IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO

STATE OF OHIO ex rel. Dave Yost,

Ohio Attorney General,

Case No. 20 CV 006281

Plaintiff,

v. JUDGE CHRIS BROWN

FIRSTENERGY CORP., et al.,

Defendants,

CITY OF CINCINNATI and CITY OF COLUMBUS,

Case No. 20 CV 007005¹

Plaintiffs,

V.

JUDGE CHRIS BROWN

FIRSTENERGY CORP., et al.,

Defendants,

STATE OF OHIO *ex rel*.

Dave Yost, Ohio Attorney General,

Case No. 20 CV 007386²

Plaintiff,

V.

JUDGE CHRIS BROWN

ENERGY HARBOR CORP., et al.,

Defendants.

COMBINED REPLY IN SUPPORT OF MOTION TO PARTIALLY LIFT THE STAY OF PROCEEDINGS

¹ City of Cincinnati, et al. v. FirstEnergy Corp., et al., consolidated by order filed Dec. 14, 2020.

² State of Ohio ex rel. Dave Yost v. Energy Harbor Corp., et al., consolidated by order filed Dec. 14, 2020.

FirstEnergy entities, Energy Harbor entities, Juan Cespedes, Charles Jones, Michael Dowling, Samuel Randazzo, and Randazzo entities (hereinafter "Responding Defendants") resist the State's request to partially lift the stay in proceedings primarily on arguments that (1) the Agreed Order entered into ten months ago, is a contract which this Court is barred from disturbing at the request of the State, (2) the indicted and unindicted defendants' self-incrimination protections are at stake, and (3) FirstEnergy's recent Deferred Prosecution Agreement, revealing an additional branch of bribery related to H.B. 6 involving the former Chair of the Public Utilities Commission of Ohio, is insufficient to show "fraud, mistake, or other extraordinary circumstances" to merit lifting the stay in these civil proceedings. Perhaps in the world of "a giant lobbying firm that runs a utility," admission of bribery of public state officials and paying a \$230 million penalty is another day in the corporate world, but to the citizens of Ohio it is a big deal, and fully justifies reevaluating the status of the pause placed on the State to have its day in Court.

Various Responding Defendants argue that the State is not honoring the terms of the Agreed Order. That is wrong. Save for minor procedural requirements, the State let the case remain stayed and did not pursue discovery. Only after FirstEnergy admitted its culpability in the underlying H.B. 6 scandal, revealing a provable new aspect of the bribery scandal involving the former Chair of the PUCO, did the State seek to lift the stay to add new parties and new claims. Amending of the Complaint was precisely justified based on the change in landscape that was argued in the State's original Motion. So too is the State's current Motion to partially lift the stay. Simply put, the original grounds for the stay are no longer in effect. As was evident from the

³ 'A giant lobbying firm that runs a utility': FirstEnergy's involvement in Ohio politics dates back decades, Columbus Dispatch (Nov. 1, 2021)

https://www.dispatch.com/story/news/politics/2021/11/01/firstenergy-played-politics-years-before-bb-6-corruption-case/6007622001/

hearing where the parties and the Court discussed the stay, and the language indicating that the parties would regularly check in with the Court during the stay, the Court and the parties knew that the grounds could shift, requiring the stay to be revisited. FirstEnergy's DPA and the advancing of other civil cases are just such circumstances.

A. The Agreed Order to stay the entire case was not a tit-for-tat for decoupling.

It is oversimpliifed for the Responding Defendants to argue that the State agreed to the stay in "exchange for discontinuation of decoupling charges". (FirstEnergy Memo Contra, pg. 4.) It is true that once the decoupling charges ended, the State saw no basis for the case to advance further at that time, based largely upon this Court's earlier discovery orders based on the pending prosecution. Thus, while the agreements were reached together, it is disingenuous for FirstEnergy to now argue that it would have contested ending decoupling had the stay not occurred.

The stay was based upon the Court's agreement with FirstEnergy's argument that "[m]oving forward with discovery now would inevitably impair FirstEnergy's ability to defend this case and interfere with the government's prosecution of the parallel criminal case." (FirstEnergy Motion to Stay Discovery, Dec. 2, 2020, pg. 1.) When this Court granted the discovery stay at the preliminary injunction, it acknowledged that the uncertainty of future criminal indictments for "unindicted Defendants" was a key factor.

"It's clear to the Court, based on news reports, that this is still an ongoing investigation as well.... It's quite possible that other individuals may be implicated in the federal criminal matter.

... At some point discovery will have to go forward; but given the early stage of all these cases and the interest of the Defendants and the unindicted Defendants' interest as well in defending their case and presenting an adequate effective defense, I think that staying all discovery in all three cases is appropriate for right now." (Tr. Pre. Inj, Hrg., Dec. 21, 2020, pgs. 15-16)

While not using FirstEnergy by name, it can hardly be a stretch of logic to equate "the unindicted Defendants' interest" with a certain "Company A" from the Federal Indictment. Thus,

while FirstEnergy may *now* want to claim that it "never cited its *own* potential criminal exposure as justification for the stay" (emphasis in original) (FirstEnergy Memo Contra, pg. 8), FirstEnergy chose not to clarify that position when this Court was believing otherwise and granted the stay that FirstEnergy requested nearly a year ago.

Recall that that the Agreed Order was entered into just a few weeks before this Court was to review its discovery stay, and at a time when FirstEnergy was using its potential criminal indictment exposure as a shield. To suggest that the Agreed Order was narrowly tailored to decoupling and wholly unconnected to the federal criminal case against FirstEnergy is laughable.

Energy Harbor and other Responding Defendants press hard the claim that the Agreed Order is a binding contract forever shacking the parties until its terms expire, and that this Court is helpless regarding its own docket and must wait until "all criminal proceedings" are completed. (Energy Harbor Memo Contra, pgs. 3-5.) However, this Court did not, and cannot, abandon its responsibilities in favor of any agreement by the parties to the contrary. For all of Energy Harbor's research in "the Tenth District and courts across the country" and bluster regarding "hornbook law" that Agreed Order is a binding contract, none of the Responding Defendants' cited cases involved agreed orders regarding stays of proceedings. The relied upon cases involved some compromise exclusively between parties and did not require the trial court to give up its own rights over the docket. State ex rel. Yost v. Summer Rays, Inc., 10th Dist. Franklin Nos. 18AP-929, 19AP-133, 2019-Ohio-3907, ¶ 13 (receivership.); Klein v. Botelho, 2d Dist. Montgomery No. 24393, 2011-Ohio-4165, ¶ 10 (child custody); GZK, Inc. v. Schumaker, 2d Dist. Montgomery No. 22172, 2008-Ohio-1980, ¶ 43 (conditional dismissal based on execution of contract); Reik v. Bowden, 172 Ohio App.3d 12, 2007-Ohio-2533, 872 N.E.2d 1253, ¶ 2 (1st Dist.) (Child support); Hayes v. White, 7th Dist. Columbiana No. 01 CO 11, 2001-Ohio-3467, ¶ 2 (tort settlement); City of Covington v. Covington Landing Ltd. Partnership, 71 F.3d 1221, 1223 (6th Cir.1995) (lease payments of property.) A court is master of its docket, not the parties. The State never considered the stay to be a contract, simply a mere reflection of the status of the case that then existed.

Defendants' failure to cite a *single* case involving a stay being interpreted as a binding contract that terminated this Court's authority to control its own docket speaks volumes.

B. The indicted and unindicted natural defendants cannot be used as blanket shields.

Although they admit that they hold no Fifth Amendment rights as corporations, FirstEnergy and Energy Harbor nevertheless argue that they seek to protect the rights of their natural person co-Defendants, and by extension, any Fifth Amendment rights invoked in discovery by those individuals would potentially harm the corporate defendants' ability to defend themselves. (FirstEnergy Memo Contra, pgs. 8-9 and Energy Harbor pgs. 7-10.) Similarly, unindicted natural defendants Jones and Dowling also seek to raise the shield of their indicted co-defendants for their own defense. (Jones and Dowling Memo Contra, pgs. 7-9.) But as explained in the State's underlying Motion, both state and federal courts are in accord that Fifth Amendment protections are not a safe harbor from being called to answer in a companion civil matter. *State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 336, 1998-Ohio-431, 691 N.E.2d 282 (1998), followed, *Ohio Bar Liab. Ins. Co. v. Silverman*, 10th Dist. Franklin No. 05AP-923, 2006-Ohio-3016, ¶ 12 ("Ohio law is clear that the protection against compulsory self-incrimination does not extend to prohibit civil litigation where the possibility of prosecution exists, nor does it require staying a related civil case until a criminal appeal is resolved.")

Thus, neither indicted defendants Householder and Borges, nor unindicted defendants Jones, Dowling, and Randazzo, have any Fifth Amendment protections in this civil RICO matter.

Consequently, if there is no Fifth Amendment natural person protection during the pendency of a

civil matter, then it certainly cannot be an extension to non-natural persons or unindicted parties.

The defendants to this case should no longer be protected by the general stay. Responding Defendants' legal support is inapposite.

In Baird v. Daniels, S.D.Ohio No. 1:12-cv-945, 2013 U.S. Dist. LEXIS 16576 (Feb. 7, 2013), the defendants were two individuals and eight companies, which were jointly or partially run by one of the defendants. Logically, the assertion of the Fifth Amendment privilege by a corporate officer will impair a corporate defendant's ability to defend itself. (Id. at *11.) Similar issues played out in other cases cited by Responding Defendants. In re Adelphia Communs. Secs. Litigation, E.D.Pa. No. 02-1781, 2003 U.S. Dist. LEXIS 9736, at *20 (May 13, 2003) ("many of the individual defendants were officers of Adelphia and the claims against them arise out of their conduct at the company"); Bruner Corp. v. Balogh, 819 F. Supp. 811, 812 (E.D. Wis. 1993) (Former employees alleged to have stolen corporate property.); Parker v. Dawson, E.D.N.Y. Nos. 06-CV-6191 (JFB) (WDW), 06-CV-6627 (JFB) (WDW), 07-CV-1268 (JFB) (WDW), 2007 U.S. Dist. LEXIS 63068, at *3 (Aug. 27, 2007) (Sole shareholder and president of two investment advisory corporations accused of diverting millions in client funds from investment accounts into corporate accounts.); Am. Express Business Fin. Corp. v. RW Professional Leasing Servs. Corp., 225 F.Supp 2d 263, 265 (E.D.N.Y.2002) ("RW Professional claims that the only employees capable of responding to discovery are the individual defendants.") (Emphasis Added.) Only two natural defendants in this case are former officers of defendants and there is no claim that only Jones and Dowling are capable of responding to FirstEnergy discovery.

To the extent that Responding Defendants believe that a *partial* stay which continues to hold Householder and Borges at arm's length from this case "exacerbates the prejudice" (FirstEnergy Memo Contra, pg. 9), places them "in an unfair predicament" (Energy Harbor Memo

Contra, pg. 11) or treats some defendants differently than others (Randazzo Memo Contra, pg. 8), they are free to argue that the stay should be complete, rather than partial. But, as was apparent from the State's Motion, the State sought the partial lift to be mindful of those parties whose ongoing criminal proceedings have not been resolved. If implementation is a concern (Randazzo Memo Contra, pg. 4), this Court is capable of crafting a scheduling order that balances the rights of all the parties while allowing some discovery to move forward.

Interestingly, Energy Harbor points out "[d]iscovery in this case is a cross-section of eight-lane highways, given the number of parties and non-parties (which includes over 70 members of the General Assembly) who will ultimately participate in very complicated discovery, both in terms of substance and process." (Energy Harbor Memo Contra, pgs. 2-3.) Jones and Dowling recently indicated that they too believe the breadth of discovery in defending the fundamental allegations of H.B. 6 extends to numerous public officials⁴. Thus, the number of potential witnesses, makes lifting the stay even *more* justified, *not* less. Moreover, waiting to get knee-deep in documents, which by some accounts could number in the millions⁵, justifies lifting the stay now, not continuing to sit idle while the criminal case plays out potentially *years* into the future.

C. No harm comes to defendants by requiring them to do in State court what they are compelled to do in Federal Court.

⁴ Fired FirstEnergy execs say Jon Husted, others may have info to help them in a civil suit, Columbus Dispatch (Nov. 23, 2021) ("Aside from [Ohio Lt. Gov. Jon] Husted, Jones and Dowling believe discoverable information is held by: FirstEnergy managers and board members, Public Utilities Commission of Ohio members and staff, former Ohio House Speaker Larry Householder, lawmakers who voted for House Bill 6, lobbyist Josh Rubin, political consultant Mike Dawson, and legislative staff members Pat Tully and Frank Strigari.")

https://www.dispatch.com/story/news/2021/11/23/firstenergy-husted-may-have-info-civil-lawsuit-documents-say/8737147002/

⁵ Feds to Matt Borges: Check the 1.5 million documents on the Ohio bribery case already sent, The Cincinnati Enquirer (Nov. 12, 2021)

https://www.cincinnati.com/story/news/politics/2021/11/13/ohio-house-bill-6-matt-borges-federal-investigation/8589091002/

FirstEnergy complains that the federal ligation discovery is not "in the normal course" and has only just begun. Importantly, FirstEnergy also argues that the federal discovery cannot close until the criminal proceedings end. (FirstEnergy Memo Contra, pg. 10.) The potential delay to the closing of federal discovery is not a reason to delay beginning state discovery.

Moreover, the inference, suggested by Responding Defendants, that once the criminal case is resolved, that magically the civil litigation here will move smoothly is an illusion. Where discovery has been permitted, FirstEnergy has been aggressively resisting⁶. There is simply no reason to believe that FirstEnergy will be more amenable to discovery in "years" currently forecasted for this case to continue until "final resolution of all criminal proceedings."

For its part, Energy Harbor claims that the State is not missing out on the discovery being exchanged in the federal civil cases, which is subject to a stipulated protective order, and to which Householder and other defendants are not named parties. (Energy Harbor Memo Contra, pg. 15.) This is a non-sequitur. Federal case discovery is at least moving forward. And while the state may not have access to that discovery it should not be denied the opportunity for its own.

D. Conclusion.

Discovery is proceeding in other fora. The State is highly interested in being the prime mover in cleaning up the shameful public corruption that has blemished the State. It should not be kept in the dark, while private plaintiffs and actors before the PUCO receive discovery.

For the reasons stated in the State Motion's previously filed and this Reply herein, the request for partially lifting the stay of proceeding should be granted.

Respectfully submitted,

⁶ FirstEnergy, DeWine's office and others still far from full disclosure on HB 6, Eye on Ohio (Oct. 12, 2021) https://energynews.us/2021/10/12/firstenergy-dewines-office-and-others-still-far-from-full-disclosure-on-hb-6/

DATED: November 29, 2021

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