UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of	)
SUBPOENA AD TESTIFICANDUM TO CVS HEALTH CORPORATION, DATED OCTOBER 16, 2024	)

ORDER DENYING PETITION TO QUASH SUBPOENA AD TESTIFICANDUM

By BEDOYA, Commissioner:

CVS Health Corporation ("CVS") has petitioned to quash an FTC Subpoena Ad Testificandum ("SAT") issued October 16, 2024, that directs CVS to make available a representative to testify about CVS's efforts to comply with a Civil Investigative Demand ("CID") issued on December 8, 2023. For the reasons stated below, the petition to quash ("Petition") is denied.

I. BACKGROUND

On December 8, 2023, the Commission issued a CID to CVS seeking documents, data, and narrative responses relevant to an investigation into potential anticompetitive or unfair practices by CVS and the other two largest pharmacy benefit managers ("PBMs"). Some of the information requested by the CID overlaps with information previously requested from CVS Caremark under Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), as part of a Commission study of PBM practices; however, the CID and 6(b) Order differ in both scope and relevant time period. For example, the CID requests information regarding CVS's efforts to require or incentivize beneficiaries to use CVS's affiliated pharmacies, but the 6(b) Order did not. And whereas the 6(b) Order only sought materials created on or before June 6, 2022, the CID, absent modification, requires CVS to produce materials created up to 30 days prior to certification of compliance. Due to these differences, compliance with the CID requires a different collection methodology, including different custodians and search terms, than the 6(b) Order.

CVS has been out of compliance with the CID for more than eight months, since March 12, 2024, when the last extension of the CID return date expired.[1] To date, nearly all of the documents CVS has produced in response to the CID are documents also produced in response to the 6(b) Order. Indeed, fewer than 1,000 of the 1.2 million documents (~0.08%) CVS produced since the CID issued are responsive uniquely to the CID. Additionally, the documents CVS has produced in response to the 6(b) Order are at least 2½ years old. Though Commission staff has made various concessions to reduce CVS's claimed burden, CVS has failed to agree on an adequate production plan for materials not covered by the 6(b) Order. In its Petition, CVS states that it told staff that CVS "expect[s]" its compliance with the CID to be completed by February 28, 2025. Pet. at 5. But CVS has not committed to this date, and in its last conversation with staff, CVS noted that even this "expected" date could slip.

To better inform staff's ongoing efforts to obtain compliance with the CID, on October 16, 2024, the Commission issued a subpoena to CVS for testimony regarding: (1) CVS's "efforts to timely comply with the CID" and (2) CVS's "policies and procedures relating to the retention and destruction of documents and data, and the steps the Company took to preserve documents related to the CID." Pet. Ex. 1. CVS seeks to quash the SAT, arguing that the Commission's request for oral testimony on these topics seeks information not reasonably relevant to the FTC's investigation, is unduly burdensome, issued for an improper purpose, and impermissibly seeks privileged information. Importantly, CVS has not sought to limit or quash the underlying December 8, 2023 CID.

II. ANALYSIS

Under Rule 2.7(h) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(h), the Commission may obtain by compulsory process the testimony of a corporate entity by describing with "reasonable particularity the matters for examination." The corporate entity then "must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify on its behalf." *Id.* Consistent with Rule 2.7(h)'s requirements, the SAT clearly specifies two discrete topics for testimony from a CVS designated witness. CVS presents no justifiable reason to quash this narrowly tailored subpoena.

Compulsory process is proper if the inquiry "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" to the investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The SAT easily meets this standard. As discussed below: (1) the SAT seeks information vital to Commission staff's investigation; (2) the SAT is narrowly tailored and not unduly burdensome; (3) the SAT was not issued to harass CVS; and (4) the SAT does not seek testimony protected by attorney-client or the work product doctrine.

[1] *See* FTC email to CVS, March 12, 2024 (referring to February 8, 2024 CID return date modification letter). The extension of the CID return date to March 12, 2024, was the last CVS sought.

A. The SAT seeks information directly relevant to the Commission's investigation

To quash Commission compulsory process on the basis of relevance, a petitioner must show that "the information sought is [not] 'reasonably relevant' to the agency's inquiry." *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979) (quoting *Morton Salt Co.*, 338 U.S. at 652). This is a high bar: "The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *see also Matter of Civ. Investigative Demand to Intuit Inc.* (*Intuit*), No. 192-3119, 2020 WL 5037437, at *3 (FTC Aug. 17, 2020) ("The standard for the relevance of administrative compulsory process is … broader and more relaxed than would be in an adjudicatory discovery demand.") (citations and internal quotation marks omitted). The evaluation of reasonableness "need not be limited to information necessary to prove a specific charge; [the Commission] can demand, instead, any documents or information 'relevant to the investigation—the boundary of which may be defined quite generally' by the Commission." *Intuit*, 2020 WL 5037437, at *3 (citing *Invention Submission Corp.*, 965 F.2d at 1090). The D.C. Circuit, addressing FTC subpoenas, has explained that "the test is satisfied if the documents sought are 'not plainly irrelevant' to the investigative purpose." *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980) (citation omitted). "The [Commission's] own appraisal of relevancy must be accepted so long as it is not obviously wrong." *FTC v. Bisaro*, 757 F. Supp. 2d 1, at 6 (D.D.C. 2010) (citing *Invention Submission Corp.*, 965 F.2d at 1089; *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977)) (granting FTC's Petition for an Order Enforcing Administrative Subpoena *Ad Testificandum*).

Applying these standards here, we conclude that CVS's relevance challenge is meritless. CVS's efforts to comply with the CID—the first topic of the SAT—are directly relevant to the investigation, particularly given that CVS has been out of compliance with the CID since March 12, 2024, and has produced very little beyond what it previously produced in response to the 6(b) Order (a mere 1,000 documents). As the Commission has recognized when denying a petition to quash objecting to similar testimony, "[t]o advance the Commission's mission, FTC staff must be allowed latitude in taking steps to explore relevant topics by issuing supplemental process and taking testimony, particularly where, as here, a company has been lax in responding to the Commission's informational needs." *In re Civil Investigative Demand to Fully Accountable, LLC Dated September 10, 2018*, FTC No. 1723195, at 4 (Nov. 19, 2018). Indeed, a company's efforts to respond to process are relevant in any investigation. And that information is precisely what the SAT seeks.

We reject CVS's arguments that the SAT is "excessive" and therefore not reasonably relevant. Pet. at 7–8. CVS argues that because it has produced "a substantial amount of information" responsive to the CID, testimony about its compliance efforts is not reasonably relevant to the investigation. *Id.* at 7. But this argument ignores that nearly all of CVS's response to the CID has been confined to production of materials provided in connection with the 6(b) Order. Eight months have elapsed since the CID's extended return date expired, yet CVS still has not made any meaningful production of *additional information* that the CID alone (not the 6(b)

Order) requires. In fact, the concerns motivating the SAT are grounded in what CVS has done—or not done—to comply with the CID *beyond* its response to the 6(b) Order.

CVS points to the number of hours it has spent on document productions "related to this matter." Only a small portion of these hours, i.e., 13%, were incurred after issuance of the CID. Pet. at 8 (specifying 180,000 hours total, including 24,000 hours after December 8, 2023), and CVS never claims that even this 13% relates exclusively to the CID. By focusing its arguments on CVS's efforts to comply with the earlier 6(b) Order rather than what it has done specifically to comply with the CID, CVS underscores the need for the SAT in the first place. Moreover, though CVS presents this as a relevance challenge, its focus on the effort it has expended is really an argument about the burden of complying with the CID—a CID that CVS never moved to limit or quash—not a showing that the topics of the SAT lack relevance.

As to the second topic of the SAT regarding document retention policies, CVS argues that because it produced its document retention policies, it is unreasonable for Staff to seek testimony about CVS's "policies and procedures relating to the retention and destruction of documents and data, and the steps [CVS] took to preserve documents related to the CID." Pet. at 8; Pet. Ex. 1. Implicit in this argument is the idea that documents are a proxy for testimony, but testimony "'typically provide[s] an opportunity to further probe the facts elicited through [other investigatory tools].'" *Intuit*, 2020 WL 5037437 at *6-7 (quoting *English v. WMATA*, 323 F.R.D. 1, 26 (D.D.C. 2017)). Indeed, CID recipients, "having provided [responsive documents and information], should reasonably expect to be queried about [those documents and information]." *Id* at 7. Critically, the text of CVS's policies provides no insight into whether CVS has in fact adhered to them.

B. The SAT focuses narrowly on CVS's efforts to produce non-6(b) materials responsive to the CID and is not unduly burdensome

Quashing compulsory process on the basis of undue burden requires a petitioner to demonstrate that the request "threatens to unduly disrupt or seriously hinder [the petitioner's] normal [business] operations." *Texaco*, 555 F.2d at 882. "The burden of showing that the request is unreasonable is on the subpoenaed party." *Id*.[2] As with the relevance standard, this is a high bar: "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, 555 F.2d at 882.[3] Establishing undue burden is all the more difficult "where, as here, the agency inquiry is pursuant to a lawful purpose and the requested [information is] relevant to that purpose." *Texaco*, 555 F.2d at 882. At

[2] *See also FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), aff'd, 636 F.2d 781 (D.C. Cir. 1980) (citation omitted) ("[T]he Court will assume reasonableness absent a showing that compliance threatens to disrupt or unduly hinder the normal operations of a business."); *Bisaro*, 757 F. Supp. 2d at *6 ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is reasonably relevant—or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency]—and not unduly burdensome to produce.") (citation omitted) (granting FTC's Petition to Enforce SAT).

[3] *See also FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980) ("[A]ny subpoena places a burden on the person to whom it is directed. Time must be taken from normal activities and resources must be committed to gathering the information necessary to comply. Nevertheless, the presumption is that compliance should be enforced to further the agency's legitimate inquiry into matters of public interest.").

a minimum, the 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.

CVS's Petition makes no such showing. Despite describing the SAT as "excessive," the Petition fails to identify *any* specific burden regarding SAT compliance other than "the burden of having to prepare a CVS representative to answer questions during an investigational hearing." Pet. at 7, 9. As discussed above, the SAT is narrowly tailored to elicit testimony on two discrete topics and does not require the production of any documents, data, or other information. CVS's general claim of undue burden from "preparing a CVS representative to answer questions" about CID compliance, Pet. at 9, does not come close to the required showing of demonstrating that "compliance threatens to disrupt or unduly hinder [CVS's] normal [business] operations." *Carter*, 464 F. Supp. at 641 (citation omitted). While identifying and preparing the appropriate witnesses to testify on behalf of a corporation might require substantial effort, that does not excuse a corporation from the obligation to provide relevant testimony. Courts have acknowledged that "[p]reparing a . . . designee [to provide a corporation's testimony] may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business." *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012).

Unable to describe the specific burden of SAT compliance, CVS again focuses on the productions it has made to date and, in doing so, stretches the facts. CVS claims that "[f]or the December CID in particular, CVS has produced more than 1.2 million documents across more than 6 million pages requiring more than 180,000 hours of work by CVS's e-discovery vendor alone." Pet. at 1-2. These efforts, however, relate almost entirely to compliance with the 6(b) Order. Indeed, fewer than 1,000 of the "1.2 million documents" CVS produced since the CID issued are responsive uniquely to the CID.

Nor do the cases cited by CVS (Pet. at 8) support its arguments. *FTC v. Texaco* recognizes that "[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," 555 F.2d at 882, and CVS does not claim complying with the SAT itself would be unduly burdensome. *Dow Chemical Co. v. Allen* involved an adjudicative subpoena, not an agency's investigative subpoena—and, in any event, the Seventh Circuit recognized that "[t]he assessment of what is unreasonable or unnecessary, by definition, depends to a large extent on the reasons or needs underlying the request." 672 F.2d 1262, 1269-70 (7th Cir. 1982); *id*. at 1268 ("[T]he relevancy of an investigatory subpoena is measured against the 'general purposes of (the agency's) investigation,' ... while relevancy of an adjudicative subpoena is measured against the charges specified in the complaint.") (quoting *Anderson*, 631 F.2d at 746). The Commission recently emphasized the distinction between adjudicative and investigative subpoenas when rejecting a similar argument, noting, "the [*Dow Chem.*] court specifically acknowledged that investigative subpoenas may be broader in scope" than trial subpoenas. *In the Matter of Subpoena Duces Tecum Issued to Humana, Inc. Dated Apr. 10, 2017*, No. 161-0026, 2017 WL 2570859, at *5 (FTC June 5, 2017) (stating that *Dow Chemical Co. v. Allen* "involved an administrative *trial* subpoena, not an *investigative* subpoena") (emphasis in original). Finally, *In re Civil*

Investigative Demand 15-439 is inapposite. At issue in that case was the burden of producing duplicative materials the CID target had already produced. *In re Civil Investigative Demand 15-439*, No. 5:16-MC-3, 2016 WL 4275853, at *1 (W.D. Va. Aug. 12, 2016) (noting that "the government acknowledges that certain of the information requested in the CID is already in its possession by virtue of its six year investigation" and directing the parties "to meet and confer on categories of relevant, non-duplicative documents to be produced"). Here, the SAT seeks testimony about compliance with the CID including about materials not already produced in response to the 6(b) Order. This information is not already in the Commission's possession.

C. The SAT was issued for a proper purpose

CVS also argues that the SAT was issued for an improper purpose and therefore must be quashed consistent with *United States v. Powell*, 379 U.S. 48, 58 (1964). CVS asserts that Chair Khan, Commissioner Slaughter, and Commissioner Bedoya "have prejudged the outcome of the underlying investigation" and points to allegedly prejudicial public statements they have made about Caremark and other PBMs. Pet. at 10-11. CVS contends that "[t]he most likely conclusion one could draw from the facts and circumstances in this matter is that the FTC's Subpoena is designed to harass CVS." *Id.* at 10. We disagree.

In *Powell*, the Supreme Court recognized (addressing an IRS summons) that courts may deny enforcement of an administrative compulsory process that "ha[s] been issued for an improper purpose, such as to harass the [recipient] or to put pressure on [the recipient] to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 58. In *United States v. LaSalle National Bank*, the Supreme Court addressed *Powell,* again in the context of an IRS administrative summons. 437 U.S. 298, 301 (1978). The Court held that "those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid . . . purpose by the [IRS]." *LaSalle Nat'l Bank*, 437 U.S. at 316. Circuit courts have explained that this burden is a high one. For example, the Third Circuit held that "the burden on the party to whom the subpoena is addressed is not a meager one. It must come forward with facts suggesting that the subpoena is intended *solely* to serve purposes outside the purview of the jurisdiction of the issuing agency." *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1979) (emphasis added, internal citation omitted). And the D.C. Circuit, addressing FTC subpoenas, has specified that "even if an improper purpose by an agency or member of the staff is shown, enforcement of the subpoena is called for so long as proper purposes exist as well." *FTC v. Carter*, 636 F.2d at 789 (affirming district court's denial of respondent's attempt to seek discovery about an alleged improper purpose in a Commission action to enforce its subpoenas); *accord Bisaro*, 757 F. Supp. 2d at 11 (finding that subpoena recipient failed to demonstrate abuse of process by the Commission with respect to the subpoena).

CVS fails to meet its heavy burden to show that the SAT was issued solely to serve purposes outside the purview of the jurisdiction of the issuing agency. It bears repeating that CVS never disputed that the CID was validly issued for an investigational purpose well within the Commission's authority. In light of Commission staff's difficulties obtaining compliance with the CID and, as already discussed, the clear relevance of testimony concerning CVS's

compliance efforts, it cannot reasonably be denied that the SAT serves a proper purpose. That is enough to overcome CVS's argument that the SAT should be quashed due to improper purpose.

D. The SAT seeks testimony not protected by attorney-client privilege or the work product doctrine

Finally, CVS argues that the Commission should grant the Petition because the SAT "[i]mpermissibly [s]eeks [p]rivileged [i]nformation." Pet. at 11-12. In support, CVS cites *Smithkline Beecham Corp. v. Apotex Corp.* for the proposition that deposition topics implicating protections from disclosure warrant quashing the SAT in its entirety. Pet. at 12. Contrary to CVS's reading of *Smithkline Beecham Corp.*, however, the court there did not strike the challenged topic on the basis that it could potentially implicate work product and attorney-client privilege. Rather, it found the topic notice "[i]n its present form, . . . overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information." *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *10 (N.D. Ill. Jan. 24, 2000). Indeed, the Commission has previously considered and dismissed the precise argument CVS makes here. *Intuit*, 2020 WL 5037437 at *7. We noted that "to the extent that [*Smithkline*] is read . . . as holding that potential privilege concerns in corporate testimony about discovery responses justif[y] categorically striking down the entire inquiry—rather than dealing with privilege claims during the testimony on a question-by-question basis—we disagree with it as contrary to the weight of authority." *Id.* We further explained that, "to the extent that, during its corporate testimony, [respondent's] designee is asked a question that in fact elicits privileged information, [respondent's] counsel 'may protect against the disclosure . . . by interposing appropriate objections and giving instructions on a question-by-question basis.'" *Id.* (quoting *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012)). We concluded that "the mere existence of such a possibility is no reason to preclude all questioning." *Id.* (citing *United States v. Matsura*, No. 14-CR-388, 2015 WL 10912346, at *5 (S.D. Cal. July 10, 2015) (withholding privileged information, not quashing entire subpoena request, is proper recourse to address privilege concerns). CVS offers no reason why the Commission should reach a different result here.

III. CONCLUSION

For the foregoing reasons, CVS's petition to quash is denied.

IT IS HEREBY ORDERED THAT CVS's Petition to Quash or Limit the October 16, 2024 Subpoena Ad Testificandum be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT CVS shall comply in full with the Commission's Subpoena Ad Testificandum and shall appear to testify on the specified topics at the designated location on December 20, 2024, or at such other date, time, and location as the Commission staff may determine.

By the Commission.

April J. Tabor
Secretary

ISSUED: December 3, 2024