UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of	)	
CIVIL INVESTIGATIVE DEMANDS TO	)	**File No. 162-3133**
CELLMARK BIOPHARMA LLC AND	)	**File No. 162-3134**
LEXIUM INTERNATIONAL, LLC DATED MAY 24, 2016	)	**July 25, 2016**

ORDER DENYING PETITIONS TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMANDS

By McSWEENY, Commissioner:

CellMark Biopharma LLC ("CellMark") and Lexium International, LLC ("Lexium") have petitioned to limit or quash Civil Investigative Demands (CIDs) issued by the Commission under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1. For the reasons stated below, the petitions are denied.

I. BACKGROUND

CellMark is a limited liability company formed in 2015. It sells and promotes two dietary supplements – "CellAssure" and "Cognify." In advertising and promotional materials, CellMark claims that these products mitigate the negative effects of chemotherapy and related cancer treatments. Derek Vest is an officer and the sole shareholder of Cellmark.

Lexium is a limited liability company that, according to its petition, used to be known as Gentech Pharmaceutical, LLC ("Gentech"). Gentech, which was formed in 2010, developed and sold dietary supplement products for cognitive function, weight loss, and sleep aid, which Lexium continues to market and sell. Mr. Vest was a former officer of both Gentech and Lexium, but no longer has such roles; he currently serves as a consultant to Lexium.

On May 24, 2016, the Commission issued CIDs to CellMark and Lexium as part of an investigation of the companies' marketing claims about their products. Each CID calls for responsive "documents and information in [the company's] possession or under [its] actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of [the company's] . . . directors, officers, employees, and other agents and consultants." Pets. Exh. 1 ¶ II.I. Each CID defines "Company" to include "affiliates,

and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing." Cellmark Pet. Exh. 1 ¶ I.H; Lexium Pet. Exh. 1 ¶ I.G. Thus, the CIDs require Cellmark and Lexium to produce all responsive documents in their possession, custody, and control, including any such documents held by their officers and consultants.

On June 13, 2016, Cellmark and Lexium filed almost identical petitions to limit or quash the CIDs, and both attach a copy of a "target letter" issued by the U.S. Attorney's Office for the Middle District of Florida to Mr. Vest. This letter informs Mr. Vest that he is the "target of a Federal Grand Jury investigation . . . [for] introducing and delivering for introduction into interstate commerce misbranded drugs and other matters, and possible violations of federal criminal laws." Pets. Exh. 2. Cellmark and Lexium state that they filed their petitions "to ensure that [Mr. Vest's] Fifth Amendment right against self-incrimination is not waived by the production of information to the FTC." Pets. at 1. They ask the Commission to strike the requirement that they produce responsive documents and information that Mr. Vest has or controls. Additionally, they ask the Commission to relieve the companies from their obligation under the CIDs to certify that all responsive documents and information have been produced. For the reasons stated below, we deny both petitions.

II. ANALYSIS

It is well established that the Fifth Amendment "privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *United States v. White*, 322 U.S. 694, 698 (1944). As a result, courts have held for over a century that a corporate officer may not invoke his personal Fifth Amendment privilege as a basis for resisting compliance with compulsory process seeking corporate records. *See, e.g., Wilson v. United States*, 221 U.S. 361 (1911). "If the corporation were guilty of misconduct, [its officer] could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures." *Id.* at 384. A corporate officer's personal privilege against self-incrimination does not prevent the production of corporate records even when the corporate officer is the sole shareholder and the only person authorized to manage a corporation's business affairs. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99, 101-02, 119 (1988) (finding sole shareholder and officer "could not resist the subpoena for corporate documents"); *Bellis v. United States*, 417 U.S. 85, 100 (1974) ("[N]o privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be."); *United States v. McDonald Chevrolet & Oldsmobile, Inc.*, 514 F. Supp. 83, 90 (N.D. Ga. 1981) ("[A] corporate officer may be compelled to produce corporate documents, even though he is the sole shareholder or alter ego of the corporation and the records may incriminate him.").

Cellmark and Lexium do not, nor can they, dispute this well-established law. Instead, they cite a supposed exception established by the Supreme Court in *United States v. Hubbell*, 530 U.S. 27 (2000), and argue they may invoke the protections of the Fifth Amendment on behalf of Mr. Vest because, in producing responsive documents, Mr. Vest would tacitly "admit their existence and authenticity." Pets. at 3. Cellmark and Lexium misinterpret the Supreme Court's holding in *Hubbell.*

In *Hubbell*, the Supreme Court recognized that the compelled production of documents can be "testimonial" and thus implicate the Fifth Amendment to the extent that the production communicates a statement of fact – for example, that papers existed and were in the control of the custodian. *Id*. at 34-37. The Court held that, in such circumstances, the government could not rely on the act of production in a *subsequent* criminal proceeding against the custodian. *Id.* at 35-36. Nowhere in the *Hubbell* opinion does the Court address, let alone deviate from, the fundamental principle endorsed most recently by the Supreme Court in *Braswell* – that an individual may not rely on the privilege against compulsory self-incrimination to avoid the production of corporate records that he holds in a representative capacity, even if those records might incriminate him. *Braswell*, 487 U.S. at 101-02, 119; *see also Bellis*, 417 U.S. at 88-89.

Not surprisingly, courts that have examined whether the *Hubbell* case changed the law have concluded, as we do, that the rule remains the same; corporate officers cannot rely on the Fifth Amendment to avoid the production of corporate records. *See, e.g., In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 n.2 (3d Cir. 2015) ("[T]here is no reason to suspect that *Hubbell* altered, in any way, the analysis set forth in *Braswell*."); *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006) (noting that post-*Hubbell*, "the act-of-production doctrine is not an exception to the collective-entity doctrine even when the corporate custodian is the corporation's sole shareholder, officer and employee"); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006) ("[W]e reject any suggestion that *Hubbell* so undermined *Braswell* that we are no longer compelled to follow its holding. . . . We remain bound by the Supreme Court's holding in *Braswell*."); *S.E.C. v. Narvett*, 16 F. Supp. 3d 979, 981-83 (E.D.Wis. 2014) (act-of-production doctrine provides no support for a corporation's sole employee and shareholder to refuse to comply with SEC subpoena).

The CIDs at issue are directed to the corporations and seek only corporate documents. Mr. Vest is an officer of Cellmark and a consultant of Lexium – in both cases, he is acting in a representative capacity as a corporate agent. The documents demanded by the CID, including those within Mr. Vest's possession, custody, or control, are corporate records that are within the companies' control, *see, e.g., Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (a company is under an "affirmative duty to seek that information reasonably available to [it] from [its] employees, agents, or others subject to [its] control"), and the corporations and Mr. Vest must produce them even if the documents are incriminating to Mr. Vest personally.[1] Accordingly, there is no basis for limiting or quashing the CIDs to excuse the production of documents in Mr. Vest's possession, custody, or control. Nor do we excuse Cellmark or Lexium from their obligation to certify that they have produced all responsive documents and information.

Cellmark and Lexium also assert that the production of the information requested in the CIDs' interrogatories would "implicate[] Vest's Fifth Amendment rights." Pets. at 2. Interrogatories are inherently testimonial in nature. Therefore, individuals who properly assert a privilege against self-incrimination cannot be compelled to answer them. Nonetheless, a corporation is still obligated to respond, and must do so by selecting an officer, employee, or "agent who could, without fear of self-incrimination, furnish such requested information as was

[1] Lexium also claims that, as an ex-employee, Mr. Vest may assert a Fifth Amendment privilege to refuse to produce documents belonging to his former employer. Lexium Pet. at 5. However, Mr. Vest has a continuing "connection to Lexium . . . as a consultant." Lexium Pet. at 1.

available to the corporation." *See United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *United States v. 3963 Bottles . . . of . . . Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959) ("It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have."). Both CIDs at issue identify and list officers and employees other than Mr. Vest. Cellmark and Lexium can call on any of them to respond on behalf of the corporations without impinging on Mr. Vest's personal Fifth Amendment rights.

Finally, Cellmark and Lexium contend that the Supreme Court's decisions in *Citizens United v. F.E.C.*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), should be read expansively to extend the Fifth Amendment privilege against compulsory self-incrimination to corporations and other collective entities and thereby provide a basis to quash the two CIDs. Pets. at 5-6. This argument is also meritless. Those cases address the application of the First Amendment to corporations. Nothing in those decisions signals any departure from century-old precedents recognizing the Fifth Amendment privilege against self-incrimination as a uniquely individual right. *See In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d at 263 n.1 (stating the court can "discern nothing in Supreme Court jurisprudence that suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent regarding corporate custodians' inability to invoke the Fifth Amendment privilege against self-incrimination").

III. CONCLUSION

For the foregoing reasons, we deny Cellmark's and Lexium's petitions to limit or quash the Commission's CIDs.

IT IS HEREBY ORDERED THAT the Petitions to Limit or Quash Civil Investigative Demand filed by CellMark Biopharma LLC and Lexium International, LLC be, and they hereby are **DENIED**.

IT IS FURTHER ORDERED THAT all documents and information responsive to the specifications in the Civil Investigative Demands to CellMark Biopharma LLC and Lexium International, LLC must now be produced on or before August 15, 2016.

By the Commission.

Donald S. Clark
Secretary

Issued: July 25, 2016