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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

-against-

THE COMMITTEE ON WAYS AND MEANS OF THE U.S. HOUSE OF REPRESENTATIVES and BRIAN SUTTER,

Respondents.

Case No.

MEMORANDUM OF LAW IN SUPPORT OF SECURITIES AND EXCHANGE COMMISSION'S APPLICATION FOR AN ORDER TO SHOW CAUSE AND AN ORDER REQUIRING COMPLIANCE WITH SUBPOENAS

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The Securities and Exchange Commission ("Commission") respectfully submits this memorandum of law in support of its Application for an Order to Show Cause and for an Order Requiring Compliance with Subpoenas ("Application"). For the reasons set forth below, and in the accompanying Declaration of Amanda L. Straub dated June 20, 2014 ("Straub Decl.") and the exhibits thereto, the Commission respectfully requests that the Court enter an order, in the form attached to the Application, directing respondents the Committee on Ways and Means of the U.S. House of Representatives (the "Committee") and Brian Sutter ("Sutter") (collectively, "Respondents") to comply with the investigative subpoenas (the "Subpoenas") the Commission lawfully issued and served on them.

PRELIMINARY STATEMENT

The Commission is investigating whether material nonpublic information concerning the April 1, 2013 announcement by the U.S. Centers for Medicare and Medicaid Services ("CMS") of 2014 reimbursement rates for the Medicare Advantage program was leaked improperly to certain members of the public in advance of CMS's announcement, and whether such action resulted in insider trading in violation of the federal securities laws. As part of its formal investigation, the Commission properly served Respondents with the Subpoenas, which seek documents and testimony critical to the Commission's investigation.

Respondents have refused to comply with the Subpoenas, asserting numerous objections, arguing, among other things, that the Subpoenas are "repugnant to public policy"; that they are vague and overbroad; that the Speech or Debate Clause of the U.S. Constitution entitles Respondents to avoid production of any documents or testimony; and that one agency of the federal government is somehow barred by sovereign immunity from fulfilling its statutory duty to investigate violations of the federal securities laws.

As explained below, these objections lack merit, and the Subpoenas satisfy all the requirements for enforcement. As such, the Court, pursuant to Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c), should issue an order compelling Respondents to comply promptly with the Subpoenas.

STATEMENT OF FACTS

A. THE COMMISSION'S INVESTIGATION

On April 1, 2013, approximately 20 minutes after the close of market trading, CMS released its final 2014 Medicare Advantage reimbursement rates (the "Rate Announcement"). Straub Decl. ¶ 9. The Rate Announcement was far more favorable to certain health care insurers than preliminary rates CMS had announced on February 15, 2013. According to that preliminary announcement six weeks earlier, payments from Medicare Advantage to insurers would have declined by 2.3% from the prior year. In contrast, the rates released in the final Rate Announcement on April 1 increased the payment rates by 3.5% from the prior year. Straub Decl. ¶ 10.

CMS effected this change through a significant alteration to its methodology. The agency incorporated into its calculation the assumption that Congress would eventually act to prevent the scheduled reduction in Medicare physician payment rates called for under the statutory "sustainable growth rate" ("SGR") formula — as Congress had done in preceding years. Previously, CMS had not assumed this override would occur. *Id.* ¶ 11 & Ex. A.

Approximately 20 minutes before the markets closed on April 1 (and thus approximately 40 minutes before CMS's Rate Announcement), an analyst at Height Securities, LLC ("Height"), a broker-dealer, released the following "flash report":

> 1. We now believe that a deal has been hatched to protect Medicare Advantage rates from the -2.3% rate update issued in the

> advanced notice mid-February
> 2. We believe that the SGR will be assumed in the trends going forward resulting in roughly a 4% increase in cost trends
> 3. This is a drastic change in historical policy aimed to smooth the confirmation of Marylyn Tavernier [sic][1]
> 4. We are supportive of MA related stocks (HUM, HNT) under this circumstance

Id. ¶ 13. Height sent its report to dozens of clients, including prominent investment funds. *Id.*

Within five minutes after Height released this report, the prices and trading volumes of stocks of those health care insurers affected by these modified rates increased dramatically. For example, the price of Humana Inc. stock increased by as much as 7% in the last fifteen minutes of trading. Among those trading in these stocks were clients of Height. *Id.* ¶ 14 & Ex. B.

Approximately half an hour before the Height analyst distributed the flash report (and about 70 minutes before the Rate Announcement), he had received the following email from a lobbyist and attorney at Greenberg Traurig, LLP ("Greenberg Traurig") (the "GT Lobbyist"):

> Our intel is that a deal was already hatched by [Sen.] Hatch to smooth the way for Tavenner as long as they address the MA rates in the final notice. We have heard from very credible sources that the final notice will adjust the phase in on risk adjustment and take into account the likelihood/certainty of an SGR fix.

Id. ¶ 12.

On April 9, 2013, the Commission staff opened a formal investigation, *In the Matter of Humana* (the "Humana Investigation"), to determine, among other things, the source(s) of information in the email sent from the GT Lobbyist to Height, the circumstances surrounding the transmittal of that information, and whether any conduct relating to the transmittal constituted insider trading. The Commission's Formal Order of Investigation, issued pursuant to Exchange Act Section 21(a), 15 U.S.C. § 78u(a), authorizes it to issue subpoenas. Straub Decl. ¶¶ 7-8.

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[1] At that time, Marilyn Tavenner was the Acting Administrator of CMS. She was confirmed in May 2013 as Administrator of the agency.

B. RESPONDENTS

1. The Committee

The Committee is a committee of the U.S. House of Representatives. Its jurisdiction includes Medicare. *Id.* ¶ 5.

2. Sutter

Sutter is the Staff Director of the Committee's Health Subcommittee, a position he has held since April 22, 2013. *Id.* ¶ 6. Before becoming Staff Director (*i.e.*, during the relevant period), Sutter was a staff member to the Subcommittee. *Id.*

Information obtained by the Commission staff as part of its investigation indicates that Sutter spoke several times in March 2013 to a colleague of the GT Lobbyist. *Id.* ¶ 16. He also communicated with at least two individuals at CMS in the week before the Rate Announcement. *Id.* ¶ 17. Further, on April 1, 2013 at 11:07 a.m. (the day that Height disseminated the CMS information in advance of the public announcement), Sutter emailed the GT Lobbyist about the termination of one of the lobbyist's clients from the Medicare Advantage program. *Id.* ¶ 18. The GT Lobbyist asked if he could speak to Sutter, and they spoke by telephone at approximately 3 p.m., ten minutes before the GT Lobbyist sent the email to Height Securities. *Id.* ¶¶ 18-19

During the Commission's investigation, the GT Lobbyist acknowledged that during this conversation with Sutter, he and Sutter spoke about the impending Rate Announcement by CMS, which was due to come out after the close of trading at 4 p.m. that day. *Id.* ¶ 20. At 3:11 p.m., the GT Lobbyist sent his email to Height Securities, claiming that he had learned from "very credible sources that the final notice will adjust the phase in on risk adjustment and take into account the likelihood/certainty of an SGR fix." *See* Section A, *supra*; Straub Decl. ¶ 12.

An agent of the Federal Bureau of Investigation and an investigator from the Office of

the Inspector General at the U.S. Department of Health and Human Services ("HHS OIG") interviewed Sutter several weeks after the Rate Announcement and discussed with him his communications with the GT Lobbyist, among other topics. Sutter said he did not recall speaking to the GT Lobbyist about the Rate Announcement. No Commission staff were present during this discussion. *Id.* ¶ 21. Several days later, an attorney for the House of Representatives ("House Counsel") sent the FBI and HHS OIG a letter in which he indicated that the information provided during his voluntary interview with the FBI and HHS OIG was incomplete and, on at least one key issue, inaccurate:

> I understand that you may have asked Mr. Sutter whether he ever had used his mobile telephone to speak with [the GT Lobbyist]. Mr. Sutter may have answered that he could not recall doing so, which would have been a correct statement of Mr. Sutter's memory at the time. With the benefit of some time for reflection, Mr. Sutter's best recollection now is that he previously may have used his mobile telephone to speak with [the GT Lobbyist], although he is not certain. It is also possible that Mr. Sutter may have made other statements in the course of his interrogation that, while an accurate reflection of his memory at the time, might merit clarification if, for example, Mr. Sutter were to review records that could refresh his memory.

Id. ¶ 22. To the staff's knowledge, Sutter has never met with the FBI, HHS OIG, or any federal agency to clarify his earlier statements. *Id.* ¶ 23.

In addition to the information discussed above, the Commission has obtained some other information during the course of its investigation indicating that Sutter may have been a source of the GT Lobbyist's non-public information. *Id.* ¶ 24.[2]

C. THE INVESTIGATIVE SUBPOENAS

Beginning in January 2014, the Commission staff attempted to obtain a voluntary production of documents from the Committee and Sutter, and an informal interview with Sutter.

[2] Under the terms of a confidentiality agreement, the Commission is not at liberty to specify this additional information at this time. *Id.*

Id. ¶ 26. House Counsel communicated an unwillingness to produce documents or to make Sutter available for an interview in several exchanges of correspondence. After several failed attempts to obtain such information voluntarily, on May 6, 2014, the Commission staff issued the Subpoenas (Straub Decl. Exhs. C and D), one of which is directed to the Committee and seeks documents, and the other of which is directed to Sutter and seeks documents and testimony. *Id.* ¶ 27. House Counsel accepted service on behalf of the Committee and Sutter. *Id.*

The Subpoenas both call for the following targeted categories of documents relevant to the investigation for a very limited time-period — from February 10, 2013, through and including April 10, 2013:

- All documents concerning communications between Sutter and any member or employee of Greenberg Traurig (Request No. 1);
- All documents concerning communications between Sutter and CMS (Request No. 2);
- All documents concerning communications to, from, copying, or blind-copying Sutter concerning (i) the preliminary 2014 Medicare Advantage payment rates announced by CMS on February 15, 2013, and/or (ii) the final 2014 Medicare Advantage payment rates announced by CMS on April 1, 2013 (together, the "Medicare Advantage Rates") (Request No. 3);
- All documents concerning communications to, from, copying, or blind-copying Sutter concerning the potential confirmation of Marilyn Tavenner as CMS Administrator by the U.S. Senate (Request No. 4); and
- All documents created by Sutter or in Sutter's files, concerning (i) [the relevant individuals at Greenberg Traurig] (ii) the Medicare Advantage Rates; and/or (iii) the potential confirmation of Marilyn Tavenner as CMS Administrator by the U.S. Senate. (Request No. 5).

Straub Decl. Exs. C&D. In addition, the Subpoena to the Committee calls for records from Sutter's work telephones. *Id.* Ex. C (Committee Subpoena Request No 6). Finally, the Subpoena to Sutter calls for documents sufficient to show all of Sutter's personal and work telephone numbers and email addresses. *Id.* Ex. D (Sutter Subpoena Request No. 6).

D. RESPONDENTS' REFUSAL TO COMPLY WITH THE SUBPOENAS

On May 7, 2014, House Counsel sent the staff a letter with questions about the subject matter of the Subpoenas, pursuant to House rules, and stating that "at least some, and perhaps all, of the documents that your agency has demanded are protected by the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, and it is plausible, if not likely, that matters about which you may seek to question Mr. Sutter will be protected in the same fashion." *Id.* ¶ 30 & Ex. E. The Commission staff responded by letter on May 8, 2014, answering questions posed by the May 7 letter and indicating that it did not believe that the materials requested implicated the Speech or Debate Clause. *Id.* ¶ 31 & Ex. F. The staff's May 8 letter also indicated that the staff would be "happy to discuss with you your views on the applicability of the Speech or Debate Clause" to the categories of information sought in the Subpoenas, Straub Decl. Ex. F, at 2, and suggested that Respondents produce logs of any documents over which they asserted privileges or protections from discovery. *Id.* at 3.

By letter dated May 19, 2014, the return date for the document Subpoenas, Respondents formally announced their wholesale refusal to comply with the Subpoenas, insisted that the Subpoenas were "repugnant to public policy," asserted nearly a dozen objections, many of which lacked an explanation, and requested that the Commission withdraw the Subpoenas. Straub Decl. ¶ 32 & Ex. G.

Even though the Subpoenas call for a targeted set of documents from the files of one individual over a two-month period of time, Respondents labeled them "vague, confusing, overbroad, and unduly burdensome." Straub Decl. Ex. G, at 2. Respondents further objected that the Subpoenas are barred by the Speech or Debate Clause and other immunities. *Id.* at 1-2.

In an attempt to resolve this matter without the necessity of litigation, the staff proposed a

compromise to Respondents' counsel by letter dated June 11, 2014, which Respondents rejected on June 17, 2014. Straub Decl. ¶ 33 & Exs. H & I.

Respondents' refusal to provide documents or testimony is particularly puzzling, as it appears contrary to the spirit of recent legislation. In April 2012, Congress affirmed unambiguously that "Members of Congress and employees of Congress are not exempt from the insider trading prohibitions arising under the securities laws" when it enacted the Stop Trading On Congressional Knowledge ("STOCK") Act, 112 P.L. 105, 126 Stat. 291, 292. Congress was clear about why insider trading prohibitions apply to its Members and employees:

> [E]ach Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.

Securities Exchange Act of 1934 ("Exchange Act") Section 21A(g)(1), 15 U.S.C. § 78u-1(g)(1).

Respondents' objections lack merit, and the Commission now invokes this Court's aid in enforcing the Subpoenas requiring the attendance of Sutter for testimony and the production of the requested documents.

ARGUMENT

I. THE SUBPOENAS SATISFY ALL REQUIREMENTS FOR ENFORCEMENT

The Commission has "broad authority to conduct investigations into possible violations of the federal securities laws and to demand the production of evidence relevant to such investigations." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741 (1984); *see also* 15 U.S.C. § 78u(a)(1). Section 21(c) of the Exchange Act authorizes the Commission to seek an order from this Court compelling Respondents to comply with the subpoenas.[3] *See* 15 U.S.C. § 78u(c).

[3] Venue properly lies in the Southern District of New York because this District is "the

"The courts' role in a proceeding to enforce an administrative subpoena is extremely limited," and courts should enforce such subpoenas if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96–97 (2d Cir. 1997) (affirming order directing compliance with Commission subpoenas) (quotations omitted). To obtain an order enforcing the Subpoenas under Section 21(c), the Commission must meet four requirements: "[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commission['s] possession, and [4] that the administrative steps required...have been followed." *RNR Enters.*, 122 F.3d at 96–97 (quoting *United States v. Powell*, 379 U.S. 48, 57–58 (1964)); *see also SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1021, 1024 (D.C. Cir. 1978) (affirming enforcement of Commission subpoenas). "An affidavit from a governmental official is sufficient to establish a *prima facie* showing that these requirements have been met." *RNR Enters.*, 122 F.3d at 97 (citation omitted). Once the Commission has made a *prima facie* showing, Respondents can defeat the enforcement of the Subpoenas only by demonstrating that the Subpoenas are "unreasonabl[e]," "issued in bad faith or for an improper purpose," or "that compliance would be unnecessarily burdensome." *RNR Enters.*, 122 F.3d at 97 (quoting *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973)) (internal quotation marks omitted).

The Commission satisfies each of the four requirements for enforcement of the Subpoenas. First, the Humana Investigation concerns possible insider trading in the stocks of a number of health care companies in violation of Section 10(b) of the Securities Exchange Act of 1934 and is accordingly a matter well within the legitimate scope of the Commission's authority.

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jurisdiction [in] which [the] investigation . . . is carried on." 15 U.S.C. § 78u(c). The Humana Investigation is being conducted by the staff of the Commission's New York Regional Office. Straub Decl. ¶ 8.

See RNR Enters., 122 F.3d at 96–97 (quoting *Powell*, 379 U.S. at 57-58); *SEC v. Finazzo*, 543 F. Supp. 2d 224, 227 (S.D.N.Y. 2008) (subpoenas issued for "a legitimate purpose" where Commission sought to "determine whether any individual or entity violated the securities laws"), *aff'd*, 360 Fed. Appx. 169 (2d. Cir. 2009).

Second, the Commission seeks documents and testimony relevant to the Humana Investigation. To satisfy this requirement, the Commission need only show that the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Arthur Young & Co.*, 584 F.2d at 1029 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)). The Subpoenas seek documents and testimony relating to Sutter's communications with relevant personnel at Greenberg Traurig, the law and lobbying firm that transmitted the non-public information to Height, and CMS, the government agency with which the non-public information originated (Straub Decl. Exs. C & D, at Requests Nos. 1 and 2). They also seek documents in Sutter's and the Committee's files, as well as testimony, relevant to the subject matter of the apparent leak; the Rate Announcement; the relevant individuals at Greenberg Traurig; and the confirmation of Marilyn Tavenner as the CMS Administrator (at Requests Nos. 3, 4, and 5). Further, in this investigation that centers on communications, the Subpoenas seek Sutter's telephone records (Committee Subpoena, Straub Decl. Ex. C, Request No. 6), and a list of Sutter's telephone numbers and email addresses (Sutter Subpoena, Straub Decl. Ex D, Request No. 6). The documents requested are solely those to, from, copying, or otherwise located in the files of one individual, Sutter, who is already linked to the facts of the Humana Investigation. *See* Statement of Facts ("Facts"), Section B, *supra*. Accordingly, the Subpoenas not only seek relevant documents and testimony, but are narrowly tailored to do so.

Third, the Commission staff does not already have the documents and testimony the

Subpoenas seek. The staff has received no documents to date from Sutter or the U.S. House of Representatives and has not interviewed or taken testimony from Sutter. Straub Decl. ¶ 34.

Fourth, the Subpoenas were issued in accordance with "the administrative steps required." *RNR Enters.*, 122 F.3d at 96–97 (quoting *Powell*, 379 U.S. at 57–58). The Commission both issued and properly served the Subpoenas. The Subpoenas were issued by Commission counsel authorized by the Formal Orders to issue subpoenas in the Humana Investigation. Exchange Act Section 21(b), 15 U.S.C. § 78u(b) (authorizing the Commission to issue subpoenas during the course of an investigation); Straub Decl. ¶ 8. The Commission also properly served the Subpoenas on Respondents through House Counsel. *Id.* ¶ 27.

Because the Commission has met each of the four requirements for enforcement of its Subpoenas, the Court should require Respondents to comply with them. None of the objections they have raised to date, which are addressed below, are valid.

II. RESPONDENTS' VARIOUS OBJECTIONS ON GROUNDS OF VAGUENESS, OVERBREADTH, BURDEN, RELEVANCE, AND PRIVACY DO NOT JUSTIFY THEIR FAILURE TO COMPLY WITH THE SUBPOENAS

The plenary objections in the House Counsel's May 19 letter on grounds of vagueness, confusion, overbreadth, burden, relevance, and privacy have no merit and do not prevent enforcement of the Subpoenas. *See* Straub Decl. Ex. G, ¶¶ 4-8. As noted above (*see* Facts, Section A, *supra*), the Subpoenas are narrowly tailored to seek documents relevant to the Commission's Humana Investigation. They seek documents in Respondents' files concerning a single individual (Sutter), several defined subject matters and people, and communications among a restricted number of relevant individuals, during only a two-month period. *See generally* Straub Decl. Exs. C&D.

Moreover, the hollowness of Respondents' objections on grounds of overbreadth and burden is revealed by the fact that they have not attempted to negotiate the scope of the

Subpoenas. Instead, they have refused to comply and insisted on the Subpoenas' withdrawal.

The May 19 letter also claims that "each of the [S]ubpoenas constitutes an unwarranted intrusion into the privacy of Mr. Sutter insofar as it demands '[a]ll telephone records from his work telephones as well as documents "sufficient to identify all of Mr. Sutter's personal and work telephone numbers and email addresses."'" Straub Decl. Ex. G, ¶ 10. This argument provides no legitimate justification for failing to comply with the Subpoenas, because Sutter does not have a protected privacy interest in this information. It is well-established that individuals have no privacy interest in personal telephone records that merely record the fact that a call has taken place. *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735, 742 (1979) ("[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial."); *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993) ("It is evident . . . that [defendant] did not have both an actual and a justifiable privacy interest in any of these materials, including his credit card statements and telephone records."); *United States v. Moalin*, No. 10cr4246 JM, 2013 WL 6079518, at *6 (S.D. Cal. Nov. 18, 2013) ("[A]n individual does not have a reasonable expectation of privacy in business records such as . . . telephone records . . . ."). And, in this instance, the Commission seeks telephone records from a government employee's use of a government telephone line or a government-issued mobile phone. Moreover, just as courts have not recognized a privacy interest in the numbers that individuals have called, they have not recognized a privacy interest in the mere identification of telephone numbers and email addresses, or the subscriber information given to providers to establish a telephone or email account. *E.g.*, *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010).

Even if Sutter could articulate an objectively reasonable privacy interest in his work telephone records or the identification of his telephone numbers and email addresses, that does

not somehow shield that information from the Commission's subpoena power. Rather, the Commission is entitled to obtain information in which a person has a reasonable expectation of privacy through the exercise of its statutory subpoena power where a subpoena is authorized for a legitimate governmental investigation, the requested materials and testimony reasonably relate to that investigation, and the subpoena is specific enough such that compliance is not unreasonably burdensome. *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). The Subpoenas here clear each of these thresholds. *See* Section I, *supra*.

III. RESPONDENTS MAY NOT AVOID COMPLIANCE WITH THE SUBPOENAS BY INVOKING THE SPEECH OR DEBATE CLAUSE

Respondents have also wholly refused to comply with the Subpoenas by taking the position that the Speech or Debate Clause of the U.S. Constitution (the "Clause"), which states that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place," U.S. Const. art. I, § 6, cl. 1, completely immunizes Respondents from production of each and every category of documents that the Commission is seeking. Their position is meritless as a matter of law, as the Clause does not protect the materials and testimony sought by the Subpoenas.

The purpose of the Clause is to prevent "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). While the Supreme Court has expanded the reach of the Clause beyond its literal terms, which cover only "Speech" and "Debate," the Court has stated the Clause's protections pertain only to "legislative acts," defined as "those things generally said or done in the House or the Senate in the performance of official duties and . . . the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 512 (1972). Thus, although the Clause shields a Member of

Congress from questions about "how [he] spoke, how he debated, how he voted, or anything he did in the chamber or in committee," *id.* at 526, it has long been recognized that if the Clause is to be extended beyond such acts — *i.e.*, those at the "heart of the Clause," *Gravel*, 408 U.S. at 625 — they "must be 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 or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.*

Where claims under the Clause are made that go "beyond what is needed to protect legislative independence," they must be "closely scrutinized." *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979). Activities that are merely "casually or incidentally related to legislative affairs but not a part of the legislative process itself" do not pass such scrutiny. *Brewster*, 408 U.S. at 528; *see also id.* at 512 (noting it has "never been seriously contended" that the Clause applies to "'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress."); *Jewish War Veterans v. Gates*, 506 F. Supp. 2d 30, 53 (D.D.C. 2007) ("While th[e] legislative-acts limitation has been phrased in various ways throughout the Supreme Court's key decisions in this area, one constant in those decisions is a refusal to 'treat[] the Clause as protecting all conduct relating to the legislative process.'" (quoting *Brewster*, 408 U.S. at 515)).

A. The Commission's Investigation and Subpoenas Do Not Implicate the Clause

Neither the Commission's Humana Investigation nor the Subpoenas are concerned with, nor do they inquire into, any "legislative act," and thus they do not implicate the purpose or scope of the Clause. The Commission staff is investigating whether there was unlawful

disclosure and trading on material non-public information about the April 1, 2013 Rate Announcement by CMS — and the Subpoenas are narrowly tailored to obtain information concerning that issue. Any enforcement proceeding that results from this investigation would address the disclosure of material nonpublic information regarding imminent action by an agency of the Executive Branch, not any act or conduct that fits within the definition of "legislative act" adopted by the Supreme Court.

Respondents' invocation of the Clause is particularly odd in this circumstance because Congress recently made clear that disclosure of such non-public information does not constitute legitimate legislative activity. Two years ago, Congress affirmed in the STOCK Act that a leak of material nonpublic information obtained by employees or Members of Congress derived from their official positions constitutes a breach of a duty owed to Congress and the public as a whole, and thus could give rise to a violation of the securities laws. *See* 15 U.S. C. § 78u-1(g)(1).

Even assuming that the Executive Branch's CMS Rate Announcement could somehow be described as a "legislative act" (and it cannot), the disclosure of that Rate Announcement before it became public is not a "legislative act" at the "heart" of the Clause. To the extent any conduct constituted a violation of the laws against insider trading, the case law suggests that it would be beyond the bounds of any protection afforded by the Clause: "While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel*, 408 U.S. at 628; *McSurely v. McClellan*, 553 F.2d 1277, 1288 (D.C. Cir. 1976) ("[t]he employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating'").

Particularly in light of the STOCK Act, it would be unwarranted to extend the Clause to

permit Respondents to evade compliance with Subpoenas issued by the regulator charged with investigating the exact insider trading violations that prompted Congress to pass that statute.

Nor may Respondents invoke the Clause in blanket fashion, without more, to avoid production of all documents or testimony. Respondents cannot merely assert that some unspecified documents and testimony may fall within the scope of the Clause even if the requests do not, on their face, implicate the Clause. Where such circumstances exist, courts have refused to permit respondents to engage in wholesale evasion of subpoenas, but rather have required them to produce responsive documents that are not protected by the Clause, and a log of those documents claimed to be covered by the Clause, with subsequent judicial resolution of specific claims of privilege that might be asserted as to specific documents, if necessary. *E.g.*, *Jewish War Veterans*, 506 F.Supp.3d at 60-62 (directing Members of Congress to produce responsive documents that are not protected by the Clause, and noting that the Court would, if necessary, later address documents withheld under claims of the Clause on a document-by-document basis).

As discussed below, none of the specific document requests contained in the Subpoenas concern "legislative acts" such that they implicate the Clause. Even assuming *arguendo* that Respondents believe certain documents responsive to those facially valid requests fall within the scope of the Clause, the proper recourse is for Respondents to identify such documents in a log for later resolution between the parties, or by the Court.

B. The Commission's Specific Document Requests Do Not Call for Material Protected by the Clause.

1. Documents Concerning Greenberg Traurig, and Communications Between Sutter and Greenberg Traurig (Document Requests 1 and 5(i))

It is well settled that the act of disseminating information outside of Congress, whether to private persons or Executive Branch agencies, generally falls outside of the protections offered

by the Clause. In *United States v. Gravel*, 408 U.S. 606 (1972), the Court rejected a Senator's motion to quash a subpoena directed to his aide from a grand jury that was investigating the potentially unlawful publication of the Pentagon Papers outside of Congress. The Court ruled that private publication by the Senator of the classified information at issue "was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." *Id.* at 625; *see also Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (issuance of press releases and newsletters not protected); *McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *aff'd in part on relevant grounds en banc*, 553 F.2d 1277 (D.C. Cir. 1976) ("if the documents were shown to individuals outside of Congress . . . such distribution is not entitled to Speech or Debate Clause protection"); *Tavoulareas v. Piro*, 527 F. Supp. 676, 681-82 (D.D.C. 1981) (denying motion to quash brought by congressional deponents who were subpoenaed to testify in a private defamation suit and holding that dissemination of information outside Congress is not protected by the Clause).

Document Requests 1 and 5(i) in the Subpoenas thus do not fall within the scope of the Clause, as they seek documents related to information disseminated outside of Congress. To the extent they call for information provided by Sutter to Greenberg Traurig (including, of course, the communications that are the subject of the Commission's investigation), the information requested does not implicate a legislative act and is not protected from disclosure by the Clause.

Furthermore, the Supreme Court and lower federal courts have recognized that the Clause does not prohibit tracing the source of information that was disseminated. *See, e.g., Gravel*, 408 U.S. at 628 (grand jury was permitted to "trac[e] the source of obviously highly classified documents that came into the Senator's possession," provided "no legislative act is implicated by

the questions," and notwithstanding that those documents were an integral part of the preparation for the committee proceeding that was otherwise held to be protected conduct); *Tavoulareas*, 527 F. Supp. at 681 ("If the act [of dissemination] … is unprotected, the Court perceives no basis for limiting the questioning of congressional deponents to their own acts of dissemination. Rather, [they] shall answer questions pertaining to the dissemination of information outside of Congress, including the dissemination of information, or arrangements to disseminate information, to any Washington Post reporter or to any executive agency.").

Nor is a different conclusion warranted to the extent responsive documents or testimony include communications made or information provided by Greenberg Traurig to Sutter. With respect to any information provided by Greenberg Traurig to Sutter regarding the Rate Announcement in the days or hours preceding the Rate Announcement, there is no evidence to suggest (as Respondents must show to invoke the Clause), that any such information was "acquired in connection with or in aid of an activity that qualifies as 'legislative' in nature," *Jewish War Veterans*, 506 F. Supp. 2d at 57, nor have Respondents identified any.

Moreover, some of the communications at issue may have been related to constituent communications and services rather than to any contemplated legislation. Greenberg Traurig represented a number of clients in the healthcare sector during the relevant period. An email in the staff's possession suggests that the call between Sutter and the GT Lobbyist on April 1 was initiated to discuss the contract termination by CMS of a Greenberg Traurig client, an unlikely matter for legislation by the House. Straub Decl. ¶ 18. Constituent "errands" and "assistance in securing Government contracts," while clearly within the normal scope of the duties of a Member of Congress, are not legislative acts and do not fall under the scope of the Clause. *Brewster*, 408 U.S. at 512.

2. Documents Concerning Communications Between Sutter and CMS (Document Requests 2)

The same conclusion is warranted with respect to Document Request 2 in each Subpoena, which calls for all documents concerning any communications between Sutter and CMS. First, during the time period covered by the Subpoenas, many Members of Congress, including Rep. Dave Camp, Chair of the Committee, advocated to CMS that the final Medicare Advantage rates should be revised significantly from those that the agency had preliminarily announced.[4] It is thus likely that some information responsive to the Subpoenas' request for communications between Sutter and CMS will fall into the category of such advocacy communications. It is settled law that actions or communications between Members of Congress and Executive Branch agencies in the context of such "lobbying" activities are not protected legislative acts. *Doe v. McMillan*, 412 U.S. 306, 313 (1973) ("Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.'"); *Gravel*, 408 U.S. at 625 (Members' contacts with Executive Branch officials to "cajole" or "exhort [them] with respect to the administration of a federal statute" do not qualify as "protected legislative activity," even "though generally done.").

Even outside the context of advocacy, it is still essential that communications between Executive Branch agencies and Congress be in connection with legislative activities to qualify for protection under the Clause. It would be extremely difficult to characterize communications between Sutter and CMS about the Rate Announcement shortly in advance of its release as in connection with legislative activities, even legislation on a temporary or permanent SGR fix (or other related legislation).

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[4] *See, e.g.,* Press Release, Committee on Ways and Means, "In Letter to CMS, Camp, Upton, Hatch Demand Answers on Cuts to Medicare Advantage Program" (Feb. 28, 2013), *available at* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=321679.

In addition, as discussed above (*see* subsection III.B.1, *supra*), to the extent the information requested consists of information provided by Sutter to CMS, dissemination of information outside of Congress is not a legislative act covered by the Clause. *See McSurely*, 521 F.2d at 1043 (rejecting motion to quash, where plaintiffs sued Congressional members and aides for damages, arising out of their dissemination outside of Congress to the IRS of materials that were obtained by third parties in violation of their Fourth Amendment rights: "if the documents were shown to individuals outside of Congress — or even apparently to an agency of the Executive — such distribution is not entitled to Speech or Debate Clause protection").

3. Documents Concerning the Medicare Advantage Rates (Document Requests 3 and 5(ii))

Document Requests 3 and 5(ii) in each of the Subpoenas seek documents concerning the very subject of the information leaked to selective members of the public in advance of the Rate Announcement. For the same reasons as stated above in Sections III.B.1-2, *supra*, these requests do not on their face seek any information relating to any "legislative act" as defined in the case law, and there is no basis to believe that information in Sutter's files regarding the Medicare Advantage Rates — actions taken by an Executive Branch agency, in the absence of any legislative act — somehow implicates the protections of the Clause.

4. Documents Concerning the Potential Confirmation of Marilyn Tavenner as CMS Administrator by the U.S. Senate (Document Requests 4 and 5)

The GT Lobbyists' April 1 email to Height suggested that Tavenner's confirmation was politically linked to CMS's decision on Medicare Advantage Rates, and the Commission has sought documents concerning that potential confirmation in this time period to ensure that it obtains all documents and communications that might reflect knowledge or disclosure of the Rate Announcements, even if that connection is made indirectly by reference to the later

confirmation of Tavenner. The Commission has no interest in and does not seek to question whether that later confirmation was in fact the product of any prior agreement, or the motivation for any such agreement. Nor does the Commission seek any information regarding the actual confirmation of Tavenner, which occurred after the time period of the Subpoenas. Rather, the Subpoenas relate solely to the time frame surrounding the Rate Announcement.

It is settled law that the information the Commission has sought is not shielded by the Clause. Indeed, the information would not be shielded even if (as is not the case here) the Commission were seeking this information about future legislative action to question the propriety of a *quid pro quo* arrangement. In *Brewster*, for example, the Supreme Court held that the Clause did not bar charges that a former senator solicited, agreed to accept, and/or took bribes in return for being influenced in the performance of legislative acts. The court held that bribe-taking was "no part of the legislative process or function; it is not a legislative act," 408 U.S. at 526, because "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the actual illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Id.* Accordingly, it is not "necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute." *Id.* In other words, "[p]romises by a Member to perform an act in the future are not legislative acts," and are not shielded by the Clause. *United States v. Helstoski*, 442 U.S. 477, 489 (1979).

Here, the Commission has no investigative interest in the subsequent confirmation of Tavenner, or the motivations or reasons behind any agreements regarding that confirmation. Tavenner's confirmation did not occur until mid-May 2013, more than a month after time period

covered by the Subpoenas. If, in late March or early April, there was speculation or discussion about future action that might be taken regarding Tavenner's confirmation in connection with a revision in the Medicare Advantage rates, such discussions would amount to no more than promises of future acts (if they amounted to "promises" at all). As in *Brewster*, "[i]nquiry into the legislative performance itself is not necessary." 408 U.S. at 527. Such communications would accordingly not be protected from discovery under the Clause.

Furthermore, any connection between the Subpoenas and a "legislative act" concerning the Tavenner confirmation is particularly attenuated here, where the Subpoenas seek information from a House Committee and one of its employees, but not any personnel or committees in the Senate, with whom the confirmation process is constitutionally lodged.

5. Sutter's Telephone Records (Document Request 6)

The Commission is unaware of any support in the case law for Respondents' refusal to comply with the Subpoenas' requests for Sutter's telephone records identifying the dates, time, duration and numbers of calls made to or from his work telephone. As these requests do not seek the substance of any such communications, they do not, without more, implicate the Clause. *Cf. Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985) (holding, in another context, that "[i]t is the content of [the] private conversations, and not the mere fact that the conversations took place, that determines whether [the Member] is entitled to legislative immunity"). Even were it possible for Respondents to make a showing that one or more communications referenced in the requested records are protected by the Clause, their proper recourse is not to avoid production in wholesale fashion, but to review those records for a particularized demonstration that one or more such records document "legislative acts." *See, e.g., United States v. Renzi*, 692 F. Supp. 2d 1136, 1155 (D. Ariz. 2010) (ruling that defendant would be allowed to "move *in limine* to exclude such testimony or evidence [including phone records] as the Court determines

is protected by the Speech or Debate Clause"); *United Transp. Union v. Springfield Terminal Ry. Co.*, Civ. Nos. 87–03442 P, 88–0117 P, 1989 WL 38131, at *5 (D. Me. Mar. 13, 1989) (after narrowing a functionally overbroad request for phone records, noting that '[m]ovants may then review the more limited group of records before they are produced and by affidavit make claims of privilege for those records which document legislative acts").

IV. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT PRECLUDE THE COMMISSION FROM SEEKING DOCUMENTS AND TESTIMONY FROM CONGRESS

Respondents have also refused to comply with the Subpoenas on "sovereign immunity" grounds (Straub Decl. Ex. G, ¶ 1). Presumably, Respondents are invoking the principle that the United States, as a sovereign, is immune from suit absent its consent to be sued. *United States v. Bormes*, 133 S. Ct. 12, 16 (2012). The reference to sovereign immunity is odd because the Commission is part of the same federal sovereign with whose immunity Respondents seek to cloak themselves. The Commission is unaware of any support in the case law — and Respondents cite none — for the proposition that the doctrine of federal sovereign immunity may be invoked *against* an agency of the federal government (serving as a plaintiff).[5] That is because issues of federal sovereign immunity usually arise when citizens or other sovereigns (*e.g.*, the States) bring a suit against the federal government (serving as a defendant). When the Executive Branch seeks to litigate against members of the Legislative Branch (or their staff), the more specific limitations imposed by the Speech or Debate Clause, and not generalized incantations of sovereign immunity, provide the only protection, if any.[6]

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[5] In their May 19 letter, Respondents cited only *Lane v. Pena*, 518 U.S. 187 (1996), which merely applied the doctrine of sovereign immunity, as it is exclusively applied, in the context of a private individual's lawsuit against the United States.

[6] Even assuming sovereign immunity could apply here in the first instance, Respondents argument would founder on Congress' explicit waiver of immunity in the STOCK Act:

V. SUTTER IS NOT EXCUSED FROM TESTIMONY BY *UNITED STATES v. MORGAN*

House Counsel's May 19 Letter also asserts that the Subpoena to Sutter was improper "because high-ranking government officials may not be compelled to testify absent extraordinary circumstances." Straub Decl. Ex. G, ¶ 3 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)). Sutter's reliance on *Morgan* is unavailing.

First, the Court's ruling in *Morgan* applies only to testimony and documents "regarding the deliberative process used to arrive at a decision within the scope of [the official's] government duties." *In re United States*, 542 Fed. Appx. 944, 947 (Fed. Cir. 2013). *Morgan* "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The Commission is not seeking testimony about the deliberative process linked to any decision of Sutter or his employer, let alone a decision within the scope of their duties. It is difficult to conceive how revealing nonpublic material information about a Medicare rate increase to a lobbyist constitutes an act of deliberation, comprises "part of a process by which governmental decisions and policies are formulated," *id.* (internal quotation marks omitted), or falls within the scope of a congressional staffer's legitimate government duties.

Second, Sutter is not a high-ranking government official. *Morgan* is a "form of executive privilege," *In re Sealed Case*, 121 F.3d at 737, and it has been extended to persons at the very top levels of executive government agencies, such as cabinet officials, agency heads, commission chairs, governors, with limited expansion beyond those examples. *See, e.g., United*

"Members [and employees] of Congress … are not exempt from the insider trading prohibitions arising under the securities laws." STOCK Act, 126 Stat. at 292.

States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 320-21 (D.N.J. 2009) (collecting authority, and finding one of ten EPA Regional Administrators to be a high-ranking official). Sutter is currently the staff director of a House subcommittee and, at the time of the events in question, was on the professional staff of that subcommittee. The Commission is aware of no authority applying *Morgan* to a Congressional subcommittee staffer.

Third, due to Sutter's unique role in the relevant events, he is not entitled to avoid testifying. As demonstrated by the facts described above (*see* Facts, Section B, *supra*), Sutter has "unique first-hand knowledge" of facts central to the Humana Investigation, and "the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). Under such circumstances, it is settled law that *Morgan* offers no excuse from testimony. *Id.*

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court order Respondents to show cause why they should not comply with the Subpoenas and order Respondents to comply with the Subpoenas promptly.

Dated: June 20, 2014
New York, New York

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