

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

In re:)	Chapter 11
)	
FIRSTENERGY SOLUTIONS CORP., <i>et al.</i> , ¹)	Case No. 18-50757 (AMK)
)	(Jointly Administered)
)	
Debtors.)	
)	
)	Hon. Judge Alan M. Koschik
)	

**MOTION OF DEBTORS PURSUANT TO RULE 9019 OF THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE TO
APPROVE SETTLEMENT BETWEEN FIRSTENERGY
SOLUTIONS CORP. AND SCHWEBEL BAKING COMPANY**

FirstEnergy Solutions Corp. (“FES”) and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), by and through their undersigned counsel, hereby move for an order approving a proposed settlement (the “Settlement”)² between debtor entity FirstEnergy Solutions Corp. (“FES” or “FirstEnergy”) and creditor entity Schwebel Baking Co. (“Schwebel” and, together with FE, the “Parties”). The Settlement is attached hereto as Exhibit A. In support of the Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Northern District of Ohio (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

¹ The 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; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage, LLC (6928), case no. 18-50764. The Debtors’ address is 341 White Pond Dr., Akron, OH 44320.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Settlement, a copy of which is attached hereto as Exhibit A.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are section 363 of title 11 of the United States Code (the “Bankruptcy Code”) and rule 9019 of the Federal Rules of Bankruptcy Procedures (the “Bankruptcy Rules”).

BACKGROUND

4. On March 31, 2018 (the “Petition Date”), the Debtors filed voluntary petitions with the Court for relief under chapter 11 of the Bankruptcy Code. The Debtors’ chapter 11 cases (the “Chapter 11 Cases”) are being jointly administered.

5. The Debtors continue to operate their businesses and manage their property as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On April 11, 2018, the United States Trustee for the Northern District of Ohio (the “US Trustee”) appointed an official committee of unsecured creditors (the “Committee”) pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases. This Court confirmed the Debtors’ Eighth Amended Joint Plan of Reorganization (the “Plan”) on October 16, 2019 [Dkt. No. 3283].

6. FES sells power and provides energy-related products and services to retail and wholesale customers throughout the Midwest and Mid-Atlantic regions of the United States. Customers have a wide range of options for contracting with FES, tailored to customer size, location, and energy requirements. FES works closely with utilities to ensure customers are provided seamless delivery of electricity to their homes and businesses.

7. On August 20, 2018, Schwebel filed its *Motion for Entry of an Order Applying Bankruptcy Rule 7023 to the Claims of a Class of Debtor FES’s Customers*

Arising from Its “Polar Vortex Surcharges” [Docket No. 1179] (the “7023 Motion”). By the 7023 Motion, Schwebel sought class treatment of alleged claims for breach of contract on behalf of itself and a purported class consisting of “all FES business customers in the Region who were wrongfully billed by FES for the Polar Vortex Surcharges referenced in FES’s Polar Vortex Surcharge Letter and who paid all or a portion of the Polar Vortex Surcharges, and which excludes FES business customers who did not pay any part of the Polar Vortex Surcharges.” Schwebel claimed that it, and all members of the class, had entered into a fixed-rate electricity supply agreement with FES and had paid surcharges during the winter of 2014 that were in violation of that agreement. Schwebel sought full recovery of all polar vortex surcharges paid by the purported class in the amount of \$23,459,723 (the “Disputed Claim Amount”).

8. On September 25, 2018, the Parties and the Committee stipulated that (1) Bankruptcy Rule 7023 applied with respect to the relief requested in the 7023 Motion; (2) Schwebel would be permitted to file a protective class proof of claim prior to the bar date as a member of the putative class on behalf of all members of the putative class; (3) the Debtors and the Committee reserved all rights to contest such class proof of claim and the claims asserted therein; and (4) that fact and expert discovery relevant to the Schwebel August 2018 Motion would proceed consistent with a preliminary schedule, to be followed by an evidentiary hearing on the Schwebel August 2018 Motion [Dkt. No. 1451].

9. The Parties thereafter engaged in significant discovery in anticipation of a class certification hearing. Debtors produced thousands of documents, and the parties met and conferred on numerous occasions regarding discovery disputes. Additional and amended scheduling stipulations and related proposed orders were agreed to by the Parties

and the Committee and so ordered by the Court, including on January 9, 2019 [Dkt. No. 1922].

10. On February 7, 2019, the Debtors filed *Debtors' Objection to Creditor Schwebel Baking Company's Motion for Entry of an Order Governing the Use of Redacted Documents and to Compel Discovery* [Docket No. 2087]. Also on February 7, 2019, Schwebel filed *Creditor Schwebel Baking Company's Memorandum of Law (A) In Opposition to Debtors' Motion to Amend Confidentiality Agreement and Stipulated Protective Order, and (B) In Further Support of its Alternative Motion for Entry of an Order Governing the Use of Redacted Documents* [Docket No. 2088]. By its discovery motion, Schwebel sought broad access to the Debtor's most sensitive business information, including customer lists and sensitive pricing information. This sensitive business information was sought at a time when the Debtors were deeply engaged in Plan negotiations, including negotiations for the sale of the business.

11. In late January, as the Parties were engaged in unsuccessful efforts to resolve the issues underlying the Parties' respective discovery motions, the parties commenced serious settlement negotiations. Two status conferences were held before the Court on February 11, 2019 and March 7, 2019. At the March 7, 2019 conference, the parties advised the Court that they had reached an agreement in principle to resolve the litigation. The Parties have since engaged in arms-length settlement negotiations over a term sheet and long form settlement agreement. For purposes of voting on Debtors' Plan, pursuant to Bankruptcy Rule 3018(a), Claim No. 934 (the Class Proof of Claim) was temporarily allowed in the amount of \$12,000,000.00 [Dkt. No. 2749].

12. The parties have agreed to the terms of the Settlement that provides, among other things, that the class of creditors encompassed by Schwebel's Rule 7023 Motion will receive an allowed general unsecured claim against FES in the amount of \$12,000,000, which claim is classified in Class A6 of the Plan (the "Allowed Claim"). The Settlement contemplates that Schwebel could elect, on behalf of the purported class, to receive equity securities in the reorganized FES in lieu of cash. Schwebel made this election for Claim 934. Thus, under the Settlement, a common fund will be formed, and New Common Stock will be distributed into that fund based on the allowed claim. The stock will thereafter be sold for cash as directed by Schwebel and its counsel, as provided in Section 7.2 of the Settlement Agreement. Members of the proposed settlement class will share the resulting cash proceeds pro rata, after payment of attorneys' fees and administrative expenses, with the cash distributions to Class Members being made by a professional claims administration firm. It is estimated that the value of the shares to be distributed into the common fund will be approximately \$3.768 million, or 31.4 cents for each dollar of the Class's \$12 million Allowed Claim.

RELIEF REQUESTED

13. By this Motion, the Debtors seek entry of an order approving the Settlement and authorizing the Parties to take all actions necessary to effectuate the Settlement without the need of further order by this Court. The Settlement consensually resolves the class claim (claim no. 934) with a reasonable allowed general unsecured claim in the amount of \$12 million, which is approximately half of the Disputed Claim Amount. For the reasons discussed below, the Settlement is fair, reasonable, and adequate both for the estate as well

as for the members of the proposed Settlement Class, and it is administratively cost-effective and in the best interests of the Debtors' estates.

BASIS FOR RELIEF

14. Bankruptcy Rule 9019(a) provides, in part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bank. P. 9019(a); *Rankin v. Brian Lavan & Assocs., P.C. (In re Rankin)*, 438 F. App'x 420, 426 (6th Cir. 2011). Indeed, “compromises are favored in bankruptcy” because they minimize the costs of litigation and further the parties’ interest in expediting administration of a bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 10 COLLIER ON BANKRUPTCY ¶ 9019.01 (16th ed. 2018)); *Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994); *John S. Marandas, P.C. v. Bishop (In re Sassalos)*, 160 B.R. 646, 653 (D. Or. 1993).

15. Courts will approve a compromise and settlement if it is fair and equitable and in the best interests of the estate and its creditors. *Treinish v. Topco Assocs., Inc. (In re AWF Liquidation Corp.)*, 208 B.R. 399, 400 (Bankr. N.D. Ohio 1997); *McGraw v. Yelverton (In re Bell & Beckwith)*, 87 B.R. 476, 478 (N.D. Ohio 1988); *In re Mobile Air Drilling Co.*, 53 B.R. 605, 607 (Bankr. N.D. Ohio 1985). In making this determination, the Court must consider such factors as:

- a. whether the settlement is fair and equitable;
- b. the probability of success in litigation, compared to the present and future benefits offered by the proposed settlement;
- c. the prospect of complex litigation, as well as the expense, inconvenience, and delay necessarily attendant to the litigation if the settlement is not approved;

- d. the extent to which the settlement is the product of arms' length bargaining; and
- e. whether the settlement falls below the lowest point in the range of reasonableness.

See In re Bell & Beckwith, 87 B.R. at 478–79 (internal citations omitted); *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991). In reviewing a proposed settlement, “courts must canvass the issues in order to determine whether the settlement falls below the lowest point in the range of reasonableness, and if the settlement falls within a range of reasonable compromises, it may be approved.” *In re Junk*, 566 B.R. 897, 912 (Bankr. S.D. Ohio 2017) (citing *In re Nicole Gas Prod.*, 518 B.R. 429, 441 (Bankr. S.D. Ohio 2014)); *see also Bell & Beckwith*, 87 B.R. at 479; *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983); *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522 (Bankr. S.D.N.Y. 1993).

16. The Settlement satisfies the standards discussed above and is in the best interests of the Debtors, their estates and all stakeholders. The Parties agreed to the terms of the Settlement only after significant contested litigation in both this Court and (pre-bankruptcy) in the District Court and after months of arms' length bargaining, and the terms provide both sides with a reasonable resolution of the alleged class claim.

17. The Settlement offers significant benefits to the Debtors' estates compared to the risks, costs and distractions that would have been attendant to the litigation. First, the Settlement put a stop to an expensive and distracting discovery process at a crucial time in the Plan negotiations. The cost of litigation in the Rule 7023 action alone may have ultimately exceeded the value of the distribution to the common fund called for by the Settlement. For each month that the action was litigated, the Debtors would have incurred

fees in the range of six figures. Continuation of the litigation would have required completion of burdensome class discovery, class certification proceedings and briefing (with potential appeals), and ultimately full trial preparation—a process that would have taken at least a year of time and expense. The claim Schwebel asserted against the Debtors for the purported class had survived an initial Motion to Dismiss in the District Court [Case No. 4:17-cv-00974, Dkt. No. 27]. There was significant risk that the class would be certified and that Schwebel could prevail at trial on the full Disputed Claim Amount (approximately \$22,054,000). As detailed in the Plaintiff's Rule 7023 Motion for Approval of this Settlement, the outcome of litigation in the Rule 7023 action was far from certain for either side. The cost savings and the certainty provided by the settlement is in the best interests of the Debtors' estates.

18. The Settlement was the result of arm's-length bargaining after significant and fiercely-contested discovery and related proceedings. Throughout the settlement negotiation process, the Debtors consulted with other constituencies, including the Committee, and the Settlement thus reflects a consensus resolution of class action claims that could well have disrupted the case and distracted the Debtors and their counsel at a crucial time in the cases.

19. For the aforementioned reasons, the Settlement between the Parties is fair and equitable and in the best interests of the estate and its creditors. The Debtors respectfully request that the Court approve the Settlement.

RESERVATION OF RIGHTS

20. Nothing contained in this Motion or in the Settlement or any actions taken by the Debtors pursuant to the relief granted in the Order is intended or should be

construed as (i) an admission as to the validity or amount of any particular claim against a Debtor entity; (ii) a waiver of the Debtors' rights to dispute any particular claims on any grounds; (iii) a promise or requirement to pay any particular claims; or (iv) a waiver or limitation on the Debtors' rights under the Bankruptcy Code or any other applicable law.

NOTICE

21. Notice of this Motion has been served on the following parties and/or their counsel, if known, via facsimile, regular mail, e-mail and/or hand delivery: (i) those parties listed on the General Service List (as defined in the *Amended Order Pursuant to Sections 102 and 105(a) of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6007, 7016, 9013 and 9014 and Local Bankruptcy Rules Establishing: (I) Omnibus Hearing dates; and (II) Certain Case Management Procedures* [Docket No. 280]); and (ii) Schwebel Baking Company. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

NO PRIOR REQUEST

22. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (i) enter an order substantially in the form attached hereto as Exhibit B and (ii) grant such other and further relief as the Court may deem proper.

[remainder of page intentionally left blank]

Dated: November 20, 2019

Respectfully submitted,

/s/ Bridget A. Franklin

BROUSE MCDOWELL LPA
Marc B. Merklin (0018195)
Bridget A. Franklin (0083987)
Anastasia J. Wade (0082797)
388 South Main Street, Suite 500
Akron, OH 44311-4407
Telephone: (330) 535-5711
Facsimile: (330) 253-8601
mmerklin@brouse.com
bfranklin@brouse.com
awade@brouse.com

- and -

AKIN GUMP STRAUSS HAUER & FELD LLP
Ira Dizengoff (admitted *pro hac vice*)
Lisa Beckerman (admitted *pro hac vice*)
David H. Botter (admitted *pro hac vice*)
Brad Kahn (admitted *pro hac vice*)
One Bryant Park
New York, New York 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
idizengoff@akingump.com
lbeckerman@akingump.com
dbotter@akingump.com
bkahn@akingump.com

- and -

Scott Alberino (admitted *pro hac vice*)
Kate Doorley (admitted *pro hac vice*)
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 887-4000
Facsimile: (202) 887-4288
salberino@akingump.com
kdoorley@akingump.com

Counsel for Debtors and Debtors in Possession