UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Applicant,	:	
-against-	:	
	:	**Case No. 14 Misc. 00193 (PGG)**
THE COMMITTEE ON WAYS AND MEANS OF THE U.S. HOUSE OF REPRESENTATIVES and BRIAN SUTTER,	:	**ECF CASE**
	:	
Respondents.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF SECURITIES AND EXCHANGE COMMISSION'S APPLICATION AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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The Securities and Exchange Commission ("Commission") respectfully submits this reply memorandum of law in further support of its Application for an Order to Show Cause and for an Order Requiring Compliance with Subpoenas ("Application"), and in opposition to the motion of Respondents the Committee on Ways and Means of the U.S. House of Representatives (the "Committee") and Brian Sutter ("Sutter") (collectively, "Respondents") to dismiss the Application on jurisdictional and venue grounds.

PRELIMINARY STATEMENT

Respondents do not contest that the Commission's Humana Investigation is within the legitimate scope of the Commission's authority, or that the Commission seeks documents and testimony that may be relevant to its investigation. Respondents also do not contest that they have failed to produce a single document in response to the Subpoenas (more than six months after the Commission first attempted to obtain information from them), or that Sutter has never appeared for testimony before the Commission. And, finally, they do not contest that the Subpoenas were duly issued. Thus, Respondents concede that the Commission has made a *prima facie* showing for enforcement of the Subpoenas. *See RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96-97 (2d Cir. 1997).

Respondents nonetheless insist that the Court refuse to enforce the Subpoenas based on a series of arguments that lack merit. First, in the absence of any precedent, they ask the Court to become the first to apply federal sovereign immunity *against* a federal law enforcement agency conducting an investigation in a sovereign capacity. July 4, 2014 Memorandum of Respondents (DE 15) ("Resp. Mem.") at 13-16. Second, they ask the Court to dismiss for lack of personal jurisdiction, even where Respondents concede that they have the requisite contacts with the United States and have failed to demonstrate that resolving this summary proceeding in New

York would contravene traditional notions of fair play and substantial justice. Resp. Mem. at 16-21. Finally, they ask the Court to dismiss this proceeding for improper venue, or to transfer it to the District of Columbia, complaining chiefly of the burden imposed on them in litigating this proceeding here, notwithstanding the settled law dismissing such concerns as irrelevant in summary proceedings such as this. *See* Section I, *infra*.

No less meritless are the non-jurisdictional defenses Respondents have interposed to block the Commission from obtaining any of the requested information. In the face of settled case law to the contrary, Respondents insist that the Court should allow them to avoid in wholesale fashion any response to the Subpoenas based on their invocation of the Speech or Debate Clause (the "Clause"), by claiming that every document in Sutter's files or those relating to him on the subjects and communications specified in the Subpoenas qualifies for protection under the Clause as informal "information-gathering." Further, again contrary to case law, they argue that the Court is bound to accept their characterization of those materials without further inquiry, and to endorse their refusal to produce any materials at all. *See* Sections IIA and IIB, *infra*. Their contention is particularly lacking in merit here, where the likelihood is that much if not all of the requested information falls well outside the scope of the Clause. *See* Section IIC, *infra*. Finally, they argue that Sutter, a staffer of the Committee from whom the Commission seeks first-hand factual information, is too high-ranking a governmental official to be questioned. For reasons discussed in the Commission's opening brief, and below, this position lacks merit.

The remainder of Respondents' brief is devoted to irrelevant criticism about the progress of the Commission's investigation, observations about the lack of allegations of any wrongdoing, and protestations that Respondents committed no wrongdoing. Resp. Mem. at 11-12. These assertions are irrelevant: This is a summary proceeding to enforce compliance with investigative

Subpoenas in the midst of an ongoing — and non-public — investigation. The Commission has alleged no wrongdoing because the very purpose of its Humana Investigation, and the Subpoenas in particular, is to gather the facts necessary to determine whether any wrongdoing has occurred.

For the reasons discussed below, and in the Commission's opening papers, the Commission requests that the Court deny Respondents' motion, and order Respondents to comply with the Subpoenas promptly.

ARGUMENT

I. THE COURT SHOULD DENY RESPONDENTS' MOTION TO DISMISS THIS PROCEEDING

A. Federal Sovereign Immunity Does Not Apply

Respondents' assertion that federal sovereign immunity bars this summary proceeding to enforce a subpoena is novel and unsupported. Respondents do not cite any court holding that sovereign immunity precludes a federal agency acting in a sovereign investigative or law enforcement capacity from bringing an action against another branch of the same federal sovereign. Rather, courts "regularly permit interbranch litigation," Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 Wm. & Mary L. Rev. 893, 910 (1991), and have not applied (let alone discussed) federal sovereign immunity in the myriad cases where one branch of government (sometimes Congress) acting in a sovereign capacity sues another branch of government (sometimes to enforce a subpoena).[1]

Sovereign immunity does not apply here — and the Commission has not located any

[1] *E.g.*, *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) (compelled disclosure of material obtained through search of a House office); *Comm. on Oversight and Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (congressional subpoena to U.S. Attorney General); *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (congressional subpoena issued to White House Chief of Staff and former White House counsel); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002) (Comptroller General seeking information from Vice-President).

cases discussing sovereign immunity in this context — because sovereign immunity is, and always has been, premised on an "immunity from *private* suits" that has been considered "central to sovereign dignity." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (emphasis added) (also quoting The Federalist Papers No. 81: "It is inherent in the nature of sovereignty not to be amenable to the *suit of an individual* without its consent." (emphasis added)). This is why all the sovereign immunity cases cited by Respondents involve a *private party* bringing suit against the federal government, rather than a suit brought *by* the federal government.[2] There is no support for the unprecedented extension of federal sovereign immunity that Respondents seek; it is not a question of whether an "exception" to sovereign immunity exists in this context, but rather whether sovereign immunity applies in the first place.[3] While Respondents attack the Commission for not identifying any cases in which a court has rejected such an extension, the Commission should not bear the burden of proving a negative.

This Court should decline to become the first to hold that a subpoena enforcement action brought by a sovereign against another branch of the same sovereign is barred by sovereign immunity. There is no justification for extending the nonconstitutional doctrine of federal

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[2] *In re SEC ex rel. Glotzer*, 374 F.3d 184 (2d Cir. 2004) (Resp. Mem. at 13, 14) is no different: a private litigant (Martha Stewart) sought enforcement of a subpoena directed to Commission staff. *See also Maarawi v. U.S. Congress*, 24 Fed. App'x 43, 44 (2d Cir. 2001) (pro se defamation action by private citizen against Congress); *Rockefeller v. Bingaman*, 234 Fed. App'x 852 (10th Cir. 2007) (*pro se* action by terminated federal employee against Congressmen); *Keener v. Congress*, 467 F.2d 952 (5th Cir. 1972) (pro se action by private plaintiff against Congress); *EPA v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999) (subpoena issued by General Electric to an EPA official); *Kasi v. Angelone*, 300 F.3d 487 (4th Cir. 2002) (subpoena issued by convicted murderer to FBI); *Boron Oil Co. v. Downey*, 873 F.2d 67 (4th Cir. 1989) (subpoena issued by oil company to EPA employee) (cited in Resp. Mem. at 14).

[3] The Jaffee article cited by Respondents (Resp. Mem. at 15 n.16) does not provide such support. Louis L. Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-9 (1963). Jaffee, who challenged the breadth of modern sovereign immunity doctrine by showing that the governed were frequently allowed to seek relief against the sovereign under the common law, did not identify any suits "between components of the federal government," but rather cited only private actions.

sovereign immunity far beyond its intended boundaries and purposes when legislators already enjoy a Constitutional protection, when available, in the form of the Clause. Indeed, several cases addressing the Clause that the parties have cited were interbranch actions in which the courts did not discuss, let alone apply, sovereign immunity. *E.g.*, *Gravel v. United States*, 408 U.S. 606 (1972) (grand jury subpoena to Senate aide); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) (material obtained by Executive branch during search of House office).

Finally, as noted in the Commission's opening papers (Commission's June 20, 2014 Memorandum of Law (DE 2) ("SEC Mem.") at 23 n.6), even if the doctrine of sovereign immunity somehow applied here, Congress expressly waived any such immunity when it enacted the STOCK Act. The STOCK Act provides that "Members and employees of Congress are not exempt" from the insider trading laws, and thus placed congressional actors on equal footing with everyone else. 112 P.L. 105, 126 Stat. 291, 292.[4]

Respondents do not disclaim the plain text of the statute, but rather argue that this express statement is not sufficient because "it says absolutely nothing about waiving any privileges or immunities" regarding subpoenas. Resp. Mem. 16. But use of the word "immunity" in a statute has never been held to be necessary for a waiver, as courts have held that statutory language analogous to what appears in the STOCK Act — equating governmental and nongovernmental entities — constitutes an express waiver.[5] The waiver in the STOCK Act should extend to the

[4] *See also* S. Rep. No. 112-244, at 2-3 (2012) (noting that Congress sought to "establish a clear policy that insider trading will not be tolerated within the halls of Congress, and *to ensure that any instances of insider trading by Members or their staff will be subject to the same civil and criminal laws that apply to everyone else*" (emphasis added)).

[5] *E.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006) (discussing the waiver in the Federal Tort Claims Act, 28 U.S.C. § 2674, which states that "[t]he United States shall be liable,

subpoena enforcement provisions of the Exchange Act — the same statute prohibiting insider trading that the STOCK Act affirmed applied to Members and staff — because it defies logic to believe that Congress waived any sovereign immunity that may exist for the substantive insider trading laws, but left in place an immunity that would preclude investigations into whether there has been any violation of those laws.

B. This Court Has Personal Jurisdiction over Respondents

Section 21(c) of the Exchange Act, under which the Commission initiated this summary proceeding, authorizes the Commission to "invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on," and serve process on a person "wherever he may be found." This nationwide service provision authorizes federal courts to exercise jurisdiction "to the limits of the Due Process Clause of the Fifth Amendment." *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996) (*citing SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990)).

Respondents concede that for purposes of the "minimum contacts" analysis in cases arising under Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c) (and other nationwide service of process statutes, such as Section 27, 15 U.S.C. § 78aa), the relevant forum is not the State of New York but the United States, and "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present." *Mariash v. Morrill,* 496 F.2d 1138, 1143 (2d Cir. 1974) (rejecting jurisdictional challenge asserted by Massachusetts resident to

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respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

Commission's plenary enforcement action under Section 27).[6] Respondents acknowledge that they have sufficient contacts with the United States. Resp. Mem. at 17.

Respondents nonetheless claim that it is constitutionally "unreasonable" for them to appear in the Southern District of New York because the Court's exercise of personal jurisdiction will contravene "traditional notions of fair play and substantial justice" (Resp. Mem. at 17), a claim that requires Respondents to show that litigating in this forum would be "so gravely difficult and inconvenient" as to place them at a "'severe disadvantage' in comparison to [their] opponent[s]." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (citations omitted). Once minimum contacts with a forum have been established (as they have here), it is Respondents' burden — not the Commission's — to "'present a compelling case'" for why it would be unreasonable for this Court to exercise jurisdiction. *SEC v. Softpoint*, No. 95 Civ. 2951 (GEL), 2001 WL 43611 at *5 (S.D.N.Y. Jan. 18, 2001) (*quoting Metro. Life Ins. Co. v. Robertson–Ceco Corp.,* 84 F.3d 560, 568 (2d Cir.1996)).

But even for ordinary litigants facing plenary civil lawsuits, the "reasonableness" inquiry "is largely academic in non-diversity cases brought under a federal law which provides for nationwide service of process." *Softpoint*, 2001 WL 43611 at *5. The test is now merely "a constitutional floor to protect litigants from truly undue burdens, [and] few (*and none in this Circuit*) have ever declined jurisdiction, on fairness grounds, in such cases." *Id*. (*emphasis*

[6] While respondents "disagree with that legal ruling," *Mariash* reflects a settled principle of law. *Knowles,* 87 F.3d at 417 (addressing summary proceedings under Section 21(c) of the Exchange Act); *SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004) ("[W]here the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process. . . . minimum contacts with the United States suffice." (citations omitted)); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985); *see also Johnson Creative Arts, Inc. v. Wool Masters, Inc.* 743 F.2d 947, 950 n.3 (1st Cir. 1984); *NGS Am. Inc. v. Jefferson*, 218 F.3d 519, 524 (6th Cir. 2000); *Fitzsimmons v. Barton,* 589 F.2d 330, 333 n.4 (7th Cir. 1979).

added); *accord SEC v. Straub,* 921 F. Supp. 2d 244, 259 (S.D.N.Y. 2013); *SEC v. Syndicated Food Servs. Int'l, Inc.*, No. 04 Civ. 1303 (NGG), 2010 WL 3528406 at *3 (E.D.N.Y. Sept. 3, 2010).

Respondents nonetheless ask this Court to apply a multi-factor analysis they derive from a case that did not involve a federal statute authorizing nationwide service of process (Resp. Mem. at 18, citing *Bank Brussels Lambert v. Fiddler Gonzalez & Rodgriguez*, 305 F.3d 120 (2d Cir. 2002)), and which has been recognized to be appropriate (if at all) as a challenge to venue, rather than to jurisdiction. *See, e.g., Fitzsimmons, supra*, 589 F.2d at 334 (declining to adopt multi-factor test for personal jurisdiction analysis in action under Section 27 of Exchange Act, as the factors in these "fairness" tests are "more appropriately used in applying 28 U.S.C. § 1404(a), which embodies the non-jurisdictional doctrine of Forum non conveniens"); *First Fed. Sav. & Loan Ass'n. v. Oppenheim, Appel, Dixon & Co.*, 634 F. Supp. 1341 (S.D.N.Y. 1986) (noting *Fitzsimmons* with approval, and declining to adopt a multi-factor "fairness" test as "a sort of constitutionalized *forum non conveniens* factor balancing" in an action under Section 27 of the Exchange Act).[7]

Moreover, this is a summary subpoena enforcement proceeding, not a plenary lawsuit, and is "conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte*." *SEC v. McCarthy,* 322 F.3d 650, 655 (9th Cir. 2003) (*quoting New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406 (1960)). "Unlike civil lawsuits, summary enforcement proceedings do not typically involve discovery, testimony from parties or witnesses, or the presentation of evidence." *SEC v. Jones,* No. CV 13-08314 (DDP), 2013 WL 6536085 (C.D. Cal. Dec. 13, 2013) (*citing United States v. Firestone*

[7] The Commission addresses the factors raised in Respondents' jurisdictional argument when responding to their venue challenge. *See* Section IC and ID, *infra*.

Tire & Rubber Co., 455 F. Supp. 1072, 1078 (D.D.C. 1978)).

In an age of modern communications and travel, requiring Sutter and a congressional committee to litigate this summary proceeding in New York, which amounts to a motion to compel documents and testimony, is consistent with traditional notions of fair play and substantial justice.[8] Even should this proceeding require additional judicial intervention, such as *in camera* review of documents (*see* Section IIB, *infra*), the burden on defendants is minimal. Indeed, courts in the Second Circuit have consistently rejected jurisdictional challenges where defendants have the requisite contacts with the United States, even where defendants reside in far more distant places than do Respondents here, and even in plenary civil actions, where the burdens of litigation are significantly greater. *See, e.g., Softpoint*, 2001 WL 43611, at *6 (not unreasonable for Nevada resident to defend himself in Commission civil enforcement action in New York).[9] Indeed, as discussed below, courts have rejected convenience/burden arguments even in the context of transfer motions under Section 1404(a) when made in the context of summary proceedings such as these. *See* Section ID, *infra*.

C. Venue Is Proper Here

Section 21(c) of the Exchange Act provides that in cases of noncompliance with its investigative subpoenas, "the Commission may invoke the aid of any court of the United States

[8] The Commission assumes *arguendo* that the Committee has due process rights under the Fifth Amendment, but that is not a settled proposition. The Commission is not aware of any court holding that Congress has the same type of due process rights guaranteed to individuals under the Fifth Amendment. And even if a congressional Committee possesses such rights, it is difficult to accept that it is unreasonable for this Committee, which should act on behalf of the entire nation, to appear in any federal venue.

[9] *See also Straub,* 921 F. Supp. 2d at 259 (same, with respect to Hungarian residents); *SEC v. Morton,* No. 10 Civ. 1720 (LAK), 2011 U.S. Dist. LEXIS 36487 (S.D.N.Y. Mar. 31, 2011) (same, with respect to *pro se* California defendants); *Syndicated Food Servs.,* 2010 WL 3528406, at *3 (Florida residents).

within the jurisdiction of which such investigation or proceeding is carried on…." 15 U.S.C. § 78u(c). Although Respondents contend that "by all accounts" and "as best we can tell," the Commission's investigation is being carried on in the District of Columbia (Resp. Mem. at 19, 20), it is being and has always been carried on in New York. The Formal Order initiating the investigation was approved by the New York Regional Office's Senior Associate Regional Director in April 2013, and it designated twelve attorneys exclusively employed at the Commission's New York office as officers empowered to issue subpoenas and otherwise conduct the investigation. New York has been the hub of the Commission's investigative activity, and is the location from which the Commission staff has issued subpoenas, sent voluntary requests for information, and primarily planned and directed other investigative steps. The staff also conducted a number of interviews in New York. Declaration of Sanjay Wadhwa dated July 16, 2014 ("Wadhwa Decl.") ¶¶ 2-3.

Although Respondents contend that the Humana Investigation "centers" on people and documents located in the District of Columbia (Resp. Mem. at 19), they are incorrect. CMS documents relevant to the Humana Investigation are located primarily in the District of Maryland, where CMS is headquartered, and Sutter resides in the Eastern District of Virginia. Moreover, Sutter, the Committee and Greenberg Traurig are only a part (though an important one) of the Humana Investigation: the investor clients of Height Securities that traded in the stocks of relevant health care issuers are mostly located in New York, but also Connecticut, Massachusetts, Illinois, and California (with one located in the District of Columbia). The health care issuers in question are located in Kentucky, Florida, Minnesota, and Connecticut, among other states. In addition, the Commission has sought documents from entities with relevant information in numerous other states, including New Jersey, Kansas, Nebraska, Colorado, Texas,

and Florida. Thus, not only is New York the hub of this investigation, but a substantial portion of relevant people and documents are located in New York — and many other states throughout the country — as well. Wadhwa Decl. ¶¶ 4-8.

Courts, including those cited by Respondents, have consistently held that the location of an agency's investigation or inquiry for venue purposes is the place that is the center of its investigatory activity — here, of course, New York. *See, e.g., SEC v. Smith*, No. 92 C 081 (GMM), 1992 WL 67832 (N.D. Ill. Mar. 25, 1992) (jurisdiction and venue proper in Northern District of Illinois, where Commission was directing its investigation of investment adviser located in Michigan); *FTC v. Jim Walter Corp*., 651 F.2d 251, 254, n.3 (5th Cir. 1981) (determination that investigation is being carried on in district where agency has managed and organized its investigation is reasonable where it is conducting broad inquiry; distinguishing *FTC v. Western Gen. Dairies*, 432 F. Supp. 31 (N.D. Cal. 1977)), *abrogated on other grounds, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982); *Fed. Election Comm'n v. Comm. to Elect Lyndon La Rouche*, 613 F.2d 849, 857-58 (D.C. Cir. 1979) (FEC investigative enforcement proceeding brought in District of Columbia held to be properly located there, where "the Commission determined that there was reason to believe that appellants may have violated the federal election laws, where all correspondence regarding those possible violations emanated, and where the subpoenas were in fact issued.").[10]

[10] The location of the Commission's investigation is not dependent on the location of Respondents, but rather on the investigation in its entirety. *See Jim Walter,* 651 F.2d at 254 ("the statutory term 'inquiry' refers to the entire investigation not just that portion of it involving the party subpoenaed" (*citing FTC v. Browning,* 435 F.2d 96 (D.C. Cir.1970))). Respondents' reliance on the fact that the Subpoenas in question are returnable in the District of Columbia is similarly unavailing. *See U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 249 (D.C. Cir. 2005) (Resp. Mem. at 19). Here, the Commission staff was authorized to make Sutter's testimony subpoena returnable in New York, and designated the District of Columbia solely as an accommodation to him. Wadhwa Decl. ¶ 9. This does not alter the calculus of where venue

D. Respondents' Motion Pursuant to 28 U.S.C. § 1404(a) Should Be Denied

Respondents also ask the Court to transfer this proceeding to the District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a), because it would "promote the convenience of parties and witnesses." Resp. Mem at 22. Respondents carry "the burden of making out a strong case for transfer, and, to prevail, must make a clear and convincing showing that transfer is proper." *Mohsen v. Morgan Stanley & Co.,* No. 11 Civ. 6751 (PGG), 2013 U.S. Dist. LEXIS 135682 at *10 (S.D.N.Y. Sept. 23, 2013); *see also Jones*, 2013 WL 6536085 at *1 (Movants "'must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.'" (*quoting Decker Coal Co. v. Commonwealth Edison Co*., 805 F.2d 834, 843 (9th Cir. 1986))).

Although Respondents purport to address the multi-factor test that courts generally use on motions made under Section 1404(a), they again ignore that this is a summary proceeding, which makes the multi-factor test they cite largely inapposite. Because summary proceedings generally consist of motion practice, with "discovery and testimony" allowed only "in the most extraordinary circumstances," courts have held that the purported "inconvenience to parties and witnesses associated with litigation, as may be considered under § 1404(a), is largely eliminated." *Jones, supra*, 2013 WL 6536085 at *2; *see also FTC v. Carter*, 464 F. Supp. 633, 637 (D.D.C. 1979) ("in summary proceedings such as this testimony from parties or witnesses is rarely necessary," thereby "eliminat[ing] a significant convenience factor involved in the § 1404(a) determinations"), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980).

The other factors in the typical § 1404(a) analysis are no less inapplicable in this context

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lies. *See La Rouche*, 613 F.2d at 857 n.7 ("It is true that the subpoenas were returnable in New York, but this was done solely for the convenience of appellants. … The Commission intended to send its staff from Washington to New York to examine the documents.").

and, in any event, do not support a transfer of this proceeding. As this is a subpoena enforcement action, there are no "operative facts" to address, and the fifth and sixth factors — the availability of process to compel the attendance of unwilling witnesses and the relative means of the parties — are irrelevant: Sections 21(c) and 27 of the Exchange Act authorize nationwide service of process, and it is unclear how the "relative means of the parties" has any bearing on this issue. Nor does the seventh factor (the forum's "familiarity with the governing law") justify a transfer of this proceeding. As this Court noted in *Mohsen* (a diversity jurisdiction case), this factor "is to be accorded little weight on a motion to transfer venue … because federal courts are deemed capable of applying the substantive law of other states." *Mohsen*, 2013 U.S. Dist. LEXIS 135682 at *27. Respondents' suggestion that this Court is less capable of assessing issues arising under the Clause than a court in the District of Columbia is belied by the substantial number of decisions in circuits throughout the United States that have addressed the Clause, many of which Respondents cite. *E.g.*, Resp. Mem. at 27, 28, 30.

II. THE SPEECH OR DEBATE CLAUSE DOES NOT BAR ENFORCEMNT OF THE SUBPOENAS

A. The Court, Not Respondents, Determines Whether the Information Requested Is Protected by the Speech or Debate Clause

While the Supreme Court has extended the Speech or Debate Clause to cover more than just "words spoken in debate" (Resp. Mem. at 27), it has also held that the Clause covers only "legislative acts" — activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel*, 408 U.S. at 625. Respondents believe that if they portray the information sought by the subpoenas as "manifestly," "apparently," or "purportedly" legislative, courts have an "exceedingly limited

role" and must hold that the Clause protects against disclosure. Resp. Mem. at 29-30. Respondents thus insist that *all* of the information responsive to the Subpoenas' document requests (and all subjects as to which Sutter might testify) is "manifestly legislative," and consequently that they need not respond at all, Resp. Mem. at 30-31 — including by producing documents that fall outside the scope of the Clause, identifying those they contend are privileged (such as through a log), and allowing for resolution of any disputes on any documents withheld, such as through *in camera* review by the Court.[11]

But in invoking the Clause, Respondents seek to expand its reach significantly. They do not (and cannot) claim that the requested materials fall into any of the well-recognized categories of "manifestly legislative" Speech or Debate materials — *i.e.,* the consideration of or voting on a bill, subpoenaing of records for, or introducing evidence or interrogating witnesses at, a committee hearing, or delivering a speech on the floor of the House. *See, e.g., Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985) (collecting authority).[12] Instead, they

[11] Contrary to Respondents' claims (Resp. Mem. at 28 n.21), it remains an open question in this Circuit whether the Clause extends to the production of documents in response to investigatory subpoenas. The Supreme Court "has not spoken on whether the privilege conferred by the [Speech or Debate] Clause includes a non-disclosure privilege," *Rayburn*, 497 F.3d at 659-60, and although the D.C. Circuit has extended the Clause to cover disclosure in certain cases (Resp. Mem. at 28), other circuits have held to the contrary. In *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011), for example, the Ninth Circuit held that where an action or investigation concerns conduct that does not itself implicate the Clause's protections — as is the case here — the Clause provides no protection against non-disclosure of documents to the Executive branch: "When the underlying action is not precluded by the Clause … [the Supreme] Court has demonstrated that other legitimate interests exist, most notably the ability of the Executive to adequately investigate and prosecute corrupt legislators for non-protected activity." *Id.* at 1036 (*citing United States v. Brewster*, 408 U.S. 501, 524-25 (1972); *Gravel*, 408 U.S. at 629 n.18; and *United States v. Helstoski*, 442 U.S., 477, 488 n.7 (1979)); *see also In re Grand Jury*, 821 F.2d 946, 953 n.4 (3rd Cir. 1987) ("Our precedents have suggested that the privilege is primarily one of non-evidentiary use, not one of non-disclosure." (citation omitted)).

[12] Nor (despite repeatedly expressing the point, Resp. Mem. at 28, 31), do they identify any requests that seek to inquire into legislative purposes or motives — which is not surprising, given that the Subpoenas are directed toward discovery of the circumstances surrounding an advance

argue that all of the requested information is protected from disclosure under the Clause as informal "information-gathering." *E.g.*, Resp. Mem. at 31. Respondents claim that because the Committee has considered "various legislative proposals" during the current Congress on a number of subjects within its jurisdiction (including CMS and MA rates) (Resp. Mem. at 30), *every* document covered by the Subpoenas (and every line of questioning at testimony) constitutes informal information-gathering and is protected. They contend that because the Committee has jurisdiction over CMS, the Clause protects from disclosure *ever*y communication with the Greenberg Traurig lobbyists, *every* communication with CMS, and any other document responsive to the discrete subjects regarding the April 1 rate increase that are specified in the Subpoenas. *Id.* Further, Respondents claim that the requested materials are so "manifestly" or "purportedly" legislative that the Commission — and, by implication, this Court — may not even question their counsel's conclusory description of all of these materials as concerning "legislative acts." Resp. Mem. at 30-31.

Respondents overstate the Clause's reach and understate the well-settled role of the federal courts in scrutinizing such claims of privilege under the Clause. No court has accepted that *all* activity arguably falling into the category of informal "information-gathering" is "manifestly" legislative. And no court has simply deferred to *post hoc* characterizations of the same in litigation. On the contrary, courts have carefully scrutinized invocations of the Clause in order to determine as a threshold matter whether the information or testimony requested concerns activities that are "legislative acts."

First, the term "legislative acts" has more limitations than Respondents are willing to acknowledge. As discussed in the Commission's opening papers (SEC Mem. at 13-14), the

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leak of non-public information regarding Executive Agency action.

Supreme Court has recognized that "[l]egislative acts are not all-encompassing" and extend "beyond pure speech or debate … only when necessary to prevent indirect impairment of [congressional] deliberations." *Gravel*, 408 U.S. at 625; *see also United States v. Brewster*, 408 U.S. 501, 512, 515 (1972) (Clause does not bar an "inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself," and which include "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called news letters to constituents, news releases, and speeches delivered outside Congress"). The legitimate but unprotected activities discussed in cases like *Gravel* and *Brewster* do not constitute an exhaustive list (*cf.* Resp. Mem. at 35), because the "list of activities that are legitimate yet 'political' starts (rather than ends) with *Brewster*." *Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 53-54 (D.D.C. 2007); s*ee also* SEC Mem. at 13-14.

Second, in view of the wide range of communications and activities related to legislative affairs that are not protected by the Clause, there is nothing "manifestly" or "purportedly" legislative about the documents in Sutter's files regarding his contacts with lobbyists and CMS, and they do not become so merely because Respondents now label them as informal "information-gathering." Indeed, courts have recognized that informal information-gathering is not protected under the Clause unless at the end of every such venture "is a legislative act that could in some sense be deemed 'formal': a piece of draft legislation, a hearing before or investigation by a committee, a meeting to help push through a pending bill." Or, "[p]ut another way," informal information-gathering does not warrant protected status "unless the information

is being gathered as part of, in connection with, or in aid of a legitimate legislative act." *Jewish War Veterans*, 506 F. Supp. 2d at 57.

Consequently, courts have not accepted without further inquiry an assertion of privilege based on informal information-gathering. In *Lee*, 775 F.2d 514 , a case that Respondents cite (Resp. Mem. at 27 n.20), the Third Circuit reversed the lower court's ruling that it could not inquire into the purpose of a legislator's meetings and conversations with various officials in New York and Washington. The Court rejected the argument that it had to defer, based on *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973)), to the characterization of those meetings as informal information-gathering. 775 F.2d at 522 (citing *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 503 (1975)). The Third Circuit noted that the lower court's ruling (like Respondents' argument here) was based on a misreading of *Dowdy*, and a misunderstanding of the settled case law concerning "manifestly" and "apparently" legislative materials. The Third Circuit explained that in all prior decisions discussing "manifestly" legislative acts, the acts at issue in those matters — introducing proposed legislation, voting on resolutions and introducing evidence at committee hearings — were so clearly legislative in nature "that no further examination had to be made to determine their appropriate status." *Lee*, 775 F.2d at 522.[13]

The Third Circuit further explained that, with respect to meetings and conversations claimed to be for the purpose of informal information-gathering, no such conclusions could be

[13] *Lee* noted that the "purportedly or apparently legislative" acts in *Dowdy* to which that court deferred were not *post-hoc* rationalizations offered in litigation (such as those raised here by Respondents), but rather were acts *that at the time in question* were formally and facially legislative (*i.e.,* subpoenas and committee hearing alleged to have been shams organized for an improper purpose). *Lee*, 775 F.2d at 524. Equally unavailing is Respondents' reliance on the *dictum* in *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988) (Resp. Mem. at 30), in which the Second Circuit cited *Dowdy* in passing on inapposite facts. *Biaggi* never had occasion to consider the scope of permissible questioning, because it recognized that no impermissible inquiries had occurred in the first place.

drawn from the face of the claims. *Id*. Thus, the "task of the district court at the outset" is "to determine which acts were proper legislative acts and which were … non-legislative acts." *Id.*

Courts, in fact, have consistently refused to accept the notion that they are merely "rubber stamps," tasked solely with deferring to claims by Members or Congressional committees that requested information is protected by the Clause. *See Benford v. Am. Broad. Cos.*, 98 F.R.D. 42, 45 (D. Md. 1983) (rejecting insistence by congressional committee that "this Court blindly accept their conclusory and seemingly self-serving suggestion that they will screen what is and what is not protected [by the Clause]. … As to the issue of what is and what is not privileged, this Court reminds counsel that it is 'the duty of the judicial department to say what the law is'" (*quoting United States v. Nixon*, 418 U.S. 683, 703 (1974))); *Marbury v. Madison*, 5 U.S. 137 (1803); *Jewish War Veterans*, 506 F. Supp. 2d at 61 (rejecting "the Members' contention that the Constitution categorically bars courts from deciding whether individual documents are legislative in nature, and hence within the ambit of the Speech or Debate Clause.").

B. Respondents Are Required To Produce Non-Privileged Documents, and Identify Those They Withhold As Protected by the Clause

Respondents may not refuse to respond to the Subpoenas in their entirety based on hypotheticals about the contents of the communications. Respondents have not provided a privilege log or otherwise made the materials available to the Court for *in camera* inspection, yet their brief repeatedly asks the Court to accept their unsupported assertion that all of the requested information is plainly covered by the Clause. Respondents, in essence, ask this Court to take it on faith that none of the information requested by the Commission concerns matters that are not entitled to the protection of the Clause, including attempts to influence the conduct of executive agencies, constituent services, assistance in securing government contracts, and dissemination of

materials outside the Congress. SEC Mem. at 15-23, and Section IIC. But the Commission's requests are narrowly targeted to a two-month period, and to specific individuals and defined topics. To properly invoke the Clause, Respondents are required to establish that this targeted information has "some nexus to the [Committee's] legislative functions." *Lee*, 775 F.2d at 520. They may not refuse to comply with the Subpoenas based on conjecture that amounts to little more than that the information requested is "casually or incidentally related to legislative affairs." *Id.* (*quoting Brewster*, 408 U.S. at 525).

Courts have rejected the position taken by Respondents, even when faced with document requests that arguably have even a closer "nexus" to legislative functions than those here, and have refused to allow a wholesale refusal to respond to a subpoena. *Jewish War Veterans* provides a framework for this Court to follow. Litigants challenging legislation to establish a war memorial sought documents from Members of the House that were addressed toward events and communications that were (unlike the Commission's requests here) directly related to the passage of the challenged legislation. Those litigants sought, among other things, to discover information about the legislative purposes of the bill in question. The requested documents related to (1) all of the Members' "contacts, communications, discussions, lobbying of, financial contributions to or received, or interactions with" a series of lobbying and interest groups as to the memorial; (2) the arrangement, scheduling or coordination of meetings with any person and any other person in the Executive Branch regarding the memorial; and (3) "contacts, communications, discussions, or interactions" with anyone in the Executive Branch regarding the memorial. 506 F. Supp. 2d at 37.

As Respondents do here, the Members argued that all of the requested information was protected from disclosure by the Clause, because they all constituted informal information-

gathering. The court rejected that argument. It noted that some of the requested materials might be protected, but it also recognized the likelihood that many of the requested materials would fit into one or more of the many categories of non-protected legislative activity, *e.g.*, attempts to influence or exhort the Executive Branch with respect to the administration of a statute, or "political activities." *Id.* at 57-58. Upon concluding its request-by-request review of the subpoena, the court rejected the Members' argument, and directed them to produce non-privileged documents responsive to all of the litigants' requests — and further held that the court would have the ultimate say in the future should the parties encounter and be unable to resolve between themselves any disputes as to the status of any particular document. *Id*. at 62.[14]

Jewish War Veterans and the other decisions discussed above apply *a fortiori* in this case. Unlike the requests at issue in *Jewish War Veterans*, the Commission's requests do not seek any information about a core legislative act such as the passage of legislation — and yet even in that case, the court directed the production of responsive materials, and a mechanism affording the parties the opportunity to resolve disputes about whether documents were properly withheld on the basis of the Clause. This Court should, consistent with settled precedent, order Respondents to produce all responsive, non-privileged information, and preserve for later resolution, if necessary, any claims for protection over specific documents.

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[14] *See also Rayburn House Office Bldg*., 497 F.3d at 658, 666 (on remand, district court was directed to "to make findings regarding 'which, if any, documents … are records of legislative acts'" as Member was entitled to return of only those "legislative materials … protected by the Speech or Debate Clause"); *In re Grand Jury Investigation,* 587 F.2d 589, 596 (3d Cir. 1978) (holding that Congressman seeking to invoke Clause has burden to distinguish between legislative and other materials, and tasking the District Court to resolve disputes that may arise should the party seeking discovery challenge the Congressman's claim of privilege over particular subject matter); *In re Possible Violations of 18 U.S.C. §§ 201, 371,* 491 F. Supp. 211, 214 (D.D.C. 1980) (requiring Congressman to submit an "index of all material which is … [claimed to be] privileged under the Speech or Debate Clause" for judicial review and allowing the party seeking discovery—the Government—to contest any claims of privilege).

C. The Specific Requests in the Subpoenas Are Not Barred by the Clause

1. Documents Concerning Greenberg Traurig, and Communications Between Sutter and Greenberg Traurig

Respondents assert that any document in Sutter's files regarding Greenberg Traurig, and any communications between them for the two-month period covered by the Subpoenas, must consist only of these lobbyists' "petition for a redress of grievances" or information provided by the lobbyists "regarding the impact of MA payment rates on industry." Thus, they conclude, these communications necessarily fall within the scope of the Clause as part of Sutter's "information-gathering" work for the Committee. Resp. Mem. at 34.

First, that Sutter may have had the discussions hypothesized by his counsel does not justify the conclusion that those communications were made in the course of protected informal "information-gathering." *See United States v. Garmatz*, 445 F. Supp. 54, 64 (D. Md. 1977) (rejecting Member's assertion based on *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), that he was entitled to the protections of the Clause "with respect to any discussion with any interested party which might be construed as a part of the information gathering process of a Congressman or of a Congressional committee"). And the Commission can find no support in the case law (and Respondents cite none) for the proposition that a lobbyist's complaint to a congressional staffer is protected conduct or communication under the Clause.

Second, as noted above in Section IIB (discussing *Jewish War Veterans* and similar decisions), Respondents may not completely avoid responding to the Commission's subpoena by offering hypothetical examples of privileged communications, because, even if such communications exist, it does not follow that *all* of the information sought by these requests must be protected "information-gathering." Quite the contrary: Respondents ignore that the Commission has requested information provided *by* Sutter *to* Greenberg Traurig — and they do

not dispute that any dissemination of information by Sutter to Greenberg Traurig falls outside the scope of the Clause. *See* SEC Mem. at 16-18.[15] That the information provided to Greenberg Traurig might have been related to some unspecified potential legislation (something Respondents merely speculate about) does not make that conversation protected, and Respondents cite no case law suggesting that it does.[16] While Respondents do not specify the legislation supposedly referred to in Sutter's communications with Greenberg Traurig, if Respondents are basing their argument on legislative acts the Committee might undertake in the future, the law is also well-settled that the Clause offers no such protection. *See Helstoski*, 442 U.S. at 490 (Clause's "protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a promise to introduce a bill is not a legislative act.")

Regardless of the direction of information flow, it is highly unlikely that communications between a Committee staffer and a lobbyist regarding nonpublic rates that CMS was about to announce in mere days or hours could legitimately qualify as "part of the legislative process,"

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[15] When addressing the "outside dissemination" line of cases, Respondents emphasize the addition of the phrase "in the absence of a claim of legislative purpose" to the dissemination point from the *en banc* decision in *McSurely*, 553 F.2d at 1286 (Resp. Mem. at 35). But *McSurely* was referring to the situation in which "a Congressional committee lawfully may forward to appropriate Executive agencies information which it believes relates to their legitimate functions." *Id.* If Sutter was disseminating advance information to Greenberg Traurig about an imminent announcement by an Executive Agency, it is precisely the type of communication that courts have not protected under the Clause. *See* SEC Mem. at 17-18.

[16] The information disseminated in *Gravel* and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) was clearly *related* to the legislative process – it concerned subjects on which Congress could, and perhaps even likely would, legislate – but that was not enough to bring such communications within the scope of the Clause. *Gravel* concerned the Pentagon Papers — *i.e.*, a classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy." 408 U.S. at 608. *Hutchinson* concerned a Senator's allegations of wasteful government spending, *see* 443 U.S. at 114-17. *See also Brewster,* 408 U.S. at 528 ("[A]ctivities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself" are not covered by the Clause.).

Brewster, 408 U.S. at 528, as there is no indication that legislative action on any relevant piece of legislation prior to the public announcement would have been likely or even possible. Notably, Respondents have not identified any pending or planned legislation being considered in or about April 2013 for which advance knowledge of the April 1 rate increase would have been necessary or even directly relevant.

Finally, Respondents insist that none of Sutter's communications with Greenberg Traurig could have constituted non-protected "constituent" services or communications, because his employer, the Committee, is not an individual Member, and thus has no "constituents." Resp. Mem. at 37. Information related to the provision of favors or services by Members or Committee staffers is not protected by the Clause, regardless of whether they are called "constituents," "stakeholders" or "lobbyists." *See Brewster*, 408 U.S. at 512 (excluding constituent "errands" and "assistance in securing Government contracts" from the scope of the clause). Respondents' contention, which is wholly unsupported as a factual matter, is simply not credible: It is flatly contradicted, for example, by the email in the Commission staff's possession (*see* SEC Mem. at 18), suggesting that the call between Sutter and the Greenberg Traurig lobbyist on April 1 was initiated to discuss the contract termination by CMS of a Greenberg Traurig client—a "stakeholder" or "constituent" communication that, notwithstanding that the Committee purportedly has no "constituents" to service, nonetheless is reflected in Sutter's office email account. *See* Reply Declaration of Amanda Straub dated July 16, 2014 ("Straub Reply Decl.") ¶¶ 2-4.

Nor, more generally, is there any merit to Respondents' argument that Sutter's files and his communications with Greenberg Traurig and/or CMS necessarily are protected because the employer that controls access to them, the Committee, is not an individual Member, and acts

only "officially." Resp. Mem. at 37. Respondents cite no authority for this proposition, which is contradicted by the case law. *See, e.g., McSurely*, 553 F.2d at 1280 (Clause did not protect the General Counsel or Chief Counsel and Investigator of the Senate's Permanent Subcommittee on Investigation from liability for disseminating materials outside of Congress).

The argument is also contrary to reality. Even if every communication or act of the Committee itself are protected "legislative acts" (and they are not), it hardly follows that all of the documents and communications in Sutter's files consist solely of legislative-act materials (quite the contrary, as noted above), or that any act taken while in the employ of the Committee is a protected act. The Committee can act and communicate only through its individual Members (from whom the Committee derives any privileges under the Clause in the first place) or employees, and as the Supreme Court has recognized, Members act and communicate in ways that are both protected and unprotected by the Clause.[17]

2. Documents Concerning Communications Between Sutter and CMS

As with communications between Sutter and Greenberg Traurig, Respondents cannot escape their obligation to respond to the Subpoenas' requests for communications between Sutter and CMS through hypothetical characterizations of such exchanges as informal "information-gathering" related in some manner to potential legislation. Respondents refer to various initiatives they claim were related in some manner to CMS and the MA rates (Resp. Mem. at 4-7), but the existence of such initiatives does not justify the conclusion that *all* or even many documents and communications in Sutter's files relating to CMS or the MA rates are integral to any recognized legislative acts. *See Brewster*, 408 U.S. at 528 (relation to legislative process is

[17] *See Gravel*, 408 U.S. at 616-17 (noting, with respect to a congressional aide, that the Speech or Debate privilege only extends to conduct "which would have been legislative acts, and therefore privileged, if performed by the Senator personally" (quotation omitted)).

insufficient; the communication, to be protected, must be "part of the legislative process itself").

Moreover, as noted above, the Commission is already aware that at least one of Sutter's communications with CMS, an executive agency, may have involved discussions of the cancellation of a contract between the government and a Greenberg Traurig client, a "stakeholder" communication that Respondents cannot and do not defend as a protected, legislative act or communication. SEC Mem. at 18; Declaration of Amanda Straub dated June 20, 2014 ("Straub Decl.") (DE 3) ¶ 18; Straub Reply Decl. ¶¶ 2-5. This is precisely the type of communication that has been recognized as falling outside the scope of the Clause. *See McSurely*, 553 F.2d at 1285-86 ("interc[ession] on behalf of constituents with agencies of the Executive Branch" is not covered by the Clause). Respondents nonetheless argue that all of the documents responsive to the requests must be protected, because the Committee is "solely a legislative entity." Resp. Mem. at 37. For the reasons discussed above, the argument is meritless.

In addition, much of the requested information may in fact relate to communications in the course of attempting to influence CMS in its administration of the statutes with which it is charged — an effort to influence the Executive branch that falls outside the scope of the Clause. *Gravel*, 408 U.S. at 625; *see also* SEC Mem. at 19. Respondents insist that such communications could not possibly have occurred because the Committee did not "interface with CMS other than in its role as a House committee of legislative jurisdiction with respect to CMS" (Resp. Mem. at 37), but their own exhibits contradict this argument. *See* Ex. A (which the Commission also previously cited, SEC Mem. at 19 n.4). The letter from the Committee's Chairman, Representative Camp, sent to CMS on February 28, 2013, is replete with precisely the types of "exhortations" and "cajoling" of an executive agency with respect to the administration

of a statute that courts have recognized as not covered by the Clause.

3. Documents Concerning the Medicare Advantage Rates

For similar reasons, documents and communications concerning the MA rates set by CMS are unlikely to fall under the protection of the Clause. Once again, Respondents offer only the conclusory assertion that all interactions on the subject of these rates would have constituted privileged "information-gathering." Resp. Mem. at 33. But mere conjecture as to the nature of responsive documents and communications is insufficient to resist production. As discussed above, that Respondents' list of initiatives may have related in some manner to the MA rates (Resp. Mem. at 33) does not justify the conclusion that all documents in Sutter's files relating to CMS's April 1 announcement of the 2014 MA rates are integral to legislative acts.

4. Documents Concerning the Potential Confirmation of Marilyn Tavenner

Respondents concede that the Committee and Sutter had no role in Tavenner's confirmation, Resp. Mem. at 34, but argue that "to the extent that the Committee did obtain information about Ms. Tavenner and/or her potential confirmation, . . . such information would be relevant to actions CMS might take under her leadership . . . and thus to whether legislation might be needed to ensure that CMS would adhere to the Committee's policy preferences." *Id*.

This strained argument is insufficient to bar enforcement of the Subpoenas, *see Brewster*, 408 U.S. at 528 (activities only "incidentally related to legislative affairs but not part of the legislative process itself" are not protected under the Clause); *Jewish War Veterans*, 506 F. Supp. 2d at 53 (noting Supreme Court's "refus[al] to treat the Clause as protecting all conduct relating to the legislative process" (quotation and alteration omitted)). Moreover, notwithstanding Respondents' unexplained assertion that *Brewster* does not apply here (Resp. Mem. at 33 n.24), it is directly on point: To the extent the documents in question concern a promise to perform a

future legislative act (*i.e.*, the confirmation of Tavenner) in exchange for a revision to the CMS Rate Announcement, they are clearly not covered by the Clause. 408 U.S. at 526; *Helstoski*, 442 U.S. at 489 ("Promises by a Member to perform an act in the future are not legislative acts.").

5. Sutter's Telephone Records

Courts have also rejected the type of argument that Respondents make here to avoid completely producing Sutter's telephone records. In *In re Grand Jury Investigation*, the Third Circuit rejected the argument of a Member that "because some of the calls reflected in [the Congressman's] telephone bill reflect legislative acts[,] the entire bill" should be protected from disclosure under the Speech or Debate Clause, and in particular that where a "House document contains both privileged and unprivileged materials the entire document is privileged." 587 F.2d at 595-96. The Third Circuit held that the Congressman was required to identify those calls he claimed related to legislative acts, and produce the non-protected records. *Id.* at 597. Respondents should be required to do the same here. *See also* SEC Mem. at 22.[18]

III. *UNITED STATES v. MORGAN* DOES NOT BAR THE COMMISSION FROM TAKING SUTTER'S TESTIMONY

Citing *United States v. Morgan*, 313 U.S. 409 (1941) and its progeny, Respondents argue that the Commission should not be permitted to take Sutter's testimony because under "[l]ong-

[18] The cases Respondents cite on this point are inapposite. *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 863 (D.C. Cir. 1988) (Resp. Mem. at 38-39), which did not concern telephone records, addressed requests directly targeted to core legislative materials regarding a subcommittee's formal hearing. *United Transportation Union v. Springfield Terminal Railway,* No. 87-03442 P, 1989 WL 38131, at *4 (D. Me. Mar. 13, 1989) (Resp. Mem. at 38) concerned a broader array of requests for telephone records, and even in that case, the court acknowledged that where "a document contains two types of information, one privileged and one not, it should be redacted to disclose only the unprotected material." *Id*. at *5 n.3. Finally, *Brown & Williamson Tobacco Corp. v. Williams,* 62 F.3d 408, 411-12 (D.C. Cir. 1995) (Resp. Mem. at 38), like *MINPECO*, did not specifically concern telephone records, but rather stated its disagreement with the Third Circuit's holding in *In re Grand Jury Investigation* that the Clause's privilege *i*s "one of nonevidentiary use, not of nondisclosure." *Brown*, 62 F.3d at 420.

settled federal common law … high-ranking government officials may not be forced to testify in litigation to which they are not parties" absent "exceptional circumstances." Resp. Mem. at 39. Yet, Respondents do not grapple with the primary reason *Morgan* is inapplicable here: the shield against testimony by high ranking officials applies only to testimony about "the *deliberative process* used to arrive at a decision within the scope of [the official's] government duties." *In re United States*, 542 Fed. App'x 944, 947 (Fed. Cir. 2013) (emphasis added) (SEC Mem. at 24).

This case is not one where the Commission seeks any information regarding an official's "deliberative process." It does not, for example, seek to "understand" CMS' Rate Announcement (Resp. Mem. at 43) or to interview Sutter about his or any Members' "deliberative process" surrounding any piece of legislation. The Commission is conducting an insider trading investigation; it seeks to learn whether, how, and when Sutter learned about an imminent CMS rate adjustment, and whether he told individuals outside the government about the rate adjustment. Straub Decl. Ex. F (describing anticipated subjects of inquiry for Sutter).

The cases that Respondents cite are inapposite because, in each, a party sought to question a high-ranking official "regarding the reasons for taking official action." *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013) (cited in Resp. Mem. at 39).[19] Respondents do not cite a single case applying *Morgan* in which the party

[19] *Accord Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 587 (D.C. Cir. 1985) (Resp. Br. at 39, 40) (applying doctrine to witness "called to testify regarding their reasons for taking official actions"); *In re United States*, 542 F. App'x. at 949 (Resp. Br. at 39) (holding Federal Reserve Chairman Bernanke not required to be deposed about "the Federal Reserve's deliberative processes or Chairman Bernanke's mental processes"). The other authorities Respondents cite likewise limit *Morgan*'s application to discovery bearing upon high-ranking individuals' official actions and the reasons for taking those actions. *See, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (noting that courts, "[r]elying on *Morgan* … have concluded that top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action." (citations omitted)); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (vacating order denying

seeking to interview a governmental official sought answers to purely factual questions within that official's knowledge as opposed to the reason why the government acted in a particular way. For this reason alone, the Court should reject this argument.

Even assuming *Morgan* applied because the Commission sought to interview Sutter about the reasons for some official action, the Commission is not aware of any authority (and Respondents cite none) in which the Staff Director of a congressional subcommittee was treated as a sufficiently senior government official to merit *Morgan*'s application.[20] Courts have rejected *Morgan* protection for officials at the same or even higher levels than that which Sutter occupies.[21]

Finally, even if Sutter were sufficiently high-ranking, his unique first-hand knowledge of events relevant to this investigation means that he is not shielded from testifying. *See* SEC Mem. at 25. Respondents contend that the information the Commission seeks from Sutter cannot be

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motion to quash subpoenas for testimony of FDIC officials concerning FDIC's decisions regarding the sale of certain land) (Resp. Br. at 39).

[20] The Commission did not argue that *Morgan* is inapplicable to legislative officials, as Respondents suggest. Resp. Mem. at 40. Rather, the Commission argued that Sutter was not "high-ranking" regardless of the governmental branch in which he served. While Respondents cite a few decisions applying *Morgan* to "Legislative Branch officials" (Resp. Mem. at 40), these cases concern Members and, in one instance, a Member's Chief of Staff. Respondents' effort to bolster Sutter's credentials by referring to his status as a "very senior staff" member for purposes of congressional reporting requirements (Resp. Mem. at 41) is unavailing. By statute, this designation applies to all congressional staff earning at least 75% of Members' salaries, and it is believed that hundreds of congressional staffers qualify as "very senior staff" under this definition. *See* Erica Lovley, *2000 House Staffers Make Six Figures*, Politico (Mar. 26, 2010), *available at* http://www.politico.com/news/stories/0310/35050.html. Moreover, there is no case suggesting that salary determines whether an official is "high-ranking" for purposes of *Morgan*.

[21] *See, e.g., Citizens for Responsibility and Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 179 (D.D.C. 2008) (neither the Chief of Staff to Vice President Richard Cheney nor the Director of the Presidential Materials Staff in the Office of the Presidential Libraries is the kind of "cabinet-level officer over which the D.C. Circuit's decisions contemplate protection from discovery"); *Green v. Baca*, 226 F.R.D. 624, 649-50 (C.D. Cal. 2005) (permitting depositions of County Sheriff); *see also* SEC Mem. at 24-25.

at 25. Respondents contend that the information the Commission seeks from Sutter cannot be "necessary" to its investigation because the investigation is focused on a leak that "must have originated at CMS" and trading in healthcare stocks by people other than Sutter himself. Resp. Mem. at 44. But Respondents' suggestion that the Commission speak to CMS officials instead of Sutter is beside the point, because only Sutter can testify as to what Sutter knew and when he knew it. The Commission's investigation has reasonably led it to conclude that Sutter may have first-hand knowledge of operative facts relevant to the Humana investigation, and Respondents may not invoke *Morgan* to preclude his testimony.

CONCLUSION

For the foregoing reasons, and those set forth in the Commission's papers submitted on June 20, 2014 the Commission respectfully requests that the Court grant the Commission's Application, and deny Respondents' motion.

Dated: July 16, 2014
New York, New York

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