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August 5, 2022

By Email

The Honorable John R. Adams
2 South Main Street, Suite 510
Akron, OH 44308

Re: ***Miller v. Anderson et al.*, No. 5:20-cv-01743 (N.D. Ohio)**

Your Honor:

I write on behalf of Markovits, Stock & DeMarco, LLC (“MSD”) and Abraham, Fruchter & Twersky LLP (“AFT” and together with MSD, “MSD/AFT”) as counsel for Todd Augenbaum, a shareholder of FirstEnergy Corp. (“FirstEnergy” or the “Company”), in response to the Court’s July 29, 2022, Order instructing applicants seeking appointment as lead counsel in this matter to provide a filing that include a description of what they believe will be the subjects on which discovery is to be sought, the nature and extent of discovery, any potential problems that may arise with discovery, the possible use of experts to aid in discovery or litigation, and the dates by which they believe discovery could be completed.

1. The Subjects on Which Discovery Is to Be Sought

MSD/AFT view Defendants as falling broadly into two categories: (1) persons engaging in the illegal acts identified in the Company’s deferred prosecution agreement (the “DPA”); and (2) persons who failed either in their contractual or fiduciary duties of oversight designed to prevent the underlying illegal conduct identified in the DPA. The former category consists of Charles Jones (“Jones”), the former CEO of First Energy, as well as at least Michael Dowling (“Dowling”), identified to the Court as the executives who spearheaded FirstEnergy’s bribery scandal. ECF No. 291-1, ¶4. The latter category consists of the members of the Company’s board of directors (the “Directors”) at the time of the illegal conduct and outside entities such as Clearsoft, Inc. (“Clearsoft”).

Directors of an Ohio corporation face personal liability only if it is shown by clear and convincing evidence that they acted with reckless disregard for the corporation’s best interest, or with deliberate intent to cause injury to the corporation. *See* Ohio Rev. Code § 1701.59(E). Absent direct participation by Directors, liability depends on a failure of oversight which, in turn, hinges on whether the directors “ignore ‘red flags’ that actually come to their attention, warning of compliance problems.” *In re Cardinal Health, Inc. Derivative Litig.*, 518 F. Supp. 3d 1046, 1065 (S.D. Ohio 2021) (citations omitted). The liability of Clearsoft and other persons who are

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neither Directors nor officers of the Company likely depends on the terms of any contract, the terms of which are not yet known to MSD/AFT, or a theory of professional negligence.

MSD/AFT's review of the docket in the case pending in the Southern District of Ohio shows that the Plaintiffs in that action have previously served third-party subpoenas on both ClearSulting and PriceWaterhouseCoopers, LLP ("PwC").¹ *See Employee Ret. Sys. Of the City of St. Louis ex rel. FirstEnergy Corp. v. Jones*, Case No. 2:20-cv-04813 (S.D. Ohio), ECF No. 179 at 12-13. MSD/AFT will seek to obtain those documents from the Plaintiffs or, absent their cooperation, directly from ClearSulting and PwC, if necessary, with the Court's assistance. The existence of any viable claims against ClearSulting or PwC represents another potential source of monetary recovery to FirstEnergy. In addition, to the extent those claims are not effectively released by the Court in the Southern District of Ohio, asserting such a claim will likely place different groups of Defendants in the position of casting blame on each other in an effort to lessen or avoid their own liability in the proverbial "circular firing squad." MSD/AFT expects that this would likely result in the filing of cross-claims which could also allow Plaintiffs to effectively avoid the otherwise demanding standard for having to prove an oversight claim against the Directors. *See, e.g., In re Keithley Instruments, Inc., Derivative Litig.*, 599 F. Supp. 2d 875, 893 n.13 (N.D. Ohio 2008) (collecting cases and describing oversight claims brought against directors as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.").

MSD/AFT believes that pressing the claims against ClearSulting and potentially PwC should proceed alongside the other discovery needed to be taken in this case. In that vein, MSD/AFT would take heed of this Court's observation that "FirstEnergy's admissions [in the DPA] provide a clear and concise road map to litigate this matter fully and fairly." ECF No. 290 at 3-4. MSD/AFT would follow that roadmap by reviewing the discovery produced and seeking all further discovery necessary to prove the admissions of the DPA against Defendants. MSD/AFT would also serve requests for admission coupled with interrogatories with respect to each of FirstEnergy's admissions in the DPA in an effort to narrow the scope of discovery to the extent possible.

In the event the U.S. District Court for the Southern District of Ohio approves the proposed settlement, MSD/AFT, representing the only timely objector and having appeared and presented their objections at the fairness hearing held on August 4, 2022, expect to appeal the approval to the extent the extent any release of claims could impair prosecution of the claims which Mr. Augenbaum plans on bringing in this action. At the very least, Mr. Augenbaum intends to prosecute, and take fulsome discovery with respect to, the Compensation Claims (as defined in the Augenbaum Objection at p.10), for which demand is futile and which are not subject to being

¹ Ohio does not recognize claims for aiding and abetting breaches of fiduciary duties (*see Bentley v. Equity Trust Co.*, 9th Dist. Lorain No. 14CA010630, 2015-Ohio-4735, ¶ 16 n.2, 2015 WL 7254796), making it difficult to sue ClearSulting or PwC without access to their engagement contracts. Mr. Augenbaum has sought to review those engagement agreements, but the Company refused to allow their inspection.

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released. *See* Augenbaum Objection at pp.10-12.² *See, e.g., In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1083 (C.D. Cal. 2008) (finding demand would be futile for eight claims but not for a claim involving the compensation of the company's chief executive officer).

Mr. Augenbaum also intends to prosecute, and take fulsome discovery with respect to, FirstEnergy's claims against Clearstulting and PwC. Mr. Augenbaum believes the SLC constructively refused his litigation demand by including (at best) an ambiguous release in their proposed settlement and by failing to respond to the demand in a timely manner. *See* Augenbaum Objection at pp.4-6. No other shareholder has demonstrated that they have standing to bring those claims. *See* Fed. R. Civ. P. 23.1(b)(3) (requiring demand be futile or wrongfully refused to prosecute derivative claims).

2. The Nature and Extent of Discovery to Be Sought

MSD/AFT would seek all relevant materials relating to the claims that Mr. Augenbaum and the Plaintiffs continuing in this action are permitted to prosecute in this Court, including the materials that the Company relied upon in making admissions in the DPA. MSD/AFT is not yet able to estimate the full extent of that discovery without knowing the parameters used to obtain the discovery already received by the Plaintiffs and without access to the discovery already produced. MSD/AFT note, however, that they have both litigated large and complex cases and are familiar with efficient methods of analyzing large document productions.

MSD/AFT understands that as of late January 2022, Plaintiffs received almost 400,000 pages (about 75,000 documents) from the Defendants, collectively, and another 10,000 pages from third parties, including Clearstulting. *See* ECF No. 284 at 2-3 (describing discovery efforts). MSD/AFT further understands that most of that production is FirstEnergy's productions to the DOJ and the SEC. ECF No. 276 at 2 n.4. MSD/AFT would begin by trying to fill in the gaps identified by the Court in its Order and Decision of February 11, 2022, including seeing the written

² In opposing Mr. Augenbaum's objection to the proposed settlement, Plaintiffs wrongly asserted that "by making his demand, Augenbaum conceded that a majority of the Board at the time of his demand was independent and could consider whether to pursue claims on behalf of FirstEnergy in connection with the bribery scandal." SD Ohio ECF No. 186. That is not correct as demand futility is analyzed "on a claim-by-claim basis" with any claims against Clearstulting and PwC being distinct from those asserted against the Directors. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003)); *In re Keithley Instruments, Inc.*, 599 F.Supp.2d 908, 918, n.6 (N.D. Ohio 2009) (recognizing that "Ohio courts routinely look to Delaware case law for guidance in deciding corporate law issues generally, and demand futility issues specifically" and treating Delaware law as "highly persuasive" in applying Ohio law to decide whether demand on board of Ohio corporation was excused). Here, the Southern District's bases for finding demand futile, as adopted by this Court (ECF No. 117 at 1-2), are that the Director Defendants "participated actively in the wrongdoing complained of in the Consolidated Complaint" and "recklessly disregarded their duties to the Company and allowed the criminal scheme to continue unchecked." *Emps. Ret. Sys. of City of St. Louis v. Jones*, 2021 WL 1890490, at *19-22 (S.D. Ohio May 11, 2021). Mr. Augenbaum, by limiting his demand to claims against the auditors, has not conceded anything with respect to claims against the Company's Directors and officers.

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discovery that has already been served through to completion; obtaining testimony under oath from Defendants and other percipient witnesses; reviewing privilege logs, which apparently reflect that 25,529 documents were withheld (ECF No. 276 at 4) and, where appropriate, challenging the withholding of documents. Among other things, MSD/AFT expects to invoke the shareholder-fiduciary exception to the attorney-client privilege with respect to those documents. *See, e.g., Vendita Tech. Grp., Inc v. Sullinger*, 2018 WL 10812126, at *2 (N.D. Ohio July 2, 2018) (citing cases).

MSD/AFT would also act quickly to hire an expert to scrutinize the forensic investigation on Charles Jones' personal electronic devices. ECF No. 270 at 2; ECF No. 274 at 1. We would then supplement that discovery with further requests for production, interrogatories, and requests for admission to the extent necessary and appropriate. MSD/AFT note that Mr. Jones' status report to the Court stated that his counsel "do not currently believe that there is any evidence that Mr. Jones has been sending any relevant, non-privileged text messages since leaving FirstEnergy." ECF No. 270 at 2. MSD/AFT would test that contention by demanding a privilege log for any materials withheld on that basis in order to properly evaluate claims of privilege and by taking Mr. Jones' deposition.

3. Potential Problems That May Arise with Discovery

MSD/AFT cannot predict the future but nonetheless see three potential overarching issues, one of which has arisen and two of which may arise, that could impact pre-trial discovery. *First*, spoliation issues including, but not necessarily limited to, Jones, are ripe (*see* ECF No. 248 at 4-5) and, to the extent that substantive text messages no longer exist, MSD/AFT would need to subpoena the service provider (*i.e.*, Verizon) or, alternatively, seek a negative inference if supported by the record against Jones. *Second*, MSD/AFT expects several former FirstEnergy directors and officers to invoke their Fifth Amendment rights if compelled to testify, from which we would seek to draw negative inferences against any such directors and officers. *See Bradley v. Miller*, 2013 WL 5937009, at *1 (S.D. Ohio Nov. 4, 2013); *In re Moses*, 792 F. Supp. 529, 536 (E.D. Mich. 1992). *Third*, Defendants and third parties may object to discovery based upon any claims that are arguably released in the event the Southern District of Ohio approves the pending proposed settlement.

4. The Possible Use of Experts to Aid in Discovery or Litigation

MSD/AFT intends to quickly engage a forensic expert to review spoliation issues regarding Charles Jones's text messages. MSD/AFT will also engage other experts in connection with discovery and litigation as appropriate, including experts with respect to the diligence necessary for a fiduciary to properly discharge their fiduciary duties and whether Clearsulting and PwC were negligent in performing services for FirstEnergy.

5. The Dates by Which Counsel Believe Discovery Could Be Completed

MSD/AFT intends to prosecute this case expeditiously, but also carefully and at a reasonable pace. Ordinarily MSD/AFT would set a target of nine months for the completion of fact discovery. However, it is premature to estimate when discovery could be completed without information to which MSD/AFT currently lacks access. In addition, MSD/AFT notes that sharing

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a document review platform with current counsel and having access to their document review work product to date would expedite prosecution, but we do not know if the Court intends to order existing counsel to cooperate.³ In the event that we are required to engage in a fresh review of the documents, that is something which would be time consuming and slow down the progress of the action.

Mr. Augenbaum's ability to prosecute claims against Clearsulting and potentially PwC will require filing a new complaint, which would certainly be challenged by motions to dismiss. In the event this Court declined to stay discovery pending any such motion to dismiss, the effects on the time needed for discovery is not likely to be great.

Very truly yours,



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³ See <https://www.law360.com/articles/1515188/david-boies-wants-to-take-over-firstenergy-shareholder-suit> (quoting Mr. Little, the Court's law clerk, as stating that the Court "plans to appoint additional counsel who he believes will prosecute the case while existing attorneys will remain as part of the suit[.]").