UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya

In the Matter of	)	
CIVIL INVESTIGATIVE DEMAND TO Abbott Laboratories,	)	**File No. 221-0168**
DATED JAN. 27, 2023.	)	

ORDER DENYING PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

By BEDOYA, Commissioner:

Abbott Laboratories ("Abbott") petitions the Commission to (1) extend by 21 days the deadline to file their Petition to limit the FTC's Civil Investigative Demand served on January 27, 2023, *see* Pet. Appx. A ("CID"), or, in the alternative, (2) limit the CID by narrowing its substantive and temporal scope. The Commission served its CID in connection with its investigation into potential violations of Section 5 of the FTC Act, 15 U.S.C. § 45, by collusion or coordination in bidding for WIC Infant Formula Contracts. For the reasons set forth below, we DENY the Petition.

I. Background

Abbott is a health care company that markets pharmaceuticals, medical devices, and nutritional products. It is the leading manufacturer of infant formula in the United States: Abbott controls 48 percent of a highly concentrated market dominated by just three manufacturers.[1]

Over half of U.S. infant formula sales are made through the U.S. Department of Agriculture's ("USDA") Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), which provides free infant formula to low-income families with infants.[2]

[1] *See* Julie Creswell and Madeleine Ngo, *Baby Formula Shortage Has an Aggravating Factor: Few Producers*, N.Y. Times (May 20, 2022), *available at* https://www.nytimes.com/2022/05/20/business/economy/baby-formula-shortage-market.html (noting that Abbott and three other manufacturers supplied nearly ninety percent of the U.S. infant formula market as of May 2022). In November 2022, two infant formula manufacturers—Perrigo Co. and Nestlé S.A., which owns Gerber Products Company and sells infant formula under the Good Start brand—announced a transaction under which Perrigo acquired Nestlé's sole U.S. infant formula manufacturing plant and the U.S. and Canadian rights to the Good Start brand. *See* Perrigo Co. plc, Quarterly Report (Form 10-Q) at 49 (Nov. 8, 2022), *available at* https://www.sec.gov/Archives/edgar/data/1585364/000158536422000098/prgo-20221001.htm.

[2] Victor Oliveira *et al.*, *WIC and the Retail Price of Infant Formula*, USDA Econ. Rsch. Serv. at 1, 11-12 (May 2004), https://www.ers.usda.gov/webdocs/publications/46787/15976_fanrr39-1_1_.pdf ("Oliveira 2004"); Victor Oliveira and Elizabeth Frazão, *The WIC Program: Background, Trends, and Economic Issues, 2015 Edition*, USDA Econ. Rsch. Serv. at 1 (Jan. 2015), https://www.ers.usda.gov/webdocs/publications/43925/50999_eib134.pdf.

State agencies that administer the WIC program bid out multi-year contracts to infant formula suppliers, where the winning bidder becomes the sole infant formula supplier for that contract period. The manufacturer offering the lowest average net price wins the contract in this bidding regime. While the rebates paid by the WIC contract holders are substantial, studies show that WIC contracts create a lucrative "spillover effect" on the manufacturer's non-WIC sales of infant formula.[3] Although the boost in non-WIC sales motivates manufacturers to win WIC contracts, it may also create incentives to engage in collusive or coordinated market allocation, whereby incumbent WIC contract holders agree not to bid against each other so that they can continue enjoying dominant positions in non-WIC markets in their respective states. A 2015 USDA study examining WIC bidding between 2003 and 2013 identified patterns potentially indicative of non-competitive bidding for WIC formula contracts.[4] Abbott is one of only three manufacturers that have bid on WIC contracts since 1996.[5]

In 2022, the Commission initiated an investigation into whether any participant in infant formula markets has engaged in collusion or coordination with any other market participant regarding the bidding for WIC contracts. On January 27, 2023, pursuant to this investigation, the Commission issued the CID to Abbott that is the subject of this Petition. Pet. Appx. A. The CID seeks information about Abbott's WIC bidding and sales, as well as information related to its non-WIC infant formula business, during the timeframe from January 1, 2016, to present. *Id.* The timeframe of the request would capture multiple WIC bidding cycles, since each state generally solicits bids only once every three to four years in cycles that do not perfectly overlap.[6]

Since the issuance of the CID, FTC staff have met and conferred with Abbott on multiple occasions, with Abbott expressing "objections to the substantive and temporal scope of the CID" from an early date. Pet. Appx. B at ¶ 14. On February 14, 2023, Abbott told staff that it was "considering a petition to quash the CID to the extent that it seeks documents and information

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[3] *See, e.g.,* Victor Oliveira *et al.*, *The Infant Formula Market: Consequences of a Change in the WIC Contract Brand*, 124 U.S. Dep't of Agric. Econ. Research Servs. at 20 (Aug. 2011), *available at* https://www.ers.usda.gov/webdocs/publications/44900/6918_err124.pdf ("Oliveira 2011") (finding when states changed contract brands, the new contract manufacturer's market share increased by an average of 74 percent); Rui Huang and Jeffrey M. Perloff, WIC Contract Spillover Effects, 44 Rev. Ind. Org. 49, 56 – 57 (Feb. 2014) (finding that after a change in the WIC contract manufacturer, the contract winner's market share increased by an average of 34 percent in the first two week period, and then by an additional 23 percent over a six month period); David E. Davis*, Bidding for WIC Infant Formula Contracts: Do Non-WIC Customers Subsidize WIC Customers?*, 94 Am. J. Ag. Econ. 80, 94–95 (2012) (estimating that the award of a WIC contract was associated with a 50 to 60 percent increase in non-WIC market share).

[4] David E. Davis and Victor Oliveira, *Manufacturers' Bids for WIC Infant Formula Rebate Contracts, 2003-2013* USDA Economic Research Service at 7 (July 2015), https://www.ers.usda.gov/webdocs/publications/43996/53266_eib142.pdf ("Davis 2015").

[5] For purposes of this Order, all future references to the WIC program refer exclusively to infant formula contracts and not other aspects of the program.

[6] *See, e.g.*, Yoon Y. Choi *et al.*, *Effects of United States WIC Infant Formula Contracts on Brand Sales of Infant Formula and Toddler Milks*, 41 J. Health Pol'y 303, 304 (2020) ("Choi 2020") (noting that each state typically only bids out a WIC infant formula contract approximately once every four years); Ga. Dep't of Pub. Health, *WIC Formula Resources*, https://dph.georgia.gov/WIC/wic-formula-resources (last visited on Apr. 6, 2023) ("In Georgia, infant formula manufacturers competitively bid for the sole-source WIC contract every three years."); Oliveira 2004 at 11 ("Generally, infant formula rebate contracts are for 3 years."); Oliveira 2011 at 1 ("On average, WIC State agencies rebid their infant formula rebate contracts every 4 years"); Davis 2015 at 2 (stating that contracts typically run for 4 years, including extensions).

that relate to non-WIC sales[.]" Letter from E. Takashima to A. Reeves (dated Feb. 16, 2023). Staff responded by letter two days later, explaining that non-WIC information is "reasonably relevant" to the investigation because WIC and non-WIC "appear to be interrelated" such that "[a]ny collusive or coordinated practices" in WIC bidding "would affect, and would likely be aimed at, non-WIC sales." *Id.*; *see* Pet. Ex. 1 (quoting from staff's Feb. 16 letter). Abbott raised concerns about the CID's temporal scope at the February 21 meet and confer. Pet. Appx. B at ¶ 14. Shortly after these discussions, staff agreed to extend the deadline for Abbott's filing of a petition to quash or limit from February 20 to March 16, 2023, and requested that Abbott provide a written statement of its anticipated arguments for any petition. *Id.* at ¶¶ 15, 17.

In response to staff's request, on February 27, 2023, Abbott provided a letter setting forth its grounds for a petition to quash or limit, stating its objections to the non-WIC requests and the CID's temporal scope insofar as it extended beyond January 1, 2020. Pet. Ex. 1. Abbott's letter included 33 pages of specific objections to all the CID requests, including those requesting information about the WIC program. Pet. Ex. 1.

On March 13, 2023, Abbott reached out to staff to request another meet and confer. Pet. Appx. B at ¶ 18; Pet. Ex. 2. During a call on March 14, 2023, Abbott proposed deferring any production of non-WIC information until the FTC "had some evidence of coordinated or collusive conduct in the WIC part of Abbott's business" and requested a further extension of the petition deadline from staff to "continue to work through these issues." Pet. Appx. B at ¶ 19. Staff followed up later that day by email, informing Abbott that staff would not agree to conduct its investigation in stages and noting that the parties were at an impasse. Pet. Ex. 3. Staff also informed Abbott that if it "intend[ed] to withhold documents or information responsive to the CID on the grounds that (1) they do not relate to WIC, or (2) they predate January 1, 2020, then Abbott should file a petition to quash or limit the CID by the current deadline, March 16, 2023." *Id*.

After receiving staff's email declining to grant a further extension, Abbott contacted the Director's Office in the Bureau of Competition to reiterate Abbott's request for an extension. The Director's Office denied this request. Later that evening, Abbott sent staff another email and reiterated Abbott's request for a 21-day extension of the petition deadline. Pet. Ex. 4 at 1. Staff responded on March 16, 2023, stating its understanding that Abbott was not willing to produce non-WIC or pre-2020 documents at this time, and reiterating that Abbott and staff were at an impasse. *See* Email from E. Takashima to A. Reeves (dated Mar. 16, 2023 at 4:00 PM). Abbott filed this Petition that same day.

II. Analysis

A. No Good Cause Exists to Extend the Petition Deadline

Abbott requests additional time to seek "a negotiated resolution" with FTC staff on two categories of requests for documents and information: those related to issues outside the WIC program, and those dated between 2016 and 2020. Pet. at 1–2.

The Commission's Rules of Practice generally require a CID recipient to file any petition to quash or limit within 20 days of service. 16 C.F.R. § 2.10 (a)(1). A petitioner seeking an extension of its deadline to file such petition must show "good cause," supported by "an adequate evidentiary basis." *In re Civil Investigative Demand to Liberty Auto City, Inc., dated April 12, 2022*, FTC File No. 222-3077, at 3 (June 13, 2022) (citing 16 C.F.R. § 210(a)(1) and *United States v. Morton Salt Co.*, 338 U.S. 632, 653–54 (1950)). "Good cause" is established when a petitioner can "identify compelling reasons for an extension" and can "show that the deadlines cannot reasonably be met despite [the party's] diligence." *Id.* at 3; *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011).

Abbott has failed to show good cause for the Commission to extend the time to file its Petition. Abbott suggests that it needs additional time for its Petition because it cannot yet "fashion its own proposal" for a reasonable scope of non-WIC production. Pet. at 2. However, Abbott had all the information it needed to make its arguments in this Petition before the deadline. The grounds for challenging a Commission CID are limited to the determination of whether the agency has exceeded its authority, whether the CID itself is "too indefinite," whether "the information sought is reasonably relevant," and whether, on the whole, the CID is "not . . . unreasonable." *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652–63 (1950). Abbott has presented staff with its objections and how it wishes to limit the CID's scope on multiple occasions during the meet and confer process, and via this Petition, and requires no additional time to assess its arguments under *Morton Salt*. *See* Pet. Ex. 1 (setting forth Abbott's objections to non-WIC and pre-2020 documents).

Abbott attempts to blame staff for its failure to propose modifications to the CID's scope. Pet. at 1; *see* Pet. Appx. B at ¶ 21. Abbott falsely claims that staff "have not offered a credible explanation about the relevance or scope of what it seeks on the non-WIC side," and "have not countered Abbott's suggestion that documents should be collected from January 1, 2020, forward." Pet. at 2., Pet. Appx. B at ¶ 16. But the record shows that staff explained the relevance of non-WIC information on multiple occasions. *See* Pet. Ex. 3 (noting that staff had previously discussed the relevance of both non-WIC and pre-2020 documents); Pet. Ex. 1 at 3 ("Your February 16 Letter contends that non-WIC information is relevant because 'WIC and non-WIC sales of infant formula appear interrelated,' and '[a]ny collusive or coordinated practices regarding bidding for WIC Infant Formula Contracts would affect, and would likely be aimed at, non-WIC sales.'"). While Abbott has apparently "not tak[en] the position that it would *never* produce non-WIC documents," staff told Abbott that staff could not accept Abbott's proposal to defer production of any non-WIC documents until after the FTC has reviewed its WIC production. Pet. Ex. 3 ("[W]e will not agree to conduct our investigation in stages."). Staff explicitly informed Abbott that the parties "are at an impasse" on the non-WIC and pre-2020 documents and that Abbott should file its Petition. Pet. Ex. 3. Abbott knew staff's position on the disputed categories of documents well before the filing deadline.

Abbott even goes so far as to falsely assert that staff has not responded to Abbott's request for a deadline extension. Pet. at 2; Pet. Appx. B at ¶ 21. On the contrary, staff informed Abbott that it would not grant the second extension *no fewer than three times*. During the discussions just two days before the Petition deadline, staff informed Abbott that, if it intends to withhold non-WIC or post-2020 documents, then it should file a petition to quash by the current

deadline. Pet. Ex. 4 at 1. Abbott's response to this email makes clear that it understood staff's rejection of the request for an extension. *Id.* ("[W]e therefore reiterate our proposal as I conveyed on the phone, which was a request for an extension of the petition to question deadline . . . Our understanding from the email below is that staff rejected that request, so there is nothing further to discuss on this issue at this time, but if I have that wrong, please let me know."). Then Abbott, not having received the response it wanted from staff, directly lobbied the Bureau of Competition's leadership for an extension, which the Bureau denied. Staff did not fail to respond to Abbott's request for deadlines or clarification; Abbott just did not like the answers it received.[7]

Perhaps Abbott hopes that an extension would put it in a better position to negotiate with staff. But to the extent Abbott wants the Commission to "allow time to resolve areas of disagreement or at least narrow them," Pet. at 2, this is not valid grounds for an extension. As the Commission recently noted, a petitioner's "desire to know the outcome of the negotiations does not provide good cause for extension." *In re CID to Leader Automotive Dated Dec. 21, 2022*, FTC File No. 232-3004, at 4 (Feb. 27, 2023). A CID's initial scope will necessarily be greater than its scope after staff has granted requests to narrow it, so any narrowing that occurs will not create additional grounds for a petition, only fewer. "If the CID, as issued, is not unreasonable, neither is one that is narrowed and clarified." *Id.* Thus, an extension would not give Abbott additional information that would be useful to narrowing the scope of the CID.

Abbott has also failed to act with diligence in meeting its deadline to petition and its production obligations under the CID. Abbott has already received one 24-day extension, during which time Abbott made little progress toward complying with the CID and reiterated objections it had already made. Pet. Appx. B at ¶ 17. Abbott was aware of staff's insistence on receiving non-WIC documents as early as February 16. Pet. Ex. 1 at 3 ("Your February 16 Letter contends that non-WIC information is relevant because…"). That issue was discussed well before the current petition deadline. However, Abbott delayed until three days before its extended deadline to request its second extension from staff. Pet. Appx. B at ¶ 18. This does not "bespeak diligence or any sense of urgency." *Capitol Sprinkler*, 630 F.3d at 226. Nor has Abbott acted with reasonable diligence in meeting its production obligations in general. As of the date of the filing of this Petition, Abbott had produced little more than 1,000 pages of documents—a small fraction of the expected production—and provided no search terms. Pet. Appx. B at ¶¶ 12–13. On the other hand, it has given staff 33 pages of largely boilerplate objections to nearly every CID specification, including those it does not challenge in this Petition except as to temporal scope. Pet. Ex. 1 (enclosure). Abbott's conduct demonstrates delay, not diligence.

[7] The Commission is concerned about the repeated lack of candor displayed by Abbott in the presentation of the facts in this Petition, and refers counsel to the Commission's Rules regarding reprimands, suspension, and disbarment of attorneys practicing before the Commission. *See* 16 C.F.R. § 4.1(e)(1) (Commission may publicly reprimand, suspend, or disbar from practice before the Commission anyone who has "engaged in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation," or has "knowingly or recklessly given false or misleading information . . . to the Commission or any officer or employee of the Commission."). The Commission admonishes counsel to rein in such behavior in light of these requirements as well as their duties under the Rules of Professional Conduct. *See, e.g.*, ABA Model Rule 3.3 ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal" or "offer evidence that the lawyer knows to be false").

Finally, there is no good cause to grant Abbott an extension beyond the additional time it has already received simply by filing this Petition. Doing so gave Abbott an additional 54 days to continue its negotiations with staff on the CID's scope. The Commission's rules grant a de facto extension of time even for losing petitions by staying the compliance period until the Commission rules, at which point a new return date is ordered. 16 C.F.R. § 2.10(b). By the time of the return date in this order, Abbott will have had 98 days to respond to the CID and negotiate with staff since the CID was served. The Commission will not create further unmerited delay in this important investigation by providing an additional extension.

B. The CID Seeks Relevant Information

Abbott challenges the relevance of two categories of information and documents sought by the CID, as noted above: (1) those unrelated to the WIC program; and (2) those generated before Jan. 1, 2020.

In *Morton Salt*, the Supreme Court held that an FTC compulsory process demand for information or documents is permissible "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 652. The standard for the relevance of administrative compulsory process is, therefore, "broader and more relaxed" than would be in an adjudicatory discovery demand. *In the Matters of Civil Investigative Demand to Johnson & Johnson Dated August 19, 2019, and Subpoena Duces Tecum to Johnson & Johnson Dated August 19, 2019*, FTC File No. 191-0152, 2019 FTC LEXIS 95 (Oct. 18, 2019), at *7 (citing *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). The Commission's compulsory process need not be limited to information necessary to prove a specific charge; it can demand, instead, any documents or information "relevant to the investigation—the boundary of which may be defined quite generally" by the Commission. *Invention Submission*, 965 F.2d at 1090; *see Johnson & Johnson*, *supra*, 2019 FTC LEXIS 95, at *8. Put another way, the requested information must "'not [be] plainly incompetent or irrelevant to any lawful purpose' of the [agency]." *Texaco*, 555 F.2d at 872 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)). The CID recipient bears the burden "to show that the [requested] information is irrelevant." *Invention Submission*, 965 F.2d at 1090. Unless "obviously wrong," the FTC's "own appraisal of relevancy must be accepted." *Id*. at 1089.

We find that both categories of challenged information and documents meet the standards of relevance.

1. Non-WIC Business Information

Abbott first argues that the CID specifications requesting the production of information about Abbott's non-WIC infant formula business seek irrelevant information. Pet. at 5 n.4 (listing Specifications 1, 6-15, 18 & 19). Specifically, Abbott asserts that "the non-WIC information sought in the CID is not reasonably relevant to the investigation," Pet. at 5, and that "staff have not offered a credible explanation about the relevance or scope of what it seeks on the non-WIC side," *id.* at 1. However, documents and information unrelated to the WIC program are relevant to the investigation.

At the investigatory stage, the test is whether the information requests are relevant to the investigation—which itself may be defined broadly in the relevant resolution. *Invention*

Submission, 965 F. 2d at 1090. Each specification falls comfortably within the Resolutions cited in the CID, which permit FTC staff to, among others, investigate whether a collusion or coordination in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or any other statutes or rules enforced by the Commission, has occurred.[8]

As noted in recent economic literature, non-WIC business information is relevant to understanding the market relationship between WIC contracts and non-WIC sales, including any spillover effects between WIC contracts and non-WIC sales.[9] Such information may also be needed to evaluate, for example, whether WIC contract holders had incentives not to bid against each other and which specific WIC bidding opportunities may have been tainted by coordination or collusion. Accordingly, the documents and information related to Abbott's non-WIC business are highly relevant to the Commission's investigation and comfortably meet the investigative purpose. *Accord FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011) (establishing that the information may "'not [be] plainly irrelevant' to the investigative purpose").

Abbott appears to contend that a CID recipient need not produce responsive information that could illuminate unlawful conduct and its harmful effects, unless and until that conduct has been conclusively shown through other evidence. *See* Pet. at 5. This contention is meritless. There is no requirement for the Commission or its staff to conduct investigations in phases. *FTC v. Church & Dwight Co., Inc.* is instructive here. The petitioner objected to a CID and subpoena for documents on the grounds that they sought information regarding the company's sales in Canada, even though the applicable compulsory process resolution stated that the Commission was investigating Church & Dwight's conduct in the United States. 747 F. Supp. 2d at 4–7. The district court overruled that objection, noting that the Commission was not required to "prove what it is investigating as a condition of the legitimacy of the investigation it is conducting[.]" *Id*. at 6 (citing *Texaco*, 555 F.2d 862). The court accepted the Commission's explanation that information from Church & Dwight's Canadian subsidiary would "assist in determining the factors that affect C&D's market shares" in the United States and Canada and granted the Commission's petition for an order enforcing its compulsory process. *Id*. at 7, 10. The D.C. Circuit later affirmed the district court's decision. *Church & Dwight*, 665 F.3d 1312, 1313 (D.C. Cir.). Abbott's objection to producing non-WIC documents fails for the same reasons—the information sought will, at a minimum, assist staff in understanding the dynamics of the WIC market and enable staff to evaluate the full course of Abbott's conduct.

[8] *See* Res. P859910 (July 1, 2022).

[9] *See, e.g.*, Oliveira 2011 (determining that when states switched the manufacturer that holds the WIC contract, the new contract manufacturer's market share increased by an average of 74 percent); Rui Huang and Jeffrey M. Perloff, *WIC Contract Spillover Effects*, 44 Rev. Ind. Org. 49, 56–57 (Feb. 2014) (finding that after a change in the WIC contract manufacturer, the contract winner's market share increased by an average of 34 percent in the first two week period, and then by an additional 23 percent over a six month period); David E. Davis, *Bidding for WIC Infant Formula Contracts: Do Non-WIC Customers Subsidize WIC Customers?*, 94 Am. J. Ag. Econ. 80, 94–95 (2012) (estimating that the award of a WIC contract was associated with a 50 to 60 percent increase in non-WIC market share).

Accordingly, we conclude that the documents and information related to Abbott's non-WIC infant formula business are reasonably relevant to the Commission's investigation.[10]

2. Information Predating January 1, 2020

We also find that the requests for information and documents dating back to January 1, 2016, seek the production of reasonably relevant information. In its correspondence with Abbott's counsel, staff explained that "because each state generally only solicits bids once every 3-4 years, the timeframe of 2016 through the present is necessary to capture documents and data that will reasonably allow staff to analyze and understand Abbott's current and ongoing bidding practices." *See* Pet. Ex. 3. Similar timeframes for the rebidding of infant formula rebate contracts have been noted by scholars analyzing the relationship between WIC infant formula contracts and non-WIC brand sales of infant formula and toddler milks.[11]

In light of the states' multi-year, non-overlapping bidding cycles, we find that the 7-year timeframe is reasonably calculated to produce a data set that allows staff to analyze bidding patterns, identify anomalies, and understand manufacturers' current and ongoing bidding practices. Because the rebidding for each state's WIC infant formula contract generally occurs once every three to four years, the three-year timeframe proposed by Abbott would come with a significant risk of not producing data sets for all states. Therefore, the request for information and documents dating back to January 1, 2016, squarely fits within the scope of the investigation as set forth in the Resolutions.[12] Additionally, the request is not indefinite given that it is limited to a 7-year timeframe. *See Morton Salt*, 338 U.S. at 652 ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.").

Accordingly, we conclude that the request for information and documents dating back to January 1, 2016, seeks the production of reasonably relevant information.

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[10] We note that Abbott cites two cases—*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), and *FTC v. Turner*, 609 F.2d 743 (5th Cir. 1980)—in the context of its discussion of relevance. *See* Pet. at 5. Neither case supports Abbott's position. Abbott suggests that *Oklahoma Press* stands for the proposition that, in the context of an investigative subpoena, relevancy requires the burden imposed by a request to be "weighted 'in relation to the nature, purposes and scope of the inquiry.'" Pet. at 5 (citing *Oklahoma Press Pub. Co.*, 327 U.S. at 209). The mere fact that compliance with the request will require Abbott to produce voluminous records does not overcome the finding that the documents and information pertaining to Abbott's non-WIC sales are reasonably relevant to the Commission's investigation, *see, e.g., In re Subpoena Duces Tecum*, 228 F.3d 341, 350 (4th Cir. 2000). The Commission also rejects Abbott's burden argument for the reasons stated below. In addition, unlike the instant matter, *FTC v. Turner* involved an investigative subpoena seeking information about an individual's wealth "to determine the practical feasibility of a consumer redress action," which the court held was "not relevant to any issue that will be raised in the contemplated lawsuit." 609 F.2d at 745.

[11] *See, e.g.*, Choi 2020 at 304 (noting that each state typically only bids out a WIC infant formula contract approximately once every four years); Ga. Dep't of Pub. Health, *WIC Formula Resources*, https://dph.georgia.gov/WIC/wic-formula-resources (last visited on Apr. 6, 2023) ("In Georgia, infant formula manufacturers competitively bid for the sole-source WIC contract every three years."); Oliveira 2004 at 11 ("Generally, infant formula rebate contracts are for 3 years."); Oliveira 2011 at 1 ("On average, WIC State agencies rebid their infant formula rebate contracts every 4 years"); Davis 2015 at 2 (stating that contracts typically run for 4 years, including extensions).

[12] *See* Res. P859910 (July 1, 2022).

C. Abbott Has Failed to Demonstrate Any Undue Burden or Unreasonableness

Finally, Abbott asks the Commission to limit its CID on the grounds that its requests for non-WIC and pre-2020 information creates an undue burden on the company. Pet. at 5–6. The Commission also rejects this request.

A petitioner seeking to limit or quash a CID based on undue burden must show that the CID "threatens to unduly disrupt or seriously hinder normal operations" of the petitioner's business. *Texaco*, 555 F.2d at 882. The burden must be significant because "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* "Broadness alone is not sufficient justification to refuse enforcement of a subpoena," particularly when that breadth "is in large part attributable to the magnitude of the [company's] business operations." *Id.* A petitioner must "ma[ke] a record that would convince [the Commission] of the measure of their grievance rather than ask [the Commission] to assume it." *Morton Salt*, 338 U.S. at 654; *see Texaco*, 555 F.2d at 882 ("The burden of showing that the request is unreasonable is on the subpoenaed party."); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) ("The subpoenaed party must not merely utter the claim; it must persuade us.").

Abbott has failed to present any evidence of undue burden. It is not enough to assert, as Abbott does, that it would have to produce "millions of documents" at the cost of "millions of additional dollars in attorney's fees and costs." Pet. at 5. The sheer volume of requests cannot "itself establish that the CID is overbroad or imposes undue burden." *In re March 19, 2014 Civil Investigative Demand Issued to Police Protective Fund, Inc.*, FTC File No. 132-3239, at 7 (May 22, 2014); *see Jim Walter Corp.*, 651 F.2d at 258 ("Absent a showing of disruption, the sheer number of documents sought does not demonstrate [undue burden]."). Additionally, while Abbott would need to identify "legacy systems and predecessor custodians" to gather some documents requested, this is well within the ordinary burden associated with responding to government investigations. *See Police Protective Fund*, FTC File No. 132-3239, at 7 ("It is not enough merely to assert . . . that gathering, copying, and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have."); *Liberty*, FTC File No. 222-3077, at 5 ("To the extent the asserted burdens stem from [Petitioner's] own document practices . . . such burdens cannot excuse [Petitioner] from compliance with the CID."); *Letter Ruling re Civil Investigative Demands Issued to D. R. Horton, Inc. and Lennar Corp.*, FTC File Nos. 102-3050 & 102-3051, at 6 (Mar. 9, 2010) ("Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs.").

Further, "expense alone cannot constitute burdensomeness, where it is a concomitant of a broad, but valid, investigation." *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980). Abbott has not shown that the incremental burden of producing the disputed categories of information, over and above the burden of complying with the CID in all other respects, is undue. Nor can Abbott demonstrate that the cost of responding to the CID is too high "relative to the financial position" of the company when "measured against the public interest of this investigation." *Id*. The Petition is devoid of any information about Abbott's financial or other resources available for complying with the CID. Abbott's position as a Fortune

100, multi-billion-dollar[13] company suggests that, even if its unsubstantiated claim of "millions of dollars" in additional costs to respond to the CID are accurate, this would not create an undue burden, especially when weighed against the public need of uprooting potential collusion in the vital and extremely lucrative infant formula market.

III. CONCLUSION

For the foregoing reasons, Abbott's petition to limit is DENIED.

IT IS HEREBY ORDERED THAT Abbott Laboratories' Petition to Limit Civil Investigative Demand, Dated January 27, 2023, be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Abbott shall comply in full with the Commission's Civil Investigative Demand no later than **Tuesday May 9, 2023, at 9:00 a.m. (Eastern Time)**, or at such other later date, time, and location as the Commission staff may determine.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: April 25, 2023

[13] According to Abbott's most recent annual report, its revenues totaled over $43 billion in 2022, with $1.3 billion in U.S. formula sales alone. Abbott Laboratories, Annual Report (Form 10-K) at 45 (Feb. 28, 2023), *available at* https://www.sec.gov/Archives/edgar/data/1800/000130817923000249/abt_2022annualreport.pdf.