

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

COHEN & COMPANY,)	
)	
Petitioner,)	
)	
v.)	
)	Civil Action No. 1:96 CV 1396
UNITED STATES OF AMERICA and)	
ANNE K. BINGAMAN, Assistant)	Hon. Donald C. Nugent
Attorney General, U.S. Department)	
of Justice, Antitrust Division,)	
)	
Respondents and)	
Cross Petitioners.)	

**MEMORANDUM IN SUPPORT OF GOVERNMENT'S CROSS-PETITION
FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND NO. 14993
AND IN OPPOSITION TO COHEN & COMPANY'S
"PETITION REGARDING COMPLIANCE"**

This proceeding arises out of an investigative subpoena, Civil Investigative Demand ("CID") No. 14993, issued by the Antitrust Division of the U.S. Department of Justice to Cohen & Company on June 5, 1996, in connection with the Antitrust Division's investigation of possible violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Pursuant to negotiations with the government, Cohen & Company agreed to comply with the CID on or before June 28, 1996. Instead of complying with the CID, Cohen & Company filed a "Petition Regarding Compliance," asking this Court to determine "whether [Cohen & Company] must comply with CID No. 14993." The Petition does not suggest that the CID fails to comply with the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq. (1994) ("ACPA" or "the Act"), nor does it assert "any constitutional or other legal right or privilege" of Cohen & Company. It merely notes that Blue Cross and Blue Shield Mutual of Ohio

("BCBSMO") "has taken the position that the documents sought by the CID are proprietary to BCBSMO, are confidential and should not be produced." As such, Cohen & Company's petition does not assert a cognizable claim under the Act. Cohen & Company's petition should be seen for what it is, an attempt, orchestrated by BCBSMO, to avoid producing documents and to further delay the government's investigation of possible violations of the antitrust laws. Cohen & Company should be ordered to comply immediately with the CID.

STATEMENT OF FACTS

For approximately two years, the Antitrust Division has been investigating unlawful restraints of trade in the hospital, medical services, and health insurance markets in Ohio. As part of this investigation, the Antitrust Division learned that "most favored nations" clauses ("MFNs") are included in some or all of BCBSMO's contracts with hospitals, and that such clauses have had the effect of unreasonably excluding competitors from entering the market, restraining existing competitors from competing effectively in the market, discouraging hospitals and competing insurers from offering innovative and more efficient methods of delivering health care, and raising prices. The Antitrust Division has also learned that Cohen & Company, an independent auditing firm, has worked closely with BCBSMO in enforcing BCBSMO's MFNs, and has in its possession, custody, or control documents and other information relevant to this investigation.

On June 5, 1996, the Antitrust Division issued CID No. 14993 directing Cohen & Company to produce documents relating to Cohen & Company's: (1) structure and organization (e.g., Cohen & Company's articles of incorporation, bylaws, and organizational charts); (2) communications with BCBSMO with respect to the MFNs; and (3) audits of hospitals and other efforts to enforce the MFNs. A copy of CID No. 14993 is attached hereto as Exhibit 1.

On June 25, 1996, Kenneth A. Bravo, counsel for Cohen & Company, informed the Division that Cohen & Company intended to comply with the CID. Accordingly, the United States and Cohen & Company agreed that Cohen & Company would mail certain responsive documents to the government no later than June 27, 1996, and would review the remaining materials to determine the most expeditious means for their production. A copy of the letter of Paul J. O'Donnell to Kenneth A. Bravo, Esq. dated June 26, 1996, is attached hereto as Exhibit 2. During this conversation, Mr. Bravo also stated that very few of the responsive documents involved communications with BCBSMO and that the greatest percentage of the documents were obtained from various hospitals in the region. He further explained that BCBSMO is specifically prohibited from access to most of the documents responsive to the CID.

Meanwhile, on June 24, 1996, this Court (Aldrich, J.) denied in full BCBSMO's November 1994 petition to set aside a CID that the Antitrust Division had served on BCBSMO in connection with this same investigation, and granted the government's cross-petition to enforce the CID, requiring BCBSMO to produce all responsive documents by July 8, 1996. In denying BCBSMO's petition and granting the government's petition, the Court rejected each of BCBSMO's contentions, and specifically held that the CID "is reasonably related to a legitimate government investigation." A copy of the Court's Order and Memorandum and Order in Blue Cross Blue Shield of Ohio v. U.S., No. 1:94 CV 2297 (N.D. Ohio June 24, 1996) (Aldrich, J.), is attached hereto as Exhibit 3. Significantly, the CID addressed to BCBSMO encompassed all documents in BCBSMO's possession, custody, or control relating to the audits and other means of enforcing the MFNs. A

copy of the pertinent portions of CID No. 11466 is attached hereto as Exhibit 4.¹ See CID No. 11466 at Definitions ¶¶ 4 and 7; Interrogatories ¶ 11; and Documents Demanded at ¶¶ 6 and 33.

On June 27, 1996, rather than complying with its CID as agreed to, Cohen & Company filed a "Petition Regarding Compliance," asking this Court whether it must comply. Cohen & Company bases its Petition on its averment that "BCBSMO has taken the position that the documents sought by the CID are proprietary to BCBSMO, are confidential and should not be produced." Petition Regarding Compliance at ¶ 8. As of this date, Cohen & Company has failed to produce any documents demanded by the CID, including documents relating to its own structure and organization as well as documents that BCBSMO is specifically prohibited from ever seeing.

ANALYSIS

The ACPA grants the Government broad powers to obtain information in the course of an investigation of possible violations of the federal antitrust laws. The Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice are authorized to issue a civil investigative demand to "any person" they have "reason to believe . . . may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a) (1994). The recipient is obliged "to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony . . . , or to furnish any combination of such material, answers, or testimony." *Id.* Congress further underscored the importance of the

¹On July 15, 1996, BCBSMO filed a Notice of Appeal and a Motion for a Stay Pending Appeal of Judge Aldrich's June 24 Order.

CID as a law enforcement tool by imposing criminal penalties on persons obstructing compliance with civil investigative demands. See 18 U.S.C. § 1505 (1994).

Congress enacted and subsequently amended the ACPA "to provide the Justice Department's Antitrust Division with all the basic investigative tools necessary for effective and expeditious investigations into possible civil violations of the federal antitrust laws," including compulsory process for its civil investigations comparable to the grand jury subpoenas available for its criminal investigations. H.R. Rep. No. 1343, 94th Cong., 2d Sess. 1, 2, 4-6 (1976), reprinted in 1976 U.S.C.C.A.N. 2596, 2599-600; H.R. Rep. No. 1386, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. at 2568-69. As a result, courts have accepted only a limited role in challenges to a CID. "[T]he scope of the issues which may be litigated in [a CID] enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." U.S. v. Markwood, 48 F.3d 969, 979 (6th Cir. 1995)("[a] district court's role in the enforcement of an administrative subpoena is a limited one"), quoting FTC v. Texaco, Inc., 555 F.2d 862, 872-73 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977). A court's role is limited to determining "whether the subpoena, and the enforcement process, are authorized by Congress, whether the information sought is relevant to the agency's investigation, and whether or not the investigation and enforcement of the subpoena is an abuse of the court's process." Markwood, 48 F.3d at 982-83.

The courts have been even less inclined to limit administrative subpoenas directed to third-party corporate entities. In re McVane v. FDIC, 44 F.3d 1127, 1137 (2d Cir. 1995), citing U.S. v. Arthur Young & Co., 677 F.2d 211, 216-17 (2d Cir. 1982) (and cases cited therein), aff'd in part, rev'd in part, 465 U.S. 805, cert. denied, 466 U.S. 936 (1984). Indeed, the ACPA was amended

expressly in order to make CIDs "available for use in gathering third-party analyses, as well as relevant information." U.S. v. GAF Corp., 596 F.2d 10, 13 (2d Cir. 1979).

I. THE PETITION OF THE UNITED STATES TO ENFORCE CID NO. 14993 SHOULD BE GRANTED

Cohen & Company does not argue that CID No. 14993 was improperly issued, that it violates a constitutional or other legal right or privilege of Cohen & Company, that the information sought by CID No. 14993 is irrelevant to the government's investigation, or that the CID is an abuse of the court's process. In fact, Cohen & Company concedes that the material requested is relevant to the investigation, ("Petition Regarding Compliance" at ¶ 6 ("[i]n material part, the CID focused on BCBSMO's inclusion of 'most favored nation'/'most favorable rates' clauses in contracts, and requested documents pertaining to these clauses")), and this Court (Aldrich, J.) has already determined that the investigation is legitimate and within the authority of the Department of Justice. Blue Cross Blue Shield of Ohio v. U.S., *supra*, slip op. at 13.

Nor does Cohen & Company suggest that the CID is defective, or that its enforcement would be an abuse of the court's process. It simply asks -- without suggesting an answer -- whether it must comply with the CID in light of its contract with BCBSMO. The answer is clear. CID No. 14993 was duly issued by the Acting Assistant Attorney General in connection with a legitimate investigation, the documents sought are relevant to that investigation, and there has been no showing -- or even claim -- that enforcement of the CID would be an abuse of the court's process. Accordingly, this Court should enter judgment on the pleadings and order Cohen & Company to comply with CID No. 14993.

II. COHEN & COMPANY'S "PETITION REGARDING COMPLIANCE" SHOULD BE DENIED

A. Cohen & Company's Petition Does Not Comply With the ACPA in that It Fails to Assert Any Claim or Grounds for Relief Under the ACPA

Section 1314(b) of the ACPA provides that a CID recipient may file "a petition for an order modifying or setting aside" a CID in federal court, but that "[s]uch petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person." 15 U.S.C. § 1314(b)(emphasis added) .

Despite the clear statutory language, Cohen & Company's petition fails to comply with either requirement: it does not seek "an order modifying or setting aside" the CID, nor does it raise an objection to either the form or substance of the CID or specify any "constitutional or other legal right or privilege" of Cohen & Company. Instead, Cohen & Company's Petition seeks "an order determining whether it must comply with" the CID, a remedy which is not provided for by the ACPA, and does so based solely on an assertion by BCBSMO that the latter possesses some proprietary and contractual rights in the material. The express language of the ACPA requires that the "constitutional or other legal right or privilege" upon which a petition may lie belong to the "petitioner." The Act does not permit a petitioner to request judicial intervention -- and to delay compliance with a CID -- on behalf of third-parties.²

² Cohen & Company's Petition is more accurately characterized as a request for a declaratory judgment on two issues: (1) whether BCBSMO's claims of proprietary interest and contractual obligation are founded, and (2) if so, do they exempt Cohen & Company from its own obligations to produce documents under its CID. Significantly, Cohen & Company takes no position one way or the other on either issue, cites no case law, and provides no guidance to the
(continued...)

When dealing with a statute that is clear and unambiguous, the starting and ending point of the analysis is the statutory language. Estate of Cowart v. Nicholas Drilling Co., 505 U.S. 469, 475, cert. denied, 505 U.S. 469 (1992), citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) ("When a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"); See also Caminetti v. U.S., 242 U.S. 470, 485 (1917) (language of a statute should be adhered to when its terms are plain and unambiguous). Cohen & Company's self-styled "Petition Regarding Compliance" simply has no basis under the ACPA, makes no claim for relief under the ACPA, and raises issues that are not properly before this Court. It should be denied, and Cohen & Company ordered to comply with CID No. 14993.

B. Agreements Between BCBSMO and Cohen & Company Cannot Vary the Express Statutory Authority of the Antitrust Division to Investigate Potentially Unlawful Conduct

According to Cohen & Company's Petition, BCBSMO has informed Cohen & Company that it should not produce the documents sought under CID No. 14993 because: (1) pursuant to a "consulting agreement" between BCBSMO and Cohen & Company, the documents are "proprietary and confidential to BCBSMO;" and (2) the documents are "confidential by virtue of written statements, signed by agents of Cohen, stating that Cohen will not disclose any information pertaining to BCBSMO's relationships with selected hospitals." Petition Regarding Compliance at

²(...continued)

Court. The ACPA, however, does not authorize petitions for declaratory relief, and presumably was invoked by Cohen & Company here to avail itself of the Act's tolling provision, which provides that the time allowed for compliance with the CID shall not run during the pendency of a petition under the section. 15 U.S.C. § 1314(b)(2). By improperly characterizing its Petition as pursuant to the ACPA (rather than as a declaratory judgment action), Cohen & Company and BCBSMO have been able to delay production of relevant documents and impede the government's investigation even in the absence of a cognizable claim.

¶¶ 8 & 9b. Even assuming that the consulting agreement and purported written statements do somehow "brand" these documents as "proprietary" or "confidential," such an agreement cannot exempt Cohen & Company from compliance with the ACPA.

Neither the ACPA, nor cases interpreting the scope of administrative subpoenas, permits parties to vary by contract their obligation to comply with a CID. See SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) (rejecting attempt by targets to prevent third parties from complying with SEC subpoenas, holding that "[i]t is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities") (emphasis added); U.S. v. Miller, 425 U.S. 435, 443 (1976) (finding, in the context of a grand jury subpoena to a bank for records of a depositor, that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed"). See also, Vanguard Int'l Mfg., Inc. v. U.S., 588 F. Supp. 1229 (S.D.N.Y. 1984) (requiring third-party record keeper to produce documents in response to IRS summons even where foreign court had entered order prohibiting such production); Coster v. Olin Corp., 1987 WL 16331 (D.D.C. 1987) (movant's argument that it was contractually precluded from producing documents in response to a discovery subpoena "is wholly without merit"). To permit BCBSMO, or any party, to determine by contract whether another must comply

with a CID would permit it to obstruct a legitimate antitrust investigation and undermine the investigatory powers of the Department of Justice.

C. The Documentary Material and Information Required by the CID Are Not Protected from Disclosure Under the Applicable Provisions of the ACPA

Even if some of the requested documents were "proprietary" or "confidential" to BCBSMO (a showing neither Cohen & Company nor BCBSMO has made), that fact does not exempt such material from production under the ACPA. The ACPA does not exempt "proprietary" or "confidential" documents. The only exceptions are set out at § 1312(c), which provides that a CID shall not require the production of documents if the documents "would be protected from disclosure under (A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or (B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this chapter." Neither standard exempts "proprietary" or "confidential" documents from discovery. See Fed. R. Civ. P. 26(b)(1) ("[p]arties may obtain discovery regarding any matter, not privileged, which is relevant . . ."); Coster, 1987 WL 16331, at *1 ("If the documents are relevant, not privileged nor subject to work product immunity, a party in possession of the document is required to produce those that he possesses even though they belong to a non-party.").

Neither Cohen & Company nor BCBSMO has suggested that these documents are subject to any cognizable privilege or work product immunity. Indeed, no such privilege or immunity exists here. Arthur Young & Co., 465 U.S. at 815-20 (holding that there is no accountant-client privilege or work product immunity for accountants' work papers under federal law); Couch v. U.S., 409 U.S.

322, 335 (1973) (same); In re Subpoena to Testify Before Grand Jury, 787 F. Supp. 722, 724 (E.D. Mich. 1992) (same); U.S. v. Nelson, 486 F. Supp. 464, 483 (W.D. Mich. 1980) ("the scope of the privilege doctrine is narrow indeed;" and "[t]he mere fact that a communication was made in express confidence, or in an implied confidence of a confidential relationship, does not create a privilege"). See also Jerry T. O'Brien, Inc., 467 U.S. at 742 (target of SEC investigation has no Fifth Amendment privilege enabling it to challenge enforcement of administrative subpoena directed at a third party); Miller, 425 U.S. at 440 (bank customer has no "protected Fourth Amendment interest" in its records held by bank).

D. The Consulting Agreement Between BCBSMO and Cohen & Company Does Not Prohibit Production of the Requested Documents

In its Petition, Cohen & Company alleges BCBSMO has "taken the position that the documents sought by the CID are proprietary to BCBSMO, are confidential and should not be produced, and has so informed Cohen[] [and Company]," and cites ¶¶ 5.2 and 5.5 of the Consulting Agreement. Petition Regarding Compliance at ¶ 8. In fact, neither provision of the Consulting Agreement restricts Cohen & Company's duty to comply with the CID.

Paragraph 5.2 compels Cohen and Company to return documents and materials under certain conditions, or provide BCBSMO written confirmation that certain materials have been destroyed. Nowhere does it address Cohen & Company's obligation to respond to lawful compulsory process. Similarly, Paragraph 5.5 provides for the return of materials and requires Cohen & Company to provide assistance to BCBSMO in acquiring certain rights. It does not purport to restrict Cohen & Company's obligations to comply with a CID or other process.

Significantly, Cohen & Company fails to inform the Court of the contents of Paragraph 5.3 of the Consulting Agreement, which provides in pertinent part that:

Upon receipt of a subpoena or other process of a court or government agency requesting discovery or disclosure of any portion of the Confidential Information, Consultant shall timely notify the court or governmental agency that the Confidential Information is the proprietary and confidential property of BCBSMO, and shall immediately notify BCBSMO of the existence of such subpoena or other process. BCBSMO shall, within ten (10) business days, or such lesser time as may be reasonable, employ all lawful means to resist disclosure of all or a portion of the requested Confidential Information or authorize disclosure of the portion of the Confidential Information requested

The plain and unambiguous language of the Consulting Agreement requires only that Cohen & Company notify the Antitrust Division that the information requested is deemed confidential and proprietary by BCBSMO and to notify BCBSMO of the existence of the CID. In this case, Cohen & Company met both those requirements. Cohen & Company had no obligation not to comply with the CID, only to give BCBSMO an opportunity to exercise whatever rights it might possess within ten days, an opportunity which BCBSMO declined. Thus, the Consulting Agreement does not prohibit Cohen & Company from complying with the CID. Cohen & Company's sole justification for its petition is illusory.

E. The Antitrust Civil Process Act Provides Sufficient Safeguards for Confidential Information

Finally, to the extent that this Petition is addressed to a legitimate concern for the preservation of confidential information, the ACPA provides sufficient protections.³ Indeed, the

³ACPA, 15 U.S.C. § 1313(c) provides as follows:

(continued...)

very protections provided for in the statute make clear Congress's intent to give the Antitrust Division broad access to confidential documents through the CID process in order to expedite the Division's investigations into possible violations of the federal antitrust laws.

CONCLUSION

For the foregoing reasons, Cohen & Company's Petition Regarding Compliance should be denied, and the government's Petition For Enforcement of CID No. 14993 should be granted. Cohen

³(...continued)

(3) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

The statute also provides for return of the documents should a party so desire, upon completion of an investigation. 15 U.S.C. § 1313(e).

& Company should be ordered to comply with the requirements of CID No. 14993 within fourteen days of the Court's Order.

UNITED STATES OF AMERICA AND
ANNE K. BINGAMAN, Assistant Attorney General

By their Attorneys,

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Dated: July __, 1996

DECLARATION OF COMPLIANCE WITH LOCAL RULE 8:8.1(F)

I, the undersigned, do hereby declare under penalty of perjury, that this cause has to my knowledge not yet been assigned to a track, and that the attached MEMORANDUM IN SUPPORT OF GOVERNMENT'S CROSS-PETITION FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND NO. 14993 AND IN OPPOSITION TO COHEN & COMPANY'S "PETITION REGARDING COMPLIANCE" adheres to the page limitations set forth in Local Rule 8:8.1(f).

Paul J. O'Donnell

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this ____ day of July, 1996, I caused a copy of the foregoing MEMORANDUM IN SUPPORT OF GOVERNMENT'S CROSS-PETITION FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND NO. 14993 AND IN OPPOSITION TO COHEN & COMPANY'S "PETITION REGARDING COMPLIANCE" to be served on counsel of record for Petitioner Blue Cross & Blue Shield of Ohio, by U.S. Mail, at the following address:

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