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RECEIVED

APR 0 1 2014

HEALTH FACILITIES &
SERVICES REVIEW BOARD

VIA OVERNIGHT DELIVERY

March 31, 2014

Ms. Courtney R. Avery
Administrator
Illinois Health Facilities and Services
Review Board
525 West Jefferson Street
2nd Floor
Springfield, IL 62761

Re: Written Comment on Project No. E-007-14,
Northwestern Medical Faculty Foundation Dialysis Center, Chicago

Dear Ms. Avery:

I represent Fresenius Medical Care Holdings Inc. and Dialysis Centers of America-Illinois Inc. which owns and operates Fresenius Medical Care Dialysis at Northwestern, a 44-station end stage renal dialysis ("ESRD") facility located at 710 North Fairbanks in Chicago. I submit this written comment on their behalf in connection with Project No. E-007-14, Northwestern Medical Faculty Foundation Dialysis Center ("NMFF Dialysis Center") in accordance with the Public Notice provided for such comment. A copy of the Public Notice is attached hereto as Attachment A.

The application is for change of ownership of an existing health care facility that is identified in the application as NMFF Dialysis Center. Fresenius objects to the characterization of NMFF Dialysis Center as an existing health care facility. It is not. NMFF Dialysis Center does not come within the definition of an existing health care facility under the rules of the Illinois Health Facilities and Services Review Board ("State Board") and, in fact, is specifically excluded as an existing health care facility under the State Board's definition. Section 1130.140 of the State Board's rules states:

> "'Existing Health Care Facility' means any health care facility subject to the Act that:
>
> > has a license issued by IDPH and has provided services within the past 12 month, unless the failure to provide such service is the result of pending license revocation procedures, and has not

> surrendered or abandoned its license or had its license revoked or voided or otherwise deemed invalid by IDPH; or
>
> is certified under Titles XVIII or XIX of the Social Security Act (42 USC 1395); or
>
> is a facility operated by the State of Illinois.
>
> HFSRB NOTE: Projects approved by HFSRB for establishment of a health care facility that have not been deemed complete in accordance with the provisions of this Part shall not be considered existing facilities, but the approved number of beds or services shall be recorded in the Inventory of Health Care Facilities and shall be counted against any applicable need estimate."

77 Ill. Adm. Code 1130.140.

NMFF Dialysis Center does not have a license issued by the Illinois Department of Public Health, it has not provided services within the last 12 months, it is not certified under Titles XVIII or XIX of the Social Security Act, and it is not a facility operated by the State of Illinois. Therefore, NMFF Dialysis Center is not an "existing health care facility" as defined by the State Board.

Moreover, NMFF Dialysis Center is expressly excluded from the definition of an existing health care facility by the above IHFSRB Note that states that projects approved by the State Board for "establishment of a health care facility that have not been deemed complete ... shall not be considered existing facilities..." (Emphasis added; 77 Ill. Adm. Code 1130.140.) The State Board approved the establishment of NMFF Dialysis Center on March 26, 2013 as Project No. 12-099 and that project has not been deemed complete. To the contrary, based on the recent status report submitted by NMFF Dialysis Center, as of March 24, 2014 the project was only "approximately 6% complete, and the anticipated completion date remains June 30, 2016." (*See* Annual Progress Report, Project No. 12-099, dated March 24, 2014 from Mr. Brian Walsh to Mr. Michael Constantino attached hereto as Attachment B.) The exemption application itself for Project No. E-007-14 states that Project No. 12-099, NMFF Dialysis Center, "will not be completed ... by the time of the proposed ownership change...." Exemption application at page 2.

Fresenius challenged the State Board's issuance of the permit for Project No. 12-099 in Case No. 13-CH-11972 in the Circuit Court of Cook County. Fresenius has appealed the circuit court's decision affirming the State Board's issuance of the permit and that appeal remains pending in the Appellate Court, First District as Appeal No. 1-13-3448. Fresenius opposes Project No. 12-099 on the basis, among other grounds, that it is dependent upon the entire current and future patient volume of Fresenius Medical Care Dialysis at Northwestern, is to be located only two blocks from that facility, and constitutes an unnecessary duplication

of services. Fresenius maintains and reasserts its objections to Project No. 12-099, NMFF Dialysis Center, as more fully set forth in the Complaint for Administrative Review filed May 6, 2013 in Case No. 13-CH-11972 attached hereto as Attachment C.

Please include this written comment with attachments in the project file for Project No. E-007-14, NMFF Dialysis Center, pursuant to Section 12.2 of the Illinois Health Facilities Planning Act (20 ILCS 3960/12.2) and the Public Notice on this project providing for written comment by April 2, 2014.

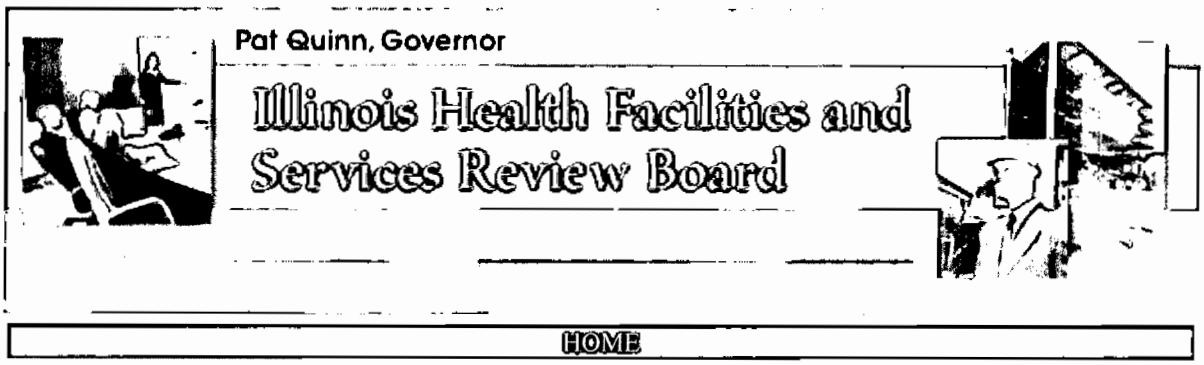
Very truly yours,

BARNES & THORNBURG LLP

Daniel J. Lawler

DJL:dp
Enclosures

cc: Mr. Frank Urso, General Counsel, IHFSRB
Brook Long, Esq., counsel for NMFF Dialysis Center in Case No. 13-CH-11972
Clifford Berlow, Assistant Attorney General, counsel for IHFSRB in Case No. 13-CH-11972



LEGAL NOTICE OF EXEMPTIONS AND OPPORTUNITY FOR PUBLIC HEARINGS

In compliance with the PA 93-0935 the state agency is publishing the legal notices for all change of ownership exemptions. As required by PA 93-0935 the public has 15 days from the date of publication to request a public hearing on the exemptions. If interested in requesting a public hearing on the proposed exemptions contact the Illinois Health Facilities and Services Review Board at 217-782-3516.

For additional information, call 217-782-3516, TTY (for hearing impaired use only) 800-547-0466.

IMPORTANT NOTICE

The Board will **NOT** accept emailed or faxed information submitted in regards to any type of application for permit, application for exemption, or any information pertaining to a permitted project. The Board will only accept information submitted in regards to any type of application for permit, application for exemption, or any information pertaining to a permitted project that is delivered in-person, or sent by certified USPS mail; or United Parcel Service (with signature required); or FedEx (with signature required). Therefore, any information received by email or fax will **NOT** be accepted. Please plan accordingly.

Exception: Pre-registration requests to provide comment at Board meetings will continue to be accepted via email or fax.

Exemption	Facility/Service	Posting Date	Public Hearing Request Deadline
E-007-14	Northwestern Medical Faculty Foundation Dialysis Center, Chicago	3/19/2014	4/3/2014

E-007-14 Northwestern Medical Faculty Foundation Dialysis Center, Chicago

In accordance with the requirements of the Illinois Health Facilities Planning Act, Notice is given of receipt of a change of ownership exemption application (E-007-14) from Northwestern Memorial HealthCare, 251 East Huron Street, Chicago, Illinois and Northwestern Medical Faculty Foundation Dialysis Center, LLC, 680 North Lake Shore Drive, Suite 1118, Chicago, Illinois for Northwestern Medical Faculty Foundation Dialysis Center, located at 259 East Erie Street-15th Floor, Chicago, Illinois. The transaction will result in a change in the membership or sponsorship of a not-for-profit corporation that owns or controls an Illinois health care facility (as well as its physical plant and capital assets). **The anticipated project completion date is upon State Board approval.**

Northwestern Medical Faculty Foundation ("NMFF") holds an 80% interest in the Northwestern Medical Faculty Foundation Dialysis Center, LLC. On September 1, 2013, NMFF (now doing business as Northwestern Medical Group, or NMG) became a wholly owned subsidiary of Northwestern Memorial HealthCare ("NMHC") pursuant to a clinical affiliation agreement by and between Northwestern Memorial HealthCare and Northwestern Memorial Faculty Foundation.

All categories of service and beds currently provided at Northwestern Medical Faculty Foundation Dialysis Center will not substantially change for at least 12 months following the completion of the proposed transaction, and there will be no change resulting in the restriction of patient admissions or reductions in access to care. According to the applicants the proposed affiliation will improve access to care by supporting future growth and will be able to support the formation of a broad network of integrated services. The proposed affiliation will result in some level of cost savings to the community.

The proposed transaction will occur on the approval from the Illinois Health Facilities and Services Review Board. The applicants have certified that no adverse actions have been taken against them by the federal government, licensing or certifying bodies of the State of Illinois. The applicants have also certified that the facility will not adopt a more restrictive charity care policy than the policy that was in effect one year prior to the transaction. The applicants have provided certification that the compliant charity care policy will remain in effect for a two-year period, following the change of ownership transaction. The applicants also certify that they intend to maintain ownership and control of the facility for a minimum of three years.

The Applicants have prepared a written response addressing the review criteria contained in 77 Ill. Adm. Code 1110.240, 1130.500, 1130.520 and response is available for public review on the premises of the Hospital.

Interested parties may obtain information regarding the proposed transaction from Ms. Danae Prousis, 680 North Lake Shore, Chicago, Illinois 60611, 312.695.8391.

The exemption application was declared complete on **March 19, 2014. Any person wanting a public hearing on the proposed project must submit a written request for such hearing to the address below. The request must be received by April 3, 2014**. A copy of the application may be viewed at the Illinois Health Facilities and Services Review Board Office, at the address below, or by CLICKING HERE.

Consideration by the State Board has been tentatively scheduled for the **April 22, 2014 State Board Meeting**. Any person wishing to submit written comments on this exemption must submit these comments by **April 2, 2014** to the address listed below.

The State Board will post its findings in a State Board Staff Report, and the report will be made available via the internet on **April 8, 2014**. The public may submit written responses to errors in the findings of the Board Staff. The public will have until **9:00 am, April 14, 2014** to submit responses. The internet address used to access this report is: www.hfsrb.illinois.gov

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Courtney R. Avery, Administrator
Illinois Health Facilities and Services Review Board
2nd Floor

525 West Jefferson Street
Springfield, Illinois 62761
Phone 217-782-3516
TTY 800-547-0466
Questions or Comments

NORTHWESTERN MEDICAL FACULTY FOUNDATION
DIALYSIS CENTER, LLC

March 24, 2014

RECEIVED

MAR 25 2014

HEALTH FACILITIES &
SERVICES REVIEW BOARD

VIA FEDEX

Mr. Michael Constantino
c/o Illinois Health Facilities and
Services Review Board
525 West Jefferson
Springfield, IL 62761

RE: Annual Progress Report
Project # 12-099

Dear Mr. Constantino:

Please accept this document in response to the annual progress reporting requirements for the above-referenced project, consistent with the provisions of Section 1130.760.

This project was approved by the State Board on March 26, 2013 and involves the establishment of a 36-station ESRD facility.

The project is currently approximately 6% complete, and the anticipated completion date remains June 30, 2016. To date, it is estimated that a total of approximately $275,000 has been incurred, related to project.

The attached table identifies the anticipated project costs, as identified in the *Application*, the currently-anticipated project cost, and costs incurred to date. The sources of funds of the ESRD center are not anticipated to change from that identified in the *Application*. Additional planning is being undertaken and it is likely that the physical size of the ESRD center will be reduced from that identified in the *Application*. If the reduction in physical size is 5% or more, a request for an alteration would be filed in that case.

The major project components completed to date include:

- completion of programming processes
- partial completion of design process
- execution of lease for space to be leased
- preliminary equipment planning review
- budget confirmation

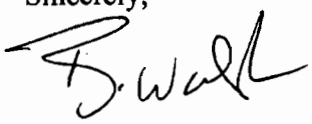
The major project components yet to be completed include:

- finalize design process
- construction
- purchase and installation of equipment
- inspections and occupancy permit

Attachment B

As the IHFSRB is aware, the proposed ESRD facility will be located in a medical office building currently under construction on the Northwestern Medical Center campus (Project 11-107). Progress on the construction of that building is on schedule, and approximately 85% of the core and shell have been completed. The "build out" for the ESRD facility, as addressed in Permit 12-099, cannot commence until the associated core and shell space has been completed and approved for "build out".

Sincerely,



Brian Walsh
Member, Board of Managers

680 N. Lake Shore Drive
Suite 1118
Chicago, IL 60611

Cc: Jack Axel

Attachment

IDENTIFICATION OF COSTS INCURRED

	Approved Amount	Current Estimate	Incurred to Date *
Preplanning Costs	$70,000	$70,000	
Site Survey & Soil Invest.			
Site Preparation			
Off Site Work			
New Construction Contracts			
Modernization Contracts	$2,375,000	$2,375,000	
Contingencies	$263,000	$263,000	
A & E Fees	$236,700	$236,700	
Consulting & Other Fees	$250,000	$250,000	
Movable Equipment	$1,422,000	$1,422,000	
FMV of Leased Space	$4,390,764	$4,390,764	
TOTAL	**$9,007,464**	**$9,007,464**	

SOURCES OF FUNDS		
Cash and Securities	$4,616,700	$4,616,700
Pledges		
Gifts and Bequests		
Bond Issues		
Mortgages/Loans		
FMV of Leased Space	$4,390,764	$4,390,764
Depreciated Value of Equipment		
Grants		
Other Funds (earned interest)		
TOTAL	**$9,007,464**	**$9,007,464**

*Estimate

Attorney No. 32715

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FRESENIUS MEDICAL CARE HOLDINGS, INC. and DIALYSIS CENTERS OF AMERICA-ILLINOIS, INC.,	)	
Plaintiffs,	)	No. 13CH 11972
v.	)	Administrative Review
ILLINOIS HEALTH FACILITIES AND SERVICES REVIEW BOARD; NORTHWESTERN MEDICAL FACULTY FOUNDATION DIALYSIS CENTER, LLC; NORTHWESTERN MEDICAL FACULTY FOUNDATION, and AMBULATORY SERVICES OF AMERICA, INC.,	)	
Defendants.	)	

FILED
CH-2601
MAY 06 2013
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

COMPLAINT FOR ADMINISTRATIVE REVIEW

Plaintiffs, Fresenius Medical Care Holdings, Inc. and Dialysis Centers of America-Illinois, Inc., by their attorneys and for their Complaint for Administrative Review allege as follows:

Nature of the Action

1. Plaintiffs bring this action under the Administrative Review Law (735 ILCS 5/3-101 *et seq.*) for judicial review of a decision of the Defendant Illinois Health Facilities and Services Review Board ("State Board") to approve an application for a permit to establish a 36-station end stage renal dialysis ("ESRD") facility in Chicago, Illinois at a cost of $9 million. The permit was issued to Defendant Northwestern Medical Faculty Foundation Dialysis Center, LLC (the "Applicant"). A copy of the State Board's written decision is attached hereto as Exhibit A and incorporated herein by reference.

2. Plaintiffs own and operate an existing 44-station ESRD facility that is located just two blocks from the site of the Applicant's proposed facility. By the Applicant's own admission,

the viability of its proposed facility is dependent on the redirection of literally every patient from Plaintiffs' existing facility to the Applicant's proposed facility. This would result in the closure of Plaintiffs' facility for lack of patients.

3. The Applicant's project is an extreme and unprecedented case of an unnecessary duplication of services. Its approval directly contravenes the State Board's statutory mandate. The Illinois Health Facilities Planning Act ("Planning Act") (20 ILCS 3960/1 *et seq.*) compels the State Board to promote "the orderly and economic development of healthcare facilities in the State of Illinois *that avoids unnecessary duplication of such facilities.*" (Emphasis added; 20 ILCS 3960/1.) The proposed project duplicates the services now available at Plaintiffs' nearby facility and is unneeded because all of the project's proposed patients are currently being treated at nearby facilities. Healthcare facilities are not developed in an "orderly and economic" manner, as directed by the Planning Act, when the approval of a new facility necessarily requires the closure of an existing facility located two blocks away.

4. The approval of the Applicant's project not only contravenes the primary purpose of the Planning Act, it directly contradicts the specific findings of the State Board's own staff. Under Section 6.2 of the Planning Act, the Board's staff reviews an application for compliance with applicable criteria and submits its findings to the State Board in writing. 20 ILCS 3960/6.2. The Board's staff found that the Applicant's project did not meet the State Board's criteria that a project must be needed and must not constitute an unnecessary duplication or maldistribution of services.

5. In its written report to the State Board, the staff made the following findings:

- **"THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT DOES <u>NOT</u> APPEAR TO BE IN CONFORMANCE WITH THE PLANNING AREA NEED CRITERION (77 IAC 1110.1430(b))."** Staff Report at 21; Bold, Caps and Underline in the original.

- **"THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT DOES <u>NOT</u> APPEAR TO BE IN CONFORMANCE WITH THE UNNECESSARY DUPLICATION/MALDISTRIBUTION OF SERVICE CRITERION (77 IAC 1110.1430(c))."** Staff Report at 22; Bold, Caps, and Underline in the original.

6. Notwithstanding the findings of the State Board's staff that the project was not needed and would create an unnecessary duplication of services, and failed to meet the Board's criteria on need and unnecessary duplication, the State Board approved the application for permit.

7. Plaintiffs seek reversal of the State Board's decision on the grounds that the decision is against the manifest of the evidence, contrary to the purposes of the Planning Act, contrary to the State Board's own criteria, and is arbitrary and capricious.

Jurisdiction and Venue

8. This action arises under Section 11 of the Planning Act (20 ILCS 3960/11), the regulations promulgated thereunder (77 Ill. Adm. Code 1100.10 *et seq.*), and the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq.*). Section 11 of the Planning Act provides that, "Any person who is adversely affected by a final decision of the State Board may have such decision judicially reviewed" under the Administrative Review Law.

9. This action was timely commenced. That State Board's written decision is dated April 1, 2013, and it was served on the parties affected by the decision on or after that date. Venue is proper in Cook County under Section 3-104 of the Administrative Review Law (735 ILCS 5/3-104) because the subject matter involved is situated in Cook County and part of

the transaction which gave rise to the proceedings before the agency occurred in Cook County. The site of the proposed project is in Cook County and the patient volume for the project will primarily come from patients currently being treated at Plaintiffs' facility which is also in Cook County.

Parties

10. Plaintiff Fresenius Medical Care Holdings, Inc., d/b/a Fresenius Medical Care North America, is a New York corporation which, through its affiliates and subsidiaries, owns ESRD facilities throughout the United States including in Illinois.

11. Plaintiff Dialysis Centers of America-Illinois, Inc. is an Illinois corporation that owns and operates ESRD facilities in Illinois including Fresenius Medical Care Dialysis at Northwestern, a 44-station ESRD facility located at 710 North Fairbanks, Suite 4-200, Chicago, Illinois. Dialysis Centers of America-Illinois, Inc., is a subsidiary of Fresenius Medical Care Holdings, Inc.

12. Defendant State Board is an agency of the State of Illinois created by the Planning Act to perform such functions as described in the Act. 20 ILCS 3960/4. Those functions include the issuance of permits for the construction, establishment or modification of a health care facility. 20 ILCS 3960/6. The State Board maintains offices in Chicago and Springfield, Illinois.

13. Defendant Applicant, Northwestern Medical Faculty Foundation Dialysis Center LLC, is a Delaware limited liability company and is the applicant for permit to establish a proposed 36-station ESRD facility at 259 East Erie Street, 15th Floor, Chicago, Illinois. The Applicant's business address is 680 North Lake Shore Drive, Suite 1118, Chicago, Illinois.

14. Defendant Northwestern Medical Faculty Foundation ("NMFF") is identified in the Applicant's permit application as an 80% owner of the Applicant.

15. Defendant Ambulatory Services of America, Inc. is identified in the Applicant's permit application as a 20% owner of the Applicant. The permit letter issued by the State Board for the proposed project was addressed to Ambulatory Services of America, 320 Seven Springs Way, Suite 220, Brentwood, Tennessee. *See* Exhibit A hereto.

The Planning Act and State Board Rules

16. The stated purpose of the Planning Act is "to establish a procedure designed to reverse the trends of increasing costs of healthcare resulting from unnecessary construction or modification of health care facilities." 20ILCS 3960/2. Just last year, the Illinois legislature specifically reinforced this directive by adding the provision that "the Certificate of Need process required under this Act is designed to restrain rising healthcare costs by preventing unnecessary construction or modification of healthcare facilities." 20 ILCS 3960/5, implemented by P.A. 97-1115, eff. August 27, 2012.

17. The procedure established by the Act is intended to promote "the orderly and economic development of healthcare facilities in the State of Illinois that avoids unnecessary duplication of such facilities...." 20 ILCS 3960/2. To further this objective, Section 5 of the Planning Act provides that no person shall construct, modify or establish a healthcare facility without first obtaining a permit or exemption from the State Board. 20 ILCS 3960/5.

18. Healthcare facilities subject to State Board's regulation and permit approval process include hospitals, surgery centers and "Kidney disease treatment centers, including a free-standing hemodialysis unit required to be licensed under the End Stage Renal Disease Facility Act." 20 ILCS 3960/3. The Applicant's proposed facility is a kidney disease treatment center required to be licensed under the End Stage Renal Disease Facility Act.

19. Section 12 of the Planning Act requires the State Board to promulgate written criteria and standards required to carry out the purpose of the Act. 20 ILCS 3960/12(1). In

establishing criteria to be utilized in the review of applications for permits, the Planning Board is directed to consider, among other things, (1) "the number of existing and planned facilities offering similar programs," (2) "the extent of utilization of existing facilities," and (3) "the availability of facilities which may serve as alternatives or substitutes." 20 ILC S. 3960/12(4)(b), (c), (d).

20. In accordance with Section 12 of the Planning Act, the State Board has promulgated standards, criteria and plans of need applicable to the establishment of a new facility, and they are contained in two parts of the State Board's rules. Part 1110 includes the State Board's general and specific criteria relating to the need for the new beds and services. 77 Ill. Adm. Code 1110.10 *et seq*. Part 1120 relates to the financial and economic viability of a proposed project. 77 Ill. Admin. Code 1120.10 *et seq*.

21. Section 6 of the Planning Act requires that the State Board find four statutory criteria are met to approve a permit: (1) that the applicant is fit, willing and able to provide a proper standard of healthcare services for the community; (2) the economic feasibility is demonstrated, taking into account, among other things, the "projected impact on the total health care expenditures in the facility and community"; (3) that safeguards are provided which ensure the establishment of a healthcare facility is consistent with the public interest; and (4) "that the proposed project is consistent with the orderly and economic development of such facilities and ... is in accord with standards, criteria, or plans of need adopted and approved pursuant to the provisions of Section 12 of this Act." 20 ILCS 3960/6.

The Proposed Project

22. The State Board received the Applicant's permit application on December 4, 2012. The application sought approval to establish a 36-station ESRD facility in Chicago.

23. Under the State Board's regulations, an applicant must document the demand for a proposed ESRD facility with physician referral letters. Here, the Applicant submitted with its permit application referral letters from six nephrologists. The application stated, "During 2009 and 2010 all of the nephrologists' hemodialysis referrals were to FMC-Northwestern...." (Permit Application at 43.) FMC-Northwestern is the ESRD facility owned and operated by Plaintiffs as alleged in paragraph 11, above. The permit application further stated, "As of March 31, 2012, approximately 87% of those six nephrologists' 184 hemodialysis patients were receiving services through FMC-Northwestern, located approximately two blocks from the site of the proposed facility." (Permit Application at 42.)

24. The six nephrologists who submitted referral letters in support of the Applicants' project, and who were currently directing patient referrals to Plaintiffs' facility, committed to direct all of their future referrals to the Applicant's proposed facility.

Plaintiffs' Opposition

25. By letter to the State Board dated March 6, 2012, Plaintiffs objected to the Applicant's proposed project. Plaintiffs objected on the ground that the project was an unnecessary duplication of facilities that would have a serious negative impact on Plaintiffs' nearby existing facility.

26. Plaintiffs' objection letter noted that all of the patients at Plaintiffs' Fresenius Medical Care Dialysis at Northwestern facility were referred to the facility by physicians who were members of NMFF, the 80% owner of the Applicant. Plaintiffs referenced the permit application's statement that NMFF nephrologists currently referred 87% of their patients to Fresenius Medical Care - Northwestern and the remaining 13% to another area facility. The application and referral letters further stated that patients of NMFF physicians would be transferred to the proposed facility and that future patients would be referred to it.

27. Plaintiffs' letter to the State Board stated that, "If in fact NMFF does what it says it will do and transfers its current patients and refers its future patients to its own facility, the Fresenius Northwestern clinic will most likely have to eventually close, as it will have not patients."

The Negative Findings of the State Board's Staff

28. The State Board's staff submitted a 33-page report to the State Board with the staff's findings and conclusions. In addition to finding that the proposed project was not needed and would constitute an unnecessary duplication of services, the staff also found that project would not improve access to dialysis services and would adversely impact the utilization of existing facilities (primarily Plaintiffs' facility). In addition, the staff reported to the State Board that the area had 51 ESRD facilities and that 39 of them were operating below the State Board's target utilization level.

29. The staff's report included the following assessments of the Applicant's project:

- "It appears a duplication of services will occur with the establishment of this facility as there are existing facilities within 30 minutes not operating at the 80% target occupancy." SAR at 2.
- "It also appears that utilization of other area providers will be reduced as the referring physicians are currently referring patients to facilities within the planning area." SAR at 2.
- "[I]t does not appear that access will be improved because 39 of 51 facilities within 30 minutes are operating at less than 80%." SAR at 2.
- "It does not appear access will be improved by the establishment of this facility." SAR at 21.
- "There is no absence of service in the planning area, nor access limitations due to payor status, or restrictive admission policies in the planning area." SAR at 21.
- "It appears that a duplicative of service will result with the establishment of this facility." SAR at 22.

- **THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT DOES NOT APPEAR TO BE IN CONFORMANCE WITH THE PLANNING AREA NEED CRITERION (77 IAC 1110.1430(b)).** SAR at 21; Bold, Caps and Underline in the original.

- **"THE STATE BOARD STAFF FINDS THE PROPOSED PROJECT DOES NOT APPEAR TO BE IN CONFORMANCE WITH THE UNNECESSARY DUPLICATION/MALDISTRIBUTION OF SERVICE CRITERION (77 IAC 1110.1430(c)).**" Staff Report at 22; Bold, Caps, and Underline in the original.

The State Board's Action on the Applicant's Project

30. The State Board considered the Applicant's project at a meeting on March 26, 2013. The Board approved the project by a vote of 6 to 2. The Board's written decision dated April 1, 2013, states that approval was "based upon the project's substantial conformance with the applicable standards and criteria...." *See* Exhibit A.

Count I – Administrative Review

31. Plaintiffs incorporate, and reallege by reference, the allegations contained in paragraphs 1-30 above.

32. The State Board's decision should be reversed on the following grounds:

(a) The decision is against the manifest weight of the evidence;

(b) The decision is arbitrary and capricious;

(c) The decision constitutes an abuse of discretion;

(d) In reaching its decision, the State Board failed to take into consideration factors specified in the Planning Act;

(e) In reaching its decision, the State Board considered factors not contemplated by the Planning Act, and;

(f) The decision is contrary to the Planning Act and Board regulations.

33. Plaintiffs own and operate an ESRD facility that provides services identical to those offered by the Applicant's proposed facility, and Plaintiffs' facility is a competing healthcare facility to the Applicant's proposed facility.

34. Plaintiffs are adversely affected by the State Board's decision and are shown of record to have participated in the proceedings below.

WHEREFORE, Plaintiffs Fresenius Medical Care Holdings, Inc. and Dialysis Centers of America-Illinois, Inc. request that the Court reverse the decision of the State Board that approved the Applicant's permit application, reverse the permit issued in connection with said project, direct that the State Board compile, certify and file with the Clerk of this Court the complete record of proceedings in this matter, and grant Plaintiffs any such other and further relief as the Court deems just and appropriate.

FRESENIUS MEDICAL CENTER
HOLDINGS, INC. and DIALYSIS CENTERS
OF AMERICA-ILLINOIS, INC. Plaintiffs

By: _____
One of their Attorneys

Daniel J. Lawler
Claire M. Reed
BARNES & THORNBURG LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606
Phone: (312) 214-4861
Fax: (312) 759-5646
Email: dlawler@btlaw.com

STATE OF ILLINOIS
HEALTH FACILITIES AND SERVICES REVIEW BOARD
525 WEST JEFFERSON ST. • SPRINGFIELD, ILLINOIS 62761 • (217) 782-3516 • FAX: (217) 785-4111

April 1, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Linda S. Earhart, Chief Administrative Officer
Ambulatory Services of America
320 Seven Springs Way, Suite 220
Brentwood, Tennessee 37027

Re: Permit Approval
PROJECT NUMBER: 12-099
FACILITY NAME: Northwestern Medical Faculty Foundation Dialysis Center
APPLICANTS: Northwestern Medical Faculty Foundation Dialysis Center, LLC

Dear Ms. Earhart:

On March 26, 2013, the Illinois Health Facilities and Services Review Board approved the application for permit for the referenced project based upon the project's substantial conformance with the applicable standards and criteria of 77 Ill Adm. Code 1110 and 1120. In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, public hearing testimony and documents, any testimony made before the State Board, and the Illinois Health Facilities Planning Act (20 ILCS 3960).

- **PROJECT: #12-099 – Northwestern Medical Faculty Foundation Dialysis Center** – The permit holder is approved for the establishment of a 36 station end stage renal dialysis station facility in 9,776 GSF of leased space located at 259 East Erie Street, 15th Floor, Chicago, Illinois. The operating entity/licensee is Northwestern Medical Faculty Foundation Dialysis Center, LLC and the owner of the site is Northwestern Memorial Hospital.

- **PERMIT HOLDER:** Northwestern Medical Faculty Foundation Dialysis Center, LLC, 680 North Lake Shore Drive, Suite 1118, Chicago, Illinois, 60611

- **PERMIT AMOUNT:** $9,007,464

- **PROJECT OBLIGATED BY:** September 26, 2014

- **PROJECT COMPLETION DATE:** June 30, 2016

This permit is valid only for the defined construction or modification, site, amount and the named permit holder and **is not transferable or assignable.** In accordance with the Planning Act, the permit is valid until such time as the project has been completed, provided that all post permit requirements have been fulfilled, pursuant to the requirements of 77 Ill. Adm. Code 1130 and may result in an invalidation of the permit, sanctions, fines and/or State Board action to revoke the permit.

EXHIBIT
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The permit holder is responsible for complying with the following requirements in order to maintain a valid permit. Failure to comply with the requirements may result in expiration of the permit or in State Board action to revoke the permit.

1. OBLIGATION-PART 1130.720

   The project must be obligated **by the Project Obligation Date,** unless the permit holder obtains an "Extension of the Obligation Period" as provided in 77 Ill. Adm. Code 1130.730. Obligation is to be reported as part of the first annual progress report for permits requiring obligation within 12 months after issuance. For major construction projects which require obligation within 18 months after permit issuance, obligation must be reported as part of the second annual progress report. If project completion is required prior to the respective annual progress report referenced above, obligation must be reported as part of the notice of project completion. The reporting of obligation must reference a date certain when at least 33% of total funds assigned to project cost were expended or committed to be expended by signed contracts or other legal means.

2. ANNUAL PROGRESS REPORT-PART 1130.760

   An annual progress report must be submitted to the State Board every 12th month from the permit issuance date until such time as the project is completed.

3. PROJECT COMPLETION REQUIREMENTS-PART 1130.770

   The permit holder must submit a written notice of project completion as defined in Section 1130.140. Each permit holder shall notify IHFSRB within 30 days following the project completion date and provide supporting documentation within 90 days following the completion date and must contain the information required by Section 1130.770.

   This permit does not exempt the project or permit holder from licensing and certification requirements, including approval of applicable architectural plans and specifications prior to construction.

Please note that the Illinois Department of Public Health will not license the proposed facility until such time as all of the permit requirements have been completed.

Should you have any questions regarding the permit requirements, please contact Mike Constantino at 217-782-3516.

Sincerely,

Courtney Avery

Courtney Avery, Administrator
Illinois Health Facilities and Services Review Board

cc: Dale Galassie, Chairman