IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEAN LLC d/b/a FUSION GPS 1700 Connecticut Ave., NW Suite 400 Washington, DC 20009, Plaintiff, v. DEFENDANT BANK, Defendant, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor.	Case No. 1:17-cv-02187-RJL

NOTICE OF REDACTION

Intervenor Permanent Select Committee on Intelligence of the U.S. House of Representatives ("Committee") files contemporaneously herewith redacted versions of its Response in Opposition to Plaintiff's Renewed Application for a Temporary Restraining Order and Preliminary Injunction and the supporting Declaration of Scott L. Glabe. The Committee has redacted information from these documents in accordance with (i) the terms of the parties' Confidential Agreement and Sealed Protective Order, *see* Stipulation and Order (ECF No. 19); and (ii) Committee Rule 12(a)(1)(B) which governs the Committee's disclosure of information received in executive session.

Undersigned counsel have conferred with counsel for Plaintiff Fusion GPS and Defendant Bank in preparing these redactions.

Respectfully submitted,

/s/ Thomas G. Hungar
THOMAS G. HUNGAR (DC Bar #447783)
General Counsel
TODD B. TATELMAN (VA Bar #66008)
Associate General Counsel
KIMBERLY HAMM (DC Bar #1020989)
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
Thomas.Hungar@mail.house.gov

Counsel for the Permanent Select Committee on Intelligence of the U.S. House of Representatives

November 21, 2017

CERTIFICATE OF SERVICE

I certify that on November 21, 2017, I filed the foregoing document by the court's CM/ECF system, which I understand caused it to be served on all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar

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RESPONSE OF INTERVENOR THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE U.S. HOUSE OF REPRESENTATIVES IN OPPOSITION TO PLAINTIFF'S RENEWED APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THOMAS G. HUNGAR
General Counsel
TODD B. TATELMAN
Associate General Counsel
KIMBERLY HAMM
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
Thomas.Hungar@mail.house.gov

Counsel for Intervenor Permanent Select Committee on Intelligence of the U.S. House of Representatives

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INTRODUCTION

The Permanent Select Committee on Intelligence of the U.S. House of Representatives ("Committee") respectfully submits this response[1] in opposition to Plaintiff's Renewed Motion (ECF No. 23) ("Pl. Renewed Mot.") and Memorandum in Support (ECF No. 23-1) ("Plaintiff's Renewed Memorandum" or "Pl. Renewed Mem."). At the cost of considerable inconvenience and delay, the Committee has now reviewed the approximately 400 pages of records responsive to the Bank Subpoena – which by Plaintiff's calculation "contain[ed] several thousand checks drawn on, withdrawals from and deposits into [Plaintiff's] bank account," Second Fritsch Decl. (ECF No. 13-1) ¶ 3 – and is now seeking production of only a small fraction of those thousands of transactions (only 70 remain in dispute), which contain investigative leads that are necessary to the Committee's ongoing investigation. Continuing its pattern of intransigent and baseless resistance to a lawful congressional investigation of the highest national importance, however, Plaintiff opposes production of even this relative handful of transactions.

Contrary to the fundamental premise of Plaintiff's latest submission, the Committee does not bear the burden of demonstrating the "pertinence" of each record sought by the Committee. That is simply not how investigations work – whether by congressional committees or by any other organ of government. This is not a criminal prosecution for contempt of Congress, in which pertinence would be an element of the prosecution's burden of proof, nor is it an

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[1] The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has authorized the Committee's intervention in this matter. The BLAG is comprised of the Honorable Paul Ryan, Speaker of the House, the Honorable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the United States House of Representatives, available at https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf. The Democratic Leader and Democratic Whip decline to support the Group's position in this case.

enforcement action brought by the Committee against an unwilling subpoena recipient. Rather, this is a request by Plaintiff for this Court to take the extraordinary step of enjoining the third-party recipient of a congressional investigative subpoena from willingly complying with that subpoena – a step fraught with immense constitutional difficulties by virtue of its direct intrusion upon Congress's Article I powers, and one that no court in this Circuit has ever taken at the behest of a private litigant. Plaintiff thus bears a heavy burden indeed, and at a minimum could not hope to prevail without establishing a clear and compelling legal right under the Constitution or applicable statutory law to such extraordinary and unprecedented relief.

Despite Plaintiff's best efforts, it falls far short of establishing any such right. Instead, Plaintiff merely asserts that, in its opinion, it has nothing pertinent to offer the Committee. Plaintiff cites no authority, however, for the proposition that a private party whose actions lie at the center of a congressional investigation can block enforcement of a congressional subpoena to a third party by disputing pertinence, and it is well established that it would be "manifestly impracticable to leave to the subject of the investigation alone the determination of what information may or may not be probative of the matter being investigated." *Senate Select Committee v. Packwood*, 845 F. Supp. 17, 21 (D.D.C. 1994).

While the Committee "is not a grand jury or a law enforcement agency," Pl. Renewed Mem. 7, its power to investigate is no less broad. Congress's long-established authority to compel the production of evidence, like that of grand juries, is derived from the Constitution itself, and "is as penetrating and far-reaching as the potential power to enact and appropriate ...." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (citation and quotation marks omitted). Plainly, therefore, there is no basis for Plaintiff's *ipse dixit* assertion that the Committee's power to investigate matters within its jurisdiction is any less wide-ranging than

that of a grand jury or administrative agency, both of which have been held by the Judiciary to possess the authority to seek and obtain far more sweeping compilations of financial records than the narrow and precisely targeted records sought by the Committee here. *See generally United States v. R. Enterps., Inc.*, 498 U.S. 292, 299 (1991) (cautioning against "[r]equiring the Government to explain in too much detail the particular reasons underlying a subpoena").

Indeed, even in the context of subpoenas issued by administrative agencies in civil cases, which are merely exercising whatever subpoena authority Congress has chosen to confer upon them in the exercise of its legislative power, it is hornbook law that investigative subpoenas seeking broad categories of information are entirely appropriate, without the need to justify each particular piece of information sought. *See, e.g.*, *Exch. Point LLC v. U.S. SEC*, 100 F. Supp. 2d 172, 176 (S.D.N.Y. 1999) (refusing to quash or modify broad SEC subpoena for financial records that "cover[ed] many records that are not related to the SEC's investigation," because the information requested "'touches a matter under investigation'" (citation omitted)). The subpoena power exercised by Congress itself, which is inherent in the very legislative power that created the administrative agencies and granted them subpoena authority, is no less sweeping than that of its creations. *Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976).

It is worth remembering also that this suit is before the Court only because of the refusal of Plaintiff's principals either to cooperate voluntarily with the Committee's investigation or to furnish the necessary information during compelled depositions. While Plaintiff's principals are entitled to assert the privilege against self-incrimination during their respective depositions if there is a good-faith basis for such assertion, the Committee and this Court are equally entitled to draw adverse inferences from those privilege assertions. *See, e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Here, the only logical inference to be drawn is that those privilege

assertions are tantamount to an admission that Plaintiff possesses additional information – as yet unrevealed – that is relevant to the Committee's investigation. That inference provides a sufficient basis in itself for the Committee to pursue other avenues of obtaining said relevant information, including this subpoena for Plaintiff's financial records.

In addition, the interactions between Plaintiff and the Committee fully justify the Committee's unwillingness to accept at face value Plaintiff's representations that it has no remaining relevant information. *See* Committee Response in Opposition (ECF No. 12) ("Comm. Mem.") 2-3; Declaration of Scott L. Glabe ("Glabe Decl.") ¶¶ 10-15. Plaintiff's repeated pattern of denying relevance, then grudgingly allowing the production of additional relevant transactions, *id.*, simply confirms the Judiciary's wisdom in rejecting the notion that the subjects of an investigation are entitled to determine what documents are relevant.

Accordingly, for all the reasons stated below, as well as those set forth in the Committee's first response in opposition, which is incorporated herein by reference, and particularly in light of the Committee's substantial modification of the scope of its subpoena, the Court should deny Plaintiff's renewed request for a preliminary injunction and temporary restraining order.

COMMITTEE'S MODIFIED SUBPOENA FOR RECORDS

[redacted] on October 27, 2017, Defendant Bank produced records that, according to Plaintiff, [redacted] Glabe Decl. ¶ 12. Such records included certain payments to Plaintiff from [redacted], payments by Plaintiff to various entities including [redacted]

[redacted] and transactions with individuals such as [redacted]. *See id.*

From October 30 to November 1, 2017, [redacted] ("Responsive Records") [redacted]. *See* Glabe Decl. ¶ 17. [redacted] but Plaintiff's principal [Mr. Fritsch] has asserted under oath in this proceeding that those records "contain several thousand checks drawn on, withdrawals from and deposits into Fusion's bank account." Second Fritsch Decl. ¶ 3; *accord* Pl. Reply 6.

On November 1, 2017, after a careful and diligent review of what Plaintiff describes as "several thousand" transactions, Second Fritsch Decl. ¶ 3, which review was informed, in part, by classified information in the possession of the Committee, *see* Glabe Decl. ¶ 19, Committee Review Counsel identified 82 transactions necessary for its investigation and that had not been previously produced by Defendant Bank on October 27, and so notified counsel for Plaintiff and Defendant Bank. *See id.* ¶ 18. In addition, Committee Review Counsel informed Plaintiff and Defendant Bank that it sought the re-production of certain pages reflecting line entries for 30 transactions already produced to it, so that the Committee would have a single production set, with sequential Bates pages, for ease of reference. *See id.* In total, the Committee requested that Plaintiff instruct Defendant Bank to produce (or reproduce) a mere 112 transactions out of the "several thousand" transactions reviewed. *See id.* In addition, the Committee seeks [redacted] records relating to each of the 112 transactions. *See id.* ¶ 31. It is the

Committee's understanding that this requested data is exclusive to Defendant Bank and does not contain or implicate Plaintiff or Plaintiff's client information. *See id.*

[redacted]. *See id.* ¶ 16. Subsequently, on November, 3, 2017, the Committee received from Defendant Bank a "First Supplemental Production," which included 12 of the transactions requested, specifically those involving [redacted]. *See id.* ¶ 33. As a result of this development, the Committee's request has been reduced from 82 transactions to 70.

In short, contrary to Plaintiff's characterization of a "long list of records," Pl's Renewed Mem. at 3, the subpoena has been significantly modified and now seeks only the eminently reasonable production of pages reflecting 100 transactions (of which 30 transactions already have been produced), which amounts to an exceedingly small number of the Plaintiff's bank records.

ARGUMENT

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). To demonstrate entitlement to a preliminary injunction, a litigant must show "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C. Cir. 1995). "'When seeking a preliminary injunction,

the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.'" *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)).

Plaintiff attempts to evade its burden of proving all four of the preliminary injunction factors, pointing to the so-called "sliding scale." Pl. Renewed Mem. 3. But in *Winter* the Supreme Court expressly rejected the sliding-scale approach, which had been proffered as a purported justification for lessening the movant's burden of proving irreparable injury, 555 U.S. at 21-22, and multiple D.C. Circuit Judges have correctly read *Winter* "at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley*, 644 F.3d at 393 (quoting *Davis*, 571 F.3d at 1296 (concurring opinion)). In light of *Winter*, the sliding-scale approach is no longer valid, and Plaintiff cannot prevail without meeting its burden of proving, by a "clear showing," each and every one of the four requisite factors. *Sherley*, 644 F.3d at 392. It has not even come close.

I. PLAINTIFF CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiff's renewed application, while incorporating Plaintiff's previous submissions, claims a likelihood of success based primarily on the following theories: (i) the modest number of financial records still at issue are allegedly not "pertinent" to the Committee's investigation; (ii) production of this relatively small number of records will somehow infringe on Plaintiff's "free speech and free association" rights; and (iii) Plaintiff's "confidentiality obligations" will be impaired. Pl. Renewed Mem. 1, 3. For the reasons already provided by the Committee in its original opposition, and for the reasons set forth below, Plaintiff cannot demonstrate any likelihood of success on the merits.

A. The Role Of The Courts In Reviewing A Congressional Subpoena Is Narrowly Circumscribed And Must Be Exercised With Appropriate Deference To A Coordinate Branch Of Government Exercising Its Core Constitutional Power.

It is well-established that Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins v. United States*, 354 U.S. 178, 187 (1957). It is equally axiomatic that the "[i]ssuance of subpoenas … [is] a legitimate use by Congress of its power to investigate." *Eastland*, 421 U.S. at 504 (citation omitted). And, when Congress does resort to compulsory process, "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action." *Watkins*, 354 U.S. at 187, 187-88.

Contrary to Plaintiff's suggestion, the Committee has never asserted that its investigative power is "immune from judicial review." Pl. Renewed Mem. 5. What the Committee has stressed, however, is that the specific relief that Plaintiff seeks is extraordinary, while this Court's power to intrude into the Legislative Branch's exercise of its constitutionally grounded power of inquiry is severely limited, and one that can be exercised only in furtherance of clear constitutional or statutory commands and with due regard to the interests of a coordinate branch of government. Comm. Mem. 14. As the D.C. Circuit explained in response to a similar request by a private litigant to restrain a third party's compliance with a congressional request for information, such a ruling "would skirt dangerously close to being at least the temporary 'equivalent to an order quashing [the official request or subpoena,] which is generally an impermissible frustration of the congressional power to investigate['] …, and hence would raise serious constitutional issues." *Exxon Corp. v. FTC*, 589 F.2d 582, 588 (D.C. Cir. 1978) (quoting *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 388 (1976) ("*AT&T I*"). Plaintiff's attempts

to downplay the constitutionally problematic nature of the relief it seeks are thus foreclosed by binding Circuit precedent.

Not surprisingly, therefore, Plaintiff's invitation for this Court to conduct or mandate a searching line-by-line inquiry into the "pertinence" of the remaining disputed transactions finds no support in the law. Even in the context of a subpoena enforcement action brought by a congressional committee against an unwilling subpoena recipient, no such requirement exists. "In determining the proper scope of a legislative subpoena [in such an enforcement action], this Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties.'" *Packwood*, 845 F. Supp. at 20-21 (quoting *McPhaul v. United States,* 364 U.S. 372, 381 (1960)). And when, in such a case, "an investigative subpoena is challenged on relevancy grounds, the Supreme Court has stated that the subpoena is to be enforced 'unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation.'" *Id.* (quoting *R. Enterps.*, 498 U.S. at 301).

Moreover, "[t]here is no requirement that every piece of information gathered in [a congressional] investigation be justified before the judiciary." *McSurely v. McClellan*, 521 F.2d 1024, 1041 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 553 F.2d 1277, 1280 (D.C. Cir. 1976) (en banc) (per curiam). In fact, the Supreme Court has made clear that a congressional investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509. So, while the Committee does not contest this Court's power to adjudicate this dispute, it does adhere to the well-established view that the Court's inquiry on likelihood of success should be limited to

whether the Committee's inquiry is authorized under House Rules, and whether Plaintiff has met its heavy burden of proving, by a clear burden, that the Committee's subpoena is "plainly incompetent or irrelevant to any lawful purpose," *McPhaul*, 364 U.S. at 301, of the Committee and that there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation," *R. Enterprises*, 498 U.S. at 301. *See, e.g., McSurely*, 521 F.2d at 1041; *Packwood*, 845 F. Supp. at 20-21.

Plaintiff's plea for this Court to stray from the traditional, narrowly-defined role of the Judicial Branch in congressional investigations rests on its misreading of the D.C. Circuit's *AT&T* decisions, *see* Pl. Renewed Mem. 5, but those cases provide no support for Plaintiff's position. Unlike here, in the *AT&T* cases, the D.C. Circuit faced "the delicate problem of accommodating the needs and powers of two coordinate branches in a situation where each claimed absolute authority," *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 123 (D.C. Cir. 1977) ("*AT&T II*"), and both the Executive and Legislative Branches asserted that their actions were "unreviewable by the courts." *AT&T I*, 551 F.2d at 391. On the one hand, the Executive claimed that "the Constitution confers on the executive absolute discretion in the area of national security." *AT&T II*, 567 F.2d at 128. On the other hand, Congress, relying on the Speech or Debate Clause, argued "that judicial interference with its actions in this dispute is barred by the constitution." *Id.* Faced with these dueling claims of constitutional superiority in a direct clash between the two political branches of government, the D.C. Circuit rejected both absolutes, holding instead that neither branch's power was absolute, *id.* at 128-29, and that some form of accommodation of the interests of both coequal branches was therefore necessary to resolve the constitutional clash, *id.* at 130. None of those concerns is present here. This case involves no separation-of-powers clash between the political branches that the Court must resolve, nor does it

present competing claims of absolute constitutional immunity from judicial review. Plaintiff is obviously not a coordinate branch of government asserting its compelling interest in national security as a basis for resisting a congressional subpoena, and Plaintiff's attempt to put itself in the position of the Executive Branch is nothing short of laughable. *AT&T* simply has no application here.

The result reached in the *AT&T* cases is equally irrelevant here. The *AT&T II* court's decision to leave the injunction against AT&T in place was not based on any evaluation of the underlying merits of the dispute, but rather was the product of the court's decision to direct the Executive Branch *itself* to provide certain information to Congress, 567 F.2d at 131-33, while leaving for another day the question "whether the Subcommittee is entitled to all that it seeks," *id.* at 131.

Thus, the *AT&T* cases are of no help to Plaintiff. The unique accommodation approach adopted by the D.C. Circuit in that case, which was intended to resolve the dispute in a manner that minimized judicial entanglement in the constitutional tensions posed by a direct clash between the political branches, plainly cannot be transposed to the completely different setting of this case. Indeed, Plaintiff's suggestion that *AT&T II* amounts to an invitation for courts to follow a similar approach in cases brought by private parties, *see* Pl. Renewed Mem. 6-7, is foreclosed by binding Circuit precedent. One year after its decision in *AT&T II,* the D.C. Circuit made clear that courts must make every effort to avoid interfering with congressional investigations at the behest of private parties, since such relief "would skirt dangerously close to being at least the temporary 'equivalent to an order quashing [the official request or subpoena,] which is generally an impermissible frustration of the congressional power to investigate[']... and hence would raise serious constitutional issues." *Exxon Corp.*, 589 F.2d at 588 (*quoting AT&T I,*

551 F.2d at 388). In so holding, the *Exxon* court expressly invoked the Supreme Court's decision in *Eastland*, even though that case arose under the Speech or Debate Clause. 589 F.2d at 588-89 & n.13. As the *Exxon* court explained, notwithstanding the Clause's inapplicability in a suit to enjoin a third party's compliance with a congressional subpoena, the *Eastland* "decision's emphasis on the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress" had "an obvious relevance" to the requested injunctive relief at issue there. *Id.* at 588-89. Precisely the same is true here.

B. The Committee's Subpoena Seeks Information In Furtherance Of A Valid Legislative Purpose.

The Committee's narrowed requests are plainly in furtherance of its valid legislative purpose. After previously denying the relevance of the records sought by the Committee, Plaintiff has now effectively conceded that a number of those records are relevant to the Committee's investigation. Third Declaration of Peter Fritsch (Nov. 3, 2017) ("Third Fritsch Decl.") ¶¶ 4, 9. Plaintiff cannot now seriously contend that the vastly narrowed subpoena has no valid legislative purpose in light of the intense Legislative Branch and Executive Branch interest in the Russian active measures campaign.

Nevertheless, Plaintiff asserts that the Committee must establish that the narrow set of records it now seeks are "pertinent to [its] investigation." Pl. Renewed Mem. 1, 7, 8. Plaintiff cites to no controlling authority for the proposition that a third party, whose actions lie at the center of a congressional investigation, has a judicially enforceable right to prevent compliance with a congressional subpoena by challenging the pertinency of the information sought. The only case Plaintiff even attempts to cite for this proposition is *Watkins*, *see* Pl. Renewed Mem. 7, but that case arose in the context of a criminal prosecution for contempt of Congress in violation of 2 U.S.C. § 192, which makes "pertinen[cy]" an element of the crime. *Watkins*, 354 U.S. at

181. *Watkins* did not involve a civil suit brought by a private third party seeking to enjoin compliance with a congressional subpoena, and it certainly did not hold or suggest that the question of pertinency would be dispositive in such a case.

In addition, Plaintiff's insistence that this Court adopt a heightened standard for pertinency and mandate a line-by-line review of the records sought by the Committee simply ignores the fact this Circuit has consistently held that courts should not only "refrain from creating 'needless friction' with a coordinate branch of government …[,]" *Exxon Corp.*, 589 F.2d at 590 (quoting *Cole v. McClellan*, 439 F.2d 534, 535-536 (D.C. Cir. 1970)), but also "refrain from interfering with or delaying the investigatory functions of Congress," *id.* at 589. Both "needless friction" and further delay would necessarily occur if Plaintiff's baseless request were to be accepted.

In any event, even if "pertinency" were the relevant standard, Plaintiff would not come close to meeting its burden of establishing that the 70 disputed transactions are not pertinent to the Committee's investigation. The Supreme Court has made clear that "pertinency" is not an onerous requirement, even in the criminal context where it properly applies. In *McPhaul v. United States*, for example, the Court held that pertinency was "clearly shown" when it was "reasonable to suppose" that the requested records would reveal whether or not an entity under investigation was engaged in activities within the scope of the committee's investigation. 364 U.S. at 381. In those circumstances, even though the committee could not know in advance whether or not the requested records would establish any connection, "the records called for by the subpoena were not 'plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties,' *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 [(1943)], but, on the contrary, were reasonably 'relevant to the inquiry,' *Okla. Press Publ'g*

Co. v. Walling, 327 U.S. 186, 209 [(1946)]," and thus pertinency was established. *McPhaul*, 364 U.S. at 381-82.[2]

Nor is the alleged breadth of a congressional subpoena probative of a lack of pertinency. Where, as here, the Committee's "inquiry … [i]s a relatively broad one[,] … the permissible scope of materials that could reasonably be sought [i]s necessarily equally broad." *McPhaul*, 364 U.S. at 382.

Similar principles govern all forms of investigative subpoenas. Thus, courts routinely reject arguments that the production of bank records sought in a government investigation must be limited to the precise transactions at issue. *See, e.g.*, *SEC v. Dowdell*, 144 F. App'x 716, 723-24 (10th Cir. 2005) (affirming denial of motion to quash subpoena for attorney bank records where "it is likely that not every document requested by the subpoena will be related to [the subject of the investigation]"); *Exch. Point LLC*, 100 F. Supp. 2d at 176 (refusing to quash or modify broad SEC subpoena for financial records that "cover[ed] many records that are not related to the SEC's investigation," because the information requested "touches a matter under investigation" (citation omitted)); *Flatt v. U.S. SEC*, No. 10-60073-MC, 2010 WL 1524328, at *4 (S.D. Fla. Apr. 14, 2010) (same); *see also Nat'l Commodity & Barter Ass'n v. United States*, 951 F.2d 1172, 1175 (10th Cir. 1991) (affirming "broad" subpoenas issued by the government in investigation regarding violations of currency transaction reporting requirements where subpoenas sought records that "admittedly are not subject to the currency transaction reporting requirements").

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[2] Notably, the two cases quoted by the *McPhaul* Court – in describing the test for pertinency in a prosecution for criminal contempt – both involved *administrative* subpoenas, confirming that even in the context of a criminal prosecution, the standard applicable to congressional subpoenas is no less broad and flexible than that governing the sweeping investigative subpoenas typically issued by administrative agencies.

This is true both because courts are loathe to impermissibly intrude on the investigatory methods of the government, and because of "the complex nature of the United States financial system and the numerous ways money can be moved within it." *Nat's Commodity*, 951 F.2d at 1175. Courts recognize that government investigators must be allowed to "to trace the path of the proceeds," *Flatt*, 2010 WL 1524328, at *4, of transactions under investigation and, to do so, the government must have broad access to the financial records of the entity involved in the transactions, even if that access results in disclosure of transactions that are not the subject of the government's investigation. *See id.* at * 4; *see also Dowdell*, 144 F. App'x at 724 ("[B]ecause the subpoena seeks to identify persons, at this time unknown to the [government] but associated with [the target], by tracking related funds which passed through [the third-party] bank account, the relevancy of the documents requested is apparent on the face of the subpoena.").

Plaintiff's attempt to burden the Committee's investigation, by forcing it to establish or prove "pertinency" under some heightened standard and on a transactional basis, is plainly inconsistent both with the burden of proof in this case, which lies squarely with Plaintiff, and with the standard consistently applied in government investigations. Courts routinely allow broad discovery of financial records based on government investigators' "reasonable belief that the records sought are relevant," observing that in the context of "'investigative subpoenas,'" "'[o]nce a person's connection to apparently illicit conduct has been shown, it is relevant to know whether that person's bank account contains evidence of such conduct.'" *Davidov v. U.S. SEC*, 415 F. Supp. 2d 386, 387, 392 (S.D.N.Y. 2006) (emphasis omitted) (quoting *Matter of SEC Private Investigation/Application of John Doe re Certain Subpoenas*, No. M8-85, 1990 WL 119321, at *2 (S.D.N.Y. Aug. 10, 1990)).

Plaintiff does not even attempt to demonstrate that the Committee's narrowly drawn request for a modest number of financial records somehow fails the "reasonably relevant" standard applicable to government subpoenas for financial records. Nor is there any basis for Plaintiff's apparent attempt to impose a heightened standard for congressional subpoenas, which would lead to the absurd result that Congress would possess less investigative power than do the administrative agencies it has created. This position was specifically rejected by the Supreme Court in *Buckley v. Valeo*, which made clear that an administrative agency's powers "of an investigative and informative nature … fall[] in the same general category as those powers which Congress might delegate to one of its own committees[.]" 424 U.S. at 137-38 (per curiam).

Here, Plaintiff's objection to production of the remaining transactions sought by the Committee boils down to its oft-repeated assertion that the requested transactions "have[] no connection to Russia or Mr. Trump." Pl. Renewed Mem. 9; *see also id.* at 10 (journalist records "are not pertinent, as they are not related to Russia or Donald Trump"); *id.* at 10 ("Business A retained [Plaintiff] for services that were unrelated to … Russia or Donald Trump."); *id.* at 11 ("Business B retained [Plaintiff] for a matter that had nothing to do … with Russia or Donald Trump."). In other words, Plaintiff's position is that the Committee is obligated to take Plaintiff's word that no additional relevant information exists.

Deferential reliance on material witnesses to make unilateral relevance determinations is simply not how investigations work – whether by Congress or any other investigative body. As courts have noted, "it is manifestly impracticable to leave to the subject of the investigation alone the determination of what information may or may not be probative of the matters being investigated." *Packwood*, 845 F. Supp. at 21. This is particularly true here, where the full scope

of the Committee's investigation is classified and, therefore, cannot possibly be known to Plaintiff. *See* Glabe Decl. ¶ 19.

Moreover, the actions of Plaintiff to date cast serious doubt on the credibility of its assertions regarding the nature of the information it possesses. For instance, Plaintiff, through its representatives, has consistently underrepresented the amount of information it possesses that is relevant to the Committee's investigation, even under its own crabbed view of "relevance." For example, as early as October 19, the Committee was informed by a representative of Plaintiff that "only transactions related to one [Plaintiff] client were relevant to the Committee's inquiry." Glabe Decl. ¶ 10. Contrary to this representation, the October 27, 2017, production of records deemed relevant by Plaintiff included transactions related to at least *six* counterparties and *two* of Plaintiff's clients. Glabe Decl. ¶ 12.

Additionally, as previously detailed, Plaintiff's principals asserted the Fifth Amendment in response to all substantive questions from the Committee at their depositions, thereby attesting under oath to an imminent risk of criminal prosecution if they were to answer the Committee's questions about their involvement in matters within the scope of this investigation. *See* Declaration of Mark R. Stewart (ECF No. 12-1) ("Stewart Decl.") ¶ 17. Yet, the very next day, one of those principals, Mr. Fritsch, executed a sworn declaration to this Court providing information that would have been directly responsive to some of the Committee's questions, thereby casting considerable doubt on the veracity of his sworn testimony the day before. *See id.* It should be noted, moreover, that the Committee has not sought any information from Plaintiff or its principals that thus far suggests any basis for such criminal liability. *See* Glabe Decl. ¶ 9. It logically follows either that Plaintiff's principals may have been perjuring themselves when they testified to a purportedly good-faith belief that their answers would tend to incriminate

them, and/or that they are in possession of incriminating information of relevance to the Committee's investigation that they have not yet disclosed. Either inference provides a further rational basis for the Committee's belief that, in fact, additional relevant information exists in Plaintiff's financial transactions.

Additionally, since the Committee's investigation is a civil inquiry, not a criminal proceeding, the Committee and the Court are entitled to draw adverse inferences from the fact that Plaintiff's principals have chosen to assert their privilege against self-incrimination. *See, e.g.*, *Baxter*, 425 U.S. at 318; *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 68 (D.D.C. 2000). As Justice Brandeis observed, "[s]ilence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) (citations omitted).

Furthermore, Plaintiff's assertions regarding what is relevant to the Committee's investigation have continued to evolve and shift, casting still further doubt on the credibility of its latest protestations. After Plaintiff had purportedly caused the Bank to produce to the Committee on October 27 all of the bank records that Plaintiff deemed relevant to the Committee's investigation, Glabe Decl. ¶ 12, the Committee reviewed the remaining transactions and provided the Bank and Plaintiff with its dramatically narrowed list of additional requested transactions. *See id.* ¶ 18. Plaintiff responded by claiming that, with the exception of transactions relating to [redacted], the other newly requested records "are not pertinent to any question under inquiry." Pl. Renewed Mem., Ex. C. Two days later, however, Plaintiff voluntarily produced an additional transaction from [redacted] as well as the transactions related to [redacted], both of which Plaintiff had previously

failed to disclose and had earlier described as "not pertinent." *See* Glabe Decl. ¶ 33. That description was plainly lacking in credibility, given Plaintiff's subsequent voluntary production.

In addition, on November 3, 2017, as part of its supplemental production, Plaintiff produced to the Committee numerous transactions from [redacted] effectively admitting their pertinence, and despite the fact that it had previously indicated that the original production contained *all* transactions directly relevant to the Committee's investigation. *See id; id* ¶ 12. Plaintiff had at no time previously indicated that records related to [redacted] existed or were relevant to the Committee's investigation. *See id.* at ¶ 33.

Even leaving aside Plaintiff's demonstrated unreliability, the Committee has ample basis to believe that the 70 disputed transactions are related to its investigation. For example, the Committee now knows that two law firms, Perkins Coie and BakerHostetler, engaged Plaintiff's services on matters of direct interest to the Committee. *See id.* ¶¶ 20-22. This previously unknown fact alone provides a reasonable basis for the Committee to inquire about transactions with other law firms during the same relevant time frame who may also have engaged with Plaintiff regarding similar or related activity. *See id* ¶ 22. Given the large sums involved in these retentions, it is highly unusual at best for law firms to assume such payment obligations on behalf of clients (rather than asking their clients to pay directly) absent some reason for concealing the identity of their clients. Disclosure of the transactions will not reveal the identity of those intentionally concealed clients, but it will permit the Committee to make inquiries of those law firms to determine the nature of their involvement with Plaintiff and any possible relationship to the subject matters of the Committee's investigation. *See id.* Such investigative leads are plainly pertinent to the investigation under any possible standard.

Plaintiff's interactions with media entities will provide equally pertinent investigative leads. As highlighted in a 2011 press interview with Plaintiff co-founder Peter Fritsch, Plaintiff's specialty is "seeding its opposition research into news stories." *See id.* at ¶ 23. For example, the Committee has information that Plaintiff brokered meetings for dossier author Christopher Steele with at least five major media outlets in September 2016, including Yahoo News, which specifically reported on facts citing information it received from a "single 'well-placed Western intelligence source.'" *See id.* at ¶ 27. The additional transactions requested by the Committee therefore include transactions related to Plaintiff's work on behalf of another media outlet in which Plaintiff could have seeded its research, Media Company A [redacted]. *See id.* Additionally, the Committee seeks transactions related to three individual journalists, [redacted], each of whom have reported on and/or been quoted in articles regarding topics related to the Committee's investigation, some of which were published as recently as October 2017. *See id* ¶ 25. All of this material will provide important avenues of investigation for the Committee, and is therefore demonstrably pertinent to the Committee's inquiry.

Finally, the Committee has sought transactions related to two [redacted] firms, Business A [redacted], and Business B [redacted] *See id.* ¶¶ 28-30. The Committee has information suggesting that Business A has long represented [redacted]. *See id.* ¶ 29. The Committee's publicly-announced investigation parameters specifically include "links between Russia and individuals associated with political campaigns or any other U.S. Persons." Accordingly, these transactions

are within the scope of the Committee's investigation because they will enable the Committee to investigate the nature of the relationships they evidence to ascertain their significance for purposes of the Committee's inquiry. In addition, since January 2017, the Committee is aware that Business A [redacted]. *See id.* ¶ 29. The Trump campaign's and Administration's policy toward [redacted] also is a component of the Committee's investigation. *See id.*

Likewise, the Committee has information that Business B [redacted]. *See id.* ¶ 30. Of particular relevance to the Committee is Business B's [redacted]. *See id.* Given that the "Trump dossier" drafted by Plaintiff contractor Christopher Steele implicates [redacted]. *See id.*

C. Plaintiff's First Amendment Argument Lacks Merit.

The Committee has made no demand that infringes on Plaintiff's First Amendment rights. *See* Comm. Mem. 24-37. The Committee's original subpoena to Defendant Bank sought a limited set of financial records relating to transactions of a private corporation engaged in a variety of commercial activity – not from a trade association, a campaign or political committee, a labor union, a 501(c)(4) social welfare organization, a public interest organization, or even a private corporation with any discernible educational, cultural, religious, social or political goals, or any goals beyond maximizing the corporate owners' wealth. *See* Stewart Decl. ¶ 14. In all relevant respects, the Committee's subpoena was an unremarkable and routine third-party

document request of a type that is commonplace and consistently complied with in civil discovery, administrative investigations, and grand jury proceedings.

What was remarkable, however, was Plaintiff's response to the subpoena. Plaintiff raised the sweeping and fanciful constitutional claim that production of financial records relating to a handful of accounts at a single bank would violate the First Amendment rights of Plaintiff and its customers by revealing the identity of Plaintiff's customers. Notwithstanding the baseless nature of that claim, the Committee has now significantly narrowed its request and seeks production of only a modest number of financial transactions – 70 disputed transactions out of what Plaintiff describes as "thousands" originally covered by the subpoena. Second Fritsch Decl. ¶ 3. Nonetheless, Plaintiff renews its meritless First Amendment objection. As previously explained, Comm. Mem. 26-29, Plaintiff cannot seriously contend that it has a First Amendment right of association with its customers – and the same is true with respect to its own vendors as well.

As the party seeking to prevent disclosure, Plaintiff bears the burden of establishing the applicability of any First Amendment privilege as a basis for enjoining Defendant Bank from producing records in response to the Committee's Narrowed Request. *See In re Subpoena Duces Tecum Issued to CFTC*, 439 F.3d 740, 750-51 (D.C. Cir. 2006) ("The basis of a privilege must be adequately established in the record through evidence sufficient to establish the privilege with reasonable certainty.") (internal punctuation and citations omitted). To date, Plaintiff's primary response to the Committee's showing that it lacks a protectable associational interest is that it is "indisputable," Plaintiff's Reply (ECF No. 13) ("Pl. Reply") 14, that corporate entities are entitled to First Amendment protection under the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). *Citizens United*, however, had nothing whatsoever to do with the First Amendment right of association – it held that corporations, like individuals, were entitled to

freedom of speech, *id.* at 318, 371-72, a proposition that is of no relevance here given that Plaintiff has not even attempted to demonstrate that its ability to speak has been restrained in any cognizable way.[3]

Here, in order to assert the purported First Amendment rights of its customers and vendors, Plaintiff must first establish that it is a protectable association, and then separately establish that compelled disclosure will chill its associational rights. Plaintiff cannot meet its initial burden of establishing that it is an association for First Amendment purposes by conclusory statements regarding the activities of certain of its customers, without explanation as to how these customers' activities implicate any associational goals of Plaintiff itself and of Plaintiff's other customers. Plaintiff's business operations are not shielded from government inquiry merely because some of its customers are engaged in political activity. *FEC v. Automated Bus. Servs.*, 888 F. Supp. 539, 542 (S.D.N.Y. 1995). And Plaintiff's desire to maximize profit is certainly not a protectable associational right. *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106 (9th Cir. 2006).

Contrary to Plaintiff's apparent belief, the First Amendment does not provide blanket immunity from production of documents in response to an otherwise valid government subpoena; to conclude otherwise would render the government's subpoena power (whether judicial, executive, administrative, or legislative) meaningless. "[T]here are governmental

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[3] While Plaintiff alleges (without explanation) that its "free speech" rights are implicated, Pl. Renewed Mem. 1, it has made no coherent showing to that effect. *See* Comm. Mem. 32-33. At most, Plaintiff appears to allege, in vague terms, that its customers' free speech rights are somehow implicated by the production of a modest number of bank records reflecting debits to and credits from Plaintiff's bank accounts. *See* Pl. Renewed Mem. 9-12. Plaintiff lacks standing to assert those customers' rights, even if they were adequately pled and cognizable. *See* Comm. Mem. 29-30.

interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley*, 424 U.S. at 66 (citation omitted). For this reason, *even if* Plaintiff had adequately alleged a First Amendment associational right – a huge leap of logic under these circumstances – the government can overcome that showing upon a "compelling interest" for the records. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 382-83 (1981). The D.C. Circuit has held that a "compelling interest" is presumed in the case of government subpoenas, even where "highly sensitive" information is sought, if the agency has statutory jurisdiction to conduct the investigation pursuant to which the subpoena was issued. *Id.* at 389. The same is true here. As has been amply demonstrated, Comm. Mem. 14-20; *supra* Part I.E, the Committee is authorized to conduct an investigation into the Russian active measures campaign, so the Committee's compelling interest is self-evident. *See generally United States v. Inst. for Coll. Access & Success*, 27 F. Supp. 3d 106, 115, 115 n.8 (D.D.C. 2014) (rejecting First Amendment objection to administrative subpoena because government agency had statutory authorization to conduct the investigation and the subpoena was "reasonably relevant" to the investigation, and explaining that "the presence of First Amendment issues alone is not enough to thwart … enforcement") (citation omitted).

1. Plaintiff Is Not An "Association" For Purposes Of The First Amendment.

Plaintiff is a for-profit company that provides a broad array of commonplace commercial due diligence and research services to a wide range of corporate clients, as well as clients representing interests on both sides of the political spectrum. *See* Complaint (ECF No. 1) ("Compl.") ¶ 11 ("Plaintiff is a research firm that provides strategic intelligence and due diligence services to corporations, law firms, and investors worldwide."); Fusion GPS, *About*

Fusion, (Plaintiff provides "due diligence" services "crucial to investment decisions and performance," as well as "regulatory compliance, asset recovery and market intelligence" services);[4] Declaration of Peter Fritsch (ECF No. 2-2) ("Fritsch Decl.") ¶ 6 ("Our clients include private sector businesses and individuals, as well as political organizations and politicians on both the left and the right.").

As previously explained, Comm. Mem. 26-29, Plaintiff is not a protectable "association" made up of persons who are engaged in a "collective effort" "for the advancement of beliefs and ideas" that are shared among the association's members. *Nat'l Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 463 (1958). Plaintiff asserts that because certain of its clients had a common goal – "oppos[ing] President Trump and his allies" – then all of Plaintiff's activities must be shielded from government intrusion under its First Amendment associational rights. *See* Pl. Reply 14-15. But Plaintiff can no longer advance this argument, because Plaintiff and its dossier-related clients have now chosen to publicize their identity and involvement in "oppos[ing] President Trump" – with no resulting "chilling" effect – and thus the purported threat to First Amendment interests has been shown to be illusory. Pl. Reply 8, 15; Glabe Decl. ¶¶ 11, 15.

In any event, Plaintiff cannot claim associational rights merely because certain of its commercial customers, by happenstance, want the same things as other commercial customers – the association *itself* must "express the[] collective views and protect the[] collective interests" of a coherent group of like-minded individuals or entities. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977). While the members of an "association" for purposes of the

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[4] *Archived page available at* https://web.archive.org/web/20110814073733/http://www.fusiongps.com:80/about.html

First Amendment need not share identical interests in all respects, there must be some discernible common thread or overarching goal of the association. *Cf. Citizens United*, 558 U.S. at 324-25 (nonprofit corporation funded by donations and engaged in "express advocacy"); *see also id.*, Appellant Br., No. 08-205 at 5 ("Citizens United is a nonprofit membership corporation that has tax-exempt status under 26 U.S.C. § 501(c)(4) as an 'organization[ ] not organized for profit but operated exclusively for the promotion of social welfare.' … Through a combination of education, advocacy, and grass-roots programs, Citizens United seeks to promote the traditional American values of limited government, free enterprise, strong families, and national sovereignty and security."); *NAACP*, 357 U.S. at 452 (nonprofit membership corporation seeking "to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States"); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 503 (D.C. Cir. 2016) ("political committee that works for the election of federal officeholders"); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2010) (proponents of a particular ballot measure to amend state constitution); *AFL-CIO v. FEC*, 333 F.3d 168, 171 (D.C. Cir. 2003) (labor union); *Machinists Non-Partisan Political League*, 655 F.2d at 382-83 (committee organized to draft a candidate for President).

Plaintiff has not shown that any such consistent policy agenda exists for it and its clients. Accordingly, Plaintiff is not a protected association. It is instead a profit-maximizing hired gun, selling its investigative services to the highest bidder. Plaintiff's goal – to be highly compensated for its work – is not a protectable associational interest. *See Fleck & Assocs.*, 471 F.3d at 1106. Nor is this profit-maximizing goal for itself one that Plaintiff shares with its customers.

2. Plaintiff Lacks Standing To Assert The Alleged First Amendment Rights Of Its Customers.

While some of Plaintiff's customers may (or may not) be engaged in First Amendment activities, that is beside the point. Plaintiff would have standing to assert the First Amendment rights of its *members* (here, allegedly, its customers) only if Plaintiff were a protected *association.* It is not. When, as here, "the allegations in the complaint make clear that 'members' of [Plaintiff] are merely customers," and Plaintiff "does not allege that its customers in any way have come together to form an organization for their mutual aid and benefit," there is no associational standing. *Fleck & Assocs.*, 471 F.3d at 1106.

In addition, to adequately allege associational standing, Plaintiff must establish that "the interests [the suit] seeks to protect are germane to the organization's purpose[.]" *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996). When the "the purpose of the 'association' … is to turn a profit," there is no associational standing. *Fleck & Assocs.*, 471 F.3d at 1106 (rejecting associational standing to challenge ordinance prohibiting live sex acts by an association who ran that type of business because plaintiff merely had customers, not members, and suit to allegedly vindicate "putative privacy interests of its customers" was not germane to plaintiff's purpose).

3. Plaintiff Has Not Engaged In Protected First Amendment Activities And, In Any Event, The Disclosure Of Its Financial Records Does Not Offend The First Amendment.

Plaintiff also raises additional purported First Amendment objections to the disclosure of the disputed transactions. Plaintiff's claims of constitutional infirmity are unclear and conclusory at best, but it objects to the production of records reflecting the following:

- a small number of transactions that Plaintiff claims are irrelevant to the Committee's inquiry even though they involve customers or contractors whose activities undisputedly fall within the scope of the Committee's investigation, Third Fritsch Decl. (11/3/2017) ¶ 4 (referencing Committee Request No. 4 (BakerHostetler); *id.* at ¶ 9 (referencing Committee Request Nos. 44-45, 47, 49-50, 52-53 ([redacted] and 74-76 [redacted];

- payments received from 9 customers that Plaintiff asserts "do not pertain to any work related to" or "had nothing to do" with Russia or Donald Trump or other areas of the Committee's inquiry, *id.* at ¶¶ 4-8 (referencing Committee Requests Nos. 12-16, 17, 18-31, 32-43); and

- payments made to three contractors that Plaintiff asserts "are not pertinent to work related to Russia or Donald Trump," *id.* at ¶ 6 (referencing Committee Requests Nos. 66, 68-69, 107-112).

Plaintiff seeks to have this Court – or a Special Master – engage in an unwarranted assessment, on a document-by-document basis, of Congressional need for the requested records. Pl. Renewed Mem. 12. But Plaintiff itself is unwilling to disclose to this Court, on a document-by-document basis, how its First Amendment rights are implicated by the Committee's narrowed requests, and avers merely that "the records are protected by the First Amendment and confidentiality." Pl. Renewed Mem. 9-10.

For the reasons stated above, Plaintiff is not a protected association and cannot resist discovery on the basis that its customer lists will be revealed by this narrowed production. Indeed, the identities of certain of Plaintiff's customers who retained Plaintiff for Russia-related work and contractors who assisted Plaintiff in this paid work are already public, so the core element of Plaintiff's purported First Amendment objections – the alleged concern about exposure of the identity of anti-Trump clients – no longer exists even under Plaintiff's view. Glabe Decl. ¶ 11, 15. No First Amendment associational right could possibly be implicated by producing additional transactions relating to these now (by virtue of seemingly calculated media disclosures by Plaintiff and/or its clients themselves, *id.*) publicly known customers and contractors. To the extent Plaintiff is alleging that the remaining transactions it seeks to shield

reflect "political activit[ies]," Plaintiff's Memorandum In Support of Temporary Restraining Order (ECF No. 2-1) ("Pl. Mem.") 11, of its customers, Plaintiff has failed to provide any specific evidence to that effect, and in any event it lacks standing, as explained above, to assert the First Amendment rights of its customers.

Plaintiff has no additional First Amendment basis to shield its business records from government review. Producing records that reveal customer lists of a commercial enterprise does not offend the First Amendment because commercial transactions do not give rise to associational rights, even if the underlying subjects of the transactions are themselves protected speech. *United States v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) (customer list of tax professional not protected); *IDK, Inc. v. Cty. of Clark*, 836 F.2d 1185, 1193-95 (9th Cir. 1988) (escort/client relationship not protected by freedom of association); *In re Grand Jury Subpoena Duces Tecum Served Upon PHE, Inc.*, 790 F. Supp. 1310, 1317 (W.D. Ky. 1992) (commercial relationship between publisher and customers not protected "associational right" under First Amendment); *In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc.*, 630 F. Supp. 614, 619 (E.D.N.C. 1986) (holding that "the commercial relationship arising from the sale of videotapes by the subpoenaed corporations to their customers is not protected by the [F]irst [A]mendment's freedom of association guarantee," even though videotapes themselves were protected form of speech).[5]

Under Plaintiff's theory of the First Amendment, any service provider to a political campaign could resist government inquiry into its business operations. This would be an absurd result, and courts are understandably reluctant to shield political vendors' commercial

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[5] At most, Plaintiff has alleged in conclusory terms that certain of its customers are engaged in political activities. Plaintiff has made no showing that the law firms, media organizations, and contractors at issue in the narrowed transactions were engaged in protected activities.

transactions from government inquiry on First Amendment grounds. For example, in *FEC v. Automated Business Services*, the court enforced an administrative subpoena to examine the records of vendors that provided services to a campaign committee, observing that

> [t]he notion that by doing business with vendors that are owned or operated by its political supporters, a campaign committee can shield those vendors from investigation by the F.E.C. is a baseless attempt to hamper the proper functioning of the F.E.C. .... [I]f respondents' argument were valid, then ultimately all campaigns could make themselves immune from federal election laws, by only doing business with their political supporters.

888 F. Supp. at 542 (internal quotation marks omitted). In reaching its conclusion, the court relied upon its earlier opinion rejecting an order to show cause seeking to stay compliance with a subpoena served on the campaign's bank:

> The mere vending of goods or services to a political association neither evinces support for that association, nor makes the vendor a member of that association. Thus, the First Amendment clearly affords no such protection to vendors of goods or services to political associations.

Id. at 542. *See also Holderbaum v. United States*, 589 F. Supp. 107, 111, 112 (D. Colo. 1984) (refusing to quash an IRS summons for financial records, stating "the Court believes that an individual should not be insulated from tax liability or investigation into his tax liability merely because he ... deals with members of a particular organization").

4. Plaintiff's Free Speech Rights are Not Impaired.

As previously demonstrated, Comm. Mem. 32-33, Plaintiff also cannot identify any intrusion on its freedom of speech. Plaintiff's Reply and Renewed Memorandum failed to address the Committee's arguments in this regard, so the Committee stands on those arguments.

5. Plaintiff Alleges No Relevant Harm Arising From the Disclosure of Its Financial Records.

As previously demonstrated, Comm. Mem. 33-37, Plaintiff is not entitled to injunctive relief on the basis of its conclusory assertions of harm. Although the Committee's original subpoena was entirely proper and valid, Plaintiff's asserted panoply of purported harms are even more implausible now in light of the fact that the Committee has dramatically narrowed its requests. Moreover, the Committee's Rules guard against the type of public disclosure that Plaintiff claims to fear (except, of course, when Plaintiff and its clients decide to publicize the very facts that Plaintiff has claimed would destroy its business and threaten First Amendment freedoms if disclosed). *See* Comm. Mem. 24, 33-34; Stewart Decl. ¶ 20. "Even if [Plaintiff's] activities … were entitled to greater scrutiny, the record shows that the subpoena's impact on [Plaintiff's] First Amendment freedoms is 'so slight' that the [Committee's] interests must prevail." *Senate Permanent Subcomm. on Investigations v. Ferrer*, 199 F. Supp. 3d 125, 143 (D.D.C. 2016) (citations omitted), *vacated as moot*, 856 F.3d 1080, 1089 (D.C. Cir. 2017).

D. Plaintiff Has Identified No Legally-Cognizable "Confidentiality" or "Privacy" Privileges

Plaintiff also claims that production of the 70 disputed transactions "will violate Plaintiff's … confidentiality obligations" and invade Plaintiff's "privacy rights," and the requested records "are protected by … confidentiality." Pl. Renewed Mot. 2; Pl. Renewed Mem. 4, 9-12. It is unclear why Plaintiff believes that its purported "privacy" or "confidentiality" concerns are relevant to the Court's resolution of Plaintiff's application (the same concerns are shared by any recipient of a government inquiry or subpoena), but it is clear that neither of these vaguely worded objections is a legitimate basis to resist a Congressional subpoena.

With respect to Plaintiff's asserted privacy rights in the 70 disputed transactions, as an initial matter, there is no constitutional privacy right in bank records. *United States v. Miller*,

425 U.S. 435, 442-43 (1976) (discussing "[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records," and noting that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."). In addition, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *accord G.M. Leasing Corp. v. United States,* 429 U.S. 338, 353, (1977) ("[A] business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."). While explaining that there are "limits" to what the government can demand from corporate entities, the Supreme Court has also recognized the limited role of the judiciary in assessing the propriety of a government investigation – "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Morton Salt*, 338 U.S. at 652. Agencies are entitled to no more deference in conducting statutorily defined investigations than Congress in conducting constitutionally derived investigations in furtherance of its Article I power.

Plaintiff's reliance on *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127, 1130-31 (S.D.N.Y. 1975), for the proposition that this Court may enjoin the production of records that reflect "purely personal financial matters" of Plaintiff's customers is misplaced. The Senate subpoena at issue in *Bergman* was directed at individuals, not a corporate entity, as here. *Id.* at 1129. The *Bergman* court based its holding on what it viewed as a "personal interest in privacy" enjoyed by the individual plaintiffs, ruling that "purely personal" financial records should not be produced to the Senate committee. *Id.* at 1131. In this regard, *Bergman* is no longer good law. The decision pre-dates the Supreme Court's 1976 decision in *United States v. Miller*, in which the Court held that "we perceive no legitimate 'expectation of privacy'" in

banking records, which "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," 425 U.S. at 442. Indeed, the *Bergman* court relied upon the lower court decision reversed by the Supreme Court in *Miller*. *See* 389 F. Supp. at 1130. Thus, *Bergman* provides no support for Plaintiff here. But *Bergman* remains relevant in one respect: in a holding that remains good law, the court correctly recognized that documents relating to plaintiffs' "corporate … activities or dealings" had to be produced to the Senate committee. *Id.* at 1130. The same is true here. Plaintiff's corporate bank records are not "personal" in any respect.

Because there is no free-standing privacy right enjoyed by corporate entities, or bank customers generally, Plaintiff also appears to reassert (albeit only in passing) its statutory privacy claims under the Right to Financial Privacy Act ("RFPA") and the Gramm-Leach-Bliley Act ("GLB Act"). Compl. ¶¶ 49-63. But as the Committee has shown, Comm. Mem. 29-30, Plaintiff (a Delaware LLC) lacks standing to bring claims under these Acts, because by their plain terms these Acts do not apply to financial records held by a corporate entity, such as an LLC. *See Exch. Point LLC*, 100 F. Supp. 2d at 176 (holding that Delaware LLC lacked standing under RFPA, because "the plain meaning of the statute simply cannot countenance the inclusion of a limited liability company in the term 'individual or partnership …'"); 15 U.S.C. §§ 6802(a), 6909(9) (GLB Act) (relating to disclosure of the financial records of a "*consumer*," defined as an "*individual* who obtains … financial … services … for *personal, family, or household purposes*") (emphases added); *cf.* Henry J. Friendly, Benchmarks 202 (1967) (recounting Justice Frankfurter's three rules of statutory interpretation as "(1) [r]ead the statute; (2) read the statute; (3) read the statute!"). In addition, as explained in Committee's original brief, neither Act applies to Congressional subpoenas. *See* Comm. Mem. 20-24.

Plaintiff's asserted confidentiality obligations fare no better. It is not clear if Plaintiff is claiming a contractual obligation to maintain the confidentiality of its clients' identities, or simply acknowledging that as a business matter, it chooses to exercise discretion with respect to its paid engagements. Regardless, Plaintiff has failed to establish the existence of any relevant contractual provision, or to allege how either reason (contractual term or a sound business decision) would defeat a valid government subpoena to Plaintiff's bank. The D.C. Circuit has held that agencies and private parties cannot withhold documents from Congress on confidentiality grounds, allowing disclosure to Congress even when the documents contain highly sensitive trade secrets. *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (denying injunctive relief to party that sought to prevent disclosure by the FTC to a House committee of its "trade secret" information). And of course, it is axiomatic that disclosure to the government by subpoena, regulation, or order excuses any contract term to the contrary. *See* Robert L. Haig, ed., 8 Bus. & Comm. Litig. Fed. Cts. § 89:35 (4th ed.) (as a matter of law, a party to a contract may assert an impracticability defense to a contract when "the nonoccurrence of an event is a basic assumption of a contract," including "government intervention that prevents performance"); Restatement (Second) of Contracts § 264 (1981) (Prevention by Governmental Regulation or Order).

Even where a clearly privileged relationship exists with a client, courts routinely refuse to shield the client's identity from disclosure. *See, e.g., In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983) ("The federal forum is unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege." (collecting cases)); *United States v. Ritchie*, 15 F.3d 592,

602 (6th Cir. 1994) ("[V]irtually every court to consider the issue has concluded that client identity and payment of fees is not privileged information.").

The D.C. Circuit has recognized that "the judiciary must refrain from slowing or otherwise interfering with the legitimate investigative functions of Congress," and that judicial restraint must be exercised where "confidential documents" are at issue. *Owens-Corning Fiberglas Corp.*, 626 F.2d at 970. Accordingly, Plaintiff has failed to meet its burden of establishing a substantial likelihood of success on any "confidentiality" or "privacy" claims.

E. The Committee's Subpoena Is Valid.

Under well-established precedent, the Committee Chairman, like all government officials, enjoys a "presumption of regularity" that, absent a contrary showing, requires the Court to conclude that his official duties were properly discharged. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (quotation marks omitted). Nothing in Plaintiff's papers comes close to overcoming that presumption by proving that the Committee's subpoena was not authorized or that the Committee's rules were not adhered to. *See* Comm. Mem. 14-17.

Contrary to Plaintiff's assertions, the Committee's subpoena to Defendant Bank was duly authorized and properly issued. The Committee's authority to conduct this investigation is clear and derives from House Rule X.11(b)(1), which was adopted by the full House of Representatives via the passage of House Resolution 5 on January 3, 2017. *See* Rules of the U.S. House of Representatives (115th Cong.), Rule X.11(b)(1); 163 Cong. Rec. H7-H11 (daily ed. Jan. 3, 2017) (approving H. Res. 5 by vote of 228-184). Consistent with this authorization, and in accordance with the Committee's Rules and internal practices, the subpoena to Defendant Bank was requested by Representative Conaway, signed by Chairman Nunes, and the Ranking Member was properly notified before the subpoena was issued. *See* Committee Rule 10; Stewart Decl. ¶¶ 12, 14, 15.

Despite these facts, Plaintiff complains that the notification to the Ranking Member occurred at the staff level. *See* Pl. Reply at 3. This practice, however, is completely consistent with the Committee's Rules, as authoritatively explained by the Committee's Chief Counsel. *See* Stewart Decl. ¶ 15. Even if there were any doubt about that question, moreover, the courts would lack authority to second-guess the Committee's interpretation and implementation of its own rules. The Constitution expressly delegates to each House of Congress the sole authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, and the Supreme Court has consistently held that "within these limitations [– violation of constitutional restraints or fundamental rights –] all matters of method are open to the determination of the [H]ouse, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995) (courts may not resolve ambiguities in House Rules). Accordingly, Plaintiff's belief that subpoena notifications should occur differently is of no moment.

II. PLAINTIFF CANNOT ESTABLISH IRREPARABLE INJURY.

As the Committee previously explained, *see* Comm. Mem. 37-42, the D.C. Circuit has consistently "set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). In particular, the court has emphasized the "requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur. *Bare allegations of what is likely to occur are of no value* since the court must decide whether the harm will *in fact* occur. *The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future*." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (first and third

emphases added). Plaintiff has not satisfied this heavy burden, and its attempts to do so fall woefully short.

Far from proffering concrete proof that the alleged harms "have occurred in the past" and are "likely to occur again," or that "the harm is certain to occur in the near future," Plaintiff simply repeats its conclusory and self-serving mantra that its business will be harmed and First Amendment rights will be chilled if 70 bank transactions are produced to the Committee. Such conclusory allegations could not satisfy the *Wisconsin Gas* test under any circumstances, but they are even more clearly insufficient now, because they are refuted by the recent conduct of Plaintiff and its clients. Since the time that Plaintiff initially advanced its hyperbolic claims of irreparable injury, Plaintiff and its clients have *themselves* chosen to publicize the very facts that Plaintiff claimed would be most harmful – namely, their identity and involvement in opposition research efforts aimed at now-President Trump, as well as related information regarding Plaintiff's transactions with the author of the "dossier." Glabe Decl. ¶¶ 11, 15. Plaintiff has offered no evidence that these disclosures have led to even the slightest hint of the resulting harms that Plaintiff had confidently asserted would ensue from such disclosures. Thus, Plaintiff has failed to establish a likelihood of irreparable injury.

Plaintiff's claim of irreparable injury also suffers from an independently fatal flaw: it is foreclosed by binding D.C. Circuit precedent. All of Plaintiff's speculative claims of hypothesized adverse consequences rest on the premise that production of the records to the Committee will result in public disclosure of the information so produced. But Plaintiff offers no evidence to substantiate that assumption, and Circuit precedent precludes this Court from accepting it: "We have heretofore held that release of information to the Congress does not constitute 'public disclosure.' … The courts must presume that the committees of Congress will

exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp.*, 589 F.2d at 589 (citation omitted); *see, e.g.*, *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Ashland Oil*, 548 F.2d at 979; *see also Murphy v. Dep't of Army*, 613 F.2d 1151, 1155, 1155-56 (D.C. Cir. 1979) (rejecting assertion that "disclosure of information to Congress is disclosure to the whole world"). Plaintiff's concerns are particularly misplaced in the context of this investigation, because any records produced by Defendant Bank will be treated as executive session material subject to strict confidentiality provisions under the Committee's Rules. *See* Second Stewart Decl. ¶ 21.

Plaintiff attempts to dispute this proposition, claiming that the Committee's "conduct gives no comfort" that the Committee will abide by its executive session rules. Pl. Reply 5. The stated grounds for this lack of trust are Plaintiff's allegations that (i) "some of what occurred during the otherwise confidential October 18, 2017, depositions of Messrs. Fritsch and Catan" was revealed in an October 19, 2017 Wall Street Journal article, *see* Second Declaration of Joshua A. Levy (ECF No. 14-1) ("Second Levy Decl.) ¶ 11, and (ii) the Committee "leaked the identification of the bank to the press." *Id.* at ¶ 12. Those assertions are completely lacking in merit, because none of the information identified by Plaintiff was subject to the Committee's executive session rules, and its disclosure casts no doubt whatsoever on the Committee's compliance with those rules.

With respect to Plaintiff's principals' assertions of their privilege against self-incrimination, such assertions are not "information received by the Committee" within the meaning of Committee Rule 12(a)(1)(B); rather, they are legal claims proffered to justify a *refusal* to provide "information" to the Committee, and thus the confidentiality obligation does not apply. *See* Second Stewart Decl. ¶ 19. Moreover, Plaintiff's protestations regarding the

purported confidentiality of the assertions of alleged constitutional privilege are particularly baseless here, because Plaintiff's counsel (Mr. Levy) *himself* made public the fact that Messrs. Fritsch and Catan raised constitutional privileges at their committee depositions, shortly after the conclusion of the depositions. *See* Jeremy Herb & Evan Perez, *Fusion GPS Partners Plead Fifth Before House Intel*, CNN (Oct. 18, 2017, 4:58 PM) ("Fusion GPS' Peter Fritsch and Thomas Catan invoked their Fifth Amendment rights not to answer questions during their closed-door appearance before the committee, *according to their attorney Joshua Levy*.") (emphasis added).[6] Plaintiff's attempt to impugn the integrity of the Committee based on the conduct of Plaintiff's own counsel is thus doubly baseless and misleading.

As to the so-called "leak" of Defendant Bank's identity, there exists no requirement, either in House or Committee Rules, that such information be kept confidential. The identity of the recipient of a subpoena is not "information received by the Committee in executive session," Stewart Decl. ¶ 20, within the meaning of the executive session rules; rather, it is information released by the Committee to the recipient of the subpoena, and as such (absent a specific Committee determination to the contrary) it is not subject to the executive-session confidentiality requirement. *See* Second Stewart Decl. ¶ 20. Moreover, as Mr. Levy's declaration notes, the disclosure was made before any ruling on the motion to use a pseudonym, Second Levy Decl. ¶ 12, and there is no evidence that whomever made the disclosure (even assuming it was someone affiliated with the Committee) was even aware that Plaintiff had filed a motion to avoid naming the Bank – a filing that occurred as one small part of a 90-page submission filed shortly before the article at issue was published.

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[6] *Available at* http://www.cnn.com/2017/10/18/politics/fusion-gps-partners-plead-fifth-before-house-intel/index.html.

Thus, Plaintiff has failed to meet its burden of making a "substantial showing ... that the materials in the possession of the [Bank] will necessarily be 'made public' if turned over to Congress." *Ashland Oil*, 548 F.2d at 979. As a result, this Court "must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon*, 589 F.2d at 589 (quotation marks omitted). Plaintiff's claim of irreparable injury therefore fails as a matter of law.[7]

III. THE BALANCE OF EQUITIES CLEARLY FAVORS ENFORCEMENT OF THE MODIFIED SUBPOENA.

The balance of the equities now tips even more heavily in favor of the Committee. The Committee has conducted a careful, time-consuming review of the Responsive Records and has dramatically narrowed the scope of its request to only those transactions – a tiny fraction of the whole – that merit further investigation because they may shed additional light on matters of direct interest to the Committee. In its original motion, Plaintiff's theory of injury focused on purported harm to its business and to alleged First Amendment rights arising from what Plaintiff

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[7] Plaintiff cites two cases in support of the proposition that damage will be done as soon as the information is provided to the Committee. Pl. Reply at 6-7. Neither case is even remotely analogous to the facts and circumstances at issue here. To start, neither case involved a government investigation; rather, they both are civil actions between private entities with no confidentiality requirements or obligations such as those imposed by the Committee Rules here. Second, in *Council on Am.-Islamic Relations v. Gaubatz*, unlike here, "the record ... support[ed] a finding that Defendants have unlawfully obtained access to, and have already caused repeated public disclosure of, material containing CAIR's proprietary, confidential and privileged information." 667 F. Supp. 2d 67, 76 (D.D.C. 2009). Finally, in *Morgan Stanley DW Inc. v. Rothe*, unlike here, the customer lists and other information at issue was expressly protected by statute, *see* 150 F. Supp. 2d 67, 76 (D.D.C. 2001) (citing District of Columbia's Uniform Trade Secrets Act). Accordingly, both cases are inapposite, as (i) there are no allegations of unlawful access here, (ii) the Committee has numerous procedures and rules in place specifically intended to prevent the type of public exposure found in *Gaubatz*, and (iii) unlike the records in *Morgan Stanley*, Plaintiff's records are not entitled to any statutory protection. *See* Comm. Mem. 20-24.

characterized as an overbroad request. Pl. Mem. 16-17; Pl. Reply 4-5. That theory lacked merit when originally advanced, *see* Comm. Mem. 42-43, and it is even more obviously meritless now.

Not only has the number of disputed transactions been reduced from "several thousand" to only 70, but Plaintiff and its clients have themselves now chosen to publicize a number of highly significant transactions, Glabe Decl. ¶¶ 11, 15 – transactions that Plaintiff previously described as absolutely inviolate and indeed the very predicate for its claim of irreparable injury. *See* Pl. Reply 7-8 (claiming "chilling" effect from "disclosure of confidential political work that Plaintiff conducted in opposition to Mr. Trump"). Even though that very information has now been publicly disclosed – *not by the Committee, but by Plaintiff and its clients*, evidently as part of their calculated media strategy – Plaintiff offers not a shred of evidence to prove that any of its hyperbolic and wholly speculative assertions of resulting harm have actually come to pass. "Injunctions … will not issue to prevent injuries neither extant nor presently threatened, but only merely 'feared.'" *Exxon*, 589 F.2d at 594 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

In any event, as shown above, D.C. Circuit precedent precludes this Court from indulging Plaintiff's assumption that disclosure of the disputed handful of transactions to the Committee will constitute public disclosure. *See, e.g.*, *Exxon*, 589 F.2d at 589 ("release of information to the Congress does not constitute 'public disclosure'" (quoting *Ashland Oil*, 548 F.2d at 979)). And without that assumption, Plaintiff's house-of-cards theory of harm utterly collapses.

By contrast, further interference with the Committee's exercise of its constitutional power of inquiry would directly harm the Committee's compelling interest in expeditious completion of this investigation, which involves matters of pressing national importance. The transactions at issue contain investigative leads that the Committee seeks to pursue in the exercise of its

constitutional responsibilities, and further delay will directly impede the progress of the Committee's investigation by blocking its ability to pursue those leads. "This investigation is a national security necessity," Comm. Press Release (Ranking Member Adam Schiff), yet Plaintiff's intransigence has already substantially delayed the course of the investigation. As one of the Committee's Members recently observed, the Committee's ability to promptly conclude its investigation has been hampered by the recalcitrance of witnesses that possess relevant information. *See* Katie Bo Williams, *House Republicans Growing Impatient with Russia Probe*, The Hill (Oct. 26, 2017) (quoting Rep. Eric Swalwell: "I would love to wrap [the Russia active measures investigation] up as soon as we can and in a comprehensive way – meaning that witnesses are actually asked to turn over relevant documents. Part of the problem right now has been that witnesses are coming in without turning over what we've asked[.]").[8] "For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress" based on nothing more than Plaintiff's asserted confidentiality concerns "could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality." *Exxon*, 589 F.2d at 588. Plaintiff has failed to meet its burden of establishing that the balance of equities favors issuance of the intrusive and unprecedented injunction it seeks.

IV. PUBLIC INTEREST SUPPORTS ENFORCEMENT OF THE MODIFIED SUBPOENA.

The public interest compels denial of Plaintiff's renewed attempt to interfere with an ongoing congressional investigation. The D.C. Circuit has squarely held that there is a "clear public interest in maximizing the effectiveness of the investigatory powers of Congress[,]"

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[8] *Available at* http://thehill.com/policy/national-security/357420-house-gop-growing-impatient-with-russia-probe.

because "the investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibilities of Congress[.]" *Exxon Corp.*, 589 F.2d at 594 (citing *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)). Thus, when a private litigant seeks to enjoin a third party from complying with a congressional request for information, "[i]t would ... require an extremely strong showing ... to succeed in obtaining an injunction in light of the compelling public interest in denying such relief." *Id.* No such showing has been made here.

Plaintiff's attempt to satisfy its heavy burden rests primarily on its First Amendment claim, but as explained above, that claim is meritless, and falls far short of the requisite "extremely strong showing." Plaintiff also asserts that "this case presents novel and important questions of constitutional law regarding the interplay between two co-equal branches of government: the Judiciary and the Legislature." Pl. Reply 21. Even if that were true, it would hardly demonstrate that the public interest supports the extraordinary remedy of an injunction against compliance with a congressional subpoena. In any event, this is hardly the first case in which private parties have sought to enjoin compliance with congressional demands for information, and such attempts have been uniformly rejected in this Circuit. *See, e.g.*, *Exxon*, 589 F.2d at 594 (denying private party's request to enjoin agency from producing confidential trade secrets to Congress); *Ashland Oil*, 548 F.2d at 979 (same). Plaintiff has not made an "extremely strong showing" that the public interest favors injunctive relief in this case, and accordingly its motion must be denied.

CONCLUSION

For all of the foregoing reasons, Plaintiff's renewed request for a temporary injunction should be denied and the case should be dismissed with prejudice.

Respectfully submitted,

/s/ Thomas G. Hungar
THOMAS G. HUNGAR (DC Bar #447783)
General Counsel
TODD B. TATELMAN (VA Bar #66008)
Associate General Counsel
KIMBERLY HAMM (DC Bar #1020989)
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
Thomas.Hungar@mail.house.gov

Counsel for the Permanent Select Committee on Intelligence of the U.S. House of Representatives

November 21, 2017

CERTIFICATE OF SERVICE

I certify that on November 21, 2017, I filed the foregoing document by the court's CM/ECF system, which I understand caused it to be served on all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEAN LLC d/b/a FUSION GPS 1700 Connecticut Ave., NW Suite 400 Washington, DC 20009, Plaintiff, v. DEFENDANT BANK, Defendant, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor.	Case No. 1:17-cv-02187-TSC

DECLARATION OF SCOTT L. GLABE

1. I currently am, and have been since January 2016, Deputy General Counsel for the House Permanent Select Committee on Intelligence ("Committee"). In this capacity, I have participated in the Committee's investigation regarding the Russian active measures campaign targeting the 2016 U.S. election, and am familiar both with the publicly announced parameters of that investigation as well as the classified scoping document. The facts set forth in this Declaration are based upon my personal knowledge.

2. House Resolution 5, approved on January 3, 2017, and adopting the Rules of the House of Representatives for the 115th Congress, grants the Committee broad oversight over intelligence and intelligence-related activities.

3. In an exercise of its oversight jurisdiction, on March 1, 2017, the Committee

publicly announced its Scope of Investigation regarding the Committee's investigation relative to the Russian active measures campaign targeting the 2016 U.S. election. While a detailed, six-page Committee scoping document remains classified, the Committee publicly announced key questions the investigation seeks to answer: *1) What Russian cyber activity and other active measures were directed against the United States and its allies?; 2) Did the Russian active measures include links between Russia and individuals associated with political campaigns or any other U.S. Persons?; 3) What was the U.S. Government's response to these Russian active measures and what do we need to do to protect ourselves and our allies in the future?; and 4) What possible leaks of classified information took place related to the Intelligence Community Assessment of these matters?*

4. Based on extensive media reporting and the Committee's own investigative efforts, the Committee formed a reasonable belief that Fusion GPS and its co-founders Glenn Simpson, Peter Fritsch, and Thomas Catan may have information relevant to the Committee's investigation.

5. Specifically, the Committee learned of Fusion GPS' commissioning of former British intelligence officer, Christopher Steele, to compile the approximate 35-page "Steele Dossier." The Committee also learned that Mr. Steele had provided the Federal Bureau of Investigation ("FBI") with several memos that also were shared with the website *Mother Jones*.[1] The Committee also became aware that Mr. Steele briefed a *Mother Jones* reporter in late October 2016, as well as met with multiple other news outlets at Fusion GPS' behest during the

[1] http://www.motherjones.com/politics/2016/10/veteran-spy-gave-fbi-info-alleging-russian-operation-cultivate-donald-trump/.

same time period.[2] A version of the "Steele Dossier" was published by *BuzzFeed News* on January 10, 2017, and CNN subsequently reported that a synopsis of the dossier had been briefed to President Obama and President-elect Donald J. Trump as an appendix to the January 6, 2017, Intelligence Community Assessment on Russian interference in the 2016 election.[3]

6. Additionally, the Committee learned of allegations that Fusion GPS acted as an unregistered agent of the Russian government in violation of the Foreign Agent Registration Act ("FARA") through work it performed for Prevezon Holdings, a Russian state-owned company. According to the allegations, "Prevezon's lobbying efforts were . . . organized . . . through a Delaware non-profit . . . and through the law firm then representing Prevezon in [an] asset forfeiture case [brought by the Justice Department], BakerHostetler."[4] Fusion GPS was alleged to have "dug up dirt" on Hermitage CEO William Browder, a vocal Putin critic.[5] According to a FARA complaint brought by Mr. Browder, individuals associated with these efforts included, among others, a partner of the BakerHostetler law firm; Fusion GPS; Rinat Akhmetshin; "Anatoly Samorchonov, [a] Russian born professional interpreter and project manager for the US State Department"; and "Natalia Veselnitskaya, the Russian lawyer for Prevezon."[6] Mr. Veselnitskaya, Mr. Akhmetshin, and Ms. Samochornov all attended a June 9, 2016, meeting at

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[2] https://assets.documentcloud.org/documents/3892131/Trump-Dossier-Suit.pdf.

[3] http://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html.

[4] https://www.grassley.senate.gov/news/news-releases/complaint-firm-behind-dossier-former-russian-intel-officer-joined-lobbying-effort.

[5] https://www.grassley.senate.gov/news/news-releases/complaint-firm-behind-dossier-former-russian-intel-officer-joined-lobbying-effort.

[6] https://www.grassley.senate.gov/sites/default/files/judiciary/upload/Russia%2C%2003-31-17%2C%20Magnitsky%20Act%20-%202016-%2007-15%20HCM%20Complaint%20to%20FARA%20%28003%29_Redacted.pdf.

Trump Tower with senior Trump associates including Donald Trump Jr., the ostensible purpose of which was for Mr. Veselnitskaya, to "provide the Trump campaign with some official documents and information that would incriminate Hillary and her dealings with Russia."[7] Recent press reports indicate that documents brought to the Trump Tower meeting contained information connecting major donors to Democratic candidates, including former Secretary of State and 2016 presidential candidate Hillary Clinton.[8] These documents also attacked Mr. Browder at length, in a manner consistent with the position advocated by both the Kremlin and Fusion GPS in its work on behalf of Baker Hostetler.[9]

7. On the basis of this and other information obtained by the Committee, on October 4, 2017, the Committee issued subpoenas for testimony and documents to Fusion GPS co-founders Messrs. Simpson, Fritsch, and Catan.

8. On October 5, 2017, a Committee subpoena for documents was served on Defendant Bank. The subpoena to Defendant Bank required it to provide, among other items, by October 13, 2017, all documents sufficient to identify Fusion GPS's banking transaction history from August 1, 2015 to October 4, 2017. At the request of counsel for Defendant Bank, Alexander Bono, the subpoena return date was subsequently extended to October 23, 2017. On October 19, 2017, Mr. Bono informed the Committee that Defendant Bank intended to comply with the subpoena and would produce all responsive documents by 9 A.M. on October 23, 2017.

9. On October 18, 2017, during closed-door depositions before the Committee, Messrs. Fritsch and Catan invoked their First and Fifth Amendment rights not to answer any

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[7] https://www.nytimes.com/interactive/2017/07/11/us/politics/donald-trump-jr-email-text.html.

[8] https://www.nytimes.com/2017/10/27/us/politics/trump-tower-veselnitskaya-russia.html.

[9] https://www.nytimes.com/interactive/2017/10/29/us/politics/document-Read-the-Talking-Points-Shared-with-the-Kremlin.html.

questions.[10] I am not aware of any information sought by the Committee to date from Fusion GPS or its principals that would give rise to any basis for criminal liability on the part of Fusion GPS or its principals.

10. On the evening of October 19, 2017, during a telephonic conference call with myself and other Committee staff, counsel for Fusion GPS, Mr. William Taylor, outlined a proposal to avert litigation over the subpoena to Defendant Bank. Mr. Taylor proffered that, if the Committee would extend Defendant Bank's subpoena deadline for 48 hours, he would encourage his client to authorize Defendant Bank to produce records relevant to transactions related to the "Steele Dossier"—namely payments to Fusion GPS from the (then-undisclosed) client who funded it. When specifically asked about reports that multiple clients had funded Fusion's anti-Trump research efforts, Mr. Taylor represented that only transactions related to one Fusion GPS client were relevant to the Committee's inquiry.

11. On October 24, 2017, the Committee learned from a *Washington Post* report that the Clinton campaign and the Democratic National Committee ("DNC") had provided funding to Fusion GPS for the research that resulted in the dossier on Mr. Trump. The *Post* report also contained the information that Mark E. Elias, an attorney with the law firm Perkins Coie, and who represented both the Clinton campaign and the DNC, was the individual that retained Fusion GPS. Reporting also disclosed a letter sent by Perkins Coie to counsel for Fusion GPS, informing Fusion GPS that it was released from any client confidentiality obligations and

[10] http://www.cnn.com/2017/10/18/politics/fusion-gps-partners-plead-fifth-before-house-intel/index.html. Mr. Simpson is due to appear before the Committee under subpoena on November 8, 2017.

authorizing Fusion GPS to disclose its identity as a client, as well as certain substantive details of the engagement.[11]

Initial Production

12. Shortly before 8:00 PM on October 27, 2017, [redacted] ("Initial Production"). Contrary to Mr. Taylor's representations on October 19 that only records relating to one Fusion GPS client were relevant to the Committee's investigation, the Initial Production included [redacted]. The transactions and counterparties reflected in the Initial Production are as follows:

[redacted]

13. The Initial Production contained [redacted] that were produced in

[11] https://www.documentcloud.org/documents/4116754-Perkins-Coie-Letter.html.

incomplete form. Specifically, the following information was redacted from the [redacted]: Fusion GPS' address, account and routing numbers, and other information related to the banking activity of the counterparties. Complete copies of [redacted] are necessary for the Committee's investigation and will assist the Committee, among other things, in tracing the source of Fusion GPS' payments and tracing the recipients of payments made by Fusion GPS.

14. [redacted] also contained redactions of similar information. Complete information for the relevant transactions are necessary for the Committee's investigation and will assist the Committee, among other things, in tracing the source of Fusion GPS' payments and tracing the recipients of payments made by Fusion GPS.

15. Notwithstanding Fusion GPS' representations, the Committee immediately formed a reasonable belief that the Initial Production did not reflect a complete set of relevant transactions, in addition to the deficiencies outlined above. On October 27, 2017—*before* the Committee received the Initial Production—[redacted]

16. [redacted]

Committee Counsel Review of Responsive Records and Request for Additional Responsive Records

17. On October 30, October 31, and November 1, [redacted]

[redacted]

[redacted]

("Responsive Records") [redacted]

18. On November 1, 2017, [redacted], I identified—in writing to Plaintiff and Defendant Bank—records relating to 112 transactions among the Responsive Records that the Committee, in good faith, deemed necessary for its investigation ("Requested Records"). The Requested Records consist of:

- the 30 transactions included in the Initial Production;
- 12 transactions associated with previously-identified counterparties for whom some but not all transactions were included in the Initial Production;
- 19 transactions associated with payments from eight (8) law firms other than [redacted] or [redacted];
- 12 transactions associated with payments to four journalists and/or researchers other than [redacted] or [redacted];
- 8 transactions associated with [redacted]
- 12 transactions associated with payments from Media Company A ([redacted]);
- 19 transactions associated with two [redacted] firms, Business A [redacted] and Business B ([redacted]); and
- metadata associated with the 112 identified transactions and contained within specified pages of the Responsive Records.

Although not required by the Confidential Agreement, the Committee—as a show of good faith and to aid the parties, without prejudice to additional reasons the Committee might set forth in any ensuing proceeding—provided a justification articulating, for each payor/payee, the nexus between the records sought and the Committee's investigation.

19. Fusion GPS is not aware of the full scope of the Committee's investigation, which is classified. Classified information made available to the Committee informed, in part, Committee Review Counsel's identification of the Requested Records and its reasonable belief

that those records contain investigative leads within the scope of the Committee's investigation.

Law Firms

20. With respect to the eight (8) law firms, the Committee identified Requested Records within the Responsive Records based on Fusion GPS' established pattern and practice of using law firms as intermediaries to mask the true beneficiaries of its research. For example, based on carefully timed disclosures to the press by Fusion GPS and/or its clients, it is now undisputed that Fusion was retained by the law firm Perkins Coie, which was acting on behalf of DNC and the Clinton campaign, to conduct opposition research on then-candidate Trump, and that in the course of that engagement Fusion GPS contracted with Orbis Business Intelligence Ltd. to produce the "Steele Dossier," which primarily relates to Mr. Trump's alleged connections with Russians and was based in substantial part on information allegedly derived from Russian governmental, intelligence, and other sources.

21. Similarly, based on public reporting, it is now undisputed that Fusion GPS was retained by the law firm Baker Hostetler to provide litigation support in the *Prevezon* matter, and engaged in advocacy opposing the Global Magnitsky Act. Such advocacy is consistent with the position articulated by, and possibly directed by, the Kremlin, and involved numerous individuals who participated in a meeting at Trump Tower—the ostensible purpose of which was "provide the Trump campaign with some official documents and information that would incriminate Hillary and her dealings with Russia."—that is a key focus of the Committee's investigation.

22. In light of this established pattern of law firms retaining Fusion GPS on behalf of publicly undisclosed clients to perform Russia-related work, the Committee has a direct and compelling investigative interest in identifying other law firms that also retained Fusion GPS

during the same relevant time period so that it can pursue its investigation by making inquiries of those law firms to ascertain the nature of their involvement with Fusion GPS and its potential relationship to the subject matter of the Committee's investigation.

Researchers and Journalists

23. The Committee is aware that Fusion GPS' specialty is seeding its opposition research into news stories, a *modus operandi* highlighted by a 2011 interview with Mr. Fritsch.[13] During a conference call with Committee staff on October 19, 2017, counsel for Fusion GPS failed to offer records related to payments to journalists and/or researchers. At no point prior to October 27, 2017, did Fusion GPS proffer or concede that records related to payments to journalists and/or researchers were relevant to the Committee's investigation. However, the Initial Production—comprising records that Fusion GPS now admits are within the scope of the Committee's investigation—included records related to payments to [redacted].

24. Later, on November 1, 2017, Fusion GPS authorized the production of records of [redacted]—consistent with Fusion GPS' efforts to oppose the Act as part of its work performed for BakerHostetler. The Committee was provided with no explanation as to why these records were not previously produced.

25. Given the clear relevance of journalists and researchers to Fusion GPS's activities of relevance to the Committee's investigation, the Requested Records therefore include records

[13] http://www.mondaq.com/x/144198/Antigua+A+New+Spotlight.

related to nine payments to three additional journalists and/or researchers who have reported or written on matters within the scope of the Committee's investigation:

[redacted]

Media Organizations

26. On October 27, 2017, Beacon acknowledged that "during the 2016 election cycle we retained Fusion GPS to provide research on multiple candidates in the Republican presidential primary," including Donald Trump. However, notwithstanding numerous public reports linking the Republican funder of Fusion GPS' anti-Trump research to the dossier,[17] the Initial Production did not include any records related to Beacon. [redacted]. The Committee has a clear investigative interest in scrutinizing Beacon's public claims regarding its relationship with Fusion GPS, including unredacted transaction information associated with Beacon, which has

[redacted]

[17] http://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html

expressly consented to Defendant Bank producing such records to the Committee.

27. As Mr. Steele has acknowledged in other dossier-related litigation, in addition to sharing memos comprising the dossier with *Mother Jones*, in fall 2016 he met with at least five major media outlets at Fusion GPS' direction.[18] Those outlets included *Yahoo News*, which on September 23, 2016, reported purported meetings between Trump campaign adviser Carter Page and specified high-ranking Russian officials, attributed to a single "well-placed Western intelligence source."[19] Substantively similar allegations were contained in the dossier. Given Fusion GPS' demonstrated pattern of dossier-related engagement with media outlets, the Requested Records include records related to 12 payments from [redacted]

[redacted] *Firms*

28. The Requested Records include 19 records associated with payments from two [redacted] firms. Based on public reporting, the Committee has formed a reasonable belief that such transactions are relevant to the Committee's investigation.

29. The Committee has information suggesting that Business A [redacted] has long [redacted] Since the publicly-announced parameters of the Committee's investigation include "links between Russia and individuals associated with political campaigns or any other U.S. Persons," these

[18] https://assets.documentcloud.org/documents/3892131/Trump-Dossier-Suit.pdf (see p. 8).

[19] https://www.yahoo.com/news/u-s-intel-officials-probe-ties-between-trump-adviser-and-kremlin-175046002.html.

[redacted]

alleged communications are within the scope of the Committee's investigation. In addition, since January 2017, Business A [redacted] The Trump campaign's and Administration's policy toward [redacted] including allegations regarding such policy contained in the dossier, is similarly within the scope of the Committee's investigation.[22]

30. The Committee also has information that Business B [redacted] has long represented a variety of interests, including [redacted] The "Steele Dossier" directly implicates [redacted] in potential collusion between the Trump campaign and Russia; specifically, it alleges that [redacted]

Bank Records/Metadata

31. The Requested Records also included metadata associated with the 112 identified transactions. Specifically, the Committee learned that Defendant Bank utilizes [redacted], and [redacted]

[22] https://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=220 ("Also, according to Steele's Russian sources, the Trump campaign is offered documents damaging to Hillary Clinton, which the Russians would publish through an outlet that gives them deniability, like Wikileaks. The hacked documents would be in exchange for a Trump Administration policy that de-emphasizes Russia's invasion of Ukraine and instead focuses on criticizing NATO countries for not paying their fare share – policies which, even as recently as the President's meeting last week with Angela Merkel, have now presciently come to pass.").

[redacted]

requested records relating to the 112 transactions from this [redacted] system.[24] These records provide important details about the name and location of the financial institutions utilized by Fusion GPS' counterparties. The Committee understands that these records belong to Defendant Bank, and that banks maintain these records for, among other reasons, FinCEN Section 314(a) screening purposes.[25]

Communications with Fusion GPS after Initial Production

32. On November 1, 2017, counsel for Fusion GPS indicated that it intended to object to the Committee's request for additional documents on the ground that, with the exception of the records related to [redacted] the newly Requested Records "are not pertinent to any question under inquiry and represent the majority of the records that were not produced to the Committee."

33. On November, 3, 2017, the Committee received Defendant Bank's First Supplemental Production, which included the following 12 Requested Records, all of which Fusion GPS had failed to disclose previously or described as not pertinent to the Committee's investigation:

[redacted]

34. At no time prior to November 3, 2017, did Fusion GPS proffer or concede that records related to payments to [redacted] were relevant to the Committee's

[redacted]

[25] *See* https://www.sec.gov/about/offices/ocie/aml2007/fincen-314afactsheet.pdf.

investigation.

35. As a result of Defendant Bank's First Supplemental Production, only 70 Requested Records remain in dispute ("Disputed Records"). The Requested Records, including the Disputed Records, reflect a tailored request, formulated based on a careful and diligent review.

36. I am aware of Fusion GPS's claim that the Requested Records constitute a majority of records reviewed by the Committee. I believe this claim to be inaccurate. The 112 transactions in the Requested Records—and particularly the 70 transactions in the Disputed Records—represent no more than a tiny fraction of the total records [redacted]. Specifically, these 70 records are individual line entries for specific transactions contained within [redacted] and [redacted]. With respect to the [redacted], the Committee is seeking only redacted copies of the [redacted] (that omit transactions not listed among the Requested Records).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Re-executed this 21st day of November 2017, in Washington, D.C.

SCOTT L. GLABE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEAN LLC d/b/a FUSION GPS 1700 Connecticut Ave., NW Suite 400 Washington, DC 20009, Plaintiff, v. DEFENDANT BANK, Defendant, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor.	Case No. 1:17-cv-02187-TSC

SECOND DECLARATION OF MARK R. STEWART

1. I currently am, and have been since February 2017, General Counsel for the House Permanent Select Committee on Intelligence ("Committee" or "HPSCI"). In this capacity, I provide legal oversight of Committee matters, including the Committee's investigation regarding the Russian active measures campaign targeting the 2016 U.S. election and the publicly announced parameters of that investigation. In addition, I advise on and interpret the Committee's rules, procedures, and practices regarding the conduct of all Committee business. The facts set forth in this Declaration are based upon my personal knowledge.

2. In the course of the Committee's investigation regarding the Russian active measures campaign targeting the 2016 U.S. election, the Committee has negotiated for and been granted access to highly classified information from various agencies within the Intelligence

Community ("IC").

3. Based in part on its review of this classified information, as well as other information in its possession, the Committee has a good faith basis to believe that the remaining records sought by the subpoena to Defendant Bank contain information relevant to the Committee's investigation. In light of this information, the Committee seeks access to the identified records held by Defendant Bank to determine whether to pursue investigative leads arising from those transactions, including whether they relate to any other entities or individuals involved in matters within the scope of the Committee's investigation, including entities or individuals whose connection to the investigation is based in whole or in part on classified information. However, because the key information regarding those entities and/or individuals is classified, the Committee cannot reveal that information to Defendant Bank, Plaintiff, the Court, or anyone else.
4. Pursuant to Executive Order 13526, all of the information the Committee has been granted access to has been classified by the executive branch as "Top Secret," meaning that the "unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." Exec. Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).
5. Additionally, the Top Secret information the Committee has been granted access to is considered "Sensitive Compartmented Information" ("SCI") meaning that it contains information concerning or derived from sensitive intelligence sources, methods, or analytical processes. As a result of its SCI status, access to some of the information obtained by the Committee is severely restricted. In some instances, only a select number of Committee staff have been granted access to review information contained in a specific compartment.

6. Executive Order 13526 grants the "authority to classify information originally to (a) the President and Vice President (b) agency heads and officials designated by the President and (c) United States Government officials delegated this authority …." 75 Fed. Reg. at 708. Accordingly, the Committee does not have the authority to classify documents and, as such, is not the "classifying authority" of any classified information. The classified information obtained by the Committee and relevant to its investigation has been derived from multiple classifying authorities within the IC.
7. Executive Order 13526 provides that "[c]lassified information originating in one agency may be disseminated to another agency or U.S. entity by any agency to which it has been made available without the consent of the originating agency … unless the originating agency has determined that prior authorization is required for such dissemination …." 75 Fed. Reg. at 721. Each of the classifying authorities that has provided classified information to the Committee has determined that further dissemination requires prior authorization. As part of its negotiations with the IC for access to the classified information, the Committee has expressly agreed to abide by this requirement.
8. The Committee negotiated and executed an extremely detailed agreement with the IC requiring that all information provided be handled consistent all applicable IC procedures.
9. Clause 13 of Rule XXIII of the *Rules of the House of Representatives* for the 115th Congress provides that, "Before a Member, Delegate, Resident Commissioner, officer, or employee of the House may have access to classified information, the following oath (or affirmation) shall be executed: 'I do solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorized by the House of Representatives or in accordance with its Rules.'''

10. All Committee Members and staff have signed an "Oath for Access to Classified Information" for the 115th Congress, pursuant to Clause 13 of Rules XXIII of the *Rules of the House of Representatives*.
11. Rule 14(d) of the *Rules of Procedure for the Permanent Select Committee on Intelligence* for the 115th Congress provides that "Before any member of the Committee, or the Committee Staff, shall have access to classified information, the following oath shall be executed: 'I do solemnly swear (or affirm) that I will not disclose or cause to be disclosed any classified information received in the course of my service on the House Permanent Select Committee on Intelligence, except when authorized to do so by the Committee or the House of Representatives.'"
12. All Committee Members and staff have signed an "Oath of Access to Classified Information" for the 115th Congress, pursuant to Rule 14(d) of the Committee's *Rules of Procedure*.
13. Rule 12(b) of the *Rules of Procedure for the Permanent Select Committee on Intelligence* for the 115th Congress provides that "All Committee Staff must, before joining the Committee Staff, agree in writing, as a condition of employment, not to divulge or cause to be divulged any classified information which comes into such person's possession while member of the Committee Staff, to any person not a member of the Committee or the Committee Staff, except as authorized by the Committee in accordance with the Rules of the House and these Rules."
14. All Committee staff have executed a Non-Disclosure Agreement in accordance with Rule 12(b) which provides that "I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, either during my tenure with the HPSCI or anytime thereafter, any testimony given before the HPSCI in executive session including the name of any witness who

appeared or was called to appear before the HPSCI in executive session, the contents of any material, restricted data (as that term is defined by Title 42, United States Code, Section 2014), or information received or generated by the HPSCI that has been identified under established HPSCI security procedures, by Executive Order, by the Director of Central Intelligence (DCI), or otherwise by statute, as requiring protection from unauthorized disclosure and to which I have access during my tenure with the HPSCI staff, or any information classified pursuant to any Executive Order, by the DCI, by the DNI, or otherwise by statute, which may otherwise come into my possession during my tenure with the HPSCI Staff, to any person not a Member of the HPSCI or HPSCI staff, *for any purpose or in connection with any proceeding, judicial or otherwise*, except as authorized by the HPSCI in accordance with Section 7 of H. Res. 658, and the Rules of Procedure for the HPSCI, or in the event of the termination of the HPSCI in such a manner as may be determined by the House" (emphasis added).

15. Accordingly, the Committee is not authorized to disseminate to anyone, beyond other Members of the House, the classified information it has reviewed and that forms the basis for its good faith belief that the records sought contains information relevant to its investigation without first obtaining the authorization from the Executive Branch. *See* House Rule X.11(g)(1); 18 U.S.C. § 798. This includes Plaintiff, Defendant Bank, this Court, a Magistrate and/or Special Master appointed by this Court, or any other third party.

16. For this reason, the subpoena to Defendant Bank and the Committee's document request in the instant case cannot be narrowed by the use of search terms or contain other more specific information. To do so could cause the Committee to reveal classified information it is not authorized to disseminate.

17. Based on its own negotiations with the IC for this information, the Committee believes that not only will obtaining the necessary authorizations be time consuming and difficult, but it is very unlikely that such efforts would be successful. In any event, the substantial delay that even attempting to obtain such authorizations requires will result in substantial prejudice and harm to the Committee's investigation.

18. Rule 12 of the *Rules of Procedures For The Permanent Select Committee on Intelligence, United States House of Representatives, 115th Congress* prohibits the discussion or disclosure to the public of "any information received by the Committee in executive session," except as otherwise provided by Committee Rules or the Rules of the House of Representatives. It is the Committee's standard and consistent practice to handle any documents produced to the Committee pursuant to a subpoena as information received by the Committee in executive session. Thus, any records produced in response to the subpoena to Defendant Bank will be subject to the Committee's executive session rules.

19. The Committee does not believe the refusal of a witness to testify based on the assertion of privilege is "information received by the Committee" for the purposes of Committee Rule 12(a)(1)(B). Thus, the confidentiality obligation set forth in that Rule does not apply to such assertions.

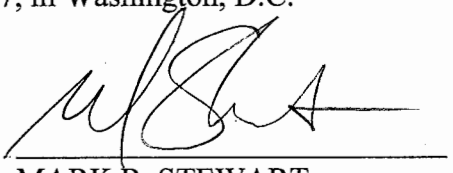
20. The identity of a subpoena recipient is not "information received by the Committee" for the purposes of Committee Rule 12(a)(1)(B). This information is released by the Committee to, among others, the recipient of the subpoena, and, as such (absent a specific Committee determination to the contrary), it is not subject to the confidentiality obligation.

21. Contrary to the Plaintiff's assertion that any bank records produced to the Committee will become public, it should be noted that any records Defendant Bank produces to the

Committee pursuant to the subpoena will be considered Executive Session information and prohibited from public disclosure as discussed in paragraph 18 unless such disclosure is directed by the full Committee during a Committee business meeting.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 7th day of November 2017, in Washington, D.C.



MARK R. STEWART