiff's allegations regarding acts or omissions of Defendant Diane Derzis, individually and Defendant Patrick Smith, individually, the Court is not reasonably satisfied by the Plaintiff Board's evidence that either have engaged in any conduct which would warrant injunctive relief.

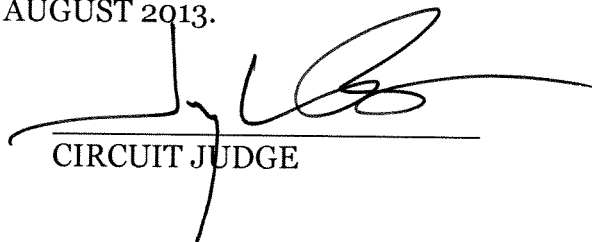
Finally, regarding Plaintiff's allegations of acts or omissions by Defendant All Women's Inc. d/b/a New Woman All Woman Health Care, Inc., the Court likewise, is not reasonably satisfied by Plaintiff Board's evidence that these corporate entities have engaged in any conduct that would warrant injunctive relief.

ORDER ON PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

WHEREFORE, the foregoing evidence and findings of law having been considered by the Court, the following is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court hereby declares that the operation of the Birmingham Facility located at 1001 17th Street South in Birmingham, Alabama, meets the definition of an abortion or reproductive health center as the said term is defined at *Ala. Admin. Code Rule §420-5-1-.01(2)(b)(1) or (2)*. As such, the said Birmingham Facility is a hospital, as that term is defined at *Ala. Code §22-21-20(1)*.
2. The Court hereby declares that the Birmingham Facility located at 1001 17th Street in Birmingham, Alabama, having been found to be a hospital is operating as such without a valid or current license from the Plaintiff Alabama State Board of Health.
3. Under the provisions of *Ala. Code §22-21-33(a) (1975)*, and under proper petition having been filed by the Alabama State Board of Health, a permanent injunction is hereby entered against Defendant Bruce E. Norman, the owner or proprietor of the said Birmingham Facility located at 1001 17th Street South in Birmingham, Alabama, from operating the facility as an abortion or reproductive health center.
4. Defendant Dipat, LLC, the owner of the referral telephone number is enjoined from directing members of the public to the said Birmingham Facility for administration of abortion services.
5. Plaintiff State Board of Health's petition for injunctive and declaratory relief with regard to the alleged acts or omissions of Defendant All Women's Inc. d/b/a New Woman All Women Health Care, Inc., Defendant Diane W. Derzis and Defendant Patrick Smith is hereby dismissed.
6. Costs of these proceedings are hereby taxed to Defendants Dipat, LLC and Bruce E. Norman.

DONE AND ORDERED THIS THE 8th DAY OF AUGUST 2013.


CIRCUIT JUDGE