

ONE HUNDRED EIGHTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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March 21, 2024

Mr. Andrew D. Herman  
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1099 14th St., NW  
8th Floor West  
Washington, D.C. 20005

Re: As You Sow – Deposition of Andrew Behar

Dear Mr. Herman:

The Committee on the Judiciary is conducting oversight of the adequacy and enforcement of U.S. antitrust laws.<sup>1</sup> Of particular relevance here, the Committee has sought testimony from As You Sow's Chief Executive Officer Andrew Behar, President and Chief Counsel Danielle Fugere, Shareholder Relations Manager Gail Follansbee, Shareholder Relations Senior Coordinator Rachel Lowy, and former Energy Program Manager Lila Holzman to inform potential legislative reforms, such as whether existing civil and criminal penalties and current antitrust law enforcement efforts are sufficient to deter anticompetitive collusion in the investment industry.

We first requested on November 27, 2023, that Mr. Behar, Ms. Fugere, Ms. Follansbee, Ms. Lowy, and Ms. Holzman appear for transcribed interviews before the Committee.<sup>2</sup> On December 1, 2023, As You Sow offered to make Ms. Fugere available for a transcribed interview, representing that she was As You Sow's "most knowledgeable individual regarding the Committee's inquiry."<sup>3</sup> However, As You Sow refused to discuss whether it would agree to

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<sup>1</sup> See generally Rules of the House of Representatives R. X (2023).

<sup>2</sup> See Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Andrew Behar (Nov. 27, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Danielle Fugere (Nov. 27, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Gail Follansbee (Nov. 27, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Rachel Lowy (Nov. 27, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Lila Holzman (Nov. 27, 2023).

<sup>3</sup> E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Dec. 1, 2023).

transcribed interviews for Mr. Behar, Ms. Follansbee, Ms. Lowy, and Ms. Holzman until after the Committee interviewed Ms. Fugere.<sup>4</sup>

Following extensive communication with Committee staff, the Committee conducted a transcribed interview of Ms. Fugere on January 18, 2024.<sup>5</sup> Although you had represented that Ms. Fugere was the person most knowledgeable at As You Sow, she testified that she did not know, did not remember, or did not recall the answer to questions posed to her well over one hundred times – including about matters in which she was personally involved.<sup>6</sup>

In addition, Ms. Fugere repeatedly testified that Mr. Behar was personally involved in matters directly related to the Committee’s inquiry and likely possessed knowledge and information that Ms. Fugere lacked.<sup>7</sup> Accordingly, at the conclusion of Ms. Fugere’s interview on January 18, you indicated that As You Sow would be willing to make Mr. Behar available for a transcribed interview.

However, on January 25, 2024, you reneged on this offer, requesting that the Committee “provide specific details on the topics and information it is seeking” “[b]efore making CEO Andy Behar available for a voluntary, transcribed interview,” and suggesting that providing this information “would increase the likelihood that Mr. Behar would appear voluntarily.”<sup>8</sup> On January 31, 2024, Committee staff accommodated your request on a telephone call, explaining that the Committee was interested in learning more about the work that As You Sow does, as well as about As You Sow’s efforts to identify and produce documents that are responsive to the Committee’s document requests and subpoena.<sup>9</sup> In particular, Committee staff emphasized that it was necessary to obtain testimony from Mr. Behar regarding the many topics as to which Ms. Fugere claimed to lack knowledge or about which she suggested that Mr. Behar would have information.<sup>10</sup> During that conversation, you also acknowledged that the scope of Mr. Behar’s transcribed interview was not limited, and that the Committee was free to ask Mr. Behar about any topic that it wished.<sup>11</sup>

Subsequently, after the Committee provided you with the information that you requested, on February 2, 2024, you advised that “Mr. Behar is available to sit for a transcribed interview on March 12.”<sup>12</sup> After resolving a scheduling conflict, on February 7, 2024, the Committee accepted and confirmed your offered date for Mr. Behar’s transcribed interview.<sup>13</sup> However, the

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<sup>4</sup> See E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Dec. 11, 2023); E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Dec. 15, 2023); E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Dec. 26, 2023).

<sup>5</sup> See Transcribed Interview with Danielle Fugere, President & Chief Counsel, As You Sow (Jan. 18, 2024) (on file with H. Comm. on the Judiciary).

<sup>6</sup> See *id.*

<sup>7</sup> See, e.g., *id.* at 46:17–47:5, 150:22–151:2, 189:2–5, 194:12–17, 203:12–15, 203:22–25, 204:11–14, 205:23–24.

<sup>8</sup> E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Jan. 25, 2024).

<sup>9</sup> Telephone call between H. Comm. on the Judiciary Staff and Andrew D. Herman (Jan. 31, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Feb. 2, 2024).

<sup>13</sup> See E-mail from H. Comm. on the Judiciary Staff to Andrew D. Herman (Feb. 7, 2024).

next day, you again reneged, stating without further explanation that, “[i]n the interim, we have had a conflict on that date.”<sup>14</sup>

On February 9, 2024, you confirmed that Mr. Behar instead would appear for a transcribed interview on March 28, 2024 – four months after the Committee originally requested his transcribed interview.<sup>15</sup> However, on March 14, 2024 – more than a month later, and just two weeks before the agreed-upon date for Mr. Behar’s transcribed interview – you once again reneged upon your commitment to voluntarily produce Mr. Behar for a transcribed interview. In attempting to justify your reversal, you improperly conflated the Committee’s request for a transcribed interview with Mr. Behar with As You Sow’s lackluster response to the subpoena for documents, which the Committee detailed in a letter to you dated February 29, 2024. Specifically, you wrote:

In light of the Committee’s February 29 Letter threatening the initiation of contempt proceedings and the Committee’s use of As You Sow’s good faith cooperation against the organization, As You Sow is compelled to impose conditions on Mr. Behar’s agreement to voluntarily appear at a transcribed interview on March 28, 2024. Specifically, Mr. Behar will agree to submit to a transcribed interview consisting of no more than two hours of questioning from Majority counsel and addressing only those topics posed by Majority counsel to Ms. Fugere that she was unable to answer. Mr. Behar will not address questions relating to As You Sow’s responses to the Committee’s letters or subpoena (which are, in any case, not pertinent to the investigation’s legislative purpose). Please advise As You Sow no later than March 21, 2024, whether these conditions are acceptable to the Committee.<sup>[16]</sup>

The Committee’s February 29 letter warned As You Sow that it may be held in contempt of Congress for its continued failure to comply with the Committee’s November 1, 2023, document subpoena.<sup>17</sup> As noted in that letter, As You Sow has produced only 958 documents in response to the Committee’s subpoena.<sup>18</sup> Further, “As You Sow does not appear to have produced a single e-mail in response to the subpoena” – despite “responsive e-mail communications from As You Sow having been produced to the Committee by other parties to this investigation.” The February 29 letter did not concern Mr. Behar’s voluntary transcribed interview with the Committee, which is a request wholly separate from the subpoena for documents. The Committee is not persuaded by your attempt to conflate its requests for documents and testimony. The Committee is entitled to the information that it has requested and it will proceed to use all means at its disposal to obtain these documents and this testimony as necessary.

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<sup>14</sup> E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Feb. 8, 2024).

<sup>15</sup> See E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Feb. 9, 2024).

<sup>16</sup> Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Mar. 14, 2024).

<sup>17</sup> See Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Andrew Behar (Feb. 29, 2024).

<sup>18</sup> See *id.*

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We have repeatedly met and conferred with you regarding Mr. Behar's testimony, including by e-mail on December 4, December 7, December 11, December 12, December 14, December 15, December 21, and December 26, 2023, and January 2, January 23, January 24, January 25, January 29, January 30, February 2, February 7, February 8, and February 9, 2024; by telephone on January 19 and January 31, 2024; and in person on January 18, 2024. Nevertheless, As You Sow has declined to comply voluntarily with our requests for a transcribed interview of Mr. Behar, and has repeatedly reneged on its commitment to make him available. Now you have attempted to impose arbitrary and unacceptable restrictions on his transcribed interview in a manner that implies Mr. Behar will not appear voluntarily unless the Committee accedes to your demands. The Committee rejects your proposed conditions as both unreasonable and unworkable.

As You Sow's dilatory tactics, which have persisted for more than three months after our initial request for this voluntary interview, have impeded and obstructed the Committee's legislative oversight efforts. The Supreme Court has been clear that Congress has a "broad and indispensable" power "to secure needed information in order to legislate."<sup>19</sup> This power "encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them," and these are among the matters about which the Committee requires testimony.<sup>20</sup> The subpoena "concern[s] a subject on which legislation could be had"<sup>21</sup> as the Committee's oversight of the adequacy and enforcement of U.S. antitrust laws to inform potential legislative reforms falls squarely within its jurisdiction.<sup>22</sup>

Accordingly, for the reasons detailed above, please find enclosed a subpoena compelling Mr. Behar to appear for a deposition on March 28, 2024.

Sincerely,



Jim Jordan  
Chairman

cc: The Honorable Jerrold L. Nadler, Ranking Member  
Mr. Andrew Behar, Chief Executive Officer, As You Sow

Enclosure

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<sup>19</sup> *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (cleaned up).

<sup>20</sup> *Id.* (cleaned up).

<sup>21</sup> *Id.* (cleaned up).

<sup>22</sup> See Rules of the House of Representatives R. X (2023).