

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

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 petition

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 estab24(6(h)ink(inc(ust)on 26 M)-()s)T(e)4(nt)-2(s)- Tc 0.)2(A)45w)-odmenSj (p)Tj 0.002

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

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. 2756 (2014) (sdo 0 Td (-)Tj