

No. 24-3654

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re FirstEnergy Corp. Securities Litigation, et al.

Appeal from the United States District Court
for the Southern District of Ohio
Nos. 20-cv-03785, 20-cv-4287
The Honorable Algenon L. Marbley

PLAINTIFFS-RESPONDENTS' ANSWER IN OPPOSITION TO
FIRSTENERGY CORP.'S PETITION FOR WRIT OF MANDAMUS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 24-3654

Case Name: In re FirstEnergy Corp. Sec. Litig., et al.

Name of counsel: Jason A. Forge

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Respondents Los Angeles County Employees Retirement Association, Amalgamated Bank,
City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Fund

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 19, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jason A. Forge

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RELEVANT LEGAL STANDARDS	2
A. Mandamus Petitions for Privilege-Related Discovery Orders.....	2
B. Privilege and Work-Product Assertions.....	5
1. Attorney-Client Privilege.....	5
2. Work Product	6
C. Declarations.....	7
1. Section 1746.....	7
2. Declarations Must Be Based on Personal Knowledge and Must Set Forth Non-Conclusory Facts	7
III. RELEVANT FACTS.....	8
A. FirstEnergy’s Corruption-Fueled Scheme.....	8
B. FirstEnergy’s Most Urgent Need for the Internal Investigations Was to Obtain Its Outside Auditor’s Approval.....	8
C. FirstEnergy’s Second Most Urgent Need for the Internal Investigations Was for HR Decisions	10
D. FirstEnergy’s Third Most Urgent Need for the Internal Investigations Was to Preserve Access to Capital by Striking a Bargain with the Government	13
E. FirstEnergy’s Disclosures	14
1. FirstEnergy Revealed Virtually Its Entire Internal Investigation to PwC.....	14

	Page
2. FirstEnergy’s Extensive Disclosures During This Litigation (and to the Government)	16
a. All the Information Set Forth in the DPA Came from FirstEnergy’s Internal Investigation	17
b. FirstEnergy’s Extensive Disclosures in the PwC Memorandum and Deposition Scripts	17
F. FirstEnergy Is Strategically Forbidding Witnesses from Discussing the Very Facts It Chose to Disclose	19
G. The District Court’s Factual Conclusions	19
IV. ARGUMENT	21
A. FirstEnergy Cannot Identify Any Protected Information at Stake	23
B. FirstEnergy’s Complete Lack of Proof	23
C. The District Court’s Factual Findings Were Amply Supported and Are Ineligible for Mandamus Review	26
1. The Internal Investigation Was Essential to Convincing PwC to Approve FirstEnergy’s Mandatory SEC Filing	26
2. The Internal Investigation Was Essential to Imperative Human Resource Decisions	27
3. The Internal Investigation Was Essential to Preserving FirstEnergy’s Liquidity	30
4. The District Court’s Factual Finding that FirstEnergy Had Failed to Provide Evidence	32

	Page
D. FirstEnergy Waived Any Attorney-Client Privilege and Work-Product Protections	33
1. FirstEnergy’s Disclosure of Its Internal Investigation to PwC	33
2. FirstEnergy’s Nearly Complete Disclosure of Its Internal Investigation to PwC Waived Any Work-Product Protection for the Internal Investigation	34
3. FirstEnergy’s Extensive Disclosures Waived Any Protections.....	34
E. Attorney-Client Privilege Does Not Extend to Facts a Witness Learned Through Communications with Counsel	36
F. In Addition to Being Irrelevant, the O’Neil Declaration Is Deficient	37
V. CONCLUSION.....	38

TABLE OF AUTHORITIES

Page

CASES

<i>Alomari v. Ohio Dep’t of Pub. Safety</i> , 626 F. App’x 558 (6th Cir. 2015)	6
<i>Basulto v. Netflix, Inc.</i> , 2023 WL 3197655 (S.D. Fla. May 2, 2023)	37
<i>Biegas v. Quickway Carriers, Inc.</i> , 573 F.3d 365 (6th Cir. 2009)	7, 8
<i>Cheney v. U.S. Dist. Ct. for D.C.</i> , 542 U.S. 367 (2004)	2, 22
<i>E.E.O.C. v. BDO USA, L.L.P.</i> , 876 F.3d 690 (5th Cir. 2017)	5, 6
<i>First Horizon Nat’l Corp. v. Hous. Cas. Co.</i> , 2016 WL 5867268 (W.D. Tenn. Oct. 5, 2016)	33, 34
<i>Holt-Orsted v. City of Dickson</i> , 641 F.3d 230 (6th Cir. 2011)	3, 4, 22
<i>In re Bendectin Prods. Liab. Litig.</i> , 749 F.2d 300 (6th Cir. 1984)	19, 22
<i>In re Columbia/HCA Healthcare Corp.</i> <i>Billing Pracs. Litig.</i> , 293 F.3d 289 (6th Cir. 2002)	<i>passim</i>
<i>In re Express Scripts, Inc.</i> , No. 25-3006 (6th Cir. June 3, 2025)	<i>passim</i>
<i>In re FirstEnergy Corp.</i> , 2025 WL 2335978 (6th Cir. Aug. 7, 2025)	4
<i>In re King Pharms., Inc. Sec. Litig.</i> , 2005 WL 8142328 (E.D. Tenn. Sept. 21, 2005)	34

	Page
<i>In re Lott</i> , 424 F.3d 446 (6th Cir. 2005)	2, 3
<i>In re Metro. Gov’t of Nashville & Davidson Cnty.</i> , 606 F.3d 855 (6th Cir. 2010)	22
<i>In re Profs. Direct Ins. Co.</i> , 578 F.3d. 432 (6th Cir. 2009)	4
<i>In re Search Warrant Executed at L. Offs. of Stephen Garea</i> , 1999 WL 137499 (6th Cir. Mar. 5, 1999)	6
<i>In re United Shore Fin. Servs., LLC</i> , 2018 WL 2283893 (6th Cir. Jan. 3, 2018).....	4, 23
<i>In re VisionAmerica, Inc. Sec. Litig.</i> , 2002 WL 31870559 (W.D. Tenn. Dec. 18, 2002)	6
<i>In re Zuniga</i> , 714 F.2d 632 (6th Cir. 1983)	5
<i>Mohawk Indus., Inc. v. Carpenter</i> , 558 U.S. 100 (2009).....	passim
<i>Ondo v. City of Cleveland</i> , 795 F.3d 597 (6th Cir. 2015)	7
<i>Plaskolite, Inc. v. Zhejiang Taizhou Eagle Mach. Co., Ltd.</i> , 2008 WL 5190049 (S.D. Ohio Dec. 9, 2008).....	7
<i>United States v. Householder</i> , 137 F.4th 454 (6th Cir. 2025)	8
<i>United States v. Roxworthy</i> , 457 F.3d 590 (6th Cir. 2006)	6, 7, 20

	Page
<i>United States v. Sadler</i> , 24 F.4th 515 (6th Cir. 2022)	5, 6, 37
<i>Worthington v. United States</i> , 166 F.2d 557 (6th Cir. 1948)	7
STATUTES, RULES, AND REGULATIONS	
28 U.S.C. §1746.....	7, 37
SECONDARY AUTHORITIES	
H.R. Rep. No. 94-1616 (1976).....	38

I. INTRODUCTION

FirstEnergy Corp. has deployed an army of law firms and amicus briefs to obscure its complete failure to carry its burden after Plaintiffs presented overwhelming evidence that FirstEnergy had affirmatively revealed to its adversaries all manner of its investigating attorneys' activities, mental impressions, opinions, and conclusions, spanning identities of employees interviewed; employees' knowledge, culpability, and credibility; whether laws were violated; and what evidence the investigations had and had not uncovered—making these revelations through *inter alia* public filings, meetings, and dozens of pages of testimonial scripts—leaving FirstEnergy unable to identify a single piece of protected information. Granting FirstEnergy's mandamus petition under these circumstances would not only be unprecedented, it would contradict this Court's denial of mandamus relief under more compelling circumstances just two months ago, directly defy the Supreme Court decisions on which that denial was based, and reverse decades of precedent regarding the elements and burdens for privilege and work-product assertions.

Plaintiffs respectfully request that this Court deny FirstEnergy's petition.

II. RELEVANT LEGAL STANDARDS¹

A. Mandamus Petitions for Privilege-Related Discovery Orders

Two months ago, this Court reminded litigants that “[m]andamus ‘is a “drastic and extraordinary” remedy “reserved for really extraordinary causes.”’” *In re Express Scripts, Inc.*, No. 25-3006, ECF24-1 at 2 (6th Cir. June 3, 2025) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). The overarching rule is that “mandamus relief is not warranted when there is an adequate alternative remedy.” *Id.* (citing *Cheney*, 542 U.S. at 380-81). In addition to *Cheney*, this Court’s *Express Scripts* decision was largely dictated by the Supreme Court’s holding in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009), which dramatically changed the legal landscape for reviews of discovery orders concerning purportedly protected information:

Historically, “[t]he inability to cure an unlawful piercing of the privilege through direct appeal has led numerous courts of appeals to regularly utilize mandamus when important interests such as privilege are at issue.” *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005). But *Mohawk* made clear that mandamus relief is justified only when a

¹ Plaintiffs-Respondents in the related direct (non-class) actions—*MFS Series Trust I, et al. v. FirstEnergy Corp., et al.*, No. 2:21-cv-05839-ALM-KAJ (S.D. Ohio), and *Brighthouse Funds Trust II – MFS Value Portfolio, et al. v. FirstEnergy Corp., et al.*, No. 2:22-cv-00865-ALM-KAJ (S.D. Ohio)—join in the arguments set forth in this brief. Emphasis is added and citations are omitted unless otherwise indicated, excepting citations to the Deferred Prosecution Agreement (“DPA”), for which all emphases are in the original.

discovery order “amounts to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice.” 558 U.S. at 111 (cleaned up).²

Express Scripts, ECF24-1 at 2.

Years before *Express Scripts*, this Court held: “‘Only when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate.’ We agree.” *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 238 (6th Cir. 2011). Thus, *Mohawk* changed the historical approach by confirming that a post-judgment-direct appeal is an adequate remedy for allegedly erroneous denials of attorney-client protection. In the nearly 16 years since *Mohawk*, this Court has followed its holding, as well as *Holt-Orsted*, and not granted a single mandamus petition from a privilege- or work-product-asserting litigant, including the most recent denial in *Express Scripts*. No Circuit has granted a post-*Mohawk* petition from a privilege-asserting litigant who failed to identify a single piece of purportedly protected information, let alone failed to offer any proof that the information is protected. Without such identification and proof, there is nothing to protect, so the *Mohawk* standard cannot be met, as it can neither be an abuse of discretion to compel

² FirstEnergy’s mandamus petition relies heavily on *Lott*, 424 F.3d 446, but as *Express Scripts* pointed out, *Lott* represents how courts handled these issues *before Mohawk* changed the legal landscape.

production of non-protected information nor could production of such information ever “work[] a manifest injustice.” *Mohawk*, 558 U.S. at 111.

Similarly ineligible for mandamus relief are disagreements with a district court’s factual conclusions, such as those regarding “whether the predominant purpose of the communications was in fact advice as opposed to business operations” because “[f]actual errors cannot justify the issuance of the writ.” *See Express Scripts*, ECF24-1 at 2 (alteration in original).

This Court’s mandamus decision should not be influenced by the order on FirstEnergy’s related motion to stay (*In re FirstEnergy Corp.*, 2025 WL 2335978 (6th Cir. Aug. 7, 2025)) for three reasons. First, that order did not acknowledge, let alone follow, *Mohawk*. Nor did it acknowledge any of this Court’s post-*Mohawk* decisions and orders, such as *Express Scripts*, *Holt-Orsted*, 641 F.3d at 238, and *In re United Shore Fin. Servs., LLC*, 2018 WL 2283893 (6th Cir. Jan. 3, 2018). Instead, the order’s harm analysis was based on *In re Profs. Direct Ins. Co.*, 578 F.3d. 432 (6th Cir. 2009), which this Court issued months *before Mohawk* changed the “historical” approach to assessing the adequacy of direct appeals concerning privilege issues. Second, the stay order did not consider the overwhelming evidence of FirstEnergy’s comprehensive disclosures and use of information from the internal investigations, or the resulting waiver that would eliminate any potential injustice

from having to produce documents or information that FirstEnergy has never shown is materially different from what it voluntarily disclosed. And third, the stay order does not address the portion of the district court’s order that shut down FirstEnergy’s plainly improper practice of preventing witnesses from discussing any facts that they happened to have learned from counsel—facts that FirstEnergy had voluntarily disclosed.

B. Privilege and Work-Product Assertions

1. Attorney-Client Privilege

“Determining the applicability of the privilege is a ‘highly fact-specific’ inquiry, and the party asserting the privilege bears the burden of proof.” *E.E.O.C. v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) (applicability of privileges should be determined on case-by-case basis); *United States v. Sadler*, 24 F.4th 515, 557 (6th Cir. 2022) (“‘burden of establishing the existence of the privilege rests with the person asserting it’”). Of course, a privilege proponent must prove that it has maintained the confidentiality of all information it seeks to protect. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Pracs. Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

To carry this burden, parties must provide particularized descriptions as to what exactly they contend is protected. *In re Search Warrant Executed at L. Offs. of Stephen Garea*, 1999 WL 137499 (6th Cir. Mar. 5, 1999).

Critically, “communications are not protected ‘when an attorney conveys to his client facts acquired from other persons or sources.’” *Sadler*, 24 F.4th at 557. Likewise, this Court has favorably cited cases from outside the Circuit holding that the party claiming privilege must also show non-waiver. *See In re VisionAmerica, Inc. Sec. Litig.*, 2002 WL 31870559, at *1-*2 (W.D. Tenn. Dec. 18, 2002) (collecting cases). As other courts have recognized: “There is no presumption that a company’s communications with counsel are privileged.” *E.E.O.C.*, 876 F.3d at 696.

To be privileged, the primary purpose of a communication must be to obtain legal advice, rather than primarily to obtain information or advice for business purposes. *See, e.g., Alomari v. Ohio Dep’t of Pub. Safety*, 626 F. App’x 558, 573 (6th Cir. 2015).

2. Work Product

Parties who claim work-product protection bear the burden of proving that any given document they wish to protect was “created because of the prospect of litigation.” *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006). Even so, “a document will not be protected if it would have been prepared in substantially the

same manner irrespective of the anticipated litigation.” *Id.* at 593-94. Moreover, to carry its burden, a party must provide “specific and detailed” proof as to any document it claims was created in anticipation of litigation. *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 381 (6th Cir. 2009). This is *not* a perfunctory task and conclusory statements will not suffice. *Id.* at 382. Similar to the attorney-client privilege, maintaining work-product protection requires the proponent to maintain its confidentiality, at least as to any adversaries. *Columbia/HCA*, 293 F.3d at 306.

C. Declarations

1. Section 1746

A fundamental requirement of all declarations is that they must be subscribed “as true under penalty of perjury.” 28 U.S.C. §1746.

2. Declarations Must Be Based on Personal Knowledge and Must Set Forth Non-Conclusory Facts

Although the contexts in which affidavits or declarations are used may vary, they are universally required to be based on personal knowledge. *Ondo v. City of Cleveland*, 795 F.3d 597, 605 (6th Cir. 2015) (opposition to summary judgment); *Worthington v. United States*, 166 F.2d 557, 565 (6th Cir. 1948) (search warrant); *Plaskolite, Inc. v. Zhejiang Taizhou Eagle Mach. Co., Ltd.*, 2008 WL 5190049, at *5 (S.D. Ohio Dec. 9, 2008) (jurisdiction). Similarly, “*application of the privilege*

will be rejected where the only basis for the claim is an affidavit containing conclusory statement[s].” Biegas, 573 F.3d at 381 (alteration in original).

III. RELEVANT FACTS

A. FirstEnergy’s Corruption-Fueled Scheme

This Court recently summarized the Larry Householder (House Speaker) side of the massive corruption conspiracy that FirstEnergy used to execute the securities fraud scheme at issue here. *United States v. Householder*, 137 F.4th 454, 463, 466 (6th Cir. 2025). The Samuel Randazzo (Chairman of Public Utilities Commission) side of the conspiracy and its inextricable interconnection to FirstEnergy’s securities fraud scheme was highlighted by a text message defendant Charles Jones sent Randazzo with a screenshot showing a stock-price bump followed by “Thank you!!” after Randazzo had delivered the return on a \$4.3 million bribe by eliminating a rate case that had been holding down FirstEnergy’s share price. DPA, R.259-5/Ex.B, PageID#6041.

B. FirstEnergy’s Most Urgent Need for the Internal Investigations Was to Obtain Its Outside Auditor’s Approval

By the time the government unsealed its exceptionally detailed Criminal Complaint (July 21, 2020) (MTD Reply, R.192-2/Ex.A, PageID#4348-424), three weeks had already passed since FirstEnergy’s second financial quarter ended on June 30, 2020. Response, R.615, PageID#13531. This meant FirstEnergy’s

mandatory SEC Form 10-Q had to be filed within weeks, which required the approval of FirstEnergy's independent auditor, PwC. *Id.* To achieve this feat, FirstEnergy had to gather facts to share with PwC, or at least create the appearance of doing so. As such, FirstEnergy shared with PwC nearly its entire internal investigation—an investigation with which PwC *did not assist*.³ See Memo., R.489-3/Ex.1(sealed), -996, -001. On August 13, 2020, FirstEnergy's Squire Patton Boggs LLP investigation team advised PwC “that they have completed all of their investigative procedures.” *Id.*, -017. On August 14, 2020, defendant Donald Misheff (Chairman of the “Special Investigation Committee” and member of the Audit Committee) represented to PwC that FirstEnergy's Special Investigation Committee “has no knowledge of any illegal acts or suspected illegal acts affecting the Company that were identified through the investigation or otherwise raised in communications from employees, former employees, analysts, regulators, short sellers, or others that have not been reported to PwC.” *Id.*, -020. With this assurance, on August 16, 2020, PwC reported it was “good for the Company to file first thing in the morning.” Message Report, R.489-3/Ex.2(sealed), -453. The next day, on

³ Documents filed under seal are cited as “(sealed)” with pincites to sealed document.

August 17, 2020, FirstEnergy filed its SEC Form 10-Q for the quarter ending June 30, 2020.

C. FirstEnergy's Second Most Urgent Need for the Internal Investigations Was for HR Decisions

FirstEnergy director-defendant, Julia Johnson (who was also a member of the Special Investigation Committee), has already testified that the Board used lawyers to gather facts for the Board's employment decisions. Deposition Transcript, R.489-3/Ex.3(sealed), 391:20-392:2, 394:13-21, 395:24-396:24, 397:7-15, 488:6-489:4; *see also* Deposition Transcript, R.489-3/Ex.6(sealed), 64:3-14, 98:24-99:5; Deposition Transcript, R.489-3/Ex.-7(sealed), 357:19-358:2. Another FirstEnergy director and Committee member, defendant Thomas Mitchell, testified that the Board did not even discuss whether Jones or defendant Michael Dowling's actions amounted to criminal conduct (an arguably legal issue), but instead focused on violations of Company policies. Deposition Transcript, R.489-3/Ex.6(sealed), 94:11-24, 102:2-103:1.

On October 29, 2020, two months after completing its investigative procedures and assuring PwC that there was no reason it would be inappropriate to rely on representations by Jones, FirstEnergy fired Jones, Dowling, and defendant Dennis Chack, disclosing: "During the course of the Company's previously disclosed internal review related to the government investigations, the Independent

Review Committee of the Board determined that these executives violated certain FirstEnergy policies and its code of conduct.” Response, R.615, PageID#13532 & n.2. This determination was based entirely on the shared facts gathered in FirstEnergy’s internal investigation. *Id.*, PageID#13532.

Less than two weeks later, on November 8, 2020, FirstEnergy “separated” its top two in-house counsel, defendant Robert Reffner and Ebony Yeboah-Amankwah, for their involvement in and lack of candor regarding a key aspect of FirstEnergy’s confessed criminal conduct: “[T]he \$4.3 million payment to [Samuel] Randazzo/S[ustainability Funding Alliance of Ohio (“SFAO”)].” See Topic 9, R.489-3/Ex.5(sealed), -464-65. Again, this shared information and these conclusions were gathered and reached in FirstEnergy’s internal investigation. Deposition Transcript, R.489-3/Ex.4, PageID#10512-19/24:24-25:17, 27:10-23, 137:7-21, 138:24-139:3.

Four months later, on February 23, 2021, FirstEnergy “separated” senior in-house counsel BB and MH (Plaintiffs are using initials here, but FirstEnergy revealed to Plaintiffs their full identities as interviewees, which is considered work product). FirstEnergy also revealed to Plaintiffs their attorneys’ investigative impressions and conclusions, including that the separations were because, *inter alia*: (1) “[BB] knew that payments to [SFAO] were payments to Randazzo and that

[SFAO] did not provide consulting services to the legal team” (Topic 9, R.489-3/Ex.5(sealed), -468); and (2) “[MH] approved payments to Randazzo under the [SFAO] consulting contract and knew those payments were payments to Randazzo; also knew that [SFAO] did not provide consulting services to the legal team. Knew he was being paid ‘every month to do nothing’” (*id.*, -474). Again, this shared information and these conclusions were gathered and reached in FirstEnergy’s internal investigation. Deposition Transcript, R.489-3/Ex.4, PageID#10512-19/24:24-25:17, 27:10-23, 137:7-21, 138:24-139:3.

That same day, February 23, 2021, FirstEnergy tasked Acting Vice President of External Affairs, Eileen Mikkelsen, with providing Joel Bailey, Justin Biltz, and Ty Pine the reasoning behind their “separations,” which was their involvement in several aspects of FirstEnergy’s subsequently confessed criminal conduct. Topic 9, R.489-3/Ex.5(sealed), -470-73. Again, all this shared information and these conclusions were gathered and reached in FirstEnergy’s internal investigation. Deposition Transcript, R.489-3/Ex.3(sealed), 488:6-489:4; *see also* Deposition Transcript, R.489-3/Ex.4, PageID#10512-19/24:24-25:17, 27:10-23, 137:7-21, 138:24-139:3.

Three months later, on May 27, 2021, FirstEnergy “separated” Mikkelsen for her own involvement in several aspects of FirstEnergy’s subsequently confessed

criminal conduct, including using Randazzo to help with HB6. Topic 9, R.489-3/Ex. 5(sealed) at -466. Again, all this information and these conclusions were gathered and reached in FirstEnergy's internal investigation. Deposition Transcript, R.489-3/Ex.4, PageID#10512-19/24:24-25:17, 27:10-23, 137:7-21, 138:24-139:3.

FirstEnergy never submitted a declaration, or any other indication, from PwC that its interests were in any way aligned with FirstEnergy's at a time when FirstEnergy was actively misleading it and still led by a CEO with whom FirstEnergy admittedly conspired to commit honest services wire fraud.

D. FirstEnergy's Third Most Urgent Need for the Internal Investigations Was to Preserve Access to Capital by Striking a Bargain with the Government

A core purpose for FirstEnergy's internal investigations was to help FirstEnergy preserve its access to capital. FirstEnergy's Treasurer presented to the Board various "HB6 DOJ/*Internal Investigation* Scenarios," concluding: "Final agreement with DOJ is our best chance for achieving waiver, extension, and preserving access to liquidity while minimizing onerous terms." Presentation, R.489-3/Ex.8(sealed), -857.

Consistent with its Treasurer's conclusion, FirstEnergy proceeded to reach a final agreement with the DOJ. On July 20, 2021, FirstEnergy entered into the DPA with the United States Attorney's Office for the Southern District of Ohio ("USAO-

SDOH”). FirstEnergy’s very first obligation under the DPA was “[c]ooperation.” DPA, R.259-5/Ex.B, PageID#6002. And the very first form of “substantial cooperation” the DPA acknowledged that FirstEnergy had already “provided” was “conducting a thorough internal investigation.” *Id.* The DOJ also credited FirstEnergy for “proactively identifying issues and facts that would likely be of interest to the government; making regular factual presentations to the government; *sharing information that would not have been otherwise available to the government*; and making such material available to the government on an expedited basis.” *Id.* FirstEnergy committed to disclose “any information...requested by the government,” and agreed to a detailed Statement of Facts that fleshed out many of the details concerning FirstEnergy’s activities (primarily through the actions of Jones and Dowling) that related to the Criminal Complaint that the government had unsealed almost exactly a year earlier. *Id.*

E. FirstEnergy’s Disclosures

1. FirstEnergy Revealed Virtually Its Entire Internal Investigation to PwC

To obtain PwC’s imperative approval for its mandatory SEC filing, FirstEnergy shared with PwC nearly every aspect of its internal investigation, spanning the most critical aspects, from “detailed interview debriefs,” to regular “[u]pdates on findings and conclusions,” (Memo., R.489-3/Ex.1(sealed), -004) to a

nearly complete provision of relevant documents (withholding only eight), to its ultimate (albeit later diametrically contradicted) conclusion, including the following:

- “[T]o assess the sufficiency of the investigation scope and investigative procedures performed, PwC participated in periodic discussions with the Investigation Team throughout the Investigation which included, but were not limited to, calls and video meetings” that included multiple “[u]pdate[s] on findings and conclusions” and multiple “Witness Interview debrief discussions.” Response, R.615, PageID#13535.
- “[D]etailed interview debriefs” of “individuals who provide Management Representations for the PwC Audit Team and individuals who were referenced within the [Criminal] Complaint as having communications with Defendants.” *Id.*, PageID#13535-36.
- An assurance that only “eight (8) responsive documents [were] withheld from PwC based on the assertion of attorney-client or other legal privilege” and that “the documents withheld based on privilege do not change the conclusions of the Investigation.” *Id.*, PageID#13536.
- “[A] meeting with the Investigation Team to hear and document the results of the Investigation,” including its conclusions. *Id.*
- The lead Investigation Counsel, Joseph Walker of Squire, assured PwC that “for the purpose of filing the Company’s Quarterly Report on Form 10-Q for the period ended June 30, 2020”:

1. *Our investigation is complete*

* * *

8. We understand that PwC may rely on the representations of Mr. Chuck Jones, Mr. Jon Taylor, Jason Liskowski [*sic*], and Steven Strah and we know of no reason that such reliance would be inappropriate and that there has been no evidence of violations of laws by any of these individuals as it relates to this investigation.

Id.

- FirstEnergy’s Chief Legal Officer (Reffner) and FirstEnergy’s criminal counsel (Steve Sozio of Jones Day, who led a parallel internal investigation) assured PwC that “[no] incremental work was necessary to support the conclusions [the Investigation Team and Investigation Counsel] were reaching.” *Id.*

This was all completed in less than a month following the Householder arrests.

Memo., R.489-3/Ex.1(sealed), -001.

2. FirstEnergy’s Extensive Disclosures During This Litigation (and to the Government)

FirstEnergy has repeatedly conceded that it has disclosed to its adversaries here (as well as to the government) every fact that its internal investigations uncovered. 11/30/23 Hr’g Tr., R.587, PageID#12898; Memo., R.489-3/Ex.1(sealed), -022 (“We have not reported relevant facts to the Special Committee, the Company, the Company’s Advisors, *or governmental regulators* that we have not provided to PwC.”); DPA, R.259-5/Ex.B, PageID#6002. Throughout all its briefs, including its present petition, and multiple oral arguments, FirstEnergy never claimed that there is a single fact its internal investigation uncovered that it has not already shared with adversaries.

a. All the Information Set Forth in the DPA Came from FirstEnergy's Internal Investigation

FirstEnergy's Board authorized FirstEnergy to enter into the DPA, including all the many facts and admissions that FirstEnergy chose to disclose in it. Deposition Transcript, R.489-3/Ex.3(sealed), 510:19-22. Johnson admitted that all the information FirstEnergy disclosed to its adversary (the USAO-SDOH) and to the general public came from its internal investigation, on which FirstEnergy relied as the basis to instruct Johnson (and other witnesses) not to answer any questions about this information. *Id.*, 482:1-11. Further, Johnson acknowledged that the investigation used lawyers not so much as legal advisors, but more as fact finders so the Board could make the above-referenced business decisions to terminate employees and enter into the DPA. *Id.*, 397:7-15.

b. FirstEnergy's Extensive Disclosures in the PwC Memorandum and Deposition Scripts

In addition to the many disclosures FirstEnergy approved that comprise the unredacted portions of the PwC memorandum concerning the internal investigation, FirstEnergy made similarly extensive disclosures in written scripts its lawyers created based on the internal investigation for two different Rule 30(b)(6) witnesses, who relied on the scripted answers FirstEnergy's lawyers had given them to share with Plaintiffs and others. Response, R.615, PageID#13537.

FirstEnergy's testimony scripts revealed extensive information from its internal investigations, including apparent quotes from investigative materials and witness interviews, numerous facts, and most importantly, the lawyers' ultimate conclusions and inferences regarding employees' intent, knowledge, candor, and violations of corporate policy—all of which FirstEnergy's Rule 30(b)(6) witnesses and directors testified came from counsel. For example, FirstEnergy's lawyers told the witness to share the investigative conclusion that Jones and Dowling had each conspired with FirstEnergy to commit honest services wire fraud. Deposition Transcript, R.489-3/Ex.4, PageID#10516/54:18-55:20. Likewise, there were two documents that presented extensive conclusions and selected allegedly supporting facts regarding "TERMINATIONS AND SEPARATIONS" of 10 employees, including Jones and Dowling (Topic 9, R.489-3/Ex.5(sealed), -452)—again, all this information came from FirstEnergy's internal investigation. Response, R.615, PageID#13538. According to FirstEnergy's lawyers' scripts, this extensive revelation of information derived from the internal investigation and revealed who did what to advance the criminal conspiracy, who was involved with what, who was aware of what, who knew what, and who failed to share with investigators relevant information about their knowledge. *Id.*, PageID#13538-39(sealed) (listing examples).

F. FirstEnergy Is Strategically Forbidding Witnesses from Discussing the Very Facts It Chose to Disclose

FirstEnergy openly acknowledged that it had been and intended to continue instructing witnesses not to answer any questions about the factual bases for their own actions, decisions, and opinions if the witness happened to have learned those facts from a lawyer—even though FirstEnergy has repeatedly disclosed the facts themselves. Due to space constraints, Plaintiffs did not provide the district court with dozens of excerpts from multiple witnesses, but two excerpts from Johnson’s deposition and another from Mitchell’s deposition gave the court a sense of FirstEnergy’s obstructiveness, as epitomized by the following exchange:

[DIRECT ACTION PLAINTIFFS’ COUNSEL:] Q. Are you saying that facts conveyed by counsel are privileged?

[FIRSTENERGY’S COUNSEL:] A. Yes.

Response, R.615, PageID#13540-41.

G. The District Court’s Factual Conclusions

The district court reached several factual conclusions that are dispositive of FirstEnergy’s petition, as “[f]actual errors cannot justify the issuance of [a] writ.” *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 n.14 (6th Cir. 1984). The district court found that FirstEnergy had wholly failed to present any evidence to carry its burden of establishing the existence of any protectable information:

- “FirstEnergy acknowledge[d] that they used the internal investigations for many purposes, including business and employment decisions (Doc. 510 at 20, 25-26)[,] [y]et [did] not clarify what materials, if any, contain only confidential communications for the predominant purpose of rendering legal advice, and which materials were primarily made for other reasons” (Compulsion Order, R.653, PageID#14263-64).
- “FirstEnergy did not provide specifics on ‘when, where, how, to whom, and in what manner’ legal advice was communicated during the internal investigations and therefore failed to meet its burden” (*id.*, PageID#14264).
- FirstEnergy did not provide the Special Master with a privilege log or with any documents to review *in camera* (*id.*, PageID#14264-65).
- “FirstEnergy did not provide specific, non-conclusory evidence to establish that litigation was the ‘driving force behind the preparation’ of the disputed materials,” particularly since it did not utilize a privilege log or “submit documents to the Special Master for *in camera* review” (*id.*, PageID#14267).
- “Without a log or the opportunity for *in camera* review, the Special Master could not independently determine whether materials were made with a predominant purpose of soliciting or rendering legal advice” (*id.*, PageID#14264-65).

Likewise, the district found that FirstEnergy had failed to “provide specific, non-conclusory evidence to establish that litigation was the ‘driving force behind the preparation’ of the disputed materials.” Compulsion Order, R.653, PageID#14267 (quoting *Roxworthy*, 457 F.3d at 595). “And again, FirstEnergy did not submit documents to the Special Master for *in camera* review, so the Special Master could not independently determine their purposes.” *Id.*

Last, the court found that FirstEnergy had failed to furnish evidence to overcome Plaintiffs' evidence regarding the primary purpose for its internal investigations and had failed to prove that its internal investigations would not have been conducted in substantially the same manner for the vital business purposes they served. Compulsion Order, R.653, PageID#14266-67.

IV. ARGUMENT

Contrary to the narrative FirstEnergy tries to spin, the district court's decision broke no new ground here and in no way imperils the ability of others to preserve the confidentiality of their internal investigations. Rather, it applied well-established law to a set of facts that were largely dictated by FirstEnergy's choices, beginning with its decision to use its internal investigation to barter with the government. That was certainly FirstEnergy's prerogative, but having reaped the benefits from disclosing all manner of its investigating attorneys' activities, mental impressions, opinions, and conclusions, FirstEnergy cannot credibly disclaim responsibility for the consequences of that decision. The bottom line is that FirstEnergy abandoned the confidentiality of the *information* its internal investigations generated to such a great extent, it was unable to identify a single piece of information it had not already revealed to one or more adversaries. If companies want to preserve the confidentiality of the information their internal investigations generate, all they need

to do is preserve the confidentiality of the information their internal investigations generate—and be able to prove it. FirstEnergy chose not to do so.

There are at least three different reasons why FirstEnergy’s mandamus petition fails. First, following the Supreme Court’s decision in *Mohawk*, this Court has held: “*Only when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate.*” *Holt-Orsted*, 641 F.3d at 238. Because FirstEnergy is a litigant, its direct appeal from a final decision is adequate, which renders its privilege assertion ineligible for mandamus relief. *Cheney*, 542 U.S. at 380-81. Second, FirstEnergy completely failed to identify any information it purports to be protected that it has not already disclosed to its adversaries and/or potential adversaries. Because this Court cannot say with any confidence whatsoever that *any* protected information exists, the *Mohawk* standard cannot be met, as it can neither be an abuse of discretion to compel production of non-protected information nor could production of such information ever “work[] a manifest injustice.” *Mohawk*, 558 U.S. at 111. And third, FirstEnergy’s petition seeks to challenge the district court’s factual conclusions, including

as to whether the predominant purpose of the communications was in fact legal advice as opposed to business operations. But “[f]actual errors cannot justify the issuance of the writ.” *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 n.14 (6th Cir. 1984); *see also In re Metro. Gov’t of Nashville & Davidson Cnty.*, 606 F.3d 855, 866 (6th Cir. 2010) (recognizing that “evaluating the strength and

persuasiveness of all the evidence in the case [is] not a legal issue that might support mandamus”).

Express Scripts, ECF24-1 at 2-3 (alterations in original).

A. FirstEnergy Cannot Identify Any Protected Information at Stake

This case fits squarely within the reasoning this Court has given for denying all privilege-related mandamus petitions brought by litigants since *Mohawk*, as “‘most’ district court rulings on attorney-client privilege ‘involve the routine application of settled legal principals.’” *United Shore*, 2018 WL 2283893, at *2 (quoting *Mohawk*, 558 U.S. at 110, and denying mandamus petition). For a party to a litigation with only money at stake, there is no reason a post-judgment appeal would not “suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege.” *Mohawk*, 558 U.S. at 109. FirstEnergy’s inability to identify any protected information at stake makes it impossible to conclude that FirstEnergy’s rights on direct appeal are inadequate.

B. FirstEnergy’s Complete Lack of Proof

FirstEnergy’s petition falls far short of what this Court found insufficient only two months ago in *Express Scripts*. In *Express Scripts*, the privilege proponent at least identified specific “‘Audit Documents’” it claimed were privileged. *Express Scripts*, ECF24-1 at 1. Here, FirstEnergy has failed to identify a single document or

piece of information it claims to be protected. This would be woefully inadequate under any circumstances, but it is doubly so here, where Plaintiffs have shown an unparalleled breadth of disclosures from FirstEnergy's internal investigations.

In what amounts to a complete failure to provide the requisite “specific and detailed” proof establishing the applicability of privilege and/or work-product protection for each piece of information it is withholding, FirstEnergy has neither identified a single purportedly protected piece of information nor proved such information is entitled to any protection. Instead, FirstEnergy submitted a single substantive declaration, that of director-defendant James O’Neil. But O’Neil’s declaration fails to indicate the existence of any information from FirstEnergy’s internal investigation that FirstEnergy has not already disclosed to its adversaries (the DOJ and Plaintiffs) and/or its potential adversaries (PwC), let alone identify any such information. Indeed, given FirstEnergy’s extensive cooperation obligations and extensive disclosures of all manner of its investigating attorneys’ activities, mental impressions, opinions, and conclusions, there is no basis to believe any such information exists. In other words, FirstEnergy has failed to establish that it has maintained the confidentiality of *any* information from its internal investigation.

FirstEnergy’s failure is triply damning considering the ease with which this could have been accomplished if such information existed. It could have submitted

an *ex parte in camera* declaration describing the information that FirstEnergy had withheld from the government and Plaintiffs, but it did not; it could have submitted *in camera* documents reflecting any purportedly withheld information, as the district court noted (Compulsion Order, R.653, PageID#14270), but it did not; and it could have submitted a detailed privilege log, as the district court noted, but it did not. Considering the breadth of FirstEnergy's cooperation obligations, the breadth of its disclosures, and the ease with which it could have identified any existing information that it had not already disclosed, the only (or at least the strongest) inference is that no such information exists. But there is no need for inferences here, as it was FirstEnergy's burden to prove such information exists and it failed to carry that burden. No court has ever sustained a privilege or work-product assertion based on such a complete failure of proof, let alone granted a mandamus petition to do so.⁴

⁴ One of several red herrings within FirstEnergy's petition is its argument concerning an agreement between the parties to expedite discovery by allowing FirstEnergy to produce documents without having to log privileged documents dated after July 21, 2020. Pet., 17. This *June 10, 2022* agreement has nothing to do with FirstEnergy's failure to carry its burden of establishing the existence of *any* investigation-related information it has not already revealed to an adversary and/or potential adversary. Not logging such documents back in 2022 did not prevent FirstEnergy from doing so when this dispute arose over a year later with Plaintiffs' *June 30, 2023* motion to compel. MTC, R.489. Moreover, FirstEnergy was always aware of whatever documents it was withholding so when this dispute arose in 2023, it could have easily submitted them *in camera*, described them in an *in camera*

C. The District Court’s Factual Findings Were Amply Supported and Are Ineligible for Mandamus Review

Even in FirstEnergy’s self-serving framing of the situation it faced as of July 21, 2020, it admitted that it was acting “in the face of a severe *corporate* crisis.” Objections, R.607-1, PageID#13197. There was no immediate *legal* crisis. It did not have to make any immediate legal decisions. It did not risk arrest or any other *immediate* peril from any legal proceedings, which (as this case confirms) take *years* to reach the merits. But because the government’s extensive public disclosures showed FirstEnergy at the epicenter of a massive criminal corruption scheme, it faced multiple imminent and intertwined existential *business* demands: mandatory SEC filings, which required approval from PwC; critical human resource decisions, which required information as to who did/knew what; and, access to outside capital, which required a bargaining chip with the government.

1. The Internal Investigation Was Essential to Convincing PwC to Approve FirstEnergy’s Mandatory SEC Filing

The record clearly shows that the Squire internal investigation focused on providing information to get PwC’s approval for FirstEnergy’s SEC Form 10-Q

declaration, and/or generated a privilege log for them. Instead, FirstEnergy did chose to do absolutely nothing to carry its burden.

filing (and incorporated the Jones Day investigation by virtue of a signoff from Jones Day's lead investigating attorney). *See* Memo., R.489-3/Ex.1(sealed), -017, -020; Message Report, R.489-3/Ex.2(sealed), -453. It was effectively a charade for PwC, and not for FirstEnergy's reliance in any legal proceedings, as demonstrated by its rushed nature (completed in a few weeks), and completely unreliable conclusions, which absolved Jones and FirstEnergy of any unlawful conduct just two months before FirstEnergy fired Jones and later admitted to conspiring with him in a massive criminal corruption scheme. That investigation was declared "complete" in less than a month—just in time for PwC to approve FirstEnergy's mandatory Form 10-Q—is more than sufficient to support the district court's factual finding regarding FirstEnergy's failure of proof.

2. The Internal Investigation Was Essential to Imperative Human Resource Decisions

While FirstEnergy was able to pull the wool over PwC's eyes the month after the Householder arrests, it was obvious from the government's Criminal Complaint that FirstEnergy's officers and other employees had played integral roles in the criminal corruption scheme. Naturally, therefore, the second primary purpose of the internal investigation was to gather facts for a series of human resource decisions, starting with whether to retain or fire FirstEnergy's CEO, Jones. This is a business purpose, and Johnson (who was also a member of the Special Investigation

Committee) has already testified that the Board used lawyers to gather *facts* for the *Board's* employment decisions. Deposition Transcript, R.489-3/Ex.3(sealed), 391:20-392:2, 394:13-21, 395:24-396:7, 397:7-15, 488:6-489:4; Deposition Transcript, R.489-3/Ex.6(sealed), 64:3-14, 98:24-99:5; Deposition Transcript, R.489-3/Ex.7(sealed), 357:19-358:2. Another FirstEnergy director and Committee member, Mitchell, testified that the Board did not even discuss whether Jones or Dowling's actions amounted to criminal conduct (an arguably legal issue), but instead focused on violations of Company policies. Deposition Transcript, R.489-3/Ex.6(sealed), 94:11-24, 102:2-103:1.

The district court had previously reminded the parties: "A party asserting privilege must provide sufficient information to allow a court to determine whether the communications in question were in fact confidential communications relating to legal advice." Opinion and Order, R.378, PageID#9011. Yet, throughout two full days of testimony, Johnson never identified a single category of *legal* advice that the Board sought from the internal investigation. Even the many instructions not to answer questions were completely untethered to any indication or condition that the answer would reveal a communication *concerning legal advice*: "I'm going to object and I'm going to instruct you to leave out any communications or information you received from your lawyers." Deposition Transcript, R.489-3/Ex.3(sealed),

348:21-23.⁵ In fact, over the course of four days of testimony from two directors, the only time legal advice was a condition of an instruction not to answer was during questioning about a meeting that occurred the week after Householder and several of his alleged co-conspirators were arrested—before the formation of the IRC. Deposition Transcript, R.489-3/Ex.6, 172:1-175:20.

The decisions to terminate Jones and other officers were imperative *business* decisions with tremendous *business* implications, but FirstEnergy (which bore the burden of proof) failed to identify a single *legal* issue related to the firings and separations of these at-will employees that could have superseded the many obvious significant business considerations. This is not to say that human resources decisions cannot implicate legal issues, but FirstEnergy failed to identify any, let alone any that predominated over the business implications of continuing to employ a CEO and multiple officers who perpetrated a massive corruption conspiracy, were complicit in it, and/or interfered with the investigation of it. FirstEnergy's Board could not possibly ignore the well-publicized circumstances that left it with no

⁵ See also Deposition Transcript, R.489-3/Ex.3(sealed), 359:16-18, 365:1-5, 365:12-14, 392:7, 392:15, 392:20, 393:1, 393:10, 393:17, 394:1-2, 395:2-5, 398:18, 398:23, 472:19-21, 482:6-8, 501:16-17, 502:24-503:1, 503:17-18, 507:7-16, 508:4-5, 508:10-14, 508:19-22, 541:12-15, 541:24-542:1, 543:8-10, 545:3-6, 546:8-10, 549:9-14, 553:9-12, 554:12-15, 558:5-9.

choice but to seek facts concerning employees' conduct, including the government's very public criminal case and the massive media reaction to it.

3. The Internal Investigation Was Essential to Preserving FirstEnergy's Liquidity

The third and fourth purposes of the internal investigation were intertwined. The third is that FirstEnergy wanted to protect its access to outside capital at manageable rates (*see, e.g.*, Presentation, R.489-3/Ex.8(sealed); Deposition Exhibit, R.489-3/Ex.9(sealed)), which is clearly a business purpose. One would be hard pressed to draw a clearer connection between the purpose for FirstEnergy's internal investigation and this clear business purpose than FirstEnergy's Treasurer's PowerPoint presentation, which expressly outlined various "HB6 DOJ/*Internal Investigation* Scenarios" for FirstEnergy's loans and credit lines. *See* Presentation, R.489-3/Ex.8(sealed), -857. That same presentation also confirmed the direct connection between FirstEnergy's access to capital and its need for a bargaining chip with the government, concluding that, "[f]inal agreement with DOJ is our best chance for achieving waiver, extension, and preserving access to liquidity while minimizing onerous terms." *Id.*

This is exactly what inspired FirstEnergy's internal investigation past the initial charade: to assist the government. FirstEnergy's very first obligation under the DPA was "[c]ooperation." DPA, R.259-5/Ex.B, PageID#6002. And the very

first form of “substantial cooperation” that the DPA acknowledges that FirstEnergy had already “provided” was “conducting a thorough internal investigation.” *Id.* The DOJ also credited FirstEnergy for “proactively identifying issues and facts that would likely be of interest to the government; making regular factual presentations to the government; *sharing information that would not have been otherwise available to the government*; and making such material available to the government on an expedited basis.” *Id.* All these presentations and all this information were generated by FirstEnergy’s internal investigation. *See Columbia/HCA*, 293 F.3d at 306 (public policy weighs against selective waivers).

There is not a single exhibit and not a single sentence of sworn testimony supporting the facially unreasonable contention that FirstEnergy’s internal investigations would *not* have been undertaken in substantially the same manner regardless of whether litigation or criminal proceedings were threatened or had commenced. FirstEnergy has not come close to proving that it would *not* have conducted the internal investigation in substantially the same manner were it not for the prospect of litigation. FirstEnergy failed to carry its burden to establish that *the* primary purpose of its internal investigation was legal advice because that simply was not *the* primary purpose. Further, with or without possible litigation, FirstEnergy had to conduct its internal investigation to satisfy its outside auditor and

comply with SEC filing requirements, as well as to determine which employees to retain and which to fire—all prototypical business purposes. With so much evidence supporting the district court’s factual determination regarding the primary purpose for FirstEnergy’s investigations, there is clearly no clear error or risk of manifest injustice here.

In stark contrast to these immediate business purposes for which Plaintiffs showed FirstEnergy needed the internal investigations, FirstEnergy failed to identify a single pleading, motion, brief, or legal argument informed by this investigation. Under these circumstances, the record amply supports the district court’s factual conclusion that any legal *purpose* for the internal investigation was secondary to these business *purposes*—and disagreements with factual conclusions such as these “cannot justify the issuance of [a] writ.” *Express Scripts*, ECF24-1 at 2.

4. The District Court’s Factual Finding that FirstEnergy Had Failed to Provide Evidence

The district court’s factual finding that FirstEnergy had failed to provide evidence as to “what materials, *if any*, contain only confidential communications for the predominant purpose of rendering legal advice, and which materials were primarily made for other reasons” is unassailable, as the record below (and the same failure before this Court) confirms. And again, disagreements with such a factual

conclusion cannot justify the issuance of a writ. This unchallengeable failure of proof dooms FirstEnergy’s privilege and work-product assertions.

D. FirstEnergy Waived Any Attorney-Client Privilege and Work-Product Protections

Even if FirstEnergy’s internal investigations were ever protected by the attorney-client privilege or the work-product doctrine, FirstEnergy waived those protections. There is certainly no “manifest injustice” in compelling a party to disclose information for which it has waived any applicable protections. *Mohawk*, 558 U.S. at 111.

1. FirstEnergy’s Disclosure of Its Internal Investigation to PwC

“As a general rule, the ‘attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.’” *Columbia/HCA*, 293 F.3d at 294. As such, the disclosure of documents to third-party accountants *who are not assisting in any provision of legal advice* waives any possible attorney-client privilege: “By voluntarily disclosing documents to KPMG, the Plaintiffs waived any attorney-client privilege they had in those documents.” *First Horizon Nat’l Corp. v. Hous. Cas. Co.*, 2016 WL 5867268, at *10 (W.D. Tenn. Oct. 5, 2016) (citing *Columbia/HCA*, 293 F.3d at 306).

There is no good-faith basis to dispute that FirstEnergy shared with PwC nearly its entire internal investigation, including all witness interviews and attorney opinions, while withholding only eight documents—an insignificant number compared to over 750,000 documents produced in this litigation, including 1,670 from PwC alone. MTC Reply, R.529, PageID#11442.

2. FirstEnergy’s Nearly Complete Disclosure of Its Internal Investigation to PwC Waived Any Work-Product Protection for the Internal Investigation

Though there is a split outside this Circuit as to whether disclosures to outside auditors waive work-product protections, there is no split within it. The only two district courts to address this issue both unequivocally held that disclosure of privileged communications to outside auditors renders both inapplicable. *First Horizon*, 2016 WL 5867268, at *10; *In re King Pharms., Inc. Sec. Litig.*, 2005 WL 8142328, at *3 (E.D. Tenn. Sept. 21, 2005). It cannot be a “clear abuse of discretion” for the district court to reach a decision that is consistent with the only two district courts within the Circuit to consider this issue. *Express Scripts*, ECF24-1 at 2.

3. FirstEnergy’s Extensive Disclosures Waived Any Protections

Although the quantity of FirstEnergy’s work-product disclosures to PwC exceed its disclosures in this litigation, the quality of the disclosures here is unprecedented for maintaining any protections. “For example, Jones authorized a

\$980,000 payment in January 2015 for Strategies for Results, Tony George’s consulting entity, *without knowing* what Tony George did and without any supporting documentation.” Topic 9, R.489-3/Ex.5(sealed), -457. Revealing “examples” of supposedly privileged information is simply not a luxury one can enjoy and keep the privilege. *See also Columbia/HCA*, 293 F.3d at 302 (“we reject the concept of selective waiver, in any of its various forms”).

FirstEnergy has disclosed to its adversaries and used in this litigation its attorneys’ mental impressions and opinions concerning the most important aspects of its internal investigation:

- *Whether or not any laws were violated.* Response, R.615, PageID#13564; Memo., R.489-3/Ex.1(sealed), -023.
- *Whether someone conspired with someone else and if so, with whom.* Response, R.615, PageID#13564-65; MTC Supp. Mem., R.549-2/Ex.22, PageID#11875-76 (54:18-55:7).
- *Whether interviewees were candid.* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -464-65.
- *Whether interviewees “reasonably ensur[ed] that information was produced in connection with the [then-]ongoing investigation.”* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -468, -470, -474.
- *Whether employees had failed to act when confronting misconduct.* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -464-65.

- *Whether employees had “participated in the use of company devices and systems for inappropriate messaging.”* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -471, -473.
- *What someone knew or did not know.* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -457, -468, -474.
- *What was discovered during the internal investigations, and the Board’s response.* Response, R.615, PageID#13565; Topic 9, R.489-3/Ex.5(sealed), -459.
- *Whether there is any evidence of someone’s knowledge.* Response, R.615, PageID#13565; Deposition Exhibit, R.529-2/Ex.19, PageID#11608.

Moreover, FirstEnergy repeatedly used such information to exonerate its Board and select employees—and thus itself—as to any vicarious liability related to such individuals. Likewise, FirstEnergy’s lawyers scripted disclosures from its internal investigation to cast the Company and its Board in a better light in support of its defenses, such as “good faith.” Response, R.615, PageID#13566 (citing examples).

E. Attorney-Client Privilege Does Not Extend to Facts a Witness Learned Through Communications with Counsel

Last, we have the issue that started this whole conflict: FirstEnergy’s obstruction of discovery by improperly instructing witnesses not to answer any questions about the factual bases for their own actions, decisions, or opinions if the witness happened to have learned those facts from a lawyer—even though FirstEnergy has repeatedly disclosed those facts themselves. The law is clear:

*“[C]ommunications are not protected ‘when an attorney conveys to his client facts acquired from other persons or sources.’” Sadler, 24 F.4th at 557; see also Basulto v. Netflix, Inc., 2023 WL 3197655, at *14 (S.D. Fla. May 2, 2023) (citing cases).* The soundness of this portion of the district court’s order is not debatable.

F. In Addition to Being Irrelevant, the O’Neil Declaration Is Deficient

As set forth above, the O’Neil declaration is irrelevant because it fails to identify any purportedly protected information that FirstEnergy has not already disclosed to its adversaries. It also conflicts with the sworn testimony of two other former FirstEnergy directors—it cannot be clearly erroneous to credit the testimony of two witnesses subject to cross-examination over the untested written statement of another. Moreover, it fails the fundamental requirement that declarations and affidavits must be based on the personal knowledge. Response, R.615, PageID#13550-51 (listing examples). Last, as the district court rightly held, the lone sentence within it upon which FirstEnergy based its entire argument “is a conclusory statement that does not help FirstEnergy meet its burden.” Compulsion Order, R.653, PageID#14267.

Beyond these substantive deficiencies is the matter of O’Neil’s deficient attestation. The legislative history of 28 U.S.C. §1746 confirms that Congress intended the truth attestation to be mandatory, not just read out of the statute as

FirstEnergy demands. H.R. Rep. No. 94-1616 at 1-2 (1976). It would be a perversion of the “clear error” standard to find it can be met when a district court applies a statute as written.

V. CONCLUSION

Plaintiffs respectfully request that this Court follow *Mohawk* and this Court’s unanimous post-*Mohawk* approach (as demonstrated most recently in *Express Scripts*) by denying FirstEnergy’s petition.

DATED: August 19, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing PLAINTIFFS-RESPONDENTS' ANSWER IN OPPOSITION TO FIRSTENERGY CORP.'S PETITION FOR WRIT OF MANDAMUS complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because the text of the brief comprises 7,744 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), according to the word count provided by Microsoft Word 2011 word processing software. The undersigned further certifies that the foregoing document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 word processing software in Times New Roman, 14-point.

s/Jason A. Forge

JASON A. FORGE

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on August 19, 2025, I caused to be electronically filed the foregoing document: PLAINTIFFS-RESPONDENTS' ANSWER IN OPPOSITION TO FIRSTENERGY CORP.'S PETITION FOR WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 19, 2025, at San Diego, California.

s/Jason A. Forge

JASON A. FORGE