

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

JENNIFER L. MILLER, *et al.*,

Plaintiffs,

v.

MICHAEL J. ANDERSON, *et al.*,

Defendants,

and

FIRSTENERGY CORP.,

Nominal Defendant.

Judge John R. Adams

Case No. 5:20-CV-01743

Status Report (per ECF 160)

PLAINTIFFS' SECOND STATUS REPORT

Plaintiffs, including Intervenor-Plaintiffs who are also court-appointed Lead Plaintiffs in the related derivative action pending in the Southern District of Ohio, respectfully submit the following status report in advance of the telephonic status conference scheduled for January 28, 2022.

1. Update on the Status of Litigation

Since the commencement of this action on August 7, 2020, Plaintiffs have zealously prosecuted this action, including by: (i) investigating the claims and filing comprehensive complaints, including the consolidated operative complaint; (ii) successfully defeating all Defendants' motions to dismiss in this Court and in the Southern District of Ohio; (iii) successfully defeating the Special Litigation Committee's ("SLC") motions to stay this Action and the action in the Southern District of Ohio; (iv) successfully moving to dismiss the SLC's appeals of this Court's and the Southern District of Ohio's denials of the stay motion in the Court of Appeals for

the Sixth Circuit; (v) successfully opposing the SLC's mandamus petitions concerning this Court's and the Southern District of Ohio's denials of the stay motion in the Court of Appeals for the Sixth Circuit; (vi) negotiating discovery protocols with eighteen defendants, as well as nominal defendant FirstEnergy, represented by eight different sets of counsel; (v) reviewing more than 400,000 pages of documents; and (vi) preparing to start depositions on this Court's approved schedule, starting February 10, 2022. In short, Plaintiffs have devoted substantial resources in pursuing the claims and defending this Court's and the Southern District's rulings over the past 18 months, and have a team of more than 30 attorneys working on the matter. Indeed, Plaintiffs' diligent work has thwarted all countervailing efforts to prevent this case from progressing through discovery and being ready for trial by August 2022. (*See* November 8, 2021 Case Management Conference Transcript at 46:20-23).

2. Discovery During the Reporting Period

A. Discovery from Defendants and FirstEnergy

Plaintiffs served two sets of Requests for Production on FirstEnergy and three sets of Requests for Production on the Individual Defendants. Plaintiffs have obtained production of more than 75,000 documents (nearly 400,000 pages) from the Defendants, collectively. To date, Plaintiffs have also received nearly 10,000 pages of documents in discovery from third parties, including the Nathan Cummings Foundation, Green Century, and Clearsulting, and additional document productions by other third parties are forthcoming. Plaintiffs fought vigorously to achieve the breadth of discovery obtained in this action. For instance, the Company and the Individual Defendants initially refused to produce documents dated before January 1, 2017 or after Householder's arrest in July 2020.

Through persistent effort and by invoking the Court's oversight, Plaintiffs obtained agreement of the Company and all of the Individual Defendants to include in their productions relevant information dated or created over a span of more than five years, commencing on January 1, 2016 and extending through at least mid-June 2021. FirstEnergy also agreed to search its custodial ESI using nearly 200 search terms and the Individual Defendants agreed to search their custodial ESI using about 260 search terms pursuant to Plaintiffs' operative search term protocols. Plaintiffs further vigorously fought for Defendants to review and produce relevant text messages exchanged between each Defendant and 30 counterparties, without the application of search terms. FirstEnergy further agreed to produce flight logs for the years 2016-2021, without the application of search terms or culling, as well as any phone logs for the Defendants within FirstEnergy's possession, custody, or control. Through the dogged efforts of a team of over 30 attorneys, Plaintiffs are ready to commence depositions in February, as scheduled.

Plaintiffs have also served interrogatories on FirstEnergy and the Individual Defendants, as well as Requests for Admission on FirstEnergy and Defendants Jones and Dowling. Plaintiffs subsequently received and have reviewed Defendants' responses to their interrogatories and requests for admission. The responses significantly streamline Plaintiffs' case and eliminate potential factual disputes in advance of trial.

B. Third-Party Discovery:

Plaintiffs have received documents from third parties Green Century Capital Management, Inc. and the Nathan Cummings Foundation, two shareholder groups that made proposals to FirstEnergy to increase oversight and transparency regarding the Company's political activities. These document productions shed additional light on the Company and Board's response,

information which is highly relevant to Plaintiffs' 14(a) and fiduciary duty claims. Plaintiffs have also received documents from Clearsulting, a firm that assisted FirstEnergy with an internal audit.

C. Charles Jones's Spoliation Issues:

As the Court is aware, on December 29, Charles Jones's counsel alerted Plaintiffs that their client had not preserved text messages exchanged using three personal devices Jones obtained shortly after his October 29, 2020 termination from FirstEnergy; specifically, two personal iPhones and one personal iPad. In response, Plaintiffs' counsel promptly retained a forensic expert, TransPerfect, to oversee and advise on the data recovery efforts undertaken by the forensic expert retained by Jones' counsel, Interhack. On January 3, very shortly after learning of Jones' potential spoliation of relevant text messages, Plaintiffs' counsel met and conferred with Jones' counsel. The parties agreed that Plaintiffs' forensic expert would be permitted to participate in discussions concerning Interhack's text messages recovery efforts. Plaintiffs, in consultation with their forensic expert, sent Jones a list of questions concerning the steps taken by Interhack to restore deleted data on January 11. Relatedly, Plaintiffs also subpoenaed Verizon seeking to recover Jones' deleted text messages from an alternate, independent source on or around January 12, 2022. Jones provided written responses to Plaintiffs' list of questions on January 18 and Plaintiffs, Jones, and the parties' respective forensic experts held a telephonic meeting to further discuss these issues on that same day.

During the call on January 18 and again in writing on January 24 and 25, Plaintiffs asked Jones to engage in a number of action items, including providing written confirmation that (i) Jones will provide a list of apps contained on his three personal devices; (ii) Jones will conduct a supplemental, more in-depth data extraction as recommended by Plaintiffs' data forensics expert; and (iii) confirm whether Interhack was able to recover certain deleted text messages and/or text

messages logs, and, if so, what time period Interhack has recovered messages for, and what methods Interhack used to recover these previously deleted text messages.

On January 27, Jones sent Plaintiffs a letter responding to Plaintiffs' second list of questions, which represented, among other things, that: (i) "Interhack was able to extract SMS iPhone message data from three devices," including data pertaining to text messages and instant messages, however, a "significant amount of the information is fragmentary" and does not include substantive text messages; (ii) Interhack is currently examining five personal PC desktop computers used in Jones' homes to determine whether they contain any relevant backup data; and (iii) Jones has located additional personal devices, including an "Apple Watch, a Garmin golf watch, an iPhone 11 (not in current use), and an iPad Mini" which Jones' counsel is in the process of collecting and intends to submit to Interhack for review. Plaintiffs will continue to keep the Court apprised of the efforts by Plaintiffs and Jones to locate and restore any relevant text messages.

D. Privilege Log Protocol for FirstEnergy:

Since early December 2021, Plaintiffs and FirstEnergy have engaged in negotiations of a privilege log protocol applicable to FirstEnergy's document production. Those negotiations have involved significant efforts by both parties to resolve numerous privilege-related issues.

On January 18, 2022, FirstEnergy petitioned the Court for an extension of the January 18th paper discovery cutoff deadline mandated by Your Honor's Case Management Plan in order for FirstEnergy to, among other things, be able to "complete negotiation of a privilege log protocol with Plaintiffs and accordingly finish FirstEnergy's privilege review and any related production to Plaintiffs." (ECF No. 240). The Court granted FirstEnergy's request for an extension on January 25th. (ECF No. 243). Plaintiffs were able to reach an agreement on a privilege log protocol

acceptable to both Plaintiffs and FirstEnergy. The proposed privilege protocol was filed with the Court earlier today, and contemplates production of privilege logs by January 31, 2022.

E. Ongoing Discovery Negotiations:

Status reports filed by the parties on December 23, 2021 detailed the state of discovery and a number of outstanding issues that the parties were continuing to negotiate at that time. Since then, many of these disputes have been resolved. The parties are working through final issues and will involve the Court before the February 7, 2022 status conference, if necessary.

3. Settlement Discussions during the Reporting Period

Plaintiffs have no updates to report since the last Conference with the Court on January 10, 2022.

4. Motions Filed or Pending during the Reporting Period

Plaintiffs have not filed any motions during the reporting period.

5. Developments Giving Rise to a Request to Deviate from the Case Management Plan

Plaintiffs are unaware of any developments giving rise to a request to deviate from the Case Management Plan since the last status report filed on December 23, 2021, aside from FirstEnergy's Motion To Extend Deadline To Confirm Completion Of Document Production And Address Recent Discovery filed on January 18, 2022, which motion was granted by the Court on January 25, 2022. Plaintiffs are prepared to begin depositions, starting with deposition of Mr. Mitchell on February 10, 2022, as scheduled.

Dated: January 27, 2022

Respectfully submitted,

/s/ John C. Camillus

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2022, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF participants.

/s/ John C. Camillus

John C. Camillus