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, HOULIAN "ALAN" CHEN, HEEP FUND, INC., and CU FUND, INC.	)	
Defendants.	)	

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

Plaintiff Federal Energy Regulatory Commission ("FERC") submits this Reply in further support of its Motion for Protective Order disallowing Defendant Powhatan Energy Fund LLC's ("Powhatan") deposition of FERC pursuant to Fed. R. Civ. P. 30(b)(6). More importantly, FERC submits this reply to correct the numerous misstatements of fact and law contained in Powhatan's opposition. *See generally* Dkt. No. 256 (Defendant Powhatan's Opposition to Motion for Protective Order ("Opp'n")).

Relying on well-reasoned precedent in this District, which follows the majority of courts nationwide, FERC's Motion for Protective Order (Dkt No. 251-1) established that a Rule 30(b)(6) deposition of a government agency engaged in a civil enforcement actions is tantamount to deposing opposing counsel and should be permitted *only* when the topics: (i) are purely factual; (ii) are not duplicative of written discovery; and (iii) cannot be resolved through less intrusive means such as interrogatories or stipulations. Dkt. No. 251-1 ("Mot.") at 4 (citing *SEC*

v. Clark, No. 1:20-cv-01529-CMH-MSN (E.D. Va. May 14, 2021)). Given that FERC, like the SEC in *Clark*, produced its entire non-privileged investigative file, FERC demonstrated why Powhatan can show neither a compelling need nor the lack of less burdensome means for any of its Rule 30(b)(6) topics. Perhaps more fundamentally, FERC also demonstrated the problematic nature of the topics proposed by Powhatan, all of which are designed or have the tendency to intrude upon information that is privileged and protected.

Powhatan's opposition does not challenge *Clark*'s well-reasoned precedent on legal grounds, and does not cite any contrary Fourth Circuit authority. *See generally*, Dkt. No. 256 (Defendant Powhatan's Opposition to Motion for Protective Order ("Opp'n")). Instead, Powhatan contends for a variety of unsupported, novel reasons that the manipulative trading allegations in this case are particularly unique in comparison to the insider trading allegations at issue in *Clark* and on that basis alone warrant a different outcome. *Id*. at 5-8. Based on precedent outside the Fourth Circuit, Powhatan's remaining contentions repeat the same arguments rejected by EDVA Magistrate Judge Nachmanoff's reasoning in *Clark*, and should be similarly rejected as unpersuasive by this Court. Most fatal to Powhatan's position, however, is its inability after five attempts (four lists of topics and its opposition briefing), to articulate any non-privileged factual areas of inquiry or information not already available from previously disclosed discovery. *See, e.g*., Opp'n at 9-14.

DISCUSSION

A. FERC Expressly Conditioned Its Willingness to Provide A Rule 30(b)(6) Witness On Satisfactory Resolution of Its Privilege and Undue Burden Objections

Powhatan's opposition mischaracterizes FERC's good faith efforts to reach a negotiated resolution of the current dispute. *See* Opp'n at 1 and 5. Powhatan cites to FERC's meet and confer status update to the Court indicating it "agreed that it will provide a 30(b)(6) witness,

subject to agreement with Defendants regarding the topics and scope of the deposition," but ignores the latter clause of that statement in order to argue that FERC reneged by filing a Motion for Protective Order. *Id*. at 1 n.1. FERC did no such thing. In its motion, FERC provided a more complete description of its efforts to resolve this dispute since receiving the original list of objectionable topics on May 28, 2021. *See* Dkt. No. 251-1 at 1-3 and Exs. B-C (describing the four revised lists of topics received to date that reflect very little effort by Defendants to narrow or tailor the topics, as evidenced by the fourth list which represents a copy/paste version from the previous lists, even seeking to re-introduce certain topics it previously withdrew). In light of its own repeated failures to meaningfully tailor the topics during the protracted meet and confer period, Powhatan's mischaracterization of FERC's status report should be summarily discarded.

B. FERC's Motion for Protective Order Does Not Contend That Government Agencies Are Categorically Exempt from Rule 30(b)(6) Depositions

Powhatan spends a significant portion of its opposition attacking an argument FERC never made. Powhatan recites the general principle and cites to supporting authority for the proposition that government agencies are not categorially exempt from Rule 30(b)(6) depositions. *See* Opp'n at 2-4.[1] FERC agrees. FERC's Motion for Protective Order acknowledged that Rule (30)(b)(6) expressly applies to government agencies. *See, e.g*., Mot. at 4 -5 ("The overwhelming majority of courts to consider this issue, including one recently in this District, have held that 30(b)(6) depositions of government agencies engaged in civil enforcement actions are highly disfavored and, while not precluded *per se*, are typically inappropriate because any discoverable information may be obtained through less intrusive means than deposing opposing counsel, or the equivalent.").

[1] Powhatan's citation to *Fed. Energy Regul. Comm'n v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 230 (D.D.C. 2016) is highly misleading. No 30(b)(6) deposition of FERC was requested or brought before the court in that case.

Powhatan's opposition ultimately ignores the crux of FERC's argument, which is that Fed. R. Civ. P. 30(b)(6) does not exist in isolation; instead, like other rules of civil procedure, it reflects a balance of needs versus burdens against a backdrop of established privileges. Pertinent here, the vast majority of courts to consider the issue currently before the Court have held that 30(b)(6) depositions of government agencies in civil enforcement actions are generally disfavored. *Id.*[2] Indeed, out of hundreds of civil cases filed in recent decades, no court in this Circuit has ever compelled Rule 30(b)(6) testimony from FERC, the SEC, or the CFTC – a point Powhatan tacitly concedes – and there is nothing unique about this one.

C. Powhatan's Attempt to Factually Distinguish *Clark* is Unavailing

Powhatan's attempt to distinguish *Clark* misses the mark. As explained in FERC's motion, *Clark* is the only case from within this District to examine whether to allow a 30(b)(6) deposition of a government agency engaged in a civil enforcement action. *SEC v. Clark*, Civ. A No. 1:20-cv-01529-CMH-MSN, ECF No. 37 (E.D. Va. May 14, 2021). Recognizing that agencies pursuing a civil law enforcement function employ lawyers to investigate underlying facts for which they have no personal knowledge, *Clark* correctly concluded that a request to depose such an agency under Rule 30(b)(6) is equivalent to seeking a deposition of opposing counsel, thereby triggering the need for appropriate limitations and threshold requirements necessary to properly safeguard the privileges and protections that are implicated. *Id*. Because

[2] As Powhatan acknowledges, Magistrate Judge Nachmanoff in *Clark*, for example, expressly held there was no *per se* rule against a 30(b)(6) deposition of a government agency like the SEC. Yet, after careful consideration of countervailing factors such as privilege and burden, it did not stop him from granting a protective order barring the deposition. His analysis and conclusion are consistent with the dictates of Rule 26(b)(C), which "requires" that: "[o]n motion or *on its own*, the Court *must* limit the frequency or extent of discovery *otherwise allowed by these rules* or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1) (*e.g.*, privileged)." Fed. R. Civ. P. 26(b)(C) (emphasis added).

the SEC in *Clark* disclosed its entire investigative file containing the facts it gathered and intended to use in prosecuting its case, the defendant in *Clark* could not articulate any remaining non-privileged factual information sought by the Rule 30(b)(6) topics that was not already disclosed. Accordingly, Magistrate Judge Nachmanoff reasoned that the defendants' request did not seek the "underlying facts," which had already been provided to the defendants, but the protected "mental impressions and strategy decisions" of the SEC's counsel. *Id*. at 6. In other words, the defendants did not truly seek facts, but instead sought the SEC's *interpretation and understanding of facts* the defendants already possessed.

Unable to refute *Clark*'s holding, Powhatan unpersuasively seeks to distinguish *Clark*. First, Powhatan argues that this case differs from *Clark* based on a vague reference to "circumstantial evidence." Opp'n at 5-6. But, this argument is refuted by the very examples of non-circumstantial evidence it cites. Just as "[t]here is nothing circumstantial about the facts of the trades at issue [here]: the day, the time, the nodes, and the Marginal Loss Surplus Allocation (MLSA) received," there is nothing circumstantial about the facts of the trades at issue in *Clark*, such as the day, the time, the securities traded, and the revenues received. Despite these numerous non-circumstantial facts, Magistrate Judge Nachmanoff did not allow a 30(b)(6) deposition to proceed. Moreover, the circumstantial evidence at issue in *Clark* is of the exact same sort at issue here—the intent and circumstances underlying those trades. At bottom, there is no material difference between the allegations in *Clark* in this case that mitigate in favor of a 30(b)(6) deposition in one and not another.

Second, Powhatan argues that an economist could testify on behalf of FERC. This argument too is wrong and directly refuted in *Clark*. The SEC has over 4,300 employees. It is not an agency of 4,300 attorneys. To the contrary, the SEC's website lists dozens of employees

holding the title "economist."[3] Magistrate Judge Nachmanoff considered whether one of these numerous non-attorney employees could testify on the SEC's behalf in *Clark* and unequivocally held they could not - it would be equivalent to FERC attempting to depose defense counsel under Rule 30(b)(6) and rationalizing that they could always use a paralegal or secretary to explain Powhatan's understanding of market manipulation and how the law applies to the facts. *See Clark*, No. 1:20-cv-01529, at 15:22-16:9, ECF No. 39 ("I'm not persuaded that them selecting an accountant or someone who's a nonlawyer" solves the problem of the deposition being a deposition of opposing counsel). Indeed, FERC cited to this very passage in its motion seeking a protective order. Mot. at 10. Yet, as is the case with all of the holdings, orders, and opinions inconvenient to its position, Powhatan simply ignores this portion of Magistrate Judge Nachmanoff's ruling.

D. Powhatan Misstates the Scope of the Attorney Work Product Privilege

Powhatan's opposition ignores any claim of privilege cited by FERC except the attorney-client privilege. In doing so, it ignored the attorney work product privilege, which has important applicability here. Under Fed. R Civ. P 26(b)(3), the work product privilege protects from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative *(including the other party's attorney, consultant, surety, indemnitor, insurer, or agent*)." Fed. R. Civ. P. 26(b)(3)(A) (emphasis added). "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney *or other representative* concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B) (emphasis added). "Thus, the jurisprudence of Rule 26(b)(3) . . . divides work product into two parts, one of which is

[3] *See, e.g.*, https://www.sec.gov/page/dera_economists#

'absolutely' immune from discovery [opinion work product] and the other only qualifiedly immune [fact work product]." *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc*., 967 F.2d 980, 983-84 (4th Cir. 1992). In the Fourth Circuit, "the pure work product of an attorney insofar as it involves `mental impressions, conclusions, opinions, or legal theories ... concerning the litigation' is immune to the same extent as an attorney-client communication." *Id.* at 984. "This is so *whether the material was actually prepared by the attorney or by another `representative*' of the party. *Id*. (*citin*g Fed. R. Civ. P. 26(b)(3)); *see also Coryn Group II, LLC v. O.C. Seacrets, Inc*., 265 F.R.D. 235, 241 (D. Md. 2010) ("The immunity from discovery for fact work product has been described as an anti-freeloader rule designed to prohibit an adverse party from riding to court on the enterprise of another.") (quoting *National Union*., 967 F.2d at 985).

Multiple times throughout its opposition, Powhatan attempts to circumvent the attorney work product barrier to its Rule 30(b)(6) topics by erroneously suggesting that the work product privilege does not extend to non-attorneys or third parties. In one typical example, Powhatan contends that testimony can be properly sought regarding "facts related to FERC's communications with third-parties like PJM and IMM (which cannot be protected by privilege)." Opp'n at 6. This misstates the plain text of the attorney work product privilege, which by its terms extends to work product of attorneys or "other representative" such as "consultants or agents." Fed. R. Civ. P. 26(b)(3)(A) and (B). For example, the Court in *S.E.C. v. Goldstone* precluded Rule 30(b)(6) deposition testimony concerning the SEC's investigative communications with KPMG (defendants' external auditor) on work product grounds. 301 F.R.D. 593, 663–66 (D.N.M. 2014). Similar to the topics at issue here, the *Goldstone* defendants sought expansive Rule 30(b)(6) testimony about SEC/KMPG communications such as the SEC's

"enforcement action" and "allegations in the Complaint." *Goldstone*, 301 F.R.D. at 663-65. In explaining its reasoning, the court in Goldstone noted the following: "[t]he problem is that the noticed topics would repeatedly invade the SEC's work product, while the Defendants have other avenues available to obtain substantially similar information, including deposing KPMG witnesses" *Id*. at 664. Powhatan's topics seeking FERC Rule 30(b)(6) testimony regarding communications with PJM and the IMM pose the same problem. And similar to the defendants in *Goldstone*, Powhatan has had ample opportunity to depose both third parties and is in fact scheduled to do so by December 3, 2021. Accordingly, FERC's pre-Complaint communications with third parties such as PJM and the IMM are protected from disclosure under the attorney work product privilege.

Another typical example is Powhatan's mistaken view that the work product of non-attorney FERC employees is not protected by the work product privilege because such employees are not considered opposing counsel for purposes of seeking Rule 30(b)(6) testimony. To illustrate, the opposition claims: (1) "[FERC] employs analysts, economists, and ostensibly energy traders, former PJM officials, and former IMM officials on staff. For example, the Director of Enforcement is not an attorney." "And such an individual or individuals could answer the question of 'which facts show that these trades constitute market manipulation' without intruding into privilege." (*See* Opp'n at 6-7); (2) "[I]f a FERC employee analyzed the trades at issue and concluded they were 'wash trades' that did not have an economic benefit, those facts are not protected by privilege nor are they 'mental impressions' or 'legal theories' of counsel." *See* Opp'n at 11. Powhatan is mistaken. As explained above, protection under the work product privilege applies *whether the material was actually prepared by the attorney or by another representative* of the party. *National Union*., 967 F.2d at 984; *see also Federal Election*

Comm'n v. Christian Coalition, 178 F.R.D. 61, 76 (E.D. Va. 1998), *order aff'd in part, modified in part*, 178 F.R.D. 456 (E.D. Va.1998) (responding to a similar contention, the Court opined that "[i]t would completely stand the work product doctrine on its head to allow discovery of an attorney's work product simply because that attorney shared it with someone who was helping him prepare for litigation"); *SEC v. SBM Inv. Certificates, Inc*., Civil Action No. DKC 2006–0866, 2007 WL 609888, at *23–24 (D. Md. Feb. 23, 2007) (finding 30(b)(6) notice designating "all communications" with various third-parties "clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings" and thereby invaded attorney work product); *SEC v. Rosenfeld*, No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *2 (S.D.N.Y. Sept. 16, 1997) ("[A] Rule 30(b)(6) deposition of an SEC official with knowledge of the extent of [an] investigative effort, amounts to the equivalent of an attempt to depose the attorney for the other side."). Consequently, designating a non-attorney FERC employee will intrude on the attorney work product privilege to the same extent as a FERC enforcement attorney designee, and does not serve to cure the areas of inquiry that rely on this incorrect interpretation of the attorney work product privilege. Moreover, to the extent Powhatan seeks expert analysis supporting FERC's claims, rather than underlying facts, such analysis will be made available during expert discovery, which is the proper method for Powhatan to obtain such testimony. *See, e.g*., Fed. R. Civ. P 26(a)(2) and 26(b)(4)(A).

E. Powhatan Is Still Unable to Identify A Permissible Area of Inquiry Under Any of Its Proposed Topics

Through its four separate lists of topics, Powhatan has submitted 44 proposed topics to FERC. With the benefit of FERC's arguments in support of its Motion for Protective Order, Powhatan's opposition represents yet another, and final, considered version of proposed areas of inquiry. By repeating and compounding the same defects contained in previous versions,

Powhatan's final proposed areas of inquiry underscore Powhatan's continued misapprehension of the proper scope of the work production privilege as described above, and its persistent improper demand that, in addition to the underlying facts already disclosed, FERC provide "analysis," "positions," "views and understanding," "comparisons," "reasons for the selection or non-selection of market participants (*i.e.*, the exercise of prosecutorial discretion)," "factual basis" for legal terms, and "understanding and consideration" of conduct by non-FERC parties that Powhatan is free to depose (such as PJM and Dr. Chen). As a result of Powhatan's decision to recycle these lines of inquiry in its opposition, Powhatan has failed to rebut the topic-by-topic analysis and supporting authorities submitted in FERC's motion, which we incorporate here by reference. *See* Dkt. No. 251-1 (Mot. for Protective Order) at 9-22. Because Powhatan is still unable to identify any permissible Rule 30(b)(6) topics or areas of inquiry, FERC is entitled to a protective order disallowing the noticed Rule 30(b)(6) deposition. For example:

> (1) In connection with Topic 1, Powhatan posits that it plans to seek "testimony for the basis that the trades were 'manipulative' and 'round-trip.'" Opp'n at 9. As Powhatan notes in the very next line, "[w]hether or not the trades constituted market manipulation," is the central legal issue of this case. While the parties can quibble with whether some of the information sought is or is not a fact, there is no way Powhatan can argue that questions about the central legal theory to FERC's case – that Powhatan's trades meet the legal definition of market manipulation — seek anything other than counsel's privileged and protected mental impressions and legal strategies. *See, e.g.*, *Equal Employment Opportunity Commission v. Pinal County*, 714 F.Supp.2d 1073, 1078 (S.D. Cal. 2010) (observing that asking any EEOC representative to even set forth the selected facts which constitute the factual basis of the probable cause finding would infringe on the

deliberative process privilege as it would reveal the EEOC's evaluation and analysis of the extensive factual information gathered by the agency).

(2) In connection with Topic 2, Powhatan states it plans to ask why FERC determined some trades were "uneconomic," but completely ignores the attorney work product implication of such a question. Opp'n at 10-11. As was the case in its multiple lists of topics, Powhatan's opposition uses the purposefully obfuscatory phrase "FERC employee," when it really means FERC's counsel in this case. If counsel, or someone acting on counsel's behalf, analyzed Powhatan's trading, that analysis is unequivocally protected.

(3) In connection with Topic 4, Powhatan drops any pretense of seeking anything other than FERC's legal analysis. Opp'n at 11-12. Instead, it argues, without citation to any authority, that its plain attempt to seek privileged information—namely, FERC's legal theory as to why Powhatan's trading meets the legal standard for market manipulation—is cured by asking a non-attorney the question. As previously explained, however, FERC's analysis and legal conclusions regarding market manipulation constitute opinion work product that is absolutely immune whether sought from an attorney or a non-attorney designee or representative.

(4) The most glaring example of Powhatan's clear intent to use this deposition as a vehicle to attempt to invade upon FERC's privileged information is in connection with Topic 6. Opp'n at 12-13. Powhatan writes "the question 'why did you request this information from PJM' is not privileged and is beyond the produced communications but relevant, discoverable, and an appropriate deposition question." Powhatan is simply wrong. Counsel's rationale for why he or she chose to ask (or not ask) for specific

information from a witness is at the core of the attorney client privilege, attorney work product, and the deliberative process privilege. This is the very type of question Magistrate Judge Nachmanoff was attempting to ward off in *Clark*. *See Clark,* No. 1:20-cv-01529, at 14:21–16:9, ECF No. 39 (Rule 30(b)(6) deposition not permitted to attempt to discover counsel's "mental impressions and strategy decisions" or "why the lawyers put together the case the way they put it [together] and why they're relying on [certain facts]").

CONCLUSION

The relief FERC seeks relies on well-reasoned Fourth Circuit authority within the Eastern District of Virginia that carefully weighed similar facts and considered the prevailing nationwide interpretive authority. Powhatan has repeatedly failed to identify non-privileged factual lines of inquiry that would overcome the privilege and burden thresholds established by *Clark*. Based on the foregoing, and FERC's Motion for Protective Order, FERC respectfully submits that good cause exists pursuant to Fed. R. Civ. P. 26(c) for this Court to grant a protective order barring the proposed 30(b)(6) deposition in its entirety.

Respectfully Submitted,

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Dated: November 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I filed the foregoing Reply 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.

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