

SO ORDERED.

SIGNED this 11th day of February, 2015.



Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:)	
)	
)	
C AND M INVESTMENTS OF HIGH)	Case No. 13-10661
POINT INC., et al.)	
)	
Debtors.)	
_____)	
)	
JOHN A. NORTHEN, Chapter 7)	
Trustee for C&M Investments of High)	
Point, Inc., C. Wayne McDonald)	
Contractor, Inc., C. Wayne McDonald,)	
and Wendy C. McDonald,)	
)	
Plaintiff,)	Adv. Pro. No. 14-02023
)	
v.)	
)	
WINDSOR INVESTMENTS OF)	
NORTH CAROLINA, LLC, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on February 3, 2015, upon the Motion to Quash Subpoenas and Motion for Protective Order filed by Windsor Investments of North Carolina,

LLC, the Maggie McDonald Irrevocable Trust, the Jason W. McDonald Irrevocable Trust, the Ashley McDonald Davis Irrevocable Trust, Branson Meadows Holding, LLC, Cedar Lane Properties, LLC, Dorothy Jane Smith, Jack Smith, Maggie's Farm, LLC, Jason W. McDonald, the McFactory, LLC, Mac & Mac, LLC, the Melissa Anne Martin Glick Irrevocable Trust, the Michael Steven Martin Irrevocable Trust, and the Mary Margaret McDonald Irrevocable Trust (the "Family Defendants"). Appearing on behalf of the Chapter 7 Trustee (the "Trustee") was Mr. John Paul Cournoyer. Appearing on behalf of the Family Defendants was Mr. Ellis Drew. Also present was Mr. David Meschan, attorney for MMM Holdings, LLC, Zan Man Properties, LLC, Belle Fifty, LLC, Windemere Holdings, LLC, CJW Properties of North Carolina, LLC, Triple Creek, LLC, and Hickory Rio, LLC. After considering the Family Defendants' motions, the Trustee's Response, arguments from Mr. Cournoyer and Mr. Drew, and the record in this case, the Court finds that the Family Defendants' motions should be denied.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding, within the meaning of 28 U.S.C. § 157(b)(2), which this Court has jurisdiction to hear and determine.

FACTUAL BACKGROUND

The pertinent facts, as they relate to the Family Defendants' motions, are not in dispute. On May 17, 2013, two creditors filed involuntary Chapter 7 petitions against C&M Investments of High Point, Inc., C. Wayne McDonald Contractor Inc., C. Wayne McDonald, and Wendy C. McDonald (the "Debtors"), and the Trustee was subsequently appointed. On August 29, 2014, the Trustee filed an adversary proceeding against the Family Defendants, asserting seventeen

causes of action for avoidance and recovery of fraudulent transfers under N.C. Gen. Stat. § 39-23.1 *et seq.* and 11 U.S.C. §§ 544(b) and 550, six causes of action seeking declaratory relief concerning invalid legal entities, and one cause of action for the appointment of a receiver. The Family Defendants filed an amended answer that generally denied the allegations and asserted various defenses.

On or about January 8, 2015, the Trustee served subpoenas duces tecum (“subpoenas”) on the Family Defendants’ banking institutions pursuant to Rule 45 of the Federal Rules of Civil Procedure and Rule 9016 of the Federal Rules of Bankruptcy Procedure. The Trustee gave notice to the Family Defendants of their intention to serve the subpoenas on the banking institutions. The subpoenas asked for all bank statements, wire confirmations, cancelled checks, and any other documents relating to the Family Defendants during the period from September 2009 through December 31, 2014. The banking institutions were required to comply with the subpoenas by February 6, 2015. The Family Defendants filed a Motion to Quash Subpoenas and a Motion for Protective Order on January 22, 2015, to which the Trustee filed a Response on January 27, 2015. The Family Defendants made several arguments in support of its motions, namely that the subpoenas sought confidential private information and that the subpoenas were overly burdensome. The Trustee responded, arguing that the Family Defendants lacked standing to quash the subpoenas but if the Family Defendants had standing that the subpoenas were issued in accordance with Rule 45.

DISCUSSION

A party may subpoena an individual or institution for certain documents, also called a subpoena duces tecum, pursuant to Rule 45 and made applicable in adversary proceedings pursuant to Rule 9016. A court is required to quash or modify a subpoena if it “i) fails to allow a

reasonable time to comply; ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A). The burden of proof to quash a subpoena is on the movant. *United States v. Bornstein*, 977 F.2d 112, 116 (4th Cir. 1992).

A party must have standing in order to quash a subpoena. “Ordinarily, a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena.” *United States v. Idema*, 118 F. App’x. 740, 744 (4th Cir. 2005) (unpublished) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2459 (2d ed. 1995)).¹ Examples of a personal right or privilege include those under the Constitution and statutory rights. *See, e.g., In re Grand Jury Subpoena John Doe*, 584 F.3d 175, 185-86 (4th Cir. 2007) (examining whether the Fifth Amendment grants a privilege or right sufficient to confer standing to a nonparty subpoena); *Powers v. Eichen*, 961 F. Supp. 233, 235 (S.D. Cal. 1997) (finding that the Private Securities Litigation Reform Act of 1995 grants standing to quash nonparty subpoenas).

An individual’s bank records are business records of the bank. In *United States v. Miller*, agents from the Alcohol, Tobacco, and Firearms Bureau served subpoenas on two banks that sought account information on a defendant charged with several federal offenses. 425 U.S. 435, 437-38 (1976). In rejecting the motion to quash the subpoenas the Supreme Court stated that the sought-after bank account information was not the “private papers” of the defendant but were instead “the business records of the banks.” *Id.* at 440. By categorizing bank account information

¹ This Court recognizes that *Idema* is an unpublished case and is therefore not binding authority. Numerous other courts within the Fourth Circuit have found *Idema* to be persuasive in resolving the same issue before this Court. *See Carolina Materials v. Cont’l Cas. Co.*, 2009 WL 4611519, at *3 (W.D.N.C. December 1, 2009); *United States v. Gordon*, 247 F.R.D. 509, 509 (E.D.N.C.2007); *Robertson v. Cartinhour*, 2010 WL 716221, at *1 (D. Md. February 23, 2010); *Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 239 (E.D. Va. 2012).

as private papers, the Court wrote, “no Fourth Amendment interests of the depositor are implicated.” *Id.* at 444. Without any basis in the Fourth Amendment the Court concluded that “a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant.” *Id.* Shortly after *Miller*, Congress passed the Financial Privacy Act of 1978 which stated that “no Government authority may have access to...the financial records of any customer from a financial institution” except in five narrow circumstances. 12 U.S.C. § 3402. While subsequent legislation has abrogated the holding of *Miller* insofar as when the federal government is the issuer of the subpoena, *Miller* continues to control in civil cases. *See Clayton Brokerage Co. of St. Louis v. Clement*, 87 F.R.D. 569, 571 (D. Md. 1980) (finding *Miller* dispositive within a civil suit).

An individual cannot quash a subpoena issued to his or her bank on the theory that it infringes a privacy right. In *Robertson v. Cartinhour*, the defendant issued a subpoena to the plaintiff’s bank for his financial records and the plaintiff attempted to quash it. 2010 WL 716221, at *1 (D. Md. February 23, 2010). Relying on *Miller*, the court held that the plaintiff lacked standing to quash the subpoena because “the records sought in the subpoena are the bank’s business records, not his personal records.” *Robertson*, 2010 WL 716221, at * 3. Other courts within the Fourth Circuit have made similar holdings to *Robertson*. *See United States v. Gordon*, 247 F.R.D. 509, 510 (E.D.N.C. 2007) (“Typically, a party has no standing to challenge a subpoena issued to his or her bank seeking discovery of financial records because bank records are the business records of the bank, in which the party has no personal right”); *Robinson v. Quicken Loans, Inc.*, 2012 WL 6045836, at *2 (S.D. W. Va. December 5, 2012) (finding that the plaintiff had “no personal right or privilege in her financial records and, thus, no standing to move to quash the subpoenas for banking and financial records”); *Singletary v. Sterling Transp.*

Co., 289 F.R.D. 237, 240 (E.D. Va. 2012) (affirming *Robertson* and claiming that “a personal right does not attach to bank records”).

Other courts have taken the contrary position that an individual’s personal interest in the privacy of their bank records is sufficient to confer standing. In *Chazin v. Liberman*, the court accepted the defendants’ bald assertion “that they have personal privacy rights in the [bank] records sought by plaintiff” and found that “[t]his claim is sufficient to give them standing...” 129 F.R.D. 97, 98 (S.D.N.Y. 1990). This ruling in *Chazin* has been relied on by subsequent courts. See, e.g. *Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*, 206 F.R.D. 78, 93 (S.D.N.Y. 2002) (collecting cases). *Chazin* and its progeny make no effort to reconcile their rulings with *Miller* but instead accept the privacy of a person’s bank records as an inherent principle. Even in this line of authority, however, the objecting individual still has the burden to prove that the disclosure of his or her bank records either impairs a privilege or personal right, or that it imposes an undue burden. See *DIRECTV, Inc. v. Richards*, 2005 WL 1514187, at *4 (D. N.J. June 27, 2005) (“Defendant only offers vague legal conclusions and speculates about the existence of a personal privilege”).

This Court is persuaded by the rulings of other courts within the Fourth Circuit. The Supreme Court’s decision in *Miller* definitively categorized a person’s bank account information as a bank’s business records. While it certainly did not remove all grounds to confer third-party standing to quash a subpoena, *Miller* removed one from consideration: privacy interests stemming from the Fourth Amendment. The cases from the Fourth Circuit cited *supra* accurately follow the reasoning of *Miller* to hold that a person does not have a privacy interest in his or her bank records sufficient to quash a subpoena. The line of cases stemming from *Chazin*, which were cited by the Family Defendants, all contain flat assertions without any significant analysis

or discussion of *Miller*. This Court cannot ignore *Miller* and finds support from other courts within the Fourth Circuit that have decided likewise.²

Based on the foregoing, this Court finds that the Family Defendants do not have standing to quash the subpoenas. The subpoenas were issued to several banks seeking the Family Defendants' account information. Because the subpoenas were issued to their banks rather than to the Family Defendants themselves, they are required to show that they have a personal right or privilege in the information being sought. Contrary to the Family Defendants' privacy claims, under *Miller* the subpoenas sought the banks' business records. As such, the subpoenas do not require the disclosure of protected information. Besides their understandable concern for the privacy of their account information, the Family Defendants presented no evidence that the subpoenas sought the disclosure of privileged or protected information. In the absence of a recognizable personal right or privilege, the Family Defendants do not have standing to quash the subpoenas issued to their banks.³

Even if the Family Defendants had standing to quash the subpoenas, they did not carry their burden under Rule 45(d)(3). The Family Defendants failed to explain how the disclosure of their bank account information would threaten a purported privilege, choosing instead to provide "vague legal conclusions." *DIRECTV, Inc.*, 2005 WL 1514187, at *4. Additionally, the Family Defendants failed to prove that the subpoenas would subject them to an undue burden. The

² Of course, courts within the Fourth Circuit are not alone in its interpretation of *Miller*. See, e.g. *In re McVane*, 44 F.3d 1127, 1141 n.4 (2d Cir. 1995) ("Contrary to the FDIC's assertion, *Miller* did not purport to nullify all rights to privacy in financial records; rather, the Court held only that a bank customer could not assert a privacy interest in those records *held by the bank*."). (emphasis in original).

³ It appears that the same result would occur if the Trustee brought a similar action under North Carolina law. See N.C. R. Civ. P. 45(c)(5) ("A person commanded...to produce and permit inspection and copying of records...may file a motion to quash or modify the subpoena."). See also *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 698 S.E.2d 190, 194 (N.C. Ct. App. 2010) (denying standing to dispute the validity of a subpoena because the party was not the "witness whose attendance was sought"); *Deyton v. Estate of Waters*, 2011 NCBC 34 ¶45 (holding that the North Carolina Financial Privacy Act does not grant a third party standing to quash a subpoena issued to that party's bank).

Family Defendants argued that the duration of the Trustee's subpoenas are overly burdensome because the subpoenas seek account information going back to September 2009. This Court finds that this time period is reasonable, given that the applicable look back period under North Carolina law is four years and the petitions were filed on May 17, 2013. *See* N.C. Gen. Stat. § 39-23.9. Furthermore, the Trustee explained that he chose to subpoena particular banks because his research unveiled a locus of activity around Kernersville, North Carolina, where most of the banks operate branches. By obtaining the Family Defendants' bank account information the Trustee can determine if the Debtors transferred property away from their estate before the involuntary petitions were filed against them. Thus, this Court concludes that even if they had standing, the Family Defendants did not carry their burden under Rule 45(d)(3).

The Family Defendants' concerns over the confidentiality of their bank account information are not unfounded and therefore must be protected. Given the sensitive nature of the information sought, the Trustee shall enter into a confidentiality agreement such that he shall not disclose any document obtained pursuant to the subpoenas to anyone outside of the course of this litigation except for the Trustee's attorneys or agents, expert witnesses, deponents, court reporters, and the Family Defendants and their agents.

CONCLUSION

Based on the foregoing, this Court finds that the Family Defendants lack standing to quash the subpoenas. Therefore, this Court denies the Family Defendants' Motion to Quash Subpoenas and Motion for Protective Order.

IT IS SO ORDERED.

END OF DOCUMENT

SERVICE LIST

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