UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EMPLOYEES RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS, *et al.*, Plaintiffs, v. CHARLES E. JONES, *et al.*, Defendants, and FIRSTENERGY CORP., Nominal Defendant.	Case No. 2:20-cv-04813 Chief Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson

OBJECTION OF SHAREHOLDER JOHN DONOVAN TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND PLAINTIFF SERVICE AWARDS

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Shareholder John Donovan, by his undersigned counsel, respectfully submits this objection to Plaintiffs' Motion for Final Approval of Settlement and other relief (the "Motion"), ECF No. 179,[1] and to the proposed settlement (the "Proposed Settlement") of this action brought derivatively on behalf of FirstEnergy Corporation ("FirstEnergy" or the "Company"). In support of this objection, Mr. Donovan states as follows:[2]

PRELIMINARY STATEMENT

The Proposed Settlement should be rejected because it is not reasonable. In a representative action, such as this, it is incumbent upon the plaintiffs to litigate the case to a point where they and the court can appropriately assess the strengths and weaknesses of the case, and confirm that the result they are reaching for shareholders is fair and reasonable. Plaintiffs have failed to fulfill that obligation here.

Instead, before taking a single deposition, Plaintiffs have proposed a settlement that handsomely rewards Plaintiffs' counsel, while failing to provide any reasonable recovery to FirstEnergy and its shareholders. Indeed, despite Plaintiffs' admission that FirstEnergy's "claims were strong," the Proposed Settlement provides—as Judge Adams in the Northern District of Ohio described it—"a net recovery of $150 million [that] would not only fail to cover the cost of solely the fine paid to the federal government, but it could also cover as little as 10% or less of the total loss caused by the bribery scheme."[3] That loss includes an estimated $1 billion in lost shareholder

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[1] The docket entry for the Motion states that objections thereto are due July 28, 2022.

[2] Mr. Donovan states that his counsel intends to appear at the Settlement Fairness Hearing but does not intend to call witnesses. The grounds for Mr. Donovan's objections are set forth herein. Mr. Donovan's address is 1145 Four Wheel Dr., Warren, Pennsylvania, 16365 and his telephone number is (814)-723-5189. Proof that Mr. Donovan owned shares of FirstEnergy common stock as of the close of business on March 11, 2022, is filed herewith as Exhibit A.

[3] *Miller v. Anderson*, 2022 WL 2439749, at *2 (N.D. Ohio July 5, 2022).

value, as estimated by Plaintiffs' own proffered expert. The proposed recovery is therefore a pittance relative to the value and strength of FirstEnergy's claims.

Realizing this, Plaintiffs extensively tout the corporate governance reforms that the Proposed Settlement purportedly provides. As FirstEnergy's own Special Litigation Committee points out, however, those reforms were already well underway before the scheduled date of the final fairness hearing on the Proposed Settlement, much less any *approval* of the settlement.

At the same time, under the Proposed Settlement, *none of the alleged wrongdoers will pay a single cent to the settlement* as the full amount of the settlement is below the covered insurance limits. For this, Plaintiffs' counsel is seeking $48.6 million in attorneys' fees (coming directly out of FirstEnergy's recovery) for approximately seven months of litigating without taking a single deposition. As a result, the Proposed Settlement is a windfall for everybody *except FirstEnergy*—Plaintiffs' counsel get a large fee award, the wrongdoers get valuable releases without paying a cent to FirstEnergy, and FirstEnergy is left with as little as 10% or less of its total damages without even getting the chance to put a single one of the defendants under oath. Under the relevant standards, there is no basis in law or fact for the Proposed Settlement to be approved.

In addition, there certainly is no basis for the Proposed Settlement to affect the related proceedings in the first-filed action in the Northern District of Ohio, *Miller v. Anderson, et al.*, C.A. No. 20-CV-1743 (N.D. Ohio) (the "Northern District Action"). That case is the first-filed case and it should therefore proceed to judgment absent a settlement in that action; the parties have failed to establish any basis for setting aside the first-filed rule; and the parties' effort to have this Court approve a settlement that would affect the Northern District Action appears to be the product of forum-shopping in view of Plaintiffs' counsel's interest in securing a $48.6 million fee award.

At a minimum, this Court should not approve a settlement of a case in a court of co-equal jurisdiction—particularly where that court has expressed doubts over the settlement value.

At bottom, the Proposed Settlement amounts to a premature effort—pursued through forum shopping—to (i) enrich Plaintiffs' counsel, (ii) insulate the actual wrongdoers from pecuniary harm while providing them valuable releases, and (iii) leave FirstEnergy with a net recovery that does not even cover the fine it had to pay the federal government because of the wrongdoers' bribery scheme, much less even begin to make the Company whole. It should be rejected in full.

ARGUMENT

The settling parties bear the "burden of proving the fairness of the settlement." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013). In considering a proposed settlement, "the district court 'must carefully scrutinize' whether the named plaintiffs and counsel have met their fiduciary obligations to the class and whether the settlement itself is 'fair, reasonable, and adequate.'" *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 309 (6th Cir. 2016). Plaintiffs—the only group seeking approval here—have not met their burden because the amount for which they propose to settle is unreasonable and they are improperly purporting to release claims in the Northern District Action that are not subject to a settlement here.

I. PLAINTIFFS FAIL TO SHOW THAT THE PROPOSED SETTLEMENT IS REASONABLE

In the Sixth Circuit, the following factors are to be considered when evaluating the propriety of a proposed settlement of a representative action: "'(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.'" *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 754 (6th Cir. 2013) (quoting *Int'l*

Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)). These factors overwhelmingly weigh against approval of the Proposed Settlement.

A. The Terms of the Proposed Settlement Weigh Against Approval

As Plaintiffs concede, in the derivative suit context, "since the corporation is the intended beneficiary of the suit, fairness of the settlement must in the first instance . . . be measured by the benefit or detriment to the corporation." *In re Cirrus Logic, Inc.*, 2009 WL 10670041 (W.D. Tex. Jan. 8, 2009) (internal quotations omitted). "The 'burden of showing that a proposed settlement of a shareholders' derivative action is fair, reasonable, and adequate, and that acceptance of its terms is in the best interests of the Corporation and its shareholders, is on the proponents of the settlement.'" *Id.* (quoting *Maher v. Zapata Corp.*, 714 F.2d 436, 454 (5th Cir. 1983)). The Proposed Settlement falls well short of conferring benefits on FirstEnergy that justify the release of the Company's valuable claims.

First, the record shows that FirstEnergy's cash recovery under the proposed settlement is inadequate. In considering that record, Judge Adams in the Northern District Action observed that "the recovery of roughly $150 million pales in comparison to the losses caused by the bribery scheme at issue" in this case. *Miller v. Anderson*, 2022 WL 2439749, at *2 (N.D. Ohio July 5, 2022). As that court also observed, "[w]hen evaluating the proposed corporate governance reforms, Professor Jeffrey Gordon [Plaintiff's proffered expert] noted that [the] bribery scheme 'led to a criminal investigation, a Deferred Prosecution Agreement, the payment of a $230 million fine, numerous civil suits and class actions, and the loss of an estimated over $1 billion in shareholder value when the federal indictment was announced. *In other words, a net recovery of $150 million would not only fail to cover the cost of solely the fine paid to the federal government,*

but it could also cover as little as 10% or less of the total loss caused by the bribery scheme." *Id.* (emphasis added).

Second, the inadequacy of that settlement amount is compounded by the size of the requested fee award, which is disproportionate to the result achieved. Plaintiffs gloss over their request for $48.6 million in attorneys' fees, all of which would come directly out of FirstEnergy's recovery. That requested fee award substantially reduces the purported benefit of the Proposed Settlement to FirstEnergy and—given the stage of the litigation and the deficiencies in the Proposed Settlement identified herein—it is disproportionate to the litigation effort undertaken by Plaintiffs' counsel, which was meager, at best. *See infra*, Part I(B).

Third, Plaintiffs incorrectly claim that the corporate governance reforms under the Proposed Settlement purportedly will "restore[] confidence among shareholders and other stockholders" in FirstEnergy. (Pls.' Mot. for Fin. Approval of Settlement, An Award of Att.'s Fees & Exp., & Pl. Service Awards ("Pls.' Mot."), ECF No. 179, at 3.) The record indicates that it will not where the Proposed Settlement does not require any economic contribution from the Individual Defendants and FirstEnergy's Board has failed to recoup compensation paid to those Defendants amidst the bribery scheme. Indeed, in considering these facts, Judge Adams observed:

> While touting that the settlement and its reforms will restore the public's confidence in FirstEnergy, the parties ignore that the alleged wrongdoers will pay not a single cent to the settlement. Moreover, a recent audit by the Pennsylvania Public Utility Commission noted: 'The Board elected not to use the contracted claw back provisions which would have recouped compensation paid during the years investigated. In other words, despite an ability to seek compensation from those that allegedly perpetrated and benefitted from the bribery scheme, FirstEnergy has declined to do so. This is true despite the fact that Defendant Charles Jones *alone* received roughly **$55,207,422** over the course of the scheme. As such, all those facts undermine the parties' assertions about the enormity of their proposed settlement.

Miller, 2022 WL 2439749, at *2 (emphasis in original; internal citations omitted).

Fourth, Mr. Donovan joins in and incorporates by reference the arguments made in Mr. Augenbaum's March 21, 2022 Objection to the Proposed Settlement (the "Augenbaum Obj."). Specifically:

- The insurance funds used to fund the settlement would be otherwise available to pay any judgment and, indeed, the policy is worth more than the settlement amount. There is no reason to settle for 20% less than policy amount—especially when the policy amount is still insufficient to cover the likely liability. (Augenbaum Obj., No. 2:20-cv-04813-ALM-KAJ, ECF No. 181, at 9-12.)

- The Proposed Settlement provides that FirstEnergy would release compensation-based claims against certain Defendants, but permit those same Defendants to assert compensation-based claims against FirstEnergy, despite Plaintiffs' admission that there was "more than $100 million in compensation FirstEnergy paid to the Individual Defendants while the scheme was going on." (Augenbaum Obj., at 12-14.)

- The Proposed Settlement includes a release with an indeterminate and overly broad scope that makes it impossible to discern whether it is fair and reasonable in view of the (inadequate) consideration that FirstEnergy is receiving under the Proposed Settlement. (Augenbaum Obj. at 14-15.)

On this record, the Proposed Settlement simply does not confer a sufficient benefit on FirstEnergy to justify the Company's release of its valuable claims.

B. FirstEnergy's Derivative Claims Are Likely to Succeed on the Merits

Plaintiffs cannot reasonably claim that that they are unlikely to succeed on the merits. As a threshold matter, Plaintiffs themselves admit that their "claims were strong." (Pls.' Mot. at 39.) That conclusion is amply supported by the record.

As Plaintiffs' own proffered governance expert has explained: "This derivative litigation follows a federal criminal prosecution of FirstEnergy for bribery and political corruption in connection with FirstEnergy funds directed by FirstEnergy officers to conduct political organizations run by an Ohio legislator and as a direct bribe to the chairman of the Ohio Public Utilities Commission. The conduct led to a federal criminal investigation and indictment, a

Deferred Prosecution Agreement with the U.S. Department of Justice, and the payment of a $230 million fine." (Decl. of Prof. Jeffrey N. Gordon, ECF No. 170-5 ("Gordon Decl."), at ¶ 9.) Mr. Gordon went on to explain that Defendants' misconduct "led to a criminal investigation, a Deferred Prosecution Agreement, the payment of a $230 million fine, numerous civil suits and class actions, and the loss of an estimated over $1 billion in shareholder value when the federal indictment was announced." (*Id.* at ¶ 22.)

On these facts, there can be no serious dispute that FirstEnergy was likely to succeed on its claims. Indeed, Defendants do not identify a single pre-settlement event that suggested any material weaknesses in FirstEnergy's claims. In fact, the *most* Plaintiffs could muster is their assertion that litigating this action "was not a risk-free proposition." (Pls.' Mot. at 39.) But no litigation is, and that platitude hardly justifies the deep discount (and disproportionate attorneys' fees) that Plaintiffs seek here. Indeed, the only so-called "risks" that Plaintiffs identify are "risks" that are present in virtually every high-value derivative case, such as the potential to exceed insurance-policy limits, "the risk of appeal," and the purported difficulty of proving non-pecuniary harm. None of these generalized concerns can reasonably justify FirstEnergy receiving a pittance relative to the actual value of its claims, much less paying Plaintiffs' counsel upwards of $48 million in fees. *See Cirrus Logic*, 2009 WL 10670041, at *9 (denying preliminary approval of settlement in derivative action where the settlement "presents benefits that are greatly exaggerated and unacceptably low in light of the strong allegations . . .").

C. Plaintiffs' Inadequate Discovery Efforts Do Not Justify the Proposed Settlement

Plaintiffs assert that "there can be no doubt that Plaintiffs had access to sufficient information to evaluate the strengths and weaknesses of their claims" but the facts show otherwise. (Pls.' Mot. at 40.) The record confirms that Plaintiffs did not complete any meaningful aspect of

discovery before hurriedly entering into a settlement seeking to award them with up to $48 million in attorneys' fees. Indeed, in recognition of that fact, Judge Adams observed that "[i]t would be extraordinary if the parties could demonstrate that a settlement was fair and reasonable despite the following:"

- "Incomplete written discovery";
- "No testimony under oath from any Defendant or other witness";
- "Incomplete privilege logs detailing withheld documentation";
- "An incomplete forensic examination to identify possible missing communications contained on Defendant Charles Jones' personal electronic devices"; and
- "An inadequate period to review and analyze the documents that were provided."

Miller, 2022 WL 2439749, at *2.

Plaintiffs have thus failed to undertake sufficient discovery to be able to show that FirstEnergy's claims somehow warrant 10% or less of the overall damages suffered due to the bribery scheme, particularly when Plaintiffs concede those "claims were strong." (Pls. Mot. at 39.)

D. There Is Ample Evidence that the Proposed Settlement Is Collusive

The Proposed Settlement appears to be a collusive attempt to achieve a lucrative settlement through forum shopping, thus weighing against approval.

The Northern District Action was the first-filed action: it was filed on August 7, 2020 and this action was filed on September 9, 2020. The Northern District Action was therefore the first-filed action, which controls the disposition of these claims. *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001) (citations and quotations omitted).

Plaintiffs have failed to show any basis for setting aside the first-filed action rule here, particularly where the record indicates they are engaged in collusive forum shopping by seeking

this Court's approval of the settlement after the court in the Northern District Action expressed skepticism about settlement at this stage of the litigation.

In considering the record, Judge Adams observed: "by all appearances, it is the parties seeking to have their settlement approved in the later-filed action that have engaged in forum shopping. From this Court's review, Plaintiffs were more than willing to litigate the matter before this Court when the undersigned mandated an expedited discovery schedule." *Miller*, 2022 WL 2439749, at *1. Judge Adams continued: "A review of the transcripts of proceedings before this Court reveals why the parties may desire to have their settlement reviewed by another District. In short, this Court offered an honest assessment when the parties indicated a desire for early mediation. The Court indicated it would be extraordinary if the parties could demonstrate that a settlement was fair and reasonable despite" Plaintiffs' failure to complete written discovery or to obtain any testimony under oath from any Defendant or other witness, among other issues. *Miller*, 2022 WL 2439749, at *2. Judge Adams concluded: "It is apparent from the parties' actions that the Court's candor caused the parties to seek approval of their settlement from another District. Given that counsel is permitted under the settlement to seek up to **$48,600,000 in attorney fees**, it is hardly surprising that the parties would seek out what they believe to be a more favorable forum." *Miller*, 2022 WL 2439749, at *2.

Plaintiffs concede that although "[c]ourts presume the absence of fraud or collusion," that presumption is rebuttable where "there is evidence to the contrary." (Pls. Mot. at 34 (citing *Bailey v. AK Steel Corp*., 2008 WL 495539, at *4 (S.D. Ohio Feb. 21, 2008).) Here, there certainly is—the evidence is that the parties are collusively pursuing the Proposed Settlement through forum shopping. *See Sharp Farms v. Speaks*, 917 F.3d 276, 292 (4th Cir. 2019) (finding abuse of discretion when district court rejected "the possibility of collusion based on the presence of the

mediator" and "without sufficiently grappling with" another "court's detailed order setting forth the allegedly collusive conduct").

E. The Public Interest Strongly Weighs against the Settlement

Plaintiffs fail to show that the Proposed Settlement is in the public interest. To the contrary, the public interest would be better served by denying the Proposed Settlement.

First, as discussed above, FirstEnergy has strong claims, including against the Individual Defendants whom FirstEnergy paid upwards of $100 million while they undertook the bribery scheme and who—by Plaintiffs' own expert's assessment—caused an estimated $1 billion loss in FirstEnergy shareholder value. Incredibly, however, those very wrongdoers will not contribute a single cent to the settlement. Plaintiffs offer no explanation—none—for why it is in the public interest for the individuals who perpetrated this scheme to not pay into the Proposed Settlement.

Second, Plaintiffs claim that the Proposed Settlement purportedly serves the public interest because it provides for a cash payment to FirstEnergy. (Pls.' Mot. at 42.) For the reasons discussed above in Parts I(A)-(B), however, that cash payment is inadequate relative to the strength and value of FirstEnergy's claims, and the public interest would therefore be better served by pursuing those claims to obtain more reasonable value for the Company and its shareholders—not abandoning them before a single witness testifies under oath.

Third, Plaintiffs claim that the corporate governance reforms called for by the Proposed Settlement serve the public interest, asserting that such reforms are possible only through the Proposed Settlement. (Pls.' Mot. at 42.) They omit, however, that the Deferred Prosecution Agreement *already* provides for corporate-governance reform including, among other things, (1) "establishing an Executive Director role for the Board of Directors, which supports the development of enhanced controls and governance policies and procedures"; (2) "hiring a new Chief Legal Officer, who oversees the Company's Legal and Internal Audit departments";

(3) "separating the Chief Legal Officer and Chief Ethics/Compliance Officer functions, and hiring a new Chief Ethics and Compliance Officer, who reports directly to the Audit Committee of the Board and administratively to the Chief Legal Officer"; and (4) implementing a robust Corporate Compliance Program. *See* https://tinyurl.com/2dj488da at § 5(F) and Attachment B. FirstEnergy, moreover, could achieve more material corporate-governance changes in a future settlement if it is permitted to pursue its claims, and the public interest thus lies in prosecuting—not settling—those claims.

F. Other Shareholders, and FirstEnergy Itself Have Objected to the Settlement

The Proposed Settlement also should be denied given the other objections to the Proposed Settlement, including those filed by Mr. Augenbaum and FirstEnergy itself. As the Augenbaum Objection states: "upon closer examination, it becomes apparent that Plaintiffs fail to satisfy their burden to establish that the Proposed Settlement will benefit FirstEnergy. The Company is sacrificing $40 million of insurance coverage that it would otherwise be able to use to offset liabilities, and effectively becoming self-insured for the blowback from its bribery scandal in other existing material claims being prosecuted against it, despite the fact that its insurance coverage would otherwise almost certainly be exhausted absent a settlement." (Augenbaum Obj., at 12–14.)

In addition, consistent with Part I(A) above, FirstEnergy explains in its objection that Plaintiffs' request for an award of $48.6 million in attorneys' fees "seeks to deprive FirstEnergy of much of the monetary value of the Proposed Settlement, proposing that Plaintiffs' counsel receive nearly $50 million that would otherwise be paid to the Company." (Objection of the Special Litigation Committee of the Board of Directors of Nominal Defendant FirstEnergy Corp. to Plaintiffs' Motion for Award of Attorneys' Fees (the "SLC Objection") at 2.)

These objections underscore that the Proposed Settlement is not reasonable and should not be approved.

G. The Prospect of Further Litigation Does Not Weigh in Favor of Approval

Relying on broad platitudes and citing the types of issues that exist in almost all complex litigation, Plaintiffs claim that continued litigation would have presented risks that justify the Proposed Settlement. (Pls.' Mot. at 34-39.) They are wrong. And, relying on such platitudes is insufficient to garner approval. As the Sixth Circuit explained,

> [T]he district court 'cannot substitute the parties' assurances or conclusory statements for its independent analysis of the settlement terms.' Nor can the court . . . offer up platitudes about the risks of litigation generally. Instead, the district court must specifically examine what the unnamed class members would give up in the proposed settlement, and then explain why—given their likelihood of success on the merits—the tradeoff embodied in the settlement is fair to unnamed members of the class.

Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 309 (6th Cir. 2016) (*quoting In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350–51 (3d Cir. 2010)).

In summary, Plaintiffs assert that they would have had to face high evidentiary standards, "reasonable reliance" defenses, litigation expenses, the risk of exhausting insurance policies, and the prospect of a special litigation committee terminating the claims—in other words, the issues that a plaintiff in nearly any high-value breach-of-fiduciary-duty or fraud suit faces. Such generic, generalized concerns cannot justify a settlement that is unreasonably low on its face.

Worse, Plaintiffs posture as if this is a case where they would be limited to "oversight claims"—it is not. (Pls.' Mot. at 35.) This is a case in which the Company already has undergone an SEC investigation and been fined $230 million because of claims that Plaintiffs' own expert says arise out of "bribery and political corruption in connection with FirstEnergy funds *directed by FirstEnergy officers* to conduit political organizations run by an Ohio legislator *and as a direct*

bribe to the chairman of the Ohio Public Utilities Commission" leading to "a federal criminal investigation and indictment, a Deferred Prosecution Agreement with the U.S. Department of Justice, and the payment of a $230 million fine," in addition to "the loss of an estimated over $1 billion in shareholder value." (Gordon Decl. at ¶¶ 9, 22.) This is not only an oversight case or a case where there is some great mystery about culpability. This is a case where, by Plaintiffs' own assessment, FirstEnergy's "claims were strong" and where FirstEnergy had "strong counter-arguments" to Defendants' arguments. (Pls.' Mot. at 36, 39.) Plaintiffs' generalized concerns about the standard hurdles involved in complex litigation do not justify a paltry settlement.

H. On This Record, the Opinions of Representative Counsel and the Representative Parties Should Not Weigh in Favor of the Proposed Settlement

As discussed above in Part I(D), the evidence is that Plaintiffs' counsel is engaged in collusive forum-shopping in a bid to secure a lucrative payout of $48.6 million for approximately seven months of litigation, without taking a single deposition, and obtaining a recovery of 10% or less of the Company's damages. Indeed, as Judge Adams stated: "Given that counsel is permitted under the settlement to seek up to **$48,600,000 in attorney fees**, it is hardly surprising that the parties would seek out what they believe to be a more favorable forum." *Miller*, 2022 WL 2439749, at *2 (emphasis in original). Plaintiffs' counsel therefore of course support this settlement—they stand to be unreasonably enriched by it—and their views should therefore not factor into the analysis of whether it should be approved.

II. THE SETTLEMENT SHOULD NOT APPLY TO THE NORTHERN DISTRICT ACTION

The Settlement Agreement improperly purports to resolve the Northern District Action—which concerns the same subject matter—without obtaining that court's approval of the Proposed Settlement.

The terms of the Settlement Agreement confirm that the parties are attempting to settle the claims pending in the Northern District Action. The consideration in the Settlement Agreement ("SA") is identified as being exchanged for release of the "Actions" as defined therein. (SA § 2.) The term "Actions" is defined in the Settlement Agreement to include not only this action, but also the Northern District Action. (SA § 1(a).) The term "Complaints" similarly sweeps the Northern District Action together with this pending action. SA § 1(b). And the releases appear to include the claims in the Northern District Action. (SA § 1(x, z); SA §§ 8-9.) Further, the Settlement Agreement mandates that the Northern District Action be dismissed. (SA § 14.)

The parties have thus attempted to circumvent the first-filed Northern District's review of the Proposed Settlement by submitting it solely to this Court instead. Indeed, Judge Adams denied the parties' motion to dismiss the Northern District Action while they seek approval of a settlement before this Court, concluding that "the Court will not dismiss this matter without reviewing any proposed settlement," after finding that the parties (i) had failed to provide proper notice of the proposed dismissal to shareholders; (ii) failed to show any basis to set aside the first-filed rule; and (iii) as discussed above in Part I(D), engaged in forum shopping to avoid that court's review of the Proposed Settlement after Judge Adams expressed skepticism about the reasonableness of settlement, particularly at a stage so early in this litigation. *See generally Miller*, 2022 WL 2439749. Under the doctrine of issue preclusion, that court's ruling bars the Proposed Settlement before this Court from resolving the Northern District Action without that court's prior review and approval of the settlement.

This Court has recognized the parties' attempts to circumvent the Northern District's review and should not reward them. As this Court explained in denying the parties' request for a "bar enjoining . . . . prosecuting any other action asserting the claims alleged in this Action—

including the Northern District Action," they offered no authority to support such a request. (ECF No. 176 at 5.) For this reason, the Court refused to stay other cases and suggested that the parties seek relief in those other courts. (*Id*.) To date, they have not. (*See* Northern District Action, ECF No. 316 at 2.) Just as this Court was careful to avoid interfering with an action pending in a court of co-equal jurisdiction, it should not approve a settlement disposing of a case in a court of co-equal jurisdiction without that court's approval.

CONCLUSION

For the foregoing reasons, Mr. Donovan respectfully requests that the Court reject the Proposed Settlement.

Dated: Berkeley Heights, New Jersey
July 28, 2022

Respectfully submitted,

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