UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA and the STATE OF NORTH CAROLINA, *Plaintiffs,* v. THE CHARLOTTE MECKLENGURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM, *Defendant*.	Case No. 3:16-cv-00311-RJC-DCK

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE OR ALTERNATIVEY TO STRIKE EXTRANEOUS MATERIALS SUBMITTED BY PLAINTIFFS IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Without first seeking to meet and confer with Plaintiffs' counsel, Defendant Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System ("CHS") has moved to exclude academic and economic authority which Plaintiffs cited in their Opposition to CHS's Fed. R Civ. P. 12(c) Motion. CHS's motion should be dismissed because it did not follow LCvR 7.1(B) by failing to meet and confer with counsel for Plaintiffs. In addition to being procedurally improper, CHS' motion is meritless because CHS has (i) submitted and/or cited a variety of inferior authority in its motion to dismiss, and (ii) failed to show why the Court should exercise its discretion to strike academic articles and economic reports which demonstrate that CHS's critique of Plaintiffs' Complaint is unfounded.

BACKGROUND

In its memorandum of law in support of its Motion For Judgment on The Pleadings (ECF No. 11), CHS argued that Plaintiffs' Complaint allegations were "unprecedented" "conjecture and supposition" and economically "implausible." CHS Mem. at 2 and 6. In arguing that Plaintiffs' Complaint should be dismissed, CHS cited remarks about the impact of steering restrictions from economists on a panel at a conference.

To address these remarks and CHS's assertions, Plaintiffs cited several peer-reviewed academic articles and economic reports regarding the benefits of steering consumers to lower-priced and higher quality health care, as alleged in the Complaint. Among other things, the academic articles and reports concluded that:

- Patients choose safer hospitals when insurers provide financial incentives;
- Premiums for broad network plans are 15-23% higher than steered plans and steered plans are among the lowest cost health insurance plans in the country;
- A significant share of employers offer steered networks to reduce healthcare costs; and
- Steering with reference pricing reduces healthcare costs.[1]

Plaintiffs Opp. Br. (ECF No. 25) at 12 n.8. For the convenience of the Court and counsel, Plaintiffs attached copies of the articles to its brief. *See e.g., United States v. Staten*, 666 F.3d 154, 164-65 (4th Cir. 2011) (encouraging parties to provide copies of social science reports). At the time CHS filed its reply to Plaintiff's Opposition, CHS also moved to strike the articles,

[1] CHS mistakenly asserts that the Complaint does not address reference pricing because the Complaint does not specifically name reference pricing. In fact, reference pricing is a common form of steering and the Complaint challenges all CHS conduct which restricts insurers from offering "consumers a financial incentive" when they seek medical care. Complt., ¶¶ 5-9.

arguing that Plaintiffs' cited authorities relate to "matters outside of the pleadings [filed] in connection with [CHS's] Motion for Judgment on the Pleadings." [ECF.No.10] at 2.

I. CHS Did Not Seek To Resolve This Dispute Through a Meet and Confer

Rule 7.1(B) of the Court's Local Rules – which create a "Requirement of Consultation" – expressly requires a moving party to consult with opposing counsel prior to filing any non-dispositive motion. See LcRV 7.1(B) ("Any motions other than for dismissal, summary judgment, or default judgment shall show that counsel have conferred or attempted to confer and have a attempted in good faith to resolve areas of disagreement and set forth which issues remain unresolved.") CHS disregarded this requirement and filed the instant motion without attempting to meet and confer with Plaintiffs' counsel. Meeting and conferring is important because it often eliminates issues, narrows disputes, and preserves judicial resources. CHS's failure to comply with Local Rule 7.1(B)'s meet and confer requirement justifies summarily denying CHS's motion, *Equal Employment Opportunities Comm'n v. The Winning Team, Inc*., 2008 U.S. Dist. LEXIS 40646 (W.D.N.C. May 7, 2008), or striking it from the record. *Fender v. Toys "R" Us-Delaware, Inc*., 2013 U.S. Dist. LEXIS 85312 (W.D.N.C. June 18, 2013).

II. CHS's Argument Contradicts Its Own Reference To Authorities in its Pleadings

In its Answer and Motion for Judgment on the Pleadings, CHS discussed a wide variety of material, including a non-final academic paper, comments from economists at a conference, media reports, and a letter. Specifically, CHS discussed:

- An economic *working* paper (CHS Reply (ECF No. 31) at 22);
- Remarks from two economists on a panel (CHS Brief (ECF No. 11) at 11 and 12 n.7);

- Letters drafted by the Federal Trade Commission (CHS Reply (ECF No 30) at 16-17 n.10;
- A part of a newspaper article (CHS Ans. (ECF No. 8) at 10 and Exhibit 6; and
- A radio report (CHS Reply (ECF No 31) at 21 n.12).

In addition, CHS has discussed – in detail -- the academic articles which Plaintiffs cited. Memorandum in Support of Mot. to Exclude (ECF No. 30) at 3-5. CHS should not be permitted to cite hearsay media reports, incomplete economic papers, and the comments from a conference while seeking to exclude the peer-reviewed published academic articles and economic reports which Plaintiffs cite. The Court should therefore reject CHS's motion to exclude these materials.

III. The Court Is Entitled To Review Academic and Economic Authority Which Undermines CHS's Assertions

Plaintiffs' Complaint stands on its own in alleging CHS's violation of the antitrust laws and more than meets the applicable pleading requirements. However, Plaintiffs' economic literature shows that CHS is mischaracterizing the Complaint. In short, the fact that the Kaiser Family Foundation, The McKinsey Center for US Health System Reform and a number of professional healthcare economists have studied the impact of steering and published their results in peer-reviewed journals is clearly relevant and demonstrates that CHS's critique of Plaintiffs' Complaint allegations is without merit.

Although it is unclear because CHS did not meet and confer, CHS's motion to strike may be based upon confusing adjudicative with legislative facts. "Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 244-45 n.52 (5th Cir. 1976) (citing Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv.L.Rev. 364, 402—16 (1942)). "[A] party is free to cite

academic or other studies that may be factual in nature, provided the facts are "legislative" rather than "adjudicative" in character, that is, provided they are facts that help a court formulate a rule, as distinct from facts specific to the case that help the trier of fact decide whether the rule applies to the case." *Hart v. Sheahan*, 396 F.3d 887, 894–95 (7th Cir. 2005) (Posner, J.) (discussing use of legislative facts not introduced at the district court on appeal); *see also Continental T.V., Inc. v. G.T.E. Sylvania, Inc*. 433 U.S. 36, 54-55 (1977) (discussing economics text).

In this case, the academic articles and economic reports do not refer to Plaintiffs' allegations of CHS's conduct. Instead, these materials contain legislative facts demonstrating that steering lowers health care costs. CHS seeks to dismiss the Complaint on the ground that it is implausible that artificial limits on steering harm competition. But it also seeks to prevent this Court from considering common-sense, academic studies that show that CHS is not fairly characterizing the state of knowledge of the economic benefits of steering. The Court is entitled to consider Plaintiffs' cited authority and give it whatever weight it merits in evaluating CHS's claims of novelty and implausibility, just as the Court may consider any of the authority that CHS has submitted.

CONCLUSION

Plaintiffs' citations to academic and economic authority on steering are offered to the Court to rebut CHS's assertions that Plaintiffs' theories of competitive harm are not plausible and have no basis in market realities. CHS cannot urge this Court to disregard Plaintiffs' cited authority on steering while citing its own authority on the subject, nor should it seek to restrict what this Court can review in evaluating the arguments in this matter. This Court should therefore deny CHS's motion to exclude or strike extraneous materials.

Dated: September 26, 2016

Respectfully Submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

s/John R. Read
JOHN R. READ
KARL D. KNUTSEN
RICHARD MARTIN
PAUL TORZILLI

Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W., Suite 4100
Washington, D.C. 20530
(202) 514-8349 (phone)
(202) 514-7308 (fax)
Paul.Torzilli@usdoj.gov

s/Paul B. Taylor
PAUL B. TAYLOR
Assistant United States Attorney
Chief, Civil Division
N.C. Bar Number 10067
Room 233, U.S. Courthouse
100 Otis Street
Asheville, NC 28801-2611
(828) 271-4661(phone)
paul.taylor@usdoj.gov

FOR PLAINTIFF THE STATE OF NORTH CAROLINA:

ROY COOPER
Attorney General of North Carolina

s/K.D. Sturgis
K.D. STURGIS
Special Deputy Attorney General
North Carolina Department of Justice
N.C. Bar Number 9486
P.O. Box 629
Raleigh, NC 27602
Tel. (919) 716-6011
Fax (919) 716-6050
ksturgis@ncdoj.gov

CERTIFICATE OF SERVICE

I do hereby certify that on this 26day of September, 2016 the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE OR ALTERNATIVEY TO STRIKE EXTRANEOUS MATERIALS SUBMITTED BY PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS was served via the Court's CM/ECF system as follows:

James P. Cooney III
Debbie W. Harden
Mark J. Horoschak
Brian Hayles
Michael Fischer
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
One Wells Fargo Center, Suite 3500
301 South College Street
Charlotte, North Carolina 28202
Telephone: (704) 331-4900
E-mail: jcooney@wcsr.com
E-mail: dharden@wcsr.com
E-mail: mhoroschak@wcsr.com
E-mail: bhayles@wcsr.com
E-mail: mfischer@wcsr.com

Richard A. Feinstein
Nicholas A. Widnell
Hampton Dellinger
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington DC 20015
(202) 274-1152 (direct)
Email: hdellinger@bsfllp.com
Email: rfeinstein@bsfllp.com
Email: nwidnell@bsfllp.com
Attorneys for Defendant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

*/s Karl D. Knutsen*_____
Karl D. Knutsen