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.	)	

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

Plaintiff Federal Energy Regulatory Commission ("FERC") moves for entry of a protective order in response to Defendant Powhatan Energy Fund LLC's ("Powhatan") notice of deposition pursuant to Fed. R. Civ. P. 30(b)(6). *See* ECF No. 191 (discovery chart on this issue prepared consistent with Judge Lauck's direction). The court should not allow the deposition to proceed on the topics proposed by Powhatan, because neither a 30(b)(6) deposition of FERC in this posture nor the individual topics are appropriate.

FERC notes that all other discovery disputes currently pending before the Court have been resolved. *See* ECF 215 (joint notice withdrawing discovery disputes listed in ECF Nos. 179, 185, 196).

BACKGROUND

On May 28, 2021, Powhatan jointly with its then-codefendants submitted a notice requesting a deposition of FERC under Fed. R. Civ. P. 30(b)(6). This notice attached 15 topics

and FERC timely objected that a 30(b)(6) deposition of FERC was inappropriate in this situation because it would amount to a deposition of opposing counsel, and that the specific topics proposed confirm the impropriety and impracticability of compelling FERC's counsel to testify. Exhibit A (Powhatan's original list of topics). In response to that objection, Powhatan withdrew its original list of topics and submitted to FERC a new set of 11 topics bearing little relation to the original list. Exhibit B (Powhatan's second list of topics). FERC persisted in its objections and the parties jointly submitted a discovery chart outlining their positions. ECF No. 191.

The parties jointly met with Magistrate Judge Colombell on July 16, 2021. During that meeting, recognizing the privilege minefield implicated by the topics, the Magistrate Judge asked Powhatan to submit a revised list of topics and to provide further information to FERC about the nature and scope of the proposed questioning on each of the topics. The parties agreed to table the request for 30(b)(6) testimony until Powhatan could review the then-pending document production from FERC, determine whether it believed 30(b)(6) testimony remained necessary in light of it, and reconsider the topics of any requested testimony.

Powhatan provided its purportedly revised list of nine topics on October 21, 2021. This list was nearly identical to the previously proposed topics. Exhibit C (Powhatan's third list of topics). It appears that Powhatan made little effort to narrow or tailor the topics, but instead copied the majority virtually verbatim from the previous lists, even seeking to re-introduce certain topics it previously withdrew. The parties met and conferred on October 28, 2021, but were unable to resolve any of these issues.

Following a conference with the Magistrate Judge, Powhatan submitted a fourth list of topics to FERC on November 1, 2021. Despite representing to the Magistrate that these topics were revised, the topics were in all material respects identical to the October 21, 2021 list. *See*

Exhibit D (Powhatan's fourth list of topics). The parties met and conferred on November 2, 2021, and were again unable to resolve any of these issues.

ARGUMENT

If FERC attempted to compel the deposition of Powhatan's counsel, the Court would be confronted with the fact that in the Eastern District of Virginia, as in every court in the country, depositions of opposing counsel are not permitted, save in extremely limited circumstances.[1] Yet, Powhatan seeks to do just that here. The vast majority of courts, including the only court in the Eastern District of Virginia to have reviewed this issue, have held that Rule 30(b)(6) depositions of government agencies engaged in civil enforcement actions are highly disfavored because they are the equivalent of deposing opposing counsel. As a result, they are rarely granted. In reviewing the dockets of the nearly 100 Securities and Exchange Commission ("SEC") enforcement actions filed in the Eastern District of Virginia in the last thirty years, FERC has identified *no instance* in which a court has ordered the SEC to produce a 30(b)(6) witness in a civil enforcement case. This is equally true for cases involving the Federal Trade Commission ("FTC") and the Commodity Futures Trading Commission ("CFTC"). FERC is aware of no case where a court in this district has ordered an agency to produce a 30(b)(6) deponent in a civil enforcement action. To the contrary, mere months ago, Magistrate Judge Nachmanoff of the Alexandria Division granted the SEC's motion for a protective order in circumstances virtually identical to those here. *See* Order Quashing Subpoena Seeking 30(b)(6)

[1] *See, e.g.*, *Ford Motor Co. v. Nat'l Indem. Co.,* 3:12CV839, 2013 WL 3831438 (E.D. Va. July 23, 2013) (a party seeking to depose an opposing party's counsel must establish that: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case") (citation omitted)*; Navient Sols., LLC v. L. Offs. of Jeffrey Lohman, P.C.,* No. 119CV461LMBTCB, 2020 WL 6379233, at *3 (E.D. Va. Sept. 4, 2020) (same).

Deposition, *SEC v. Clark*, No. 1:20-cv-01529-CMH-MSN (E.D.Va. May 14, 2021), ECF No. 37. That recent precedent, discussed in detail below, is both instructive here and consistent with the overwhelming weight of authority nationwide, which holds that defendants may take 30(b)(6) testimony from government agencies engaged in civil enforcement actions *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.

Neither *Clark,* nor any of the overwhelming majority of cases holding that 30(b)(6) depositions of government enforcement agencies are improper, turn on whether the requesting party has specifically asked that an attorney serve as the deponent. Instead, those cases reason that regardless of the title or the position of the deponent, in cases such as this where any factual information was gathered via an investigation by FERC's attorneys, the only source of information is the attorneys litigating the case. As a result, the 30(b)(6) deposition is necessarily a deposition of opposing counsel, whether directly or by proxy.

Powhatan has not – and cannot – offer any reason to depart from these near universal principles, and the Court should not hesitate to reject its request to do sonhere. Moreover, even if the Court were inclined to permit a 30(b)(6) deposition to proceed, it should do so on the narrowest possible set of topics and with the recognition that, as to virtually all questions asked, the witness likely would merely read portions of pleadings, orders, and previously produced discovery responses into the record or refuse to answer entirely on grounds of privilege or work product so as to avoid any potential waiver issues.

A. No 30(b)(6) Deposition of FERC Should Be Permitted Here

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. *See, e.g.,* Transcript of Motion Hearing, SEC v. Clark, No. 1:20-cv-01529, at 15:22-16:9 (E.D.Va. May 14, 2021), ECF No. 39 (holding that 30(b)(6) deposition of SEC was equivalent to deposing SEC's lawyers); *EEOC v. McCormick & Schmick's Seafood Rests., Inc.*, No. WMN-08-CV-984, 2010 WL 2572809, at *4 (D. Md. June 22, 2010) ("[n]umerous other federal courts have similarly concluded that 30(b)(6) deposition notices directed to a law enforcement agency . . . were, in effect, notices to depose opposing counsel of record and would not be permitted"); *FTC. v. U.S. Grant Res., LLC*, No. CIV.A. 04-596, 2004 WL 1444951, at *11 (E.D. La. June 25, 2004) (holding that party seeking 30(b)(6) of agency in civil enforcement matter was required to make a showing sufficient to discover attorney's work product – "compelling need and the inability to discover the substantial equivalent by other means"); *see also EEOC. v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2012 WL 442025, at *3 (E.D. Wash. Feb. 10, 2012) (denying 30(b)(6) deposition in government enforcement action because attempting to rule on each individual question would be "an inefficient use of the parties' time and the court's time").

Indeed, the only court in this District to consider this issue, in a ruling mere months ago, granted the SEC's motion for a protective order in its entirety, rejecting Defendants' argument that the agency could object on a question-by-question basis. *See Clark*, No. 1:20-cv-01529, ECF No. 37 (order quashing subpoena seeking 30(b)(6) deposition of SEC in a civil enforcement action). EDVA Magistrate Judge Nachmanoff's reasoning in *Clark* is equally persuasive here: a government agency engaged in a civil enforcement action "isn't a fact witness in the traditional sense . . . they have no direct knowledge of what happened other than by conducting an

investigation." No. 1:20-cv-01529, at 11:16-23, ECF No. 39 (Exhibit E) (transcript of hearing before Magistrate Judge Nachmanoff). Accordingly, EDVA Magistrate Judge Nachmanoff reasoned that the defendants' request did not seek the "underlying facts," which had already been provided to the defendants, but the "mental impressions and strategy decisions" of the SEC's counsel.[2] *Id*. at 16:5-9; *see also id*. at 14:21-23 (holding that by requesting the 30(b)(6) deposition the defendants "really want to know why the lawyers put together the case the way they put it [together] and why they're relying on [certain facts]"). EDVA Magistrate Judge Nachmanoff closed the hearing by expressly adopting the reasoning of the overwhelming majority of courts to consider this issue, holding that:

> [T]he weight of the case law supports a finding that absent really unusual circumstances that I do not find here, that a 30(b)(6) deposition of the SEC is disfavored, and that as we know in the Eastern District of Virginia and the Fourth Circuit and throughout the country, that depositions of opposing counsel are strongly disfavored and that ultimately that's who would have to present this information or would be most likely to present the information, either directly or indirectly.

Id. at 23:11-19.

A small minority of courts outside of this District have allowed 30(b)(6) depositions to proceed against government agencies engaged in civil enforcement actions. The most commonly cited case for that outcome, and the one upon which Powhatan primarily relied in its briefing chart, is *SEC v. Merkin*, 283 F.R.D. 689 (S.D. Fla. 2012). But that case's reasoning was revealed

[2] As in *SEC v. Clark*, FERC has already provided its entire investigative file to Powhatan twice, once during the administrative litigation before the Commission and again at the commencement of this litigation. *See* 1:20-cv-01529, at 24:10-13, ECF No. 39 (30(b)(6) deposition inappropriate where agency has produced entire investigative file). Magistrate Judge Nachmanoff's view on this issue accords with the view of other courts who have examined this issue and held that 30(b)(6) depositions of agencies engaged in enforcement actions are inappropriate where the agency has produced its entire investigative file. *See, e.g.*, *EEOC v. Am. Int'l Grp., Inc.,* No. 93-CIV-6390, 1994 WL 376052, at *2-3 (S.D.N.Y. July 18, 1994) (in case where agency produced its entire investigative file, "the defendants do not have a legitimate need to inquire into facts contained in the file").

to be nearsighted and deeply flawed by the resulting deposition (as detailed below). Consequently, *Merkin*'s only utility in this instance is to serve as a cautionary tale of why its reasoning should be rejected here.

Merkin's ruling is erroneous because it hinges on a misreading of the primary case it cites in support of the idea that government enforcement agencies should be required to provide 30(b)(6) testimony. *Merkin*'s analysis relied on *SEC v. Collins & Aikman Corp.,* 256 F.R.D. 403, 418 (S.D.N.Y.2009), citing it for the proposition that "[w]hen a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties." But that quotation was taken out of context. *Collins & Aikman* explicitly recognized that, notwithstanding the technical applicability of Rule 30(b)(6), government enforcement agencies are typically *not* properly subject to 30(b)(6) depositions. *See Collins & Aikman.,* 256 F.R.D. at 409 n.26 (citing favorably *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y.1992), for the proposition of prohibiting "deposition of SEC attorney based on the work product doctrine where defendant's Rule 30(b)(6) notice was intended to ascertain how the SEC intends to marshal the facts, [discover the] documents and testimony in [the SEC's] possession, and to discover the inferences that [the SEC] believes properly can be drawn from the evidence it has accumulated") (internal quotation omitted). In sum, *Merkin*'s conclusion is contradicted by the primary case upon which it relies.

The resulting deposition in *Merkin* illustrates the reason most courts (including *Clark* in this District) reject its reasoning – the deposition was an exercise in futility. After a full day of questioning wherein counsel for the SEC instructed its witness to repeatedly not answer because of various privilege issues, the court ruled that only eight of Merkin's questions were permissible and proper. *SEC v. Merkin*, No. 11–23585–CIV, 2012 WL 5449464, at *1 (S.D. Fla. Aug. 13,

2012). The court held that all of the remaining questions asked were impermissible because they were "either beyond the scope of the deposition . . . speculative, problematic because they would require the disclosure of privileged information and/or unduly argumentative." *Id*. at *1-2. Indeed, rather than reopen the deposition, the court instructed the SEC to answer the remaining eight questions in writing with a simple yes or no. *Id*. This result is not uncommon. *See FTC v. CyberSpy Software*, *LLC*, No. 608-CV-1872, 2009 WL 2386137, at *3 (M.D. Fla. July 31, 2009) (court ruling that agency had properly instructed its 30(b)(6) witness to not answer questions following an order requiring the agency to provide a 30(b)(6) witness).

In *Clark*, Magistrate Judge Nachmanoff recognized these problems with *Merkin* and expressly declined to follow it, explaining: "I read the *Merkin* case. Frankly, I didn't find it persuasive, but hearing that they spent eight hours and then ended up responding to only eight questions in writing suggests to me that it probably was an enormous amount of waste of time and an undue burden." *Clark*, No. 1:20-cv-01529, at 16:12-16, ECF No. 39.

In sum, there is no cause for this Court to break new ground in this District's jurisprudence – EDVA Magistrate Judge Nachmanoff considered these issues and joined the majority of courts in holding that 30(b)(6) depositions of government agencies engaged in civil enforcement actions are presumptively improper, and are *certainly* improper when written discovery has or could be used to obtain the facts at issue. *See Ford Motor Co.*, No. 3:12cv839, 2013 WL 3831438 (E.D. Va. July 23, 2013) ("a party seeking to depose an opposing party's counsel must establish that "no other means exist to obtain the information than to depose opposing counsel"). As discussed in significantly more detail below, any deposition here will be an exercise in futility, because Powhatan's proffered topics seek plainly privileged information. There is no value to the parties or the Court in permitting a deposition to proceed where the

nature of the likely questions to be asked will only lead to FERC instructing its witness to not answer virtually every question on various privilege or work product grounds. Consequently, the Court should bar the deposition in its entirety.

B. None of Powhatan's Proposed Topics Presents Permissible Grounds of Inquiry

To date, through its four separate lists of topics, Powhatan has submitted 44 topics to FERC. Throughout this process, not a single topic has presented a legitimate line of inquiry seeking *facts*, much less facts that cannot or have not been obtained through written discovery. Instead, each topic appears calculated to obtain privileged information under the guise of seeking "facts," and the overarching intent appears to be to find any hook to interrogate FERC's attorneys in service of Powhatan's public relations campaign.

In this posture, courts consider 30(b)(6) depositions of civil enforcement agencies to be equivalent to deposing opposing counsel, meaning that for *each* of these topics Powhatan bears the burden of establishing that there is both a compelling need and no less burdensome means available for seeking the facts at issue. *Clark*, No. 1:20-cv-01529, at 15:22-16:9, ECF No. 39 (holding that 30(b)(6) deposition of SEC was equivalent to deposing SEC's lawyers); *McCormick & Schmick's Seafood Rests.*, 2010 WL 2572809, at *4 ("[n]umerous other federal courts have similarly concluded that 30(b)(6) deposition notices directed to a law enforcement agency . . . were, in effect, notices to depose opposing counsel of record and would not be permitted"). Powhatan cannot do so, particularly when FERC has produced its entire investigative file and Powhatan sought comparable information in its interrogatories.

It is no answer to say that FERC could identify a non-lawyer to serve as a witness on any of these topics, because courts recognize that, in cases such as this, the only source for much of the information sought is the agency's attorneys who conducted the investigation and are

prosecuting the case. Put another way, a non-lawyer could only obtain the necessary information by talking to the lawyers and regurgitating the lawyers' information. *See, e.g., id.* ("[n]umerous other federal courts have similarly concluded that 30(b)(6) deposition notices directed to a law enforcement agency . . . were, in effect, notices to depose opposing counsel of record and would not be permitted"). Magistrate Judge Nachmanoff observed this problem in *Clark*, reasoning:

> The issue is whether or not it's fair to make them put up a lawyer, because, frankly . . . I'm not persuaded that them selecting an accountant or someone who's a non-lawyer who's simply going to be fed all of the information because this is a 30(b)(6) deposition, so they don't need to have direct knowledge themselves, is going to come back to the same play, which is they will simply interpose an objection to every question, saying what you're asking for are not the underlying facts, which we've already given you, but how we came about making the decision about how we answered this question or what we've relied on to, to put in the complaint, and those are mental impressions and strategy decisions, which are not permissible.

Clark, No. 1:20-cv-01529, at 15:22-16:9, ECF No. 39. Given that FERC produced its entire non-privileged investigative file, Powhatan can show neither a compelling need nor the lack of less burdensome means for any of the topics listed below. Consequently, they each should be rejected in whole.

i. Topic 1 - The factual allegations in FERC's complaint.

FERC's attorneys' selection of which facts to include (or not include) in a complaint, and those facts' significance to its case, represent counsel's privileged mental impressions and strategy regarding the case. *See Clark*, No. 1:20-cv-01529, at 14:21-23, ECF No. 39 (holding that, by requesting the 30(b)(6) deposition, the defendants "really want to know why the lawyers put together the case the way they put it [together] and why they're relying on [certain facts]"); *see also SEC. v. SBM Inv. Certificates, Inc.*, No. DKC 2006-0866, 2007 WL 609888, at *21, 24 (D. Md. Feb. 23, 2007) (granting protective order barring 30(b)(6) testimony regarding "[t]he factual bases, if any, for the allegations made against Westbury in the SEC's Complaint in the

case" because it "directly seek[s] the results of the SEC's present investigation, and would require disclosure of the opinions, strategy, and would inevitably tend to disclose the investigating attorneys' preliminary positions and legal theories concerning the suspected conduct of defendant . . . and those factual areas which were of particular interest to the SEC investigators") (internal citation and quotation omitted); *SEC v. Buntrock*, 217 F.R.D. 441, 446 (N.D. Ill. 2003) (granting protective order barring 30(b)(6) topic not genuinely seeking facts but instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts"). Even assuming the most benign of motives, namely a genuine desire to seek only nonprivileged factual evidence related to the allegations in the complaint, a 30(b)(6) deposition of the agency's counsel is perhaps the least efficient means for seeking such information. *See SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1177 (D. Colo. 2009) (granting motion to quash 30(b)(6) notice regarding allegations in complaint because it would be "inefficient in the extreme" to require the deponent to "recite by rote all of the facts in excruciating detail for the allegations in paragraph 132 or 147 or whatever number"). This is particularly true when Powhatan has sought the same or similar information in its interrogatories.

EDVA Magistrate Judge Nachmanoff ruled on this very issue, as many of the proposed topics in *Clark* sought some permutation of "[t]he factual basis for the contentions in the Complaint." *See* Plantiff's Memorandum of Law ISO its Motion to Quash Defendant's Rule 30(b)(6), *SEC v. Clark*, No. 1:20-cv-01529, at 6-9 (E.D. Va. May 14, 2021), ECF No. 28 (discussing topics seeking factual basis for allegations in complaint).

ii. Topic 2 - FERC's factual understanding and view of Defendants' trading that was investigated by its Office of Enforcement, including any facts indicating whether that trading was manipulative and/or uneconomic.

Powhatan's second topic drops any pretense of seeking facts and displays Powhatan's intent to use the 30(b)(6) deposition to probe FERC's protected legal analysis. There is no reasonable reading of this topic as seeking anything other than FERC's privileged analysis and work product regarding the merits of the case, because seeking FERC's "understanding" and "views" self-evidently seeks the privileged mental impressions and litigation strategy underlying FERC's legal allegation that Powhatan's trading was manipulative. This information is attorney work product and privileged. *See CyberSpy Software*, 2009 WL 2386137, at *3 (FTC 30(b)(6) witness not required to testify to "factual basis" underlying agency's legal allegation because "a request for such justification is explicitly a request for the mental impressions, conclusions, opinions or legal theories of a party's attorney") (internal citation and quotation omitted).

As with many of Powhatan's topics, this topic conflates discoverable *facts* with arguments Powhatan would like to make. Powhatan is free to argue to the jury that the facts alleged in the complaint are insufficient, but a 30(b)(6) deposition is not meant to be a vehicle for Powhatan to argue with FERC's counsel regarding the sufficiency of those facts. Powhatan has all of the facts in FERC's possession on these issues, and that is all it is entitled to.

iii. Topic 3 - All communications among FERC personnel regarding whether or not Defendants' trading was lawful.

Powhatan's third topic, again, does not pretend to seek anything other than the agency's protected legal analysis. For the same reason FERC is not entitled to ask whether any of Powhatan's counsel have ever thought Powhatan is guilty of market manipulation, Powhatan is not entitled to probe FERC's legal analysis that is attorney work product also protected by the attorney-client and deliberative process privileges. *See Evans Fruit,*, 2012 WL 442025, at *1

(granting protective order barring 30(b)(6) topics "seek[ing] information as to how and why [the agency] determined it should proceed with this case. As such, they impermissibly seek attorney work product and/or information which is subject to the government's deliberative process privilege").

Putting aside the legal impropriety of this topic, as a practical matter, it would be impossible to prepare a 30(b)(6) deponent to testify to the communications (presumably both written and oral) of every employee of an agency with approximately 1,500 employees over a period of more than ten years. Rule 30(b)(6) does not require a 30(b)(6) deponent to undertake a burden of such magnitude. *See Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *3 (D. Mass. Sept. 24, 2014) (denying motion to compel 30(b)(6) testimony based on overly broad and vague topics because "[i]f the noticing party does not describe the topics with sufficient particularity or if the topics are overly broad, the responding party is subject to an impossible task. . . . if the noticed party cannot identify the outer limits of the topics noticed, compliant designation is not feasible") (internal citation omitted).

This is particularly true where Powhatan cannot possibly show the relevance of the information sought. Following a formal adjudication, the Commission as a regulatory body determined Powhatan committed market manipulation. Powhatan was then granted a full trial de novo in this court regarding that determination, meaning no deference is being given to the factual and legal findings contained in the Commission's order, let alone the determinations of any individual FERC staff. Ultimately, whether a secretary in FERC's Portland office talked to an IT staffer about her thoughts on Powhatan's trading is of no possible import here. Based on Powhatan's election, receipt, and vigorous pursuit here of a trial de novo, the only relevant

determinations regarding Powhatan's guilt or innocence will lie with the factfinder—namely, the jury. Powhatan cannot have it both ways; a trial de novo with no deference to the Commission's order and a nearly unlimited probe into the decision-making of the Commission.

iv. Topic 4 - All facts indicating that Defendants' trading constituted market manipulation.

This topic seeks the direct application of law to facts — namely, the Federal Power Act's prohibition on market manipulation. That application of law to facts is not in and of itself a *fact*. It is, instead, FERC's counsel's legal analysis and interpretation protected by the attorney-client and deliberative process privileges and as attorney work product. *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]"); *see also Buntrock*, 217 F.R.D. 446 (granting protective order barring 30(b)(6) topic not genuinely seeking facts but instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts").

FERC is not obligated to provide a 30(b)(6) deponent to lay out in detail FERC's, to borrow Powhatan's phrasing, "views and understanding" of how each fact is (or is not) relevant to the legal analysis of whether Powhatan committed market manipulation, particularly where, as here, the entirety of FERC's investigative record has been produced and FERC has responded to interrogatories on this issue. Ultimately, this request must fail because it is nothing more than an attempt to ask FERC's counsel to lay out in advance the Commission's privileged and protected trial strategy.

v. Topic 5 - The origin and evolution of up-to-congestion trading, marginal loss surplus allocation, and the interplay between the two in PJM. This would include FERC understanding and consideration of the incentives created by the payment of MLSA to PJM market participants.

This topic appears to seek two tranches of information: 1) facts regarding the "origin and evolution" of certain aspects of the markets operated by the PJM Interconnection LLC ("PJM"), and 2) FERC's legal analysis regarding one such aspect of those markets.

As to the first subset, as EDVA Magistrate Judge Nachmanoff noted in *Clark*, civil enforcement agencies are not fact witnesses to the events underlying their enforcement actions. *Clark*, No. 1:20-cv-01529, at 11:16-23, ECF No. 39. No FERC employee will testify in this case that he or she personally witnessed Powhatan make the manipulative trades that are the subject of this litigation. Instead, any facts in FERC's possession were gathered from third parties and have been produced to Powhatan on multiple occasions. Additionally, FERC responded to interrogatories seeking the same or similar information. Courts, including EDVA Magistrate Judge Nachmanoff, routinely hold that an agency is not required to produce a 30(b)(6) deponent after providing all responsive facts in its possession. *See, e.g., id.* at 6:9-13 (granting protective order in part because "The SEC has very clearly stated in its pleadings that they have turned over all of the information related to the case and responsive to the discovery requests, and there's no indication that there's some part of the file, documents, or information that is being withheld"); *Buntrock*, 217 F.R.D. 444-45 (granting protective order because "Buntrock is unconvincing in his argument that there is no other means to obtain the information he seeks. Given the staggering amount of evidence the SEC has already turned over, the court finds this hard to believe, and Buntrock offers little in the way of explanation.").

More fundamentally, there are less burdensome means for seeking this information. For example, Powhatan has received reams of documents from both PJM and the PJM Market

Monitor. Powhatan has scheduled six depositions of PJM and PJM Market Monitor staff. And, the "origin and evolution" of the PJM market are matters of public record because the PJM market was developed as part of public proceedings before FERC resulting in public orders. *See Russo v. Aerojet Rocketdyne, Inc.*, No. CV 18-3024, 2020 WL 4530703, at *8 (E.D. Pa. Aug. 6, 2020) (denying party's request for 30(b)(6) testimony, in part, on the basis that information sought was publicly available). FERC's counsel is not the proper deponent to provide Powhatan an oral history of the PJM markets, particularly when all of the facts in FERC's possession on this issue would have come from either PJM or PJM market participants.

As to the second tranche of information this topic seeks, Powhatan uses the phrase "understanding and consideration" as a euphemism for FERC's legal analysis of the PJM markets. For all of the reasons articulated above, this information is protected by the attorney-client privilege, the deliberative process privilege, and as attorney work product.

Lastly, this topic should be precluded because it is little more than Powhatan's legal contention masquerading as a deposition topic. Powhatan alleges that its trading was "incentivized" and, therefore, not manipulative. Yet, courts do not typically permit 30(b)(6) deposition topics that are merely a party's legal allegation dressed up as an attempt to seek "facts." *Trustees of Bos. Univ.*, 2014 WL 5786492, at *4 (granting protective order barring 30(b)(6) topic that was effectively a contention interrogatory because "[a] Rule 30(b)(6) deposition is an overbroad, inefficient, and unreasonable means of discovering an opponent's factual and legal basis for its claims").

vi. Topic 6 - Communications between (1) FERC Commissioners or FERC staff and (2) third parties about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets.

FERC has produced all such communications to Powhatan via a comprehensive search based on custodians and search terms agreed to by Powhatan. No non-privileged factual information exists that is proper testimony for a FERC 30(b)(6) deponent beyond what is contained in the produced communications themselves. Even assuming Powhatan is entitled to discover factual information beyond the face of the produced communications, a FERC 30(b)(6) deposition is an inappropriate discovery tool for pursuing information from individual FERC staff. There is little point in a conducting a deposition in which a witness would merely read into the record messages that were previously produced.

To the extent this topic seeks anything beyond written communications, it is unduly burdensome and approaches the point of being impossible. FERC is an agency of 1,500 employees, and there would be no way for a 30(b)(6) deponent to interview and accurately recall and recite the non-written communications of even a fraction of those employees. *Trustees of Bos. Univ.*, 2014 WL 5786492, at *3 (denying motion to compel 30(b)(6) testimony based on overly broad and vague topics because "[i]f the noticing party does not describe the topics with sufficient particularity or if the topics are overly broad, the responding party is subject to an impossible task. . . . if the noticed party cannot identify the outer limits of the topics noticed, compliant designation is not feasible") (internal citation omitted).

Finally, to the extent Powhatan intends the witness to opine on the content or meaning of the previously produced communications, this topic seeks FERC's privileged legal analysis and attorney work product, not *facts*. A FERC 30(b)(6) deponent should not be required to respond

to questioning about the legal import or inferences that can be drawn from communications between an individual member of FERC staff and a third-party.

vii. Topic 7 - FERC's understanding and view of the extent to which market participants may and/or do take MLSA into account when making trading decisions and concomitant notice provided to market participants, including notice provided to market participants regarding the "sole or primary purpose" standard articulated in the FERC v. Coaltrain Energy, L.P., et al., No. 2:16-cv-00732 (S.D. Ohio) ("Coaltrain") litigation.

This topic – which, as with certain previous ones, seeks the agency's "understanding" and "views" – asks FERC to opine on multiple issues of pure law, such as fair notice and the legal standard governing whether Powhatan's trading was manipulative. The Commission is not required to provide its legal analysis of these issues under the guise of a fact deposition. *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]"); *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.,* 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (denying request for 30(b)(6) deposition because party was not entitled to seek "mental impressions, conclusions, opinions, and legal theory" under "the guise of requesting 'facts'").

viii. Topic 8 - How UTC trading by other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral compares to Defendants' UTC trading, and FERC's understanding and view of the propriety or impropriety of that other UTC trading.

This topic would have a FERC deponent reveal Enforcement staff's mental impressions and thought processes regarding how non-charged traders' activities "compare[]" to Powhatan's, as well as (once again) Enforcement staff's "understanding" and "view" of whether certain trading is or is not proper. Put another way, it asks for Enforcement staff's privileged legal analysis and work product regarding why some conduct constituted a violation and some did not – a question that cannot be answered without revealing those attorneys' privileged mental

impressions, deliberations, and thought processes. *See Evans Fruit,*, 2012 WL 442025, at *1 (granting protective order barring 30(b)(6) topics "seek[ing] information as to how and why [the agency] determined it should proceed with this case. As such, they impermissibly seek attorney work product and/or information which is subject to the government's deliberative process privilege").

One possibility, for example, is that Enforcement staff determined that other trades encompassed by the referral faced a procedural or substantive hurdle – such as a statute of limitations issue, jurisdictional complication, or mitigating factor – that Powhatan's trades did not. Were that the case, FERC could not explain its concerns without revealing its attorneys' deliberative processes, legal strategies, and privileged mental impressions regarding the applicable doctrines. A deposition on this topic would, therefore, be an exercise in instructions not to answer the questions on various privilege grounds.

Even assuming (hypothetically) that the decision not to pursue other referred traders reflected sheer prosecutorial discretion, a 30(b)(6) witness *could not say so*, because it would reveal the agency's analysis that no other factors, such as statute of limitations, jurisdiction, or mitigating factors, posed an obstacle to prosecution. Again, the questions would be futile.

Finally, even assuming (counterfactually) that a FERC 30(b)(6) witness were permitted to reveal that prosecutorial discretion was the reason Powhatan was charged and others were not, that would be the end of the line of questioning. An agency's exercise of its prosecutorial discretion is attorney work product that is also subject to the attorney-client privilege, meaning Powhatan could not probe why FERC exercised its discretion as it did. *Fed. Election Comm'n v. Friends of Evans*, No. 04 -4003, 2005 WL 8163039, at *2 (C.D. Ill. Feb. 8, 2005) (granting motion for protective order prohibiting agency deposition under the rationale that, "[a]bsent

definitive evidence of prohibited motive, discovery that focuses on the state of mind and/or the discretion of the prosecutor (or, as here, the agency charged with enforcement of the Act), is not permitted"); *Sierra Club v. Larson*, 882 F.2d 128, 132 (4th Cir.1989) (decision not to institute enforcement proceedings is unreviewable exercise of agency discretion); *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 710 (4th Cir. 2019) (recognizing that, though perhaps more often discussed in the criminal context, prosecutorial discretion also encompasses civil enforcement decisions).

Finally, and dispositively under EDVA and Fourth Circuit case law regarding deposing opposing counsel, there are less burdensome means available to Powhatan to seek this information. For example, FERC has produced not only its entire investigative record from this case, but all documents produced in the *Coaltrain* litigation, an entirely separate case involving UTC trading. FERC also has produced all emails covering a wide array of other UTC cases based on search terms to which Powhatan agreed. Finally, any trading by other market participants deemed to be a violation resulted in a publicly available Commission order, meaning there are publicly available materials describing that trading. *Russo*, 2020 WL 4530703, at *8 (denying party's request for 30(b)(6) testimony, in part, on the basis that information sought was publicly available). Those materials are plainly sufficient for Powhatan to probe how its trading resembled or differed from other market participants' trading.

At bottom, through its *own* analysis and comparison of these factual materials, Powhatan is free to argue on motion or at trial that its conduct is distinguishable from other trading and therefore does not constitute prohibited manipulation. However, FERC is not required to divulge how it exercised its prosecutorial discretion by providing 30(b)(6) testimony regarding its "understanding and view" of facts that are equally available to Powhatan.

ix. Topic 9 - FERC Staff's meetings and communications with PJM and IMM officials, including but not limited to (1) the November 4, 2010 meeting with Joseph Bowring, (2) the August 28, 2015 meeting with PJM officials, and Communications on or about June 20, 2019 between FERC staff and Jacqulynn Hugee of PJM regarding the implications of the June 20, 2019 order in the Black Oak proceeding for the Coaltrain litigation and this Civil Action.

While Powhatan has used the term "Staff," what it really means here is "FERC's attorneys litigating this case," as FERC's Enforcement attorneys were likely the primary, or even potentially the sole participants, of any such meetings. With that understanding, this topic is better understood as seeking counsel's mental impressions of those meetings, such as which facts counsel ascribed importance or meaning. This information is inextricable from information protected as attorney work product, and is therefore not a proper subject of a 30(b)(6) deposition. *Clark*, No. 1:20-cv-01529, at 16:5-9, ECF No. 39 (Rule 30(b)(6) deposition not permitted to seek counsel's "mental impressions"); *CyberSpy Software*, 2009 WL 2386137, at *3 (FTC 30(b)(6) witness not required to testify to counsel's "mental impressions") (internal quotation omitted). Counsel's notes of these meetings or mental recollection, to the extent either exist, would be replete with counsel's privileged analysis of what facts and information counsel deemed important, noteworthy, or otherwise warranting notation or recollection.

Additionally, as with many of Powhatan's topics, there are less burdensome means than deposing opposing counsel for seeking facts regarding these meetings. First, FERC has produced any emails or correspondence it had with PJM or the PJM Market Monitor. Second, Powhatan has already noticed the deposition of Dr. Bowring along with four PJM witnesses. Powhatan is free to inquire with those witnesses about any conversations they have had with FERC.

Lastly, this topic is far too broad and, therefore, unduly burdensome. FERC staff meet and communicate with PJM and IMM staff on a regular basis. The Office of Enforcement, for

example, has standing monthly meetings with each, along with ad hoc meetings to discuss a litany of matters. It would not be possible for a FERC 30(b)(6) deponent to in any meaningful way study and report this multitude of communication, particularly where, as here, Powhatan has identified communications from over a decade ago. *Bos. Univ.,* 2014 WL 5786492, at *3 (denying motion to compel 30(b)(6) testimony based on overly broad and vague topics because "[i]f the noticing party does not describe the topics with sufficient particularity or if the topics are overly broad, the responding party is subject to an impossible task. . . . if the noticed party cannot identify the outer limits of the topics noticed, compliant designation is not feasible") (internal citation omitted).

CONCLUSION

In light of FERC having produced all factual evidence in its possession to Powhatan, FERC having responded to interrogatories on many of the proffered subjects, and Powhatan's intent to attempt to invade upon FERC's privileged and protected information, the Court should grant a protective order barring the proposed 30(b)(6) deposition in its entirety. In the alternative, the court should substantially narrow or eliminate all of the topics listed above that make no pretense of seeking anything other than privileged and protected information.

Respectfully Submitted,

/s/ Kevin Dinan

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Attorneys for Federal Energy Regulatory Commission

Dated: November 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, I filed the foregoing motion with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

/s/ Kevin Dinan

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EXHIBIT A

SCHEDULE A

DEFINITIONS

The following definitions shall apply to the Topics for Examination in Schedule A:

1. The "*Black Oak* Proceeding" means the proceeding in FERC Docket No. EL08-14.

2. "Civil Action" means the above-captioned action, which began when FERC filed its Petition for an Order Affirming the Federal Energy Regulatory Commission's May 29, 2015 Order Assessing Civil Penalties Against Powhatan Energy Fund, LLC, HEEP Fund, Inc., Houlian "Alan" Chen, and CU Fund, Inc. in the United States District Court for the Eastern District of Virginia on July 31, 2015.

3. "Complaint" means FERC's First Amended Complaint in this civil action, as filed January 29, 2018.

4. "Correlated Pairs Trades" means the trades referred to in Paragraph 56 of the Complaint.

5. "Defendants" means, inclusively, any combination of the defendants in this civil action (Powhatan Energy Fund, LLC, Houlian "Alan" Chen, HEEP Fund, Inc., and CU Fund, Inc.), including any single defendant and, regardless of the plurality or singularity of the term's use in any Request, shall not be construed to limit any Request to a single defendant or combination of defendants.

6. "FERC" means the Federal Energy Regulatory Commission.

7. The "Home Run Strategy" refers to the trading strategy discussed in Paragraph 92 of the Complaint and Paragraph 86 of the Penalty Assessment Order.

8. The "IMM" means (a) Monitoring Analytics, LLC, PJM's independent market monitor, and all of its offices, committees, divisions, or units and (b) all of its current or former representatives.

9. "MLSA" means marginal loss surplus allocation.

10. "Penalty Assessment Order" means FERC's May 29, 2015 Order Assessing Civil Penalties, attached to the Complaint as Exhibit 1.

11. "PJM" means (a) PJM Interconnection, L.L.C. and all of its offices, committees, divisions, or units and (b) all of its current or former representatives.

12. "Referrals of Potential Violations" means (a) PJM's August 16, 2010 Confidential Referral of Potential Violations of FERC Market Rule (from Jacqulynn Hugee to Norman C. Bay); (b) the oral referral PJM made to FERC's Enforcement Hotline on July 29, 2010; and (c) the IMM's January 6, 2011 referral of potential violations to FERC Enforcement, entitled *PJM Marginal Loss Surplus Allocation and Market Participant Transaction Activity: May 15, 2010 through September 17, 2010.*

13. The "Relevant Period" means June 1, 2010 through August 3, 2010.

14. "Representative" or "representatives" means, both collectively and individually any person, agent, director, officer, employee, partner, owner, member, attorney, corporate parent, subsidiary, or affiliated entity, acting or purporting to act on behalf of another person.

15. "Tariff" refers to PJM's Open Access Transmission Tariff, Operating Agreement, and Reliability Assurance Agreement.

16. "UTC" means the up-to congestion product in PJM.

17. "You" or "Your" refer to FERC.

TOPICS OF EXAMINATION

1. The allegations in the Complaint.

2. PJM's UTC market and requirements for UTC trading.

3. The distribution of MLSA to PJM market participants, including UTC traders.

4. PJM Tariff provisions, filings submitted to FERC, and FERC orders addressing the distribution of MLSA to PJM market participants, including UTC traders.

5. The *Black Oak* Proceeding, including the incentives created by FERC's orders in the *Black Oak* Proceeding and the implications of those orders for this Civil Action, the investigation preceding this Civil Action, or other FERC inquiries, investigations, administrative processes or proceedings, or lawsuits related to MLSA payments to UTC traders.

6. The propriety or impropriety of PJM market participants taking MLSA payments into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets during the Relevant Period.

7. Defendants' UTC trading.

8. The Home Run Strategy.

9. Whether Defendants had notice that the trades within the scope of the Complaint were manipulative prior to the submission of any of those trades.

10. Your calculation of civil penalties and disgorgement sought in the Complaint.

11. Your decision not to seek civil penalties or disgorgement for Defendants' Correlated Pairs Trades.

12. Your investigation of Defendants and their UTC trading.

13. Referrals of Potential Violations from PJM or the IMM and your investigation(s) arising from such referrals.

14. Complaints, inquiries, investigations, administrative processes or proceedings, or civil penalty actions regarding MLSA payments to UTC traders, including *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio).

15. The Federal Power Act's prohibition on market manipulation and FERC's anti-market manipulation rule.

EXHIBIT B

Revised Topics for Defendants' Depositions of FERC's 30(b)(6) Representative

1. The types of trading contemplated in and permitted by FERC's orders in the *Black Oak* Proceeding.

2. The incentives created by the payment of MLSA to PJM market participants, including FERC's consideration of such incentives.

3. Notice provided to market participants about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets during the Relevant Period.

4. Communications between (1) FERC Commissioners or FERC staff and (2) third parties about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets.

5. Notice provided to market participants regarding the "sole or primary purpose" test set forth in the *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio) ("*Coaltrain*") litigation.

6. Defendants' Correlated Pairs Trades, including FERC's position on such trades and the inclusion of the Correlated Pairs Trades in FERC Enforcement's Preliminary Findings.

7. UTC trading by other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral and how such trading compares to Defendants' UTC trading.

8. Reasons why other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral were not subject to civil penalties and/or disgorgement.

9. Communications on or about June 20, 2019 between FERC staff and Jacqulynn Hugee of PJM regarding the implications of the June 20, 2019 order in the *Black Oak* proceeding for the *Coaltrain* litigation and this Civil Action.

10. FERC Enforcement's meetings and communications with PJM and IMM officials, including but not limited to (1) the November 4, 2010 meeting with Joseph Bowring and (2) the August 28, 2015 meeting with PJM officials.

11. FERC's failure to timely produce exculpatory materials in accordance with the Commission's Policy Statement on Disclosure of Exculpatory Materials. *Enforcement of Statues, Regulations & Orders*, 129 FERC ¶ 61,248 (2009).

EXHIBIT C

Second Revised List of Topics for Defendant's Deposition of FERC's 30(b)(6) Representative(s)

1. The allegations in FERC's complaint.

2. FERC's understanding and view of Defendants' trading that was investigated by its Office of Enforcement, including whether that trading was manipulative and/or uneconomic.

3. Whether any FERC personnel think or thought that Defendants' trading was lawful.

4. FERC's understanding and view of market manipulation.

5. The origin and evolution of up-to-congestion trading, marginal loss surplus allocation, and the interplay between the two in PJM. This would include FERC understanding and consideration of the incentives created by the payment of MLSA to PJM market participants.

6. Communications between (1) FERC Commissioners or FERC staff and (2) third parties about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets.

7. FERC's understanding and view of the extent to which market participants may take MLSA into account when making trading decisions and concomitant notice provided to market participants, including notice provided to market participants regarding the "sole or primary purpose" standard articulated in the *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio) ("*Coaltrain*") litigation.

8. How UTC trading by other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral compares to Defendants' UTC trading, and FERC's understanding and view of the propriety or impropriety of that other UTC trading.

9. FERC Staff's meetings and communications with PJM and IMM officials, including but not limited to (1) the November 4, 2010 meeting with Joseph Bowring, (2) the August 28, 2015 meeting with PJM officials, and Communications on or about June 20, 2019 between FERC staff and Jacqulynn Hugee of PJM regarding the implications of the June 20, 2019 order in the *Black Oak* proceeding for the *Coaltrain* litigation and this Civil Action.

EXHIBIT D

Schedule A

1. The factual allegations in FERC's complaint.

2. FERC's factual understanding of Defendants' trading that was investigated by its Office of Enforcement, including any facts indicating that trading was manipulative and/or uneconomic.

3. All communications among FERC personnel regarding whether or not Defendants' trading was lawful.

4. All facts indicating that Defendants' trading constituted market manipulation.

5. The origin and evolution of up-to-congestion trading, marginal loss surplus allocation, and the interplay between the two in PJM. This would include FERC understanding and consideration of the incentives created by the payment of MLSA to PJM market participants.

6. Communications between (1) FERC Commissioners or FERC staff and (2) third parties about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets.

7. FERC's understanding and view of the extent to which market participants may and/or do take MLSA into account when making trading decisions and concomitant notice provided to market participants, including notice provided to market participants regarding the "sole or primary purpose" standard articulated in the *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio) ("*Coaltrain*") litigation.

8. How UTC trading by other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral compares to Defendants' UTC trading, and FERC's understanding and view of the propriety or impropriety of that other UTC trading.

9. FERC Staff's meetings and communications with PJM and IMM officials, including but not limited to (1) the November 4, 2010 meeting with Joseph Bowring, (2) the August 28, 2015 meeting with PJM officials, and Communications on or about June 20, 2019 between FERC staff and Jacqulynn Hugee of PJM regarding the implications of the June 20, 2019 order in the *Black Oak* proceeding for the *Coaltrain* litigation and this Civil Action.

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	.	Civil Action No. 1:20cv1529
Plaintiff,	.	
vs.	.	Alexandria, Virginia
	.	May 14, 2021
CHRISTOPHER CLARK and WILLIAM WRIGHT,	.	10:01 a.m.
Defendants.	.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MICHAEL S. NACHMANOFF
UNITED STATES MAGISTRATE JUDGE
(Via Zoom Teleconference)

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 26)

(Proceedings recorded by FTR electronic sound recording, transcript produced by computerized transcription.)

APPEARANCES: (Cont'd.)

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P R O C E E D I N G S

THE CLERK: Securities and Exchange Commission versus Clark, et al., Case No. 20cv1529. Will the parties please note their appearances.

MR. MUHLENDORF: Good morning, Your Honor. Kevin Muhlendorf and Enbar Toledano from Wiley Rein for Mr. Wright.

THE COURT: Good morning.

MS. HALL: Good morning, Your Honor. It's Sarah Hall from the SEC. I'm here with Dan Maher, Olivia Choe, and John Lucas; and Mr. Maher will be arguing this morning.

THE COURT: Good morning. Good morning to you-all.

MR. MAHER: Good morning, Your Honor.

MR. CUMMINGS: Good morning, Judge. My name is Mark Cummings. How are you?

THE COURT: Good morning, Mr. Cummings.

MR. CUMMINGS: I'm representing Mr. Clark.

THE COURT: Very good.

This matter comes before the Court on the SEC's motion for a protective order regarding a 30(b)(6) deposition notice. I've received the pleadings, including the motion, memorandum, the opposition, and the reply brief, and I will hear argument now. You-all don't need to repeat what, what's in the pleadings, and I may focus the argument not in order to cut anyone off but to, to keep the matter focused.

If you are not arguing, I'd ask you to stay on mute.

I think everyone is now, and we will, we will proceed from there. So I'll hear from the -- from you, Mr. Maher, I believe, for the plaintiffs; is that correct?

MR. MAHER: That's correct, Your Honor. Thank you. So the SEC's argument on this motion is twofold. One is that the information that is requested in the deposition topics has already been provided in full or can easily be provided in writing. The second is that the deposition topics also plainly on their face call for information that is protected by what would be work product and attorney-client privileges.

And in support of that, I just want to emphasize that the weight of authority I would think clearly supports the SEC's position, but there's -- some of the cases in the Fourth Circuit, the district court cases in the Fourth Circuit, I just want to emphasize that they consistently make clear -- I'm talking about *SBM Investment Certificates*, *Fish*, and *Navient* -- but they all make clear that in the Fourth Circuit, first of all, work product is protected, and the Court should take steps to ensure that continues to be the case.

Second of all, in situations like this, where there is a 30(b)(6) deposition of the other side for a deposition -- a requested deposition of counsel, they say the Fourth Circuit is clear you have to use alternative means if they can be used.

Here, obviously, we provide this information. Our answers are complete and full and precise. I would think

that's consistent with the authorities.

Plaintiff's argument is twofold: first which is that there are some questions that have, you know, allow the defendant to take a 30(b)(6) deposition notice of the SEC. We don't disagree. We know those cases are out there.

I just want to emphasize two things about that: One, even those cases all make clear that defendants are only entitled to learn facts, and in this situation, where we've already supplied that information, there's no need for a deposition.

Two, the second thing that those cases make clear, and I think we talk about the *Merkin* opinion in our reply brief, is that, you know, that the, the 30(b)(6) deposition if it does proceed becomes extremely unwieldy. There are tons of objections. You know, ultimately, that case came down to the SEC answering eight yes-or-no questions in writing.

This is a dramatically wasted effort in a situation like here, wherein we are moving quickly through depositions by fact witnesses with direct knowledge of the facts.

Plaintiff's second argument is that there must be something else, that they would consider the SEC's answers to be incomplete, inadequate, and that therefore they are entitled to further questioning of SEC counsel.

The SEC stands by its answer, disagrees substantively with plaintiff's arguments, and, you know, there is -- and, you

know, plaintiff's argument is really one for the trier of fact that, you know, the SEC doesn't have a good case. It is not a, you know, justification for further questioning when the SEC has already provided the information that they are seeking.

THE COURT: Well, Mr. Maher, if I can interrupt you, maybe you're finished, on that last point, and I'll let the defendants speak for themselves, it appears that, as you noted, that they are articulating a concern that they don't have all of the information. The SEC has very clearly stated in its pleadings that they have turned over all of the information related to the case and responsive to the discovery requests, and there's no indication that there's some part of the file, documents, or information that is being withheld.

Is that correct?

MR. MAHER: That's correct, Your Honor.

THE COURT: Okay. And so your view is that a 30(b)(6) deposition isn't going to get them any more information because whatever they would be asking about they already have; is that right?

MR. MAHER: That's correct, Your Honor. And in addition to the risk of intruding on the SEC's work product and attorney-client privilege.

THE COURT: And has there been a discussion between counsel about a stipulation that the evidence provided is all that there is? In other words, and I will let them address

this directly, if their concern is that they're going to be sandbagged, that there is some piece of evidence or witness or information that is available to the SEC but hasn't been turned over, can the SEC provide some assurance to allay those fears on their part?

MR. MAHER: Sure. The SEC stands by its answer that the information is provided, those answers are complete. You know, the answers are not what is all the evidence the SEC ultimately had. It was simply what the SEC -- what evidence did the SEC have before filing its complaint. Those questions have been answered, we stand by them, are happy to proceed, and consistent with what the Court is describing.

THE COURT: Thank you. Is there anything else you wish to add?

MR. MAHER: No, thank you, Your Honor.

THE COURT: Thank you.

Now, who's arguing? Mr. Muhlendorf?

MR. MUHLENDORF: Yes, Your Honor, thank you. Your Honor --

THE COURT: Let me just start with my final question there. Does that not give you what you're really looking for here, which is knowing that what you have received from the SEC is, in fact, the facts that they have collected in connection with this investigation?

MR. MUHLENDORF: Well, I think it -- I don't think it

does, and let me explain why it doesn't get us what we need to defend Mr. Wright, and, and I can answer that in two ways.

First, you know, we, we did do the contention interrogatories, and we got some answers back, but interestingly, if you look at the contention interrogatories and the answers, and I'll give you a concrete example, we asked about the December 9 phone call, and they -- and the answer that we got back, what are the facts that support your contention about that Mr. Wright made that phone call, and they identified two facts, and one fact was that it was from a landline, and the other fact was that Mr. Clark then traded.

And we can debate about the value of that circumstantial evidence, but what they didn't tell us and what they had was a 302 where Mrs. Wright told the FBI, and the SEC had that information, that that was not a phone that he normally used. And so that's a concrete example of where we didn't get that information without going to another source.

And so while we do have that now, you know, the SEC played a little slight of hand there, because in another interrogatory, they did reference the FBI 302 of Ms. Wright and information there, and that's another interrogatory response, but we had to ferret that out from another source.

So I'm not quite sure that we are confident that we have all the information, but more importantly, you know, the way the SEC has framed this argument is turning discovery rules

on its head. They're asking for asymmetric discovery. We are entitled to under the rule ask for a 30(b)(6) deposition of a government entity, and they are a government entity.

Now, they can raise an undue burden, an undue burden argument, which, which they have tried to do, but it's circular because it comes back to, well, you couldn't possibly take a deposition of any -- about any facts without intruding into work product, but they've got to do more than that, and the cases are clear on that.

And, Your Honor, you know, Mr. Maher cited to, to the *Merkin* case. You know, I have to laugh at that. I mean, the *Merkin* case, the deponent is -- it's a one-page opinion they cited to, but they left out the part that in the *Merkin* case, the SEC deponent sat for a day and answered questions, and there were eight questions in dispute. It was not such a burdensome thing that the, that the deposition couldn't go forward. So that's a, that's a little disingenuous to say that *Merkin* stands for a proposition that it would be too hard to do it.

You know, I represent an individual who's been publicly accused of fraud. We are entitled and the rules give us the right to test those allegations, not just to uncover every single fact but to say especially in a case like this, in a circumstantial case, that, okay, well, what about that fact and what about that fact, and have it come from the person

making that allegation, entity making that allegation.

You know, the citation *SBM* that Judge Chasanow gave -- and, Your Honor, I have, you know, I have every respect for the SEC. I used to work in the unit that brought this case, and I used to work in the fraud section, supervise the fraud section that declined this case. So I have every respect and understand their argument about circumstantial evidence, but when you bring a case on circumstantial evidence, you have -- we have to be allowed to test that by asking the claimant, well, did you consider that fact? Did you consider this fact? And did you have this fact when you made that allegation?

And they want this asymmetric discovery, which is plainly not what the rules talk about.

And the *SBM* case, the one that Judge Chasanow gave from the District of Maryland, doesn't stand for anything entirely different. That case was a regulatory case about whether someone was properly registered and whether they lied about registering. It wasn't based on circumstantial evidence. It was based on a rule reading and whether people should have registered. So that's a completely different case.

There are 20 years of cases making the SEC sit for these depositions, and there are 20 years of cases that we cited. We, we designed our, our topics to match what has been provided for in prior cases.

So about the remedies, of course we're entitled to find out the facts the SEC intends to prove to get the remedies. We can't get to the end of the case and not know what, what facts support these many steps they have to get to. That's manifestly unfair.

I'll stop now because I think I've gotten far away from your question, but --

THE COURT: No, I -- the struggle that I'm having, Mr. Muhlendorf, is trying to understand how the 30(b)(6) deposition would accomplish what, what you are seeking -- what you are articulating you're seeking to do. The SEC is the claimant, they are the entity bringing the case, but as the cases describe and the cases the SEC are relying on, the ones from the Second Circuit, Judge Chasanow's case from Maryland, they make it clear that the SEC, you know, isn't a fact witness in the traditional sense. They are a law enforcement investigative body; and as you've said, you understand that; you, you worked there.

So by definition, the claimant or the plaintiff is collecting information from others, and then they are presenting that information ultimately to prove their case, but they have no direct knowledge of what happened other than by conducting an investigation.

So you have every right to the results of their investigation, to test what they've collected, how they're

going to present it, but the decisions about how they've decided, you know, that this case was meritorious even if it was declined by another unit or by the Department of Justice goes to the heart of work product and strategy and the mental impressions of lawyers.

So I'm grappling with I hear you say they answered a contention interrogatory. They didn't reference what would arguably be exculpatory information that the wife said he doesn't usually use the home phone, which, you know, is what it is. You're obviously aware of that fact. They've turned over the 302.

So other than perhaps your second-guessing the lawyers' decision about how to write the response to the contention interrogatory, what are the facts that you're seeking that you think you don't have that you can't get another way?

MR. MUHLENDORF: Well, Your Honor, I think, I think again the problem is we can't get it another way. You know, the SEC is trying to impede the flow of regular discovery, and I understand that they, they contend and purport to be a law enforcement agency and only a fact gatherer, but there also needs -- we also need (inaudible) their complaint.

And this is, you know, there are -- you are right, there are cases that have gone the other way, but there's also cases like *McCabe,* which refers to this as a one-sided boxing

match; like *Kovzan*, which counsel, Mr. Maher, was in, which also, you know, awarded the -- you know, denied the SEC's claim, and even on appeal, the magistrate's decision was upheld to order a 30(b)(6) go forward.

What's missing from the facts, Your Honor, is we, we are, we are going to be in a position with, with a jury or a fact finder where the SEC says Mr. Wright made that phone call, right? And that's in the complaint. And we have no one to put the complaint in front of and say, well, there are other facts, right? There's no, there's no case agent here we can do that with, there's no one, and that's why the rules are set up the way they are so that we can do that.

I mean, there is, there is no exemption under 30(b)(6) for the SEC. We know, we know, Your Honor, that when the SEC has felt that discovery rules have been unfair to them, they go to Congress and get relief. They're not praying for a Rule 45 limiting how they did business. They got nationwide their attention. Just last year, when the Supreme Court shut them down, they went back to Congress and got an extension.

THE COURT: Let me stop you, Mr. Muhlendorf, about the -- the policy issues are of less interest to me than the very practical issues here of this case. The plaintiff has a burden, they're alleging insider trading. They're either going to be able to prove it or not.

With regard to your specific example of whether or

not your client made a phone call or the other client, I can't remember who's who now, made the phone call or not, the evidence is what it is, right? There's evidence of a phone call. The SEC's going to present it. Your client can testify or choose not to testify. Your client's wife can choose to testify or not testify. He can say, "I never used the home phone." She can say, "I was the one who made that phone call." You can choose not to respond at all.

I'm not sure how -- and again, I'll tell you right now there is no categorical prohibition on the SEC being subject to a deposition. The case law is clear, the rules apply to the SEC just as they apply to everyone else.

The challenge is in this circumstance, there is substantial authority that is not binding but, frankly, it's quite persuasive that permitting a deposition of the SEC under these circumstances is not appropriate pursuant to Rule 26.

So I haven't made up my mind. I want to give you your full opportunity to argue. It's clear that other courts have permitted depositions to go forward, and if you persuade me that there, there is a basis to do so here, I'll permit it, but right now what I'm hearing is you really want to know why the lawyers put together the case the way they put it and why they're relying on this phone call when there's no specific evidence that he picked up the phone in the kitchen at 5:45 on December 9 and said X, Y, and Z to Mr. Clark.

And the SEC's response, as the case law lays out very clearly, is in inside, you know, information cases, there's almost no direct evidence like that until someone flips on someone else and says: You know what? I did get the call, and he did tell me, and that's why I went out and borrowed, you know, hundreds of thousands of dollars on a highly speculative, you know, thing.

So this is the case you've got. It's not unusual in that circumstance. In fact, you may have something you didn't have before, which is the SEC has just said in open court on the record that they've turned over everything.

And so to the extent they can't say that he picked up the phone or not and what he said on the phone and, you know, what that conversation was about, whether that inference is good enough or not is a matter for the trier of fact, right?

We're not, we're not trying the case here. We're trying to determine whether everyone's had a fair chance to collect the evidence in the case, and you're certainly making an argument, as you have in the papers, that they have a weak case and that the inferences aren't going to be able to meet the burden, but that's not the issue.

The issue is whether or not it's fair to make them put up a lawyer, because, frankly -- just as with the Maryland and the New York cases, I'm not persuaded that them selecting an accountant or someone who's a non-lawyer who's simply going

to be fed all of the information because this is a 30(b)(6) deposition, so they don't need to have direct knowledge themselves, is going to come back to the same play, which is they will simply interpose an objection to every question, saying what you're asking for are not the underlying facts, which we've already given you, but how we came about making the decision about how we answered this question or what we've relied on to, to put in the complaint, and those are mental impressions and strategy decisions, which are not permissible.

So in that context, I'll give you one more chance to persuade me that there's something else there, because I, you know, I understand, I read the *Merkin* case. Frankly, I didn't find it persuasive, but hearing that they spent eight hours and then ended up responding to only eight questions in writing suggests to me that it probably was an enormous amount of waste of time and an undue burden. So --

MR. MUHLENDORF: Well, Your Honor, again, that's not what the *Merkin* case says, that case says. They sat there for eight hours and took testimony, and there were only eight questions that were a problem, not all of the questions asked in eight hours. I mean, that's -- they misrepresents that case. It's a one-page opinion. That's not what it stands for.

I just want to make sure we're clear on that. That is the -- the court there awarded the 30(b)(6) deposition, and then it went forward for eight hours, and there were eight

questions. And the questions that were ruled inappropriate were clearly inappropriate. We would never ask questions like that.

But, you know, Your Honor, I think we're again, we're not -- I understand, I understand the points you're trying to get to, which is how is it fair to make the SEC sit. And I ask them this question: How is it fair that Mr. Wright doesn't get to challenge the assertion? That is a significant problem with the way the SEC plays with intent.

THE COURT: But let me stop you there. How is Mr. Wright precluded from challenging the assertion?

MR. MUHLENDORF: Well -- and I'll give you an example. So if this -- if these questions that we can't ask them in the 30(b)(6) deposition are inappropriate questions, then they're not going to get answered. They're the same -- the same objections that we raised in our requests for admission, the same objections that we raised in the interrogatories. So I don't think this solves that problem.

What would solve the problem is if we sit down in a room and start asking the questions, I am 100 percent confident, more than 100 percent confident that between Mr. Maher and myself, and Ms. Choe and myself, and Ms. Toledano and the rest of the team, we can, we can sort through what's privileged and what's not privileged, but the blanket assertion of privilege before we've asked a question is -- the courts

have routinely said that's wholly inappropriate.

And, you know, the staff of the SEC, there is -- there are plenty of people who have sat for depositions. That's not to say that all of that was work product. It doesn't become work product because an attorney states it. That's a truism. There's always an attorney that drafts the complaint when the 30(b)(6) (inaudible) set. That's just a truism that that's always the case. That can't be -- it can't be that a 30(b)(6) never happens with an attorney involved in the case.

THE COURT: Let me do this, because I am trying to keep an open mind, but topic 1 says: "The factual basis for the contentions in the complaint related to the defendants' attendance at various basketball games and the alleged interaction of the defendants at those games."

So let's just take that topic. What is it that you would be asking that you would think you would get that you don't have now and that you haven't received fully with regard to the interrogatory and the request for production of documents that presumably address exactly this conduct?

MR. MUHLENDORF: And that's a perfect example, because we asked in the contention interrogatory: Give us all the facts that support for every event you say he attended, okay?

So they go through -- and it's in the complaint --

they go through and they say: On, you know, December 23, he was -- he attending a basketball practice.

And then we asked: What is the evidence that supports that, that allegation?

And they came back to: Well, Mr. Clark traded outdoors and there was a practice, and now we know from their, from their contention interrogatory there's a blast e-mail that shows that Mr. Wright knew about the practice, but none of that, none of that gives us the evidence we need to refute that he was actually there.

The commission is making a statement. They made a statement in this complaint, and we are entitled to test that by asking the commission: Well, did you, did you interview this person? Did you interview anyone on the basketball team? Did you, did you -- none of those -- the only way --

THE COURT: Mr. Muhlendorf, let me stop you. I really am having a hard time. If they interviewed someone on the basketball team and the guy said: I remember Mr. Wright being there, they would have been obliged to put that in the response to the interrogatory, so the fact that it's not there means they haven't done it.

God knows if they had a photograph or a video of Mr. Wright at the practice, they would have turned it over. If they had someone who overheard Mr. Wright talking about the sale of the company at a basketball game, they would have had

to have disclosed that, right?

MR. MUHLENDORF: Correct.

THE COURT: And they're telling you that there is no other information. So how is asking anyone, whether it's an SEC attorney or whether it's some non-attorney, going to change that?

MR. MUHLENDORF: Because, Your Honor, it gets into the efficiency argument. The efficiency is this: If I have to ask that through a series of requests for admission, there's going to be a thousand requests for admission, because I'm going to have to foreclose every possible opportunity, but if we do the deposition and (inaudible) who says we didn't talk to this person, well, I've got the list here. Did you talk to any of these people? And that's, that's a much more efficient way of doing it.

THE COURT: I don't want to be harsh, but I would suggest that we're doing the opposite of efficiency here. I started out this discussion by saying is the SEC willing to stipulate that they provided everything, or you-all could have worked that out without coming to court on this at all.

What you want to do is nail down that what this case is is what they've presented and there's nothing else there, and you want to argue that six ways to Sunday, you know, if this case gets to a trial. I understand that, but nothing you're saying persuades me that having a deposition of the SEC

under 30(b)(6) gets you there better than what you could have gotten just by calling Mr. Maher and doing this, you know, without this entire motion.

MR. MUHLENDORF: Well -- and, Your Honor, if that is correct and if the SEC is willing to walk through sort of the things I just said, well, did you interview this -- you will admit you didn't interview this person, you will admit you didn't interview this person, then we can do it that way, that's fine, you are correct, but when we've asked for proffers of information, we've gotten back sort of rote bullet points.

This is not -- it's not as if we haven't tried. We tried that with our witnesses, and four witnesses the same answers, none had documents. We have no documents for those witnesses.

So I'm happy to go back and try and work that out with Mr. Maher if that's your -- if that's your instruction. We believe it's less efficient, but if the commission is willing to agree to sit down and walk through those questions with us and give us answers we can use at trial, we're happy to do that. That's a perfect solution in my mind, if they're willing to make that concession and sit down and answer those questions in a usable format, and that's the difference. It has to be usable format. It has to be something we can present to the jury.

I can't, I can't, I can't argue to the jury

effectively that the commission didn't interview those six people. I'm not sure how I'd do that without getting them to say it, but when you've got a circumstantial case like this, that's manifestly unfair to make me in front of the jury foreclose all the stuff that's not there when they could easily answer that question in a deposition or in some other form of discovery, and as long as I get that, that piece of evidence, I'm -- we're satisfied.

THE COURT: Would you not, would you not ask a -- for an interrogatory for all of the people they interviewed so that you would have the universe?

MR. MUHLENDORF: We have, we have not asked that yet, and we have not asked that yet, Your Honor, because when we started the interrogatory process, they told us they wouldn't answer it yet. So we didn't -- we ended up --

THE COURT: Okay. I think I understand.

Mr. Maher, I saw you shaking your head, but I will -- if this was Judge Ellis, he would say counsel should never move their head in response to counsel's, you know, opposing counsel's statements, but I'll give you a chance to speak, but I think we, we can resolve this now relatively promptly.

Is there anything you want to add?

MR. MAHER: Just -- I mean, Your Honor, yes, we'd be happy to submit in writing the people that are -- I'm pretty sure we already have actually and we certainly did not take the

position that we would not provide that information, so I'm not sure what, what counsel is referring to. In fact, it may have been our response to interrogatory 12.

THE COURT: Okay. Well, I've listened carefully to the arguments of counsel, and I've reviewed the pleadings. I do find that there is no categorical prohibition on the taking of a 30(b)(6) deposition, that the SEC is a government agency and government agencies are covered by 30(b)(6).

I also don't find that there was a specific request that the SEC produce an attorney to sit for the deposition, but I also find that the weight of the case law supports a finding that absent really unusual circumstances that I do not find here, that a 30(b)(6) deposition of the SEC is disfavored, and that as we know in the Eastern District of Virginia and the Fourth Circuit and throughout the country, that depositions of opposing counsel are strongly disfavored and that ultimately that's who would have to present this information or would be most likely to present the information, either directly or indirectly.

I find that Maryland and the Southern District of New York and those cases are persuasive and that, in fact, although the topics discuss basic facts, the real issue here is whether or not the overwhelming effort would be to obtain attorney-client privileged or work product information, and so I'm going to grant the motion for the protective order. It

would be an undue burden, and I do believe there are alternative ways to get this information.

It is unclear to me and I don't have before me in the record and don't want all of the responses to written discovery, and I understand counsel perhaps has a slightly different view of whether this information has been presented or not or whether the specific questions have been asked, and that is a relevant consideration in looking at these other cases.

The SEC has represented in open court both in writing and here today that they have provided complete responses and all of the underlying factual information related to the claims in their complaint.

To the extent, Mr. Muhlendorf, there are specific questions that have not been answered, such as has the universe of people interviewed been provided, so that you could make the argument clearly that of all of the basketball players and their parents, none of them were interviewed or only these people were interviewed or that nobody else was in the house when the phone was used on the day that the call has been identified, that those are perfectly legitimate areas to propound for discovery if that has not been the case.

And there may be a very efficient way that counsel can come up with a stipulation so that you know what the government is relying on and that you can then make arguments

as to things they could have done or should have done that they have not, but I don't find based on Rule 26 and the case law that the 30(b)(6) deposition is the right avenue to pursue it, and therefore, I will grant the motion.

It is not without prejudice to the extent that you pursue whatever other means are there or you try to find the collaborative way of working this out through a stipulation, that you cannot re-raise an issue if you feel that you have exhausted all other methods of collecting this information and there is some reason why you need to bring this back before the Court, but my hope is that you will not feel that way.

MR. MUHLENDORF: Your Honor, thank you. I'm confident we'll be able to work out some stipulations and some, and some requests for admissions and things that will get where we (inaudible). I have every confidence the SEC will work with us on that. So thank you.

THE COURT: Thank you.

Is there anything else I need to address with regard to this matter?

MR. MAHER: No, Your Honor.

MR. MUHLENDORF: No, Your Honor.

THE COURT: Thank you. And I realize these are somewhat unusual cases in comparison to other civil litigation matters, but if the parties think that there could be a way of amicably resolving this with the help of the Court, I'd be

happy to have a settlement conference, and you can contact chambers to follow up on that.

Having delved into this a little bit, I could see powerful reasons on both sides to consider trying to find a way to settle the matter.

MR. MAHER: Thank you, Your Honor.

MR. MUHLENDORF: Thank you.

THE COURT: Thank you very much. Have a good weekend. Court will be in recess.

MR. MAHER: Thank you.

THE COURT: Thank you.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE TRANSCRIBER

I certify that the foregoing transcript of proceedings was prepared from an FTR Gold audio recording of proceedings in the above-entitled matter and was produced to the best of my ability. Inaudible indications in the transcript indicate that the audio captured was not clear enough for this transcriber to attest to its accuracy.

/s/
Anneliese J. Thomson