

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES HOUSE OF REPRESENTATIVES,)	
)	
	Plaintiff,)	
)	
	v.)	Case No. 14-cv-01967-RMC
)	
SYLVIA MATHEWS BURWELL,)	
in her official capacity as Secretary of the United States)	
Department of Health and Human Services, et al.,)	
)	
	Defendants.)	
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**JOINT SUBMISSION IN RESPONSE TO
THIS COURT’S JUNE 1, 2015 MINUTE ORDER**

This Court’s June 1, 2015 Minute Order directed the parties to “submit a stipulated record of the request(s), consideration, and funding decisions for Sections 1401 and 1402 of the Affordable Care Act in the FY 2014 Appropriations Bills, including any action by Defendant(s) to withdraw the funding request for Section 1402, with supporting documentation. The parties shall submit a timeline with the record.”

Plaintiff United States House of Representatives (“House”), and defendants Sylvia Mathews Burwell, the United States Department of Health and Human Services (“HHS”), Jacob J. Lew, and the United States Department of the Treasury (collectively, “Defendants”), have conferred but have been unable to agree on a single presentation of the information requested by the Court’s Minute Order. Accordingly, the House and the Defendants each respectfully submit below their respective responses to the Court’s Minute Order. The parties stipulate that the documents attached as exhibits are true and correct copies of those documents. The Defendants do not stipulate to the relevance of any particular document attached as an exhibit. The House contends that all of the documents it has attached as exhibits are relevant and responsive to the

Court's Minute Order, and contends that Defendants' exhibits 6, 7, 9 and 12 are not relevant or responsive.

The Court's Minute Order also states that "[i]f the parties wish to submit supplemental briefs with respect to the factual record and timeline, they should submit a joint proposed briefing schedule in conjunction with their submission of the record." The parties' positions on the supplemental briefing question are set forth at pages 10-11 below.

The Defendants' Response to This Court's Order of June 1

Defendants respectfully submit the following documents in response to this Court's instruction for the submission of a record. Defendants do not concede that any or all of the documents listed below are relevant to the issues underlying the pending motion to dismiss.

Defendants object to Plaintiff's submission of materials that, to Defendants' understanding, are not responsive to this Court's instructions. In particular, Defendants object to the submission of materials predating or postdating the period of time for which the Court instructed the parties to provide a record. Defendants further object to Plaintiff's characterization of the documents submitted herein, and Defendants intend to address these characterizations in the forthcoming supplemental briefing.

Date	Record Item
Apr. 10, 2013	Office of Mgmt. & Budget ("OMB"), Fiscal Year 2014 Budget of the U.S. Government (Apr. 10, 2013) (Exhibit 1).
Apr. 10, 2013	HHS, Fiscal Year 2014, Centers for Medicare & Medicaid Services, Justification of Estimates for Appropriations Committees (Apr. 10, 2013) (Exhibit 2).
May 17, 2013	FY 2014 Budget Amendments for the Departments of Agriculture, Defense, HHS, Housing and Urban Development, the Interior, Justice, State, and Transportation, as well as Other International Programs, the National Aeronautics and Space Administration, the Federal Trade Commission, and the Legislative Branch, H. Doc. No. 113-31 (May 17, 2013) (Exhibit 3).
July 11,	S. 1284, 113th Cong. (2013) (Exhibit 4).

2013	
July 11, 2013	S. Rep. No. 113-71, 113th Cong. (2013) (Exhibit 5).
July 25, 2013	House Appropriations Committee, Notice of Postponement of Mark-up Session for FY 2014 Labor, Health and Human Services, and Education Appropriations Bill (July 25, 2013) (Exhibit 6).
Sept. 12, 2013	No Subsidies Without Verification Act, H.R. 2775, 113th Cong. (2013) (as reported by the House) (Exhibit 7).
Oct. 17, 2013	Continuing Appropriations Act, 2014, H.R. 2775, Pub. L. No. 113-46, 127 Stat. 558 (2013) (Exhibit 8).
Jan. 1, 2014	Letter of the Hon. Kathleen Sebelius to the Hon. Joseph R. Biden, Jr. (Jan. 1, 2014), attaching Report on Verification of Household Income and Other Qualifications for the Provision of Affordable Care Act Premium Tax Credits and Cost-Sharing Reductions (Jan. 1, 2014) (Exhibit 9).
Jan. 15, 2014	H.J. Res. 106, Pub. L. No. 113-73, 127 Stat. 559 (2014) (Exhibit 10).
Jan. 17, 2014	Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014) (Exhibit 11).
Mar. 4, 2014	OMB, Fiscal Year 2015 Budget of the U.S. Government (Mar. 4, 2014) (Exhibit 12). ¹

¹ At oral argument on the defendants' motion to dismiss, counsel for the defendants stated that "[t]here was initially a request [for a line item designating funds under Section 1402] and that request was later withdrawn because the administration took a second look and realized that there were principles of appropriations law that made the request unnecessary." Tr. of Oral Arg. at 23. The reference of a withdrawal is to OMB's submission of the Fiscal Year 2015 Budget, which did not request a similar line item. Defendants' counsel did not intend to suggest that there was a separate formal withdrawal document, and apologizes for being unclear on that point.

The House’s Timeline and Factual Submission

Over the House’s objection, Defendants have insisted on filing with the Court all 12 of their exhibits in full; those exhibits total nearly 5,000 pages, even though only a miniscule fraction of those pages are relevant to this matter. Counsel for the House offered to participate with Defendants’ counsel in a conference call with chambers to obtain clarification from the Court on this issue, but Defendants’ counsel twice declined. Accordingly, the House is filing its 14 exhibits (denominated A-N) separately. The House’s separately filed exhibits include only the pages of each document that actually are relevant to this matter. For the Court’s convenience, the House has included hyperlinks to full documents at footnote 3.

Date	Event and Documentation
March 23, 2010	<p>The President signs into law the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (“ACA”).</p> <p>Section 1401(a) of the ACA authorizes refundable tax credits to be paid for qualified individuals to reduce the cost of their health insurance premiums (the “Section 1401 Refundable Tax Credit Program”). It does this by amending the Internal Revenue Code to add a new section 36B to the Code.</p> <p>Section 1401(d)(1) of the ACA provides funding for the Section 1401 Refundable Tax Credit Program by amending 31 U.S.C. § 1324(b)(2). Section 1324(a) of title 31 provides that “[n]ecessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law,” while section 1324(b), as amended, provides that “[d]isbursements may be made from the appropriation made by this section only for – (1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the Internal Revenue Code . . . [including] section . . . 36B . . . of such Code”</p> <p>ACA Section 1402 requires health insurance companies that offer qualified health plans through the ACA to provide specified cost-sharing reductions to certain beneficiaries. ACA Section 1412(c)(3) authorizes, but does not appropriate, payments to such insurance companies to offset the costs they may incur in providing such cost-sharing reductions to beneficiaries (the “Section 1402 Offset Program”).</p> <p>The ACA does not amend 31 U.S.C. § 1324 to provide funding for the Section 1402 Offset Program.</p>

April 10, 2013	<p>The Administration submits its Fiscal Year 2014 budget to Congress. <i>See</i> Ex. A.</p> <p>In its FY 2014 Budget, the Administration requests an annual appropriation for the Section 1402 Offset Program. Specifically, in the section of the budget dealing with requested appropriations for the Centers for Medicare and Medicaid Services (“CMS”), an agency within HHS, the Administration requests, “[f]or carrying out . . . sections 1402 and 1412 of the [ACA], such sums as necessary,” and, “[f]or carrying out . . . such sections in the first quarter of fiscal year 2015[,] . . . \$1,420,000,000.”</p> <p>In its FY 2014 Budget, the Administration does not request an annual appropriation for the Section 1401 Refundable Tax Credit Program.</p> <p><i>Ex. A: Office of Mgmt. & Budget (“OMB”), Fiscal Year 2014 Budget of the U.S. Government, App. p. 448 (Apr. 10, 2013) (“FY 2014 Budget”).</i></p>
April 10, 2013	<p>HHS submits to Congress its justification for the appropriations requested by CMS for Fiscal Year 2014. <i>See</i> Ex. B.</p> <p>The FY 2014 CMS Justification states that CMS requires an FY 2014 appropriation for CMS’ “five annually-appropriated accounts,” including a new “annually-appropriated” account for the 1402 Offset Program payments beginning in FY 2014, the “Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans (Cost Sharing Reductions)” account.</p> <p>The FY 2014 CMS Justification also states that “CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014.”</p> <p>The FY 2014 CMS Justification also states that CMS needs an “annual” appropriation for Section 1402 Offset Program payments in the amount of “\$4.0 billion in the first year of [ACA Exchange] operations . . . [and] a \$1.4 billion advance appropriation for the first quarter of FY 2015 . . . to permit CMS to reimburse [certain insurance] issuers.”</p> <p><i>Ex. B: HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees, pp. 2, 4, 7, 183-84 (“FY 2014 CMS Justification”).</i></p>
May 17, 2013	<p>Pursuant to Title X of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§ 681-88), and OMB Circular No. A-11, Part 1: General Information, § 22; Part 3: Selected Actions Following Transmittal of the Budget, §§ 110, 112, the Administration submits to Congress amendments to its FY 2014 Budget. <i>See</i> Ex. C.</p> <p>None of the FY 2014 Budget Amendments withdraw or otherwise concern the Administration’s request for an annual appropriation for the Section 1402 Offset Program.</p>

	<p><i>Ex. C: Ltr. from President Barack Obama to the Honorable John Boehner, Speaker of the U.S. House of Representatives (May 17, 2013), attaching Ltr. from Sylvia M. Burwell, Dir., OMB, to the President (May 16, 2013), enclosing amendments to FY 2014 Budget for the Departments of Agriculture, Defense, HHS, Housing and Urban Development, the Interior, Justice, State, and Transportation, as well as Other International Programs, the National Aeronautics and Space Administration, the Federal Trade Commission, and the Legislative Branch, H. Doc. No. 113-31 (“FY 2014 Budget Amendments”).</i></p>
<p>May 20, 2013</p>	<p>The Office of Management and Budget (“OMB”) issues its FY 2014 Sequestration Report. <i>See</i> Ex. D.</p> <p>The OMB FY 2014 Sequestration Report estimates that Section 1402 Offset Program payments to insurers for Fiscal Year 2014 will be \$3.978 billion, and states that such payments are subject to sequestration in the amount of \$286 million.</p> <p>The OMB FY 2014 Sequestration Report references Treasury account no. 009-38-0126, under “Centers for Medicare and Medicaid Services,” as the account established to make Section 1402 Offset Program payments to insurers.</p> <p>The OMB FY 2014 Sequestration Report does not reference the Section 1401 Refundable Tax Credit Program).²</p>

² The context for OMB’s FY 2014 Sequestration Report is as follows:

In 1985, Congress enacted, and the President signed into law, the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (“Gramm-Rudman-Hollings Act”). Section 255(d) of the Gramm-Rudman-Hollings Act provides that “[p]ayments to individuals made pursuant to provisions of the Internal Revenue Code of 1986 establishing refundable tax credits shall be exempt from reduction under any order issued under this part.”

In 2011, Congress enacted, and the President signed into law, the Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011) (“Budget Control Act”). Section 302 of the Budget Control Act amends the Gramm-Rudman-Hollings Act by adding a new section 251A, which creates a process of automatic, largely across-the-board spending reductions (“sequestration rules”). Certain payments are exempt from the sequestration rules. In particular, new section 251A(8) of the Gramm-Rudman-Hollings Act provides that “[w]hen implementing the sequestration of direct spending pursuant to this paragraph, OMB shall follow . . . the exemptions specified in section 255” The “exemptions specified in section 255” include “payments to individuals made pursuant to provisions of the Internal Revenue Code of 1986 establishing refundable tax credits,” the permanent appropriation for which is provided by 31 U.S.C. § 1324(b).

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	<i>Ex. D: OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version, App. p. 23 (May 20, 2013 (“OMB FY 2014 Sequestration Report”).</i>
July 11, 2013	<p>The Committee on Appropriations of the United States Senate adopts S. 1284, a bill to make appropriations for the Departments of Labor, HHS, and Education, and related agencies for Fiscal Year 2014. <i>See Ex. E.</i></p> <p>S. 1284 does not contain an appropriation to fund the Section 1402 Offset Program for Fiscal Year 2014.</p> <p>The Senate Report, which accompanies S. 1284, states that the “[t]he Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA.”</p> <p><i>Ex. E: S. Rep. No. 113-71, 113th Cong., pp. 123, 225, 251 (2013) (“Senate Report”).</i></p>
October 16, 2013	The Senate adopts H.R. 2775, the Continuing Appropriations Act, 2014. <i>See</i> 159 Cong. Rec. S7532 (Oct. 16, 2013).
October 16, 2013	The House adopts H.R. 2775, the Continuing Appropriations Act, 2014. <i>See</i> 159 Cong. Rec. H6625-H6626 (Oct. 16, 2013).
October 17, 2013	<p>The President signs into law the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013), which continues appropriations through January 15, 2014.</p> <p>The Continuing Appropriations Act, 2014, does not contain an appropriation to fund the Section 1402 Offset Program for Fiscal Year 2014, or any part thereof.</p> <p><i>Ex. F: Pub. L. No. 113-46 (first page).</i></p>
January 14, 2014	The House adopts H.J. Res. 106. <i>See</i> 160 Cong. Rec. H198 (Jan. 14, 2014).

In short, payments properly made under 31 U.S.C. § 1324(b) are exempt from sequestration, and thus OMB’s statement that Section 1402 Offset Program payments to insurers are subject to sequestration is an acknowledgement that the permanent appropriation codified at 31 U.S.C. § 1324 cannot be the funding source for such payments.

January 15, 2014	The Senate adopts H.J. Res. 106. <i>See</i> 160 Cong. Rec. S344 (Jan. 15, 2014).
January 15, 2014	The President signs into law H.J. Res. 106, Pub. L. No. 113-73, 128 Stat. 3 (2014), which continues appropriations through January 18, 2014. Pub. L. No. 113-73 does not contain an appropriation to fund the Section 1402 Offset Program for Fiscal Year 2014, or any part thereof. <i>Ex. G: Pub. L. No. 113-73.</i>
January 15, 2014	The House adopts H.R. 3547, the Consolidated Appropriations Act, 2014. <i>See</i> 160 Cong. Rec. H451-H452 (Jan. 15, 2014).
January 16, 2014	The Senate adopts H.R. 3547, the Consolidated Appropriations Act, 2014. <i>See</i> 160 Cong. Rec. S425 (Jan. 16, 2014).
January 17, 2014	The President signs into law the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014). The Consolidated and Further Continuing Appropriations Act, 2014, does not contain an appropriation to fund the Section 1402 Offset Program for Fiscal Year 2014 or any part thereof. <i>Ex. H: Pub. L. No. 113-76 (first page).</i>
January 2014	Defendants begin making Section 1402 Offset Program payments to insurers. <i>See</i> Exs. I, J. <i>Ex. I: Joint HHS OIG/TIGTA Report: Review of the Accounting Structure Used for the Administration of Premium Tax Credits, p. 18 (Mar. 31, 2015).</i> <i>Ex. J: CMS, March Marketplace Payment Processing Cycle: Enrollment & Payment Data Reporting and Restatement, p. 9 (Feb. 12, 2014).</i>
March 10, 2014	OMB issues its FY 2015 Sequestration Report. <i>See</i> Ex. K. The OMB FY 2015 Sequestration Report makes no mention of Treasury account No. 009-38-0126 – described in the OMB FY 2014 Sequestration Report as the account established to make Section 1402 Offset Program payments to insurers – and it provides no explanation for the omission. <i>Ex. K: OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2015, App., p. 6 (March 10, 2014) (“OMB FY 2015 Sequestration Report”).</i>
May 16, 2014	Senators Ted Cruz and Michael Lee ask defendant Burwell – then the Director of OMB and the nominee to be Secretary of HHS – why the Administration had

	<p>changed its position on the question of whether Section 1402 Offset Program payments were subject to the mandatory sequestration rules. <i>See</i> Ex. L.</p> <p><i>Ex. L: Ltr. from Senators Ted Cruz and Michael S. Lee, to Sylvia M. Burwell, Dir., OMB, p. 2 (May 16, 2014).</i></p>
May 21, 2014	<p>Defendant Burwell responds to Senators Cruz’s and Lee’s May 16, 2014 letter. <i>See</i> Ex. M.</p> <p>Burwell states that no payments would be made from the Treasury account established for the purpose of making Section 1402 Offset Program payments to insurers (account no. 009-38-0126), and that Section 1402 Offset Program payments instead “will be paid out of the same account [account no. 015-45-0949] from which the [Section 1401 Refundable Tax Credit Program payments] are paid,” an explanation she justified on grounds of “efficiency.”</p> <p><i>Ex. M: Ltr. from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, Responses, p. 4 (May 21, 2014).</i></p>
May 28, 2015	<p>Defendants’ counsel represents to the Court that the Administration withdrew its request for an annual appropriation for the Section 1402 Offset Program for FY 2014. <i>See</i> Ex. N.</p> <p>None of the Administration’s FY 2014 Budget Amendments withdrew that request, and the House has no documentation or other evidence of any such withdrawal.</p> <p><i>Ex. N: Tr. of Oral Argument, p. 23 (May 28, 2015).</i>³</p>

³ The relevant hyperlinks are as follows:

The FY 2014 Budget is available online at <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>, and <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/appendix.pdf>.

The FY 2014 CMS Justification is available online at <http://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2014-CJ-Final.pdf>.

OMB Circular No. A-11 is available online at https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2013.pdf.

The OMB FY 2014 Sequestration Report is available online at https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy14_preview_and_joint_committee_reductions_reports_05202013.pdf.

S. 1284 is available online at <https://www.congress.gov/113/bills/s1284/BILLS-113s1284pcs.pdf>.

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Supplemental Briefing

The parties' positions on the supplemental briefing question are as follows:

The Defendants: Defendants intend to provide the Court with supplemental briefing that would address the documents submitted herein and the import of those documents with respect to the Defendants' pending motion to dismiss. Defendants believe that briefing on the schedule proposed below, with each party to file an initial brief of no more than 15 pages and each party to file a reply brief of no more than 8 pages, would be adequate to provide the Court with the relevant context. Defendants respectfully inform the Court that Plaintiff's proposed schedule, calling for the filing of reply briefs by July 10, 2015, would not provide Defendants adequate time for them to prepare a reply brief that would be of the most assistance to the Court.

Accordingly, Defendants respectfully propose that the Court adopt the following schedule:

1. On or before July 1, 2015, Defendants shall submit a supplemental memorandum of no more than 15 pages in length in support of their pending motion to dismiss. On or before the same date, Plaintiff shall submit a supplemental memorandum of no more than 15 pages in length in opposition to the pending motion to dismiss.

The Senate Report is available online at <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt71/pdf/CRPT-113srpt71.pdf>.

The Consolidated Appropriations Act, 2014, is available online at <https://www.congress.gov/113/plaws/publ76/PLAW-113publ76.pdf>.

The Joint HHS OIG/TIGTA Report is available online at <http://www.treasury.gov/tigta/auditreports/2015reports/201513029fr.pdf>.

The CMS, March Marketplace Payment Processing Cycle document is available online at https://www.regtap.info/uploads/library/FM_MPP_Slides_021214_5CR_021214.pdf.

The OMB FY 2015 Sequestration Report is available online at https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/sequestration_order_report_march2014.pdf.

2. On or before July 17, 2015, Defendants shall submit a supplemental reply memorandum of no more than 8 pages in length in support of their pending motion to dismiss. On or before the same date, Plaintiff shall submit a supplemental reply memorandum of no more than 8 pages in length in opposition to the pending motion to dismiss.

The House: The House believes supplemental briefing is unnecessary in light of (i) the information presented in this Joint Submission, in particular, the fact that Defendants now acknowledge that the Administration's request for an annual appropriation for the Section 1402 Offset Program for FY 2014 was not withdrawn, and (ii) the fact that Defendants already have filed two briefs in support of their motion to dismiss.

If the Court concludes that supplemental briefing is necessary, the House proposes the following briefing schedule:

1. On or before, July 1, 2015, the House and Defendants, if they choose, each may submit a supplemental memorandum of no more than 12 pages in length. All supplemental memoranda shall be limited to matters raised by this Joint Submission.
2. On or before, July 10, 2015, the House and Defendants, if they choose, each may submit a supplemental response of no more than 8 pages in length to the other party's supplemental memorandum. All supplemental responses shall be limited to matters raised by the supplemental memoranda.

Respectfully submitted,

JONATHAN TURLEY
D.C. Bar No. 417674

2000 H Street, N.W.
Washington, D.C. 20052
(202) 285-8163
jturley@law.gwu.edu

/s/ Kerry W. Kircher

KERRY W. KIRCHER, General Counsel

D.C. Bar No. 386816

WILLIAM PITTARD, Deputy General Counsel

D.C. Bar No. 482949

TODD B. TATELMAN, Senior Assistant Counsel

ELENI M. ROUMEL, Assistant Counsel

ISAAC B. ROSENBERG, Assistant Counsel

D.C. Bar No. 998900

KIMBERLY HAMM, Assistant Counsel

D.C. Bar No. 1020989

OFFICE OF GENERAL COUNSEL

U.S. HOUSE OF REPRESENTATIVES

219 Cannon House Office Building

Washington, D.C. 20515

(202) 225-9700

Kerry.kircher@mail.house.gov

Counsel for Plaintiff U.S. House of Representatives

BENJAMIN C. MIZER, Acting Assistant Attorney General

KATHLEEN R. HARTNETT, Deputy Assistant Attorney
General

VINCENT H. COHEN, JR., Acting United States Attorney

JENNIFER D. RICKETTS, Director

SHEILA LIEBER, Deputy Branch Director

/s/ Joel McElvain

JOEL McELVAIN, Assistant Branch Director

U.S. Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Avenue, NW

Washington, D.C. 20530

(202) 514-2988

Joel.McElvain@usdoj.gov

Counsel for the Defendants

June 15, 2015

CERTIFICATE OF SERVICE

I certify that on June 15, 2015, I served one copy of the foregoing Joint Submission in Response to This Court's June 1, 2015 Minute Order via CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse