UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Chapter 11
	)	
	)	Case No. 18-50757
FIRSTENERGY SOLUTIONS CORP., *et al.*,[1]	)	(Jointly Administered)
	)	
Debtors.	)	
	)	Hon. Judge Alan M. Koschik
	)	

STATEMENT OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF JOINT PLAN OF REORGANIZATION

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned jointly administered chapter 11 cases, by and through its undersigned counsel, hereby submits this statement in support of the Debtors' *Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2934] (the "Plan"),[2] and in support thereof, respectfully states as follows:[3]

PRELIMINARY STATEMENT

1. When the Debtors filed for chapter 11 protection seventeen months ago, there were billions of dollars of unresolved intercompany litigation claims and an uncertain road ahead for the Debtors' business. There was no consensus among the creditor groups to maximize the value of the Debtors' business and preserve thousands of jobs in so doing, nor was there a significant prospect

[1] The debtors in these chapter 11 cases (the "Debtors"), 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), Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is 341 White Pond Dr., Akron, OH 44320.

[2] Capitalized terms used and not defined herein have the meanings ascribed to them in the Plan.

[3] The Committee also joins in the reply of the Debtors to the objections filed with respect to the Plan.

of attaining legislative relief that was needed to support the continued operation of certain of the Debtors' generating assets. In sum, there was a substantial risk of the Debtors' chapter 11 cases devolving into a morass of intercompany and intercreditor litigation, followed by a liquidation of the Debtors' assets for a fraction of their value.

2. Seventeen months after standing on this shaky precipice, however, the Debtors and their creditors will share a much different fate—indeed, a far better one—if the Court confirms the Plan. The substance of the Plan bears repeating: it contemplates not only a comprehensive and broadly consensual chapter 11 plan of reorganization, but also the settlement of numerous inter-creditor and inter-debtor issues, including: (i) claims and causes of action concerning the allocation of value among the Debtors, including the consideration provided under the FE Settlement Agreement, (ii) the treatment and allowance of the Inter-Debtor Claims, (iii) issues relating to the rejection of agreements arising from the sale leaseback transaction for Unit 1 of the Bruce Mansfield Plant, (iv) the claims of the Mansfield Owner Parties arising under certain tax indemnity agreements, and (v) the allocation of administrative expenses among the Debtors' estates.

3. These settlements will permit the Debtors and their estates to avoid substantial litigation costs in confirming a plan, which otherwise would have been borne by the unsecured creditors in these cases, and also represent the best path for the Debtors to emerge from chapter 11 in the most efficient, value-additive, and cost-effective manner. Most importantly, the transactions and settlements contemplated by the Plan are also fair to all affected creditor constituencies, and have been fully vetted by both estate fiduciaries and the primary economic beneficiaries in these cases—each of which played a critical role in formulating the Plan. For these reasons, as more fully described below, the Committee respectfully submits that the Plan should be confirmed and the objections thereto should be overruled.

I. The Plan Allocates Value Fairly and Reasonably

4. As noted in prior pleadings and statements made before the Court, the Committee has a duty to act as a fiduciary to ***all*** unsecured creditors at ***each*** of the Debtors—not just to the individual creditors that comprise the seven-member Committee. This fiduciary duty extends to all aspects of the Debtors' bankruptcy cases, but perhaps none more important than plan negotiations that affect distributions to unsecured creditors. This fact, which is true of any official committee of unsecured creditors in any chapter 11 case, seems to have been lost on objector American Centrifuge Enrichment, LLC and United States Enrichment Corporation (together, "USEC"). Indeed, USEC asserts in its objection [Docket No. 2976] (the "USEC Objection") that the Committee was "indifferent" to FES receiving a disproportionate share of value since "there is not a single member of the Creditors Committee or any of the groups that were invited to participate in the allocation of value who asserts trade claims against NG as USEC does." USEC Objection at ¶ 2-3. As a result, according to USEC, the value to be provided under the Plan was allocated in a manner that was unfair to USEC.

5. USEC's objection is misplaced for a number of reasons (as described more fully below), but chief among them is the assertion that the Committee was "indifferent" or somehow unconcerned with the Plan's effect on each and every unsecured creditor constituency. This assertion is false. On the contrary, the effect on each Debtor (and each creditor constituency at each Debtor) was thoughtfully considered in the Committee's analysis of the Plan and its fairness to unsecured creditors.

6. While the Committee firmly believes that each of the settlements and transactions contained in the Plan are fair and eminently reasonable, this determination was not reached lightly since many of the settled outcomes were indeed "zero sum" such that one Debtor's gain would result

in another's loss (particularly with respect to the Inter-Debtor Claims and the allocation of the FE Settlement Value). As the fiduciary to all unsecured creditors at each of the Debtors, however, the Committee was uniquely positioned to call "balls and strikes" in order to reach the fairest possible outcome for each Debtor and its respective unsecured creditors. Various courts have recognized the unique role of an official committee of unsecured creditors in this regard. *See In re Greystone Holdings, L.L.C.*, 305 B.R. 456, 459 (Bankr. N.D. Ohio 2003) ("A creditors' committee stands as a fiduciary to the class of creditors it represents."); *Rickel & Assocs., Inc. v. Smith (In re Rickel & Assocs., Inc.)*, 272 B.R. 74, 99 (Bankr. S.D.N.Y. 2002) (noting that "[a]s fiduciaries, the committee was required to be honest, loyal, trustworthy, and without conflicts of interest"); *In re Enduro Stainless, Inc.*, 59 B.R. 603, 605 (Bankr. N.D. Ohio 1986) ("A member of the creditors' committee undertakes to act in a fiduciary capacity and may not act through the committee in such a manner as to promote only that creditor's interest."); *In re Baldwin-United Corp.*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983) (same); *Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.)*, 26 B.R. 919, 924 (Bankr. S.D.N.Y. 1983) ("[C]ommittees are the primary negotiating bodies for the plan of reorganization. They represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituent's interests.").

7. In furtherance of these duties, the Committee has been a model for its role in calling "balls and strikes" in these cases, which the Court has recognized. Moreover, the Committee's exercise of these duties has been consistently informed by its members, which possess claims at each of the primary Debtors (including FENOC and NG). To imply, as USEC does, that the Committee is not able to adequately represent FENOC and NG creditors because no Committee member has

precisely the same claims as USEC is an assumption that is entirely unworkable, and would defeat the purpose of a creditors' committee.

8. In addition to its role as a fiduciary to all unsecured creditors, the Committee's view of the Plan's value allocation and overall fairness is also informed by the Committee's comprehensive and independent investigation of the litigation claims against FirstEnergy Corporation and its non-Debtor affiliates. The findings of this investigation were critical for the Committee's advisors to be able to determine the fairest possible allocation of the FE Settlement Value based on, *inter alia*, which Debtor(s) possessed the underlying litigation claims—a task that the Committee and its advisors were uniquely positioned to perform.

9. Alongside this analysis, the Committee also charged its advisors with analyzing, among other things: (i) the allocation of the other non-settlement value in the Debtors' estates, including the Debtors' cash and generation assets, (ii) the validity and amounts of the Inter-Debtor Claims, taking into account all possible claims and defenses of each Debtor, (iii) the legal issues underlying the Mansfield Settlement, including whether all or part of the Mansfield facility constituted real or personal property and whether the Mansfield Facility Lease Agreements were financings or true leases, (iv) the merits of the Mansfield TIA Claims and the terms of the relevant tax indemnity agreements, and (v) the allocation of administrative expenses among the Debtors' estates. The Plan accounts for and adequately reflects the Committee's findings and recommendations with respect to each of these analyses. As a result, the Committee is convinced that the Plan and its allocation of value are fair, reasonable, and will substantially benefit all of the Debtors' unsecured creditors relative to a litigated outcome.

10. USEC, on the other hand, has not viewed or been made aware of the findings from the Committee's independent investigation, has not approached any of the Committee's advisors to

discuss the Committee's findings or its report, and has sought minimal discovery with respect to its confirmation objections—instead opting to launch a broadside attack against the integrity of the Committee and its process. Had USEC approached the Committee, it likely would have discovered, among other things, that the allocation of value to NG away from FES—the exact outcome under the Plan that USEC advocates for—*is actually in the economic interest of the ad hoc bondholder groups* that allegedly "dominated" the plan negotiations. Indeed, since the bondholder groups have claims at each of FES, FG, and NG, and since the amount of non-bondholder claims at NG is an order of magnitude lower than at either FES or FG,[4] the bondholder groups would be economically incentivized to direct value to NG, rather than FES, to avoid diluting their own recoveries with the claims of other creditors—a dynamic that all negotiating parties were fully conscious of throughout the plan negotiation process. USEC conveniently ignores this fact.[5] Additionally, USEC ignores the fact that an independent manager of NG was appointed to negotiate strictly on behalf of NG's interests with respect to inter-Debtor issues, and was represented by sophisticated counsel in those negotiations.

11. USEC also mistakenly asserts that the Plan fails various confirmation requirements, including sections 1129(a)(1), (3), and (7), 1123(a)(4), and 1129(b). For the reasons described above, these objections are without merit and should be overruled. The Plan clearly complies with all applicable provisions of the Bankruptcy Code (section 1129(a)(1)), including the requirement to provide the same treatment for each claim or interest of a particular class (section 1123(a)(4)), has

[4] On information and belief, there are approximately three times as many non-bondholder claims at FES than there are at NG.

[5] The Committee also notes that USEC did not raise an objection to the Debtors' Restructuring Support Agreement or Disclosure Statement, did not appear at the hearing to approve the Restructuring Support Agreement, and on information and belief, at no point requested to meaningfully participate in the Plan negotiation process. To the extent the USEC Objection is last-minute attempt to extract value in a potential settlement of USEC's claim, the Committee urges the Court to overrule the USEC Objection.

been proposed in good faith and is not forbidden by law (section 1129(a)(3)), and satisfies the best interests test for each class of creditors (section 1129(a)(7)), as evidenced by the Debtors' liquidation analysis and the practical realities of these chapter 11 cases.

12. The Plan is also fair and equitable and does not discriminate unfairly (section 1129(b)), which requirements USEC alleges have been violated because (a) FES is purportedly receiving a distribution on account of its equity interests in NG, and (b) Class D5 (NG-FENOC Unsecured Claims against FENOC) may only receive a cash distribution instead of the choice of cash or equity. As a preliminary matter, the allocation of settlement and other value across the various Debtors is a settled outcome that should be evaluated under Rule 9019 of the Bankruptcy Code, and does not effectuate any distribution to FES on account of its equity interests in either FG or NG. Moreover, there are numerous classes—not just Class D5—that are only entitled to receive cash (e.g., the various Mansfield Indemnity Claims and Convenience Classes), and numerous classes that are only entitled to receive equity or that have an extremely limited cash option (e.g., the various Mansfield Certificate Claims and the Unsecured PCN/FES Notes Claims). As with the distribution of value across the Debtors, the entitlement of each Class to equity and/or cash is a settled outcome that was heavily negotiated among the parties and is critical to the success of the Plan. Such "discrimination," if any, certainly does not rise to the level of "unfair discrimination," given that creditors will be receive fair and commensurate distributions in cash or equity, as applicable, on account of their Claims. *See, e.g.*, *Victory Park Credit Opportunities, LP v. VPR Liquidation Trust ex rel. Milligan*, 539 B.R. 305, 313 (W.D. Tex. 2015) ("Note that § 1129(b) permits "'discrimination,' so long as it is not 'unfair.'").

13. For each of the foregoing reasons, the Committee respectfully requests that the Court overrule the objections to the Plan, including the USEC Objection.[6]

II. The Plan Exculpations Are Lawful

14. The Plan provides for the release and exculpation of the Exculpated Parties[7] in connection with their negotiation, formulation, and preparation of the Plan and various other agreements, including the FE Settlement Agreement and the Restructuring Support Agreement, as well as in connection with the Exculpated Parties' pursuit of confirmation and consummation of the Plan. *See* Plan Art. VIII.F. These exculpation provisions are appropriate and consistent with applicable case law.

15. As a preliminary matter, and as both the United States and the U.S. Trustee acknowledge in their objections,[8] case law in various jurisdictions is clear that exculpation provisions may properly cover creditors' committees and their members. *See, e.g., In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) ("Section 1103(c) of the Bankruptcy Code, which grants to the Committee broad authority to formulate a plan and perform such other services as are in the interest of those represented, has been interpreted to imply both a fiduciary duty to committee

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6 For the reasons discussed herein, the Court should also overrule, *inter alia*, the objection of Jeff Barge [Docket No. 2977], which seems to mischaracterize various components of the Plan and conflate the businesses of the Debtors with those of FE Corp.

7 "Exculpated Parties" means, collectively, and in each case in its capacity as such: (i) the Debtors; (ii) the FE Non-Debtor Parties; (iii) the Indenture Trustees; (iv) the Consenting Creditors; (v) the Committee and each of its members, in their capacities as such; (vi) the FE Owner Trustee; and (vii) with respect to each of the foregoing Entities in clauses (i) through (vi), such Entity and its current and former Affiliates and members (except any such member of the Ad Hoc Noteholders Group, the Mansfield Certificateholders Group, or the FES Creditor Group that voted to reject the Plan and has not changed its vote to accept the Plan by the Confirmation Date), and such Entities' and their current and former Affiliates' current and former directors, managers (including all Independent Directors and Managers), officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, managed/advised funds or accounts, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

8 *See* Docket Nos. 2980 and 2986.

constituents and a limited grant of immunity to committee members … [A]ctions against committee members in their capacity as such should be discouraged.") (citations and internal quotations omitted); *In re Washington Mut., Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) (a creditors' committee, its members, and estate professionals may be exculpated under a plan for their actions in the bankruptcy case); *In re L.F. Rothschild Holdings, Inc.*, 163 B.R. 45, 49 (S.D.N.Y. 1994) (section 1103(c) of the Bankruptcy Code "implies both a fiduciary duty to committee constituents, and a grant of limited immunity to committee members").

16. The rationale for including committees, committee members, and their professionals within the scope of a plan's exculpation provision has been clearly articulated at the circuit level: "If members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee." *PWS Holding*, 228 F.3d at 246. Indeed, since the Bankruptcy Code "contemplates a significant and central role for committees in the scheme of a business reorganization," it must also be interpreted to grant a degree of immunity for any such committee. *L.F. Rothschild Holdings, Inc.*, 163 B.R. at 49.

17. In addition to estate fiduciaries, courts in this Circuit also have regularly approved exculpations of third-party non-estate fiduciaries. *See, e.g., In re AmFin Financial Corp.*, Case No. 09-21323 (Bankr. N.D. Ohio Nov. 3, 2011) [Docket Nos. 1277, 1314] (exculpating holders of bonds, senior notes, and subordinated notes, along with their respective current and former directors, officers, employees, advisors, and affiliates); *In re The Wornick Co.*, Case No. 08-10654 (Bankr. S.D. Ohio June 27, 2008) [Docket Nos. 177, 262] (releasing and exculpating the debtors' directors, noteholders, indenture trustees, and purchaser of assets, among others); *In re Collins & Aikman Corp.*, Case No. 05-55927 (Bankr. E.D. Mich. July 18, 2007) [Docket Nos. 7731, 7827] (exculpating

current and former directors, prepetition lenders, and the debtors' critical customers who settled sizable claims with the debtors). While the Sixth Circuit has not opined on the standard for exculpating non-estate fiduciaries, courts outside of this Circuit have permitted such exculpations "when [such] provisions are important to a debtor's plan" or "where the released party provides substantial consideration," among other circumstances. *In re Genco Shipping & Trading Limited*, 513 B.R. 233, 269 (Bankr. S.D.N.Y. 2014) (citing various cases).

18. Here, both of these factors are present. First, the exculpation provisions are critical to the success of the Plan because without such provisions, the Exculpated Parties (which include all of the parties to the Restructuring Support Agreement) would not have been willing to engage in Plan negotiations or otherwise assist with the Debtors' reorganization. As one court has noted, "Exculpation provisions are frequently included in chapter 11 plans, because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the chapter 11 case." *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 10156 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff'd in part, rev'd in part*, 627 F.3d 496 (2d Cir. 2010).

19. Without any exculpation for their actions during the Debtors' bankruptcy cases, the Exculpated Parties may be incentivized to terminate the Restructuring Support Agreement, or to otherwise cease assisting the Debtors with their ongoing reorganization efforts post-confirmation (e.g., with obtaining all necessary regulatory approvals, separating from FE Corp., transferring the undivided Mansfield plant interests to the Debtors, etc.). Second, the Court has already found that many of the Exculpated Parties have made substantial contributions to the Debtors chapter 11 cases. *See Order Granting Application of Consenting Creditors Pursuant to 11 U.S.C. 503(b)(3)(D) and*

503(b)(4) for Allowance and Payment of Fees and Expenses Incurred in Making a Substantial Contribution [Docket No. 2694].

20. In light of the foregoing and the unique facts and circumstances of the Debtors' bankruptcy cases, the exculpation of all the Exculpated Parties—without whom the Debtors would not be able to confirm the Plan—is warranted.

CONCLUSION

For the reasons stated herein, the Committee respectfully requests that the Court confirm the Plan and overrule all objections to the same, and grant such other relief as this Court deems just.

Dated: August 16, 2019

By: /s/ *Rocco Debitetto*

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