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, *et al.*	)	
Defendants.	)	

PLAINTIFF FEDERAL ENERGY REGULATORY COMMISSION'S REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

While Powhatan's subpoena seeks only metadata, its response makes clear this is merely a first step towards seeking the substance of the personal emails of two FERC attorneys. *See* Response at 12 ("if [the metadata shows] they communicated often, it establishes a reasonable basis to obtain the substance of those emails, as Powhatan would need to know what they were communicating about that necessitated frequent communications that would be shielded from FERC's knowledge.").[1] Yet, Powhatan's subpoena cannot escape a fatal conundrum:

(1) If Messrs. Tabackman and Olson used Gmail to communicate with each other about this case, then those communications between co-counsel would be presumptively privileged under the work product doctrine and not discoverable. And, Powhatan offers the Court no justification for why that would not be the case here, particularly where no Separation of Functions violation could have occurred.

[1] Defendant Powhatan Energy Fund, LLC's Opposition to Plaintiff Motion for Protective Order, FERC v. Powhatan Energy Fund, LLC, No. 3:15-cv-00452-MHL-MRC (E.D. Va. Dec. 17, 2021), ECF 282 (Response).

(2) In contrast, if Messrs. Tabackman and Olson used Gmail to communicate with each other about something *other than* this case, then the communications are irrelevant to the claims and defenses at issue here and are not discoverable, particularly against the backdrop of Powhatan's public harassment campaign.

That Powhatan's subpoena seeks only metadata is irrelevant. Also irrelevant is that Powhatan only seeks metadata about communications between counsel over Gmail, because the work product privilege applies regardless whether counsel discuss a case with each other via FERC email, personal email, or any other means of communication. The Court should grant FERC's motion and end Powhatan's highly public attempts to interrogate and intimidate FERC's employees.

I. Powhatan Impermissibly Seeks the Substance of Attorneys' Personal Emails Regardless of Relevance

Lost in Powhatan's response is any recognition of its request's extraordinary nature. Despite this Circuit's strong presumption against discovery of opposing counsel, Powhatan has now attempted to depose three FERC attorneys and attempted to subpoena the personal email accounts of two FERC attorneys.[2] As FERC explained in its Rule 30(b)(6) deposition briefing and its prior briefing on this issue, however, a party attempting to subpoena documents from opposing counsel faces a high bar and must show, among other things, that "the information sought is relevant and nonprivileged" and "the information is crucial to the preparation of the case." *Allen v. Brown Advisory, LLC,* No. CV 3:20-MC-00008, 2020 WL 5603760, at *2 (W.D. Va. Sept. 17, 2020) (citations and quotations omitted). Neither is true here, but Powhatan is undeterred and argues it will eventually be entitled to the substance of FERC's attorneys'

[2] Powhatan noticed Messrs. Tabackman and Olson individually and noticed FERC's counsel indirectly via its request for a FERC 30(b)(6) deponent.

personal emails following the receipt of metadata from Google. *See* Response at 12 (suggesting Powhatan may be entitled to review opposing counsel's emails to each other based on how often they communicated); *see also* Response at 3 (arguing Powhatan has a right to review the emails to "corroborate" Mr. Tabackman's and Mr. Olson's sworn affidavits). It cites no supporting authority for the notion that such invasive discovery into counsel's personal communications is permitted, let alone appropriate here.

Powhatan's argument regarding the metadata's potential relevance is unfalsifiable. It reasons that, if the metadata reflects emails between Messrs. Tabackman and Olson[3] on their Gmail accounts over the course of a decade, then it may be entitled to review the substance of those communications. How many emails? Powhatan does not say. It simply ventures that the mere fact of communicating "often" might be enough. Response at 12.[4]

Powhatan similarly cannot explain how the subpoena would yield relevant, nonprivileged evidence; instead, it argues that after it reviews the metadata, it might be able to scrabble together further speculation about what could lie underneath counsel's personal communications. As the Fourth Circuit said of a similarly misguided subpoena, "[w]hile the [subpoena proponent]

[3] FERC clarifies Powhatan's misstatement about the role of Mr. Olson. Response at 1 ("Two members of FERC's litigation team in this matter have already shown that they are willing to engage in misconduct to win a case."). Mr. Olson has never entered an appearance as counsel for FERC in this litigation. Instead, he had limited involvement in the initial investigation of Powhatan.

[4] The Commission recently concluded its own internal investigation of Messrs. Olson and Tabackman's personal email correspondence and determined, at least as it relates to *GreenHat*, "there were no additional prohibited communications." *See GreenHat Energy, LLC*, 178 FERC ¶ 61,002. at P 5 (Jan. 5, 2022). In other words, the Commission concluded this was an isolated incident, not part of a larger pattern of conduct. In that same order, the Commission declined to rule on whether Mr. Tabackman's emails constituted a formal violation of the Separation of Functions rule based primarily on the fact that the emails in question did not address any substantive matter that was then before the Commission. *Id*. PP 8-10.

assert[s] that these materials may [lead] to discovery of admissible evidence, they present no intelligible explanation of how that is so, nor can we detect any; the requests have every indicia of the quintessential fishing expedition." *Cook v. Howard*, 484 Fed. App'x 805, 813 (4th Cir. 2012). At bottom, besides speculation as to possible frequency, Powhatan offers no support for either its claim that personal emails between two long-time work colleagues should be considered relevant to litigation brought by their employer or that metadata will sufficiently show such relevance.

II. Powhatan Cannot Sufficiently Support Its Allegation of Prosecutorial Misconduct

Powhatan has presented no evidence of prosecutorial misconduct occurring in *this case*. Instead, it relies on a threadbare insinuation—an alleged procedural violation in an unrelated case ten years after the facts here, relating to a type of violation that could not possibly have occurred here between Messrs. Tabackman and Olson. This is insufficient evidence to support discovery regarding alleged prosecutorial misconduct. *See United States v. Shipman*, 190 F. App'x 289, 291 (4th Cir. 2006) (defendant must present more than mere "conclusory claims" to justify discovery into alleged prosecutorial misconduct); *see also United States v. Scates*, 11 F. App'x 208, 211 (4th Cir. 2001) (affirming district court's disallowance of discovery regarding alleged prosecutorial misconduct where defendant failed to "make a credible showing, by clear and convincing evidence").[5]

[5] A defendant bears a similarly high burden when attempting to seek discovery regarding alleged selective enforcement. *See, e.g., United States v. Stone*, 394 F. Supp. 3d 1, 30–31 (D.D.C. 2019) ("The standard for obtaining discovery regarding selective prosecution is correspondingly rigorous . . . Thus, defendant must put forward some evidence tending to show the existence of the essential elements of a selective prosecution claim. This evidence must be credible, and a defendant must provide something more than mere speculation or personal conclusions based on anecdotal evidence.") (internal citations and quotations omitted).

Despite its frequent claims on Twitter, Powhatan has cited no evidence of prosecutorial misconduct occurring here, let alone "clear and convincing evidence." Instead, its position is that the subpoena should be permitted to allow Powhatan to determine not only if Messrs. Tabackman and Olson committed a Separation of Functions Rule violation like the one at issue in *GreenHat*,[6] but also whether those attorneys might have taken any other actions Powhatan finds "improper." Response at 11.[7] Yet the specific request – for metadata from personal emails between Messrs. Olson and Tabackman – cannot reveal a Separation of Functions violation because neither was ever part of the Commission's decisional team in this case (*i.e.*, at no point were Messrs. Tabackman and Olson ever on opposite sides of any ethics "wall" in this case). Nor can mere metadata show whether a communication is "proper" or "improper," as it will not contain any of the substance of the underlying communication.[8] It is impossible to square this

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[6] *See generally GreenHat Energy, LLC*, et al., FERC Dkt. IN18-9-000.

[7] Powhatan appears to argue that the metadata may show Messrs. Tabackman and Olson had "animus" against Powhatan. Response at 11. There are multiple problems with that speculation. First, metadata cannot show "animus," whatever that term means. Second, Powhatan has not attempted to offer any evidence of Messrs. Tabackman's and Olson's alleged animus or how that manifested itself in this case. Worse, Powhatan presents no authority for the position it is entitled to conduct discovery to determine whether animus possibly existed. Indeed, the case Powhatan relies upon, *United States v. Cooper*, 617 F. App'x 249, 250 (4th Cir. 2015), does not involve a subpoena or discovery request. As in this case, it involves an unsupported allegation of prosecutorial animus the court summarily dismissed. Of further note, the *Cooper* court explicitly declined to impute an allegation of "animus" by an investigator against the attorneys prosecuting the case. *Id*. at 251. And, yet, that is precisely what Powhatan seeks to do here, at least as it pertains to Mr. Olson.

[8] FERC notes, again, the lack of sufficient specificity of Powhatan's subpoena. Despite quoting the very terms of the subpoena, which asked for "All documents sufficient and necessary to identify" several categories of metadata, Powhatan argues FERC has misunderstood the subpoena. Response at 10. But the fact that the subpoena is open to multiple plausible interpretations shows it is insufficiently specific. Under the Stored Communications Act, 18 U.S.C. §§ 2701–2712, Powhatan is entitled to just the metadata, not "all documents" related to the metadata. To the extent the subpoena implies an entitlement to anything greater, it is in violation of that act. *See e.g.*, *Obodai v. Indeed, Inc*., No. 13–80027–MISC EMC (KAW), 2013

Circuit's rulings requiring specific, clear, and credible evidence of alleged prosecutorial misconduct with Powhatan's attempt to discover "improper" conduct of a sort it declines to identify, much less evidence. A subpoena designed to ferret out unspecified, unknown, and unevidenced "improper" communications can be described as nothing else but a fishing expedition.

Finally, it is telling that Powhatan attempts to take discovery into prosecutorial misconduct despite having failed to raise any such defense. "Just as a plaintiff may not take discovery regarding unpled claims, so a defendant is precluded from seeking discovery concerning unpled defenses." *Lifeguard Licensing Corp. v. Kozak*, No. 15Civ.8459(LGS)(JCF), 2016 WL 3144049, at *1 (S.D.N.Y. May 23, 2016); *accord* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or *defense*. . ") (emphasis added). Powhatan should not be permitted to prolong discovery by issuing subpoenas seeking evidence for defenses it has never raised.[9]

WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013) (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).

[9] The Court should reject Powhatan's suggestion that a one-sentence, generic assertion of an "unclean hands" Affirmative Defense somehow encompasses prosecutorial misconduct and selective prosecution. Response at 10 fn.7; *see also* Answer at 29 ("FERC's claims are barred because of inequitable conduct and unclean hands."). First, and most importantly, the doctrine of unclean hands is unavailable to defendants in government enforcement cases, including FERC enforcement cases. *See FERC v. Coaltrain Energy, L.P.*, 501 F. Supp. 3d 503, 546 (S.D. Ohio 2020). Second, affirmative defenses must be pled with sufficient specificity to put a plaintiff on clear notice of the issue, but nothing about a vague assertion of unclean hands remotely suggests prosecutorial misconduct. There is little doubt that, had Powhatan intended to allege prosecutorial misconduct in its Answer – as it has done almost daily on Twitter – it could and would have done so explicitly.

III. Powhatan's Recitation of Facts Misrepresents FERC's Attempt to Resolve this Discovery Dispute

Powhatan's summary of how this issue came before the Court is misleading.[10] It states: "Mr. Olson and Mr. Tabackman individually searched their own personal email accounts and unilaterally provided what they considered to be relevant to FERC's counsel, all without input from counsel." Response at 3. That is false. The sworn affidavits themselves stated that Messrs. Tabackman and Olson searched their personal email accounts using a list of search terms provided by FERC counsel. As FERC explained to Powhatan's counsel on numerous occasions, these search terms were based on the same terms Powhatan itself agreed to earlier in this litigation.[11]

Despite the baselessness of Powhatan's subpoenas, FERC worked diligently to attempt to resolve the dispute without the Court's intervention. First, FERC voluntarily provided sworn affidavits from both Messrs. Tabackman and Olson. Second, in coordination with FERC's counsel and despite their willingness to aver that they did not use their personal email accounts to work on this case, Messrs. Tabackman and Olson voluntarily searched their emails and provided the responsive results to counsel consistent with counsel's directions. Third, counsel reviewed those records to confirm none was of any relevance to this proceeding. Fourth,

[10] Powhatan's characterization of the background of this case as "FERC's 11-year, dogged and 'one-sided' pursuit of Powhatan" is perplexing. Response at 2. Powhatan was granted full discovery rights in 2017 and has fully availed itself of those rights in the intervening years. There has been nothing "one-sided" about the past five years of litigation.

[11] Powhatan remarks vaguely that "FERC did not provide any emails from Mr. Tabackman," as if that absence implies something untoward. Response at 3. But, as FERC explained to Powhatan's counsel in detail, there were only a small handful of emails in Mr. Tabackman's email account that hit on the search terms, and all but one related to counsel's transmission of the subpoena at issue here. Such communications are obviously irrelevant to any of Powhatan's defenses.

notwithstanding its own review, FERC allowed Powhatan's counsel to conduct an in-person review of the documents.[12] Finally, to prove its good faith and to put this issue to rest, FERC has offered to provide the emails to the Court for its *in camera* review.[13]

FERC undertook these efforts in good-faith reliance on Powhatan's representations to it and the Court that a "satisfactory" affidavit would resolve this dispute. But Powhatan's brief makes clear that FERC's efforts have been for naught and the only acceptable result is one in which Powhatan conducts its own search and review of Messrs. Tabackman's and Olson's personal and private emails. As Powhatan pithily summarized its filing on Twitter: "HAHAHAHA @FERC." (Ex. A). The Court should not reward such antics.

IV. Powhatan's Response is Premised on Wholly Unsupported Allegations of Perjury

With no evidence at all, Powhatan speculates that two members of the bar may have committed perjury. It argues that its subpoena is necessary because "Mr. Olson and Mr. Tabackman could have had numerous other communications they unilaterally chose not to produce to FERC's counsel." Response at 10. Yet, Messrs. Olson and Tabackman, officers of the court, have sworn under penalty of perjury that they provided all responsive emails to counsel consistent with counsel's directions. Powhatan is fully aware of this fact because it is clear on the face of the declarations. Consequently, Powhatan's implicit position is that Messrs.

[12] Notably, Powhatan does not contend that any of the documents it reviewed were relevant to its defenses.

[13] Powhatan makes much of the fact that Mr. Olson redacted several of his emails, but it again misrepresents the facts. *See, e.g.,* Response at 3. It is true that Mr. Olson redacted the documents in the first instance, but FERC clearly explained to Powhatan in the meet-and-confer process that FERC's counsel subsequently reviewed and agreed with the redactions. As FERC told Powhatan, Mr. Olson's redactions covered highly personal information of unequivocal irrelevance, such as information regarding a sender's minor child. If FERC were attempting to hide relevant information behind these redactions, it would not have offered them for *in camera* review. Powhatan's insistence on seeking these materials speaks volumes about its motivation.

Olson and Tabackman may have lied in their sworn affidavits, otherwise no "corroboration" would be warranted. *See* Response at 3 (arguing the subpoena is necessary to "corroborate" Mr. Olson and Mr. Tabackman's affidavits).

Accusing opposing counsel of perjury is a grave measure that requires far more foundation than Powhatan has offered. This type of allegation goes to the heart of the Fourth Circuit's disallowance of discovery in cases involving vague, unsubstantiated claims of prosecutorial misconduct. Virtually every defendant, whether in criminal or civil enforcement action, feels the prosecutors or agency attorneys involved are biased against them, but Powhatan's mere dislike of Messrs. Tabackman and Olson is insufficient to support an accusation of what amounts to perjury. To hold otherwise would give carte blanche to defendants in virtually every case to explore counsel's personal and private communications based on little more than conclusory allegations.

* * * * *

Powhatan's inappropriate subpoena, which it supports largely with innuendo and rhetoric, embodies Carl Sandburg's famous aphorism: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and facts are against you, pound the table and yell like hell." It attempts to create a sideshow about prosecutorial "animus" to further delay the adjudication of its wash trading scheme, and hopefully to obtain further grist for its Twitter mill, all in service of its oft-stated hope that positive media coverage may sway the case in its favor. The Court should reject this latest attempt to use discovery tools as a means for supporting a prolonged and ongoing harassment campaign.[14]

[14] FERC's opening brief pointed out that Powhatan's subpoena to Google was open to multiple interpretations, and could be read to cover not only metadata about emails between Mr. Tabackman and Mr. Olson but potentially *all* of Mr. Tabackman's and all of Mr. Olson's

Respectfully Submitted,

/s/ Kevin Dinan

Kevin Dinan (Va. Bar No. 25517)
Damon Taaffe (*Pro Hac Vice*)
Daniel T. Lloyd (*Pro Hac Vice*)
888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-6214
Facsimile: (202) 502-6449
Email: kevin.dinan@ferc.gov

Attorneys for Federal Energy Regulatory Commission

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personal non-work emails since 2010. Powhatan's Response makes clear that the subpoena is limited to metadata about emails between Mr. Tabackman and Mr. Olson, and does not cover metadata about any of their other personal emails. Response at 10. While FERC appreciates this limitation, it does not obviate its concerns regarding the subpoena.

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2022, 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
Kevin Dinan (Va. Bar No. 25517)
888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-6214
Facsimile: (202) 502-6449
Email: kevin.dinan@ferc.gov

Attorneys for Federal Energy Regulatory Commission

EXHIBIT A


Powhatan Energy Fund LLC
@PowhatanFundLLC
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