

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

FEDERAL TRADE COMMISSION,

Petitioner,

v.

Case No: 2:17-cv-30-FtM-29CM

LEXIUM INTERNATIONAL LLC
and CELLMARK BIOPHARMA,
LLC,

Respondents.

REPORT AND RECOMMENDATION¹

This matter comes before the Court upon review of the Petition of the Federal Trade Commission (the “FTC” or “Commission”) for an Order Enforcing Administrative Investigative Process and Memorandum of Law (“Petition”). Doc. 1. Respondents CellMark Biopharma LLC (“CellMark”) and Lexium International LLC (“Lexium”) filed their responses (Docs. 4, 5), to which the FTC filed a reply (Doc. 12). For the reasons discussed below, the undersigned recommends that the Petition be granted.²

¹ A party has fourteen days from this date to file written objections to the Report and Recommendation’s factual findings and legal conclusions. A party’s failure to file written objections waives that party’s right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

² The undersigned will “proceed by report and recommendation because the application sets forth all the relief requested by the [FTC], making its resolution dispositive of this matter.” *Equal Emp’t Opportunity Comm’n v. Royal Caribbean Cruises, Ltd.*, No. 12-MC-22014, 2013 WL 9778951, at *1 n.1 (S.D. Fla. Jan. 4, 2013), *report and recommendation adopted*, No. 12-22014-MC, 2013 WL 12133963 (S.D. Fla. June 7, 2013), *aff’d*, 771 F.3d 757 (11th Cir. 2014).

I.

4 -

Regardless, two days later, attorney Oparil sent Commission staff an email confirming that “[s]ubject to the petition to quash or limit [the CID] on the Fifth Amendment privilege issue,” CellMark agreed to comply with a production schedule of four two-week rounds between June 14, 2016 and July 26, 2016 within which to comply with the CID. *Id.* ¶¶ 9-10.

On June 8, 2016, Commission staff met and conferred with two Lexium officials and with attorney Oparil, who also represented Lexium. Doc. 1-2 ¶ 11. Commission staff proposed a rolling production schedule of four three-week rounds between June 14, 2016 and August 16, 2016 for Lexium to comply with the CID. *Id.* Similar to CellMark’s defense, attorney Oparil informed Commission staff that Mr. Vest was asserting a privilege against self-incrimination and, on that basis, Lexium intended to file a petition to limit or quash the CID. *Id.* Nevertheless, on June 13,

“Respondents”) timely filed their petitions to limit or quash the CIDs with the FTC on June 13, 2016. Docs. 1-8; 1-18. Lexium identified Mr. Vest as a “former officer and owner of Lexium’s predecessor,” Gentech Pharmaceutical, LLC (“Gentech”), which later changed its name to Lexium. Doc. 1-8 at 2. Lexium also identified Mr. Vest’s current role to the company as a consultant.

1, 8 (1970)). Lastly, regarding Lexium and CellMark's assertion of their own Fifth Amendment privilege against self-incrimination, the FTC held that the privilege is a uniquely individual right that corporate entities may not invoke. *Id.* Accordingly, the FTC denied both petitions and ordered Lexium and CellMark to comply with the CIDs on or before August 15, 2016. *Id.* 3

Amendment privilege against self-incrimination.

19 F.3d 620, 623 (11th Cir. 1994) (quoting *Equal Emp't Opportunity Comm'n v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991)). Generally, subject to recognized privileges, “an administrative subpoena should be enforced if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant.” *Id.* (citation omitted); *U.S. Equal Emp't Opportunity Comm'n v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996) (citations omitted); *United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460, 1462 (M.D. Fla. 1998) (citations omitted).

Here, each Respondent’s principal place of business is in Fort Myers, Florida. Docs. 1 ¶¶2-3, 7; 1-4 at 2; 5 at 2. Accordingly, the Court may “hear and determine the matter so presented.” 15 U.S.C. § 57b-1(h). Neither Respondent contests the authority of FTC to issue the CIDs, nor alleges that the CIDs are too indefinite or that the information sought is not reasonably relevant to the FTC’s investigation of Respondents. *See* Docs. 4, 5. Rather, the issue is whether Mr. Vest, Lexium or CellMark can assert a Fifth Amendment privilege against self-incrimination and avoid producing the documents and information responsive to the CIDs. Upon review of the Petition and the file as a whole, the undersigned recommends the investigation at issue is within the FTC’s authority, the demand is not too indefinite, and the information the FTC seeks from Respondents is reasonably relevant to its investigation of them. The undersigned next considers the arguments related to the Fifth Amendment privilege against self-incrimination.⁶

⁶ As mentioned in note 3, *supra*, Mr. Vest has been adjudicated guilty and entered a plea

The Fifth Amendment to the United States Constitution reads: “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The United States Supreme Court has held that a corporation has no Fifth Amendment privilege against self-incrimination to withhold its corporate records. *Hale v. Henkel*, 201 U.S. 43 (1906). The Fifth Amendment privilege “is

(11th Cir. 1992) (listing cases).

As the Supreme Court has explained,
individuals, when acting as representatives of a collective group, cannot

corporate documents. *See*

- For components that are not dietary ingredients, all documents relating to any tests or examinations conducted to confirm the identity of those components or to determine whether those components comply with component specifications (as established pursuant to 21 C.F.R. § 111.70(b)(2)) (Document Request #17)

- All complaints and answers in any state or federal c

322 U.S. at 699. Simply because Mr. Vest may wish to withhold the documents for personal reasons does absolve the company from the need to comply with the CID. *In re Grand Jury Subpoena*, 957 F.2d at 812; *cf. Wilson*, 221 U.S. at 378 (“Plainly [appellant] could not make these books his private or personal books by keeping personal letters in them.”). Indeed, even if Mr. Vest is no longer associated with Lexium, he continues to hold the documents in a representative capacity. *In re Grand Jury Subpoena*, 957 F.2d at 812.

Similarly, the CellMark CID is directed to the company. Doc. 1-14 at 2. The types of documents requested are very similar, and some identical, to the documents requested of Lexium, with the exception of dates, company names, and products. *Compare* Doc. 1-

that Mr. Vest can assert his right against self-incrimination to avoid responding to the CIDs because the simple act of producing the documents may incriminate him because production would admit their “existence and authenticity.” Docs. 4 at 10; 5 at 5 (incorporating CellMark’s response).

compulsory incrimination through his own testimony or personal records.”

issued by the Federal Trade Commission within ten (10) days of the Order or at such later date as the Federal Trade Commission establishes.

DONE and **ENTERED** in Fort Myers, Florida on this 1st day of June, 2017.


CAROL MIRANDO
United States Magistrate Judge

Copies:
Honorable John E. Steele
Counsel of record