

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

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

**PLAINTIFF AND INTERVENOR-PLAINTIFFS’
RESPONSE TO THE COURT’S MARCH 11, 2022 ORDER**

Plaintiff Jennifer L. Miller (“Miller”) and Intervenor-Plaintiffs Employees’ Retirement System of the City of St. Louis (“St. Louis”), Electrical Workers Pension Fund, Local 103, I.B.E.W. (“Local 103”), and Massachusetts Laborers Pension Fund (“MLPF”) (collectively, “Plaintiffs”) hereby respectfully respond to the Court’s Order of March 11, 2022 (ECF No. 286, the “March 11 Order”) in the above-captioned action (the “Action”).

On February 11, 2022, this Court issued an Order denying all parties’ joint motion to stay proceedings in this Court pending assessment of the proposed settlement in the parallel derivative action pending in the Southern District of Ohio (the “Proposed Settlement”).¹ The Court’s February 11 Order required the parties to provide information concerning the Proposed Settlement with respect to 11 separate topics of inquiry “via public filing with this Court.” ECF No. 274 at 2.

¹ On March 11, 2022, Plaintiffs filed an unopposed motion for preliminary approval of the Proposed Settlement in the Southern District. *See Employees Retirement System of the City of St. Louis, et al. v. Charles E. Jones, et al.*, Case No. 2:20-cv-04813 (S.D. Ohio), ECF No. 170.

Although the Proposed Settlement is not before this Court, Plaintiffs answered the Court's questions consistent with their obligations under the Confidentiality Orders entered by this Court (ECF No. 195) and the Southern District of Ohio (ECF No. 128) and their obligation to keep settlement negotiations confidential under the mediation privilege. *See* ECF Nos. 276 and 276-1 (Declaration of the Hon. Layn R. Phillips (ret.) explaining the importance of the mediation privilege and that the “the arguments and positions asserted by all involved were the product of substantial work, they were complex and highly adversarial, and they reflected a detailed and in-depth understanding of the strengths and weaknesses of the claims and defenses at issue in the case”).

On March 9, 2022, this Court held a public hearing, noting the likely presence of the media, and informed the parties that the Court had “a number of questions to ask,” including “who it is that paid the bribes in this case.” ECF No. 280, March 9, 2022 Hr'g Tr. at 8-9, 17. Speaking on behalf of all Plaintiffs, Plaintiffs' counsel informed the Court that Plaintiffs “know who paid the bribes,” but had learned this information “through discovery, subject to a confidentiality order” and used it “as part of settlement negotiations and part of a mediation.” *Id.* at 11-12. Plaintiffs further explained that in this *derivative* action, Plaintiffs' counsel have obligations to FirstEnergy and FirstEnergy's shareholders—not to the public. *Id.* at 17. Plaintiffs respectfully submit that given these obligations under the applicable Confidentiality Orders and the mediation privilege, Plaintiffs were not permitted to publicly identify specific individuals who appear to have paid the bribes or disclose whether this information was part of the parties' considerations and communications in connection with the Proposed Settlement. Such public disclosure could also be harmful to FirstEnergy considering the myriad related criminal and civil proceedings, the

ongoing regulatory investigations, and the securities class action pending in the Southern District of Ohio where FirstEnergy is a defendant.

The Sixth Circuit Court of Appeals has recognized a settlement privilege based on the “strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations.” *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).² This privilege operates to prohibit parties from disclosing information concerning facts learned exclusively during, and communications exchanged in furtherance of, mediation. Plaintiffs respectfully submit 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, a complete and accurate response to which would divulge communications exchanged and positions taken during the mediation process. Relatedly, information concerning counsel’s evaluation of evidence and strategic determinations concerning the Proposed Settlement is protected from public disclosure (and disclosure to Defendants) by the attorney work product doctrine. *See Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

The Confidentiality Orders entered by this Court and by the Southern District of Ohio also prohibited Plaintiffs from *publicly* disclosing information that they received during discovery that the producing party marked “confidential.” This includes information produced by Defendants and FirstEnergy that was marked “confidential” and is responsive to questions concerning the underlying conduct of specific individuals and entities, including the Court’s question “who is it that paid the bribes?” Order at 1. Plaintiffs have sought consent from Defendants and FirstEnergy to publicly disclose the information produced to Plaintiffs by Defendants and FirstEnergy in

² Likewise, Ohio law and the Local Rules of both this Court and the Southern District of Ohio provide for strict secrecy as to communications in the context of mediation. *See* Ohio Rev. Code § 2710.03; Northern District Local Rule 16.6(h); Southern District Local Rule 16.3(c).

discovery and requested by the Court, pursuant to ¶5(b)(5) of the Confidentiality Order entered by this Court and pursuant to ¶20 of the Confidentiality Order entered by the Southern District of Ohio, but no Defendant nor FirstEnergy has consented to such public disclosure. *See* Exhibit 1 attached hereto.

Plaintiffs note the relevant Confidentiality Orders do not prohibit disclosure of factual information learned in discovery to the Court under seal or *in camera*. Plaintiffs are willing to do so promptly, provided that requested information is not otherwise subject to the mediation privilege or the work product doctrine. Should the Court alternatively order *public* disclosure of information produced in discovery and designated by Defendants and FirstEnergy as “confidential” pursuant to those Confidentiality Orders, Plaintiffs respectfully request an order clarifying that such disclosure will not violate this Court’s Confidentiality Order. In that case, Plaintiffs will also seek a modification of the Confidentiality Order entered by the Southern District of Ohio, making clear that such *public* disclosure by Plaintiffs of information provided by Defendants and FirstEnergy to Plaintiffs in discovery and marked “confidential” will not violate that Confidentiality Order. *See, e.g., Ohio Willow Wood Co. v. ALPS South LLC*, 2010 WL 3470687, at *2 (S.D. Ohio Aug. 31, 2010) (finding “there is really no reason for this Court not to afford the order of its sister District Court in Florida the comity to which its protective order is entitled”); *see also Navajo Nation v. Urban Outfitters, Inc.*, 2015 WL 11109396, at *3 (D.N.M. May 15, 2015) (distinguishing disclosure of information by the producing party from disclosure of information by the receiving party).

Dated: March 16, 2022

Respectfully submitted,

/s/ John C. Camillus

John C. Camillus

**LAW OFFICES OF JOHN C.
CAMILLUS LLC**

John C. Camillus (0077435)
P.O. Box 141410
Columbus, OH 43214
Phone: (614) 992-1000
jcamillus@camilluslaw.com

*Liaison Counsel for Intervenor Plaintiffs
and Court-Appointed Liaison Counsel for
Co-Lead Plaintiffs in the Southern District
Action*

SAXENA WHITE P.A.

Maya Saxena
Joseph E. White III
Lester R. Hooker
Dianne M. Pitre
7777 Glades Road, Suite 300
Boca Raton, FL 33434
Phone: (561) 394-3399
msaxena@saxenawhite.com
jwhite@saxenawhite.com
lhooker@saxenawhite.com
dpitre@saxenawhite.com

SAXENA WHITE P.A.

Thomas Curry
Tayler D. Bolton
1000 N. West Street, Suite 1200
Wilmington, DE 19801
Phone: (302) 485-0480
tcurry@saxenawhite.com
tbolton@saxenawhite.com

SAXENA WHITE P.A.

Steven B. Singer
Sara DiLeo
10 Bank Street, 8th Floor
White Plains, NY 10606

Phone: (914) 437-8551
ssinger@saxenawhite.com
sdileo@saxenawhite.com

- and -

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

Jeroen van Kwawegen
Alla Zayenchik
Matthew Traylor
Margaret Sanborn-Lowing
1251 Avenue of the Americas
New York, NY 10020
Phone: (212) 554-1400
jeroen@blbglaw.com
alla.zayenchick@blbglaw.com
matthew.traylor@blbglaw.com
margaret.lowing@blbglaw.com

*Counsel for Intervenor Plaintiffs and
Court-Appointed Co-Lead Counsel for Co-
Lead Plaintiffs in the Southern District
Action*

**COHEN MILSTEIN SELLERS
& TOLL PLLC**

Steven J. Toll
Daniel S. Sommers
Molly Bowen
1100 New York Ave. NW, Fifth Floor
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
stoll@cohenmilstein.com
dsommers@cohenmilstein.com
mbowen@cohenmilstein.com

**COHEN MILSTEIN SELLERS
& TOLL PLLC**

Christopher Lometti
Richard A. Speirs
Amy Miller
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: (212) 838-7797

Facsimile: (212) 838 7745
clometti@cohenmilstein.com
rspeirs@cohenmilstein.com
amiller@cohenmilstein.com

*Counsel for Intervenor Plaintiff Additional
Plaintiff in the Southern District Action
Massachusetts
Laborers Pension Fund*

EDELSON LECHTZIN LLP

Marc H. Edelson
Eric Lechtzin
3 Terry Drive, Suite 205
Newtown, PA 18940
Telephone: (215) 867-2399
Facsimile: (267) 685-0676
medelson@edelson-law.com
elechtzin@edelson-law.com

Counsel for Plaintiff Jennifer Miller

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys on record.

/s/ John C. Camillus

John C. Camillus