IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

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NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING SERVICES, INC.,

Plaintiff,

vs.

CASE NO. CL 97-5796 "DIV. AA"
Judge Glenn Kelley

STATE OF FLORIDA, ATTORNEY GENERAL BILL McCOLLUM, in his Official Capacity, FLORIDA DEPARTMENT OF HEALTH, DR. ANA M. VIAMONTE ROS, in her Official Capacity as Surgeon General, AND FLORIDA BOARD OF MEDICINE,

Defendants.
_____/

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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION TO STRIKE DEFENDANTS' DEFENSES**

**THIS CAUSE** comes before the Court on Defendants' Amended Motion for Summary Judgment filed on February 22, 2010, and Plaintiff's Renewed Motion for Summary Judgment And/Or Motion to Strike Defendants' Defenses filed February 22, 2010. This Court, having reviewed the court file, the Motions, the oppositions, heard argument of counsel and being otherwise fully advised in the premises, finds the following:

The Women's Right to Know Act provides that a termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian. *See* § 390.0111(3), Fla. Stat. (2009). Plaintiff brought this action under the Declaratory Judgment Act, seeking a declaration that subsection 390.0111(3)(a)(2) of

the Women's Right to Know Act is unconstitutional, both facially and as applied. Subsection 390.0111(3)(a)(2) states that except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

> * * *
> Printed materials prepared and provided by the department have been provided to the pregnant woman, if she chooses to view these materials, including:
>
> a. A description of the fetus.
>
> b. A list of agencies that offer alternatives to terminating the pregnancy.
>
> c. Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.

*See* § 390.0111(3)(a)(2), Fla. Stat. (2009). The Florida Legislature declared that any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of section 390.0111 commits a felony of the third degree. *See* § 390.0111(10)(a), Fla. Stat. (2009). If a physician violates subsection 390.0111(3), such violation constitutes grounds for disciplinary action. § 390.0111(3)(c), Fla. Stat. (2009).

"The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Santa Rosa County v. Admin. Comm'N, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995). There must be a bona fide need for a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief. *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). Even though the legislature has expressed its intent that the declaratory judgment act should be broadly construed, there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction. *Id.* at 1170–71. Otherwise, any opinion on a statute's validity would be advisory only and improperly considered in a declaratory action. *Id.* at 1171; *see also Fla. Dep't of Ins. v. Guar. Trust Life Ins. Co.*, 812 So. 2d 459, 460–

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61 (Fla. 1st DCA 2002) ("Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.").

In order for the court to decide the constitutionality of subsection 390.0111(3)(a)(2), Plaintiff must show that:

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

*Santa Rosa County*, 661 So. 2d at 1192–93 (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)).

The court finds that the affidavit dated February 5, 2010 of Elizabeth Renee Alsobrook, Deputy General Counsel in the Office of the General Counsel of the Florida Department of Health - while not dispositive - is compelling. Ms. Alsobrook explains that:

> because of the controversies concerning the Women's Right to Know Act and its subject matter; of the expenses of initiating state-wide workshops; an agency must have rulemaking authority in order to institute a rule; and of the likelihood of legal challenges to printed materials that the Department would propose at and after such workshops, *the Department should first obtain rule making authority from the Florida Legislature to implement this statute.* (emphasis added).

As the Department of Health is required under subsection 390.0111(3)(a)(2) to prepare and provide the printed materials, but that the Department of Health will not do such until the

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legislature grants them rule making authority, there is no present need for the court to adjudicate the constitutionality of subsection 390.0111(3)(a)(2). *See Fla. Dep't of Ins. v. Guar. Trust Life Ins. Co.*, 812 So. 2d 459 (Fla. 1st DCA 2002) (finding that no present controversy existed for the exercise of the trial court's declaratory judgment jurisdiction, because the plaintiffs, insurance companies regulated by the Department of Insurance, alleged in their complaint challenging the constitutionality of a statute affecting an insurer's right to seek premium rate increases, only the mere possibility that the Department might, during some indefinite period in the future, disapprove their rate increase requests under the procedure afforded in the statute). As the Department of Health is not preparing or providing the printed materials, Plaintiff fails to show an actual injury or a real threat of immediate injury. *See State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) ("While one may seek a declaration of his or her rights without an allegation of actual injury, an aggrieved party must nonetheless make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future.").

In addition, Plaintiff does not claim to have been charged with violating, or actually threatened with prosecution for violation of, subsection 390.0111(10)(a). *See McGee v. Martinez*, 555 So. 2d 914, 915 (Fla. 1st DCA 1990) ("A party seeking an adjudication of the constitutionality of a statute and/or a declaratory judgment must show that he or she has been charged with violating the statute or is actually threatened with prosecution for its violation and that the declaration requested will affect his or her rights."). Nor has Plaintiff claimed that its physicians are actually injured or that there is a real threat of immediate injury involving disciplinary action taken against the physicians. Instead, Plaintiff claims that "[i]f the law is not declared invalid . . . then it *could* subject the physicians performing the procedure to . . . the loss

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of his or her license (emphasis added)."

It is not insignificant that, in the long history of this case, no attempt has been made to implement Section 390.0111(3)(a)(2). The Court is cognizant of the fact that a brochure was, at one time, prepared by the Department. There is some dispute as to whether this brochure represented a "draft" of a future publication or was, in fact, the brochure intended for distribution in accordance with Section 390.0111(3)(a)(2). However, whatever this brochure represented, there is presently no dispute that the Plaintiff is under no obligation to utilize this brochure.

The assertions made by Plaintiff here are similar to *Florida Consumer Action Network* in which the First District Court of Appeal held that there was no justiciable controversy essential for the issuance of declaratory judgment because "plaintiffs' asserted claims of injury below were nonspecific and hypothetical, and did no more than question the constitutionality of chapter 99–225 based on vague, general fears of possible future harm." *Fla. Consumer Action Network*, 830 So. 2d at 153; *see also Florida Soc. of Ophthalmology v. State, Dep't of Professional Regulation*, 532 So. 2d 1278, 1279 (Fla. 1st DCA 1988) (finding allegations alleged what "might" occur under the revised act and thus does not refer to any facts showing an actual rather than theoretical dispute).

Accordingly, for the aforesaid reasons, the court lacks jurisdiction to decide the constitutionality of subsection 390.0111(3)(a)(2), Florida Statutes. This does not mean, of course, that jurisdiction might not exist at some future time.

Based on the foregoing, it is hereby,

**ORDERED AND ADJUDGED** that Defendants' Amended Motion for Summary Judgment is GRANTED, in part, and DENIED, in part, and the filed on February 22, 2010, and Plaintiff's Renewed Motion for Summary Judgment is DENIED. This case is dismissed for lack

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of jurisdiction.

**DONE AND ORDERED** in Chambers in West Palm Beach, Palm Beach County, Florida this 5th day of August, 2010.

JUDGE GLENN KELLEY
CIRCUIT COURT JUDGE

Copies Furnished:

Barry Silver, 1200 S. Rogers Circle, Suite 8, Boca Raton, FL 33487.

Veronica McCrackin, Assistant General Counsel, Florida Department of Health, 4052 Esplanade Way, Tallahassee, FL 32399.

James Peters, Special Counsel, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399.

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