

Interlocutory Orders, Etc.

IN THE MATTER OF

ARDAGH GROUP, S.A.;
SAINT-GOBAIN CONTAINERS, INC.;
AND
COMPAGNIE DE SAINT-GOBAIN

Docket No. 9356. Order, June 17, 2014

Letter approving application to divest the Anchor Glass Business to Glass Container Acquisition LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Wayne Dale Collins, Esq.
Shearman & Sterling LLP

Dear Mr. Collins:

This letter responds to the Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC (“Anchor Glass Application”) filed by Ardagh Group S.A. (“Ardagh”) on April 24, 2014. The Anchor Glass Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Ardagh’s proposed divestiture of the Anchor Glass Business to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P. The Application was placed on the public record for comments until May 28, 2014, and no comments were received.

After consideration of the proposed divestiture as set forth in Ardagh’s Anchor Glass Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Ardagh’s Anchor Glass Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting and Commissioner McSweeney not participating.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

AUTO DEALERS

FTC File No. 131 0206 – Decision, April 21, 2014

RESPONSE TO ZIEGLER SUPERSYSTEMS, INC.'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND DATED FEBRUARY 11, 2014

By WRIGHT, Commissioner:

Ziegler Supersystems, Inc. (“ZSS”) has filed a petition to quash or limit the civil investigative demand (“CID”) issued by the Federal Trade Commission on February 11, 2014. For the reasons stated below, the petition is denied.

I. BACKGROUND

TrueCar.com matches potential automobile purchasers and dealers and gives consumers pricing information about specific vehicles. Before February 2012, TrueCar matched buyers and sellers through online reverse auctions. A user would specify a desired car make and model, along with a zip code. In response, TrueCar provided “leads” that identified participating local dealers with the car in stock, together with a price bid by each dealer. The website then generated a coupon stating that the user was entitled to buy the desired car at the price quoted by the dealer. The website also purported to provide the dealer’s cost for the car after rebates, the factory invoice price, the average market price, and the manufacturer’s suggested retail price.

This business model came to an end in February 2012, after thousands of dealers ended their business relationships with TrueCar during the previous few months. At that point, the company announced that it would eliminate the reverse auctions and dealer cost disclosures. Commission staff is now investigating whether dealers, consultants, and other firms in the retail automotive industry violated Section 5 of the FTC Act, 15

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U.S.C. § 45 (as amended), by agreeing that they would collectively refuse to participate in TrueCar’s reverse auctions.

As part of this investigation, the Commission has sought information from James Ziegler, an industry consultant who is the owner and President of petitioner ZSS. Mr. Ziegler advises dealers nationwide, organizes management seminars, speaks at industry conventions, and writes opinion pieces for trade periodicals and blogs.¹ In the months preceding TrueCar’s announcement that it was changing its business model, Mr. Ziegler appears to have contributed unfavorable blog posts and comments about TrueCar’s reverse-auction business model to the industry blogs DealerElite and Automotive Digital Marketing. Mr. Ziegler himself states that he encouraged “thousands” of dealers and “industry influencers” to end their relationships with TrueCar,² and that he was recognized for “spear-heading the Anti-TrueCar movement.”³ Staff is now investigating whether he may have helped orchestrate an unlawfully collusive agreement among dealers to suppress price competition.

On February 11, 2014, pursuant to a Commission resolution authorizing the use of compulsory process,⁴ the FTC issued a CID to ZSS seeking, *inter alia*, the communications of its employees (including Mr. Ziegler) with dealers, manufacturers, consultants, and trade associations concerning TrueCar’s effects on the retail price of automobiles and any decisions by dealers to terminate TrueCar’s services. The CID’s initial return date (February 20,

¹ Pet. 2. Although ZSS’s Petition to Quash refers to itself as a “media publications company,” the company’s website (<http://www.zieglersuper.com>) promotes Mr. Ziegler’s consulting services, seminars, and speaking engagements.

² James A. Ziegler, TRUE CAR and ZAG Cyber Bandits, Parasites or Good for the Car Business?, Dec. 3, 2011 comment, DealerElite (Nov. 27, 2011), available at http://www.dealerelite.net/profiles/blog/show?id=5283893%3ABlogPost%3A250154&commentId=5283893%3AComment%3A254205&xg_source=activity.

³ *Id.* at Feb. 9, 2012 comment.

⁴ See Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 1310206 (Jan. 17, 2014).

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2014) was extended to March 20, 2014. During a phone call on March 18, 2014, counsel for ZSS first informed Commission staff that ZSS intended to withhold documents responsive to certain CID specifications on the ground that they were privileged under state and federal laws protecting journalists. ZSS's counsel did not voice any other specific issues with the CID at that time.

On March 20, 2014, ZSS produced 138 pages of documents and filed this petition to limit or quash.

II. ANALYSIS

A. The Applicable Legal Standards

Agency 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 inquiry, as defined by the Commission's investigatory resolution.⁵ Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and need not even have a belief that wrongdoing has actually occurred.⁶ As the D.C. Circuit has explained, "[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally, as it was in the Commission's resolution here."⁷ Furthermore, if the recipient of compulsory process asserts an

⁵ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

⁶ See, e.g., *Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants an assurance that it is not.").

⁷ *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

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evidentiary privilege, it has the burden to establish that the privilege applies.⁸

ZSS argues that the CID's demands for its TrueCar-related documents should be quashed on the grounds that they violate the journalist's privilege, the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa(a)-(b), and the Georgia reporter's shield law. Additionally, ZSS asserts that the Commission resolution was overbroad; the CID seeks irrelevant material concerning ZSS's income sources, personnel, and document retention policies; and the CID's demands for ESI production are unduly burdensome. These contentions lack merit.

B. ZSS's Privilege Claims Are Without Merit

Most appellate courts recognize a qualified privilege that protects journalists from disclosing in civil proceedings information that they obtained while reporting the news.⁹ A person who claims the privilege must bear the burden to show that he or she (1) gathered the material with the intent to disseminate information to the public, *and* (2) did so with journalistic independence from the subject matter.¹⁰ Even when the privilege applies, it must give way if the party seeking the material demonstrates that the material is highly relevant, necessary to the

⁸ *CFTC v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 32 (D.D.C. 2005) (*McGraw-Hill I*); *CFTC v. McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 50 (D.D.C. 2007) (*McGraw-Hill II*).

⁹ Although most courts of appeals have recognized the privilege in some form, they have taken conflicting positions about whether it is mandated by the First Amendment, *see Price v. Time, Inc.*, 416 F.3d 1327, 1342-43 (11th Cir. 2005), or is grounded in federal common law, *see Riley v. City of Chester*, 612 F.2d 708, 714-16 (3d Cir. 1979). The Seventh Circuit, by contrast, concludes that “rather than speaking of privilege, courts should simply make sure” that a subpoena directed to a journalist be “reasonable in the circumstances, which is the general criterion for judicial review of subpoenas.” *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). *But see Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (journalists not immune from testifying about confidential sources before a criminal grand jury).

¹⁰ *See, e.g., Chevron Corp. v. Berlinger*, 629 F.3d 297, 307-08 (2d Cir. 2011); *von Bulow v. von Bulow*, 811 F.2d 136, 142-45 (2d Cir. 1987).

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investigation, and unavailable from other sources.¹¹ When, as here, a federal agency is investigating possible law violations, the privilege is “more qualified” than it would be in private civil litigation, in light of the “public interest” in combating harms to consumers, such as “artificially inflated prices.”¹²

Here, ZSS has failed to establish that the journalist’s privilege shields its TrueCar-related documents from disclosure. Commission Rule 2.10(a)(1) requires that a Petition to Quash “set forth all assertions of protected status . . . including all appropriate arguments, affidavits, and other supporting documentation.”¹³ ZSS, however, did not submit credible evidence that Mr. Ziegler acted primarily for newsgathering purposes, nor did it provide any evidentiary support regarding the scope and nature of the documents it seeks to protect under the journalist’s privilege. Accordingly, we conclude that Mr. Ziegler has not shown that he was engaged in newsgathering and, in any event, has not established that he exercised the requisite journalistic independence. Moreover, even if he had made both of those showings, any privilege claim would yield to FTC staff’s *bona fide* need for these documents because they contain information that lies at the heart of the investigation and is not reasonably available from other sources.

1. Mr. Ziegler was not engaged in independent newsgathering

The journalist’s privilege does not extend “to any person with a manuscript, a web page or a film.”¹⁴ It applies only if the person claiming the privilege “demonstrate[s], through competent evidence,” that he or she intended to use the claimed protected material “to disseminate information to the public and that such

¹¹ See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

¹² See, e.g., *McGraw-Hill I*, 390 F. Supp. 2d at 33 (“The CFTC is a federal agency authorized by Congress to investigate violations of law, a posture quite distinct from that of a private litigant seeking personal redress.”).

¹³ 16 C.F.R. § 2.10(a)(1).

¹⁴ *Madden*, 151 F.3d at 129.

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intent existed at the inception of the newsgathering process.”¹⁵ The privilege does not protect those who collect information “for personal reasons, unrelated to dissemination of information to the public,” even if such persons later decide to publish what they have learned.¹⁶ Instead, the privilege is reserved for “persons whose purposes are those traditionally inherent to the press; persons gathering news for publication.”¹⁷

ZSS asserts that the journalist’s privilege protects Mr. Ziegler’s “information and documents relating to TrueCar” because he intended to “prepar[e] articles” on this subject.¹⁸ However, a general intention to publish articles is not enough; such intention must have existed at the inception of the newsgathering process and be proven through competent evidence. ZSS has not shown that Mr. Ziegler spoke with industry members about TrueCar for journalistic or investigatory purposes. For example, ZSS has not provided a sworn declaration from Mr. Ziegler affirming that his primary purpose was simply to inform the public about TrueCar’s business relationships or its effects on the price of cars. Instead, Mr. Ziegler’s blog posts state that his purpose was to encourage dealers to “Cancel your dealership’s Affiliation with TrueCar” and “Bring This Monster to It’s [sic] Knees” in order to prevent the price of automobiles from falling (11/27/11, DealerElite and Automotive Digital Marketing).¹⁹ Statements such as this suggest that Mr. Ziegler, who describes himself as an “advis[or to] more than 500 [car] dealerships throughout the country,”²⁰ was functioning more like an industry facilitator than like a journalist. Although the purpose

¹⁵ *von Bulow*, 811 F.2d at 144.

¹⁶ *Id.* at 143; *see also Chevron*, 629 F.3d at 307.

¹⁷ *Madden*, 151 F.3d at 129-30; *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill. 1998); *Pinkard v. Johnson*, 118 F.R.D. 517, 521 (M.D. Ala. 1987).

¹⁸ Pet. 8.

¹⁹ Ziegler, *supra* note 2, at Nov. 27, 2011 comment.

²⁰ Pet. 2.

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of our investigation is to learn all the relevant facts, the facts we have before us now tend to discredit any claim that Mr. Ziegler was engaged in genuine journalistic activities.

Even if ZSS had shown that Mr. Ziegler acted with a newsgathering purpose, it also failed to meet its additional burden to demonstrate his financial and editorial independence from the subject matter. “A person (or entity) that undertakes to publish commentary but fails to establish that its research or reporting [was] done with independence from the subject of the reporting either has no press privilege at all, or in any event, possesses a privilege that is weaker and more easily overcome.”²¹ Although ZSS has acknowledged that Mr. Ziegler served as an advisor to car dealerships, it has not disputed the natural inference that Mr. Ziegler was compensated for those business services. To the contrary, ZSS has not identified its income sources in response to the CID, and in fact seeks to quash the CID’s request for such information.²²

2. *The FTC has an investigative need for Mr. Ziegler’s TrueCar materials*

Even if ZSS had met its burden of demonstrating that the journalist’s privilege applies, any such privilege would nonetheless yield to the FTC’s overriding need for ZSS’s TrueCar-related materials.

When the government investigates potential federal law violations, it has greater entitlement to journalistic resources than a private civil litigant. In *Branzburg v. Hayes*, 408 U.S. 665, at 701 (1972), the Supreme Court ruled that journalists must disclose their confidential sources when subpoenaed before a grand jury, in light of that institution’s “role . . . as an important instrument of effective law enforcement,” and its far-reaching “investigatory

²¹ *Chevron*, 629 F.3d at 309. “The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality.” *Id.* at 308.

²² See Part II.D.2, *infra*.

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function.” Although it is a civil enforcement agency, the FTC, like a grand jury, has a broad investigatory function that advances the public interest in effective law enforcement. As courts have held, the journalist’s privilege is even more “qualified” than it is in private civil litigation if “the party seeking disclosure is the government pursuing an enforcement matter.”²³

Here, any First Amendment interests ZSS might claim in its TrueCar-related material must yield to staff’s investigatory needs because that material is unquestionably (1) highly relevant, (2) necessary to a full investigation of the issues, and (3) not reasonably available from other sources. In particular, that material is critical to the pending investigation into whether dealers and consultants, including Mr. Ziegler, orchestrated a collusive refusal to deal with TrueCar, an innovative new industry entrant:

- Specification Three seeks ZSS’s communications related to the TrueCar National Dealer Council, which was established after TrueCar announced it was changing its business model. These documents may help determine whether the Dealer Council developed, implemented, or benefited from a potential concerted refusal to deal, and may allow staff to evaluate any justifications that the dealers and consultants might offer to defend their conduct.
- Specification Four seeks ZSS’s communications with TrueCar. These materials may clarify whether dealers and consultants entered into a concerted refusal to deal with TrueCar, whether any threats were issued to the company,

²³ *McGraw-Hill I*, 390 F. Supp. 2d at 33 (observing that the CFTC’s interests in pursuing an energy price manipulation inquiry are “more akin to those in a criminal case than a purely civil matter”); *see also McGraw-Hill II*, 507 F. Supp. 2d at 51 (citing the CFTC’s “significant public interest” in investigating law violations as a reason for limiting the scope of the journalist’s privilege). *Accord, Univ. of Pa. v. EEOC*, 493 U.S. 182, 194 (1990) (rejecting university’s claim that it had a First Amendment privilege to withhold academic tenure review files from the EEOC, since this “would place a substantial litigation-producing obstacle in the way of the Commission’s efforts to investigate and remedy alleged discrimination”).

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and whether the actions of dealers and consultants influenced TrueCar's decision to change its business model.

- Specification Five seeks ZSS's internal and external communications regarding TrueCar's services, the effect or perceived effect of TrueCar's reverse auctions on automobile prices, and any decisions by dealers to terminate their TrueCar affiliations. Such information may help Commission staff assess whether competing dealers engaged in direct communications regarding TrueCar, any anticompetitive effects of such communications, and any anticompetitive motive for a refusal to deal that might contradict purported justifications offered by dealers and consultants.

In addition, much of the information the CID seeks is not reasonably available from other sources. Mr. Ziegler claimed that he spoke with "thousands" of auto dealers regarding TrueCar,²⁴ but he only identified a few by name. Although Commission staff is seeking relevant information from other sources, only Mr. Ziegler can identify all those with whom he communicated about TrueCar and what was said. Therefore, such material is unavailable from other sources. Although Specification Four seeks ZSS's communications with a known entity, TrueCar, we conclude that this specification will likely reveal information unavailable from another source, given the strong possibility that responsive communications have been lost or deleted with the passage of time. Additionally, even if certain information responsive to Specification Four were available from another source, we decline to limit or quash this specification because ZSS has not established that Mr. Ziegler is eligible to claim the journalist's privilege.

In sum, we reject ZSS's journalist's privilege claim because (1) Mr. Ziegler has not satisfied his burden to show that he acted as an independent journalist; and (2) the FTC's need for the material would outweigh any First Amendment interests at stake.

²⁴ Ziegler, *supra* note 2, at Dec. 3, 2011 comment.

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Finally, ZSS's other privilege claims are likewise without merit. ZSS's Georgia shield law is not relevant because federal common law governs evidentiary privileges in investigations of potential violations of federal law.²⁵ The Privacy Protection Act is inapposite, too, because that statute "applies only when there is a criminal investigation or prosecution."²⁶

C. ZSS's Remaining Arguments Lack Merit

ZSS also asserts that the CID should be quashed because (1) the resolution authorizing compulsory process was "overly expansive"; (2) the CID seeks irrelevant information; and (3) the CID's request for electronically stored information would cause undue burden.²⁷ As a preliminary matter, ZSS failed to raise these arguments with Commission staff in any of its four teleconferences with staff to date. Commission Rule 2.7(k) provides, "The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process."²⁸

A CID recipient's obligation to meet and confer with Commission counsel is an essential component of the Commission's procedures. It requires the recipient to give Commission staff an opportunity to resolve disputes in an efficient manner and thus prevents the investigation from being

²⁵ See, e.g., *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

²⁶ *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 567 (6th Cir. 2007). Under the PPA, "the government, in connection with the investigation or prosecution of a criminal offense, is prohibited from searching for or seizing any documentary. . . materials 'possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.'" *United States v. Any & All Radio Station Transmission Equip.*, 218 F.3d 543, 551 n.4 (6th Cir. 2000) (quoting 42 U.S.C. § 2000aa(b)).

²⁷ Pet. 9-10.

²⁸ 16 C.F.R. 2.7(k).

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sidetracked by avoidable or inconsequential disagreements. ZSS's failure to satisfy the meet and confer requirements is an adequate and independent reason to deny ZSS's arguments concerning relevance, burden, and the breadth of the authorizing resolution.

In any event, even if ZSS had satisfied the meet and confer requirement in Commission Rule 2.7(k), ZSS's petition should be denied because it provides no basis for ZSS to refuse to produce the documents required by the CID.

1. The Commission resolution was sufficiently specific

ZSS asserts, but without explanation, that the Commission resolution authorizing compulsory process in this investigation was "over-broad" and "outside the FTC's authority."²⁹ Under the FTC Act, a CID is proper when it "state[s] the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 15 U.S.C. § 57b-1(c)(2). It is well-established that the resolution authorizing process provides the requisite statement of the purpose and scope of the investigation.³⁰ The resolution may define the investigation generally, need not state the purpose with specificity, and need not tie it to any particular theory of violation.³¹

Resolution File No. 1310206 authorizes the use of compulsory process:

[t]o determine whether firms in the retail automobile industry, including automobile dealers

²⁹ Pet. 10.

³⁰ *Invention Submission*, 965 F.2d at 1088, 1090; *accord Texaco*, 555 F.2d at 874; *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979).

³¹ *Invention Submission*, 965 F.2d at 1090; *Texaco*, 555 F.2d at 874 & n.26; *FTC v. Nat'l Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (citing *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1988)).

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and industry consultants, may be engaging in, or may have engaged in, conduct violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by agreeing to restrain competition, including by agreeing to refuse to deal with TrueCar, Inc.³²

This resolution is plainly sufficient under the legal standards outlined above. It gives ample notice of the general purpose, scope, and legal authority for the investigation.

2. *The CID seeks relevant information*

ZSS challenges the relevance of CID Specification One, which directs ZSS to identify its personnel; Specification Two, which requests ZSS’s income received from dealerships and trade associations; and Specification Seven, which seeks ZSS’s document retention policies.³³ In the context of an administrative CID, “relevance” is defined broadly and with deference to an administrative agency’s determination.³⁴ An administrative agency is accorded “extreme breadth” in conducting an investigation.³⁵ As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is “more relaxed” than in an adjudicatory proceeding.³⁶ As a result, a CID recipient must demonstrate that the agency’s determination is “obviously wrong,” or the documents are “plainly irrelevant” to the investigation’s purpose.³⁷

³² Pet. Exh. 1.

³³ Pet. 10.

³⁴ *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

³⁵ *Linde Thomson*, 5 F.3d at 1517.

³⁶ *Invention Submission*, 965 F.2d at 1090.

³⁷ *Id.* at 1089; *Carter*, 636 F.2d at 788.

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Here, the material sought by the CID is plainly relevant. ZSS has already provided information about its employees and document retention policies in the partial CID response it submitted on March 20, 2014. To the extent ZSS still objects to providing such material, we note that FTC staff routinely ask for this material because it helps to ensure the investigation is accurate, thorough, and comprehensive. Additionally, the request for ZSS's income sources is relevant to the core issue in the investigation: whether consultants and dealers may have orchestrated a concerted refusal to deal.

3. *The request for electronically stored information is not unduly burdensome*

ZSS also asserts that the CID would impose an undue burden by requiring ZSS to “conduct sophisticated searches for electronically stored information,” which would require “assistance from an information technology specialist from outside the company,” resulting in “substantial costs that are not justified”³⁸ When an agency inquiry pursues a lawful purpose and the requested documents are relevant to that purpose, the reasonableness of its request is presumed absent a showing that compliance threatens undue disruption to the normal operations of the business.³⁹ Some burden on the recipient of process is “to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”⁴⁰ Thus a recipient of process must produce the materials unless the request is unduly burdensome or unreasonably broad.⁴¹ In other words, the recipient must make a record to show the “measure of their grievance rather than [asking the court] to assume it.”⁴²

³⁸ Pet. 10.

³⁹ *In re Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978) (citing *Texaco*, 555 F.2d at 882).

⁴⁰ *Texaco*, 555 F.2d at 882.

⁴¹ *Texaco*, 555 F.2d at 882 & n.49 (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)).

⁴² *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (citing *Morton Salt*, 338 U.S. at 654).

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It is not enough for ZSS to assert that the Commission CID is unduly burdensome because it requires “sophisticated searches.” ZSS has provided no evidence that the costs imposed by the CID exceed costs typically incurred in an investigation, that these costs are unduly burdensome in light of the company’s normal operating costs, or that these costs would hinder or threaten its normal operations. We note, moreover, that ZSS never presented FTC staff with detailed information about the company and the manner in which it stores its information. ZSS also did not make any suggestions about how the CID might be modified so as to reduce any burden yet also satisfy staff’s investigative needs.⁴³ Indeed, as noted, ZSS failed to raise these concerns at all in the four teleconferences with FTC staff.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Ziegler Supersystems, Inc. to quash the Civil Investigative Demand be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioner Ziegler Supersystems, Inc. shall comply with the Commission’s CID by May 6, 2014.

By the Commission.

⁴³ See 16 C.F.R. § 2.7(k) (anticipating that in a meet and confer session parties may discuss “ESI systems and methods of retrieval”).

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THE COLLEGE NETWORK, INC.*FTC File No. 132 3236 – Decision, April 21, 2014***RESPONSE TO THE COLLEGE NETWORK, INC.’S
PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE
DEMAND DATED JANUARY 16, 2014****By WRIGHT, Commissioner:**

The College Network, Inc. (“TCN” or “Petitioner”) has filed a petition to strike or limit the civil investigative demand (“CID”) issued by the Federal Trade Commission on January 16, 2014. Petition to Strike or Limit of The College Network, Inc., F.T.C. File No. 1323236 (Mar. 20, 2014) [hereinafter Pet.]. For the reasons stated below, the petition is denied.

I. INTRODUCTION

TCN is an educational services and publishing company that creates and markets self-guided educational materials and exams to adults seeking to complete college course equivalency examinations. TCN sells study guides called Comprehensive Learning Modules (“CLMs”). After a consumer completes a CLM, the consumer can register to take a college course equivalency exam offered by TCN or a third party. If the consumer passes the exam and later enrolls at a “university partner,” that university may accept the passing exam as course credit towards a degree or certificate awarded by that school. As TCN states in its petition, TCN itself is not a school and does not award college degrees.

After receiving hundreds of complaints, FTC staff opened an investigation of TCN and its practices. As authorized by a Commission-approved resolution,¹ the FTC issued a CID to TCN

¹ The Commission’s Resolution Directing Use of Compulsory Process in a Non-public Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services describes the nature and scope of the investigation as follows:

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seeking information concerning TCN's advertising, marketing, and sales of educational products and services. Pet. Exh. A, CID attached as Exh. 1. The CID seeks, among other things, information regarding TCN's products and services, and the marketing claims regarding those products and services, including claims regarding the content of its CLMs, TCN's affiliations with universities, cancellation and refund policies, and the nature and terms of loans TCN offers or facilitates to consumers. Counsel for TCN and FTC staff agreed to some limitations of the CID, but could not reach agreement on all issues before the deadline to file this Petition. Since TCN filed its petition, staff has further limited the CID.²

As described below, TCN challenges the CID on the ground that it is overbroad and vague, and that it could lead to undue burden of compliance. TCN also opposes production of certain information because it claims the information is proprietary. Finally, TCN challenges various requests for information as an improper "fishing expedition."

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Resolution File No. P138402 (Nov. 14, 2013).

² Pet. at 1-3. On March 19, 2014, FTC staff modified the CID by limiting the scope of particular definitions and extending the date for compliance. See Pet. at 3; Pet. Exh. G (March 19, 2014 Letter from Thomas N. Dahdouh to Jeanne M. Cors). FTC staff further modified the CID after the Petition was filed. Because these modifications mooted some of Petitioner's objections, we do not address them in detail in this order. Specifically, staff struck Interrogatory 40; modified Document Specification 15(c) to accept TCN's proposal to produce customer files for certain listed customers; and modified Interrogatories 37a and 39 to clarify that they apply only to natural persons, businesses, or organizations.

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II. ANALYSIS**A. The Definitions and Specifications in the CID Clearly Identify Responsive Materials and Do Not Impose Undue Burden**

TCN challenges numerous definitions and specifications in the CID, claiming variously that they are overly broad, oppressive, unreasonable, vague and ambiguous, and unduly burdensome. These challenges lack merit.

The standards for evaluating TCN's claims are well established. A CID is impermissibly vague where it lacks reasonable specificity or is too indefinite to enable a responding party to comply.³ A CID is overbroad where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."⁴

A CID imposes an undue burden only if compliance threatens to seriously impair or unduly disrupt the normal operations of the recipient's business.⁵ The recipient bears the responsibility of establishing that the burden of compliance is undue.⁶ It must show the "measure of their grievance rather than [asking the court] to assume it."⁷ Of course, balanced against this required

³ See, e.g., *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982); *United States v. Wyatt*, 637 F.2d 293, 302 n.16 (5th Cir. 1981); *United States v. Cox*, 73 F. Supp. 2d 751, 766 (S.D. Tex. 1999); *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

⁴ *Wyatt*, 637 F.2d at 302 (quoting, among others, *United States v. Morton Salt Co.*, 338, U.S. 632, 652 (1950)).

⁵ See *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

⁶ See *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir. 1986); *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882.

⁷ *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962).

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showing is the understanding that “any subpoena places a burden on the person to whom it is directed.”⁸

We address each challenge of particular specifications against these standards. We also consider the cumulative effect of Petitioner’s challenges and conclude that compliance with the CID does not impose undue burden.

The Defined Word “Company.” The CID, as issued, defined the term “Company” to mean “The College Network, Inc. and its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, including College Network Inc. and The College Network Inc., and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.” The phrase “and affiliates” was later deleted after discussions between TCN and staff.⁹ TCN seeks to limit that definition further.¹⁰ It argues that the description of “other persons working for or on behalf of” TCN is vague, overly broad, and could include unrelated entities like lead vendors or independent contractors over whose documents TCN lacks custody or control. Pet. at 4-5.

We find that the definition of “Company,” including the challenged phrase, is sufficiently definite. That definition is used routinely in similar FTC CIDs. Nothing about the phrase lacks reasonable specificity or is too indefinite to enable TCN to identify responsive materials. In fact, TCN’s argument recognizes that lead vendors and independent contractors who sell or market to prospective customers fall within the definition.

⁸ *Shaffner*, 626 F.2d at 38.

⁹ See Pet. Exh. F (March 17, 2014 Letter from Yan Fang to Jeanne M. Cors), at 1-2, 6-7. The definition of “Company” that strikes “and affiliates” is a “provisional” definition.

¹⁰ Petitioner also objects to the particular Interrogatories and Document Specifications that use or reference the word “Company.” Petitioner objects to Interrogatories 1-8, 10-24, 26-37, and 39, and Document Specifications 1-2, 4, 7, 18-31, and 35-36. Pet. at 3-4.

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TCN's real claim seems to be not that it cannot understand what information is called for, but that it cannot produce that information because it is in the hands of third parties – vendors and independent contractors who sell or market to prospective customers (and therefore fall within the definition of “Company”). That contention is without merit. The CID imposes no obligation on TCN to produce materials over which it lacks possession, custody or control – which in this context means the legal or practical ability to obtain the responsive documents.¹¹ A party can be said to control documents if, for example, they are available through a contractual right of access,¹² or are in the possession of a party's agents.¹³ Thus, under the Instructions of the CID, if TCN does not control the documents of its vendors and contractors, the definition of “Company” imposes no obligation on TCN to produce them. We now address TCN's factual claims.

To support its contention that TCN lacks possession, custody or control over the documents of lead vendors and independent contractors, TCN relies on the Affidavit of Cory Eyler, who states that he is “unaware of any ability of TCN to demand production of those types of documents from independent contractors or lead vendors.” Pet. Exh. H (Eyler Affidavit) ¶ 5. However, Mr. Eyler's affidavit does not indicate whether TCN has in its possession any documents from the contractors or whether it has

¹¹ See, e.g., *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (applying Fed. R. Civ. P. 34) (citing *Bank of NY v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997)). See also, e.g., *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006); *Dietrich v. Bauer*, 2000 WL 1171132 at *3 (S.D.N.Y. 2000) (“‘Control’ has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought upon demand.”).

¹² *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D. Mich. 2008) (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-29 (1st Cir. 1988); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992)).

¹³ *Flagg*, 252 F.R.D. at 353 (citing *Commercial Credit Corp. v. Repper*, 309 F.2d 97, 98 (6th Cir. 1962); *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984)).

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ready access to such documents. If it does, it must produce that material. Nor does the affidavit provide any other detail regarding Mr. Eyler's review of any relevant contract terms, or other facts that might clarify whether TCN has a right to access the requested materials. The tentative and conclusory statement in the affidavit does not allow us to determine whether relevant documents and material fall beyond TCN's possession, custody, or control.

Petitioner also has failed to establish that producing the requested materials would be unduly burdensome (assuming it has them, or has a right to retrieve them). As explained above, a CID recipient bears the responsibility of establishing that the burden of compliance is undue. "At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue)." ¹⁴ But TCN's affidavit provides no details regarding the burden associated with searching and retrieving documents and materials from its lead vendors and independent contractors. Pet. at 4-5. The affidavit states that TCN has more than 125 lead vendors and 140 independent contractors, Pet. Exh. H (Eyler Affidavit) ¶ 5, but it includes no additional facts to support the conclusion that "[e]ven attempting to obtain information orally [from the independent contractors] would be an expensive, time consuming, and overly burdensome undertaking." Pet. at 5.

Instead of addressing the burden of searching and retrieving all documents and materials from its lead vendors and independent contractors, Petitioner provides only an example of the number of links or advertisements that are generated by lead vendors and independent contractors demanded by Document Specification 20. Pet. Exh. H (Eyler Affidavit) ¶ 5. Petitioner does not identify or provide factual support regarding other types of documents that lead vendors and independent contractors are likely to have, estimate their volume, or provide estimates of the burden of production. Thus, except for Document Specification

¹⁴ *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

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20, which is discussed below, TCN has not made a sufficient showing that compliance is unduly burdensome.

The Defined Word “Identify.” TCN asks the Commission to strike Interrogatories 6, 7, 10, 12, 23, 25, 34, and 37c because the word “identify” requires TCN to name the officers, directors, managers, and contact persons of third party businesses or organizations. Pet. at 6-8. TCN also objects that a telephone number must be provided in addition to the name and business address for these parties. Pet. at 7-8. TCN argues that such demands are oppressive, unreasonable, overbroad and unduly burdensome. As an alternative to its motion to strike the interrogatories, TCN proposes to limit the definition so that TCN would provide only names and job titles or business affiliations for natural persons, and names and addresses for third party businesses or entities.

After TCN filed its petition, FTC staff narrowed the definition of “Identify” to reduce some of TCN’s burden.¹⁵ Although the modified definition is still somewhat broader than the definition TCN proposes in its Petition, we find that it is reasonable. As modified, it asks for business affiliations, business addresses and telephone numbers for natural persons, and the names and telephone numbers of TCN’s contacts at businesses and organizations. Such information is relevant to the investigation and should be readily available to TCN; in any event, the CID requests it for only a limited number of persons or organizations. Consequently, we decline Petitioner’s proposal to limit the definition further.

Interrogatory 3. Interrogatory 3 asks TCN to identify current and former officers, employees, independent contractors,

¹⁵ Letter from Thomas N. Dahdouh to Jeanne M. Cors (Apr. 1, 2014). The modified definition states: “‘Identify’ or ‘the Identity of’ shall be construed to require identification of (a) natural persons, by stating the person’s name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home address; and (b) businesses or other organizations, by stating the business’s or organization’s name and address, and the name and contact telephone number of TCN’s contacts at the organization, where applicable.”

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affiliates, and agents with responsibility or knowledge about four topics. TCN argues that this Interrogatory is overbroad and oppressive because “virtually all TCN personnel have some knowledge” about the particular issues. Pet. at 10. That is not a valid objection. Indeed, the phrasing of the interrogatory is no broader than Federal Rule of Civil Procedure 26(a)(1)(A)(i), which mandates disclosure in litigation of “each individual likely to have discoverable information.”

Even if the Interrogatory asked TCN to identify all its employees, it is not unduly burdensome because TCN has approximately 150 employees,¹⁶ 125 lead vendors, and 140 independent contractors. Listing those persons and entities imposes no great burden. Under the modified definition of “Identify” discussed above, TCN must provide a “person’s name, title, and department” for current employees of The College Network, Inc. For businesses such as the 125 lead vendors, TCN must provide the business or organization name and address, and the name and telephone number of TCN’s contact(s). For individuals such as TCN’s 140 independent contractors, TCN must provide a person’s name, title, business affiliation, business address and telephone number. To the extent that former employees, lead vendors, or independent contractors must be identified, the CID covers a limited time period that begins in 2011, so the number of persons or entities should be limited. This information should be readily available and easily assembled by TCN, and is relevant for the investigation.

Interrogatories 19 and 32. TCN asks the Commission to strike Interrogatories 19 and 32 on the grounds that they are so overbroad, unduly burdensome, unreasonable, and oppressive that TCN would not be able to certify that its responses are complete. Interrogatory 19 seeks TCN’s customer information, including name, contact information, products purchased, payments, complaints and cancellations, exam passage, and college enrollment. TCN objects to Interrogatory 19 because it “demands that TCN identify all of its customers during the responsive period.” Pet. at 10. In addition, Petitioner objects to

¹⁶ In discussions with FTC staff, TCN estimated that it has 100 to 150 employees.

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Interrogatory 19 because the demand to identify complaints “would require a manual review of over 200,000 customer files, which would likely consist of millions of pages of documents.” Pet. Exh. I (Fair Affidavit) ¶ 5.

Interrogatory 32 seeks information about the number of customers who, among other things, enrolled at degree-granting institutions, obtained degrees, or withdrew before earning a degree. TCN claims that this specification would also require a manual review of customer records, which “would be impossible for the company to undertake without ceasing normal operations, or would require . . . months or years to complete, depending on the manpower devoted to the project.” Pet. Exh. A (Ivory Affidavit) ¶ 8.

These Interrogatories are not overly burdensome because, by their own terms, they can be satisfied either by “a narrative response” or by production of materials “in an electronic database format.” TCN thus need not compile a new list of all of its customers or conduct the manual review of which it complains. Its electronic customer database likely contains all the responsive information and materials. Indeed, the petition indicates that it contains the 200,000 customer files. See Pet. Exh. J (Sallee Affidavit) ¶ 7. If TCN produces the databases, it need not manually review the files in the databases to address the interrogatories. We now address TCN’s objection to producing the databases.

Document Specifications 10, 11, 12, 13, 22, and 27. TCN seeks to strike the word “databases” from Document Specifications 10, 11, 12, 13, 22 and 27 on the grounds that the word renders the specifications overbroad, unreasonable, oppressive, vague, ambiguous, unduly burdensome, and that TCN would be unable to certify that its response was complete. See Pet. at 15. Document Specifications 10, 11, and 12 seek accounting data; Document Specification 22 seeks documents that summarize advertising dissemination schedules; and Document Specifications 13 and 27 call for databases (such as the customer database) used to respond to Interrogatories 19 and 32.

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There is nothing vague or ambiguous about those specifications. They are not rendered vague or ambiguous merely because the CID does not provide a definition of the term “database.” That term is commonly used and has a generally accepted meaning. TCN should easily be able to identify responsive materials. In fact, in objecting to the burden of producing them, TCN appears already to have identified that material.

To support its claim of unreasonable burden, TCN estimates that producing a copy of TCN’s accounting database would cost \$10,000-\$15,000 to purchase a server, software and licenses and that it would need a vendor to install and configure the database and provide access at an addition \$2,000-\$5,000 cost. *See* Pet. Exhibit J (Sallee Affidavit) ¶ 9. Additionally, TCN asserts that production of the customer database would cost approximately \$30,000 and take weeks to complete because TCN would need new servers to house the database and a vendor to create a mirror image of the database and application. *See id.* ¶ 7.

Petitioner’s claimed burden of responding to the document specifications for accounting data is overstated. The CID provides TCN with a number of options for providing the requested accounting data. A database is one of several types of responsive documents that TCN may provide to satisfy the specifications. Document Specifications 10, 11, and 12 also allow TCN to respond by providing “spreadsheets, statements, memoranda, reports, or any summarizing document.” *See* Pet. Exh. A, CID attached as Exh. 1.

Even if the Commission were to accept TCN’s claims regarding the process for and cost of producing the accounting and customer databases,¹⁷ Petitioner has not established that this

¹⁷ FTC experience in other investigations suggests reason to question TCN’s estimated cost and burden. First, accounting databases are typically located in programs specifically designed for accounting, and prior investigations have shown that extracting files from Peach Tree Accounting, the common accounting program that TCN uses, is neither difficult nor costly. Second, businesses typically store data within an industry standard database system and most businesses create regular backups of their databases to ensure there is another copy in case the original is corrupted or accidentally deleted. In discussions with FTC staff, TCN indicated that it uses an Onyx SQL database,

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production threatens to seriously impair or unduly disrupt the normal operations of TCN's business.¹⁸ Some cost of complying with an investigation is expected; the burden of that cost must be evaluated in relation to the size and complexity of a recipient's business operations. Here, TCN's estimated \$50,000 cost for equipment and vendor services to provide the two databases is evaluated in light of gross sales revenue that exceeded \$73 million in 2012 and \$48 million in 2013. In similar circumstances, courts have found that far greater compliance costs – ranging from \$392,000 to \$4,000,000 – did not impose unreasonable burden.¹⁹ In sum, Petitioner has not shown that its costs are excessive.

Document Specification 7. Document Specification 7 seeks documents sufficient to show TCN's policies, practices, and procedures for creating and revising substantive CLM content. Petitioner contends that this document specification (which relates to Interrogatory Specification 8) requires TCN to produce or review documents it does not control because the underlying interrogatory specification asks for the number of independent contractors, affiliates, and others involved in developing CLMs. Pet. at 17. This argument is untenable. Document Specification 7 seeks information that plainly belongs to TCN. If it put that responsibility for developing CLMs information in the hands of its vendors, it can get that information back in order to respond to the CID.

with a third-party cloud service. If TCN has a recent backup copy of its database, it could easily make a copy of this backup to an external hard drive, which the FTC could provide. If TCN has not recently run a backup, it could create a backup manually using the database's backup function, which is normally not costly and might be completed in one day, depending on the quantity of data. Finally, in other investigations, FTC technical support personnel have copied materials themselves if they are provided access to a petitioner's facilities. This alternative is also available to Petitioner to copy the database at FTC expense.

¹⁸ See *Texaco*, 555 F.2d at 882.

¹⁹ See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) (\$392,000 cost for a bank with net income of \$178 million); *Texaco*, 555 F.2d at 922 (\$4,000,000)).

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In any event, TCN has offered no factual support for its assertion that it would be unduly burdensome to obtain documents in the hands of its independent contractors and lead vendors. TCN does not provide a reason to believe that its contractors and lead vendors, who solicit customers or buy advertising space, would have responsive documents related to the creation or revision of substantive CLM content. In addition, to the extent there is any burden, it is minor, because TCN is required to produce only documents “sufficient to show” TCN’s policies, practices and procedures for creating and revising substantive content for CLMs (rather than all documents relating to the creation or revision of CLMs). Thus, TCN has some flexibility in assembling its response. We conclude that Petitioner has not demonstrated that Document Specification 7 is unduly burdensome.

Document Specification 16. TCN objects to Document Specification 16, which seeks communications, including internal email and responses to customers, that refer or relate to issues raised in customer complaints. TCN contends that the specification is “overbroad, oppressive, unreasonable, unduly burdensome, and not subject to certification.” Pet. at 16. TCN argues that the specification is overbroad because TCN receives at least five categories of complaints that do not have “anything to do with the company.”²⁰ See Pet. Exh. I (Fair Affidavit) ¶ 3. We disagree with TCN’s conclusion about the relevance of some complaints. The affidavit discounts some categories of complaints – such as subject matter that is “too hard” – which may be relevant to the Commission’s need to determine whether TCN is providing consumers with the types of test preparation materials that it advertises. While there may be instances where a complaint relates to a customer’s personal circumstances, Petitioner does not show these complaints are so prevalent that they present an obstacle to complying with the CID.

²⁰ The affidavit explains that TCN has received complaints that “(a) the location where a particular end-of-course equivalency examination is being offered by a third party testing agency is too far away from the customer’s home; (b) the subject matter of a particular CLM is ‘too hard’; (c) the customer’s spouse has left them and therefore they cannot afford the materials they have purchased; (d) the customer has moved to another state; [and] (e) the customer has taken ill[.]” Pet. Exh. I (Fair Affidavit) ¶ 3.

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Regarding the burden of Document Specification 16, the Fair affidavit states that compliance would require a manual review of customer files. *Id.* at ¶ 5. As noted above, however, in lieu of manual review, TCN may produce the customer database. As for the objection to providing email or other documents that discuss complaints and responses to complaints, a wide-ranging search throughout the company for responsive documents is unnecessary because Mr. Fair's affidavit states that he oversees the "department within the company which receives, responds to, and if possible, resolves various customer complaints or issues." *Id.* at ¶ 2. A search for responsive documents can reasonably be focused on one department.

Document Specifications 20, 21, 22, and 28. TCN objects to the burden created by Document Specification 20, which seeks "all disseminated advertisements" relating to products and services offered by TCN to individual consumers. TCN also objects to the burden created by other document specifications that seek information about the ads demanded by Document Specification 20.²¹ As support for its claimed burden of review and production, Petitioner states that approximately 3,000 to 6,000 links²² or advertisements are generated daily when TCN's lead vendors and independent contractors are included and the ads "appear on an unknowable number of websites and webpages." See Pet. Exh. H (Eyler Affidavit) ¶ 5. In his affidavit, Mr. Eyler states that the production of all websites and webpages, including screenshots, archived versions, source code programs, log files, scripts, and dissemination schedules that include dates and times for the 3,000 to 6,000 daily links "is simply impossible." *Id.*

It appears that TCN has misconstrued the specifications. Document Specification 20 directs TCN to produce copies of all ads. An ad is the "written or verbal statement, illustration, or

²¹ Document Specification 21 seeks all documents relating to the creation and development of the advertising. Document Specification 22 seeks documents about dissemination schedules and visitor volume for each ad. Document Specification 28 seeks documents relating to consumers' interpretations and perceptions of the ads.

²² Website links are often distributed via Internet search, keyword, sponsored, pop-up, and banner ads.

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depiction . . . that is designed to effect a sale or create interest in the purchasing of goods or service.” See Pet. Exh. A, CID attached as Exh. 1, at Definition B (Advertisement). The definition includes ads that are “displayed or accessible as Web pages.” *Id.* Each link that is generated is not a separate advertisement that must be produced. If two consumers who click on links that they found at two different places (*e.g.*, two different third-party websites) arrive at the same webpage or otherwise see the same ad copy, TCN need only to produce one ad.²³ The same requirement applies to Document Specifications 21, 22, and 28.

In addition, we note that, after TCN filed its Petition, FTC staff modified Document Specifications 20 and 22.²⁴

Document Specification 17. The specification seeks all documents relating to TCN’s marketing policies, practices, and procedures for consumer phone calls, Internet chats with consumers, email communications with consumers, and in-person communications with consumers. Petitioner contends that Specification 17 imposes undue burden, Pet. at 16-17, but the only facts it provides to support its objection appear to relate to Document Specification 20, which we have already addressed.²⁵ Given the absence of facts to support its claim, it is not possible for us to fully assess Petitioner’s proposed limitation to the specification. We note, however, that limiting the production to “any TCN marketing policies and procedures” likely would omit documents relating to the implementation of the policies and procedures, as well as formal and informal “practices” for

²³ The analysis is similar to other advertising; TCN needs to produce print advertising only once even if it has been distributed to 1000 households.

²⁴ An April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors modified the specifications. The modification to Specification 20 eliminates the need for TCN to produce source code, programs, log files, scripts, and past or archived versions of websites and webpages for websites and webpages not operated by TCN. Document Specification 22 was modified to reduce the burden regarding dissemination schedules for Internet advertising; Specification 22, as modified, seeks only summarizing documents sufficient to show dates and numbers of dissemination, visitor volume, and click-through rates for Internet ads. *Id.* at 2-3.

²⁵ See Pet. Exh. H (Eyler Affidavit) ¶¶ 5-6.

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marketing TCN products and services to consumers. Pet. at 17. Such materials are highly relevant to the purpose of the investigation, and TCN, therefore, must produce them.

Document Specification 29. TCN objects to Document Specification 29, which seeks documents referring or relating to the target audience of TCN's advertising. TCN argues that a demand for "all documents" "referring or relating to the target audience" would require producing all TCN documents. Pet. at 14-15.

FTC staff modified this specification after the Petition was filed.²⁶ The modified text provides TCN with flexibility to determine how it can best produce the requested materials and ameliorate any burden by reducing the number of responsive documents.

Document Specification 35. TCN petitions to strike this specification, which seeks complaints, inquiries, and communications from third-party organizations such as the Better Business Bureau, state attorneys general, universities, and nursing organizations. Although it contends that this request imposes undue burden, TCN provides no factual support for this claims. For example, it has not provided the Commission with an estimate of the number of organizations that have complained, the number of third-party complaints received, or the number of document custodians. In addition, contradicting Petitioner's claimed burden, TCN's Vice President of Call Center Operations has stated that producing certain third-party complaints is "more manageable" because TCN's customer database "contain[s] a field to capture certain types of 'complaints' including those received from a state attorney general, the Better Business Bureau, or even an attorney." Pet. Exh. I (Fair Affidavit) ¶¶ 5, 7. Thus, it appears that Petitioner can comply with the specification by producing its customer database and, as we previously explained, production of the customer database is not an

²⁶ As modified by an April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors, Document Specification 29 requires the production of all documents, including consumer research, media research analysis, and relevant portions of media plans "sufficient to show" the target audience for each TCN ad produced pursuant to Document Specification 20.

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unreasonable burden. We therefore deny Petitioner's request that we strike this specification.

Email and Document Specifications 2-4, 15-18, 20-23, 29-31, and 35. Petitioner seeks leave to file a future petition to quash regarding email if it encounters additional objections after it reviews its emails. TCN explains that it “was working with FTC investigators to reach consensus regarding a universe of custodian accounts to retrieve and search and a listing of search terms to apply. That process was necessarily halted by the deadline for the filing of this Petition[.]” Pet. at 12.

As Petitioner has acknowledged, Commission Rule 2.10(a)(1) provides one opportunity for a CID recipient to file a petition to quash. 16 C.F.R. §2.10(a)(1) (“petition shall set forth *all* assertions of protected status or other factual and legal objections to the Commission’s compulsory process”) (emphasis added). As we have explained, “[t]he rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID.”²⁷

Petitioner has not sufficiently availed itself of the meet-and-confer process required by the FTC’s Rules of Practice and the CID itself.²⁸ The meet-and-confer requirement “provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner.”²⁹ Here, Petitioner did not engage in an exchange with staff to resolve the issues surrounding email and limits on custodians whose files would be retrieved and searched. Petitioner received the CID on January 21, 2014, Pet. Exh. A (Ivory Affidavit) ¶ 3, but as late as March 17, Petitioner had not yet provided FTC staff with a list of

²⁷ *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (letter ruling dismissing appeal from denial of petition to quash CID).

²⁸ 16 C.F.R. § 2.7(k); Pet. Exh. A, CID attached as Exh. 1, at Instruction B.

²⁹ *Firefighters Charitable Found., Inc.*, FTC File No. 102-3023, at 3 (Sept. 23, 2010).

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relevant custodians.³⁰ Given that Petitioner did not provide the very information that staff needed to properly consider and resolve any lingering issues regarding TCN's obligations to search for emails, we disagree that a refusal to allow another petition to quash is an "arbitrary action" that would "raise[] a question of due process."

B. TCN's Claim that Particular Information is Proprietary is Not a Reason to Limit the CID or Avoid Production

Petitioner objects to Interrogatory 12 to the extent that it seeks the number and percentage of TCN customers in default, because "the identity of TCN's present and past customers is proprietary . . . [and] contact [with these customers could] adversely affect TCN's business." Pet. at 7. With respect to Interrogatory 12, Petitioner's concern is misplaced because the modified definition of "identify," does not require personal or contact information to the extent that the specification seeks numerical information. See discussion at note 2, *supra*.

Because Petitioner's argument that disclosure of TCN's customers also arises with respect to the production of TCN's customer database and materials demanded by other specifications,³¹ we address the substance of Petitioner's claim. Concerns about customer reactions to a Commission investigation do not excuse an obligation to comply with investigative process unless "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."³² The same allegations were

³⁰ See Pet Exh. F (March 17, 2014 letter from Yan Fang to Jeanne M. Cors) at 8 ("TCN proposes to forward a list of relevant custodians this week."); Pet. Exh. D (March 13, 2014 letter from Yan Fang to Jeanne M. Cors) at 2 ("We are generally amenable to custodian limits and search terms [to retrieve and search e-mail], but before we can agree to any limits, TCN would first need to provide us sufficient information to identify those custodians likely to possess responsive documents.").

³¹ See Interrogatories 3, 19, and 32 and Document Specifications 13, 16, 27, and 29.

³² *Texaco*, 555 F.2d at 882.

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made in *Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992), but were not accepted by the D.C. Circuit as a basis for excusing noncompliance with a CID. The D.C. Circuit did not lighten or change the standard just because disclosing the identity of clients might place the respondent under a “cloud of suspicion and speculation” if the potential witnesses were contacted.³³ If the mere creation of a cloud of suspicion were sufficient to quash a CID or excuse a failure to comply, then, as the D.C. Circuit recognized, “it could be made with respect to almost any investigation.”³⁴

C. The CID Specifications Seek Information that is Reasonably Related to the Investigation

Finally, TCN objects to Interrogatories 12 and 19 and Document Specification 29 on the ground that the requests constitute improper “fishing expeditions.” Pet. at 7, 11, 14. Interrogatory 19 seeks TCN’s customer information, including names, contact information, products purchased, payments, refunds, and complaints. Interrogatory 12 seeks information about customers in default. TCN argues that Document Specification 15 already identifies 29 individuals who are customers of TCN so the “only reason for the FTC requiring the names of other TCN’s customers can be for the FTC to contact those customers as the FTC sees fit.” Pet. at 11. The Petition also objects to Document Specification 29, which demands documents relating to the targeted audience of TCN’s ads.

The information responsive to these specifications is highly relevant to the investigation.³⁵ Indeed, Petitioner does not argue

³³ See *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

³⁴ *Id.*

³⁵ See, e.g., *id.* at 1089 (D.C. Cir. 1992) (“The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. . . . The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally”); *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 9 (D.D.C. 2010) (rejecting claim that “FTC [must show] like any litigant, that the document demanded will lead to reasonably relevant and ultimately admissible evidence” as mischaracterizing

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that the information is irrelevant, but instead objects to the Commission using that information to contact those customers. As we discussed above, this concern does not provide a basis to excuse Petitioner's obligation to comply with the CID. The challenged specifications seek information that is relevant to the purpose of the investigation and we deny Petitioner's request that we strike the specifications.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of The College Network, Inc. to Strike or Limit the Civil Investigative Demand be, and it hereby is, DENIED; and

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to The College Network, Inc. must now be produced on or before May 19, 2014.

By the Commission.

the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642, and *Texaco*, 555 F.2d at 874).

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POLICE PROTECTIVE FUND, INC.*FTC File No. 132 3239 – Decision, May 22, 2014***RESPONSE TO POLICE PROTECTIVE FUND, INC.’S
PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND
DATED MARCH 19, 2014****By WRIGHT, Commissioner:**

Police Protective Fund (“PPF”) has filed a petition to quash a Civil Investigative Demand (“CID”) issued by the Commission on March 19, 2014.¹ For the reasons stated below, the petition is denied.

I. INTRODUCTION

PPF is organized as a not-for-profit corporation under state law and is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.² In its 2012 IRS Form 990, PPF states that its mission is to “promote the safety and well being of law enforcement officers through educational programs and public awareness campaigns.”³ In recent years, PPF has been the subject of various state and federal investigations and, in 2007, received a letter from the IRS pointing out deficiencies in its operations that, if not corrected, could threaten its status as a 501(c)(3) organization.⁴ Additionally, the Commission has received numerous consumer complaints relating primarily to PPF’s telephone solicitations.

The Commission is conducting an investigation to determine whether PPF is engaged in “unfair or deceptive acts or practices”

¹ “Pet.” refers to PPF’s Petition to Quash; “Pet. Ex.” refers to the exhibit attached to PPF’s petition; “Int.” refers to specific interrogatories from the CID; “Doc. Req.” refers to specific document requests from the CID.

² See Pet. Ex. G, I-K.

³ See Pet. Ex. B.

⁴ See Pet. Ex. L.

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in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Among other matters, the Commission is investigating whether PPF is misrepresenting the level of financial support it provides for its programs and whether it is making false statements to potential donors concerning any financial support it may provide to the families of fallen officers in the donors' home states. The Commission is also inquiring whether PPF is violating the Do Not Call provisions of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310. In addition, the Commission is examining whether PPF, notwithstanding its representations to potential donors, has used the funds they contribute to confer pecuniary benefits on private persons who are not the claimed beneficiaries of its campaigns.

On March 19, 2014, under the authority of a Commission resolution authorizing the use of compulsory process,⁵ the Commission issued a CID to PPF seeking, *inter alia*, information and materials relating to PPF's finances, oversight, and employee compensation; its fundraising and telemarketing practices; and the level of support PPF provides to programs and individuals. The Commission issued this CID pursuant to Section 20 of the FTC Act, which authorizes the Commission to issue compulsory process to any "person," and "person" is defined broadly as "any natural person, partnership, corporation, association or other legal entity."⁶

The return date for the CID was April 21, 2014. On April 10, 2014, PPF's counsel offered to make a limited production of documents in exchange for an extension to May 12 of the

⁵ The purpose of the investigation is:

"To determine whether unnamed persons, partnerships, corporations, or others, in connection with soliciting charitable contributions, donations, or gifts of money or any other thing of value, have engaged in or are engaging in (1) deceptive or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310."

Pet. Ex. P.

⁶ 15 U.S.C. § 57b-1 (a)(6).

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deadline for filing a petition to quash.⁷ In response, FTC staff offered to defer certain specifications, to accept a rolling response as to certain non-deferred items, and to grant the extension until May 12.⁸ On April 21, however, PPF filed a petition asking the Commission to quash the CID in its entirety.

PPF's principal objection is that the Commission "lacks personal and subject matter jurisdiction . . . because [PPF] is a tax-exempt, nonprofit corporation."⁹ According to PPF, that status means that it is not a "corporation" within the Commission's jurisdiction because, it claims, it is not "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Additionally, PPF asserts that the CID violates the First, Fourth, and Fourteenth Amendments.¹⁰ As discussed below, all of these contentions are unfounded.

II. ANALYSIS

A. The Commission is Authorized to Use Compulsory Process to Conduct The Present Inquiry

PPF principally asserts that its tax-exempt status and form of organization relieve it of any obligation to comply with FTC compulsory process. PPF's objections confuse the Commission's investigatory authority (under Section 20 of the FTC Act) with its enforcement authority (under Section 5). The Commission's authority to enforce the prohibitions of Section 5 applies to corporations that are "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44. Moreover, PPF's status does not preclude an alternative finding that PPF constitutes a "person" subject to the prohibitions of Section 5 of the FTC Act.¹¹ In any case, Section 20 authorizes the FTC to

⁷ See Pet. Ex. M.

⁸ See Pet. Ex. O.

⁹ Pet. at 1.

¹⁰ Pet. at 8-16.

¹¹ The Commission has previously maintained that its jurisdiction over "persons" under Section 5 of the FTC Act extends to state-chartered nonprofit

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issue a CID “[w]henever 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.”¹²

Courts have consistently held that “an individual may not normally resist [investigative process] on the ground that the agency lacks regulatory jurisdiction”¹³ As the Ninth Circuit has explained,

[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. After the agency has determined its jurisdiction, that determination may be reviewed by the appropriate court.¹⁴

Thus, 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 itself. As we have

municipal corporations such as the City of New Orleans and the City of Minneapolis. See Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Notice of Proposed Rulemaking and Request for Public Comment*, 73 Fed. Reg. 48317, 48324 & n.86 (Aug. 19, 2008) (citing *In re City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In re City of Minneapolis*, 105 F.T.C. 304, 305 (1985)).

¹² 15 U.S.C. § 57b-1(c)(1).

¹³ *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (“... courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.” (citing *United States v. Sturm, Roger & Co.*, 84 F.3d 1, 5 (1st Cir. 1996))); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 468-73 (2d Cir. 1996); *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979).

¹⁴ *FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975).

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previously observed, “[j]ust as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity.”¹⁵ PPF may not foreclose that inquiry simply by asserting that, *if* conducted, the inquiry would yield facts favorable to PPF.

As part of the present inquiry, the Commission will conduct a careful examination to determine whether PPF “is organized to carry on business for its own profit or that of its members.”¹⁶ While the Commission may take into account PPF’s form of organization and its tax exemption in making an initial determination of regulatory coverage, these factors are not dispositive.¹⁷ Rather, the Commission will conduct a fact-intensive inquiry into how the corporation actually operates. Such an inquiry encompasses a broad array of factors, including the

¹⁵ Commission Letter Denying Petition to Limit and/or Quash Civil Investigative Demand Directed to Firefighters Charitable Foundation, Inc., FTC File No. 102 3023 (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973)); see *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1942); *Ken Roberts Co.*, 276 F.3d at 583 (“[A]s a general proposition, agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.”).

¹⁶ 15 U.S.C. § 44.

¹⁷ See, e.g., *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) (“mere form of incorporation does not put them outside the jurisdiction of the Commission”); *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.”); *In re Daniel Chapter One*, 2009 WL 5160000 at *12 (F.T.C. 2009) (“As recognized by the ALJ, however, ‘courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act.’”), *aff’d*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion); *In re College Football Association*, 117 F.T.C. 971, 1004 (1994) (IRS determinations are not binding on the Commission); *In re Am. Medical Ass’n*, 94 F.T.C. 701, 990 (1979) (“status as . . . tax-exempt organization does not obviate the relevance of further inquiry”), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided court*, 455 U.S. 676 (1982); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972) (“Notwithstanding the fact the [defendant] had been afforded an exemption certificate . . . it was not in fact an exempt corporation.”).

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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.¹⁸ The 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.¹⁹

The specifications of the CID are designed to elicit precisely that information. PPF contends “that everything the FTC needs [to determine its jurisdiction] is readily available to it in the public domain.”²⁰ That is plainly incorrect. Most of the CID requests ask for nonpublic materials and information that are highly relevant to the question whether charitable donations are being diverted to insiders or affiliated entities.²¹ Other such requests will elicit detailed information on PPF’s financial affairs and the degree of oversight it receives from an independent board.²²

¹⁸ See *Community Blood Bank*, 405 F.2d at 1019-20; *Ameridebt*, 343 F.Supp. 2d at 460 (factors include “the manner in which it uses and distributes realized profit; its provision of charitable purposes as a primary or secondary goal; and its use of non-profit status as an instrumentality of individuals or others seeking monetary gain.” (citing *Community Blood Bank*, 405 F.2d at 1019-20 and *In re Ohio Christian College*, 80 F.T.C. 815, at 849-850)).

¹⁹ See, e.g., *FTC v. Gill*, 183 F.Supp. 2d 1171, 1184-85 (C.D. Cal 2001) (FTC had jurisdiction where individual defendant lived in corporate office, paid personal expenses from corporate accounts, and otherwise comingled business and personal items); *In re Ohio Christian College*, 80 F.T.C. at 23-24 (“profit” for purposes of FTC Act is not limited to dividends; corporation provided individual defendants “much of their subsistence and shelter” and expensive automobiles).

²⁰ Pet. at 17.

²¹ See, e.g., Int. 47, 50, 53, 60-61; Doc. Req. 9, 16-28, 41.

²² See, e.g., Int. 3-9, 13-30; Doc. Req. 6-9, 12-28.

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B. PPF's First Amendment Challenge to the Commission's Jurisdiction Is Meritless

PPF also challenges the CID on First Amendment grounds. In particular, PPF assumes that the Commission will merely compare PPF's fundraising costs to its program expenditures, as reported unfavorably by the media.²³ Based on that assumption, PPF then contends that the solicitation of charitable donations is fully-protected speech under the First Amendment, that "using percentages to decide the legality of the fundraiser's fee or the minimum amount that must reach the charity is constitutionally invalid," and that "the FTC [therefore] cannot rely on high percentages of fundraising fees alone to satisfy the definition of profits necessary to trigger jurisdiction."²⁴ PPF concludes that the Commission must undertake some additional (though unspecified) "threshold inquiry" before it can obtain the information requested by the CID. We find no merit in these contentions.

First, the First Amendment's protection extends only to truthful solicitations.²⁵ Thus, in *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), the Supreme Court held that states may maintain fraud actions where fundraisers make false or misleading representations designed to deceive donors. The Court reiterated that the First Amendment protects the right to engage in charitable solicitations, but that, like other forms of deception, fraudulent charitable solicitations do not enjoy any such protection.²⁶

²³ Pet. at 10-11.

²⁴ Pet. at 9-10.

²⁵ See Pet. at 8-12. Those cases—*Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Munson Co., Inc.*, 467 U.S. 947 (1984), and *Riley v. Federation of the Blind*, 487 U.S. 781 (1988), involved statutes and regulations that prohibited or limited certain kinds of truthful speech. They do not support the proposition that there are First Amendment constraints on Commission actions seeking to prohibit deceptive speech.

²⁶ *Madigan*, 538 U.S. at 611-27.

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In any event, PPF's concern about a possible infringement of its First Amendment rights is also premature. The Commission has not found that PPF has engaged in unlawful conduct, nor has the Commission ordered it to do, or refrain from doing, anything. The Commission is merely conducting an investigation, the very purpose of which is to determine whether PPF may have engaged in conduct that lacks any protection under the First Amendment. Thus, PPF's reliance on cases involving prior restraints on protected speech is misplaced.²⁷

Moreover, as the D.C. Circuit has made clear, "in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case."²⁸ We emphasize, again, that the investigation is at an early stage. Much of PPF's petition is devoted to anticipating and addressing possible theories it believes the Commission may wish to pursue. Such arguments are at best premature. At this stage, the Commission is clearly entitled to all the materials that it has requested in the CID so that it may make its initial determination of jurisdiction on a complete record.

C. PPF's Objections to the Scope of the CID are Also Unfounded

Finally, PPF objects to the CID as being "overbroad, overreaching and overly burdensome."²⁹ In particular, PPF points to a "sheer volume of requests issued for an alleged determination of jurisdiction," asserts that Commission staff declined PPF's offer to provide a more limited production as to its non-profit status, and complains that a "significant amount of time and resources" would be required to comply with the CID.³⁰ According to PPF, "everything the FTC needs to affirm its lack of jurisdiction . . . is readily available to it in the public domain,"³¹

²⁷ *Id.* at 623-24.

²⁸ *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

²⁹ Pet. at 16.

³⁰ Pet. at 16-17.

³¹ Pet. at 17.

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“[the CID] constitutes nothing more than a fishing expedition,”³² and “such searches are constitutionally repugnant under the Fourth and Fourteenth Amendments to the United States Constitution.”³³ We disagree.

The recipient of a CID bears the burden of showing that the request is highly disruptive and, therefore, unduly burdensome or unreasonably broad. That burden is not easily satisfied,³⁴ and the recipient must make a specific showing of disruption.³⁵ It is not enough merely to assert, as PPF does here, that the request is overbroad and burdensome and 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.”³⁶ PPF has made no effort to identify the information requests it considers overly broad or burdensome, nor has PPF made any showing of business disruption. Instead, it has made a blanket objection to all the requests. That does not satisfy PPF’s burden.

³² Pet. at 15.

³³ Pet. at 16.

³⁴ See, e.g., *Texaco*, 555 F.2d at 882 (if the agency inquiry is pursuant to a lawful purpose, and the requested documents are relevant to that purpose, the burden of proof is on the subpoenaed party and “is not easily met”); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (FTC should be accorded “extreme breadth” in conducting its investigations).

³⁵ *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981), citing *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (quoting *Texaco*, 555 F.2d at 882).

³⁶ Pet. at 17; see, e.g., *FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (mere allegation that subpoena called for thousands of financial documents and one million other documents was not sufficient to establish burden; a party claiming a “fishing expedition” must establish how); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (recipient must demonstrate the unreasonableness of the Commission’s demand and make a record to show the measure of its grievance instead of just assuming it).

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Furthermore, a “sheer volume of requests”³⁷ does not itself establish that the CID is overbroad or imposes undue burden. In particular, the *number* of requests, by itself, says little or nothing about the burden of compliance because complying with many of the specifications would require little time, effort, or money. Furthermore, many of the requests relate both to the subject matter of the investigation and PPF’s status as a charitable organization.

We likewise find no merit in PPF’s assertion that the CID constitutes an unconstitutional search and seizure.³⁸ As courts have recognized, “[a]n administrative subpoena is not self-executing and is therefore technically not a ‘search.’ It is at most a constructive search, amounting to no more than a simple direction to produce documents, subject to judicial review and enforcement.”³⁹

III. CONCLUSION

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Police Protective Fund to quash the Civil Investigative Demand be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Police Protective Fund comply in full with the Commission’s Civil Investigative Demand on or before June 12, 2014.

By the Commission.

³⁷ Pet. at 16.

³⁸ See Pet. at 16-17.

³⁹ *Sturm*, 84 F.3d at 3.

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STAR PIPE PRODUCTS LTD

FTC File No. 131 0214 – Decision, May 27, 2014

RESPONSE TO STAR PIPE PRODUCTS LTD.’S PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED APRIL 4, 2014

By WRIGHT, Commissioner:

Star Pipe Products Ltd. (“Star Pipe”) has filed a Petition to limit the subpoena *duces tecum* (“Subpoena”) issued by the Commission on April 4, 2014. For the reasons stated below, the Petition is denied as moot.

On July 17, 2013, the Commission commenced an investigation to determine whether Star Pipe is violating or has violated the terms of a Consent Order approved by the Commission on May 8, 2012 (“the May 8, 2012 Order”). The May 8, 2012 Order resolved the Commission’s allegations that Star Pipe had engaged in collusive conduct in the market for ductile iron pipe fittings, brought through an Administrative Complaint under Part 3 of the Commission’s Rules of Practice.¹ The Complaint alleged that beginning in January 2008, Star Pipe and its two main competitors, McWane, Inc. and Sigma Corporation, conspired to raise and stabilize prices for ductile iron pipe fittings by exchanging information regarding pricing and output for these products.²

The May 8, 2012 Order settled the Commission’s allegations against Star Pipe and provided for various types of injunctive relief. Among them, Star Pipe agreed to cease and desist from

¹ See Complaint, *In re McWane, Inc. and Star Pipe Products Ltd.*, Docket No. 9351 (Jan. 4, 2012) [hereinafter “Complaint”]. Ductile iron pipe fittings are a component of systems for transporting drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. These fittings are typically used by municipal and regional water authorities to join pipes, valves and hydrants in straight lines, and to change, divide, or direct the flow of water. See Complaint, ¶14.

² Complaint, ¶¶ 28-38.

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entering into “any combination, conspiracy, agreement, or understanding between or among” the competitors in the ductile iron pipe fittings market.³ Star Pipe further agreed to cease and desist from communicating with competitors regarding cost, pricing, output, and customers for these products.⁴

Subsequently, FTC staff received information to suggest that Star Pipe might be violating the terms of the May 8, 2012 Order by communicating with representatives of its competitors about competitively sensitive topics. Accordingly, on September 20, 2013, the Commission issued a compulsory process resolution “[t]o determine whether Star Pipe Products Ltd. is violating or has violated the May 8, 2012, Decision and Order[.]” and, on April 4, 2014, the Commission issued the Subpoena to Star Pipe pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. The Subpoena contains nine specifications that request documents and information on various topics including: (1) Star Pipe’s compliance with the requirement that it distribute the May 8, 2012 Order to relevant personnel; (2) Star Pipe’s communications with its competitors, including Sigma; (3) Star Pipe’s pricing; and (4) Star Pipe’s document retention policies. The Subpoena provides a return date of May 5, 2014. The deadline for Star Pipe to file a petition to limit or quash the Subpoena was April 29, 2014.

FTC staff and counsel for Star Pipe engaged in a meet-and-confer process, but because they were unable to resolve the company’s objections sufficiently in advance of the April 29 deadline to file a petition to limit or quash the Subpoena, Star Pipe filed the instant Petition on April 24, 2014.

Following Star Pipe’s filing of its Petition, however, FTC staff and counsel for Star Pipe continued to confer and, on May 14, 2014, FTC staff formally modified the Subpoena to respond to Star Pipe’s objections, based on information proffered by Star Pipe. FTC staff informed the Commission of the agreed-upon modification and a comparison of the modified Subpoena to Star

³ May 8, 2012 Order, ¶¶ II.A., II.C.

⁴ May 8, 2012 Order, ¶¶ I.D., II.B., II.D.

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Pipe's Petition shows that the claims raised by the Petition have been resolved. As a result, Star Pipe's Petition is now moot.

We note that Star Pipe did not avail itself of the opportunity to withdraw its Petition despite FTC staff's modification of the Subpoena. In fact, rather than withdraw its Petition, Star Pipe filed an untimely supplement to its Petition on May 22.⁵ We are under no obligation to consider untimely motions and merely observe that the issues raised in Star Pipe's supplemental petition have been resolved. We urge Star Pipe to comply with relevant Commission deadlines and to avoid unnecessary Commission review and action when disagreements with FTC staff have been resolved.

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as moot;

IT IS FURTHER ORDERED THAT the Supplement to Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as untimely and moot; and

IT IS FURTHER ORDERED THAT Star Pipe Products Ltd. comply in full with the Commission's Subpoena consistent with FTC staff's May 14, 2014, modification, or as otherwise amended pursuant to Rule 2.7(l) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(l).

By the Commission.

⁵ See Supplement to Petition of Star Pipe Products Ltd. to Limit Subpoena Duces Tecum (May 22, 2014). The Commission's Rules of Practice require that, with respect to a Subpoena such as this one, a petition setting forth "*all* assertions of protected status or other factual or legal objections" shall be filed within 20 days after service of process, which in this case was April 29, 2014. 16 C.F.R. § 2.10(a) (emphasis added).