

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:

PLEASANTS CORP *et al.*,¹

Debtors.

Chapter 11

Case No.: 18-50757

Cases Jointly Administered under
Case No. 18-50757

Judge Alan M. Koschik

**REPLY MEMORANDUM IN FURTHER SUPPORT OF SCHWEBEL BAKING COMPANY'S
MOTION TO (A) ENTER FINAL ORDER APPROVING CLASS ACTION SETTLEMENT AND
(B) APPROVE CLASS COUNSELS' APPLICATION FOR AWARD OF
PROFESSIONAL FEES AND EXPENSES**

Schwebel Baking Company (“Schwebel” or “Class Claimant”) and Class Counsel² submit this reply memorandum of law in further support of their respective Motions to (A) enter the Parties’ proposed Final Order Approving Class Action Settlement (“Final Order”); and (B) approve Class Counsel’s application for an award of (i) attorneys’ fees equal to 1/3 of the Settlement Fund and reimbursement of expenses of \$26,688.88, (ii) professional fees to the Class’s financial advisors and expert witness, and (iii) \$15,000 to Schwebel for its service to the Class (collectively, the “Professional Fees and Expenses Application”).³

¹ The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; Energy Harbor Generation, LLC (0561), case no. 18-50762; Pleasants Corp. (5914), case no. 18-50763; Energy Harbor Nuclear Corp. (1493), case no. 18-50761; Energy Harbor LLC (0186), case no. 18-50757; and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors’ address is: 341 Pond Dr., Akron, OH 44320.

² Unless otherwise stated, all capitalized terms herein have the same meanings as in the Stipulation.

³ Copies of (a) the Parties’ proposed Final Order (Exhibit B to the Parties’ Stipulation of Settlement), and of (b) Class Counsel’s [Proposed] Order Approving Professional Fees and Expenses Application, are attached as **Exhibits 7 & 8**, respectively, to the previously submitted Joint Declaration of William Fredericks and David Neumann, dated April 6, 2020 (the “Joint Declaration”) [ECF No. 3927].

PRELIMINARY STATEMENT

1. For the reasons set forth in Schwebel’s and Class Counsel’s opening papers, the proposed Settlement represents an excellent result for the Class, and should be approved. In sum, the Settlement provides that the Class will receive an allowed claim of \$12,000,000 (the “Allowed Claim”), with the distributions thereon to be made in the form of New Common Stock into a Settlement Fund, which (after being converted to cash) will then be paid to eligible Class Members. The resulting Allowed Claim (\$12 million) represents **54.5%** of the *maximum* amount (roughly \$22 million) of damages that the Class could have established had it prevailed on all issues in this matter. *Jt. Decl.* ¶¶3, 16. Given the excellent result achieved, the substantial risks overcome, and the other relevant *Ramey* factors detailed in their opening papers, Class Counsel also respectfully submit that the Court should grant in full the Professional Fee and Expense Application, including counsel’s request for a percentage-based attorneys’ fee award of one-third ($\frac{1}{3}$) of the Settlement.

2. To avoid repetition, this Reply addresses only two new matters: (1) the reaction of the Class (now that the Notice has actually been disseminated in accord with the Court-approved Notice Plan); and (2) an update on the increase in the current market value of Settlement based on recent trading in shares of the New Common Stock (which trade under the ticker “ENGH”).

A. THE ABSENCE OF ANY OBJECTIONS SUPPORTS BOTH FINAL APPROVAL AND THE REQUESTED AWARD OF PROFESSIONAL FEES AND EXPENSES

3. After the mailing of Notice to the Class, no objections to any aspect of the Settlement or the Professional Fees and Expense Application have been submitted, and only *one* “opt out” request has been received. *See* Supplemental Declaration of Michael E. Hamer of Claims Administrator Heffler LLC Confirming Implementation of Notice Plan and Reporting on Requests for Exclusion Received, dated May 18, 2020 (the “Suppl. Hamer Decl.”), at ¶¶8-9. As set forth

below, this favorable reaction further supports final approval of the Settlement and approval of the requested Professional Fees and Expenses Application.

4. Following entry of the Preliminary Approval Order, the Claims Administrator (the Heffler firm) mailed Individual Notices to 50,803 billing addresses associated with the approximately 36,000 Class Members in this matter. *See* opening Declaration of Heffler's Michael Hamer, dated April 4, 2020 [**Jt. Decl. Exh. 1**, ECF No. 3927-2] at ¶¶3, 6. Moreover, since April 4, Heffler has sent out an additional 1,135 Individual Notices to Class Members who had one or more of their original Notices were returned as undeliverable, using updated addresses that Heffler obtained either through LexisNexis or through further consultations with Energy Harbor (the "Reorganized Debtor"). *See* Supplemental Declaration of Michael E. Hamer of the Settlement Claims Administrator (Heffler Claims Group, LLC) Confirming Implementation of Notice Plan, dated May 18, 2020 (the "Suppl. Hamer Decl."), at ¶ 2. The Individual Notice advised Class Members of the Settlement and directed them to www.polarvortexsettlement.com for the longer Website Notice and additional information about the Settlement (including a complete copy of the Stipulation of Settlement and Plan of Allocation) and requested fees and expenses. In particular, the Website Notice specifically stated that the Professional Fees and Expenses Application would seek an award of attorneys' fees equal to 33 $\frac{1}{3}$ of the Settlement and reimbursement of up to \$75,000 of out-of-pocket expenses to Class Counsel; payment of specified additional amounts to the Class's financial advisor and industry expert; and a service award of \$15,000 to Schwebel.

5. Both the Individual and Website Notices also advised Class Members of (1) their right to object to the proposed Settlement, the Plan of Allocation, and/or any aspect of the Professional Fees and Expenses Application (and the May 1, 2020 deadline for exercising those rights); (2) their right to exclude themselves from the Settlement Class (and the April 21, 2020

deadline for submitting any such “opt-out” requests; (3) the Court’s discretion to alter any of the deadlines or requirements set forth in the Notice; and (4) their ability to contact the Claims Administrator or Class Counsel for additional information. The Website Notice also advised that copies of all papers filed with the Court in support of Final Approval and/or the Professional Fee and Expenses Application could be reviewed on the Settlement Website.⁴

6. As noted above, in response to the Notice program, no Class Member has objected to any aspect of the Settlement, the Plan of Allocation, or the Professional Fees and Expenses Application. Moreover, Heffler has received only *one* request for exclusion, from a Class Member whose claim was for only \$19.87. Suppl. Hamer Decl., at ¶¶8-9

7. The lack of any objections (and only one opt-out) from a Class consisting of over 36,000 of FES’s former industrial and commercial customers provides additional support for approving the Settlement. *See, e.g., Barnes v. Winking Lizard, Inc.*, 2019 WL 16114822, at *4 (N.D. Ohio Sept. 20, 2019) (lack of any objections or opt-outs from class with 150 members was “overwhelmingly positive reaction” that supported approval); *Kimber Baldwin Designs, LLC v. Silv Communic’ns*, 2017 WL 5247538, at *5 (S.D. Ohio Nov. 13, 2017) (no objections and only one opt-out after notice was sent to 24,000 class members “weighs in favor of approval”); *Rotondo v. JPMorgan Chase Bank*, 2019 WL 6167086, at *6 (S.D. Ohio Nov. 20, 2019) (no objections and only three opt-outs, where notice was mailed to 5,035 class members, “favor[s]” approval”).

8. The Class’s favorable reaction also favors approving the Plan of Allocation. *In re Payment Card Interchange Fee & Merch. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013); *In re Veeco Instr. Inc. Sec. Litig.*, 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007).

⁴ Heffler duly caused copies of these papers be posted on the Settlement Website on April 7, 2020, the day after they were filed with the Court. Suppl. Hamer Decl. ¶ 7.

9. Finally, the Class's reaction also supports approving the Professional Fees and Expenses Application. As noted above, the Notice advised that the Application would request: an award of attorneys' fees of 33 $\frac{1}{3}$ % of the Settlement plus reimbursement of expenses of up to \$75,000⁵ to Class Counsel; payment of specified contingent fees to the Class's financial advisor (Dundon Associates LLC) under its retainer agreement; payment of \$10,620 to the Class's industry expert (Matthew Brakey of Brakey Energy); and a service award of \$15,000 to Schwebel. The Notice also advised that all papers in support of the Application would be promptly posted on the Settlement Website after they were filed. The lack of *any* objections to the Professional Fees and Expenses Application provides further support for approving it, in full, as fair and reasonable. *See In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *22 (S.D.N.Y. Dec. 23, 2009) (lack of objections "strongly supports" approving requested fee as fair and reasonable); *In re Chemed Corp. Sec. Litig.*, 2014 WL 12650642, at *1 (S.D. Ohio July 15, 2014) (lack of objections supported approval of award of attorneys' fee equal to 33% of \$6 million settlement).

B. UPDATE ON THE CURRENT MARKET VALUE OF SETTLEMENT BASED ON RECENT TRADING IN SHARES OF THE NEW COMMON STOCK

10. In its opening papers, Schwebel and Class Counsel advised the Court that the market price of shares of the New Common Stock (ticker symbol "ENGH") -- the "currency" to be used to fund the Settlement in connection with the Class's proposed \$12 million Allowed Claim -- had fallen during the second half of March and early April of this year. *See* Joint Decl. at ¶¶15, 49 (noting that although the New Common Stock had initially traded at between \$24.50 and \$27.50 per share, during the 10 trading days from March 23 to April 4, 2020 the shares traded on the OTC

⁵ Class Counsel actually seek reimbursement of only \$26,688.88 (the \$27,538.88 referenced in counsel's opening papers, less an \$850.00 accrual for travel costs given that the Final Approval Hearing will now be held telephonically) -- which is well under the \$75,000 expense figure referenced in the Website Notice.

market between a high of only \$16.52 and a low of \$12.00). As a result of these share price declines, what had appeared to be a settlement with a market value of roughly \$3.9 to \$4.4 million in early March 2020 was closer to one in the range of only \$2.0 to \$3.2 million by April 4. *Id.*⁶

11. Over the most recent three-week period between April 27 and May 18, 2020, however, the price of the New Common Stock has rebounded significantly, trading between a low of \$27.00 and a high of \$37.55 per share. Based on this higher and more recent trading range, the Settlement has a current market value of roughly ***\$4.4 million to \$6.2 million***.

12. This higher current market value, assuming that it holds and that the Class's portion of the New Common Stock is distributed into the Settlement Fund without undue passage of time⁷, plainly provides further support for approving the Settlement.

13. It is also respectfully submitted that this higher current market value also provides further support for approving the Professional Fees and Expenses Application, including the requested 33⅓ % fee award to Class Counsel. *See, e.g., Osman v. Grube, Inc.*, 2018 WL 2095172, at *5 (N.D. Ohio May 4, 2018) (“value of the benefit rendered to the class” is major factor in awarding fees), citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

14. At the same time, using an increased assumption as to the value of the Settlement increases the imputed value of the “lodestar multiplier” derived from applying a “lodestar crosscheck.” Based on a share price of \$16.52 (the highest price at which ENGH traded during the two weeks before Class Counsel filed their opening papers on April 6, 2020), the Settlement

⁶ Class Counsel added new disclosure to the Website Notice in mid-March to advise Class Members of (a) the actual number of shares that had been set aside for the Class, (b) the share's then most-recent trading prices; and (c) a website where they could obtain daily updated prices for the shares using the “ENGH” ticker. *See* Joint. Decl. [ECF 3927-1] at ¶17, n.4; Hamer Decl. [ECF 3927-2] at pp. 18-19 of Ex. B thereto.

⁷ Section 3.1 of the Stipulation of Settlement provides simply that “The [Class's] Allowed Claim [of \$12 million] will be deemed allowed as of the Settlement Effective Date and distributions on the Allowed Claim shall be distributed thereafter in accordance with the [Debtors'] Plan [of Reorganization].”

would have had a value of roughly \$2.75 million, the resulting dollar value of the requested $\frac{1}{3}$ fee would have been roughly \$917,000, and the resulting “negative” lodestar multiplier would have been only 0.46 (\$917,000 divided by Class Counsel’s lodestar of \$1.973 million). By comparison, based on a share price of \$37.55 (the all-time high for ENGH shares reached on May 18, 2020), the Settlement would have a value of roughly \$6.225 million, the resulting dollar value of the requested $\frac{1}{3}$ fee would be roughly \$2.07 million, and the resulting lodestar multiplier be a slightly positive 1.05 (\$2.07 million divided by Class Counsel’s lodestar of \$1.973 million).

15. However, as confirmed by the authorities cited in their opening brief at ¶50, lodestar crosscheck multipliers of as high as 3x or 4x (*i.e.*, of three to four times class counsel’s lodestar) are frequently approved. *See, e.g., Dillow v. Home Care Network, Inc.*, 2018 WL 4776977, at *7 (S.D. Ohio Oct. 3, 2018) (2.9 multiplier was “well within the acceptable range of multipliers”);⁸ Given the excellent results achieved in the face of substantial risk (and all of the other factors also discussed in their opening brief), Class Counsel respectfully submit that a lodestar multiplier of 2.0x or more could be easily justified, that a 1.05x multiplier based on the recent run-up in ENGH’s stock price is still extremely modest, and that “crosscheck” thus continues to provide **strong** support for the reasonableness of the requested 33 $\frac{1}{3}$ % fee.

⁸ *See also In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) (crosscheck multipliers of 1.3 to 4.5 are commonly approved); *Lowther v. AK Steel Corp.*, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (approving a “very acceptable” 3.06 multiplier and citing cases finding multipliers from 4.3 to 8.74 to be reasonable). Numerous cases nationwide support the same position. *See, e.g., In re Equifax Inc. Cust. Data Sec. Breach Litig.*, 2020 WL 256132, at *39 (N.D. Ga. Mar. 17, 2020) (awarding 2.62 multiplier as “consistent with multipliers approved in other cases”).

CONCLUSION

57. For the reasons set forth above and in Schwebel's and Class Counsel's opening papers, the Court should (A) enter the Parties' [Proposed] Final Order [**Jt. Decl. Exh. 7**, ECF 3927-8], which grants final approval to the Settlement; and (B) enter Class Counsel's [Proposed] Order Approving Requested Award of Professional Fees and Expenses [**Jt. Decl. Exh. 8**, ECF 3927-9], and grant the awards requested therein in full.

Dated: May 19, 2020

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