UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	
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

[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] On June 2, 2023, CLF filed suit against the Commission seeking a declaration that the Commission's investigation is unlawful and that the prior CID is void. *Childhood Leukemia Fdn., Inc. v. FTC*, No. 3:23-cv-03034 (D.N.J.). The Commission (through the Department of Justice) served a motion to dismiss on CLF on September 22, 2023. On October 19, 2023, shortly before its response to that motion was due, CLF voluntarily dismissed that action.
[3] *See* Pet. at 19, 25-33.
[4] *E.g.*, Pet. at 75

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, 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. 15 U.S.C. § 57b-1(a)(6), (c)(1). Second, 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. *See, e.g.*, *Cmty. Blood Bank of Kansas City Area v. FTC*, 405 F.2d 1011, 1018-19 (8th Cir. 1969). 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. Although CLF purports to identify flaws in the Commission's prior reasoning, none of its arguments have merit.

Additionally, CLF raises two constitutional arguments that were not raised in its prior petition. CLF argues that the procedures for challenging a CID deny it due process and that the Commission's structure violates Article II because the Commissioners are not removable by the President at will. Neither argument has any merit.

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.[13] As the Commission explained in its prior decision, 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).[14] "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). CLF argues that the term "corporation," as used in this definition, must have the meaning set forth in Section 4.[15] That is true but irrelevant because "person" is defined to include not just a

[12] Pet. at 7-13

[13] Pet. at 4-11.

[14] 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).

[15] Pet. at 10.

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 legal entity" is "misplaced."[16] It attempts to bolster this position with a misleading citation to *Community Blood Bank*. According to *CLF*, *Community Blood Bank* supports the proposition that "'[T]he distinction made in the [FTC] Act between corporations acting for profit and nonprofit corporations would be erased if all the Commission had to do, in order to obtain [authority]' to issue and serve CIDs to non-profit corporations was to just classify them as 'other legal entities.'"[17] Although the first part of the sentence is an accurate quotation from *Community Blood Bank*, it is truncated and taken out of context. The Eighth Circuit said nothing about the "other legal entity" language—nor could it have, since Section 20 was not enacted until 1980 and *Community Blood Bank* was decided 11 years earlier. Rather, the court held that "the distinction made in the Act between corporations acting for profit and nonprofit corporations would be erased if all the Commission had to do, in order to obtain jurisdiction, *was to name the officers, directors and other personnel of a nonprofit corporation as the respondents*." *Cmty. Blood Bank*, 405 F.2d at 1021 (emphasis added). Nothing in this holding suggests that the Commission can or should ignore the plain text of Section 20 authorizing service of a CID on a "corporation" or "other legal entity."

CLF also proffers a misleading citation to *FTC v. Winters National Bank & Trust Co.*, 601 F.2d 395 (6th Cir. 1979). According to CLF, *Winters* holds that "Section 20 'is not an independent grant of authority or source of substance [*sic*] power for the Commission."[18] *Winters*, however, said nothing about Section 20 because it was decided the year before Section 20 was enacted. *Winters* dealt with the scope of the Commission's authority under Section 9 of the FTC Act, 15 U.S.C. § 49, which authorizes the issuance of subpoenas. The court held that the Commission properly issued a subpoena for documents to a bank, which are not subject to the Commission's investigative authority, *see* 15 U.S.C. § 46(a), because the bank was not the subject of the Commission's investigation. *Winters*, 601 F.2d at 401-04.

To the extent CLF is arguing that the logic of *Winters* prevents issuance of a CID to an entity formally organized as a nonprofit corporation, the argument fails for multiple reasons. First, this case involves a CID issued pursuant to Section 20, not a subpoena under Section 9. The two procedures are distinct, and they are governed by different statutory provisions. Second, whether an entity is a "bank" is a straightforward matter which can be determined by looking at its charter, but as discussed in more detail below, whether an entity is a nonprofit turns on how it is actually operated in practice, which cannot necessarily be determined without investigation. Finally, even if the rule of *Winters* did apply and CLF were determined to be a true nonprofit, the CID would still be proper because the subject of the investigation also includes potential violations by Innovative, a for-profit entity.[19]

Prior Commission decisions have recognized that the Commission's investigatory authority under Section 20 is broader than its enforcement authority under Section 5. For

[16] Pet. at 11.
[17] Pet. at 11.
[18] Pet. at 8 (quoting *Winters*, 601 F.2d at 400).
[19] Pet. at 158.

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

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[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 facts requisite to determining whether it has jurisdiction over the matter sought to be investigated.").

the agency lacks regulatory jurisdiction." *FTC v. Ken Roberts Co.*, 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.[24] *See In re Coll. 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.[25]

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 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." 157 F.T.C. at 1916. CLF "may not foreclose that inquiry simply by asserting that, *if* conducted, the inquiry would yield facts favorable to [it]." *Id.* at 1917.

CLF argues that the Commission has become "fixated on CLF's telemarketing fundraising expenses."[26] While CLF is correct that there is nothing inherently illegal about a nonprofit utilizing telemarketing to raise money, CLF's own records in this case show that more than 90% of CLF's fundraising revenue from 2019 to 2021 was spent on fundraising and employee compensation. This raises serious questions about whether CLF is in fact being operated as a nonprofit and whether it is deceiving consumers as to how their donations will be used.

Here, as in *Police Protective Fund*, the Commission will conduct a careful examination to determine whether CLF is carrying on business "for its own profit or that of its members." 15 U.S.C. § 44. The Commission may consider 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 other 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

[24] Pet. at 11-12.
[25] Pet. at 9-11.
[26] Pet. at 14.

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 aside a CID must first petition the Commission for relief. *See* 15 U.S.C. § 57b-1(f). According to CLF, this procedure "deprives CLF of its Fifth Amendment due process right to a fair trial before a neutral judge appointed in accordance with Article III of the Constitution with the procedural protections of a federal court."[28]

This argument fails because "CIDs are not self-enforcing." *FTC v. O'Connell Assocs., Inc*., 828 F. Supp. 165, 168 (E.D.N.Y. 1993). If CLF does not comply with the CID, the Commission will be required to petition a court to enforce the subpoena. *See* 15 U.S.C. § 57b-1(e). Should that happen, CLF will have a hearing before an Article III judge. The petition to quash procedure simply functions as an exhaustion requirement; a CID recipient who fails to raise objections in a petition to quash before the agency generally waives those objections if the Commission later seeks to enforce the CID in court. *See O'Connell*, 828 F. Supp. at 168-170. CLF cites nothing to suggest that exhaustion requirements, which are commonplace in agency practice, violate due process.

Furthermore, CLF's arguments appear to confuse Commission investigations with the Commission's administrative enforcement proceedings.[29] At this point, the Commission is merely conducting an investigation. It has not made any determination that there is reason to believe that a violation of the FTC Act or the TSR has occurred or is occurring. If the Commission ultimately determines that there is sufficient evidence to warrant filing of an enforcement complaint, it will then consider whether to sue in district court, *see* 15 U.S.C. §§ 53(b), 57b, or to issue an administrative complaint, *see* 15 U.S.C. § 45(b). CLF's complaints

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[27] *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 (2020) (expenses such as "extraordinary salaries" may amount to "dividends of profit under another name").

[28] Pet. at 15.

[29] Pet. at 15. CLF cites Justice Gorsuch's recent statement that "some say the FTC has not lost an in-house proceeding in 25 years." *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890, 918 (2023) (Gorsuch, J., concurring). Justice's Gorsuch's statement is not entirely accurate. *See, e.g.,* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. Comp. L. & Econ. 623, 630-35 (2016) (surveying Commission decisions from 1977 to 2016). Moreover, the Supreme Court has repeatedly held that the combination of investigative, prosecutorial, and adjudicative functions within a single administrative agency does not violate due process. *Withrow v. Larkin*, 421 U.S. 35, 47, 56 (1975); *see also FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948). Commission administrative enforcement proceedings are conducted in strict compliance with the Administrative Procedure Act, which among other things prohibits *ex parte* communications between the Commissioners and the agency staff who prosecute the complaint. *See* 5 U.S.C. § 554(d)(2); 16 C.F.R. § 4.7(b).

about the Commission's administrative enforcement proceedings are thus premature and not relevant to the question of whether the CID should be quashed.

CLF next argues that the structure of the Commission violates Article II because the Commissioners are removable only for cause. This argument is squarely foreclosed by *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld the for-cause removal requirement. *Id.* at 626-32. Contrary to CLF's argument, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), did not overrule *Humphrey's Executor.* To the contrary, the Supreme Court made clear that "we do not revisit *Humphrey's Executor* or any other precedent today." *Id.* at 2206.

Furthermore, even if the Supreme Court were to revisit *Humphrey's Executor* in some future case, that would not by itself invalidate the Commission's CID. In *Collins v. Yellin*, 141 S. Ct. 1761 (2021), the Supreme Court held that where agency officials were properly appointed, an unconstitutional restriction on removal does not void the agency's actions unless the removal restriction actually caused harm. *Id.* at 1787-88. Harm might be shown, for example, if the President "had attempted to remove [an agency official] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," or "had made a public statement expressing displeasure with actions taken by [an agency official] and had asserted that he would remove [the official] if the statute did not stand in the way." *Id.* at 1789. Here, CLF has not attempted to make any showing of harm resulting from the President's inability to remove Commissioners other than for cause.

CLF's constitutional arguments thus provide no basis for quashing the subpoena.

III. CONCLUSION

For all the foregoing reasons, **IT IS HEREBY ORDERD 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., shall comply in full with the Commission's Civil Investigative Demand and shall appear ready to testify on the specified topics at the designated location on November 16 at 9 a.m. PT, or at other such date, time, and location as FTC staff may determine.

By the Commission.