



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 13, 2005

VIA FACSIMILE AND EXPRESS MAIL

BlueHippo Funding, LLC
c/o Ian D. Volner, Esquire
Venable, LLP
575 7th Street, NW
Washington, DC 20004-1601

Re: *Petition of BlueHippo Funding, LLC to Quash Civil Investigative Demand*
("Petition to Quash"), File No. 052-3092

Dear Mr. Volner:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand ("CID") filed by BlueHippo Funding, LLC ("BlueHippo" or "Petitioner"). BlueHippo has petitioned the Commission to quash a CID issued to Wachovia Bank, NA ("Wachovia") for "information concerning any BlueHippo account with Wachovia." Petition at 1. The Petition is denied because BlueHippo lacks standing to challenge the CID served upon Wachovia and because the Petition to Quash is otherwise without merit. Pursuant to 16 C.F.R. § 2.7(e), Wachovia is ordered to comply with the CID on or before December 23, 2005 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

I. Background and Summary

A CID was issued on August 10, 2005 to Wachovia for the bank's business records relating to BlueHippo. The CID return date was September 1, 2005. BlueHippo timely filed its Petition to Quash the CID issued to Wachovia on August 26, 2005.²

The Petition to Quash states two separate bases for relief: (1) "BlueHippo's past and present bank account information is not reasonably relevant to the scope and purpose of the investigation . . . [of] whether BlueHippo violated the Commission's 'Mail or Telephone Order Merchandise' Rule . . . or engaged in deceptive mail or telephone order shipping practices in violation of Section 5(a)(1) of the Federal Trade Commission Act;"³ and (2) "BlueHippo's bank account information is proprietary and confidential business information."⁴ Before addressing the merits of these claims, the Commission must first determine whether BlueHippo has standing to challenge a CID issued to Wachovia.

II. Petitioner Lacks Standing to Challenge the CID Issued to Wachovia.

According to its Petition to Quash, BlueHippo is a Maryland Corporation that "markets computers, televisions, and related equipment and accessories and extends credit to customers to enable them to make purchases." Petition at 2. Wachovia, the recipient of the CID, appears to be a wholly separate business entity with whom Petitioner claims no relationship other than that of a customer of Wachovia's banking services.

The records sought by the CID appear to be the business records of Wachovia and not those of BlueHippo. That being the case, it is clear that the mere fact that Wachovia's business records might contain information relevant to a Commission investigation of the business practices of BlueHippo does not give BlueHippo standing to quash a CID issued to Wachovia. *See United States v. Miller*, 425 U.S. 435, 445 (1976) ("We hold that the District Court correctly denied [depositor]'s motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to a subpoena."); and *Donaldson v. United States*, 400 U.S. 517, 530-31 (1971) (taxpayer cannot intervene as of right in a subpoena enforcement action in which a third party may be directed to produce records which may establish that the taxpayer is liable for taxes unless the taxpayer has shown that he/she possesses either a proprietary interest in the records or that such records are subject to some recognized privilege, e.g., work product of

² Counsel for Petitioner has not informed the Commission why it chose to file the Petition to Quash without the inclusion of the "signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement." 16 C.F.R. § 2.7(d)(2). The Commission will, as a matter of discretion, determine the Petition to Quash on the merits rather than denying it for this material deficiency.

³ Petition at 1.

⁴ *Id.*

his attorney or account). As in *Miller* and *Donaldson*, BlueHippo has identified no interest or privilege in the business records of Wachovia sufficient to give it standing to challenge the CID issued to Wachovia.

BlueHippo's description of the information sought by the CID as being its own "proprietary and confidential business information," Petition at 1, is simply wrong as a matter of law and fact. The law is well settled that bank records "are not the bank customer's private papers; they are, rather, the business records of the bank." *Clayton Brokerage Co., Inc. v. Edward Clement*, 87 F.R.D. 569, 570 (D. MD 1980), citing *Miller*, 425 U.S. at 440. Moreover, bank customers have "no legitimate 'expectation of privacy' in the contents of checks, deposit slips and other banking records." *Id.* Thus, a customer, such as BlueHippo, possesses no cognizable interest in the bank's records sufficient to provide it with standing to challenge the CID issued to Wachovia. See, e.g., *Securities and Exchange Comm'n v. First Security Bank of Utah*, 447 F.2d 166, 167 (10th Cir. 1971 (SEC administrative subpoena); and *Kelley v. United States*, 536 F.2d 897 (9th Cir. 1976) (IRS administrative summons). Thus, BlueHippo lacks standing to challenge the CID issued to Wachovia.

III. The Petition to Quash Is Otherwise Without Merit

Even if BlueHippo had standing to challenge the CID issued to Wachovia, the Petition to Quash is otherwise without merit. Neither the claims of confidentiality nor those of irrelevancy advanced by BlueHippo provide any grounds for quashing the CID issued to Wachovia.

A. The Information Requested Is Relevant to the Investigation.

The CID was issued pursuant to the Resolution adopted by the Commission on May 14, 1994 permitting Staff to conduct investigations of possible violations of 16 C.F.R. § 435 ("Telemarketing Sales Rule" or "TSR") or § 5(a)(1) of the FTC Act (15 U.S.C. § 5(a)(1)) in connection with any such sales. BlueHippo's claim that this investigation is limited to issues related to the "timing of sales and shipments and delivery," Petition at 2-3, is simply wrong. The CID does not evidence any limitation of the type posited by Petitioner.

The Petition to Quash appropriately cites the *Morton Salt* and *Invention Submission Corp.* cases to state the broad scope of the Commission's investigatory reach. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."); and *Federal Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information is reasonably relevant . . . – or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . – and not unduly burdensome to produce.") (citations and internal quotation marks omitted).

BlueHippo's reliance on *Invention Submission Corp.* or *Federal Trade Comm'n v. Turner*, 609 F.2d 743 (5th Cir. 1980), to establish that information responsive to the CID "is not reasonably relevant to the scope and purpose of the investigation," Petition at 1 and 5, is misplaced. The *dicta*

in the *Turner* opinion, 609 F.2 at 745 (“The amount of [the subject’s] assets is not relevant to an inquiry into whether a violation of the law exists.”), is distinguishable⁵ and was unpersuasive to the District of Columbia Circuit regarding the enforcement of pre-complaint process.⁶ The Commission, like the DC Circuit, finds the *Turner* case does not support granting the present Petition to Quash.

Further, BlueHippo’s attempt at artificially cabining the investigation to “shipping representations and delays,” Petition at 5, is at best illusory. The scope of the CID is determined by the resolution authorizing it rather than any particular theory of violation. *Invention Submission Corp.*, 965 F.2d at 1091-92 (“The Commission’s compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’”) (citations omitted). A review of the specifications of the challenged CID shows that the information requested is relevant to the subject of the Commission’s investigation and consistent with the scope of the authorizing resolution. For example, materials produced by Wachovia may assist in the identification of parties possessing information relevant to the inquiry. Accordingly, we find the information sought by the CID relevant to the investigation and neither Petitioner nor Wachovia claim that the CID specifications are too indefinite. *See United States v. Morton Salt, supra*; *see also Federal Trade Commission v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (“enforcement of an agency’s investigatory subpoena will be denied only when there is ‘a patent lack of jurisdiction’ in an agency to investigate or regulate”) (citations omitted).

B. The Petition to Quash Raises No Valid Claim of Privilege.

BlueHippo’s claim that the CID to Wachovia requires the provision of information that is “proprietary and confidential” to it is misplaced. *See* Section II., *supra*. Even if the Commission assumed that BlueHippo had a cognizable privacy interest in Wachovia’s business records, BlueHippo has provided no factual or legal support for a finding that the Commission’s existing protection of confidential or sensitive information is somehow inadequate. *See* 15 U.S.C. § 57b-2(f).

⁵ *Turner* involved the question of whether the Commission might use investigative process after having issued a cease and desist order to determine whether an order violator had sufficient assets to make a consumer redress remedy a viable enforcement option. 965 F.2d at 1089. The instant investigation is a pre-complaint inquiry to determine whether sufficient evidence exists to warrant initiation of any form of enforcement action, as in *Information Submission Corp. Id.*

⁶ The DC Circuit affirmed the order directing *Invention Submission Corp.* to produce its financial information in response to a CID. *Invention Submission Corp.*, 965 F.2d at 1090 (“Financial data, including evidence of relative profitability, could facilitate the Commission’s investigation of ISC in different ways, not all of which may yet be apparent. . . . And the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigatory subpoena by tying that material to a particular theory of violation.”).

IV. Conclusion and Order

Accordingly, no grounds having been established by BlueHippo to warrant quashing the CID issued to Wachovia, **IT IS ORDERED THAT** BlueHippo's Petition to Quash should be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Wachovia shall respond to the CID on or before December 23, 2005 at 5:00 p.m. E.S.T. The Secretary is directed to serve a copy of this letter decision on Wachovia by facsimile and express mail.

By direction of the Commission.

Donald S. Clark
Secretary