Responses to Petitions to Quash

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"

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[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.

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).

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

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

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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 (lst 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).

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

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[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)); s*ee 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.").

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]

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[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.

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]

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[23] Pet. at 10-11.

[24] Pet. at 9-10.

[25] *See* Pet. at 8-12. Those cases—*Schaumberg 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.

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]

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[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.

"[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.

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[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).

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.

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[37] Pet. at 16.

[38] *See* Pet. at 16-17.

[39] *Sturm*, 84 F.3d at 3.

Responses to Petitions to Quash

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.