UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO BLUE CROSS AND BLUE SHIELD OF OHIO'S MOTION TO INTERVENE

Blue Cross and Blue Shield of Ohio's ("BCBSO") motion to intervene in this proceeding is but one more move in its long-standing effort to prolong and thereby thwart the Department of Justice's investigation of certain of BCBSO's business practices. The simple fact of the matter is that its motion to intervene is baseless, and should be denied.

ARGUMENT

Fed.R.Civ.P. 24(a)(2), upon which BCBSO relies in arguing that it is entitled to join this action, provides that anyone shall be permitted to intervene:

> where the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action

> may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Despite the rule's clear requirement, BCBSO has failed to establish that it has a legally protectable interest in the documents which are the subject of the underlying petition or that any such interest would be impaired or impeded by the disposition of this action.

A. BCBSO Has Failed to Establish a Legally Protectable Interest in the Documents Responsive to CID No. 14993

BCBSO fails to provide even the most elementary basis for intervention: evidence that it has a legally protectable interest in the property (or transaction) which is the subject of this action. BCBSO offers instead only the naked assertion that it has a "proprietary" interest in the documents sought by CID No. 14993, BCBSO Mem. at 2-3, an assertion which is flatly inconsistent with its previous statements and prior conduct.

Despite its current claim that all of the material sought by CID No. 14993 is proprietary, BCBSO had previously acknowledged that it had no claim to -- and no objection to the production of -- some substantial portion of the material in Cohen & Company's possession responsive to the CID. See letter from Paul J. O'Donnell, Esq. to Scott A. Stempel, Esq., dated July 12, 1996; letter from Paul Lefkowitz, Esq. to Kenneth A. Bravo, Esq., dated July 15, 1996; letter from Paul Lefkowitz, Esq. to Paul J. O'Donnell, Esq., dated July 15, 1996; and letter of Paul J. O'Donnell, Esq. to Paul Lefkowitz, Esq., dated July 17, 1996, all of which are attached hereto as Exhibit 1. While BCBSO assiduously refused to clarify which material it believed was proprietary and which not, its assertions in the course of this correspondence are flatly inconsistent with the position it now takes in its motion to intervene -- that it has a

proprietary interest in *all* the material in Cohen & Company's possession responsive to CID No. 14993.

Equally important, however, is the fact that neither BCBSO nor Cohen & Company has ever acted as if the materials sought by the CID were "proprietary" to BCBSO. BCBSO argues in its motion that Cohen & Company was contractually required to return all "proprietary" material to BCBSO upon completion of the work. BCBSO Mem. at 2. Cohen & Company's failure to return the materials requested by CID No. 14993 (relating to work going back as far as 1989) -- *and BCBSO's failure to request or obtain their return* -- is compelling evidence that neither party to the contract regarded BCBSO as having any ownership interest in this material. BCBSO's belated discovery of a "proprietary interest" in the material called for in CID No. 14993 is simply not credible, and does not justify its motion to intervene.[1]

It is patently obvious that BCBSO's actual interest in intervening here is to prevent a law enforcement agency from obtaining information relevant to its investigation of unlawful conduct. Such an "interest" can not justify intervention:

> [Movant's] only interest -- and of course it looms large in his eyes -- lies in the fact that those records [in the possession of the third party] presumably contain details of . . . payments possessing significance for federal income tax purposes . . . .
>
> * * *

[1] BCBSO recognizes that its current claim of a proprietary interest is inconsistent with its failure to have obtained the material from Cohen & Company at the conclusion of the latter's assignment, and seeks to cast blame upon Cohen & Company by labeling Cohen & Company's continuing possession of these materials a possible "breach" of the contract. BCBSO Mem. at 2. If BCBSO had any evidence that it had ever asked for its return, it presumably would have so informed the court.

> This interest can not be the kind contemplated by Rule 24(a)(2) where it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." It obviously meant there is a significantly protectable interest.

Donaldson v. United States, 400 U.S. 517, 530-31 (1971).

A "significantly protectable interest," one which might warrant intervention, has been defined as a "direct, non-contingent, substantial and legally protectable interest," Dilks v. Aloha Airlines, 642 F.2d 1155, 1157 (9th Cir. 1981); an interest which the substantive law recognizes as belonging to or being owned by the applicant. New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452 (5th Cir.), cert. denied, 469 U.S. 1019 (1984). None of these criteria are met here.

The material sought by CID No. 14993 consists of four types of documents: (i) Cohen & Company's own corporate records (organizational charts, shareholder list, etc.), (ii) material obtained from various hospitals during the course of the audits, (iii) Cohen & Company's work papers (documents created by the auditor in the conduct of the audit), and (iv) administrative materials, including correspondence and communications between BCBSO and Cohen & Company regarding the audits, billing records, and so on. BCBSO does not have a "significantly protectable interest" in any of this material.

As for the first two types of material, Cohen & Company's corporate records and the material obtained from the audited hospitals, BCBSO can have no proprietary interest by any plausible definition: the former were created and maintained by Cohen & Company for reasons unrelated to its work for BCBSO; the latter consists of material obtained from various hospitals subjected to the audit -- material that BCBSO is prohibited from ever seeing, much less

"owning."[2] Documents in the third category, Cohen & Company's work papers, are, as a matter of substantive law, the property of Cohen & Company, not BCBSO.[3] Finally, Cohen & Company's administrative materials, including its communications with BCBSO, cannot be deemed the property of BCBSO where they have been in the uninterrupted possession of Cohen & Company and BCBSO failed to make an unambiguous and contemporaneous assertion of proprietorship.

The Sixth Circuit's decision in Widelski, 452 F.2d 1 (6th Cir. 1971), cert. denied, 406 U.S. 918 (1972), is instructive here. In Widelski, an accountant had prepared income tax returns for his clients and had kept copies of the returns and the work papers. After the IRS began an investigation, these papers were transferred by the accountant to the taxpayers. The IRS then issued a summons to the taxpayers for the accountant's copies of these documents, and the taxpayers refused to comply, asserting their Fourth and Fifth Amendment rights. The court held that the accountant's work papers were presumptively the property of the accountant, and ordered the taxpayers to produce these documents that had been in the possession of the accountant. Id. at 4 (citing Zakutansky, 401 F.2d at 70; In re Fahey, 300 F.2d 383 (6th Cir. 1961); Annot., 90 A.L.R.2d 784 (1963)). The court found it significant that, as in this case, "[a]t

---

[2] According to Cohen & Company, the hospitals it audits are required to provide detailed information regarding, *inter alia,* contracts with other payors, the rates it charges such payors for various procedures, cost information, and utilization patterns, and Cohen & Company is contractually required not to disclose that information to BCBSO.

[3] See United States v. Widelski, 452 F.2d 1, 4 (6th Cir. 1971), cert. denied, 406 U.S. 918 (1972) (accountant's work papers are presumptively the property of the accountant); United States v. Zakutansky, 401 F. 2d 68, 70-73 (7th Cir. 1968), cert. denied, 393 U.S. 1021 (1969) (same; accountant's uninterrupted possession of workpapers an important factor in determining ownership).

no time prior to the transfer had the taxpayers shown any interest in securing the copies. It was only after Internal Revenue Service agents sought an interview with the accountant that taxpayers requested transfer of the returns to them." Id. at 5. In addition, and of particular significance here, the court noted that had the papers remained in the accountant's possession, "the lack of proprietary interest in the copies on the part of the taxpayers or of a recognized privilege between the taxpayers and their accountant *would have denied the taxpayers the right to intervene in the summons enforcement proceeding*," even for the purpose of asserting the taxpayers' Fifth Amendment privilege against self incrimination. Id. at 4 (citing Donaldson, 400 U.S. at 530-31 (1971)) (emphasis supplied). See also Zakutansky, 401 F.2d at 70-73 (under similar facts, holding that accountant would have been obligated to produce work papers in its possession regardless of any proprietary rights raised by the taxpayer; "[t]he natural desire [of accountants] to protect themselves or their clients is not sufficient to change the character of the papers and thereby defeat a legitimate government investigation").

As Widelski, Donaldson, and Zakutansky make clear, a subject of an investigation does not have the right to intervene in a proceeding to enforce an administrative subpoena addressed to the subject's accounting firm -- even where the documents include "proprietary and confidential" work papers -- where the documents have been in the accountant's uninterrupted possession, and where the subject cannot raise any established legal privilege.

B. BCBSO Has Failed to Establish that Any Legally Protectable Interest Will Be Adversely Impacted By the Disposition of this Action

Even assuming, *arguendo,* that BCBSO could demonstrate that it has a property interest in some small fraction of the materials sought, BCBSO utterly fails to suggest how that interest

may be adversely affected by resolution of this petition. Enforcement of the CID would only make the documents available for inspection and copying; Cohen & Company will, presumably, retain the original documents. The material will not be destroyed or altered, and to the extent that BCBSO may be concerned about the confidentiality of information contained in the documents, the Antitrust Civil Process Act provides sufficient protections.[4] In short, the disposition of this action will not adversely impact any legitimate interest BCBSO may claim to have in these documents.

Furthermore, BCBSO's only objection to the production of these documents is that the CID does not seek information relevant to a "legitimate" investigation of potentially unlawful conduct. However, this objection has already been conclusively answered by Judge Aldrich in her June 24, 1996 Order, in which she rejected BCBSO's claims that the investigation is not a legitimate exercise of the Division's statutory authority. Judge Aldrich found that BCBSO itself

---

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

> (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).

had no right to withhold documents, and ordered that they be produced.[5] Denying BCBSO the opportunity to relitigate the identical issue in this proceeding is not the kind of "adverse impact" contemplated under Rule 24. To the contrary, it is well established that where intervention would result only in the reconsideration of claims or objections previously rejected, intervention is not warranted. United States v. BASF-Inmont Corp., 52 F.3d 326 (6th Cir. 1995) (unpublished disposition) (published at 1995 WL 234648) (a copy of which is attached hereto as Exhibit 3), citing United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994) (finding intervention in CERCLA action unnecessary where intervenor previously presented views to district court; "it is hard to fathom how [intervenor] would suffer undue prejudice by being denied an opportunity to present the same views to the district court again"); City of Bloomington, Ind. v. Westinghouse Elec. Corp., 824 F.2d 531, 537 (7th Cir. 1987) (same); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D. Wis. 1990) (same).

C. BCBSO Has Also Failed to Demonstrate the Requisites for Permissive Intervention Under Fed.R.Civ.P. 24(b)

---

[5] Memorandum and Order, dated June 24, 1996 (attached hereto as Exhibit 2). BCBSO filed a notice of appeal of Judge Aldrich's Order on July 15, 1996, and requested a stay pending appeal. As of this writing, Judge Aldrich has not acted on BCBSO's motion, and BCBSO has continued to withhold those documents, in violation of Judge Aldrich's Order.

BCBSO's claim that Cohen & Company's production of these materials would defeat its appeal of Judge Aldrich's Order is likewise meritless. In the unlikely event the Sixth Circuit disagrees with Judge Aldrich, this Court could readily fashion a remedy -- the return of the documents obtained from Cohen & Company. See Church of Scientology of California v. United States, 506 U.S. 9, 13 (1992)("When the government has obtained . . . materials as a result of an unlawful summons . . . a court can effectuate relief by ordering the government to return the records"); United States v. Fla. Azalea Specialist, 19 F.3d 620, 622 (11th Cir. 1994)(appeal from order enforcing administrative subpoena not rendered moot by compliance where return or destruction of documents possible); E.P.A. v. Alyeska Pipeline Service Co., 836 F.2d 443, 445 (9th Cir. 1988)(compliance with administrative subpoena does not render appeal moot where documents could be returned) (citing Casey v. FTC, 578 F.2d 793, 796 (9th Cir. 1978), and FTC v. Browning, 435 F.2d 96, 97-8 (D.C.Cir. 1970)).

BCBSO also suggests, albeit in passing, that it should be permitted to intervene pursuant to Fed.R.Civ.P. 24(b), which governs "permissive intervention." The analysis under Rule 24(b) focuses on (1) whether the applicant has demonstrated a "claim or defense" which has "a question of law or fact in common" with the main action, and (2) the "undue delay or prejudice" the intervention may precipitate; and the court possesses considerable discretion in deciding whether to permit intervention. See Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 524 (1947); Afro Am. Patrolmen's League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974) (same).[6] For the reasons discussed below, this Court should exercise this discretion by denying BCBSO's Motion to Intervene.

1. BCBSO Has Failed to Establish a Valid Claim Having a Common Question of Law or Fact

In order to be allowed to intervene under Rule 24(b), BCBSO must set forth a *legitimate claim or defense* having "a question of law or fact in common" with the main action. See Fed.R.Civ.P. 24(b); U.S. v. 635.76 Acres of Land, More or Less, In Franklin et al. Counties, Ark., 319 F.Supp. 763, 766 (W.D. Ark. 1970) (intervention may be dismissed on motion if claim lacks sufficient law or facts to support claim), aff'd 447 F.2d 1405 (8th Cir. 1971); U.S. v. Akzo Coatings of Am., Inc., 719 F.Supp. 571, 576 (E.D. Mich. 1989) (prerequisite to intervention is the assertion of a "*valid substantive claim for relief*."), aff'd 949 F.2d 1409 (6th Cir. 1991)(emphasis supplied). While the basis for its motion is difficult to decipher, BCBSO

[6] BCBSO may also be required to demonstrate it has an independent jurisdictional basis in order to warrant permissive intervention here. See Horn v. Eltra Corp., 686 F.2d 439, 440 (6th Cir. 1982); but cf. Secretary of Dep't of Labor v. King, 775 F.2d 666, 668 (6th Cir. 1985).

appears to make two arguments in an attempt to meet the standard. The first argument is that the documents in Cohen & Company's possession are exempt from disclosure *by Cohen & Company* because they belong to BCBSO. As demonstrated above, this claim is incorrect. It is also irrelevant.

The existence of a proprietary interest in the documents subject to the CID issued to Cohen & Company has no bearing on the question of whether permissive intervention is appropriate. Section 1312 of the ACPA provides that the Assistant Attorney General may seek documents that may be in the "possession, custody or control" of any person. The recipient of a CID is not exempt from producing documents merely because another claims a proprietary interest in them, or that the recipient had agreed to withhold them. Coster v. Olin Corp., 1987 WL 16331, at *1 (D.D.C. 1987) ("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.").[7] Since it is undisputed that Cohen & Company has "possession, custody or control" of the documents, BCBSO cannot establish a valid claim justifying intervention in this case. 635.76 Acres of Land, 319 F.Supp. at 766; Akzo Coatings, 719 F. Supp. at 576. See also U.S. v. J. Joseph Gartland, Inc., 79 F.R.D. 148, 150-51 (D. Md. 1978) (taxpayer not allowed to intervene when corporate business records are sought

[7] See also S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) ("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"); U.S. v. Miller, 425 U.S. 435, 443 (1976) (Fourth Amendment does not prohibit production of third party's confidential bank records by bank); 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).

because such intervention would allow undue interference with IRS enforcement efforts) (citing U.S. v. Newman, 441 F.2d 165, 172-73 (5th Cir. 1971) (taxpayer not entitled to intervene as of right or permissively and holding Donaldson, 400 U.S. at 531, applicable to permissive intervention cases).

BCBSO's second argument centers around "[t]he issue of whether the sought-after documents are relevant to a valid investigation . . . ." BCBSO's Motion to Intervene at 4. That issue has already been decided by Judge Aldrich in her Order of June 24, 1996, at 13, where she specifically found that the inquiries were "reasonably related to a legitimate government investigation." Since neither argument sets forth a legitimate "claim or defense," BCBSO's Motion to Intervene should be denied.

2. BCBSO's Intervention Would Result in Undue Delay and Prejudice

Rule 24(b) also requires that the Court "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." This is particularly significant here, where BCBSO has clearly engaged in a pattern of delay. BCBSO's motion to intervene, in which it challenges the production of clearly relevant documents from a third-party on the very basis rejected by Judge Aldrich, is simply one more example of that effort, and need not be countenanced. See Fed. Sav. and Loan Ins. Corp. v. First Nat'l Dev. Corp., 497 F.Supp 724, 732 (S.D. Tex. 1980) (savings and loan association who asserted interest in documents not entitled to intervene where such intervention "would serve more to delay" than to help resolve the issues presented); S.E.C. v. Fourth Nat'l Bank of Tulsa, 1979 WL 1234, at *4 (N.D. Okla. 1979) (where company moved to intervene when SEC sought company's bank records, court held that given the investigative powers conferred by statute to the SEC, to allow intervention

would "hamper and impede the investigatory process"). BCBSO's intervention would permit it to further delay this investigation while adding nothing to the resolution of the issues posed by Cohen & Company's petition. Its Motion to Intervene should be denied.

D. Public Policy Strongly Disfavors Intervention in these Circumstances

To allow BCBSO to intervene in the instant proceeding, where the only issue it raises has already been decided, where the only objective served is BCBSO's long-standing interest in delaying this investigation, and where BCBSO utterly fails to demonstrate that it has any legitimate interest in the material sought by the CID (or that such an interest would be adversely impacted by resolution of this matter), would seriously undermine the ability of the Antitrust Division to investigate unlawful conduct, and give to the targets of investigations generally an unprecedented ability to obstruct and delay those proceedings.

CONCLUSION

For the forgoing reasons, the United States requests that BCBSO's Motion to Intervene be denied.

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

By their Attorneys,

_____/s/_____
Paul J. O'Donnell
Jesse M. Caplan
Evelio J. Yera

Attorneys, Antitrust Division
United States Department of Justice
Liberty Place Building
325 Seventh Street, NW, Suite 400

Washington, D.C. 20530

Dated: August 22, 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 OF THE UNITED STATES IN OPPOSITION TO BLUE CROSS AND BLUE SHIELD OF OHIO'S MOTION TO INTERVENE" 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 22nd day of August, 1996, I caused a copy of the foregoing MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO BLUE CROSS AND BLUE SHIELD'S MOTION TO INTERVENE to be served on counsel for Petitioner and Intervenor by hand at the following addresses:

Kenneth A. Bravo
Ulmer & Berle P.L.L.
Bond Court Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583

John R. Climaco
Kenneth F. Seminatore
Paul S. Lefkowitz
David W. Neel
Climaco, Climaco, Seminatore, Lefkowitz &
Garofoli, Co. LPA
Ninth Floor, The Halle Building

1228 Euclid Avenue
Cleveland, Ohio 44115-1891

/s/
Paul J. O'Donnell