No. 24-1672

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re: AAM HOLDING CORP.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant-Appellee,

v.

AAM HOLDING CORP., agent of Flashdancers Gentlemen's Club,
59 MURRAY STREET ENTERPRISES, INC., agent of Flashdancers Gentlemen's Club,
Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

EEOC RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO STAY

The EEOC is investigating a charge that alleges sexual harassment involving potentially dozens of women who worked as dancers at two adult entertainment clubs operated by AAM Holding Corp. and 59 Murray Street Enterprises as FlashDancers Gentlemen's Club (together,

"FlashDancers"). The EEOC is required by statute to investigate that charge. 42 U.S.C. § 2000e-5(b). But, to date, FlashDancers has refused to provide information on any employee other than the Charging Party, frustrating the EEOC's ability to determine whether discrimination occurred.

The EEOC issued subpoenas for information identifying FlashDancers employees, but FlashDancers did not comply. It instead insisted that the EEOC revoke its subpoenas, then, when the EEOC did not, it asked the district court to deny the EEOC's petition to enforce the subpoenas. The district court granted the EEOC's petition, and FlashDancers moved the district court to stay its order. The district court denied that motion. FlashDancers now seeks this Court's intervention to stay the district court's order requiring FlashDancers to comply with the subpoenas, but FlashDancers has not met the heavy burden required for this Court to exercise its discretion to do so.

I. Background

Charging Party Raquel Flores Thomas filed a charge of discrimination in March 2022,[1] alleging sexual harassment at FlashDancers. R.24.1 at 64. She alleged that she worked as a dancer at two adult entertainment clubs that FlashDancers operated from September 2019 to July 2021. *Id.* at 65. She described egregious sexual harassment, including FlashDancers forcing her to engage in sexual acts with customers, change clothes in front of video cameras, and "get completely naked" in front of a customer. *Id.* at 65-68. She alleged that FlashDancers's owners and managers knew about the harassment and "made clear that she was to do whatever the customers wanted." *Id.* at 67.

Thomas's charge alleged that FlashDancers's subjected other dancers to similar treatment. She alleged discrimination "on behalf of all others similarly-situated," *id.* at 64, and said that "the hostile work environment . . . affected all women who have worked at [FlashDancers's] strip clubs." *Id.* at 65. She estimated that "more than forty women" endured harassment

[1] Thomas filed one charge of discrimination naming AAM and 59 Murray Street as respondents, though they "are different locations of the same integrated enterprise/single employer." R.24.1 at 120. The EEOC assigned a different charge number to each respondent, *id.*, so the record below sometimes references "charges of discrimination."

there. *Id.* Continuing, she noted that FlashDancers's owners required all dancers to change while being monitored by video and that she had seen a customer having sex with another dancer. *Id.* at 65-67. One of FlashDancers's owners also told all the dancers they "must be taking customers into the champagne rooms for any and all services requested by a customer." *Id.* at 67. Based on Thomas's experience, that included having sex with customers. *See id.* at 66-67.

After receiving FlashDancers's position statement on the charge, the EEOC requested more information. *Id.* at 71-78. That information included, from January 2019 to the present, any complaints of harassment FlashDancers received, any relevant policies, a searchable database listing pedigree information[2] for FlashDancers's employees, and the number of people FlashDancers employed from 2019 to 2022, among other things. *Id.* at 78. FlashDancers provided a limited response. FlashDancers indicated that it had not received any complaints of harassment, and it provided the number of employees for each of its two locations. *Id.* at 81-83. Each club

[2] "Pedigree information" is information to identify and contact individuals. Here, that included name, age, sex, race, position at FlashDancers, dates of employment, reason for separation, if separated, and contact information (email, physical address, and phone number). *Id.* at 82.

employed at least 150 people each year—and in some years more than 200. *Id.* at 82-83. Although FlashDancers also provided various policies and declarations from its managers, FlashDancers refused to provide pedigree information for any employees. *Id.* at 82.

The EEOC issued two identical subpoenas for the pedigree information in November 2023. *Id.* at 93. FlashDancers refused to comply, *id.* at 100-104, and the EEOC petitioned the district court to enforce the subpoenas. *See id.* at 35. After reviewing FlashDancers's arguments against enforcement, the court granted the EEOC's petition. *See id.* at 35-42. The court held that the requested pedigree information was relevant because the charge alleged discrimination against other women, and the information would cast light on their experiences. *Id.* at 38. It rejected FlashDancers's undue burden argument. *Id.* at 39-41.

FlashDancers then asked the district court to stay its order, but the district court refused. *Id.* at 44. Addressing likelihood of success on the merits, the court rejected FlashDancers's arguments that the subpoenas improperly requested information on male employees and information on race and age, holding that the information was relevant to the EEOC's investigation. *Id.* 47. The court similarly held that FlashDancers had not

offered enough information on undue burden to "contextualize [the] burden in relation to [FlashDancers's] regular operations." *Id.* at 49. It then held that FlashDancers had not shown irreparable harm before concluding it need not reach the final factors because FlashDancers had not met the first two. *Id.* at 49-53.

II. Standard of review

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Instead, "[i]t is . . . an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

This Court considers four factors in assessing a request for a stay: "the applicant's strong showing that he is likely to succeed on the merits, irreparable injury to the applicant in the absence of a stay, substantial injury to the nonmoving party if a stay is issued, and the public interest." *Uniformed Fire Officers Ass'n v. de Blasio*, 973 F.3d 41, 48 (2d Cir. 2020) (internal quotation marks omitted) (citing *Nken*, 556 U.S. at 434). Of those,

"[t]he first two factors are the most critical." *Id.* When the "likelihood of success [is] totally lacking, the aggregate assessment of the factors bearing on issuance of a stay pending appeal cannot possibly support a stay." *Id.* at 49. While there can be "a sliding scale" between likelihood of success and irreparable harm, there still must be "a certain threshold showing . . . on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

III. FlashDancers has not shown the necessary likelihood of success on appeal.

To prevail on appeal, FlashDancers must show that the district court abused its discretion in enforcing the subpoenas. *McLane Co. v. EEOC*, 581 U.S. 72, 79-83 (2017). Nothing in the company's motion demonstrates that it is likely to make this showing.

"A district court's role in an EEOC subpoena enforcement proceeding . . . is a straightforward one." *McLane Co.*, 581 U.S. at 76. A court only examines whether "the charge is proper and the material requested is relevant" and whether the employer can then establish an affirmative defense such as undue burden. *Id.* at 77. In doing so, district courts must apply "broad standards to 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.* at 81 (quoting *Pierce v. Underwood*,

487 U.S. 552, 561-62 (1988)). As a result, district courts, rather than appellate courts, are "better suited" to address whether a subpoena should be enforced—hence the deferential standard of review (which, notably, FlashDancers's motion does not acknowledge). *Id.*

Here, the district court did not abuse its discretion in holding that the subpoenas seek relevant information or in holding that FlashDancers had not demonstrated undue burden.

A. FlashDancers is not likely to successfully show that the district court abused its discretion in holding that the EEOC subpoenas sought relevant information.

Title VII "obligates the Commission to investigate a charge of discrimination" and, as a result, "[t]o enable the Commission to make informed decisions . . . [it] confers a broad right of access to relevant evidence." *Univ. of Penn v. EEOC*, 493 U.S. 182, 190 (1990); *see also* 42 U.S.C. § 2000e-5(b) (EEOC "shall make an investigation" of charges). Courts thus use an expansive standard for relevance when reviewing EEOC subpoenas. As the Supreme Court observed, the relevance requirement "is not especially constraining" because it includes "virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136,

139 (2d Cir. 2009) (applying *Shell Oil* relevance standard). Applying that test, "[r]elevancy is determined in terms of the investigation rather than in terms of evidentiary relevance." *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 854 (9th Cir. 2009). Assessing relevance does not permit a district court "to test the strength of the underlying complaint." *McLane*, 581 U.S. at 76.

As the district court recognized, information identifying potentially aggrieved individuals and witnesses to the alleged discrimination is relevant. Pedigree information is relevant where it allows the EEOC "to contact other . . . employees . . . to learn more about their experiences." *EEOC v. McLane Co.*, 804 F.3d 1051, 1056 (9th Cir. 2015), *vacated and remanded on other grounds sub nom. McLane Co. v. EEOC*, 581 U.S. 72 (2017); *see also EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035, 1040 (8th Cir. 2006) (district court abused its discretion by quashing a subpoena seeking information on other employees because the charges "alleged not only individual discrimination but also discrimination against all" employees of the same national origin). And, even if other employees may not themselves be aggrieved individuals, they may have information that "might cast light on the allegations against [the employer]—whether positively or negatively." *McLane*, 804 F.3d at 1056-57.

FlashDancers has not shown any likelihood that the district court abused its discretion in applying this broad relevance standard to the information the EEOC seeks here. It instead makes three arguments on relevance, but none are likely to prevail.

1. FlashDancers's attacks on the charge and the EEOC's investigation are not appropriate for a subpoena enforcement challenge.

FlashDancers argues that the underlying charge lacks detail about the harassment other employees suffered and that the EEOC has not identified what it will do with the information sought. Neither is a basis for challenging EEOC subpoenas.

A charge need only provide "fair notice" of the allegations to "ensure that the employer was given some idea of the nature of the charge;" it is not "a substantive constraint on the Commission's investigative authority." *Shell Oil*, 466 U.S. at 74-75; *see also EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) ("The charge is not to be treated as a common-law pleading that strictly cabins the investigation that results therefrom."); *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338, 349 (6th Cir. 2024) ("[T]he Commission's regulations do not hold complaining individuals to the requirements of artful legal pleading . . . ."). And the Supreme Court has held that an

employer cannot attack the strength of the charge in a subpoena enforcement proceeding. *McLane*, 581 U.S. at 76. "[A]ny effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error." *Shell Oil*, 466 U.S. at 72 n.26.

An employer similarly cannot challenge a subpoena based on the adequacy of the EEOC investigation. "[T]he Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing. . . ." *McLane Co.*, 804 F.3d at 1057-58. Arguments about "the dearth of evidence" or the "seeming lack of other investigation" are . . . "not a district court's charge in considering relevance." *EEOC v. UPMC*, 471 F. App'x 96, 100 (3d Cir. 2012); *see also United Parcel Serv.*, 587 F.3d at 140 ("[A]t the investigatory stage, the EEOC is not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination.").

2. FlashDancers has not shown the subpoenas are overbroad.

FlashDancers argues that the EEOC cannot seek information to identify other potentially aggrieved individuals, but FlashDancers

misconstrues the broad standard for relevance. As discussed above, subpoenas can seek information on other aggrieved individuals and witnesses. *See McLane Co.*, 804 F.3d at 1056-57; *EEOC v. United Parcel Serv.*, 859 F.3d 375, 379 (6th Cir. 2017). And the EEOC may seek data for several years before and after the alleged discrimination, particularly when the charging party alleges ongoing discrimination. *See EEOC v. Roadway Exp., Inc.*, 261 F.3d 634, 641-42 (6th Cir. 2001); *see also EEOC v. Kronos Inc.*, 620 F.3d 287, 299 (3d Cir. 2010) (holding that temporal scope depends on "the scope of information that might cast light on the practice under investigation").

Here, the district court correctly applied this generous standard in holding that the subpoenas seek relevant information. R.24.1 at 47-48. The district court reviewed the charge and explained that it alleged that FlashDancers discriminated against other women, specifically alleging that they were "forced to change in an area monitored by video and . . . pressured to engage in unwanted sexual activity." *Id.* at 47. The district court did not abuse its discretion by permitting the EEOC to seek information to investigate these allegations that FlashDancers subjected other women to a sex-based hostile work environment as well.

As it did below, FlashDancers relies on several out-of-circuit authorities to argue that the investigation cannot seek information about other aggrieved individuals, *id.* at 14, but the district court correctly distinguished those cases. *See id.* at 48 ("Unlike the charges in those cases, the charges here do include allegations that a class of employees experienced discrimination at both of Respondents' clubs."). FlashDancers does not argue that the district court erred in doing so, *see id.* at 14, and this Court has already held that a charge alleging discrimination against others is sufficient for a subpoena seeking companywide information. *United Parcel Serv.*, 587 F.3d at 139.

FlashDancers also attacks several parts of the pedigree information sought, but again construes relevance too narrowly. According to FlashDancers, the EEOC cannot seek information on male employees, employees' age or race, or information for years other than the years of Thomas's employment. R.24.1 at 25. But male employees may well have been witnesses or provide information that allows the EEOC to compare the working conditions for male and female employees. *See United Parcel Serv.*, 859 F.3d at 379 (rejecting argument that EEOC may only seek information on similarly situated employees); *see also McLane*, 804 F.3d at

1056-57. Information on age and race, meanwhile, may cast light on the identity of potential witnesses if an aggrieved individual identifies a witness by their approximate age or race. And the EEOC reasonably sought information on employees from before and after Thomas's employment to determine the scope of the alleged ongoing harassment. *See Roadway Exp.*, 261 F.3d at 641-42 (6th Cir. 2001); *Kronos*, 620 F.3d at 299.

3. Rule 23 does not limit EEOC subpoenas.

Finally, FlashDancers suggests that investigating the alleged harassment "is problematic" because harassment cases are ill-suited to class action lawsuits under Fed. R. Civ. P. 23. R. 24.1 at 16-17. But this is an administrative investigation, not a lawsuit. And, even if the EEOC were to ultimately file a lawsuit, Rule 23 does not apply to the EEOC. *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 323 (1980); *EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 797 (5th Cir. 2016) ("[T]he EEOC is not required to adhere to Rule 23 when bringing an enforcement action . . . in its own name." (internal quotation marks omitted)).

FlashDancers similarly suggests that harassment cannot be subject to a broad investigation because, even if the EEOC found cause to believe harassment occurred, the EEOC could not sue on behalf of multiple

victims. R.24.1 at 26-27. FlashDancers cites no authority imposing such a limitation, and the EEOC often seeks relief for groups of aggrieved individuals subjected to harassment. *See, e.g.*, *Arizona ex rel. Horne & EEOC v. Geo Grp., Inc.*, 816 F.3d 1189, 1199-1200 (9th Cir. 2016) (EEOC lawsuit alleging sex-based harassment and seeking relief for a group of employees); *EEOC v. Tesla, Inc.*, __ F. Supp. 3d __, No. 23-cv-04984, 2024 WL 1354530, at **4-5 (N.D. Cal. Mar. 29, 2024) (EEOC lawsuit alleging race-based harassment and seeking relief for a group of employees).

B. FlashDancers has not shown a likelihood of success in demonstrating that the district court abused its discretion in evaluating the company's undue burden defense.

Determining "whether the subpoena is unduly burdensome in light of the circumstances" is "well suited to a district judge's expertise." *McLane Co.*, 581 U.S. at 73. Because of the "fact-intensive, close calls" involved in assessing burden, it is "better suited to resolution by the district court than the court of appeals." *Id.* (internal quotation marks omitted). The district court here carefully and correctly made those calls, and FlashDancers has not shown it will be able to demonstrate an abuse of discretion.

But under any standard, FlashDancers is unlikely to succeed in showing an undue burden. "The burden of proving that an administrative subpoena is unduly burdensome is not easily met." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986). Doing so requires an employer to show "the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs" or "gathering the information would threaten its normal business operations." *Id.* at 479. And it requires more than evidence "that compliance would be inconvenient and involve some expense." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993). This well-settled standard tracks the one that this Court has long applied to administrative subpoenas. *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006) (applying standard to same statute from which the EEOC derives its subpoena power); *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979).

The district court applied the correct standard to FlashDancers's arguments here, and it held FlashDancers had not shown an undue burden. It noted that FlashDancers's evidence did not "contextualize the burden that cost would impose relative to [FlashDancers's] regular operations" and thus held FlashDancers had not carried its burden. R.24.1

at 49. FlashDancers argues that the district court misjudged FlashDancers's evidence, but that is exactly the kind of fact-intensive inquiry entrusted to the district court's discretion.

FlashDancers's evidence of alleged burden does not grapple with the comparative nature of the undue burden test. As the Sixth Circuit recently noted, "[a]ssessing whether the burden of compliance is undue is a comparative exercise." *Ferrellgas, L.P.*, 97 F.4th at 350; *see also Maryland Cup Corp.*, 785 F.2d at 478-79 (employer did not show estimated cost of $75,000 was undue burden in light of "normal operating costs"). Assertions that "compliance with the subpoena will divert employee attention from ordinary tasks [are] insufficient" to show an undue burden because, while the employer "provide[d] an estimate of the burden it might face, [it] offer[ed] up no baseline against which we can compare its estimates to decide whether the burden it faces is undue." *Ferrellgas, L.P.*, 97 F.4th at 350. FlashDancers offers a declaration asserting that it would take three hundred hours to compile the relevant information, R.24.1 at 56-57, but, like the employer in *Ferrellgas*, FlashDancers provided no baseline and thus no context for its alleged burden.

Rather than providing that context, FlashDancers attacks the district court's reliance on other reporting requirements that may minimize the alleged burden. Notably, FlashDancers concedes that it must report the name, address, and dates of employment for each employee to the IRS, R.24.1 at 29, but FlashDancers has not provided that information for any employees. And, although FlashDancers must show an undue burden, it offers no evidence that it had fewer than the 100 employees that would require it to collect and report EEO-1 data, *id.*, even as it attached a response to a request for information that showed it had at least 150 employees at each location every year from 2019 to 2022. *Id.* at 82-83.

Ultimately, "[t]here is a presumption in favor of requiring an employer's compliance with a subpoena when the Commission inquires into legitimate matters of public interest." *EEOC v. Konica Minolta Bus. Sols. U.S.A., Inc.*, 639 F.3d 366, 371 (7th Cir. 2011). And FlashDancers has not shown that compliance would be "an undue burden because the company would have to obtain, organize, and produce the materials," *see id.*, much less that the district court abused its discretion in holding otherwise.

IV. FlashDancers has not demonstrated irreparable harm.

As the EEOC argued below, the Court need not reach this or any other remaining factor because FlashDancers has not shown any likelihood of success on appeal. *See Uniformed Fire Officers Ass'n*, 973 F.3d at 49. Should the Court address this factor, however, FlashDancers has not offered any evidence of irreparable harm.

FlashDancers argues that it cannot disclose the information the EEOC seeks because it is confidential, but as the company acknowledges, Title VII requires information obtained in an investigation to be kept confidential. R.24.1 at 19. The Supreme Court has long held that Title VII's confidentiality provisions protect sensitive employee information. *Univ. of Penn.*, 493 U.S. at 192. Relying on 42 U.S.C. § 2000e-8, the Court rejected the employer's request "to go further than Congress thought necessary to safeguard confidentiality." *Id.*; *see also McLane Co.*, 804 F.3d at 1058 (rejecting argument that employer could withhold information "to protect its employees' privacy interests").

FlashDancers does not cite the Supreme Court's decision, instead relying almost exclusively on cases that the district court correctly distinguished below. R.24.1 at 51 (noting FlashDancers "again cite[s]

several out-of-Circuit cases" that each involved "additional factors that are absent here"). Despite these distinctions, FlashDancers again relies on *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979), which, as the district court noted, involved the "full public disclosure of sensitive information" and *PepsiCo, Inc. v. Redmond*, No. 94-cv-6838, 1996 WL 3965, at *30 (N.D. Ill. Jan. 2, 1996), which involved disclosing trade secrets to direct competitors. R.24.1 at 18, 51; *see also Providence J. Co.*, 595 F.2d at 889 (FBI sought stay of order requiring disclosure to newspaper); *PepsiCo*, 1996 WL 3965, at *30 (describing harm from disclosing trade secrets to competing companies). No such factor exists in this context, where the Supreme Court has already held that Title VII adequately safeguards sensitive information. *See Univ. of Penn.*, 493 U.S. at 192.

To be sure, FlashDancers argues that relying on Title VII's robust confidentiality provision "misses the point" because there is no remedy for the disclosure of information to the EEOC. But, again, the Supreme Court already rejected such an argument. In *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), the Court addressed a challenge to an IRS request for documents. There, the government argued that compliance with that request mooted the appeal, and the Supreme Court disagreed:

"While a court may not be able to return the parties to the *status quo ante*—there is nothing a court can do to withdraw all knowledge or information that IRS agents may have acquired . . . —a court can fashion *some* form of meaningful relief . . . by ordering the Government to return the records." *Id.* at 12-13; *see also Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 393 (2d Cir. 2022) (complying with subpoena "does not necessarily moot an appeal . . . since respondents maintain a privacy interest in the documents they have produced and would be entitled to their return if successful"); *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 364 (5th Cir. 2013) (argument that complying with subpoena moots an appeal "is absolutely meritless").

Ignoring that Supreme Court precedent, FlashDancers cites a single, unpublished district court decision in support of its argument. R.24.1 at 19 (citing *EEOC v. FedEx Corp.*, No. 06-cv-276, 2007 WL 9734298, at *2 (D. Ariz. Oct. 5, 2007)). That nonprecedential case summarily concludes that production of documents could moot an appeal, but offers no authority for that proposition and, like FlashDancers, it does not discuss the Supreme Court's decision in *Church of Scientology*. *See FedEx Corp.*, 2007 WL 9734298, at *2.

Moreover, irreparable harm "must be imminent or certain, not merely speculative." *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) (describing irreparable harm standard for preliminary injunction); *Nken*, 556 U.S. at 434 (noting similarity of preliminary injunction standard to stay standard). It is not enough to show that the harm is merely possible. *Nken*, 556 U.S. at 434-35.

Here, FlashDancers's arguments are speculative. It argues that disclosure "*could* greatly harm" its employees because "the EEOC *may* inadvertently alert individuals who are not [employees] to the fact that [they] work at the Clubs." R.24.1 at 20 (emphases added). FlashDancers does not suggest anything more than a theoretical possibility such a disclosure would occur, nor does the company suggest it would be impossible to mitigate any such risks during the investigation process.

Finally, FlashDancers argues that the cost of compliance causes irreparable harm, but this alleged harm is also speculative. FlashDancers cites a district court case for the proposition that "[i]rreparable harm may be found where the moving party makes a strong showing that economic loss would significantly damage its business *above and beyond a simple diminution in profits*." R.24.1 at 20 (emphasis added) (citing *RxUSA*

Wholesale, Inc. v. Dep't of Health & Hum. Servs., 467 F. Supp. 2d 285, 301 (E.D.N.Y. 2006) (internal quotation marks omitted), *aff'd sub nom. Dep't of Health & Hum. Servs., U.S. Food & Drug Admin. v. RxUSA Wholesale, Inc.*, 285 F. App'x 809 (2d Cir. 2008)). That standard requires more than some cost: it must "significantly damage [the employer's] business." *RxUSA Wholesale*, 467 F. Supp. 2d at 301. And the *RxUSA Wholesale* court found such damage where the company would go out of business if the challenged rule went into effect and the company's inventory would "become worthless." *Id.* at 302.

FlashDancers offered no such evidence here. FlashDancers argues only that complying with the subpoenas will take "a significant amount of time" that would take employees from other tasks. R.24.1 at 20-21. Even then, FlashDancers asserts only that complying "*could* damage the Clubs beyond diminished profits, as diminished operations *could* result in loss of customer good will." *Id.* at 21 (emphases added). Regardless of whether FlashDancers could ultimately recoup any expenses should it prevail, FlashDancers's speculation as to the mere possibility of significant damage cannot show irreparable harm.

V. Even if the Court were to reach the third and fourth factors, they do not support FlashDancers's request for a stay.

As FlashDancers has not carried its burden on either of the first two critical factors, the Court need not reach the last two factors. *Nken*, 556 U.S. at 435 ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest."); *DiMartile v. Hochul*, 80 F.4th 443, 456 (2d Cir. 2023) (both likelihood of success and irreparable harm must be present).

Nonetheless, should the Court turn to the final two factors, both counsel against a stay. When the government opposes a request for stay, the third and fourth factors merge, *Nken*, 556 U.S. at 435, and here they cut against FlashDancers.

Congress charged the EEOC with investigating charges of discrimination and empowered the EEOC to issue subpoenas where necessary to conduct those investigations. 42 U.S.C. §§ 2000e-5(a), 2000e-5(b), 2000e-9. "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Gen. Tel.*, 446 U.S. at 326; *see also EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986)

(holding that the automatic stay for bankruptcy proceedings does not apply to the EEOC because it acts in the public interest).

FlashDancers's delay is hindering the EEOC's ability to investigate. Thomas filed her charge more than two years ago, and the EEOC requested the information at issue here more than a year ago. R.24.1 at 64, 77-78. FlashDancers has delayed providing that information despite the EEOC's determination on FlashDancers's objections to the subpoenas, the district court's order that the EEOC may enforce the subpoenas, and the district court's order denying FlashDancers's request for a stay. In doing so, it has repeatedly prevented the EEOC from performing its statutory obligation to determine whether discrimination has occurred, potentially leading to witnesses' memories fading and evidence becoming stale. And FlashDancers has not shown any contravening public interest.

FlashDancers cites an unpublished district court decision to suggest that these factors favor a stay, but that decision again provides no basis for a stay here. *See FedEx Corp.*, 2007 WL 9734298, at *2. Indeed, that decision acknowledged that "[t]he elimination of discrimination in the public workplace is an important public interest." *Id.* It then held, citing no authority, that there was a countervailing interest in having the Ninth

Circuit "creat[e] binding legal precedent . . . with regard to this legal issue." *Id.* That interest in creating law, however, turned on the district court's belief that denying the stay would moot the appeal. *Id.* As discussed above, there is no risk of mootness here because the court can order the EEOC to return any documents obtained if FlashDancers were to prevail. *See Church of Scientology*, 506 U.S. at 12.

VI. Conclusion

For all these reasons, the EEOC requests that the Court deny FlashDancers's request to stay the district court's order.

Respectfully submitted,

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September 20, 2024

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,981 words.

This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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September 20, 2024

CERTIFICATE OF SERVICE

I certify that on this 20th day of September, 2024, I electronically filed the foregoing motion in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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