

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

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In the Matter of)
)
AUGUST 11, 2022, CIVIL INVESTIGATIVE DEMAND) **Matter No. 222 3073**
ISSUED TO CHILDHOOD LEUKEMIA FOUNDATION,)
INC.)
)
)
)

**ORDER DENYING PETITION TO QUASH
CIVIL INVESTIGATIVE DEMAND**

By WILSON, Commissioner:

Childhood Leukemia Foundation, Inc. (“CLF”) has filed a petition to quash a Civil Investigative Demand (“CID”) issued by the Commission on August 11, 2022.¹ For the reasons stated below, the petition is denied.

I. INTRODUCTION

CLF is organized as a non-profit corporation under New Jersey law and has been granted an exemption from federal taxation under Section 501(c)(3) of the Internal Revenue Code.² In its IRS Form 990s, CLS states that its mission is “to educate, empower and lift the spirits of children suffering with the devastating effects of cancer throughout the United States.”³ It operates four main programs: “Keeping Kids Connected iPads,” which provides iPads to children with cancer, “Hope Binders,” which have sections to reference and record medical information, “Hugs U Wear,” which provides custom made human hair wigs, and “Wish Baskets,” which contain age-appropriate items to help children learn and cope with anxiety and boredom associated with cancer treatment and hospitalization.⁴

¹ “Pet.” refers to CLF’s Petition to Quash and the exhibits attached thereto. Citations are to page numbers of the .pdf file submitted to the Commission.

² See Pet. at 14, 20-28.

³ E.g., Pet. at 192.

⁴ Pet. at 15-17.

Over the past three years, more than 99% of CLF’s revenue has come from public charitable donations obtained through fundraisers and solicitations.⁵ According to its Form 990s, between 2019 and 2021, CLF received contributions and grants totaling about \$11.5 million, but spent about \$9.1 million on fundraising expenses, plus another \$1.3 million in employee compensation, most of which was paid to two executives.⁶ Thus it appears from forms filed with the IRS that more than 90% of CLF’s fundraising revenue was spent on fundraising and employee compensation. Comparatively little was spent on CLF’s programs. For example, the 2021 Form 990 indicates that CLF spent \$126,313 on the iPad program and \$43,703 on the wish basket program, or about 3.6% and 1.2% of total fundraising contributions, respectively.⁷ For comparison, CLF reported total compensation of \$309,819 to its two highest-paid employees (its executive director and chief operating officer), representing about 8.8% of fundraising contributions.⁸

The Commission is conducting an investigation to determine whether CLF is engaged in “unfair or deceptive acts or practices” in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. The investigation centers on whether CLF’s program spending is so *de minimis* that it is deceptive to tell consumers that their money will be spent on the purported charities described to them. The Commission is also investigating whether CLF is violating the Commission’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, by assisting and facilitating paid fundraisers who make deceptive solicitations of charitable donations on behalf of CLF, and who in some instances may engage in robocalling (*i.e.*, calling consumers to play a prerecorded message).

On August 11, 2022, under the authority of a Commission resolution authorizing the use of compulsory process, the Commission issued a CID to CLF pursuant to Section 20 of the FTC Act, 15 U.S.C. § 57b-1.⁹ The CID seeks information about its fundraising representations and about how it spends donated funds. It also seeks information about CLF’s governance and operations, which is relevant to the Commission’s determination as to whether CLF qualifies as a “corporation” within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44. *See* discussion below.

The return date for the CID was September 12, 2022. Under the Commission’s rules, a petition to quash was initially due on August 31, 2022, *see* 16 C.F.R. § 2.10, but Commission staff granted an extension until September 9, 2022.¹⁰ After meeting and conferring with

⁵ Pet. at 17.

⁶ Pet. at 152, 158, 192, 198, 234, 240.

⁷ Pet. at 243.

⁸ Pet. at 240-41.

⁹ The CID states that the subject of the investigation is whether CLF “committed violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) and/or committed violations of the Commission’s Telemarketing Sales Rule, 16 C.F.R. Part 310, relating to the solicitation of charitable donations, and whether Commission action to obtain monetary relief would be in the public interest.”

¹⁰ Pet. at 302.

Commission staff, CLF filed a petition on that date asking the Commission to quash the CID in its entirety.

II. ANALYSIS

CLF argues that it is a non-profit corporation so the Commission lacks jurisdiction to issue and serve the CID and may not compel CLF to comply with the CID.¹¹ This argument hinges upon Section 4 of the FTC Act, which provides in relevant part that the term “corporation” shall be deemed to include any company “without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. § 44. CLF relies upon *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969), which held that the Commission lacked jurisdiction to enforce Section 5 of the FTC Act against a corporation where the evidence showed that the corporation was not engaged in business for profit. *Id.* at 1018-20.

CLF’s arguments fail for two reasons. First, the plain language of Section 20 permits the Commission to serve a CID on any legal entity, regardless of whether it is a “corporation” within the meaning of Section 4. Second, as *Community Blood Bank* and other cases make clear, an organization’s form of incorporation and tax-exempt status is not controlling for purposes of whether the organization is a “corporation” within the meaning of Section 4. The Commission is entitled to determine for itself whether CLF is in fact operating as a nonprofit entity, and it needs the information sought in the CID to make that determination.

A. The Commission Has Authority Under Section 20 To Serve a CID on Any Legal Entity.

CLF argues that if it is not a “corporation” within the meaning of Section 4, then the Commission lacks authority to serve a CID under Section 20.¹² The plain language of the FTC Act refutes this argument. Section 20 authorizes the Commission to serve a CID on any “person.” 15 U.S.C. § 57b-1(c).¹³ “Person” is defined as “any natural person, partnership, corporation, association, or *other legal entity*, including any person acting under color or authority of State law.” *Id.* § 57b-1(a)(6) (emphasis added). Regardless of whether CLF is a “corporation” under Section 4, it certainly is a “legal entity.” CLF does not argue otherwise.

As prior Commission decisions have recognized, the Commission’s investigatory authority under Section 20 is broader than its enforcement authority under Section 5. For example, the Commission “can require production of material from an entity that is not subject to

¹¹ Pet. at 4.

¹² Pet. at 5-7.

¹³ Section 20(c)(1) provides: “Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), or to antitrust violations, the Commission may, before the institution of any proceedings under this subchapter, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.” 15 U.S.C. § 57b-1(c)(1).

the Commission’s enforcement authority if that material furthers the investigation of possibly illegal conduct by entities that are subject to the agency’s jurisdiction, such as for-profit telemarketers making calls on [the CID recipient’s] behalf.” *In re Feature Films for Families*, 150 F.T.C. 866, 870 (2010). And the Commission “also possesses the authority to investigate whether its jurisdiction extends to [the CID] recipient.” *Id.* at 871; *see also In re March 19, 2014 Civil Investigative Demand Issued to Police Protective Fund, Inc.*, 157 F.T.C. 1913, 1919-20 (2014).¹⁴

Since there is no dispute that CLF is a legal entity, it is a “person” within the meaning of Section 20 of the FTC Act and may properly be issued a CID.

B. The Information Sought in the CID Is Needed To Enable the Commission To Determine Whether CLF Is Operated as a Nonprofit.

CLF also argues that it is “unquestionable” that it is “a charitable non-profit corporation” that is outside of the Commission’s enforcement jurisdiction.¹⁵ It has submitted evidence supporting this assertion in the form of a declaration from CLF’s executive director with voluminous exhibits attached.¹⁶ But this argument puts the cart before the horse. The Commission cannot determine whether CLF is truly operated as a nonprofit, and hence is outside Section 4’s definition of “corporation,” without reviewing the information requested in the CID.

The law is clear that just because a corporation is organized as a nonprofit entity under state law and has been granted tax-exempt status does not mean that it is not a “corporation” under Section 4. *See Community Blood Bank*, 405 F.2d 1018-19 (“[W]e do not mean to hold or even suggest that the charter of a corporation and its statutory source are alone controlling.”); *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 460 (D. Md. 2004) (“Although AmeriDebt is incorporated as a non-stock corporation with tax-exempt status, the Court finds this insufficient to insulate it from the regulatory coverage of the FTC Act.”). It is equally clear that the Commission has the power to investigate the facts to determine whether an organization is subject to its regulatory jurisdiction.¹⁷ Thus a party “may not normally resist [investigative process] on the grounds that the agency lacks regulatory jurisdiction.” *FTC v. Ken Roberts Co.*,

¹⁴ CLF argues that *Police Protective Fund* was wrongly decided, and that the CID recipient there did not “bring the inherent limitations of the Commission’s jurisdiction to issue CIDs … to the Commission’s attention.” Pet. at 7. But as discussed above, the plain text of Section 20 provides that the Commission may issue a CID to any legal entity, regardless of whether it is a “corporation” under Section 4.

¹⁵ Pet. 9.

¹⁶ See Pet. at 14-269. These exhibits include (1) certificates of amendment to CLF’s articles of incorporation, (2) a letter from the IRS confirming CLF’s status as a tax-exempt entity under Section 501(c)(3), (3-6) lists of children who received iPads, Hope Baskets, wigs, or Wish Baskets from 2019 through August 24, 2022, (7) requests and appreciation letters from children, hospital social workers, and others, (8) and CLF’s Form 990s for 2019 to 2021.

¹⁷ See, e.g., *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973) (agency’s “jurisdiction to determine whether it has jurisdiction is as essential to its effective operation as is a court’s like power.”); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (where evidence sought in agency subpoena “was not plainly incompetent or irrelevant to any lawful purpose of the [agency] … it was the duty of the District Court to order its production.”); *Fed. Mar. Comm’n v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975) (“[E]ach independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated.”).

276 F.3d 583, 586 (D.C. Cir. 2001) (quoting *FTC v. Ernsthal*, 607 F.2d 488, 490 (D.C. Cir. 1979)).

CLF acknowledges that its corporate form and tax-exempt status are not determinative of whether it is truly a nonprofit organization. It cites the two-pronged test the Commission has employed for analyzing this question, which looks to both the source and destination of an organization's income.¹⁸ See *In re College Football Ass'n*, 117 F.T.C. 971, 998 (1994) ("The not-for-profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests."); see also *In re California Dental Ass'n*, 121 F.T.C. 190, 290 (1996) ("[A]n organization that falls short on either prong comes within our jurisdiction."), aff'd, 128 F.3d 720 (9th Cir. 1997), and aff'd in relevant part, 526 U.S. 756, 765-69 (1999). CLF argues that the evidence it has submitted demonstrates that it satisfies this test.¹⁹

The problem with this argument is that the Commission cannot make that determination at this stage of proceedings based solely on the evidence that CLF has voluntarily supplied in an effort to avoid compliance with the CID. As we explained in *Police Protective Fund*, "the Commission is not required to take at face value an organization's claim that it is a charitable organization and can require it to produce documents and other information to enable the Commission to make that determination for itself." *Police Protective Fund*, 157 F.T.C. at 1916. CLF "cannot foreclose that inquiry simply by asserting that, if conducted, the inquiry would yield facts favorable to [it]." *Id.* at 1917.

Here, as in *Police Protective Fund*, the Commission will conduct a careful examination to determine whether CLF is in fact carrying on business "for its own profit or that of its members." 15 U.S.C. § 44. The Commission may take into account CLF's form of organization and tax-exempt status, but as discussed above those factors are not dispositive. Rather, the Commission "will conduct a fact-intensive inquiry into how the corporation actually operates," including examination of "the primary purpose of the organization, the extent to which funds or benefits may have been conferred on related for-profit companies or individuals, and the extent to which the organization may have been used by individuals or for-profit entities as a device to seek monetary gain." *Police Protective Fund*, 157 F.T.C. at 1917-18. For purposes of this inquiry, '[t]he extent to which an entity confers benefits on private interests is relevant even if those benefits are not in the form of 'profits' as that term is traditionally understood.' *Id.* at 1918.²⁰

¹⁸ Pet. at 8.

¹⁹ Pet. at 9-11.

²⁰ See also *FTC v. Gill*, 183 F. Supp. 2d 1171, 1184-85 (C.D. Cal. 2001) (company was "not a legitimate nonprofit organization" where evidence showed individual defendant lived in corporate office, paid personal expenses from corporate account, and otherwise commingled assets); *In re Ohio Christian Coll.*, 80 F.T.C. 815, 848 (1972) ("Profit, for the purpose of Section 4 of the Federal Trade Commission Act, is not limited to dividends, gains or direct reward."); cf. *Liu v. SEC*, 140 S. Ct. 1936, 1946, 1950 (2020) (expenses such as "extraordinary salaries" may amount to "dividends of profit under another name.").

In sum, the Commission is not required simply to accept CLF's representation that it is a nonprofit based on CLF's selective presentation of evidence. It needs the information requested in the CID to determine whether CLF is truly operated as a nonprofit such that it is not a "corporation" within the meaning of Section 4.

III. CONCLUSION

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Quash Civil Investigative Demand filed by Childhood Leukemia Foundation, Inc., be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED that Childhood Leukemia Foundation, Inc., comply in full with the Commission's Civil Investigative Demand on or before October 31, 2022.

By the Commission.

April J. Tabor
Secretary