

and foreclosing any further attempts to seek discovery regarding the personal non-work communications of FERC employees.

BACKGROUND

I. Powhatan's Harassment of FERC Staff

This case presents a single question: whether in the summer of 2010 Powhatan violated the Federal Power Act and FERC's Anti-Manipulation Rule when it captured millions of dollars by "moving electricity around in a circle" – as Kevin Gates, one of Powhatan's owners, put it. Since even before this case was lodged, however, Powhatan has chosen not to focus on the merits of this case, but has instead sought a trial by Twitter in which FERC's civil servants, and sometimes their families, are harassed and ridiculed *ad hominem* in the public sphere.

Powhatan's campaign has included: (1) a threat to stalk FERC staff at an out of office event, (2) soliciting photographs of female FERC employees for posting to its Twitter account, (3) the repeated cyber-stalking and harassment of the family members of FERC staff, and (4) public statements comparing FERC generally, and specific FERC staff, to an alleged child trafficker and a police officer accused of shooting an unarmed black man. *See* Exhibit A.²

This targeted harassment is an established part of Powhatan's misguided attempt to litigate this case in the court of public opinion, rather than on the merits. To date, FERC has largely ignored Powhatan's public attempts at provocation, and has not brought them to the Court's attention. But it does so here to provide context for Powhatan's current attempt to invade the privacy of personal non-work email accounts of two attorneys previously assigned to this matter. Though Powhatan has the right engage in what it describes as a "battle" against

² Exhibit A is not an exhaustive compilation of Powhatan's tweets. Powhatan's owners, Kevin and Richard Gates, are prolific Twitter users, and FERC offers Exhibit A as a sample of the types of materials posted to Powhatan's Twitter account @PowhatanFundLLC.

FERC on Twitter, the Court should not permit it to abuse the tools provided in the Rules of Civil Procedure to serve ends that have nothing to do with discovery or the relevant issues in this case.

II. The Subpoenas for Mr. Tabackman's and Mr. Olson's Personal Non-Work Emails and Depositions

On October 15, 2021, Powhatan submitted a subpoena to FERC requesting the deposition of Steven Tabackman along with a search of Mr. Tabackman's personal email accounts, text messages, and social media accounts. (Exhibit B). On October 29, 2021, Powhatan submitted a subpoena containing a similar request for Thomas Olson. (Exhibit C). Mr. Olson and Mr. Tabackman are both attorneys in FERC's Office of Enforcement. Both worked on this case at various points, Mr. Olson at the inception of the investigation and Mr. Tabackman during the investigation and as counsel of record until September 2021.³

The alleged basis of Powhatan's request is a violation of FERC's Separation of Functions regulation by Mr. Tabackman in communications with Mr. Olson in a separate and unrelated case more than ten years after the facts at issue here. Consistent with longstanding Commission regulations, while an Order to Show Cause proceeding is pending before the Commission, certain members of FERC staff are designated as "decisional," meaning they are walled off from all other Commission staff so that they can provide unbiased counsel to the Commissioners voting on the matter. *See* 18 CFR § 385.2202 (FERC's Separation of Functions Regulation). Non-decisional Commission staff are not permitted to advise or participate in the Commission's decisional process, including by attempting to discuss the pending matter with decisional staff.

³ These subpoenas are not directly at issue as part of this motion. FERC provides background regarding those subpoenas, however, because they are inextricably linked with the subpoena at issue—Powhatan's subpoena to Google.

On the evening of September 17, 2021 and the morning of September 18, 2021, Mr. Tabackman, a member of decisional staff, used his personal non-work email account to send three emails to Mr. Olson, who was a member of non-decisional staff, about a then-pending proceeding against GreenHat Energy. *See generally GreenHat Energy, LLC, et al.*, FERC Dkt. IN18-9-000. These emails violated the Commission's Separation of Functions Regulation. Upon realizing the impropriety of Mr. Tabackman's communications, Mr. Olson ceased the discussion and reported the exchange to management of the Office of Enforcement. The Office of Enforcement then, consistent with Commission requirements, filed a public notice disclosing the improper communication and providing copies of the emails themselves. (Exhibit D).

While FERC strongly disagrees with the contention that the developments in *GreenHat* have any relevance in this *de novo* proceeding, FERC also voluntarily undertook several steps in response to Powhatan's subpoenas in a good-faith attempt to avoid involving the Court. First, Mr. Olson and Mr. Tabackman agreed to search their personal non-work email accounts consistent with the search terms and parameters to which Powhatan agreed during this litigation. Second, FERC produced to Powhatan sworn affidavits regarding this search and its results, along with attestations regarding Mr. Tabackman's and Mr. Olson's use of other forms of communication (*i.e.*, text messages and social media). Finally, despite the search not having produced **any** genuinely relevant emails,⁴ FERC allowed Powhatan's counsel to review physical copies of the results of the email search.⁵

⁴ A small number of documents in each attorney's personal non-work email accounts met the parties' agreed upon search criteria. However, these emails had no relevance to the case, as they were largely communications with family and friends making tangential references to the case, such as sharing news articles about the litigation.

⁵ Given the highly personal nature of some of the communications, such as emails to family members and close friends, FERC did not produce them to Powhatan. However, FERC is willing to submit them for *in camera* review should the Court wish.

III. Powhatan's Reneging of Its Agreement With FERC

The above-described steps were offered, in part, at Powhatan's behest. Powhatan represented that the combination of affidavits and document searches would resolve this matter acceptably. (Exhibit E). FERC, therefore, took the steps above as part of a good-faith attempt to accommodate Powhatan's request.

Unfortunately, after reviewing the emails, rather than rescind the subpoenas or even contact FERC, Powhatan issued a new subpoena to Google, the subpoena at issue here, for even more personal communications of opposing counsel. (Exhibit F).⁶ That subpoena is a direct violation of the parties' good-faith agreement, as it seeks to further invade FERC attorneys' privacy by seeking additional materials related to their personal non-work email accounts. This step is particularly galling given Powhatan's counsel has already seen the results of the searches of the email accounts at issue and, therefore, knows there are **no genuinely relevant documents contained therein**. This makes the Google subpoena nothing more than a brazen fishing expedition. The parties met and conferred on December 6, 2021, and Powhatan was unwilling to alter or amend its subpoena.

ARGUMENT

I. This Court Has Authority to Grant a Protective Order, which FERC Has Standing to Seek

Judges in the Eastern District of Virginia in have recognized that a party has standing to move for a protective order to challenge a subpoena to a third party. *See Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 240 n.2 (E.D. Va. 2012); *Flame S.A. Glory Wealth Shipping Pte Ltd. v. Indus. Carriers, Inc.*, No. 2:13-CV-658, 2014 WL 12551212, at *2 (E.D. Va. May 29,

⁶ For privacy purposes, FERC has redacted Mr. Tabackman's and Mr. Olson's personal non-work email addresses in both Exhibit F and in this memorandum. FERC is happy to provide an unredacted copy under seal if required for the Court's consideration.

2014) (“This Court has previously acknowledged that parties ‘have standing to challenge subpoenas duces tecum as irrelevant and overbroad under Rule 26, regardless of whether they have standing to bring a motion to quash under Rule 45.’”) (citing *Singletary v. Sterling Transp.*, 289 F.R.D. at 240 n.2); *In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, No. 3:16–MC–1, 2016 WL 1071016, at *4 (E.D. Va. Mar. 17, 2016) (“[I]t is the practice and precedent in this district that parties enjoy the right to challenge subpoenas directed at third parties on the basis of undue burden. Such practice and precedent conforms with the text of Fed. R. Civ. P. 26, which . . . does not impose any limitations prohibiting a party from raising the issue of undue burden on behalf of a third party before the court issues that undue burden order.”) (citations omitted).

FERC seeks a protective order here because the subpoena is unduly burdensome, lacks specificity, and potentially seeks to invade FERC’s privileged and protected information. In addition, FERC seeks to protect the rights of its employees to perform their jobs free from harassment. *See generally S.E.C. v. Navellier & Assoc., Inc.*, No. 17-cv-11633, 2019 WL 688164, at *2 (D. Mass. Feb. 19, 2019) (“The personal right or privilege claimed need not be weighty: parties need only have ‘some personal right or privilege in the information sought’ to have standing to challenge a subpoena to a third party.”) (citations omitted). This court is the proper venue for such a motion because the documents are being requested by a party to this litigation (Powhatan) as a part of this litigation. *Kappel v. Garris*, 2020 WL 707123, at *2 (D.S.C. 2020) (“[C]ourts generally find that a party can seek a protective order for a third party subpoena.”); *Todd v. XOOM Energy, LLC*, 2018 WL 5081156 (D. Md. 2018) (court reserved discretion as district where action is pending to control discovery and rule on Rule 45 motion,

noting that Rule 45 expressly obligates court of compliance to rule on motion but does not preclude district where action is pending from doing same).

II. Powhatan's Subpoena Harasses FERC Attorneys

Powhatan's owners Kevin and Richard Gates have longstanding personal vendettas against Mr. Tabackman and Mr. Olson for the perceived sin of doing what their jobs require. Richard Gates called the pair "bullies" in his recent deposition,⁷ and dozens of Powhatan's tweets personally target them, making a wide array of salacious allegations that, come what may in this case, will remain a mere Google search away for years to come. This subpoena is part and parcel of Powhatan's larger public relations effort, not a legitimate attempt to seek evidence relevant to its defense in this case.

Although Fed. R. Civ. P. 26(c) does not use the word "harassment," courts have consistently denied subpoenas propounded for that purpose. *See, e.g., Charleston Equities, Inc. v. Winslett*, C/A No. 3:17-137-JFA, 2018 WL 5778301, at *5 (D.S.C. Jan. 24, 2018) (denying subpoena "posed solely for purposes of harassment"). This is because Rule 45 is not intended to allow a party unfettered and unnecessary access into the personal lives of participants to a litigation. *See In re Subpoena Duces Tecum to AOL*, 550 F.Supp.2d at 612 (granting motion to quash non-party subpoena to ISP in part because subpoena seeking e-mails produced over a six-week period would likely include privileged and personal information unrelated to the underlying litigation and thus constituted an undue burden); *Papanicolas v. Project Execution & Control Consulting, LLC*, CIV.A. No. CBD-12-1579, 2015 WL 1242755, at *3 (D. Md. Mar. 17, 2015) (subpoena not permitted for highly sensitive personal records not relevant to case); *Robinson v. Quicken Loans, Inc.*, No. 3:12-CV-00981, 2012 WL 6045836, at *4 (S.D.W. Va.

⁷ See Exhibit G at 261:24-262:12.

Dec. 5, 2012) (not allowing subpoena seeking personal information based on the “potential for embarrassment or oppression”).

Courts have not hesitated to block attempts to discover the personal communications of federal prosecutors in similar civil enforcement matters. *See S.E.C. v. Ripple Labs, Inc.*, No. 20-CIV-10832-ATSN, 2021 WL 1814771, at *5 (S.D.N.Y. May 6, 2021) (disallowing a defendant’s “attempt to engage in broad discovery of the personal communications . . . of public servants . . . designed to distract the [agency] and the Court from the merits of the claims against them”). It is certain that this subpoena will cause “annoyance, embarrassment, [and] oppression” for FERC and its staff. FERC staff should not have to fear that their personal non-work email accounts are subject to subpoena by any party that the Commission – *their employer* – accuses of market manipulation, let alone disclosure to those with a history of harassment like Powhatan, Kevin Gates, and Richard Gates. Nor should FERC itself fear that its employees are subject to invasive subpoenas merely for doing their jobs. Regardless of whose name is on the subpoena, FERC has an interest in protecting its employees.

III. Powhatan’s Subpoena is Unduly Burdensome

Because it is virtually inconceivable that the Google subpoena would lead to relevant, admissible evidence, it is unduly burdensome. *Singletary*, 2012 WL 5449687 (citing *Cook v. Howard*, 2012 WL 3634451, at *6 n.7 (4th Cir. Aug. 24, 2012) (“undue burden [category] ‘encompasses situations where the subpoena seeks information irrelevant to the case’”)) (citations omitted); *In re Subpoena Duces Tecum to AOL*, 550 F.Supp.2d at 612 (granting motion to quash non-party subpoena to ISP in part because subpoena seeking e-mails produced over a six-week period would likely include privileged and personal information unrelated to the underlying litigation and thus constituted an undue burden). “It is also well-accepted in this

district that the scope limitations of Rule 26 apply to all methods for obtaining discovery, including the bases for protective orders under Rule 26(c) and the subpoena powers enumerated in Rule 45.” *In re Subpoenas for Documents Issued to Thompson McMullan*, 2016 WL 1071016, at *5. Additionally, the “party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” *Id.* (quotations and citations omitted) “Put another way, any subpoena that seeks evidence that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, or that is so overbroad that compliance with its demands will necessarily require production of irrelevant evidence, seeks evidence outside the scope of Rule 26(b)(1). Such a subpoena creates an undue burden because it necessarily imposes greater hardship than is necessary to obtain proper discovery.” *Id.*

The personal non-work email information sought is patently irrelevant to this case. As Judge Payne recently has explained, in order to be relevant, the evidence sought must “bear on any issue that is or may be in the case.” *Spendlove v. RapidCourt, LLC*, No. 3:18-CV-856, 2019 WL 7143664, at *4 (E.D. Va. Dec. 23, 2019). Despite FERC’s good-faith efforts to meet and confer on this issue, Powhatan has failed to explain how the subpoena might yield relevant, admissible evidence bearing on its defense.

First and foremost, although FERC agrees that communications breaching a decisional wall are improper, it is *impossible* for Mr. Tabackman to have had such an improper communication with Mr. Olson regarding Powhatan. That is because, in this case, those attorneys were *always on the same side* of separation-of-functions “walls.” Even if that were not the case, FERC is aware of no emails between Mr. Tabackman and Mr. Olson on their personal

non-work email accounts regarding this case.⁸ Even if such communications were to exist, they would be nothing more than run-of-the-mill messages between co-counsel, which would be protected from disclosure under FERC’s attorney-client, deliberative process, and work product privileges.⁹

Powhatan knows the information sought is irrelevant. FERC has already shown Powhatan’s counsel copies of any emails contained in Mr. Olson or Mr. Tabackman’s personal non-work email accounts meeting the parties’ agreed search criteria. All of the emails are entirely non-substantive personal communications, such as forwarding a news article about the case to a friend or family member. Powhatan’s request is, therefore, necessarily an attempt to gain access to irrelevant emails—namely, the personal non-work communications that did not hit on Powhatan’s own search criteria. Powhatan has no legitimate need for further information from Google about emails having no possible bearing on the triable issues in this matter.

Powhatan’s counsel has suggested that delving into the personal non-work communications of FERC’s employees could show bias. Aside from being entirely speculative

⁸ No emails between Mr. Olson and Mr. Tabackman hit on the search terms agreed to by Powhatan.

⁹ To be clear, FERC’s argument is that, first and foremost, the communications are irrelevant and therefore not discoverable. Courts routinely hold that in civil enforcement actions such as this that internal agency communications are not relevant. *See Ripple Labs*, 2021 WL 1814771, at *5. As such, FERC has not produced a privilege log regarding these communications. *See Fed. R. Civ. P. 26(b)(5)(A)*; *Fed. R. Civ. P. 26(b) Advisory Committee’s note to 1993 amendment* (noting that a party need not provide a privilege log (in any form) for documents that it believes in good faith not to be “otherwise discoverable,” *e.g.*, that the party believes in good faith to be irrelevant, to impose undue production burdens, or not to be proportional to the needs of the case).

and unsupported as a factual matter,¹⁰ Powhatan has never alleged selective prosecution or asserted any affirmative defense implicating prosecutorial bias. *See generally* Answer (ECF No. 145). More fundamentally, it is unclear how metadata— which by its nature should not include the subject or content of the underlying emails— related to communications occurring on Mr. Tabackman’s and Mr. Olson’s personal non-work email accounts could show bias.

This clear lack of relevance shows two things: (1) the protective order should be granted because the subpoena is unduly burdensome, and (2) the real justification for the subpoena is to harass FERC and its staff. *See, e.g., City of Rockford v. Mallinckrodt ARD, Inc.*, 2020 WL 11191830, at *4 n7 (N.D. Ill. May 27, 2020) (“[w]hile this Court is quashing the subpoena because it is overbroad on its face, the Court notes that Defendants’ unsupported allegation of possible ethical violations on this record in this Court’s opinion borders on harassment in violation of Rule 26(c)(1).”).

¹⁰ Powhatan must make some showing greater than a naked suggestion of bias, because “prosecutorial misconduct,” not “bias,” is the proper term for understanding whether FERC’s attorneys’ actions have been appropriate. Unlike a judge, a civil prosecutor is not a neutral finder of fact for whom “bias,” or lack of impartiality, is typically a probative term. Instead, a prosecutor is an advocate – the Supreme Court has explained that “[p]rosecutors need not be entirely ‘neutral and detached[.]’ In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. . . . [T]he strict requirements of neutrality cannot be the same [as] for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-250 (1980). Indeed, rare is the defendant who does not feel the prosecutor might be biased against him and his arguments, but for a prosecutor to exercise “bias” in a legally relevant sense, he generally must abuse his position against a protected class of individuals, such as by exercising peremptory strikes on racial grounds. With regard to Powhatan, absent having a personal financial interest in a rival company, it is difficult to understand how a civil prosecutor could be “biased” against a firm he is investigating for energy market fraud. It speaks volumes that Powhatan has failed to allege any prosecutorial misconduct, which is the relevant term and doctrine. Instead, it invokes the specter of “bias” as a talismanic, amorphous scare term to justify any discovery request, however speculative and irrelevant. The law requires more.

IV. Powhatan’s Subpoena Potentially Attempts to Invade Privileged and Protected Communications

Mr. Olson and Mr. Tabackman are not only both FERC attorneys, but they are both FERC attorneys who worked on this case. While Powhatan’s subpoena does not expressly seek privileged communications or attorney work product, it does seek “[a]ll documents” concerning the metadata contained in emails in Mr. Tabackman’s and Mr. Olson’s. Courts have held that such a request potentially implicates the content of the emails. *See, e.g., Obodai v. Indeed, Inc.*, No. 13–80027–MISC EMC (KAW), 2013 WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013) (subpoena to third-party seeking “All documents” pertaining to subscriber information or email metadata was overbroad as it risked disclosing associated email content protected from disclosure under the SCA).

Accordingly, to the extent the subpoena seeks anything greater than metadata, a possible intent of the subpoena is to “nibble around the edges” of FERC’s privileged and protected communications regarding the case. Courts in the Fourth Circuit impose a nearly insuperable bar when attempting to obtain opposing counsel’s communications – one Powhatan cannot possibly meet here. *See Allen v. Brown Advisory, LLC*, Civ. No. 3:20-MC-00008, 2020 WL 5603760, at *2 (W.D. Va. Sept. 17, 2020) (party attempting to subpoena documents from opposing counsel must show: “(1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case”) (citations omitted).

To be clear– there is nothing improper about two attorneys working on the same case communicating with each other. And, if those communications were about the case, they are privileged or protected regardless of the medium on which they took place. If those communications are not about the case, then they are not possibly relevant, making the subpoena

unduly burdensome. It would not be at all surprising or strange that two coworkers who have spent over a decade of their respective careers working in the same office to have any number of personal non-work communications with one another. Powhatan’s attempt to cast such communications in a negative light is entirely unjustified.

V. Powhatan’s Subpoena Lacks Sufficient Specificity

Powhatan’s subpoena also is defective on its face for lack of specificity. Rule 45 subpoenas are not without bounds, and the issuing party must describe the material sought with specificity. *Enzo Life Scis., Inc. v. Affymetrix, Inc.*, Civ. No. DKC 05-1263, 2005 WL 8174749, at *1 (D. Md. July 11, 2005) (quashing subpoena for lack of specificity). Powhatan has not done so here.

Powhatan purports to seek: “All documents sufficient and necessary to identify the following information with respect to every email sent to or from the email account [Tabackman redacted email]@gmail.com since January 1, 2010, and the email account [Olson redacted email]@gmail.com. . . .” Powhatan’s counsel stated during the parties’ meet and confer that it merely seeks metadata regarding personal non-work emails between, on the one hand, Mr. Olson, and, on the other hand, Mr. Tabackman. Yet, the natural reading of the sentence lends itself to a far broader reading—namely, all of Mr. Tabackman’s and all of Mr. Olson’s personal non-work emails since 2010 – and Google could comply based on the broader reading.

A subpoena that lends itself to multiple equally plausible interpretations cannot possibly be sufficiently specific to meet the procedural requirements of Rule 45.

VI. The SCA Prohibits the Subpoena

Finally, Powhatan’s subpoena runs afoul of the Stored Communications Act (“SCA”), 18 U.S.C. §§ 2701–2712. The SCA prohibits service providers from knowingly disclosing the

contents of a user’s electronic communications. The SCA states that “a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.” See 18 U.S.C. § 2702(1). The “contents” of a “wire, oral, or electronic communication” is defined as “any information concerning the substance, purport, or meaning of that communication.” 18 U.S.C. § 2510(8). Civil subpoenas to a non-party for email content are not among the SCA’s exceptions. See *In re Subpoena Duces Tecum to AOL*, 550 F. Supp. 2d at 610, 611 (“Applying the clear and unambiguous language of [18 U.S.C.] § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of . . . electronic communications to State Farm because the statutory language of the Privacy Act does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.”); see also *Viacom Int’l Inc. v. Youtube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (holding that the SCA prohibits disclosure of electronic communications pursuant to a civil subpoena because the SCA “contains no exception for disclosure of such communications pursuant to civil discovery requests”); *Facebook, Inc. v. Wint*, 199 A.3d 625 (D.C. 2019) (holding the SCA broadly prohibits providers from disclosing contents of covered communications-including in response to a criminal defendant’s subpoena, and none of the nine statutory exceptions applied).

Consistent with these limitations, courts have ordered only extremely narrow productions under the SCA – generally only “non-content metadata.” See *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.*, No. C 12–80242 EJD (PSG), 2013 WL 256771, at *2 (N.D. Cal. Jan .23, 2013) (allowing “non-content metadata” to be disclosed to plaintiff pursuant to a discovery subpoena issued to Google, but quashing the subpoena to the extent it sought

terms used in Google Talk messages. “However trivial, [a term used in the body of an email communication] is exactly the sort of information the SCA sought to protect.”). Powhatan’s request for “[a]ll documents” pertaining to Mr. Tabackman’s and Mr. Olson’s personal non-work email metadata violates the SCA because strict compliance would require disclosing prohibited content data together with permitted metadata. *See, e.g., Obodai*, 2013 WL 1191267, at *3 (subpoena to third-party ISP seeking “All documents” pertaining to subscriber information or email metadata was overbroad as it risked disclosing associated email content protected from disclosure under the SCA); *see also Leonardo World Corporation v. Pegasus Solutions, Inc.*, 2015 WL 5610019, *3 (N.D. Cal. 2015) (although declining to entirely quash a subpoena issued to Google for certain non-content e-mail information, the court recognized that requests seeking “documents sufficient to show” detailed subscriber and metadata information such as email attachments, Google Talk messages, recipients, and deleted messages, “could be read to require production of content”).

At bottom, Powhatan’s proffered theory of relevance– the possibility of unearthing some undefined and unalleged “bias” against it– would require obtaining precisely what the SCA forbids.

Conclusion

For the reasons stated above, FERC requests the Court issue a protective order blocking Powhatan's subpoena and disallowing any further discovery regarding Mr. Tabackman and Mr. Olson's personal non-work emails. In addition, given the pendency of Google's intended response, FERC further requests either expedited consideration or an order temporarily staying Google's compliance pending the court's resolution of this motion.

Respectfully Submitted,

/s/ Kevin Dinan

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Commission*

Dated: December 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, I filed the foregoing motion with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

/s/ Kevin Dinan

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Commission*

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

)	
FEDERAL ENERGY)	
REGULATORY COMMISSION.)	
)	
Plaintiff,)	
)	Civil Action No. 3:15-cv-00452 (MHL)
v.)	
)	
POWHATAN ENERGY FUND LLC,)	
<i>et al.</i> ,)	
)	
Defendants.)	
)	

[PROPOSED] PROTECTIVE ORDER

Before the Court is FERC’s Motion for a Protective Order, under Fed. R. Civ. P. 26(c)(1), regarding a subpoena by Powhatan to Google. For good cause shown that motion is granted.

SO ORDERED, this the _____ day of _____, 2021.

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

)	
FEDERAL ENERGY)	
REGULATORY COMMISSION.)	
)	
Plaintiff,)	
)	Civil Action No. 3:15-cv-00452 (MHL)
v.)	
)	
POWHATAN ENERGY FUND LLC,)	
<i>et al.</i> ,)	
)	
Defendants.)	
)	

[PROPOSED] ORDER STAYING SUBPOENA COMPLIANCE

Before the Court is FERC’s Motion for a Protective Order, under Fed. R. Civ. P. 26(c)(1), regarding a subpoena by Powhatan to Google. FERC has requested Google’s compliance with Powhatan’s subpoena be stayed pending the Court’s resolution of FERC’s Motion for a Protective Order. For good cause shown Google’s compliance with Powhatan’s subpoena is stayed.

SO ORDERED, this the _____ day of _____, 2021.

EXHIBIT A

Tweets Evidencing The Stalking or Cyberstalking of FERC Staff

1. On April 17, 2017, Powhatan tweeted the following regarding a planned offsite conference for the Division of Analytics and Surveillance within the Office of Enforcement.



The screenshot shows a Twitter thread. The top tweet is from **CitizensAgainstWaste @OpposeWaste**, posted 18 hours ago. The text of the tweet is: "@PowhatanFundLLC FERC OE taking expensive boondoggles to Hyatt Chesapeake Bay in April. Totally unnecessary and a waste of industry funds." It has 1 reply, 2 retweets, and 2 likes. Below it is a reply from **Powhatan Energy Fund @PowhatanFundLLC**, posted 17 hours ago. The text of the reply is: "If true, I actually think it might be a good investment! They need to do some serious soul searching and regroup." It has 1 reply, 1 retweet, and 1 like. Below the reply is the profile information for **Powhatan Energy Fund @PowhatanFundLLC**, including a "Follow" button. The main text of the reply is: "Replied to @PowhatanFundLLC @OpposeWaste
Heard event might be from April 22-29! I might go to take pictures of OE litigators to post on Twitter! It's not that far away from here. 😊
6:17 AM - 17 Apr 2017"

2. On July 30, 2014, Powhatan tweeted requesting photos of Lauren Rosenblatt and Cathleen Colbert for the purpose of posting those photos to their Twitter feed. Ms. Rosenblatt, an attorney, and Ms. Colbert, an analyst, are former FERC staff who worked on the Commission's investigation of Powhatan.



3. In July 2014, Powhatan repeatedly tweeted about Tom Olson. Mr. Olson is a FERC attorney who worked on FERC's investigation of Powhatan.



Powhatan Energy Fund @PowhatanFundLLC · Jul 21

Where is OLSON'S LinkedIn profile? What happened? Anything WEIRD happen???



Powhatan Energy Fund @PowhatanFundLLC · Jul 21

@scottdisavino Did FERC's Tom Olson take down his LinkedIn page that had language you quoted in your JP Morgan story?
mobile.reuters.com/article/idUSBR...



Powhatan Energy Fund @PowhatanFundLLC · Jul 20

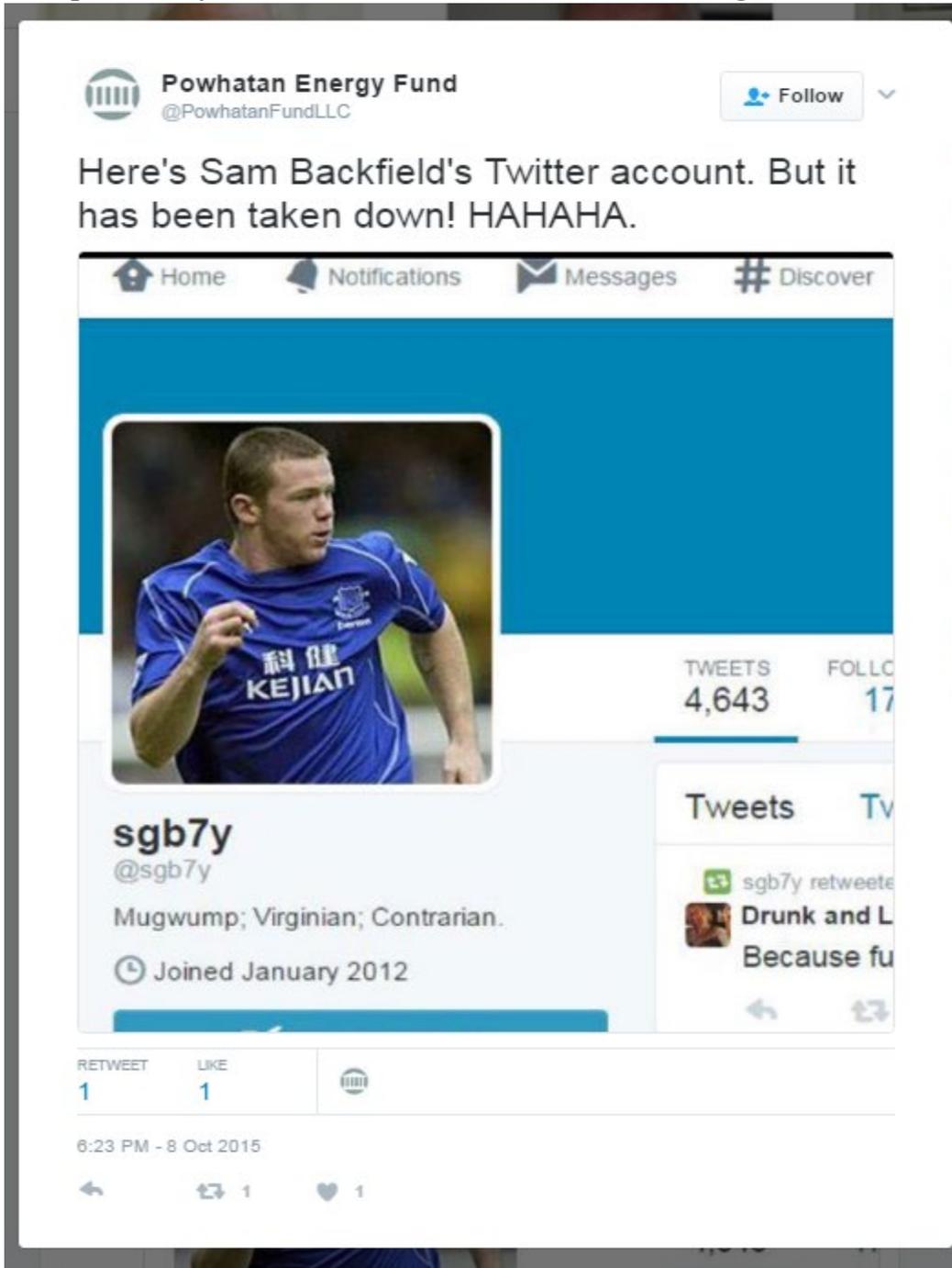
@LauraMonaEsq @WesternEnergy1 @PKayDee @NicoleFriedman
TOM OLSON'S LINKEDIN PROFILE TAKEN DOWN??? See last paragraph mobile.reuters.com/article/idUSBR...



Powhatan Energy Fund @PowhatanFundLLC · Jul 10

Tom Olson's LinkedIn profile - is it gone?!?!

4. On or about October 8, 2015, Powhatan tweeted about Samuel Backfield, who previously served as counsel of record in this litigation:



5. Multiple times through the investigation and litigation, Powhatan has tweeted regarding James Owens, who previously served as FERC's counsel in FERC v. Coaltrain.

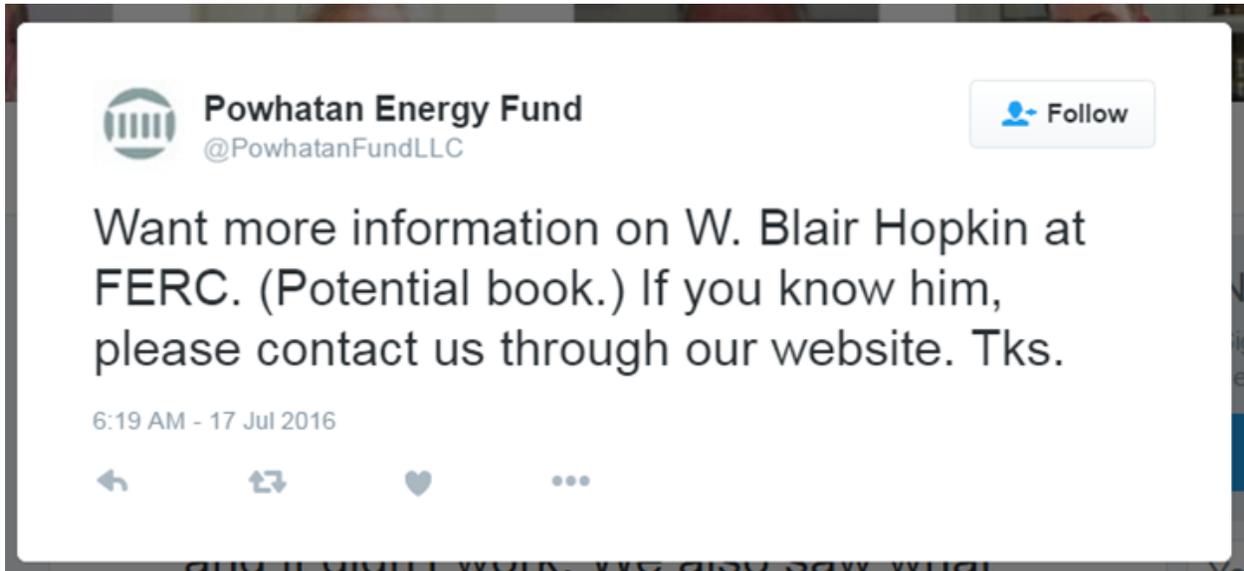


 **Powhatan Energy Fund** @PowhatanFundLLC · May 26
James Owens went to JMU for undergrad. Commonwealth of Virginia has very solid state schools across the board....

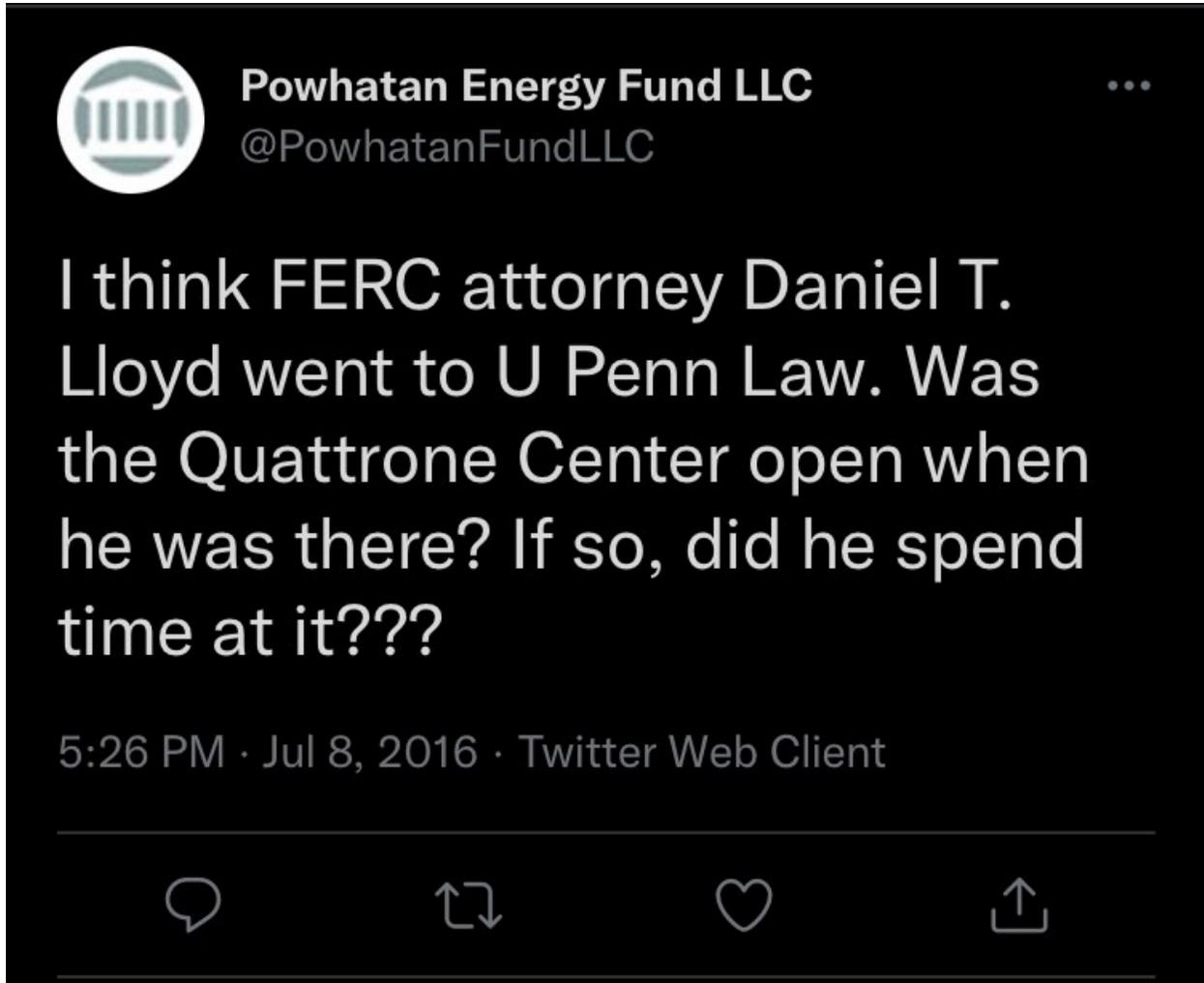
6. On April 3, 2017, Powhatan tweeted a link to a social media account maintained by Lisa Owings, imploring its followers to tweet her. Ms. Owings previously served as counsel of record in this litigation.



7. On July 17, 2016, Powhatan attempted to solicit information regarding Blair Hopkin. Mr. Hopkin is a FERC attorney who worked on the investigation of Powhatan.



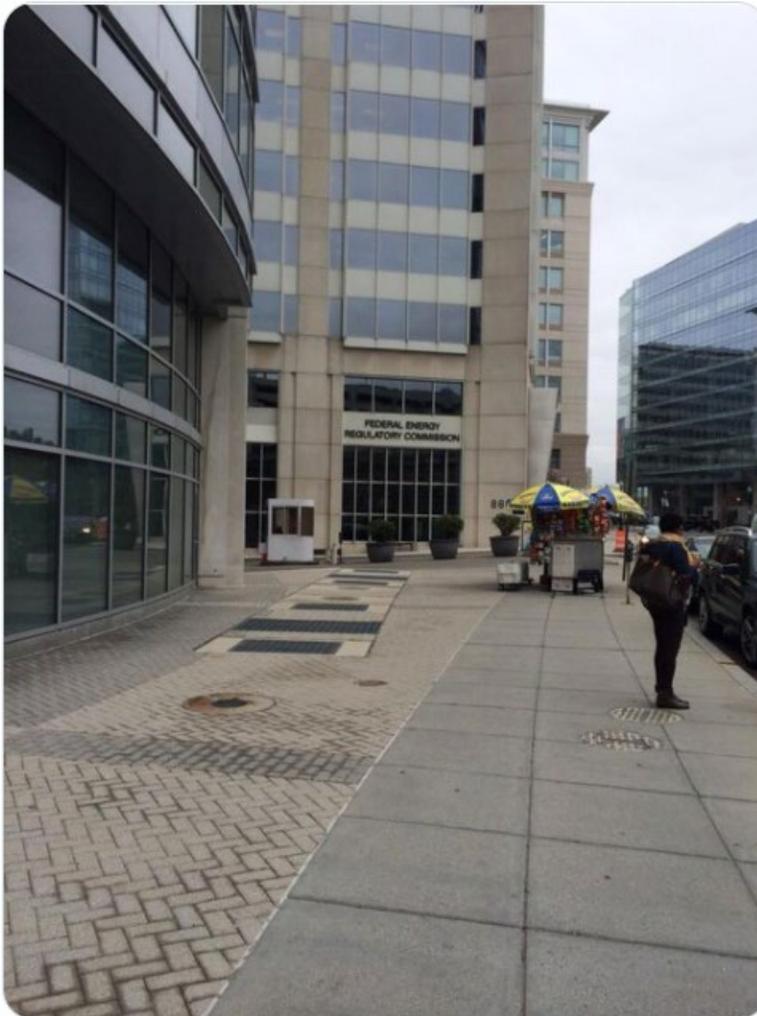
8. On July 8, 2016, Powhatan tweeted the following regarding Daniel Lloyd, one of FERC's current counsel of record in this case. The Quattrone Center is a research organization within the University of Pennsylvania Law School that researches potential improvements to the criminal justice system, including allegations of prosecutorial misconduct.



9. On April 7, 2014, Powhatan posted the accompanying photo of what appears to be one of its principals standing in front of FERC's headquarters. This tweet is one of several similar instances of Powhatan posting photographs of its principals at or near FERC's office building.



Powhatan Energy Fund LLC @PowhatanFundLLC · Apr 7, 2014
Food carts out in front of FERC office this last week. Spring is here!!!



Tweets Evidencing Ad Hominem Attacks Against FERC Staff

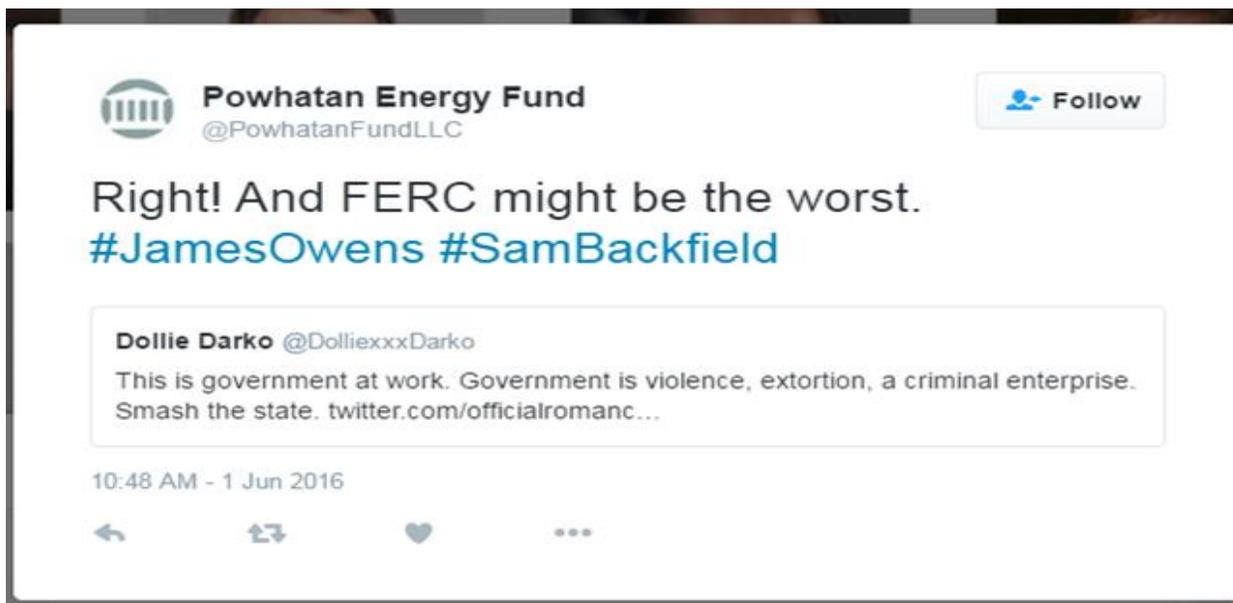
1. On November 30, 2021, Powhatan tweeted the following. Norman Bay previously served as the Director of the Office of Enforcement and the Chairman of FERC. FERC understands “WELLINGHOFF” to refer to former FERC Chairman Jon Wellinghoff. Larry Gasteiger previously served as FERC’s Chief of Staff. Max Minzer previously served as FERC’s General Counsel. The remaining named individuals are FERC attorneys who have worked on this case in some capacity



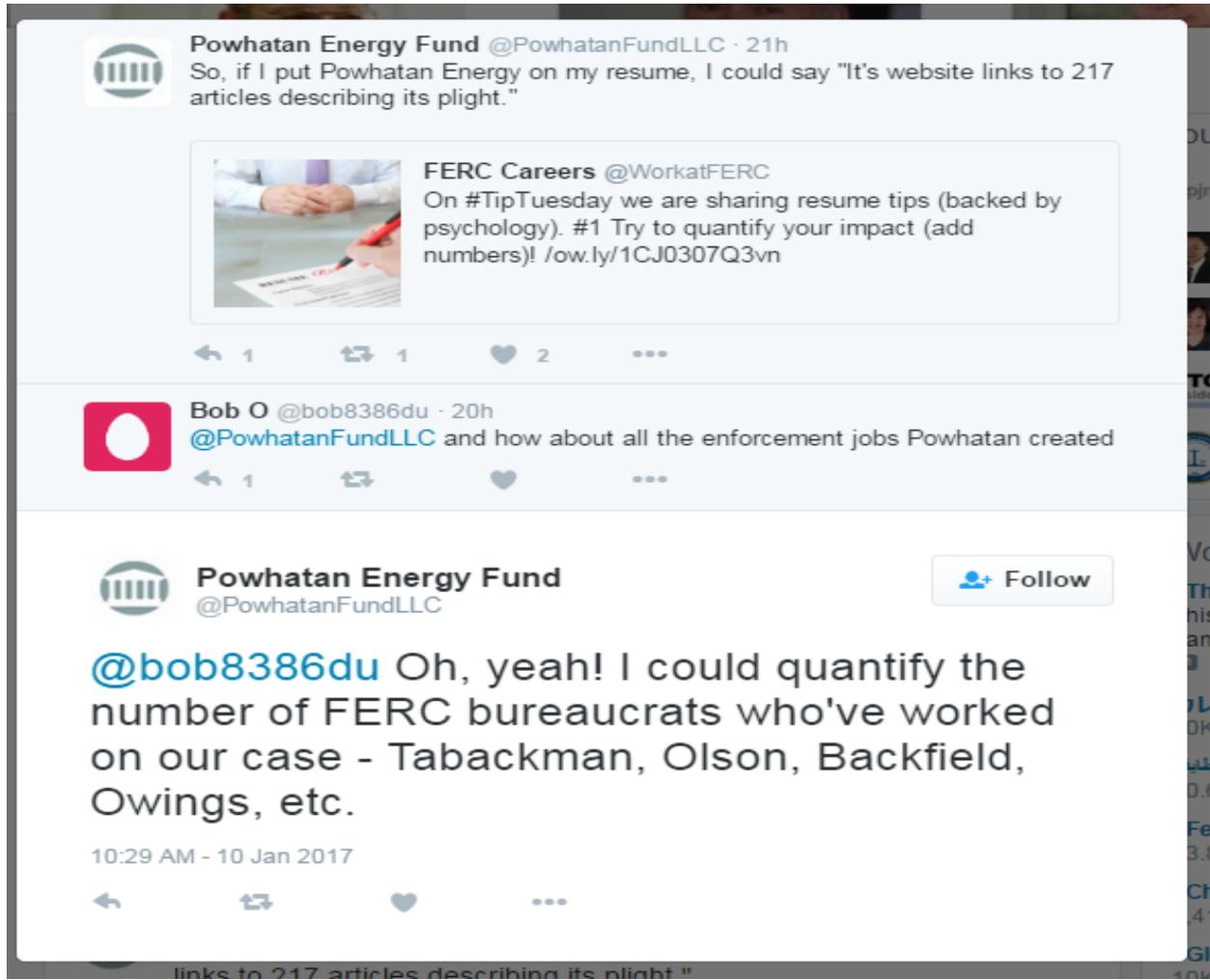
2. On September 18, 2020, Powhatan tweeted the following accusing several current and former members of FERC staff, including current counsel of record in this litigation, of unspecified “prosecutorial misconduct.”



3. On June 1, 2016, Powhatan tweeted the following accusing several members of FERC staff of “violence” and “extortion.” As explained above, Mr. Owens was previously FERC’s counsel in Coaltrain and Mr. Backfield was previously FERC’s counsel in this case.



4. On January 10, 2017, Powhatan tweeted the following referencing FERC attorneys who worked on this matter either during the investigation, the litigation, or both.



5. On February 11, 2017, Powhatan tweeted the following regarding Mr. Olson.

Trisha Mae Rasonable @TrishaRasonable
targetting weak people won't show any strength
- Angelina Jolie

Feb 4

in reply to @TrishaRasonable

Powhatan Energy Fund
@PowhatanFundLLC

@TrishaRasonable Olson thought it made him tough.

10:34 PM · Feb 11, 2017

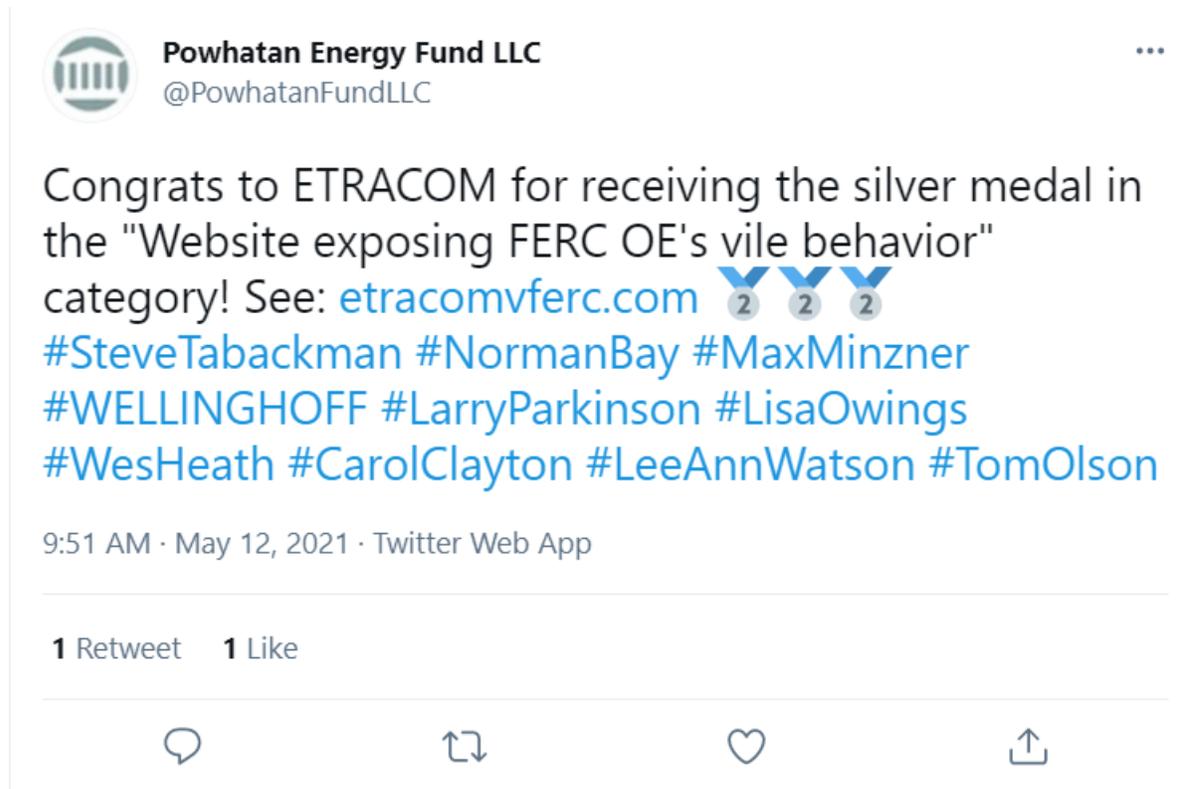
6. On September 24, 2021, Powhatan tweeted the following accusing several members of FERC staff of “atrocities.” Larry Parkinson previously served as the Director of the Office of Enforcement. Daniel Lloyd and Damon Taaffe are presently FERC’s counsel of record in this case.



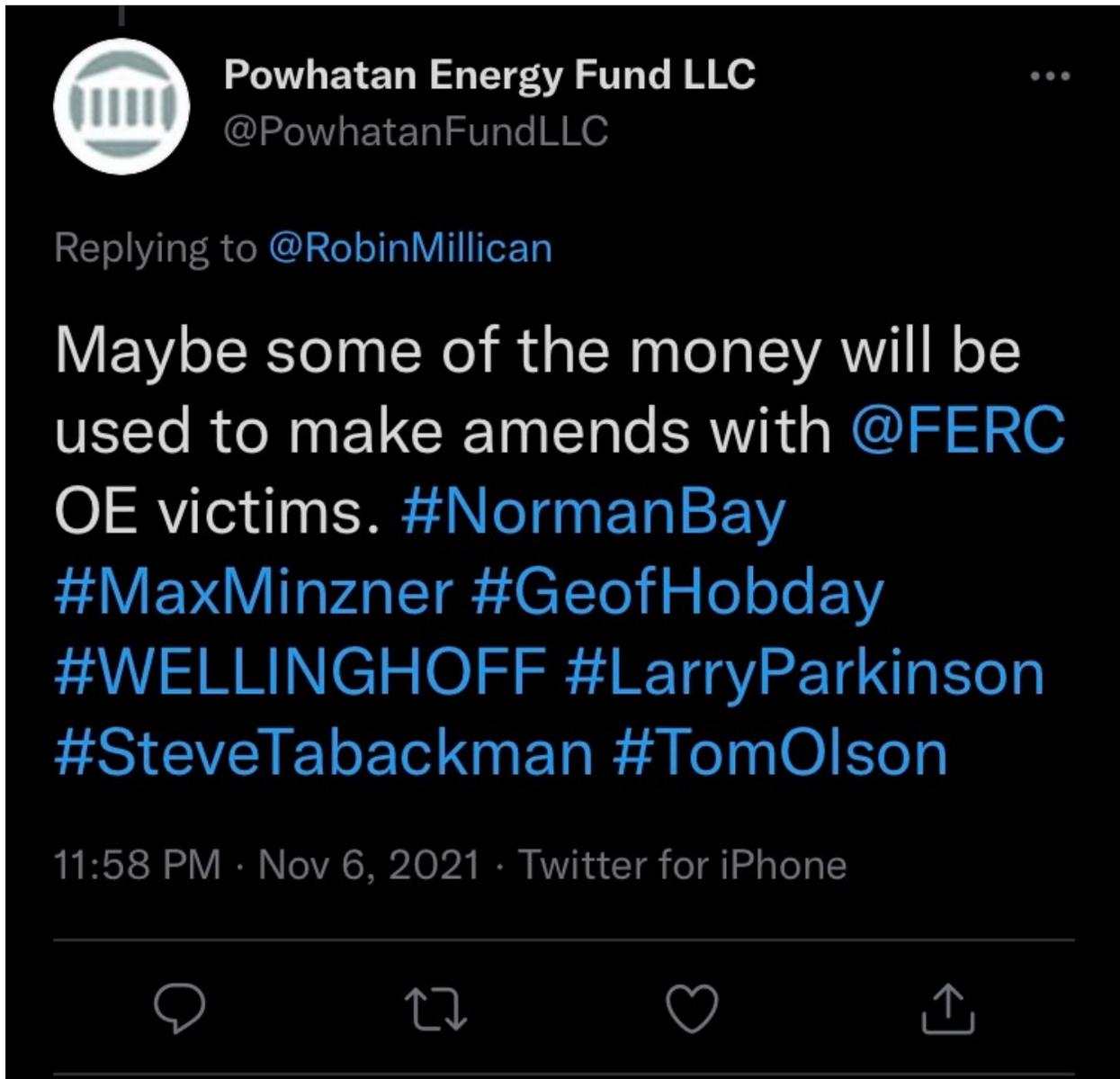
7. On November 27, 2021, Powhatan tweeted the following, accusing several members of FERC staff of prosecutorial misconduct. Geof Hobday is the Director of FERC's Division of Investigations.



8. On May 12, 2021, Powhatan tweeted the following, accusing several members of FERC staff of “vile behavior” in connection with case involving market manipulation by ETRACOM LLC. LeeAnn Watson previously served as the Deputy Director of the Office of Enforcement. Wes Heath and Carol Clayton were previously attorneys in FERC’s Office of Enforcement. Several of the FERC staff listed had no involvement in the ETRACOM litigation.



9. On November 6, 2021, Powhatan tweeted the following, arguing that money from the recently passed infrastructure bill should be used to “make amends with @FERC OE victims” and listing specific FERC staff.



Tweets Targeting the Friends and Family of FERC Staff

1. On February 15, 2017, Powhatan tweeted the following regarding Suzanne Bay, who is the niece of former FERC Chairman Norman Bay.

National Review @NRO

Jun 19, 2014

'The Tale of the Immigrant and the Federal Energy Regulatory Commission': natl.re/1vY3TEF

↩️ ↻️ 2 ❤️ 1 ✉️

↩️ in reply to @NRO

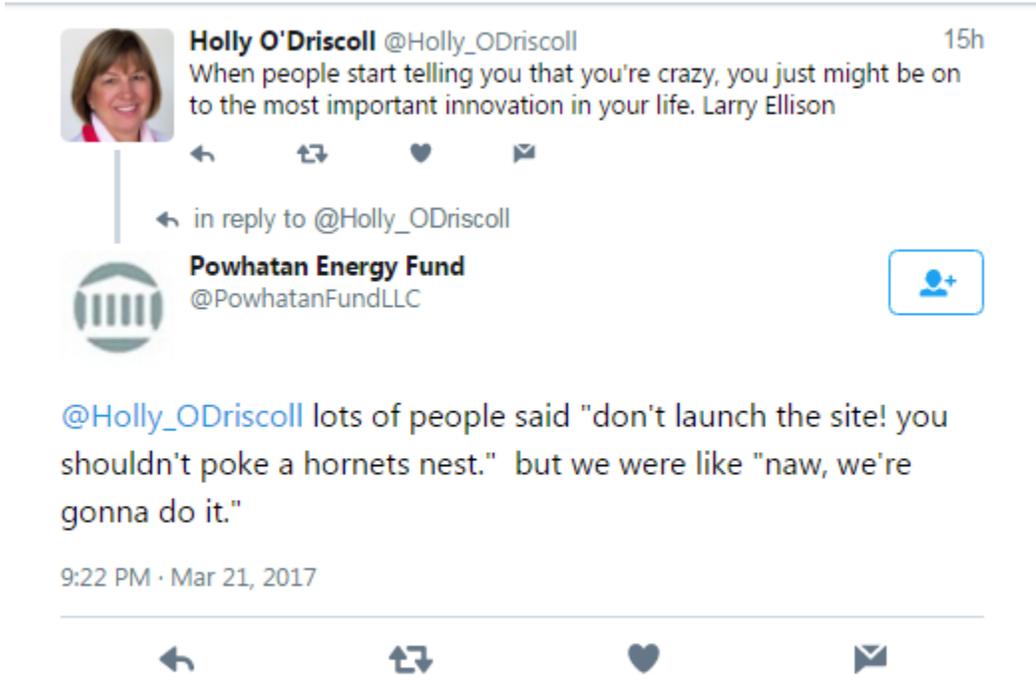
Powhatan Energy Fund
@PowhatanFundLLC

@NRO I bet @Suzanne_Bay has read the sad story about the immigrant and seen the picture of Jessica.

7:22 PM · Feb 15, 2017

↩️ ↻️ ❤️ ✉️

2. On March 21, 2017, FERC tweeted the following targeting Holly O'Driscoll, who FERC understands to be a relation to Mary O'Driscoll, FERC's Acting Deputy Director for the Office of External Affairs.



3. On February 4, 2017, Powhatan tweeted the following targeting Katie Backfield, the wife of FERC's previous counsel of record in this case, Sam Backfield.



Tweets Making Serious Unsupported Allegations Against FERC

1. On or around September 25, 2014, Powhatan tweeted the following comparing FERC to a police officer accused of shooting an unarmed black man. FERC understands the tweet's reference to "Alan" to mean Alan Chen.

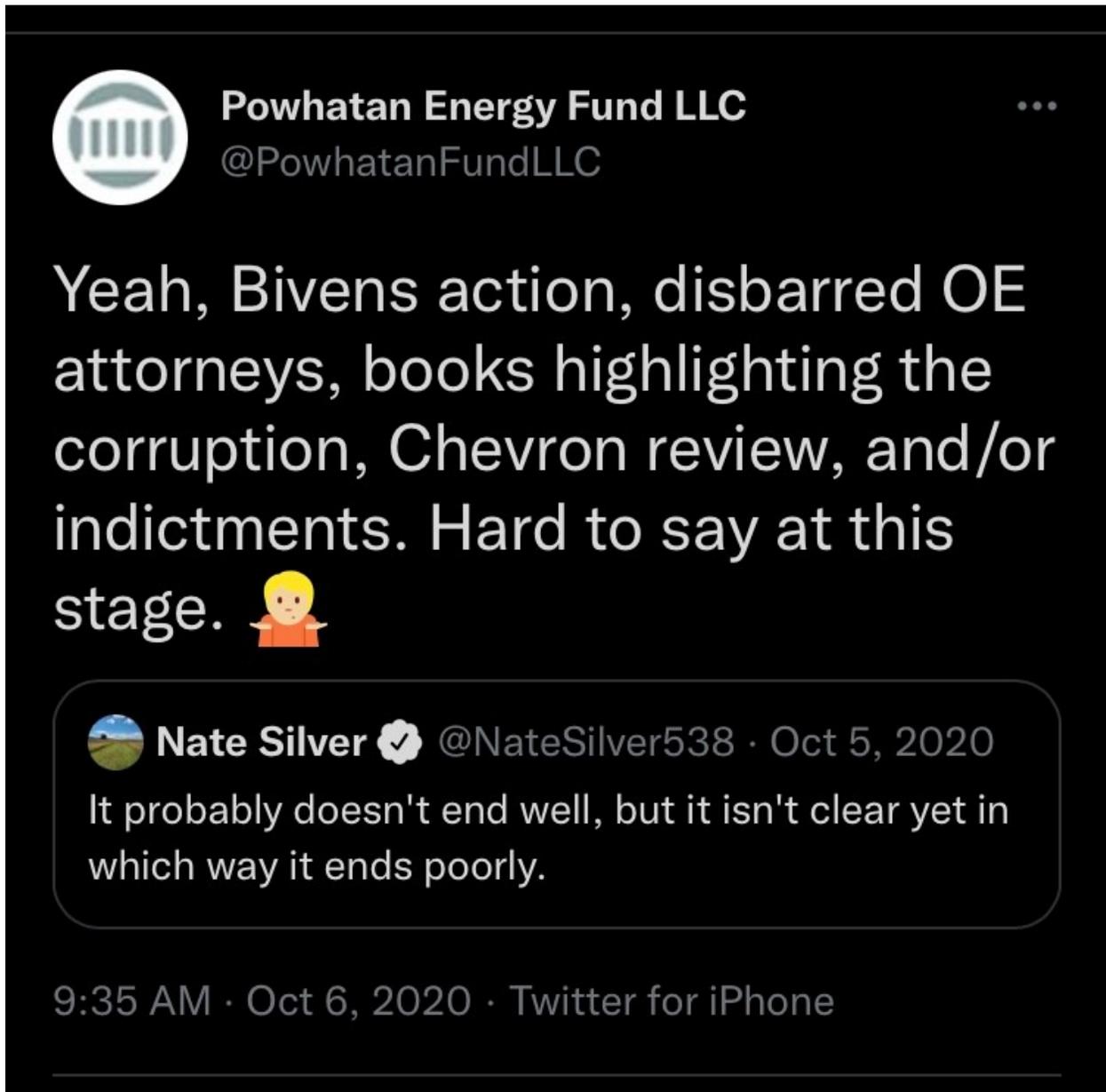
 **Powhatan Energy Fund @PowhatanFundLLC** · 52m
Levar & Alan have stuff in common. Some people just don't like African Americans & some people don't like traders. [youtube.com/watch?v=1yEQDB...](https://www.youtube.com/watch?v=1yEQDB...)

 YouTube



Dash Cam video of South Carolina Trooper Sean Groubert shooting Levar...
White South Carolina Trooper Sean Groubert shot Levar Jones, an unarmed black man for attempting to retrieve his license that the trooper asked for.

2. On October 6, 2020, Powhatan tweeted the following, threatening Bivens actions against unspecified FERC attorneys and accusing “OE attorneys” of unspecified actions warranting disbarment and criminal indictments.



3. On September 29, 2021, Powhatan tweeted the following, accusing FERC's Office of Enforcement of unspecified "atrocities."



4. On November 8, 2021, Powhatan tweeted the following, accusing FERC's Office of Enforcement of unspecified "atrocities."



5. On April 25, 2021, Powhatan tweeted the following, accusing the FERC attorneys listed in the “glossary on our website” of being “bad apples” “who intentionally cheat the criminal justice system.” Several former and present members of FERC’s litigation team are listed on the glossary on Powhatan’s website www.FERCLitigation.com.



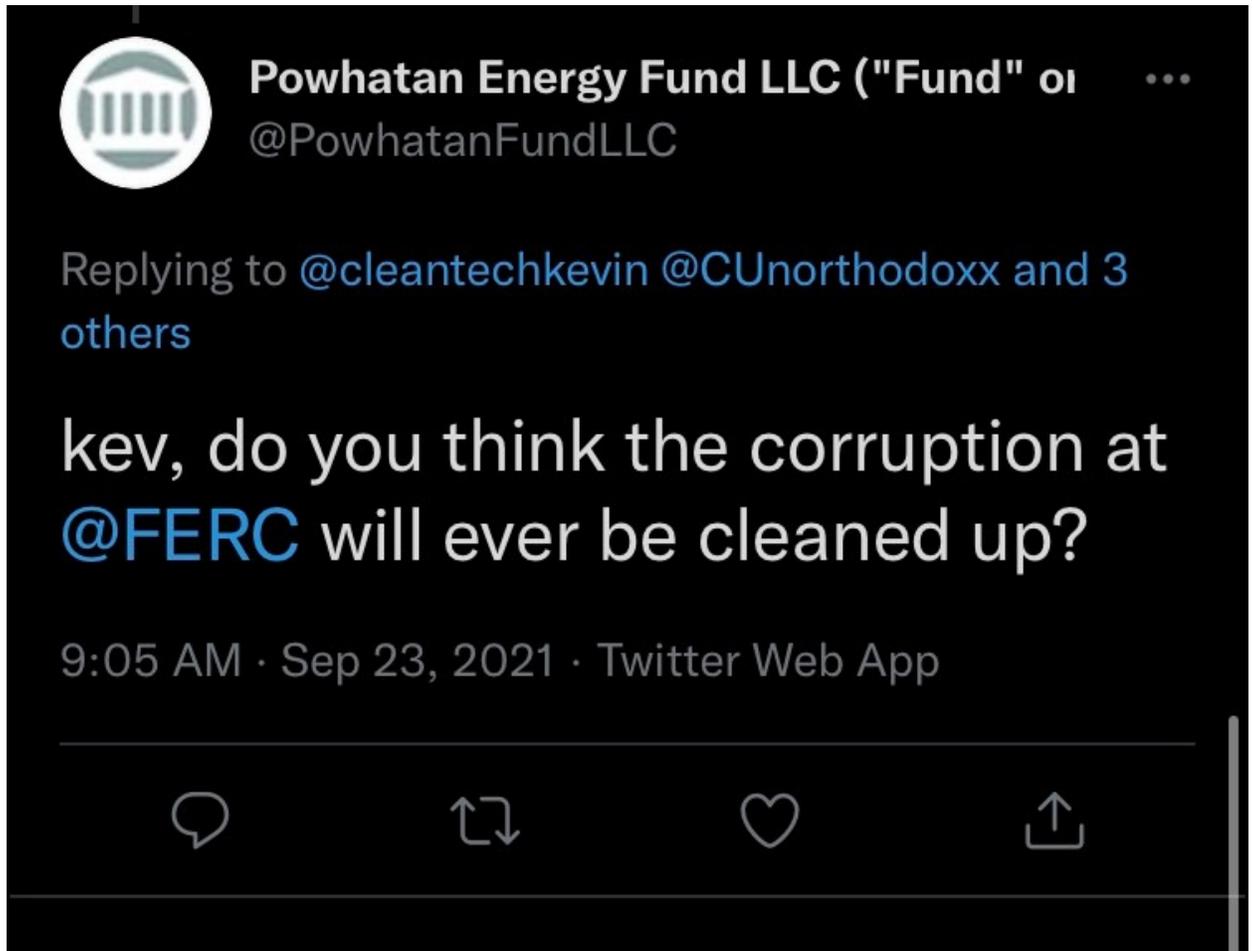
6. On November 29, 2021, Powhatan tweeted the following, accusing FERC of unspecified corruption.



7. On September 23, 2021, Powhatan tweeted the following accusing FERC of unspecified “corruption” and accusing an unspecified group of lawyers of “lov[ing]” said corruption.



8. On September 23, 2021, Powhatan tweeted the following, accusing FERC of unspecified “corruption.”



9. On November 17, 2021, Powhatan tweeted the following, accusing FERC of unspecified dishonesty.



10. On September 16, 2021, Powhatan tweeted the following, accusing FERC of having “falsely accused PEF and many others with allegations of market manipulation.” FERC understands “PEF” to refer to Powhatan Energy Fund.



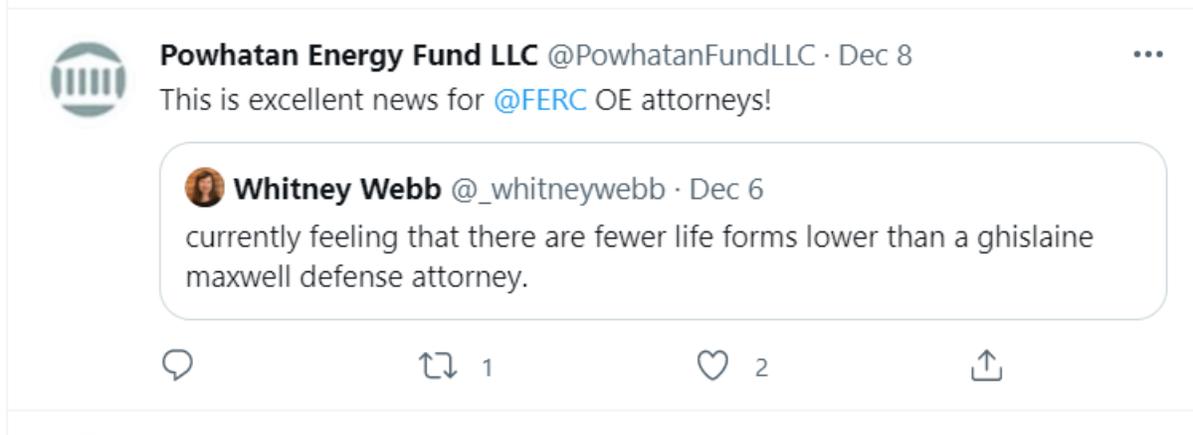
11. On September 23, 2021, Powhatan tweeted the following, accusing FERC of acting as a “political weapon.”



12. On November 29, 2021, Powhatan tweeted the following, accusing FERC of unspecified “totally vile and disgusting” actions. FERC understands the persons and entities listed by the tweet to refer to persons who have settled cases with FERC involving market manipulation.



13. On December 8, 2021, Powhatan tweeted the following regarding unspecified “FERC OE attorneys.”



Representative Tweets Regarding Mr. Tabackman's Emails



Powhatan Energy Fund LLC

@PowhatanFundLLC

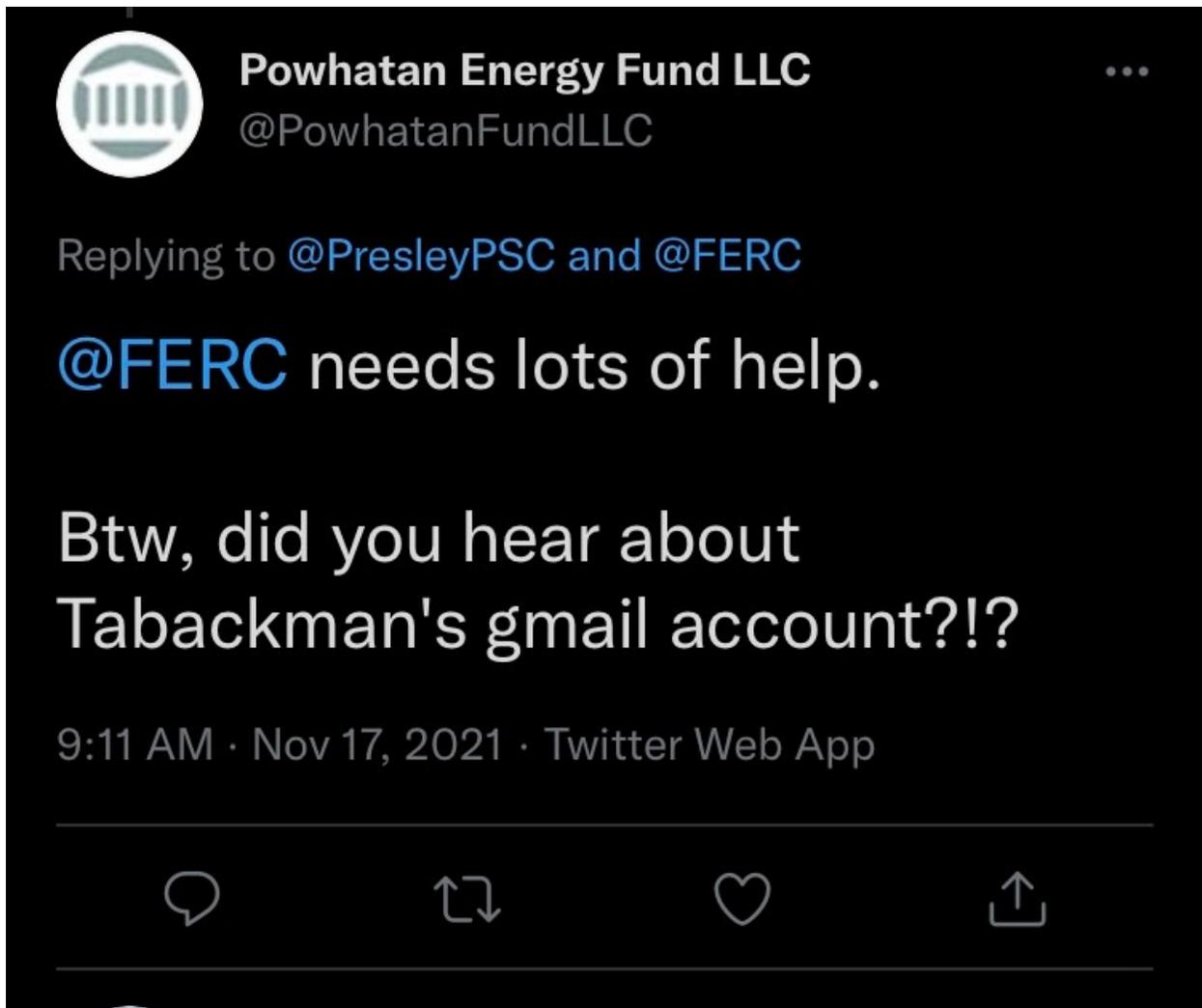


Replying to [@mlberkowitz](#)

hahahaha, yeah. maybe it would also be helpful if [@FERC](#) wasn't corrupt. [#SteveTabackmanGmail](#)

4:53 PM · Dec 6, 2021 · Twitter Web App





↻ Powhatan Energy Fund LLC Retweeted



Powhatan Energy Fund LLC

@PowhatanFundLLC



How many bad emails do you think Tabackman sent?



4 votes · Final results

8:06 PM · Nov 12, 2021 · Twitter for iPhone

1 Retweet **1** Like

Tweets Attacking the Court

1. On September 14, 2021, Powhatan tweeted the following, accusing the “judicial system” of being “broken and corrupt.”



Powhatan Energy Fund LLC ("Powhatan" or "Fund")
@PowhatanFundLLC



Haha, yeah! This is funny.



LathamSm7 @LathamSm7 · Sep 12

They are not. America's judicial system is broken and corrupt. The scales of justice do not tip at innocence or guilt. They tip with the evidence of wealth and power. twitter.com/BigbooteJan/st...

9:42 AM · Sep 14, 2021 · Twitter Web App



2. On September 16, 2021, Powhatan tweeted the following, accusing the “judicial system” of being absurd.



EXHIBIT B

the purposes of discovery, use at trial in this action, and any other purposes permitted under the Federal Rules of Civil Procedure.

Respectfully,

/s/ Robert W. Warnement

Robert W. Warnement (Va. Bar No. 39146)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7507
Facsimile: (202) 661-9040
robert.warnement@skadden.com

*Counsel for Houlian Chen, HEEP Fund,
Inc., and CU Fund, Inc.*

/s/ Charles A. Zdebski

Charles A. Zdebski (Va. Bar No. 37519)
ECKERT, SEAMANS, CHERIN &
MELLOTT, LLC
1717 Pennsylvania Avenue, N.W., 12th Floor
Washington, DC 20006
Telephone: (202) 659-6605
Facsimile: (202) 659-6699
czdebski@eckertseamans.com

Counsel for Powhatan Energy Fund, LLC

Dated: October 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2021, I caused a copy of the foregoing notice to be served upon counsel of record for Plaintiff by electronic mail.

/s/ Robert W. Warnement

Robert W. Warnement (Va. Bar No. 39146)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7507
Facsimile: (202) 661-9040
robert.warnement@skadden.com

*Counsel for Houlian Chen, HEEP Fund,
Inc., and CU Fund, Inc.*

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

Federal Energy Regulatory Commission)	Civil Action No. 3:15-cv-00452 (MHL)
<i>Plaintiff</i>)	
v.)	
Powhatan Energy Fund, LLC, Houlian "Alan" Chen, HEEP Fund, Inc., and CU Fund, Inc.)	
<i>Defendant</i>)	
)	

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Steven Tabackman
c/o Daniel Lloyd, Counsel for FERC, 888 First Street, NE, Washington, DC 20426
(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Place: Remote (virtual videoconference).	Date and Time: November 18, 2021, 9:00 am (Eastern)
---	--

The deposition will be recorded by this method: Stenographic and audiotape and/or videotape

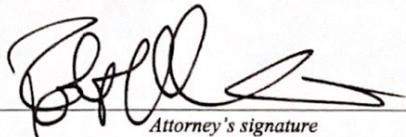
Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: October 15, 2021
CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR



Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Alan Chen,
HEEP Fund, Inc., and CU Fund, Inc., who issues or requests this subpoena, are:
Robert W. Warnement; Skadden, Arps, Slate, Meagher, & Flom LLP; 1440 New York Ave, 9-38, N.W. Washington, DC
20005; robert.warnement@skadden.com; (202) 371-7507.

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:15-cv-00452 (MHL)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT C

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

Federal Energy Regulatory Commission
Plaintiff
v.
Powhatan Energy Fund, LLC, Houlian "Alan" Chen,
HEEP Fund, Inc., and CU Fund, Inc.
Defendant

Civil Action No. 3:15-cv-00452 (MHL)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Thomas Olson
c/o Daniel Lloyd, attorney for FERC, 888 First Street, NE, Washington, D.C. 20426
(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Table with 2 columns: Place (Remote (virtual videoconference)), Date and Time (11/18/2021 9:00 am)

The deposition will be recorded by this method: Stenographic and audiotape and/or videotape

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: All documents and communications, including but not limited to emails, texts and social media posts, related in any way to the FERC investigation and/or litigation against Powhatan Energy and all co-defendants.

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/29/2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Handwritten signature of attorney

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Powhatan Energy Fund, LLC, Jeffrey Brundage Eckert Seamans Cherin & Mellott, LLC, 1717 Pennsylvania Ave, NW, Suite 1200, Washington, D.C. 20006, jbrundage@eckertseamans.com, 202-659-6676, who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:15-cv-00452 (MHL)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Thomas Olson
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

GreenHat Energy, LLC, John Bartholomew,
Kevin Ziegenhorn, and Luan Troxel, in her
capacity as Executor of the Estate of
Andrew Kittell

Docket No. IN18-9-000

NOTICE RE COMMUNICATION WITH DECISIONAL STAFF

On Friday evening, September 17, 2021, and Saturday morning, September 18, 2021, an attorney with the Division of Investigations of the Office of Enforcement (DOI), who serves as decisional staff in the *GreenHat* proceeding, sent three emails to a DOI attorney who is part of the litigation staff in the proceeding. After receiving the third email from the decisional staff attorney, which referred to his work as part of the decisional team, the litigation staff member realized that these emails constituted a violation of the Commission's separation of functions regulation, 18 C.F.R. § 385.2202. The litigation staff member did not respond further, and he reported the email exchange to management of the Office of Enforcement. The emails are disclosed with partial redaction of personal email addresses and are attached hereto as Exhibit 1.

Respectfully submitted,

JANEL BURDICK
Director
Office of Enforcement

GEO. F. HOBDAY, JR.
Director
Division of Investigations

JEREMY MEDOVOY
Deputy Director
Division of Investigations

KATHERINE WALSH
Branch Chief
Division of Investigations

/s/ Thomas P. Olson
THOMAS P. OLSON
PAUL A. MUSSENDEN
Attorneys
Division of Investigations
Office of Enforcement
Federal Energy Regulatory Commission
Thomas.Olson@ferc.gov
(202) 502-6278

DATED: October 1, 2021



Are you familiar with this

5 messages

Steven Tabackman <[REDACTED]@gmail.com>
To: Thomas Olson <[REDACTED]@gmail.com>

Fri, Sep 17, 2021 at 6:17 PM

2 attachments **US v Summerlin.doc**
252K **Marshall v Marshall.rtf**
3674K

Thomas Olson <[REDACTED]@gmail.com>
To: Steven Tabackman <[REDACTED]@gmail.com>

Fri, Sep 17, 2021 at 6:37 PM

no...thanks for the cases. Are you thinking about GreenHat, or something else?also,
how are you?!

On Fri, Sep 17, 2021 at 6:17 PM Steven Tabackman <[REDACTED]@gmail.com> wrote:

Steven Tabackman <[REDACTED]@gmail.com>
To: Thomas Olson <[REDACTED]@gmail.com>

Fri, Sep 17, 2021 at 10:39 PM

I am fine. Feeling swamped. Wishing I were smarter/quicker. Hope you are well
I had thought you didn't know about Sumerlin because the SOL analysis I have seen (in the Staff Report and in what Janel filed the other day did not reflect awareness of Sumerlin.
And then I thought maybe you were thinking that the "probate exception" to federal jurisdiction might get in the way of giving time to file. But Marshall takes care of that.

Yes- you should be familiar with them -- though you should not mention how you came upon them. Sumerlin says that ewhere federal rights are involved, the federal statute of limitations controls, not the state. Full stop.

And Marshall simply says that the "probate exception" to federal court jurisdiction doesn't mean that the federal court can't decide a dispute between a federal entity's claim to money in probate -- all it means is that you have the federal claim litigated in federal court and then you take your judgment (if you win, of course) and the probate court has to honor the federal judgment.

The more important point is the Sumerlin one -- and its significance is that it means that so long as you have an OAP by 60 days before January 6, they have nothing to argue about on timing because you will have met the 1 year CA statute and the 60 days they get under the FPA. But actually you actually have longer than that -- because when the amount of the claim is undetermined when you first file it, because it is a federal claim, the clock doesn't start until the amount being claimed is determined , i.e., when the OAP is issued -- at which time, you have 5 years to file.

But in any event, so long as you have an OAP by 60 days before the "1-yr from death" CA SOL, you've met the CA statute as well.

But you never heard that here

[Quoted text hidden]

Thomas Olson <[REDACTED]@gmail.com>
To: Steven Tabackman <[REDACTED]@gmail.com>

Fri, Sep 17, 2021 at 10:44 PM

got it....very helpful.

it's actually pretty easy for us to satisfy the CA SOL so we will probably not need to litigate this....but glad to know we have this backstop

[Quoted text hidden]

Steven Tabackman <[REDACTED]@gmail.com>
To: Thomas Olson <[REDACTED]@gmail.com>

Sat, Sep 18, 2021 at 10:11 AM

Yes. I learned all this when there was greater concern about the fire drill on getting the OAP

[Quoted text hidden]

--
Steve Tabackman

Document Content(s)

Notice re Communication with Decisional Staff Dkt No. IN18-9.docx.....1
Sept. 17 and 18 emails (Redacted)_Redacted - Copy.pdf3

EXHIBIT E

From: [Charles A. Zdebski](#)
To: [Daniel Lloyd](#); [Jeffrey P. Brundage](#); [Christopher Perkins](#)
Cc: [Damon Taaffe](#); [Joshua Ferrentino](#); [Paul A. Mussenden](#); [Katherine Walsh](#); [Nooshin Sherkat](#)
Subject: Re: FERC v. Powhatan - Olson and Tabackman Subpoenas
Date: Monday, November 08, 2021 1:11:20 PM

Powhatan is willing to accept:

- production of any relevant gmails from Tabackman and Olson
- a satisfactory sworn declaration that they have not communicated about the Powhatan case using any other personal means, such as texts, IM, DM, or social media
- a declaration that they have not destroyed or omitted any documents relative to the above two points
- the foregoing in lieu of depositions, unless the documents produced or declarations indicate improper communications in our case thereby warranting a deposition.

Thank you.



Charles A. Zdebski, Member
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW, 12th Floor | Washington, D.C. 20006
T: 202-659-6605 C: 202-277-3326 F: 202-659-6699

This email message and any files transmitted with it may be subject to attorney-client privilege and contain confidential information intended only for the person(s) to whom this email message is addressed. If you have received this email message in error, please notify the sender immediately by telephone or email and destroy the original message without making a copy. Any use, copying, disclosure, and/or distribution of this email message and/or any files transmitted with it by someone other than the intended recipient(s) is prohibited. Thank you.

Neither this information block, the typed name of the sender, nor anything else in this email message is intended to constitute an electronic signature and/or create an enforceable contract unless a specific statement to the contrary is included in this email message.

From: Daniel Lloyd <Daniel.Lloyd@ferc.gov>
Sent: Monday, November 8, 2021 12:06 PM
To: Jeffrey P. Brundage <JBrundage@eckertseamans.com>; Christopher Perkins <cperkins@eckertseamans.com>; Charles A. Zdebski <CZdebski@eckertseamans.com>
Cc: Damon Taaffe <Damon.Taaffe@ferc.gov>; Joshua Ferrentino <Joshua.Ferrentino@ferc.gov>; Paul A. Mussenden <Paul.Mussenden@ferc.gov>; Katherine Walsh <Katherine.Walsh@ferc.gov>; Nooshin Sherkat <Nooshin.Sherkat@ferc.gov>
Subject: [EXTERNAL] RE: FERC v. Powhatan - Olson and Tabackman Subpoenas

Jeff,

Hoping to follow up on this so that we can know what our next steps need to look like.

Thank you,

Daniel

From: Daniel Lloyd
Sent: Thursday, November 04, 2021 1:23 PM
To: Jeffrey P. Brundage <JBrundage@eckertseamans.com>; Christopher Perkins <cperkins@eckertseamans.com>; Charles A. Zdebski <CZdebski@eckertseamans.com>
Cc: Damon Taaffe <Damon.Taaffe@ferc.gov>; Joshua Ferrentino <Joshua.Ferrentino@ferc.gov>; Paul A. Mussenden <Paul.Mussenden@ferc.gov>; Katherine Walsh <Katherine.Walsh@ferc.gov>; Nooshin Sherkat <Nooshin.Sherkat@ferc.gov>
Subject: FERC v. Powhatan - Olson and Tabackman Subpoenas

Jeff,

Following up on our call from earlier today, FERC is willing to provide sworn affidavits from Mr. Tabackman and Mr. Olson of the type that we discussed. Please let me know when you've received sign-off from your client, and we will proceed accordingly.

Thanks,

Daniel Lloyd
Attorney/Advisor
Office of Enforcement - Division of Investigations
Federal Energy Regulatory Commission

888 First Street, NE, Rm 52-80
Washington, DC 20426
(202) 502-6514

EXHIBIT F

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I caused a copy of the foregoing notice to be served upon counsel of record for Plaintiff by electronic mail.

Respectfully,

/s/ Jeffrey Brundage

Jeffrey Brundage (Va. Bar No. 80179)
ECKERT, SEAMANS, CHERIN & MELLOTT,

LLC

1717 Pennsylvania Avenue, N.W., 12th Floor
Washington, D.C. 20006

Telephone: (202) 659-6676

Facsimile: (202) 659-6699

jbrundage@eckertseamans.com

Counsel for Powhatan Energy Fund, LLC

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

Federal Energy Regulatory Commission)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 3:15-cv-452
Powhatan Energy Fund, LLC)	
<i>Defendant</i>)	

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Google, LLC
 Serve at: CSC-Lawyers Incorporating Service Company, 7 St. Paul Street, Suite 820, Baltimore, Md 21202
(Name of person to whom this subpoena is directed)

Production: **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Schedule A

Place: Eckert Seamans Cherin & Mellott, LLC 1717 Pennsylvania Ave, NW, Suite 1200 Washington, D.C. 20006	Date and Time: 12/13/2021 12:00 pm
--	---

Inspection of Premises: **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/30/2021

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR



Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* _____
 Defendant Powhatan Energy Fund, LLC _____, who issues or requests this subpoena, are:
 Jeff Brundage 1717 Pennsylvania Ave NW Suite 1200 Washington DC 20006 jbrundage@eckertseamans.com 2026596676

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:15-cv-452

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Print

Save As...

Add Attachment

Reset

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT G

Federal Energy Regulatory Commission

Date: October 21, 2021

Volume:

Case: FERC v. Powhatan Energy Fund, LLC



Ace-Federal Reporters, Inc.
Phone: 202-347-3700
Fax: 202-737-3638
Email: info@acefederal.com
Internet: www.acefederal.com

FERC v. Powhatan Energy Fund, LLC - October 21, 2021

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

- - - - -X
Federal Energy Regulatory Commission :
Plaintiff, :
v. Civil Action No.
Powhatan Energy Fund, LLC, 3:15-cv-00452(MHL)
Houlian "Alan" Chen, HEEP Fund, Inc. :
and CU Fund, Inc., :
Defendants. :

- - - - -X
Thursday, October 21, 2021
Washington, DC

VIDEOTAPED VIRTUAL DEPOSITION
OF RICHARD GATES

called for examination, pursuant to agreement of
counsel, held via Cisco Webex, at 9:03 a.m.,
before Kim M. Brantley, C.S.R., a Court Reporter
and Notary Public in and for the District of
Columbia, when were present on behalf of the
respective parties:

<p>Page 258</p> <p>1 Q. Who is K. Dynamite or KD? 2 A. My sense is a member of the media. 3 Q. All right. And I think he or she is 4 asking if you have -- strike that. 5 Let me just read what you wrote in 6 the -- in the first paragraph. "Sorry for my 7 delays on this. We haven't released the 8 transcripts. But may do it on -- in Monday. I 9 think the issue is that the FERC's Office of 10 Enforcement called trades that are ubiquitous in 11 all other markets... manipulative. So instead of 12 settling we just went open kimono". 13 Next paragraph continues, "The 14 deposition transcripts are just a continuation of 15 our desire to provide more transparency". And it 16 continues. 17 Let me ask about your -- your statement 18 that "FERC's Office of Enforcement called trades 19 that are ubiquitous in all other markets... 20 manipulative". 21 In what sense are the trades that Alan 22 Chen performed for Powhatan ubiquitous in all 23 other markets? 24 A. I don't know what I meant when I wrote 25 it at that time. This is over seven years ago,</p>	<p>Page 260</p> <p>1 tempted to turn a blind eye to the activity as 2 long as other clients don't complain". 3 Q. I'm sorry, are you reading from 4 something right now? 5 A. Not any more. I'm no longer reading. 6 But I just read the last paragraph of the art that 7 I mentioned earlier, Measuring Arbitrage in 8 Milliseconds. 9 Q. Thank you. 10 So I want to direct you back to Exhibit 11 29 and you state to K. Dynamite, "So instead of 12 settling we just went open kimono". 13 What is -- what is the -- what did the 14 term "open kimono" mean in this context as you 15 wrote it? 16 A. I don't remember what I meant at that 17 time. I don't remember this email. I do remember 18 somebody named Kid Dynamite. 19 Q. All right. 20 A. But I don't -- I don't remember this 21 specific email or that term. 22 I'll speculate now, you know, reading 23 it more than seven years later, without any 24 context, without even looking at any other emails 25 or other material, just looking at this kind of in</p>
<p>Page 259</p> <p>1 and -- but I will say that I believe now, looking 2 back on it, I may have suggested that spread 3 trades are ubiquitous in all other markets and 4 allowed except for -- were similar to -- the ones 5 that Alan Chen executed are spread traits and 6 those are ubiquitous in all other markets. 7 Q. So the spread trade characteristic is 8 ubiquitous elsewhere? 9 A. Yes. I believe -- I mean, I believe 10 spread trades are ubiquitous in markets, in all 11 markets. 12 And Josh, while I have you here, a 13 little pause here... earlier today I mentioned an 14 article that appeared in 2009 described -- 15 entitled Measuring Arbitrage in Milliseconds, 16 written by Rob Curran in the Wall Street Journal. 17 The last paragraph might be of interest to you, 18 because you specifically asked -- you implied 19 that -- about latency arbitrage, the last 20 paragraph of it reads, "The scale of Mr. Gates' 21 fund, direct feeds to the exchanges proved cost 22 prohibitive. But for larger funds, Mr. Gates said 23 it would be foolish not to engage in latency 24 arbitrage. And he said dark pools, whose 25 profitability is linked to their volumes, may be</p>	<p>Page 261</p> <p>1 isolation, perhaps the idea of open kimono 2 described that we just kind of published 3 everything on the internet. 4 Q. And you published everything that you 5 had received from FERC on ferclitigation.com, all 6 the litigation transcripts, a variety of other 7 documents. 8 Is that right? 9 A. "Everything". I don't know I'd 10 describe it as everything but a lot of things. 11 Q. A lot of things. At least the 12 deposition transcripts, right? 13 A. Yep, they're out there. 14 Q. When you suggested in your email to KD 15 that the transcripts showed bullying, is that 16 your -- is that a fair characterization of what 17 you wrote here, in Exhibit 29. 18 A. I'm sorry, can you read -- you're 19 saying is it the exhibit bullying? 20 The way I read it now is that it 21 provides a sense of whether they were doing 22 research or just acting like bullies. So I didn't 23 know -- 24 Q. Do you believe the lawyers who deposed 25 the witnesses in the FERC investigation behaved</p>

Page 262

1 like bullies?

2 A. Do I believe the lawyers who did

3 depositions in the FERC investigation behaved like

4 bullies? Yes.

5 Q. Which ones?

6 A. I would say Steve Tabackman. He -- he

7 deposed me and my brother. I've heard Tom Olson

8 and the bullying. I've heard, yeah, some other

9 people, but those are the ones that we -- that I

10 know of that deposed individuals here at Powhatan

11 that I would say that, yeah, they kind of are

12 bullies.

13 Q. All right. I'll move on.

14 You attended Mr. Eiben's deposition or

15 at least a part of it. Is that right?

16 A. Yes.

17 Q. Have you received a transcript of Mr.

18 Eiben's deposition? I may have asked that before?

19 A. I think you did ask that before and the

20 answer then I believe was no and I believe the

21 answer is still no.

22 Q. Okay. So you haven't posted the

23 deposition transcript on ferclitigation.com then,

24 because you don't have it.

25 And you -- you attended the last

Page 263

1 hearing before Judge Roth in this case in

2 Richmond?

3 A. I did, yep.

4 Q. And your brother Kevin -- your brother

5 Kevin testified in that hearing. Do you recall

6 that?

7 A. I do.

8 Q. Do you have a transcript of that

9 hearing?

10 A. I believe we did get it, yes.

11 Q. All right. Have you posted it on

12 ferclitigation.com?

13 A. I don't believe so.

14 Q. Why not?

15 A. Just a business decision.

16 Q. What are the factors that went into

17 your business decision not to post the transcript?

18 A. I think the attorneys said don't do it

19 until there was redactions made, or is added to

20 the docket.

21 Q. What -- what redactions might need to

22 be made for the transcript in your view?

23 A. In my view?

24 Q. Yes.

25 A. Whatever the attorneys suggest. We

Page 264

1 just follow their guidance.

2 (10/13/14 email from Richard Gates to

3 Chao Chen, Bates stamped POWDC_8181, was marked R.

4 Gates Exhibit 32, for identification.)

5 BY MR. FERRENTINO:

6 Q. All right, we can move on to Exhibit

7 32, please. I'll give you a chance to flip to it.

8 We're skipping a few here. And this a -- it's a

9 one-page email. The Bates number ends 8181.

10 A. I see it.

11 Q. All right. I'll give you just a chance

12 to review it here.

13 (Witness peruses document.)

14 A. Okay.

15 Q. Is this an email conversation you

16 participated in?

17 A. I don't recall this email exchange. It

18 appears that I did and it appears it was sent from

19 my account and referencing my children.

20 Q. All right. So it looks to me like you

21 and Kevin and Chao Chen are discussing the PJM

22 power market circa October 2014 in this email

23 chain.

24 Is that fair?

25 A. That is one of the fair descriptions

Page 265

1 of -- of what I would describe has taken place

2 here. It's probably not the best.

3 Q. All right. And Chao -- Chao says

4 essentially, I think the first -- the first

5 sentence he said is, "The market," quote, The

6 market is poorly designed". And he goes on to

7 explain why this is. And you -- you respond with

8 a slightly lengthier email explaining that, quote,

9 "The market may not be designed the way we would

10 design it if we were in charge." And I'm skipping

11 some, but you basically continue, "We should not

12 pass judgment on the designs of the tariffs. They

13 are what they are, period".

14 Do you -- do you still hold the view

15 that we shouldn't pass judgment on the designs of

16 markets that we're trading in?

17 A. Well, first off, it looks like I had a

18 typo in the first sentence that you didn't pick

19 up. It said it may not be designed the way "he"

20 way would design it and I think you put the word

21 "the" in there for "he".

22 Yes. But to answer your question, yes,

23 I believe we just have to follow the rules that

24 exist and the processes that are set up.

25 Q. And that's the way you feel about the