

Order

IN THE MATTER OF

**EVANSTON NORTHWESTERN HEALTHCARE
CORPORATION**

**ORDER GRANTING EXPEDITED MOTION AND
PERMITTING ENLARGEMENT OF LENGTHS OF
APPEAL BRIEFS**

Respondent Evanston Northwestern Healthcare, Inc. has filed an Expedited Motion for Extension of Length of Initial Appeal Brief (“Expedited Motion”), requesting leave to file an opening brief not to exceed 24,000 words in length. This amount is a 28 percent increase over the 18,750 word limitation prescribed by Commission Rule 3.52(b)(2). For the reasons set forth below, the Commission grants the Expedited Motion, and also enlarges by the same percentage amount the word limitations for the other three briefs that may be filed by the parties in this appeal.

This is the second motion for an extension of the word limitations filed by Respondent. By Order dated November 18, 2005, the Commission denied the portion of a previous Joint Motion filed by Respondent and Complaint Counsel that requested that the Commission enlarge the word limitations for all of the briefs by 60 percent. Commission Rule 3.52(k) expressly provides that “[e]xtensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.” In their Joint Motion, however, the parties based their request to extend the word limitations only on their assertions that the case involved “complex underlying issues” and on the length of the trial record, the prior pleadings, and the Initial Decision. Joint Motion at 3-4. The Commission denied the parties’ request because “[t]hese facts, offered without any elaboration as to the nature of the complexity of the issues, [did] not by themselves constitute the necessary strong showing to warrant extending the word count limitation.” November 18 Order at 2. Many of the Commission’s matters involve complex

Order

issues and large records. To make the showing required by Commission Rule 3.52(k), a party must, at minimum, state with specificity the reasons for the request for the extension, including the precise issues to be covered in the briefs, and why those issues cannot be adequately briefed in the specified word limitations. Otherwise, any party could seek an extension to the Commission's word limitations for briefs simply by making a general assertion about the complexity of the issues in the case at issue.

Respondent's Expedited Motion states that if it is bound in its Appeal Brief to the 18,750 word limitation prescribed by Commission Rule 3.52(b)(2), it will have to omit "important arguments necessary for its defense and will so limit its discussion of other complex, nuanced and novel issues raised on this appeal as to interfere with their clarity and completeness." Expedited Motion at 2. Respondent contends that these arguments and issues include (1) whether the merger at issue produced "substantial, verified pro-competitive effects arising from improved quality of care," and if so, whether any such improvements were merger specific; (2) whether the merger produced improvements "in other areas;" (3) whether, and if so to what extent, the merger affected prices, as reflected in "complex pricing analyses and internal documentary evidence;" (4) the contours of relevant markets, and the manner in which they should be defined; and (5) whether, and if so to what extent, the merger produced unilateral anticompetitive effects. Expedited Motion at 5-7.¹

The Commission expresses no opinion as to the substantive relevance or merit of any of the arguments or issues identified by Respondent with respect to the ultimate resolution of Respondent's appeal. The Commission has determined, however, that Respondent's contentions about the complexity of the issues

¹ Respondent advises that Complaint Counsel takes no position on the relief requested in Respondent's motion. Expedited Motion at 2.

Order

before the Commission, combined with the substantial size of the record in this matter, are sufficiently specific and well-founded to warrant extending the word limitation for Respondent's opening brief by the requested 28 percent amount.² Therefore, the Commission grants the Expedited Motion, and also enlarges by the same percentage amount the word limitations for the other three briefs that may be filed by the parties in this appeal.

Accordingly,

IT IS ORDERED THAT Respondent's Appeal Brief shall not exceed 24,000 words in length.;

IT IS FURTHER ORDERED THAT if Complaint Counsel perfects its Cross-Appeal, Complaint Counsel's Answering and Cross-Appeal Brief shall not exceed 33,600 words in length;³

IT IS FURTHER ORDERED THAT Respondent's Reply and Answering Brief shall not exceed 24,000 words in length.;

IT IS FURTHER ORDERED THAT Complaint Counsel's Rebuttal Brief shall not exceed 14,400 words in length.; and

IT IS FURTHER ORDERED THAT all of the foregoing Briefs shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

² See *In the Matter of Rambus, Incorporated*, Docket No. 9302, Order Granting Extensions of Time To File Appellate Briefs and Increases in Word Count Limits (March 18, 2005), at 2.

³ For purposes of this Order, Complaint Counsel's Cross-Appeal will be deemed to have been perfected if its Answering and Cross-Appeal Brief contains "its arguments as to any issues [Complaint Counsel] is raising on cross-appeal . . ." Commission Rule 3.52(c), 16 C.F.R. § 3.52(c). If Complaint Counsel do not perfect their cross-appeal, then their Answering Brief shall not exceed 24,000 words in length. *Id.*

The Honorable Dan Flynn
Texas State Representative
House District 2
P.O. Box 2910
Austin, TX 78768-2910

Dear Representative Flynn:

This responds to your letter dated April 12, 2005, in which you request a Commission opinion on the lawful construction of the term “cash advance item” as used in the FTC’s Funeral Rule, 16 C.F.R. § 453.1(b) (“the Funeral Rule” or “the Rule”).

Specifically, you question whether a Texas trial court is correct in ruling that “all goods or services purchased from a third-party vendor, even though not included on the contract, are ‘cash advances’” under the Funeral Rule.¹ Correct interpretation of the

¹ It is our understanding that your request is prompted by the May 2004 decision granting partial summary judgment in *Hijar v. SCI Texas Funeral Services, Inc.*, No. 2002-740, Order Granting Plaintiff’s Motion for Partial Summary Judgment and Establishing Issues Under Rule 166a(e), T.R.C.P. and Denying Defendants’ Second Motion for Summary Judgment (County Court at Law No. 3, El Paso, May 21, 2004), in which the court held that the defendant violated the cash advance disclosure provision of the Funeral Rule by failing to disclose each fee charged to the plaintiff for the cost of advancing funds on behalf of the plaintiff for goods and services purchased from third parties and resold to plaintiff. The Court in *Hijar* based its holding on an interpretation of the term “cash advance item” that would include the following items, when purchased from a third party and resold to persons arranging funerals: “direct cremation; immediate burial; forwarding remains; receiving remains; embalming; refrigeration; other preparation; transportation; casket/cremation casket; alternative container; outside enclosure; clothing/shroud; memorial booklet; service folders/prayer cards; acknowledgment cards; flowers;

term “cash advance item” is important because it determines the breadth and impact of certain substantive provisions of the Funeral Rule that employ that term.

The Commission believes that the court is incorrect in ruling that *all* goods or services purchased from a third-party vendor are cash advance items. This interpretation sweeps far too broadly, potentially bringing within its scope every component good or service that comprise a funeral. This was not and is not the Commission’s intention in the “cash advance” provisions of the Rule. In our opinion, the term “cash advance item” in the Rule applies only to those items that the funeral provider represents expressly to be “cash advance items” or represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them. This conclusion is based on the analysis set forth below.

Analysis

The Funeral Rule² defines the term “cash advance item” as follows:

[a]ny item of service or merchandise described to a

shipping container; crematory services; crucifix; escorts; certified copies; public transportation; outside funeral director’s expense; vault installation; clergy/religious facility; musicians or singers; hairdressing; and permits.”

² The Commission promulgated the original Funeral Rule on September 24, 1982, making it fully effective on April 30, 1984. 47 Fed. Reg. 42260 (Sept. 24, 1982). The Commission amended the Rule in 1994, following a lengthy review proceeding, and that 1994 amended Rule continues to be in effect. 59 Fed. Reg. 1592 (Jan. 11, 1994). All references to “the Funeral Rule” or “the Rule” are to the 1994 amended Rule, currently in effect. References to the 1982 Rule are to “the original Rule.”

purchaser as a “cash advance,” “accommodation,” “cash disbursement,” or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser’s behalf. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities; and, death certificates. 16 C.F.R. § 453.1(b).

The first sentence of this definition quite clearly states that any item a funeral provider describes expressly using the words “cash advance” item (or similar words or phrases) is, in fact, a cash advance item for purposes of the Funeral Rule. The second sentence broadens the definition to cover situations when a funeral provider purports to act “on behalf” of a particular customer, more as that customer’s procurement agent rather than as a retailer serving the general public. The third sentence merely provides an illustrative list of the various types of goods or services that funeral providers typically may treat as cash advance items.

Certain substantive provisions in the Funeral Rule employ the defined term “cash advance item.” Specifically, §§ 453.3(f)(1)(ii) and 453.3(f)(2) require a funeral provider who is charging a customer more for a cash advance item than the funeral director paid for it to disclose that material fact (*i.e.*, the existence of a mark-up, but not the amount) to the customer on the statement of funeral goods and services selected by the customer.³

³ Also, the statement of goods and services that the funeral provider must give to the customer at the conclusion of the discussion of funeral arrangements must itemize any cash advance items that are part of the agreed-upon funeral arrangements, and must state the price, or if not known, the estimated price, of those items. The Rule states: “(These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall

The Commission included these “cash advance” disclosure provisions in the Rule to address a practice in the marketplace that the Commission had identified as being harmful to consumers. Specifically, some funeral providers misrepresented that they would obtain goods or services for their customers at cost, when in fact these funeral providers profited by marking up the price of the items.⁴ The Final Staff Report on the original Funeral Rule, which is part of the rulemaking record on which the Commission relied in adopting the Rule, succinctly describes the problem:

Cash advance charges are completely separate from, and additional to, the funeral director’s own charges. They usually appear on the funeral bill under such headings as

be given and a written statement of the actual charges shall be provided before the final bill is paid.)” 16 C.F.R. § 453.2(b)(5)(i)(B).

⁴ This mark-up was achieved both directly and indirectly. As noted in the Final Staff Report, “[s]ometimes, [the mark-up] has been accomplished by simply inflating the amount of the charge on the customer’s bill. In other instances, the same effect has been achieved by the funeral home securing some form of kickback or rebate from the supplier of the cash advance item after charging the customer the full price.” Final Staff Report (June 1978) at 249. Marking up cash advance items was not an uncommon practice. The Commission noted, in adopting the original Rule, that “the evidence demonstrates that many individual funeral providers do charge mark-ups for cash advances. In a 1976 survey of California funeral directors, 12% of the 291 respondents admitted charging ‘in excess of the amount actually advanced for any items of service labeled as ‘cash advances’ or ‘accommodation items.’ [The National Funeral Directors Association’s] annual survey of funeral homes indicates that, on a national level, funeral homes are receiving a 5% mark-up on cash advance items. . . .” 47 Fed. Reg. 42279 (Sept. 24, 1982).

“accommodations,” “cash disbursements,” and “cash advanced for your convenience.” This terminology clearly indicates the basic conception, both by the funeral home and the consumer; that is, that the family is simply reimbursing the funeral director for cash outlays. The traditional use of such terms, as well as the obvious fact that these items are being provided by the third party, create the expectation that the amount billed is the same as that paid or owed. . . . Our investigation revealed, however that some funeral homes have generated extra revenues by charging their customers more for cash advance items than the funeral home actually paid out.⁵

Based on the record evidence of this problem, as summarized and analyzed in the Final Staff Report, the Commission adopted § 453.3(f) to remedy it. As noted in the Statement of Basis and Purpose issued by the Commission when it adopted the original Rule, § 453.3(f) is intended to prevent consumers from being led to believe, incorrectly, that the cost to the consumer for a particular item is the same as the cost to the funeral provider:

[C]onsumers believe that items labeled “cash advances” . . . are being provided at cost. There is an implicit representation that the cash advance transaction involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the consumer The use of this term in connection with items such as flowers, obituary notices, etc., which the consumers could easily obtain from a third party, creates the expectation that the amount billed the consumer is the same as the amount paid by the funeral provider. Given this expectation, the failure to disclose the existence of a mark-up is a deceptive practice.⁶

⁵ Final Staff Report (June 1978) at 249.

⁶ 47 Fed. Reg. 42278-42279 (Sept. 24, 1982).

The Commission found that, in describing a particular item to a customer, a funeral provider's express use of the term "cash advance item" (or alternative formulations such as "accommodation" or "cash disbursement") implies that the cost to the customer for that item is the same as the cost to the funeral provider. Thus, in cases where a funeral provider describes an item in this manner, yet charges the customer more for it than the funeral provider paid for it, the Commission requires a corrective disclosure to prevent the customer from being deceived. Specifically, in such a circumstance, the Funeral Rule requires that the following disclosure be placed on the statement of funeral goods and services selected: "We charge you for our services in obtaining: (specify cash advance items)."⁷ This is the scenario addressed by the first sentence in the "cash advance item" definition.

The second sentence of the definition, indicating that "[a] cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf," is in the nature of a "fencing-in" provision.⁸ The Commission's intention in including this sentence is to bring within the ambit of § 453.3(f) any situation where a funeral provider might, without using the specific term "cash advance," offer to obtain an item for a particular customer that the customer could obtain on her own – purporting to act "on behalf" of that customer, more as that customer's procurement agent than as a retailer serving the general public. Specifically, the purpose of this fencing-in aspect of the definition is to deter the less scrupulous funeral provider from evading the Rule by eschewing express description of an

⁷ 16 C.F.R. § 453.3(f)(2). The Rule also specifically prohibits this type of affirmative misrepresentation. 16 C.F.R. § 453.3(f)(1)(i).

⁸ Under the "fencing-in" doctrine, the FTC may frame a remedy which extends beyond the precise illegal conduct found. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984).

item as a “cash advance item” (or alternative formulations), yet nevertheless conveying to a customer acting reasonably under the circumstances that obtaining the item involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the customer. The Commission’s intention, in sum, is that this part of the “cash advance item” definition function to foreclose funeral providers from attempting to sidestep the strict letter of the Rule by using implied misrepresentations rather than express ones.

In the absence of either the funeral provider’s express representation that an item is a “cash advance item” or implied representations that the item is procured for a particular customer at the funeral provider’s cost, a consumer, acting reasonably under the circumstances, would not believe that the amount he or she is billed for an item is the same as the amount the funeral provider pays its supplier. Indeed, such a belief would be contrary to a reasonable consumer’s most elementary experience in the everyday marketplace. In these circumstances, the funeral provider is generally acting like any retailer who purchases goods or services from third parties for resale to consumers.

The Commission believes that reasonable consumers generally understand that the price charged by a retail seller – including funeral providers – includes profit.⁹ Thus, the corrective disclosure about cash advance items that § 435.3(f)(2) requires is unnecessary when the funeral provider does not mislead the customer through either express representations that the item is a “cash advance item” (or alternative formulations), or implied representations that the customer is paying no more for an item than the amount the funeral provider paid for it.

⁹ As the Commission noted in the Statement of Basis and Purpose for the original Rule, “The Commission does not suggest that it is improper for funeral providers to profit on items obtained from third parties. It is clear that it is wholly proper for providers to do so.” 47 Fed. Reg. 42278 (Sept. 24, 1982).

It is worth noting that the text and structure of the Rule overall reflect the fundamental distinction between cash advance items and non-cash advance items. For items that are typically non-cash advance items, the Rule requires disclosure of the **retail** price of specified goods and services offered for sale by a funeral provider.¹⁰ An obvious example is the Rule's treatment of caskets, for which it requires a separate price list containing only the funeral provider's **retail** price.¹¹ Therefore, items that must appear on a funeral provider's price list¹² would not trigger

¹⁰ Funeral providers must "[i]nclude on the [general] price list, in any order, the **retail** prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale" The rule then lists: forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial; transferring remains to the provider's premises; embalming and other preparation of the body; use of the provider's facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider's equipment and staff for a graveside service; the use of the provider's hearse or limousine; and the provider's basic services fee. 16 C.F.R. § 453.2(b)(4). (Emphasis supplied.)

¹¹ "The funeral provider must offer the [casket price] list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the **retail** prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list." 16 C.F.R. § 453.2(b)(2)(i). (Emphasis supplied.)

¹² Section 453.2(b)(4)(i)(C) of the Rule sets forth the minimum information that must be included on a funeral provider's general price list. These items include: caskets; outer burial containers; forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial;

the cash advance disclosures unless the funeral provider expressly represents the items as “cash advance items” (or alternative formulations) or represents by implication that items can be procured on behalf of the particular customer and provided at the same price the funeral provider paid for them.

Accordingly, the Commission wishes to be clear that the term “cash advance item” does not apply to *every* good or service that a funeral provider obtains from a third party. This overbroad interpretation, which potentially brings within its scope every component good or service of a funeral, does not comport with the Commission’s intention in promulgating the “cash advance” provisions of the Rule. Rather, based on a review of the original Rule and the rulemaking record, the Commission finds that the term “cash advance item” in the Rule applies only to those items that the funeral provider represents expressly to be “cash advance items” or represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them.

transferring remains to the provider’s premises; embalming and other preparation of the body; use of the provider’s facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider’s equipment and staff for a graveside service; the use of the provider’s hearse or limousine; and the provider’s basic services fee.

Response to Petition

Re: *Petition to Quash Civil Investigative Demand*, File No.
051-0131

July 15, 2005

Dear Mr. Schildkraut:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand (“Petition to Quash”) served on Aloha Petroleum, Ltd. (hereinafter “Petitioner” or “Aloha”) in conjunction with an investigation by the Federal Trade Commission (hereinafter “FTC” or “Commission”) of a proposed transaction between Aloha and Trustreet Properties, Inc. (“Trustreet”). The Petition to Quash is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand (“CID”) is July 18, 2005.

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 The filing of such a request for review does not, however, stay the time for compliance established herein. 16. C.F.R. § 2.7(f).

I. Background and Summary

On June 29, 2005, the Commission issued a CID to Petitioner in connection with the Commission’s investigation. Petitioner received the CID on July 5, 2005. The original return date, July 6, 2005, was extended by letter dated July 8, 2005 until July 13,

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 should be calculated from the date you receive the original by express mail.

Response to Petition

2005. After conferring with counsel for the Commission in accordance with the provisions of 16 C.F.R. § 2.7(d)(2), the Petition to Quash was timely filed on July 13, 2005.

The investigation involves a proposed purchase of assets by Aloha from Trustreet. Since the transaction is below the reporting thresholds established by 15 U.S.C. § 18a, the Commission's investigation has been conducted through both voluntary and compulsory requests for information.

The two-page Petition to Quash raises two issues. First, Aloha claims that the information sought is irrelevant to the Commission's deliberative process because Staff recommendation's already have been made to the Commission and because Commission Staff would not have adequate time to evaluate the information prior to the Commissioners taking any action concerning the transaction. Related to this point, Aloha asserts that the CID provided an inadequate response time and that "it typically takes months to respond" to the type of information request posed by the CID. Petition at 1.² Second, Aloha claims that production of its own records to the Commission at this time would be unfair to it because the timing of the transaction is such that a Commission decision to challenge the transaction would have to be made before Aloha could "respond to any new issues raised by Staff's analysis of the CID."³ Petition at 2.

² Even if the Commission were to treat this cryptic statement as an assertion that compliance was too burdensome, Petitioner has failed to carry its burden of demonstrating such unreasonableness. *See* Federal Trade Commission v. Rockefeller, 591 F.2d 182, 190 (2nd Cir. 1979); and National Claims Service, Inc., 1998 FTC Lexis 192, *8 (FTC 1998).

³ This argument is based on a misperception on the part of Aloha regarding Commission procedures. As a courtesy, Commission Staff typically advises subjects of investigation of the bases upon which Staff will be recommending any

Response to Petition

II. Analysis

When reviewed by a federal court, a CID must be enforced so long as the information sought is: (1) reasonably relevant, *i.e.*, not plainly incompetent or irrelevant to any lawful purpose of the agency; and (2) not unduly burdensome to produce. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). *See also Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 107 (D.C. Cir. 1997).⁴ Though the Commission is not a federal court, the standard by which the courts would evaluate the Commission's decision is the appropriate standard for the evaluation of the Petition to Quash.

enforcement action that might be authorized by a vote of the Commissioners. After receiving that advice from Staff, meetings with the parties may be scheduled with individual Commissioners to provide an opportunity for the subjects of the investigation to present reasons why the Commissioners should not adopt a particular Staff enforcement recommendation with which they disagree. The timing of this transaction is such that production of materials on July 18th will not provide enough time for either additional Staff discussions or Commissioner meetings before the time that the Commission must make a decision on whether it should seek to enjoin the consummation of this transaction. No legally cognizable right of Aloha would be adversely affected if such additional consultation cannot occur here. Further, the timing constraints here are not of the Commission's making. The dates by which Aloha and Trustreet have advised the Commission that this transaction must close are solely within the control of one or the other of them. If the transaction parties desire the Commission to have additional time for consultation, it is a problem uniquely within their hands to resolve.

⁴ It also must be within an agency's authority to conduct an investigation and to issue a CID. In this merger, the Commission's authority neither is nor could be challenged.

Response to Petition

Notably, the Petition does *not* assert that the information sought by the CID is not relevant to the transaction. Indeed, such an assertion would be impossible since the CID directly addresses issues concerning the transaction. For this reason alone, under the standard enunciated in *Invention Submission*, the Petition must be denied.

Attempting to sidestep the critical (but fatal) relevance issue, Aloha, in effect, claims that it should be excused from responding to the CID because the Commission already has sufficient information to make its decision whether to challenge the transaction. It is not, however, within Aloha's purview to make this determination. Indeed, a similar argument was rejected in *EEOC v. Med-National, Inc.*, 186 F.R.D. 609, 618 (D. Hawaii 1999). In *Med-National*, the petitioner asserted that it should not be required to respond to an administrative subpoena because the EEOC already had sufficient evidence to resolve the merits of the related claim. Citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 191 (1990), the district court held that the only germane issue as to whether it should enforce the EEOC's administrative subpoena was whether the information sought was relevant to the EEOC's investigation. The court was not to make an evaluation of whether the agency, without the information sought by the administrative subpoena, already had sufficient evidence to determine if the issue being investigated was well-founded.

Beyond these issues, and without waiving the Commission's deliberative process privilege, assuming *arguendo* that: (1) Staff's recommendations have been made to the Commission; and (2) that these recommendations were unanimous in their conclusions, the information sought in the CIDs would still be relevant to the Commission's deliberative process. Most simply stated, the Commission does not merely "rubber stamp" Staff's recommendations. Up until the moment that the Commissioners formally vote, each individual Commissioner has both the right and obligation to deliberate upon all relevant information that is legitimately available to her or him before voting as to whether the transaction does or is likely to violate any statute enforced by

Response to Petition

the Commission. Moreover, Commissioners are fully capable of evaluating such evidence directly, without the need for Staff intercession.

III. Conclusion and Order

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition to Quash should be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e),⁵ the new date for Petitioner to comply with the subject Subpoena and CID, as amended herein, is July 18, 2005.⁶

⁵ 16 C.F.R. § 2.7(e).

⁶ Petitioner is urged, but not required, to respond to the Subpoena on a rolling basis.

Response to Petition

Re: *Petition to Limit or Quash, File No. 032-3237*

October 13, 2005

Dear Mr. Seiger:

This letter advises you of the disposition of the Petition to Limit or Quash (hereinafter "Petition") filed by Garden of Life, Inc. (hereinafter "Petitioner") in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Petition appears to be moot.

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

The Petition was timely filed on March 25, 2004. At that time, the Commission had reason to believe that Petitioner intended to comply with the terms of the Civil Investigative Demand in accordance with a schedule being negotiated with Staff. A ruling on the Petition was, therefore, held in abeyance. The Commission now has reason to believe that Petitioner and Staff did negotiate a satisfactory schedule for compliance and that production has been completed. Those developments have mooted the Petition. Accordingly,

IT IS ORDERED THAT the Petition to Limit or Quash filed by Petitioner should be, and it hereby is, **DENIED** on the grounds that it is **MOOT**.

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 is to be calculated from the date you received the original by express mail.

Response to Petition

Re: *Motion to Quash Civil Investigative Demands (“Motion to Quash”) Filed by Steve Wingard, Ashley Industries, LLC, Ashley Industries, LP, and Ashley Industries GP, LLC, File No. 042-3127*¹

October 13, 2005

Dear Mr. Zachry:

This letter advises you of the disposition of the Movants’ Motion to Quash Civil Investigative Demands (“CIDs”) for written interrogatories, documentary materials, and oral testimony in conjunction with an investigation by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Motion is denied in part and granted in part for the reasons hereinafter stated. Pursuant to 16 C.F.R. § 2.7(e), the new date for Steve Wingard to comply with the document production CID and for the Ashley entities to comply with the CIDs for document production and interrogatory answers is October 27, 2005, and the new date for Steve Wingard to comply with the CID for oral testimony is November 10, 2005.

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.²

¹ Ashley Industries, LLC, Ashley Industries, LP, and Ashley Industries GP, LLC will be referred to herein as “the Ashley entities.” The Ashley entities and Steve Wingard will be referred to herein as “Movants.”

² 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.

Response to Petition

I. Background and Summary

The CIDs³ were issued on June 30, 2005 – production of interrogatory answers and documents was required by July 25, 2005 and the investigational hearing was scheduled for August 8, 2005. On July 18, 2005 counsel for Movants spoke with Staff as required by Commission Rule § 2.7(d)(2), 16 C.F.R. § 2.7(d)(2). In particular, Staff were advised that Movants would only comply with the CIDs if Steve Wingard were granted immunity from prosecution. Staff advised Movants that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. On July 20, 2005, the Motion to Quash was filed.

II. Movants Are Only Entitled To Relief With Regard to One of the CIDs.

The factual basis for this Motion is the unsupported assertion of counsel that “Steve Wingard has always operated [the Ashley entities] as a sole proprietorship.” Motion at 1. The Motion is not accompanied by any affidavits or other materials under oath. In substance, Movants claim that they are entitled to relief from the commandment of the CIDs because the business records of the Ashley entities “could be used against [Steve Wingard] in a future criminal proceeding.” Motion at 2. Accordingly, it is claimed that the production of evidence required by the CIDs would violate Steve Wingard’s Constitutional rights against self-incrimination secured by the Fifth Amendment. These claims, except those made by Steve Wingard with respect to the CID directing him to respond to interrogatories, are without merit.

³ Five separate CIDs are involved in this matter. Three were issued to Steve Wingard – one for testimony, one for interrogatory answers and one for document production. Two were issued to the Ashley entities – one for interrogatory answers and one for document production.

Response to Petition

A. The Ashley entities have provided no factual basis for their claims under the Fifth Amendment.

An individual is protected from the compelled provision of incriminating testimony by the Fifth Amendment under many circumstances. However, the Movants have demonstrated no factual support for their claim that such protection is available to the Ashley entities. In the first place, the privilege against compelled incriminating testimony does not extend to corporations or other collective entities. *Braswell v. United States*, 487 U.S. 99 (1988); and *Bellis v. United States*, 417 U.S. 85, 88-90 (1974). Public records of the State of Texas show that the Ashley entities are corporations or other collective entities within the meaning of the law.⁴ As such, the Ashley entities have no rights against self-incrimination to assert. *Braswell*, 487 U.S. at 102. Additionally, the contents of the business records of the Ashley entities are not privileged. *Id.* Finally, service of the CIDs on the Ashley entities to respond to interrogatories and to produce documents also imposed on them the obligation to “find the means by which to comply because no Fifth Amendment defense

⁴ On April 12, 2002, Ashley Industries GP, LLC filed Articles of Organization with the Corporations Section of the Office of the Secretary of State of the State of Texas establishing itself as a Texas limited liability company. Article Four on the first page of that document names Steve Wingard as the company’s initial registered agent. Article Five, beginning on the first page of that document, states that the company will be managed by its “members” and names Steve Wingard as its initial member. On that same date, Steve Wingard, “President and Sole Member” of Ashley Industries, LP filed its “Certificate of Limited Partnership” with the Corporations Section of the Office of Secretary of State of the State of Texas. On September 24, 2003, Steve Wingard filed a “Texas Franchise Tax Public Information Report” with the Texas Secretary of State on behalf of Ashley Industries LLC in which Steve Wingard was listed as the President, a Director, and the Registered Agent of that company.

Response to Petition

is available to it.” *Id.* at 116 (quoting *In re Sealed Case*, 832 F.2d 1268, 1282, n. 9 (DC Cir. 1987)).⁵

B. Steve Wingard has provided no factual basis for his claim under the Fifth Amendment regarding the production of the business records of the Ashley entities.

Movants, including Steve Wingard, claim that their business activities are “currently under investigation by the United States Attorney’s Office for the Western District of Texas.” Motion at 2. That fact does not by itself, however, excuse Steve Wingard from compliance with the CID for the production of documents directed to him as custodian of records for the Ashley entities.

The CID for document production only seeks the business records of the Ashley entities. Steve Wingard makes a general claim that the business records of the Ashley entities are purely private, but provides no support whatsoever for such claim. Further, Steve Wingard chose to incorporate and/or organize the Ashley entities as collective entities because of the legal

⁵ Movants claim an entitlement to be treated as sole proprietorships based on the assertion that “Steve Wingard has always operated Ashley Industries as a sole proprietorship.” Motion at 1 & 4. It is unclear whether this assertion is intended to be a subtle distinction between a company “being” a sole proprietorship as opposed to a company being “operated” as a sole proprietorship. The claim fails nevertheless because Movants cite no authority upholding this apparent distinction nor do they provide any factual basis for either the fact of being sole proprietorships or for the fact that the companies are being operated as sole proprietorships. Further, even if the Ashley entities were sole proprietorships, Movants have not provided an adequate factual basis for quashing the CIDs issued to them. *See, e.g., Shapiro v. United States*, 335 U.S. 1, 18 (1948) (holding that “required records” cannot be treated as private papers subject to the privilege).

Response to Petition

advantages and protections that such organizational structures provided to him and them and may not now simply walk away from those choices in order to protect their business records from production. *United States v. Stone*, 976 F. 2d 909, 912 (4th Cir. 1992).

It is well established that “without regard to whether the subpoena is addressed to the corporation or, as here, to the individual in his capacity as a custodian, . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.” *Braswell*, 487 U.S. 108-09 (citations omitted). Even if “the act of production may prove personally incriminating” to the custodian, the custodian is not entitled to claim protection from the Fifth Amendment. *Id.* at 111-12. The Supreme “Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. . . . Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege.” *Id.* at 110-11.

The *Braswell* Court held that the custodian of corporate records could not assert a Fifth Amendment privilege against the production of corporate records; however, that Court left “open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.” *Id.* at 118, n. 11. That argument fails here because Movants have not provided any evidence to show that the Ashley entities are a sole proprietorship. Additionally, the Fourth Circuit has squarely rejected that claim in *United States v. Stone*⁶ when it held that even if a company

⁶ 976 F.2d at 912 (citations omitted).

Response to Petition

is a one-man operation, . . . it is still a corporation, a state law regulated entity that has a separate legal existence from [the individual] shielding him from its liabilities. The business could have been formed as an unincorporated sole proprietorship and production of its business records protected by the privilege against self-incrimination. . . . [The individual] chose the corporate form and gained its attendant benefits, and we hold, in accord with the decisions of sister circuits, that he cannot now disregard the corporate form to shield his business records from production.

Accordingly, we find that Steve Wingard is the custodian of the records of the Ashley entities. As such, he is not entitled to assert a claim of Fifth Amendment privilege with respect to either the production of such records or the provision of testimony “to identify or authenticate the documents for admission in evidence.” *Braswell*, 487 U.S. at 114 (quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957)).

Further, since the contents of the business records of the Ashley entities were in all likelihood voluntarily prepared by them in the ordinary course of their business and not by reason of government commandment in furtherance of a criminal investigation, the contents of such documents are not likely to be entitled to any privilege, even if the Ashley entities were sole proprietorships – which they are not. *United States v. Fisher*, 425 U.S. 391, 410 (1976). This is especially true with respect to so-called “required records” which must be produced even if the privilege against compelled testimony might otherwise apply. *Shapiro*, 335 U.S. at 17.

C. Steve Wingard may not make a blanket assertion of privilege under the Fifth Amendment with respect to the provision of oral testimony.

Steve Wingard has failed to provide any factual basis for his claims under the Fifth Amendment with respect to oral testimony. Steve Wingard must establish a factual basis for the Commission

Response to Petition

to believe that his compelled oral testimony would subject him to “substantial and real, and not merely trifling or imaginary, hazards of incrimination.” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting earlier Supreme Court cases – internal quotation marks omitted). Second, the privilege against compelled testimony cannot be asserted in a wholesale fashion. “A person may not make a ‘blanket assertion’ of the [Fifth Amendment] privilege.” *United States v. Aeilts*, 855 F. Supp. 1114, 1116 (C.D. CA 1994) (citing *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990)). The Commission’s Rules and general investigatory practice require privilege claims to be asserted in a more detailed manner to keep blanket claims of privilege from being used to sweep in unprivileged materials. *See, e.g.*, 16 C.F.R. §§ 2.7, 2.8A, and 2.9. The privilege must be asserted on a document-by-document basis, *Aeilts*, *supra*, and a “question-by-question basis.”⁷ *United States v. Bodewell*, 66 F.3d 1000, 1002 (9th Cir.

⁷ Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of Steve Wingard from the investigational hearing commanded by the CID. Further, as the Sixth Circuit pointed out in *United States v. Mayes, et al*, 512 F.2d 637, 649 (6th Cir. 1975):

The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. *United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964). . . . While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, *United States v. Compton*, 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 *Wigmore, supra*, § 2270, the nature of the privilege is such that in the final analysis the

Response to Petition

1995); and *Brown*, 918 F.2d at 84 (“A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.”) (internal quotation marks omitted). Accordingly, Steve Wingard’s blanket assertion of privilege under the Fifth Amendment with respect to the provision of oral testimony must be denied.

D. Steve Wingard has adequately asserted a claim of privilege under the Fifth Amendment with respect to the CID directing him to answer interrogatories.

Unlike the document production CID that was served on Steve Wingard, the CID for responses to interrogatories does not differentiate between the personal knowledge of Mr. Wingard and knowledge derived from the contents of the business records of the Ashley entities. Further, Mr. Wingard has asserted, albeit in a summary fashion, a separate, and plausible, claim of privilege under the Fifth Amendment as to each interrogatory that has been directed to him. Motion at 4-6.

As a general matter, a claim of privilege under the Fifth Amendment may be upheld as to an individual when that individual “reasonably believes that his testimony could ‘furnish a link in the chain of evidence needed to prosecute’ him for a crime.” *Hoffman v. United States*, 485 U.S. 479, 486 (1951). “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Id.* at 486-87. There must be a real danger of self-incrimination, not merely one that is remote or

controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

Response to Petition

speculative. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). "When the danger is not readily apparent from the implications of the question asked or the circumstances surrounding the inquiry, the burden of establishing its existence rests on the person claiming the privilege." *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2nd Cir. 1990).

In this instance, counsel for Mr. Wingard has advised the Commission that Mr. Wingard's business activities are being investigated for possible criminal violations by the United States Attorney for the Western District of Texas. Further, the Commission has reason to believe that the subject of that inquiry may involve some of the same business conduct that is the subject of the Commission's investigation. A review of each of the seven interrogatories directed to Mr. Wingard shows that it is apparent from both the implications of the questions asked and the circumstances surrounding the Commission's investigation that Mr. Wingard's answers to the Commission's interrogatories may be self-incriminating to Mr. Wingard. Accordingly, his Motion to Quash must be granted, at least in part.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** Movants' Motion to Quash should be, and it hereby is, **DENIED** with respect to the CIDs directed to Steve Wingard and the Ashley entities for document production, the CID directed to the Ashley entities for responses to interrogatories, and the CID directed to Steve Wingard for oral testimony; and **IT IS FURTHER ORDERED THAT** Movants' Motion to Quash should be, and it hereby is, **GRANTED** with respect to the CID directed to Steve Wingard for answers to interrogatories. Pursuant to 16 C.F.R. § 2.7(e), the new date for Steve Wingard to comply with the document production CID and for the Ashley entities to comply with the CIDs for document production and interrogatory answers is October 27, 2005, and the new date for Steve Wingard to comply with the CID for oral testimony is November 10, 2005.

Response to Petition

Re: *Petition to Limit and/or Quash Civil Investigative Demand*
("Petition"), File No. 052-3182

November 17, 2005

Dear Mr. Raney:

This letter advises you of the disposition of the Petition filed by Voice Mail Broadcasting Corp. (hereinafter "Petitioner") in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Petition is hereby denied because it was not filed in conformity with the Commission's Rules of Practice, 16 C.F.R. § 2.7(d)(2) and because it was otherwise lacking in substantial merit. The new date for Petitioner to comply with the CID is November 28, 2005, at 9:00 a.m.

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

I. BACKGROUND

On October 14, 2005, the Commission issued a CID to Petitioner in connection with an investigation by the Commission into potential violations of the Commission's "Telemarketing Sales Rule," Petition at 1. On November 3, 2005, Petitioner filed the Petition. Petitioner asks for relief from most of the specifications of the CID on the grounds that: (1) the "definition of 'voice broadcasting services' exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or

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 receive the original by express mail.

Response to Petition

practices prohibited by that rule or the FTC Act;” Petition at 1, and (2) Specification D-9 of the CID’s Schedule of Documents to be Produced “requests documents which [sic] are privileged and/or confidential based on the attorney-client privilege, trade secrets, and other applicable privileges.” Petition at 2.

II. Petitioner Failed to Comply with the Requirements of Our Rules.

Petitioner failed to discharge its meet-and-confer obligations under 16 C.F.R. § 2.7(d)(2). FTC rules require a petitioner to meet with Commission counsel in a “good faith” attempt to resolve any disputes raised by the production of materials in response to our compulsory process. The rule contemplates that any adjustments to avoid undue burden or unnecessary intrusion into confidential areas can be made by well-intentioned lawyers cognizant of the specific problems raised by the production demanded. It serves the exemplary public purpose of facilitating Commission investigations without unduly intruding into other areas. In this case, it does not appear that Petitioner even attempted to contact or engage the Commission’s Staff in any discussion of the merits of the claims raised in this Petition.

The obligation on the part of the recipient of FTC compulsory process to meet and confer with Commission counsel on the merits of any objections that might arise in compliance with such demands is neither a *pro forma* one nor one that can be easily excused.² Compulsory process is routinely issued by investigatory agencies without good knowledge regarding the record keeping

² In cases where the issue raised is primarily, if not exclusively, an issue of law, a summary meet-and-confer might be appropriate. However, where, as here, the issues are primarily mixed questions of law and fact (confidentiality, relevance and materiality), a failure on the part of counsel to engage in a meaningful meet-and-confer with Commission counsel is less tolerable.

Response to Petition

practices of the recipients of its process. Demanding good faith attempts to resolve avoidable compliance problems is of equal interest and concern to the Commission and any process recipient. The meet-and-confer requirement provides both sides a mechanism within which adjustments can be made to competing interests in a quick and efficient manner.³ Petitioner's failure to comply with the meet-and-confer requirements of FTC rules is sufficient, in and of itself, to deny the instant Petition. However, inasmuch as the Petition does not otherwise exhibit any substantial merit, it is additionally denied on that ground as well.

III. Petitioner Failed to Provide a Factual or Legal Basis for the Relief Requested.

The Petition asserts claims without providing any factual or legal support for those claims. This opinion has already recited the entire substantive content of the Petition in Section I, *supra*. This Petition contains no hint regarding the facts underlying the claims advanced by the Petition or any indication of the legal authority upon which Petitioner relies. We are unwilling to speculate at large on these matters about which Petitioner apparently wished us to be uninformed.

Even a casual review of the specifications of the challenged CID shows that the information requested is relevant to the subject of the Commission's investigation. Moreover, Petitioner has not argued that the Commission's investigation is outside its authority, or that the specifications are too indefinite. Accordingly, Petitioner's jurisdictional challenge is rejected. *See United States v. Morton Salt*, 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

³ We understand that in most cases significant accommodation of legitimate interests can be and is achieved without the necessity of any conduct more taxing than a phone call between well-intentioned counsel.

Response to Petition

reasonably relevant.”). *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).

Further, Petitioner claims privilege with respect to one specification of the CID. It, however, has not provided the Commission with a description of the information for which privilege is claimed, the actual privilege being claimed for each privileged item, or any factual basis for a claim of privilege.⁴ Accordingly, Petitioner provides no basis for relief on this ground, and the privilege claims are denied.

IV. CONCLUSION

For all the foregoing reasons, the Petition should be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e),⁵ the new date for Petitioner to comply with the subject compulsory process demands is November 28, 2005, at 9:00 a.m.

⁴ Rule 2.7(d)(1) clearly requires that every “petition shall set forth all assertions of privilege or other factual and legal objections to the . . . civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation.” 16 C.F.R. § 2.7(d)(1).

⁵ 16 C.F.R. § 2.7(e).

Response to Petition

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

December 13, 2005

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.

Response to Petition

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.

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.*

Response to Petition

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 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

Response to Petition

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

Response to Petition

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

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

Response to Petition

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

material to a particular theory of violation.").

Response to Petition

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).

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.