BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37.	))))))	Case No. 17-974-EL-UNC

MEMORANDUM CONTRA FIRSTENERGY'S MOTION TO QUASH OCC'S SUBPOENA FOR A DEPOSITION OF FIRSTENERGY'S VICE PRESIDENT, CONTROLLER & CHIEF ACCOUNTING OFFICER JASON LISOWSKI BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

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March 25, 2022

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I. INTRODUCTION

The PUCO has repeatedly stated that it is "determined to act in a deliberate manner, based upon facts rather than speculation."[1] However, to take appropriate action for public protection based on facts, *the PUCO must first obtain the facts.* OCC's subpoena serves the interests of fact-finding and public transparency, in addition to finding truth and justice for FirstEnergy consumers whose utility is owned by a company (FirstEnergy Corp.) charged with a federal crime.

In another forum not far away, U.S. District Judge John Adams is demanding that depositions of FirstEnergy be taken for fact-finding.[2] And he is demanding facts.[3] And he has gotten more facts (within hours, not months).[4]

[1] *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶17 (Nov. 4, 2020).

[2] *Miller v. Anderson*, Case No. 5:20CV1743, Order (N.D. Ohio) (Mar. 24, 2022) (Attached).

[3] *Id*., Order (Mar. 22, 2022) (Attached).

[4] *Id.*, Affidavit (Mar. 23, 2022) (Attached).

OCC obtained a subpoena seeking to depose FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer, Jason Lisowski. Consistent with the PUCO rules on discovery, OCC also asked for Mr. Lisowski to produce documents several days before appearing for OCC's noticed deposition. Attorney Examiner Price (who withdrew from this case on March 4th) signed OCC's subpoena and the subpoena was properly served.

Now FirstEnergy Corp. seeks to limit OCC's fact-finding by refusing to provide subpoenaed documents to OCC. FirstEnergy also intends to determine the witnesses OCC deposes – even though it's OCC's case preparation. FirstEnergy Corp. has moved to quash the subpoena duces tecum on Mr. Lisowski.[5]

FirstEnergy Corp. challenges the relevancy of documents OCC seeks related to FirstEnergy's response/reaction to FERC's audit of FirstEnergy Corp. and its subsidiaries. (Meanwhile, in Case No. 20-1502, FirstEnergy Corp. and its affiliates were ordered to produce FERC audit-related communications and documents that were provided by FirstEnergy to FERC Staff during the audit.)[6] FirstEnergy Corp. also says OCC has subpoenaed the wrong person and asserts that OCC cannot seek documents for the deposition because discovery has closed. It also asserts that OCC cannot show a substantial need for the documents. The discovery-response delay continues in these PUCO cases. Mr. Lisowski was subpoenaed to produce documents on March 15, 2022and be subject to deposition on March 17, 2022.

FirstEnergy's Motion to Quash should be denied.

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[5] FirstEnergy Corp. Motion to Quash (Mar. 10, 2022).

[6] *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company et al.,* Case No. 20-1502-EL-UNC, Prehearing Conference, Tr. 55-59 (Mar. 11, 2022).

II. ARGUMENT

A. OCC seeks information that is relevant and reasonably calculated to lead to the discovery of admissible evidence per O.A.C. 4901-1-16(B).

FirstEnergy Corp. alleges that FERC-related document requests that are part of the subpoena are irrelevant and "confidential," protected from disclosure as a result of FERC's audit.[7] It asserts that information regarding the H.B. 6 scandal and matters concerning the former PUCO Chair are "wholly unrelated to this proceeding."[8] FirstEnergy Corp. asserts that OCC made no effort to explain the relevance of the documents requested. FirstEnergy's arguments are not well made.

Here is some context for OCC's discovery and FirstEnergy's efforts to avoid this discovery. Under Ohio law, the FirstEnergy Ohio Utilities must implement and operate under a corporate separation plan that "satisfies the public interest" and is "sufficient" to protect Ohioans from undue preference or advantage being given to the utilities' affiliates.[9] The PUCO-appointed auditor (Daymark) noted that FirstEnergy's compliance approach to corporate separation was set up to meet FERC requirements. It found that "FirstEnergy leans heavily on compliance with FERC requirements as a way to meet Ohio corporate separation requirements."[10] Daymark reported that "[i]n many cases, FirstEnergy had no Ohio-specific processes or documentation; rather they relied on procedures developed to meet FERC's Affiliate Restrictions rules that are laid out in 18 CFR §35.39."[11] Daymark also noted that it "could not get access to records of the

[7] Motion to Quash at 10-11 (Mar. 10, 2022).

[8] *Id*. at 12-13.

[9] R.C. 4928.17.

[10] Audit Report at 28 (Sept. 13, 2021).

[11] *Id.* at 29.

compliance officer in place during the compliance period (2016 through 2020) since that person had been separated from the company prior to the start of the audit."[12]

Recently, FERC 's Division of Audits and Accounting undertook an audit of FirstEnergy Corp., including its service companies and other companies in the FirstEnergy holding company system.[13] That audit covered a five-year period and evaluated, among other things, compliance with cross-subsidization restrictions on affiliate transactions, service companies accounting and recordkeeping, and accounting and reporting for franchised public utilities for their transactions with associated entities. (FERC's audit report was attached to OCC's Motion for Subpoena).

Note that FERC's audit findings included its acknowledgement of "significant shortcomings" in FirstEnergy's and its subsidiaries' internal controls over financial reporting for expenses relating to civic, political and lobbying activities. FERC additionally noted that:

> [e]ven more concerning, several factual assertions agreed to by FirstEnergy in DPA [deferred prosecution agreement] and the remedies FirstEnergy agreed to undertake, point towards *internal controls having been possibly obfuscated or circumvented to conceal or mislea*d as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates. (Emphasis added.)[14]

Given the FirstEnergy Ohio Utilities' heavy reliance on maintaining a corporate separation plan that meets FERC requirements (and not necessarily Ohio requirements), it is crucial to understand whether and to what extent FirstEnergy Corp. and the FirstEnergy

[12] *Id.* at 1.

[13] (Docket No. FA19-1-000).

[14] *Id.*, Audit Report at 48 (Feb. 4, 2022).

Ohio Utilities are complying with FERC's rules and regulations on corporate separation. The FERC-related documents are highly relevant to this case involving corporate separation compliance. FirstEnergy Corp. and the FirstEnergy Ohio Utilities have themselves made them highly relevant.

Attorney Examiner Addison in Case No. 20-1502 recently issued a ruling on a similar issue where OCC had filed a motion to compel discovery seeking FERC audit-related documents.[15] The examiner ruled that OCC is entitled to all documents and communications provided to FERC Staff by FirstEnergy during the course of the FERC audit, pertaining to the Ohio FirstEnergy Utilities.[16]

We note this ruling for several reasons. First, the utilities (unlike FirstEnergy Corp.) did not claim the information lacked relevance. Second, the FERC documents at issue here pertain to the same audit. Third, FirstEnergy Corp.'s assertions of "confidentiality" have been rejected. The PUCO should, consistent with its ruling in Case No. 20-1502, require the production of these documents prior to the deposition of Mr. Lisowski.

Regarding the H.B. 6 scandal and matters concerning former PUCO Chair Randazzo, FERC's audit staff discovered that FirstEnergy Service Company improperly recorded $10.9 million of lobbying costs in utility operating expense accounts.[17] FERC Staff also identified $20.9 million of payments to entities associated with the former PUCO Chair.[18] And the FERC Staff identified $28.98 million in payments to sixteen

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[15] *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company et al.,* Case No. 20-1502-EL-UNC, Prehearing Conference, Tr. 55-59 (Mar. 11, 2022).

[16] *Id*., Tr. 37, 56-59.

[17] Audit Report at 5, 48 (Sept. 13, 2021).

[18] *Id.* at 50-51.

entities associated with one person that were improperly classified or misallocated to certain FirstEnergy regulated utilities.[19] FERC Staff also found that internal lobbyists (in the FirstEnergy Governmental Affairs department) were incorrectly recording their labor costs, resulting in FirstEnergy Service Company charging such costs to FirstEnergy transmission affiliates, which in turn charged their customers.[20] Such matters go to the very heart of corporate separation compliance.

The Motion to Quash should be denied.

B. Contrary to FirstEnergy Corp.'s assertions, there is a substantial need for the subpoenaed discovery in consumers' interest. Moreover, cases at the PUCO are subject to a law (R.C. 4903.082) that gives parties such as OCC ample discovery rights, which OCC is exercising.

FirstEnergy Corp. claims that OCC must show a substantial need for the subpoenaed discovery, under Ohio Civ. R. 45(C).[21] That is mistaken under law and rule governing discovery in PUCO cases. Specifically, FirstEnergy Corp. says that Mr. Lisowski, FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer "has no special knowledge of the FirstEnergy Ohio utilities' compliance with corporate separation matters under O.A.C. Rule 4901:1-37-05(B)(11)."[22] OCC's document requests are "unduly burdensome and unreasonable" because OCC already has "many of the categories of documents sought."[23] Lastly, FirstEnergy Corp. complains about the number of documents responsive to OCC's subpoena and that OCC's document requests

[19] *Id.* at 50-51.

[20] *Id.* at 51-52.

[21] Motion to Quash at 5-7 (Mar. 10, 2022).

[22] *Id.* at 5.

[23] *Id.* at 6.

are somehow at odds with our representations about the number of documents produced thus far.[24] FirstEnergy Corp.'s arguments should be rejected.

At the outset, OCC notes that FirstEnergy Corp.'s reliance on Ohio Civ. R. 45(C) is misplaced. The PUCO's rule for subpoenas, O.A.C. 4901-1-25, does not require OCC to demonstrate a substantial need to take Mr. Lisowski's deposition. The Attorney Examiner deemed the subpoena was appropriate because the Attorney Examiner issued the subpoena. Moreover, FirstEnergy Corp. is *required* to produce records to determine whether the FirstEnergy Utilities complied with Ohio corporate separation requirements,[25] so FirstEnergy Corp. should not be permitted to argue that a request for the parent company's records is "unduly burdensome."

Also missing from FirstEnergy's claim is that OCC's discovery rights are protected by R.C. 4903.082, which states that "[a]ll parties and intervenors shall be granted ample rights of discovery." *See OCC v. PUC,* 111 Ohio St.3d 300, 2006-Ohio-5789. The PUCO has also adopted rules that broadly define the scope of discovery. O.A.C. 4901-1-16(B) provides:

> any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

Although OCC does not concede it must demonstrate a substantial need for the deposition, OCC in fact has a substantial need for this information from Mr. Lisowski.

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[24] *Id.* at 7.

[25] R.C. 4928.18(B).

The FirstEnergy Utilities' default position when OCC seeks records to investigate this case has been to argue that the utilities do not have possession, custody or control of the documents that OCC seeks.[26] Now when OCC seeks records from FirstEnergy Corp. officers, FirstEnergy Corp. argues that it is unduly burdensome to produce the records. If FirstEnergy's approach were allowed to prevail, OCC would not be entitled to obtain any documents.

The deponent (Mr. Jason Lisowski) was named Vice President, Controller and Chief Accounting Officer of FirstEnergy beginning in March 2018. Mr. Lisowski continues to serve in that position. Mr. Lisowski appears to be familiar with the FERC audit and in fact provided FirstEnergy Corp.'s response to the audit on behalf of FirstEnergy Corp. Because FirstEnergy put such heavy reliance on complying with FERC corporate separation requirements (and not necessarily Ohio's requirements),

Mr. Lisowski's familiarity with the FERC audit and FERC requirements (as evidenced by, for example, his response to FERC on FirstEnergy Corp.'s behalf for the audit) confirms his centrality to the corporate separation issues here. It is hard to believe that Mr. Lisowski, who responded to FERC on FirstEnergy Corp.'s behalf for the audit, would have no relevant information on FirstEnergy's compliance with Ohio corporate separation laws. After all, the auditor noted that FirstEnergy's strategy for complying with Ohio corporate separation requirements was based on attempting to comply with FERC code of conduct requirements.[27]

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[26] *See, e.g., In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company et al.,* Case No. 20-1502-EL-UNC, Motion to Compel Responses to Fifth and Seventh Sets of Discovery (June 29, 2021).

[27] Audit Report at 28 (Sept. 13, 2021).

Regarding OCC's document requests, the PUCO should not buy into FirstEnergy Corp.'s "sleight of hand" assertion that OCC already has "many" of the "categories of documents" sought. *All* of the documents that OCC seeks are relevant, so OCC is entitled to *all* of the documents sought – not just "many" of the "categories" of documents sought.[28] Further, OCC is entitled to question Mr. Lisowski under oath regarding the assertion that OCC already has "many" of the "categories of documents" – and have him specifically identify those documents responsive to OCC's document requests.[29]

The *number* of documents produced thus far, and the *number* of documents potentially responsive to OCC's subpoena, are not germane. What *is* germane is that FirstEnergy Corp. produce *all* relevant documents.[30] Considered in this appropriate light, OCC's request for relevant documents from Mr. Lisowski (explained herein) is not at odds with OCC's request for more time to review documents.[31]

The documents requested by OCC cannot be obtained from other sources. FirstEnergy should identify those sources if it claims otherwise. OCC would face undue hardship if it were deprived of these documents. OCC clearly has a substantial need for the documents that cannot be met through other means. And FirstEnergy Corp. has failed to show that producing the documents would be create an undue burden on it. In fact, FirstEnergy should show if it has undue burden. (via an affidavit).

The Motion to Quash should be denied.

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[28] Parties have broad rights to discovery under law, rule, and Supreme Court of Ohio precedent. *See, e.g.,* R.C. 4903.082; O.A.C. 4901-1-16(B); *OCC v. PUC*, 111 Ohio St.3d 300 (2006).

[29] *See Id.*

[30] *See Id.*

[31] *See* O.A.C. 4901-1-24 (permitting parties to move for a protective order to, for example, conduct discovery on specified terms and conditions).

C. OCC's subpoena duces tecum is not untimely. OCC's subpoena is in consumers' interest and does not violate the procedural schedule in this case.

FirstEnergy Corp. asserts that the subpoena signed by the Attorney Examiner is "untimely and procedurally improper" because document discovery is closed.[32] FirstEnergy Corp.'s effort to prevent OCC's fact-finding is, once again, wrong and contrary to the PUCO's discovery rules.

The PUCO rules only require that discovery be completed prior to the commencement of a hearing. O.A.C. 4901-1-17(A). The production of documents under the subpoena is intended to be completed prior to the hearing in this case, which is currently scheduled for May 9, 2022.

FirstEnergy Corp., however, relies on an Entry of the PUCO that was issued many months ago,[33] before the hearing date was rescheduled. At the time of that Entry, the discovery cut off was established consistent with O.A.C. 4901-1-17(A). Discovery was to be completed before the hearing was to take place. Unfortunately, in the last PUCO Entry,[34] which set the new hearing date of May 9, 2022, the PUCO failed to establish a new discovery cut-off. We believe this to be an inadvertent omission by the PUCO.

Most significantly, FirstEnergy Corp. is misstating a PUCO ruling about the discovery deadline. The Attorney Examiner allowed parties to conduct depositions regardless of the discovery cut-off.[35]

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[32] Motion to Quash at 7-8 (Mar. 10, 2022).

[33] Entry (Oct. 12, 2021) setting a hearing date of Feb. 10, 2022, with discovery cut off Nov. 24, 2021.

[34] Entry (Feb. 10, 2022).

[35] Case No. 17-974-EL-UNC, Entry, at ¶18(a) (Sept. 17, 2021) ("The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021."); Case No. 17-974-EL-UNC, Entry, at ¶24(a) (Oct. 12, 2021) (extending discovery cut-off to Nov. 24, 2021).

Depositions of non-party deponents can be conducted, with attendance compelled through subpoenas. O.A.C. 4901-1-25(A) allows the PUCO (and those acting on its behalf) to issue a subpoena to compel a person to give testimony at a time and place specified and command such person to produce "books, papers, documents, or other tangible things." O.A.C. 4901-1-25(D) allows parties to subpoena a person to attend and give testimony at a deposition, *and "to produce designated books, papers, document, or other tangible things within the scope of discovery."* That is just what OCC has done, consistent with the Entry allowing depositions to go forward, despite a discovery cut-off.

The Attorney Examiner did not rule that parties could not exercise their right to ask for documents to be produced at depositions. Nor did FirstEnergy Corp. or the FirstEnergy Utilities seek clarification of the Examiner's ruling. The Attorney Examiner in fact signed OCC's subpoena duces tecum.

Unfortunately for consumers, OCC does not have subpoena power. (The General Assembly should change that.)

An Attorney Examiner, on his or her own, may quash the subpoena.[36] The Examiner did not do so here.

FirstEnergy cites to several proceedings where the PUCO granted motions to quash the production of documents under a deposition subpoena.[37] Those cases, however, did not involve the truly unique circumstances that surround the PUCO's FirstEnergy investigation cases concerning FirstEnergy's H.B. 6 activities. These cases stem from what has been described as "likely the largest bribery, money laundering scheme ever

[36] O.A.C. 4901-1-25(C).

[37] Motion to Quash at 4 (Mar. 10, 2022).

perpetrated against the people of the state of Ohio." FirstEnergy Corp., the entity seeking to shut down OCC's fact-finding, stands charged with a federal crime—a crime which it has admitted.[38]

The Motion to Quash should be denied.[39]

III. CONCLUSION

The PUCO's Attorney Examiner signed OCC's subpoena, which is part of giving Ohioans the benefit of a full investigation of FirstEnergy's corporate separation plan, including issues involving the FirstEnergy scandals. Under R.C. 4928.17_tthe PUCO must consider whether the plan satisfies the public interest. And the PUCO must consider whether the plan is sufficient to ensure the FirstEnergy Ohio Utilities do not extend undue preference or advantage to FirstEnergy affiliates, to the detriment of Ohio consumers.

The documents subpoenaed from FirstEnergy's Vice President, Controller & Chief Accounting Officer are discoverable under law and the Ohio Administrative Code. FirstEnergy's Motion to Quash should be denied. Like the FERC documents the Attorney Examiner ordered to be produced in Case No. 20-1502, FirstEnergy Corp. should be producing the FERC audit documents sought in the subpoena duces tecum.

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[38] *United States of America v. FirstEnergy Corp*., Case No. 1:21-cr-86, Deferred Prosecution Agreement (Jul. 22, 2021).

[39] Further, the discovery cut-off, except notices of deposition, has largely been overcome by unforeseen, recent events. Since it agreed to produce documents to OCC in October, FirstEnergy Corp. has been dilatory in producing documents. Also, there have been delays in obtaining documents from the PUCO in response to OCC's public records request. Accordingly, OCC is preparing to file a motion for continuance, in consumers' interest.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Maureen R. Willis
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Counsel of Record
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 25th day of March 2022.

/s/ Maureen R. Willis
Maureen R. Willis
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jennifer L. Miller,	)	CASE NO. 5:20CV1743
	)	
Plaintiff,	)	JUDGE JOHN R. ADAMS
	)	
-vs-	)	
	)	
Michael J. Anderson, et al.,	)	ORDER
	)	
	)	
Defendants.	)	

Within their February 22, 2022 responsive brief, Plaintiffs renewed their motion to stay this matter. To ensure the record is clear, the renewed motion is DENIED.

The parties shall apprise the Court in advance of any days and times that they seek to use the courthouse facilities to conduct depositions.

IT IS SO ORDERED.

Dated: March 24, 2022

/s/ John R. Adams
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jennifer L. Miller,	)	CASE NO. 5:20CV1743
	)	
Plaintiff,	)	JUDGE JOHN R. ADAMS
	)	
-vs-	)	
	)	
Michael J. Anderson, et al.,	)	ORDER
	)	
	)	
Defendants.	)	

At the first in-person hearing in this matter, the Court noted:

> There's a presumption of openness, transparency. That's what is [] going to occur. We're going to be transparent.
>
> …
>
> So I hope everybody understands we start with the presumption of openness, transparency, including at the discovery phase. We're not going to keep things off the docket or out of the record if it isn't required.

Doc. 166 at 20. The Court stressed that this need for transparency was all the more important based upon the nature of the complaint.

I. The Allegations

The complaint alleges a bribery scheme executed by senior executives at FirstEnergy that resulted in the unlawful payment of millions and millions of dollars to elected state officials, including then Speaker of the House Larry Householder.[1] The complaint includes a quote from the chief prosecutor in the Southern District of Ohio who noted: "This is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of

[1] The Court notes that Mr. Householder has been indicted, but he has not been convicted of any crime to date. Accordingly, these accusations remain allegations against him and are not proven facts.

Ohio…bribery, pure and simple. This was a quid pro quo." Doc. 75 at 8. The complaint alleges that the people of Ohio were directly impacted in several ways. First and foremost, the bribery scheme was designed to influence the passage of House Bill 6, a bill described in the complaint as providing "a billion-dollar-bailout for FirstEnergy's uncompetitive power plants funded by monthly ratepayer surcharges." Doc. 75 at 10. When a statewide ballot referendum threatened to repeal House Bill 6, FirstEnergy funneled more than $38 million dollars to its alleged co-conspirators to assist in defeating the citizen initiative.

As alleged, the bribery scheme was designed to *directly* take money out of the pockets of millions of Ohioans. Moreover, when the scheme came to light, Householder was criminally indicted for his role. As a result, the public's confidence in the political process was undermined. The public heard allegations that their politicians were for sale to the highest bidder and that House Bill 6 was only passed through the unlawful transfer of millions and millions of dollars from FirstEnergy.

The complaint then goes on to detail what FirstEnergy executives received in exchange for their alleged wrongdoing. During the course of the scheme, the compensation Defendants allegedly received was as follows:

Defendant Charles Jones - **$55,207,422**

Defendant Michael Anderson - **$1,031,757**

Defendant Steven Demetriou - **$704,538**

Defendant Julia Johnson - **$953,825**

Defendant Donald Misheff - **$1,224,230**

Defendant Thomas Mitchell - **$978,193**

Defendant James O'Neil - **$739,825**

Defendant Christopher Pappas - **$1,009,482**

Defendant Sandra Pianalto - **$452,838**

Defendant Luis Reyes - **$948,601**

Defendant Leslie Turner - **$314,836**

Defendant James Pearson - **$22,803,462**

Defendant Robert Reffner - **$2,467,891**

Defendant Steven Strah - **$16,848,974**.

In total, these Defendants are alleged to have received over **$105 million** during the course of the alleged bribery scheme.

II. Admissions

While the complaint contains only allegations, the Court takes note of the fact that FirstEnergy made numerous admissions in its deferred prosecution agreement ("DPA") with the United States Attorney Office in the Southern District of Ohio. On July 20, 2021, FirstEnergy formally signed its DPA. In the DPA, FirstEnergy "stipulate[d] and agree[d] that if this case proceeded to trial, the United States would prove the facts set forth below beyond a reasonable doubt." FirstEnergy then admitted that it "conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.'s benefit." Among numerous other facts, FirstEnergy admitted to paying more than $59 million to Generation Now and more than $22 million to companies owned by "Public Official B," the then Chairman of the Public Utilities Commission of Ohio. FirstEnergy admitted that paying these millions of dollars was intended to influence official action, namely the passage of House Bill 6.

The DPA contains nearly 30 pages of facts that FirstEnergy agreed would be proven beyond a reasonable doubt if the prosecution moved forward against it. These facts detail the financial transactions and electronic communications of both unnamed FirstEnergy executives and unnamed public officials. While FirstEnergy's admissions are not conclusive upon the defendants named in this action, they provide a clear and concise road map to litigate this matter fully and fairly.

III. Settlement on the Eve of Depositions

Based on the serious allegations raised, their impact on both the shareholders and the public at large, and FirstEnergy's prior factual admissions, the Court told the parties during their first in-person hearing that it "intend[ed] on moving this case in an expeditious way." Doc. 166 at 27. To move the case forward efficiently, the Court made space in the federal courthouse available for conducting depositions. Plaintiffs used this offer from the Court to provide a schedule that included depositions of 22 individuals, including each of the named Defendants. The first of these depositions was set to begin at 9:30 a.m. on February 10, 2022. Instead of moving forward, at 4:16 p.m. on February 10, 2022, the parties sought to stay this matter while they sought approval of their settlement in a later-filed action in the Southern District of Ohio.

As a result, those persons that received over $100 million in compensation were not required to sit in a room, swear under oath, and answer honestly about the actions they took. The settlement also reveals that none of these alleged wrongdoers will be required to contribute even $1 to the ultimate settlement. At the same time, it remains unknown how much FirstEnergy will actually receive from the settlement. While Plaintiffs continue to tout the recovery of $180

million, the settlement agreement allows Plaintiffs' counsel to seek up to approximately $48 million in attorney fees and costs.[2]

IV. Hiding the Ball

With the above in mind, the Court hoped to gain a better understanding of what led to settlement in this matter and what drove the amount of the settlement. The Court began its quest with a simple question to counsel to determine whether the identity of those actively approving the alleged bribes had been learned through the lawsuit. Counsel indicated that he had learned this information, but he refused to provide the Court with any names when directly asked who had paid the bribes alleged in the complaint. Specifically, counsel claimed the information was subject to the mediation privilege and made vague references to other confidentiality agreements.

When asked to brief the privilege issue that counsel claimed prevented him from answering the Court's question, none of the parties offered any reasonable argument that the Court's factual question infringes on any mediation privilege. Instead, Plaintiffs responded that "this privilege bars disclosure of information responsive to the Court's questions concerning why and how the parties' mediation process ultimately resulted in the precise terms of the Proposed Settlement[.]" Doc. 288 at 3. Contrary to such an assertion, the Court made *no inquiry* regarding the mediation process. Rather, the Court asked a direct question about whether discovery had demonstrated who paid the alleged bribes at issue in this matter. Answering that

[2] *Any* recovery in this matter must viewed against the backdrop of the losses suffered by FirstEnergy. The DPA required FirstEnergy to pay a fine of $230 million. To date, FirstEnergy has not recouped any of the $105 million in salary and benefits paid to the executives that are alleged to have perpetrated this scheme. FirstEnergy has incurred attorney fees in the criminal action against it, in at least three derivative lawsuits including this one, and in numerous securities fraud lawsuits. FirstEnergy also incurred costs in forming and supporting the Special Litigation Committee. It remains unclear what liability may ultimately flow from the securities fraud lawsuits, but damages could easily stretch into the millions in that suit. Finally, FirstEnergy directly lost value when its stock plummeted and its goodwill was tarnished when news of this scheme became public. As the initial complaint in this matter alleged, the total losses incurred by FirstEnergy "may well stretch into the billions of dollars." Doc. 1 at 3.

question cannot reasonably be interpreted to even tangentially touch upon the mediation process generally, let alone fall within its privilege.

Counsel then attempted to transition away from the mediation privilege and claim that the parties' protective order prohibited him from answering the Court's question. However, in so doing, Plaintiffs ignore the plain language of the protective order:

> Any and all documents that may have been subject to sealing during discovery or motion practice will not enjoy a protected or confidential designation if the matter comes on for hearing, argument, or trial in the courtroom. *The hearing, argument, or trial will be public in all respects.*

Doc. 195 at 6 (emphasis added). The protective order continues:

> Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make any orders that may be appropriate with respect to the *use and disclosure of any documents produced* or use in discovery or at trial.

Doc. 195 at 7 (emphasis added). During its March 9, 2022 hearing, the Court very clearly ordered counsel to publicly provide an answer to a question surrounding information provided during discovery. As the Court's order falls squarely within its authority in the protective order, counsel's claim that the protective order inhibits disclosure has no legal or factual basis.[3]

Finally, Plaintiffs suggest that answering the Court's question would infringe upon their work product privilege. The work product privilege protects documents "prepared in anticipation of litigation ... by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). This Court's test "asks (1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable." *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006). This Court's inquiry regarding whether certain *facts* were learned

[3] Plaintiffs also suggest that a similar protective order entered into in the Southern District may also prohibit disclosure. However, it is clear that the parties could not agree in *either* District to restrict the release of information to the District Judge presiding over each matter. Accordingly, the protective order in the Southern District imposes no restrictions on an order from this Court.

during discovery does not touch upon counsel's work product. Accordingly, the work product privilege does not support counsel's refusal to answer the Court's question.

V. Public Interest

The bribery scheme giving rise to this case involved a *publicly* elected official receiving bribes from a *publicly* held company resulting in the passage of legislation that impacted the citizens of Ohio. The parties were informed early on that confidentiality agreements and protective orders would not be used to shield information from the public.

In response to the Court's most recent order, FirstEnergy through its Special Litigation Committee ("SLC") strenuously argues that public disclosure of facts will cause it more harm.[4] The SLC contends that the criminal investigation will resolve any lingering doubt about the facts surrounding the bribery scheme. The Court fundamentally disagrees with this assertion. To genuinely begin to rebuild FirstEnergy's image with the public, and therefore begin to restore the value the company has lost, there must be some recognition that FirstEnergy *knows* how certain events occurred. The public cannot begin to trust – or even evaluate – the corporate reforms proposed through the parties' settlement agreement if there is no indication that FirstEnergy actually knows what shortcomings existed that allowed for this scheme to occur and demonstrates that the reforms will remedy those shortcomings. Moreover, given that it is alleged that FirstEnergy executives perpetrated a scheme that impacted nearly every Ohioan, the Court cannot agree that FirstEnergy's

[4] This position is particularly disconcerting. FirstEnergy's prior Board of Directors twice defeated shareholder proposals in 2015 and 2016 that would have increased disclosure, transparency, and accountability for FirstEnergy's lobbying expenditures. The SLC now seeks a return to secrecy surrounding FirstEnergy's conduct.

interests are the sole interests that should be taken into account in this matter.[5]

It is not only the trust of FirstEnergy that must be rebuilt. This bribery scheme has undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials.[6] The public has a right to know how it is that the political process was so easily corrupted.

VI. The Court's Role

Because this was filed as a derivative action by shareholders on behalf of FirstEnergy, the Court would ordinarily review any proposed settlement to ensure that it is fair, reasonable, and adequate. At the preliminary approval stage, "the court is required to determine whether 'the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies and whether it appears to fall within the range of possible approval." *In re: Regions Morgan Keegan Sec.*, No. 08-2260, 2015 WL 11145134, at *3 (W.D. Tenn. Nov. 30, 2015)(quotations and alterations omitted). To date, the parties have attempted to deprive the Court of any role in ensuring that any resolution of this case is fair, reasonable, and adequate. Rather than present their settlement for this Court to analyze, they have actively engaged in forum shopping to present their settlement to another district judge in a later-filed action. The parties have refused to provide information to the Court despite requesting a stay in which they offered to provide information: "Counsel are available to discuss the Settlement and this request with the Court at the Court's convenience should the Court have any questions." Doc. 273 at 6.

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[5] Given the SLC's contention that all the same information will be made public through a criminal investigation, it is unclear how that very same information becoming public in this litigation could be deemed harmful to the company.

[6] The Court reiterates that these are merely allegations against elected officials. While FirstEnergy has admitted that they made payments with the intent to influence official actions, the elected officials have denied engaging in such conduct.

By attempting to deprive the Court of any review of the settlement in this matter, the parties undermine any public confidence in their outcome. All of the purported goals in the complaint – holding Defendants accountable and making FirstEnergy whole again chiefly among them – are thwarted. The public will have no confidence that a fair resolution was reached when so few details are made public, especially when the parties have gone to such great lengths to attempt to shield discovery from the public. While the parties may attempt to dilute the Court's role in this case, the Court will not shirk from its responsibility to ensure a fair and reasonable outcome.

VII. Conclusion

It has now been more than 100 years since Supreme Court Justice Louis Brandeis penned his most famous statement in a 1913 Harper's Weekly article titled "What Publicity Can Do." Brandeis' statement rings just as true today. "Sunlight is said to be the best of disinfectants." Providing the Court and the public with the information learned through discovery will serve to *enhance* the public's trust that any potential resolution of this case is fair. As such, the Court will grant Plaintiffs' counsel one final opportunity to comply with the Court's order. By no later than 12:00 p.m. on March 23, 2022, counsel shall answer under oath, via affidavit, the Court's question by naming the individuals who paid the bribes in this matter, and thereafter counsel will answer the Court's further inquiries regarding what fact discovery has shown to date.

IT IS SO ORDERED.

Dated: March 22, 2022

/s/ John R. Adams
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

JENNIFER L. MILLER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
MICHAEL J. ANDERSON, *et al.*,	)	Judge John R. Adams
	)	
Defendants,	)	Case No. 5:20-cv-01743-JRA
	)	
and	)	
	)	
FIRSTENERGY CORP.,	)	
	)	
Nominal Defendant.	)	

AFFIDAVIT OF JEROEN VAN KWAWEGEN AND THOMAS CURRY

Jeroen van Kwawegen and Thomas Curry, being duly sworn, hereby state as follows:

1. We are counsel to the Intervenor-Plaintiffs in the above-captioned Action and, on behalf of all plaintiffs' counsel, submit this Affidavit in response to the Court's Order of March 22, 2022 (the "Order," ECF No. 290), which directed counsel to "answer under oath, via affidavit, the Court's question by naming the individuals who paid the bribes in this matter[.]" *Id.* at 9.

2. FirstEnergy Corp. ("FirstEnergy" or the "Company") admitted in its July 20, 2021 Deferred Prosecution Agreement with the Department of Justice (the "DPA") that it "conspired . . . to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.'s benefit." DPA at 17.

3. Plaintiffs received substantial discovery concerning the payments described in the DPA during the discovery process following orders issued in the parallel consolidated shareholder derivative action pending in the Southern District of Ohio.

4. Plaintiffs' counsel believe that the discovery received would have shown at trial that two senior executives of FirstEnergy devised and orchestrated FirstEnergy's payments to public officials in exchange for favorable legislation and regulatory action:

- Defendant Charles E. Jones, who was FirstEnergy's Chief Executive Officer and a director at the time of the scheme and has since been terminated by the Company; and
- Defendant Michael J. Dowling, who was FirstEnergy's Senior Vice President for External Affairs at the time of the scheme and has since been terminated by the Company.

5. Based on the discovery, Plaintiffs' counsel understand that Defendant Jones is the individual identified in the DPA as "Executive 1" and that Defendant Dowling is the individual identified in the DPA as "Executive 2." The DPA describes Executive 1's and Executive 2's central roles in the events giving rise to this litigation.

6. Defendants Jones and Dowling have vehemently denied acting improperly, and neither Jones nor Dowling have been charged by the Department of Justice.

7. We declare under penalty of perjury that the foregoing facts are true and correct.

Dated: March 23, 2022

Jeroen van Kwawegen
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SWORN TO AND SUBSCRIBED BEFORE me in the State of New York, this 23rd day of March, 2022

LAURA MARIONI
Notary Public - State of New York
NO. 01MA6043496
Qualified in Queens County
My Commission Expires 6/17/2022

Thomas Curry
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Wilmington, DE 19801
Phone: (302) 485-0480
tcurry@saxenawhite.com

SWORN TO AND SUBSCRIBED BEFORE me in the State of Delaware this 23rd day of March, 2022

Tayler D. Bolton
Attorney-at-Law
Notary per 29 Del. C. § 4323(a)(3)

Summary: Memorandum Memorandum Contra FirstEnergy's Motion to Quash OCC's Subpoena for a Deposition of FirstEnergy's Vice President, Controller & Chief Accounting Officer Jason Lisowski by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.