

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JENNIFER L. MILLER,

Plaintiff,

vs.

MICHAEL J. ANDERSON, ET AL.,

Defendants.

Case No. 5:20CV1743

Akron, Ohio

Friday, January 28, 2022

1:36 p.m.

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

APPEARANCES:

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

1 Friday, January 28, 2022

2 THE COURT: All right. Ladies and gentlemen,
3 good afternoon. This is Judge Adams. We're here today
4 regarding Case Number 5:20CV1743. The case is captioned
5 Jennifer Miller versus Michael J. Anderson. We're here
6 today for a status conference regarding the matter.

7 I know there is a substantial number of counsel on the
8 phone, so we would ask that each of you identify yourself
9 before you speak.

10 I'll go through the best I can the docket and refer to
11 counsel. If you represent more than one party, please state
12 that as well for the record.

13 I did receive -- I think yesterday late evening there
14 was a status report filed by the parties. The plaintiff, I
15 believe, filed a status report.

16 And I previously received a report from the Nominal
17 Defendant FirstEnergy.

18 So I have read those. So I'm familiar with what's
19 been represented to the Court.

20 Counsel for the plaintiff, why don't you take a few
21 moments and give me some detail of the status, etcetera, of
22 the case, discovery, any knowledge of any disputes, things
23 of that nature, please.

24 MR. VAN KWAWEGEN: Good afternoon, Your Honor.
25 My name is Jeroen Van Kwawegen from Bernstein Litowitz on

1 behalf of the plaintiffs. Thank you for holding this
2 conference.

3 I appreciate the fact that Your Honor has read our
4 status report, docket number 258.

5 As Your Honor saw from the status report, the
6 plaintiffs have been collectively working really hard at
7 this case for the last 18 months, have defeated many
8 motions, including in the Sixth Circuit, and in the meantime
9 started working hard on discovery.

10 We have negotiated protocols -- and I'm talking about
11 a few months ago now -- but we have negotiated protocols
12 with all the defendants, including FirstEnergy, received
13 more than 400,000 pages of documents, and we have a team of
14 30 attorneys working through, and have been working through,
15 those document productions so that we will be ready to start
16 depositions starting with Mr. Mitchell on February 10.

17 We are on track, Your Honor, to meet those deadlines
18 and to continue with the Court-approved schedule.

19 As in any other large complex litigation, along the
20 way issues will arise that need to be resolved. And what I
21 can tell Your Honor is that along the way issues have
22 arisen. They have been resolved so far every time,
23 partially due to Your Honor's oversight of this case.

24 There were a number of issues that arose along the way
25 where initially we got resistance, and when we said, look,

1 maybe we should just raise this with the Court, we
2 ultimately were able to reach a satisfactory resolution.

3 And so as we have been going through this process over
4 the last six to eight months, we have been able to resolve
5 those issues.

6 We are now reaching the end, as Your Honor knows from
7 the status report and from submissions, we're reaching the
8 end.

9 And one of the final big pieces that needed to be
10 resolved, quite frankly, was the privilege log, which as
11 Your Honor probably can imagine also is going to be a
12 significant issue in this case with a large number of
13 documents.

14 And Your Honor saw that FirstEnergy had requested a
15 short extension, which Your Honor granted, to resolve that
16 issue.

17 And that issue has now been resolved, and so we will
18 soon receive the privilege log. And we will obviously comb
19 through this and raise any issues first with FirstEnergy and
20 otherwise with the Court.

21 So I'm not saying that all issues have been resolved,
22 Your Honor. But what I will say is that any issues that
23 needed to be resolved have been resolved and that we are
24 still working through some final issues with the various
25 parties to make sure that those are resolved as well,

1 knowing that the Court is available.

2 I'm happy to go party by party or issue by issue. But
3 I wanted to give this broader overview for Your Honor first
4 and see if Your Honor has any questions specifically to any
5 of the issues. And I'm happy to give you further detail.

6 THE COURT: A couple.

7 Are you still planning on trying to attempt to mediate
8 this case on Monday?

9 MR. VAN KWAWEGEN: Your Honor, all the plaintiffs
10 and all the defendants collectively have agreed to try and
11 mediate the case on Tuesday.

12 THE COURT: And who plans on attending that
13 mediation?

14 MR. VAN KWAWEGEN: All parties, Your Honor, all
15 parties before this Court, all parties before the Southern
16 District of Ohio, all parties in the related state case.

17 THE COURT: So they'll be attending in person?
18 Or how are they going to attend?

19 MR. VAN KWAWEGEN: No, Your Honor. This is going
20 to be by Zoom. Due to the pandemic, travel is very
21 difficult, as Your Honor knows.

22 In addition to that, Your Honor is also aware there is
23 a large number of parties and attorneys, and we collectively
24 deemed it advisable not to be all in the same room.

25 So it's going to be by Zoom.

1 THE COURT: All right. Well, I think I've
2 already expressed my views about mediation and what may or
3 may not be accomplished. So I'm not going to restate how I
4 feel about that at this point other than make sure that
5 everyone's aware, I know I have the deposition schedule in
6 front of me, make certain everyone's well aware and prepared
7 to proceed by way of deposition.

8 Given the Court's schedule, do you have -- do you plan
9 on using the court facilities for purposes of deposition,
10 given the number of parties, the Court's courtroom, or we
11 have a spare courtroom I believe that may be available? Is
12 that something you still intend to do?

13 MR. VAN KWAWEGEN: So Your Honor, we thank Your
14 Honor for that offer. Plaintiffs would like to take you up
15 on that offer, but ultimately we would have to discuss that
16 obviously with defendants because they need to come. But we
17 would be perfectly happy to take Your Honor up on that offer
18 for the reasons that you just expressed.

19 THE COURT: Well, I think it might be more
20 productive that it be done in person. And if the witnesses
21 appear here, that way if there is any objections or anything
22 that might impede the deposition going forward, then I can
23 be available and address it then at the time rather than
24 having delay and have more filings and more possible
25 continuation of the deposition, etcetera.

1 So if need be, I'll put up an order and we'll do that,
2 do the depositions here so everyone can be present. The
3 Court can be available should there be any issues.

4 I think that also, bluntly, would be productive, more
5 productive, since I would hope or anticipate there is going
6 to be a substantial number of documents that the parties are
7 going to utilize or may wish to utilize in the course of the
8 examination.

9 Am I mistaken? Am I in error in that thought?

10 MR. VAN KWAWEGEN: Your Honor, you are not
11 mistaken, and we appreciate Your Honor's views on this and
12 we agree with them. And so we thank Your Honor for that.

13 And I think it makes sense what Your Honor is saying
14 also because we are working -- we haven't set a trial date,
15 Your Honor, but we are working with the understanding that
16 Your Honor would like to have this case ready for trial by
17 August.

18 And we are -- we think that it could make sense, to
19 avoid further delays and the continuances that Your Honor
20 mentions, to have those depositions take place in Akron in
21 your courtroom.

22 THE COURT: Do you anticipate any amendment of
23 the complaint?

24 I don't know if there is going to be any future change
25 of circumstances, etcetera. None of us can predict that, of

1 course, but based on what you have now in terms of the
2 documentation, do you anticipate any amendment to either add
3 or delete various claims or parties?

4 MR. VAN KWAWEGEN: Not at this time, Your Honor.

5 THE COURT: All right. So let's turn then to
6 counsel -- I'll try to do this in the order they appear on
7 the docket just due to the sheer numbers here.

8 On behalf of Mr. Anderson, counsel?

9 MR. RITTS: Yes, Your Honor. This is Geoffrey
10 Ritts from Jones Day. I represent Defendants Anderson,
11 Demetriou, Johnson, Misheff, Mitchell, O'Neil, Pappas,
12 Pianalto, Reyes, Turner, Strah, and Taylor; that is, the
13 independent directors and the two defendants who are current
14 officers of the company.

15 We don't have any discovery disputes or issues to
16 bring to the Court's attention today.

17 As plaintiff's counsel said, there are a number of
18 issues on both sides that we're continuing to work through
19 and I expect that we'll continue to work through over the
20 coming days and weeks.

21 We did, Your Honor, yesterday, submit an unopposed
22 motion asking for the outside director/current officer
23 defendants to be excused from personal attendance at the
24 status conference on February 7 for a number of reasons
25 explained at more length in that motion. I just note that

1 that motion is there and is pending.

2 THE COURT: Is your client prepared to -- perhaps
3 you don't represent Mr. Mitchell. I'm sorry.

4 In terms of the witnesses that are noticed for
5 deposition next February and March, are they all prepared to
6 appear in the courthouse for deposition?

7 MR. RITTS: Your Honor, the directors live all
8 over the country and so it would, I would suggest, not be
9 optimal for the depositions of the directors who live in a
10 distance to have them in the courthouse.

11 Mr. Mitchell, for example, lives in southeastern
12 Georgia, and he is of an age where travel during this time
13 probably would not be advisable for him.

14 We have not conferred with the plaintiffs about the
15 modalities of any of the depositions so far as either
16 whether the depositions are going to be in person or hybrid
17 or remote or just what, or if they're going to be in person,
18 where the depositions are going to occur.

19 I suggest that it would make sense for us to confer
20 with the plaintiffs and the other parties about what makes
21 sense in terms of the most efficient and safest way to hold
22 these depositions.

23 And I expect, as with most other things in this case,
24 the parties will probably be able to work something out.

25 THE COURT: I think, with all due respect,

1 counsel, I think I contemplated from the very beginning,
2 from our early discussions in the case, that depositions
3 would be held here so that -- again, for the reason I've
4 already noted, the number of parties, the number of
5 witnesses, the number of counsel, more to the point, along
6 with should there be any disputes, any objections to any of
7 the answers, those can be cleared up right then and there
8 rather than the Court having to wait for the transcript to
9 be prepared, rulings made, answers given at a later date and
10 time.

11 A lot more efficient if everyone's present so we don't
12 have those particular problems.

13 So I'll hear from everyone else, but that's been my
14 thinking all along. This is a case -- FirstEnergy is based
15 in Akron. All of the parties that are named here come to
16 Akron, I suspect, as part of their duties.

17 So travel to Akron shouldn't be difficult. They
18 should be familiar with the area, familiar with the
19 community, the airport, etcetera. I don't, quite frankly,
20 see it as any undue hardship.

21 But having said that, counsel for Mr. Jones is next in
22 line. What update would you like to provide the Court?

23 MR. RITTS: Your Honor --

24 MS. RENDON: Good afternoon, Your Honor.

25 THE COURT: I'm sorry?

1 MR. RITTS: This is Geoffrey Ritts again. Just
2 one other point about the travel issue.

3 FirstEnergy has not held board meetings in Akron in
4 person for quite some time now due to the pandemic. All of
5 their board meetings during 2021 have been conducted
6 virtually with just one exception.

7 So the director defendants, in fact, have not been
8 traveling to Akron for business purposes related to
9 FirstEnergy.

10 That's in our motion that we filed yesterday. I just
11 wanted to make that clear, though.

12 THE COURT: Well, counsel, I guess my -- I don't
13 want to debate it with you. I don't want to tell you what I
14 think we should do and how to do it.

15 I'm talking about travel over the years during the
16 time frame the allegations here are made. They occurred
17 well before the pandemic occurred.

18 And we don't need to debate it. People are traveling
19 all the time through airports for other purposes, for
20 vacations, for sporting events, what have you. So travel is
21 not as restrictive as one might think.

22 So, again, I'll hear from everyone else, but as I've
23 already discussed how I think this is going to be
24 appropriate to conduct these depositions.

25 The courthouse is safe. We have protocols in place,

1 masks, and rooms are sanitized, and what have you.

2 So it's not as difficult as one might think.

3 So counsel for Mr. Jones, your position, please, or
4 your update?

5 MS. RENDON: Good afternoon, Your Honor. It's
6 Carole Rendon from Baker & Hostetler on behalf of Charles
7 Jones.

8 So Your Honor, I don't have any specific issues to
9 bring to the Court's attention. Everything that I would
10 have addressed was addressed in the plaintiff's status
11 report. So no particular items to address.

12 I would echo that it would be helpful to have an
13 opportunity to talk to plaintiff's counsel about deposition
14 locations with respect particularly to Mr. Jones who is not
15 in Ohio. He is in Florida. And he has some pretty
16 significant health issues.

17 So if you would, Your Honor, if we could just have an
18 opportunity to try to resolve some of this stuff offline and
19 get back to Your Honor perhaps as early as the status
20 conference and discuss it further because it may work for
21 some. It may not work for all.

22 And Your Honor, with respect to the status conference,
23 we do plan to file a motion, as long as Your Honor doesn't
24 object, to also excuse Mr. Jones from attending that status
25 conference in person. And we'll get that on file this

1 afternoon.

2 THE COURT: All right, counsel. What about your
3 discovery requests? Can I ask why it appears that you
4 didn't initiate any discovery in the case until what,
5 July -- excuse me, January, January 12?

6 Is there some reason why you went that period of time
7 without any discovery being requested by Mr. Jones or Mr.
8 Dowling?

9 MS. RENDON: So Your Honor, with respect to the
10 discovery requests, in part we were looking to see what was
11 going to be produced already by some of the other parties so
12 that we wouldn't have to duplicate effort.

13 And as we have been reviewing the documents that have
14 come in and some of the written discovery responses, we
15 identified some places where we thought that there were
16 holes in what has been produced. And so we wanted to target
17 very specific and limited questions to those places where we
18 thought that there was discovery that was relevant that was
19 missing as opposed to just issuing blanket duplicative
20 discovery requests and wasting a lot of time and energy.

21 So that was the reason behind that. And we're working
22 through all of those issues with counsel for the other
23 parties and expect that we won't have any problem getting
24 the information that we need.

25 THE COURT: What about the phones? How far along

1 is the forensic examination?

2 When I say phones, I don't mean just phones. I mean
3 all the other electronic devices, Apple watches, all of
4 that.

5 MS. RENDON: Yes, of course, Your Honor. Happy
6 to address that.

7 So that is well underway. A tremendous amount of work
8 has been done. We have our forensic expert, two of them
9 actually, in place. They have been in contact with
10 plaintiff's forensic expert.

11 We have reported back to the plaintiff in detail the
12 information that has been identified.

13 And I would just say, Your Honor, that it
14 substantiates what I expected and mentioned to Your Honor
15 when I raised this with you at our last status conference.
16 And that includes the following: We have now data on
17 thousands of telephone calls and text messages. There is
18 nothing of any relevance that we have found that is missing
19 and cannot be located. But we're continuing to work through
20 all of those processes.

21 I do also want to make it clear, Your Honor, that we
22 are working cooperatively with the plaintiff to try to
23 address this issue and also to make sure, Your Honor, that
24 you understand -- and I mentioned this at our last status
25 conference as well -- that this was a setting that was on

1 Mr. Jones's phone without his knowledge. He didn't do
2 anything to manipulate the phone to have that particular
3 setting in place. And as soon as it was identified, it was
4 corrected.

5 And so, you know, we are working really hard and in
6 good faith, but at this point we have identified a grand
7 total of four text streams with anyone on the extensive list
8 of people who we agreed to search for that the plaintiff's
9 had put together.

10 Three of those text streams have already been
11 produced, but none of them are relevant to the case, and
12 we're still working on the fourth.

13 THE COURT: Well, I'm sure the plaintiff's
14 counsel will be delving into this, I would certainly hope.

15 These are all Apple devices?

16 MS. RENDON: That is correct, Your Honor. These
17 are all devices that were purchased after Mr. Jones was
18 terminated, so after all of the events at issue in the case.

19 It was an iPhone that was purchased, I believe, the
20 day after his termination. That is now being used by his
21 wife and has been searched.

22 Mr. Jones used that phone for a matter of a couple of
23 weeks and then got a different phone. And that phone has
24 been searched.

25 There is also an iPad.

1 And as indicated in plaintiff's status report, we've
2 identified a couple of other devices which nobody expects
3 will have any relevant information on them. There is a
4 Garmin golf watch and an Apple watch. But out of an
5 abundance of caution, those are all being reviewed as well.

6 In addition, all of Mr. Jones's computers, any
7 computers that were in his home, are being reviewed.

8 There is no indication that there was ever a backup
9 within the relevant time period from Mr. Jones's phone to
10 any of those computers. But we're triple checking just to
11 make sure.

12 So every place where we could look for potentially
13 relevant data we are looking.

14 But again, I just want to make sure that I'm clear,
15 that there is no expectation that there is any data that was
16 relevant to the issues in this case that has been lost.

17 But we are running down every lead and will continue
18 to keep the Court informed as we continue through that
19 process.

20 THE COURT: Well, I suppose counsel might wish to
21 depose those other individuals that, when you look at text
22 messages and other communications from other individuals
23 that are referenced or related to the case, perhaps as part
24 of the -- part of the current prosecution agreement, there
25 is certain individuals who are named there. Certainly

1 public officials A, B, etcetera, I would think that perhaps
2 those phones are either being searched or very well may be
3 subject to a search so you can get information that
4 additional way if need be.

5 Plus, counsel, the way I read it, Verizon has been
6 asked to reproduce various text messages, etcetera, I seem
7 to recall reading in one of the reports.

8 MS. RENDON: That's correct, Your Honor. The
9 plaintiff has issued a subpoena to Verizon for any
10 information that we might be able to get directly from the
11 carrier.

12 But Your Honor, you made an excellent point just now,
13 which is why this really isn't, you know, it's not an issue
14 of tremendous concern. And that is that if a text message
15 is sent or received, it's not just located on one phone.
16 It's located on two.

17 So, for example, there was a text message between Mr.
18 Jones and Mr. Dowling. We were able to identify that the
19 text message had been sent but couldn't produce the content
20 of it. But Mr. Dowling was able to.

21 So the plaintiffs know exactly what that text message
22 said. It has been produced to them. And it has really no
23 relevance to the case. But it was produced anyway.

24 And so that is another layer of protection to ensure
25 and to confirm that nothing of any relevance to this

1 litigation is no longer available to the plaintiff.

2 THE COURT: So you've joined in the plaintiff's
3 request -- or do you join in their request to obtain
4 information from Verizon?

5 MS. RENDON: Yes, Your Honor. In fact, we
6 actually drafted that subpoena for them so that we would
7 make sure that they were capturing everything that could
8 possibly be relevant.

9 So yes. We've been working very cooperatively with
10 them, Your Honor, and they have been working very
11 cooperatively with us.

12 So we are all trying to resolve this issue so we can
13 put it behind us and focus on the matters that are really
14 relevant to the case.

15 THE COURT: All right. Thank you.

16 MS. RENDON: Thank you, Your Honor.

17 THE COURT: Thank you.

18 Let's see. Is it Mr. -- I'm sorry, Ebony, and her
19 last name I apologize. I know I'm not going to pronounce it
20 properly, so I'll just refer to her by her first name.

21 What if any update from your perspective, please?

22 MS. LAPE: Good afternoon, Your Honor. This is
23 Marcie Lape on behalf of Defendant Ebony Yeboah-Amankwah.

24 We do not have any discovery disputes to bring to the
25 Court's attention. We've been working with plaintiff along

1 the way.

2 We are planning, however, Your Honor, to also file a
3 motion later this afternoon to excuse any personal
4 attendance from the status coming up on February 7 as well.

5 THE COURT: Is there some reason why?

6 MS. LAPE: A combination of reasons, Your Honor.

7 She is employed and working that day and has some work
8 obligations as well as issues with respect to, you know,
9 concerns with health reasons as well. And we'll be putting
10 the reasons for that request in the motion that we file.

11 THE COURT: I'm just curious because unbeknownst
12 to me she was part of a jury pool in this courtroom for voir
13 dire on a jury here not too long ago.

14 MS. LAPE: Yes, I'm familiar with that, Your
15 Honor.

16 THE COURT: So it's just interesting that she's
17 not available to us.

18 Mr. Chack, I believe, is -- actually, listed next in
19 the docket is FirstEnergy, Nominal Defendant FirstEnergy
20 Corporation. What would you like to tell us at this time?

21 MR. GLEESON: Judge, this is John Gleason, and
22 I'm on the phone with Susan Gittes, Debevoise & Plimpton,
23 counsel for the litigation committee. We have nothing to
24 report to the Court.

25 THE COURT: So the six months has passed and the

1 special litigation committee has nothing at all to offer or
2 give us an update at all?

3 MR. GLEESON: Not today, no. We didn't realize
4 the Court was expecting that.

5 THE COURT: I'm simply asking. I know back in
6 July you asked for six months, and that obviously wasn't
7 granted. But that period has passed, and I thought we would
8 receive some update as to what the committee is doing.

9 Last I heard they were following up on this matter, so
10 I'm curious.

11 MR. GLEESON: Okay. Well, it actually hasn't
12 passed. We asked in late July for a six-month period to
13 begin at the commencement of the first order granting a
14 stay. And the deny, it got denied later.

15 But still, we've worked very hard. We're heading into
16 a mediation that we hope is successful. But today, on this
17 status conference, I've got nothing to report on behalf of
18 the SLC. Thank you, Judge.

19 THE COURT: All right. Thank you, counsel.

20 You asked for it in July. Let's put it that way. All
21 right.

22 Well, yeah. We'll just note that you're working
23 diligently, I take it.

24 So with regard to the next party in the case, let's
25 see. Who is next in line? Mr. Pearson, counsel?

1 MR. KATSIFF: Yes, Your Honor. This is Tim
2 Katsiff from Ballard Spahr on behalf of Mr. Pearson. And
3 also on the line with me is my colleague, Emilia McKee
4 Vassallo.

5 Your Honor, we've been working cooperatively with the
6 plaintiffs, and we don't have anything to report currently
7 with respect to discovery.

8 We will also, Your Honor, be filing a motion to
9 request that the Court excuse Mr. Pearson from attendance at
10 the status conference, as he is in Florida, Your Honor.

11 THE COURT: Okay. He's coming back for the
12 deposition, I take it, on February 16?

13 MR. KATSIFF: Well, Your Honor, we would like the
14 opportunity to talk to plaintiffs about that as well. When
15 we agreed to the 16th -- which he is obviously prepared to
16 be deposed on the 16th, Your Honor -- it was our
17 understanding that it was going to be in Florida.

18 But we would like to, you know, have the opportunity
19 to confer with the plaintiffs about that.

20 THE COURT: Well, let's clear it up right now.

21 Counsel for the plaintiffs, where would you prefer the
22 depositions be conducted?

23 MR. VAN KWAWEGEN: Your Honor, ultimately -- this
24 is Jeroen Van Kwawegen from Bernstein Litowitz.

25 Ultimately what we really want is what is best for the

1 case. And that means that the deposition take place and it
2 take place as scheduled and that there is no delay in the
3 schedule and that we can actually do it effectively.

4 For the reasons that Your Honor outlined earlier
5 today, you know, one option certainly is Your Honor's
6 courtroom. But there are a large number of defendants, and
7 they all present potentially individual issues.

8 And so if the question is, you know, will it actually
9 happen in your courtroom or will that mean that it's going
10 to be delayed and it's causing delay in the schedule, that
11 is a difficult question.

12 So if someone has specific health concerns and they
13 would say I can do it in Florida on that day, and you can do
14 it in person, but I cannot travel because of X, Y, Z,
15 because, you know, we have -- and counsel for defendant is
16 correct. We haven't had these conversations yet.

17 But if there is a real reason that people cannot
18 travel, which I cannot foresee, but if there is, I would
19 much rather do it in Florida than have a delay in the case
20 because I say it must be in Your Honor's courtroom.

21 Having said all that, I think it is very helpful to
22 know that Your Honor's courtroom is available. And I think
23 it should be available and used, certainly for anybody who
24 can make it to Your Honor's courtroom. But I can't oversee
25 that right now.

1 THE COURT: Let me just interject then, folks.

2 I think that the parties have disavowed themselves of
3 the idea that they're never coming to court, they're never
4 coming to Akron, and that the parties are going to be
5 required to fly all around the country to take depositions
6 or engage in discovery, etcetera.

7 The events in question in this matter, very serious,
8 all arose, most of them, here in the Northern District of
9 Ohio as it relates to FirstEnergy.

10 So you ought to suggest to your clients, in the
11 absence of, oh, I'm positive with the virus, I'm in the
12 hospital, or I'm sick, that they're going to need to travel.

13 Now, I don't know this firsthand, I suspect any number
14 of the plaintiffs may have summer homes or winter homes and
15 may live in Florida in the winter, live in Ohio in the
16 summer, back and forth, travel back and forth, etcetera.

17 So you need to advise your clients we are going to be
18 traveling to Akron in the absence of something extreme.

19 February 11th the Court's general order will expire.
20 We will start jury trials again later this month.

21 We conducted trials, at least I did, from May until
22 November, approximately ten jury trials. Jurors come to the
23 courthouse.

24 Now, if jurors are going to come, average citizens are
25 going to be able to come to the courthouse and do their duty

1 and help the Court proceed with trials, and a backlog of
2 trials, these defendants as well as these plaintiffs will
3 come to Akron.

4 So you better suggest to your clients, you better make
5 sure you have travel plans made to come to Akron and be
6 deposed. Period.

7 To be done effectively, there should be one central
8 location. And the cases are based out of the Northern and
9 Southern District of Ohio. All the ties, the allegations,
10 etcetera, are out of Ohio.

11 So you better get on the phone with your client and
12 say, look, you're going to need to be in Akron, Ohio, on
13 this date. February 10. Or February 14. Or what have you.

14 And that's how we're going to proceed.

15 So I hope there is no -- no one has any confusion.

16 Back when we talked about this case, way back when, I
17 said to you, the best way of conducting these depositions,
18 given the sheer volume of documents that are going to be
19 presented, maybe hundreds, maybe thousands, to do a
20 deposition properly, it's going to need to be in person.

21 And this is the best location. We'll have staff
22 available. And again, I'm repeating myself. I don't want
23 to have to go back and read a deposition where someone
24 objects, instructs their client not to answer, and then I'm
25 going to have to go back and deal with that issue at a later

1 time after I hear arguments from counsel in writing,
2 etcetera. Not going to do it that way. If there is a
3 problem, I'll deal with it right then and there.

4 If any of you read the media, you know that last year
5 was a record-setting year for the Northern District in
6 criminal matters. This year is likely to be the same, if
7 not more. So we have busy dockets.

8 And so we will do the depositions here. I'll make
9 sure that we have rooms available so that anyone who wants
10 to come and attend and participate may do that.

11 Is that clear?

12 Let your clients know.

13 Now, who is next in line? Just give me a moment,
14 please.

15 Mr. Taylor, I believe is next.

16 MR. RITTS: Your Honor, this is Geoffrey Ritts.
17 I already spoke on behalf of Mr. Taylor. I represent Mr.
18 Taylor.

19 THE COURT: Mr. Reffner, counsel for Mr. Reffner.

20 MR. SCHOLES: Steve Scholes, Your Honor.
21 S-C-H-O-L-E-S.

22 We have no disputes with respect to the discovery that
23 we have served.

24 Mr. Reffner's deposition is scheduled for March 7, and
25 we have heard Your Honor, let me assure the Court, loudly

1 and clearly with respect to the Court's view on the
2 depositions. And we will certainly discuss those views with
3 our clients and conduct ourselves appropriately due to the
4 Court's desires.

5 THE COURT: Counsel, I'll interject again. If
6 there is any confusion, you can all come next Monday and
7 I'll tell your clients directly. They can all fly in. They
8 can all be here. I can stress to them how important this
9 case is and how they're going to be required to be here for
10 depositions. We can all do it that way. Very simple.
11 Period.

12 Counsel on behalf of the intervenor, what would you
13 like to add, please?

14 MR. VAN KWAWEGEN: Your Honor, this Jeroen Van
15 Kwawegen from Bernstein Litowitz.

16 The only thing I would add is we hear you loud and
17 clear, Your Honor, and plaintiffs will be made available in
18 Akron.

19 THE COURT: Couple other questions -- anybody
20 else? Have I missed anyone, please?

21 MR. MCCAFFREY: Your Honor, John McCaffrey --

22 MS. MCNALLY: Laura McNally --

23 THE COURT: I'm sorry. One at a time.

24 Who spoke first, please?

25 MR. MCCAFFREY: Go ahead.

1 THE COURT: Mr. McCaffrey, you have something you
2 want to say?

3 MR. MCCAFFREY: Your Honor, good afternoon. John
4 McCaffrey on behalf of Michael Dowling. I have nothing to
5 add, Your Honor, other than just point of clarification.

6 I know the courtroom is located in a federal building.
7 And are there any restrictions on hours or the ability to
8 store documents at the courthouse for depositions?

9 While we have all the parties on the line, I thought I
10 would raise that issue just to see if the Court could give
11 us some advice on that. Thank you.

12 THE COURT: We have several witness rooms off the
13 courtroom we can use effectively for depositions -- excuse
14 me, for document storage.

15 And you're from the Northern District, so what I
16 anticipate is using Judge Dowd's old courtroom for the
17 deposition. That room is vacant, I believe.

18 And if there is any issue there, then we will use my
19 courtroom if need be.

20 I'm working through a trial schedule now, so the way I
21 see it, I think I'll be able to work around these
22 depositions in my own courtroom if need be because we're
23 starting up trials on February 22, is the first one
24 tentatively being scheduled to begin.

25 So does that answer your question?

1 MR. MCCAFFREY: What about access to the
2 building? The hours?

3 You know, I understand that, you know, there is entry
4 into the building, out of the building. Sometimes
5 depositions can go on.

6 THE COURT: Normal business hours. I think the
7 CSO's leave at potentially 5:00 or 6:00. So we have a full
8 compliment of court security officers here.

9 We're not the only agency in the building. I believe
10 there is others in the building, certainly from the U.S.
11 Attorney's Office, certainly from Social Security. There
12 is -- the building is open. We're not closed down formally.
13 We've just taken certain steps with regard to safety
14 protocols, etcetera. Masks are required, etcetera. The
15 courtroom has plexiglass so that there is safety protocols
16 in that regard.

17 So turning to -- I'm sorry. One other counsel wanted
18 to make a comment, please, before I called on Mr. McCaffrey?

19 MS. MCNALLY: This is Laura McNally, counsel for
20 Defendant Dennis Chack, and I have nothing further to add
21 other than what's already been said. And I hear you loud
22 and clear on the location of the depositions.

23 THE COURT: Thank you.

24 With regard to other matters, I just reviewed the
25 protocol you submitted to the Court here. I think it was

1 filed on the 27th, the privilege log supplement, the joint
2 protocol.

3 I have a question regarding page 5, the very last
4 provisions here, about -- the provision that states,
5 "Provided, however, FirstEnergy shall not be required to
6 individually log privileged advice or work product regarding
7 irrelevant PUCO proceedings, irrelevant issues involving
8 FirstEnergy subsidiaries or affiliates, or the FES
9 bankruptcy."

10 Can you just tell me what is contemplated by that
11 provision? Having read the third prosecution agreement, it
12 seems like there is a great deal in this agreement related
13 to at least FES and perhaps others.

14 MS. MCDONALD: Good afternoon, Your Honor. This
15 is Ann McDonald of Schiff Hardin, counsel for Nominal
16 Defendant FirstEnergy.

17 We've been serving a role as facilitating discovery in
18 this matter, Your Honor. I can speak to Your Honor's
19 question on that point.

20 That sentence you noted was not intended to exclude
21 any information related to the DPA, but because of the broad
22 nature of plaintiff's requests, certain documents in the
23 case call into and bring into the scope of potential
24 production unrelated issues in front of the PUCO or
25 involving the FES bankruptcy, mentioning entities that might

1 also be mentioned in the DPA but not at all relating to the
2 subject matter of it or the underlying conduct at issue
3 here.

4 So if there was, for example, a totally unrelated 2016
5 filing on a particular rate issue that's not at all
6 mentioned in the DPA, that provision is just noting that
7 those irrelevant materials can be treated differently.

8 THE COURT: And who determines what's irrelevant,
9 not irrelevant?

10 MS. MCDONALD: We have been in very close
11 contact, Your Honor, with plaintiffs. And the parties have
12 agreed to take a broad interpretation of what's relevant.

13 To the extent it goes to conduct that's referenced in
14 the DPA, the underlying issues with H.B. 6 and anything
15 related to it, you know, we've been treating that as
16 relevant and have been coordinating closely.

17 When we've come across documents we don't think are
18 relevant, we'll discuss those with plaintiffs and confirm
19 the parties are on the same page.

20 THE COURT: All right. Any other issues
21 regarding that matter that you would like me to touch upon
22 here?

23 MS. MCDONALD: No, Your Honor. We appreciate
24 your concern you've shown of the protocol and would
25 appreciate if it could be entered to facilitate FirstEnergy

1 providing the privilege log materials to the plaintiff as
2 soon as possible. Thank you.

3 THE COURT: Thank you very much.

4 Counsel for the plaintiff, has there been any -- I
5 shouldn't even ask about settlement discussion because I've
6 already indicated to you I don't know how you could possibly
7 settle this case at this stage of the proceedings without
8 further discovery or certainly detailed discovery.

9 But why don't you tell me what you contemplate by way
10 damages just so I'm aware. How are you going to go about
11 calculating, if you were to prevail, and what arguments are
12 you going to make regarding damages in the case?

13 MR. VAN KWAWEGEN: Thank you, Your Honor. Jeroen
14 Van Kwawegen from Bernstein Litowitz.

15 And by way of reference for the Court, under Your
16 Honor's rules, we made a settlement demand as required by
17 Your Honor's rules back in October of last year.

18 And we indicated various what I would call sources of
19 damages and sources of harm in that settlement demand. I'm
20 happy to go over those.

21 But clearly when we are thinking about this case, the
22 harm that was caused by the defendants by breaching their
23 fiduciary duties to the company -- because remember, we are
24 obviously trying to recover damages that were incurred by
25 the company because of the breach of the fiduciary duty by

1 the senior executive officers, former senior executive
2 officers and directors -- there are a number of categories
3 of damages in there.

4 That includes, for example, the fine that was paid in
5 connection with the DPA. It also includes the money that
6 was expended, FirstEnergy money that was used to pay in this
7 pay to play scheme. That was approximately \$60 million plus
8 approximately \$4.3 million to Mr. Randazzo.

9 And it also includes a number of sources of harm that
10 have not fully crystallized yet, and that would cause me to
11 create an estimate.

12 As Your Honor is aware, there is a related securities
13 class action pending where the class is claiming damages due
14 to a stock drop when the underlying conduct was revealed.
15 And that class case is still at the motion to dismiss stage.
16 Chief Judge Marbley has not ruled on the pending motion to
17 dismiss just yet.

18 But, of course, we believe that the harm caused by, or
19 at least the damages caused and recovered in that case were
20 also attributable to the misconduct here.

21 So that's a long way of saying there are a number of
22 different sources of damages caused by the misconduct and
23 the breach of the fiduciary duty here.

24 I don't have a hard number because of some of the
25 estimates that it would require me to make.

1 I hope that answers Your Honor's question, but I'm
2 happy to give more background or detail if Your Honor would
3 like.

4 THE COURT: No. That's fine.

5 Are you going to seek disgorgement of profits? Again,
6 subject to, obviously it's a matter of proof, and if your
7 allegations carry out the day, you're going to be
8 apportioning liability among the various defendants, seek
9 disgorgement of any profits or gains made by this alleged
10 misconduct?

11 MR. VAN KWAWEGEN: Yes, Your Honor. Obviously
12 that is on the table. We proceed through trial. The jury
13 finds that breach and misconduct has been proven,
14 disgorgement is certainly on the table with respect to each
15 defendant where the jury would find that those breaches of
16 duty occurred. And then there would be an apportionment.

17 But yes, absolutely, Your Honor.

18 THE COURT: Are you doing discovery regarding
19 that issue?

20 MR. VAN KWAWEGEN: The answer to that is yes,
21 Your Honor. And, you know, there are two issues there,
22 right.

23 One is the merits discovery to determine which
24 defendant did what. And, you know, not that we are now, as
25 plaintiffs, make a determination because that would not be

1 for us, that would be for the Court, of relative fault, but
2 clearly the merits discovery bears on that question.

3 And the second thing is we are pursuing discovery with
4 respect to the defendants' net worth. That is one of the
5 open issues yet to be resolved because there is some case
6 law that makes it not self-evident to get that discovery
7 prior to trial and prior to a finding of liability. But
8 that is something that we are still working through with
9 defendants because we believe that this is a unique
10 situation.

11 If we cannot resolve that -- and I think we have a
12 strong legal basis for pursuing it -- I will bring it to
13 Your Honor's attention, of course. But that is one of the
14 issues that we have not resolved yet because of the
15 uncertainty surrounding that.

16 THE COURT: Doesn't that make settlement somewhat
17 difficult as well?

18 MR. VAN KWAWEGEN: Not really, Your Honor.
19 Obviously I don't want to get too much into the detail there
20 because, A, there may not be a settlement. And I don't want
21 to disclose our strategies or thinking as we are pursuing
22 discovery and as we are preparing for trial.

23 And B, you know, the mediation may or may not be
24 successful, and that would be a negotiation. And it would
25 not be very helpful for me to express my views in detail

1 there either.

2 But to put a finer point on it, we know from the
3 public record a fair amount of how much the various
4 defendants received from FirstEnergy as they were serving
5 their different roles at FirstEnergy. And I believe that
6 that's a very good first start because they were remunerated
7 by the company, as we allege -- that's not been proven
8 yet -- but as we allege, breached their fiduciary duty to
9 the company.

10 THE COURT: Stock sales, things of that nature?

11 MR. VAN KWAWEGEN: That's correct, Your Honor.
12 Stock options, executive compensation, things of that
13 nature.

14 THE COURT: All right. Anyone else wish to make
15 any presentation to the Court?

16 All right. My career law clerk is Jonathan little.
17 He'll be your facilitator, if need be, regarding depositions
18 and location, etcetera. And we'll continue to work with our
19 clerk's office, make sure everything is organized.

20 So please give us information regarding,
21 starting -- the first is on the 10th. So give us the
22 details regarding who is going to be appearing and so that
23 we can make sure we know how many individuals will be in the
24 courthouse and what we can do to make your stay more
25 comfortable and provide you whatever assistance you might

1 need.

2 In terms of court reporters, etcetera, I don't know
3 whether our -- one of our official court reporters are -- I
4 guess they're not permitted to assist. So that is off the
5 table. So make sure you have court reporters available,
6 etcetera.

7 And if need be, we'll try to make copiers available.
8 Hopefully you'll bring enough copies for everyone who
9 intends to appear. All those housekeeping matters you can
10 work out among yourselves.

11 And I'll let you know by next Monday, unless -- anyone
12 else have any objection to any other matter we addressed
13 here today?

14 All right. Having heard nothing from anyone, I
15 appreciate it. Everyone stay safe and enjoy the weekend.
16 Hopefully you're not here in the snow and the cold.

17 So we'll look forward to seeing you in the not too
18 distant future. Take care.

19 (Proceedings concluded at 2:27 p.m.)

20 C E R T I F I C A T E

21 I certify that the forgoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.

23

24 S/Caroline Mahnke 1/28/2022

25 Caroline Mahnke, RMR, CRR, CRC Date