

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED

2004 AUG -5 P 4: 36

SALT INSTITUTE, *et al.*,)
Plaintiffs,)
v.)
)
TOMMY THOMPSON,)
Secretary, Department of Health)
and Human Services)
)
Defendant.)

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA *js*

CIVIL ACTION NO. 04-359 GBL

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S EMERGENCY MOTION FOR CONTINUANCE
OF THE HEARING AND LEAVE TO FILE SUR-RESPONSE**

Submitted by:

Reed D. Rubinstein
Mark E. Solomons
Geoffrey J. Greeves (VSB 41499)
GREENBERG TRAURIG, LLP
800 Connecticut Avenue, N.W.
Washington, D.C. 20006
COUNSEL FOR PLAINTIFFS

Stephen A. Bokat
Ellen Bryant
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
OF COUNSEL FOR PLAINTIFF
CHAMBER OF COMMERCE OF
THE UNITED STATES

BACKGROUND

This case concerns Plaintiffs' rights under the Information Quality Act ("IQA") and the Shelby Amendment.¹ Plaintiffs are Salt Institute and The Chamber of Commerce of the United States of America ("Plaintiffs"). They seek relief under the Information Quality Act, the Shelby Amendment and the Administrative Procedure Act from the refusal of the National Heart, Lung and Blood Institute (the "Institute"), a unit of the U.S. Department of Health and Human Services, to disclose data and methods used by the Institute to support the dissemination of certain public information.

Plaintiffs sued for judicial review of final agency action that has denied them the important rights Congress conferred. Citing Fed. R. Civ. P. 12 (b) (1) and 12 (b) (6), Defendant filed a motion to dismiss Plaintiffs' Complaint, arguing that Plaintiffs' claims are not justiciable for a variety of reasons. Plaintiffs filed a response on Thursday, July 15, 2004. Defendant filed a reply brief (the "Reply") on Friday, July 30, 2004. Argument on Defendant's motion is scheduled for August 13, 2004 at 2:00 pm.

Appended to the Reply, in support of the Defendant's new argument that the Plaintiffs' claim for information production under IQA is moot, is an affidavit from an Institute employee, and a medical journal article dated July 15, 2004. The affidavit states that the "data Plaintiffs requested, and more, is available in" this article. Declaration of Nancy L. Geller, ¶11. Plaintiffs' science expert, who has had an opportunity to review the article and the employee affidavit, has

¹ These new laws are, perhaps, the most significant advancements in the pursuit of transparency, honesty and openness in the Federal government that have been made in the past 40 years. They require Federal agencies that disseminate information to the public, not only as part of a formal rulemaking, but a part of almost any facet of agency activity, to meet clear and specific quality standards. By Act of Congress, administrative agencies must use only valid, demonstrably accurate and empirically supported scientific and technical data to support any information disseminated. They must truthfully inform the public, and disclose and provide all underlying data and methods the public needs to test and verify the accuracy of such information, including data generated by federally-funded grant research. And, most significantly, the public is entitled to seek and obtain correction of government disseminated information that does not meet quality standards.

advised Plaintiffs' counsel that the affidavit is incorrect, and the necessary information sought remains undisclosed.

On Monday, August 2, 2004, Plaintiffs' counsel contacted Defendant's counsel regarding Plaintiffs' right to respond to the affidavit and journal article submitted for the first time with Defendant's Reply. Counsel agreed that Plaintiffs' could file a counter-affidavit and short sur-response brief addressing Defendant's affidavit and mootness claims. Counsel further agreed that it would be reasonable to continue the argument on the motion to dismiss until September 3, 2004, to allow Plaintiffs' to respond to the new information. On August 4, 2004, Defendant's counsel expressed his willingness to continue the hearing to August 27, 2004 only.

Plaintiffs' also advised Defendant that they intended to file a motion for summary judgment, based in part on material in the newly disclosed journal article. Plaintiffs' counsel requested that the schedule be adjusted to allow this motion to be heard at the same time as the motion to dismiss. On August 2 and August 4, Defendant refused to consent to such an arrangement, advising Plaintiffs' that he objected to any such motion.

Plaintiffs' submit this emergency motion seeking leave of the Court to continue the hearing in this matter until October 15, 2004 and to authorize briefing of Plaintiffs' motion for summary judgment according to a schedule allowing Plaintiffs' to file their motion for summary judgment including a sur-response to Defendant's motion to dismiss by August 27, 2004. Defendants then would file their response to Plaintiffs' motion for summary judgment on or before September 24, 2004 and Plaintiffs' would reply on or before October 1, 2004. Hearing on all pending motions would take place on October 15, 2004.

ARGUMENT

I. Good Cause Exists For A Continuance

Local Rule 7 (G) provides that motions for continuances will be granted for good cause. The parties agree apparently Plaintiffs have good cause for leave to file a sur-response, and that there is good cause to continue the hearing date accordingly. Plaintiffs' are entitled to respond to

Defendant's newly filed materials and dispute the interpretation of them offered in the Geller Affidavit. The dispute here is whether under the circumstances the continuance should be extended to allow Plaintiffs' to file their motion for summary judgment, with adequate time for briefing.

On the facts of this case, there is good cause for granting a continuance and for rescheduling the briefing in this case to accommodate Plaintiffs' motion for summary judgment and sur-response to the new materials submitted by the Defendant.

Whether or not the Defendant's submission of a medical journal article and affidavit in support of a contested claim of mootness, converts Defendant's motion to dismiss into a motion for summary judgment under Rule 56 of the Federal Rule of Civil Procedure ² the article and commentary introduces the merits of the case as a factor to be considered by the Court in resolving the Defendant's motion to dismiss. This lawsuit seeks the production of data under the IQA and a correction of disseminated information that is not supported by the data. According to Ms. Geller's affidavit, the disclosure request is moot because all the information sought is set forth in the article.

Thus, in order to determine whether to grant the Defendant's motion to dismiss in whole or in part on mootness grounds, the Court is called upon to evaluate whether the information in the article and affidavit is sufficient to discharge the Defendant's duty to disclose under the IQA. This matter is, therefore, so closely connected to the merits of the Plaintiffs' disclosure claim that it would seem to be prejudicial for the Court to consider it without fully considering all the arguments and materials that bear on the resolution of the issue that would be presented to the court in a motion for summary judgment.

² See Wilson-Cook Medical Inc. v. Wilson, 942 F.2d 217, 249, 252 (4th Cir. 1991), see also GFI Inc. v. Frankline Industries, 55 F. Supp. 2d, 565,567, (N.D. Miss 1999); Williamson v. Tucker, 645 F.2d 404,413 (5th Cir. 1981) (supporting that proposition that a Rule 12 (b) (1) defense (like mootness) is not converted to a motion for summary judgment by the consideration of material in addition to the pleadings.). We have found no comparable Fourth Circuit authority.

The consolidation of Defendant's motion to dismiss and Plaintiffs' motion for summary judgment for hearing at the same time affords the Court the opportunity to dispose of all or most of the case and to consider all of the arguments of the parties that need the Court's attention short of a trial. It may avoid the possibility of piecemeal appeals and surely will enhance the prospect of a more efficient resolution of this case. The Court should consider, in this connection, that there are no published district court³ or federal appellate decisions in any jurisdiction concerning any of these important preliminary issues presented under the IQA and that less than a full consideration of the issues by the Court serves no useful purpose. The Court is being called upon to consider new law and a full, thorough consideration of all the preliminary issues presented is warranted and best serves the interests of everyone involved.

By the same token, there is no apparent reason for the Government's strong objections to the seemingly more efficient consolidation approach suggested by the Plaintiffs'. There are no compelling governmental interests that are implicated by the fairly brief delay requested. All of the important issues needing the Court's attention eventually will be addressed and the Government's determination to complicate the process by piecemeal review is not helpful.

Finally, it is not possible to compress the schedule because of one of Plaintiffs' counsel's observance of the Jewish High Holy days throughout September and early October and it is respectfully requested that the Court accommodate those obligations.

³ The unpublished memorandum of the U.S. District Court for the District of Minnesota in In re: Operation to the Missouri River System Litigation, No. 03-MD-1555 slip op. at 49. (D. Minn. June 21, 2004), presents distinguishable circumstances and suffers from a lack of any analysis by the court. In the Missouri River case, the IQA issue is a very minor side bar in a longstanding multi-party dispute over the operation of the Missouri River. The court's rejection of an IQA disclosure request is not at all enlightening for the instant case.

For these reasons, the Plaintiffs' Motion for Continuation of the Hearing to October 15, 2004 and Leave to File a Sur-Response, should be granted.

Respectfully submitted,
SALT INSTITUTE
THE CHAMBER OF COMMERCE
OF THE UNITED STATES



Reed D. Rubinstein
Mark E. Solomons
Geoffrey J. Greeves (VSB 41499)
Greenberg Traurig, LLP
800 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 331-3100

OF COUNSEL FOR THE CHAMBER OF COMMERCE OF THE
UNITED STATES
Stephen A. Bokat
Ellen Bryant
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 462-5337

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2004, a true copy of the foregoing was served, via First Class Mail and fax, to the following:

Dennis C. Barghaan, Jr.
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3891
Attorney for Defendant

Edward H. White
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 7107
Washington, D.C. 20530



Geoffrey J. Greeves