UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

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

REPLY MEMORANDUM IN SUPPORT OF
MOTION OF COUNSEL FOR LEAVE TO WITHDRAW

The undersigned counsel for Defendant Powhatan Energy Fund, LLC ("the Fund"), on behalf of Williams Mullen, submits this Reply Memorandum to the Fund's Notice of Objection to Motion of Counsel for Leave to Withdraw (ECF No. 213) (the "Fund's Objection").

In support of its original Motion to Withdraw (ECF No. 207), Williams Mullen submitted a memorandum and supporting declaration (ECF No. 208) that avoided disclosure of confidential information gained in the representation related to the two grounds of the Motion. The Fund's Objection contains relevant allegations concerning Williams Mullen's representation of the Fund. In accordance with Rule 1.6(b)(2) of the Virginia Rules of Professional Conduct, the undersigned submits herewith an additional Declaration (the "Reply Declaration" or "Reply Decl.") attached hereto as *Exhibit 1* setting forth additional facts that are reasonably necessary to respond to those allegations.

The facts demonstrate, without question, that representatives of the Fund have not provided an adequate source or assurance of payment of the substantial legal fees and expenses that Williams Mullen would be required to incur as the sole counsel acting on the Fund's behalf

prior to trial. That financial burden is substantial, *See Hanes Decl.* ¶¶ 18-20 (estimating the amount of uncompensated fees and expenses the firm would incur through trial at a range from $280,000 to $440,000). The facts also demonstrate that the undersigned and the Fund have been unable to reach agreement on the manner of conducting the remaining stages of the litigation.[1] The differences between Williams Mullen and the Fund are substantial, have arisen after the lifting of the stay in this litigation, and are irreconcilable. As a result, the continued representation of the Fund by Williams Mullen has been rendered unreasonably difficult by the Fund and the Motion to Withdraw should be granted. *See, e.g.*, *Portsmouth Redevelopment & Hous. Auth. v. BMI Apartments Assocs.*, 851 F. Supp. 775 (E.D. Va. 1994) (Payne, J.).

In its Objection, the Fund concedes that it has declined to provide Williams Mullen an adequate source or assurance of payment. And it acknowledges that the effect of sustaining their objection and denying the motion to withdraw would be to "force[the firm] to work for free." *The Fund's Objection* at 4. Even though they treat it as one, the insufficiency of the current balance of the Fund's financial statement to meet the needs of its defense is no answer to its apparent dilemma. The owners of the Fund are not constrained from providing additional funding to the business or otherwise guaranteeing payment of the Fund's legal fees. Perhaps the owners may have made a business decision not to invest further in the Fund or its defense. That

[1] Though the Fund claims in its Objection to be unaware of it, the undersigned has had many disagreements with the representatives of the Fund regarding the course to be taken in preparing the case for trial. Representatives of the Fund have stated that they will not pay the firm to review the substance of documents produced in the case, to prepare for depositions, or even to attend depositions of witnesses other than the representatives of the Fund. Counsel has told the representatives on more than one occasion that he does not believe the firm can meet its obligation to provide zealous representation under such restrictions. *See* Reply Decl. ¶¶ 7, 11-12. And the conduct of the Fund's representatives with respect to its obligations to the firm with respect to the fees has contributed to the irreparable disruption to the relationship. *Id.* ¶¶ 5, 13-17.

could even be a sound business decision. But it is their decision. It does not entitle the Fund to avoid the very consequences of that decision.

Yet they argue that while it is unfair to burden a hedge fund or its owners with the financial costs of its defense, it would not be unreasonable to impose that same burden on its law firm. Thus, the Fund's position does not avoid the unfairness about which it complains; it would simply shift it by demanding that the Fund effectively be provided with compulsory and free legal representation. The Fund implies that because Williams Mullen is a large and successful law firm that it can afford to "work for free." *The Fund's Objection* at 4. As this Court has observed, the size and success of the law firm is just not relevant to whether providing legal services without compensation is an unreasonable financial burden. *Portsmouth Redevelopment*, 851 F. Supp. at 786.

For example, every year lawyers at this firm provide substantial legal services for no or reduced compensation to indigent parties and nonprofit entities. That does not mean that providing those services comes at no financial burden. But while it is certainly reasonable to expect good lawyers to perform *pro bono* representation, the Fund is neither indigent nor is defense of its legal position infused with a societal or public purpose. The Fund is a business. It is owned and operated by individuals who do so to make a profit, do not appear to lack for means, and who, according to the Amended Complaint, enjoyed millions of dollars from the trades at issue in this case. Counsel can only marvel at the cynicism that permits these same individuals to cite the firm's participation in the Government's PPP program—an emergency program designed to ensure that businesses like ours continued to pay our employees when they were unable to work—to argue that we should be compelled to keep working for a hedge fund that refuses to pay for it.

Permitting Williams Mullen to withdraw now should neither pose a material adverse effect on the interests of the Fund nor should it delay or cause undue disruption of the proceedings herein. With trial more than a year away, and with all disputes between the parties regarding the document discovery conducted on the Fund's behalf now having been almost fully resolved, very little of the work of this Firm will result in duplicative expense for a new firm to "get up to speed." *See Reply Decl.* ¶7. Granting the firm's motion cannot unfairly prejudice the Fund's right and ability to a vigorous defense of their conduct. The only prejudice here, as observed by Judge Payne, is "the prejudice which always will exist when withdrawal is based on the client's inability, or refusal, to pay a fee …." *Portsmouth Redevelopment & Hous. Auth.*, 851 F. Supp. at 786-87. Accordingly, Williams Mullen respectfully requests that the Court grant its Motion to Withdraw.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record. I also emailed a copy to the representatives of the Fund and sent a hard copy of this order by FedEx addressed to Powhatan's office.

By:/s/ *Patrick. R. Hanes*
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DECLARATION OF PATRICK R. HANES

I, Patrick R. Hanes, in accordance with 28 U.S.C. § 1746, based on my personal knowledge and upon review of records, declare that:

1. On July 26, 2021, I submitted a Declaration in support of the Motion of Counsel for Leave to Withdraw from Representation filed herein (the "Motion to Withdraw").

2. I have read the "Notice of Objection to Motion of Counsel for Leave to Withdraw" submitted by a representative of Powhatan Energy Fund, L.L.C. (the "Fund"), which I filed as directed by the Court on behalf of the Fund (the "Fund's Objection").

3. The Fund's Objection contains the following relevant allegations concerning Williams Mullen's representation of the Fund:

   a. "The Firm's notion" that it is serving as local counsel is incorrect (Fund's Objection at p. 2);

   b. "Allowing the firm to withdraw now will require Powhatan to spend a significant portion of its remaining cash on a new lawyer to gain the knowledge that the Firm already has about the case" (*Id.* at 4);

c. Powhatan's lack of sufficient funds to pay its legal fees "should not surprise the Firm because it has known about Powhatan's financial situation for some time now" (*Id.* at 2);

d. "Powhatan is unaware of any differences between Powhatan and the Firm, other than Powhatan's financial situation, which are irreconcilable or otherwise result in a continued representation that is unreasonably difficult" (*Id.* at 5).

4. Pursuant to Rule 1.6(b)(2) of the Virginia Rules of Professional Conduct, the following sets forth the information that is reasonably necessary to respond to those allegations.

5. Williams Mullen was engaged to serve in a limited role as local counsel. Our engagement letter with Powhatan dated August 31, 2015, confirms the Fund's engagement of Williams Mullen:

> to serve as your local counsel in the litigation with the Federal Energy Regulatory Commission in the Federal District Court of the Eastern District of Virginia and other matters related thereto.

This engagement letter was transmitted to the Fund's representative and has not been amended. The Firm cannot locate a copy of the letter signed by the Fund's representative, but a draft of it had been sent to a lawyer representing the Fund who acknowledged receipt and directed the final copy to be sent to the Fund's representative.

6. Following the lifting of the Stay of this case in October of 2020, the undersigned initiated conversations with representatives of the Fund regarding our role in the case, including whether lead counsel would be replaced. Those representatives informed me about discussions they were having with other law firms and associations, some of whom they specifically said they were seeking to bring into the case. Once it appeared that the Fund had not secured another firm to serve as lead counsel, my attempts to address how this firm would need to manage an

expanded role in this case were met by the Fund's representatives with what I perceived to be a level of indifference. Simply put, my impression was the matter of their representation in this case was a problem they did not want to have to deal with. But at no point did I, or to my knowledge anyone else at Williams Mullen, modify the original terms of the engagement.

7. The statement that Powhatan will have to incur significant additional expense having a new lawyer "gain the knowledge that the Firm already has about the case" should be considered in context with two facts. First, this firm did not represent the Fund during the lengthy period that the plaintiff's claims were the subject of formal investigation and show cause proceedings prior to the filing of the Complaint. Thereafter, this firm's engagement was solely in the role of local counsel. Accordingly, we have not yet been required to do the types of "lead" legal work that are necessary to prepare a case such as this one for summary judgment and trial. Second, representatives of the Fund have specifically imposed limitations on the work they have authorized us to perform. For example, they specifically stated that the Fund would not pay us to prepare ourselves or the Fund's witnesses for depositions or to conduct a comprehensive review of the substance of documents produced in the case. During the first phase of discovery which has consisted of written discovery and document production, these limitations have not substantially affected the firm's ability to provide zealous representation. And presently all disputes between the parties regarding the document discovery have largely been resolved. Accordingly, in my opinion very little of the work incurred by this Firm to date will result in duplicative expense for a new firm.

8. With respect to the Fund's assertion that Williams Mullen has known that the Fund is unable to pay the anticipated legal fees for "some time now," the undersigned initiated a conversation with the Fund in March of this year soon after I became aware of the current

balance of funds from reading a copy of the Fund's financial statement. At that time I provided the Fund's representatives with my analysis of various options, including the possibility of providing additional capital to the Fund.

9. It was my understanding that the Fund is owned by individuals including the representatives of the Fund with whom we communicated. It is also my understanding that the Fund distributed profits from its trading to individual owners of the Fund. In my experience, it is not uncommon for the beneficial owners of a business to fund legal fees incurred in pursuing a vigorous legal defense those owners desire on behalf of the business entity.

10. My discussions regarding a plan for the legal defense the Fund desired have been ongoing, but at no point during any of those discussions have the representatives of the Fund stated that they were financially unable to provide additional capital or an alternative source of payment.

11. The Fund asserts that it is surprised and unaware of any irreconcilable differences between itself and Williams Mullen. The undersigned has had many disagreements with the representatives of the Fund regarding the course to be taken in preparing the case for trial. Representatives of the Fund have stated that the Fund will not pay the firm to review the substance of documents produced in the case, to prepare ourselves or witnesses for depositions, or even to attend depositions of witnesses (other than the representatives of the Fund). The undersigned has told the representatives on more than one occasion that he is unwilling to put his personal and professional reputation at risk and does not believe the firm can meet its professional and ethical obligations with such restrictions in place. They have, on multiple occasions in both emails and in conversations, acknowledged that our differences exist and that as a result this firm would likely move to withdraw from the representation.

12. Disagreements between Williams Mullen and the Fund with respect to the payment of fees also have been substantial, ongoing, and have rendered the representation unreasonably difficult.

13. Our engagement letter with the Fund provides that:

> if a statement remains unpaid for more than thirty (30) days, without an arrangement satisfactory to us for payment of the account, we reserve the right to withdraw from the representation and upon payment, to decline further representation without an acceptable deposit for payment of future services and costs.

14. Earlier this year, the Fund owed this firm over $80,000 that had been unpaid for over thirty days after the issuance of two monthly statements, dated March 8, 2021, and April 7, 2021. In response to inquiries being made by the undersigned regarding the Fund's options and intentions going forward, the Fund's representatives emailed counsel to state that:

> Although we are running out of money and have talked to a bankruptcy attorney, we have decided not to pursue bankruptcy. … We expect your firm may need to submit a letter to the court requesting to be removed from the case.

15. In response, the undersigned notified the Fund's representative that the firm would require all amounts to be paid, kept current, and payment of an advance deposit sufficient to cover at least two months of anticipated legal expenses. The Fund's representative paid the amounts then outstanding, but expressly declined the firm's proposal for a deposit for future services and costs.

16. Two months later, on Friday, July 16, 2021, the Fund's representative who had received Williams Mullen's invoice for services provided in June, 2021, sent an email to the undersigned stating that:

> I am writing to regretfully inform you that Powhatan does not plan on paying the recent invoice that Williams Mullens (sic) sent us. In addition, we do not plan on paying future ones, either. We

understand that your firm may approach the court to ask to be removed.

17. Although a few days later another representative of the Fund partially retracted the statement (stating they would pay the June invoice which subsequently was paid), I informed the Fund's representative that Williams Mullen already had decided to withdraw.

18. According to the records of the firm, as of this date the amount invoiced and still owed by the Fund to Williams Mullen is $19,716.32.

19. The average monthly fees and expenses billed during the calendar year 2021 has been approximately $35,000. I have no reason to believe that the pace of the Fund's legal expenses will decline prior to trial.

20. If the Fund goes through with its representative's threat to stop paying any invoices going forward, and if Williams Mullen's Motion is denied, then Williams Mullen could be expected to incur at least $440,000 in fees and expenses through trial (which includes the amount currently unpaid) for which the Fund will not compensate it. If, on the other hand, the Fund decides to keep paying its fees and expenses until the end of this year but then stops, then Williams Mullen could be expected to incur at least $280,000 in fees and expenses through trial for which the Fund will not compensate it. Neither of these figures account for post-trial matters, such as briefing on motions to set aside or modify the verdict.

I declare under penalty of perjury and under the laws of the Commonwealth of Virginia that the foregoing is true and correct to the best of my knowledge.

Executed on August 6, 2021

/s/
Patrick R. Hanes