

Interlocutory Orders, etc.

IN THE MATTER OF

HARBOUR GROUP INVESTMENTS, L.P.

Docket No. 9244. Order, May 22, 2000

Order reopening and modifying order.

ORDER REOPENING AND MODIFYING ORDER

On February 16, 2000, Meade Instruments Corporation ("Meade"), the successor to the respondent named in the consent order issued by the Commission on August 19, 1991, in Docket No. 9244 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Meade asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995) ("Prior Approval Policy Statement"). Meade's Petition requests that the Commission reopen and modify the Order so as to remove the prior approval requirement contained in Paragraph II of the Order, which currently requires Meade to seek the prior approval of the Commission before directly or indirectly, through subsidiaries or otherwise, acquiring the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the United States in the manufacture or sale of mid-sized Schmidt-Cassegrain telescopes with apertures of eight (8) to eleven (11) inches used for astronomical viewing ("SCTs"). The thirty-day public comment period on Meade's Petition ended on March 24, 2000. No comments were received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

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The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, to protect the public interest in effective merger law enforcement. 60 Fed. Reg. at 39,746. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." *Id.* As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." 60 Fed. Reg. at 39,746. The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors. *Id.*

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The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." 60 Fed. Reg. at 39,746. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Prior Approval Policy Statement. *Id.*

The complaint in this matter alleged that the entry of Harbour Group Investments, L.P. ("Harbour Group"), the predecessor to Meade, into a joint venture with Diethelm Holding (U.S.A.) Ltd ("Diethelm") would have violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition and tending to create a monopoly in the market for SCTs in the United States.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. Prior notification is appropriate for acquisitions in the relevant markets because the record evidences a credible risk that Meade could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The complaint in this matter alleged that, in 1990, Harbour Group and Diethelm collectively had sales of only \$4.1 million in the relevant market, but had sufficient market share to create a "virtual monopoly" in that market if the transaction had been consummated. This is an indication that acquisitions in the relevant market could fall below the sheaf-transaction threshold in the HSR Act. By letter dated March 22, 2000, Meade agreed to accept a prior notification requirement as a

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substitute for the prior approval requirement. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to replace the original prior approval requirement with a prior notification requirement.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that Paragraph II of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IT IS FURTHER ORDERED that, for a period commencing on the date this order becomes final and continuing for ten (10) years, Harbour Group shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, acquire the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the manufacture or sale of SCTs in the United States. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

The prior notification required by this Paragraph II shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance With the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a

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written request for additional information, Respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

ANDRX CORP. AND HOECHST MARION ROUSSEL, INC

FTC File No. 981 0368 Decision, January 19, 2000

RESPONSE TO HOECHST MARION ROUSSEL, INC.'S REQUEST FOR FULL COMMISSION REVIEW OF DENIAL OF PETITION TO QUASH

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") *Request for Full Commission Review of Denial of Petition to Quash* ("Appeal"). The Appeal seeks review of the November 1, 1999 letter ruling by Commissioner Anthony ("Initial Ruling") denying the September 15, 1999 *Petition of Hoechst Marion Roussel, Inc. to Quash* ("Petition") the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Subpoena"), outside counsel to Hoechst. For the reasons set forth below, the Commission affirms the Initial Ruling and sets January 27, 2000 at 9:00 a.m. as the new date and time for Spears to appear and give testimony. Petitioner's request for oral argument is denied.

I. Background

The focus of this investigation is a September, 1997 agreement between Hoechst and Andrx Corporation (the "Agreement"). As the Initial Ruling states: "The Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends." Initial Ruling at 2. In its Appeal, Hoechst does not dispute that Spears

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took the lead in negotiating and drafting the Agreement on behalf of Hoechst or that Spears is the most knowledgeable Hoechst representative with respect to many of the negotiations and drafts. *See id.* at 2, 5.

Rather, Hoechst argues that the Commission must apply the heightened standards used by *some* federal courts in considering whether to permit depositions of opposing counsel in the context of civil litigation. Appeal at 3-6, 11-12. Hoechst further maintains that these standards are not met here. *Id.* at 6-8. Hoechst also argues: (1) that, even if the Commission is unwilling to quash the Subpoena, it should limit the scope of the questioning; and (2) that forcing Spears to assert any applicable privileges in response to specific questions is inappropriate. The Commission rejects each of these arguments.

II. Analysis

A. An Administrative Investigation Is Not Equivalent to Civil Discovery.

Hoechst argues that certain federal court precedent regarding subpoenas directed to opposing counsel “apply to agency investigatory subpoenas” Appeal at 6 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)). First, to the extent Hoechst is arguing that the Commission is bound to follow this precedent, it is wrong. The Commission is an independent federal agency with its own procedural Rules, not a part of the federal judiciary obliged to apply the Federal Rules of Civil Procedure. Moreover, the precedent upon which Hoechst relies is merely one of two conflicting lines of authority in the federal courts on a question the Supreme Court has not addressed. *See generally Sparton Corp. v. United States*, 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (collecting cases on both sides of the conflict).

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Second, as Commissioner Anthony noted in the Initial Ruling, the aims and limits of administrative investigations often diverge from those of civil litigation. *See* Initial Ruling at 7-8. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at determining whether violations of law likely exist that should be pursued through litigation.¹ The Commission must take these differences into account in determining the persuasive significance of precedent established under the Federal Rules of Civil Procedure to an administrative investigation governed by the Commission's Rules.

B. The *Shelton* Case Is Inapplicable Here.

The normal standards governing subpoenas both in administrative investigations and in civil litigation place on the party opposing the subpoena "the difficult burden of showing that the demands are unduly burdensome or unreasonably broad." *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980). Hoechst, however, advocates the special standards proposed by the Eighth Circuit in *Shelton* for limiting depositions of opposing counsel and urges the Commission to apply those standards to investigational hearings of counsel representing parties under investigation. We decline to do so.

Shelton was a tort suit arising from a Jeep roll-over accident. The district court granted default judgment against the manufacturer after the manufacturer's in-house counsel, during her deposition, refused to state whether she was aware of the existence of any documents relating to roll-over tests or accidents in her client's files. The only issue on appeal was whether the

¹ As the Supreme Court explained fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

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attorney's mere acknowledgment of the existence of the documents would constitute work product. The court concluded that because such acknowledgment would reveal the counsel's mental impressions ("mental selective process" in culling certain documents from the voluminous files reviewed during litigation), it was privileged. 805 F.2d at 1326, 1329. In dicta, the court disapproved of depositions of opposing counsel "as a negative development in the area of litigation" and proposed that such depositions should be permitted only where "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327.²

This formulation has been criticized by several other federal courts. *See, e.g., qad.inc v. ALN Associates, Inc.*, 132 F.R.D. 492, 495 (N.D. Ill. 1990) ("This Court's disagreement with a principle stated in such broadbrush terms is respectful but profound. What *Shelton* says may fairly (and properly) reflect an attitude of protecting our brethren at the bar, all other things being equal. But stated as a rule of law it must be viewed as wrong"); *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378 (S.D. Ind. 1994); *see also First Security Sav. v. Kansas Bankers Surety Co.*, 115 F.R.D. 181, 182-83 (D. Neb. 1987) (interpreting *Shelton* as not intended to effect a change in the general burden of persuasion for attorney depositions).³

² The *Shelton* court also stated: "To be sure, the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition" and "We do not hold that opposing trial counsel is absolutely immune from being deposed." 805 F.2d at 1327.

³ Other courts of appeals have declined to take sides in this conflict. *See Nguyen v. Excel Corp.*, 1999 U.S. App. Lexis 32457, *23 (5th Cir. 1999) (assuming, without deciding, "the applicability of the *Shelton* inquiry");

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At least in the context of administrative investigative subpoenas, the Commission believes that the approach of these latter courts is preferable. The *Shelton* dicta appear to reverse the normal burden of persuasion on subpoenas and add a novel requirement that the party seeking information prove before obtaining it that it is “crucial” to the case. In doing so, the Eighth Circuit was reacting to concerns that private litigants were abusing the discovery process by frequently noticing depositions of opposing counsel as a means of harassment. See 805 F.2d at 1327, 1330. The Commission does not frequently issue subpoenas to counsel, nor does it do so in bad faith. Moreover, since Commission investigations are aimed at determining whether to bring a case, it would be premature to require at the investigatory stage a showing that the information sought “is crucial to the preparation of the case.”

1. Unlike the Attorney in *Shelton*,
Spears Was a Direct Participant.

A key distinction between *Shelton* and the instant matter is that the attorney in *Shelton* was not a material witness or actor in conduct prior to the proceeding in which her testimony was sought. The *Shelton* attorney was merely being deposed about her client’s honesty in responding to discovery. See 805 F.2d at 1330. Here, Commission counsel seeks to question Spears about his first-hand participation in the formation of the agreement at the heart of this investigation, which was negotiated, drafted, and executed before the investigation began. As one court aptly noted, “[e]ven cases in the *Shelton* line recognize that, if an attorney is a witness or actor in prelitigation conduct, he may be deposed the same as any other witness.” *Kaiser*, 161 F.R.D. at 382 (citations omitted); see also *Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (*Shelton* standards do not bar depositions of opposing counsel “where attorneys take part

Boughton v. Cotter Corp., 65 F.3d 823, 829 n.7 (10th Cir. 1995) (declining to take sides between the *Shelton* dicta and *qad.inc*).

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in significant, relevant pre-events and the attorney-client privilege does not apply to the testimony sought"); *Johnston Dev. Group v. Carpenters Local 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) ("The deposition of the attorney may be 'both necessary and appropriate' where the attorney may be a fact witness, such as an 'actor or viewer,' rather than one who was not a party to any of the underlying transactions giving rise to the action, or whose role in a transaction was speculative and not central to the dispute"); *In re Tutu Water Wells Contamination*, 184 F.R.D. 266, 267 (D.V.I. 1999) ("protective order will not issue where the attorney's conduct is the basis for the claim or defense or where the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action").

In its Appeal, Hoechst argues that Spears cannot be considered an actor or participant "merely because he may have negotiated and or drafted any of the subject documents in the course of his representational duties." Appeal at 7, n.9. On the contrary, a negotiator and drafter of an agreement *is* an actor and participant in the formation of that agreement. That participant's status as counsel does not exempt him from questioning in discovery or, for that matter, administrative investigations. *See, e.g., United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995) ("Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation.").

The case of *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996), is instructive. There, defendants noticed the opposing counsel's deposition and the plaintiffs moved for a protective order. Finding, among other things, that the attorney played a "key role" "in negotiating the transaction which lies at the

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heart of this dispute,” the court denied the motion and ordered the deposition to proceed. *Id.* at 38; *accord, Tutu*, 184 F.R.D. at 267-68 (deposition of attorney ordered where attorneys “were actors or witnesses to the agreement giving rise to the cause of action”). In reaching its ruling, the *Rainbow Investors* court declined to follow the *Shelton* court in its apparent reversal of the burden of persuasion. Instead, it explained:

Federal Rule of Civil Procedure 26(b)(1) allows for discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” Moreover, the Federal Rules of Civil Procedure do not specifically prohibit taking the deposition of counsel. Thus, the party seeking the protective order to preclude their attorney’s deposition bears the burden under Rule 26(c) of demonstrating good cause to preclude or limit the testimony.

168 F.R.D. at 36 (citations omitted); *see also Johnston*, 130 F.R.D. at 352-53 (“The preclusion of attorney depositions is to be analyzed with the same standards as any other protective order motion, with the movant bearing the burden of persuasion under Rule 26(c)”); *Kaiser*, 161 F.R.D. at 380 (“The burden is on the Rule 26(c) movant to establish adequate grounds (‘good cause’) for an order protecting against discovery.”).

The *Rainbow Investors* court then found that the “plaintiff ha[d] failed to make the required showing of good cause” 168 F.R.D. at 37. Spears is situated similarly to the attorney in *Rainbow Investors*,⁴ and the same approach is appropriate here.

⁴ Some of the similarities are striking. For example, the defendants in *Rainbow Investors* took the deposition of the plaintiff corporation’s president, and during that deposition “defendants learned that [the attorney] may possess vital information unknown even to [the president] regarding the negotiation of the [asset sale agreement].” *Id.* at 37; *see also Nguyen*, 1999 U.S. App. Lexis 32457, *23-*24 (approving a deposition of defense counsel “even assuming the applicability of the *Shelton* inquiry” where the defendant had not established

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Addressing privilege concerns, the *Rainbow Investors* court held that bona fide attorney-client communications regarding the negotiations were privileged. But “[i]nsofar as [the attorney] was acting more as a negotiator in a business activity on [his client’s] behalf than as their attorney, any knowledge possessed by [the attorney] in this regard is discoverable. Moreover, any non-privileged communications between [the attorney] and [the other party to the agreement] are also discoverable.” *Id.* at 37. The same is true here: while communications between Spears and Hoechst during the negotiation of the Agreement, to the extent not otherwise subject to waiver, are likely to be privileged, Spears’ actions as a negotiator and his communications with Andrx’s representatives are proper subjects for inquiry by Commission counsel.

2. The *Shelton* Dicta Are Inconsistent with the Commission’s Rules.

Hoechst argues that investigative subpoenas to counsel for a party under investigation should not be enforced unless the FTC attorneys conducting the investigation on behalf of the Commission satisfy the Commission that the *Shelton* factors are met. Appeal at 6 & n.6.⁵ Whatever the merits of the *Shelton* dicta

that “its executives could . . . respond meaningfully to the questions to be posed”). Here, [investigational hearings] [redacted] revealed that Spears was the only source of vital information regarding the Agreement at issue here. *See* Initial Ruling at 2, 5.

⁵ Lest there be any confusion, we note that investigative subpoenas are not issued by FTC staff, but by the Commission. All FTC investigative subpoenas are reviewed and executed by a Commissioner, acting as the Commission’s delegate, based upon information provided by Commission staff as to the need to direct compulsory process to the recipient and upon a compulsory process resolution approved by the full Commission.

and their apparent burden-shifting under the Federal Rules of Civil Procedure, their approach cannot be reconciled with the Commission's Rules.

Section 2.7(d) of the Commission's Rules, 16 C.F.R. § 2.7(d) (1999), places the burden on the petitioner to show with particularity why a subpoena should be limited or quashed.⁶ In the Commission's view, this provision precludes a burden-shifting approach. Instead, the Commission interprets Rule 2.7(d) as requiring *the party seeking to avoid appearance or production obligations* to show good cause according to traditional criteria, as elaborated in *Johnston*:

The party seeking to block its attorney's deposition concerning relevant information will succeed if it establishes undue burden or oppression measured by (1) the relative quality of information in the attorney's knowledge, that is, whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm to the party's representational rights of its attorney if called upon to give a deposition testimony.

130 F.R.D. at 353.

All three of these concerns were addressed at length in the Initial Ruling, and we affirm and hereby adopt those findings.

⁶ Section 2.7(d)(1) provides, in relevant part:

Any petition to limit or quash any investigational subpoena . . . shall set forth all assertions of privilege or other factual and legal objections to the subpoena . . . , including all appropriate arguments, affidavits and other supporting documentation.

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Specifically, (1) the information possessed by Spears is central to the subject of the investigation, namely the Agreement, Initial Ruling at 4-5, 8; (2) the information is not available from another source, *id.* at 5, 8; and (3) representational harm is speculative,⁷ *id.* at 5-6. On appeal, Hoechst does not even argue that Spears lacks relevant information⁸ or that the Spears information could

⁷ See *Rainbow Investors*, 168 F.R.D. at 37-38 (“although the prospect of oppression is present in the examination of opposing counsel, I find that the risk is justified here due to the key role [the attorney] played in negotiating the transaction which lies at the heart of this dispute”); see also *Frazier v. S.E. Pa. Transp. Auth.*, 161 F.R.D. 309, 314 (E.D. Pa. 1995) (rejecting the potential disqualification argument “because of the flimsy nature of its premise: whether [the attorney] is compelled to testify at trial depends not on whether his deposition is taken, but on the nature of the information he possesses”); *Bogan*, 152 F.R.D. at 14 (“The fact that an attorney is deposed, or that an adversary claims the testimony is or may be material, does not establish that the attorney should be a witness at trial or must be disqualified. This remedy is not to be lightly imposed.”).

⁸ Instead, Hoechst argues that the staff has failed to show that the information Spears possesses is “critical to the staff’s investigation.” Appeal at 6. As noted above, we hold that the staff bears no such burden. Rather, it is Hoechst that is obliged to show that the harm it will suffer as a result of the hearing outweighs the importance of the information that Spears has to offer. Of course, as with all subpoenas, staff must satisfy the executing Commissioner that the subpoena is appropriate and necessary. The status of the recipient as counsel to the target would certainly be a significant factor weighing in the Commissioner’s review.

Hoechst further argues that the Commission does not need the Spears testimony because, Hoechst alleges, the staff has already decided to recommend suit. *Id.* First, whether or not staff has made, or decided to make, a recommendation is a confidential internal matter, and the Commission declines to respond to rumors or allegations regarding such matters. Second, even when a recommendation is made, the investigatory phase is not over until the Commission votes on the recommendation. The Commission, and not the staff, determines whether the evidence amassed by staff provides reason to believe that a violation has occurred. Indeed, the staff is obligated to continue to gather all relevant information to inform the Commission’s ultimate decision

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be obtained from other sources. Nor does it offer any further evidence demonstrating how the hearing would oppress Hoechst. In short, Hoechst has failed to carry its burden of showing good cause for the Commission to quash or limit the Subpoena.

C. Scope and Duration Restrictions.

As an alternative to its argument that the *Shelton* standards apply and preclude the hearing altogether, Hoechst argues that the scope and duration of the hearing should be limited. Appeal at 8-9. We decline to do so because Hoechst has not met its burden to demonstrate the need for such limitations and because we find that no such limitations are necessary or appropriate.

First, Hoechst has failed to propose any specific substantive limitations other than to suggest that inquiries be limited to non-privileged matters in light of general “dangers inherent in attorney depositions.” *Id.* at 9. A petitioner seeking to limit a subpoena must present specific proposals for limitation and support those proposals with facts and reasoned argument. *See* 16 C.F.R. 2.7(d)(1). Hoechst has failed to discharge that burden.

right up until the final vote is cast regarding the issuance or non-issuance of a complaint.

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Second, limiting the lines of inquiry in advance is unnecessary to protect applicable privileges and inappropriate.⁹ It is unnecessary, because Hoechst or Spears is free to assert an appropriate claim of privilege during the investigational hearing in lieu of a response to a specific question. *See* Section D, *infra*; *see also* Letter from B. Albert to M. Koon, September 3, 1999, at 2. In addition, such a limitation is inappropriate because the Commission as the investigator is not in the position to know what areas are likely to be privileged or if a privilege will be waived. A general limitation specifying no more than “only non-privileged matters” is, therefore, essentially meaningless. Moreover, the Commission will not impose a prior restraint that would hobble staff in carrying out its duty to pursue all relevant lines of inquiry. *See United Phosphorus*, 164 F.R.D. at 250 (“The court is unwilling to preclude plaintiff from discovery of facts which may be relevant in this case simply because defendant has chosen Mr. Tillotson to represent it as counsel in this matter notwithstanding his personal knowledge of the underlying facts which are related to the action.”). We concur with the *qad.inc* court, which “reject[ed] any prior restraint in favor of permitting the deposition to go forward, with any individualized objections to be dealt with during its regular course.” 132 F.R.D. at 495.

D. Spears Must Assert Privileges in Response
to Specific Questions at the Hearing.

⁹ In its Appeal, Hoechst contends that the Commission’s desire for testimony regarding discussions between the representatives of the two parties to the Agreement and the drafts exchanged between those representatives “underscores that the focus of the subpoena is on attorney work product and attorney-client communications.” Appeal at 7. Discussions with third parties and documents shared with them are not, however, generally privileged. If any specific communications are privileged, specific objections can be asserted at the appropriate time, as discussed below.

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Hoechst argues that because “seemingly innocent questions may trench upon privileged matters” and present a “trap for the unwary,” requiring the invocation of privileges in response to specific questions is inappropriate.¹⁰ Appeal at 9-11. We disagree.

The general rule in the federal courts is equally applicable here: “Protective orders suppressing depositions are rarely granted; deponents are expected instead to assert their objections during the deposition and allow the questioning parties to develop circumstantial facts in order to explore the propriety of the assertion of the privilege, immunity or other objection.” *Kaiser*, 161 F.R.D. at 380, *citing* 8 Fed’l Prac. & Proc. § 2037 at 272. This principle applies with full force when the person giving testimony is an attorney. *See Bogan*, 152 F.R.D. at 14 (“Counsel whose deposition is sought concededly participated in disputed pre-litigation events which at least may relate to issues raised in this litigation. If questions put at the deposition relate to privileged matters, a proper objection can be interposed at that time.”). As one district court explained:

[C]hallenges to the taking of an attorney's deposition, based upon claims that any of the attorney's testimony will involve disclosure of privileged information or “work product,” have been held to be premature. . . . [C]ompletely preventing the taking of a deposition on either of the above grounds would tend to limit or fix the

¹⁰ Hoechst argues that the Commission's Rules require privilege objections to be asserted in petitions to quash, and, therefore, requiring privilege claims to be asserted in response to specific questions during a hearing is at odds with the Rules. Appeal at 10. While some privilege claims – most notably those asserted in response to subpoenas *duces tecum* – might well be made in a petition to quash, the specific rule dealing with testimony, Section 2.9, states with regard to claims of privilege: “Where it is claimed . . . that the witness is privileged to refuse to answer a question . . . the witness or counsel for the witness may object on the record to the question . . . and may state briefly and precisely the ground therefor.” 16 C.F.R. § 2.9(b)(2) (1999).

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scope of the examination before it began and would usurp the court's role in deciding whether certain questions seek privileged information. *The more appropriate method is to allow the deposition to be taken and permit the attorney to claim privilege in the face of certain questions if necessary.*

Hunt Intern. Resources Corp. v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983) (emphasis added, citations omitted).

In addition, staff has worked cooperatively with other witnesses in this matter to deal with potential privilege issues, and the Commission is confident that the same consideration will be extended to Spears.

III. Conclusion

The Commission does not routinely issue investigative subpoenas to counsel for targets in its investigations. Nor does it take lightly the privilege and burden issues potentially raised by such subpoenas. However, where, as here, counsel for a party has acted as the target's agent in conduct that is the subject of the investigation, the attorney is a proper witness and may be a necessary one. This is even more true where, as here, the attorney is the *only* source for certain key information. The Commission will not reverse the burden with respect to investigatory hearings of attorneys; as with all other witnesses, the burden is on the witness, or other objecting party, to show that the hearing should not take place or should be limited. The Commission rejects the notion that a prior restraint is necessary to deal with any privilege or burden issues that an investigatory hearing of counsel might raise. Instead, burden issues should be addressed by a petition to quash in advance of the hearing, and privilege claims should be made in response to individual questions posed at the hearing. A

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more restrictive approach would unduly interfere with the Commission's ability to carry out its mandate to investigate potential anticompetitive practices that may seriously harm consumers.

The Commission concludes that Commissioner Anthony's November 1, 1999 Initial Ruling fairly and properly considered and addressed all of Petitioner's arguments. Accordingly, the full Commission hereby affirms the Initial Ruling. The Commission amends that ruling only insofar as it set November 17, 1999 as the new return date. The new return date is January 27, 2000.

By direction of the Commission.

The Ken Roberts Company, et al.

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**THE KEN ROBERTS COMPANY, THE UNITED
STATES CHART COMPANY, THE KEN
ROBERTS INSTITUTE, INC., AND THE TED
WARREN CORPORATION**

FTC File No. 992 3259 Decision, February 25, 2000

RESPONSE TO THE KEN ROBERTS COMPANY, THE UNITED STATES
CHART COMPANY, THE KEN ROBERTS INSTITUTE, INC. AND THE
TED WARREN CORPORATION PETITION TO QUASH CIVIL
INVESTIGATIVE DEMANDS

Dear Messrs. Goteiner and Fong:

This letter advises you of the Federal Trade Commission's ruling on the petition of The Ken Roberts Company, The United States Chart Company, The Ken Roberts Institute, Inc. and The Ted Warren Corporation (collectively "petitioners") to quash civil investigative demands ("CIDs") in the above-referenced matter (the "petition"). The petition is **denied** for the reasons stated below.¹ The new deadline for petitioners to respond to, and otherwise comply with, the CIDs is **March 17, 2000**.

Because the petition raised questions regarding the jurisdiction of the Commission, Commissioner Sheila F. Anthony, the

¹ Petitioners' request for oral argument is also denied. Petitioners set forth their arguments in substantial detail in their thirty-seven page petition. Moreover, petitioners state that "the fundamental and dispositive jurisdictional issues are unalloyed questions of law, and . . . that no additional facts are necessary to decide whether this investigation is preempted by the CFTC and the SEC." Petition at 2. Additional argument is therefore unnecessary and would only further delay this investigation.

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Commission's delegate for ruling on petitions to quash, referred this petition to the full Commission for a determination. *See* 16 C.F.R. § 2.7(d)(4). Accordingly, this decision was reached by the full Commission, and petitioner does not have the right to request further review of this matter by the full Commission. *See* 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioners are companies that sell various sets of instructional materials, including written materials, videos, cassettes, and online and facsimile updates, that purport to teach customers how to make significant sums of money by trading commodities or stocks. Petitioners advertise and market those materials on several web sites that allow customers to order their products online or by telephone, facsimile, or mail. The web sites also include numerous earnings claims and customer testimonials.

On September 30, 1999, the Commission issued CIDs for written interrogatories and documentary material to petitioners seeking substantiation for, *inter alia*, eighteen earnings claims and dozens of customer testimonials. Petitioners submitted responses to some of the interrogatories (subject to their jurisdictional concerns) on October 15, 1999, and October 22, 1999, and filed their petition to quash all the CIDs on October 28, 1999.² Although petitioners present their arguments in several different ways, their basic contention in the petition is that the Commission is barred from investigating their advertising and marketing practices because the Commodity Exchange Act ("CEA") provides the Commodity Futures Trading Commission ("CFTC") with exclusive jurisdiction with respect to the advertising and marketing practices of commodities trading advisers ("CTAs").³

² The Commission provided petitioners with two extensions for producing the documents requested in the CIDs for documentary materials as well as two additional extensions for filing their petition to quash.

³ This is not the first time that the Commission has investigated or sought to prevent deceptive practices by a CTA. Indeed, the Commission has brought

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Petition at 7-33. Petitioners also make a brief argument to the effect that the FTC is barred from investigating investment advisers because the Securities and Exchange Commission (“SEC”) has exclusive jurisdiction to regulate the advertising and marketing practices of investment advisers. *Id.* at 33-36.

After careful review of the CIDs, the petition, the declarations and various correspondence filed with the petition, and the relevant statutes and case law, the Commission finds that none of petitioners’ arguments provides a basis for quashing the CIDs.

II. ANALYSIS

Section 5 of the Federal Trade Commission Act (“FTC Act”) gives the Commission broad authority to “prevent persons, partnerships, or corporations” from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2) (1999). Section 5 also sets forth a few limited exceptions to this grant of authority: the Commission is not empowered to prevent deceptive or unfair practices by banks, savings and loan institutions, federal credit unions, common carriers and air carriers, insofar as those entities are subject to specified regulations, or by anyone subject to the Packers and Stockyards Act. *Id.*

The Commission’s investigative authority is even broader. Section 6 of the FTC Act, 15 U.S.C. § 46 (1999), gives the Commission the power to:

several actions against defendants in the commodity futures industry. *See, e.g., FTC v. Osborne*, No. 94-55615, 1995 U.S. App. LEXIS 31570 (9th Cir. Oct. 27, 1995) (upholding injunction against defendant corporations for deceptive trade practices in the sale of options for precious metals to consumer investors).

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gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Absent a specific statutory exemption, the Commission thus has authority to investigate or prohibit deceptive practices by any person or commercial enterprise.⁴ See *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876 (8th Cir. 1977) (noting that “the investigatory power granted the FTC under 15 U.S.C. § 46 reaches further than the regulatory power granted it under 15 U.S.C. § 4” in holding that FTC had authority to investigate meat packer).⁵

⁴ A few other industries, such as the insurance industry, are also partially or wholly excluded from the Commission's investigative and enforcement authority by virtue of other explicit statutory provisions. See, e.g., 15 U.S.C. § 1012 (1999) (FTC Act applies to insurance business only insofar as business is not regulated by state law).

⁵ Importantly, the fact that another agency also has regulatory power over a specific industry does not bar the FTC from investigating a company in that field as well. See *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) (“this is an area of overlapping agency jurisdiction under different statutory mandates”). For example, the FTC and the Securities and Exchange Commission (“SEC”) have, on occasion, both taken action against the same defendant. See, e.g., *Securities and Exchange Comm'n v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir. 1973) (upholding preliminary injunction against fraudulent sales scheme); *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975) (order requiring party to cease engaging in unfair and misleading commercial practices); see also *Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (FTC can regulate drug-related advertising regardless of Food and Drug Administration's regulation of advertisers; “[n]owhere in the case law or in the FTC's grant of authority is there even a hint that the FTC's jurisdiction is so constricted”).

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Among the Commission's investigatory powers is the ability to use CIDs to gather information and to enforce those demands in federal district court. *See* 15 U.S.C. § 20. In deciding whether to enforce compulsory process issued by the Commission, the federal courts apply a deferential standard, asking only whether (a) the investigation at issue is within the Commission's authority, (b) the information sought is reasonably relevant to the investigation, and (c) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). In this matter, petitioners argue that the investigation does not fall within the Commission's authority.⁶ According to petitioners, the CFTC's exclusive jurisdiction over the commodity futures market under Section 2(i) of the CEA bars an FTC investigation of their advertising practices. However, because the FTC Act gives the FTC broad authority to investigate and prohibit unfair trade practices in all areas of commerce except those specifically excluded, this argument can only succeed if petitioners can demonstrate that the CEA expressly or impliedly repealed the FTC Act as it applies to CTAs. As detailed below, petitioners are unable to do so.⁷

⁶ Petitioners also state in the petition that the Commission's investigation is "duplicative" of the efforts of the CFTC, which has also sought documents from petitioners on numerous occasions. Petition at 3-7. Because the Commission's investigation is not directed at the same practices as the CFTC's, only some of the document requests overlap. However, to the extent that petitioners are concerned that re-production of certain documents would be unduly burdensome, Commission staff has agreed to retrieve any overlapping documents sought by the Commission directly from the CFTC, and petitioners need not produce them again.

⁷ Petitioners set forth their basic argument -- that the CEA's exclusive jurisdiction clause prohibits the Commission from investigating CTAs -- under several different argument headings. For the sake of clarity, our decision separates their arguments into three sections: express repeal (which addresses arguments made in Sections I.A, I.B and I.E of the petition), implied repeal

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A. Express Repeal

Prior to 1974, commodities were generally regulated by the Commodity Exchange Authority (the Authority), which was statutorily authorized to regulate futures trading on certain agricultural products. Because the Authority's jurisdiction was quite narrow, however, a great deal of trading in the futures market was unregulated and thus subject to dangerous speculation and manipulation. In 1974, Congress responded to this danger by overhauling the CEA and creating the CFTC. In doing so, Congress' stated intent was to institute a more comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 836 (1986) (citing H.R. Rep. No. 93-975, at 1 (1974)). Accordingly, a key provision in the new law was a limited grant of exclusive jurisdiction to the Commodity Futures Trading Commission to create uniform rules for the operation of the futures market. 120 Cong. Rec. 34,736 (1974) (statement of Rep. Poage). Under the new provision, the CFTC was given exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market. 7 U.S.C. § 2(i) (1999).

In order to ensure that the limited exclusive jurisdiction provision in the CEA was not misinterpreted as broadly preempting other federal laws and regulations, Congress went out of its way to make clear that its grant of exclusive jurisdiction did not abrogate other laws of general application. Accordingly, the statute provides that

Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit

(which addresses arguments made in Section I.D.1 of the petition), and finally, preemption and the specific remedy rule (which addresses arguments made in Sections I.A, I.C and I.D.2 of the petition).

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the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 2(i) (1999). Congress thus provided that the CFTC's exclusive jurisdiction only applies to the regulation of the futures market itself (*i.e.*, promulgating rules and regulations) and does not, outside that narrow area, supersede any other federal regulatory authority. *See American Agric. Movement, Inc. v. Board of Trade of Chicago*, 977 F.2d 1147, 1157 (7th Cir. 1992) ("Laws of general application of course operate in a variety of arenas, and are preempted only when plaintiffs attempt to use them in a manner that would, in effect, regulate the futures markets.").

In analyzing the CFTC's jurisdiction, several courts have recognized that the CEA does not prevent a law enforcement agency (such as the Commission) from enforcing generally applicable laws against CTAs. According to the *Abrahams* decision,

where the [CFTC's] jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal, is preempted. This frees the exchanges from having to conform their practices to conflicting agency standards. However, these decisions do not establish that law

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enforcement agencies are precluded from prosecuting alleged frauds under criminal provisions other than those contained in the Act.

Abrahams, 493 F. Supp. at 301.⁸

In sum, preserving the ability of other agencies such as the FTC to enforce general laws is consistent with the letter and the spirit of the CEA.⁹ Accordingly, petitioners have failed to show that the CEA expressly repealed Sections 5 and 6 of the FTC Act.

B. Implied Repeal

Petitioners have also failed to show that the FTC's authority was impliedly repealed. "The law is well settled . . . that repeal by implication is not favored and that it follows only where the later act is clearly intended to be in substitution for the earlier act." *U.S. v. Abrahams*, 493 F. Supp. 296, 300 (S.D.N.Y. 1980). The Supreme Court has thus developed -- and lower federal courts have applied -- a very strict standard for finding implied repeal. Under this standard, we consider first whether "Congress expressed an intent partially to repeal" the prior statute, and second, "whether there is a repugnancy in the subject matter of the two statutes which would justify an implication of repeal." *Id.*;

⁸ As part of their efforts to demonstrate that the Commission is barred from investigating their advertising and marketing practices, petitioners discuss, at considerable length, the anti-fraud provisions in the CEA. Among their arguments, petitioners state that the breadth of these provisions "is another strong indicator that the CFTC has occupied the field" of CTA advertising and solicitation. Petition at 14. As discussed in Part I.C, *infra*, however, the concept of field preemption does not apply to the relationship between two federal agencies. Moreover, as discussed in Part I.B, *infra*, the CEA and the FTC Act can both operate to regulate similar behavior as long as they are not repugnant to each other.

⁹ Petitioners themselves inadvertently make this point by citing several cases recognizing that the CEA explicitly preserves the jurisdiction of federal courts to decide private rights of action involving the commodity futures trading industry that arise under other federal laws. Petition at 21 n. 11.

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see also *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (citation omitted) (implied repeal occurs only where there is “an irreconcilable conflict between the two federal statutes at issue”); *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985) (repeal of a law is only to be implied when “there is a plain repugnancy” between two statutes) (citation omitted). In arguing that the CEA impliedly repealed Sections 5 and 6 of the FTC Act (insofar as they are applied to CTAs), petitioners have failed to provide any evidence that Congress intended to abrogate the Commission’s authority under Sections 5 and 6 to prohibit unfair practices by CTAs. Moreover, the two statutes at issue in this matter (the FTC Act and the CEA) are in no way repugnant to each other.

First, in passing the CEA, Congress did not demonstrate any intent to repeal prior anti-fraud laws such as Section 5 of the FTC Act. To the contrary, as noted above, Section 2(i) of the CEA contains two savings clauses. The first preserves the jurisdiction of other federal agencies except as they are superseded by the limited grant of exclusive jurisdiction. The second unqualifiedly preserves the jurisdiction of the federal and state courts. The latter clause provides particularly strong textual support for the proposition that Congress did not intend to abrogate generally available federal causes of action -- such as, for example, FTC actions under Section 13(b), 15 U.S.C. § 53(b). Furthermore, in introducing the bill, Senator Talmadge, chairman of the Senate Committee on Agriculture and Forestry, emphasized that “it is not the intent of the committee to exempt persons in the futures trading industry from existing laws and regulations such as the antitrust laws.” 120 Cong. Rec. 30,459 (1974) (statement of Sen. Talmadge). Thus, rather than suggest that it intended to repeal prior laws, Congress made clear its intent that CTAs continue to

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comply with “existing laws and regulations,” such as the FTC Act.¹⁰

Second, petitioners are unable to demonstrate the type of “repugnancy” between the CEA and FTC Act that is necessary for a finding of implied repeal. The Commission’s investigation of petitioners is intended to enforce a general anti-fraud law; the Commission is not purporting to *regulate* advertising practices by CTAs.¹¹ Moreover, there is no “irreconcilable conflict” between the two statutes. To the contrary, insofar as the purpose of the FTC Act is to prohibit fraudulent trade practices, it actually supports (rather than conflicts with) the CEA, which also contains anti-fraud provisions. See 7 U.S.C. § 6b (1999) (making it

¹⁰ Petitioners’ argument that the creation of the CFTC in 1974 somehow abrogated the FTC’s jurisdiction over CTAs is also rebutted by the fact that the FTC Act has been amended twice since 1974 to exclude savings and loan associations and federal credit unions from the FTC’s jurisdiction. See 15 U.S.C. § 46(a) (1999). Had Congress also intended to exclude CTAs, it could have done so. See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

¹¹ Petitioners consistently fail to distinguish between regulatory activity and law enforcement actions. For example, petitioners cite numerous cases for the proposition that only the CFTC can “exercise regulatory authority over the commodity futures trading industry and its activities.” Petition at 20-22 (emphasis in original). These cases include *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345, 1349-50 (D. Nev. 1980), cited for the proposition that the “CFTC preempts all other agency regulation in the commodities field.” Petition at 21. However, the *Mullis* case draws a distinction between the application of non-CEA statutes and the application of non-CFTC rules to the commodities industry, holding that federal courts have jurisdiction to hear cases brought under federal securities statutes (but not under SEC rules or regulations) where the dominant purpose of the security is for trading in commodity futures. *Mullis*, 492 F. Supp. at 1350-51. Because the Commission is investigating petitioners pursuant to the FTC Act and not a Commission rule or regulation, the reasoning of the *Mullis* court clearly allows this investigation to continue. We need not reach the question of whether the Commission could apply its own rules or regulations to petitioners’ business practices.

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unlawful to “cheat or defraud” another person in connection with the sale of a commodity).

Two federal courts faced with similar issues have held that the CEA did not impliedly repeal federal antitrust law or the federal mail fraud statute. *See Strobl*, 768 F.2d at 26-28; *U.S. v. Abrahams*, 493 F. Supp. at 296. In *Strobl*, the U.S. Court of Appeals for the Second Circuit held that an individual could bring claims under the Sherman Act and the Clayton Act in connection with alleged price manipulation that led to a 1976 default of potato futures. The court held that Congress did not intend to limit the application of the antitrust laws simply by establishing an overlapping regulatory scheme. *See Strobl*, 768 F.2d at 27. Rather, the correct test was whether the two statutes were in conflict, and the court held they were not. *Id.* The court’s conclusion regarding price manipulation holds true for the advertising fraud at issue here as well.

As price manipulation also violates antitrust laws, none of [the anti-manipulation] provisions [in the CEA] conflicts with the purposes and standards of the antitrust laws. There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former.

Strobl, 768 F.2d at 28.

The *Abrahams* court used similar logic in holding that the CEA does not bar the prosecution of CTAs under the mail fraud

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statute. Like petitioners here, the defendant in *Abrahams* attempted to argue that the CEA's own fraud provisions were "intended by Congress to be the sole means by which fraudulent conduct in the commodities field . . . should be prosecuted." *Abrahams*, 493 F. Supp. at 299. The court disagreed. While recognizing that "where the Commission's jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal is preempted," the court found that such exclusive jurisdiction does not preclude law enforcement agencies "from prosecuting alleged frauds under criminal provisions other than those contained in the Act." *Id.* at 301 n.10. *See also Mullis*, 492 F. Supp. at 1349-50 (plaintiff could bring private right of action under securities statutes but not under SEC rules and regulations regarding a securities/commodities matter within the CFTC's exclusive jurisdiction).

The conclusion reached by the *Abrahams* court regarding the CEA and the mail fraud statute applies equally to the CEA and the FTC Act. "The mail fraud statute and the criminal provisions of the Act are not in conflict," the court held. "[I]nstead, they complement each other. The Court concludes that there is no conflict between the two statutory provisions which would justify an implication of repeal." *Id.* at 303. The CEA's fraud provisions and Sections 5 and 6 of the FTC Act similarly complement each other, and thus, here too, there is no conflict that would justify a finding of repeal.

C. Field Preemption and the Exclusive Remedy Rule

Petitioners also attempt to argue that the FTC is barred from investigating their advertising practices under a "field preemption" theory and under the "specific remedy rule." These arguments similarly fail.

First, the concept of field preemption, which is based on the Supremacy Clause of the Constitution, applies to the relationship between federal and state laws and not the relationship between

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two different federal laws. *See American Mfg. Mut. Ins. Co. v. Tison Hog Market, Inc.*, 182 F.3d 1284, 1287-88 (11th Cir. 1999) (“Field preemption occurs when Congress regulates a field so pervasively . . . that an intent to preempt state law can be inferred.”). Thus, petitioners’ discussion regarding preemption is inapplicable to analyzing the relationship between federal agencies.¹²

Second, petitioners’ argument regarding the “specific remedy rule” is just another twist on their “implied repeal” argument (*see* Section II.B, *supra*) and therefore fails for the same reasons. “[A]lthough the ‘specific over general’ principle is an accepted rule of statutory interpretation, it is not to be followed blindly.” *Strobl*, 768 F.2d at 30 (holding that specific remedy rule does not bar application of antitrust laws to commodities futures trading). Rather, “[s]tatutes are to be construed together to effectuate, to the greatest extent possible, the legislative policies of both.” *Id.* Because the CEA and the FTC Act can be construed together to

¹² In any event, the cases that petitioners cite in support of their field preemption argument do not buttress their conclusions. For example, petitioners cite to *Board of Trade of Chicago v. Securities and Exchange Comm’n*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), to support their argument that the savings clause in the CEA does not preserve this Commission’s jurisdiction over their advertising practices. Petition at 13-14, 19-20. However, the *Chicago Board of Trade* decision merely considers whether the sale of Government National Mortgage Association mortgage-backed pass-through certificates (“GNMAs”) are “transactions involving contracts of sale of a commodity for future delivery,” and therefore fall within the CFTC’s exclusive jurisdiction. *Id.* The court ruled that, because GNMA options should be included within the statutory definition of commodities for future delivery, the CFTC had exclusive jurisdiction, the savings clause did not apply and the SEC could not regulate their sale. *Id.* at 1161. Thus, the analysis of the CFTC’s exclusive jurisdiction focused on what constitutes a commodity future -- not on what constitutes pervasive regulation -- and is therefore inapplicable to the issue at hand.

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effectuate the legislative policies of both, the specific remedy rule is inapplicable.

D. Investment Advisers

Petitioners' final argument is that the Commission also lacks jurisdiction to investigate The Ken Roberts Institute, Inc. ("KRI") and the Ted Warren Corporation ("Warren"), the two petitioners that are involved in providing securities advice, because KRI and Warren "fall under the SEC's definition of 'investment advisers' and, as such, are subject to the exclusive regulation of the SEC." Petition at 33. Petitioners do not provide any statutes or case law in support of their statement that the SEC has exclusive jurisdiction over investment advisers, and we have found no legal authority in support of their views. Thus, even if KRI and Warren can be regulated by the SEC as investment advisers, that does not bar the FTC from investigating their advertising practices.

The one case petitioners rely upon in arguing for exclusive SEC jurisdiction, *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988), is not controlling. *Spinner* involved whether the Hawaii "baby FTC Act" applied to a private cause of action against an investment adviser -- and did not in any way rule on the jurisdiction of the Commission itself. *Id.* at 393. Rather, the court only considered this Commission's practices in light of a state statute that commands courts to be guided by judicial interpretations of the FTC Act. *Id.* at 389-90. Because the court found that the FTC Act has not been regularly applied to securities transactions, it did not allow the private cause of action to go forward under the "baby FTC Act." Importantly, the court did not rule on the jurisdiction of the Commission itself. Indeed, the *Spinner* decision itself recognizes that the FTC Act "read literally, would include security transactions." *Id.* at 392 n. 4. As noted above, the FTC and the SEC have brought cases against the

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same entities, alleging violations of their respective statutes for the same conduct.¹³ See note 5, *supra*.

III. CONCLUSION

The Commission's investigation of petitioners is a proper and statutorily authorized investigation. Neither the CFTC nor the SEC has exclusive authority to enforce laws of general applicability as they apply to CTAs or investment advisers.

For the foregoing reasons, the petition is **denied**, and pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), **petitioner is directed to comply with the CIDs on or before Friday, March 17, 2000.**

By direction of the Commission.

¹³ In addition, the FTC and the SEC have participated in joint law enforcement efforts. In 1998 both agencies brought cases against sellers of investments in general partnerships or "private placement" stock offerings. See, e.g., *FTC v. Affordable Media, LLC*, 1999-1 Trade Cas. (CCH) ¶ 72,547 (11th Cir. 1999)(in upholding entry of preliminary injunction, court described defendants' sale of partnership units as a Ponzi Scheme); *Securities and Exchange Commission v. Rynell & Associates, Inc., et al.*, Civil Action No. 98-6508 WMB (Cwx)(C.D. Cal., Aug. 11, 1998)(sale of general partnership units for movie "Desert Gold").

William E. Shell, M.D.

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WILLIAM E. SHELL, M.D

FTC Docket No. C-3749 Decision, March 31, 2000

RESPONSE TO WILLIAM E. SHELL, M.D.'S PETITION TO LIMIT
SUBPOENA *DUCES TECUM*

Dear Mr. Shaw:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition") you submitted on behalf of your client, William E. Shell, M.D. ("Petitioner"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). The Petition is denied for the reasons stated below.

Petitioner may 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 a request for review by the full Commission does not stay or otherwise affect the new return date, April 14, 2000, unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioner advertises, markets, and sells various products over the Internet through a web site called Targeted Medical Foods (targetedmedicalfoods.com). Petitioner represents that these products, such as Sentra-AM, Viralex, Vascular, and Lister B, aid the body's production of neurotransmitters and thereby prevent or mitigate specific diseases, including Chronic Fatigue Syndrome, fibromyalgia, erectile dysfunction, arteriosclerosis, high blood

¹ This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

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pressure, cold sores, colds, and sore throats. The Commission is investigating whether any of Petitioner's claims and practices are deceptive and, therefore, constitute violations of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, as amended.

On December 20, 1999, pursuant to the Commission's September 7, 1999, omnibus resolution authorizing investigations of Internet Advertisers, Sellers, and Promoters, the Commission issued a subpoena *duces tecum* to the Petitioner. The Subpoena requests various documents, including sales figures, product labels, and advertising materials. The two specifications at the heart of this Petition call for (1) documents constituting the basis of evidence relied upon to substantiate Petitioner's claims regarding the products advertised on the Targeted Medical Foods web site, and (2) documentary materials that may limit or call into question those product claims.

Petitioner asks that these two specifications, numbered 1 and 2 in the Subpoena, be stricken or modified on the grounds that they are unduly burdensome. Specifically, Petitioner argues that the two specifications would require the downloading and printing of 45,000 pages of materials.

II. ANALYSIS

The issue at the heart of this investigation is whether Petitioner's claims about the products at issue are adequately substantiated. The two specifications Petitioner seeks to have stricken or modified are those seeking to elicit evidence on this central issue.

After reciting some general legal authorities and summarizing the two Subpoena specifications at issue, Petitioner's brief offers only *one sentence* in support of his burden argument: "the production of documents responsive to the First and Second

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Requests of the Subpoena Duces Tecum requires downloading and printing of approximately 45,000 pages of materials and is therefore unduly burdensome as it hinders and disrupts the normal operations of Targeted Medical Foods.” Memorandum of Points and Authorities in Support of Petition to Limit Subpoena Duces Tecum Issued to William E. Shell, M.D. at 3. This bald conclusory statement is simply insufficient to show that the specifications should be stricken or limited.

Rule 2.7(d)(1) provides, in relevant part, that petitions “shall set forth all assertions of privilege or other factual and legal objections to the subpoena ... , *including all appropriate arguments, affidavits and other supporting documentation.*” 16 C.F.R. § 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement.

The burden of showing that a particular request for production within an administrative subpoena *duces tecum* is unreasonably burdensome, or requires an unreasonably burdensome amount of effort and expense, rests with the subpoenaed party. See FTC v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) (citing U.S. v. Powell, 379 U.S. 48, 58 (1964)). The petitioner has not met this burden. For example, Petitioner provides no file lists, examples of files, file summaries, man-hour cost projections or business analysis affidavits of any sort to support his claim that downloading the files relating to specifications one and two in the Subpoena will “unduly disrupt or seriously hinder normal operations” of his business. Instead, Petitioner merely offers a single conclusory statement with no supporting evidence. Reviewing courts have found such unsupported or vague assertions of excessive burden unconvincing and inadequate to support challenges to FTC compulsory process requests.²

² See, e.g., FTC v. Standard American, Inc., 306 F.2d 231, 235 (3rd Cir. 1962)(asserting that a corporation subpoenaed for documents by the FTC should have “met their burden of a showing of the unreasonableness of the Commission’s demand,” by making “a record that would convince (the District Court) of the measure of their grievance rather than ask (it)” to be assumed from the corporation’s mere statement that it would be deprived of “thousands of current records in daily business use” without a “single shred of evidence.”)

William E. Shell, M.D.

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All compulsory process specifications require recipients to expend some effort and incur some expense. Compulsory process would be rendered useless if it could be avoided based upon nothing more than bald assertions that compliance would require the expenditure of time and resources.

III. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioner is directed to comply with the Subpoena on or before Friday, April 14, 2000.

By direction of the Commission.