

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF OHIO
4 EASTERN DIVISION

5 JENNIFER L. MILLER,

6 Plaintiff,

7 vs.

8 MICHAEL J. ANDERSON, ET AL.,

9 Defendants.

Case No. 5:20CV1743

Akron, Ohio

Monday, January 10, 2022

1:00 p.m.

10 TRANSCRIPT OF TELEPHONE CONFERENCE
11 BEFORE THE HONORABLE JOHN R. ADAMS
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 For the Plaintiff:

Jeroen Van Kwawegen

Alla Zayenchik

Bernstein, Litowitz, Berger &

Grossmann - New York

1251 Avenue of the Americas

New York, New York

(212) 554-1472

Thomas J. Curry

Saxena White - Wilmington

Office 1265, Suite 1200

1000 North West Street

Wilmington, Delaware 19801

(302) 485-0480

Sara M. DiLeo

Saxena White - White Plains

10 Bank Street, 8th Floor

White Plains, New York 10606

(914) 437-8551

Richard A. Speirs

Amy R. Miller

Cohen, Milstein, Sellers & Toll

88 Pine Street, 14 Floor

New York, New York 10005

(212) 838 7797

1 John C. Camillus
2 Law Offices of John C. Camillus
3 P.O. Box 141410
4 Columbus, Ohio 43214
5 (614) 992-1000

6 Marc H. Edelson
7 Edelson Lechtzin
8 3 Terry Drive, Suite 205
9 Newtown, Pennsylvania 18940
10 (215) 867-2399

11 For Defendants Geoffrey J. Ritts
12 Anderson, Demetriou, Robert S. Faxon
13 Johnson, Misheff, Jones Day - Cleveland
14 O'Neil, Mitchell, 901 Lakeside Avenue
15 Pappas, Pianalto, Cleveland, Ohio 44114
16 Reyes, Turner, (216) 586-3939
17 Strah, Taylor:

18 Marjorie P. Duffy
19 Jones Day - Columbus
20 325 John H. McConnell Boulevard, #600
21 Columbus, Ohio 43215
22 (614) 469-3939

23 For Defendant Jones: Carole S. Rendon
24 Douglas L. Shively
25 Albert G. Lin
Baker & Hostetler - Cleveland
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 861-7420

Jason J. Mendro
Gibson, Dunn & Crutcher - Washington
1050 Connecticut Avenue, NW
Washington, DC 20035
(202) 887-3726

For Defendant Reffner:
Steven S. Scholes
McDermott, Will & Emery - Chicago
444 West Lake Street, Suite 4000
Chicago Illinois 60606
(312) 372-2000

1 For Defendant John F. McCaffrey
2 Dowling: John A. Favret, III
3 Tucker Ellis - Cleveland
4 950 Main Avenue, Suite 1100
Cleveland, Ohio 44113
(216) 592-5000

5 For Defendant Marcella L. Lape
6 Yeboah-Amankwah: Skadden, Arps, Slate, Meagher &
7 Flom - Chicago
155 North Wacker Drive, Suite 2700
8 Chicago, Illinois 60606
(312) 407-0700

9 For Nominal John Gleeson
10 Defendant Susan Reagan Gittes
FirstEnergy: Debevoise & Plimpton
919 Third Avenue
11 New York, New York 10022
(212) 909-6000

12 For Defendant Chack: Laura Hughes McNally
13 Morgan, Lewis & Bockius - Philadelphia
1701 Market Street
14 Philadelphia, Pennsylvania
(215) 963-5000

15 Douglas M. Mansfield, Jr.
16 Lape, Mansfield & Nakasian
9980 Brewster Lane, Suite 150
17 Powell, Ohio 43065
(614) 763-2316

18 For Defendant Pearson: Timothy D. Katsiff
19 Ballard Spahr - Philadelphia
1735 Market Street, 51st Floor
20 Philadelphia, Pennsylvania 19103
(215) 864-8301

21 Court Reporter: Caroline Mahnke, RMR, CRR, CRC
22 Federal Building & U.S. Courthouse
2 South Main Street, Suite 568
23 Akron, Ohio 44308
(330) 252-6021

24
25 Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 Monday, January 10, 2022

2 THE COURT: All right. Counsel, good afternoon.
3 This is Judge Adams. We're here today regarding Case Number
4 5:20CV1743. The case is captioned Jennifer L. Miller,
5 derivatively on behalf of FirstEnergy Corporation, versus
6 Michael Anderson and other numerous named defendants.

7 We're here for a status conference by telephone
8 regarding the matter.

9 I've reviewed all of the various status reports that
10 have been filed in the matter, and I know we have currently
11 scheduled an in-person conference on January 31, if memory
12 serves correct.

13 And so I am interested today in accomplishing two
14 things. Number one, getting an update on the status of
15 discovery. It appears there has been some issues.

16 Also to select a new date for the status conference,
17 and I'll also hear from the parties regarding this proposed
18 mediation.

19 Before you begin to speak, identify yourselves. If
20 you're representing more than one party, please so indicate.

21 I know we didn't take roll before I began the
22 conference simply because of the sheer number of counsel and
23 parties.

24 Those are the topics for today's conference, and we'll
25 hear from you in the order that appears in the Court's

1 docket.

2 Counsel for the plaintiff, can you give me an update
3 from your persecutive at this time.

4 MR. VAN KWAWEGEN: Good afternoon, Your Honor.
5 My name is Jeroen Van Kwawegen from Bernstein Litowitz.
6 With me on the line on behalf of plaintiffs are my colleague
7 Alla Zayenchik from my firm, Berstein Litowitz.

8 Also on the line for plaintiffs are Tom Curry, Sara
9 DiLeo from Saxena White; Richard Speirs and Amy Miller,
10 Cohen Milstein; John Camillus, and Marc Edelson.

11 Thank you, Your Honor for calling this status
12 conference.

13 I have the same number of issues that Your Honor had,
14 and also one housekeeping item in connection with the
15 discovery.

16 So first, with respect to the update on discovery, we
17 are working through -- obviously there are numerous parties
18 in this case. We're working through various issues. All
19 parties have started rolling productions of documents.

20 As you would expect, when you get those documents and
21 you have further discussions, there may be potential
22 disputes about the scope of discovery going forward.

23 But quite frankly, Your Honor, those disputes have not
24 ripened yet to the point where we felt it needed to be
25 addressed by the Court. We're aware of your procedure where

1 we can raise issues and you are very responsive.

2 So at this point, I was not going to raise any
3 particular issues with Your Honor. I'm happy to address any
4 that Your Honor may want to talk about. But from my
5 perspective there is nothing that is so urgent that we
6 really need the Court's intervention with respect to the
7 scope of discovery because I think we're still working
8 through various issues with the various parties.

9 And, you know, from my perspective, I think we should
10 give that a few more days. And if there are then really
11 issues, then I would like to see if we can get the Court's
12 guidance.

13 From the housekeeping perspective, we had asked Your
14 Honor to enter the ESI protocol. It's ECF number 155-2. I
15 don't know if Your Honor had a chance to look at it. I know
16 Your Honor has particular views on these types of documents,
17 but if it is permitted -- if it is okay with Your Honor, we
18 would like to enter that protocol so everybody is on the
19 same page about how documents are being produced.

20 My understanding is people are already acting
21 consistent with the protocol because it was a joint
22 protocol, but I think from a housekeeping matter, it would
23 be helpful if Your Honor can approve that.

24 And then the other point I was going to raise in
25 connection with the status conference on January 31 and the

1 mediation, I don't know if Your Honor wants me to do that
2 now or if you want to do that in a second round after we go
3 through the topic of discovery with Your Honor and with the
4 other parties on the line.

5 THE COURT: We can do it at this time if you
6 would like. I think it's probably more productive that way.

7 MR. VAN KWAWEGEN: Thank you, Your Honor.

8 So then just continuing on, thank you, Your Honor, for
9 being open to rescheduling our in-person conference from
10 January 31 to a later date. We will make ourselves
11 available at the Court's convenience.

12 It is very helpful from our perspective because we
13 have the mediation scheduled with the former Judge Layn
14 Phillips on February 1 currently scheduled to be in person
15 in his offices.

16 My understanding is that all defendants, or at least
17 their counsel, have agreed to this mediation in person, and
18 then all the insurance carriers are going to be present as
19 well.

20 We hope that this is going to be a fruitful mediation.
21 And from my perspective it makes sense to have a status
22 conference with Your Honor not too long thereafter so we can
23 update Your Honor about where we are and how we are
24 proceeding. And if there is no settlement, obviously we are
25 planning to proceed on the Court's schedule as we have

1 agreed and the Court has set.

2 THE COURT: Counsel, let me ask you a question
3 that's causing me some concern.

4 How is it that we would undertake a mediation in this
5 case before you've received all the written discovery,
6 before you've conducted even one deposition?

7 So I'm more than concerned about the vigorous or
8 adequate prosecution of this case if you haven't even done
9 the most what I would characterize rudimentary things that
10 you would need to undertake before what I think is somewhat
11 of a mad rush to mediate this case.

12 I mean, I could understand mediation if you've come to
13 me and said, Judge, we're going to be mediating this case
14 sometime in June. We received all the written discovery.

15 The way I read the status reports, we don't know that
16 you're going to get everything you have requested or not.

17 I don't know what you've gotten, what you may get,
18 what you know, what you don't know. You've not deposed any
19 one of the parties, the individually named parties, and yet
20 you tell me, Judge, we need to mediate and we're going to
21 mediate this case.

22 Any comments about that?

23 MR. VAN KWAWEGEN: Yes, Your Honor. And I
24 appreciate your comments, and I'm actually very happy that
25 you raised them.

1 Because, as Your Honor knows, when you think about a
2 case from the plaintiff's perspective or the defense
3 perspective, what you do in every stage of the case is you
4 are analyzing the potential risks to your case and also the
5 potential rewards for the party that you represent.

6 And we are here representing the plaintiff. And
7 because the motion to dismiss was denied and the Court found
8 that the matter want futile, we are now prosecuting the
9 claims on behalf of FirstEnergy against former and current
10 directors and officers.

11 And when I think about the risks to the case and the
12 potential upside to the case, one thing that I cannot ignore
13 is the availability of insurance to pay for a meaningful
14 recovery for the company for the harm that it suffered.

15 And as Your Honor probably also knows, the D&O
16 policies are wasting policies, meaning that the defense
17 costs are ultimately borne by the carriers.

18 During the last status conference, my understanding
19 was that currently the company itself is bearing those costs
20 which again is an expense to the company.

21 And so our intent is to do what's best for FirstEnergy
22 at every stage of the litigation. And so we would never,
23 ever, present a potential settlement to Your Honor that we
24 would not feel fully confident that Your Honor would look at
25 us and say, you know what, given this situation, this is an

1 excellent outcome because, quite honestly, that's not my
2 business model, and Your Honor would reject that settlement.

3 So the fact that we are engaging in mediation is a
4 multi-faceted process, clearly, but it also has to do with
5 how do we maximize the recovery and minimize the loss for
6 FirstEnergy that from our perspective these defendants have
7 caused.

8 And it is true, Your Honor, you are right, that when
9 we are looking at a typical case, having depositions and
10 crystallize out who did what and who is responsible for what
11 is a critical aspect. And I do not want to minimize that in
12 any way.

13 But at the same time, in this case, Your Honor also
14 knows that there is a deferred prosecution agreement and
15 that a lot of these underlying facts have either been
16 admitted or are, from an insurance perspective and a
17 recovery perspective, not that difficult to establish.

18 So what I would ask Your Honor is your indulgence,
19 quite frankly, your indulgence to see if we can have a
20 mediation and present a settlement that is worthy of your
21 praise, quite frankly.

22 And if we cannot, I don't even want to present it.
23 And if we do not, despite my best efforts, Your Honor will
24 just say, sorry, counsel, this is not good enough.

25 But given all those considerations, I don't think it's

1 premature to at least try.

2 THE COURT: Counsel, I don't want to get into a
3 debate back and forth with you. I guess maybe you and I are
4 just going to have to agree to disagree because I don't see
5 how you can assess the relative responsibility, alleged
6 responsibility, of any officers or others without taking
7 their depositions, without seeing all the paper discovery.

8 I candidly can't grasp the idea that you would know
9 enough about this case against the relative -- again, the
10 relative position of the defendants to in any way mediate,
11 settle, assess responsibility, if any, liability, if any, on
12 what you now know.

13 I don't get -- and I'll be candid with you. When
14 I -- I need to hear from the others, but I have not yet
15 appointed lead counsel in this case. I have informally done
16 that in some ways intentionally so I could sort of get a
17 gauge of how vigorously this is going to be prosecuted and
18 all the other requirements that the rule requires.

19 So, I guess I have to give pause to whether I need to
20 either back up and consider new lead counsel or appoint
21 additional lead counsel because it just doesn't strike me as
22 the kind of effort that would need to be undertaken before
23 we come to a mediation.

24 Without having done what's -- I'm repeating myself,
25 without having done all the things that one would want to

1 undertake to fully understand the claims, the value of them,
2 the extent of them, in terms of allocating responsibility,
3 if any, again, yet to be determined, among various
4 defendants.

5 Some may have little or no responsibility. Some may
6 have an extraordinary amount. And how you can do that
7 without seeing the discovery and taking the depositions is
8 really something I don't quite understand. So --

9 MR. VAN KWAWEGEN: So Your Honor --

10 THE COURT: I'm sorry, counsel. I need to hear
11 from the others. I think I've said what I had to say or
12 want to say about this issue.

13 So what is the position of Michael Anderson and any
14 other related defendants that counsel represents, please?

15 MR. RITTS: Good afternoon, Your Honor. This is
16 Geoffrey Ritts from Jones Day. I'm here along with my
17 partners Marjorie Duffy and Robert Faxon on behalf of
18 Defendants Anderson, et al., the current directors and
19 current officers of the company.

20 Your Honor, we do not have any discovery-related
21 issues to raise with the Court today.

22 We agree with the plaintiff in his desirability of
23 conducting the mediation on February 1 and of putting off
24 the January 31 conference date, and we appreciate the
25 Court's entertaining the request to move that date.

1 And our view is that, is that a mediation is something
2 that does make sense. And it makes sense for the parties to
3 sit down and exchange views about the case and work with an
4 experienced mediator who has done many, many, many cases of
5 this sort and address the possibilities.

6 THE COURT: So, again, just thinking out loud
7 here, so how is a mediator going to mediate this case if the
8 mediator doesn't have the benefit of any discovery, meaning
9 any paperwork -- when I say paperwork, any of the discovery
10 that's, much of which has not yet been produced, supposedly
11 is due January 14, as I recall, or thereabouts, subject to
12 other objections.

13 How is the mediator going to effectively mediate the
14 case without knowing -- having the benefit of any
15 depositions, etcetera?

16 I just don't find it to be a productive exercise at
17 this point.

18 But I'm not going to stop the parties. I will tell
19 you now. I am going to revisit the issue of lead counsel,
20 definitely. I'm going to see whether or not we need either
21 additional or perhaps new lead counsel because I just cannot
22 come to grips with the idea that we're going to mediate this
23 case after having conducted the case management conference,
24 having listened to what would be the needs of the plaintiff
25 in terms of depositions and discovery. And then now we see,

1 well, Judge, we want to mediate the case before we even have
2 the benefit of any of it, which doesn't strike me as
3 productive or proceeding with something that would -- maybe
4 I need a set of fresh -- maybe fresh eyes need to look at
5 this and determine if this is the way to proceed.

6 So, counsel, who is next up? On behalf of
7 the -- counsel on behalf of Mr. Jones, I think, is next in
8 line here.

9 MS. RENDON: Good afternoon, Your Honor. It's
10 Carole Rendon from Baker Hostetler. I am on with some of my
11 colleagues from Baker Hostetler and also some counsel from
12 Gibson Dunn, including Dan Warren, Doug Shively, and Albert
13 Lin from Baker Hostetler, and Jason Mendro from Gibson Dunn.

14 And Jason, I don't know if there is anybody else who
15 is on from Gibson Dunn. If so, would you please state their
16 presence.

17 MR. MENDRO: It's just me this afternoon. Thank
18 you, Carole, and thank you, Your Honor.

19 MS. RENDON: So Your Honor, we actually have a
20 couple, two issues, that I want to raise, both of which we
21 discussed with plaintiff's counsel.

22 The first is really sort of an administrative issue,
23 and that's a due date issue.

24 So under some of the current scheduling, we have
25 documents and written discovery due on January 17 which is

1 MLK day. And as you know, Your Honor, the courts are
2 closed. Baker Hostetler is closed.

3 We think under the federal rules, Rule 6, that in fact
4 the deadline therefore falls onto January 18.

5 But after talking to plaintiff's counsel about it, we
6 thought it would be best to make sure that we are correct
7 about that with the Court.

8 THE COURT: The 18th is fine given the fact the
9 17th is obviously a holiday.

10 MS. RENDON: Great. Thank you so much, Your
11 Honor.

12 The second issue is an issue that involves data
13 retention, an issue that we're still in the very preliminary
14 stages of figuring out. But we notified plaintiff's counsel
15 and actually all defense counsel as well, and I just want to
16 make sure that I flag it for the Court so you're aware of
17 it.

18 After Mr. Jones was terminated from FirstEnergy, he
19 purchased his own iPhone and iPad. So these are devices
20 that he did not have before his termination. These are
21 devices that he obtained long after any issues relevant to
22 the case had taken place.

23 Those devices all remain with FirstEnergy. They
24 belong to FirstEnergy. They're in FirstEnergy's possession.
25 And the relevant information from those devices, I believe,

1 has already been produced and/or FirstEnergy is in the
2 process of producing it.

3 These are devices that he purchased after the fact.

4 Unbeknownst to Mr. Jones and to counsel, when he
5 purchased these devices, there was an auto delete function
6 that was set for text messages. So text messages were being
7 auto deleted after 30 days.

8 It does not impact in any way records of phone calls
9 that were made. And we do have some data, both going back
10 for a period of 90 days and then text logs that we've been
11 able to identify.

12 This is all very preliminary, Your Honor. We're
13 working with a forensic expert vendor to try to recover as
14 much of the data as we can.

15 But so far preliminarily it looks like there is very
16 little, if anything, that would have any relevance to this
17 case that would be on these devices.

18 So far, for example, we've identified only a single
19 potentially relevant text message. And the recipient has
20 that text message. So it hasn't been lost. It's just not
21 on both devices. It's only on one.

22 And we've also reviewed preliminarily some extensive
23 call logs. And there is very little, virtually no
24 communication with anybody relevant to the matters at hand
25 as you would expect, since this is all long after Mr. Jones

1 was represented by counsel and also after he had been
2 terminated from FirstEnergy.

3 But I just wanted to make sure. We told plaintiff's
4 counsel that we would make you aware of it. We're working
5 with plaintiff's counsel, working with a forensic expert,
6 doing everything we can to recover any data that might be
7 available and are continuing to communicate with plaintiff's
8 counsel about it.

9 Counsel for the plaintiff, do you have any concerns or
10 are you going to hold in abeyance your positions, or what is
11 your views on this issue?

12 MR. VAN KWAWEGEN: Your Honor, Jeroen Van
13 Kwawegen from Bernstein Litowitz.

14 We do have concerns, and obviously Mr. Jones is a very
15 critical party in this case.

16 The reason I said there is no issue for Your Honor to
17 decide yet is because counsel is correct. They raised this
18 issue with us. And we have a specialized vendor working
19 with the defendant's vendor to analyze really the scope of
20 this problem. That's proceeding quickly. And so I expect
21 that we can give Your Honor an update in the next couple of
22 days about how that is proceeding.

23 We're also and have also subpoenaed the telecom
24 providers to understand better the scope of this problem.
25 So we are working really hard at finding out what extent

1 that is a problem.

2 And if your question is, are you concerned? The
3 answer is yes, Your Honor, and that's why we are working
4 hard to address it.

5 But I'm not sure that this is done where I could say
6 to Your Honor, please order Mr. Jones to do X, Y, Z because
7 our vendor is in touch with their vendor and we are working
8 through this issue diligently.

9 THE COURT: Okay. Well, hopefully it doesn't
10 become a problem.

11 It sounds like those are text messages, whatever there
12 may have been, are something that's going to need to be
13 explored one way or the other.

14 So don't wait. You'll obviously want to clear that
15 issue up before his deposition. So don't wait.

16 MR. VAN KWAWEGEN: I agree, Your Honor.

17 MS. RENDON: Absolutely, Your Honor.

18 Just so Your Honor is aware --

19 THE COURT: Go ahead, Ms. Rendon.

20 MS. RENDON: Just so Your Honor is aware, we have
21 retained not one but two forensic experts to work with us on
22 this issue. And we have been talking with plaintiff's
23 counsel about it since this issue came to light.

24 And counsel for the plaintiff is correct. The two
25 forensic experts are, with our agreement, in connection with

1 one another. We are also working with plaintiff's counsel
2 on other mechanisms to try to obtain this information.

3 But I do want to emphasize, Your Honor, just so you
4 understand the context, that this has nothing to do with any
5 of the devices that Mr. Jones possessed during the relevant
6 time period. These are only devices that he purchased
7 personally after he was terminated by FirstEnergy.

8 So nothing having to do with any of the timeframe that
9 is discussed or described in the DTA. Nothing having to do
10 with any communications while he was employed at
11 FirstEnergy. These are only communications, and then only
12 text message communications, on devices that he purchased
13 after he was already terminated from FirstEnergy, long after
14 he also had counsel in place.

15 So we'll continue to work on it diligently, Your
16 Honor, of course. And we're cooperating cooperatively with
17 plaintiff's counsel. And we'll make sure we keep the Court
18 apprised of anything that is relevant.

19 THE COURT: I appreciate it. Hopefully it
20 doesn't become an issue.

21 Although, hypothetically I could see post-termination
22 text messages being relevant. Depending on who the messages
23 are with or between or who they're directed at, it could be
24 relevant. So hopefully it won't become an issue.

25 Anything else?

1 MS. RENDON: Thank you, Your Honor. I appreciate
2 it.

3 THE COURT: All right. Thank you.

4 Let's make sure -- next defendant is Mr. Misheff.
5 Counsel.

6 MR. RITTS: Your Honor, this is Geoffrey Ritts.
7 I represent Defendant Misheff along with Anderson, Demetriou
8 Johnson, Mitchell, O'Neil, Pappas, Pianalto, Reyes, Turner,
9 Strah, and Taylor. And I don't have anything further
10 relating to Mr. Misheff.

11 THE COURT: All right. Thank you.

12 On behalf of Mr. Reffner then I believe is next.

13 MR. SCHOLLES: Good afternoon, Your Honor. Steve
14 Scholes, S-C-H-O-L-E-S, on behalf of Mr. Reffner.

15 And we do not have anything to add in substance in
16 addition to those of counsel for -- Mr. Ritts and counsel
17 for Mr. Jones.

18 THE COURT: Thank you.

19 On behalf of Mr. Dowling is next in line, counsel.

20 MR. MCCAFFREY: Judge Adams, on behalf Mr.
21 Dowling, John McCaffrey and John Favret from Tucker Ellis in
22 Cleveland.

23 Your Honor, we would encourage that the Court enter
24 the ESI protocol order so that we can begin our discovery
25 production post haste.

1 We also agree with proceeding with mediation for the
2 reasons that have been outlined by both plaintiff's counsel
3 and so far Mr. Ritts.

4 Thank you.

5 THE COURT: All right. Thank you.

6 On behalf of the -- I don't want to
7 mispronounce -- I'll use the first name so I don't
8 mispronounce the last.

9 On behalf of Ebony, please, counsel.

10 MS. LAPE: Hi. This is Marcie Lape on behalf of
11 Ms. Yeboah-Amankwah. We do not have any discovery issues to
12 bring to the Court's attention and have nothing to add in
13 substance to that that was already set forth by Mr. Ritts.

14 THE COURT: Thank you.

15 FirstEnergy as a nominal defendant, is there counsel
16 appearing here?

17 MR. GLEESON: Yes, Judge. Thank you. This is
18 John Gleeson from Debevoise and Plimpton. On the phone with
19 me is my partner Susan Gittes.

20 And just a report, Your Honor. We were in your
21 courtroom about two months ago. The special litigation
22 committee was already up and running and working hard
23 investigating these claims, which, as you know, we were
24 investigating on behalf of the committee's exercising the
25 company's authority with regard to these claims that have

1 been brought on behalf of the company.

2 We've continued that. We're very far along.

3 I do want to say this, Judge. The only -- I think
4 potentially the only value add I have here is to tell you
5 that, first of all, we're grateful you let us -- you've
6 given us a break on January 31 so we can go to mediation.

7 And Your Honor, you know, I'll elaborate on it to the
8 extent I can if you want me to, but I assure the Court we
9 think that it's possible that mediation in front of Layn
10 Phillips could be productive and there is enough grist for
11 the mill.

12 We hear what you're saying about depositions, but we
13 believe, and I represent to the Court, there is plenty of
14 information on which meaningful mediation proceedings can go
15 forward. And so we're grateful you're going to give us that
16 opportunity.

17 THE COURT: So when is the committee, special
18 committee, going to take any action here?

19 I'm thinking June or July you asked for six months.
20 As you have a right to do, you took that issue up to the
21 circuit, said, Judges, we need another six months.

22 So that time has come and passed. So you're working
23 diligently. With all due respect, so when are you going to
24 expect that you'll conclude this work?

25 MR. GLEESON: Judge, I can't give you a date. I

1 can say that with respect to the principal components of our
2 investigation, we're wrapping it up.

3 There are other components that we've yet to address,
4 but we think this mediation represents in some respects like
5 a major potential step forward towards resolving at least
6 some of the potential claims that the company could bring.

7 So I can't -- honestly I can't give you a date. Not
8 because we're not working our tail off, Judge, but only
9 because it's kind of a sprawling matter.

10 And you're right. We did ask for the six months. We
11 asked for it in the circuit. We didn't get it. But we
12 worked as though we weren't going to get it, and we've very
13 far along.

14 We're going to prepare for a fruitful mediation. I
15 don't think it's going to get resolved in a day, but I think
16 we've got -- and we've got a substantial likelihood that we
17 can make progress in resolving the derivative claims, if not
18 in their entirety, in substantial part.

19 As you know, you never know for sure, but, you know, I
20 think the parties are hungry to get before a very
21 accomplished mediator who has got a track record of being
22 able to help resolve issues as complex as this.

23 And, you know, we're hopeful.

24 THE COURT: Well, counsel, I hate to be this
25 opinionated, and I speak my mind sometimes too frequently.

1 But if someone was cynical, they would say, well, you
2 definitely want to try to mediate this case before the
3 parties have to come and sit down and be deposed and be
4 questioned and this entire matter be fully reviewed.

5 That's sort of the cynic's view. I wonder if there
6 isn't other counsel who might want to take a different look
7 at it and see whether or not mediation is appropriate before
8 you've done all the background work you need to do to really
9 understand the case and understand everyone's possible role
10 in the events in question here. That's what I can't quite
11 block out of my mind.

12 MR. GLEESON: Well, Judge, can I make one comment
13 in that regard?

14 THE COURT: Yeah, sure.

15 MR. GLEESON: To help you understand at least
16 where we're coming from.

17 And I speak only on behalf of the special litigation
18 committee. I carry no brief for the shareholders,
19 derivative shareholders' counsel you've heard from.

20 But you know, the one thing that he said that I would
21 like to emphasize is these are claims that are brought on
22 behalf of the company. You know, it's not a class action
23 against the company.

24 And among the things the company properly needs to
25 consider in determining whether to bring these claims, and

1 if so how to resolve them, is the potential harm to the
2 company that the pursuit of these claims could threaten in
3 connection with securities class actions, RICO actions,
4 regulatory, other governmental investigations.

5 So whereas it may well be in the company's interest to
6 advance a claim, that interest has to be weighed against the
7 potential harm that a deposition might cause for the
8 company.

9 So it's a delicate -- it's a delicate step of
10 considerations. And it's not necessarily in the interest of
11 the special litigation committee to have depositions go
12 forward because of the harm those depositions might threaten
13 with regards to claims against the company.

14 Again, we're pursuing, as is counsel for the
15 shareholders, pursuing claims in which the company is a
16 victim and pursuing claims on behalf of the company.

17 But those other claims out there against the company
18 have to be taken into account. And that's the reason why,
19 Judge, it's not necessarily advantageous to have the
20 depositions now.

21 I hope -- you know, I hope the Court understands that.

22 THE COURT: I understand that, but I guess you
23 and I will just fundamentally disagree because when you're
24 trying to assess the relative culpability, if any, alleged
25 culpability of those in leadership positions with the

1 company, trying to assess whether or not they're
2 responsible, their financial responsibility for some of the
3 harm, that's an important part of this process as well.

4 Talk about harm to the company, you know, who
5 allegedly -- I use the word "allegedly" because I don't
6 know. I know what I've read in the agreement between the
7 government and the United States, or the United States and
8 FirstEnergy, readily admitting bribery here and other
9 actions that give one pause.

10 So without doing the kind of discovery that's
11 necessary and assessing whether there is individuals who are
12 culpable for the harm -- I don't know how you can possibly
13 mediate the case appropriately or do it effectively.

14 There is other components of this claim that are
15 nonmonetary, that are important as well, I would think.

16 But I'm repeating myself. I'm repetitive. I don't
17 know how we're going to deal with it. But I just can't
18 fathom mediating the case without having -- even at this
19 point, the window of time between production of documents,
20 not knowing what you're going to receive, I mean, that's
21 even extraordinary.

22 Production is going to be January 14 and 17. There
23 will be no depositions. And then you're going to mediate a
24 case where you will have no more than two weeks, plaintiff's
25 counsel, to review thousands of pages of documents, the way

1 I read it.

2 So that strikes me as just not something that you
3 would see done in the ordinary course of a diligent vigorous
4 prosecution, trying to represent the company in assessing
5 responsibility, if any, among all the individual defendants.

6 That strikes me -- strikes me as just in some respects
7 common sense.

8 I can't think of a litigator who would say, well, I
9 don't know what I'm going to get in terms of the paper
10 discovery, but I know I'm going to get something or some
11 things subject to dispute resolution, on the 14th and the
12 17th. And then I'm going to turn around and in maybe less
13 than two weeks agree to mediate a case of this magnitude.

14 It gives me real pause and real concern. Period.

15 So let's turn to the next defendant.

16 Do we have an intervenor, Mr. Katz? Does counsel wish
17 to be heard?

18 Maybe he's not participating.

19 Do we have Employee Retirement System of the City of
20 St. Louis, counsel?

21 MR. VAN KWAWEGEN: Your Honor, Jeroen Van
22 Kwawegen from Bernstein Litowitz on behalf of all
23 plaintiffs.

24 Would you allow me just to respond to some of the
25 points you made a second ago because I want to make sure

1 that the Court understands that we have received more than
2 300,000 pages of documents. We have 25 lawyers working
3 around the clock reviewing those documents, getting ready
4 for depositions.

5 So I just want to make sure that Your Honor
6 understands that we have all the productions to the
7 Department of Justice. We have text messages. We have all
8 the board minutes and all the board materials. We have a
9 lot of documents. We are running full speed to get ready
10 for depositions.

11 So I don't want Your Honor to think that we haven't
12 received documents, that we don't have enough to prepare for
13 depositions.

14 What we're really working with, when you think about
15 January 14 and January 17, are the remaining document
16 productions, and there will be, but it's not the case that
17 we don't have document productions and that we haven't been
18 working really hard to prepare for these depositions, which,
19 and I agree with Mr. Gleeson, will go forward because, most
20 likely go forward, because it is unlikely that the case
21 settles in just one day.

22 So I just want to make sure that the Court is aware
23 that we are not sort of waiting around waiting for documents
24 to be produced.

25 We have a team of 25 attorneys and have had a team of

1 25 attorneys go through those documents already as we are
2 preparing this case.

3 The other thing I wanted to make sure that Your Honor
4 knows -- go ahead. Sorry, Your Honor.

5 THE COURT: Well, are you mediating the cases in
6 the Southern District?

7 MR. VAN KWAWEGEN: Your Honor, the answer is yes
8 and no. The mediation is independent of the Southern
9 District or the Northern District. But it was always our
10 intent to do this in connection with Your Honor, okay.

11 We want to make sure that Your Honor is pleased
12 ultimately. If -- and there may not be a settlement. But
13 if there is a settlement, we want Your Honor to be pleased
14 with that settlement.

15 And in connection with that, you know, when you think
16 about some of the largest recoveries in history in
17 derivative cases -- those are the Wells Fargo case in the
18 Northern District and the recent Boeing case in Delaware
19 Chancery. Both of those cases were ultimately settled
20 before depositions.

21 The last one, the Boeing case, was a recovery of 237
22 and a half million dollars for the company. There were no
23 depositions. And it was mediated by the same judge, former
24 judge, Judge Phillips, that is mediating this case.

25 And so all I'm asking Your Honor is to know that we

1 are working really hard with a large team of attorneys to
2 get ready for these depositions, and to give us a chance
3 that if we -- and I'm not saying we will -- but that if we
4 have a mediation that is successful, that Your Honor looks
5 at this settlement and thinks about it.

6 And my final point on that is all plaintiffs counsel,
7 in this case, but also in the state case, have agreed to
8 give this a chance to see if we can get the kind of historic
9 settlement that Your Honor would say, you know what, I had
10 my reservations, but this is really unbelievably good given
11 the monetary recovery and the government's improvements.

12 That's all I'm asking, Your Honor, beside the fact to
13 just know that we are working really, really hard to be up
14 to speed and to be up for the depositions and to have an
15 informed mediation ultimately because we agree with that on
16 Your Honor's account as well.

17 Of course it needs to be an informed mediation, but
18 we're working really hard to make that happen.

19 THE COURT: I guess we're going to go back and
20 forth. But I don't see how I can be informed, whatsoever,
21 without the benefit of some detailed discovery, depositions,
22 particularly of the major players here that are alleged to
23 have engaged in some misconduct and the challenges that
24 that's going to pose.

25 But -- again, you and I are just going to agree to

1 disagree. And maybe I need another counsel to either come
2 on the case or, you know -- I'm reluctant to remove anyone,
3 but appoint, perhaps, additional counsel who can take a look
4 at it, somebody who is, perhaps, more well-known here in the
5 Northern District to take a good look at this case and
6 assess whether or not they need to undertake depositions, do
7 discovery, do the kind of work that needs to be done.

8 Who knows? You may come here, make an offer, or come
9 with some proposed settlement. I don't know whether it's
10 good or bad or otherwise. I don't know whether it
11 incorporates or includes responsibility of others that are
12 directly involved in this case.

13 I don't know any of those things. I don't know what
14 the relevant culpability may be in terms -- if any. Again,
15 subject, if any.

16 And I'm, candidly, concerned FirstEnergy is -- I hope
17 they're not dragging their feet. FirstEnergy is claiming
18 that they have this committee that's doing this work and
19 attempting to ferret out, resolve these issues.

20 But after six months, we're well beyond six months. I
21 don't know what they've done. I don't know what they're
22 doing.

23 So I'm concerned --

24 MR. GLEESON: Judge --

25 THE COURT: I'm very concerned about this rush to

1 mediation without having all the work that I think needs to
2 be done before effective mediation can be done and when any
3 mediator can look and say, well, how many parties are at
4 issue here? How many parties need to participate in
5 settlement, if any? How many need to pay money? If there
6 is all this money coming, where -- is it all coming from
7 FirstEnergy, so to speak? Where is it coming from?

8 All those kinds of things that I think would justify
9 that this mediation is being done with all of the adequate
10 discovery information needed and necessary.

11 So I have to give pause as to whether I look for other
12 counsel.

13 MR. GLEESON: Judge, it's a small point. This is
14 John Gleeson from Debevoise again on behalf of the special
15 litigation committee.

16 But just so the Court is aware, we are not beyond the
17 six months. We asked for six months in July, and had we
18 gotten it, it would not yet have expired. Just so the Court
19 knows.

20 We are working hard. I represent that to the Court.
21 And we have made a ton of progress before early November and
22 since. So just so the Court is aware.

23 THE COURT: All right. Well, I mean, one would
24 hope that given the -- knowing how the various litigation
25 and other aspects of this, that they would be working

1 diligently and would have, would, I would hope, quickly,
2 timely, come up with some recommendations.

3 So, counsel, we'll set another date. If there is any
4 discovery issues, I need to know about it immediately so we
5 can set other dates.

6 And I will let you know, counsel, about how I go about
7 deciding who I'm going to appoint as either co-lead counsel
8 or what steps I'm going to take in that regard. But I think
9 that's going to be, with some reluctance, I guess going to
10 be necessary.

11 I just can't -- I don't have any confidence that
12 diligent prosecution is being undertaken here when I hear
13 what I've heard here about this rush to mediation.

14 And I call it rush because I just -- I'm somewhat -- I
15 don't want to use the word shocked, but I'm somewhat, I'll
16 say, more than surprised that you want to mediate before
17 you've done all the necessary work.

18 In any kind of litigation, in my experience,
19 depositions are essential, depositions to know and
20 understand, take testimony under oath, find out and
21 determine who knows what, who, what, when, where, and how,
22 and why.

23 Board minute are just board minutes. They don't tell
24 you the details of the meeting.

25 So we'll set another date. I'll let you know how I'm

1 going to go about selecting other counsel.

2 Anyone else?

3 MS. MCNALLY: Excuse me, Your Honor.

4 THE COURT: Yes.

5 MS. MCNALLY: Your Honor, this is Laura McNally
6 from Morgan, Lewis, and Bockius. I'm joined by Doug
7 Mansfield from Lape, Mansfield, and Nakasian. We're counsel
8 for Dennis Chack, and I just wanted to note our presence for
9 the record since we didn't get called on.

10 We don't have anything to add in substance other than
11 what everyone else has stated.

12 THE COURT: You're on behalf of who again,
13 please?

14 MS. MCNALLY: Dennis Chack.

15 THE COURT: Okay. I'm sorry. I'm going through
16 the docket here, trying to see how I missed you. If I did,
17 I apologize. I'm trying to find -- I thought I went
18 through everyone in turn. So my apologies, counsel.

19 Are you sure there is nothing else you want to add?

20 MS. MCNALLY: Correct, Your Honor.

21 THE COURT: All right. Anyone else wish to be
22 heard before I set up the dates?

23 MR. KATSIFF: Yes, Your Honor. Just to note our
24 presence for the record. This is Timothy Katsiff of Ballard
25 Spahr, and we represent Mr. Pearson.

1 But there is nothing additional that we need to be
2 heard on.

3 THE COURT: All right, counsel.

4 We will set a date for any discovery disputes to be
5 brought to my attention. As I read the status reports,
6 everything is due -- back up. We'll put up the ESI order so
7 you have it.

8 In terms of discovery, it's my understanding the 18th
9 is the day that everything is due, so -- by all parties, as
10 I understand it.

11 So let's take a look at the calendar. We'll set
12 another date. If there is going to be issues, hopefully by
13 that time I can explore how we go about selecting other
14 counsel or additional counsel as the case may be to review
15 the matter and perhaps act as cocounsel here, particularly
16 before the depositions start.

17 Just a moment while I find a new calendar for the year
18 here.

19 Friday the 28th is a -- you're going to go forward
20 with your mediation. That's entirely up to you.

21 The 28th, Friday, at 1:00 we'll conduct a telephone
22 conference. If there is no issues, if you're able to clear
23 up any discovery disputes or issues, let me know, and I
24 won't conduct the conference.

25 If there is some issues that I need to address, again,

1 bring them to my attention immediately. We'll use that date
2 and time to hear from the parties regarding any possible
3 disputes and resolutions, etcetera.

4 As I indicate, by that time, I don't know if time will
5 permit us to determine who else we are going to consider as
6 additional counsel in the case.

7 I will do that. And, again, I'm reluctant to remove
8 counsel, appoint new lead counsel, delay that further, but
9 again, that's something I have to contemplate here.

10 Anyone else?

11 All right. 1:30 on the 28th we will speak to everyone
12 at that time again.

13 Excuse me one second.

14 We'll reset the in-person on the 28th so that we have
15 a clear understanding of what's going to happen here.

16 Our Court put up a general order which stays all trial
17 proceedings until after the 11th of February. So after
18 that, depending on the pandemic, if it's ramping up again,
19 the trial, because of pending cases, so we will speak with
20 you about the date and time on the 28th or the next status
21 conference regarding the matter.

22 Any questions on behalf of the plaintiff?

23 MR. VAN KWAWEGEN: No, Your Honor.

24 MR. RITTS: No, Your Honor.

25 THE COURT: All right. Anyone else has any

1 questions, speak up. Otherwise we will speak with you on
2 the 28th.

3 All right. Thank you very much. Everyone have a good
4 day.

5 We'll be back with you as quickly as we can.

6 (Proceedings concluded at 1:52 p.m.)
7

8 C E R T I F I C A T E
9

10 I certify that the forgoing is a correct
11 transcript from the record of proceedings in the
12 above-entitled matter.
13

14 S/Caroline Mahnke 1/10/2022

15 Caroline Mahnke, RMR, CRR, CRC Date
16
17
18
19
20
21
22
23
24
25