IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MCS HEALTH MANAGEMENT OPTIONS, INC., Plaintiff v. **CARLOS R. MELLADO LOPEZ,** in his official capacity as patient's advocate for the Puerto Rico Office of the Patient's Advocate; and **KAREN L. GARAY MORALES,** in her official capacity as Examining Officer of the Patient's Advocate, Defendants	**CIVIL NO.: 14-01223 (PG)** **RE: DECLARATORY AND INJUNCTIVE RELIEF**

MOTION TO SET ASIDE OPINION AND ORDER

TO THE HONORABLE COURT:

COMES NOW defendant Carlos R. Mellado Lopez ("Mellado"), through the undersigned counsel, and respectfully moves the court to set aside the March 17, 2015, Opinion and Order for the following reasons:

I. INTRODUCTION

On March 17, 2015, the court issued an Opinion and Order granting plaintiff's motion for preliminary injunction and ordering defendants to suspend all administrative proceedings against plaintiff on the case no. 2011-OP-06. Defendant believes the court overlooked certain facts that, if taken under consideration, would have resulted in a judgment for defendants. For the reasons expressed below, Mellado

respectfully moves the court to reconsider and set aside the Opinion and Order of March 17, 2015.

II. STRUCTURAL BIAS

A. Examining Officer's Contract With OPA

The court found that structural bias existed because of the terms of the contract between the examiners at the Office of the Patient's Advocate ("OPA") and OPA.[1] The conditions that showed bias to the court were in the examiner's agreement to: (i) act as examining officer "in the administrative hearing that [the OPA] assigns to him/her"; (ii) "represent [the OPA] in designated matters"; (iii) "assist in the drafting of legal and administrative documents that are necessary for the furthering of the functions and duties of [the OPA]"; (iv) "absolute loyalty to [the OPA]"; and (v) will not have "conflict of interests" in detriment to the OPA. Docket 35 at 18. However, absent financial interest, none of those commitments has ever been found to be enough to support a finding of structural bias that would qualify as an exception to the *Younger* abstention doctrine. See Younger v. Harris, 401 U.S. 37 (1971).

The exception to the *Younger* abstention doctrine was crafted by the Supreme Court in Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1973). In Gibson, the Alabama Optometric Association filed charges with the Alabama Board of Optometry against

[1] Procedurally, the Commonwealth of Puerto Rico's Uniform Administrative Procedure Act, P.R. Laws Ann. tit. 3, § 2101 et seq., provides that every agency may designate examining officials, who shall not necessarily be attorneys, to preside over the adjudicatory procedures that are held there, especially when the procedure in question is informal. The head of the agency may delegate adjudicatory authority to one or more officials or employees of his agency. These officials or employees shall be designated by the title of administrative judges. P.R. Laws Ann. tit. 3, § 2153. Once such adjudicatory procedure is set into action, a final order or resolution shall be issued in writing within 90 days after the conclusion of a hearing or after the filing of proposed findings of fact and conclusions of law. P.R. Laws Ann. tit. 3, § 2164. The Puerto Rico Uniform Administrative Procedures Act, Section 3 L.P.R.A. § 2172 expressly states that the court may only review final agency orders after the petitioning party has exhausted all administrative remedies.

various optometrists who were salaried employees of Lee Optical Co. ("Lee optometrists"). "The gravamen of these charges was that the named optometrists, by accepting employment from Lee Optical, a corporation, had engaged in 'unprofessional conduct' within the meaning of s 206 of the Alabama optometry statute and hence were practicing their profession unlawfully." Id. at 567. The charges were held in abeyance while a parallel case was filed in state court, which the Alabama Optometric Association won. Pending appeal of that judgment, the Alabama Board of Optometry reactivated the proceedings pending before it.

The Lee optometrists filed a complaint in the U.S. District Court against the Alabama Board of Optometry, its individual members and the Alabama Optometric Association. "The thrust of the complaint was that the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law." Id. at 570. The District Court entered judgment for the Lee optometrists, "enjoining members of the State Board and their successors 'from conducting a hearing on the charges heretofore preferred against the Plaintiffs' and from revoking their licenses to practice optometry in the State of Alabama." Id. .

Explaining its decision, the District Court considered prejudgment of the facts and personal interest as sources of possible bias sufficient to disqualify the members of the Board of Optometrists. In creating the *Gibson* exception the Supreme Court affirmed the District Court's finding of impermissible bias but only on the personal interest grounds: ***"but we need reach, and we affirm, only the latter ground of possible personal interest."*** Id. at 579 (emphasis ours). The personal interest bias upheld by the Supreme Court was explained as follows:

> Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees.
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> Id. at 578.

The main concern of *Gibson* was to have federal courts "initially resolve any allegations of state partiality or bias, particularly regarding any "direct, personal, substantial, pecuniary interest" of the adjudicator, *vis-a-vis* the plaintiff." Corporacion Insular de Seguros v. Garcia, 680 F. Supp. 476, 478 (D.P.R. 1988). Nothing in the examiner's contract with OPA, as quoted by this court, falls within the *Gibson* exception. Nothing suggests that "success in the [OPA]'s efforts would possibly redound to the personal benefit" of the examiner. As explained by the Supreme Court, "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Id. Nothing in the examiner's contract with OPA suggests that the examiner has a "substantial pecuniary interest" in the proceedings before him. Therefore, Gibson, supra, does not support a finding of structural bias merely because of the terms relied on by the court from the examiner's contract with OPA.

At first glance, it may appear that the court's finding of structural bias based on the examiner's contract is supported by the First Circuit's opinion in Esso Std. Oil Co. v. Lopez-Freytes, 522 F.3d 136 (1st Cir. 2008) ("*Esso II*"). However, the most important factor that preoccupied the First Circuit and which "creates an appearance and incentive for bias"[2] is not present in this case. As explained by the First Circuit:

[2] *Esso II* at 147.

> [W]e are particularly concerned by the evidence that they are paid out of the same Special Account into which the fines are deposited. The Hearing Examiner's contract states that "in the eventuality of there not existing or being assigned funds for the payment of contracted services[,] the contract shall be deemed rescinded without any further right to collect." [...] it is irrefutable that such a provision—one that expressly links personal salary and the fund into which the fines are deposited—creates the appearance of and an incentive for bias.
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> Id. at 147.

In the examiner's contract, as quoted by the court, there is nothing to suggest that they are paid out of the same special account into which the fines are deposited. Nor is there anything to suggest that their contract will be rescinded without any further right to collect if said special account runs dry. The examiner's contract, absent a provision "that expressly links personal salary and the fund to which the fines are deposited" does not create the appearance of and an incentive for the kind of "extreme bias" required by *Younger* and *Gibson*.

The *Gibson* exception was expanded in Esso Std. Oil Co. v. Cotto, 389 F.3d 212 (1st Cir. 2004) ("*Esso I*"). In *Esso I*, the First Circuit found that for bias to exist, "a pecuniary interest need not be personal to compromise an adjudicator's neutrality." Id. at 219. However, this has only been found to exist when the adjudicative agency, not the adjudicator himself, does have a pecuniary interest in the outcome of the proceedings. Id. In *Esso I*, the First Circuit found that, "[a]s in *Gibson,* the adjudicative body stands to benefit financially from the proceeding because any fine imposed will flow directly to the EQB's budget." Id. at 218-219. In the case before the court, there is no finding that the OPA stands to benefit financially from the proceeding because any fine imposed will flow directly to the OPA's budget.

Even if the quoted parts of the examiner's contract could be interpreted as to show bias, a mere showing of bias is not enough. To be enough to support a finding of structural bias, that contract must show "extreme bias [that] completely renders a state adjudicator incompetent and inflicts irreparable harm". *Esso II* at 143. It is the presence of financial gain from the proceedings' outcome, whether to the adjudicative agency or to the adjudicator, that took the EQB member's from mere bias to the "extreme bias" required. That very important factor is not present here.

B. Carlos Santiago And Karen L. Garay Morales' Conduct

The court found structural bias based on the actions of examining officers Carlos Santiago ("Santiago") and Karen L. Garay Morales ("Morales"). Docket no. 35 at 18-19. The court found that Santiago denied plaintiff's "numerous discovery requests." Id. However, in the end, this is irrelevant because on May 7, 2013, plaintiff was given a certified copy of the agency's file regarding this investigation, including two compact discs containing the registry of pregnant women subscribed to the Mi Salud program and the list of gynecology and obstetrics service providers retained by MCS HMO at the time of the investigation.[3] Had structural bias been present, plaintiff would still be awaiting this discovery.

The court found that Karen L. Garay Morales' ("Morales") telephone call to plaintiff's counsel, where she scolded them for requesting a continuance without filing a proper motion when the continuance was actually requested by OPA, is indicative of bias. However, we have failed to find any case law supporting this conclusion. The fact that Morales may have made this inconsequential mistake is not evidence of the

[3] Originally filed at docket no. 31 (Exhibit 1 (A)), it is included herein as **Exhibit A** at 2-4.

"extreme bias" required by *Younger* and *Gibson*. Particularly, when neither Morales nor Santiago's action resulted in any harm to plaintiff.

C. OPA As Prosecutor And Judge

Another factor leading to the court's conclusion of structural bias was the court's misreading of Gibson:

> The structural bias indicators, however, do not stop with the Examining Officers. That the OPA acts as prosecutor and judge, that is to say, that it investigates any wrongdoing and also acts adjudicator of whether those wrongdoings violate its regulations is also telling. The *Gibson* court took that factor into account and we follow their lead. Gibson, 411 U.S. at 571.
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> Docket no. 35 at 19.

The problem with this finding is that the *Gibson* court never took this factor into account. What the court refers to at page 571 of the *Gibson* opinion is merely the court's summary of the District Court's reasoning. Instead, the *Gibson* court explicitly refused to take that factor into account. Gibson, 411 U.S. at fn. 17. Therefore, *Gibson* does not support the conclusion that structural bias exists because an agency acts as both prosecutor and judge.

There is a sad irony to be found in the court's misreading of Gibson, supra. If the misreading had been to the benefit of defendant, instead of plaintiff, plaintiff would have pointed to the misreading as an example of this court's extreme bias against it. Yet, it was a simple mistake, nothing more, like the ones plaintiff relies on in its attempt to show an inexistent extreme bias.

III. ACTUAL BIAS

A. Discovery Issues

It is a fact that plaintiff was initially denied discovery. However, it is also fact that plaintiff was afterwards provided with a certified copy of the agency's file regarding this investigation, including two compact discs containing the registry of pregnant women subscribed to the Mi Salud program and the list of gynecology and obstetrics service providers retained by MCS HMO at the time of the investigation.[4] There are only two discovery requests that are currently outstanding. One is the recording of an investigative hearing. Docket no. 35 at 20. The complete OPA file was produced to plaintiffs. If the recording is not there, it is because OPA does not have it.

The second is "requests to issue subpoenas for 5 key witnesses". Id. The court takes plaintiff's allegations at face value even though plaintiff never explained why they were "key witnesses". The fact is that the "key witnesses" plaintiff wants to compel at trial are either OPA's attorneys, as in the case of Angel Sostre, Esq., previous examining officers and Mellado himself. Yet, plaintiff never explained why it should be allowed to take the deposition of Mr. Sostre to inquire about knowledge acquired through privileged attorney client communications or why it should be allowed to inquire about the examining officers' mental processes in reaching their resolutions and orders. It is the equivalent of defendant arguing that he has been deprived of the due process of law because he was not allowed to take the deposition of MCS HMO's five attorneys, all the judges that may have taken part in this case and the U.S. Secretary of Justice, or to call them as trial witnesses. Seen under this light, it becomes clear that plaintiff was not denied any due process rights.

[4] Originally filed at docket no. 31, it is included herein as **Exhibit A** at 2-4.

B. Procedural Errors

The court summarizes as missteps and deficiencies certain procedural errors that occurred during the OPA investigation. Docket no. 35 at 20. Plaintiff proposes that these procedural errors are evidence of the extreme bias required by *Younger* and *Gibson*. However, when looked at dispassionately, they are not. Procedural errors are committed by courts and agencies frequently. Bias can be found not in their errors, as no court or agency is perfect, but in how they deal with those errors.

In the case before this court, plaintiff concedes that every time it filed a motion protesting this procedural misstep or deficiency, the OPA agreed with plaintiff's position. More than one amended resolution was entered where OPA agreed with plaintiff's position that OPA had made a mistake and said mistake was subsequently corrected. Plaintiff does not deny this.[5] If anything, the procedural missteps and OPA's adoption of plaintiff's position as to these missteps show an absence of extreme bias.

In conclusion, plaintiff has received all discovery available, and OPA agreed with plaintiff's allegations of procedural missteps, which were quickly corrected. This can hardly be said is evidence of the "extreme bias" required. The fact that plaintiff's motion to dismiss and its request to subpoena OPA's counsel and examining officers were denied does not amount to that standard, either.

C. The Amount Of The Fine

The court's concern "that a party could stand to face a $1.7 billion fine and be unclad to battle it without the shield of discovery" is understandable and laudable. Docket no. 35 at 22. However, that is not the case before the court. As explained

[5] See docket no. 21 at 11; docket no. 20 at 126-172.

previously, OPA produced a certified copy of its complete file to plaintiff. There is absolutely nothing in the possession of OPA of which plaintiff does not already have a copy. Therefore, plaintiff does not stand to face a fine without the shield of discovery.

The court found that defendants did not "provide a solid rationale for the lawful basis of this decision" to "multiply the fine by the total number of beneficiaries". Id. at 22-23. However, defendants did provide a solid lawful rationale for this decision. A look at pages 17 through 19 of defendant's *Motion to Set Aside Temporary Restraining Order and for Dismissal*, docket no. 18, explain each of the sections of the different laws that apply to this case, how plaintiff violated them, and how the fine was calculated.

More important, pursuant to United States v. Bajakajian, 524 U.S. 321, 334 (1998), it is plaintiff's burden to show how or why the proposed fine "is grossly disproportional to the gravity of a defendant's offense" and not defendant's burden to show a solid lawful rationale for this decision. In those same pages at docket no. 18, defendant reminds the court of plaintiff's failure to meet that burden. Defendant suggests to the court that until plaintiff meets its Bajakajian burden, defendant does not have to "provide a solid rationale for the lawful basis of this decision". In any event, the rationale was explained in pages 17-19 of docket no. 18.

The court agrees with the *Esso II* court that the size of the fine "only intensifies the appearance of bias infecting the proceedings." Docket no. 35 at 23. So would defendant, except that comparing the violations in *Esso II* with those in the current case is comparing apples to oranges. Neither *Esso II* nor any other case relied upon by plaintiff involves an insurance provider that breached the rights of almost 850,000 subscribers, depriving them of service or access to medication or providers as a

consequence of the termination of the plan. There is ***no*** analogous case that plaintiff can point to.

Under Bajakajian: "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." Id., at 334. A fine does not violate the Eight Amendment's Excessive Fines Clause unless "it is grossly disproportional to the gravity of a defendant's offense." Id. Regulation 7617's Article 24 requires a fine between $500 and $5,000 for each incident or violation. There were 848,841 incidents or violations in the present case. Of a possible fine of $5,000 per incident or violation, Mellado ***recommended*** a fine of roughly $2,000.[6] A fine of less than half the statutory maximum can hardly be said to be "grossly disproportional to the gravity of a defendant's offense", let alone arbitrary or capricious. Particularly, when it is remembered that this is a ***proposed*** fine. If MCS HMO's allegations prove to be correct, then the examining officer will in all likelihood not impose a fine.

In light of this, the amount of the ***proposed*** fine does not support a finding of actual bias.

D. The Examining Officers' "Preconceived Notions"

The court found that "just as in *Gibson*, they might have "preconceived notions" that taint the proceedings. Gibson, 411 at 571. From defective notifications, [...], to the lack of supporting evidence in many of their determinations (such as the calculation of the "final" proposed fine), we find that the administrative process has been marked by inconsistencies and general unfairness." Docket no. 35 at 23.

[6] This also begs the question, if OPA was indeed biased, wouldn't Mellado have asked for the maximum fine to be imposed instead of less than half the statutory maximum?

The problem with the court's finding is that the *Gibson* court never found that Board members "might have "preconceived notions" that taint the proceedings". Once again, this court relied on the Supreme Court's recitation at page 571 of the findings of the District Court. The *Gibson* court's analysis does not commence until the end of page 572. When reading the *Gibson* court's analysis and findings, it becomes clear that the court actually and specifically refused to affirm the District Court's findings on "preconceived notions". See Gibson, 411 at 578-579.

Following plaintiff's train of thought, as adopted by this court, the fact that this court made two mistakes in reading Gibson, supra, would be evidence of extreme bias against defendant and would render this court incompetent to hear the present case. Yet, we are talking about two honest mistakes. This may serve to show the extreme interpretation proposed by plaintiff and adopted by this court.

Furthermore, it must be remembered that the defective notifications were all remedied when plaintiff raised their defect as an issue. Recognizing that mistakes were made and then repairing those mistakes in the form and manner requested by the injured party cannot be evidence of bias. Finally, as explained above, the calculation of the "final" proposed fine was explained at docket entry no. 18, pages 17-19.Moreover, this court should not understate the requirement of "extreme bias" and the "extraordinary circumstances" of constitutional implications needed for it to interfere - via exception- with the initiated state administrative proceedings when adequate relief can in fact be granted by the available local proceedings and by the available state judicial remedies (i.e. OPA's decision on the proposed fine is ultimately reviewable by the Courts of the Commonwealth of Puerto Rico.) As recognized by the Hon. Judge Domínguez in San Juan Cable LLC v. Telecomms. Regulatory Bd., 2012 U.S. Dist. LEXIS

12990 (D.P.R. Feb. 2, 2012): "The threshold of personal "extreme bias" constitutes a steep mountain climb that is not easily achieved since the same requires "completely rendering the state adjudicator incompetent." Esso Standard Oil Co. v. Lopez—Freytes, et al., 522 F.3d at 143, citing Gibson v. Berryhill, 411 U.S. 564, 577, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (recognizing Gibson's bias in an "exceptional circumstance" authorizing discontinuance of Younger abstention)." Id. The plaintiffs failed to demonstrate the type of "extreme bias" that would render the OPA as incompetent. Therefore, in favor of the principles of equity, comity and federalism, this court must set aside the Opinion and Order of March 17, 2015, and allow the proceedings before OPA to continue.

In any event, since the *Gibson* court never found that the Board members had "preconceived notions" nor that such notions were evidence of extreme bias, neither should this court.

E. Unsupported Conclusions Of Fact And Law

The last paragraph of page 23 of the court's opinion and order contains a series of unsupported findings of fact and conclusions of law that must be addressed. First, the court refers to the fact that plaintiff has "admitted most, if not all, of the violations alleged" as a rhetoric that defendants have failed to sustain with evidence. Defendant respectfully disagrees with this characterization. The evidence is in the record before the court.

Article 11.1(B) of Regulation 7617 requires that MCS HMO give patients/subscriber notice of the plan's cancellation thirty (30) calendar days in advance of the date of termination or cancellation. The contract between MCS HMO and ASES

was cancelled effective on June 30, 2011.[7] This means MCS HMO had to give patients/subscribers notice of the cancellation no later than May 31, 2011. Patients were notified of the cancellation on July 15, 2011.[8] These are facts not denied by plaintiff because plaintiff did not send the required notice on or before May 31, 2011.

Article 11.1(E) of Regulation 7617 requires that MCS HMO notify OPA in writing of the cancellation of the plan 24 hours before the date of termination. MCS HMO counsel admitted that plaintiff did not give OPA the required notice of the cancellation of the contract.[9] These are facts not denied by plaintiff because plaintiff cannot produce the adequate notice.

The transition period ran from July 1, 2011, to October 31, 2011.[10] The Patient's Bill of Rights requires that MCS HMO continue providing the plan's health services to its subscribers during the transition period.[11] In a letter dated June 24, 2011, MCS HMO unilaterally cancelled the contracts of the gynecologists and obstetricians in the General Providers Network effective August 1, 2011, before the transition period end date of

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7 Docket entry 21-6 at 16 ("After summarizing the procedural incidents that have occurred to date, the parties reported that the contract between MCS HMO and ASES, under the Government of Puerto Rico's Health Program, Mi Salud, ended on June 30, 2011.")

8 Docket entry 21-6 at 17 ("The parties reported that July 15, 2011, all of the patients were notified of the contractual termination, the transition process, and the right to continuity of services.")

9 Docket entry 21-6 at 17 ("With respect to the notification that should be given to the OPS, as to the cancellation or termination of the contract, MCS HMO, through Ms. Correa, reported that such notification in effect was not done prior to the date of the cancellation or termination of the contract.")

10 Docket entry 20-1 at 10 ("The transition and transfer period of patients to the new insurer ran from **July 1, 2011 until October 31, 2011.**")

11 3 L.P.R.A. § 3045(b).

October 31, 2011.[12] At this time, there were 528 pregnant women insured under Mi Salud.[13] On September 19, 2011, MCS HMO reestablished the gynecologist and obstetrician services.[14]

It is undisputed that MCS HMO did not provide its patients with a notice of cancellation 30 days before MCS HMO cancelled its insurance services on the Mi Salud plan. It is undisputed that MCS HMO did not give OPA the required notice 24 hours before the cancellation. It is undisputed that MCS HMO canceled 164 providers of gynecologist and obstetrics services during the transition period, and then renewed that service on September 19, 2011.

Second, the court held that "[f]orcing a party to defend itself against the Government in the dark and then coaxing this party to admit to a violation of law in exchange for the potential of a decrease in an arbitrarily-imposed monumental fine, […]". Docket no. 35 at 23-24. Defendant respectfully disagrees with the court's holding. First, no one is being forced to defend itself in the dark. Plaintiff has everything that OPA has and that would be presented in the adjudicative hearing.

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[12] Docket entry 20-1 at 10 ("In a letter dated June 24, 2011, and addressed to **all** of the gynecologists and obstetricians in the General Provider Network under the Mi Salud program, MCS HMO unilaterally cancelled the contracts of those providers effective August 1, 2011.")

[13] Docket entry 20-1 at 21 ("MCS HMO canceled a total of 164 providers with the effect of forcing their respective patients (528 pregnant women insured under Mi Salud) to change providers in order to receive gynecology and obstetrics services from the available provider, if any, in the Preferred Network; or otherwise through the Medical Center in San Juan, Puerto Rico.")

[14] Docket entry 20-1 at 11 ("Thus, the gynecology and obstetrics services in the General Provider Network of MCS HMO under the Mi Salud Program were cancelled or without coverage from August 1, 2011 until September 19, 2011, the date on which a public press conference MCS HMO announced the reestablishment and continuation of these services in compliance with the Order issued by this Forum"); docket entry 20-2 at 6 ("after the September 2011 hearing, MCS HMO reversed the cancellation of these groups of providers.")

Second, no one is being coaxed to admit anything in exchange for anything. Plaintiff's pleadings admit that they ended their contract with ASES on June 30, 2011, and did not notify the 850,000 subscribers until July 15, 2011. Docket nos. 21-6 at 16, 21 at 19. Article 11.1 of Regulation 7617 requires that plaintiff notify all patients in writing the cancellation of a provider or health care plan thirty (30) days ***prior*** to the date of cancellation.

Furthermore, as explained above, plaintiff also admitted to cancelling the contracts of the gynecologists and obstetricians in the General Providers Network and even sent a letter on September 19, 2011, reestablishing the gynecologist and obstetrician services. While plaintiff refer to these as "technical violations", they do not deny that they occurred.

Finally, the fine was neither arbitrarily imposed nor monumental when considering the amount of persons victimized by plaintiff's violations. At docket no. 18, pages 17-19, the rationale behind the imposition of the fine is explained. Furthermore, when we consider that the rights of 850,000 persons were breached and the fine comes to about $2,000 per person, the amount does not seem that monumental.

IV. PRELIMINARY INJUNCTION TEST

A. Likelihood Of Success On The Merits

For the reasons expressed above, defendant respectfully suggests to the court that plaintiff has a very low likelihood of success on the merits. First, all the procedural missteps were corrected at plaintiff's request. Second, despite initially denying discovery to plaintiff, plaintiff eventually received the complete record at OPA. This means plaintiff currently has everything that OPA has. Third, when it comes to the amount of the fine, it is plaintiff's burden to show that the amount of the proposed fine does not

bear any relationship with the gravity of the offense that it is designed to punish. Bajakajian, supra. Except to argue that it is unprecedented and monumental, plaintiff offered no evidence demonstrative that the proposed fine "is grossly disproportional to the gravity of defendant's offense." Id. Nowhere does plaintiff explain why a proposed fine of approximately $2,000 per subscriber is "grossly disproportional to the offense". Particularly, when the regulation allows a maximum fine of $5,000 per subscriber. Defendant respectfully suggests to the court that if there was the "extreme bias" required by *Younger* and *Gibson*, OPA would have proposed the maximum fine allowed.

B. Irreparable Harm

While defendant does not disagree with the court's legal analysis in this section of the Opinion and Order, it disagrees with the conclusion that OPA is a biased adjudicator. Docket no. 35 at 26-27. Defendant proposes that the facts explained above show an absence of the "extreme bias" required by *Esso II*, *Younger* and *Gibson*. Absent a bias adjudicator, there is no irreparable harm.

C. Balancing of Harms

Again, while defendant does not disagree with the court's legal analysis in this section of the Opinion and Order, it disagrees with the conclusion that OPA violated plaintiff's constitutional rights. Docket no. 35 at 27. Defendant's position, as expressed above, is that no such violations occurred because the procedural issues were corrected at plaintiff's request, full discovery was provided and plaintiff failed to meet its burden to show that a proposed fine of $2,000 per violation is "grossly disproportional to the offense". Bajakajian, supra. Under this light, the harm suffered by the state exceeds that suffered by the plaintiff.

D. Effect On The Public Interest

For the reasons expressed above, defendant's, position is that there were no serious constitutional depravations in this case. See docket no. 35 at 27. Therefore, this prong is not met.

V. INCORPORATION BY REFERENCE OF REJECTED PLEADING

On March 27, 2014, defendant filed a Motion for Reconsideration. Docket no. 31. As Exhibit 1 to that motion, defendant tendered its response in opposition to plaintiff's Post-Hearing Brief, responding to the misstatements of law and fact contained in plaintiff's Post-Hearing Brief (which for all effects and purposes was more a response in opposition to plaintiff's *Motion to Set Aside Temporary Restraining Order and for Dismissal* than a post-hearing brief.) At docket entry 32, this Honorable Court denied defendant's motion for reconsideration, without expanding on the reason for the denial. Defendant respectfully incorporates by reference as if fully set forth herein the arguments, facts and exhibits contained in said pleading.

WHEREFORE, defendant respectfully moves the court to set aside the Opinion and Order of March 17, 2015, and allow the proceedings before OPA to continue.

RESPECTFULYY SUBMITTED, in San Juan, Puerto Rico, this 31st day of March, 2015.

I HEREBY CERTIFY that that the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send notification electronically to all counsel of record.

Counsel for Carlos R. Mellado López
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