Employees Retirement System of the City of St. Louis v. Jones et al.

COURT: United States District Court for the Southern District of Ohio
CASE NUMBER: 2:20-cv-04813
CASE LEADERS: Jeroen van Kwawegen, Hannah Ross, Scott R. Foglietta
CASE TEAM: Margaret Sanborn-Lowing, Stavros Katsetos

On January 25, 2021, BLB&G filed a stockholder derivative complaint in the Southern District of Ohio on behalf of nominal Defendant FirstEnergy Corp. ("FirstEnergy" or the "Company"), Co-Lead Plaintiffs Employees Retirement System of the City of St. Louis and Electrical Workers Pension Fund, Local 103, I.B.E.W., and additional plaintiff Massachusetts Laborers Pension Fund against certain current and former officers (collectively, "Defendants") of FirstEnergy. Plaintiffs allege that Defendants breached their fiduciary duties, unjustly enriched themselves, wasted FirstEnergy's assets, and violated Section 14 of the Exchange Act of 1934.

This case arises out of what the United States Attorney for the Southern District of Ohio declares "is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio." FirstEnergy stands accused of funneling over $60 million of FirstEnergy funds to the former Speaker of the Ohio House of Representatives Larry Householder ("Householder") and other public officials in exchange for favorable legislation, causing the largest political bribery scandal in the history of Ohio and one of the most egregious examples ever of the misuse of corporate funds to undermine our country's system of representative government.

FirstEnergy is one of the largest investor-owned electric utility companies in the country. By late 2016, the Company was struggling to remain profitable due to the ebb of demand in nuclear power. Faced with these difficulties, Defendants decided to seek "legislative solutions" to the Company's financial woes. Between 2017 and 2019, FirstEnergy transferred tens of millions of dollars—while publicly reporting only a fraction of that amount—to various entities controlled by Householder to support Householder's bid for Speaker of the House, and to support other House candidates that FirstEnergy and Householder believed would vote for Householder's Speakership candidacy. Eventually, through the use of these illegally secured funds, Householder was elected Speaker of the House in 2019. Subsequently, Householder and his associates introduced and passed HB6, which subsidized FirstEnergy's power plants to the tune of over $1 billion dollars. During the same period of time, FirstEnergy's board of directors repeatedly rejected concerned shareholders' proposals to increase transparency into FirstEnergy's political spending. Defendants ploy would meet a rude awakening, however, as on July 17, 2020, the U.S. Attorney for the Southern District of Ohio filed an 80-page criminal complaint with an FBI affidavit against two FirstEnergy lobbyists, Householder, and Householder staff members, identifying FirstEnergy in all but name. Various stakeholders have subsequently filed lawsuits against FirstEnergy, both civil and criminal.

On May 11, 2021, the Court denied Defendants' motion to dismiss in its entirety. In its decision, the Court found that the Complaint satisfied the particularity requirements under Rule 9 and the PSLRA, as "Plaintiffs [have made] extensive and detailed allegations suggesting that the FirstEnergy Defendants issued numerous false or misleading statements through the proxies." The Court further found that Plaintiffs had standing and had successfully pled demand futility, determining that "Plaintiffs have alleged by clear and convincing evidence that Defendants' 'knew or recklessly disregarded reports and "red flags" that FirstEnergy was paying massive amounts of illicit bribes to

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Householder and other public officials to ensure passage of legislation' and took affirmative steps to conceal the scheme."

In the wake of the Southern District Court's motion to dismiss opinion, the FirstEnergy Board belatedly formed a special litigation committee ("SLC") to conduct an investigation of Plaintiffs' claims. On July 20, 2021, the SLC moved for a six-month stay of the actions. Plaintiffs opposed the stay.

On July 22, 2021, both the Company and the Department of Justice announced that FirstEnergy had signed a historic deferred prosecution agreement ("DPA") which included a fine of $230 million. In its DPA, FirstEnergy admitted that it had "paid millions of dollars to [Householder] . . . in return for [Householder] pursuing nuclear legislation for FirstEnergy Corp.'s benefit in his capacity as a public official."

On September 16, 2021, the Northern District Court denied Defendants' motions to dismiss Plaintiffs' complaint, adopting the Southern District Court's reasoning in full. In the same ruling, the Northern District Court also denied the SLC's requested stay, observing that "[b]y all appearances, FirstEnergy was willing to go without an SLC up until it realized these matters would not be dismissed at the pleadings stage."

On February 10, 2022, following hard-fought litigation and arms'-length negotiations, FirstEnergy announced that the parties had reached an agreement in principle for a global settlement (the "Settlement") of Plaintiffs' derivative claims asserted on behalf of FirstEnergy. Under the terms of the Settlement, FirstEnergy will receive $180 million less a court-approved award of attorneys' fees and expenses, and six directors who have been on the Board for a minimum of five years will not stand for re-election. Additionally, FirstEnergy will adopt governance reforms that relate to the Company's political spending and lobbying.

On March 11, 2022, Plaintiffs filed a motion for preliminary approval of the Settlement in the United States District Court for the Southern District of Ohio. On May 9, 2022, the Southern District Court granted preliminary approval of the Settlement. On May 16, 2022, FirstEnergy provided Court-approved formal notice of the Settlement to shareholders. The Southern District held a final approval hearing on August 4, 2022.

On August 23, 2022, the Southern District issued its final judgment approving the Settlement and ordered the case dismissed. Objector Todd Augenbaum filed a motion for consideration on September 20, 2022. Plaintiffs opposed the motion on October 11, 2022. Augenbaum filed his reply brief in support of his motion for reconsideration on October 25, 2022. On May 22, 2023, the Southern District issued its opinion and order denying Augenbaum's motion for reconsideration. Augenbaum appealed the Court's final judgment approving the Settlement and the Court's opinion denying his reconsideration motion to the Sixth Circuit. The Sixth Circuit ordered a mediation between Mr. Augenbaum and counsel representing the SLC, which took place on July 21, 2023. Plaintiffs do not know the outcome of this mediation. Mr. Augenbaum filed his appellant brief on September 14, 2023, and Plaintiffs-Appellees filed our answering brief on October 16, 2023. Mr. Augenbaum filed his reply brief on November 6, 2023.

On February 16, 2024, the Sixth Circuit issued its opinion and judgment affirming Chief Judge Marbley's ruling.

On August 24, 2022, Plaintiffs joined Defendants' motion to dismiss with prejudice in the Northern District Court given the Southern District's final approval order and judgment. Objector Todd Augenbaum and his counsel filed a motion to intervene and appoint lead counsel and lead plaintiff in the Northern District Court on August 25, 2022. Plaintiffs filed an objection to the appointment of lead counsel and lead plaintiff on August 26, 2022 and opposed Augenbaum's motion to intervene on September 8, 2022. Augenbaum filed his reply in support of his motion to

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intervene on September 22, 2022. These motions are now fully briefed and we are waiting for decisions. If the Court grants Augenbaum's motion to intervene and allow him to prosecute claims that we settled with Court approval in the Southern District, we expect FirstEnergy to petition the Sixth Circuit for a writ of mandamus. We intend to support such petition consistent with the terms of the settlement agreement.

On September 29, 2023, the Northern District Court issued an order staying the Northern District Action pending resolution of the appeal in the Sixth Circuit.

Case Documents

- Notice of (I) Pendency and Proposed Settlement of Stockholder Derivative Actions; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Litigation Expenses
- July 7, 2022 - Plaintiffs' Motion for Final Approval of Settlement, An Award of Attorneys' Fees and Expenses, and Plaintiff Service Awards
- July 7, 2022 - Transmittal Declaration of John C. Camillus
- May 9, 2022 - Order of Preliminary Settlement Approval
- May 11, 2021 - Order Denying Motion to Dismiss
- January 25, 2021 - Consolidated Verified Shareholder Derivative Complaint

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