

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re FIRSTENERGY CORP. SECURITIES LITIGATION	)	No. 2:20-cv-03785-ALM-KAJ
_____	)	<u>CLASS ACTION</u>
This Document Relates To:	)	Judge Algenon L. Marbley
ALL ACTIONS.	)	Magistrate Judge Kimberly A. Jolson
_____	)	
MFS Series Trust I, et al.,	)	<b>Case No. 2:21-cv-05839-ALM-KAJ</b>
Plaintiffs,	)	
vs.	)	
FirstEnergy Corp., et al.,	)	
Defendants.	)	
_____	)	
Brighthouse Funds Trust II – MFS Value Portfolio, et al.,	)	<b>Case No. 2:22-cv-00865-ALM-KAJ</b>
Plaintiffs,	)	
vs.	)	
FirstEnergy Corp., et al.,	)	
Defendants.	)	
_____	)	

THE MOVING PARTIES’ MOTION TO COMPEL DISCOVERY REGARDING  
FIRSTENERGY’S INTERNAL INVESTIGATION

PLEASE TAKE NOTICE that Lead Plaintiff Los Angeles County Employees Retirement Association and Plaintiffs Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index Fund, LongView Quantitative LargeCap Fund, LongView Broad Market 3000 Index Fund, LongView LargeCap 500 Index Fund VEBA, LV LargeCap 1000 Value Index Fund, LongView Quantitative MidCap Fund, LongView Quant LargeCap Equity VEBA Fund and LongView Core Plus Fixed Income Fund, City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Fund, as well as Direct Action Plaintiffs (collectively, the "Plaintiffs"), together with defendants Michael J. Dowling ("Dowling") and Charles E. Jones ("Jones") (collectively, the "Moving Parties"), hereby move this Court for an order compelling discovery regarding FirstEnergy's internal investigation.<sup>1</sup>

This motion is based upon the accompanying memorandum of law in support thereof, the declaration of Jason A. Forge, and such other evidence and argument as the Court may consider.

DATED: June 30, 2023

Respectfully submitted,

s/ Joseph F. Murray  
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<sup>1</sup> "Direct Action Plaintiffs" consist of Plaintiffs in *MFS Series Trust I, et al. v. FirstEnergy Corp., et al.*, No. 2:21-cv-05839-ALM-KAJ, and *Brighthouse Funds Trust II – MFS Value Portfolio, et al. v. FirstEnergy Corp., et al.*, No. 2:22-cv-00865-ALM-KAJ.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed electronically on June 30, 2023. Notice of this filing will be sent to all electronically registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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MEMORANDUM OF LAW IN SUPPORT OF THE MOVING PARTIES’ MOTION TO COMPEL DISCOVERY REGARDING FIRSTENERGY’S INTERNAL INVESTIGATION

[REDACTED]

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As the party asserting attorney-client privilege, FirstEnergy bears the burden of not only establishing the existence of the privilege, but also that it has not waived the protection. *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999); *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998) (enumerating privilege elements, including element of nonwaiver). FirstEnergy has failed to meet its burden.

FirstEnergy’s internal investigation was primarily conducted for business purposes, which are not afforded protection under the attorney-client privilege or the work-product doctrine. “To be privileged, the communication must have the ‘primary purpose of soliciting legal, rather than business advice.’” *Zigler v. Allstate Ins. Co.*, 2007 WL 1087607, at \*1 (N.D. Ohio Apr. 9, 2007). Here, the primary business purposes of the internal investigation were to: (1) assuage PwC in connection with the Company’s required SEC filings, and evaluate the effectiveness of the Company’s internal controls; (2) gather facts to make human-resources decisions (including the retention or termination of employees); (3) protect FirstEnergy’s access to outside capital at manageable rates; and (4) gather facts to use as a bargaining chip with the government. FirstEnergy has not met its burden of establishing that the primary purpose of its investigation was anything other than business in nature.

C. FirstEnergy’s Nearly Complete Disclosure of Its Internal Investigation  
 Waived Any Attorney-Client Privilege or Work-Product Protections .....18

“Attorney-client privilege is not absolute, and ‘if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels.’” *LifeBio, Inc. v. Eva Garland Consulting, LLC*, 2023 WL 3258586, at \*3 (S.D. Ohio May 4, 2023). Reflecting this overarching principle, “[a]s a general rule, the ‘attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.’” *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002). Waiver of work-product protection occurs when “the original disclosure . . . [is] to an ‘adversary.’” *Id.* at 306 n.28. Accordingly, even if information relating to FirstEnergy’s internal investigation were privileged or otherwise protected, FirstEnergy waived those protections by disclosing facts concerning the internal investigation to numerous third parties.

1. FirstEnergy’s Disclosures to PwC Waived Any Protections .....19

FirstEnergy’s nearly complete disclosure of the internal investigation to its outside auditor undermines both attorney-client privilege and the work-product protection. *First Horizon Nat’l Corp. v. Houston Cas. Co.*, 2016 WL 5867268, at \*10 (W.D. Tenn. Oct. 5, 2016); *In re King Pharm., Inc. Sec. Litig.*, 2005 WL 8142328, at \*3 (E.D. Tenn. Sept. 21, 2005). “[A]ny information provided to [PwC] cannot have been furnished ‘in anticipation of litigation’ but was furnished to [PwC] in its capacity as an outside auditor.” *First Horizon*, 2016 WL 5867268, at \*10. The fact that FirstEnergy not only failed to properly safeguard the purportedly privileged material, but instead voluntarily revealed that material to PwC, eviscerates any possible protection FirstEnergy had concerning the internal investigation.

2. FirstEnergy’s Additional Disclosures in This Litigation Waived  
 Any Protections Related to the Internal Investigation .....20

Testimony scripts created by counsel and produced by FirstEnergy in this litigation revealed extensive information from its internal investigation, including apparent quotes from investigative materials and witness interviews, numerous facts, and most importantly, the lawyers’ ultimate conclusions and inferences regarding employees’ intent, knowledge, candor, and violations of corporate policy. Revealing “examples” of supposedly privileged information is the antithesis of treating such information “‘like jewels—if not crown jewels.’” *LifeBio*, 2023 WL 3258586, at \*3. FirstEnergy’s numerous disclosures eliminate any possible nonwaiver argument; *see also Columbia/HCA Healthcare*, 293 F.3d at 302 (“we reject the concept of selective waiver, in any of its various forms”); *United States v. Paulus*, 2021 WL 4494607, at \*4 (E.D. Ky. Sept. 30, 2021) (“[Third-party’s] partial disclosure of the consultant’s findings waives any privilege to those findings and necessitates disclosure of the balance of the findings.”).

3. FirstEnergy’s Counsel’s Conflicting Positions During Depositions Further Demonstrate the Implausibility of the Company’s Privilege Assertions.....23

FirstEnergy’s counsel has not only provided contradictory instructions to deponents during the course of depositions, but have wrongly claimed that facts conveyed by counsel are privileged. “[W]hen an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged.” *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110 (6th Cir. 1995). The arbitrariness of what FirstEnergy has revealed and what it has withheld, both during depositions and through the meet-and-confer process, demonstrates the implausibility of its privilege assertions.

D. Having Wielded the Internal Investigation as a Sword, FirstEnergy Cannot Now Shield It from Discovery .....25

“[L]itigants cannot hide behind the privilege if they are relying on privileged communications to make their case’ or, more simply, cannot use the privilege as ‘a shield and a sword.’” *In re United Shore Fin. Servs.*, 2018 WL 2283893, at \*2 (6th Cir. Jan. 3, 2018) (quoting *In re Lott*, 424 F.3d 446, 452–53 (6th Cir. 2005)). Yet, FirstEnergy is attempting to do exactly that. “When a party reveals privileged communications or otherwise waives the protections of the attorney-client privilege, ‘that party waives the privilege as to all communications on the same subject matter.’” *Mooney ex rel. Mooney v. Wallace*, 2006 WL 8434638, at \*8 (W.D. Tenn. July 12, 2006) (quoting *United States v. Skeddle*, 989 F. Supp. 905, 908 (N.D. Ohio 1997)). Accordingly, any attorney-client privilege concerning the subject matter is waived in its entirety. *See, e.g., Crestwood Farm Bloodstock LLC v. Everest Stables Inc.*, 2011 WL 13156795, at \*3 (E.D. Ky. Jan. 25, 2011) (where plaintiff’s attorney had obtained information only from plaintiff regarding whether agreement permitted an exception, plaintiff could not rely on that information “without opening discovery on other communications to and from [the attorney] on the [exception issue],” as the situation “present[ed] the classic sword and shield privilege metaphor”) (citing *Lott*, 424 F.3d at 454).

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Lead Plaintiff Los Angeles County Employees Retirement Association and Plaintiffs Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index Fund, LongView Quantitative LargeCap Fund, LongView Broad Market 3000 Index Fund, LongView LargeCap 500 Index Fund VEBA, LV LargeCap 1000 Value Index Fund, LongView Quantitative MidCap Fund, LongView Quant LargeCap Equity VEBA Fund and LongView Core Plus Fixed Income Fund, City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Fund, as well as Direct Action Plaintiffs (collectively, the "Plaintiffs"), together with defendants Michael J. Dowling ("Dowling") and Charles E. Jones ("Jones") (collectively, the "Moving Parties"),<sup>1</sup> respectfully submit this memorandum of law in support of their Motion to Compel Discovery Regarding FirstEnergy's Internal Investigation.<sup>2</sup>

## I. INTRODUCTION

In July 2020, FirstEnergy Corp. ("FirstEnergy" or the "Company") commenced an internal investigation into the matters raised in the Criminal Complaint and supporting 80-page affidavit, primarily for business, not legal, purposes.<sup>3</sup> FirstEnergy has strategically alternated between sharing

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<sup>1</sup> Pursuant to the Court's Order (ECF 474) and as agreed by the parties to be the most efficient way to present their privilege disputes (ECF 473), Mr. Jones and Mr. Dowling join in this consolidated omnibus motion's requests for relief and the substantive legal arguments in this supporting memorandum only. Mr. Jones and Mr. Dowling do not adopt the factual assertions in this memorandum.

<sup>2</sup> "Direct Action Plaintiffs" consist of Plaintiffs in *MFS Series Trust I, et al. v. FirstEnergy Corp., et al.*, No. 2:21-cv-05839-ALM-KAJ, and *Brighthouse Funds Trust II – MFS Value Portfolio, et al. v. FirstEnergy Corp., et al.*, No. 2:22-cv-00865-ALM-KAJ. Counsel for Jones and Dowling and Direct Action Plaintiffs continue in good faith the meet-and-confer process with counsel for FirstEnergy as it pertains to deficiencies with FirstEnergy's privilege logs along with other related privilege issues. Pursuant to the Court's prior Order (ECF 474), since those meet-and-confers have not yet concluded, counsel for Jones and Dowling and Direct Action Plaintiffs do not raise those issues herein and hereby reserve their right to bring these disputes to the Court pursuant to the Court's established joint status report protocol (ECF 333), to the extent necessary should the meet-and-confer process with counsel for FirstEnergy conclude with ongoing disputes.

<sup>3</sup> See Defendant Donald R. Schneider's Reply in Support of Motion to Dismiss ("MTD Reply"), Ex. A (*United States v. Householder*, No. 1:20-cr-00077, Affidavit in Support of a Criminal

or withholding information concerning that investigation. When it needed its external auditor's imprimatur for the Company's SEC Form 10-Q filing in August 2020, FirstEnergy revealed to PricewaterhouseCoopers LLP ("PwC") virtually everything from the internal investigation – including interview memoranda and mental impressions about the reliability of its executives. When FirstEnergy sought a deal with the government to resolve the criminal proceedings, the Company assured the government it had conducted a thorough internal investigation and agreed to disclose any information the government requested. And when it wanted to portray itself as a good corporate citizen cleaning house, FirstEnergy publicly disclosed facts and conclusions from its internal investigation to proclaim Company policies were violated and bad actors eliminated. And in this litigation, FirstEnergy has drawn from its internal investigation to partially inculcate Jones and Dowling while attempting to partially exculpate itself and others by asserting the purported absence of any evidence against others at the Company.

At bottom, FirstEnergy's varied privilege and work-product assertions regarding its internal investigation fail because it cannot meet its burden of establishing that these protections apply and have not been waived. Rather than exclusively or primarily seeking legal advice or preparing for litigation, FirstEnergy conducted its internal investigation primarily for business purposes. Indeed, in light of the nature of the issues addressed in the investigation, FirstEnergy's statements concerning the investigation, and the Company's course of conduct, it is clear FirstEnergy would have conducted the investigation for business reasons regardless of actual or potential legal proceedings. For this and other reasons, information relating to or purportedly uncovered during the internal investigation is not protected by the attorney-client privilege or the work-product doctrine. Even if that information had been protected, FirstEnergy repeatedly waived any protections through

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Complaint, ECF 5 ("Criminal Complaint") (S.D. Ohio July 21, 2020)), ECF 192-2 at PageID 4344-425.

its many deliberate disclosures and affirmative uses of information and conclusions from the investigation, including by freely revealing critical aspects of the internal investigation to third parties and the public. Accordingly, as set forth below, the Moving Parties respectfully request that the Court enter an order holding: (1) FirstEnergy's internal investigation is not entitled to attorney-client privilege or work-product protections in the first place; (2) even if FirstEnergy's internal investigation had been entitled to any such protections, FirstEnergy has waived them; and (3) FirstEnergy must produce all previously withheld documents, witnesses must answer all questions (past and future) related to the internal investigation, and FirstEnergy must withdraw all asserted protections that are reflected in PwC's document productions.

## **II. RELEVANT FACTS**

### **A. Underlying Criminal Allegations and Convictions**

The Court is well aware of the underlying facts here, and the Moving Parties will not belabor the relevant criminal allegations, guilty pleas, and recent guilty verdicts, other than: (1) to remind the Court of the exceptionally detailed Criminal Complaint that the government unsealed on July 21, 2020; and (2) to highlight the striking parallels between the Criminal Complaint and the Statement of Facts that FirstEnergy admitted as part of its Deferred Prosecution Agreement ("DPA"). *See* MTD Reply, Ex. A (Criminal Complaint), ECF 192-2 at PageID 4348-424; Status Report, Ex. B to Ex. 5 (*United States v. FirstEnergy Corp.*, No. 1:21-cr-00086, DPA, ECF 3 (S.D. Ohio July 22, 2021)), ECF 259-5 at PageID 6013-43 (both identifying a bailout for FirstEnergy's nuclear plants as the primary motive for the Larry Householder ("Householder") corruption; both identifying HB6's decoupling provision as guaranteeing fixed revenues for FirstEnergy entities as an additional motive; both identifying Generation Now as a Householder-controlled 501(c)(4) entity; both identifying approximately \$59 million in dark money payments from FirstEnergy entities to Generation Now as primary funding for the corrupt enterprise; both relying extensively on text messages to and from

Householder; both quoting FirstEnergy’s HB6-related statements in SEC filings; both quoting Jones’s HB6-related public statements).<sup>4</sup> The only real distinction between the documents is that the text messages quoted in the Criminal Complaint involved individuals charged in the criminal proceedings and the text messages quoted in the DPA involved individuals (Jones and Dowling) through whom FirstEnergy admitted it committed its crime. MTD Reply, Ex. A (Criminal Complaint), ECF 192-2 at PageID 4348-424; Status Report, Ex. 5 (DPA), ECF 259-5 at PageID 6013-43.

The exceptional details in the government’s Criminal Complaint, and the supporting evidence readily available to FirstEnergy (primarily bank records, phone records, text messages, and emails), distinguish this situation from nearly all other alleged corporate crimes. For white-collar crimes, it is highly unusual, if not unprecedented, for the government to present such extensive evidence prior to a single indictment or plea. In response, FirstEnergy conducted an investigation, but its statements and actions show that it did so primarily for business reasons, or at a minimum would have done so for business reasons regardless of any possible litigation. Specifically, the primary purposes for its internal investigation were business-related: retaining or firing employees, assuaging outside auditors, preserving access to capital, and creating a bargaining chip with the government.

**B. FirstEnergy’s Most Urgent Need for the Internal Investigation Was the Business Purpose of Obtaining Its Outside Auditor’s Sign-Off**

FirstEnergy’s second financial quarter ended on June 30, 2020, only three weeks before the government unsealed its Criminal Complaint. This meant FirstEnergy’s first priority was

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<sup>4</sup> Unless otherwise noted, all “Ex. \_” references are to the exhibits attached to the Declaration of Jason A. Forge in Support of the Moving Parties’ Motion to Compel Discovery Regarding FirstEnergy’s Internal Investigation, filed concurrently herewith. References to “JD\_” are to exhibits introduced by defendants Jones and Dowling. Additionally, unless otherwise noted, emphasis is added and citations are omitted.

convincing its independent auditor, PwC, to bless the Company's SEC Form 10-Q disclosures surrounding the criminal allegations. This was no mean feat given the circumstances, and it required several critical (and some quite questionable) representations to PwC:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On August 13, 2020, FirstEnergy’s investigation team advised PwC [REDACTED]

[REDACTED] *Id.* at -017. On August 14, 2020, defendant Donald

T. Misheff (Chairman of the “Special Investigation Committee” and member of the Audit

Committee) confirmed for PwC that FirstEnergy’s Special Investigation Committee [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at -020. On

August 16, 2020, PwC told Misheff and FirstEnergy executive defendants K. Jon Taylor and Jason J.

Lisowski [REDACTED]

[REDACTED]. The next day, on August 17, 2020, FirstEnergy filed its SEC

Form 10-Q for the quarter ending June 30, 2020.

On October 29, 2020, two months after concluding its investigative procedures and assuring

PwC that there was no reason it would be inappropriate to rely on representations by Jones,

FirstEnergy fired Jones, Dowling, and defendant Dennis M. Chack, and disclosed: “During the

course of the Company’s previously disclosed internal review related to the government

investigations, the Independent Review Committee of the Board determined that these executives violated certain FirstEnergy policies and its code of conduct.”<sup>5</sup>

**C. FirstEnergy Publicly Revealed Additional Information from Its Internal Investigation**

**1. All Termination-Related Information FirstEnergy Revealed Came from Its Internal Investigation**

On November 8, 2020, less than two months after deploying Reffner to assure PwC in connection with FirstEnergy’s August 2020 Form 10-Q, the Company “separated” him along with Ebony Yeboah-Amankwah (“Yeboah-Amankwah”), the Company’s General Counsel and Chief Ethics Officer, along with several other employees and in-house counsel. ¶184.<sup>6</sup> Shortly thereafter, on November 19, 2020, FirstEnergy disclosed certain conclusions its lawyers had reached regarding Reffner, Yeboah-Amankwah, and others. Specifically, FirstEnergy disclosed that these individuals “did not reasonably ensure that relevant information was communicated within our organization and not withheld from our independent directors, our Audit Committee, and our independent auditor.” ¶190. FirstEnergy further revealed that this undisclosed relevant information related to a \$4.3 million payment to the incoming Chairman of the Public Utilities Commission of Ohio (“PUCO”), Samuel C. Randazzo (“Randazzo”). *Id.* Although this information was not expressly attributed to FirstEnergy’s lawyers at the time, defendant Julia Johnson (“Johnson”) – a former director and member of the Special Investigation Committee – later confirmed during her deposition that all this information had come from FirstEnergy’s lawyers, not its Board of Directors: “That information was provided to us as a part of the special investigation committee and the information was provided by

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<sup>5</sup> See Press Release, FirstEnergy, FirstEnergy Announces Leadership Transition (Oct. 29, 2020), <https://investors.firstenergycorp.com/investor-materials/news-releases/news-details/2020/FirstEnergy-Announces-Leadership-Transition/default.aspx>.

<sup>6</sup> Unless otherwise noted, all “¶” or “¶¶” citations are to the Consolidated Complaint for Violations of the Federal Securities Laws, ECF 72 at PageID 1545-674.



lawyers . . . .” Ex. 3 (Johnson Tr. Vol. II) at 546:11-13; 558:17-18 (“My position is that the facts that were provided to us by our lawyers pursuant to what my lawyer [today] had said is privileged.”). In fact, Johnson confirmed that the firings of Jones, Dowling, and others for violations of Company policies were based solely on information lawyers had provided:

[CLASS COUNSEL:] Q. Was this text – the text messages set forth here, were they a basis for the termination of Mr. Jones?

[FIRSTENERGY’S COUNSEL:] Objection. I instruct you not to answer and reveal the privileged information or discussions with counsel. If you can answer outside of the internal investigation, go ahead.

[THE WITNESS:] A. All the information that I received in making our determination was a part of that investigation.

*Id.* at 508:7-25; *see also id.* at 541:17-543:13.

## **2. All the Information Set Forth in the DPA Came from FirstEnergy’s Internal Investigation**

Less than a year after completing its internal investigation, FirstEnergy entered into the DPA with the United States Attorney’s Office for the Southern District of Ohio (the “USAO-SDOH”). Among other things, the agreement set forth a series of obligations, many of which concerned FirstEnergy’s past and anticipated cooperation, which the agreement described as “substantial,” including an assurance that FirstEnergy had “conduct[ed] a thorough internal investigation,” a commitment to disclose “any information . . . requested by the government,” and agreement to a detailed Statement of Facts that largely paralleled the Criminal Complaint that the government had unsealed almost exactly a year earlier. Status Report, Ex. 5 (DPA), ECF 259-5 at PageID 6002, 6013.

FirstEnergy’s Board authorized FirstEnergy to enter into the DPA, including all the many facts and admissions that FirstEnergy chose to disclose in it. Ex. 3 (Johnson Tr. Vol. II) at 510:19-22. Former FirstEnergy director Johnson, admitted that all the information FirstEnergy disclosed to its adversary (the USAO-SDOH) and to the general public came from its internal investigation, on

which FirstEnergy relied as the basis to instruct Johnson (and other witnesses) not to answer any questions about this information:

[CLASS COUNSEL:] Q. And are you aware of the admissions of wrongdoing that FirstEnergy made in this DPA?

[THE WITNESS:] A. Yes.

[CLASS COUNSEL:] Q. And what is your understanding of those admissions?

[FIRSTENERGY'S COUNSEL]: Object, I object and instruct you to leave out from your answer any understandings that you gained from communications with counsel.

[THE WITNESS:] A. Everything that I know about the DPA is information that I obtained from discussions with our lawyers.

Ex. 3 (Johnson Tr. Vol. II) at 482:1-11. Further, Johnson acknowledged that the investigation used lawyers not so much as legal advisors, but more as fact finders so the Board could make the above-referenced business decisions to terminate employees and enter into the DPA:

[THE WITNESS:] A. As a board member and an independent review committee member, all of the questions that I had were directed to the lawyers.

[DOWLING'S COUNSEL:] Q. For what purpose did you direct your questions to the lawyers?

[THE WITNESS:] A. So that they could do the fact-finding on whatever the issue was. I did not independently do the fact-finding.

*Id.* at 397:7-15.

**D. FirstEnergy Continues to Reveal Information from Lawyers and Additional Investigative Conclusions Selectively**

On May 19-20, 2022, and December 6-7, 2022, FirstEnergy provided deposition testimony pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure (the December dates were necessitated by FirstEnergy's lack of preparedness for the May deposition (Opinion and Order, ECF 333 at PageID 7122-31)). The testimony from both 30(b)(6) witnesses relied on scripted answers FirstEnergy's lawyers had given them to then share with Plaintiffs and all other parties. *See, e.g.*, Ex. 4 (Ashton Tr. Vol. I) at 24:24-25:17; 27:10-23; 137:7-21; 138:24-139:3. In fact, FirstEnergy

intentionally chose a 30(b)(6) witness with no personal knowledge of the deposition topics so the only information she could provide would be the information FirstEnergy’s lawyers had scripted for her. *Id.* at 33:22-34:4; 76:22-77:2. Less than two years after representing in August 2020 to PwC

[REDACTED]

[REDACTED], FirstEnergy’s lawyers told the witness to share the investigative conclusion that Jones and Dowling had each conspired with FirstEnergy to commit honest services wire fraud. Ex. 4 (Ashton Tr. Vol. I) at 54:18-55:20.

Among the materials FirstEnergy’s lawyers created for FirstEnergy’s witnesses to use to answer questions regarding topics about which they had no personal knowledge were two documents that presented extensive conclusions and selected allegedly supporting facts regarding

[REDACTED]

[REDACTED] – again, according to former FirstEnergy director Johnson all this information came from FirstEnergy’s internal investigation. Ex. 3 (Johnson Tr. Vol. II) at 508:23-25 (“All the information that I received in making our [termination and separation] determination[s] was a part of that investigation.”). According to the scripts prepared by FirstEnergy’s lawyers, this extensive revelation of information elicited by the internal investigation included:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FirstEnergy selectively chose to disclose other information from its internal investigation to cast the Company and its Board in a better light, stating:

[REDACTED]

[REDACTED]

[REDACTED]

This self-described [REDACTED] to terminate Jones and Dowling appears irreconcilable with the internal investigators' representations to PwC in August 2020 [REDACTED]

[REDACTED]. FirstEnergy is nonetheless invoking its internal investigation to defend its actions by asserting what the Board learned for the first time “during the course of the Company’s internal review related to the government investigations.”

### III. RELEVANT LAW AND ARGUMENT

#### A. FirstEnergy Cannot Meet Its Burden

Though Moving Parties bring this motion, “[t]he burden of establishing the existence of the privilege rests with the person asserting it.” *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999).

The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

*Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998). Likewise, “federal courts in this Circuit require the proponent of the privilege to carry the burden of showing nonwaiver as an element of attorney-client privilege. *See In re VisionAmerica, Inc. Sec. Litig.*, 2002 WL 31870559, at \*1-\*2 (W.D. Tenn. Dec. 18, 2002) (collecting cases and noting that the Sixth Circuit has favorably cited cases holding that the party claiming privilege must also show nonwaiver); *Cheryl & Co. v. Krueger*, 2019 WL 6521956, at \*2 (S.D. Ohio Dec. 4, 2019).

As the Sixth Circuit has repeatedly observed, “[c]laims of attorney-client privilege are ‘narrowly construed because [the privilege] reduces the amount of information discoverable during the course of a lawsuit.’” *In re Columbia/HCA Healthcare Corp. Billing Pracs. Litig.*, 293 F.3d 289,

294 (6th Cir. 2002) (some alterations in original). Accordingly, “[t]he privilege ‘applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice.’” *Id.*

**B. The Primary Purposes of FirstEnergy’s Internal Investigation Were Business-Related**

A “‘communication is not privileged simply because it is made by or to a person who happens to be an attorney.’ To be privileged, the communication must have the ‘*primary* purpose of soliciting legal, rather than business, advice.’” *Zigler v. Allstate Ins. Co.*, 2007 WL 1087607, at \*1 (N.D. Ohio Apr. 9, 2007) (emphasis in original). This same principle applies to internal investigations. *See, e.g., Calendar Rsch. LLC v. StubHub, Inc.*, 2019 WL 11558873, at \*4 (C.D. Cal. July 25, 2019) (“courts have declined to extend the protections of the attorney-client privilege where the purpose of a due diligence investigation was to obtain factual data for a business purpose”). In this regard, “[d]espite its legal content, human resources work, like other business activities with a regulatory flavor, is part of the day-to-day operation of a business; it is not a privileged legal activity.” *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 44-46 (E.D.N.Y. 2013), *aff’d*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014).

In addition, to constitute work-product protected by Federal Rule of Civil Procedure 26(b)(3), FirstEnergy “bears the burden of showing that the investigation and report were created in anticipation of litigation and not just for business purposes.” *Futhey v. United Transp. Union Ins. Ass’n*, 2015 WL 2446169, at \*1-\*2 (N.D. Ohio May 20, 2015). The inquiry “centers on whether documents were ‘prepared or obtained because of the prospect of litigation[,]’ as opposed to those ‘prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for non-litigation purposes[.]’” *McNeil v. Mount Carmel Health Sys.*, 2021 WL 5235103, at \*4 (S.D. Ohio Nov. 10, 2021) (Jolson, M.J.) (alterations in original). Accordingly, “‘if the item would have been prepared in substantially the same manner, regardless of the anticipated

litigation, the [work-product] doctrine does not apply.” *Id.*; see also *In re OM Sec. Litig.*, 226 F.R.D. 579, 585-87 (N.D. Ohio 2005) (documents prepared in connection with audit committee’s investigation of corporation’s inventory problems, which began after shareholder litigation had commenced, would have been prepared regardless of the possibility of additional litigation, and therefore documents were not protected by work-product doctrine).<sup>7</sup>

FirstEnergy has not attempted to establish, let alone succeeded in establishing, that the primary purpose of its internal investigation was obtaining legal advice, as opposed to gathering facts for a series of predominantly business purposes and decisions. Similarly, FirstEnergy has not demonstrated that it would *not* have conducted the internal investigation were it not for the prospect of litigation. Here, as in *Kidder Peabody*, the investigation was instead required for pressing business purposes and would have been undertaken regardless of whether litigation or criminal proceedings were threatened or had commenced.<sup>8</sup>

The first purpose of the internal investigation was to assuage PwC so FirstEnergy could complete its required SEC filings, as well as to comply with the Company’s obligation to assess the sufficiency of its internal controls. This is squarely within the scope of its regularly conducted business activities. Just like in *OM*, FirstEnergy’s audit committee needed the information gathered

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<sup>7</sup> See also *Allied Irish Banks, p.l.c. v. Bank of Am., N.A.*, 240 F.R.D. 96, 106-109 (S.D.N.Y. 2007) (documents created by law firm hired to investigate alleged foreign currency trading scheme and make recommendations for changes were not protected by the work-product doctrine where party asserting privilege failed to present any testimony that the documents would not have been prepared without the threat of litigation); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 463, 466 (S.D.N.Y. 1996) (documents generated during internal investigation of defendant corporation regarding scheme by trader to inflate earnings reports were not protected work-product since the documents were not created principally or exclusively to assist in contemplated or ongoing litigation; inquiry was required for pressing business purposes and thus would have been undertaken regardless of whether litigation was threatened).

<sup>8</sup> Because the considerations for assessing privilege and work-product protection overlap considerably, though they are not identical, Moving Parties address them together.

in the internal investigation, and PwC’s resulting cooperation, regardless of the possibility of litigation.

That FirstEnergy later admitted to deficiencies in its internal controls following revelations of its unlawful conduct further demonstrates the internal investigation would have occurred regardless of any litigation. In its Form 10-Q issued on November 19, 2020 – three months after FirstEnergy represented to PwC that the Company’s investigation was “complete” – FirstEnergy admitted “its disclosure controls and procedures were not effective as of September 30, 2020” because the Company “did not maintain an effective control environment as our senior management failed to set an appropriate tone at the top.” As FirstEnergy was *required* to evaluate the effectiveness of its internal controls, the Company no doubt would have undertaken an investigation into the facts in connection with the Criminal Complaint *regardless* of any anticipated or actual legal proceedings. *See In re Valeant Pharms. Int’l, Inc. Sec. Litig.*, 2021 WL 2587784, at \*11 (D.N.J. June 24, 2021) (“[I]rrespective of pending litigation against the Company, and even irrespective of malfeasance at the top of the organization, Valeant, had it discovered financial irregularities (even in the absence of investigations or media scrutiny), would have taken – and was obligated to take – the same steps.”).

The second purpose of the internal investigation was to gather facts for a series of human resource decisions, starting with whether to retain or fire the Company’s Chief Executive Officer (“CEO”), Jones. As in *Koumoulis*, this human resource work is clearly part of the day-to-day operation of a business, as opposed to a privileged legal activity. And similar to *Calendar Research*, FirstEnergy director and Independent Review Committee (“IRC”) member Johnson (who was also a member of the Special Investigation Committee) has already testified that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Another FirstEnergy director and Committee member,



defendant Thomas N. Mitchell (“Mitchell”), testified [REDACTED]

[REDACTED]

[REDACTED]

This Court has already reminded the parties that “[a] party asserting privilege must provide sufficient information to allow a court to determine whether the communications in question were in fact confidential communications relating to legal advice.” Opinion and Order, ECF 378 at PageID 9011. Yet, throughout two full days of testimony, Johnson never identified a single category of legal *advice* that the Board sought from the internal investigation. Even the many instructions not to answer questions were completely untethered to any indication or condition that the answer would reveal a communication *concerning legal advice*: “I’m going to object and I’m going to instruct you to leave out any communications or information you received from your lawyers.” Ex. 3 (Johnson Tr. Vol. II) at 348:21-23.<sup>9</sup> In fact, over the course of four days of testimony from two directors, the only time legal advice was a condition of an instruction not to answer was during questioning about a meeting that occurred the week after Householder and several of his alleged coconspirators were arrested – before formation of the IRC. [REDACTED].

The third and fourth purposes of the internal investigation were intertwined. The third is that FirstEnergy [REDACTED] [REDACTED], which is clearly a business purpose. To accomplish this crucial objective, FirstEnergy needed to strike a deal with the government, so the fourth purpose of the investigation was to gather evidence and facts to use as a bargaining chip with the government. Indeed, FirstEnergy expressly used its internal investigation as a bargaining chip with the government, so much so that the very first form of “substantial cooperation” listed in the DPA was

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<sup>9</sup> See also *id.* at 359:16-18; 365:1-5; 365:12-14; 392:7, 15, 20; 393:1, 10, 17; 394:1-2; 395:2-5; 398:18, 23; 472:19-21; 482:6-8; 501:16-17; 502:24-503:1, 17-18; 507:7-16; 508:4-5, 10-14, 19-22; 541:12-15; 541:24-542:1; 543:8-10; 545:3-6; 546:8-10; 549:9-14; 553:9-12; 554:12-15; 558:5-9.

“conducting a thorough internal investigation.” Status Report, Ex, 5 (DPA), ECF 259-5 at PageID at 6002. Therefore, this was also predominantly a business purpose.

Two final indications that the primary purpose of FirstEnergy’s internal investigation was not legal advice are that: (1) FirstEnergy shared with others essential information from it, which, as set forth below, is completely inconsistent with a privileged investigation; and (2) FirstEnergy seemingly made no effort to recuse from the investigation several of the very people involved in the actions being investigated, which would be of paramount significance in an investigation for legal purposes. For example, on or about February 23, 2021, [REDACTED]

[REDACTED]

[REDACTED]. Yet, only three months later, FirstEnergy fired [REDACTED]

[REDACTED]. Also, as mentioned above, [REDACTED]

[REDACTED]

[REDACTED]. Only three months later, FirstEnergy “separated” [REDACTED]

[REDACTED]. These facts

further demonstrate that the business purpose of obtaining PwC’s sign-off as quickly as possible was the primary reason for FirstEnergy’s internal investigation, as this urgency led to such a hasty assembly of an investigation team that there was no effort to exclude from the team the very individuals whose own actions fell within the scope of the investigation.

At bottom, FirstEnergy cannot carry its burden to establish that *the* primary purpose of its internal investigation was legal advice because that simply was not *the* primary purpose. Further, with or without possible litigation, FirstEnergy had to conduct its internal investigation to satisfy its outside auditor and comply with SEC filing requirements, as well as to determine which employees to retain and which to fire – all prototypical business purposes. As the court in *Allied Irish Banks* observed, “the use to which the [investigative] Report was ultimately put provides further evidence of why it would have been generated in the same manner irrespective of the potential for litigation.”

240 F.R.D. at 108. Specifically:

According to AIB’s Group Chief Executive, the AIB board intended the Report to be used to “address[] culpability, accountability, control systems and organizational issues.” As noted, the Board publicly fired six individuals identified in the Report as “directly responsible for oversight of [inculpated foreign currency trader] Mr. Rusnak. . . . “[C]onsistent with the findings and recommendations of the report,” the Board also adopted a series of “organisational changes” to its “strategy and group structure” as well as to its corporate governance. These actions evidence the importance of the . . . Ludwig investigation as a corporate management tool, not as a mechanism to assist in expected litigation.

*Id.* (certain alterations in original and added). So too, here.

Under the circumstances here, any legal purpose for the internal investigation was a distant second to these business considerations.

**C. FirstEnergy’s Nearly Complete Disclosure of Its Internal Investigation Waived Any Attorney-Client Privilege or Work-Product Protections**

“Attorney-client privilege is not absolute, and ‘if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels.’”

*LifeBio, Inc. v. Eva Garland Consulting, LLC*, 2023 WL 3258586, at \*3 (S.D. Ohio May 4, 2023).

“As a general rule, the ‘attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.’” *Columbia/HCA*, 293 F.3d at 294.

Waiver of work-product protection occurs when “the original disclosure . . . [is] to an ‘adversary.’”

*Id.* at 306 n.28. FirstEnergy waived both attorney-client privilege and work-product protection by disclosing to third parties information relating to the internal investigation.

**1. FirstEnergy’s Disclosures to PwC Waived Any Protections**

Rather than safeguard any privileged material (assuming for argument’s sake it was privileged), FirstEnergy freely, and strategically, shared nearly all information from its internal investigation with its outside auditor, as well as critical aspects of it with the public and the Company’s adversaries here. Thus, even if the internal investigation had a primarily legal purpose (which it demonstrably did not) or was conducted because of ongoing or anticipated litigation (which it demonstrably was not), FirstEnergy waived any otherwise applicable protections. Though cases outside the Sixth Circuit are mixed on whether disclosure of protected information to an outside auditor waives both attorney-client privilege and work-product protection, the only two district courts within the Sixth Circuit to address this issue both unequivocally held that disclosure of privileged communications to outside auditors renders both inapplicable. *First Horizon Nat’l Corp. v. Houston Cas. Co.*, 2016 WL 5867268, at \*10 (W.D. Tenn. Oct. 5, 2016); *In re King Pharms., Inc. Sec. Litig.*, 2005 WL 8142328, at \*3 (E.D. Tenn. Sept. 21, 2005). The court in *King Pharmaceuticals*, for example, determined the company’s disclosure of information to its outside auditor (PwC) was not protected by the work-product doctrine, as “King furnished documents to PWC ostensibly to enable PWC to prepare accurate audit reports and financial statements which in turn would have been publicly disseminated . . . .” 2005 WL 8142328, at \*3.

Here, just as in *King Pharmaceuticals* and *First Horizon*, “any information provided to [PwC] cannot have been furnished ‘in anticipation of litigation’ but was furnished to [PwC] in its capacity as an outside auditor.” *First Horizon*, 2016 WL 5867268, at \*10. Equally important, this was not a superficial or summary-level disclosure, but rather a virtually complete reveal, spanning the most critical aspects of any investigation, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The fact that FirstEnergy is asserting that large swaths of information it shared with PwC are purportedly privileged [REDACTED] [REDACTED] confirms that FirstEnergy made precisely the kinds of extensive disclosures to an independent auditor that eviscerate any possible protections regarding the internal investigation, and also demonstrates the unreasonableness of FirstEnergy's privilege assertions regarding *PwC's* materials. At the same time, the fact that FirstEnergy withheld information (albeit only eight documents) from PwC further confirms that PwC was *not* assisting in the rendering of any *legal advice*.

**2. FirstEnergy's Additional Disclosures in This Litigation Waived Any Protections Related to the Internal Investigation**

As set forth above, FirstEnergy's Rule 30(b)(6) testimony scripts revealed extensive information from its internal investigation, including apparent quotes from investigative materials and witness interviews, numerous facts, and most importantly, the lawyers' ultimate conclusions and inferences regarding employees' intent, knowledge, candor, and violations of corporate policy – all of which FirstEnergy's 30(b)(6) witnesses and directors testified came from counsel. FirstEnergy even used the phrase "[REDACTED]" when revealing such information: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Revealing [REDACTED] of supposedly privileged information is the antithesis of treating such information "like jewels – if not crown jewels." *LifeBio*, 2023 WL 3258586, at \*3. It is simply not a luxury one can enjoy and keep the privilege. *See also Columbia/HCA*, 293 F.3d at 302 ("we reject the concept of selective waiver, in any of its various

forms”); *United States v. Paulus*, 2021 WL 4494607, at \*4 (E.D. Ky. Sept. 30, 2021) (“[Third-party’s] partial disclosure of the consultant’s findings waives any privilege to those findings and necessitates disclosure of the balance of the findings.”), *mandamus denied by*, 31 F.4th 520 (6th Cir. 2022).

The same goes for FirstEnergy’s disclosures of its lawyers’ conclusions that [REDACTED]

[REDACTED]

[REDACTED]. FirstEnergy also disclosed its lawyers’ conclusions regarding [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Any one of these

disclosures would be sufficient to waive any applicable protections for FirstEnergy’s internal investigation. Collectively (and these are just a few examples), they overwhelmingly eliminate any possibility of FirstEnergy meeting its burden of demonstrating non-waiver.

The *OM* court’s analysis regarding the scope of waiver is instructive here. In *OM*, the investigation at issue was an audit committee investigation for presentation to the defendants company’s board of directors. 226 F.R.D. at 584. Outside accountants were *part* of the investigation team, not the recipients of the investigation for business purposes. Moreover, unlike here, the *OM* defendants did not use the investigative materials to attempt to exonerate themselves and “did not disclose snips and quotes of employee interviews from the underlying documents to a third party in order to obtain an unqualified audit opinion.” *Id.* at 593. In fact, the *OM* court determined the audit committee’s “substantial, intentional, and deliberate” disclosure “to OMG’s Board” was particularly salient. *Id.* The court further explained that “[t]here is no reason

Defendants, who voluntarily disclosed substantial information about an investigation *that led to a public announcement* that OMG anticipated a restatement of earnings, should now be able to withhold information that would allow Plaintiff to review the whole picture.” *Id.* Accordingly, the court held that the defendants had broadly waived all protections to all underlying information related to the audit committee’s presentation to the Board (though not information generated after the presentation). *Id.*

FirstEnergy’s disclosures and use of the investigation materials go well beyond those in *OM*. Unlike the single PowerPoint presentation to the board in *OM*, FirstEnergy’s disclosures to PwC

[REDACTED]

[REDACTED]

. Likewise, FirstEnergy’s investigation led to multiple public announcements that were more detailed than the mere mention of an anticipated earnings restatement in *OM*. FirstEnergy’s public announcements not only include firings and separations of multiple employees, but also the several *reasons* for the firings, which are all attributable to the internal investigation. Moreover, unlike in *OM*, where there was no affirmative use of information attributable to the investigation to exonerate anyone, FirstEnergy repeatedly used such information to attempt to exonerate its Board and select employees and thus itself as to any vicarious liability related to such individuals. And whereas, in *OM*, the defendant company “did not disclose snips and quotes of employee interviews from the underlying documents to a third party,” that is exactly what FirstEnergy did – both with PwC (which received far more than snips and quotes) and with Moving Parties. *OM*, 226 F.R.D. at 583.

**3. FirstEnergy’s Counsel’s Conflicting Positions During Depositions Further Demonstrate the Implausibility of the Company’s Privilege Assertions**

During the depositions of two of the director-members of the IRC, FirstEnergy’s own lawyers couldn’t keep straight what was supposedly privileged and what was not, leading to indefensibly contradictory instructions such as during the deposition of Julia Johnson:

[THE WITNESS:] A. I believe I received [testimony script Ex. 5 (Dep. Ex. JD 39)].

[CLASS COUNSEL:] Q. Right. And the information contained within here in this document was the basis for the termination or at least some part of the basis for the termination of Mr. Jones and Mr. Dowling; isn’t that correct?

[THE WITNESS:] A. Yes.

Ex. 3 (Johnson Tr. Vol. II) at 528: 7-12. Not long after that exchange, FirstEnergy’s counsel asserted a privilege objection and instructed Johnson not to confirm information set forth in FirstEnergy’s own Form 10-K, which she had authorized, about Jones’s and Dowling’s terminations. *Id.* at 544:1-546:19. Soon thereafter, counsel asserted a privilege objection and instructed Johnson not to answer nearly the same questions about Deposition Exhibit JD 39 (attached hereto as Ex. 5) that she had answered minutes earlier, thus completely shutting down the questioning regarding the reasons for Jones’s termination:

[CLASS COUNSEL:] Q. Let me ask you this. So with respect to the information that was disclosed to the public, are you refusing to answer whether or no – whether or not the facts set forth in Exhibit 39 were part of the reasons why Mr. Jones and Mr. Dowling were terminated? Is that your position?

[FIRSTENERGY’S COUNSEL:] Objection. I’m instructing you not to answer and reveal any communications or discussions you had with counsel related to the internal investigation and the terminations of Mr. Jones and Mr. Dowling.

\* \* \*

[THE WITNESS:] A. My position is that the facts that were provided to us by our lawyers pursuant to what my lawyer has said is privileged.

*Id.* at 557:24-558:19.



By the time of the deposition of the next director-member of the IRC, Mitchell, FirstEnergy's counsel openly admitted what its instructions at the prior deposition had implied: FirstEnergy had adopted the untenable position that facts become privileged simply by being conveyed by counsel:

[DIRECT ACTION PLAINTIFFS' COUNSEL:] Q. Are you saying that facts conveyed by counsel are privileged?

[FIRSTENERGY'S COUNSEL:] A. Yes.

Ex. 6 (Mitchell Tr. Vol. I) at 189:4-6.

Contrary to FirstEnergy's counsel's perspective and repeated instructions not to answer, "[i]t is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110 (6th Cir. 1995); *see also Hilton-Rorar v. State & Fed. Commc'ns Inc.*, 2010 WL 1486916, at \*7 (N.D. Ohio Apr. 13, 2010) (same and citing *Kansas Wastewater, Inc. v. Alliant Techsystems, Inc.*, 217 F.R.D. 525, 528 (D. Kan. 2003), for the principle that "privilege does not apply to facts that an attorney communicates to her client"). Worse, even if facts were privileged (which they plainly are not), their disclosure in public SEC filings and in deposition transcripts such as Ex. 5 (Dep. Ex. JD 39) would have waived any protections. FirstEnergy's position is doubly indefensible because its counsel is instructing witnesses not to answer questions about facts from the Company's internal investigation that it has repeatedly chosen to disclose in other contexts.

The arbitrariness (though consistently self-serving in nature) of what FirstEnergy chose to reveal and what it insisted on withholding is further demonstrated by two discrete inquiries relating to employee terminations/separations. Despite the Court's order finding FirstEnergy had failed to provide an adequately prepared witness for its Rule 30(b)(6) deposition, even during the second deposition FirstEnergy's witness was unprepared to answer certain basic questions regarding the terminations/separations. As indicated above, in its deposition scripts FirstEnergy revealed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Yet FirstEnergy’s witness was still unprepared to identify what relevant information these employees had failed to ensure was produced in connection with the internal investigation. *See, e.g.,* [REDACTED] Ex. 11 (Storsin Tr. Vol. II) at 381:12-382:9. Likewise, regarding former CEO defendant Steven Strah’s (“Strah”) “retirement,” FirstEnergy’s witness was only prepared to testify that “the board’s offer [was] that Mr. Strah retire,” but he was completely unprepared to testify as to what the alternative was if Strah declined the “offer.” Ex. 11 (Storsin Tr. Vol. II) at 385:13-387:21. Despite raising no privilege objections to these questions during the deposition, when meeting and conferring about this lack of preparation, FirstEnergy asserted that the answers to these questions were privileged.

**D. Having Wielded the Internal Investigation as a Sword, FirstEnergy Cannot Now Shield It from Discovery**

“[L]itigants cannot hide behind the privilege if they are relying on privileged communications to make their case’ or, more simply, cannot use the privilege as ‘a shield and a sword.’” *In re United Shore Fin. Servs, LLC*, 2018 WL 2283893, at \*2 (6th Cir. Jan. 3, 2018) (quoting *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005)). “When a party reveals privileged communications or otherwise waives the protections of the attorney-client privilege, ‘that party waives the privilege as to all communications on the same subject matter.’” *Mooney ex rel. Mooney v. Wallace*, 2006 WL 8434638, at \*8 (W.D. Tenn. July 12, 2006) (quoting *United States v. Skeddle*, 989 F. Supp. 905, 908 (N.D. Ohio 1997)). “The privilege may be implicitly waived when the holder of the privilege asserts a claim that requires examination of protected communications.” *In re Grand Jury Subpoena, 93-2-1-01*, 9 F.3d 107 (Table), 1993 WL 453395, at \*2 (6th Cir. 1993) (Guy, J., concurring) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). That is precisely what FirstEnergy is doing in these proceedings.

In particular, FirstEnergy offered the following unsolicited self-exculpatory testimony during its second Rule 30(b)(6) deposition:

[THE WITNESS:] A. FirstEnergy is aware of no evidence suggesting that any outside director knew of payments or contributions in exchange for specific official action for FirstEnergy’s benefit and . . . FirstEnergy is aware of no evidence suggesting that any current officer or Mr. Strah knew of payments or contributions in exchange for specific official action for FirstEnergy’s benefit.

Ex. 10 (Storsin Tr. Vol. I) at 32:15-23. The Company echoed this claim and added another [REDACTED]

[REDACTED]

The court encountered a very similar situation in *Crestwood Farm Bloodstock LLC*. There, in a breach of contract action, the plaintiff elicited testimony from its transactional attorney that no one had discussed an exception at issue prior to the case, so the “implication [wa]s that . . . the Agreement did not contemplate such an exception.” *Id.* at \*3. Since the attorney had obtained his information only from his client, the court ruled that the plaintiff could not create such an implication “without opening discovery on other communications to and from [the attorney] on the [exception issue],” as the situation “present[ed] the classic sword and shield privilege metaphor.” *Id.* (citing *Lott*, 424 F.3d at 454).

Here, the roles are reversed but the analysis and necessary consequence are identical. In fact, FirstEnergy’s testimony went further than the mere “implication” in *Crestwood*. Since FirstEnergy’s lawyers comprised FirstEnergy’s only source of information about purported evidence (or lack thereof) of its directors’ and officers’ knowledge, FirstEnergy cannot claim it is aware of no such evidence “without opening discovery on other communications to and from [the attorneys] on the [issue].” *Id.* at \*3. Accordingly, this is another basis for finding waiver regarding all information related to FirstEnergy’s internal investigation.

#### IV. CONCLUSION

For all the foregoing reasons, Moving Parties respectfully request that the Court enter an order granting their motion and determining the following: (1) FirstEnergy's internal investigation is not entitled to attorney-client privilege or work-product protections in the first place; (2) even if FirstEnergy's internal investigation had been entitled to any such protections, FirstEnergy has waived them; and (3) FirstEnergy must produce all previously withheld documents, witnesses must answer all questions (past and future) related to the internal investigation, and FirstEnergy must withdraw all asserted protections that are reflected in PwC's document productions.

DATED: June 30, 2023

Respectfully submitted,

s/ Joseph F. Murray  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed electronically on June 30, 2023. Notice of this filing will be sent to all electronically registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Joseph F. Murray*

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re FIRSTENERGY CORP. SECURITIES LITIGATION	)	No. 2:20-cv-03785-ALM-KAJ
_____	)	<u>CLASS ACTION</u>
This Document Relates To:	)	Judge Algenon L. Marbley
ALL ACTIONS.	)	Magistrate Judge Kimberly A. Jolson
_____	)	
MFS Series Trust I, et al.,	)	<b>Case No. 2:21-cv-05839-ALM-KAJ</b>
Plaintiffs,	)	
vs.	)	
FirstEnergy Corp., et al.,	)	
Defendants.	)	
_____	)	
Brighthouse Funds Trust II – MFS Value Portfolio, et al.,	)	<b>Case No. 2:22-cv-00865-ALM-KAJ</b>
Plaintiffs,	)	
vs.	)	
FirstEnergy Corp., et al.,	)	
Defendants.	)	
_____	)	

DECLARATION OF JASON A. FORGE IN SUPPORT OF THE MOVING PARTIES’  
MOTION TO COMPEL DISCOVERY REGARDING FIRSTENERGY’S INTERNAL  
INVESTIGATION

I, JASON A. FORGE, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California and have been admitted *pro hac vice* in the above-entitled action. I am a member of the law firm of Robbins Geller Rudman & Dowd LLP, Lead Counsel for Lead Plaintiff Los Angeles County Employees Retirement Association and Plaintiffs Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index Fund, LongView Quantitative LargeCap Fund, LongView Broad Market 3000 Index Fund, LongView LargeCap 500 Index Fund VEBA, LV LargeCap 1000 Value Index Fund, LongView Quantitative MidCap Fund, LongView Quant LargeCap Equity VEBA Fund and LongView Core Plus Fixed Income Fund, City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Fund in the above-entitled action. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. I submit this declaration in support of Moving Parties' Motion to Compel Discovery Regarding FirstEnergy's Internal Investigation.

3. Attached hereto are true and correct copies of the following exhibits:

<b>No.</b>	<b>DESCRIPTION</b>	<b>FILED<sup>1</sup></b>
1	Memo to PwC Assurance – FirstEnergy Corp. 2020 Audit File, dated August 16, 2020 (Bates No. PwC_FE_SecLitig_00027996);	In Camera
2	Short Message Report of chat conversations, dated August 16, 2020 (Bates No. FE_CIV_SEC_0466452);	In Camera
3	Excerpts from the Confidential Deposition Transcript of Julia Johnson, dated May 12, 2023;	In Camera
4	Excerpts from FirstEnergy's Confidential 30(b)(6) Deposition Transcript of Tracy Ashton, dated May 1, 2023;	Public
5	Defendants Deposition Exhibit JD 39: Document entitled: "Topic 9: Terminations and Separations" (summary of terminations);	In Camera

<sup>1</sup> Exhibits 1-3 and 5-11 are being provided in camera pursuant to §8 of the Amended Stipulated Protective Order (ECF 411) as non-party PricewaterhouseCoopers LLP and defendants FirstEnergy, Julia Johnson, Charles E. Jones, Michael Dowling, and Thomas N. Mitchell, have designated these confidential under the Amended Stipulated Protective Order.

No.	DESCRIPTION	FILED <sup>1</sup>
6	Excerpts from the Confidential Deposition Transcript of Thomas N. Mitchell, dated May 17, 2023;	In Camera
7	Excerpts from the Confidential Deposition Transcript of Thomas N. Mitchell, dated May 18, 2023;	In Camera
8	Defendants Deposition Exhibit JD 25: FirstEnergy Finance Committee of the Board of Directors Presentation entitled: “Treasury Update”;	In Camera
9	Defendants Deposition Exhibit JD 63: Email from S. Staub to S. Demetriou et al., dated Nov. 18, 2020;	In Camera
10	Excerpts from FirstEnergy’s Confidential 30(b)(6) Deposition Transcript of Joseph Storsin, dated December 6, 2023; and	In Camera
11	Excerpts from FirstEnergy’s Confidential 30(b)(6) Deposition Transcript of Joseph Storsin, dated December 7, 2023.	In Camera

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 30, 2023, at San Diego, California.

  
 \_\_\_\_\_



## Mailing Information for a Case 2:20-cv-03785-ALM-KAJ Owens v. FirstEnergy Corp. et al

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[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 2

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 3

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]



# EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE FIRSTENERGY CORP. ) Civil Action  
SECURITIES LITIGATION, ) 2:20-cv-3785

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This document relates to:

ALL ACTIONS.

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CONFIDENTIAL

UNDER THE PROTECTIVE ORDER

VIRTUAL VIDEOCONFERENCE VIDEO-RECORDED

DEPOSITION OF TRACY ASHTON, FIRSTENERGY 30(B)(6)

VOLUME I

Thursday, May 19, 2022

Remotely Testifying from Cleveland, Ohio

Reported By:

Hanna Kim, CLR, CSR No. 13083

Job No. 5208512

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<p>1 first mentioned at page 15 of the Deferred 2 Prosecution Agreement, which is Exhibit 1. 3 Who is Executive 1? 4 A. Chuck Jones. 5 Q. "Executive 2" is right below that. Is 11:08:47 6 that Michael Dowling? 7 A. Yes. 8 Q. Are these pseudonyms -- pseudonyms that 9 FirstEnergy suggested, or did the Government suggest 10 them to FirstEnergy? 11:09:03 11 A. I do not know that answer. 12 Q. On that same page, you see the pseudonym, 13 "Public Official A." 14 Do you see that? 15 A. Yes. 11:09:21 16 Q. Is Public Official A Larry Householder? 17 A. Yes. 18 Q. On the next page, page 16, there's mention 19 of a "Public Official B," as in "Beatty"? 20 A. Yes. 11:09:53 21 Q. Is Public Official B Sam Randazzo? 22 A. Yes. 23 Q. Still page 16, there's a mention of 24 "Company 1." Who is Company 1? 25 A. Sustainability Alliance of Ohio, Inc. 11:10:18 Page 22</p>	<p>1 (Off the record.) 2 THE VIDEOGRAPHER: All right. We are back 3 on the record at 12:0- -- -04 p.m. 4 Go ahead, please. 5 BY MR. FORGE: 12:04:23 6 Q. Welcome back, Ms. Ashton. 7 Ms. Ashton, you have available to you a 8 number of materials today to assist you with 9 testimony; correct? 10 A. Yes. 12:04:34 11 Q. One of those you identified earlier is a 12 table of pseudonyms; correct? 13 A. Yes. 14 Q. And we're going mark that document as 15 Exhibit 2. 12:04:51 16 (Ashton Deposition Exhibit 2 was marked 17 electronically.) 18 MR. RITTS: And I'm going to -- this is 19 Geoffrey Ritts. I'm going to designate that as 20 confidential, the version with the legend on it. 12:05:01 21 MR. FORGE: Okay. And I'm introducing 22 that exhibit as Exhibit 2. 23 BY MR. FORGE: 24 Q. And this is a document that was prepared 25 to help you testify about the Deferred Prosecution 12:05:14 Page 24</p>
<p>1 Q. Right after that is a mention of "Company 2 2." Who is Company 2? 3 A. IEU Ohio Administration Company, LLC. 4 Q. Ms. Ashton, it's totally fine if you do, 5 but I just need to know for the record. Do you have 11:10:41 6 any materials in front of you or that are accessible 7 to you to help you answer the questions today? 8 A. Yes. 9 Q. Okay. What is it you have in front of 10 you? 11:10:52 11 A. I have a copy of the DPA. I have a 12 pseudonym chart. And I also have supporting 13 information for the topics identified in the notice. 14 MR. FORGE: Okay. Well, why don't we take 15 a quick break so counsel can distribute all those 11:11:13 16 materials to everyone else participating, and then 17 we'll get back on the record after. 18 MR. RITTS: I don't think we -- 19 THE VIDEOGRAPHER: Oh, go ahead. Go 20 ahead. Sorry. 11:11:29 21 MR. RITTS: Okay. We -- we can go off the 22 record. 23 THE VIDEOGRAPHER: All right. We're going 24 off the record. The time is 11:11 a.m. 25 One moment. 11:11:40 Page 23</p>	<p>1 Agreement, which we've been referring to as the DPA; 2 correct? 3 A. Yes. 4 Q. So this is all information that you were 5 provided to help you answer questions today; right? 12:05:29 6 A. Yes. 7 Q. And it's all information you were 8 authorized to share with us today; correct? 9 A. Yes. 10 Q. Okay. Is there any information that you 12:05:43 11 have to assist with your testimony here today that 12 does not relate to the DPA? 13 A. No. 14 Q. Is there any information that you have 15 access to here today to assist with your testimony 12:06:03 16 that you are not authorized to share with us? 17 A. Not that I'm aware of. 18 Q. How will you know when to turn to one 19 particular document or another to assist with your 20 testimony? Do you have any sort of index? 12:06:21 21 A. Yes. 22 Q. Okay. Where is that index located? 23 A. In front of me. 24 Q. Okay. 25 MR. FORGE: So let's, if we could, 12:06:40 Page 25</p>

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<p>1 Counsel, please place that document in the public 2 folder. 3 MR. RITTS: Okay. 4 MR. FORGE: All right. I'm going to mark 5 this document as Exhibit Number 3. 12:07:55 6 (Ashton Deposition Exhibit 3 was marked 7 electronically.) 8 MR. RITTS: And I'm going to designate 9 that as confidential also. 10 BY MR. FORGE: 12:08:08 11 Q. Is Exhibit Number 3 the index to which you 12 were referring, Ms. Ashton? 13 A. So it's not labeled Exhibit 3 yet. It's 14 labeled "Plaintiffs' Deposition Topics." And, yes, 15 that is the -- 12:08:27 16 MR. RITTS: Yeah, if you scroll down, it 17 says "Exhibit 3" -- 18 THE WITNESS: Oh, is it? 19 MR. RITTS: -- on the bottom. 20 THE WITNESS: Does it? 12:08:33 21 MR. RITTS: Well, actually -- I see one 22 with an exhibit stamp on it, but the one that the 23 witness -- 24 THE WITNESS: Oh, mine didn't yet. 25 MR. RITTS: -- has doesn't have the -- 12:08:39 Page 26</p>	<p>1 A. Document A includes supporting information 2 on Topic A of the deposition notice. 3 Q. Okay. 4 MR. FORGE: Let's -- if we can enter -- if 5 we can see Document A. 12:10:15 6 Okay. 7 MR. RITTS: I think it's there. 8 MR. FORGE: I'm going to mark Document A 9 as Exhibit 4. 10 (Ashton Deposition Exhibit 4 was marked 12:10:40 11 electronically.) 12 MR. RITTS: I'm going to designate that as 13 confidential. 14 BY MR. FORGE: 15 Q. This document is titled "TOPIC A: MONEY 12:10:51 16 IN EXCHANGE FOR OFFICIAL ACTION." 17 And that document sets forth information 18 you were authorized to share with us today regarding 19 the subjects covered in this document; correct? 20 A. Yes. 12:11:09 21 Q. What is Document B? 22 A. Information in support of Topic B of the 23 notice. 24 Q. Okay. 25 MR. FORGE: Let's take a look at that. 12:11:29 Page 28</p>
<p>1 THE COURT REPORTER: Excuse me. One 2 person at a time, please. 3 MR. RITTS: Sure. 4 Hit -- hit refresh. 5 THE WITNESS: Let me refresh again. 12:08:46 6 MR. RITTS: There we go. 7 THE WITNESS: There it is, yep. 8 Yes. 9 BY MR. FORGE: 10 Q. Is this index a comprehensive listing of 12:08:56 11 all the materials you have access to today? 12 A. In the -- are you asking in the room? 13 Q. I'm asking if it's a comprehensive list of 14 all the materials to which you have access to assist 15 in your testimony here today. 12:09:22 16 A. Yes. 17 Q. So these are all materials that relate to 18 the DPA; correct? 19 A. Yes. 20 Q. And these are all materials that contain 12:09:31 21 information that you're authorized to share with us 22 here today; correct? 23 A. Yes. 24 Q. Okay. What is -- what document is 25 Document A, as in "apple"? 12:09:51 Page 27</p>	<p>1 I'm going to mark Topic B as Exhibit 5. 2 (Ashton Deposition Exhibit 5 was marked 3 electronically.) 4 MR. RITTS: I'm going to designate that as 5 confidential. 12:12:07 6 BY MR. FORGE: 7 Q. The title of Topic B is "FORMATION OF 8 PARTNERS FOR PROGRESS." Is this all information you 9 are authorized to share with us regarding this 10 topic? 12:12:24 11 A. Yes. 12 Q. Do you have any personal knowledge of any 13 information on this topic? 14 A. No. 15 Q. Do you have knowledge of any information 12:12:41 16 on this topic, other than what is set forth in 17 Document B, which is Exhibit 5? 18 A. Beyond seeing certain text messages that 19 might be in support of this, I don't have any 20 further information. 12:13:16 21 Q. The same question with respect to 22 Exhibit 4, Topic A, do you have knowledge of any 23 information regarding the topic of money in exchange 24 for official action beyond what is set forth in 25 Exhibit 4? 12:13:33 Page 29</p>

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<p>1 A. No.</p> <p>2 Q. Okay. Let's move on to -- I think we're</p> <p>3 at Topic C. Is Topic C a document that reflects</p> <p>4 information concerning the DPA that you're</p> <p>5 authorized to share with us here today? 12:13:59</p> <p>6 A. Yes.</p> <p>7 MR. FORGE: So let's take a look at that.</p> <p>8 And I've marked Topic C as Exhibit 6 and</p> <p>9 introduced it.</p> <p>10 (Ashton Deposition Exhibit 6 was marked 12:14:42</p> <p>11 electronically.)</p> <p>12 BY MR. FORGE:</p> <p>13 Q. Does Topic C set forth all of the</p> <p>14 information you have regarding the topic of</p> <p>15 contributions to Partners for Progress? 12:14:50</p> <p>16 A. Yes.</p> <p>17 MR. RITTS: And I designate Exhibit 6 as</p> <p>18 confidential.</p> <p>19 BY MR. FORGE:</p> <p>20 Q. Okay. Topic D is described as 12:15:14</p> <p>21 "Contributions from Partners for Progress to</p> <p>22 Generation Now."</p> <p>23 That, again, is another document that</p> <p>24 reflects information related to the DPA that you are</p> <p>25 authorized to share with us today; correct? 12:15:34</p> <p style="text-align: right;">Page 30</p>	<p>1 MR. RITTS: E.</p> <p>2 MS. DUFFY: E?</p> <p>3 MR. FORGE: E, as in "Edward."</p> <p>4 MS. DUFFY: Thank you.</p> <p>5 MR. RITTS: There it is. 12:18:21</p> <p>6 MR. FORGE: Okay. I'm marking the Topic E</p> <p>7 document as Exhibit 8.</p> <p>8 (Ashton Deposition Exhibit 8 was marked</p> <p>9 electronically.)</p> <p>10 MR. RITTS: I designate Exhibit 8 12:18:44</p> <p>11 confidential.</p> <p>12 BY MR. FORGE:</p> <p>13 Q. Do you have any information concerning the</p> <p>14 topic of control of Partners for Progress beyond</p> <p>15 what is set forth in Exhibit 8? 12:18:55</p> <p>16 A. No.</p> <p>17 Q. Okay. Let's go to Exhibit -- or let's go</p> <p>18 to Topic F, "Contribution to Partners for Progress</p> <p>19 Pre-Formation."</p> <p>20 Does Topic F reflect information you were 12:19:27</p> <p>21 provided related to the DPA that you're authorized</p> <p>22 to share with us today?</p> <p>23 A. Yes.</p> <p>24 MR. FORGE: All right. Let's add that to</p> <p>25 the mix. 12:19:46</p> <p style="text-align: right;">Page 32</p>
<p>1 A. Yes.</p> <p>2 MR. FORGE: So let's introduce that.</p> <p>3 That is now Exhibit 7.</p> <p>4 (Ashton Deposition Exhibit 7 was marked</p> <p>5 electronically.) 12:16:08</p> <p>6 MR. RITTS: I designate Exhibit 7</p> <p>7 confidential.</p> <p>8 BY MR. FORGE:</p> <p>9 Q. Do you have any information regarding the</p> <p>10 subject of contributions from Partners for Progress 12:16:14</p> <p>11 to Generation Now beyond the information set forth</p> <p>12 in Exhibit 7?</p> <p>13 A. No.</p> <p>14 Q. All right.</p> <p>15 Let's turn to Topic E, which is "Control 12:16:34</p> <p>16 of Partners for Progress."</p> <p>17 Is that another document that you have to</p> <p>18 assist with your testimony related to the DPA that</p> <p>19 you're authorized to share with us here today?</p> <p>20 A. Yes. 12:16:50</p> <p>21 Q. All right.</p> <p>22 MR. FORGE: Let's introduce that.</p> <p>23 MS. DUFFY: This is Marjorie Duffy. I'm</p> <p>24 having a -- a tech issue.</p> <p>25 Could you confirm which topic is being -- 12:18:02</p> <p style="text-align: right;">Page 31</p>	<p>1 Okay. I'm going mark that as Exhibit</p> <p>2 Number 9 and introduce it.</p> <p>3 (Ashton Deposition Exhibit 9 was marked</p> <p>4 electronically.)</p> <p>5 BY MR. FORGE: 12:20:23</p> <p>6 Q. Do you have any information regarding the</p> <p>7 subject of contribution to Partners for Progress</p> <p>8 pre-formation beyond what is set forth in Exhibit 9?</p> <p>9 A. No.</p> <p>10 MR. RITTS: I designate Exhibit 9 12:20:45</p> <p>11 confidential.</p> <p>12 BY MR. FORGE:</p> <p>13 Q. The next topic is G. It is described as</p> <p>14 "\$59 Million to Generation Now (2017 through</p> <p>15 March 2020)." [As read] 12:20:56</p> <p>16 And just so I don't have to ask the same</p> <p>17 question for each one, D -- D through X, do each of</p> <p>18 these documents reflect information related to the</p> <p>19 DPA that you are authorized to share with us here</p> <p>20 today? 12:21:16</p> <p>21 A. Yes.</p> <p>22 Q. And do you have any information regarding</p> <p>23 the corresponding topics for each of these entries</p> <p>24 in Exhibit 3 beyond what is set forth in each</p> <p>25 document? 12:21:34</p> <p style="text-align: right;">Page 33</p>

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<p>1 A. I can't recall from memory from each of 2 them, but there may be certain text messages that 3 are referenced in the DPA that I'm also aware of; 4 but beyond that, no. 5 Q. Okay. 12:21:54 6 MR. FORGE: So if we could put G through X 7 in the folder. 8 BY MR. FORGE: 9 Q. And while that's happening, let me turn 10 back to Exhibit 2, which is your pseudonym list. I 12:22:40 11 noticed in your list I don't see a reference to 12 "Federal Official 1," who, if you turn to page 23 of 13 Exhibit 1, is referenced there. 14 Do you see about one-third of the way down 15 a reference to "Federal Official 1" in Exhibit 1? 12:23:13 16 A. Yes. 17 Q. Who is Federal Official 1? 18 A. Former President Trump. 19 Q. Is there a reason why you did not include 20 Former President Trump in your list of Exhibit 2? 12:23:41 21 A. I assume it was an oversight. 22 Q. So not that you're aware of, no reason -- 23 no specific reason? 24 A. Not that I'm aware of, no. 25 Q. If you look at page 24 of Exhibit 1, there 12:24:00 Page 34</p>	<p>1 page 25 of Exhibit 1? 2 A. I do not. 3 Q. Now, at the -- on the last page of 4 Exhibit 2, you have two senators listed; right? And 5 they -- they are referenced in the DPA as "Senator 12:27:41 6 3" and "Senator 4"; correct? 7 A. Yes. 8 Q. At page 41 of the DPA, which, again, is 9 Exhibit 1, there's a reference to "Senator 5" and a 10 reference "Senator 6." 12:28:04 11 Who are those individuals? 12 A. I'm sorry, could you restate the ref -- 13 where you're looking in the DPA? 14 Q. Sure. It's near the top of page 41. 15 If you could, just tell me what -- what is 12:28:32 16 it you just pulled off the chair to set in front of 17 you? 18 A. The docu- -- various documents that 19 support the DPA. 20 Q. I mean, are -- are you saying those are 12:28:50 21 documents beyond what's listed in Exhibit 3? 22 A. Yes. 23 Q. Okay. What are those documents? 24 A. Various text messages that are primarily 25 text messages to support the DPA. 12:29:17 Page 36</p>
<p>1 is a reference about two-thirds of the way down -- 2 I'm sorry, down at the very bottom, to "Company B 3 Executive." 4 Who is -- I'm sorry, I see Company B 5 Executive is in your list. 12:24:46 6 A. Yes. Mike Carey. 7 MR. RITTS: Wait for a question. 8 BY MR. FORGE: 9 Q. Got it. Okay. 10 On the next page, page 25 -- this is page 12:25:09 11 25 of Exhibit 1 -- near the bottom there's a 12 reference to "two FE lobbyists." 13 To whom does that refer? 14 A. I -- I do not know. 15 Q. Now, you knew Public Official 1 -- I'm 12:25:59 16 sorry, Federal Official 1 was former president 17 Donald Trump; right? 18 Right? 19 A. Yes. 20 Q. And that was -- that was by virtue of your 12:26:16 21 preparation for today's deposition, not personal 22 knowledge; correct? 23 A. Correct. 24 Q. But you don't recall from your preparation 25 the identities of the two FE lobbyists referenced on 12:26:29 Page 35</p>	<p>1 Q. Okay. 2 MR. FORGE: Well, let's put those 3 documents -- 4 BY MR. FORGE: 5 Q. Is there an index for that binder that you 12:29:23 6 just put in front of you? 7 A. Yes. 8 Q. Okay. 9 MR. FORGE: Well, let's take a break and 10 put the index and the documents in the folder. 12:29:33 11 BY MR. FORGE: 12 Q. And then let me just make sure, the index 13 and these documents reflect information related to 14 the DPA; correct? 15 A. Yes. 12:29:48 16 Q. And this is information you were provided 17 to enable you to provide to us information 18 concerning the DPA today; correct? 19 A. Yes. 20 Q. Okay. 12:29:58 21 MR. FORGE: So let's just take a break and 22 get those loaded up. 23 MR. RITTS: Off the record. 24 THE VIDEOGRAPHER: All right. Yep. 25 We are going off the record. The time is 12:30:09 Page 37</p>

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<p>1 BY MR. FORGE:                  2 Q. So do you refuse to answer my question                  3 with a "yes" or a "no"?                  4 A. Can you repeat your question?                  5 Q. Yes. 13:09:50                  6 Did FirstEnergy conspire with Chuck Jones                  7 to commit honest services wire fraud?                  8 MS. RENDON: Objection. Carole Rendon.                  9 MR. RITTS: Object to the extent it calls                  10 for a legal conclusion. 13:10:07                  11 THE WITNESS: I -- I can't recharacterize                  12 the -- the DPA. I think the facts in it support                  13 that conclusion.                  14 BY MR. FORGE:                  15 Q. I'm not asking you to recharacterize the 13:10:23                  16 DPA. I'm asking you to give me a yes-or-no answer                  17 to a question.                  18 Did FirstEnergy conspire with Chuck Jones                  19 to commit honest services wire fraud?                  20 MS. RENDON: Objection. Carole Rendon. 13:10:38                  21 MR. RITTS: Objection.                  22 THE WITNESS: The facts of the DPA, yes,                  23 support that.                  24 BY MR. FORGE:                  25 Q. So it's a "yes"? 13:11:10</p> <p style="text-align: right;">Page 54</p>	<p>1 FirstEnergy has provided substantial cooperation,                  2 including:"                  3 And then it lists a number of items.                  4 The first one is described as "conducting                  5 a thorough internal investigation." 13:12:53                  6 Do you see that?                  7 A. Yes.                  8 Q. What made this -- what comprised this                  9 internal investigation?                  10 MR. RITTS: I'm going to object to the -- 13:13:07                  11 on -- on the grounds of privilege there. The --                  12 the -- the -- the -- the internal investigation                  13 is -- is subject to privilege.                  14 (Record marked.)                  15 BY MR. FORGE: 13:13:21                  16 Q. Did FirstEnergy withhold/conceal from the                  17 Government any information it gathered concerning                  18 this crime set forth in the DPA and criminal                  19 information?                  20 A. Not to my knowledge, but I -- I don't -- I 13:13:46                  21 don't have -- or I'm not prepared to answer that                  22 question.                  23 Q. So as far as you know, on behalf of                  24 FirstEnergy, any information that FirstEnergy                  25 uncovered concerning these crimes -- this crime of 13:14:02</p> <p style="text-align: right;">Page 56</p>
<p>1 MR. RITTS: Objection.                  2 MS. RENDON: Objection. Carole Rendon.                  3 BY MR. FORGE:                  4 Q. So is the answer to my question "yes"?                  5 MS. RENDON: Same objection. 13:11:25                  6 MR. RITTS: Same objection.                  7 THE WITNESS: Yes.                  8 BY MR. FORGE:                  9 Q. Did FirstEnergy conspire with Michael                  10 Dowling to commit honest services wire fraud? 13:11:39                  11 MR. McCaffrey: Objection. John                  12 McCaffrey.                  13 MR. RITTS: Object to the extent it calls                  14 for A legal conclusion.                  15 THE WITNESS: The facts of the DPA would 13:11:54                  16 support that, yes.                  17 BY MR. FORGE:                  18 Q. So the answer to my question is "yes"?                  19 MR. RITTS: Same objection.                  20 THE WITNESS: Yes. 13:12:08                  21 BY MR. FORGE:                  22 Q. Turning to page 3 of Exhibit 1, in Section                  23 5 there is a heading that says "Defendant's                  24 Obligations." And the first subsection beneath that                  25 is titled "Cooperation," and it states, "To date, 13:12:36</p> <p style="text-align: right;">Page 55</p>	<p>1 conspiracy to commit honest services wire fraud, it                  2 shared with the Government; correct?                  3 MR. RITTS: Objection. Foundation.                  4 I also think it's beyond the scope of the                  5 topics in the notice. There -- there is no topic in 13:14:16                  6 the notice that addresses this.                  7 THE WITNESS: Yeah, I'm not prepared to                  8 answer that question today.                  9 BY MR. FORGE:                  10 Q. So you're not prepared to answer any 13:14:27                  11 questions regarding the very first section of the                  12 "Defendant's Obligations" in the DPA? Is that what                  13 you're saying?                  14 A. No, that's not what I said.                  15 Q. Okay. Then why don't you tell me what 13:14:41                  16 constituted what is described as a thorough                  17 investigation as set forth in the very first section                  18 of "Defendant's Obligations" in the DPA?                  19 MR. RITTS: Objection. The -- the                  20 internal investigation is privileged. The -- the 13:15:01                  21 internal investigation also is beyond the scope of                  22 the -- of the topics described in the notice.                  23 MR. FORGE: Well, I disagree with you                  24 about that, Geoff. Again, it's a speaking                  25 objection, which is, once again, improper. 13:15:15</p> <p style="text-align: right;">Page 57</p>

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<p>1 what's set forth in those materials; correct?                  2 A. I believe I also indicated I have text                  3 messages, which -- and other information, which I                  4 think we've provided here as well.                  5 Q. Okay. So other than with the possible 14:38:39                  6 exception of the documents that are annotated to the                  7 DPA, you have no other information beyond what is                  8 set forth in Exhibits 4 through 9 and 12 through 33;                  9 correct?                  10 MR. RITTS: Objection. 14:39:04                  11 THE WITNESS: Not that I'm aware of.                  12 BY MR. FORGE:                  13 Q. So that's correct?                  14 A. I mean, I can't -- I -- I don't know if I                  15 can state that I -- that every single thing is in 14:39:20                  16 binder. But, to my knowledge, yes, this is                  17 complete.                  18 Q. Well, you don't have personal knowledge --                  19 A. But this is what I've been -- this is what                  20 I've been provided with, yes. 14:39:31                  21 Q. Okay. Well, you don't have any                  22 preexisting personal knowledge regarding any of                  23 these topics, do you?                  24 A. Are you asking me as FirstEnergy's                  25 witness, or are you asking me personally? 14:39:48                  Page 74</p>	<p>1 Q. Do you have any personal knowledge                  2 regarding any of the acts described in the DPA?                  3 A. To the extent my team was involved in data                  4 out of our accounting records, that would be the                  5 only information that I -- I would have been aware 14:41:35                  6 of.                  7 Q. What -- what do you mean by to the extent                  8 your team was involved in data?                  9 A. I guess personally in my role with the                  10 company re- -- requests for information 14:41:51                  11 throughout -- prior to entering into the DPA, myself                  12 and my -- individuals on my team were involved in                  13 that in my role as assistant controller.                  14 Q. So you're saying you and your team may                  15 have been involved in gathering information after 14:42:19                  16 the arrests occurred in July of 2020?                  17 A. Yes.                  18 Q. Okay. Did you have any involvement in any                  19 of the acts described in the DPA prior to the arrest                  20 of Larry Householder and others in July of 2020? 14:42:45                  21 A. No.                  22 Q. Other than what you've read in the DPA and                  23 what is set forth in the materials your counsel                  24 provided to you in Exhibits 4 through 9 and 12                  25 through 33, as well as the annotations to the DPA, 14:43:14                  Page 76</p>
<p>1 Q. Personally. You, as Tracy Ashton, you                  2 don't have any personal knowledge as to any of these                  3 topics; correct?                  4 A. Not in addition to the -- I mean,                  5 personally I have read the DPA prior to this, 14:40:10                  6 because it's a public document. So in my role with                  7 the company, yes, I've -- I've read the DPA prior                  8 to -- to this -- this work.                  9 Q. Right.                  10 But that's the DPA. That's -- that's one 14:40:28                  11 of the documents we've been discussing; right?                  12 A. Correct.                  13 Q. Okay. So what I'm getting at is, in other                  14 words, you weren't personally involved in any of the                  15 acts that are at issue here; correct? 14:40:41                  16 A. No, I was not.                  17 Q. Okay. So let me rephrase the question                  18 because you're answering it, "No, I was not." I                  19 think it's clear, but were you involved in any of                  20 the acts that are at issue in the DPA? 14:40:58                  21 A. No.                  22 Q. Did you participate in any sort of                  23 investigation regarding any of the acts set forth in                  24 the DPA?                  25 A. No. 14:41:10                  Page 75</p>	<p>1 do you have any information concerning the DPA?                  2 A. No.                  3 Q. All right.                  4 So now I'm going to mark as Exhibit 34 a                  5 document entitled "LEAD PLAINTIFF'S NOTICE OF RULE 14:44:13                  6 30(b)(6) OF FIRSTENERGY CORP."                  7 Do you see that?                  8 A. Yes.                  9 (Ashton Deposition Exhibit 34 was marked                  10 electronically.) 14:44:32                  11 BY MR. FORGE:                  12 Q. And if you turn to page 3 of the                  13 document -- let's see. Hold on. I think it's more                  14 than page 3 -- page 4 of the document, it's the                  15 first page of Schedule A? 14:45:03                  16 THE WITNESS: Do I have the right                  17 document? So --                  18 MR. RITTS: Yeah, go down. Right there.                  19 There. That's the page.                  20 THE WITNESS: Oh, this is page 1. Sorry. 14:45:17                  21 MR. RITTS: It's the fourth page --                  22 THE WITNESS: I apologize. I was looking                  23 at the number on the bottom of the page.                  24 Got it.                  25 BY MR. FORGE: 14:45:23                  Page 77</p>



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<p>1 THE WITNESS: Again, I -- I can't speak to                  2 the magnitude of it. That's not within the DPA.                  3 And I'm not prepared to testify on behalf of the                  4 company on that.                  5 BY MR. FORGE: 16:22:35                  6 Q. I'm not asking you that. I'm not asking                  7 you what the magnitude was at this time. You've                  8 already said you're not prepared to testify to that.                  9 What I'm asking you is, whatever that                  10 magnitude was, is it your testimony that the 16:22:45                  11 magnitude was a factor or not a factor that                  12 contributed to making the passage of nuclear                  13 legislation primary among FirstEnergy's priorities?                  14 MR. RITTS: Objection.                  15 THE WITNESS: I don't know. Without 16:23:06                  16 knowing the magnitude, I -- I don't -- I don't know                  17 how to make that conclusion.                  18 BY MR. FORGE:                  19 Q. Okay. Well, the next sentence says that                  20 "FirstEnergy Corp. sought official action from 16:23:26                  21 Public Official A and Public Official B in the form                  22 of helping draft nuclear legislation that would                  23 further the interests of FirstEnergy Corp. and FES."                  24 Do you see that?                  25 A. Yes. 16:23:41</p> <p style="text-align: right;">Page 134</p>	<p>1 A. Is "right" a question?                  2 Q. Yes. I'm asking you to confirm, you're                  3 looking through your script?                  4 A. I am --                  5 MR. RITTS: Objection. 16:25:55                  6 THE WITNESS: -- looking at the exhibits.                  7 BY MR. FORGE:                  8 Q. What are you looking right now while you                  9 try to come up with an answer to my question?                  10 A. I don't know if the exhibit is recorded 16:26:08                  11 yet.                  12 Q. It is.                  13 What are you looking at? If you just give                  14 me the letter, I can tell you the exhibit number.                  15 A. Topic L. 16:26:24                  16 Q. That would be Exhibit Number 17.                  17 So to answer my question, you're looking                  18 at Exhibit 17; correct?                  19 A. Correct.                  20 Q. And so you're looking at a document that 16:26:42                  21 your lawyers prepared for you to answer my question;                  22 correct?                  23 MR. RITTS: Objection.                  24 THE WITNESS: I'm looking at Exhibit 17.                  25 BY MR. FORGE: 16:26:55</p> <p style="text-align: right;">Page 136</p>
<p>1 Q. Okay. Are you prepared to explain how the                  2 draft legislation FirstEnergy -- how the nuclear                  3 legislation FirstEnergy sought official action from                  4 in drafting would further the interest of                  5 FirstEnergy? 16:24:02                  6 A. Yes.                  7 Q. Okay. How so?                  8 A. The leg- -- legislation included a                  9 decoupling provision.                  10 Q. How would that further the interests of 16:24:24                  11 FirstEnergy?                  12 A. Decoupling would allow FirstEnergy to                  13 receive a fixed amount of revenue from its                  14 customers.                  15 Q. How would that further the interests of 16:24:55                  16 FirstEnergy?                  17 A. It created stability with its revenue by                  18 fixing the amount it would recover.                  19 Q. Any oth- -- is it -- in any other way did                  20 it further the interests of FirstEnergy? 16:25:18                  21 And just for the record, you're looking                  22 through your script; right?                  23 MR. RITTS: Objection.                  24 BY MR. FORGE:                  25 Q. Right? 16:25:44</p> <p style="text-align: right;">Page 135</p>	<p>1 Q. You previously identified Exhibit 17 as a                  2 document your lawyers prepared for you; correct?                  3 MR. RITTS: Objection.                  4 THE WITNESS: Does this relate to a                  5 specific topic? 16:27:04                  6 BY MR. FORGE:                  7 Q. You have testified that your lawyers                  8 created Exhibit 17; correct?                  9 MR. RITTS: Objection.                  10 THE WITNESS: Yes. 16:27:14                  11 BY MR. FORGE:                  12 Q. Okay. And your lawyers provided                  13 Exhibit 17 to you; correct?                  14 MR. RITTS: Objection.                  15 THE WITNESS: Yes. 16:27:26                  16 BY MR. FORGE:                  17 Q. And so you are looking at a document that                  18 your lawyers created for you to answer my question;                  19 correct?                  20 MR. RITTS: Objection. 16:27:38                  21 THE WITNESS: Yes.                  22 BY MR. FORGE:                  23 Q. So your understanding is the answer to a                  24 question like the one I posed that your lawyers want                  25 you to give is set forth in Exhibit 17, which they 16:27:58</p> <p style="text-align: right;">Page 137</p>

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<p>1 provided to you; correct?                  2 MR. RITTS: Objection.                  3 THE WITNESS: No. Actually, I was just                  4 trying to ensure I was on the correct topic since                  5 you indicated you weren't going to provide me with 16:28:14                  6 your topic. So I -- I was --                  7 BY MR. FORGE:                  8 Q. So you're saying --                  9 A. -- reviewing my materials --                  10 MR. RITTS: Hold on. Let her -- let 16:28:22                  11 her --                  12 THE WITNESS: I mean, I'm reviewing --                  13 reviewing my materials to ensure I can answer your                  14 question appropriately.                  15 BY MR. FORGE: 16:28:29                  16 Q. So you -- you were -- you weren't looking                  17 at the materials that your lawyers provided to get                  18 the answer?                  19 MR. RITTS: Objection.                  20 THE WITNESS: I was reviewing each topic 16:28:39                  21 relevant to the question you had in order to answer                  22 you appropriately.                  23 BY MR. FORGE:                  24 Q. Okay. So you were looking at the                  25 documents your lawyers provided in order to answer 16:28:58                  Page 138</p>	<p>1 MR. RITTS: Objection.                  2 THE WITNESS: I'm not -- I'm not sure                  3 that's within the scope. I reviewed the materials I                  4 was provided. I would have otherwise not had access                  5 to any of this information. 16:30:52                  6 BY MR. FORGE:                  7 Q. Is that a long way of saying you did no --                  8 you made no efforts to independently verify the                  9 accuracy of the information your lawyers provided                  10 for you to use for your answers today? 16:31:06                  11 MR. RITTS: Objection.                  12 THE WITNESS: I -- I don't know what                  13 independent example you have; but, again, I -- I had                  14 no access to this information prior to receiving it                  15 for this. 16:31:22                  16 BY MR. FORGE:                  17 Q. Okay. So you weren't even able -- even if                  18 you had wanted to, you weren't even able to verify                  19 any of the information the lawyers provided to you                  20 to use for your answers today; correct? 16:31:34                  21 MR. RITTS: Objection.                  22 THE WITNESS: I -- I -- I did not have                  23 access to it, and -- and I -- so, no, I -- I                  24 wouldn't -- I didn't have access to any of this                  25 information. 16:31:58                  Page 140</p>
<p>1 my question; correct?                  2 MR. RITTS: Objection.                  3 THE WITNESS: Yes.                  4 BY MR. FORGE:                  5 Q. Okay. So -- and you knew that those 16:29:07                  6 documents that your lawyer provided set forth the                  7 answers your lawyer -- your lawyers want you to give                  8 to questions that correspond to those topics;                  9 correct?                  10 MR. RITTS: Objection. 16:29:22                  11 THE WITNESS: They provide me with                  12 relevant background information based on each of the                  13 topics that were provided in the notice.                  14 BY MR. FORGE:                  15 Q. Well, they provide you with their 16:29:36                  16 characterization of the information; correct?                  17 MR. RITTS: Objection.                  18 THE WITNESS: I don't know if --                  19 MR. RITTS: We've been going about --                  20 BY MR. FORGE: 16:29:49                  21 Q. Well, let me ask -- let me ask you this:                  22 What, if any, independent work did you undertake to                  23 verify the accuracy and completeness of any of the                  24 scripted answers your lawyers set forth in the                  25 documents they provided to you today? 16:30:07                  Page 139</p>	<p>1 BY MR. FORGE:                  2 Q. And, therefore, you were not able to                  3 verify any of the information in any of the                  4 documents that your -- that you've identified that                  5 your lawyers provided for you to use for your 16:32:07                  6 answers during this deposition; correct?                  7 MR. RITTS: Objection.                  8 THE WITNESS: What would I have verified                  9 it to, I guess, specifically? Do you have an                  10 example? 16:32:22                  11 BY MR. FORGE:                  12 Q. Sure.                  13 Let's look at Exhibit 17.                  14 Do you see on Exhibit 17 E2? Do you see                  15 that? 16:32:32                  16 A. Yes.                  17 Q. It says, "Decoupling is a regulatory                  18 mechanism commonly used by electric utilities which                  19 allows them to 'decouple' the revenue collected by a                  20 utility from the amount of electricity consumed." 16:32:43                  21 Do you see that?                  22 A. Yes.                  23 Q. How common is decoupling used in a reg- --                  24 in -- by electric -- electric utilities?                  25 A. It's fairly common. 16:32:53                  Page 141</p>

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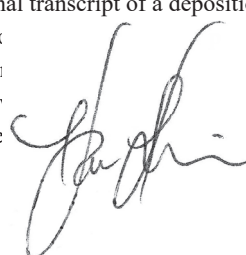
1 JURAT  
2  
3 I, TRACY ASHTON, do hereby certify under  
4 penalty of perjury that I have read the foregoing  
5 transcript of my deposition taken remotely on  
6 Thursday, May 19, 2022; that I have made such  
7 corrections as appear noted herein in ink, initialed  
8 by me; that my testimony as contained herein, as  
9 corrected, is true and correct.  
10  
11 Dated this \_\_\_\_ day of \_\_\_\_\_, 2022,  
12 at \_\_\_\_\_.  
13  
14  
15  
16 \_\_\_\_\_  
17 TRACY ASHTON  
18  
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24  
25

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1 Geoffrey J. Ritts  
2 gjritts@jonesday.com  
3 JUNE 3, 2022  
4 RE: Firstenergy Corp Securities Litigation  
5 MAY 19, 2022, TRACY ASHTON, FIRSTENERGY 30(B)(6), JOB NO. 5208512  
6 The above-referenced transcript has been  
7 completed by Veritext Legal Solutions and  
8 review of the transcript is being handled as follows:  
9 \_\_ Per CA State Code (CCP 2025.520 (a)-(e)) – Contact Veritext  
10 to schedule a time to review the original transcript at  
11 a Veritext office.  
12 \_\_ Per CA State Code (CCP 2025.520 (a)-(e)) – Locked .PDF  
13 Transcript - The witness should review the transcript and  
14 make any necessary corrections on the errata pages included  
15 below, notating the page and line number of the corrections.  
16 The witness should then sign and date the errata and penalty  
17 of perjury pages and return the completed pages to all  
18 appearing counsel within the period of time determined at  
19 the deposition or provided by the Code of Civil Procedure.  
20 \_\_ Waiving the CA Code of Civil Procedure per Stipulation of  
21 Counsel - Original transcript to be released for signature  
22 as determined at the deposition.  
23 \_\_ Signature Waived – Reading & Signature was waived at the  
24 time of the deposition.  
25

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1 CERTIFICATE OF REPORTER  
2 I, Hanna Kim, a Certified Shorthand  
3 Reporter, do hereby certify:  
4 That prior to being examined, the witness  
5 in the foregoing proceedings was by me duly sworn to  
6 testify to the truth, the whole truth, and nothing  
7 but the truth;  
8 That said proceedings were taken before me  
9 at the time and place therein set forth and were  
10 taken down by me in shorthand and thereafter  
11 transcribed into typewriting under my direction and  
12 supervision;  
13 I further certify that I am neither  
14 counsel for, nor related to, any party to said  
15 proceedings, not in anywise interested in the  
16 outcome thereof.  
17 Further, that if the foregoing pertains to  
18 the original transcript of a deposition in a federal  
19 case, before the proceedings, review  
20 of the transcript is requested.  
21 In the event that the transcript is returned  
22 to me, I will ensure that it is returned to the  
23 appropriate party.  
24  
25

  
Hanna Kim, CLR, CSR No. 13083

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1  Federal R&S Requested (FRCP 30(e)(1)(B)) – Locked .PDF  
2 Transcript - The witness should review the transcript and  
3 make any necessary corrections on the errata pages included  
4 below, notating the page and line number of the corrections.  
5 The witness should then sign and date the errata and penalty  
6 of perjury pages and return the completed pages to all  
7 appearing counsel within the period of time determined at  
8 the deposition or provided by the Federal Rules.  
9  Federal R&S Not Requested - Reading & Signature was not  
10 requested before the completion of the deposition.  
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# EXHIBIT 5

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 6

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 7

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 8

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 9

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]



# EXHIBIT 10

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

# EXHIBIT 11

[Submitted *In Camera* Pursuant to §8 of the  
Amended Stipulated Protective Order (ECF 411)]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re FIRSTENERGY CORP. SECURITIES LITIGATION	)	No. 2:20-cv-03785-ALM-KAJ
_____	)	
	)	<u>CLASS ACTION</u>
This Document Relates To:	)	Judge Algenon L. Marbley
	)	Magistrate Judge Kimberly A. Jolson
ALL ACTIONS.	)	
_____	)	
MFS Series Trust I, et al.,	)	<b>Case No. 2:21-cv-05839-ALM-KAJ</b>
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
FirstEnergy Corp., et al.,	)	
	)	
Defendants.	)	
_____	)	
Brighthouse Funds Trust II – MFS Value Portfolio, et al.,	)	<b>Case No. 2:22-cv-00865-ALM-KAJ</b>
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
FirstEnergy Corp., et al.,	)	
	)	
Defendants.	)	
_____	)	

[PROPOSED] ORDER GRANTING THE MOVING PARTIES’ MOTION TO COMPEL DISCOVERY REGARDING FIRSTENERGY’S INTERNAL INVESTIGATION

Having considered the Moving Parties' Motion to Compel Discovery Regarding FirstEnergy's Internal Investigation submitted by Lead Plaintiff Los Angeles County Employees Retirement Association and Plaintiffs Amalgamated Bank, as Trustee for the LongView LargeCap 500 Index Fund, LongView Quantitative LargeCap Fund, LongView Broad Market 3000 Index Fund, LongView LargeCap 500 Index Fund VEBA, LV LargeCap 1000 Value Index Fund, LongView Quantitative MidCap Fund, LongView Quant LargeCap Equity VEBA Fund and LongView Core Plus Fixed Income Fund, City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Fund, as well as Direct Action Plaintiffs (collectively, "Plaintiffs"), together with defendants Michael J. Dowling ("Dowling") and Charles E. Jones ("Jones") (collectively, the "Moving Parties"), and good cause appearing therefore, the Court GRANTS the motion.

It is therefore ORDERED as follows:

(1) FirstEnergy's internal investigation is not entitled to attorney-client privilege or work-product protections in the first place;

(2) even if FirstEnergy's internal investigation had been entitled to any such protections, FirstEnergy has waived them; and

(3) FirstEnergy must produce all previously withheld documents, witnesses must answer all questions (past and future) related to the internal investigation, and FirstEnergy must withdraw all asserted protections that are reflected in PricewaterhouseCoopers LLP's document productions.

DATED: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE KIMBERLY A. JOLSON  
UNITED STATES MAGISTRATE JUDGE