

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

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

In the Matter of)
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)
SEPTEMBER 11, 2023 CIVIL INVESTIGATIVE DEMAND)
ISSUED TO CHILDHOOD LEUKEMIA FOUNDATION,)
INC.) **Matter No. 222 3073**
)
)

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

By KHAN, Chair:

Childhood Leukemia Foundation, Inc. (“CLF”) has filed a petition (styled as an amended petition) to quash a Civil Investigative Demand (“CID”) issued by the Commission on September 11, 2023.¹ The Commission previously denied a petition by CLF to quash an earlier CID, *see In re August 11, 2022 Civil Investigative Demand Issued to Childhood Leukemia Corporation*, No. 222 3073 (October 19, 2022), and many of CLF’s arguments in the instant petition simply rehash arguments that the Commission previously found to be meritless.²

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.³ 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.”⁴ 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

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Baskets,” which contain age-appropriate items to help children learn and cope with anxiety and boredom associated with cancer treatment and hospitalization.⁵

In recent years, more than 99% of CLF’s revenue has come from public charitable donations obtained through fundraisers and solicitations.⁶ 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.⁷ 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.⁸ 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.⁹

The Commission is conducting an investigation to determine whether CLF and/or its paid fundraiser, Innovative Teleservices, Inc. (“Innovative”), 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 programs described to them. The Commission is also investigating whether Innovative is violating the Commission’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, by contacting potential donors using prerecorded messages (aka robocalls) and whether CLF may be liable for assisting and facilitating these practices.

On September 11, 2023, 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-1.¹⁰ The CID states that the subject of the investigation is whether CLF or Innovative “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.”¹¹ The CID seeks an investigational hearing of a CLF designee on a variety of topics related to CLF’s governance and operations, including fundraising practices and compliance with the TSR. The CID set November 16, 2023, as the date for the hearing. After meeting and conferring with Commission staff, CLF timely filed the instant petition on October 3, 2023, asking the Commission to quash the CID in its entirety.

⁵ Pet. at 20-22.

⁶ Pet. at 22.

⁷ Pet. at 35, 41, 75, 81, 117, 123.

⁸ Pet. at 126.

⁹ Pet. at 123.

¹⁰ Pet. at 156-67.

¹¹ Pet at 158.

II. ANALYSIS

CLF reiterates the same argument that the Commission found meritless in denying CLF's prior motion to quash, *i.e.*, that because it is formally organized as a non-profit corporation, the Commission lacks authority to issue and serve the CID.¹² 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.

As explained in the Commission's prior decision, CLF's arguments fail for two reasons. First,

corporation but any kind of “legal entity.” Regardless of whether CLF is a “corporation” under Section 4, it certainly is a legal entity.

CLF argues that the Commission’s reliance on the statutory term “other

example, the Commission “can require production of material from an entity that is not subject to 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 Fams., Inc.*, 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).²⁰ Both of those circumstances apply here: the Commission is investigating potentially illegal conduct by Innovative, and it is also investigating whether CLF is properly subject to the Commission’s enforcement jurisdiction.

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.²¹ It has submitted evidence supporting this assertion in the form of a declaration from CLF’s executive director, which attaches certificates of amendment to CLF’s articles of incorporation, a letter from the IRS stating that its records show CLF’s is a tax-exempt entity, and CLF’s Form 990s for 2019 to 2021.²² But CLF’s argument puts the cart before the horse. The Commission cannot determine whether CLF is truly operated as a nonprofit without obtaining the information requested through 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 Cmty. 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.²³ Thus a party “may not normally resist [investigative process] on the ground[s] that

²⁰ 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 8 n.2. 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. CLF also argues that *Feature Films* is inapplicable because it is the subject of the investigation. That argument ignores the fact that Innovative is also a subject of the investigation. Pet. at 8-9 n.2. Thus, even if CLF were determined to be a true nonprofit, the CID would still be proper.

²¹ Pet. 12.

²² *See* Pet. at 19-154.

²³ *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

the agency lacks regulatory jurisdiction.” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (quoting *FTC v. Ernsthil*, 607 F.2d 488, 490 (D.C. Cir. 1979).

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 1918.²⁷

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.

C. CLF’s Constitutional Arguments Lack Merit.

CLF argues that Section 20 violates the Due Process Clause of the Fifth Amendment because a party seeking to modify or set

about the Commission's administrative enforcement proceedings are thus premature and not