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April 5, 2019

VIA OVERNIGHT DELIVERY

Ms. Courtney Avery, Administrator
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, Second Floor
Springfield, IL 62761-0001

Re: Motion to Dismiss

Dear Ms. Avery:

I attach the Defendants' Motion to Dismiss the Complaint that was recently filed by the Village of Melrose Park. The Motion to Dismiss was filed on April 1.

We do not believe Exemption Application E-004-19 (Westlake Hospital) is the subject of litigation within the meaning of 77 Illinois Administrative Code 1130.560(b)(2). Indeed, the Complaint does not name the Illinois Health Facilities and Services Review Board as a party, and does not seek to enjoin the Board or Defendants from taking any action in connection with Exemption Application E-004-19. Exemption Application E-004-19, while it is an exhibit to the Complaint, clearly is not the subject of the litigation.

Any regulatory interpretation that causes this litigation, however specious, to halt for an indeterminate time period the Board's review of a properly-filed discontinuation application is fatally flawed. It is clearly inconsistent with the law, and with the facts.

That said, and reserving the right to challenge any such interpretation, if rendered, we note that Board staff made the Complaint a part of the record of the Application. As a result, we ask that the Motion to Dismiss, and this letter, be made part of the record of the Application as well.

Very truly yours,

Anne Murphy

Enclosures
AMM:rmc
cc: Mr. Michael Constantino

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

VILLAGE OF MELROSE PARK

Plaintiff,

v.

PIPELINE HEALTH SYSTEM LLC, a Delaware limited liability company, SRC HOSPITAL INVESTMENTS II LLC, a Delaware limited liability company, PIPELINE-WESTLAKE HOSPITAL LLC, a Delaware limited liability company, TWG PARTNERS LLC, an Illinois limited liability company, NICHOLAS ORZANO, an individual, and ERIC WHITAKER, an individual,

Defendants.

Case No. 2019CH03041

Honorable Eve M. Reilly

DEFENDANTS' COMBINED MOTION TO DISMISS THE COMPLAINT PUSUANT TO 735 ILCS 5/2-619.1

Defendants Pipeline Health System LLC, SRC Hospital Investments II LLC, Pipeline-Westlake Hospital LLC, TWG Partners LLC, Nicholas Orzano and Eric Whitaker ("Defendants") respectfully move to dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619.1. Defendants contemporaneously file their Memorandum of Law in Support of their Combined Section 2-619.1 Motion to Dismiss and reference it as if fully stated herein.

THEREFORE, DEFENDANTS pray that this Honorable Court grant this Motion, dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619 or, in the alternative, dismiss this matter pursuant to 735 ILCS 5/2-615.

Dated: April 1, 2019

Respectfully submitted,

/s/ Ronald S. Safer

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Attorneys for Defendants Pipeline Health System LLC, SRC Hospital Investments II LLC, Pipelin-Westlake Hospital LLC, TWG Partners LLC, Nicholas Orzano, and Eric Whitaker

CERTIFICATE OF SERVICE

I hereby certify that that on April 1, 2019, I filed a copy of the foregoing document electronically using the electronic filing system, which will generate notice of this filing to all counsel of record. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this Certificate of Service are true and correct.

/s/ Ronald S. Safer
Ronald S. Safer

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

VILLAGE OF MELROSE PARK Plaintiff, v. PIPELINE HEALTH SYSTEM LLC, a Delaware limited liability company, SRC HOSPITAL INVESTMENTS II LLC, a Delaware limited liability company, PIPELINE-WESTLAKE HOSPITAL LLC, a Delaware limited liability company, TWG PARTNERS LLC, an Illinois limited liability company, NICHOLAS ORZANO, an individual, and ERIC WHITAKER, an individual, Defendants.	Case No. 2019CH03041 Honorable Eve M. Reilly

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR COMBINED MOTION TO DISMISS THE COMPLAINT PUSUANT TO 735 ILCS 5/2-619.1

Defendants Pipeline Health System LLC, SRC Hospital Investments II LLC, Pipeline-Westlake Hospital LLC, TWG Partners LLC, Nicholas Orzano and Eric Whitaker ("Defendants") respectfully submit this Memorandum in support of their Combined Motion to Dismiss the Complaint pursuant to 735 ILCS 5/2-619.1.

I. INTRODUCTION

Plaintiff Village of Melrose Park ("Plaintiff") after it decided not to participate in the proper forum for its complaints – the Illinois Health Facilities and Services Review Board ("Review Board") – has filed this action without standing or basis. Plaintiff's goal is transparent; Plaintiff wants this Court to reverse the Review Board's decision to allow Defendants to purchase three hospitals, without opposition. This Court should decline that anomalous invitation. Plaintiff has no standing to bring this Complaint. Even if it had standing, Plaintiff waived its right to

complain about the change of ownership of these hospitals. Further, Plaintiff has not and cannot point to any information in Defendants' application for change of ownership that was untrue. Finally, Plaintiff's claim for relief is based not upon what happened – the change of ownership – but what might happen – the consolidation of hospitals. Any asserted injury is at best hypothetical. Plaintiff's Complaint should be dismissed.

II. BACKGROUND

Defendants followed with precision the process prescribed by Illinois State law when planning to purchase three hospitals—Westlake Hospital ("Westlake"), West Suburban Hospital ("West Suburban"), and Weiss Memorial Hospital ("Weiss Memorial"). The Review Board has jurisdiction to analyze and either approve or deny a proposed change in ownership of an Illinois licensed health care facility. 77 Ill. Admin. Code § 1130.520(a); *see also* 20 ILCS 3960/6. The purchasers of an Illinois-licensed healthcare facility may request a permit or an exemption from the Review Board to complete their purchase. *Id.* The decision to approve or reject this request rests entirely with the Review Board. *See* 20 ILCS 3960/6, 8.5; 77 Ill. Admin. Code §§ 1130.520, 1130.560. Plaintiff admits it has no decision-making authority or right to overturn a decision of the Review Board. *See* Compl. ¶¶ 35, 37-39.

On September 6, 2018, Defendants submitted their application for an exemption to change ownership of Westlake. *See* Compl. at Ex. 1. Pursuant to 20 ILCS 3960/8.5(b), "[i]f a public hearing is requested, . . . [t]he hearing shall be held in the affected area or community in a place of reasonable size and accessibility and a full and complete written transcript of the proceedings shall be made. All interested persons attending the hearing shall be given a reasonable opportunity to present their positions in writing or orally." No one, including Plaintiff, requested a public hearing regarding Westlake's change of ownership. Defendants' application was approved by the Review

Board. The statements made by Defendants in their application were correct and Plaintiff cannot allege otherwise.

Financial circumstances for the three hospitals, and Defendants' knowledge thereof changed dramatically after the application was submitted in September 2018. Compl. ¶ 61, Ex. 2 at 83-84. As a result, on February 21, 2019, Defendants submitted their application for exemption for Discontinuation of Services. *Id.* at Ex. 2. *That application remains pending.* Westlake had net operating losses of $14 million in 2018 that rapidly accelerated during the second half of the year. *Id.* at 83-84. Those losses are projected to continue to accelerate as long as Westlake continues to operate. *Id.* Given these changed circumstances, at this time and from Pipeline's perspective, Westlake is no longer financially viable. *Id.*

Absent a reversal of this trend or other unforeseen event, consolidation of Westlake and West Suburban is the only way to guarantee safe and effective treatment for the community. Indeed, discontinuing services at Westlake is critical to the success of West Suburban and Weiss Memorial and the proposed consolidation will enable former Westlake patients to be treated at West Suburban, a mere 14 minutes from Westlake and, if the application is approved, will be accessible by shuttle service. *Id.* at 84-85, 113-14.

III. ARGUMENT

A. Plaintiff's Complaint Should Be Dismissed Pursuant to Section 2-619.

A motion to dismiss pursuant to section 2-619 raises affirmative matters either internal or external to the complaint that would defeat the cause of action. *See* 735 ILCS 5/2-619(a)(9). An action will be dismissed under section 2-619 if the court finds that no set of facts can be proved upon which relief could be granted. *Goldberg v. Rush Univ. Med. Ctr.*, 371 Ill. App. 3d 597, 601 (1st Dist. 2007). Plaintiff's Complaint should be dismissed pursuant to section 2-619 for two

reasons. First, Plaintiff has no standing to challenge the Review Board's decision under the Illinois Health Facilities Planning Act ("Planning Act"). Second, Plaintiff lacks standing to sue because it has not alleged any actual injury or damages.

1. Judicial review of the Review Board's decision is not available.

Plaintiff acknowledges that it waived its right to object and oppose the change of ownership and, in fact, did not even request a public hearing to discuss any concerns it had with the proposed change of ownership. *See* Compl. ¶ 10. Plaintiff's post-hoc attempt to object to the change of ownership through this Court is impermissible. Plaintiff cannot seek judicial review because only a competing healthcare facility has a right of action to object to a final decision of the Review Board. *See* 20 ILCS 3960/1, 6, 8.5, 11. The statute provides that only "'adversely affected' persons can seek judicial review" of a final decision of the Review Board. 20 ILCS 3960/11; *see also Ahmad v. Ill. Health Facilities and Servs. Review Bd.*, 2013 IL App (5th) 120004, ¶ 20. Illinois case law defines "adversely affected persons . . . as those persons or entities who operate a competing health care facility." *Id.* Plaintiff does not operate a competing healthcare facility and lacks standing to seek judicial review of the Review Board's final decision to grant the exemption for change of ownership. Even if Plaintiff was a competing health care facility, it has sued the wrong entity. The Review Board alone has the power to approve the change of ownership.

2. Plaintiff has failed to allege injury or damages.

Plaintiff also lacks standing to bring its Complaint because it has not alleged facts to show its claimed injury is traceable to Defendants' actions or that the requested relief is likely to redress the claimed injury. "To establish standing, the claimed injury can be actual or threatened and it must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶ 22.

Initially, Plaintiff cannot prove that any injury is traceable to Defendants' actions. Plaintiff's claim fails at every link in the chain. Plaintiff does not allege, nor can it, that the Review Board would have reached a different decision regarding the change of ownership under different circumstances. Further, the change of ownership about which Plaintiff complains did nothing to alter Westlake's status. Plaintiff complains of the consolidation of Westlake *which has yet to take place.* Actions affecting the operation of Westlake would be noticed before or approved by the Review Board. Indeed, the pending Discontinuation Application for Exemption that would authorize the consolidation has *not yet been approved by the Review Board.* The alleged "loss of property tax revenue" and "additional sums of money . . . to abate the nuisance caused by Defendants' fraudulent actions" are not alleged to flow from a change of ownership, the only decision made by the Board to date. *See* Compl. ¶ 108. Further, because both the decision of the Review Board and the impact of any prospective hospital consolidation is unknown, it is entirely speculative. *See Maglio*, 2015 IL App 140782, ¶ 24 (finding plaintiffs lacked standing because "allegations of injury are clearly speculative"). Plaintiff lacks standing as a matter of law.

This Court need look no further to dismiss this Complaint. But there is more.

B. Plaintiff Fails to Plead Sufficient Facts and its Complaint Should be Dismissed Pursuant to Section 2-615.

Plaintiff's Complaint should be dismissed pursuant to Section 2-615 because it fails to allege sufficient facts to support a cause of action for fraudulent misrepresentation, civil conspiracy, violations of Melrose Park municipal codes, or public nuisance. A Section 2-615 motion attacks a pleading as legally insufficient on its face. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004); *see also Alpha Sch. Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 735 (1st Dist. 2009); *Karen Stavins Enters., Inc. v. Cmty. Coll. Dist. No. 508*, 2015 IL App (1st) 150356, ¶ 5 ("the only facts to be considered in ruling on a section 2–615 motion are those set forth in the complaint

under attack."). Illinois' fact-pleading standard requires that a plaintiff allege "sufficient facts to state all elements" of his cause of action. *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17. Only well-pleaded allegations of fact are taken as true, while conclusions of law and conclusory factual allegations are ignored. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007); *Hanks*, at ¶ 17.

1. All claims against the individual Defendants fail.

Plaintiff's cause of action is insufficiently pled with respect to the individually named defendants. "Corporate officers are generally not liable for corporate obligations." *IOS Capital, Inc. v. Phoenix Printing, Inc.*, 348 Ill. App. 3d 366, 371 (4th Dist. 2004). They are only liable where they actively participate in the alleged tort. *Id.* The only allegation in Plaintiff's Complaint made against Mr. Orzano is that he signed the Defendants' application for Change of Ownership in his official capacity. There are no allegations that Orzano personally made any false statement to anyone. Similarly, Plaintiff's Complaint references public statements Mr. Whitaker allegedly made on behalf of Defendants but fails to allege any facts to demonstrate these statements were made specifically about Westlake, as opposed to generally about the acquisition of all three hospitals, that these statements were false at the time they were made or that they had an impact on the Board's action that is the subject matter of the Complaint. Neither Mr. Orzano or Mr. Whitaker, therefore, should be personally liable for any corporate obligation.

2. Plaintiff fails to plead facts sufficient to state a cause of action for fraudulent misrepresentation.

Plaintiff's Complaint fails to plead sufficient facts to support its claim that Defendants knowingly made false statements when they applied for the Change of Ownership exemption. Fraudulent misrepresentation requires "(1) a false statement of material fact, (2) knowledge or belief of the falsity by the party making it, (3) intention to induce the other party to act, (4) action

by the other party in reliance on the truth of the statements, and (5) damage to the other party resulting from such reliance." *Bd. of Educ. of City of Chi. v. A, C & S, Inc.*, 131 Ill. 2d 428, 452 (1989); *see also Charles Hester Enters., Inc. v. Ill. Founders Ins. Co.*, 114 Ill. 2d 278, 288 (1986) (holding plaintiffs failed to allege sufficient facts to state a cause of action for fraud). Additionally, Illinois "has held that common law fraud demands a 'higher standard' when it comes to pleading. . . . The facts which constitute an alleged fraud must be pleaded with specificity and particularity, including "what misrepresentations were made, when they were made, who made the representations and to whom they were made." *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 847 (1st Dist. 2009) (internal citations omitted).

a. Plaintiff fails to plead that Defendant made any materially false statements.

Defendants' application for change of ownership makes no mention of any promise to keep Westlake open for any period of time. Nor is the application directed to the Plaintiff. Plaintiff's reliance on the application's statements that Defendants' "Charity Care Policy is *not* more restrictive than the current charity care policies at Westlake" and the Defendants' "Charity Care Policy will remain in place for no less than two years following the consummation of the Transaction" is misplaced. *See* Compl. ¶ 8. Defendants' commitment not to adopt a more restrictive Charity Care Policy is not an affirmative statement that Westlake will remain in operation indefinitely or that it will not be consolidated with another hospital. In fact, the Review Board cannot, in deciding whether or not to grant an application for change of ownership, require a guarantee of continuation of services. 20 ILCS 3960/8.5(a).

The Planning Act sets forth the key terms of the transaction proposed in this case. The Planning Act states, in section 8.5(a), that "[a]n application for a change of ownership need not contain signed transaction documents so long as it includes the following key terms of the

transaction: names and backgrounds of the parties; structure of the transaction; the person who will be the licensed or certified entity after the transaction; the ownership or membership interests in such licensed or certified entity both prior to and after the transaction, fair market value of assets to be transferred; and the purchase price or other form of consideration to be provided for those assets." 20 ILCS 3960/8.5(a). Importantly, continuation of services is not a key term of the transaction as defined by the regulation. *Id.* The Review Board is expressly not allowed "to impose any conditions, obligations, or limitations, other than those required by this Section, with respect to the issuance of an exemption for a change of ownership, including, but not limited to, . . . the commitment to continue to offer for a specified time period any services currently offered by the health care facility." *Id.* Thus, not only did Defendants' application not include a promise to continue operations, any such statement would have been immaterial to the decision to grant the application.

Further, Plaintiff does not allege, nor can it, that even if an intention to keep Westlake open had been expressed at the time the initial application was filed that it would have been untrue. Westlake's untenable financial condition was not fully evident at the time the application was filed. Westlake's financial condition deteriorated throughout 2018. *See* Compl., Ex. 2 at 81-84. Westlake's net operating loss of $14 million in 2018, of course, was not known until the year ended and had not occurred in September 2018 when Defendants submitted their application for an exemption and change of ownership or even when that application was granted. By attaching Defendants' Discontinuation Application to the Complaint, Plaintiff acknowledges that Defendants did not anticipate their consolidation of Westlake hospital at the time the change of ownership application was filed. *See* 3 Ill. Prac., Civil Procedure Before Trial § 27:4 (2d ed.) ("To the extent that there is a conflict between the allegations of the complaint and the facts set forth in

the exhibits, the general rule is that the exhibits are controlling."). The statements Defendants made in their change of ownership application to the Review Board were not false either on their face or even read in the light most favorable to Plaintiff. Defendants did not promise to continue operation of Westlake for any specific period of time (nor were they required to), and they learned new information after submitting their application which guided their decision to apply for an exemption for Discontinuation of Services and consolidate Westlake and West Suburban. Plaintiff has plainly failed to allege sufficient facts to demonstrate (1) that a false statement was made and (2) that it was made knowingly. *Bd. of Educ. of City of Chi.*, 131 Ill. 2d at 452.

Plaintiff's allegations that Defendants made false statements directly to Plaintiff are inadequately plead, untrue, and irrelevant. Plaintiff falsely contends that Defendants, through unspecified interviews with local newspapers and television networks, "promised [the Village, community members and the members of the public] that Westlake Hospital would remain open and operating for the benefit of the community." Compl. ¶ 9. Plaintiff's unsubstantiated allegation that Defendants promised to keep Westlake open does not meet the heightened standard required for a claim of fraud. Allegations that lack specific, relevant facts necessary to state a cause of action must be dismissed. *See, e.g., Dloogatch*, 396 Ill. App. 3d at 847. Plaintiff does not point to a specific public statement in which any Defendant promised to keep Westlake open. The four specific interview statements on which Plaintiff relies contain no such promises. *See* Compl. ¶ 58. The only specific statement that Defendant promised to keep Westlake open was allegedly made to the Village mayor and some unidentified members of the Village Council sometime between June and October 2018. *See id.* ¶ 52. Even if such a statement had been made, it would have had no consequence. As Plaintiff admits, it had no control over the Review Board's decision to approve or deny the change in ownership application. Thus, any statement made to the Mayor or

the Village Council did not play a role in the Review Board's decision to approve the change in ownership application. Though Plaintiff contends that Defendants' statement caused Plaintiff to waive its right to oppose the change in ownership (*see id.* ¶ 54), Plaintiff has not and cannot allege that any objection it might have made would have led the Review Board to deny Defendants' change in ownership application. Moreover, an "action for fraud may not be based on a false representation or intention of future conduct[.]" *Labolle v. Metro. Sanitary Dist.* 253 Ill. App. 3d 269, 276 (1st Dist. 1992). While there is an exception that a false promise for future conduct is part of the scheme to accomplish the fraud, that exception is not applicable here because, as Plaintiff admits, it has no role in the decision to keep Westlake open. *See id.*; *see also* Compl. ¶¶ 35, 37-39.

b. Plaintiff fails to allege facts to support a claim that Plaintiff suffered any damage as a result of reliance on false statements made to Plaintiff.

From Defendants' perspective, under present circumstances, the proposed consolidation of Westlake and West Suburban is the only realistic route to safe and effective treatment of Melrose Park's most underserved population. *See* Compl., Ex. 2 at 85. The consolidation has yet to happen. The effect of the consolidation, if approved, has yet to be felt. The exhibits to Plaintiff's Complaint make it clear that the consolidation of the hospitals will be a positive development for the community. *See id.* at 85, 114-18. Plaintiff's assertions that Melrose Park will incur increased costs for emergency services and lost tax revenue are bald speculation. *See* Compl. ¶¶ 87-89. "Damage is an essential element of fraud. [While] [a]bsolute certainty about the amount of damage is not necessary to justify a recovery if damage is shown . . . damages may not be predicated on mere speculation, hypothesis, conjecture or whim. The evidence must show a basis for computing damages with a fair degree of probability." *City of Chi. v. Mich. Beach Hous. Coop.*, 297 Ill. App. 3d 317, 323 (1st Dist. 1998) (internal citations omitted). Here, Plaintiff offers nothing more than

conjecture, speculation, and vague statements in support of their alleged damages. Generic statements that the Village is "harmed by the increased costs posed by Westlake's closure" (Compl. ¶ 87) are insufficient to "show a basis for computing damages with a fair degree of probability." *Mich. Beach Hous. Coop.*, 297 Ill. App. 3d at 323. But they do make it clear that it is the yet to be approved closure and not the change of ownership that is the root of Plaintiff's Complaint. For all of these reasons, Plaintiff's fraudulent misrepresentation claim should be dismissed.

3. Because Plaintiff fails to plead facts sufficient to state a cause of action for fraudulent misrepresentation, its claim for civil conspiracy necessarily fails.

Plaintiff's failure to plead sufficient facts to support its claim of fraudulent misrepresentation forecloses Plaintiff's civil conspiracy claim. "A conspiracy is not an independent tort." *Ill. State Bar Ass'n Mut. Ins. Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶ 37. "The elements of a civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Id.* Plaintiff's assertion that each Defendant agreed to a common strategy to convince Plaintiff and the Review Board that if allowed to purchase Westlake, they would keep it open, is conclusory and based on nothing more than conjecture. *See* Compl. ¶¶ 93, 95. The Complaint contains no specific allegation of agreement among the Defendants. As described above, Plaintiff has not alleged that Defendant made any materially false statements to the Village or the Review Board. The factors that led Defendants to apply for an exemption to allow consolidation were not known to Defendants in the summer of 2018 when the application was submitted and therefore could not have been considered when Defendants applied for a change of ownership exemption. *See* Compl. ¶¶ 61, 65, Ex. 2 at 81-84. Moreover, the Review Board

approved Defendant's application for change of ownership and found no unlawful or fraudulent purpose. "The mere characterization of a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss." *Buckner v. Atl. Plant Maint.*, Inc., 182 Ill. 2d 12, 23 (1998) (internal citations omitted). There are simply not sufficient facts alleged in the Complaint to support a claim of civil conspiracy and this claim should be dismissed.

4. Plaintiff fails to plead facts sufficient to state a cause of action under Melrose Park Municipal Code Sections 9.04.030 and 9.08.020.

As described above, nothing in Plaintiff's Complaint supports its claim that Defendants made any materially false statements to the Village. Perhaps more importantly for these purposes, because Plaintiff had no role in the approval process, any statement made to Plaintiff is immaterial.

Melrose Park Municipal Code Section 9.04.030 is called "Cheating." It provides as follows: "It is unlawful for any person in the village to obtain possession of any goods, property or thing of value by any false proceedings or by cheating or by fraud of any kind." To say there is nothing alleged in Plaintiff's Complaint to support "cheating" is an understatement – Defendants complied with all regulatory procedures and the Review Board granted their exemption for change of ownership. As set forth in Section B.2.(a) above, Plaintiff has not alleged that any statements were false at the time they were made.

Similarly, Plaintiff fails to plead sufficient facts to support an allegation that Defendants violated Municipal Code section 9.08.020. That code provision states: "It is unlawful for any person to interfere with, hinder or resist any officer or employee of the village while engaged in the duties of his or her office or employment." Plaintiff's Complaint fails to state where, when or how Defendants interfered with any officer or employee of the Village. Plaintiff had no role in this process with which Defendants could possibly interfere. These claims have no application to the facts at bar and must be dismissed.

5. Plaintiff fails to state facts sufficient to state a cause of action for public nuisance.

A claim for public nuisance has four elements: "the existence of a public right, a substantial and unreasonable inference with that right by the defendant, proximate cause, and injury." *City of Chi v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004). Circumstances that may sustain a holding that an interference with a public right is unreasonable include, among others, whether the conduct involves a significant interference with the public health, safety, peace, comfort, convenience. *Id.* at 375-76 (citing Restatement (Second) of Torts § 831B(2)(a)(1979)). Plaintiff makes a generic allegation that Westlake and West Suburban's consolidation will cause "significant and unreasonable interference with the public health, safety, welfare, peace, comfort, and convenience of Plaintiff's citizens." Compl. ¶ 104. This conclusory allegation merely restates this element of the public nuisance tort with no supporting facts. While other portions of the Complaint speculate about how the yet to be approved consolidation – *not the change of ownership* – will affect the Village and its citizens, those allegations are pure conjecture and ignore the plan to accommodate patients after Westlake's consolidation that is set forth in the exhibits to the Complaint as well as the existence of Gottlieb Hospital, 1.6 miles from Westlake in Melrose Park. As the application for discontinuation of services explains, Defendants have a thoughtful plan in place about how to continue to serve the people who Westlake currently supports. Plaintiff's allegations as to how West Suburban and Westlake's consolidation will significantly interfere with public health are speculative and an exhibit to the Complaint contradicts those very allegations. Thus, Plaintiff has not plead sufficient facts to state a claim for public nuisance.

Even if Plaintiff had adequately alleged an interference with a public right, Plaintiff cannot allege that the change of ownership caused that interference or that any injury will follow as a result. "Although proximate cause is generally a question of fact, the lack of proximate cause may

be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause." *Beretta,* 213 Ill. 2d at 395-96. (internal citations omitted). "The first requirement, cause in fact, is present 'when there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id.* at 395 (citing *Lee v. Chi. Transit Auth.*, 152 Ill. 2d 432, 455 (1992)). "The second requirement, legal cause, is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it." *Id.* (citing *Simmons v. Garces,* 198 Ill. 2d 541, 558 (2002) (quoting *McCraw v. Cegielski,* 287 Ill. App. 3d 871, 873 (1st Dist. 1996)). Plaintiff's injuries of increased costs and lost revenue (*see* Compl. ¶ 108) are pure speculation at this point and its claim of public nuisance is premature.

Illinois courts have recognized that "[a] plaintiff may seek injunctive relief for a prospective nuisance." *Helping Others Maintain Envt'l Standards v. Bos*, 406 Ill. App. 3d 669, 689 (2d Dist. 2010) (citing *Vill. of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 21–22 (1981)). However, the allegations necessary to bring such a claim may not be based on speculation or conjecture. The Illinois Supreme Court has cautioned that injunctive relief "will not be granted to allay unfounded fears or misapprehensions." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 166 (1956). Unless the activity complained of is a *per se* nuisance or the existence of a nuisance has already been legally established, "[i]t is only in *extreme cases* . . . that a court of equity will take jurisdiction to abate a nuisance by injunction." *City of Kankakee v. N.Y. Ctr. R.R. Co.*, 387 Ill. 109, 117 (1944) (emphasis added). To succeed on such a claim, a plaintiff must demonstrate that it is "highly probable" that the anticipated activity will lead to a nuisance; "if the possibility is merely uncertain or contingent the plaintiff may be left to his remedy after the nuisance has occurred." *Vill. of Willow Springs v. Vill. of Lemont*, 2016 IL App (1st) 152670, ¶ 48. Based on

the face of the Complaint, Plaintiff's alleged injuries are all speculative and it is impossible for Plaintiff to assert or the Court to determine that the anticipated consolidation of Westlake and West Suburban will lead to any interference of public health, safety, peace, comfort, or convenience, let alone a significant one.

6. Plaintiff is not entitled to a declaratory judgment because that claim overlaps with Plaintiff's substantive claims.

Plaintiff seeks a declaratory judgment that Defendants have violated Melrose Park Municipal Code sections and that they have defrauded the Village and the Review Board while engaging in a civil conspiracy. *See* Compl. ¶¶ 112, 114. The requests in these paragraphs repeat Plaintiff's allegations in Counts I-IV of the Complaint. The court should dismiss Plaintiff's request for declaratory relief on those claims because they are duplicative of Plaintiff's substantive claims. *See, e.g., Certain Underwriters at Lloyd's, London v. Boeing Co.*, 385 Ill. App. 3d 23, 44 (1st Dist. 2008) ("[A] declaratory judgment is an unacceptable vehicle of litigation where the issues in the underlying suit and the declaratory judgment action are substantially the same."). Plaintiff also seeks a declaratory judgment that Defendants have violated the Planning Act. *See* Compl. ¶ 113. That request fails as a matter of law, because Illinois case law forecloses Plaintiff, who does not operate a competing healthcare facility, from bringing such a claim. *Ahmad*, 2013 IL App (5th) 120004, ¶ 20. For these reasons Plaintiff's claim for declaratory relief should be dismissed.

IV. CONCLUSION

Plaintiff's Complaint is defective and must be dismissed pursuant to 735 ILCS 5/2-619. Plaintiff lacks standing, and improperly seeks judicial review of the Review Board's decision. Plaintiff also fails to allege sufficient facts to state the elements of its causes of actions. Accordingly, Plaintiff's Complaint should also be dismissed pursuant to 735 ILCS 5/2-615.

Dated: April 1, 2019

Respectfully submitted,

/s/ Ronald S. Safer

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Attorneys for Defendants Pipeline Health System LLC, SRC Hospital Investments II LLC, Pipelin-Westlake Hospital LLC, TWG Partners LLC, Nicholas Orzano, and Eric Whitaker

CERTIFICATE OF SERVICE

I hereby certify that that on April 1, 2019, I filed a copy of the foregoing document electronically using the electronic filing system, which will generate notice of this filing to all counsel of record. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this Certificate of Service are true and correct.

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