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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SALT INSTITUTE and the CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA Plaintiffs, v. TOMMY G. THOMPSON, Secretary, U.S. Department of Health and Human Services Defendant.	Case No. 04-CV-359 GBL

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR CONTINUANCE OF THE HEARING AND LEAVE TO FILE SUR-RESPONSE

(17)

INTRODUCTION

As much as Plaintiffs would like the court to review their claims on the merits, principles of prudence and judicial economy direct the court first to determine whether the substantial obstacles to the court's jurisdiction, identified in Defendant's Motion to Dismiss, prevent it from reaching the merits of Plaintiffs' claims. Accordingly, Defendant objects to Plaintiffs' request to continue the hearing on Defendant's Motion to Dismiss until October 15, 2004 in order to allow Plaintiffs to file a motion for summary judgment and have a consolidated hearing on both motions at that time. However, in order to accommodate Plaintiffs' counsel's vacation plans and Plaintiffs' desire to respond to the recently published medical article attached to Defendant's Reply Brief, Defendant consents to Plaintiffs' alternative request for leave to file a surreply (which shall not exceed five pages) and a supporting affidavit on or before August 27, 2004, provided that the surreply and supporting affidavit be limited to responding solely to Defendant's mootness argument. Defendant further consents to Plaintiffs' alternative request to reschedule the hearing on Defendant's Motion to Dismiss for September 3, 2004.

BACKGROUND

On June 25, 2004, the court signed the agreed order consented to and submitted by the parties that established the briefing and argument schedule on Defendant's Motion to Dismiss. As provided under the agreed order, Defendant noticed his Motion to Dismiss for hearing on August 13, 2004. Plaintiffs voiced no objection to this hearing date. On July 30, 2004 Defendant timely filed his reply brief in support of his Motion to Dismiss which includes as attachments a medical journal article dated July 15, 2004 and a declaration from an NIH scientist. The declaration states that the article contains the specific data sought by Plaintiffs in this case and supports Defendant's argument that the court lacks jurisdiction to review Plaintiffs' claims

for the data because they are moot.[1]

Acknowledging that the medical article was only recently published, on August 2, 2004, Defense counsel informed Plaintiffs' counsel over the phone that Defendant would have no objection to Plaintiffs filing a short surreply addressing the medical article as it relates to Defendant's mootness argument and to which Plaintiffs could attach their own declaration. To accommodate Plaintiffs' counsel's vacation plans and to provide them additional time to file such a surreply, Defense counsel also offered to consent to a short continuance of the August 13th hearing. Defense counsel suggested that the surreply would be due on August 20th and the hearing on Defendant's Motion to Dismiss would be rescheduled for August 27th. Plaintiffs' counsel indicated he would consider that proposal but needed to discuss these issues with his clients.

On August 3rd, after receiving only a short letter from Plaintiffs' counsel purporting to confirm that the August 13th hearing would be postponed without agreeing to any alternative dates, Defense counsel contacted Plaintiffs' co-counsel by phone and learned that Plaintiffs intended to seek a much longer continuance of the hearing to enable Plaintiffs to file their own motion for summary judgment and to have one consolidated hearing on all motions. Defense counsel indicated that he objected to Plaintiffs' proposed plan and explained that his initial willingness to postpone the August 13th hearing was based on the premise that the hearing would be delayed only for a matter of weeks, not months, that Plaintiffs would file only a short surreply,

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[1] Contrary to Plaintiffs' assertion, Defendant's mootness argument is not "new". Defendant argued that Plaintiffs' claims for the DASH-Sodium Trial data were moot in his initial Memorandum in Support of Defendant's Motion to Dismiss ("Mem."). See Mem. at 19 n. 14. Only the publication of the requested data in the July 15, 2004 medical article is new and provides an additional compelling reason to find Plaintiffs' request for the data moot.

and that the hearing would still address only Defendant's Motion to Dismiss. On August 4th, Defense counsel memorialized his position in a letter to Plaintiffs' counsel and reiterated Defendant's objection to Plaintiffs' proposed plan. See Exhibit A (attached). On August 5th, Plaintiffs filed the present motion.

ARGUMENT

I. RESOLVING DEFENDANT'S MOTION TO DISMISS FIRST IS PROPER AND EFFICIENT.

Contrary to Plaintiffs' assertions, no good cause exists to delay consideration of Defendant's Motion to Dismiss for over two months. First, as mentioned, Plaintiffs agreed to the current briefing and argument schedule solely on Defendant's Motion to Dismiss back in June. If Plaintiffs wanted to have a consolidated hearing on Defendant's Motion to Dismiss and their anticipated motion for summary judgment, Plaintiffs could have voiced their preference back then, but they failed to do so.

Principles of judicial economy also indicate that Defendant's Motion to Dismiss should be considered promptly and before any motion for summary judgment that Plaintiffs might file in the future. Defendant's Motion to Dismiss identifies multiple jurisdictional defects to Plaintiffs' claims, including lack of standing, no private right of action, no final agency action, no judicially manageable standards to apply, as well as mootness. The court must first determine if these obstacles can be overcome before it may rightfully exercise jurisdiction even to consider the merits of Plaintiffs' claims in a motion for summary judgment. See, e.g., Nelson v. United States Postal Serv., 189 F. Supp.2d 450, 454 (W.D. Va. 2002) (finding that jurisdiction is a "threshold question concerning a court's power to act" and noting that Plaintiff bears burden to prove its

existence). Moreover, if the court should determine that it does not have jurisdiction due to one or more of these defects, such a determination would end this case and the parties and the court would avoid the unnecessary delay, effort, and expense of briefing and arguing an entirely new motion for summary judgment. See, e.g., Locke v. United States, 215 F. Supp.2d 1033, 1036 (D.S.D. 2002) (finding that "[b]ecause jurisdiction is a threshold question, judicial economy demands that the issue be decided at the onset."). Plaintiffs have not yet even filed a motion for summary judgment and have indicated that they do not expect to file one for at least another two weeks. By contrast, Defendant's Motion to Dismiss is fully briefed and ready to be argued save for Plaintiffs' desire to file a short surreply. Accordingly, the efficient and proper management of this case can best be achieved by hearing Defendant's Motion to Dismiss promptly and before any consideration of a motion for summary judgment anticipated by Plaintiffs.

Plaintiffs' assertion that Defendant somehow invited a consideration of the merits of this case simply by attaching a medical article and a declaration to his reply brief is unfounded. Fourth Circuit precedent clearly indicates that "when a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Velasco v. The Government of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); see also Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). And contrary to Plaintiffs' contentions, Defendant's mootness argument does not directly implicate the merits of Plaintiffs' claims. The court is not required to determine whether NHLBI is legally obligated to produce the requested data under the statutory terms of the IQA or the Shelby Amendment. Instead, Defendant's mootness argument merely requires the court to

decide if a live "case or controversy" within the meaning of Article III exists in light of the fact that Plaintiffs now have access to the data requested as published in the recent journal article.[2] As a result, there is no compelling justification to significantly postpone the consideration of Defendant's Motion to Dismiss in order to combine its determination with Plaintiffs' yet-to-be-filed motion for summary judgment.

II. DEFENDANT CONSENTS TO PLAINTIFFS' PROPOSED ALTERNATIVE RELIEF.

As mentioned, given that the medical journal article was just published in July, Defendant has no objection to Plaintiffs' alternative request for relief granting them leave to file a surreply, not to exceed five pages, and a supporting affidavit on or before August 27, 2004, provided that the surreply and supporting affidavit be limited to responding solely to Defendant's mootness argument. Defendant also has no objection to Plaintiffs' related request to reschedule the hearing on Defendant's Motion to Dismiss for September 3, 2004. This relief is essentially what Defendant originally offered to Plaintiffs; it merely adds one additional week to the filing and argument dates.

CONCLUSION

For the foregoing reasons, Plaintiffs' Emergency Motion for Continuance of the Hearing and Leave to File Sur-response should be denied, except to the extent that Defendant has consented to Plaintiffs' alternative request for relief as stated herein.

[2] In any event, besides Defendant's mootness argument, several other jurisdictional challenges are presented in Defendant's Motion to Dismiss which do not implicate the merits whatsoever.

Dated: August 9, 2004

Respectfully submitted,

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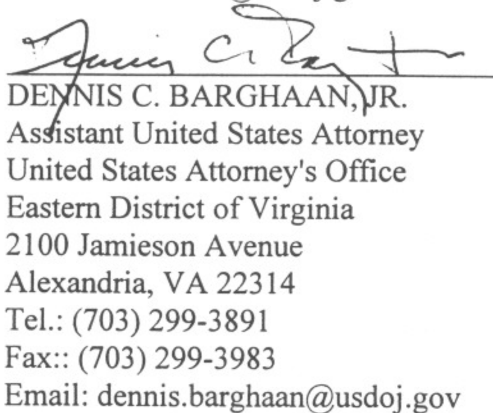

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a true copy of the foregoing DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR CONTINUANCE OF THE HEARING AND LEAVE TO FILE SUR-RESPONSE was served on Plaintiffs by first class mail and facsimile addressed to:

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