IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-3805

BLUE CROSS AND BLUE SHIELD OF OHIO,

Petitioner-Appellant,

v.

JOEL I. KLEIN, Acting Assistant Attorney General,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF OF APPELLEE UNITED STATES OF AMERICA

STATEMENT OF ISSUES

1. Whether Appellant waived objections to the breadth of, and the burden imposed by complying with, an Antitrust Division Civil Investigative Demand.

2. Whether the district court correctly held that the Antitrust Division legitimately may investigate Appellant's use of most favored nation clauses.

STATEMENT OF THE CASE

A. Course of Proceedings

On October 17, 1994, the Antitrust Division of the Department of Justice served Blue Cross Blue Shield of Ohio ("BCBSO") with Civil Investigative Demand ("CID") No. 11466. BCBSO filed a petition to set aside the CID on November 7, 1994,

R. 1 (APX 007), and the United States[1] filed a cross-petition to enforce on January 5, 1995, R. 6 (APX 076).

On June 24, 1996, following briefing on the issues raised, the district court denied BCBSO's petition and granted the United States' cross-petition. R. 27 (APX 025). BCBSO filed a notice of appeal on July 15, 1996, and simultaneously sought a stay pending appeal from the district court. R. 28-29 (APX 026). The court denied a stay on October 7, 1996, R. 34, and BCBSO subsequently moved for a stay in this Court. That motion has been briefed and, as of the date of this filing, remains pending.

B. Statement of Facts

In late 1994, the Antitrust Division conducted a preliminary investigation of possible anticompetitive practices in the delivery of hospital services, medical services, and health insurance in northern Ohio. The Division learned that BCBSO, among other things, employs so-called most favored nation ("MFN") clauses in its contracts with various hospitals in northeastern Ohio. BCBSO's MFN clauses require hospitals to offer BCBSO discounts equal to or greater than the discounts those hospitals provide to other non-governmental payers. Depending on the

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[1]Although BCBSO named only then-Assistant Attorney General Bingaman as a party in its petition, the government's cross-petition named both her and the United States. R. 5-6 (APX 043). For convenience, we refer to Respondent in this action as the United States. Also, because Ms. Bingaman resigned on October 18, 1996, we have recaptioned the case in our brief to substitute Mr. Joel I. Klein, the Acting Assistant Attorney General, for Ms. Bingaman, and have filed with the Court a motion for an Order of Substitution pursuant to Federal Rule of Appellate Procedure 43(c)(1).

facts, MFN clauses of the type imposed by BCBSO might inhibit discounting and result in anticompetitive effects such as higher prices, the exclusion of competitors, and retarded innovation.

In order to gather more information, the Antitrust Division issued to BCBSO CID No. 11466, which called for production of documents and responses to interrogatories. On November 7, 1994, BCBSO asked the district court to set aside the CID on the ground that it requested information pertaining to its use of MFN clauses, conduct that BCBSO believes is "wholly lawful" and "does not violate Section 1 or 2 of the Sherman Act." R. 1, at 2, 5 (APX 008, 011). Accordingly, BCBSO argued, the CID impermissibly sought information that "could not possibly be relevant to any civil antitrust investigation." Id. at 5 (APX 011). The petition did not suggest any other objection to the CID.

On January 5, 1995, the United States filed a cross-petition seeking the CID's enforcement. In its opposition to the cross-petition, BCBSO again argued that its use of MFN clauses cannot possibly violate the antitrust laws. BCBSO did not, as it now claims it did, ask the district court to set aside the CID on grounds that it was "oppressive." Brief of Petitioner-Appellant 5, 12 n.3 ("BCBSO Br."). Rather, plainly seeking to delay a dispositive ruling on the United States' cross-petition as long as possible, BCBSO requested -- in a footnote -- that the court permit briefing "as to the particulars of the CID" at some later date, R. 9, at 20 n.23 (APX 122), asserting that "[t]o devote time and space to that issue now would be premature," id.

Although BCBSO's footnote offered conclusory assertions that the CID "[i]n many instances . . . seek[s] every shred of paper in a given department" and that "[t]he total number of documents requested could easily total in the range of one to several million," id., BCBSO did not elaborate on these points elsewhere in its memorandum or in the two supplemental submissions BCBSO filed below.

On June 24, 1996, the district court denied BCBSO's petition and granted the United States' cross-petition. R. 27 (APX 025). Fully addressing the arguments BCBSO advanced, the court expressly rejected BCBSO's contention that its use of MFN clauses cannot violate the antitrust laws, no matter what the facts uncovered in an investigation might show. R. 26, at 12 (APX 023). Implicitly rejecting BCBSO's attempt to hold further objections to the CID "in reserve," the court ordered the CID enforced. See R. 27 (APX 025). This appeal followed.

SUMMARY OF ARGUMENT

BCBSO raised in the district court a single objection to enforcement of the Antitrust Division's CID: that the Division may not legitimately investigate BCBSO's use of MFN clauses because their employment does not violate, and indeed cannot violate, the antitrust laws.

That argument, which BCBSO now repeats, is wrong. MFN clauses may cause anticompetitive effects the antitrust laws condemn, and the case law so recognizes. Although BCBSO argues that publicly available facts conclusively establish that its use

of MFN clauses is procompetitive, and thus legal, BCBSO's contention is both erroneous and premature. Nothing in BCBSO's submission precludes the possibility that its MFN clauses cause anticompetitive effects. And, because the very purpose of a grant of investigatory power is to permit the Division to find facts and utilize its expertise to determine whether to file a case, BCBSO's characterization of the facts, and the conclusions it draws from them, cannot pretermit the investigation. BCBSO's related objections to the district court's reliance on the affidavit supporting the CID are also groundless. The court was entitled to credit the affidavit's averments absent a strong showing of bad faith or similar malfeasance, and BCBSO demonstrated neither.

Having failed to prevail on these meritless arguments below, BCBSO now seeks to manufacture a remand based on objections to the CID's supposed excessive breadth and burden that BCBSO never adequately presented to the district court and, indeed, specifically asked the court not to address. But BCBSO's strategy of interposing objections to the government's subpoena seriatim -- one transparently calculated to maximize delay -- both flouts elemental principles of judicial economy and runs counter to congressional concern with the expeditious enforcement of administrative subpoenas. BCBSO's contention that the district court erred in not considering the CID's "oppressiveness" thus lacks foundation, and this Court should not pass upon the specific challenges to the CID's scope and burden

BCBSO now raises for the first time. Accordingly, the district court's Order enforcing the CID should be affirmed.

ARGUMENT

I. BCBSO WAIVED ITS OPPRESSIVENESS OBJECTION TO THE CID

As BCBSO correctly observes, a court may set aside a CID if the material sought "would be protected from disclosure" if the demand were contained in a subpoena duces tecum issued by a court in aid of a grand jury investigation. 15 U.S.C. 1312(c)(1)(A).[2] A court "may quash or modify" a grand jury subpoena, Rule 17(c) provides, if the demand is "unreasonable or oppressive." Fed. R. Crim. P. 17(c).

BCBSO's first argument on appeal is that the district court misapplied Rule 17(c), and thereby abused its discretion, by improperly "[f]ailing [t]o [c]onsider [t]he [o]ppressiveness" of the CID. BCBSO Br. at 11, 13, 15.[3] This argument, however, is not properly before this Court because it has been waived. BCBSO did not adequately raise in the district court objections to the scope of, or the burden imposed by complying with, the CID -- the two arguments underlying BCBSO's "oppressiveness" claim.[4] More

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[2]BCBSO mistakenly cites to 15 U.S.C. 1313(c)(1).

[3]According to BCBSO, based on this error the district court (1) impermissibly ignored the CID's asserted overbreadth and excessive burden in judging its "reasonableness," BCBSO Br. at 13-14; (2) wrongly failed to "gauge [the CID's] reasonableness in relation to its oppressiveness, id. at 12, 14; and (3) should have demanded "a greater showing of [the particular requests] relevance to a legitimate investigation" than ordinarily is required because of the CID's asserted oppressiveness, id. at 15.

[4]Because a CID is entitled to a presumption of validity, a CID recipient bears the burden of sustaining a valid objection to

than that, BCBSO made the tactical decision to withhold these arguments from the district court's consideration.

1. "In general, '[i]ssues not presented to the district court but raised for the first time on appeal are not properly before this court.'" Foster v. Barilow, 6 F.3d 405, 407 (6th Cir. 1993) (quoting J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1488 (6th Cir. 1991)). BCBSO in its petition to set the CID aside raised no oppressiveness objection.[5] Nor did BCBSO specifically object to the scope of, or the burden of complying with, the CID in responding to the United States' cross-petition to enforce. To the contrary, although BCBSO tersely asserted in a footnote that the CID exhibited a "staggering" breadth and that "[t]he total number of documents requested could easily total in the range of one to several million," R. 9, at 20 n.23 (APX 122), BCBSO explicitly stated that it was not asking the court to quash or modify the CID on that ground: "[t]o the extent that this Court orders BCBSO

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its enforcement. See, e.g., Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 411-12 (D. Kan. 1982) (citing, inter alia, American Pharmaceutical Ass'n v. United States Dep't of Justice, 344 F. Supp. 9, 12 (E.D. Mich. 1971), aff'd, 467 F.2d 1290 (6th Cir. 1972)).

[5]BCBSO asserts, without explanation, that its petition raised two distinct objections to the CID. See BCBSO Br. at 5. This plainly is not the case. In its petition, BCBSO cited the provision of the Antitrust Civil Process Act that BCBSO believed rendered the demand unlawful, see R. 1, at 5 ¶ 6 (APX 011), and argued, as the only basis for objecting to the CID's "[r]easonable[ness]," id., that the Antitrust Division sought to investigate "conduct which is outside of the scope of and does not violate Section 1 or 2 of the Sherman Act," id. ¶ 5 (APX 011).

to produce materials or otherwise respond to the DOJ's CID, BCBSO requests that it be permitted to address this Court as to the particulars of the CID with which it was served. To devote time and space to that issue now would be premature." Id. at 20 n.23 (APX 122).

This Court does not review arguments unless they are "clearly present[ed]" to the district court. Building Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1398-99 (6th Cir. 1995). A vague and conclusory suggestion buried in a footnote in one of several district court pleadings is insufficient to preserve for appellate review the "oppressiveness" argument BCBSO now advances. Accordingly, BCBSO's "oppressiveness" objection to the CID should be deemed waived. See also e.g., Noble v. Chrysler Motors Corp., 32 F.3d 997, 1002 (6th Cir. 1994) (holding "observation[s]" made in a footnote "insufficient to preserve the issue for appeal"); Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324, 326 (6th Cir. 1988) (explaining that "vague reference[s]" to an argument does not constitute its "square[] present[ation]").[6]

2. Moreover, despite the ample opportunity its memorandum and two supplemental submissions afforded, BCBSO failed to

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[6]BCBSO also baldly stated, "[i]t is of no moment to anyone at the Justice Department . . . that the cost to private citizens for this baseless investigation may easily total in the millions," R. 9, at 2 (APX 104), and characterized the investigation as "bruising," "outrageously expensive," and "punishing," id. at 2, 20 (APX 104, 122). These off-the-cuff assertions neither raise nor adequately substantiate the oppressiveness claim BCBSO makes here.

substantiate its "oppressiveness" claim. BCBSO's conclusory assertions fell well short of the specific and concrete proof of "oppressiveness" courts require.[7] And BCBSO's submission hardly demonstrated, as it must, that "compliance threaten[ed] to unduly disrupt or seriously hinder normal operations of [its] business." FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977). BCBSO "should have 'made a record that would convince [the District Court] of the measure of [its] grievance rather than ask [the District Court] to assume it.'" SEC v. Kaplan, 397 F. Supp. 564, 571 (E.D.N.Y. 1975) (quoting United States v. Morton Salt, 338 U.S. 632, 654 (1950) (alternations in original)). BCBSO chose not to do so.

3. To be sure, BCBSO sought by its footnote to reserve the right to brief issues relating to the CID's "particulars" at a later time. R. 9, at 20 n.23 (APX 122). But its piecemeal litigation strategy was transparently calculated to maximize delay. BCBSO sought a ruling only on whether the Antitrust Division legitimately could investigate its use of MFN clauses. It may have hoped to delay a final disposition of the case by

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[7] See, e.g., In re August 1993 Regular Grand Jury, 854 F. Supp. 1392, 1401-02 (S.D. Ind. 1993) (explaining that "the party opposing the subpoena must quantify the volume of information requested and show that the amount is unreasonable" and rejecting as insufficient a "bald assertion" that the subpoena "requires virtually every record of the Corporation"); In re PHE, Inc., 790 F. Supp. 1310, 1314-15 (W.D. Ky. 1992) (requiring, for an overbreadth objection, a "particularized showing that certain items or categories of items are unconnected to any reasonable investigative effort"); SEC v. Kaplan, 397 F. Supp. 564, 571 (E.D.N.Y. 1975) (rejecting allegations that compliance would result in significant expense and devotion of "a substantial portion" of "time and energies").

raising objections to the CID's "particulars" after the court denied its challenge to the investigation's legitimacy; but whatever the reason, it is only now that BCBSO raises its oppressiveness claim.

In ordering the CID enforced, the district court implicitly rejected BCBSO's attempt at "sandbagging." Wainwright v. Sykes, 433 U.S. 72, 89 (1977). The court was right to do so. Permitting BCBSO a "second bite at th[e] apple," e.g., EEOC v. Westinghouse, 925 F.2d 619, 628 (3d Cir. 1991), would countenance delaying tactics inconsistent with judicial economy and the compelling interest in the swift enforcement of administrative subpoenas. See In re Subpoenas, 99 F.R.D. 582, 590 (D.D.C. 1983) ("There are important values in the prompt, crisp enforcement of subpoenas and in discouraging delaying tactics by which justice can often be denied."), aff'd, 738 F.2d 1367 (D.C. Cir. 1984); United States v. Markwood, 48 F.3d 969, 979 (6th Cir. 1995) ("[T]he very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate . . . ." (internal quotations omitted)).

Indeed, it is clear Congress intended no such seriatim presentation of objections to an Antitrust Division CID. The Antitrust Civil Process Act ("ACPA") specifically provides that a petition to modify or set a CID aside must be filed "[w]ithin twenty days after the service of any such demand" and that the "petition shall specify each ground upon which the petitioner

relies in seeking" relief. 15 U.S.C. 1314(b)(1), (2) (emphasis added). This statutory structure plainly does not contemplate that a petitioner may hold back objections not initially raised for subsequent presentation to the district court.[8]

BCBSO, having "simply chose[n] for tactical reasons, of its own accord, not to pursue" its objections to the CID's "particulars," thus withheld them at its peril. Westinghouse, 925 F.2d at 628. To consider those arguments now, or to permit further briefing on them, would only "place a potent weapon in the hands of [potential antitrust violators] who have no interest in complying voluntarily with the Act, who wish instead to delay [investigations] as long as possible." University of Pennsylvania v. EEOC, 493 U.S. 182, 194 (1990) (internal quotations omitted).

4. Whether BCBSO failed adequately to raise its oppressiveness claim, or impermissibly sought to withhold it for further consideration, the conclusion is the same: The district court did not err in refusing to address the objections to the

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[8]It is instructive that courts generally reject the government's attempts to interpose objections to requests for information under the Freedom of Information Act ("FOIA") seriatim, a context in which similar values are at stake. See generally Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987); Jordan v. United States Dep't of Justice, 591 F.2d 753, 755 (D.C. Cir. 1978) (en banc). Indeed, courts have not allowed the government to employ the very tactics BCBSO used here. See Ryan v. Department of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (refusing to permit the government to raise a FOIA exemption that it sought to preserve in a footnote but made no attempt to substantiate in district court).

CID's scope and burden BCBSO now makes for the first time.[9]

5. Finally, BCBSO's argument that because the CID is oppressive, it cannot be enforced absent evidence that BCBSO's MFN clauses cause anticompetitive effects, see BCBSO Br. at 12-15, 28; supra note 3, not only has been waived but also misstates the law. In United States v. R. Enterprises, Inc., 498 U.S. 292 (1991), the Supreme Court specifically held that Rule 17(c) does not require the government to demonstrate probable cause. See id. at 297. Although BCBSO relies on Justice Stevens' concurring opinion in R. Enterprises, he did not, as BCBSO claims, argue that a burdensome subpoena must be supported by evidence that the asserted violation occurred. Rather, he would have required a "higher degree of probable relevance," id. at 304 (Stevens, J., concurring) -- that is, a closer fit between the possible violation being investigated and the need for the material requested.

In this case BCBSO did not adequately present a challenge to the relevance of the subpoenaed material to the government's investigation. And, in any event, the proper remedy for a timely and valid objection to a CID's scope and burden is to modify the CID to eliminate the inappropriate requests or to require the parties to negotiate modifications. See, e.g., Phoenix Bd. of

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[9]As an alternative to seeking a remand, BCBSO appears to ask this Court to find the CID oppressive based on arguments it now advances. See BCBSO Br. at 14-15. This is inappropriate not only for the reasons discussed above, but also because evaluation of BCBSO's contentions would require further development of the record. See Foster v. Barilow, 6 F.3d 405, 407 (6th Cir. 1993).

Realtors, Inc. v. United States Dep't of Justice, 521 F. Supp. 828, 832 (D. Ariz. 1981). There is no basis for imposing some heightened relevancy requirement for all the material requested.[10]

II. THE DISTRICT COURT CORRECTLY FOUND CID NO. 11466 REASONABLY RELATED TO A LEGITIMATE GOVERNMENT INVESTIGATION

As explained above, the district court, in determining whether the CID sought material that "would be unreasonable if contained in a subpoena duces tecum," R. 1, at 5 ¶ 6 (APX 011), properly addressed only BCBSO's claim that the Antitrust Division cannot legitimately investigate its use of MFN clauses.[11] BCBSO repeats that contention here, specifically claiming (1) that the use of MFN clauses cannot violate the antitrust laws, see BCBSO Br. at 15-19; (2) that publicly available facts negate the possibility that BCBSO's MFN clauses cause anticompetitive effects, see id. at 21-26; and (3) that the district court impermissibly relied on an affidavit provided by an Antitrust

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[10]Notably, the single, pre-R. Enterprise case cited by BCBSO in support of its contention, see In re Grand Jury Proceedings, 707 F. Supp. 1207 (D. Haw. 1989), did not involve an administrative subpoena.

[11]Because, as explained above, BCBSO waived its objections to the CID's scope, the district court correctly concluded that "BCBSO does not dispute that the information sought in CID #11466 is relevant to an investigation of its use of MFN clauses." R. 26, at 5 (APX 016). Thus, as BCBSO framed the issue, the court was entitled to find the CID reasonably related to a legitimate government investigation if the court rejected BCBSO's contention "that the Antitrust Division cannot legitimately pursue an investigation of its use of MFN clauses because its use of MFN clauses is indisputably legal under the Sherman Act." Id.; see also R. 1, at 5 (APX 011) (Petition to Set Aside); R. 9, at 3-4 (APX 105-06) (Memorandum in Opposition).

Division attorney, see id. at 27-28. Each contention is entirely without merit.

A. MFN Clauses Are Not Exempt From Antitrust Scrutiny

1. The district court recognized that BCBSO, in arguing that the Antitrust Division's request for information concerning MFN clauses serves no legitimate investigatory purpose because use of MFN clauses cannot violate the antitrust laws, took upon itself an extraordinary burden. The Antitrust Division issues CIDs pursuant to "broad investigatory powers" bestowed by Congress. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 58 (2d Cir. 1983). As with any "administrative subpoena," H.R. Rep. No. 1343, 94th Cong., 2d Sess. 13 (1976), reprinted in 1976 U.S.C.C.A.N. 2596, 2607, the Antitrust Division generally may exercise its investigatory power "'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" United States v. Markwood, 48 F.3d 969, 977 (6th Cir. 1995) (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).

Although a CID should not be employed when "the activities at issue enjoy a clear exemption from the antitrust laws," H.R. Rep. No. 1343, supra, at 11, reprinted in 1976 U.S.C.C.A.N. at 2606, Congress recognized that when the applicability of an exemption is not "precisely clear" and may be the "central issue in the case" "the mere assertion of the exemption should not be allowed to halt the investigation." Id. at 2606 n.30. Congress thus endorsed the long-established rule that, because the very

purpose of a grant of investigatory power is to facilitate the gathering of evidence upon which a charge may be based, a claim of an exemption that depends on facts should not pretermit an investigation. See, e.g., Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946); FTC v. Markin, 532 F.2d 541, 543-44 (6th Cir. 1976) (per curiam).

BCBSO's contention that MFN clauses are not a proper subject of an Antitrust Division investigation is essentially a claim that use of MFN clauses is exempt from antitrust scrutiny. BCBSO, under the foregoing principles, accordingly must demonstrate that no matter what facts the Division's investigation might unearth, its use of MFN clauses cannot violate the antitrust laws. This Blue Cross has not shown.

2. MFN clauses embodied in agreements between an insurer and providers are subject to evaluation under Sherman Act section 1, 15 U.S.C. 1, which proscribes unreasonable agreements in restraint of trade. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 69-70 (1911).[12] Application of the Sherman Act section one's "Rule of Reason" is fact-specific and generally requires a detailed evaluation of the challenged practice's purpose and probable effect on competition. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 & n.15 (1977). According to BCBSO, however, MFN clauses can never

[12]MFN clauses might also violate Sherman Act § 2, 15 U.S.C. 2, which condemns, inter alia, monopolization. It is enough to respond fully to BCBSO's argument, however, that its MFN clauses might violate Sherman Act § 1.

cause anticompetitive effects the Rule of Reason condemns because MFN clauses simply reflect "a purchaser . . . of health care services" "bargain[ing] for a seller's best price." BCBSO Br. at 16, 19-20; see also id. at 7-8.

BCBSO is wrong. Although an MFN clause on its face may appear to have no effect except to garner for the party imposing it the best possible price, such a clause may well cause anticompetitive effects, including higher prices. It long has been recognized that MFN clauses may deter price competition. See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 623-25 & nn.1-2 (1975); United States v. Eli Lilly & Co., 1959 Trade Cas. (CCH) ¶ 69,536, at 76,152 (D.N.J. Nov. 30, 1959). Absent the MFN clause, a seller might provide certain purchasers with greater discounts than the seller provides to other purchasers. However, the MFN clause requires granting the purchaser imposing it as large a discount as it bestows on any other purchaser. If the purchaser benefitting from the MFN clause accounts for a significant portion of the seller's revenues, the MFN clause may inhibit the seller from giving any other purchaser a greater discount. See generally Jonathan B. Baker, Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses, 64 Antitrust L.J. 517, 519, 525 (1996).

In health care markets, this discount-inhibiting effect may have several adverse consequences for competition. Among other things, MFN clauses might cause providers (such as hospitals or

individual physicians) to deny particular insurers discounts that, but for an MFN clause with another insurer, the providers would offer. The further result may be higher premiums to those who purchase health insurance, exclusion of health care providers who would seek to enter and build market share by offering lower prices, and hindered development of innovative methods of delivering health care.

For instance, an MFN clause may deter hospitals from participating in a health plan offering a limited-panel of providers at lower reimbursement rates when the cost -- imposed by the MFN clause -- is accepting lower reimbursement rates from an insurer that comprises a substantial portion of the hospitals' revenues. The hospitals' failure to participate could, in turn, deprive the limited-panel plan of enough providers to survive and result in less competition and higher prices. See, e.g., United States v. Delta Dental of Rhode Island, No. 96-113/P, 1996 WL 570397, at *7 (D.R.I. Oct. 2, 1996) (refusing to dismiss a Complaint alleging that MFN clauses caused the anticompetitive exclusion of competing dental plans); Baker, supra, at 525-26 (explaining that MFN clauses may "reduc[e] the ability of entrants or rivals to lower their costs" and thus facilitate a firm's "achieve[ment] or maintenan[ce of] prices above competitive levels"); cf. Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951, 970-72 (10th Cir.) (accepting testimony that Blue Cross's MFN clauses "hindered the development of alternative [health care] delivery systems" and thereby aided

Blue Cross in maintaining "power over price"), cert. denied, 497 U.S. 1005 (1990).

3. BCBSO alternatively argues that, even if MFN clauses may result in anticompetitive effects, the case law unambiguously forecloses application of the antitrust laws to condemn them. See BCBSO Br. at 19-20. But, contrary to BCBSO's view, the case law recognizes that MFN clauses causing anticompetitive effects may violate the Sherman Act.[13]

Indeed, United States v. Delta Dental of Rhode Island, No. 96-113/P, 1996 WL 570397 (D.R.I. Oct. 2, 1996), a decision BCBSO ignores, recently rejected the very argument BCBSO now makes. "[B]lanket condonation of MFN clauses," the court explained, would "run counter to the Sherman Act's preference for fact-specific inquiries, implausibly reject the premise that MFN clauses produce substantial anticompetitive effects in particular circumstances and contradict the Sherman Act's animating concern for low consumer prices." Id. at *4. Other courts similarly have recognized that MFN clauses may run afoul of the Sherman Act. See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (recognizing that MFN clauses might cause anticompetitive effects), cert. denied, 116 S. Ct. 1288 (1996); Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp., 882 P.2d 637, 642 (Or.

[13]BCBSO notes the federal government's use of MFN clauses. See BCBSO Br. at 7 n.1. It places no weight on that fact, and for good reason. The federal government cannot violate the antitrust laws. See Jet Courier Serv., Inc. v. Federal Res. Bank of Atlanta, 713 F.2d 1221, 1228 (6th Cir. 1983).

App. 1994) (acknowledging that "in some circumstances, the enforcement of most favored nation clauses can have severe anticompetitive effects"); cf. Reazin, 899 F.2d at 971 (noting "considerable testimony on the effect of Blue Cross' most favored nations clause" and explaining that the trial court "could reasonably have concluded that [the MFN clause] contributed to Blue Cross' power over price"); Blue Cross & Blue Shield of Michigan v. Michigan Ass'n of Psychotherapy Clinics, 1980-2 Trade Cas. (CCH) ¶ 63,351 (E.D. Mich. Mar. 14, 1980) (merely rejecting the claim that MFN clauses constituted per se unlawful price fixing).

The cases cited by BCBSO are not to the contrary.[14] To be sure, the court in Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989), cert. denied, 494 U.S. 1027 (1990), said that the MFN clause before it was "as a matter of law[] not violative of section 2 of the Sherman Act." Id. at 1110. But that language does not support BCBSO's position here. The court in Ocean State

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[14]In Michigan Ass'n of Psychotherapy Clinics v. Blue Cross & Blue Shield of Michigan, 1982-83 Trade Cas. (CCH) ¶ 65,035 (Mich. Ct. App. Aug. 23, 1982), the court merely concluded that the MFN clause at issue did not constitute unlawful "price-fixing." Id. at 70,775. The court was not asked to determine more broadly that the MFN clause caused anticompetitive effects or violated the antitrust laws for any other reason. The court in Kitsap Physicians Serv. v. Washington Dental Serv., 671 F. Supp. 1267 (W.D. Wash. 1987), conducted a superficial evaluation of a particular MFN clause's legality under Sherman Act § 2 in the context of a motion for a preliminary injunction. The court did not consider the possible anticompetitive effects of MFN clauses, and for support cited two cases holding only that MFN clauses do not constitute "price fixing." See id. at 1269.

understood the plaintiff to argue that the MFN clause at issue violated Sherman Act section two, 15 U.S.C. 2, only because it was instituted for an anticompetitive purpose. See id. at 1104, 1110-12. There was no finding that the MFN clause had anticompetitive effects, see Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 692 F. Supp. 52, 71 (D.R.I. 1988), aff'd, 883 F.2d 1101 (1st Cir. 1989), cert. denied, 494 U.S. 1027 (1990), and the court did not address the legality of any MFN clause under Sherman Act section one.

BCBSO quotes the court's statement that, "[a]s a naked proposition, it would seem silly to argue that a policy to pay the same amount for the same service is anticompetitive, even on the part of one who has market power. This is what competition should be all about." Ocean State, 883 F.2d at 1110. But the court plainly did not intend by that statement that MFN clauses can never have anticompetitive effects or otherwise violate the Sherman Act. Rather, the court simply rejected the plaintiffs' "naked proposition" that the defendant's MFN clause, on its face, lacked a procompetitive purpose and was therefore unlawful.[15] As the Delta Dental court explained, Ocean State cannot plausibly be read to preclude a Sherman Act claim when the plaintiff alleges that an MFN clause causes adverse competitive effects. See Delta

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[15]Cf. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579 (1925) (explaining that Sherman Act cases must be "read in light of their facts").

Dental, 1996 WL 570397, at *6-*7.[16]

That Ocean State does not foreclose challenge to anticompetitive MFN clauses can also be inferred from the court's statement, see Ocean State, 883 F.2d at 1110, that its "conclusion [was] compelled" by Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985), a decision BCBSO also cites. Kartell involved not an MFN clause, but rather a policy by which providers agreed to charge patients only what Blue Shield specified. There was no claim that the policy stopped providers "from charging . . . other patients what they like[d]." Id. at 927. Plaintiffs' challenge to the policy, then, was nothing more than an objection to a party with market power bargaining for the best price, and the court rejected that claim. See id. at 928-29.

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[16]Indeed, BCBSO's concession that "predatory" employment of MFN clause may, under Ocean State, violate the Sherman Act, see BCBSO Br. at 25-26, is fatal to BCBSO's contention that its use of MFN clauses is per se lawful. Contrary to BCBSO's claim, see id. at 17 n.7, the Division -- as the district court recognized, R. 26, at 11 (APX 022) -- has not ruled out a predation theory. And, although BCBSO intimates that the Division never specified that the CID sought information pertaining to predation, the Division in issuing a CID "is under no obligation to propound a narrowly focused theory of a possible future case." FTC v. Texaco, 555 F.2d 862, 874 (D.C. Cir.) (en banc) (emphasis in original), cert. denied, 431 U.S. 974 (1977).

BCBSO also objects that the CID is not "reasonably related" to an investigation of possible predation. BCBSO Br. at 25-26. This argument is not well taken. As explained above, BCBSO expressly asked the court not to consider objections to the CID based on "its particulars," R. 9, at 20 n.23 (APX 122), and such a claim now comes too late. In any event, it simply is not true that the "only relevant issue" in a predation investigation "is whether BCBSO's price is below a hospital's incremental costs." BCBSO Br. at 26 (emphasis added).

The Kartell court nonetheless carefully distinguished the case before it from one in which the challenged policy acted "as if it were a 'third force,' intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality bargains," id. at 924 -- circumstances in which an "unlawful restraint" might be found. Id. As explained above, by deterring providers from dealing with third parties, an MFN clause may have precisely this anticompetitive effect.[17] Kartell thus supports rather than undermines the government's position.[18] Moreover, it confirms the quite limited scope of the Ocean State court's holding. If the Ocean State court faced convincing evidence that the MFN clause it considered did operate as a "'third force' intervening in the marketplace," Kartell, 749 F.2d at 924, the court hardly could have stated that its decision followed from Kartell.

Finally, BCBSO's reliance on E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), is wholly misplaced. That case involved a challenge, brought under section five of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), to assertedly "unilateral" conduct that included the use of MFN clauses. See DuPont, 729 F.2d at 137-38. Unilateral conduct, the court of

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[17]Thus, although BCBSO argues that "MFN clauses do not dictate what the hospital may charge any other insurer," BCBSO Br. at 8 (emphasis in original), this may be their practical consequence.

[18]Austin v. Blue Cross & Blue Shield of Alabama, 903 F.2d 1385 (11th Cir. 1990), also cited by BCBSO, involved the same factual situation as Kartell, see id. at 1390, and is inapposite to BCBSO's argument for precisely the same reason.

appeals held, may violate section five only if the Commission demonstrates "some indicia of [the practice's] oppressiveness" such as "(1) evidence of anticompetitive intent or purpose . . . or (2) the absence of an independent legitimate business reason for [the] conduct." Id. at 139.

The test of legality under Sherman Act section one, in contrast, more broadly focuses on anticompetitive effects. See, e.g., GTE Sylvania, 433 U.S. at 49 & n.15. Thus, although the DuPont court found the unilateral conduct at issue not to meet the exacting standard it erected, see DuPont, 729 F.2d at 140-41, the court by no means foreclosed contesting the legality of other MFN clauses under the Sherman Act, particularly when the MFN clauses are embodied in agreements and thus may be challenged as concerted action subject to Sherman Act section one. Indeed, the DuPont court held, the evidence did not show that the conduct challenged there "significantly lessened competition" in the relevant industry "or that the elimination of those practices would improve competition," id. at 141; the court thus implied that, had such effects been shown, and Sherman Act section one's Rule of Reason applied, a different result might have been reached even in that case.

BCBSO suggests that the court in DuPont refused to condemn the MFN clauses at issue because they "comported with the requirements of the Robinson-Patman Act," 15 U.S.C. 13 et seq., a statute, BCBSO claims, "evinc[ing] a clear congressional intent to validate MFN clauses for . . . anyone . . . who can

successfully obtain them." BCBSO Br. at 19 n.8. But the Robinson-Patman Act -- which played no part in the DuPont court's analysis and, as BCBSO concedes, is inapplicable to its MFN clauses -- proscribes certain selective discounting that might impair competition. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221-22 (1993); FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948). It hardly works an implied repeal of the antitrust laws for contracts prohibiting selective discounting that cause the very diminution of competition that both the antitrust laws and the Robinson-Patman Act seek to prevent. Cf. United States v. United States Gypsum Co., 438 U.S. 422, 458-59 (1978) (refusing to find that the Robinson-Patman Act impliedly exempts the exchange of price information from Sherman Act scrutiny in part because of the Court's doubt "that competing antitrust polices would be [thereby] served" and observing that "the Robinson-Patman Act should be construed so as to insure its coherence with the broader antitrust policies that have been laid down by Congress" (internal quotations omitted)).

4. Neither precedent nor policy, then, supports BCBSO's proposed novel rule that MFN clauses may never run afoul of the antitrust laws. BCBSO's argument that its conduct is exempt from investigation by the Antitrust Division accordingly must fail. See generally Associated Container, 705 F.2d at 58-60 (rejecting claim that the Noerr-Pennington doctrine blocked issuance of a CID because "[o]nly when permitted to utilize its investigatory authority will the Division be able to exercise its expertise to

determine whether the antitrust laws have been violated or whether the Noerr-Pennington doctrine immunizes appellees' conduct"); Markin, 532 F.2d at 543-44.

B. BCBSO's Purported Evidence That Its MFN Clauses Are Procompetitive Is Irrelevant

BCBSO appears to argue in the alternative that, even if MFN clauses are not in all cases exempt from antitrust scrutiny, the MFN clauses it employs are not the appropriate subject of an investigation because "[e]ven the most cursory review of publicly available information" precludes the possibility that these clauses have "impaired or restrained" competition. BCBSO Br. at 23-24. This contention is twice flawed.

First, BCBSO's protestation that its conduct is lawful is of no moment. The very purpose of a grant of investigatory power, such as the ACPA bestows on the Antitrust Division, is to permit the agency to "'exercise powers of original inquiry.'" Markwood, 48 F.3d at 977 (quoting Morton Salt, 338 U.S. at 642). An agency "is entitled to determine for itself whether" the law is violated, United States v. R. Enterprises, Inc., 498 U.S. 292, 303 (1991); its investigation, consequently, cannot be "'limited . . . by forecasts of [its] probable result,'" Oklahoma Press, 327 U.S. at 216 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)); see also United States v. Powell, 379 U.S. 48, 57 (1964). Although BCBSO concludes from the facts it cites that its conduct is procompetitive, the Antitrust Division is entitled to draw its own conclusions and, in order to make this determination, request pertinent information. See Associated

Container, 705 F.2d at 58-60. The appropriate time for BCBSO to raise its argument is not in a petition to set aside a CID but in a motion for summary judgment if and when the government files a case. See id.

Second, even if BCBSO's supposed evidence concerning the state of health care markets in Northern Ohio were relevant to the issues involved in this case, nothing in BCBSO's various submissions precludes the possibility that BCBSO's MFN clauses might have anticompetitive effects. According to BCBSO, since it began employing MFN clauses, prices in the relevant markets have experienced a relative decline and new entry has taken place. See BCBSO Br. at 23-25. However, even if BCBSO's assertions were correct, it may well be the case that, but for BCBSO's use of MFN clauses, prices would have declined further, and that additional, more innovative entry would have occurred. BCBSO's MFN clauses also may harm competition on a prospective basis. To make these determinations, of course, is why the government conducts investigations.

C. The District Court Appropriately Refused To Test The Weedon Affidavit's Averments

Finally, BCBSO criticizes the district court's reliance on the affidavit submitted by John Weedon, Chief of the Antitrust Division's Cleveland Field Office. BCBSO's various objections, however, are entirely baseless.

1. BCBSO principally argues that, even if the district court ordinarily need not have "test[ed] the validity" of the allegations made in the Weedon Affidavit, the court erred in

refusing to do so in this case because the CID subjected "BCBSO to a punishing and outrageously expensive investigation" and thus the Antitrust Division "was required to make a more convincing showing of CID No. 11466's relevance to a legitimate investigation" than usually is required. BCBSO Br. at 27-28. But BCBSO never presented this argument to the district court; nor, as explained above, did BCBSO either advance or preserve the argument's underlying contention -- that the CID is oppressive. See supra pp.6-12. For both these reasons the argument is waived.

2. BCBSO also appears to argue that the district court erred in relying on the affidavit because "one person's belief" is an insufficient basis for conducting an investigation when "all the facts contradict that belief." BCBSO Br. at 28. But BCBSO's argument misapprehends the scope of the investigatory power and ignores the presumption of validity to which a CID is entitled.

The Antitrust Division, as explained above, may exercise its investigatory powers "'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" Markwood, 48 F.3d at 977 (quoting Morton Salt, 338 U.S. at 642-43). As to whether the Division had an adequate basis for its "suspicion" here, that is precisely the function the Weedon affidavit served. The Antitrust Division may issue a CID when the Assistant Attorney General "has reason to believe that any person may be in possession, custody, or control of any

documentary material . . . relevant to a civil antitrust investigation." 15 U.S.C. 1312(a). The Weedon Affidavit, in representing that he recommended issuance of the CID because he "had reason to believe that Blue Cross might be engaged in conduct with the purpose or effect of lessening competition . . . and might be in possession of documentary materials and information relevant thereto," R. 6, Ex. A ¶ 3 (APX 077), confirmed both that the Antitrust Division complied with this requirement and that the CID issued for a valid investigatory purpose.[19]

Courts routinely rely on affidavits such as that provided in this case. See, e.g., American Pharmaceutical Ass'n v. United States Dep't of Justice, 467 F.2d 1290, 1292 (6th Cir. 1972); see also In re McVane, 44 F.3d 1127, 1136 (2d Cir. 1995); United States v. Witmer, 835 F. Supp. 208, 221 (M.D. Pa. 1993), aff'd, 30 F.3d 1489 (3d Cir. 1994) (Table). Moreover, because a CID is entitled to a presumption of regularity, see, e.g., American Pharmaceutical Ass'n v. United States Dep't of Justice, 344 F. Supp. 9, 12 (E.D. Mich. 1971), aff'd, 467 F.2d 1290 (6th Cir. 1972); Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 411 (D. Kan. 1982); cf. R. Enterprises, 498 U.S. at 300-01, courts refuse to test official representations absent a

[19]The district court did not, as BCBSO assets, "bas[e] its decision" on the Weedon Affidavit. BCBSO Br. at 4. The district court merely cited the Affidavit as "evidence" of the "potential [that a] violation" exists. R. 26, at 11-12 (APX 022-23). In short, the district court properly concluded that the Weedon Affidavit provided an adequate basis for the Antitrust Division's "suspicion."

substantial showing of bad faith, improper purpose, or abuse of the court's process. See, e.g., In re Petition of Maccaferri Gabions, Inc., No. MJG-95-1270, 1996 WL 494311, at *5 (D. Md. Aug. 25, 1996); cf. Markwood, 48 F.3d at 983.

There is no evidence of anything of the kind here. Certainly, BCBSO's assertion that "all the facts contradict" the affidavit's averments cannot suffice. The investigatory power, as explained above, cannot be "limited . . . by forecasts of [its] probable result," Oklahoma Press, 327 U.S. at 216 (internal quotations omitted) -- particularly when, as in this case, the "facts" advanced do not "contradict" the possibility of illegal conduct. See supra pp.25-26; see also Maccaferri Gabions, 1996 WL 494311, at *8 (refusing to "adjudicate, even on a prima facie standard, the substantive merits of any possible Antitrust case against" the petitioner).[20]

BCBSO also insinuates that the present investigation "is not about a concern for customers' welfare" but was "indiscriminately launch[ed]" to serve some other goal. BCBSO Br. at 8-9. But this scandalous allegation is wholly devoid of foundation and cannot serve to rebut the Weedon Affidavit's official representations. See, e.g., American Pharmaceutical Ass'n, 467 F.2d at 1292; In re Emprise Corp., 344 F. Supp. 319, 322 (W.D.N.Y. 1972); Maccaferri Gabions, 1996 WL 494311, at *5, *7.

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[20]Nor is BCBSO's mere observation that the Antitrust Division denied BCBSO's request, pursuant to the Freedom of Information Act, for "all documents relating to or discussing" BCBSO, R. 10, Ex. 16 (APX 254), evidence of bad faith. Cf. Maccaferri, 1996 WL 494311, at *7.

Indeed, the Antitrust Division recently filed a case, see United States v. Delta Dental of Rhode Island, No. 96-113/P (filed Feb. 29, 1996), challenging certain MFN clauses, and it has obtained two consent decrees prohibiting their use, see, e.g., United States v. Delta Dental Plan of Ariz., Inc., Civ. No. 94-1793 (filed D. Ariz. Aug. 30, 1994); United States v. Vision Serv. Plan, Civ. No. 94-2693 (filed D.D.C. Dec. 15, 1994). As the district court in Delta Dental of Rhode Island explained, and a cursory review of the Complaints and Competitive Impact Statements accompanying the consent decrees shows, the Division's concern with MFN clauses is well-grounded in the interests of competition and consumers. See Delta Dental of Rhode Island, 1996 WL 570397, at *7-*11; United States v. Vision Serv. Plan, 60 Fed. Reg. 5,210, 5,210-17 (1995); United States v. Delta Dental Plan of Ariz., Inc., 59 Fed. Reg. 47,349, 47,349-59 (1994).

3. Finally, BCBSO contends that, absent proof to test the Weedon Affidavit's averments, "it would be virtually impossible for any citizen to successfully move to set aside a CID." BCBSO Br. at 28. This argument is as false as it is extreme. Among other things, a CID recipient may contest the demand as unduly burdensome or as improperly seeking materials not even arguably related to an investigation of the conduct under scrutiny. Of course, because of BCBSO's impermissible delaying tactics, those particular objections cannot be raised in this case. But what a CID recipient may not properly accomplish, and what BCBSO seeks to do in this case, is to pretermit an investigation by denying

the existence of the very facts the inquiry is designed to uncover, thereby improperly preventing the discovery of those facts.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.



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APPELLEE'S JOINT APPENDIX DESIGNATION

The United States of America, pursuant to 6th Circuit Rule 11(b), hereby designates the following additional filing in district court as an item to be included in the joint appendix:

Item	Date	Record Entry
Memorandum in Opposition	1/30/96	R. 9