IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-3805

BLUE CROSS AND BLUE SHIELD OF OHIO,

Petitioner-Appellant,

v.

ANNE K. BINGAMAN, Assistant Attorney General,

Respondent-Appellee.

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

OPPOSITION OF THE UNITED STATES OF AMERICA TO BLUE CROSS AND BLUE SHIELD OF OHIO'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The district court properly rejected the only argument Blue Cross and Blue Shield of Ohio's ("BCBSO") advanced for setting aside a Civil Investigative Demand ("CID") issued by the Antitrust Division: that BCBSO's use of so-called most-favored nations ("MFN") clauses, regardless of what facts an investigation might reveal, can never violate the antitrust laws. BCBSO now repeats this baseless argument. It also, however, seeks a stay on grounds that it specifically did not ask the district court to address and that it advances for the first time in this Court. This strategy of interposing objections to the government's subpoena seriatim flies in the face of elemental principles of appellate review and confounds the public interest in the expeditious enforcement of administrative subpoenas.

BCBSO's claims of irreparable harm are equally unpersuasive; and granting a stay will impair the public interest in the prompt resolution of antitrust investigations. Accordingly, BCBSO's motion for a stay pending appeal should be denied.

STATEMENT OF FACTS

On October 17, 1994, the Antitrust Division of the Department of Justice served BCBSO with CID No. 11466. The CID, which was issued following a preliminary investigation into possible anticompetitive practices pertaining to the delivery of hospital, medical services, and health insurance in Northern Ohio, called for the 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 BCBSO claimed is "wholly lawful" and cannot "violate Section 1 or 2 of the Sherman Act." Petition to Side Aside CID 2-5 ("Petition") (Exhibit 1). Accordingly, BCBSO argued, the CID impermissibly sought information that "could not possibly be relevant to any civil antitrust investigation." Id. at 5. As it concedes, see Motion For Stay Pending Appeal 1 (Oct. 21, 1996) ("Motion"), BCBSO advanced no other argument in support of its petition.

On January 5, 1995, the United States filed a cross-petition seeking the CID's enforcement. In opposition, 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." Motion at 1. Plainly seeking to delay a dispositive ruling on the United States' cross-petition as long as possible, BCBSO instead requested the court permit briefing "as to the particulars of the CID" at some later date. Memorandum in Opposition to Petition to Enforce 20 n.23 (Jan. 30, 1995) ("Mem. in Op.") (Exhibit 2) ("To devote time and space to that issue now would be premature."). BCBSO, consequently, merely presented to the court 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.

On June 24, 1996, the Court denied BCBSO's petition and granted the United States' cross-petition. Fully addressing the arguments BCBSO advanced, the court rejected BCBSO's assertion that its use of MFN clauses could never violate the antitrust laws, no matter what the facts uncovered in an investigation might show. See Blue Cross & Blue Shield of Ohio v. Bingaman, No. 1:94 CV 2297, at 12 (June 24, 1996) (Exhibit 3). Implicitly rejecting BCBSO's attempt to hold further objections to the CID's scope "in reserve," the court ordered the CID enforced. See id. at 14.

BCBSO filed a notice of a notice of appeal on July 15, 1996, and simultaneously sought a stay pending appeal from the district court. The court denied a stay on October 7, 1996. After receiving a two-week extension of time, BCBSO filed its opening

brief in this Court on September 17, 1994. The United States' brief is due November 8, 1996.

ARGUMENT

THE COURT SHOULD DENY THE MOTION FOR A STAY PENDING APPEAL

I. APPLICABLE LEGAL STANDARD

A party invoking this Court's authority under Fed. R. App. P. 8(a) to grant the extraordinary relief of a stay pending appeal must meet a "heavy" burden. FTC v. Weyerhaeuser Co., 648 F.2d 739, 741 (D.C. Cir.), vacated on other grounds, 665 F.2d 1072 (D.C. Cir. 1981); 11 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2094, at 505 (2d ed. 1995). In determining whether the applicant has met its burden, courts consider: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); accord Hilton v. Braunskill, 481 U.S. 770, 776 (1981) .

Although this Court has stated that these factors are "interrelated considerations that must be balanced together" and "not prerequisites that must be met," Griepentrog, 945 F.2d at 153, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," Sampson v. Murray, 415 U.S. 61, 88 (1974) (internal quotations omitted). Failure to demonstrate irreparable harm accordingly

requires denial of a stay. See Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 104-05 (6th Cir. 1982) (citing Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 n.9 (8th Cir. 1981) (en banc)). Moreover, when, as here, issuance of a stay will harm the public interest, "the moving party faces a heavy burden in demonstrating that he is likely to prevail on the merits." Dataphase, 640 F.2d at 113.[1] As explained below, BCBSO has not met its burden.

II. BCBSO HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS APPEAL

BCBSO raises three objections to the district court's Order. First, it maintains that its "MFN clause is so clearly legal that an investigation as to whether [it] violates the Sherman Act serves no legitimate investigative purpose." Motion at 6-10. Second, it argues that "the CID is so broadly drafted as to be oppressive." Id. at 6, 14-16. Third, it contends that because the CID is unduly burdensome, to justify enforcement the government needed to adduce evidence demonstrating that BCBSO's MFN clauses violate the antitrust laws. See id. at 10-11. BCBSO's first argument wholly lacks merit and its other contentions, in addition to lacking substantiation, have been waived.

A. BCBSO's MFN Clauses Are An Appropriate Subject Of An Antitrust Division Investigation

[1]The moving party's burden is particularly heavy when, in this case, the trial judge has denied a stay. See Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970) (Winter, J.).

1. The district court correctly recognized that BCBSO, in arguing the Antitrust Division's request for information concerning MFN clauses serves no legitimate investigative purpose, 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, 641-43 (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 also 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, the claim of an exemption that depends on facts should not pretermit an investigation. See 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 an Antitrust Division investigation is essentially a claim that use of MFN clauses is exempt from the antitrust laws. BCBSO, consequently, 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.

MFN clauses, when embodied in contracts between an insurer and provider, 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). Application of the Sherman Act'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 never can 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" and can only result in lower prices to consumers. Motion at 6-9.

Depending on the facts, however, MFN clauses in insurer/provider contracts may well cause anticompetitive effects, including higher prices. It long has been recognized

that MFN clauses may deter discounting. See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 623-25 & nn.1-2 (1975). Absent the MFN clause, a seller might provide certain purchasers with greater discounts than it provides to other purchasers. However, the MFN clause requires granting the purchaser imposing it the same discount bestowed on any other purchaser. If that purchaser comprises a significant portion of the seller's income, the MFN clause may inhibit the seller from giving any purchaser a discount.

In health care markets, this discount-inhibiting effect may have several adverse consequences on competition. Among other things, MFN clauses might cause providers (such as hospitals or individual physicians) to limit or eliminate discounts granted to particular insurers that, but for the MFN clause with another insurer, the providers would offer. The result may be higher premiums to those who purchase health insurance. Similarly, insurers may use MFN clauses to exclude rivals who would seek to enter and build market share by offering lower prices; and MFN clauses may impede the development of innovative methods of delivering healthcare. For instance, an MFN clause may deter a physician 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 greater percentage of the physician's fees. Depending on the facts, this may deprive the limited-panel plan of enough providers to survive and result in

less competition and higher prices. See generally Jonathan B. Baker, Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses, 64 Antitrust L.J. 517 (1996) (describing the possible anticompetitive effects of MFN clauses).

The case law recognizes that MFN clauses may be anticompetitive and may violate the Sherman Act. Indeed, the court in United States v. Delta Dental of Rhode Island, No. 96-113/P, 1996 WL 570397 (D.R.I. Oct. 2, 1996) (Exhibit 4) -- 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) (noting the absence of evidence that the MFN before it resulted in 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. App. 1994) (acknowledging that "in some circumstances, the enforcement of most favored nation clauses can have severe anticompetitive effects"); cf. Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 971 (10th Cir.)

(noting "considerable testimony on the effect of Blue Cross's 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"), cert. denied, 479 U.S. 1005 (1990); Blue Cross & Blue Shield of Michigan v. Michigan Ass'n of Psychotherapy Clinics, 1980-2 Trade Cas. (CCH) ¶ 63,351 (E.D. Mich. 1980) (merely rejecting the claim that MFN clauses constituted per se unlawful price fixing).

The cases cited by BCBSO do not hold to the contrary.[2] 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), simply rejected the claim that the MFN clause before it was "exclusionary," and therefore violated Sherman Act section 2, because it was instituted for an anticompetitive purpose, see id. at 1104, 1110-12. The court did have before it evidence of anticompetitive effects, and did not address whether MFN clauses might violate section 1. As the Delta Dental court explained, Ocean State cannot plausibly be read to preclude a Sherman Act claim when adverse effects

[2]In Michigan Ass'n of Psychotherapy Clinics v. Blue Cross & Blue Shield of Mich., 1982-83 Trade Cas. (CCH) ¶ 65,035 (Mich. Ct. App. 1982), the court merely concluded that the MFN clause at issue did not constitute unlawful "price-fixing"; the court did not consider evidence of anticompetitive effects. See id. at 70,775. The court in Kitsap Physician Serv. v. Washington Dental Serv., 671 F. Supp. 1267 (W.D. Wash. 1987), conducted a superficial evaluation of an 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 merely holding MFN clauses not to constitute "price fixing." See id. at 1269.

stemming from MFN clauses are alleged. See Delta Dental, 1996 WL 570397 at *6-*7.[3]

As for Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985), it did not involve an MFN clause, but simply 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 the claim. See id. at 928-29. The court, however, carefully distinguished the case 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

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[3]Indeed, even under BCBSO's reading of Ocean State, its stay application must be denied. BCBSO concedes that MFN clauses may violate Sherman Act § 2 if they cause providers to charge prices below incremental costs. See Motion at 14. This concession is fatal to BCBSO's claim that MFN clauses may never violate the antitrust laws -- the premise of its argument that an investigation of MFN clauses cannot garner materially possibly relevant to a lawful antitrust investigation. BCBSO asserts that the district court "never considered whether any of the documents requested under the CID had anything to do with the incremental costs hospitals incur in dealing with BCBSO and other insurers," id., but the argument is not well taken. As explained below, BCBSO expressly asked the court not to consider objections to the CID based on "its particulars." Mem. in Op. at 20 n.23.

The United States believes that MFN clauses may violate § 2 even when the factual context does not involve below-cost pricing. However, it is enough to respond fully to BCBSO's argument that MFN clauses may in some circumstances violate Sherman Act § 1.

price/quality bargains." Id. at 924. As explained above, it is precisely this effect of deterring providers form dealing with third parties that MFN clauses may have.[4]

Accordingly, because neither policy nor precedent supports BCBSO's proposed novel rule that MFN clauses may never run afoul of the antitrust laws, BCBSO's argument that conduct is exempt from investigation by the Antitrust Division must fail. See Associated Container, 705 F.2d at 58, 59-60; FTC v. Markin, 532 F.2d 541, 543-44 (6th Cir. 1976).

2. For similar reasons, BCBSO's contention that even if MFN clauses "are not procompetitive as a matter of law, BCBSO's MFN clause is clearly procompetitive under the facts of this case," Motion at 11, is mistaken and irrelevant to its stay application. An investigating agency is not required to accept protestations that the conduct investigated is lawful. Rather, "it is entitled to determine for itself" whether the law is violated. United States v. R. Enterprises., Inc., 498 U.S. 292, 303 (1991) (citing Morton Salt, 338 U.S. at 642-43); see also Oklahoma Press, 327 U.S. at 216 (explaining that an administrative investigation must not "be `limited . . . by forecasts of [its] probable result'" (quoting Blair v. United States, 250 U.S. 273, 282 (1919))); United States v. Powell, 379 U.S. 48, 57 (1964).

Further, even if the supposed "evidence" advanced by BCBSO

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[4]Austin v. Blue Cross & Blue Shield of Ala., 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 for precisely the same reason.

concerning the state of healthcare markets in Northern Ohio were relevant to the issues involved in this case, nothing in BCBSO's submission precludes the possibility that BCBSO's MFN clauses might have anticompetitive effects. According to BCBSO, since it began employing MFN clauses, prices in relevant markets have experienced a relative decline and new entry has occurred. See Motion at 11-14. However, even if BCBSO's assertion is unassailably correct, it may well be the case that, but for BCBSO's employment of MFN clauses, prices would have declined further, and that additional, more innovative entry would have occurred. BCBSO's MFN clauses may also harm competition on a prospective basis. To make these determination, of course, is the very reason why the government conducts investigations.

3. Finally, BCBSO objects to the district court's reliance on the affidavit of chief of the Antitrust Division's Cleveland Field Office, John Weedon, which confirms that the Antitrust Division issued the CID for a proper investigatory purpose. See Motion at 10. BCBSO seems to assert that the district court should not have enforced the CID absent a "basis upon which to test the validity" of Mr. Weedon's averments because "[o]therwise, all the government would ever need to issue a CID would be an affidavit alleging that it has a belief that a party's acts are anticompetitive." Id. at 10-11 (emphasis in original). However, as explained above, it is entirely appropriate for an agency to use its investigatory power "`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 United States v. Morton Salt Co., 338 U.S. at 642-43). It need not establish "probable cause" that a violation has occurred. See R. Enterprises, 498 U.S. at 297.

As to whether the Antitrust Division has a legitimate basis for its "suspicion" here, courts routinely rely on affidavits such as that provided in this case. See, e.g., 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). And, because a subpoena is entitled to a presumption of regularity, R. Enters., 498 U.S. at 300-01; Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 411 (D. Kan. 1982), courts refuse to test official representations absent a substantial showing of bad faith or improper purpose. 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, of course, no evidence of either here.

B. BCBSO Waived Its Claim That The CID Is Oppressive

BCBSO also argues that the district court abused its discretion by "failing . . . to consider" BCBSO's claim that "the CID actually issued was so burdensome as to be overbroad, unreasonable, and oppressive." Motion at 15. But BCBSO did not specifically object to the CID on this basis in its petition or answer to the United States' cross-petition. Even if it had, the sum-total of its presentation to the district court on the matter

was a single footnote asserting in conclusory fashion that "[i]n many instances, the requests seek 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." Mem. in Op. at 20 n.23. These vague statements fail to constitute a clear presentation of the issue to the district court. Consequently, BCBSO's objection to the CID on the basis that it is overbroad or burdensome should be deemed waived. See, e.g., Building Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1398-99 (6th Cir. 1995); Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324, 326 (6th Cir. 1988).

Even if petitioner has not waived the issue, a remand for the district court to consider the merits of petitioner's contention would be futile. The conclusory assertions made fall far short of the concrete proof of "oppressiveness" that courts require. See, e.g., In re August, 1993 Regular Grand Jury, 854 F. Supp. 1392, 1401-02 (S.D. Ind. 1993); In re PHE, Inc., 790 F. Supp. 1310, 1314 (W.D. Ky. 1992); 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" and explaining that "respondent 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'" (quoting Morton Salt, 338 U.S. at 654 (alternations in original))).

To be sure, BCBSO sought to reserve the right to further brief these issues at a later time. See Mem. in Op. at 20 n.23. But the district court properly rejected this attempt at "sandbagging," Wainwright v. Sykes, 433 U.S. 72, 89 (1977), and so should this Court. The seriatim presentation of objections to a CID's enforcement is patently inconsistent with the purpose of summary subpoena enforcement procedures, which is to ensure that the government, if it is entitled to the materials sought, may obtain them without undue delay. 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."); cf. Markwood, 48 F.3d at 979 (explaining the need for "expeditious enforcement" of administrative subpoenas).[5] Petitioner withheld its challenge to the CID's "particulars" at its peril. To permit it a second bite at the apple 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

[5]Indeed, for precisely these reasons, courts do not ordinarily permit the government to hold in "reserve" objections to a request for documents made under the Freedom of Information Act, a context in which comparable values are at stake. See Ryan v. Department of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (refusing to permit a the government to raise an exemption to the Freedom of Information Act that it sought to preserve in a footnote, but made no attempt to substantiate, in district court).

quotations and citations omitted).[6]

C. BCBSO'S Contention That The Government Must Demonstrate Probable Cause Lacks Foundation

BCBSO's final objection to the district court's ruling is that, because the CID requests "millions of documents," the court erred in not requiring the government to produce "some evidence that [its] suspicions [of anticompetitive conduct] are reasonable." Motion at 10-11. BCBSO has manufactured this argument for the first time on appeal. Thus, it is waived.[7] But even if the argument may properly be advanced, BCBSO failed to prove its criminal premise: that the CID involved here is excessively burdensome. As explained above, BCBSO made no effort to substantiate this contention before the district court and,

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[6]BCBSO's failure to move for reconsideration, a more direct route of bringing before the district court the issues it supposedly reserved, demonstrates that BCBSO's interest lies solely in delay.

BCBSO alternatively asks this Court to modify the CID. See Motion at 15. But even if this were a proper action for an appellate court to take, evaluation of the objections BCBSO raises would require further development of the record. This consideration -- even apart from the compelling concern with not permitting litigants to present seriatim objections to CIDs -- precludes excusing BCBSO's waiver. See Foster v. Barilow, 6 F.3d 405, 407 (6th Cir. 1993).

[7]BCBSO arguably did ask the district court to require the Antitrust Division to produce additional evidence because "precedent and the body of publicly available information . . . shows that the DOJ's assumptions are without any factual foundation." Mem. in Op. at 20. This quite different argument for requiring the government to produce the very facts an investigation is designed to discover is, as explained above, similarly without merit.

consequently, waived any such claim. See supra pp.12-13.[8]

III. BCBSO'S CLAIM OF IRREPARABLE HARM IS BASELESS

BCBSO asserts that absent a stay it will suffer three sources of "serious[]" irreparable harm. First it "will have to spend hundreds of thousands of dollars and months (if not years) of time combing through millions of documents"; second, it will have "essentially lost its appeal before the court has ruled upon it" because the "primary purpose" of the appeal is to avoid this expenditure of effort; and third, "BCBSO will suffer from unlawful intrusion into its affairs." Motion at 17. Each contention is entirely groundless.

1. BCBSO's assertion of irreparable harm stemming from extraordinary compliance costs -- a claim it failed to advance in its stay application in district court -- lacks substantiation. Irreparable harm cannot merely be asserted; it must be proved.

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[8]In any event, BCBSO's argument that a particularly burdensome subpoena might in some instances require a showing amounting to probable cause is wrong. The Supreme Court in R. Enterprises rejected a heightened relevancy requirement, as Justice Stevens, on whose concurrence BCBSO relies, recognized. Compare R. Enters., 498 U.S. at 297 ("[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.") with id. at 304-05 (describing the majority's approach to relevancy as "truncated"). See also In re August, 1993 Regular Grand Jury, 854 F. Supp. at 1400 n.7. To be sure, if an administrative subpoena is found oppressive it may be modified or the parties may be required to negotiate a modification. See, e.g., Phoenix Bd. of Realtors, Inc. v. United States Dep't of Justice, 521 F. Supp. 828, 832 (D. Ariz. 1981). But the proper remedy to an oppressive administrative subpoena is not, as BCBSO insists, to impose on the government a heightened relevancy requirement for all the information requested.

See Griepentrog, 945 F.2d at 154. Consequently, "the movant must . . . provid[e] specific facts and affidavits supporting [its] assertion[] that" irreparable harm exists. Id. BCBSO has provided nothing of the kind. All the Court has is BCBSO's extravagant, bald assertion that complying with the CID will impose upon it an excessive burden. This, however, is insufficient. See Railroad P.B.A. of New York, Inc. v. Metro-North Commuter R.R., 699 F. Supp. 40, 43 (S.D.N.Y. 1988); Emanuele v. Kuriale, No. 93 CIV 3316, 1994 WL 9674, at *3 (S.D.N.Y. Jan. 10, 1994) (rejecting unsubstantiated allegations that compliance with subpoena will cause "great inconvenience and expense"); see also sources cited supra pp.12-13.

To be sure, complying with the CID will place upon BCBSO some burden. But irreparable harm does not include the ordinary burden of production imposed by complying with an administrative subpoena. "Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone," qualifies as irreparable harm. A.O. Smith Corp. v. FTC, 530 F.2d 515, 527 (3d Cir. 1976). Thus, "unrecoverable costs of compliance" can constitute irreparable harm to a corporation only when they are in some way "peculiar," such as when the corporation involved is small, the burden on the corporation would result in insolvency, or the "cost of compliance would be so great vis a vis the corporate budget that significant changes in [the] company's operations would be

necessitated. " Id. at 527-28 (internal quotations omitted). BCBSO, of course, has failed even to assert, much less prove, this sort of injury. But even if the argument were not now forfeited, it is fanciful to believe that complying with the CID would inflict such harm on BCBSO, a company with $2 billion in annual revenues.[9]

2. BCBSO's failure to substantiate its first source of irreparable harm defeats its second argument, which merely restates the first. If the cost of complying with the CID pending appeal, even if unrecoupable, does not constitute irreparable harm, that a successful appeal cannot obviate the harm is merely to say that the costs cannot be recouped. It does mean those costs rise to the level of irreparable harm.[10]

3. Finally, BCBSO's claim of irreparable harm from an "unlawful intrusion into its affairs" is wholly insubstantial. BCBSO does not identify any harm to the corporation that would

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[9]See Robert Kuttner, Welcome to Hospitals R Us, Sacramento Bee, Sept. 29, 1996, available in 1996 WL 3318414. For the same reasons, time spent by BCBSO employees and attorneys effectuating compliance with the subpoena cannot constitute irreparable harm. That quite ordinary hardship too is "part of the social burden of living under government." FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980) (explaining that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" (internal quotations omitted)).

[10]BCBSO wisely does not contest that failure to obtain a stay will moot its appeal, the irreparable injury it claimed in the district court. Compliance with the CID plainly will not have this effect. See Church of Scientology of Cal. v. United States, 506 U.S. 9, 13 (1992); United States v. Florida Azalea Specialists, 19 F.3d 620, 622 (11th Cir. 1994); USEPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 445 (9th Cir. 1988).

flow from the asserted "unlawful intrusion." To the extent BCBSO claims irreparable harm from some unspecified "stigma" to the corporation from complying with a government subpoena that turns out to be unlawful, BCBSO impermissibly claims irreparable harm from an ordinary burden of complying with government regulation. See A.O. Smith, 530 F.2d at 527-28.

IV. ISSUANCE OF A STAY WILL HARM THE PUBLIC INTEREST

In contrast to BCBSO's complete failure to demonstrate irreparable harm, granting the stay will harm the "[p]ublic interest" in "the prompt enforcement" of administrative subpoenas. SEC v. Prentiss, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,370 (6th Cir. Dec. 3, 1981) (Keith, J.); see also 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, because of the "substantial public interest in effective and immediate enforcement of the antitrust laws," in a subpoena enforcement action such as this, "[a]bsent unique compelling circumstances, stays are particularly inappropriate." FTC v. Anderson, 1978-1 Trade Cas. (CCH) ¶ 61,851, at 73,564 (D.D.C. Jan. 11, 1978); see also United States v. Nutrition Serv., Inc., 234 F. Supp. 578, 579 (W.D. Pa. 1964) (explaining that delay should not be tolerated when the public interest will be harmed), aff'd, 347 F.2d 233 (3d Cir. 1965), application denied, 430 U.S. 1000

(1975).[11]

These concerns apply with particular force in this case. The Division's CID has gone unanswered by BCBSO for almost two years. BCBSO's withholding of the information sought by the Division has hindered its investigation and may have facilitated the continuing infliction of unlawful restraints of trade on consumers of healthcare in Northern Ohio.

BCBSO derides this compelling public interest in the swift enforcement of administrative subpoenas, claiming that the government, in seeking a total of three additional weeks in which to file its brief on the merits, demonstrated that it did not "really believe[] that this case was time-sensitive." Motion at 18. But this disingenuous argument[12] overlooks the fact that BCBSO is presently under a court order to comply with the CID. The slight delay in the filing of the government's merits brief, given how things now stand, has no relation to how promptly BCBSO produces the requested documents and interrogatory answers and how quickly the investigation proceeds. Indeed, under BCBSO's reasoning, the government should have moved for expedition even though it prevailed below.[13]

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[11]BCBSO's argument that the "public interest" relates only to the breadth of CIDs, and not their prompt enforcement, see Motion at 19, is accordingly wrong.

[12]BCBSO itself received a two-week extension of time.

[13]BCBSO also argues that the public interest lies in "reducing bureaucratic regulation of business and protecting the spare time and family lives of BCBSO personnel." Motion at 19. But these concerns -- even if properly part of the public

V. THE BALANCE OF EQUITIES POINTS DECISIVELY AGAINST GRANTING A STAY

BCBSO has established neither irreparable harm nor a likelihood of possibility of success on the merits. Either conclusion is a sufficient basis for denying the motion. But even if BCBSO had demonstrated serious questions going to the merits and cognizable irreparable harm, these factors are outweighed by the continuing harm to the public interest in prompt and efficient enforcement of the antitrust laws that a stay would engender.

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interest equation, which they are not -- could be raised in opposing the enforcement pending appeal of any administrative subpoena, and plainly prove too much. BCBSO additionally points to the district court's statement that "granting the stay will not harm anyone." Motion at 17. However, the district court simply meant that granting the stay will not harm any third parties. See id. Ex. 2 at 5. The district court plainly did not mean that granting a stay will not harm the public interest, for it expressly so found. See id. In this Court, BCBSO identifies no harm that will befall nonlitigants if its stay application is denied.

CONCLUSION

For the foregoing reasons, BCBSO's motion for a stay pending appeal should be denied.

Respectfully submitted.

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October 25, 1996

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 1996, I caused a copy of the foregoing OPPOSITION OF THE UNITED STATES OF AMERICA TO BLUE CROSS AND BLUE SHIELD OF OHIO'S MOTION FOR STAY PENDING APPEAL to be served upon the following counsel in this matter by federal express:

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EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4