

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JENNIFER L. MILLER,

Plaintiff,

vs.

MICHAEL J. ANDERSON, ET AL.,

Defendants,

And

FIRST ENERGY CORPORATION,

Nominal Defendant.

Case No. 5:20CV1743
Akron, Ohio
Wednesday, March 9, 2022
2:00 p.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Jeroen Van Kwawegen
Alla Zayenchik
Bernstein, Litowitz, Berger &
Grossmann - New York
1251 Avenue of the Americas
New York, New York
(212) 554-1472

Marc H. Edelson
Edelson Lechtzin
3 Terry Drive, Suite 205
Newtown, Pennsylvania 18940
(215) 867-2399

Alan L. Rosca
Rosca Scarlato
23250 Chagrin Boulevard, Suite 100
Beachwood, Ohio 44122
(216) 570-0097

1 John C. Camillus
2 Law Office of John C. Camillus
3 P.O. Box 141410
4 Columbus, Ohio 43214
5 (614) 992-1000

6 Sara M. DiLeo
7 Saxena White
8 10 Bank Street, 8th Floor
9 White Plains, New York 10606
10 (914) 437-8551

11 Richard A. Spiers
12 Cohen Milstein Seller & Toll
13 88 Pine Street, 14th Floor
14 New York, New York 10005
15 (212) 838-7797

16 Thomas J. Curry
17 Saxena White - Wilmington
18 1000 N. West Street, Suite 1200
19 Wilmington, Delaware 19801
20 (302) 485-0480

21 For Defendants Geoffrey J. Ritts
22 Anderson, Demetriou, Jones Day - Cleveland
23 Johnson, Misheff, 901 Lakeside Avenue
24 O'Neil, Mitchell, Cleveland, Ohio 44114
25 Pappas, Pianalto, (216) 576-3939
26 Reyes, Turner,
27 Strah, Taylor:

28 Marjorie P. Duffy
29 Jones Day - Columbus
30 325 John H. McConnell Boulevard, #600
31 Columbus, Ohio 43215
32 (614) 469-3939

33 For Defendant Jones: Carole S. Rendon
34 Douglas L. Shively
35 Daniel R. Warren
36 Baker & Hostetler - Cleveland
37 127 Public Square, Suite 2000
38 Cleveland, Ohio 44114
39 (216) 861-7420

40 Jason R. Meltzer
41 Gibson, Dunn, & Crutcher - Washington
42 1050 Connecticut Avenue, NW
43 Washington DC
44 (202) 955-8676

1 For Defendant Steven S. Scholes
Reffner: Paul M.G. Helms
2 McDermott, Will & Emery - Chicago
444 West Lake Street, Suite 4000
3 Chicago Illinois 60606
(312) 372-2000
4
5 John C. Fairweather
Brouse McDowell - Akron
388 South Main Street, Suite 500
6 Akron, Ohio 44311

7 For Defendant John F. McCaffrey
Dowling: John A. Favret, III
8 Tucker Ellis - Cleveland
950 Main Avenue, Suite 1100
9 Cleveland, Ohio 44113
(216) 592-5000
10

11 For Defendant Marcella L. Lape
Yeboah-Amankwah: Skadden, Arps, Slate, Meagher &
Flom - Chicago
12 155 North Wacker Drive, Suite 2700
Chicago, Illinois 60606
13 (312) 407-0700

14 For Nominal John Gleeson
Defendant Maeve O'Connor
15 FirstEnergy: Debevoise & Plimpton
919 Third Avenue
16 New York, New York 10022
(212) 909-6000
17

18 Ann H. MacDonald
Barry S. Hyman
Schiff Hardin - Chicago
19 7100 Willis Tower
233 South Wacker Drive
20 Chicago, Illinois 60606
(312) 258-5548
21

22 For Defendant Chack: Laura Hughes McNally
Morgan, Lewis & Bockius - Philadelphia
1701 Market Street
23 Philadelphia, Pennsylvania
(215) 963-5000
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Douglas M. Mansfield, Jr.
Lape, Mansfield, Nakasian & Gibson
9980 Brewster Lane, Suite 150
Powell, Ohio 43065
(614) 763-2316

For Defendant Pearson: Timothy D. Katsiff
Ballard Spahr - Philadelphia
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103
(215) 864-8301

Also Present: Thomas J. Connick
George W. Cochran

Court Reporter: Caroline Mahnke, RMR, CRR, CRC
Federal Building & U.S. Courthouse
2 South Main Street, Suite 568
Akron, Ohio 44308
(330) 252-6021

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Wednesday, March 9, 2022

THE COURT: Thank you all for being here today. We appreciate it.

For the record, the Court has before it today Case Number 5:20CV1743. The case is captioned in the verified stockholder derivative complaint Jennifer Miller versus Michael Anderson and all other named defendants.

We're here today at the invitation of counsel who indicated that they would be willing to answer certain questions that this Court may have.

So I do have some questions. I may have some today, and I'm likely to have a fair number of others at the appropriate time.

I think it's worthwhile to set forth some background of the case so that we know why we're here.

Back some time ago when this matter all began, the U.S. attorney for the Southern District of Ohio, at that time Mr. DeVillers, stated this is likely the largest bribery money laundering scheme ever perpetrated against the people of the State of Ohio. Bribery, pure and simple. This was *quid pro quo*.

This, of course, was quoted in the intervenor's complaint that began this action.

By way of background, we're here as the intervenors -- the complaint indicates, this is the claims

1 that were brought, the nature of the action -- this is a
2 shareholder derivative action that seeks to remedy
3 wrongdoing committed by FirstEnergy's directors and certain
4 officers and is brought by the plaintiff on behalf of
5 FirstEnergy against Defendants Michael J. Anderson, Steven
6 J. Demetriou, Julia L. Johnson, Charles E. Jones, Donald T.
7 Misheff, Thomas N. Mitchell, James F. O'Neill, Christopher
8 Pappas, Sandra Pianalto, Luis Reyes, Leslie Turner, Steven
9 Strah, Robert Reffner, Michael Dowling, and then Ms.
10 Yeboah-Amankwah -- I may mispronounce her name, and my
11 apologies for same -- resulting from the breach of fiduciary
12 duties owed by defendants to FirstEnergy and its
13 shareholders. And the plaintiff indicates, of course, that
14 they are a shareholder.

15 At all relevant times, according to the plaintiffs,
16 the defendant engaged in concerted efforts to curtail losses
17 from nuclear operations managed by a subsidiary in order to
18 keep their lofty positions, to increase their own
19 compensation. In furtherance of their scheme, defendants
20 sanctioned the corporate policy of illegal payments to
21 government officials, including the Ohio House Speaker Larry
22 Householder, and other individuals, that resulted in a
23 significant reduction in shareholder value when it was
24 subsequently exposed.

25 And then to achieve the foregoing goal while

1 preserving or increasing their own wealth, FirstEnergy's
2 board of directors and senior executives engaged in acts,
3 adopted policies, and/or failed to act when required to do
4 so. That resulted in economic harm to the plaintiff and
5 other shareholders.

6 The complaint further alleges the defendants'
7 self-dealing, active participation, and failure to address
8 detailed and credible allegations of criminal activity
9 undertaken with the tacit or express consent of
10 FirstEnergy's CEO and other senior executives is causing,
11 and will continue to cause, the company substantial harm.

12 Even beyond the reputational damage and loss in market
13 capitalization, etcetera, the loss of stock -- I'll
14 summarize here. The complaint and the plaintiffs say the
15 total cost to FirstEnergy and its shareholders of its
16 goodwill, diminished value, civil litigation, and scorched
17 earth investigations may well stretch into the billions of
18 dollars.

19 That's the plaintiffs' claims.

20 And through this action, plaintiff seeks to redress
21 the harm caused by the defendants to FirstEnergy.

22 A brief review of the known damages -- and we refer to
23 the deferred prosecution agreement -- indicates that
24 FirstEnergy paid \$230 million, that's the fine, \$59 million
25 to Generation Now, \$4.3 million to the public utilities

1 chairman, so-called PUCO, and \$25 million to Partners for
2 Progress.

3 That total is nearly \$88 million in bribes, more than
4 \$318 million in losses to FirstEnergy.

5 That doesn't include the attorney fees and costs
6 FirstEnergy has incurred and will incur which is likely in
7 the tens of millions of dollars, nor the costs of
8 litigation, special litigation committee, other losses that
9 may be incurred due to other pending litigation.

10 So, with that in mind, February 9, there was an
11 announcement made of a settlement of \$180 million.

12 Now, interestingly, February 10 was the date on which
13 all the various defendants were going to be required to come
14 to court, be placed under oath, and answer questions.

15 The schedule included virtually every defendant
16 through the month of February, March, and April. But no.
17 None were questioned. None.

18 Settlement was achieved quickly before any questions
19 could be asked.

20 Now, counsel for the plaintiff, why don't you approach
21 the podium because I have a number of questions to ask and
22 maybe it would be helpful to the Court understanding the
23 circumstances here, please.

24 MR. VAN KWAWEGEN: Good afternoon, Your Honor.

25 THE COURT: Good afternoon, counsel.

1 MR. VAN KWAWEGEN: Jeroen Van Kwawegen from
2 Bernstein, Litowitz on behalf of all the plaintiffs.

3 THE COURT: Thank you.

4 So why don't you tell me who it is that paid the
5 bribes in this case.

6 MR. VAN KWAWEGEN: Your Honor, with your
7 permission, can I take a step back and give some background
8 to answer your question?

9 THE COURT: No. I have questions. I'm not
10 interested in the background yet. You'll have your
11 opportunity. You have filed your papers. I have some very
12 direct questions about what brings us here today.

13 So, first of all, who is -- you're the plaintiffs'
14 counsel. Who is it that paid the bribes, responsible for
15 the payment of the bribes?

16 MR. VAN KWAWEGEN: Your Honor, executives at
17 FirstEnergy, as detailed in the deferred prosecution
18 agreement with the government, paid those bribes.

19 THE COURT: And you're going to name the
20 individual for me?

21 MR. VAN KWAWEGEN: Your Honor, no, not at this
22 time.

23 THE COURT: Why not?

24 MR. VAN KWAWEGEN: Your Honor, we learned about
25 certain facts in discovery. As Your Honor knows, we had

1 more than 400,000 pages of discovery.

2 We used that discovery as part of a mediation to come
3 to the resolution that is before the Southern District of
4 Ohio.

5 And as part of those mediation efforts to extract the
6 benefits that we believe -- I understand that the Court
7 disagrees -- but we believe is a historic settlement, \$180
8 million, and unprecedented governance changes -- governance.

9 THE COURT: We'll discuss that. I've already
10 talked to you briefly about the damages. You say \$180
11 million. You pled billions. And we already know what the
12 hard damages are.

13 So my question is very simple, to avoid the back and
14 forth, ultimately, at some point, whether it's today or
15 sooner than later, for this settlement to be approved, we
16 are entitled, I, as a judge in the case overseeing this
17 case, if you expect me to approve the settlement -- and rest
18 assured, the settlement is before me, or any settlement is
19 before me in this case.

20 So direct question: Who is it that paid the bribe?
21 Because it's directly related to the settlement, the amount
22 of the settlement, and what, if any, results you achieved?

23 MR. VAN KWAWEGEN: Your Honor, the information
24 that you're asking for I used as part of the mediation.
25 It's subject --

1 THE COURT: Counsel, whether you used it as part
2 of mediation or not is not relevant.

3 It's part and parcel of the case. You've pled the
4 case. You have alleged the bribes were paid. FirstEnergy
5 has admitted the bribes were paid. FirstEnergy has said
6 there is two executives.

7 So if you did your job and you did your discovery, you
8 would know who it is directly that did that, that paid those
9 bribes.

10 So are you refusing to answer that question today,
11 counsel?

12 MR. VAN KWAWEGEN: No, Your Honor. I want to
13 make sure that we're talking about the same thing because,
14 first, what I believe does not make it fact. I can tell you
15 what I believe, but that does not make it fact.

16 THE COURT: Counsel, it's not what you believe.
17 It's what the evidence in the case has shown.

18 You're here telling me you've done all the discovery.
19 You chose not to depose anyone in this case. You think you
20 have all the information you need to come forward with this
21 settlement.

22 So it's a very direct question, very relevant.

23 We'd all like to know, who is it that paid the bribes?

24 MR. VAN KWAWEGEN: Well, Your Honor, with due
25 respect, there is no pending motion for settlement approval

1 before this Court. And therefore, and in addition to that,
2 because we used this information that we learned through
3 discovery, subject to a confidentiality order, as part of
4 settlement negotiations and part of a mediation, I cannot
5 give you a direct answer to the question of who at
6 FirstEnergy did what.

7 THE COURT: Counsel, I'm ordering you to give me
8 a direct answer for the following reasons.

9 My case is distinctly different from whatever case you
10 filed in the Southern District as we both know.

11 Judge Marbley put up an order. You're familiar with
12 his order, right? Said his order granting a stay is not
13 binding on this Court, has no effect on this Court.

14 Now, to stand here and say I want -- we have a
15 settlement and it's an appropriate settlement and not say,
16 not be willing to come forward and say who it is, without
17 taking any testimony, no sworn testimony, and not be willing
18 to directly answer a question, who it is that paid the
19 bribe, and paid the bribes, that goes directly to the
20 settlement, who is being held accountable, how much, who
21 paid it, how much you've obtained from the person who might
22 have paid the bribes.

23 Right?

24 MR. VAN KWAWEGEN: So, Your Honor, we know who
25 paid the bribes.

1 THE COURT: Okay.

2 MR. VAN KWAWEGEN: They were senior executives at
3 FirstEnergy.

4 THE COURT: So why don't you just name the
5 person, counsel, because it's directly relevant to the
6 settlement. That's what we're here today to discuss.

7 In your papers you said to me, Judge, we will answer
8 your questions. I'm asking a direct question. Are you
9 refusing to give me a direct answer?

10 MR. VAN KWAWEGEN: No, Your Honor. I'm trying to
11 give you the best answer possible within the --

12 THE COURT: A direct answer calls for a specific
13 name. It isn't a generic we know it's an executive. It's
14 who is the person directly?

15 MR. VAN KWAWEGEN: And Your Honor, what I'm
16 trying to say is I'm trying to give you the best possible
17 answer within the limitations that I face with respect to
18 the settlement, with respect to the mediation privilege, and
19 my obligations to my client.

20 THE COURT: None of those things, sir, none of
21 those things preclude you from answering my question. They
22 do not preclude you from answering my question.

23 I didn't approve any agreement, any mediation
24 agreement. I didn't approve any confidentiality provision.
25 You're here in this Court in this case in this action.

1 Now, if you don't want to answer the question, just
2 tell me now because I'm ordering you to answer the question
3 directly because you're counsel in this case. You're the
4 plaintiff. You've made these claims, including bribes were
5 paid. And now you've made the allegations.

6 So who is it, based upon work that you have done, that
7 paid the bribes?

8 MR. VAN KWAWEGEN: And Your Honor, I will repeat.
9 We stand by every allegation --

10 THE COURT: So you're not going to answer my
11 question. Is that it?

12 MR. VAN KWAWEGEN: I am trying to answer the
13 question, Your Honor.

14 THE COURT: No, no. Sir, it's very direct. Who
15 is the name of the person who paid the bribe, person or
16 persons?

17 So give me -- are you going to give me an answer or
18 not, counsel?

19 MR. VAN KWAWEGEN: If you're -- I want to make
20 sure that we're talking about the same thing, Your Honor.
21 And I'm not trying to dodge. I'm trying to tell you what
22 you want to know, okay. Within certain limitations that I'm
23 bound by, I'm trying to give a direct answer to your
24 question.

25 And so what I want to make sure is that Your Honor

1 knows that we stand by our allegations. The persons
2 identified in the DPA paid the bribes. And furthermore, we
3 have evidence of other specific people. But I cannot
4 disclose that to Your Honor.

5 THE COURT: Well, why can't you disclose it to
6 me, counsel?

7 MR. VAN KWAWEGEN: Because that is subject to the
8 mediation privilege.

9 THE COURT: The mediation privilege doesn't apply
10 here, counsel. I'm just telling you to answer the question
11 directly. If you're refusing to do that, tell me now,
12 because if that's what you're refusing to do, then maybe we
13 need new counsel to represent the shareholders in this case.

14 I suspect there may be others who are willing to come
15 forward and be willing to vigorously pursue this case.

16 And if you're not willing to say who it is that paid
17 the bribe, then that goes to the efficacy of the settlement,
18 the amount that you obtained, from whom you obtained it,
19 etcetera, directly.

20 So if the answer is no, Judge, I'm not going to tell
21 you the name of the person who paid the bribes, tell me now.
22 It's just that simple.

23 MR. VAN KWAWEGEN: Your Honor, I speak on behalf
24 of all plaintiffs in all courts. There is no plaintiff who
25 disagrees with what I'm telling you now. In state court --

1 THE COURT: Counsel, back to my question. I
2 don't care whether they agree or disagree. You're here in
3 this case. You're lead counsel, lead counsel not appointed
4 by me, but you're counsel in this case.

5 So the final time, do you want to tell me who it is,
6 based on the discovery, that paid the bribes in this case?

7 MR. VAN KWAWEGEN: On behalf of all plaintiffs, I
8 cannot answer more than what I've already done.

9 THE COURT: All right. Counsel, then I'll tell
10 you what I'm going to do. I'm ordering you to disclose the
11 name. If you want to refuse, then go ahead and refuse now
12 because then I'll take whatever action I deem is appropriate
13 in this case.

14 MR. VAN KWAWEGEN: Your Honor, I stand by my
15 prior answers. I tried to answer the best I can.

16 THE COURT: Thank you. So you're not going to
17 tell us. You're not going to tell us anything about who
18 paid the bribes, none?

19 MR. VAN KWAWEGEN: Your Honor, I disagree with
20 that characterization, but I stand by my prior answer.

21 THE COURT: You're not going to identify the
22 person? That's the question. Are you going to identify the
23 person by name or not?

24 MR. VAN KWAWEGEN: Your Honor, I think I've tried
25 to answer your question.

1 THE COURT: So there are others in this
2 courtroom, I suspect, media and maybe even other
3 shareholders, I'm sure, who want to know the answer to that
4 question.

5 You're the plaintiff. I read through the allegations
6 here. You're supposedly bringing this action, and you're
7 trying to make this recovery. And so yet you don't want to
8 tell us the who, what, where, why, and how. Right?

9 MR. VAN KWAWEGEN: Your Honor, my obligations are
10 to FirstEnergy. I'm derivative counsel. My obligations are
11 to FirstEnergy. My obligations are to the plaintiffs,
12 including my clients.

13 I have no obligations to the public and what the
14 public might or might not want to know.

15 THE COURT: What about the shareholders, counsel?
16 What about independent shareholders who may have questions?
17 What about your obligation to them?

18 MR. VAN KWAWEGEN: And Your Honor, there will be
19 a process in the Southern District of Ohio where other
20 shareholders, if they disagree with anything, they can raise
21 those objections.

22 THE COURT: You're confused, counsel. This is a
23 separate case. I know you want to bring it in the Southern
24 District. I know you're forum shopping. I know you want to
25 avoid having to come here and seek approval. I know that.

1 But that isn't the way it works. And I think Judge
2 Marbley has implicitly noted that when he indicated there is
3 no stay here. If you don't choose to do discovery in this
4 case, maybe someone else will.

5 If you don't want to disclose clearly here, answer
6 questions, basic questions about who it is that paid the
7 bribes, then one must question the vigorous nature of your
8 representation. Period.

9 MR. VAN KWAWEGEN: Your Honor, I respectfully
10 disagree with the characterization of forum shopping.

11 As Your Honor is aware, nine of the derivative cases
12 were filed in the Southern District of Ohio.

13 THE COURT: Which case was filed first, counsel?

14 MR. VAN KWAWEGEN: The very first case was
15 actually filed in the state court, Your Honor.

16 THE COURT: Actually in Summit County, correct?

17 MR. VAN KWAWEGEN: Right.

18 THE COURT: Here. In this jurisdiction.

19 FirstEnergy is located in this jurisdiction. 100 yards
20 across the road is where FirstEnergy, all these executives
21 who are involved in this litigation, most of them have ties
22 to that location over here or there.

23 Now, if we're not going to get answers to any
24 questions today, then we're wasting a lot of time because,
25 candidly, if you are not going to recognize that I have

1 jurisdiction over this case, I have questions and I'm going
2 to follow up, then we are wasting a lot of time.

3 Because if you're going to come in here and say,
4 Judge, we're not going to answer any of your questions
5 because we're going to go down in a separate action in front
6 of Judge Marbley and deal with him, because you don't want
7 to answer any hard questions, you don't want anybody to
8 challenge you about what you've done here and how thorough
9 you've been and why no one has been called to account to
10 answer any questions about their involvement in this case.

11 Correct?

12 MR. VAN KWAWEGEN: No, not correct, Your Honor.

13 First, I do recognize this Court's jurisdiction. And
14 as Your Honor knows, there is a pending request for a stay
15 of this action. I recognize this Court's jurisdiction very
16 much.

17 I also --

18 THE COURT: There is no stay in this case, and
19 Judge Marbley made it clear there is no stay in this action.

20 MR. VAN KWAWEGEN: We have renewed our request to
21 Your Honor.

22 THE COURT: It's denied, counsel. There is no
23 stay because I haven't gotten any answers to any questions
24 today that would warrant any stay. Period.

25 MR. VAN KWAWEGEN: The second thing I would like

1 to add, Your Honor, is that I have no concern about
2 difficult questions because I'm sure that Chief Judge
3 Marbley is also very capable of having very difficult
4 questions.

5 THE COURT: You're going to answer them here
6 today in front of me rather than waiting for Judge Marbley.
7 This is my case. Judge Marbley has his case. I have mine.
8 Mine is the first case.

9 Summit County is also here, Court of Common Pleas.
10 This is the first case.

11 Generally, you know first filed goes first. You've
12 tried to avoid that rule, and you've tried to go down to the
13 Southern District to avoid having any scrutiny. And I'm
14 here today to give you that scrutiny. And if you don't want
15 to follow -- again, if you don't want to answer any
16 questions, we're wasting our time because there is lots of
17 questions I have about this litigation, about what you've
18 done and how you've done it and what you've learned.

19 You say it's \$180 million. Really?

20 And we know what the damages are. I've already told
21 you, at least generally speaking, what we know.

22 You've pled in your complaint here how many millions
23 and millions of dollars these alleged wrongdoers have
24 earned.

25 Right?

1 MR. VAN KWAWEGEN: Your Honor, with respect,
2 we're not trying to avoid hard questions. We're not trying
3 to avoid --

4 THE COURT: Okay. Then let go back. Let's
5 circle back for the last time.

6 If you're not going to identify -- I'm ordering you to
7 identify the persons who paid the bribes. If you're
8 refusing to do that, then I will have to take other action.

9 MR. VAN KWAWEGEN: Your Honor, I stand by my
10 prior answers.

11 THE COURT: Thank you.

12 MR. VAN KWAWEGEN: And I would like to add, with
13 Your Honor's permission, because I think Your Honor has made
14 a number of statements that suggest that we are engaging in
15 forum shopping and that it's inappropriate for us to present
16 the settlement to Chief Judge Marbley, and I would like to
17 address that with Your Honor's permission.

18 THE COURT: No. Let's go through my questions
19 because whether you present it to Judge Marbley or not is
20 beside the point.

21 I've already stated I have jurisdiction over this
22 case. So any settlement in this case has to come to this
23 Court, not to Judge Marbley. Period. There has been no
24 transfer.

25 Just, fundamentally, that's where you have to be on

1 this case is here.

2 I know you want to try to avoid it. But this is where
3 you want to be or are going to be -- not that you want to
4 be.

5 So let's go through it. Let's talk about all the
6 various questions that I have. And if you don't want to
7 answer them, claiming some sort of mediation privilege -- we
8 know the questions are going to be asked. We know they
9 deserve answers. If that's what you're here today to do is
10 just simply avoid and evade answering any questions, tell me
11 now. I won't waste everyone's time.

12 MR. VAN KWAWEGEN: Your Honor, that's absolutely
13 not what I'm doing.

14 THE COURT: Seriously, I will have to contemplate
15 removing you, getting other counsel to represent the
16 shareholders and pursue this litigation vigorously. Someone
17 may need to do that.

18 MR. VAN KWAWEGEN: Your Honor, it's absolutely
19 not my intention to be here not to answer questions.

20 As Your Honor knows, you provided us with questions in
21 advance, and we've provided written answers to those
22 questions.

23 THE COURT: Counsel, those are just cursory
24 questions. Those don't delve into any of the matters here.

25 MR. VAN KWAWEGEN: I do think that they indicate

1 our respect for this Court in the fact that we answered them
2 as best we could.

3 And so it's not the case that we are not recognizing
4 this Court's jurisdiction or that we are not willing to
5 provide answers to Your Honor's questions.

6 THE COURT: Counsel, then let's go through each
7 of the -- I'll just go through each of the defendants.

8 Let's do it this way. You've pled that Defendant
9 Michael Anderson was the chairman of the board, or a
10 director, I should say, of FirstEnergy between 2007, served
11 on the audit committee from 2016 to 2019. He was awarded
12 over a million dollars in fees, stock awards, other
13 compensation for service on the board and other benefits.

14 So there is the number you've pled.

15 How much of that have you sought to be returned to the
16 FirstEnergy Corporation?

17 MR. VAN KWAWEGEN: Through this action or through
18 the settlement, Your Honor? Through the settlement --

19 THE COURT: Either one.

20 MR. VAN KWAWEGEN: -- none.

21 THE COURT: None.

22 Same with Mr. Demetriou. He is the chairman -- excuse
23 me. He was a director of FirstEnergy since 2017. And he
24 was awarded -- this is your pleading. This is what you're
25 claiming. He was awarded over \$704,000 in fees. And you

1 went on, talked about stock and other compensation. You
2 outlined the benefits received.

3 Have you attempted to recover any of those benefits.

4 MR. VAN KWAWEGEN: Your Honor, I have attempted,
5 but they are not part of the settlement.

6 THE COURT: Sort of a yes or no?

7 MR. VAN KWAWEGEN: They're not part of the
8 settlement, Your Honor.

9 THE COURT: Okay. Then let's go to Ms. Johnson.
10 We can go right down the list here to people that you've
11 claimed -- I'm reading your pleading -- was awarded \$953,000
12 in fees, stock awards, and other compensation.

13 And do you seek any recovery of those funds?

14 MR. VAN KWAWEGEN: As Your Honor has the term
15 sheet, which is Docket 273, Exhibit 1, Your Honor knows that
16 there are three individuals against which recoupment claims
17 were carved out from the settlement.

18 With respect to any of the other individual
19 defendants, there is no part of the settlement that --

20 THE COURT: So the answer is no. You haven't
21 sought any recovery?

22 MR. VAN KWAWEGEN: That's correct, Your Honor.
23 I'm just laying the background.

24 THE COURT: Let's move on to a bigger number.
25 Let's talk about Mr. Jones. According to your complaint, he

1 has received over the course of time, the timeframe during
2 this event, this scheme, as I read it I think it's roughly
3 \$54 million in total compensation. And I think in your
4 papers you indicate another \$31 million that he received in
5 stock options and other forms of compensation.

6 Correct?

7 MR. VAN KWAWEGEN: That sounds right, Your Honor.
8 I don't have the complaint in front of me.

9 THE COURT: Around \$81 million.

10 MR. VAN KWAWEGEN: I accept your --

11 THE COURT: So how much of that did you seek to
12 recoup?

13 MR. VAN KWAWEGEN: Your Honor, the recoupment
14 claims against Mr. Jones were carved out from the settlement
15 and they're separately --

16 THE COURT: Okay. So you didn't seek that
17 recovery. You let that go somewhere else. You weren't
18 going to try to pursue that here.

19 MR. VAN KWAWEGEN: Your Honor, we attempted to
20 pursue them, but they are not part of the settlement, and
21 they are independently pursued.

22 THE COURT: So that really goes to the strength
23 of the settlement. That goes to whether the settlement is
24 appropriate, when you seek not to recover any of this \$81
25 million here as part of this litigation.

1 MR. VAN KWAWEGEN: I respectfully disagree, Your
2 Honor.

3 THE COURT: Okay. So what about Mr. Misheff
4 here, Misheff, as we will call him?

5 And again, this is a nonexecutive chairman of
6 FirstEnergy board, according to this, served on the audit
7 and corporate and governance committee. It was over a
8 million dollars compensation.

9 Did you seek any money from him? Did you seek to
10 recoup any of the benefits he received?

11 MR. VAN KWAWEGEN: Seek, yes. They're not part
12 of the settlement, Your Honor.

13 THE COURT: Same with Mr. Mitchell, roughly
14 \$978,000 and other compensation.

15 Did you seek any recovery or recoupment?

16 MR. VAN KWAWEGEN: They are not part of the
17 settlement, Your Honor.

18 THE COURT: Same with Mr. O'Neill, \$739,000,
19 stock awards and other compensation.

20 Did you seek any recovery of those sums?

21 MR. VAN KWAWEGEN: They're not part of the
22 settlement.

23 THE COURT: Well, as part of each of these
24 defendants I'm referencing here, did you go through and make
25 an independent analysis of how much money they received, the

1 benefits, stock sales, things of that nature? Was that all
2 done?

3 MR. VAN KWAWEGEN: Yes, Your Honor, and you
4 actually have it in front of you in the complaint.

5 THE COURT: That's in the complaint. I'm talking
6 about after the complaint. I'm talking about, did you go
7 through and do a thorough analysis of all the benefits
8 received by all the defendants?

9 MR. VAN KWAWEGEN: Your Honor, we did a very
10 thorough analysis before the complaint.

11 THE COURT: Okay. So you're going to cause that
12 to be filed here, right?

13 MR. VAN KWAWEGEN: Your Honor, I'm happy to
14 provide any documents to Your Honor unless they're subject
15 to work product or other privileges.

16 THE COURT: Counsel, you can file them, and you
17 can file them under seal.

18 Same thing with Mr. O'Neill. You have over \$739,000,
19 shares of common stock, etcetera, other compensation, same.

20 So I'm guessing for every one of these corporate
21 defendants who allegedly, according to your complaint,
22 benefited from either intentional conduct or negligent
23 conduct, you haven't sought to recoup any of that money from
24 any of those individuals?

25 Is that what you're telling me?

1 MR. VAN KWAWEGEN: No, Your Honor. We have
2 sought. And as Your Honor knows from the term sheet, there
3 are three individuals who are carved out from the settlement
4 for whom the company continues to pursue recoupment claims.

5 THE COURT: They're carved out because you're not
6 going to pursue them. That's the case, right?

7 MR. VAN KWAWEGEN: And Your Honor --

8 THE COURT: That's a yes or no question, counsel.

9 MR. VAN KWAWEGEN: Yes, that's right, Your Honor.

10 THE COURT: Yes, you're not pursuing them?

11 MR. VAN KWAWEGEN: That's correct.

12 THE COURT: So you're leaving \$81 million on the
13 table as it relates to Mr. Jones by not pursuing any of
14 those recoupment.

15 MR. VAN KWAWEGEN: The answer to that is yes if
16 the settlement is approved.

17 THE COURT: Subject to my approval or the
18 Southern District's approval?

19 So just so we don't confuse each other. The
20 settlement, any settlement of this case comes back here.

21 Now, I know you want to play the game of I'm going to
22 the Southern District. I'm going to try to get approval of
23 that settlement. Then I'm going to come back here and avoid
24 the scrutiny that I'm giving you today because you don't
25 want to answer any questions today. That's obvious to me.

1 Period.

2 MR. VAN KWAWEGEN: Your Honor, again, this is a
3 derivative case. The claims are being presented on behalf
4 of FirstEnergy.

5 THE COURT: Counsel, I understand what it is. I
6 understand the nature of the case.

7 The question is, are you doing your job, actually
8 trying to recoup and recover what you've pled is billions of
9 dollars in damages, and you've got \$180 million.

10 How much of that is going to go to your firm by the
11 by? What's going to be the attorney fee award?

12 MR. VAN KWAWEGEN: I don't know, Your Honor.
13 What I do know is --

14 THE COURT: Do you have an estimate, counsel?

15 MR. VAN KWAWEGEN: No, I don't.

16 THE COURT: You have no estimate whatsoever?
17 Millions of dollars.

18 MR. VAN KWAWEGEN: I have no estimate whatsoever.
19 But what I do know --

20 THE COURT: Counsel, that's disingenuous. We
21 both know that you have a rough idea what you're going to
22 seek.

23 You're going to be filing in front of Judge Marbley
24 very soon seeking settlement. And to come here today and
25 say, Judge, I have no idea what we're going to seek. Sorry.

1 I don't find that to be credible, bluntly.

2 MR. VAN KWAWEGEN: And Your Honor, let me address
3 that point.

4 First, pursuant to the terms of the term sheet that
5 Your Honor has, there will be a negotiation between us and
6 the SLC. That negotiation has not started.

7 Second -- so I don't know what I'm going to be
8 seeking.

9 And second of all, it will be subject to court
10 approval. So I don't even know what we'll even be awarded.

11 But I would like to make one final point, just going
12 back to another point you raised, Your Honor, and I want to
13 make sure this is very clear.

14 The claims in this case on behalf of FirstEnergy are
15 identical claims as in the Southern District. There can
16 only be one Court that approves or disapproves those claims
17 because if those claims -- if the settlement is approved,
18 the claims are released. The case goes away.

19 THE COURT: Counsel, that's your view of the
20 case. But if your view is if you go to the Southern
21 District and you think that you're going to get approved
22 there and come back here and just say we're going to file a
23 dismissal, there very well may be -- I
24 actually -- seriously. There may very well be a shareholder
25 here in the Northern District that comes forward and says,

1 Judge, I would like to represent the shareholders. I or my
2 firm. Or we will do this and we will do this diligently.
3 We will do it vigorously. And we will do the work that
4 needs to be done.

5 That's what -- that's what, all it takes is one
6 shareholder, counsel, to come forward. We may even have
7 that shareholder as we speak.

8 And when that person comes forward, then that person
9 or that firm can do the diligent work of pursuing the full
10 recovery for FirstEnergy.

11 To say -- and then you -- we'll go further. You come
12 in and say, well, Judge, we have this great plan for
13 corporate governance. We're going to present this plan for
14 corporate governance.

15 What do you think would be the best type of corporate
16 governance plan there could be? What do you think would be
17 the best plan that would motivate people who are on boards
18 to do their job, make sure conduct like this doesn't occur?

19 Do you have any idea what that might be?

20 MR. VAN KWAWEGEN: I do. It's part of the
21 settlement, Your Honor.

22 THE COURT: What would be it?

23 Recoupment -- wouldn't it be that you're going to face
24 returning all the benefits that you may have received if you
25 were negligent, if you don't do what's required of you, if

1 you're on the board and you're not following
2 your -- following up what you need to do to prevent this
3 from happening? Wouldn't that be the real motivator?

4 Not some sort of, oh, we're going to be required to
5 report this, report that.

6 If these board members knew that they were going to be
7 required to return their compensation, their stock, stock
8 dividends, all the things that come with being on these
9 boards, if that were to be the case, then rest assured,
10 there would be, clearly be, a more effective corporate
11 governance. Not with just FirstEnergy, but with any
12 corporation.

13 So all of this that I see in these papers and these
14 pleadings about reporting this and disclosing that, counsel,
15 that's not what really gets anyone's attention.

16 It's if you have to pay.

17 And here, no one has had to pay, essentially. No one
18 has had to pay. There has been some insurance money.
19 That's period. But no one has had to suffer the consequence
20 here. Period.

21 MR. VAN KWAWEGEN: And Your Honor, as part of the
22 settlement, you will have noticed that there are also
23 revisions to the claw back policy to make sure that people
24 have to pay back.

25 THE COURT: Okay, so, but we're not going to do

1 that here. We're not going to do that in this case. We're
2 not really going to pursue vigorously the individuals who
3 were involved in this, either negligently or intentionally,
4 because we don't know, because you're not going to tell us,
5 and because no one had to raise their hand, take an oath,
6 and answer any questions.

7 Right?

8 MR. VAN KWAWEGEN: So Your Honor, I respectfully
9 disagree with the characterization.

10 THE COURT: Do you disagree that somebody had to
11 come in and take an oath and give testimony in the case?

12 MR. VAN KWAWEGEN: There were no depositions,
13 Your Honor.

14 THE COURT: So yes, you agree with me.

15 MR. VAN KWAWEGEN: I agree that there were no
16 depositions.

17 And I will note that the largest derivative
18 settlements in history, the two that we know that are even
19 bigger than this one, Boeing and Wells Fargo, there were no
20 depositions either, Your Honor.

21 THE COURT: Counsel, I've looked at those, and
22 you're comparing apples to oranges. You're trying to hold
23 that up as some example.

24 In the meantime, here you've done no work whatsoever.
25 And this is a distinctly different case. This is a public

1 corruption case.

2 You haven't even reviewed -- there is over 12,000,
3 maybe more, documents that FirstEnergy says, oh, by the way,
4 this is all privileged. And there was never any dispute
5 about it. No debate. No coming to this Court, saying
6 Judge, we need to review those documents. None of that was
7 done.

8 MR. VAN KWAWEGEN: Your Honor --

9 THE COURT: So let me just turn to this -- that's
10 a matter of record in the case.

11 Let's just turn to something a little more interesting
12 because I'm wasting my time here. I have, believe me, I
13 have a substantial docket.

14 I'm wasting my time because you're not here to answer
15 any questions. You're here to duck and avoid and evade and
16 say, oh, Judge, we have this mediation agreement so I can't
17 really tell you anything. I can't really answer any hard
18 questions. That's what this is all about.

19 So let me give you some questions that a shareholder
20 sent me.

21 I certainly hope this person comes forward. I'll put
22 this letter on the record so that you can see it.

23 And I certainly hope this shareholder is one -- or
24 maybe there is others -- who are going to be willing to come
25 forward and say wait a minute, Judge. Wait a minute, Judge.

1 So this question comes to me in a letter form. Says,
2 "Why aren't any of the board of directors being sued or
3 penalized for their lack of oversight on this \$60 million of
4 illegal payments? The SEC uses claw backs in various
5 situations where there are issues like this. It's hard to
6 believe no one on the board was aware of these illegal
7 payments and questioned whether they were legitimate
8 business expenses."

9 Secondly, this is somebody who obviously follows,
10 says, "Donald T. Misheff occupied the position of
11 non-executive chairman at FirstEnergy Corporation. From a
12 review of websites, Donald was a CPA and former managing
13 partner at Ernst & Young in Akron. Wouldn't he not only
14 have the expertise but also be in a position to be aware of
15 the \$60 million in illegal payments?

16 "Ernst & Young audited the financial statements of
17 FirstEnergy. What is their role in overlooking or missing
18 payments? What discussions did they have with Misheff,
19 their former managing partner?

20 "What about the FirstEnergy board members who were on
21 the audit committee, including Misheff? Were they aware of
22 these payments or were they negligent in not noticing -- or
23 noticing \$60 million?"

24 So there are shareholders -- and this is one -- who I
25 hope comes forward, any one comes forward, who would be

1 willing to pursue the case, be willing to ask questions,
2 hard questions, take depositions, pursue recovery, and not
3 come in and say, well, Judge, we got \$180 million when, no,
4 I already told you \$230 million was paid just as the
5 penalty, not including the bribes.

6 So as far as I'm concerned, counsel, the hearing is
7 over. You don't want to answer any questions. You're not
8 here to answer any questions.

9 You're here simply to say to me, well, Judge, you
10 don't have any jurisdiction, or nothing you do matters
11 because we're going to go to the Southern District. We're
12 going to try to get someone to approve our settlement there.
13 We don't have to answer any of your questions.

14 That's exactly the summary here.

15 MR. VAN KWAWEGEN: Again, Your Honor, I
16 respectfully disagree.

17 And to that shareholder -- I'm glad that the
18 shareholder raised these questions to you. And to that
19 shareholder I would say that six directors do not stand for
20 reelection. They're the legacy directors.

21 And honestly, I've been doing this for a long time. I
22 have never seen a situation where six directors do not stand
23 for reelection.

24 And we have the additional governance changes that you
25 see in the term sheet, including the claw backs, including

1 the board oversight, including the disclosures to
2 stockholders, including new reporting lines circumventing
3 executives who may be incentivized to pay bribes.

4 I've never seen anything like this, and I've been
5 doing this for a long time, Your Honor.

6 THE COURT: So, counsel, if someone were cynical,
7 a shareholder were cynical -- I can't speak for the person
8 that sent me the letter -- they might say, well, gee. This
9 is a terrible thing. All of these directors get to leave
10 the board, take their money, take whatever their profits
11 were, whatever compensation, take all the benefits they
12 received as a result of this scheme, and just go on and ride
13 off into the sunset. And that's just a terrible
14 consequence.

15 Is that what you're telling me?

16 MR. VAN KWAWEGEN: I'm not, Your Honor.

17 THE COURT: Okay. Well, that's what I would
18 suspect many shareholders would say, many shareholders.
19 Yes, this is not -- you're not beholden to the public, but
20 yes, the public has an interest.

21 There is a public interest here, counsel, because this
22 is a public corruption case. So there is a public interest.
23 You may think there is not, but there is a public interest
24 and there is an interest to FirstEnergy because as you've
25 pled, it goes to their reputation. It goes to their loss of

1 value.

2 And so I know you don't want to try to deal with this
3 Court. I understand that. But we'll deal with it in a
4 different way. And hopefully there will be a shareholder
5 that will come forward and say, Judge, I will step up to the
6 plate because then, very well, subject to a hearing, then we
7 may appoint counsel who is going to pursue the case, who is
8 going to come to court, is going to answer a direct question
9 with a direct answer and not try to bob and weave and not
10 respond. Period.

11 Thank you for being here, all of you. I appreciate
12 it. I'm not going to waste anyone else's time because I
13 know I'm not going to get any responses or answers. I think
14 the record is clear.

15 And so thank you all for being here. And we will deal
16 with it in due course.

17 Counsel, we'll just note your refusal to answer the
18 Court's questions and then decide how we're going to proceed
19 in that fashion.

20 Anything else?

21 Do you want to change your mind? Do you want to
22 answer any questions about who paid the bribes or go
23 further?

24 MR. VAN KWAWEGEN: Your Honor, I think I've tried
25 to answer all your questions, and I have nothing further at

1 this time.

2 THE COURT: You haven't tried, sir. You just
3 refused and ignored, offered what I would characterize as
4 excuses that really don't carry a great weight.

5 Thank you for being here.

6 All of you have a good day.

7 (Proceedings concluded at 2:30 p.m.)

8

9 C E R T I F I C A T E

10

11 I certify that the forgoing is a correct
12 transcript from the record of proceedings in the
13 above-entitled matter.

14

15 S/Caroline Mahnke 3/9/2022

16 Caroline Mahnke, RMR, CRR, CRC Date

17

18

19

20

21

22

23

24

25