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

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| IN RE FIRSTENERGY CORP. SECURITIES LITIGATION, | : | Case No. 2:20-cv-03785 |
| This document relates to: | : | Chief Judge Algenon L. Marbley |
| ALL ACTIONS. | : | Magistrate Judge Kimberly A. Jolson |

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| MFS SERIES I TRUST, et al., | : | |
| Plaintiffs, | : | Case No. 2:21-cv-05839 |
| v. | : | Chief Judge Algenon L. Marbley |
| FIRSTENERGY CORP., et al., | : | Magistrate Judge Kimberly A. Jolson |
| Defendants. | : | |

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| BRIGHTHOUSE FUNDS TRUST II – MSF VALUE PORTFOLIO, et al., | : | |
| Plaintiffs, | : | Case No. 2:22-cv-00865 |
| v. | : | Chief Judge Algenon L. Marbley |
| FIRSTENERGY CORP., et al., | : | Magistrate Judge Kimberly A. Jolson |
| Defendants. | : | |

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**REPORT AND RECOMMENDATION BY SPECIAL MASTER**
**ON MOTION TO STAY (ECF NO. 577)**

This matter is before the undersigned for consideration of a motion for a stay filed by Defendant FirstEnergy Corp. (Motion, ECF No. 577), memoranda in opposition filed by Plaintiffs (Memo Opp, ECF No. 603) and (Memo Opp, ECF No. 604), and a reply memorandum filed by

FirstEnergy (Reply, ECF No. 613).[1] For the reasons that follow, the undersigned **RECOMMENDS** that the motion be **GRANTED IN PART and DENIED IN PART**.

## BACKGROUND

On June 6, 2022, Plaintiffs filed a motion for class certification in Case No. 2:20-cv-03785. (Motion, ECF No. 293.) Following a period of extended briefing and a March 17, 2023 hearing, the Court issued a March 30, 2023 Opinion & Order in which Chief Judge Marbley granted the motion and certified a class under Federal Rule of Civil Procedure 23(b)(3). (Order, ECF No. 435.) Thereafter, FirstEnergy and various defendants filed a total of five petitions to appeal the certification order under Federal Rule of Civil Procedure 23(f). The Sixth Circuit granted permission to appeal on November 16, 2023, in a decision bereft of any substantive indication as to why the appellate court accepted the interlocutory appeal. (Order, ECF No. 559.) The appeal currently remains pending.

On November 30, 2023, Defendants FirstEnergy, Dennis Chack, John Judge, James Pearson, Robert Reffner, Donald Schneider, Leila Vespoli, and the Underwriter Defendants filed a motion to stay the litigation. (Motion, ECF No. 577.) Chief Judge Marbley and Magistrate Judge Jolson referred that motion to the undersigned for issuance of a report and recommendation. (Order, ECF No. 578 at PageID 12722.) That Order also stayed all discovery during the pendency of the motion. (*Id.*)

The undersigned has reviewed the briefing on the motion to stay, has read additional filings provided by the parties that were submitted to the Sixth Circuit as part of the appeal, and has

[1] Unless otherwise expressly indicated, all references to documents filed on the docket shall be to the numbered document in Case No. 2:20-cv-03785. The parties should understand these references to refer to the corresponding documents filed in Case Nos. 2:21-cv-05839 and 2:22-cv-00865 when appropriate.

entertained oral argument on aspects of the stay issue. At a March 7, 2024 status conference, the undersigned then provided verbal notice to the parties of the recommendations that would be made on the motion to stay. This Report and Recommendation memorializes those recommendations and explains the reasoning behind them.

## ANALYSIS

Federal Rule of Civil Procedure 23(f) provides that an appeal under the rule "does not stay proceedings in the district court unless the district court or the court of appeals so orders." The Sixth Circuit has explained that when addressing a motion to stay under such an appeal, the court must consider:

> (1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.

*Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3 927, 228 (6th Cir. 2002). This requisite inquiry involves a balancing of the factors, and "[t]he strength of the likelihood of success on the merits that must be demonstrated is inversely proportional to the degree of irreparable harm that will be suffered if a stay does not issue." *Id.* at 928. Moreover, "in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

***Likelihood of success.*** Defendants argue that a stay is warranted because there is a substantial likelihood that the Rule 23(f) appeal will produce an appellate decision that substantially impacts the matters before this Court so that continued proceedings during the pending appeal would likely be wasteful and prejudicial. They posit that the appeal will resolve whether the *Affiliated Ute* or the *Basic* doctrine will apply to this litigation and that the answer to

that question will determine whether Plaintiffs can maintain any fraud-based claims under the Securities Exchange Act of 1934. Thus, Defendants conclude, the appeal will likely affect which parties remain subject to class claims, the scope of discovery, what defenses are available, and the scope of expert testimony.

Plaintiffs disagree with Defendants' contentions. They argue that a stay is not the norm in these cases, that the same core facts will continue to apply to the claims in this litigation, regardless of what the appellate decision yields, and that the only effect of the appeal would be to alter the characterization of those facts. Moreover, they explain, even if class certification would somehow be punctured, the individual plaintiffs would press ahead with their claims based on the facts alleged.

In addition to briefing expounding on the parties' foregoing positions, the parties have supplied the undersigned with the Sixth Circuit briefing, which the undersigned has reviewed. All of this has led to three basic conclusions regarding Defendants' likelihood of success on the merits.

***First***, the undersigned does not agree with Defendants that the Court should stay the entirety of this litigation. The undersigned's research agrees with Plaintiffs' proposition that there is a dearth of cases in which courts grant a stay during a 23(f) appeal where the core claims will continue regardless of the outcome of the appeal.

There is no question in the undersigned's mind that the core elements of this litigation and the essential discovery associated with those elements will remain the same regardless of the appeal. Defendants argue that the appeal will dramatically alter the composition of the case, but there is little substantive reason to accept that proposition. Despite their recent confidence that certification will crumble, Defendants have long represented to the Court that they concede some form of a class will exist here. The undersigned agrees that wholesale decertification would be an

astounding and unlikely event. The appeal *may* tweak parties and claims, but the overall context of the litigation will proceed.

Similarly, although the appeal may indeed render some of the discovery that would be conducted without a continued stay unnecessary, the bulk of the discovery conducted would be useful and relevant. The core factual allegations would almost invariably remain the same (even if they are labeled with a different legal effect post-appeal), and the proof required would remain the same. Random spot-checking of the Complaint supported Plaintiffs' statement that "every single statement and act alleged in the Complaint will remain at issue regardless of what the Sixth Circuit decides." (Memo Opp, ECF No. 603 at PageID 13083.) Although how the alleged statements and acts may be subject to different characterizations and assessments post-appeal, the existence and relevance of the statements and acts appear to remain viable.

In other words, Defendants have not demonstrated serious questions going to the claims and defenses that much if not most of the discovery targets, which means Defendants have failed to demonstrate a likelihood of serious on appeal that would substantively effect the discovery phase of this litigation (excluding expert discovery) to a degree that it outweighs the risk of lost evidence.

All of this necessitates emphasizing two points, which overlap with the harm to others analysis. One, delaying discovery during the appeal could readily result in lost discovery and lost evidence that would otherwise be capable of preservation if discovery were allowed to proceed now. Two, the risk of lost evidence is not mere speculation; there have already been witnesses testifying that they cannot recall past events, past facts, and past evidence. As time moves forward, memories fade, and this problem would likely worsen. Moreover, as time has passed, potential witnesses been indicted and one witness, Neil Clark, even committed suicide. The consequent

harm to the discovery that can be obtained is apparent and outweighs the risk of some unnecessary discovery, to the degree such a risk may be realized.

The risk of lost evidence is concerning. Plaintiffs assert that "[f]urther delay will only exacerbate the likelihood that witnesses will not remember key facts and events at the center of this litigation, or that one of the myriad ongoing government investigations will result in disruption of Plaintiffs' development of its case." (Memo Opp, ECF No. 603 at PageID 13085.) This is not hyperbole. There is no doubt to the undersigned that this litigation will continue forward—almost certainly as a class action (even if modified)—and that the core factual allegations will remain the same and depend on the same evidence. There is also no doubt in the undersigned's mind that delaying discovery now would impose needless and perhaps substantially dispositive effects on producing evidence that will speak to the elements of both the claims and defenses in this litigation. It would make little sense to risk wholly avoidable concerns by imposing a stay on the entirety of this litigation. Accordingly, no stay of all discovery is warranted.

***Second***, the undersigned does agree with Defendants that the Court should stay expert discovery. Defendants argue that "the outcome of the appeal will clearly impact the scope of the expert opinions." (Motion, ECF No. 577-1 at PageID 12439.) The undersigned is less wholly convinced that "clearly" is a reasonable qualifier—reading the tea leaves of future appellate action is at best a murky proposition—but concluding that the outcome of the appeal will *most likely* inform the damages issue seems not only reasonable, but almost inescapably precognitive. If clearing up which doctrine applies here is not the issue is not the issue on which the Sixth Circuit panel took the appeal, then why the petitions were granted is essentially a mystery given the limitations on such appeals.

The effect of such appellate action matters. Defendants suggest that Plaintiffs may be unable to propose any satisfactory classwide damages methodology at all, but such hyperbolic conjecture seems more likely their wishful thinking than a probable outcome tied to the facts of this case. Most likely, the Sixth Circuit will provide clarity regarding application of the respective doctrines, may expressly indicate which doctrine applies here (or, presumably much less likely given the petitions were granted, will illuminate the relationship between the doctrines that provides a novel understanding of how both may apply to aspects of this litigation), and could even discuss a methodology, however unlikely.

Given such considerations, it would make little sense to forge ahead with the experts when the ultimate inquiry in which they will engage will likely turn on the doctrine involved. Requiring the experts to act now would risk a waste of time and resources when their analysis could easily turn on what the Sixth Circuit says in the 23(f) appeal. Staying the expert component of this litigation makes sense, then, and Plaintiffs have offered no persuasive argument to the contrary.

***Third***, given the first two analytic points, the undersigned concludes that Defendants have demonstrated a likelihood of success that the appeal will affect a portion of this litigation in a meaningful way, which means that a partial stay is warranted. The appeal may indeed affect discovery, rendering some discovery useless at the end of the day, but the risk of losing evidence substantially outweighs the limited waste that engaging in ultimately unnecessary discovery would present. In contrast, the appeal will invariably affect the expert portion of this litigation unless the appellate court does something truly unexpected.

These conclusions no way mean the undersigned necessarily agrees with either side's appellate arguments—the undersigned expresses no opinions in that regard—but the conclusions do mean that Defendants have demonstrated at least serious questions going to the merits of the

experts' work that outweighs and the potential for irreparable harm in the form of wasted time and resources (on the experts' part and by the parties and the Court if the litigation were to proceed through a *Daubert* phase before a 26(f) merits decision were to issue that decidedly outweighs the harm to Plaintiffs and the public interest that a nominal delay of expert work would present. Stated more simply: proceeding with discovery presents little actual harm to Defendants, but proceeding with expert work at this time risks waste; not staying discovery avoid likely substantial harm to factfinding, while staying expert work presents an acceptable level of additional delay.

The likelihood of success factor therefore weighs in favor of a partial stay. Because this factor is the most important factor in regard to whether a stay is warranted, and given the weight it carries here, the undersigned shall discuss the remaining factors in more truncated form. *See Abarca v. Werner Enters., Inc.*, No. 8:14CV319 & 8:15CV287, 2018 WL 10229729, at *1 (D. Neb. May 21, 2018) ("Although likelihood of success on the merits is the most important factor, a court must consider the relative strength of the four factors, balancing them all. (internal quotation marks omitted)); *Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-CV-4001, 2017 WL 5952872, at *2 (W.D. Ark. Jan. 25, 2017) ("Courts must consider the relative strength of the four factors, balancing them all, with the most important factor being the likelihood of success on appeal.').

***Irreparable harm.*** In examining the likelihood of success, the undersigned also explained the various risks of harm to Defendants. As explained above, the risk is not in Defendants' favor in regard to fact discovery, but the risk does favor Defendants in regard to expert discovery and work. In discussing the rationale for denying a stay, the judge in *Abarca* well explained a summary point here:

> The defendants have also failed to demonstrate that they will be irreparably injured unless a stay is granted. Although they contend that they will be substantially harmed by the expense of litigation, that is unavoidable regardless of whether this litigation proceeds as a class action or as individual lawsuits. At best,

> the Rule 23(f) appeal will eliminate the class certification, but it will not extinguish the claims of the individual named plaintiffs.

*Abarca*, 2018 WL 10229729, at *1. This rationale applies here to the fact discovery. Any unnecessary expenses would be minimal and far outweighed by the need to obtain and preserve timely evidence. Moreover, "litigation expenses alone do not necessarily qualify as irreparable harm," and staying expert discovery while permitting fact discovery minimizes any injury to Defendants caused by the partial denial of a wholesale stay. *See Thorpe v. District of Columbia*, 306 F.R.D. 6, 11 (D. Columbia 2014) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D. Columbia 2002)).

***Substantial injury to other interested parties.*** Similar to the irreparable harm factor discussion directly above, the undersigned has already touched on this factor in discussing the likelihood of success.

***Public interest.*** The Court has already recognized that the public has an interest in the substance of this case, which means that the public also has an undeniable interest in this case being resolved in as expedited and efficient a manner as possible. As another court has explained, "if the public interest is rooted in the proper resolution of the important issues raised in this case . . . granting a stay of discovery would not further that interest." *Thorpe*, 306 F.R.D. at 11 (internal quotation marks omitted). Here, continuing with fact discovery now promotes the proper resolution of the issues. The public interest factor thus favors only the partial stay recommended.

***Conclusion.*** Contrary to Defendants' assertion, it does not appear that courts regularly stay the entirety of a case during a Rule 23(f) appeal. In fact, the undersigned's research would indicate such action is atypical, especially in the context of securities fraud. The circumstances before the Court do not support that such a full stay be implemented here. Instead, they suggest

that his litigation should resume and that all efforts be made to ensure the efficient progression of non-expert discovery until it is complete. There is a great deal of work to be done, and there is no reason to delay that work, especially when the irreversible, consequent risks of such delay far outweigh any limited savings in wasted time or resources. In contrast, the risk of wasted resources associated with expert discovery and work is sufficiently grave to warrant a limited stay regarding the experts.

## RECOMMENDATIONS

The undersigned recommends that the Court **GRANT IN PART and DENY IN PART** the motion to stay (Motion, ECF No. 577) as follows:

(1) The Court should **VACATE** the existing stay upon issuance of a final decision on the motion to stay;

(2) The Court should **DENY** a stay of all discovery and allow all non-expert aspects of this litigation to resume despite the 23(f) appeal;

(3) The Court should **GRANT** a stay of all expert deadlines and required expert work during the pendency of the 23(f) appeal, or until further order from the Court (with the parties free to have their own expert(s) perform work as the party wishes); and

(4) The Court should **EXTEND** the partial stay set forth above to the opt-out or Direct Action cases, Case Nos. 2:21-cv-05839 and 2:22-cv-00865, where the discovery and work involved would appear to be largely duplicative of Case No. 2:20-cv-03785.[2]

Having made the foregoing recommendations, one last matter remains for disposition regarding the motion for a stay. During an informal March 14, 2024 status conference, Plaintiffs requested that the period for briefing on any objections to this Order be shortened to prevent any unnecessary delay in this litigation. FirstEnergy opposes this request on the grounds that it would

[2] At this juncture, Defendants and Direct Action Plaintiffs agree that the case schedules should proceed in lockstep.

impose an unfair burden on its counsel given the plan to file multiple objections to the other recent Orders and Reports and Recommendations recently issued by the undersigned, as well as the travel schedule and other work commitments of lead counsel.

The undersigned is cognizant that the press of business alone is rarely good cause for obtaining an extension—and, by extension, only somewhat of a factor against lessening time for briefing. The undersigned is also not unsympathetic regarding acting to avoid delay in resuming discovery in this matter. This litigation has been delayed enough. Given the relatively limited amount of time that the default briefing schedule would delay resumption of discovery, however, the undersigned in his discretion declines to shorten the briefing period for this Order. The parties are encouraged to file any permissible briefing on this Order as early as possible to avoid taking the full period for objections briefing.

**IT IS SO ORDERED.**

*/s/ Shawn K. Judge*
SHAWN K. JUDGE (0069493)
SPECIAL MASTER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 15, 2024, the foregoing was filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Shawn K. Judge*
Shawn K. Judge (0069493)