

**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-MRC
v.	)	
	)	
POWHATAN ENERGY FUND, LLC, HOULIAN “ALAN” CHEN, HEEP FUND, INC., and CU FUND, INC.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANT POWHATAN ENERGY FUND, LLC’S OPPOSITION  
TO PLAINTIFF FEDERAL ENERGY REGULATORY  
COMMISSION’S SECOND MOTION TO AMEND ITS COMPLAINT**

Defendant Powhatan Energy Fund, LLC (“Powhatan”), by counsel, files this Opposition to the Federal Energy Regulatory Commission’s (“FERC”) Second Motion to Amend its Complaint (ECF No. 261), and states as follows.

**Preliminary Statement**

After 11 years in unabated pursuit of Powhatan, a long inactive limited liability company on the verge of bankruptcy, for alleged improper trades made in 2010 by former co-defendant, Dr. Alan Chen (“Dr. Chen”), FERC belatedly and improperly now seeks to add individual “Relief Defendants” to the case. Filed on the last day of fact discovery, FERC’s proposed amendment is nothing more than a thinly veiled attempt to push Powhatan into capitulating—like Dr. Chen recently did—to FERC’s unrelenting pressure campaign. The Court should not permit the amendment at this stage as it is an improper use of the concept of a “Relief Defendant”, is patently

untimely given FERC's knowledge of the facts dating back to 2010, and highly prejudicial as it likely extends this protracted litigation even further.

### **Procedural and Factual Background**

The Court should deny FERC leave to amend the Complaint *for yet a second time* based on information that has been in FERC's possession since 2010. On August 18, 2010, FERC first initiated a formal investigation into Dr. Chen's trading. On September 23, 2010, Powhatan explained to FERC the process for distributing profits to investors and the existence of records demonstrating such distributions. In November and December 2010, in response to FERC's data requests, Powhatan provided FERC with information regarding the distributions.

On December 17, 2014, FERC issued an Order to Show Cause and Notice of Proposed Penalty, including an 84 page Enforcement Staff Report and Recommendation with a revised version issued the next day. ECF No. 93-2. On May 29, 2015, FERC issued a 193 page Order assessing Civil Penalties. ECF No. 93-1. On July 31, 2015, FERC filed a 30 page, 108 paragraph Complaint. ECF No. 1. On January 29, 2018, FERC filed a 37 page, 114 paragraph First Amended Complaint. ECF No. 93.

At no point during the protracted history of this case did FERC ever pursue *any* individual associated with Powhatan. Now, nearly *four* years after the First Amended Complaint and over *II* years after the investigation began, on the very last day of fact discovery, FERC seeks to once again amend its Complaint. This time, FERC seeks to add eight individuals as "nominal" or "relief" Defendants. Not only is the proposed amendment futile as an improper procedural device, it is also late, prejudicial, and the Court should not allow FERC to amend again.

## I. ARGUMENT

### A. The Proposed Amendment is Futile Because Powhatan's Investors Provided Consideration and Have Legitimate Claims to Distributions.

Leave to amend should be denied if the proposed amendment is futile. *See Booth v. Maryland*, 337 F. App'x 301, 312 (4th Cir. 2009) (per curium) (unpublished) (“[T]his Court holds that the district court did not abuse its discretion in denying Booth’s motion to amend because the amendment would have been futile”); *U.S. ex rel. Black v. Health & Hosp. Corp. of Marion Cty.*, 494 F. App'x 285, 297 (4th Cir. 2012) (per curium) (unpublished) (“‘futility of amendment’ are acceptable grounds for denying a request for leave to amend the complaint.”) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, the proposed amendment is a misuse of the “Relief Defendant” device, because the investors in Powhatan have a legitimate ownership interest in the company’s distributions. “A ‘nominal defendant’ is a person who can be joined to aid the recovery of relief without an [additional] assertion of subject matter jurisdiction *only* because he has *no ownership interest* in the property which is the subject of litigation.” *Commodity Futures Trading Comm’n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002) (quoting *S.E.C. v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (emphasis added)). “[A] nominal defendant is a party that ‘has no ownership interest in the property which is the subject of litigation.’” *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013) (citing *Kimberlynn Creek Ranch*, 276 F.3d at 191).

“The jurisprudence requires only an ‘ownership interest’ to preclude an entity from being a proper relief defendant.” *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009) (citing *Kimberlynn Creek Ranch*, 276 F.3d at 191; *Cherif*, 933 F.2d at 414 (7th Cir.1991); *SEC v. Founding Partners Capital Mgmt.*, 639 F.Supp.2d 1291, 1294 (M.D. Fla. 2009)). Thus, “the standard nominal

defendant is a bank or trustee, which has only a *custodial* claim to the property.” *Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187 at 191 (quoting *Cherif*, 933 F.2d at 414; *S.E.C. v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (emphasis added). See *Commodity Futures Trading Comm’n v. Walsh*, 618 F.3d 218, 226 (2d Cir.) (noting Courts have held that “relief defendants who have provided some form of *valuable consideration* in good faith in return for proceeds of fraud are beyond the reach of the district court’s disgorgement remedy.”) (emphasis added).

A legitimate ownership interest and valuable consideration is precisely the factual situation here that makes the proposed second amendment futile. As even FERC concedes, the proposed nominal Defendants, at their financial risk, invested money in Powhatan, *i.e.*, valuable consideration in good faith.<sup>1</sup> And it is undisputed that Dr. Chen executed trades on Powhatan’s behalf, some of which made money and others that did not. Indeed, as FERC has alleged, on May 30, 2010, “HEEP and Powhatan lost money—in Powhatan’s case, a significant amount...”. First Am. Compl. at 22, ¶ 60, ECF No. 93. For the trades that were profitable, Powhatan’s operating agreement provided that the investors were lawfully entitled to distributions of profits based on their ownership percentages. Indeed, FERC also concedes the proposed relief defendants reinvested in Powhatan “to fund further trading that is not the subject of this suit.” Unredacted Mem. in Supp. of Mot. to Amend at 7 (“Mem.”), ECF. No. 262.

Thus, FERC has not, and can not, assert the distributions themselves to have been fraudulent—because they were not. See *Kimberlynn Creek Ranch, Inc.*, 276 F.3d at 192 (“[A] claimed ownership interest must not only be recognized in law; it must also be valid in fact.”).

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<sup>1</sup> In paragraphs 19-26 of the proposed Second Amended Complaint, FERC alleges each of the proposed nominal Defendants were investors in Powhatan. Proposed Second Am. Compl. at 8-9, ECF No. 263-1. Further, in paragraph 114, FERC alleges these investors received “distributions”, which by definition, are shares of profits that a limited liability company distributes to its owners pursuant to the company’s operating agreement. *Id.* at 37.

Investors, who put their own money at risk, are entitled to share in distributions of profits of a limited liability company. They are not, as FERC suggests, mere custodians.

FERC's position that the proposed nominal Defendants have no ownership interest is circular, and *presupposes* that the funds they received are "ill-gotten." In other words, FERC posits they have no right to the money because the money was obtained by fraud. But that is the very question before the Court on this *de novo* review, and Powhatan's trades are presumed to be lawful until proven otherwise. "Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." *S.E.C. v. George*, 426 F.3d 786, 798 (6th Cir. 2005). FERC cannot carry its burden of establishing the second element of this claim, by mere reference to the first—and certainly cannot do so before it has proven such funds were "ill-gotten."

Moreover, FERC's reliance on its citations is misplaced as those cases are inapposite to the facts before the Court. This is not a situation where the recipients have "mere custody" to property like a bank; nor did they receive property as a "gift" without consideration, or received the property from a fraudulent Ponzi scheme that diverted funds from other investors to the recipients. *See, e.g., George*, 426 F.3d at 798 ("While each of the three invested his own money in Thorn's investment scheme, ***the SEC showed that the money they received from the scheme came not from profits on their investments but from the investments of others.***") (emphasis added). Here, the recipients invested money in good faith—and as shown by the May 30 loss, at a substantial risk—and received distributions of profits in proportion to their ownership, making them beyond the reach of a disgorgement remedy. *Compare Walsh*, 618 F.3d at 226 (2d Cir. 2010) (good faith purchaser for value immune from disgorgement) *with Houlian Chen Powhatan Energy*

*Fund, LLC Heep Fund, LLC Cu Fund, Inc.*, 151 FERC ¶ 61179, 62172 ¶ 188 (2015) (ECF No. 93-1) (assessing disgorgement of unjust profits).

Essentially, FERC's proposed amendment is tantamount to an impermissible pre-trial attachment, without any showing that the distributions were improper. Worse, FERC's own pleadings, taken as true for purposes of this motion, allege investment, risk, profit, and distribution—all indicia of lawful ownership. The Federal Power Act prescribes the proper procedure for pursuing collection in such circumstances: first reduce the claim to judgment pursuant to 16 U.S.C § 823b(d)(3)(B) (which FERC is attempting), and if it meets that hurdle, collection pursuant to 16 U.S.C § 823b(d)(5). Only after a judgment is awarded by the district court, can FERC institute a separate action seeking recovery. Adding the relief defendants at this stage is a premature end-around this rule.

**B. The Proposed Amendment is Also Futile Because it Does Not Relate Back Under Fed. R. Civ. P. 15(c) and Thus is Outside the Statute of Limitations.**

Leave should not be granted to file the proposed second amended complaint because it does not relate back under Fed. R. Civ. P. 15(c)(1)(A), (B), or (C). “An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading.” “Where a proposed amendment is made beyond the statute of limitations and it would not relate back to the original complaint, such an amendment would be futile. In that case, a district court does not abuse its discretion under Rule 15(a)(2) in denying a motion to amend.” *Everett v. Prison Health Servs.*, 412 F. App'x 604, 606 (4th Cir. 2011) (per curium) (unpublished) (citing *United States v. Pittman*, 209 F.3d 314, 318–19 (4th Cir. 2000)).

Here, the applicable statute of limitations, 28 U.S.C. § 2462, does not allow relation back. This makes Fed. R. Civ. P. 15(c)(1)(A) inapplicable. Regarding Fed. R. Civ. P. 15(c)(1)(B), the amendment does not assert a claim that arose out of the conduct, transaction, or occurrence. An amendment “related back to the date of the original complaint because it arose out of the same occurrence and simply amplified the prayer for ‘other relief.’” *Int’l Chem. Workers Union, Loc. No. 566 v. Mobay Chem. Corp.*, 755 F.2d 1107, 1110 (4th Cir. 1985) (allowing an amendment to the prayer for relief from modifying an arbitration award to vacating an arbitration award). *See Pittman*, 209 F.3d 314, 318 (4th Cir. 2000) (“These new claims do not relate back to his original claims because they arise from separate occurrences of both ‘time and type’”) (citation omitted); *Smith v. Town of Clarkton, N. C.*, 682 F.2d 1055, 1060 (4th Cir. 1982) (amendment that stated specifically an alternative theory of recovery related back); *see also G & M Oil Co. v. Glenfed Fin. Corp.*, 782 F. Supp. 1085 (D. Md.) (amendment for negligent misrepresentation claim regarding commercial loan related back to breach of contract claim for same loan), *aff’d sub nom., G & M Oil Co. v. Glenfed Fin. Corp.*, 947 F.2d 940 (4th Cir. 1991).

The “conduct, transaction, or occurrence” alleged in the original pleading were alleged manipulative trades made by Dr. Chen on Powhatan’s behalf. Any distributions made internally to Powhatan investors have no relation to those allegations and are “separate occurrences of both time and type”. Thus Rule 15(c)(1)(B) also does not apply.

Fed. R. Civ. P. 15(c)(1)(C) provides that an amendment relates back to the date of the original pleading when:

the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

FERC overstates the holding in *Goodman v. Praxair, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007). “The Rule does not concern itself with the amending party’s particular state of mind except insofar as he made a mistake; it presumes that the amending party can make the amendment, although it does constrain substantially the type of amendment that may relate back—one that changes a party or the naming of a party with respect to a claim already asserted.” *Id.* at 469–70. Unlike *Goodman*, FERC is not adding the wholly owned subsidiary of Powhatan who was on notice of the claim. FERC is attempting to add eight individuals and does not claim to have made a “mistake” by not naming them in the 2015 Complaint or subsequent amendment.

FERC writes “it merely asks that [the proposed relief Defendants] be brought into this suit to ensure the effectiveness of the Court’s remedial powers in the event of a disgorgement award.” Mem. at 16. FERC knew about the investors and distributions in 2010 and did not move for a preliminary injunction to freeze those distributions in 2015 when it filed suit (or in the six years since then). Now, at the very last minute, realizing that it has pushed Powhatan to the brink of bankruptcy, it seeks an inappropriate premature, pre-judgment attachment. FERC’s remedy is 16 U.S.C § 823b(d)(5), which allows FERC to file suit to collect a judgment. FERC’s alleged discovery sometime in 2021 of a recall document does not change these facts.

FERC's cases are inapposite on these facts. This is not a situation where a federal enforcement agency discovered a monetary transfer after it filed suit (*SEC v. Montle*) or a situation where "amending a pleading to add relief defendants unmasked in discovery" is appropriate (*FTC v. Bronson Partners, LLC*). The Motion to Amend should be denied because alleged market manipulation does not relate back to internal company distributions.

**C. The Proposed Amendment is Untimely.**

FERC's proposed amendment is extremely untimely and unduly prejudices Powhatan. *See Woodson v. Fulton*, 614 F.2d 940, 943 (4th Cir. 1980) ("While leave to amend should be liberally granted, it may be denied for undue delay.") (citing *Foman*, 371 U.S. at 182 ); *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987) ("A motion to amend under Rule 15(a) may be denied where the motion has been unduly delayed and where allowing the amendment would unduly prejudice the non-movant") (citing *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980); *Woodson*, 614 F.2d at 943)); *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593, 602 (4th Cir. 2005) (unpublished) ("[W]e conclude that the district court did not abuse its discretion in ruling that the plaintiffs' many opportunities ... to present their claim, warranted denial of the motion to amend.") (internal quotation marks omitted).

FERC's proposed amendment is premised on distributions to Powhatan's investors in August and October 2010. But FERC first learned about these distributions within two months of the inception of its formal investigation, when Powhatan both testified to and turned over its financial and email records. Despite this knowledge, FERC failed to take any action with respect to the distributions or the individual recipients, and now attempts to bootstrap an allegedly recently discovered agreement as a basis for amendment at this late juncture. The Court should not accept

this argument. *See Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987) (“[A] motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule.”) (citing 6 Wright & Miller, *Federal Practice and Procedure* § 1488 (1971)), *cert. denied*, 485 U.S. 977 (1988).

Within a month of instituting its investigation in August 2010, FERC took the deposition of a Powhatan representative. At his September 23, 2010 deposition, Powhatan’s representative, Larry Eiben was transparent and forthcoming about the distributions:

Q: If I wanted to trace money that Dr. Chen earned on Powhatan's behalf back through your organization, how would you recommend I go about doing that?

A: Just ask me to provide it. That’s easy.

Q: Are there any particular documents you would refer to in the course of doing that?

A: There's the -- I guess in terms of tracking the cash flows throughout, there's the wires that are dispersed. So there's a checking account that would show inflows and outflows, and then ***there is a set of records that Greg Sekelsky keeps that would describe when the disbursements go out***, who they’re going to or if money is coming in, who it’s coming from, that type of thing.

Q: When you say the money is kicked out of Powhatan, the money’s not kept in for collateral purposes or whatever, is that typically distributed to individuals or to other corporate entities in the larger corporate family?

A: Distributions from Powhatan?

Q: Yes.

A: That would go back out to the members. So members have the ability to request a redemption monthly, and if they submit the withdrawal paperwork, then Greg and I would implement the distribution and record it. ***So the money that is dispersed out of Powhatan for the purposes of redemptions would go back to the investors or the members.***

**Exhibit 1**, Sep. 23, 2010 Dep. Tr. of Lawrence S. Eiben 49:6-50:11 (emphasis added).

Subsequent to that deposition, FERC sent Powhatan two separate data requests. On November 22, 2010, Powhatan produced to FERC a spreadsheet labeled Bates POW00000926 in

response to FERC's second data request number five. **Exhibit 2.**<sup>2</sup> In this document, Powhatan identified all distributions from May 2010 to October 2010. Specifically, distributions were identified to accounts named ChenC001A<sup>3</sup>, EibenL002A, FrederickT003A, GatesK004A, GatesR005A, HarrisS006A, NewmanE007A, and SekelskyG008A. In addition, in the narrative response accompanying this document, Powhatan wrote it was providing "documents used to track the value of Powhatan on a monthly basis, providing total value, *net cash flow and profit/loss information*, as well as the monthly allocation of profits pursuant to members' ownership interest." (emphasis added). Then, on December 17, 2010, Powhatan provided a second document production including email correspondence. Powhatan produced an October 22, 2010 email among Powhatan representatives discussing the upcoming second distribution and the fact that the "redemption terms" will be the same as those in August, and that the recipients are no notice that they "may have to return the money to Powhatan." See POW00006713 attached as **Exhibit 3** ("October 2010 email").

Thus, FERC has been aware of the distributions, the recipients, and the terms on which those distributions were made for over 11 years. Having ignored this information for over a decade, FERC now suggests that the distributions justify dragging the individuals into this action because they were accompanied by a letter further detailing the condition referenced in Powhatan's October 2010 email. That letter merely puts the recipients on notice that the distributions *may*

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<sup>2</sup> This is a truncated version of the original document that omits irrelevant information and is converted from a spreadsheet to a PDF.

<sup>3</sup> To be clear, this account refers to Chao Chen, an investor in Powhatan, and not Alan Chen, the co-Defendant who placed the trades at issue in this case and who is not associated with Powhatan.

have to be returned if Powhatan's managing member, LSE Capital, in its "sole discretion" requested the recipient to do so to potentially "settle" claims being investigated by FERC.<sup>4</sup>

The letter is a red herring—it does not magically turn the known distributions to the known recipients into the proper subject of a Relief Defendant amendment, and does not excuse FERC's 11 year delay in pursuing the distributions and recipients. Rather, it is an attempt by FERC to manufacture a basis to amend when it could have, but did not, name the recipients as nominal Defendants a long time ago—at a time when it sought similar disgorgement from Dr. Alan Chen in May 2015. *See, e.g.*, Mem. at 3, n.1 ("FERC also sought disgorgement from Dr. Chen and the entities he controlled..."). FERC did not do so at the Commission level and did not do so in its initial or First Amended Complaint.

All the letter accomplished was put the recipients on notice that to *resolve* the pending investigation (which no one could have predicted would still be pending 11 years later) Powhatan *may* request the funds back from the recipients. Importantly, however, the letter does *not* refute the legality of the distributions, which were a legitimate exercise of Powhatan's rights under its

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<sup>4</sup> Notably, FERC takes care not to disclose to the Court how or when it allegedly learned of the letter—or why it did not or could not learn this information earlier based on the deposition testimony of Eiben and Powhatan's 2010 responses to FERC's data requests. *See* Unredacted Mem. in Supp. of Mot. to Amend at 2, ECF. No. 262 ("Only this year, in discovery, [did FERC learn]"); *id.* at 9 ("Though the distributions from Powhatan occurred in 2010, FERC learned only in discovery this year that those distributions were—and remain—conditional and subject to recall"); *id.* at 3, n.2 ("Spreadsheets reflecting only the dollar amount of these distributions [sic] were produced to the Commission during its investigation. However, FERC only learned of the purpose of distributions, the existence of the recall obligation, and the fact that Powhatan would claim insolvency based on these distributions this year during discovery in this litigation."); *id.* at 5 (citing October 25, 2010 email); *id.* at 4-5 (citing January 2011 email and email from "later that year"); *id.* at 14 ("The sole reason for delay in naming the Proposed Relief Defendants is that FERC only this year learned..."). The fact that FERC does not even identify the month it allegedly learned of the basis for the amendment tells the Court everything it needs to know about the Motion.

operating agreement based on the valid consideration and legitimate ownership of the recipients. And the letter does not turn the lawful distributions into mere “custodial” possession, nor does it negate the investors’ valuable consideration.

Thus, the undisputed facts, written documents, and sworn testimony demonstrate clearly that FERC knew about the distributions and the redemption terms as far back in 2010. It is of no purchase that there is a potential recall resting within LSE’s “sole discretion.” FERC has unduly delayed any effort to pursue the distributions or the recipients, waited until the last day of fact discovery to seek leave to amend, and as a result, the Motion should be denied.

**D. The Proposed Amendment is Barred by the Doctrine of Laches.**

As FERC seeks to invoke the Court’s “inherent equitable powers”, Mem. at 2, the equitable principal of laches applies, and prohibits leave to amend at this late stage. This Court succinctly summarized the doctrine last year:

Estoppel by laches generally applies to preclude relief for a plaintiff who has unreasonably slept on his rights. Potential application of the doctrine of laches typically involves a two-step analysis. First, Defendant must demonstrate that Plaintiff lacked diligence in asserting its claims. The Fourth Circuit has held that the first element of laches requires proof that the plaintiff delayed inexcusably or unreasonably in filing suit. Defendant may show a lack of diligence either by proof that the action was not commenced within the period provided by the analogous statute of limitations or with facts otherwise indicating a lack of diligence.

The second element focuses on any prejudice to Defendant. Defendant is aided by the inference of prejudice warranted by the plaintiff’s delay. And indeed, Defendant’s assertion of prejudice “may either rest on the inference alone or [the] introduc[tion of] additional evidence.

*Plumbers & Steamfitters Union Loc. No. 10 v. Waters*, 451 F. Supp. 3d 543, 551 (E.D. Va. 2020) (internal citations and quotation marks omitted, brackets in original). FERC knew in 2010 (1) who the distribution recipients were and (2) how much money each received as spreadsheets reflecting this information “were produced to the Commission during its investigation.” Mem. at 2, n.2. *See*

Chart, Mem. at 7. As soon as FERC learned that information, it had the knowledge and ability to add these individuals as nominal Defendants, regardless of any recall obligation document. It failed to do so despite already amending the Complaint once. Thus, FERC “lacked diligence in asserting its claims” and “delayed inexcusably or unreasonably [in amending the Complaint for a second time]”. The Motion to Amend should be denied on this basis alone.

**E. Powhatan is Prejudiced by the Proposed Amendment.**

Powhatan is prejudiced by the delay this amendment would cause. Powhatan has a constitutional right to take this matter—now pending for over 11 years—to a finder of fact and obtain a resolution. Should the proposed amendment be allowed, eight new Defendants, with up to eight new sets of counsel, would enter the case, potentially requiring further modification of the scheduling order, more discovery, more expense, and more delay. Affirmative expert reports are due today. Trial begins in approximately eight months on August 15, 2022.<sup>5</sup> If the proposed nominal Defendants are added to this case, the nominal Defendants would have the ability to file motions to dismiss, and engage in discovery with FERC and Powhatan. *See S.E.C. v. Cavanagh*, 155 F.3d 129, 136–37 (2d Cir. 1998) (“Lehmann is named, if only as a relief defendant, and thus has full opportunity to litigate her rights.”); *S.E.C. v. Ross*, 504 F.3d 1130, 1142 (9th Cir. 2007) (“We do not believe that the Constitution permits the Receiver to use the nominal defendant designation to deprive one whose only plausible basis for liability is a violation of the securities laws of either his right to full and formal service of process or his right to fully litigate the question

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<sup>5</sup> Powhatan notes the proposed Second Amended Complaint requests a jury trial. In previous similar litigation, FERC has argued that there is no right to a jury. *See FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 232–33 (D.D.C. 2016) (“The Court does reserve judgment on one issue: whether City Power is entitled to a jury trial. City Power says it is; FERC says it isn’t.”). Powhatan reserves all rights to challenge FERC’s jury demand should the Motion be granted.

of his own liability under the securities laws.”). Powhatan has fervently sought to vindicate itself for the last decade and would be unduly prejudiced by a further delay.

This prejudice, delay, and untimeliness justifies the denial of the Motion to Amend. *See Smith v. Angelone*, 111 F.3d 1126, 1135 (4th Cir. 1997) (“Given the multiple past delays, the late hour of Smith’s motion to amend, and the great additional burdens granting the motion would have placed on the State, the district court did not abuse its discretion in denying the motion.”); *Equal Rts. Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 604 (4th Cir. 2010) (“We hold that the district court did not abuse its discretion in finding the proposed amendment would be unduly prejudicial to [the Defendant]. We find compelling the court’s analysis that the amendment—coming so belatedly—would change the nature of the litigation and, would therefore, prejudice [the Defendant].”); *Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1148–49 (4th Cir. 1988) (affirming district court’s denial of a second motion to amend the complaint 18 months after the complaint was filed and holding “the motion at issue does not seek to add more particularized or newly discovered facts to the complaint or to plead a different cause of action. Rather, it seeks merely to add a request for an additional remedy that appellant was or should have been aware of from the outset.”).

## **II. CONCLUSION**

The proposed amendment is an improper use of the “Relief Defendant” concept and many years too late. It is 11 years after FERC knew about distributions via document production and deposition testimony. The “potential recall” is a red herring that does not provide a basis to amend— and certainly not a new basis that did not exist anytime since the initial filing of the first complaint in 2015. The amendment is thus prejudicial and futile, and for these reasons, it should be denied.

**WHEREFORE**, Powhatan asks the Motion to Amend be denied.

Dated: December 17, 2021

Respectfully Submitted,

/s/ Jeffrey Brundage

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**CERTIFICATE OF SERVICE**

I certify that on December 17, 2021, I filed the foregoing with the Court's CM/ECF system, which caused a copy to be served on counsel of record for all parties to this action.

/s/ Jeffrey Brundage  
Jeffrey Brundage  
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# **EXHIBIT 1**

Lawrence S. Eiben - THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION - September 23, 2010  
In The Matter Of: PJM UP-TO CONGESTION TRANSACTIONS

BEFORE THE UNITED STATES  
FEDERAL ENERGY REGULATORY COMMISSION

- - - - -x

In the Matter of: :

PJM UP-TO CONGESTION TRANSACTIONS. :

- - - - -x

DEPOSITION OF LAWRENCE S. EIBEN

Washington, D.C.

Thursday, September 23, 2010

REPORTED BY:

SARA A. WICK, RPR, CRR

1 Deposition of LAWRENCE S. EIBEN, called for  
2 examination pursuant to agreement of counsel, on  
3 Thursday, September 23, 2010, in Washington, D.C.,  
4 at the Federal Energy Regulatory Commission, 888  
5 First Street Northeast, Room 3M-4B, at 2:20 p.m.,  
6 before SARA A. WICK, RPR, CRR, a Notary Public  
7 within and for the District of Columbia, when were  
8 present on behalf of the respective parties:

9

10 W. BLAIR HOPKIN, ESQ.  
11 ERIK C. BAPTIST, ESQ.  
12 STEVEN TABACKMAN, ESQ.  
13 Division of Investigations  
14 Office of Enforcement  
15 888 First Street Northeast  
16 Washington, D.C. 20426  
17 212-502-6038  
18 blair.hopkin@ferc.gov  
19 erik.baptist@ferc.gov  
20 steven.tabackman@ferc.gov  
21 On behalf of the FERC

22

23

24

-- continued --

25

1 APPEARANCES (continued):

2

3 DANIEL A. HAGAN, ESQ.

4 EARLE H. O'DONNELL, ESQ.

5 White & Case LLP

6 701 13th Street Northwest

7 Washington, D.C. 20005

8 202-626-3582

9 dhagan@whitecase.com

10 eodonnell@whitecase.com

11 On behalf of the Witness

12

13 Also Present: Bikash Thapliya

14

15

16

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25

1 identical portions, but together, I guess it's on  
2 the order of 60 to 70 percent or so.

3 Q And among the three of you, Kevin and Rich  
4 Gates and yourself, who has the largest?

5 A I don't know for sure.

6 Q If I wanted to trace money that Dr. Chen  
7 earned on Powhatan's behalf back through your  
8 organization, how would you recommend I go about  
9 doing that?

10 A Just ask me to provide it. That's easy.

11 Q Are there any particular documents you  
12 would refer to in the course of doing that?

13 A There's the -- I guess in terms of  
14 tracking the cash flows throughout, there's the  
15 wires that are dispersed. So there's a checking  
16 account that would show inflows and outflows, and  
17 then there is a set of records that Greg Sekelsky  
18 keeps that would describe when the disbursements go  
19 out, who they're going to or if money is coming in,  
20 who it's coming from, that type of thing.

21 BY MR. TABACKMAN:

22 Q When you say the money is kicked out of  
23 Powhatan, the money's not kept in for collateral  
24 purposes or whatever, is that typically distributed  
25 to individuals or to other corporate entities in the

1 larger corporate family?

2 A Distributions from Powhatan?

3 Q Yes.

4 A That would go back out to the members. So

5 members have the ability to request a redemption

6 monthly, and if they submit the withdrawal

7 paperwork, then Greg and I would implement the

8 distribution and record it. So the money that is

9 dispersed out of Powhatan for the purposes of

10 redemptions would go back to the investors or the

11 members.

12 Q And the investors are individuals or  
13 corporations or both?

14 A Individuals, other than the managing  
15 member, LSE Capital Management, LLC.

16 MR. TABACKMAN: Thanks. That's all I had.  
17 Thank you.

18 MR. BAPTIST: Counsel, do you have any  
19 questions for the witness? Would you like to take a  
20 break?

21 MR. HAGAN: Could we take a break for five  
22 minutes.

23 (Recess.)

24 MR. BAPTIST: We can go back on the  
25 record. Counsel, do you have any questions for your

# **EXHIBIT 2**

**Powhatan Energy Fund  
May 31, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit (308,665.37)

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month Subs / End of Month W/D</u>	<u>Relative %</u>	<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
TFS				0.0000%	-			-	-	#DIV/0!
ChenC001A		50,000.00		4.5372%	(14,004.78)			(14,004.78)	35,995.22	-28.010%
EibenL002A		334,000.00		30.3085%	(93,551.94)			(93,551.94)	240,448.06	-28.010%
FrederickT003A				0.0000%	-			-	-	#DIV/0!
GatesK004A		334,000.00		30.3085%	(93,551.94)			(93,551.94)	240,448.06	-28.010%
GatesR005A		334,000.00		30.3085%	(93,551.94)			(93,551.94)	240,448.06	-28.010%
HarrisS006A		15,000.00		1.3612%	(4,201.43)			(4,201.43)	10,798.57	-28.010%
NewmanE007A		20,000.00	14,750.00	1.8149%	(5,601.91)			(5,601.91)	29,148.09	-28.010%
SekelskyG008A		15,000.00		1.3612%	(4,201.43)			(4,201.43)	10,798.57	-28.010%
	-	1,102,000.00	14,750.00	100.0000%	(308,665.37)	-	-	(308,665.37)	808,084.63	

Management	-
Performance	-
Withdrawals	-
Total Assets	<u>808,084.63</u>

**Powhatan Energy Fund**  
**June 30, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit 1,243,900.82

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month</u>		<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
			<u>Subs / End of Month W/D</u>	<u>Relative %</u>						
TFS	-			0.0000%	-			-	-	#DIV/0!
ChenC001A	35,995.22	78,500.00		6.6103%	82,225.02			82,225.02	196,720.24	71.815%
EibenL002A	240,448.06	280,000.00		30.0475%	373,761.05			373,761.05	894,209.12	71.815%
FrederickT003A	-	10,500.00		0.6062%	7,540.60			7,540.60	18,040.60	71.815%
GatesK004A	240,448.06	288,000.00		30.5094%	379,506.27			379,506.27	907,954.34	71.815%
GatesR005A	240,448.06	259,000.00		28.8351%	358,679.85			358,679.85	858,127.91	71.815%
HarrisS006A	10,798.57	4,500.00		0.8832%	10,986.70			10,986.70	26,285.27	71.815%
NewmanE007A	29,148.09		34,750.00	1.6828%	20,932.77			20,932.77	84,830.86	71.815%
SekelskyG008A	10,798.57	3,500.00	12,000.00	0.8255%	10,268.55			10,268.55	36,567.12	71.815%
	808,084.63	924,000.00	46,750.00	100.0000%	1,243,900.82	-	-	1,243,900.82	3,022,735.45	

Management -  
 Performance -  
 Withdrawals -  
 Total Assets 3,022,735.45

53.09%  
 45.64%  
 71.82%  
 45.97%  
 44.71%  
 34.80%  
 22.06%  
 19.89%

**Powhatan Energy Fund**  
**July 31, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit 2,443,002.21

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month Subs / End of Month W/D</u>	<u>Relative %</u>	<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
TFS	-			0.0000%	-			-	-	#DIV/0!
ChenC001A	196,720.24	200,000.00	(195,000.00)	7.4260%	181,416.62			181,416.62	383,136.86	45.729%
EibenL002A	894,209.12	700,000.00	(1,175,000.00)	29.8411%	729,017.57			729,017.57	1,148,226.68	45.729%
FrederickT003A	18,040.60	9,500.00		0.5155%	12,594.07			12,594.07	40,134.67	45.729%
GatesK004A	907,954.34	700,000.00	(1,200,000.00)	30.0983%	735,303.13			735,303.13	1,143,257.47	45.729%
GatesR005A	858,127.91	700,000.00	(1,130,000.00)	29.1657%	712,517.96			712,517.96	1,140,645.87	45.729%
HarrisS006A	26,285.27	10,100.00	(31,000.00)	0.6811%	16,638.66			16,638.66	22,023.93	45.729%
NewmanE007A	84,830.86		(40,000.00)	1.5879%	38,792.39			38,792.39	83,623.25	45.729%
SekelskyG008A	36,567.12		(35,000.00)	0.6845%	16,721.81			16,721.81	18,288.93	45.729%
	<u>3,022,735.45</u>	<u>2,319,600.00</u>	<u>(3,806,000.00)</u>	<u>100.0000%</u>	<u>2,443,002.21</u>	<u>-</u>	<u>-</u>	<u>2,443,002.21</u>	<u>3,979,337.66</u>	

Management	-
Performance	-
Withdrawals	<u>3,806,000.00</u>
Total Assets	<u><u>7,785,337.66</u></u>

**Powhatan Energy Fund**  
**August 31, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit 412,468.67

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month Subs / End of Month W/D</u>	<u>Relative %</u>	<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
TFS	-			0.0000%	-			-	-	#DIV/0!
ChenC001A	383,136.86		(289,000.00)	9.6282%	39,713.13			39,713.13	133,849.99	10.365%
EibenL002A	1,148,226.68		(866,000.00)	28.8547%	119,016.67			119,016.67	401,243.36	10.365%
FrederickT003A	40,134.67		(30,000.00)	1.0086%	4,160.06			4,160.06	14,294.73	10.365%
GatesK004A	1,143,257.47		(862,000.00)	28.7298%	118,501.60			118,501.60	399,759.07	10.365%
GatesR005A	1,140,645.87		(860,000.00)	28.6642%	118,230.90			118,230.90	398,876.77	10.365%
HarrisS006A	22,023.93		(16,600.00)	0.5535%	2,282.84			2,282.84	7,706.76	10.365%
NewmanE007A	83,623.25		(63,000.00)	2.1014%	8,667.77			8,667.77	29,291.02	10.365%
SekelskyG008A	18,288.93		(13,700.00)	0.4596%	1,895.70			1,895.70	6,484.63	10.365%
	<u>3,979,337.66</u>	-	<u>(3,000,300.00)</u>	100.0000%	<u>412,468.67</u>	-	-	<u>412,468.67</u>	<u>1,391,506.33</u>	

Management	-
Performance	-
Withdrawals	<u>3,000,300.00</u>
Total Assets	<u><u>4,391,806.33</u></u>

**Powhatan Energy Fund**  
**September 30, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit (60,167.19)

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month Subs / End of Month W/D</u>	<u>Relative %</u>	<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
TFS	-			0.0000%	-			-	-	#DIV/0!
ChenC001A	133,849.99			9.6191%	(5,787.52)			(5,787.52)	128,062.46	-4.324%
EibenL002A	401,243.36			28.8352%	(17,349.32)			(17,349.32)	383,894.04	-4.324%
FrederickT003A	14,294.73			1.0273%	(618.09)			(618.09)	13,676.65	-4.324%
GatesK004A	399,759.07			28.7285%	(17,285.14)			(17,285.14)	382,473.93	-4.324%
GatesR005A	398,876.77			28.6651%	(17,246.99)			(17,246.99)	381,629.79	-4.324%
HarrisS006A	7,706.76			0.5538%	(333.23)			(333.23)	7,373.53	-4.324%
NewmanE007A	29,291.02			2.1050%	(1,266.51)			(1,266.51)	28,024.51	-4.324%
SekelskyG008A	6,484.63			0.4660%	(280.39)			(280.39)	6,204.24	-4.324%
	<u>1,391,506.33</u>	-	-	100.0000%	<u>(60,167.19)</u>	-	-	<u>(60,167.19)</u>	<u>1,331,339.14</u>	

Management	-
Performance	-
Withdrawals	-
Total Assets	<u><u>1,331,339.14</u></u>

**Powhatan Energy Fund**  
**October 31, 2010**

Mngmt Fee 0.2500% If beginning of month sub, money went in first 5 business days of current month or transfer  
 Perf Alloc 20% If mid-month sub, money went in before end of current month, but doesn't share in profits until next month  
 Total Profit (99,917.59)

<u>Account Name</u>	<u>Beginning Balance</u>	<u>Beginning of Month Subs</u>	<u>Mid-Month Subs / End of Month W/D</u>	<u>Relative %</u>	<u>Profit</u>	<u>Management Fee</u>	<u>Performance Allocation</u>	<u>Net Profit</u>	<u>Closing Balance</u>	<u>Gross MTD%</u>
TFS	-			0.0000%	-			-	-	#DIV/0!
ChenC001A	128,062.46		(96,190.71)	9.6191%	(9,611.14)			(9,611.14)	22,260.61	-7.505%
EibenL002A	383,894.04		(288,351.80)	28.8352%	(28,811.42)			(28,811.42)	66,730.82	-7.505%
FrederickT003A	13,676.65		(10,272.85)	1.0273%	(1,026.44)			(1,026.44)	2,377.36	-7.505%
GatesK004A	382,473.93		(287,285.13)	28.7285%	(28,704.84)			(28,704.84)	66,483.96	-7.505%
GatesR005A	381,629.79		(286,651.07)	28.6651%	(28,641.48)			(28,641.48)	66,337.23	-7.505%
HarrisS006A	7,373.53		(5,538.43)	0.5538%	(553.39)			(553.39)	1,281.71	-7.505%
NewmanE007A	28,024.51		(21,049.86)	2.1050%	(2,103.25)			(2,103.25)	4,871.39	-7.505%
SekelskyG008A	6,204.24		(4,660.15)	0.4660%	(465.63)			(465.63)	1,078.46	-7.505%
	<u>1,331,339.14</u>	<u>-</u>	<u>(1,000,000.00)</u>	<u>100.0000%</u>	<u>(99,917.59)</u>	<u>-</u>	<u>-</u>	<u>(99,917.59)</u>	<u>231,421.55</u>	

Management	-
Performance	-
Withdrawals	<u>1,000,000.00</u>
Total Assets	<u><u>1,231,421.55</u></u>

# **EXHIBIT 3**

From: Kevin Gates [Kevin@TFSCapital.com]  
Sent: Friday, October 22, 2010 04:32:26 PM  
To: Rich Gates  
Cc: Greg Sekelsky; Larry Eiben  
Subject: Re: HFoF ownership info

Hi Greg,

- a. My personal Scottrade account number is [REDACTED]. The account is registered under my name. I'll complete the redemption paperwork and will send down.
- b. I do not understand this statement: " I expect the true-up will need at least 18 months (with the KLR withdrawal) or 2 years (without the KLR withdrawal). Hopefully it will take less than that. " Can you please help me to better understand what "true-up" you are referring to?
- c. In aggregate, I think that we can redeem \$1,000,000 from Powhatan. This will leave us with about 1.2 million in the checking account - which is enough to pay Alan's estimated 1 million in fees, and other misc attorneys fees.
- i. Even though we want Powhatan's ownership to be the same as TFS's, I don't think that we should try to match-them up now, as that would be unfair to significantly alter the ownership interest after we've stopped trading but before we've paid Alan's fees. But, I don't even know the current ownership as I don't think that the master ops file has been updated through the end of September. Can you please do this and let me know when it's complete? I'll then let everyone know how much they can redeem.
- ii. The redemption terms from Powhatan will be the same as the last time we pulled money - everyone has to realize that they may have to return the money to Powhatan.

Kevin

On Fri, Oct 22, 2010 at 12:53 PM, Rich Gates <[Rich@tfscapital.com](mailto:Rich@tfscapital.com)> wrote:

Greg, Kevin, and Larry:

Here are some thoughts:

1. My personal Scottrade account number is: [REDACTED]. It is registered in my name directly.
2. We initiated the transfer of TFSSX from Jefferies to Scottrade. I expect it will be transferred into the account by Wednesday of next week.
3. To keep the balance in the HFoF Jefferies account above the required \$2.5 MM, I wired \$310,000 today outta HFoF Scottrade into HFoF Wachovia. I was able to come up with this cash by transferring the HY fund into the margin account from the cash account. Later this afternoon (or Monday), I will get the money wired into HFoF Jefferies.
4. We are gonna have problems transferring the shares of TFSSX outta Scottrade in early Nov since they are currently held in the margin account. We just do not have the cash available. We are either going to need to wire money into it (new subscriptions into HFoF at month end?) or sell the high yield fund. The good news is that we have a little time to work on this.