UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

CREDITOR SCHWEBEL BAKING COMPANY'S MOTION PURSUANT TO §105 OF THE CODE AND BANKRUPTCY RULE 7023 TO (A) PRELIMINARILY APPROVE SETTLEMENT; (B) PRELIMINARILY CERTIFY PROPOSED SETTLEMENT CLASS; (C) APPOINT SCHWEBEL BAKING AS CLASS REPRESENTATIVE AND ITS COUNSEL AS CLASS COUNSEL; (D) APPROVE FORM AND MANNER OF NOTICE; (E) SCHEDULE FAIRNESS HEARING; AND (F) GRANT RELATED RELIEF

Schwebel Baking Company ("Schwebel" or "Class Claimant") submits this motion pursuant to Bankruptcy Code §105 and Bankruptcy Rule 7023 (incorporating Fed. R. Civ. Proc. 23) ("Rule 23") for entry of its [Proposed] Preliminary Approval Order ("Preliminary Order") that will (a) preliminarily approve its Stipulation of Settlement with Debtors (the "Stipulation" or "Settlement"); (b) preliminarily certify the proposed class (the "Class") of FES commercial and industrial customers for settlement purposes only; (c) appoint Schwebel as Class Representative and its counsel as Class Counsel; (d) approve the form and manner of notice of the Settlement to Class Members; (e) schedule a fairness hearing; and (f) grant related relief (the "Motion").[1]

PRELIMINARY STATEMENT

Schwebel respectfully requests that the Court preliminarily approve the Settlement pursuant to §105 of the Bankruptcy Code and Rule 23, subject to final approval following

[1] A copy of the proposed Preliminary Order, with Exhibits A-1 and A-2 thereto, is attached at Exhibit A (together with Exhibits A-1 and A-2 thereto) to the Stipulation. The Preliminary Order is also sometimes referred to in the settlement papers as the "Preliminary 7023 Approval Order"). A complete copy of the Stipulation and its exhibits (including the Preliminary Order and its exhibits) are attached as an Exhibit to the accompanying Declaration of William C. Fredericks ("Fredericks Decl.") in support of this Motion. Unless otherwise defined herein, all capitalized terms used herein have the same meanings as in the Stipulation.

issuance of notice and a hearing pursuant to Rule 23(e).

The underlying claims at issue arise out of Debtor FirstEnergy Solutions Corp.'s ("FES") imposition of certain "Polar Vortex Surcharges" in 2014 on its large and mid-size industrial customers (the "Class Members"). Schwebel alleges that FES's imposition of such surcharges breached the terms of the common form contracts that FES had with each Class Member.

Under the proposed Settlement, in exchange for the release of the Class Members' breach of contract claims, the Class will receive an allowed claim in the amount of $12,000,000 (the "Allowed Claim"), with the distributions thereon to be paid, in the form of New Common Stock, into a Settlement Fund pursuant to the terms of the Stipulation and the provisions of Eighth Amended Joint Plan of Reorganization (the "Plan"). After the settlement consideration is deposited into the Settlement Fund and converted into cash, the resulting cash (after deductions for Class Counsel's attorneys' fees and expenses, and for costs of notice and administration, as approved by the Court) will be distributed to Class Members pursuant to a Plan of Allocation.

The proposed Settlement is fair and reasonable, and warrants preliminary approval and issuance of Notice to the Class (so that the Court can then, following the issuance of the notice and required fairness hearing under Rule 23(e), consider whether to grant ***final*** approval). The amount of the resulting Allowed Claim – $12 million – would represent roughly 54.5% of the ***maximum*** amount ($22.054 million) of damages that the Class could have established had it prevailed on all issues in this matter. Fredericks Decl. ¶ 20. Given the time and expense required to complete fact and expert discovery, conduct a trial, and resolve appeals, the proposed Settlement is well within the "range of reasonableness" meriting preliminary approval. In addition, various other constituencies in these proceedings, including the ad hoc noteholder

groups and the Official Committee of Unsecured Creditors (the "Committee"), have also consented to the material terms of the Settlement. *Id.* at ¶ 16.

The Court should also certify, for settlement purposes only, the proposed Class under Rule 23(b)(3).[2] Based on the best available information, there are 36,345 putative Class Members who have been identified from FES's records, and who are all similarly situated as they had common form contracts that FES allegedly breached in the same way when FES invoiced them for the Polar Vortex Surcharges at issue. *Id.* at ¶ 23-24, 30. Nor is it disputed that Schwebel and its undersigned counsel are "adequate" to represent the Class. The Rule 23(a)'s prerequisites of numerosity, commonality, typicality, and adequacy – as well Rule 23(b)(3)'s requirements that common issues predominate and that class treatment is a superior method of resolving the claims at issue – are thus all readily satisfied.

Schwebel also requests that the Court approve the proposed Notice Plan, which has been prepared in consultation with Heffler Claims Group ("Heffler"), the proposed Claims Administrator for the Settlement. *Id.* at ¶34. The Notice Plan calls for each member of the proposed Class to be sent a summary Individual Notice in the form of a customized letter. *See* [Proposed] Preliminary Order attached hereto at Exhibit A-2. The Individual Notice will (a) briefly describe the action and proposed Settlement, (b) state the amount of Polar Vortex Surcharges paid by that Class Member (their "Recognized Claim Amount"), and (c) refer the recipient to a dedicated settlement website, www.polarvortexsettlement.com, for a copy of the "Website Notice." This longer Website Notice (*id*. at Exhibit A-1) will contain more extensive details regarding the action, the Settlement, and Class Members' rights to object or "opt out"

[2] The Court, by Stipulation and Order filed September 25, 2018 [Dkt No. 1451], has already allowed Schwebel to file its Class Proof of Claim (no. 934) ("Class POC"), and found, under Bankr. Rule 9014, that Rule 7023 applies to class certification issues relating to the Class POC.

(and how they can exercise them). The Parties agree that this Notice Plan complies with all relevant notice requirements, while also avoiding undue printing and mailing costs.[3]

Because the Effective Date of the Settlement can occur only after the Plan has been confirmed and the effective date of the Plan occurs, the Parties request that the Court (a) agree to defer actual issuance of the Notice until after the Plan Effective Date (assuming that that Date has not already occurred), and (b) set a provisional date for the required Fairness Hearing under Rule 23(e)(2) that would fall roughly 75 days after the anticipated Plan Effective Date. Should the Plan Effective Date be delayed, due to appeals or otherwise, the Parties will contact the Court to set a new date for the Fairness Hearing.[4]

Accordingly, the Court should enter the Parties' Proposed Order.

JURISDICTION

This Court has jurisdiction over this Motion under 28 U.S.C. §1334. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b)(2). Venue is proper under 28 U.S.C.

[3] To reduce costs while also ensuring that the Settlement's net proceeds are fairly distributed, Class Members will ***not*** need to submit individual claims. Instead, each Class Member's "Recognized Claim Amount" will be pre-determined by the Claims Administrator from FES records, and will issue checks to qualifying Class Members based on those amounts.

[4] Under the [Proposed] Preliminary Order, all deadlines relevant to obtaining final approval under FCRP 23 will be fixed by reference to the date of the Fairness Hearing (*e.g.*, the order will provide that the Individual Notice be mailed at least 60 days before the Fairness Hearing (*id.*, ¶18), and require Class Members to submit any objections or "opt-out" requests at least 30 days before that Hearing (*id.*, ¶¶14-15). The proposed time interval giving Class Members 30 days from the mailing of the Notice in which to submit objections or "opt-out" requests is consistent with the time periods provided for *In Re Data Cooling Tech. LLC*, No. 17-52170, Adv. Proc. No. 17-05065 (Bankr. N.D. Ohio Apr. 6, 2018) (Koschik, J.) [Doc. No. 49] (ordering that individual notices be mailed by April 9, and that class members submit any objections or opt-out requests by May 7).

§§1408 & 1409. The statutory predicates for the relief requested are 11 U.S.C. §105 and Bankruptcy Rule 7023 (including Rule 23 as applicable through Rule 7023).[5]

NATURE OF THE UNDERLYING CLAIMS

In January 2014, FES's service region experienced unusually cold "Polar Vortex" weather conditions. As a result, PJM Interconnection LLC ("PJM"), the regional transmission organization ("RTO") that coordinates the supply of electricity on a wholesale basis within FES's service region, purchased additional electricity generation capacity. PJM billed the costs of those purchases to "retail" energy companies (such as FES), which supply electricity to actual end-users. ¶¶3, 18-19.[6] FES, in turn, "passed through" much of its share of the PJM charges to FES's large or mid-sized industrial and commercial customers (the Class Members).

Schwebel alleges that, by "passing through" these PJM charges to the Class Members, FES breached the terms of the substantially similar form contracts that FES had with each Class Member. In particular, Schwebel alleges that these contracts allowed FES to "pass through" surcharges imposed by an RTO (such as PJM) ***only*** if they were due to an RTO imposing either "***new***" charges or a new "method or procedure for determining charges." Compl., ¶¶2, 17 & Compl., Ex. A). Schwebel further alleges that the PJM surcharges that FES "passed through" to the Class Members were neither "new" nor the result of a changed "method or procedure for determining charges" – but instead simply reflected charges for ***customary*** RTO services that simply happened to be more ***expensive*** than had been expected due to unusually cold weather.

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[5] Insofar as Rule 9019 approval is also needed to obtain the requested relief, Schwebel joins in Debtors' separately filed Motion to Approve Settlement Under Bankruptcy Rule 9019.

[6] Citations to "Compl., ¶__" or "¶__" are to paragraphs of Schwebel's Complaint in the District Court, which was later filed as an exhibit to the Class POC (claim no. 934).

Schwebel paid roughly $11,000 in Polar Vortex Surcharges that FES had billed it for (*see* Schwebel individual proof of claim (claim no. 935)), but later protested to FES that the charges were improper. After FES declined to refund the disputed amounts, Schwebel sued. ¶24.

PROCEDURAL HISTORY

Schwebel filed its Complaint in May 2017, seeking damages, on behalf of itself and a putative class, equal to the amount of all Polar Vortex Surcharges paid to FES. Fredericks Decl. ¶7.

On July 3, 2017, FES moved to dismiss the Complaint for failure to state a claim and, alternatively, to strike the class allegations. Those motions were fully briefed and argued. *Id.* at ¶8.

On March 21, 2018, the District Court (Pearson, J.) denied both the motion to dismiss and the motion to strike the class allegations. Sch*webel Baking Co. v. First Energy Sols. Corp.*, 2018 WL 1419477 (N.D. Ohio Mar. 21, 2018), DC Dkt. No. 27. *Id.* at ¶9.

On March 31, 2018, the Debtors filed for Chapter 11 relief in this Court. *Id.* at ¶ 10.

On April 11, 2018, the U.S. Trustee selected Schwebel to serve on the Committee in these proceedings. *Id.* at ¶ 11.

On August 20, 2018, Schwebel filed a Motion for an Order Applying Bankruptcy Rule 7023 to the Claims of a Class of Debtor FES's Customers Arising From Its Polar Vortex Surcharges, together with its [Proposed] Class POC. Dkt No. 1179; Fredericks Decl. at ¶ 12.

On September 25, 2018, by Stipulation and Agreed Order among Schwebel, the Committee, and the Debtors, the Court (a) "direct[ed] application of Bankruptcy Rule 7023" with respect to Schwebel's request for class treatment; (b) allowed Schwebel to file its "protective class proof of claim"; and (c) reserved decision on all other matters relating to class

certification or the Class POC until after the Parties could conduct discovery. Dkt No. 1451; Fredericks Decl. at ¶ 13.

During late 2018 and early 2019, Schwebel took significant document discovery, and obtained over 36,000 pages of documents (plus responses to numerous interrogatories and requests to admit) from the Debtors. Discovery was adversarial and hard-fought; indeed, Schwebel filed a motion to compel against the Debtors on February 5, 2019. Dkt No. 2074; Fredericks Decl. at ¶14.

Shortly before Schwebel filed its February 5 motion to compel, the Parties began serious settlement discussions. *Id.* at ¶ 15.

In February 2019, the Parties negotiated a Settlement Term Sheet, and secured the consent of the Committee and the ad hoc noteholder group and Mansfield certificateholders group to the terms thereof, subject to the completion of customary "long form" settlement papers and the Rule 23 approval process. *Id.* at ¶ 16.

On February 11, 2019, the Parties advised the Court that they had settled. *Id.* at ¶ 17.

On June 25, 2019, pursuant to Stipulation and Agreed Order among Schwebel and the Debtors, the Court temporarily allowed the Class POC in the amount of $12,000,000 in Class A6 for the limited purpose of allowing Schwebel, pursuant to Rule 3018(a), to vote on the Plan as the holder of that Claim. Dkt No. 2820; Fredericks Decl. at ¶ 18.

On November 20, 2019, following good faith efforts to resolve certain issues arising from Schwebel's decision (on behalf of the putative Class) to exercise the "equity election" under the Plan, the Parties executed the long-form Stipulation of Settlement. *Id.* at ¶ 19.

SUMMARY OF THE SETTLEMENT

Under the Settlement the Class will receive a non-priority unsecured Allowed Claim for the Class POC in the amount of $12,000,000 (or roughly 54.5% of the maximum Allowed Claim

that Schwebel believes could have been obtained had Schwebel prevailed on all matters relating to the Class POC; *see* §I.B(i) below). After the Settlement Effective Date occurs, the consideration payable on the Allowed Claim will be transferred to the Settlement Fund. Because Schwebel, on advice of its financial advisor (Dundon Advisors LLC), has exercised the "equity election" under the Plan, the Settlement Fund will initially be funded with shares of New Common Stock (as defined in the Plan). Class Counsel, upon the advice of its financial advisor, intend to sell (and convert to cash) the New Common Stock promptly after it is received, consistent with their fiduciary duty to avoid selling at an unreasonable discount from the shares' fair value. The Settlement also provides for the Parties to retain (subject to the Court's approval) Heffler Claims Group as the Claims Administrator that, in addition to administering the Notice Plan, will also distribute checks from the Net Settlement Fund to Class Members in accord with the proposed Plan of Allocation (or such modified allocation plan as the Court may approve). Stipulation, §§3.1, 6.1, 7.1-2, 12. The Settlement's other main terms are:

a) The proposed Class of current and former large and mid-sized FES industrial and commercial customers who paid all or a portion of the disputed Polar Vortex Surcharges (*see* §II below) will be certified for settlement purposes only (Stipulation, §1.67, 5.1);

b) Upon the Settlement Effective Date, each Class member will release all "Released Claimants' Claims" (including all claims arising from their payment of any Polar Vortex Surcharges) as against FES and its Affiliates (*id*., §13.1).

c) Notice- and Administration-related costs incurred in connection with the Settlement will be paid from the Settlement Fund up to a cap of $75,000; and any such costs in excess of $75,000 shall be paid by FES or its bankruptcy estate (*id*., §§6.8, 6.13);

d) Schwebel, as Class Representative, may apply to the Court for a Service Award of $15,000 to compensate for its time and expense in representing the Class (*id*., §9.2);

e) Class Counsel may apply to the Court for a Professional Fees and Expenses Award, including for an award of attorneys' fees to Class Counsel of up to 33⅓ percent of the Gross Settlement Fund, and for payment of reasonable expenses (including the fees and expenses of Schwebel's financial advisor and litigation experts), but with the

proviso that no Fees or Expenses shall be payable until the Settlement Fund has been funded and the Settlement Effective Date has occurred (*id*., §9.1);

f) Debtors represent and warrant that the "Records File" that they have produced to Heffler Claims Group and (in partially redacted form) to Schwebel contains the information reasonably necessary to allow the Claims Administrator to (a) identify each prospective Class member by name and last known address, and (b) calculate the value of each Class member's Recognized Claim Amount (i.e., the amount of Polar Vortex Surcharges it actually paid) under the proposed Plan of Allocation (*id*., §6.3);

g) The Claims Administrator will disseminate the Individual Notice (*see* [Proposed] Preliminary Order at Exhibit A-2) by first class mail to each Class member's last known address as shown in a "Records File" that Debtors have already provided to the the proposed Claims Administrator (Heffler), and shall also direct Class Members to a dedicated settlement website, www.polarvortexsettlement.com, where they can view and download the longer "Website Notice" (*see* Preliminary Order at Exhibit A-1), which will describe in greater detail (a) the claims at issue; (b) the proposed Settlement; (c) class counsels' request for an award of Professional Fees and Expenses and Schwebel's request for a Service Award; (d) each Class Member's rights to "opt out" or to object to the Settlement and any related application, to object to the proposed Plan of Allocation, to dispute the calculation of its "Recognized Claim Amount" contained in its Individual Notice letter, and to attend the Fairness Hearing either in person or through counsel, and how to timely exercise those rights; and (e) the binding effect of the proposed Judgment and release of claims under the Settlement on any Class Members that do not "opt out" (*id*., §6.9-.11);

h) Copies of the Settlement and, when filed, of all papers in support of final approval and in support of any related Professional Fees and Expenses Application, will also be posted on the dedicated Website, and the Claims Administrator will also establish and staff a "1-800" number that Class Members can call with questions (*id*., §6.10-.11 and page 2 of Exhibit A-1 thereto);

i) The Settlement will become Effective only if the Court approves both the Settlement and the Plan, and those approvals become final and non-appealable (*id*., §15).

ARGUMENT[7]

I. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. The Settlement Is Well Within the Range of Possible Approval

Dismissal or compromise of a class action requires Court approval. Rule 23(e)(1)(A). Approval of a proposed class-action settlement is a three-step process: (1) the court must

[7] Unless otherwise noted, in quoted material emphasis is added and internal cites are omitted.

preliminarily approve the proposed settlement; (2) class members must be given notice of the proposed settlement and of their rights to object or "opt out"; and (3) the court must hold a final hearing, after which it must decide whether to finally approve the settlement as fair, reasonable, and adequate. *See*, *e.g*., MANUAL FOR COMPLEX LITIGATION (THIRD), §30.41 at 236 (1995); *In re Telectronics Pacing Sys., Inc*., 137 F. Supp. 2d 985, 1026 (S.D. Ohio 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

The key issue at the instant preliminary approval stage is whether the proposed settlement is "within the range of possible approval." MANUAL FOR COMPLEX LITIGATION (THIRD), §30.41 at 237. In other words, to '"ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing,'" a court must first "determine whether the proposed settlement is potentially approvable." *Berry v. School Dist. of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). A court "bases its preliminary approval of a proposed settlement upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement." *Telectronics*, 137 F. Supp. 2d at 1026. '"If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with[in] the range of possible approval, then the Court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.'" *Id*. at 1015 (quoting MANUAL FOR COMPLEX LITIGATION §30.44 (2d ed. 1985)).

Here, the Parties engaged in extensive arm's-length negotiations, and the proposed Class was represented by experienced counsel. *See also* 4 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §11.41 at 90 (4th ed. 2002) ("There is usually an initial presumption of fairness when a

proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval."). Moreover, Schwebel believes that the Settlement reflects an excellent recovery in the form of an allowed claim in the amount of $12 million, which is equal to roughly 54.5% of all Polar Vortex Surcharges actually paid by Class Members. And the proposed Plan of Allocation not only provides for all Class Members to ultimately receive a distribution check (subject to a $50 minimum payment threshold) representing their *pro rata* share of the recovery, but contemplates a low-cost claims administration process where individual claims are "pre-calculated" based on the Debtors' records without the need for individual claims to be filed, processed, or audited. *See generally* Stipulation at §§6.3-6.5. As further shown below, the proposed Settlement thus merits preliminary approval.

B. The Relevant Criteria for Final Approval Support Preliminary Approval

At the preliminary approval stage, the Court need not and should not determine whether it will ultimately approve the Settlement. However, a preview of the factors that will be relevant to the final approval stage is useful, and confirms that preliminary approval should be granted.

In determining whether a settlement is fair, adequate, and reasonable under Rule 23, courts in this Circuit consider the following factors:

> (a) [T]he likelihood of success on the merits weighed against the amount and from of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest.

In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citing *Granada Invs. Inc. v. DWG Corp*., 962 F.2d 1203, 1205 (6th Cir. 1992) and *Williams v. Vukovich*, 720

F.2d 909, 922-23 (6th Cir. 1983); *accord Rankin v. Rots*, No. 02-cv-71045, 2006 WL 1876538, at *3-*4 (E.D. Mich. June 27, 2006).[8]

i. Likelihood of Success on the Merits vs. the Value of the Settlement

Schwebel believes the Class's claims have merit. Unsurprisingly, however, the Debtors take a different view, and contend (*inter alia*) that (1) the District Court's findings that the contract language was ambiguous meant that the Debtors would be able to vigorously contest Schwebel's contract interpretation theories at summary judgment and at trial, and (2) the Debtors would also be able to successfully assert various affirmative defenses (such as the "voluntary payment doctrine") against Schwebel and every other every Class member (as they had all actually paid the surcharges at issue). Accordingly, success at summary judgment, trial, and likely, appeals is far from certain.[9]

Despite these real litigation risks, under the proposed Settlement the Class will obtain an Allowed Claim of $12 million. This factor thus provides strong support for preliminary approval.

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[8] Similarly, in the bankruptcy context under Rule 9019 (*see* Debtors' separate motion), courts in this Circuit consider (1) the probability of success on the merits; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation and likely expense, inconvenience and delay of further litigation; and (4) the interest of creditors and a proper deference to their reasonable views. *Bard v. Sicherman (In re Bard),* 49 F. App'x 528, 530 (6th Cir. 2002); *In re Bailey,* 421 B.R. 841, 845 (Bankr. N.D. Ohio 2009).

[9] It is axiomatic that in reviewing a proposed settlement courts "do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981). Instead, the court's focus is on whether the agreement is "the product of fraud or overreaching by, or collusion between, the negotiating parties," and whether it appears that '"the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Gardner v. Lafarge Corp.*, No. 99-10176, 2007 WL 1695609, at *5 (E.D. Mich. June 12, 2007), 2007 U.S. Dis. Lexis 42536, at *14-*15 (E.D. Mich. June 12, 2007) (citing *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986)); *accord Williams*, 720 F.2d at 921 ("The Court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties.").

ii. Risks, Expense, and Delay of Continued Litigation

Settlements should represent "a compromise which has been reached after the risks, expense and delay of further litigation have been assessed." *Cardizem*, 218 F.R.D. at 523 (quoting *Williams*, 720 F.2d at 922). "[T]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery," *id*., whereas "settlement avoids the costs, delays, and multitude of other problems." *Telectronics*, 137 F. Supp. 2d at 1013.

Here, the further costs to the Parties and the Court would be considerable absent a settlement, as the Debtors would have continued to vigorously defend against Schwebel's claims through the remainder of discovery, at summary judgment, at trial, and on appeal. The Settlement eliminates the attendant risks, delays, and costs of such further litigation. The benefits to the Class of the "bird in the hand" under the Settlement here thus outweigh the risks of trying to obtain a better result through further litigation. *Cardizem*, 218 F.R.D. at 525.

iii. The Judgment of Experienced Counsel

In deciding whether to approve a proposed settlement, courts "also consider[] the opinion of experienced counsel as to the merits of the settlement." *Id*.; *see also Rankin*, 2006 WL 1876538, at *3-*4 ("The Court will not substitute its business judgment for that of the parties; the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval").

Here, after (a) investigating the claims at issue; (b) defeating Debtors' motions to dismiss and strike class action allegations; (c) obtaining leave from this Court to file the Class POC; (d) conducting significant discovery; (e) retaining and consulting with its merits expert; and (f) retaining a financial expert to assist in negotiating and structuring the Settlement, it is respectfully submitted that the undersigned counsel have developed a firm basis on which to assess the strengths and weaknesses of the claims at issue. Their strong belief that the proposed

Settlement is fair, reasonable, and in the Class's best interest also supports approval.

iv. Amount of Discovery Completed

As noted above, significant document and written discovery in this case has been taken, and the case has been actively and vigorously litigated through contested motions in both this Court and the District Court. This factor therefore also supports preliminary approval.

v. Fairness to Absent Class Members

As stated above, the Settlement reflects a substantial recovery for the Class as a whole, and provides for a *pro rata* distribution of the resulting Net Settlement Fund (after deduction of Court-approved fees and costs) based upon the amount of Polar Vortex Surcharges that each Class member actually paid.[10] This factor thus also supports approval.

vi. Whether the Settlement Is the Product of Arm's-Length Negotiations

Absent contrary evidence, courts presume that the parties negotiated in good faith and that the resulting agreement was reached without collusion. *Telectronics*, 137 F. Supp. 2d at 1016 ('"Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered'") (quoting NEWBERG ON CLASS ACTIONS §11.51 (3d ed. 1992)). This matter was settled after 2½ years of litigation, contested motion practice, and significant discovery. This factor thus also supports approval.

vii. Public Policy Considerations

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement

[10] To reduce costs, and consistent with the similar threshold applicable to claim holders under Article VI.D.4 of the Plan, Class Members whose Recognized Claim Amounts are so small that their *pro rata* share of the Net Settlement Fund would be less than a $50 Minimum Payment Threshold will not qualify for a distribution under the proposed Plan of Allocation (which will also be subject to Court review and approval at the Fairness Hearing).

conserves judicial resources." *Cardizem*, 218 F.R.D. at 530 (quoting *Granada Invs., Inc. v. DWG Corp*., 962 F.2d 1203, 1205 (6th Cir. 1992)). Here, there is no reason to deviate from the strong public interest in favor of this class action Settlement which provides significant monetary and non-monetary relief to the Class. *See also Telectronics*, 137 F. Supp. 2d at 1008-09 ("[b]eing a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement"), *Berry*, 184 F.R.D. at 97 (settlements of class actions are favored).

In sum, the applicable factors[11] that this Court will also ultimately have to weigh again later at the final approval stage ***all*** support preliminary approval here.

II. THE COURT SHOULD PRELIMINARILY CERTIFY THE PROPOSED CLASS

The Parties, for settlement purposes only, seek to certify the following Class:

> All current or former entities categorized as Large or Mid-Sized Commercial or Industrial Business customers of FES in FES's business records that (a) had one or more accounts with FES that were invoiced, by or on behalf of FES, for Polar Vortex Surcharges (a/k/a RTO Surcharges) in 2014, and (b) paid all or a portion of such Surcharges.

The Debtors have already provided the names and current addresses (or last known addresses in the case of former customers) of all Class Members to Heffler Claims Group.

Class certification involves a two-fold analysis. First, courts consider whether the four prerequisites for class certification (numerosity, commonality, typicality, and adequacy) under Rule 23(a) are satisfied. Second, courts must consider, in an action seeking damages, if the relevant Rule 23(b)(3) requirements (predominance and superiority) are met. *Bent v. ABDM Ltd.*, 439 B.R. 475, 481-82 (Bankr. S.D. Ohio 2010). All of these requirements are satisfied here.

[11] The final factor, Class's reaction and existence of any objections, is appropriately considered at the final approval stage, after Notice to the Class Members has been issued.

A plaintiff satisfies its burden of showing that certification is merited by providing "an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled." *Pipefitters Local 636 Ins. Fund. v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 629 (6th Cir. 2011). In determining whether Rule 23's requirements have been met, courts avoid engaging in "free-ranging merits inquiries" at the certification stage, and must resolve factual disputes only to the extent necessary to determine compliance with Rule 23. *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 460, 466 (2013) (merits issues may be considered *only* to the extent "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," as the purpose of the class certification analysis is not to decide the merits but simply "to select the method best suited to adjudication of the controversy fairly and efficiently").

A. The Class Meets the Four Requirements of Rule 23(a)

Numerosity. Rule 23(a)(1) tests whether the class is "so numerous that joinder of all class members is impracticable." Classes of 40 or more are routinely found to be sufficient to satisfy numerosity. *See Ganci v. MBF Inspection Srvcs, Inc*., 323 F.R.D. 249, 255 (S.D. Ohio 2017) (certifying class of 67). Here, based on Debtors' books and records, there are 36,345 members of the proposed Class. Fredericks Decl., ¶ 22. Numerosity is thus easily satisfied.

Commonality. Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Commonality is established where class-wide proceedings may "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also Sprague v. Gen. Motors Corp*., 133 F.3d 388, 397 (6th Cir. 1998) ("What we are looking for is a common issue the resolution of which will advance the litigation."). However, "[t]his provision does not demand that all questions of law and fact raised in the complaint are common to the class. 'The standard is not that demanding.'" *Bobbitt v. Acad. of Court Reporting, Inc.*, 252 F.R.D. 327, 338 (E.D. Mich. 2008); *In re CommonPoint*

Mortg. Co., 283 B.R. 469, 477 (Bankr. W.D. Mich. 2002) (same). Indeed, even "a single common question will do." *Wal-Mart*, 564 U.S. at 359.

Here, Schwebel alleges a pattern of activity by FES, common to all Class Members, involving FES's common breach of substantially identical contract terms. Compl., ¶¶2, 15; Declaration of Michael Brakey, Dkt No. 1179-1, ¶¶13-14; Fredericks Decl. ¶24. As another bankruptcy court in this Circuit has noted, '"[c]laims arising out of standard documents present a classic case for treatment as a class action,'" and "when [a] class action arises from contracts that were virtually identical . . . 'common questions of law and fact abound'"). *CommonPoint*, 283 B.R. at 477. Common questions of law or fact here include:

- whether the common language of the "pass-through events" clause in FES's standard contracts precluded FES from "passing through" the Polar Vortex Surcharges to Class members;
- whether FES's conduct in invoicing Class members breached those contracts; and
- the appropriate measure of damages.

Compl., ¶28. Such common questions are central to each Class Member's claim, and are amenable to resolution on a class-wide basis.

Typicality. Typicality requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3). "The test for typicality, like commonality, is not demanding." *Rockey v. Courtesy Motors, Inc*., 199 F.R.D. 578, 584 (W.D. Mich. 2001). Importantly, '"[t]ypical does not mean identical, and the typicality requirement is liberally construed.'" *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 185 (S.D. Ohio 2012). A named plaintiff's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [its] claims are based on the same legal theory." *In re Am. Med. Sys., Inc*., 75 F.3d 1069, 1082 (6th Cir. 1996); *Swigart*, 288 F.R.D. at 185. Typicality is thus readily met when '"the class representative's claims arise from

a contract similar to that of the putative class members.'" *CommonPoint*, 283 B.R. at 477-78 (quoting 5 MOORE'S FED'L PRAC. ¶23.24, at 23-104 (3d ed. 1997)). As in *CommonPoint*, Schwebel's claims here are typical of those of the other Class Members, as they are all based on FES's common course of conduct in allegedly breaching common contract language.

Adequacy. Rule 23(a)(4) requires a representative plaintiff to be able to fairly and adequately represent the class's interests. In the Sixth Circuit, this means that: (1) the proposed representative '"must have common interests with unnamed members of the class" and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Am. Med. Sys.*, 75 F.3d. at 1083. Here, Schwebel and the Class have a common interest pursuing their alleged common claims, and neither Schwebel nor its counsel are unaware of any disabling conflicts between Schwebel and the other Class Members. Fredericks Decl. ¶¶ 26, 33.

It is also respectfull submitted that Schwebel has retained qualified counsel who have vigorously and diligently represented the Class's interests. *See* Fredericks Decl. ¶ 27; *see also CommonPoint*, 283 B.R. at 478 (adequacy shown where named plaintiffs' two law firms "appear to be experienced in class action . . . bankruptcy law"). Adequacy is thus met.

B. The Proposed Class Meets the Requirements of Rule 23(b)(3)

The Class also meets Rule 23(b)(3)'s predominance and superiority tests.

Predominance. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and a claimant must show that the issues "that are subject to generalized proof, and thus applicable to the class as a whole, [. . .] predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). But a movant "need not prove that every element [of its claim] can be established by

classwide proof." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc*., 863 F.3d 460, 468 (6th Cir. 2017), and predominance is met as long as a common question "is at the heart" of the action. *Powers v. Hamilton Co. Pub. Defender Comm'n*., 501 F.3d 592, 619 (6th Cir. 2007).

Courts routinely hold that "[c]ases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers*, 501 F.3d at 619. Indeed, as one court in this Circuit held in another class action that also involved allegedly improper surcharges:

> [Even if] certain aspects of Defendants' contracts with customers may have varied, [plaintiffs' claim] that the addition of a . . . surcharge to customers' invoices was a breach of contract is common to all members of the putative class and predominates over any individual differences that may exist among the contracts. . . . That is to say, Plaintiffs have satisfied the predominance requirement as to the claim for breach of contract because the essence of [that] claim, for each Plaintiff, would be whether the surcharge that Defendants allegedly added to customers' invoices constituted a breach.

Durant v. ServiceMaster Co., 208 F.R.D. 228, 232-33 (E.D. Mich. 2002) (certifying class); *see also, e.g., Cobb v. Monarch Fin. Corp*., 913 F. Supp. 1164, 1170 (N.D. Ill. 1995) ("claims arising out of form contracts are particularly appropriate for class action treatment"); *Mortimore v. F.D.I.C*., 197 F.R.D. 432 (W.D. Wash. 2000) (certifying breach of contract claim against defendant banks arising out of form agreements); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 122 F.R.D. 177 (E.D. Pa. 1988) (certifying class of customers who alleged that broker breached common contracts by charging improper mark-ups on certain bonds); *Heartland Commc'ns., Inc. v. Sprint Corp*., 161 F.R.D. 111, 116 (D. Kan. 1995) (certifying class involving common challenge to virtually identical contract provision that was common to agreements entered into by all class members).

Here, whether the costs that FES incurred due to the Polar Vortex were the result of a "pass-through event" – and whether FES's "pass-through" of the Polar Vortex Surcharges to its customers was a breach of contract – is ***the*** central issue, and would turn on common evidence as applied to a common contract provision that would ultimately result in a common determination

of the issue that will apply equally to all Class Members. Fredericks Decl. ¶ 30. Predominance is therefore satisfied.[12]

Superiority. Rule 23(b)(3) requires a class action "[to be] superior to other available methods for fairly and efficiently adjudicating the controversy," after taking into account: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; and (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Rule 23(b)(3)(A-C).[13]

While there might be some Class Members who had big enough claims to justify litigating them on their own, to the best of Schwebel's counsel's knowledge none have done so (and there would likely be statute of limitations and/or bar date issues if any were to try to do so now). Fredericks Decl. ¶32. This further confirms that this is not a case where Class Members had strong interests in "individually controlling" the prosecution of the claims at issue. By contrast, and even assuming no bar to individual claims, denial of certification would either (i) vastly increase the number of claims that the Court would have to resolve individually; or (ii) result in a situation where many Class Members (whether through lack of knowledge, reluctance or inability to litigate individual proofs of claim, or a combination thereof) do not submit claims

[12] Moreover, "the presence of affirmative defenses against various class members . . . will not usually bar a finding of predominance of common issues," as individual defenses will defeat certification of a class only if they are the central focus of the action. NEWBERG ON CLASS ACTIONS §4.26 (3d ed.); *Garrish v. UAW*, 149 F. Supp. 2d 326 (E.D. Mich. 2001) (certifying breach of contract claims as defendant's common course of conduct remained predominant issue regardless of any affirmative defenses); *Lauber v. Belford High School*, No. 09-cv-14345, 2012 WL 5822243, at *3 (E.D. Mich. Jan. 23, 2012) (same). Indeed, affirmative defenses often raise additional common issues that only further strengthen the grounds for class certification. *See, e.g., Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 45 (S.D.N.Y. 2008).

[13] A fourth factor, whether there will be "difficulties in managing a class action," is inapplicable in the context of a settlement. *See Amchem*, 521 U.S. at 620.

– thereby increasing administrative burdens and/or leaving hundreds or thousands of otherwise qualifying claimants uncompensated. In short, granting class treatment here advances important policy goals of compensating damaged parties, deterring wrongful conduct, and insuring that even relatively smaller claimants get their "fair share" of the debtors' remaining assets, and is thus a case that "call[s] for employing the class device" to vindicate the basic equitable purposes that bankruptcy courts exist to serve. *Matter of American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1998) (applying Bankruptcy Rule 7023 to class claim). And because FES is in bankruptcy, this Court is plainly a "desirable" forum under Rule 23(b)(3)(C). Superiority is thus also easily satisfied.

III. THE COURT SHOULD APPOINT SCHWEBEL AS CLASS REPRESENTATIVE AND THE UNDERSIGNED COUNSEL AS CLASS COUNSEL

Schwebel easily meets Rule 23(a)(4)'s adequacy test, as it has no conflicts with other Class Members, has retained experienced counsel, and has diligently pursued the Class's claims. *See* §II.A above. Schwebel should therefore be appointed Class Representative.

In appointing class counsel, courts must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Rule 23(g)(1)(A)(i)-(iv). Here, it is uncontested that proposed class counsel, Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Meyers, Roman, Friedberg & Lewis LLP ("Meyers Roman") are highly qualified to represent the class, as they combine the bankruptcy law and general expertise of Meyers Roman with the experience of a national class

action firm, Scott+Scott.[14] *See CommonPoint*, 283 B.R. at 478 (appointing as co-class counsel two firms that "appear to be experienced in class action[s] [and] bankruptcy"). The undersigned counsel also respectfully submit that their work in investigating the claims, defeating FES's motion to dismiss in the District Court, pursuing the claims into discovery in this Court, and their work on negotiating the proposed Settlement, also merits appointing them as Class Counsel.

IV. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

A. The Proposed Notice Contains the Requisite Content

Notice to members of a class certified pursuant to Rule 23(b)(3) "must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if [it] so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

The proposed Notice Plan meets all of these requirements, and in addition also provides that each Class member will also be advised (in its Individual Notice letter) of the size of its "Recognized Claim Amount" (namely, the amount of Polar Vortex Surcharges it paid) based on Debtors' books and records. *See* [proposed] Preliminary Order at Exhibit A-2.[15]

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[14] Information regarding the qualifications of the Meyers, Roman and Scott+Scott law firms is available at www.meyersroman and www.scott-scott.com, respectively.

[15] The Notice will also advise each Class member of how it can dispute this determination of its "Recognized Claim Amount" in the (unlikely) event it can produce payment records showing that its Polar Vortex Surcharge payments were greater than what FES's own records show.

The Individual Notice letter, in addition to summarily describing the nature of the action and the proposed Settlement and Class Members' rights with respect thereto, also directs each Class Member to a much more extensive Website Notice that can be viewed on and downloaded from a dedicated settlement website, www.polarvortexsettlement.com. This more detailed notice (*see* [proposed] Preliminary Order at Ex. A-1) sets forth a history of the action, the class definition, describes the claims and defenses asserted, summarizes the material terms of the Settlement, and advises Class Members of their various rights and how to exercise them (including their rights to object, to exclude themselves from the Class ("opt out"), to appear at the Fairness Hearing, and to appear by counsel) – and of the relevant deadlines for exercising those rights. It also advises that any judgment, whether favorable or not, will bind all Class Members that do not request exclusion. In sum, the proposed Notice Plan complies with Rule 23(c) by giving Class Members "sufficient information ... to permit an intelligent decision [in] language framing the key elements in the proceedings with both clarity and objectivity." 3 NEWBERG ON CLASS ACTIONS (5th ed. 2019), §8.31 at 252; *Williams v. Bluestem Brands, Inc.*, No. 8:17-cv-1971, 2019 WL 1450090, at *5 (M.D. Fla. Apr. 2, 2019) (mailed postcard notice combined with longer website notice "clearly" sufficed to give class members adequate notice).

B. The Proposed Combination of Mail and Website Notice Satisfies the "Manner of Notice" Requirement

"For any class certified under Rule 23(b)(3), . . . the court must direct to class members the best notice . . . practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2)(B).

Consistent with Rule 23 and due process, the Notice Plan requires the Claims Administrator to mail, by first class mail, the individualized summary Notice Letter to each class member at their current or last known address, as reflected in the Debtors' books and records.

Moreover, to the extent that any such notices are returned due to a stale address, the Claims Administrator will access on-line databases to try to identify a corrected address, and will promptly re-mail the Individual Notice to that address. To save on costs and avoid the added expense of printing and mailing a "long form" notice to all Class Members, the shorter Individual Notice letter will refer the recipient to the dedicated www.polarvortexsettlement.com website for a copy of the much longer "Website Notice", as well as a "1-800" telephone number that will be answered by the Claims Administrator. Inasmuch as all of the tens of thousands of Class Members here are large-to-mid-size industrial or commercial *businesses*, it is reasonable to expect that all of them have ready access to the internet – and even in cases involving mostly individuals (such as consumer class actions), courts today routinely approve notice plans that, as here, combine mailed individual summary notices (including postcards) with a much longer website-based notice and dissemination of a 1-800 helpline number. *See e.g. Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 279814, at *12 (E.D. Mich. Jan. 23, 2017); *Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280, 2019 WL 2269958, at *3 (S.D. Cal. May 28, 2019); *Williams*, 2019 WL 1450090, at *5.

Finally, Schwebel notes that counsel for both sides developed the Notice Plan in conjunction with an experienced claims administration firm (the Heffler group), which concurs that, based on its experience, the proposed Notice Plan is appropriate. Fredericks Decl. ¶34.

CONCLUSION

For all of the foregoing reasons, Class Claimant respectfully submits that the Court should preliminarily approve the Settlement, preliminarily certify the proposed Class, approve the proposed Notice Plan, and enter the Parties' [Proposed] Preliminary Approval Order.

Dated: November 20, 2019

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Counsel for Proposed Class Representative Schwebel and the Proposed Class

EXHIBIT A

[Proposed] Preliminary 7023 Approval Order

[EXHIBIT A]

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

ORDER PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 7023 (A) PRELIMINARILY APPROVING PROPOSED SETTLEMENT; (B) CERTIFYING SETTLEMENT CLASS FOR SETTLEMENT PURPOSES ONLY, (C) APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL; (D) APPROVING THE FORM AND MANNER OF NOTICE TO SETTLEMENT CLASS MEMBERS; AND (E) SCHEDULING A FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF THE SETTLEMENT

Upon consideration of the *Motion of Schwebel Baking Company Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 7023 to (A) Preliminarily Approve Settlement (B) Preliminarily Certify Proposed Settlement Class; (C) Appoint Schwebel Baking As Class Representative And Its Counsel As Class Counsel; (D) Approve Form And Manner Of Notice; (E) Schedule Fairness Hearing and (F) Grant Related Relief* [Dkt. No. ___] (the "Preliminary 7023 Approval Motion")[2], and the Court having considered the Preliminary 7023 Approval Motion and any objections or oppositions thereto; and this Court having found that proper and

[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 L.L.C. (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 them in the Settlement Agreement attached as an exhibit to the Preliminary 7023 Approval Motion and thereto.

sufficient notice of the Preliminary 7023 Approval Motion has been given; and the Court having determined, based on the range of possible outcomes and the cost, delay, and uncertainty associated with further litigation, that the proposed Settlement appears to be sufficiently fair, reasonable and adequate to the members of the proposed Settlement Class (as well as administratively cost-effective and consistent with the interests of the Debtors' estates) such as to warrant preliminary approval and the granting of the requested relief; and the Court having determined that the legal and factual bases set forth in the Preliminary 7023 Approval Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The Court reaffirms it prior Order. ECF Doc. 1451, directing the application of Bankruptcy Rule 7023 to these Bankruptcy Proceedings with respect to class certification matters relating to resolution of the Class Proof of Claim filed by Schwebel (claim no. 934), including with respect the proposed Settlement.

3. The Settlement, as set forth in the Settlement Agreement, is preliminarily approved pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 7023 (and Fed. R. Civ. P. 23 as applicable under Rule 7023), subject to final approval at the Fairness Hearing.

4. The Settlement Class is certified pursuant to Federal Rule of Civil Procedure 23, as applicable through Bankruptcy Rule 7023, and is comprised of all current or former Large and Mid-Sized Commercial or Industrial Business Customers of FES (as reflected in Debtors' books and records) that (a) had one or more accounts with FES that were invoiced, by or on behalf of

FES, for Polar Vortex Surcharges in 2014; and (b) paid all or a portion of such Polar Vortex Surcharges, excluding any such customer that has settled or released any claims against the Debtors relating to its payment of all or any portion of its Polar Vortex Surcharges; provided, however, that such Settlement Class shall be certified for settlement purposes only.

5. Schwebel is appointed Class Representative for the Settlement Class.

6. Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Meyers, Roman, Friedberg & Lewis ("Meyers Roman") are appointed Class Counsel for the Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(1)(B).

7. For purposes of voting on Debtors' Plan (as may be amended or modified from time to time), pursuant to Bankruptcy Rule 3018(a), Claim No. 934 (the Class Proof of Claim) shall be temporarily allowed (to the extent it has not already been allowed) in the amount of $12,000,000.00.

8. The forms of Website Notice and Individual Notice, substantially in the form attached to the Settlement Agreement as Exhibits A-1 and A-2 respectively, are hereby approved.

9. Issuance of the Individual Notice to the Settlement Class Members, as identified in the Records File provided to the Claim Administrator by the Debtors, by first class mail, postage prepaid, at their last known address is reasonable and the best notice practicable under the circumstances and constitutes due and sufficient notice to all potential Settlement Class Members in compliance with the notice requirements of Federal Rule of Civil Procedure 23 and due process.

10. The Court hereby appoints Heffler Claims Group as the Claims Administrator. The Claims Administrator shall have the responsibilities given to it under the Settlement

Agreement, and shall, as set forth herein and in the Settlement Agreement, (a) cause the Individual Notices to be prepared and mailed to Settlement Class Members and (b) cause the Website Notice to be published on a dedicated settlement website (the "Settlement Website").

11. Because the effectiveness of the proposed Settlement (i.e., the occurrence of the "Settlement Effective Date") is conditional upon Debtors' proposed Plan becoming effective, the Court finds that it is cost-effective and otherwise fair, reasonable and appropriate to delay the issuance and mailing of the Individual Notice until after the Debtors' Plan has become effective.

12. Subject to ¶18 below, however, the Claims Administrator shall (a) complete the mailing of the Individual Notice to Settlement Class Members and (b) cause the Website Notice to be published on the Settlement Website) as soon as practicable after the Plan Effective Date (*i.e.,* the date the Debtors' Plan becomes effective), and in no event less than sixty (60) days before the date (or any revised date) of the Fairness Hearing scheduled under ¶18.

13. The reasonable expenses of preparing, printing and mailing the Individual Notice to Settlement Class Members and of establishing the Settlement Website, as required by this Order, and of all other fees, costs or expenses relating to the noticing or administration of the Settlement, shall be payable as provided in the Settlement Agreement, subject to review and approval by the Court.

14. Each Settlement Class Member shall be bound by the terms of the Settlement Agreement and the proposed Final Approval Order, unless it requests exclusion from the Settlement Class in a timely and proper manner, as provided herein. In order to be considered a valid exclusion request, one or more duly authorized representatives of a Settlement Class Member must mail a written request to be excluded from the Settlement and the Class that it is *received* at least thirty (30) calendar days before the Fairness Hearing (the "Opt-Out Deadline"),

and that otherwise complies with the requirements of this paragraph. Any requests for exclusion must be sent either (a) by first class mail, in which case they must be postmarked at least five business days before the Opt-Out Deadline, or (b) by Priority Express Mail or by a reliable delivery service (such as Federal Express, UPS or DHL) for delivery on or before the Opt-Out Deadline, and addressed to the Claims Administrator at the following address:

Heffler Claims Group
Attn:_____
[Insert address]

Any such request must also (1) be signed, (2) include the printed name, business title or position, address and business telephone number of the person(s) executing the opt-out request on behalf of the Settlement Class Member, (3) clearly manifest an intent to exclude the Settlement Class Member from the Settlement Class; and (4) include a statement that the person(s) executing the request is authorized to do so on behalf of the Settlement Class Member, and attach a separate document (such as a corporate resolution or power of attorney) if the person(s) executing the request is not an officer or other duly-authorized employee of a Settlement Class Member that is a corporate entity. Requests for exclusion must be individually made on behalf of each Settlement Class Member who seeks exclusion. Any class, mass, or collective requests for exclusion will be invalid. The Claims Administrator shall promptly furnish to counsel for Debtors and Class Counsel copies of any exclusion requests that come into its possession. Within 20 days after the Opt-Out Deadline, any Party to the Settlement Agreement may file a motion with the Court challenging the validity of any particular request for exclusion. At the Fairness Hearing, Class Counsel shall identify for the Court any person(s) that may have sought to opt-out of the Class.

15. A Settlement Class Member may object to the fairness, reasonableness, or adequacy of the Settlement or the Plan of Allocation, or to the fairness and reasonableness of any proposed award of attorneys' fees and expenses (including any service award to the Settlement Class Claimant). The Court will consider objections only if such objections and any supporting papers are filed in writing with the Clerk of Court, United States Bankruptcy Court for the Northern District of Ohio, John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio 44308. Copies of objections and all supporting papers must be both (i) *received* by the Clerk of the Court at least 20 days prior to the date of the Fairness Hearing, and (ii) served (by certified or registered mail, return receipt requested, or by a reliable delivery service for overnight or two-day delivery) at least 20 days prior to the date of the Fairness Hearing upon each of the following:

William C. Fredericks
SCOTT+SCOTT, ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Ave., 17th Floor
New York, NY 10169
Tel: (212) 223-6444
Fax: (212) 223-6334

(on behalf of the Settlement Class)

Seamus C. Duffy
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market St. #4100
Philadelphia, P.A. 19103
Telephone: (215) 965-1200
Facsimile: (212) 965-1210

(on behalf of the Debtors)

In its objection, any Settlement Class Member who objects must (a) state all supporting bases and reasons for the objection; (b) provide a statement or attach documentary evidence confirming that the person submitting the objection has been authorized to do so on behalf of the Settlement Class Member; (c) clearly identify any and all witnesses, documents and any other evidence of any kind that it may seek to proffer at the Fairness Hearing in connection with its objection; and (d) provide a summary description of the substance of any testimony that it may

wish to offer itself or through any supporting witnesses in support of its objection. Any Settlement Class Member who does not object in the manner prescribed herein (and as further described in the Settlement Class Notice) shall be deemed to have waived such objection and shall be foreclosed from making any objection to (A) the fairness, adequacy or reasonableness of the Settlement, the Plan of Allocation, or any Final Approval Order that may be entered that approves the Settlement and allows the Class Proof of Claim, and to any proposed award of attorneys' fees and expenses.

16. Any objector who files and serves a timely objection in accordance with the immediately preceding paragraph may also request permission to appear at the Fairness Hearing, either in person or through counsel retained at the objector's expense. Objectors or their counsel intending to appear at the Fairness Hearing must follow the procedures as prescribed in the Settlement Class Notice and in the immediately preceding paragraph 15. Any objector who does not timely file and serve a notice of intention to appear in accordance with this paragraph and the procedures set forth in the Notice shall not be permitted to appear at the Fairness Hearing, except for good cause shown

17. Class Counsel shall file, no later than forty-five (45) days prior to the Fairness Hearing, motions for final approval of the Settlement and the proposed Plan of Allocation, and any Professional Fees and Expenses Application (and any application for a Service Award to the Class Representative), together with any papers in support thereof. Class Counsel shall also cause the Claims Administrator to promptly post such any such filed materials on the Settlement Website.

18. Consistent with the Court's intention to schedule the Fairness Hearing regarding the Settlement on a date that is at least seventy-five (75) days after the Plan Effective date (and to

allow time for the Individual Notices to be printed and mailed to Settlement Class Members at least sixty (60) days *before* the Fairness Hearing), the Fairness Hearing is hereby scheduled to be held on _____, **2020, at ____ __.m., prevailing Eastern Time**, at the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, located in the John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio 44308. However, should the Plan Effective Date ultimately occur on a date that is less than 75 days before the date set for the Fairness Hearing in the preceding sentence, or for other good cause at any time prior to actual issuance of the Notice, counsel for the Parties shall promptly ask the Court to set a new date and time for the Fairness Hearing that is at least 75 days after the Plan Effective Date (in which case, absent contrary Order of the Court, the deadline for the Claims Administrator to issue the Notice under ¶12 shall be reset to the first business day falling fifteen (15) days after entry of the Order setting a new date and time for the Fairness Hearing.

19. The Fairness Hearing may also be rescheduled or continued from time to time by the Court even after issuance of the Notice, without further notice to the Parties or to any Settlement Class Members beyond (a) the Court's entry of an order rescheduling or continuing the Fairness Hearing, or (b) the posting of appropriate Notice of such order and the rescheduled Fairness Hearing date on the Settlement Website.

20. The Court shall retain jurisdiction over all matters arising pursuant to or related to the relief granted by this Order.

DATED: _____, 2019

_____
Hon. Alan M. Koschik

United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

NOTICE TO SETTLEMENT CLASS MEMBERS OF (1) PROPOSED SETTLEMENT OF CLASS PROOF OF CLAIM ARISING FROM POLAR VORTEX SURCHARGES; (2) CERTIFICATION OF SETTLEMENT CLASS AND APPOINTMENT OF CLASS COUNSEL AND SETTLEMENT CLASS CLAIMANT; (3) RIGHTS TO OPT OUT OR OBJECT; AND (4) SETTING OF DATE FOR FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF PROPOSED SETTLEMENT

Based on records maintained by FirstEnergy Solutions ("FES") or its affiliates, your company or business ("You" or "Your Business") is a member of the Settlement Class (as defined below) that has been certified for settlement purposes only in connection with Claim No. 934 (the "Class Proof of Claim") as filed in the above-captioned bankruptcy proceedings. The Class Proof of Claim is based on breach of contract claims asserted on behalf of the Settlement Class relating to certain "Polar Vortex Surcharges" that FES charged Settlement Class Members in connection with unusually cold weather conditions experienced in FES's service area in early 2014. This Notice provides important information with respect to the Class Proof of Claim and proposed class-wide resolution of the matter (the "Settlement") that has been preliminarily approved by the U.S. Bankruptcy Court for the Northern District of Ohio (the "Bankruptcy Court" or the "Court")[1].

[1] The Court is also sometimes referred to herein as "the "Bankruptcy Court" to distinguish it from the U.S. District Court ("District Court"), where the claims at issue were first asserted. Other capitalized terms used in this Notice and not otherwise defined have the meanings given them in the Parties' Stipulation of Settlement (the "Settlement Agreement"), which sets forth the full terms of the Settlement. A complete copy of the Settlement Agreement is available at www._____.com.

The Settlement applies to a certified Settlement Class consisting of all current or former Large and Mid-Sized Commercial or Industrial Business Customers of FES that (a) had one or more accounts with FES that were invoiced, by or on behalf of FES, for Polar Vortex Surcharges in 2014; and (b) paid all or a portion of such Polar Vortex Surcharges, but excluding any such customer that has settled or released any claims against the Debtors relating to its payment of all or any portion of its Polar Vortex Surcharges.

IF YOU DO NOT OBJECT TO THE PROPOSED SETTLEMENT (AND THE SETTLEMENT IS APPROVED AND BECOMES EFFECTIVE), YOU DO NOT HAVE TO TAKE ANY ACTION IN ORDER FOR YOUR BUSINESS TO RECEIVE THE PAYMENT (IF ANY) FROM THE NET SETTLEMENT FUND TO WHICH YOUR BUSINESS MAY BE ENTITLED BASED ON THE "RECOGNIZED CLAIM AMOUNT" THAT HAS ALREADY BEEN CALCULATED FOR YOUR BUSINESS. EACH RESPECTIVE CLASS MEMBER'S "RECOGNIZED CLAIM AMOUNT" IS SET FORTH IN THE SEPARATE LETTER (THE "INDIVIDUAL NOTICE") THAT HAS BEEN MAILED TO EACH SETTLEMENT CLASS MEMBER. If You have misplaced or did not receive a copy of the Individual Notice letter that sets forth the amount of Your Business's Recognized Claim Amount, You can obtain another copy by emailing the Claims Administrator at _____.com or by calling it at 1-800-__-___.[2]

If You disapprove of the Settlement, the proposed Plan of Allocation, or the Fee and Expense Application, You may object by following the procedures described below. You may also request to have Your Business excluded from the Settlement Class and the Settlement by

[2] If You wish the challenge the calculation of Your "Stated Recognized Claim Amount" as set forth in Your Individual Notice, you may do so by following the procedures described below in the answer to Question 8 below.

following the procedures described below (in which case Your Business will *not* be included in, or recover anything under, the Settlement). *See* Answers to Questions 10-11 and 14-15 below. You do *not* have to appear in Court in connection with any matters relating to the Settlement.

PLEASE READ THIS NOTICE CAREFULLY. A FEDERAL BANKRUPTCY COURT HAS AUTHORIZED THIS NOTICE. THIS IS NOT A SOLICITATION.

This Notice advises You of the proposed Settlement of breach of contract claims that were first asserted by Schwebel Baking Company ("Schwebel Baking" or the "Settlement Class Claimant"), on behalf of itself and a proposed class, in a lawsuit it filed against FES in the U.S. District Court for the Northern District of Ohio in May 2017 captioned *Schwebel Baking Company v. FirstEnergy Solutions Corp.*, 4:17-cv-00974-BYP (N.D. Ohio) (the "District Court Action"). After FES and certain of its related companies (collectively, "Debtors")[3] filed for bankruptcy protection in March 2018, the claims at issue continued to be litigated in the Bankruptcy Court under the caption *FirstEnergy Solutions Corp., et al.*, No. 18-50757 (Bkrtcy N.D. Ohio) (the "Bankruptcy Proceedings"). Both the complaint in the District Court Action and the Class Proof of Claim in the Bankruptcy Proceedings were filed by the Settlement Class Claimant on behalf of the Settlement Class. The Settlement Class Claimant and Debtors (including FES) are referred to collectively as the "Parties."

The Bankruptcy Court has preliminarily approved the proposed Settlement, which would settle all class-wide claims relating to the Polar Vortex Surcharges asserted in the District Court Action and the Bankruptcy Proceedings (collectively, the "Action"), and has scheduled a hearing (the "Fairness Hearing") to consider whether to grant final approval to the Settlement and Plan of

[3] "Debtors" includes FES and First Energy Nuclear Operating Company, and their respective subsidiaries, including FE Aircraft Leasing Corp, FirstEnergy Generation, LLC, FirstEnergy Generation Mansfield Unit 1 Corp; First Energy Nuclear Generation, LLC, and Norton Energy Storage L.L.C.

Allocation as fair, reasonable and adequate. At the Fairness Hearing, the Bankruptcy Court will also consider Class Counsel's application for an award of fees and expenses (including an award of no greater than $15,000 to Schwebel Baking for its time and commitment in service to the Settlement Class) (the "Fee and Expense Application"). The Fairness Hearing is scheduled to be held before the Hon. Alan M. Koschik, U.S. Bankruptcy Court Judge, on [_____, 2020, at _____ __.m.], prevailing Eastern Time, at the U.S. Bankruptcy Court for the Northern District of Ohio, located in the John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio, 44308.

Summary of the Settlement. In sum, the Settlement provides that, in exchange for releasing Debtors and their Affiliates[4] from the Polar Vortex Surcharge-related claims at issue (the "Released Claims"), the Settlement Class will receive an "Allowed Claim" in the pending Bankruptcy Proceedings in the amount of $12,000,000 (which Class Counsel estimate is roughly 55% of the maximum possible allowed claim that could have been obtained on behalf of the Settlement Class had the Settlement Class Claimant prevailed on behalf of the Settlement Class on every disputed issue in connection with the Action and the Class Proof of Claim).

Because, *inter alia*, the Settlement Fund that will be created for the benefit of Settlement Class Members will initially be funded with equity securities ("New FES Common Stock") in the reorganized, post-bankruptcy FES – and because Class Counsel will have to sell those securities and convert them to cash before any payments are made to Settlement Class Members -- it is not possible to know with certainty what the ultimate cash value of the Settlement Fund will be. Class Counsel, on behalf of the Settlement Class, intend to sell (and convert into cash)

[4] "Affiliates," as used herein, refers to an entity's past and present trustees, directors, partners, officers, employees, contractors, auditors, principals, agents, attorneys, advisors, predecessors-in-interest, successors-in-interest, and parent and subsidiary companies.

any New FES Common Stock received as promptly as possible, consistent with their fiduciary duties to avoid selling such securities at an unreasonable discount from their fair value.

Debtor FES, in its Court-approved Disclosure Statement dated May 30, 2019, projected the value of "FES Single-Box Unsecured [Creditor] Claims" (the category of creditor claims into which the Settlement's "allowed claim" falls) will be 31.4% of the amount of such claims.[5] Class Counsel did not participate in the creation of and has not independently validated the foregoing valuation projection, but that projection appears to reflect the most recent valuation estimate that is publicly available from the materials that have been filed in Debtors' ongoing bankruptcy proceedings. Applying this estimated 31.4% bankruptcy recovery rate, the estimated value of the Settlement here to Settlement Class Members would be approximately $3.768 million (or 31.4 cents for each dollar of the Class's $12 million Allowed Claim), before deductions for administrative costs and Class Counsel's fees and expenses in connection with litigating and settling the Settlement Class's claims. If the Settlement is approved, the final value of the Settlement, before deductions for administrative costs (capped at $75,000) and any Court award of fees and expenses to Class Counsel (see §13 below), may be either greater or less than $3.768 million due to, *inter alia*, the final amount of all allowed FES Single Box Unsecured Claims, and the final value of the aggregate consideration available to be distributed to all holders of allowed FES Single Box Unsecured Claims, being either greater or lesser than what was projected in Debtor's Disclosure Statement. Class Counsel's ability to realize cash value upon the sale of the New FES Common Stock to be received under the Settlement will also be affected by, *inter alia*, such securities' liquidity, by changes in market conditions prior to the

[5] Because the combined debts of FES (and the other Debtors) exceeded their ability to pay them, all "allowed claims" held by unsecured creditors of FES (and not just the "allowed claim" of the Settlement Class) have been subjected to a "bankruptcy discount" under the Debtors' Court-approved Plan of Reorganization.

occurrence of the Settlement Effective Date, by any market premium or discount to fair value at the time the securities are sold or otherwise converted to cash, and by transaction costs.

The full terms of the Settlement are contained in the Parties' Stipulation of Settlement (the "Settlement Agreement"), which is available at www._____.com. The proceeds of the Settlement, if the Settlement is approved and becomes Effective, will be distributed *pro rata* to Settlement Class Members in accord with the Plan of Allocation described below and the letter (the "Individual Notice") that has been separately mailed to each Settlement Class Member. To avoid the time and administrative expense involved in paying relatively small claims, distributions will not be made to Settlement Class Members who would otherwise be entitled to receive a distribution of less than $___ (the "Minimum Payment Threshold").

Any questions regarding the Settlement, this Notice or the Individual Notice should be directed to Class Counsel as follows: Scott+Scott Attorneys at Law LLP, c/o William C. Fredericks, The Helmsley Building, 230 Park Avenue, 17th Floor, New York, NY 10169-1820, at (212) 223-6444, wfredericks@scott-scott.com. *Please do not contact the Court, as it will not be able to answer your questions.*

SUMMARY OF SETTLEMENT CLASS MEMBERS' OPTIONS IN THIS SETTLEMENT

DO NOTHING *(Note: No Action On Your Part Is Required For You To Receive A Payment if You Are Eligible to Receive One)*	If the Settlement is approved by the Court and becomes Effective, *You are not required to do anything to receive a payment if Your Business is eligible to receive one.* Your allocable portion of the Net Settlement Fund, subject to the Minimum Payment Threshold, will be calculated by the Claims Administrator under the Plan of Allocation (see §[7] below) and mailed to You (at the address to which Your Individual Notice letter was sent) based on the "Recognized Claim Amount" information set forth in Your Individual Notice letter.
REQUEST REVIEW OF THE CLAIMS' ADMINISTRATOR's CALCULATION OF YOUR "RECOGNIZED CLAIM AMOUNT"	The Parties believe that the "Recognized Claim Amount" that has been provided in each Settlement Class Members' Individual Notice letter is reliable. However, if (1) You believe that the Claims Administrator has miscalculated Your "Recognized Claim Amount", and (2) You have supporting documentation to support a larger Recognized Claim Amount, You can ask the Claims Administrator (based on Your additional documentation) to recalculate Your Recognized Claim Amount by following the procedures set forth in §[8] below.
ASK TO BE EXCLUDED FROM THE CLASS AND THE SETTLEMENT ("OPTING-OUT")	This is the only option that potentially allows You to pursue Your own claims or to be part of another lawsuit (at Your own expense) against FES or the other Released Debtor Parties based on the Released Claims covered by this Settlement. Requests for exclusion, prepared and sent in accord with the requirements set forth in §[10] below, must be *received* by the Claims Administrator on or before [_____], 2020. [insert date at least thirty days before the Fairness Hearing]. If You exclude Your Business from the Class, it will *not* participate in the Settlement, and it will *not* receive any payment from the Net Settlement Fund.
OBJECT	Write to the Court about why You do not like the Settlement, the Plan of Allocation, or the Fee and Expense Application. Your Business will still be a member of the Settlement Class. Objections, prepared and sent in accordance with all of the requirements set forth in §[14] below, must be submitted in writing and *received* by the Court and counsel for the Parties on or before [_____], 2020 [insert date at least 20 days before the Fairness Hearing].

GO TO THE FAIRNESS HEARING CURRENTLY SCHEDULED FOR _____, 2020 at ____.m., ET	If You have submitted a timely written objection to the Court and counsel for the Parties, You can ask to speak (including through a lawyer of Your own choice at Your own expense) in Court about the fairness of the Settlement, the Plan of Allocation, or the Fee and Expense Application. Requests to speak must be submitted in writing and *received* by the Court and counsel for the Parties on or before [_____, 2019] [insert date at least 20 days before the Hearing]. *See also* §§16-18 below.

Please Do Not Call the Court with Questions About the Settlement.

SUMMARY OF THIS NOTICE

1. Why Is This Notice Being Provided?

Based on FES's books and records, Your Business paid certain charges that were identified as "RTO Surcharges" on invoices that FES sent Your Business in 2014 in connection with unusually cold "polar vortex" weather conditions experienced in FES's service area in early 2014. Accordingly, if You received a copy of an Individual Notice letter (which contains individualized information concerning Your Recognized Claim Amount and directs the recipient to this "Website Notice" document), You have already been identified as a Settlement Class Member. As a Settlement Class Member, You have the right to know about the proposed Settlement and related matters before the Court decides whether to approve the Settlement. If the Court approves the Settlement and proposed Plan of Allocation, and objections or appeals (if any) are resolved and the Settlement becomes Effective, then (a) the Net Settlement Fund to be created under the Settlement will be distributed to Settlement Class Members pursuant the Plan of Allocation, and (b) the Settlement Class Members will release FES and the other Released Debtor Parties (consisting of Debtors and their Affiliates) from claims based on the RTO Surcharges (hereafter, the "Polar Vortex Surcharges"), as detailed in the Settlement Agreement.

This Notice summarizes the history of the Action, the terms of the Settlement, and Your rights with respect to the Settlement. It is also being made available to inform You of a hearing (the "Fairness Hearing") to be held by the Court to consider the fairness, reasonableness and

adequacy of the Settlement, proposed Plan of Allocation, and Class Counsel's Fee and Expense Application. *See* §[16-18] below for more details about the Fairness Hearing.

The U.S. Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Court") is in charge of this Action. This Notice is not an expression of any opinion by the Court concerning the merits of any claims or defense asserted in the Action, and the Court still has to decide whether to approve the Settlement. If it approves the Settlement, payment to Settlement Class Members based on the Plan of Allocation and their respective Recognized Claim Amounts (*see* §§[7-9] below), subject to the $___ Minimum Payment Threshold, will be made after any appeals are favorably resolved and the Settlement becomes Effective pursuant to its terms.

2. What Is This Action About? What Has Happened So Far?

In this Action, the Settlement Class Claimant, Schwebel Baking, alleges that FES breached its contracts with Schwebel Baking and a class of similarly situated FES business customers who were located within FES's service area (the "Region"), by "passing through" certain surcharges to those customers. More specifically, in February 2014, PJM Interconnection (the regional transmission organization ("RTO") that provided electricity to FES, which FES then resold to FES's customers) charged FES for FES's share of certain unusually high ancillary charges (the "PJM Polar Vortex Charges") that PJM had incurred to maintain a reliable supply of electricity to "retail" electricity suppliers (such as FES) when the Region experienced unusually cold "Polar Vortex" conditions in early 2014. FES then "passed-through" certain of these charges to its business customers by adding an "RTO Surcharge" (or "Polar Vortex Surcharge") to those customers' invoices.

In those invoices, FES identified the amount of each Polar Vortex Surcharge being assessed, and referenced a website that FES business customers could access for more

information about the basis for their Polar Vortex Surcharges. Thereafter, Schwebel Baking and other Settlement Class Members paid FES some or all of the invoiced Polar Vortex Surcharges, even though Schwebel Baking (among other Class Members) had protested to FES that the Surcharges were not authorized by FES's relevant agreements. In response, FES asserted (and has continued to assert) that it was entirely proper under the relevant contract documents for FES to "pass through" and invoice each Settlement Class Member for its respective *pro rata* share of the PJM Polar Vortex Charges.

Several years later, on May 8, 2017, Schwebel Baking filed a complaint against FES (the "Complaint") in the District Court in the matter captioned *Schwebel Baking Company v. FirstEnergy Solutions Corp.*, 4:17-cv-00974-BYP (N.D. Ohio). On behalf of itself and a purported class of similarly situated FES customers, Schwebel Baking alleged claims for breach of contract against FES, asserting that FES was not entitled to pass through any PJM Polar Vortex Charges (which FES had previously paid to PJM) to FES's fixed-rate business customers.

In response, FES denied (and has continued to deny) any and all liability in connection with the claims alleged in the Complaint. FES's Answer to the Complaint also asserted fourteen (14) affirmative defenses, including that (i) the Complaint failed to state a claim for breach of contract; (ii) any claims were in any event also barred by the "voluntary payment doctrine" and/or the equitable doctrines of laches (under which aggrieved persons who unreasonably delay in trying to obtain a recovery may have their claims barred as a matter of equity) and/or waiver and estoppel (because Schwebel Baking and other Class Members had allegedly ratified FES's interpretation of relevant contract terms by later renewing contracts with FES that contained the same terms).

FES also filed a Motion to Dismiss the Complaint (the "Motion to Dismiss") in which FES asserted that the Complaint failed to state a cause of action and that the voluntary payment doctrine barred Schwebel Baking's claims. FES also filed a Motion to Strike the Complaint's class action allegations (the "Motion to Strike") on the grounds that (a) there were material differences in the contracts that different customers had entered into with FES that precluded class treatment; and (b) FES's affirmative defenses, including those based on the voluntary payment doctrine, raised "individual issues of law or fact" such that "common issues" would not "predominate" over individualized issues as required to certify a class. Both Schwebel Baking and FES submitted extensive briefing, affidavits and oral argument on these Motions to the District Court.

In March 2018, the District Court denied the Motion to Dismiss, stating that dismissing the case prior to taking discovery would be proper only if FES's contract interpretation was the "only reasonable construction," and that Schwebel Baking had raised sufficient disputed factual and legal issues to avoid dismissal of its individual claims without first allowing discovery. The District Court also declined to strike the Complaint's class allegations, on the grounds that it would also be more appropriate to decide disputed class certification issues after discovery had been conducted.

On March 31, 2018, Debtors (including FES) filed a voluntary bankruptcy petition for relief under Chapter 11 of Title 11 of the United States Code, thereby commencing the Bankruptcy Proceedings under Case No. 18-50757 (Bkrtcy. N.D. Ohio). Given this bankruptcy filing, in April 2018 the District Court entered an order perpetually staying all proceedings in the District Court Action and closing that case.

On August 20, 2018, Schwebel Baking filed a 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, together with supporting affidavits. The Motion requested that, *inter alia,* the Bankruptcy Court (a) permit Schwebel Baking to file a class proof of claim, and (b) certify a class under Bankruptcy Rule 7023 and Fed. R. Civ. P. Rules 23(a) and 23(b)(3). In connection with that Motion, Schwebel Baking also filed the Class Proof of Claim (claim no. 934) asserting, on behalf of itself and the putative class, an estimated $20,000,000 claim for breach of contract against FES. Pursuant to a stipulation that was so-ordered by the Court on September 25, 2018, the Parties and the Court agreed that: (1) Bankruptcy Rule 7023 should be applied to the Class Proof of Claim; (2) Schwebel Baking would be allowed to file the Class Proof of Claim on behalf of itself and the proposed class; and (3) the Court would defer final decision on class certification until after completion of relevant discovery. The Court thereafter set a schedule for conducting discovery and for submitting supplemental briefs, affidavits and expert reports. The Court also entered a Confidentiality Agreement and Stipulated Protective Order to govern all discovery conducted in the Action.

Before the Parties entered into settlement discussions in late January 2019, the Parties conducted significant discovery. For example, Schwebel Baking served Debtors with multiple Requests for Production of Documents, Requests for Admission and Interrogatories, and obtained Debtors' responses thereto. During the same period, Debtors also served Schwebel Baking with Debtors' Requests for Production of Documents and Interrogatories, to which Schwebel Baking responded. In total, Debtors ultimately produced over 36,000 pages of documents in response to Schwebel Baking's discovery requests before settlement discussions commenced. In response to a *subpoena duces tecum* from Schwebel Baking, PJM

Interconnection also produced roughly 1200 pages of documents. The Parties also engaged in numerous telephonic meet-and-confers and exchanged numerous emails and lengthy letters over contested discovery matters, and both sides had submitted fully briefed motions seeking to resolve various discovery disputes that were pending before the Court at the time the Parties agreed to settle.

On February 11, 2019, the Parties informed the Court that they had made meaningful progress towards reaching a settlement in principle of the claims at issue, and following further weeks of arm's length negotiations they ultimately reached agreement on the terms of written Term Sheet in March 2019, and signed the customary "long form" Settlement Agreement (including the exhibits thereto) on [_____], 2019.

Based upon the discovery taken to date, Settlement Class Claimant Schwebel Baking and Class Counsel believe that proposed Settlement represents an excellent result for the Settlement Class, and is fair, reasonable, adequate, and in the Settlement Class's best interests, taking into account FES's bankruptcy and all other relevant factors, including the substantial benefits that the Settlement Class Members will receive under the Settlement versus the substantial costs, risks and uncertainties of continued litigation. *See also* [§5] below.

3. Why Has The Action Been Litigated On A Putative Class-Wide Basis?

In proceedings brought on a putative class-wide basis, one or more representative parties, such as Schwebel Baking here, purports to assert claims on behalf of persons or entities that have similar claims. Schwebel Baking alleges that its claims against FES are similar to and typical of the claims of the other FES business customers who are members of the Settlement Class. By bringing first the Complaint in the District Court Action, and then (following FES's bankruptcy filing) the Class Proof of Claim in the Bankruptcy Proceedings, the Court is able to resolve the

claims of all Settlement Class Members, without requiring each Settlement Class Member to incur the time and expense of pursuing its own separate claims.

4. Who Is Included In The Class?

The Court has already certified the "Settlement Class" in this matter. The Settlement Class, for the purposes of this Settlement only, consists of

> All current or former Large and Mid-Sized Commercial or Industrial Business Customers of FES that (a) had one or more accounts with FES that were invoiced, by or on behalf of FES, for Polar Vortex Surcharges in 2014; and (b) paid all or a portion of such Polar Vortex Surcharges. Excluded from the Settlement Class is any Settlement Class Member that has settled or released any claims against the Debtors relating to its payment of all or any portion of its Polar Vortex Surcharges.

IF YOU HAVE RECEIVED AN INDIVIDUAL NOTICE LETTER REGARDING THIS MATTER FROM THE CLAIMS ADMINISTRATOR (HEFFLER CLAIMS ADMINISTRATION), IT HAS ALREADY BEEN DETERMINED, BASED ON INFORMATION CONTAINED IN FES's BOOKS AND RECORDS, THAT YOUR BUSINESS IS A MEMBER OF THE SETTLEMENT CLASS.

5. Why Is There A Settlement?

The Court did not decide in favor of Schwebel Baking or FES (or any Related Debtor Party). Instead, both sides agreed to a Settlement. If approved, the Settlement will avoid the cost and uncertainties of further litigation (including the taking of depositions, the preparation of expert reports and taking of expert discovery, the submission of dispositive pre-trial motions, the holding of a trial, and the litigation of likely appeals), while allowing eligible Settlement Class Members to receive compensation.

Class Counsel believe that the claims asserted against FES have merit. They recognize, however, that continuing the litigation through trial and likely appeals would be expensive and

potentially take additional years to resolve, and would involve the very substantial risk that Schwebel Baking would be unable to establish that Debtors were liable, or that Debtors (even if they were liable) had caused the Settlement Class to suffer legally recoverable damages. For example, no regulatory body has held that imposition of the Polar Vortex Surcharges on FES's business customers was improper, and persuading a court to resolve contractual ambiguities in the Settlement Class's favor would have likely involved a complex and expensive "battle of experts" whose outcome would have been inherently uncertain. In addition, even if an underlying breach of contract were ultimately proven, it would have remained uncertain whether Schwebel Baking and individual Settlement Class Members could have defeated FES' affirmative defenses based on the voluntary payment doctrine, laches, waiver and estoppel. To obtain a larger recovery, Schwebel Baking would also have had to complete additional (and expensive) fact and expert discovery, and then prevailed at several future stages of litigation, including at class certification, summary judgment, trial, and any appeals. Further prosecution of the Action would therefore involve significant risks and potentially years of further litigation.

FES and its Affiliates continue to deny any liability in connection with the Released Claims and deny that they breached any contracts, and further maintain that each Settlement Class Member's Polar Vortex Surcharge claims would in any event also be barred by the voluntary payment doctrine, principles of laches and estoppel, and by other affirmative defenses. FES and its Affiliates state that they only agreed to the Settlement to avoid the substantial costs of further litigation, and to facilitate the consummation of Debtors' recently approved Plan of Reorganization. The Settlement's material terms have also been approved by various constituencies in the Bankruptcy Proceedings, including the Court-appointed Official Committee of FES's Unsecured Creditors.

6. What Does the Settlement Provide?

The Settlement provides that the Settlement Class will receive an Allowed Claim in the pending Bankruptcy Proceedings in the amount of $12,000,000 (which Class Counsel estimate is roughly 55% of the maximum possible allowed claim that could have been obtained on behalf of the Settlement Class in the Bankruptcy Proceedings had Schwebel Baking prevailed, on behalf of the Settlement Class, on every disputed issue in connection with the Action and the Class Proof of Claim).

Because, *inter alia*, the Settlement Fund that will be created for the benefit of Settlement Class Members will initially be funded with equity securities ("New FES Common Stock") in the reorganized, post-bankruptcy FES – and because Class Counsel will have to sell those securities and convert them to cash before any payments are made to Settlement Class Members -- it is not possible to know with certainty what the ultimate cash value of the Settlement Fund will be. Class Counsel, on behalf of the Settlement Class, intend to sell (and convert into cash) any New FES Common Stock received as promptly as possible, consistent with their fiduciary duties to avoid selling such securities at an unreasonable discount from their fair value.

Debtor FES, in its Court-approved Disclosure Statement dated May 30, 2019, projected the value of "FES Single-Box Unsecured [Creditor] Claims" (the category of creditor claims into which the Settlement's "allowed claim" falls) will be 31.4% of the amount of such claims.[6] Class Counsel did not participate in the creation of and has not independently validated the foregoing valuation projection, but that projection appears to reflect the most recent valuation estimate that is publicly available from the materials that have been filed in Debtors' ongoing

[6] Because the combined debts of FES (and the other Debtors) exceeded their ability to pay them, all "allowed claims" held by unsecured creditors of FES (and not just the "allowed claim" of the Settlement Class) have been subjected to a "bankruptcy discount" under the Debtors' Court-approved Plan of Reorganization.

bankruptcy proceedings. Applying this estimated 31.4% bankruptcy recovery rate, the estimated value of the Settlement here to Settlement Class Members would be approximately $3.768 million (or 31.4 cents for each dollar of the Class's $12 million Allowed Claim), before deductions for administrative costs and Class Counsel's fees and expenses in connection with litigating and settling the Settlement Class's claims. If the Settlement is approved, the final value of the Settlement, before deductions for administrative costs (capped at $75,000) and any Court award of fees and expenses to Class Counsel, may be either greater or less than $3.768 million due to, *inter alia*, the final amount of all allowed FES Single Box Unsecured Claims (and the final value of the aggregate consideration available to be distributed to all holders of allowed FES Single Box Unsecured Claims) being either greater or lesser than what was projected in Debtor's Disclosure Statement. Class Counsel's ability to realize cash value upon the sale of the New FES Common Stock to be received under the Settlement will also be affected by, *inter alia*, such securities' liquidity and by any market premium or discount to fair value at the time the securities are sold or otherwise converted to cash. and by associated transaction costs.

In exchange for this recovery, the Settlement provides that each Settlement Class Member, on behalf of itself and its Affiliates, will release all "Released Claimants' Claims" as against FES and its Affiliates. "Released Claimant's Claims" is defined as "any and all claims and causes of action of every nature and description, including Unknown Claims, whether arising under federal, state, common or foreign law, that any Settlement Class Member or Released Claimant Party (a) asserted in the District Court, the Bankruptcy Court or any other forum, or (b) could have asserted in any forum that arise or arose out of, or are based upon, any Settlement Class Member's payment of all or any portion of its Polar Vortex Surcharges, except for claims relating to enforcement of the Settlement." The Final Approval Order shall also

provide for the release of all Released Claims as against FES and its Affiliates, and shall permanently bar each Settlement Class Member and its Affiliates from asserting any such claims.[7]

The full terms of the Settlement are contained in the Parties' Stipulation of Settlement (the "Settlement Agreement"), a copy of which is available at www._____.com. The proceeds of the Settlement, if it is approved and becomes Effective, will be distributed *pro rata* to Settlement Class Members in accordance with the Plan of Allocation described at [§7] below. Questions regarding the Settlement or the Plan of Allocation should be directed to Class Counsel c/o William C. Fredericks, Scott+Scott Attorneys at Law LLP, 230 Park Avenue, The Helmsley Building, 17th Floor, New York, NY 10169-1820, (212) 223-6444, wfredericks@scott-scott.com.

7. The Plan of Allocation: How Will the Settlement Fund Be Allocated, and What Will My Business's Share Be?

The distribution of the Net Settlement Fund (after the non-cash "New FES Common Stock" settlement consideration has been converted to cash) to each Settlement Class Member shall be *pro-rata* based on each respective Settlement Class Members' "Recognized Claim Amount," with each Settlement Class Members' "Recognized Claim Amount" being equal to the net amount of Polar Vortex Surcharges (a/k/a/ RTO Surcharges) actually paid by that Settlement Class Member.

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[7] The Settlement also provides that FES and each Debtor, on behalf of itself and its Affiliates, will release all "Released Debtors' Claims" (if any) as against each Settlement Class Member and its Affiliates. "Released Debtors' Claims" is defined as "any and all claims and causes of action of every nature and description including Unknown Claims, whether arising under federal, state, common or foreign law that [FES or its Affiliates] has or could have asserted in any forum that arise or arose out of, or are based upon, any Settlement Class Member's conduct with respect to disputing, litigating or settling the Polar Vortex Surcharges, except for claims relating to the enforcement of the Settlement." The Final Approval Order will also provide for the release of all Released Debtors Claims as against each Settlement Class Member and its Affiliates, and shall permanently bar FES and its Affiliates from asserting any such claims.

Here, the Claims Administrator has already calculated a "Recognized Claim Amount" for each Settlement Class Member, based on information provided to it from FES's books and records, and each Settlement Class Member has been advised of its "Recognized Claim Amount" in the Individual Notice letter that has been mailed to it by the Claims Administrator. Your "Recognized Claim Amount" is not the same as what You will receive under the Settlement (assuming it becomes Effective), but will be used by the Claims Administrator to determine Your percentage *pro rata* share of the Net Settlement Fund (which will be determined by dividing (a) Your "Recognized Claim Amount" by (b) the total of all "Recognized Claim Amounts" of all Settlement Class Members).

To avoid the time and administrative expense involved in paying relatively small claims, the proposed Plan of Allocation provides that distributions will not be made to Settlement Class Members who would otherwise be entitled to receive a distribution check of less than $___ (the "Minimum Payment Threshold"). Any amounts that the Claims Administrator determines are too small to qualify to be paid under the Minimum Payment Threshold shall be re-allocated and distributed on a *pro rata* basis to those Settlement Class Members that are eligible to be paid under the Minimum Payment Threshold.

Your Recognized Claim Amount, as set forth in Your separate Individual Notice letter, has already been calculated for You by the Claims Administrator. However, each Settlement Class Member has the right to submit evidence that its actual Recognized Claim Amount is greater than what is set forth in its Individual Notice letter. Given FES's representations that the relevant information they have provided to Claims Administrator is accurate and complete based on their reasonable review of readily accessible books and records, Class Counsel do not expect that any material errors in calculating any Settlement Class Member's Recognized Claim

Amount will be identified. In the event of any disputes as to what Recognized Claim Amount should be for any given Settlement Class Member, the dispute shall be submitted to the Claims Administrator (subject to review by the Court) for resolution. *See* §8 below.

8. Does My Business Have the Right to Dispute the Court-Appointed Claims Administrator's Calculation of My Business's "Recognized Claim Amount?"

Yes. If You believe that Your Recognized Claim Amount is not correctly set forth in the separate Individual Notice letter that has been mailed to You, and that Your Recognized Loss Amount would be higher if calculated based on information from Your records, you must submit a letter to the Claims Administrator by Certified Mail, return receipt requested, stating what You believe Your Recognized Loss Amount figure should be, together with copies of (1) relevant invoices reflecting the Polar Vortex Surcharges (a/k/a "RTO Surcharges") that You were invoiced for, and (2) evidence of Your payment of such invoices (or such other supporting documentation sufficient to establish a higher Recognized Claim Amount) no later than _____, 2020 [insert date 10 days prior to the Fairness Hearing]. The letter must be addressed as follows:

Heffler Claims Administration
Attn: FES Polar Vortex Litigation
[Insert address]

Any Settlement Class Member challenging the calculation of its Recognized Claim Amount must bear its own costs and expenses in connection with its challenge.

Do not send originals of any supporting documentation to the Claims Administrator. Also, please remember that, unless You have reason to believe that Your Recognized Claim Amount as stated in Your Individual Notice letter is incorrect, You do ***NOT*** need to take any further action to establish Your Recognized Claim Amount and, subject to the Minimum Payment Threshold, Your *pro rata* share of the Net Settlement Fund will be calculated based on

Your Recognized Claim Amount number as stated in Your Individual Notice letter.

9. When Will My Business Receive Its Share of the Settlement Proceeds?

Payment to Settlement Class Members who qualify for a payment under the Plan of Allocation is conditioned on several matters, including entry of an order by the Court approving the Settlement and either affirmance of that order following any appeals or the expiration of the time for filing any such appeals. For a fuller description of all conditions required to be satisfied for the Settlement to become Effective, you can review a complete copy of the Settlement Agreement (*see* §[6] above). In addition, before any Settlement proceeds can be distributed, any New FES Common Stock received as part of the Settlement consideration must first be sold and converted to cash. Class Counsel, on behalf of the Settlement Class, intend to sell (and convert into cash) any New FES Common Stock received under the Settlement as promptly as possible consistent with their fiduciary duties to avoid selling such securities at an unreasonable discount from their fair value, although unexpected delays due to market conditions are possible.

Subject to the foregoing, the Net Settlement Fund will be allocated and distributed to Settlement Class Members as soon as reasonably practicable in accordance with the Plan of Allocation as approved by the Court. If the Settlement is not approved, the Court's approval order is overturned on appeal, or the Settlement is otherwise terminated in accordance with its terms, the Parties will return to their respective positions as they existed as of [_____, 2019], and the existence of the proposed Settlement may not be introduced as evidence in subsequent litigation.

10. Can My Business Opt Out of the Settlement? What Is the Procedure To Do So?

If Your Business does not want to participate in the Settlement, and wishes to retain the ability to assert (at its own expense) any of the Released Claims on an individual basis against

FES or any of the other Released Debtor Parties, it must timely and properly exclude itself ("opt out") from the Settlement and the Settlement Class. To do so, one or more of Your duly authorized representatives must submit a written request to be excluded from the Settlement and the Settlement Class that complies with the requirements of this paragraph so that it is *received* by no later than _____, 2019 [insert date thirty (30) calendar days before the Fairness Hearing] (the "Opt-Out Deadline"). Any requests for exclusion must therefore be sent to the Claims Administrator either (a) by First Class Mail postmarked by no later than _____, 2020 [thirty-five (35) business days before the Fairness Hearing], or (b) by Priority Express Mail or by a reliable delivery service (such as Federal Express, DHL or UPS) by overnight or two-day delivery so that it is *received* no later than the _____, 2020 Opt-Out Deadline. Any such requests must be sent to the Claims Administrator at the following address:

Heffler Claims Administration
Attn: FES Polar Vortex Litigation
[insert Address]

To be valid, a request for exclusion must also (1) be signed, (2) include the printed name, business title or position, address and business telephone number of the person(s) executing the request on Your behalf, (3) state that Your Business "wishes to be excluded from the Settlement Class relating to the FES Polar Vortex Surcharges," and (4) either include a statement that the person executing the request is an officer of Your Business, or, if the executing person is not an officer of Your Business, attach a separate document (such as an affidavit or corporate resolution) attesting to the authority of such person to execute the request on Your Businesses' behalf. Requests for exclusion must be individually made on behalf of a single Settlement Class Member in accordance with the above requirements, and any class, mass, or collective requests for exclusion will be invalid.

11. What Is the Effect Of Opting-Out?

If You ask to be excluded, Your Business will *not* receive any payment from the Settlement, or any other share of the Settlement's proceeds. Instead, if You ask to be excluded, You will not be bound by any rulings concerning the Polar Vortex Surcharge-related claims made in connection with the Settlement; You will not be able to object to the Settlement (because it will no longer affect You if You exclude yourself); and You will retain any rights You may have to file or assert, at Your own expense, Your own Polar Vortex Surcharge-related claims against FES or its Affiliates (and FES and its Affiliates will retain any rights to assert any voluntary payment, laches and other affirmative defenses in response to any such claims).

12. Do I Have a Lawyer in this Action?

The Court appointed the law firms of Scott+Scott Attorneys at Law LLP and Meyers, Roman, Friedberg & Lewis (collectively, "Class Counsel") to represent You and other Settlement Class Members. You are not personally liable for the fees and expenses incurred by these attorneys. If You want to be represented by Your own lawyer, you may hire one at your own expense.

13. How Will the Lawyers Be Paid?

Class Counsel will apply to the Court for an award of attorneys' fees of not more than 33⅓% of the Gross Settlement Fund, and for an award of expenses (including the fees and expenses of its industry expert and its consulting financial advisor) in an amount not exceeding [$_____] in connection with litigating and resolving the claims asserted in the Action (the "Fee and Expense Application"). In its Application, Class Counsel will also request that the Court award Class Representative Schwebel Baking $15,000 for its time and service in

representing the Settlement Class. Such fees, expenses and service awards as may be approved by the Court will be paid from the Gross Settlement Fund. Settlement Class Members are not personally liable for any such fees, awards or expenses.

To date, Class Counsel have received nothing for their services in litigating the Action on behalf of the Settlement Class Claimant and the proposed Settlement Class, despite having expended more than ___ hours of attorney and paraprofessional time to date in connection with this matter. Class Counsel will file its Fee and Expense Application and supporting papers on the Court's docket (and post them at www._____.com) not later than [35 days] prior to the Fairness Hearing, which will argue, among other things, that the requested attorneys' fees are well within the range awarded to class counsel in high risk contingent litigation. The Court will rule on the Fee and Expense Application, and may award less than what is requested.

14. How Do I Tell the Court If My Business Has Objections?

You can object to the proposed Settlement, proposed Plan of Allocation, and Fee and Expense Application, or any portion thereof, by submitting a timely written objection to the Court, which will consider it if You submit it in accord with the requirements of this paragraph. To submit a timely and valid objection, the objection and any supporting papers must be filed electronically or by mail with the Clerk of the Court, U.S. Bankruptcy Court for the Northern District of Ohio, John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio 44308. Copies of objections and all supporting papers must be both (i) *received* by the Clerk of the Court no later than _____, 2020 [insert date at least 20 days prior to the Fairness Hearing], and (ii) served (by certified or registered mail, return receipt requested, or by a reliable delivery service such as Federal Express, DHL or UPS for overnight or two-day delivery) no later than _____, 2020 [insert date at least 20 days prior to the Fairness Hearing], upon each of the

following:

William C. Fredericks
SCOTT+SCOTT ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Ave., 17th Floor
New York, NY 10169
Tel: (212) 223-6444
(counsel for the Class)

Seamus C. Duffy
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market St. #4100
Philadelphia, P.A. 19103
Tel: (215) 965-1200
(counsel for Debtors)

To be valid the objection must also (1) be signed; (2) include the printed name, title, address and business telephone number of the duly authorized person(s) executing the opt-out request; (3) state all supporting bases and reasons for the objection; (4) clearly identify any and all witnesses, documents and any other evidence of any kind that You may seek to proffer at the Fairness Hearing in connection with the objection; and (5) provide a summary description of the substance of any testimony that You may wish to offer in support of the objection.

A Settlement Class Member that files and serves a timely written objection in accordance with this paragraph may also ask to speak at the Fairness Hearing (*see* §§ [16-18]), including through its attorneys (at its own expense), provided that its written objection also states that it "intends to appear" at the Fairness Hearing and identifies the name and contact information of the person(s) planning to appear. An objector that does not timely include or submit a notice of their intention to appear in accord with this paragraph will not be permitted to speak at the Fairness Hearing. However, a Class Member does not need to appear at the Fairness Hearing to have the Court consider a written objection submitted in compliance with the requirements of this section.

15. What Is the Difference Between Objecting and Opting Out of the Class?

Objecting is simply telling the Court that You do not like something about the Settlement, the Plan of Allocation, or a related application. A Settlement Class Member can object only if it stays in the Settlement Class (because if it opts out, the Settlement will no longer

apply to it). If a Settlement Class Member objects, but the Court approves the Settlement, that Settlement Class Member will be bound by the Settlement's terms in the same way as Settlement Class Members who do not object. A Settlement Class Member that excludes itself is telling the Court that it does not want to receive any payment under the Settlement and does not want to release any Released Claims it may have against FES and its Affiliates. If You exclude Yourself, You will receive nothing under the Settlement.

16. When and Where Will the Court Decide Whether to Approve the Settlement?

The Court will hold a hearing, called a "Fairness Hearing," to decide whether to approve the Settlement. It has scheduled this Hearing for _____, 2019, at __:__.m., prevailing Eastern Time, before The Honorable Alan M. Koschik, United States Bankruptcy Court Judge, at the U.S. Bankruptcy Court for the Northern District of Ohio, located in the John F. Sieberling Building, 2 South Main Street, Akron, Ohio, 44308. At this hearing, the Court will consider whether the Settlement and Plan of Allocation are fair, reasonable and adequate, and whether to grant the Fee and Expense Application. The Court may decide these issues at the hearing or take them under consideration for a later decision.

17. Does a Representative of My Business Have to Go to the Fairness Hearing?

No. Class Counsel will answer any questions the Court may have. But You may come at Your own expense. Settlement Class Members that submit an objection in accord with the requirements of § [14] do not have to come to Court to have the Court will consider it. A Settlement Class Member may also have its own lawyers attend the Fairness Hearing (at its own expense), but it is not necessary. Settlement Class Members need not appear at the Fairness Hearing or take any other action to indicate their approval.

18. May a Representative of My Business Speak at the Fairness Hearing?

If You wish to speak at or present testimony or other evidence at the Fairness Hearing, Your written objection must also give the Court notice of your intention to appear at the Fairness Hearing, and also identify any witnesses that You intend to call or evidence You intend to present, as set forth in § [14]. Please note that the Fairness Hearing may be rescheduled by the Court without further notice to Settlement Class Members. Accordingly, Class Members who wish to attend the Fairness Hearing should confirm the date and time beforehand with Class Counsel.

19. Does My Business Need To Fill Out Any Forms, Or Will It Receive Its Share of the Settlement Fund Even If I Do Nothing?

It is not necessary for You to fill out or file a "proof of claim" or to take any other action for Your Business to participate in the Settlement and receive its share of the Settlement (assuming it becomes Effective) as described in this Notice. If Your Business does nothing, (a) it will be deemed to have a Recognized Claim Amount equal to that set forth in the Individual Notice letter that has been mailed to You, without Your having to prepare and file any separate claim, and without Your having to collect and submit any supporting documentation from Your files, and (b) the amount of any payment You may be entitled to under the Settlement will be automatically calculated by the Claims Administrator based on Your Recognized Claim Amount in accord with the Plan of Allocation, and any check to which Your Business may be entitled will be sent to Your Business at the address to which Your Individual Notice letter was sent (unless You write to the Claims Administrator and request that any check be sent to a different address).

Please remember that it may take time for the Settlement to become Effective and for the settlement consideration to be converted to cash. Please be patient. After the date of the Fairness

Hearing, You can check the settlement website for information concerning the status of the claims administration process in this matter.

20. Can I Get More Information?

Yes. This Notice summarizes the proposed Settlement. You can view the full text of the Settlement Agreement at www._____.com. For more detailed information concerning the Action and the Settlement, you may also contact a representative of Class Counsel at: Scott+Scott Attorney at Law LLP, attn. William C. Fredericks, The Helmsley Building, 230 Park Avenue, 17th Floor, New York, NY 10169-1820, tel: 1-212-223-6444, email wfredericks@scott-scott.com. Reference is also made to the pleadings filed in support of the Class Proof of Claim, the Court's prior Orders, and all settlement-related papers filed in the Action, which may be inspected at the Office of the Clerk of the Court, located in the John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio, 44308 during regular business hours. For a fee, all papers filed in these Bankruptcy Proceedings or in the prior District Court Action are also available through PACER at www.pacer.gov.

PLEASE DO NOT CALL OR WRITE THE COURT, DEBTORS OR THEIR COUNSEL REGARDING THIS NOTICE.

DATED: _____, 20__ BY ORDER OF THE COURT

[Claims Administrator Letterhead]
[Address]

_____, 2019

[insert Company Name] [Name of Settlement Class Member]
Attn: [Relevant contract person] or Company CFO
Address

RE: *In re FirstEnergy Solutions Corp. et al.,* No. 18-50757 (Bktcy. N.D. Ohio)

Dear Sir or Madam:

You are receiving this letter, and also being advised to view the more detailed "Website Notice at www.polarvortexsettlement.com, because, based on information provided by FirstEnergy Solutions Corp. ("FES"), your business is a member of a class of FES business customers that has been certified by the U.S. Bankruptcy Court for the Northern District of Ohio (the "Court").[1]

WHAT CLAIMS ARE AT ISSUE THAT INVOLVE MY BUSINESS?

The Class Representative in this matter, Schwebel Baking Company ("Schwebel"), alleges that FES breached FES's contracts with its large and mid-size industrial and commercial customers (the "Settlement Class Members) by "passing through" to those customers certain "Polar Vortex Surcharges" that FES had paid in connection with the efforts to ensure a reliable supply of electricity during unusually cold weather conditions in early 2014. FES (which filed for bankruptcy in 2018) has maintained throughout that it was entirely proper for it to "pass-through" the surcharges at issue, but it has agreed to a proposed class-wide Settlement to avoid the cost of further expensive litigation and to facilitate the implementation of its recently Court-approved

[1] Capitalized terms not otherwise defined in this letter have the same meanings that are given to them in the more detailed Website Notice document, available at www.polarvortexsettlement.com.

Plan of Reorganization.

WHAT DOES THE SETTLEMENT PROVIDE?

Under the Settlement, in exchange for releasing all Polar Vortex Surcharge-related claims, the Settlement Class will receive an Allowed Claim of $12,000,000 in FES's bankruptcy proceedings. By contrast, Class Counsel estimate that had Schwebel and the Settlement Class prevailed on all aspects of their breach of contract claims, the Settlement Class would have been entitled to an Allowed Claim of roughly $22 million. However, because the Settlement Fund will initially be funded with equity securities in the reorganized, post-bankruptcy FES which will then have to be sold and converted to cash (after which distribution checks will be sent to eligible Settlement Class Members), it is not possible to know with certainty what the ultimate cash value of the Settlement will be. The *estimated* value of the Settlement Fund, based on information from FES's last Disclosure Statement dated _____, 2019 (which estimates how much value will be available to distribute to all of FES's various creditors at the end of the bankruptcy proceedings) is $3.768 million, or 31.4 cents for each dollar of the Class's $12 million Allowed Claim, before deductions for settlement-related notice and administration costs and Class Counsel's application for an award of professional fees and expenses.

WHAT ARE MY OPTIONS?

To Participate in the Settlement and Be Eligible To Receive a Payment:

To reduce claims administration costs, you will ***not*** be required to file an individual claim, submit supporting documentation, or take any other actions for your Company to receive any payment it is entitled to under the Settlement. Instead, under the proposed Plan of Allocation, each Settlement Class Member will receive a percentage

share of the net Settlement fund based on their "Recognized Claim Amount", which is equal to the total net amount of Polar Vortex Surcharges that it paid to FES.

Your Recognized Claim Amount will not be the same as the payment you will receive under the Settlement. Instead, your "Recognized Claim Amount" will be used to determine your percentage *pro rata* share of the Net Settlement Fund. Your payment will be determined by dividing (a) your "Recognized Claim Amount" by (b) the total of all "Recognized Claim Amounts" of all Settlement Class Members. To avoid the significant administrative expense involved in paying relatively small claims, distributions will not be made to Settlement Class Members who would otherwise be entitled to receive a distribution of less than $50 (the "Minimum Payment Threshold").

To Request a Review of your Recognized Claim Amount.

Based on billing records provided by FES, the Claims Administrator has calculated Your "Recognized Claim Amount" (i.e., the total amount of all Polar Vortex Surcharges that you paid) to be $_____. If you believe that your Recognized Claim Amount is ***not*** correct, and that it would be higher if calculated based on information from your records, you must submit a letter by _____, 2020 (together with *copies* of supporting documentation) to the Claims Administrator that complies with the requirements of [§8] of the Website Notice.

To Object or to Request Exclusion from the Class:

If your business wishes to object to the proposed Settlement, Plan of Allocation or related Professional Services Fees and Expense Application, it may submit an objection to the Court, and it also has the right to enter an appearance through an attorney (at its own expense). If your business does not want to be part of the proposed Settlement, the

Court will exclude from the Class any member who timely and validly requests exclusion.

THIS LETTER IS ONLY A SUMMARY AND SHOULD BE READ IN CONJUNCTION WITH THE WEBSITE NOTICE, WHICH IS AVAILABLE AT WWW.POLARVORTEXSETTLEMENT.COM OR BY CALLING 1-800_____. The Website Notice contains important additional information concerning: (a) the nature of the underlying claims asserted on behalf of the Settlement Class; (b) the definition of the Settlement Class; (c) the defenses asserted by Debtor FES to the claims that were asserted against it; (d) the terms of the Settlement and the proposed Plan of Allocation; (e) estimated notice and administrative costs and Class Counsel's application for an award of Professional Services Fees and Expenses; (f) each Settlement Class Member's rights to appear by counsel, to request exclusion from the Settlement Class, to challenge the calculation of its Recognized Claim Amount, and to object to the Settlement, the Plan of Allocation or any Professional Services Fee and Expense Application; (g) the time and manner for exercising the foregoing rights; and (h) the binding effect of the proposed Settlement and proposed class-wide Judgment on Settlement Class Members.

PLEASE NOTE THAT IF YOU WISH TO BE ELIGIBLE TO PARTICIPATE IN THE SETTLEMENT (AND THE COURT APPROVES IT) YOU DO *NOT* NEED TO TAKE ANY ACTION (SUCH AS FILING A CLAIM FORM) TO RECEIVE WHATEVER PAYMENT YOUR BUSINESS IS ENTITLED TO UNDER THE PROPOSED SETTLEMENT AND PLAN OF ALLOCATION.

Please do not contact the Bankruptcy Court with questions, as it will be unable to answer them. Instead, please review the Website Notice at www.polarvortexsettlement.com, call the Claims Administrator (Heffler Claims Administration) at 1-800_____ or contact Co-Class Counsel (Scott+Scott Attorneys at Law LLP) at 1-800-_____.

Very truly yours,
[Name of Claims Administrator]

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

DECLARATION OF WILLIAM C. FREDERICKS, ESQ., IN SUPPORT OF MOTION OF SCHWEBEL BAKING COMPANY FOR ENTRY OF ORDER PRELIMINARILY APPROVING PROPOSED SETTLEMENT AND GRANTING OTHER RELIEF

I, William C. Fredericks, hereby declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am attorney duly admitted to practice law in the State of New York, and have been admitted pro hac vice in these proceedings. I represent Schwebel Baking Company ("Schwebel Baking" or "Class Claimant"), an individual creditor and putative class claimant in this matter.

2. I respectfully submit this declaration in support of Schwebel Baking's Motion for Entry of an Order (A) Preliminarily Approving Class Action Settlement; (B) Preliminarily Certifying Proposed Settlement Class; (C) Appointing Schwebel Baking as Class Representative and its Counsel as Class Counsel; (D) Approving the Form and Manner of Notice to Settlement Class Members; (E) Scheduling a Fairness Hearing to Consider Final Approval of the Settlement; and Granting Related Relief (the "Motion").

3. Attached hereto as Exhibit 1 is a copy of the Stipulation of Settlement

("Stipulation"[1]) entered into among creditor, class claimant and proposed Class Representative Schwebel Baking, on behalf of itself and the Settlement Class (as defined below), on the one hand, and FirstEnergy Solutions Corp. ("FES"), FES's subsidiaries, and FirstEnergy Nuclear Operating Company (collectively, the "Debtors"), on the other hand. The exhibits to the Stipulation, which are also attached, consist of: (A) the Parties' [proposed] form of Preliminary 7023 Approval Order (Exhibit A to the Stipulation) (the "Preliminary Order") and the exhibits thereto (consisting of the proposed forms of the Website Notice (at Exhibit A-1) and Individual Notice (at Exhibit A-2)); (B) the Parties' [proposed] form of 9019 Order (Exhibit B to the Stipulation); and (C) the Parties' proposed form of Final Approval Order (Exhibit C to the Stipulation).

NATURE OF THE UNDERLYING CLAIMS

4. Class Claimant alleges that in January 2014, FES's service region experienced unusually cold "Polar Vortex" weather conditions. As a result, PJM Interconnection LLC ("PJM"), the regional transmission organization ("RTO") that coordinates the supply of electricity on a wholesale basis within FES' service region, purchased additional electricity generation capacity. PJM billed the costs of those purchases to "retail" energy companies (such as Debtor FES), which supply electricity to actual end-users. *See also* ¶¶3, 18-19.[2] FES, in turn, "passed through" much of its share of the PJM charges to FES's large or mid-sized industrial and commercial customers (the Class Members).

5. Schwebel further alleges that, by "passing through" these PJM charges to the Class, FES breached the terms of the substantially similar form contracts that FES had with each

[1] All capitalized terms used herein, unless otherwise defined herein, have the same meaning as given to them in the Stipulation.

[2] Citations to "Compl., ¶__" or "¶__" are to paragraphs of Schwebel Baking's Complaint in the District Court, which has been filed in these proceedings as an exhibit to the Class POC (claim no. 934).

Class Member. In particular, Schwebel alleges that these contracts only allowed FES to "pass through" surcharges imposed by an RTO (such as PJM) ***only*** if they were due to an RTO imposing either "***new***" charges or a new "method or procedure for determining charges." Compl., ¶¶2, 17 & Compl., Ex. A). And Schwebel further alleges that the PJM surcharges that FES "passed through" to the Class Members were neither "new" nor the result of a changed "method or procedure for determining charges" – but instead simply reflected charges for ***customary*** RTO services that simply happened to be more ***expensive*** than had been expected due to unusually cold weather.

6. Schwebel paid roughly $11,000 in Polar Vortex Surcharges that FES had billed it for (*see* Schwebel individual proof of claim (claim no. 935)), but later protested to FES that the charges were improper. After FES declined to refund the disputed amounts, Schwebel sued. ¶24.

PROCEDURAL HISTORY

7. Schwebel filed its Complaint in May 2017, seeking damages, on behalf of itself and a putative class, equal to the amount of all Polar Vortex Surcharges paid to FES.

8. On July 3, 2017, FES moved to dismiss the Complaint for failure to state a claim and, alternatively, to strike the class allegations. Those motions were fully briefed and argued.

9. On March 21, 2018, Judge pearson of the District Court for the Northern District of Ohio (the "District Court") denied both the motion to dismiss and the motion to strike the class allegations. *Schwebel Baking Co. v. FirstEnergy Sols. Corp.*, 2018 WL 1419477 (N.D. Ohio Mar. 21, 2018), DC Dkt No. 27.[3]

[3] Citations in the form of "DC Dkt No. ___" are to entries on the docket of the District Court in the subsequently stayed *Schwebel Baking Co. v. FirstEnergy Sols. Corp.* action. Citations in the form of "Dkt. No." are to docket entries in this Bankruptcy Court in the pending matter.

10. On March 31, 2018 Debtors filed for Chapter 11 relief in this Court.

11. On April 11, 2018, the U.S. Trustee selected Schwebel to serve on the Official Committee of Unsecured Creditors ("Creditors Committee") in these proceedings.

12. On August 20, 2018, Schwebel filed a Motion for an Order Applying Bankruptcy Rule 7023 to the Claims of a Class of Debtor FES's Customers Arising From Its Polar Vortex Surcharges, together with its [Proposed] Class POC. Dkt No. 1179.

13. On September 25, 2018, by Stipulation and Agreed Order among Schwebel, the Creditors Committee, and Debtors, the Court (a) "direct[ed] application of Bankruptcy Rule 7023" with respect to Schwebel's request for class treatment; (b) allowed Schwebel to file its "protective class proof of claim"; and (c) reserved decision on all other matters relating to class certification or the Class POC until after the Parties could conduct discovery. Dkt No. 1451.

14. During late 2018 and early 2019, Schwebel took significant document discovery, and obtained over 36,000 pages of documents (plus responses to numerous interrogatories and requests to admit) from the Debtors. Discovery was adversarial and hard-fought; indeed, Schwebel filed a motion to compel against the Debtors on February 5, 2019. Dkt No. 2074.

15. Shortly before Schwebel filed its February 5 motion to compel (and roughly 21 months after Schwebel had initiated the underlying litigation), the Parties began serious settlement discussions.

16. In February 2019, negotiated a Settlement Term Sheet, and secured the consent of the Creditors Committee and various *ad hoc* FES noteholder groups to the terms thereof, subject to the completion of customary "long form" settlement papers and the Rule 23 approval process.

17. On February 11, 2019, the Parties advised the Court that they had settled.

18. On June 25, 2019, pursuant to Stipulation and Agreed Order among Schwebel, the

Creditors Committee and Debtors, the Court temporarily allowed the Class POC in the amount of $12,000,000 in Class A6 for the limited purposes of allowing Schwebel, pursuant to Rule 3018(a), to vote as the holder of that Claim under the Plan. Dkt No. 2820.

19. On November 20, 2019, following good faith efforts to resolve certain technical issues arising from Schwebel's decision (on behalf of the putative Class) to exercise the "equity election" under the Plan, the Parties executed the long-form Stipulation of Settlement.

SUMMARY OF THE SETTLEMENT

20. Under the Settlement the Class will receive a single-box non-priority unsecured allowed claim on the Class POC in the amount of $12,000,000. By comparison, information produced to class claimant in discovery, as further refined and supplemented by information produced by Debtors to Class Claimant during subsequent settlement discussions, confirms that the total amount of all Polar Vortex Surcharges actually paid by Class Members to FES, was $22,054,419.63. Accordingly, Class Counsel respectfully submit that the Allowed Claim amount of $12 million provided for under the Settlement represents roughly 54.5% of the maximum allowed claim ($22,054,419.63) that the Class could have obtained in this Court had Schwebel Baking, as Class Representative, prevailed on all disputed issues relating to the Class POC.

21. After the Settlement Effective Date occurs, the consideration payable on the Allowed Claim will be transferred to the Settlement Fund. Because Schwebel, on advice of its financial advisor (Dundon Advisors LLC), has exercised the "equity election" under Debtors' Plan, the Settlement Fund will initially be funded with shares in the reorganized FES ("New FES Common Stock"). Class Counsel, upon the advice of its financial advisor, intend to sell (and convert to cash) the New FES Common Stock shortly after it is received, consistent with their fiduciary duty to avoid selling at an unreasonable discount from the shares' fair value. The

Settlement also provides for the Parties to retain (subject to the Court's approval) Heffler Claims Group as the Claims Administrator. In addition to administering the Notice Plan, the Claims Administrator will also distribute checks from the Net Settlement Fund to Class Members in accord with the proposed Plan of Allocation (or such modified allocation plan as the Court may approve). Stipulation, §§3.1, 6.1, 7.1-2, 12. The Settlement's other main terms are:

a) The proposed Class (consisting of current and former large and mid-sized FES industrial and commercial customers that paid all or a portion of the disputed Polar Vortex Surcharges) (*see* §II below) will be certified for settlement purposes only (Stipulation, §1.67, 5.1);

b) Upon the Settlement Effective Date, each Class Member will release all "Released Claimants' Claims" (including all claims arising from their payment of any Polar Vortex Surcharges) as against FES and its Affiliates (*id.*, §13.1).

c) Notice- and Administration-related costs incurred in connection with the Settlement will be paid from the Settlement Fund up to a cap of $75,000; and any such costs in excess of $75,000 shall be paid by FES or its bankruptcy estate (*id.*, §§6.8, 6.13);

d) Schwebel, as Class Representative, may apply to the Court for a Service Award of $15,000 to compensate for its time and expense in representing the Class (*id.*, §9.2);

e) Class Counsel may apply to the Court for a Professional Fees and Expenses Award, which will include a request for an award of attorneys' fees to Class Counsel of up to 33⅓ percent of the Gross Settlement Fund, and for payment of reasonable expenses (including the fees and expenses of Schwebel's financial advisor and litigation experts), but with the proviso that no Fees or Expenses shall be payable until the

Settlement Fund has been funded and the Settlement Effective Date has occurred (*id.*, §9.1);

f) Debtors represent and warrant that the "Records File" that they have produced to Heffler Claims Group and (in partially redacted form) to Schwebel contains the information reasonably necessary to allow the Claims Administrator to (a) identify each prospective Class member by name and last known address, and (b) calculate the value of each Class member's Recognized Claim Amount (i.e., the amount of Polar Vortex Surcharges it actually paid) under the proposed Plan of Allocation (*id.*, §6.3);

g) The Claims Administrator will disseminate the Individual Notice (*see* [Proposed] Preliminary Order at Exhibit A-2) by first class mail to each Class member's last known address as shown in the Records File, and shall also direct Class Members to a dedicated settlement website, www.polarvortexsettlement.com, where they can view and download the longer "Website Notice" (*see* Preliminary Order at Exhibit A-1), which will describe in greater detail (a) the claims at issue; (b) the proposed Settlement; (c) class counsels' request for an award of Professional Fees and Expenses and Schwebel's request for a Service Award; (d) each Class member's rights to "opt out" or to object to the Settlement and any related application, to object to the proposed Plan of Allocation, to dispute the calculation of its "Recognized Claim Amount" contained in its Individual Notice letter, and to attend the Fairness Hearing either in person or through counsel, and how to timely exercise those rights; and (e) the binding effect of the proposed Judgment and release of claims under the Settlement on any Class Members that do not "opt out" (*id.*, §6.9-.11);

h) Copies of the Settlement and, when filed, of all papers in support of final approval and in support of any related Professional Fees and Expenses Application, will also be posted on the dedicated Website (*id.*, §6.10-.11);

The Settlement will become Effective only if the Court approves both the Settlement and Debtors' Plan, and those approvals become final and non-appealable (*id.*, §15).

ALL RELEVANT CLASS CERTIFICATION REQUIREMENTS UNDER FRCP 23(a) AND FRCP 23(b)(3) ARE SATISFIED

22. Numerosity. Based on information provided by Debtors to Schwebel's counsel, there are 36,345 members of the proposed Class.

24. Commonality. In the course of discovery, Debtors produced hundreds of partially redacted copies of executed electricity supply agreements between FES and various Class Members, as well as copies of unexecuted "form" contract documents that Debtors described as being examples of the "template" industrial and commercial customer contracts that FES used in the years preceding the imposition of the disputed Polar Vortex Surcharges. Although Class Counsel's review of the numerous executed contracts and various "template" or "form" contracts produced in discovery revealed minor variations (for example, language in some clauses were modified over the years, and sometimes slightly different forms were used in different States within FES's service region), Class Counsel did not observe any material variations in the common language of the relevant contract clauses at issue.

25. Typicality. Typicality requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3). As set forth in Schwebel Baking's accompanying brief, a named plaintiff's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [its] claims are based on the same legal theory," *In re Am. Med. Sys., Inc.*, 75 F.3d 1069,

1082 (6th Cir. 1996); *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 185 (S.D. Ohio 2012), and typicality is thus readily met when "'the class representative's claims arise from a contract similar to that of the putative class members.'" *In re CommonPoint Mortg. Co.*, 283 B.R. 469, 478 (Bankr. W.D. Mich. 2002) (quoting 5 MOORE'S FED'L PRAC. ¶23.24, at 23-104 (3d ed. 1997)). As in *CommonPoint*, it is respectfully submitted that Schwebel's claims here are typical of those of the other Class Members, as they are all based on FES's common course of conduct in (allegedly) breaching common contract language.

26. Adequacy. Rule 23(a)(4) requires a representative plaintiff to be able to fairly and adequately represent the class's interests. In the Sixth Circuit, this means that: (1) the proposed representative "'must have common interests with unnamed members of the class" and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). Here, it is respectfully submitted that Schwebel and the Class plainly have a common interest in showing that Debtor FES's conduct in "passing through" the disputed Polar Vortex Surcharges to Class Members was a breach of contract, and neither Schwebel nor its counsel are aware of any disabling conflicts of interest between Schwebel and the other Class Members.

27. Here, it is also respectfully submitted that proposed class counsel, Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Meyers, Roman, Friedberg & Lewis LLP ("Meyers Roman") are highly qualified to represent the class, as they combine the bankruptcy law and general expertise of Meyers Roman with the experience of a national class action firm, Scott+Scott.[4] *See CommonPoint*, 283 B.R. at 478 (appointing as co-class counsel two firms that "appear to be experienced in class action[s] [and] bankruptcy"). It is also respectfully submitted

[4] Information regarding the qualifications of the Meyers, Roman and Scott+Scott law firms is available at www.meyersroman and www.scott-scott.com, respectively.

that the work of these two firms in investigating the claims, defeating FES's motion to dismiss in the District Court, pursuing the claims into discovery in this Court, and in negotiating the proposed Settlement, also merits appointing them as Class Counsel.

28. The Class also meets Rule 23(b)(3)'s predominance and superiority tests.

29. Predominance. As further detailed in Schwebel Baking's accompanying brief, the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and courts routinely hold that cases alleging a single course of wrongful conduct are particularly well-suited to class certification under that test. Indeed, as one court in this Circuit held in another class action that also involved allegedly improper surcharges:

> [Even if] certain aspects of Defendants' contracts with customers may have varied, [plaintiffs' claim] that the addition of a . . . surcharge to customers' invoices was a breach of contract is common to all members of the putative class and predominates over any individual differences that may exist among the contracts. . . . That is to say, Plaintiffs have satisfied the predominance requirement as to the claim for breach of contract because the essence of [that] claim, for each Plaintiff, would be whether the surcharge that Defendants allegedly added to customers' invoices constituted a breach.

Durant v. ServiceMaster Co., 208 F.R.D. 228, 232-33 (E.D. Mich. 2002) (certifying class).

30. Here, whether the costs that FES incurred due to the Polar Vortex were the result of a "pass-through event" – and whether FES's "pass-through" of the Polar Vortex Surcharges to its customers was a breach of contract – is ***the*** central issue, and will turn on common evidence as applied to a common contract provision that will ultimately result in a common determination of the issue that will apply equally to all Class Members. It is therefore respectfully submitted that predominance is also satisfied.

31. Superiority. Rule 23(b)(3) requires a class action "[to be] superior to other available methods for fairly and efficiently adjudicating the controversy," after taking into account: "(A) the class members' interests in individually controlling the prosecution or defense

of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; and (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Rule 23(b)(3)(A-C).[5]

32. While there might be some Class Members who had big enough claims to justify litigating them on their own, to the best of the knowledge of Schwebel's counsel none have done so (and there would likely be statute of limitations and/or bar date issues if any were to try to do so now). This further confirms that this is not a case where Class Members had strong interests in "individually controlling" the prosecution of the claims at issue. By contrast, and even assuming no bar to individual claims, it is respectfully submitted that denial of certification would either (i) vastly increase the number of claims that the Court would have to resolve individually; or (ii) result in a situation where many Class Members (whether through lack of knowledge, reluctance or inability to litigate individual proofs of claim, or a combination thereof) do not submit claims – thereby increasing administrative burdens and/or leaving hundreds or thousands of otherwise qualifying claimants uncompensated. Moreover, it is respectfully submitted that granting class treatment here will advance the important policy goals of compensating damaged parties and insuring that even relatively smaller claimants (subject to the $50 "minimum payment threshold" previously endorsed by the Court in these proceedings) get their "fair share" of the debtors' remaining assets. *Accord Matter of American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1998) (applying Bankruptcy Rule 7023 to class claim based on substantially similar considerations).

SCHWEBEL IS QUALIFIED TO SERVE AS CLASS REPRESENTATIVE AND ITS COUNSEL ARE QUALIFIED TO SERVE AS CLASS COUNSEL

[5] A fourth factor, whether there will be "difficulties in managing a class action," is inapplicable in the context of a settlement. *See Amchem*, 521 U.S. at 620.

33. For the reasons already set forth above, it is respectfully submitted that Schwebel's counsel are amply qualified to be appointed as class counsel, and that Schwebel, having easily met Rule 23(a)(4)'s adequacy test, is amply qualified to be appointed as Class Representative. I will only add here that, based on my own experience and my discussions with my co-counsel at the Meyers Roman firm, we agree that Schwebel representatives have been attentive and responsive to the needs of the case throughout (including, *inter alia*, by repeatedly making themselves available to consult with counsel on both litigation and settlement matters, and by working with counsel to satisfy their discovery obligations to Debtors). In sum, to the best of my knowledge, Schwebel has in all respects easily satisfied Rule 23's standard of adequately, fairly and faithfully representing the interests of the Class throughout the protracted course of this litigation.

THE NOTICE PLAN HAS BEEN REVIEWED BY BOTH COUNSEL AND THE PROPOSED CLAIMS ADMINISTRATOR

34. For the reasons set forth in Schwebel's accompanying brief, it is respectfully submitted that the Notice Plan should be approved. I will only add here that, in preparing the proposed Notice Plan, I consulted on multiple occasions by phone and by email, as well through an in-person meeting at my offices in New York, with David Kaufman of the Heffler claims administration firm. Mr. Kaufman has advised me that, based on his extensive experience, he believes that the proposed Notice Plan is appropriate, and I can confirm that I, as well as Debtors' counsel, have worked with Mr Kaufman to develop a Notice Plan (and a claims administration program) that, while avoiding unnecessary costs, are also user-friendly and meet all applicable legal requirements.

35. For all of the foregoing reasons, it is respectfully submitted that the Court should enter the parties' [proposed] Preliminary Order.

Executed on this 20th day of November, 2019 under penalty of perjury under the laws of the United States of America.

/s/ William C. Fredericks

EXECUTION COPY

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

STIPULATION AND AGREEMENT OF SETTLEMENT

This Stipulation and Agreement of Settlement (the "Stipulation" or "Settlement Agreement") is submitted in the above-captioned chapter 11 proceedings, styled *In re FirstEnergy Solutions Corp.*, et al., Case No. 18-50757, pursuant to Rules 7023, 9014 and 9019 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and Rule 23 of the Federal Rules of Civil Procedure ("FRCP Rule 23"). Subject to the approval of the United States Bankruptcy Court for the Northern District of Ohio, this Stipulation is entered into among creditor and proposed class claimant Schwebel Baking Company ("Schwebel" or "Settlement Class Claimant" or "Settlement Class Representative"), on behalf of itself and the Settlement Class (as defined below), on the one hand, and FirstEnergy Solutions Corp. ("FES"), FES's subsidiaries, and FirstEnergy Nuclear Operating Company ("FENOC") (collectively the "Debtors"), on the other hand. The Debtors and Settlement Class Claimant are each a "Party" and collectively referred to as the "Parties" herein.

WHEREAS, on May 8, 2017, Schwebel filed a putative class action complaint against FES (the "Complaint") in the United States District Court for the Northern District of Ohio (the "District Court"), captioned *Schwebel Baking Company v. FirstEnergy Solutions Corp.*, No. 4:17-cv-00974-BYP (the "District Court Action"), in which Schwebel alleged that FES breached its customer supply agreement and related contract documents with certain fixed-rate business

customers by passing-through certain expense surcharges relating to the Polar Vortex conditions experienced in FES's service region during January 2014 ("Polar Vortex Surcharges"), and asserted these breach of contract claims on behalf of itself and a putative class consisting of those FES business customers who paid all or part of invoices for the Polar Vortex Surcharges;

WHEREAS, on March 31, 2018, each of the Debtors commenced voluntary cases under chapter 11 of the Bankruptcy Code in the Bankruptcy Court (the "Bankruptcy Proceedings"), which are jointly administered under Case No. 18-50757;

WHEREAS, the Debtors have continued to operate their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, on April 5, 2018, in light of FES's bankruptcy filing, the District Court entered an order staying the District Court Action and closing the case (subject to reopening on motion by a party if deemed necessary or appropriate);

WHEREAS, 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,"* [Dkt. No. 1179] (the "Schwebel August 2018 Motion") (together with supporting declarations) which requested, among other things, that the Bankruptcy Court: (a) allow Schwebel to file a class proof of claim on behalf of a putative class, and (b) certify a proposed class under Bankruptcy Rule 7023 and FRCP 23(a) and 23(b)(3);

WHEREAS, as part of its August 20, 2018 submissions, Schwebel also filed Claim 934 (defined below) alleging an estimated $20,000,000 claim for breach of contract against FES on behalf of itself and a putative class;

WHEREAS, Schwebel also filed Claim 935 (defined below) alleging a $10,965.02 claim against FES on behalf of itself as an individual claimant;

WHEREAS, the Debtors contested the relief requested in the Schwebel August 2018 Motion on various grounds;

WHEREAS, pursuant to a stipulation negotiated by the Parties and the Official Committee of Unsecured Creditors (the "Committee") that was so-ordered by the Bankruptcy Court on September 25, 2018, it was agreed and so-ordered that: (1) Bankruptcy Rule 7023 applied with respect to the relief requested in the Schwebel August 2018 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 had 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];

WHEREAS, the Parties thereafter served and responded to multiple requests for production of documents, requests for admission, and interrogatories;

WHEREAS, additional and amended scheduling stipulations and related proposed orders relating to the Schwebel August 2018 Motion were agreed to by the Parties and the Committee and so ordered by the Court, including on January 9, 2019 [Dkt. No. 1922];

WHEREAS, the Parties thereafter reached agreement on the material terms of a settlement, and have entered into this Stipulation (including the exhibits hereto), to resolve the issues raised in the Complaint, the Schwebel August 2018 Motion, and the Debtors' responses, defenses, and objections thereto;

WHEREAS, the material terms of the Settlement (defined below) embodied in this Stipulation have also been approved by various constituencies in the Bankruptcy Proceedings

including: (i) the ad hoc group consisting of holders of the majority in aggregate amount of (a) certain secured pollution control revenue bonds supported by notes issued by FG and NG (defined herein), (b) certain unsecured pollution control revenue bonds supported by notes issued by FG and NG, and (c) certain unsecured notes issued by FES; (ii) the ad hoc group of certain holders of pass-through certificates issued in connection with the leveraged lease transaction for Unit 1 of the Bruce Mansfield Power Plant; (iii) certain holders of (a) unsecured claims against FES arising from the rejection of certain power purchase agreements and (b) unsecured claims against FENOC that are guaranteed by FES; and (iv) the Committee;

WHEREAS, the Parties agree that the claims asserted by Schwebel on behalf of itself and the Settlement Class Members in the District Court Action and/or in the proceedings in the Bankruptcy Court (collectively, the "Action") present significant and complex legal and factual issues, and that this Stipulation and the Settlement embodied herein were reached only after arm's length settlement negotiations among counsel for the Parties;

WHEREAS, Settlement Class Claimant and Class Counsel (defined below) believe that the terms and conditions of this Stipulation and the Supplemental Agreement (defined below) referenced herein are fair, reasonable and adequate, and in the best interests of the Settlement Class, taking into account all relevant factors including, but not limited to, the substantial benefits that the Settlement Class Members will receive under the Settlement versus the substantial costs, risks and uncertainties of continued litigation;

WHEREAS, the Parties have agreed that this Stipulation shall not be construed or deemed to be a concession by Settlement Class Claimant or any Settlement Class Member of any infirmity in the claims asserted or submitted in the Action (or deemed to be evidence of any such infirmity), nor shall it be deemed to be a concession by any of the Released Debtor Parties of any liability in

connection with such claims or of infirmity in any of the affirmative defenses asserted in the District Court Action or that any of the Debtors asserted or submitted in response to the Schwebel August 2018 Motion (or deemed to be evidence of any such liability or infirmity);

NOW THEREFORE, it is hereby STIPULATED AND AGREED, by and between the Parties to this Stipulation, through their respective counsel, subject to approval of the Bankruptcy Court pursuant to Bankruptcy Rules 7023 and 9019 and FRCP Rule 23, in consideration of the benefits flowing to the Parties hereto and the Settlement Class Members from the Settlement herein set forth, that all Released Claimants' Claims as against the Released Debtor Parties, and all Released Debtors' Claims as against the Released Claimant Parties, shall be settled, resolved, compromised, released, discharged and dismissed with prejudice, upon and subject to the following terms and conditions:

1. DEFINITIONS

1.1 "Action" refers collectively to the District Court Action and to the subsequent proceedings in the Bankruptcy Court as they relate, directly or indirectly, to Claim 934 and/or Claim 935.

1.2 "Ad Hoc Noteholder Group" means the ad hoc group consisting of bondholders of the majority in aggregate amount of (a) certain secured pollution control revenue bonds supported by notes issued by FG and NG (defined below), (b) certain unsecured pollution control revenue bonds supported by notes issued by FG and NG, and (c) certain unsecured notes issued by FES.

1.3 "Administration Costs" means the reasonable and customary fees of the Claims Administrator and the ordinary and necessary expenses incurred in administration of the Settlement, including Notice Costs.

1.4 "Allowed Claim" means the allowed non-priority unsecured claim in the amount of twelve million U.S. dollars ($12,000,000 USD) on the Class POC.

1.5 "Bankruptcy Court" means the United States Bankruptcy Court for the Northern District of Ohio.

1.6 "Bankruptcy Proceedings" means the Debtors' Chapter 11 bankruptcy proceedings before the Bankruptcy Court being jointly administered under the caption *In re FirstEnergy Solutions Corp.*, Case No. 18-50757.

1.7 "Brakey Energy" means Settlement Class Claimant's expert and energy consultant Brakey Energy, including its general counsel, Carolyn Blake.

1.8 "Claim 934" means proof of claim no. 934 that Settlement Class Claimant filed alleging an estimated $20,000,000 claim for breach of contract against FES on behalf of itself and a putative class.

1.9 "Claim 935" means proof of claim no. 935 that Schwebel filed alleging a $10,965.02 claim against FES as an individual claimant.

1.10 "Claims Administrator" means Heffler Claims Group, or such other duly qualified and experienced claims administration entity selected by the Parties, subject to approval by the Court, to act as such in accordance with the provisions of Sections 6, 11 and 12 below.

1.11 "Class Counsel" means Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Meyers, Roman, Friedberg & Lewis ("Meyers Roman").

1.12 "Class POC" or "Class Proof of Claim" means Claim 934 (defined below) filed by Schwebel on behalf of a putative class.

1.13 "Committee" means the Official Committee of Unsecured Creditors appointed in the Bankruptcy Proceedings.

1.14 "Complaint" means the putative class action complaint against FES filed by Schwebel in the District Court on May 8, 2017.

1.15 "Confirmation Order" has the same meaning as set forth in the Plan.

1.16 "Debtors" means and includes FES and its subsidiaries, as well as FirstEnergy Nuclear Operating Company ("FENOC"). For the avoidance of doubt, following the Plan Effective Date, any obligations of the Debtors under this Agreement shall become obligations of the Plan Administrator (as defined herein) and the Reorganized Debtors (as defined in the Sixth Amended Plan) shall not be liable or have any obligations under this Agreement.

1.17 "Debtors' Counsel" means the law firms of Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") and Brouse McDowell LPA.

1.18 "District Court" means the United States District Court for the Northern District of Ohio.

1.19 "District Court Action" refers to the action filed by Schwebel in the District Court on May 8, 2017, captioned *Schwebel Baking Co. v. First Energy Solutions, Corp.*, No. 4:17-cv-00974-BYP (N.D. Ohio).

1.20 "Debtors' Notice Costs" means the costs reasonably incurred by the Debtors in connection with providing information regarding (a) names and addresses of Settlement Class Members and (b) the amount (or net amount) of Polar Vortex Surcharges that such Settlement Class Members paid.

1.21 "Disputed Claims Reserve" has the same meaning as set forth in the Sixth Amended Plan.

1.22 "Equity Election" refers to the ability of certain creditors under the Plan to elect to receive their ratable share of New Common Stock (as defined in the Plan), subject to the Equity Election Conditions (as defined in the Plan) and subject to dilution by the Management Incentive Plan (as defined in the Plan), as set forth in the Sixth Amended Plan or in such further amended version of the Plan that does not materially affect the nature or value of the Equity Election.

1.23 "Equity Election Record Date" has the same meaning as set forth in the Sixth Amended Plan.

1.24 "Escrow Account" refers to the escrow account that Class Counsel may establish to hold the cash, securities or other instruments that are part of the Settlement consideration hereunder to be distributed pursuant to the Allowed Claim, as further described in Section 7 below.

1.25 "Escrow Agent" means a federally-insured financial institution (and/or the brokerage subsidiary of such institution) proposed by Class Counsel that may be appointed, pursuant to Section 7.1 below, to hold the Escrow Account, and to perform such other functions as are set forth in Sections 7 and 8 below.

1.26 "Fairness Hearing" means the hearing to be held by the Bankruptcy Court to determine, among other things, whether to grant final approval to the Settlement, as contemplated by the form of Preliminary 7023 Approval Order (attached hereto as Exhibit A) and Final Approval Order (attached hereto as Exhibit C).

1.27 "FE Corp." means FirstEnergy Corp., the ultimate parent of each of the Debtors.

1.28 "FENOC" means FirstEnergy Nuclear Operating Company.

1.29 "FES" means FirstEnergy Solutions Corp.

1.30 "FES Single-Box Unsecured Claim" means any general unsecured claim against only FES as defined in the Sixth Amended Plan.

1.31 "FG" means FirstEnergy Generation, LLC.

1.32 "Final," with respect to any Final Approval Order or any other order or judgment, means: (a) if no appeal is filed, the expiration date of the time provided by the corresponding rules of the applicable court or legislation for filing or noticing of any appeal therefrom has occurred; or (b) if there is an appeal therefrom, the (i) the date of final dismissal of such appeal, or the final dismissal of any proceeding on certiorari or otherwise to review the Final Approval Order has occurred; or (ii) the date of the final affirmance on an appeal thereof, the expiration of the time to file a petition for a writ of certiorari or other form of review, or the denial of a writ of certiorari or other form of review thereof, and, if certiorari or other form of review is granted, the date of final affirmance thereof following review pursuant to that grant, has occurred. Any proceeding or order, or any appeal or petition for a writ of certiorari or other form of review pertaining solely to (a) any application for Professional Fees and Expenses, (b) any application for a Service award, and/or (c) the Plan of Allocation, shall not be deemed to delay or preclude the Final Approval Order or Alternative Order from becoming Final, though it may delay distribution of funds (other than for payment of Taxes and of Administration Costs, Notice Costs and Debtors' Notice Costs) from the Settlement Fund until such appeal or proceeding is resolved.

1.33 "Final Approval Order" shall mean the order contemplated by Paragraph 14.1, substantially in the form attached hereto as Exhibit C (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court).

1.34 "Gross Settlement Fund" shall have the meaning set forth in Section 4 below.

1.34A "Individual Notice" – see definition 1.40 below.

1.35 "Large and Mid-Sized Commercial or Industrial Business Customers of FES" shall mean those customers who were categorized as such in the business records of FES, and who have been identified as such in the Records File.

1.36 "Mansfield Certificateholders Group" means the ad hoc group of certain holders of pass-through certificates issued in connection with the leveraged lease transaction for Unit 1 of the Bruce Mansfield Power Plant.

1.37 "Net Settlement Fund" means the balance of the Gross Settlement Fund, after certain deductions, as forth in in Section 4 below.

1.37A "New Common Stock" (which is also sometimes referred to as "New FES Common Stock in the Notice) shall have the same meaning as in the Plan.

1.38 "NG" means FirstEnergy Nuclear Generation, LLC.

1.39 "Notice" refers collectively to the Individual Notice and the Website Notice.

1.40 "Individual Notice" means the notice document to be disseminated to Settlement Class Members as part of the plan for providing notice of the Settlement to Settlement Class Members, in the form attached hereto as Exhibit A-2 (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court) and which shall (inter alia)

advise Settlement Class Members of the address of the Settlement Website where they can access, review, and/or print a copy of the Website Notice.

1.41 "Notice Costs" means the reasonable, ordinary, and necessary expenses incurred by the Claims Administrator in disseminating the Individual Notice, establishing the Settlement Website, and/or in otherwise complying with the provisions of the Preliminary 7023 Approval Order with respect to providing notice of the Settlement.

1.42 "Parties" means the Settlement Class Claimant and the Debtors (each of which is a "Party").

1.43 "Person" means an individual, partnership, corporation, governmental entity or any other form of entity or organization.

1.44 "Plan" means the Sixth Amended Plan, inclusive of any amendments or modifications that have been or may be made thereto that do not materially modify or impair the Settlement.

1.45 "Plan Administrator" has the same meaning as set forth in the Sixth Amended Plan.

1.46 "Plan Effective Date" means the date that the Plan becomes effective pursuant to the terms thereof.

1.47 "Plan of Allocation" means the plan of allocation of the Net Settlement Fund as proposed by Class Counsel and approved by the Bankruptcy Court as fair and appropriate, and which (subject to any modifications as may be ordered by the Bankruptcy Court) is summarized below at Section 11.

1.48 "Polar Vortex Surcharge(s)" refers to the expense surcharges that FES passed-through to certain of its business customers relating to the Polar Vortex conditions experienced in FES's service region during January 2014.

1.49 "Preliminary 7023 Approval Motion" means the motion and supporting papers to be filed by Class Claimant with the Bankruptcy Court for entry of the Preliminary 7023 Approval Order.

1.50 "Preliminary 7023 Approval Order" means an order of the Bankruptcy Court, substantially in the form attached hereto as Exhibit A, that will (a) apply Rule 7023 to the proceedings; (b) certify the Settlement Class for settlement purposes only; (c) approve the form and manner of providing notice to the Settlement Class; (d) appoint Schwebel as class representative for settlement purposes only and Scott+Scott and Meyers Roman as Class Counsel for settlement purposes only; and (e) provide a schedule for a Fairness Hearing (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court).

1.51 "Professional Fees and Expenses" means the reasonable attorneys' fees, costs, and expenses of Class Counsel, plus reasonable fees, costs, and expenses of Schwebel's and/or Class Counsel's financial advisors, litigation experts and/or other consultants, in connection with the Action.

1.52 "Professional Fees and Expenses Application" means any application for an award of Professional Fees and Expenses.

1.53 "Professional Fees and Expenses Award" means any award by the Bankruptcy Court for Professional Fees and Expenses.

1.54 "Recognized Claim Amount" means the amount of Polar Vortex Surcharges actually paid by a Settlement Class Member, less the amount of any Polar Vortex Surcharges that (as determined by the Claims Administrator, subject to review by the Court) may have subsequently been recovered by, credited back to, or otherwise recouped by such Settlement Class Member, as further described in Sections 6 and 11 below.

1.55 "Records File" refers to the electronic file of records and information that has been provided by Debtors to Heffler Claims Group (the Parties' proposed Claims Administrator), and to Class Counsel in partially redacted form, as referenced in Section 6 below.

1.56 "Released Claimants' Claims" means any and all claims and causes of action of every nature and description, including Unknown Claims, whether arising under federal, state, common, or foreign law, that any Settlement Class Member or Released Claimant Party (a) asserted in the District Court, the Bankruptcy Court, or any other forum, or (b) could have asserted in any forum that arise or arose out of, or are based upon, any Settlement Class Member's payment of all or any portion of its Polar Vortex Surcharges, except for claims relating to enforcement of the Settlement.

1.57 "Released Debtors' Claims" means any and all claims and causes of action of every nature and description including Unknown Claims, whether arising under federal, state, common or foreign law that Debtors or any Released Debtor Party could have asserted in any forum that arise or arose out of, or are based upon, any Class

Member's conduct with respect to disputing, litigating or settling the Polar Vortex Surcharges, except for claims relating to the enforcement of the Settlement.

1.58 "Released Claimant Parties" (each a "Released Claimant Party") means Settlement Class Claimant, each Settlement Class Member, and each of the foregoing entities' respective past and present trustees, directors, partners, officers, employees, contractors, auditors, principals, agents, attorneys, advisors, predecessors-in-interest, successors-in-interest, and subsidiaries.

1.59 "Released Debtor Parties" (each a "Released Debtor Party") means Debtors (including FES) and the foregoing entities' respective past and present trustees, directors, partners, officers, employees, contractors, auditors, principals, agents, attorneys, advisors, and predecessors-in-interests, successors-in-interest, and subsidiaries.

1.60 "Released Parties" (each a "Released Party") means the Released Debtor Parties and Released Claimant Parties.

1.61 "Schwebel" refers to Schwebel Baking Company.

1.62 "Schwebel's August 2018 Motion" refers to the 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," [Dkt. No. 1179] filed by Schwebel on August 20, 2018, seeking, among other things, that the Bankruptcy Court: (a) allow Schwebel to file a Class Proof of Claim on behalf of a putative class, and (b) certify a proposed class under Bankruptcy Rule 7023 and FRCP 23(a) and 23(b)(3).

1.63 "Service Award" means any award by the Bankruptcy Court to Settlement Class Claimant for its service to the Settlement Class.

1.64 "Settlement" means the settlement of the Action, including the withdrawal of Claim 934 and resolution of the Class POC, as contemplated by this Stipulation.

1.65 "Settlement Agreement" or "Stipulation" refers to this Stipulation and Agreement of Settlement.

1.66 "Settlement Amount" means the amount payable as a distribution under the Plan on the Allowed Claim.

1.67 "Settlement Class" means, for the purposes of this Settlement only, a class consisting of all current or former Large and Mid-Sized Commercial or Industrial Business Customers of FES that (a) had one or more accounts with FES that were invoiced, by or on behalf of FES, for Polar Vortex Surcharges in 2014; and (b) paid all or a portion of such Polar Vortex Surcharges. Excluded from the Settlement Class is any Settlement Class Member that has settled or released any claims against the Debtors relating to its payment of all or any portion of its Polar Vortex Surcharges.

1.68 "Settlement Class Claimant" or "Settlement Class Representative" means Schwebel Baking Company in its capacity as representative of the Settlement Class.

1.69 "Settlement Class Member" means any Person that is a member of the Settlement Class.

1.70 "Settlement Effective Date" has the meaning set forth in Section 15 below.

1.70A "Settlement Fund" refers to the common fund to be created for the benefit of the Class under the Settlement as described in Section 4.

1.71 "Settlement Website" refers to the dedicated website, to be established by the Claims Administrator, from which Settlement Class Members can access, review, and/or print a copy of the Website Notice.

1.72 "Sixth Amended Plan" means the Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., pursuant to Chapter 11 of the Bankruptcy Code filed by Debtors on July 23, 2019 [Dkt No. 2934], inclusive of any amendments or modifications that have been or may be made thereto which do not materially modify or impair the Settlement.

1.73 "Supplemental Agreement" means the supplemental agreement referred to in Section 15 below.

1.74 "Taxes" means (a) any and all applicable taxes, duties and similar charges imposed by a government authority (including any estimated taxes, interest or penalties) arising in any jurisdiction, if any, (i) with respect to the income or gains earned by or in respect of the Gross Settlement Fund, (ii) by way of withholding as required by applicable law on any distribution made by the Claims Administrator or the Escrow Agent of any portion of the Gross Settlement Fund to any persons entitled thereto pursuant to this Stipulation; and (b) any and all expenses, liabilities and costs incurred in connection with the taxation of the Gross Settlement Fund (including without limitation, expenses of tax attorneys and accountants).

1.75 "Unknown Claims" means any and all Released Claimants' Claims or Released Debtors' Claims that any Settlement Class Member or Released Party does not know or suspect to exist in its favor at the time of the release of such claims which, if known by it, might have affected its decision(s) with respect to the Settlement.

With respect to any and all Released Claimants' Claims and Released Debtors' Claims, the Parties stipulate and agree that upon the Settlement Effective Date, the Parties shall expressly waive, and each Settlement Class Member and each Released Party shall be deemed to have waived, any and all provisions, rights, and benefits conferred by any law of any state of the United States, or principle of common law or otherwise, that is similar, comparable, or equivalent to California Civil Code §1542, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

1.76 "Website Notice" means the notice to be posted by the Claims Administrator on the Settlement Website substantially in the form attached hereto as Exhibit A-1 (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court).

1.77 "9019 Motion" refers to the motion to be filed by the Debtors to enter the 9019 Order.

1.78 "9019 Order" means an order of the Bankruptcy Court, substantially in the form attached hereto as Exhibit B (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court) that will approve the Settlement under Bankruptcy Rule 9019 and address any other matters pertinent to preliminary approval not otherwise resolved by the Preliminary 7023 Approval Order.

2. **SCOPE AND EFFECT OF SETTLEMENT**

2.1 The obligations incurred pursuant to this Stipulation shall, upon the Settlement Effective Date, be in full and final disposition of the District Court Action, the Class POC, and any and all Released Claimants' Claims and Released Debtors' Claims as against any and all Released Parties.

3. **SETTLEMENT CONSIDERATION**

3.1 In consideration for the releases and discharges provided for in Section 13 hereof, the Settlement Class shall receive an allowed non-priority unsecured class claim in the amount of $12,000,000 relating to the Class POC (the "Allowed Claim"). The Allowed Claim will be deemed allowed as of the Settlement Effective Date and distributions on the Allowed Claim shall be distributed thereafter in accordance with the Plan.

3.2 The Allowed Claim shall be, and be in all regards treated as, a Class A6 claim held as of record by the Settlement Class Claimant (on behalf of the Settlement Class) as of the Equity Election Record Date and entitled to make the Equity Election under the Plan if the Plan is confirmed and becomes effective with no material change as to Class A6 claims' definition and treatment from that set forth in the Sixth Amended Plan. In the event the definition or treatment of a Class A6 claim is materially altered from that provided in the Sixth Amended Plan, then the Allowed Claim shall be afforded the most favorable treatment accorded to any allowed non-priority, non-guaranteed, general unsecured claim of FES. Settlement Class Claimant, acting by and through Class Counsel and with the advice of its financial advisor, and consistent with its fiduciary duties to the Settlement Class, shall have the right, on behalf of itself and the Settlement Class, to make each and

every election as to the form of recovery (i.e. equity versus cash) upon the Allowed Claim which the applicable Plan, Confirmation Order or other instrument may provide to claims entitled to similar treatment as the Allowed Claim, including but not limited to the Equity Election.

3.3 Schwebel shall withdraw Claim 935, with the right to refile the same should the Settlement contemplated herein fail to become effective.

3.4 Settlement Class Claimant consents to all discharges and releases (including third party releases) provided for by the Settlement Agreement dated as of August 26, 2018, by and among (a) the Debtors, (b) the FE Non-Debtor Parties (as defined therein), (c) the Ad Hoc Noteholder Group, (d) the Mansfield Certificateholders Group, and (e) the Committee, the Plan and any other incremental releases to which the Committee may provide its support.

3.5 Settlement Class Claimant and its agents, including but not limited to Brakey Energy, agree not to directly or indirectly object to, delay, impede, vote to reject, or take any other action to interfere with the acceptance or implementation of the Plan, or the occurrence of the Plan Effective Date, subject to Settlement Class Claimant's fiduciary duties as a member of the Committee. In its capacity as a creditor, Settlement Class Claimant shall (if it has not already done so) vote in favor of the Plan, inclusive of any amendments or modifications which may be made thereto and which do not adversely impact the character or value of the Settlement. Without limiting the generality of the foregoing, pursuant to Bankruptcy Rule 3018(a), the Class POC was temporarily allowed for purposes of voting to accept the Plan in the amount of $12,000,000.

4. USE OF SETTLEMENT PROCEEDS; NON-REVERSIONARY NATURE OF SETTLEMENT

4.1 The Gross Settlement Fund shall consist of the distribution(s) under the Plan on account of the Allowed Claim, plus any interest that may be earned thereon following such distribution(s) or investment gains obtained in connection therewith following such distribution(s). For the avoidance of doubt, the Settlement Class Claimant shall not be entitled to any interest on account of the Allowed Claim, except and to the extent that any interest may be paid generally upon or in connection with Class A6 Claims or any portion thereof, and except as provided in the immediately preceding sentence. The Net Settlement Fund shall consist of the Gross Settlement Fund less: (a) such Professional Fees and Expenses as are approved by the Bankruptcy Court as fair and reasonable; (b) any Service Award to Settlement Class Claimant as approved by the Bankruptcy Court as fair and reasonable; (c) Taxes; and (c) such Administration Costs, Notice Costs and Debtors' Notice Costs, subject to the $75,000 cap referenced in ¶6.13, as are approved by the Bankruptcy Court as fair and reasonable.

4.2 The Net Settlement Fund shall be distributed among the members of the Settlement Class in accordance with the Plan of Allocation, or such revised Plan of Allocation as may be approved by the Bankruptcy Court as fair and reasonable.

4.3 The Settlement is not a claims-made settlement, and if the Settlement Effective Date occurs, there will be no reversion of Settlement funds to any Debtor, any affiliate or successor-in-interest of any Debtor (including the Plan Administrator),

or any reorganized entity that is created under the Plan, or to any creditor that is not a Settlement Class Member.

5. PRELIMINARY APPROVAL ORDER AND SETTLEMENT FAIRNESS HEARING

5.1 Promptly after execution of the Stipulation, Settlement Class Claimant shall file a Preliminary 7023 Approval Motion with the Bankruptcy Court for entry of the Preliminary 7023 Approval Order. The Debtors shall consent to entry of the Preliminary 7023 Approval Order for settlement purposes only.

5.2 Concurrently with the Preliminary 7023 Approval Motion, the Debtors shall file the 9019 Motion. Settlement Class Claimant shall consent to entry of the 9019 Order for settlement purposes only.

5.3 The Parties shall appear at the Fairness Hearing to seek entry of the Final Approval Order. The Fairness Hearing shall occur on the date provided in the Notice (or on such adjourned date as the Bankruptcy Court may subsequently order and that the Parties shall duly re-notice by entry on the Bankruptcy Court's docket), which date shall be scheduled to occur after the Plan Effective Date.

6. CLAIMS ADMINISTRATION AND NOTICE

6.1 The Parties, subject to approval by the Bankruptcy Court, shall (to the extent that they have not already done so) select an experienced Claims Administrator to be appointed by the Bankruptcy Court to act as administrator for issuing notice and processing claims in connection with administering the Settlement, with any disputes to be resolved by the Bankruptcy Court.

6.2 After the Bankruptcy Court enters the Preliminary 7023 Approval Order and the 9019 Order, but not before the Plan Effective Date, the Claims Administrator will

disseminate the Individual Notice to all prospective members of the Settlement Class.

6.3 The Debtors warrant and represent that they have, in good faith, produced records or data reasonably necessary to allow the Claims Administrator (a) to identify each prospective Settlement Class Member (by name and last known address) and (b) to calculate the value of each prospective Settlement Class Member's Recognized Claim Amount, as set forth below and in the Plan of Allocation.

6.4 Debtors represent and warrant that they have produced the records and information referenced in sub-paragraph 6.3 in an electronic file (the "Records File") by the Debtors to the Claims Administrator (with a redacted copy to Class Counsel from which individual customer names and street addresses have been redacted). To the extent that the Records File contains separate listings for separate accounts maintained by the same Settlement Class Member, the Records File has been (except to the extent as the Parties may have otherwise agreed in writing) formatted in such a way as to allow the information for each account to be organized by proposed Settlement Class Member name and address for each account, as relevant. Because the Debtors' customer data and information is organized by customer account and not by name, and multiple accounts may be associated with the same Settlement Class Member but with different addresses, the Records File has been organized by account number, name, and address, rather than by name only.

6.5 Debtors have provided within the Records File a list of all Settlement Class Members and/or Settlement Class Member accounts to permit the Claims Administrator to (a) identify, by name and last known address, all Settlement Class

Members and (b) make a reasonably reliable determination of the value of each Settlement Class Member's Recognized Claim Amount (including specifically the amount of Polar Vortex Surcharges actually paid by each Settlement Class Member).

6.6 The confidentiality of the Debtors' customer information, including the identity of its customers, will be preserved and protected in the Settlement administration process to the fullest extent reasonably practicable, and in no event will the Debtors' customer list or any other confidential customer information be provided to Settlement Class Claimant or its experts or consultants, or to any of Class Counsel who are or have been an employee of, or in-house counsel to, Brakey Energy. Class Counsel (other than current or former employees of, or in-house counsel for, Brakey Energy) shall, however, promptly be given access by Debtors and the Claims Administrator to information from the Records File as may be reasonably necessary and appropriate for Class Counsel to understand and address issues or concerns that may arise relating to Debtors' or the Claims Administrators' compliance with their respective obligations under this Agreement with respect to notice and claims administration matters.

6.7 Any disputes as to the sufficiency of Debtors' production of information for purposes of issuing notice or calculating Recognized Claim Amounts, if they cannot first be resolved by the Parties, shall be subject to review and determination by the Bankruptcy Court.

6.8 The Debtors shall be reimbursed from the Gross Settlement Fund for Debtors' Notice Costs reasonably incurred in connection with providing information

regarding the names and addresses of Settlement Class Members and the amount of Polar Vortex Charges that such class members paid, subject to approval by the Bankruptcy Court. To the extent that the Settlement Class Claimant makes the Equity Election and the distribution on the Allowed Claim is made in securities, Class Counsel, on behalf of the Settlement Class, shall direct the Escrow Agent to convert a portion of those securities to cash to pay Debtor's Notice Costs, if any, within 90 days of the Settlement Effective Date, provided that, in connection therewith, Debtors shall grant any waivers or consents that such sales or liquidations may require. Notwithstanding the foregoing and any contrary provisions in this Stipulation, in the event that the amount of Notice Costs, Debtors' Notice Costs, and Administration Costs incurred exceeds $75,000 in total, the Gross Settlement Fund's obligation to reimburse the Debtors for Debtors' Notice Costs shall be reduced by the amount by which the sum of such incurred Notice Costs, Debtors' Notice Costs, and Administration Costs exceeds $75,000.

6.9 The Claims Administrator shall be responsible for serving all required notices related to the Preliminary 7023 Approval Motion and the 9019 Motion, except that electronic service on the docket of the Bankruptcy Court shall be the responsibility of the Party filing such Motion. The Claims Administrator shall also be responsible for serving the Individual Notice, in accord with the provisions of the Preliminary 7023 Approval Order to be entered by the Bankruptcy Court, to every Settlement Class Member at their last known address as listed in the Records File. For any Individual Notice returned as non-deliverable, the Claims Administrator will promptly re-mail said Notice to the addressee via First Class U.S. mail if the

returned Notice contains a forwarding address. If no forwarding address is provided, the Claims Administrator will promptly attempt to determine the correct address through consultation with the Debtors, through review of any additional addresses contained in the Record File and/or through internet searching or other practicable and reasonably economical means to both (a) locate one or more potentially valid current addresses for such Settlement Class Member and (b) mail and/or email an additional copy of the relevant Individual Notice to the Settlement Class Member at such address(es), if any, as appear to the Claims Administrator to be most likely to lead to actual notice.

6.10 Each Individual Notice, which shall be delivered to each Settlement Class Member, shall, subject to the approval of the Bankruptcy Court, be substantially in the form set forth in Exhibit A-2 hereto (with the proviso that the Parties shall conform any definitions and terms therein to the terms of this Stipulation before submitting it to the Court).

6.11 The Claims Administrator shall also be responsible for establishing the Settlement Website, and for posting downloadable and printable copies of the Stipulation, the Website Notice, the Preliminary 7023 Approval Motion, the Preliminary 7023 Approval Order, the 9019 Motion, the 9019 Order, the Fee and Expense Application and the Final Approval Motion on the Settlement Website.

6.12 Without the prior approval of the Bankruptcy Court, the Claims Administrator shall be authorized to incur up to $75,000 in reasonable Notice Costs and Administration Costs associated with preparing and disseminating the Individual Notice, preparing and maintaining the Settlement Website, determining the Recognized Claim

Amounts of Settlement Class Members, and preparing and disseminating distribution checks to the Settlement Class Members. Subject to any deferred billing arrangements that the Claims Administrator may otherwise agree to, such reasonable sums so incurred up to $75,000 will, within 90 days after the date of the earlier of (a) entry of the Bankruptcy Court's ruling on the Parties' motion to enter the Final Approval Order or (b) the valid termination of the Settlement, be payable out of either the Gross Settlement Fund (if the Gross Settlement Fund has been funded) or out of the share of the Debtors' assets or the New Common Stock that would otherwise be or have been available for distribution to the Gross Settlement Fund on the Allowed Claim (with disputes, if any, as to how the share of assets or share of New Common Stock was determined as reference in this sentence being subject to review by the Court). In addition, after the Settlement Effective Date, the Claims Administrator may apply to the Court to be paid for any additional reasonable Notice Costs and/or Administration Costs over $75,000. All payments to the Claims Administrator shall be subject to review for reasonableness and final approval before payment by the Bankruptcy Court. However, in the event that Settlement Class Claimant makes the Equity Election as further described in Section 7 below and the distributions on the Allowed Claim are made in the form of non-cash property or securities, then, notwithstanding any other terms or provisions in this Stipulation to the contrary, any obligations to make the payments otherwise due in connection with notice or administration matters shall be tolled and extended for an additional period ending fifteen (15) days after such non-cash property or securities have been converted to cash, with the exception that Debtors'

Notice Costs, if any, shall be paid in accordance with the provisions of Paragraph 6.8 of this Stipulation.

6.13 Notwithstanding any other terms or provisions in this Stipulation to the contrary, in the event that combined Notice Costs and Administration Costs should exceed $75,000, then the Claims Administrator may apply to the Bankruptcy Court for payment for such reasonable fees and costs in excess of $75,000, and payment of such additional fees and costs as may be approved by the Bankruptcy Court shall be the obligation of Debtor FES, or of its bankruptcy estate. In addition, notwithstanding any other terms or provisions in this Stipulation to the contrary, in the event that the sum of Notice Costs, Debtors' Notice Costs and Administration Costs should exceed $75,000, in no event shall the Settlement Fund, Settlement Class Claimant or any Released Claimant Party (including Class Counsel) have any obligation to pay more than $75,000 towards the payment of combined Notice Costs, Debtors' Notice Costs, and Administration Costs, and instead the payment of Notice Costs, Debtors' Notice Costs, and Administration Costs in excess of this $75,000 aggregate cap shall be the obligation of Debtor FES, its successor(s)-in-interest, or its bankruptcy estate.

7. PAYMENT AND HOLDING OF SETTLEMENT PROCEEDS

7.1 Upon the Settlement Effective Date, the distributions on the Allowed Claim shall be paid into or otherwise transferred into the Escrow Account on the first Periodic Distribution Date following the Settlement Effective Date, as set forth in the Plan. Class Counsel shall appoint a federally-insured financial institution (and/or the

brokerage subsidiary of such institution) to serve as Escrow Agent for the Escrow Account.

7.2 In the event that Settlement Class Claimant, on behalf of the Settlement Class and by and through Class Counsel, has made and not rescinded the Equity Election, and the distributions on the Allowed Claim are to be made in the form of New Common Stock, any shares of New Common Stock intended for ultimate distribution to the Settlement Fund shall be caused by the issuer to be registered and/or exchange-listed if and to the same extent as any other shares of New Common Stock are so registered or exchange-listed. The Escrow Agent shall hold such securities as are ultimately distributed (consistent with ¶7.1 above) on the Allowed Claim in the Escrow Account until Class Counsel, on behalf of the Settlement Class, directs the Escrow Agent to sell, redeem, or otherwise convert such securities to cash. Consistent with their fiduciary duties to the Settlement Class, Settlement Class Claimant and Class Counsel shall not unreasonably delay in selling, redeeming, or otherwise converting the securities to cash for the benefit of the Settlement Class, and the sale, redemption, or other conversion of such securities to cash shall occur either within 12 months after its receipt by the Escrow Agent or upon the development of market liquidity sufficient to effect the sale, redemption or other conversion without unreasonable discount from its fair value, whichever is later.

7.3 In the event that the Settlement Class Claimant elects to have distributions on the Allowed Claim paid in cash, or following any conversion to cash of any securities distributed on the Allowed Claim, the Escrow Agent shall, until such time as the Settlement proceeds are ready to be disbursed (in whole or in part) in accordance

with the Plan of Allocation and Final Approval Order, invest or hold any funds, as directed by Class Counsel, in (a) U.S. Treasury Securities, (b) other securities backed by the full faith and credit of the United States, (c) money market funds comprised exclusively of instruments backed by the full faith and credit of the United States, and/or (d) a bank account or certificates of deposit that are fully insured by the Federal Deposit Insurance Corporation. The Escrow Agent shall collect and reinvest in the Gross Settlement Fund any interest earned or accrued thereon.

7.4 Subject to further order(s) and/or directions as may be made by the Court, the Escrow Agent is authorized to execute such transactions as are consistent with the terms of the Stipulation. The Released Debtor Parties shall have no responsibility for, interest in, or liability whatsoever with respect to the actions of the Escrow Agent or any transaction executed by the Escrow Agent in its capacity as such, nor shall the Settlement Class Claimant, Class Counsel, any of their financial advisers or consultants, or the Escrow Agent have any liability whatsoever to any Released Debtor Party with respect to any actions taken in good faith by Settlement Class Claimant, Class Counsel, any of their financial advisers or consultants, or the Escrow Agent to sell (or not sell), redeem (or not redeem), or otherwise convert (or not convert) to cash any securities received by the Escrow Agent as a distribution on the Allowed Claim.

7.5 All funds held by the Escrow Agent shall be deemed and considered to be *in custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court,

until such funds are distributed pursuant to the Plan of Allocation and Final Approval Order.

7.6 Upon the occurrence of the Settlement Effective Date, no Debtor, or any other Person that paid or contributed any portion of the Settlement Amount, shall have any right to the return of the Gross Settlement Fund or to the securities or other assets payable to the Settlement Fund hereunder, or to any portion thereof.

8. TAXES

8.1 The Parties and the Escrow Agent shall treat the Settlement Fund as being at all times a "qualified settlement fund" for purposes of §468B of the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder. In addition, the Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this paragraph, including, without limitation, the "relation-back election" (as defined in Treasury Regulation §1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary Parties, and thereafter to cause the appropriate filing to occur.

8.2 For the purposes of §468B of the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder, the "administrator" shall be the Escrow Agent as that term is used in Treas. Reg. §1.468B-2. As administrator, the Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including, without

limitation, the returns described in Treas. Reg. §1.468B-2(k)). Such returns (as well as the election described in the preceding sub-paragraph) shall be consistent with this sub-paragraph and in all events shall reflect that all Taxes (including any estimated Taxes, interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in the sub-paragraph immediately below.

8.3 All (a) Taxes (including any estimated Taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including, without limitation, any Taxes or tax detriments that may be imposed upon the Debtors or their counsel with respect to any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a "qualified settlement fund" for federal or state income tax purposes, and (b) expenses and costs incurred in connection with the operation and implementation of this Section 8 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this Section 8 ("Tax Expenses")), shall be paid out of the Settlement Fund. In all events the Debtors, Class Claimant, and their respective counsel shall have no liability or responsibility for Taxes or Tax Expenses. Further, Taxes and Tax Expenses shall be treated as, and considered to be, a cost of administration of the Settlement Fund and shall be timely paid by the Escrow Agent out of the Settlement Fund without prior order from the Court, and the Escrow Agent shall be authorized (notwithstanding anything herein to the contrary) to withhold from distribution to Authorized Claimants any funds necessary to pay such amounts,

including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. §1.468B-2(l)(2)); and neither the Debtors, Class Claimant nor their respective counsel are responsible, nor shall they have any liability for, any Taxes or Tax Expenses. Notwithstanding any contrary provision in this Stipulation, if Class Claimant makes the Equity Election and any Taxes or Tax Expenses become due before Class Counsel directs the sale, redemption, or other conversion to cash of securities distributed on the Allowed Claim, then Class Counsel shall sell, redeem, or otherwise convert such securities to cash in an amount sufficient to enable the Escrow Agent to pay such Taxes and Tax Expenses, out of the Settlement Fund, as they become due. The Parties hereto agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this Section 8.

9. PROFESSIONAL FEES AND EXPENSES AND SERVICE AWARD

9.1 Class Counsel may apply to the Bankruptcy Court for a Professional Fees and Expenses Award, including for an award of attorneys' fees to Class Counsel no greater than 33⅓ percent of the Gross Settlement Fund, and for payment of reasonable expenses (including the fees, costs and expenses of Schwebel's financial advisor in this matter (Dundon Advisors LLC) and its litigation experts and consultants (Matthew Brakey and/or Brakey Energy)). The two Class Counsel firms may allocate any award of attorneys' fees between their two firms in a manner in which they in good faith believe reflects the value of the time and contributions of such counsel to the initiation, prosecution, and resolution of the Action.

9.2 In addition, Class Counsel may include an application to the Bankruptcy Court on behalf of the Settlement Class Claimant for a Service Award of no greater than $15,000 to Settlement Class Claimant for its time and expense incurred in representing the Settlement Class.

9.3 Debtors shall take no position with respect to the Professional Fees and Expenses Application or request for Service Award. The effectiveness of the Settlement Agreement shall not be contingent on Bankruptcy Court approval of any requested Professional Fees and Expenses Award or of any requested Service Award.

9.4 Any Professional Fees and Expenses Award or Service Award awarded by the Bankruptcy Court shall be payable only from the Gross Settlement Fund, as ordered, as soon as (a) the Gross Settlement Fund has been fully funded; (b) the Bankruptcy Court has entered the Final Approval Order; and (c) the Final Approval Order becomes Final. For the avoidance of doubt, the Debtors shall have no liability or obligation in connection with any Professional Fees and Expenses Award or Service Award.

10. RIGHTS TO OBJECT TO SETTLEMENT OR OPT OUT OF CLASS

10.1 Any Settlement Class Member who wishes to opt out of the Settlement must follow the procedures for doing so as referenced in the Individual Notice and detailed in the Website Notice, and do so within the deadlines specified in the Preliminary 7023 Approval Order. Group opt-outs, including "mass" or "class" opt outs, shall not be permitted. Any Settlement Class Member that does not submit a timely written request to opt out will be bound by all proceedings, orders and judgments with respect to the Class POC and the Released Claims.

10.2 Any Settlement Class Member who wishes to object to the fairness, reasonableness, or adequacy of this Settlement, or to any aspect of the Professional Fees and Expenses Application, or to speak at the Fairness Hearing, must follow the procedures for doing so as detailed in the Website Notice, and must do so within the deadlines specified in the Preliminary 7023 Approval Order.

10.3 The Claims Administrator shall mail the Individual Notice to all prospective Settlement Class Members at the addresses provided for them in the Records File not less than forty (40) days before the deadline for submitting objections or requests to opt-out, and shall make copies of the Website Notice available on the Settlement Website by the date it mails the Individual Notices.

11. PLAN OF ALLOCATION

11.1 The distribution of the Net Settlement Fund to each Settlement Class Member shall be *pro-rata* based on the net amount of Polar Vortex Surcharges actually paid by each such Settlement Class Member, subject to any Minimum Payment Threshold (as that term is defined below) approved by the Court.

11.2 Specifically, the Claims Administrator shall determine the total net amount of Polar Vortex Surcharges that were paid by each Settlement Class Member based on the information contained in the Records File. Each Settlement Class Member's "Recognized Claim Amount" shall be equal to the total net amount of Polar Vortex Surcharges as determined by the Claims Administrator, absent a successful challenge in accordance with the procedure specified in Section 11.3 below.

11.3 Each Settlement Class Member shall be advised in the Individual Notice of its Recognized Claim Amount as determined by the Claims Administrator based on the information contained in the Records File. Each Settlement Class Member shall

then have the opportunity to challenge the Claims Administrator's determination of its Recognized Claim Amount based on additional or different evidence that it submits to the Claims Administrator, provided, however, that no such challenge may be considered unless it is submitted at least 10 days prior to the Fairness Hearing. Any such dispute shall be resolved by the Bankruptcy Court. In the event that the Claims Administrator determines that a timely challenge is valid, the Claims Administrator shall appropriately correct the previously calculated Recognized Claim Amount for that Class Member; whereas, in the event that the Claims Administrator does not agree (in whole or in part) with the challenge, and the Claims Administrator and the Class Member are unable to resolve their differences, the dispute shall be resolved by the Court.

11.4 Once all challenges, if any, to the Claims Administrator's determination of Recognized Claim Amounts have been resolved or withdrawn, the Claims Administrator shall then calculate the total amount of all Recognized Claim Amounts of all Settlement Class Members, and shall distribute by check to each Settlement Class Member that Settlement Class Member's *pro rata* share of the Net Settlement Fund (*i.e.*, the Net Settlement Fund multiplied by a fraction where (a) the dividend is the given Settlement Class Member's Recognized Claim Amount and (b) the divisor is the total amount of all Settlement Class Members' Recognized Claim Amounts), subject to the Minimum Payment Threshold provisions of ¶11.5.

11.5 Subject to the approval of the Bankruptcy Court, the Plan of Allocation shall (in the interests of administrative efficiency and reducing Notice Costs and Administration Costs) provide for a "Minimum Payment Threshold" of up to

$50.00, and shall further provide that Settlement Class Members whose Recognized Claim Amount would otherwise result in a distribution check of less than the Minimum Payment Threshold shall be entitled to no distribution. To the extent that the Claims Administrator determines, based on its analysis of the Records File and the value of the Net Settlement Fund, that a Settlement Class Member would (but for the Minimum Payment Threshold) receive a distribution check in an amount less than the Minimum Payment Threshold, then (a) the Recognized Claim Amount for each such Settlement Class Member shall be deemed to be zero and (b) the Recognized Claim Amounts for each Settlement Class Member whose claim would *not* result in a distribution of less than the Minimum Payment Threshold shall be recalculated in accordance with sub-paragraph 11.4 (with the originally used dividends and divisors thereunder recalculated to take into account the revaluation to zero of the Recognized Claim Amount of each Settlement Class Member whose Recognized Claim Amount would have resulted in a distribution of less than the Minimum Payment Threshold).

11.6 The effectiveness of the Settlement shall not be contingent on the Bankruptcy Court's approval of any particular Plan of Allocation, and Class Counsel reserve the right to unilaterally propose amendments to the Plan of Allocation, subject to the approval of the Bankruptcy Court.

12. CLAIM ADMINISTRATION AND DISTRIBUTION OF THE NET SETTLEMENT FUND TO CLASS MEMBERS

12.1 Upon the occurrence of the Settlement Effective Date, and following the conversion to cash of any non-cash property or securities distributed on the Allowed Claim, the Claims Administrator shall, in accordance with the Plan of Allocation approved

by the Bankruptcy Court, distribute the Net Settlement Fund to Settlement Class Members.

12.2 Any balance remaining in the Net Settlement Fund due to uncashed checks or otherwise after six months after the date of the initial distribution of the Net Settlement Fund, and after payment of any additional Administration Costs, shall be distributed only as directed by the Bankruptcy Court.

12.3 No Person shall have any claim against the Parties, any of their counsel, or the Claims Administrator, based on determinations or distributions made substantially in accordance with this Stipulation, the Plan of Allocation approved by the Bankruptcy Court, or any order(s) of the Bankruptcy Court.

13. RELEASES

13.1 Upon the Settlement Effective Date, Settlement Class Claimant and each Released Claimant Party shall be deemed to have and by operation of the Judgment shall have fully, finally and forever released, relinquished and discharged all Released Claimants' Claims against Debtors and each Released Debtor Party. Upon the Settlement Effective Date, Settlement Class Claimant and each Released Claimant Party will similarly be forever barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any action or other proceeding in any court of law or equity, arbitration tribunal, or administrative forum that asserts the Released Claimants' Claims against any of the Released Debtor Parties. This discharge and release includes both known claims and Unknown Claims, to the maximum extent permitted by law.

13.2 Upon the Settlement Effective Date, each Debtor and each Released Debtor Party shall be deemed to have and by operation of the Final Approval Order shall have

fully, finally, and forever released, relinquished and discharged all Released Debtors' Claims against the Class Claimant and each Settlement Class Member and Released Claimant Party. Upon the Settlement Effective Date, Debtors and each Released Debtor Party will similarly be forever barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any action or other proceeding in any court of law or equity, arbitration tribunal, or administrative forum, asserting the Released Debtors' Claims against any Released Claimant Party. This discharge and release includes both known claims and Unknown Claims, to the maximum extent permitted by law.

14. FINAL APPROVAL ORDER

14.1 Following the issuance of the Notice and after the Effective Date of the Plan, and pursuant to the Preliminary 7023 Approval Order, Class Counsel and Debtors' Counsel shall appear at the Fairness Hearing and jointly request that the Bankruptcy Court enter a Final Approval Order substantially in the form annexed hereto as Exhibit C.

15. OCCURRENCE OF SETTLEMENT EFFECTIVE DATE; TERMINATION

15.1 The Settlement Effective Date shall occur on the first business day when each of the following events or conditions has occurred:

(a) the Plan Effective Date has occurred;

(b) the Bankruptcy Court has entered the Preliminary 7023 Approval Order, substantially in the form of Exhibit A hereto (but a modification to the Preliminary 7023 Approval Order relating solely to the manner or content of the issuance of the Notice that is deemed necessary by the Bankruptcy

Court to meet applicable legal requirements shall not be deemed to constitute a substantial change to the form of such order;

(c) Debtors have not timely and validly exercised any option they may have to terminate the Stipulation under the Supplemental Agreement;

(d) the distributions to be made to the Escrow Account on the Allowed Claim have been made; and

(d) the Bankruptcy Court has entered the Final Approval Order, substantially in the form of Exhibit C hereto, and such order has become Final.

15.2 If the events or conditions specified in Paragraph 15.1 above are not met (after allowing for any relevant processes for reconsideration or appeal to be exhausted), either Debtors or Settlement Class Claimant may terminate the Stipulation subject to the terms hereof, unless they mutually agree in writing to proceed with the Stipulation. Within ten (10) business days following any valid termination of this Settlement, the Escrow Agent shall return to Debtors' bankruptcy estate (or its successors-in-interest) any portion of the Settlement Amount in the Settlement Fund.

15.3 If Persons who would otherwise be Settlement Class Members with Recognized Claim Amounts exceeding a certain level should timely request exclusion from the Settlement Class and this Settlement in accordance with the Notice, Debtors shall have the option, as set forth in a separate agreement (the "Supplemental Agreement") being executed by or on behalf of the Parties simultaneously with the execution of this Stipulation, to terminate the Settlement. The Supplemental Agreement will not be filed with the Bankruptcy Court unless a dispute arises as to

its terms, or as otherwise ordered by the Bankruptcy Court, nor shall it otherwise be disclosed unless ordered by the Bankruptcy Court, in which case the Parties shall request that it be filed under seal or redacted.

15.4 Upon the occurrence of the Settlement Effective Date, no Debtor (including any of their affiliates or successors-in-interest or the Plan Administrator), or any other Person that paid or contributed any portion of the Settlement Amount, shall have any right to the return of the Gross Settlement Fund, or to the securities or other assets payable to the Settlement Fund hereunder, or to any portion thereof.

16. NON-DISPARAGEMENT

16.1 The Parties and their counsel, experts and other agents agree not to disparage the Settlement or each other concerning the subject matter of the Action or this Settlement.

17. NO ADMISSION OF WRONGDOING

17.1 This Stipulation, whether or not consummated, and any proceedings taken pursuant to it:

(a) shall not be offered or received against any Released Debtor Party as evidence of, or construed as or deemed to be evidence of, any presumption, concession, or admission with respect to (i) the truth of any fact alleged in the Complaint; (ii) the validity of any claim that has been or could have been asserted in the Action or in any other litigation or proceeding, (iii) the deficiency of any defense to such claims that Debtors asserted or could have asserted in the Action or in any other litigation or proceeding; or (iv) the purported liability, negligence, or fault of any Released Debtor Party;

(b) shall not be offered or received against any Released Debtor Party as evidence of a presumption, concession or admission of any fault, misrepresentation, or omission with respect to any statement or written document approved or made by such Released Party;

(c) shall not be offered or received against any Released Debtor Party as evidence of a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against such Released Party in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to enforce the terms of this Stipulation;

(d) shall not be construed against the Debtors as an admission or concession that the consideration to be given hereunder represents the amount that could be or would have been recovered after trial or any other adjudication of the merits of any claim; and

(e) shall not be construed as or received in evidence as an admission, concession, or presumption against Settlement Class Claimant or any of the Settlement Class Members that any of their claims are without merit, or that any defenses asserted by any Debtor has any merit, or that damages recoverable in the Action would not have exceeded the amount recoverable on the Allowed Claim.

18. STAY OF PENDING LITIGATION

18.1 Absent further order of the Bankruptcy Court, the pending litigation concerning the Polar Vortex Surcharges in the Bankruptcy Proceedings shall continue to be stayed. If the Settlement is terminated pursuant to its terms or otherwise fails to become

effective, the Parties shall schedule a meet and confer within fourteen (14) days and schedule a status conference with the Bankruptcy Court as soon as reasonably practicable prior to the continuation of any litigation, and agree to meet and confer over submission of a revised litigation schedule which shall provide, *inter alia*, a reasonable period of time for the completion of fact and expert discovery.

19. **MISCELLANEOUS PROVISIONS**

19.1 **Exhibits.** All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

19.2 **No Modification Except in Writing.** This Stipulation may not be modified or amended, nor may any of its provisions be waived, except by a writing signed by all Parties or their successors-in-interest.

19.3 **Headings.** The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

19.4 **Continuing Jurisdiction of the Bankruptcy Court.** The administration, consummation, and enforcement of the Settlement and this Stipulation and any related proceedings shall be under the authority of the Bankruptcy Court. Similarly, the Parties agree that the Bankruptcy Court shall retain exclusive and continuing jurisdiction over the Parties and the Settlement Class Members to interpret the terms, conditions, and obligations under this Stipulation.

19.5 **No General Waivers for Partial Breach.** The waiver by one Party of any breach of this Stipulation by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation.

19.6 **Entire Agreement.** This Stipulation and its exhibits and the Supplemental Agreement and its exhibits constitute the entire agreement concerning the

effective, the Parties shall schedule a meet and confer within fourteen (14) days and schedule a status conference with the Bankruptcy Court as soon as reasonably practicable prior to the continuation of any litigation, and agree to meet and confer over submission of a revised litigation schedule which shall provide, *inter alia*, a reasonable period of time for the completion of fact and expert discovery.

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19.6 **Entire Agreement.** This Stipulation and its exhibits and the Supplemental Agreement and its exhibits constitute the entire agreement concerning the

Settlement, and no representations, warranties, or inducements have been made by any Party hereto concerning this Stipulation, the Supplemental Agreement, or their respective exhibits, other than those contained and memorialized in such documents.

19.7 **Governing Law.** The construction and interpretation of this Stipulation shall be governed by the laws of the State of Ohio without regard to conflicts of laws, except to the extent that the law of the United States requires that federal law governs.

19.8 **Construction.** This Stipulation shall not be construed more strictly against one Party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Parties, it being recognized that this Stipulation is the result of arm's length negotiations between the Parties, and all Parties have contributed substantially and materially to the preparation of this Stipulation.

19.9 **Authority to Execute.** Each counsel, and any other Person executing this Stipulation on behalf of a Party (or Parties), warrants and represents that he or she has the full authority to do so on behalf of such Party.

19.10 **Mutual Cooperation.** The Parties hereto agree to cooperate with one another in (a) obtaining certification, for settlement purposes only, of the Settlement Class; (b) seeking entry and approval of the Preliminary 7023 Approval Order, the 9019 Order, the Stipulation, and the Final Approval Order, and (c) to otherwise use their best efforts to consummate and obtain Final judicial approval of the Settlement.

19.11 **Notice to Parties.** Any notice, demand, or other communication to be provided by a Party to another Party under this Stipulation shall be in writing and shall be sent

by (a) registered or certified mail (postage prepaid, return receipt requested) or delivered by reputable express overnight courier *and* (b) email as follows:

IF TO SETTLEMENT CLASS CLAIMANT:

William C. Fredericks
Scott+Scott Attorneys at Law LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Tel: (212) 223-6444
Email: wfredericks@scott-scott.com

and

David Neumann
Meyers, Roman, Friedberg & Lewis
28601 Chagrin Blvd, Suite 500
Cleveland, OH 44122
Tel: (216) 831-0042
Fax: (216) 831-0542
dneumann@meyersroman.com

IF TO FES AND/OR ANY OTHER DEBTORS:

Seamus C. Duffy
Kathryn E. Deal
Akin Gump Strauss Hauer & Feld LLP
Two Commerce Square
2001 Market Street, Suite 4100
Philadelphia, PA 19103-7013
Tel: (215) 965-1212
Email: sduffy@akingump.com
Email: kdeal@akingump.com

Any Party may change the address(es) at which it is to receive notice by written notice delivered to the other Parties in the manner described above.

19.12 **Counterpart Copies; Execution.** This Stipulation may be executed by exchange of faxed or scanned executed signature pages, and any signature thereby transmitted for the purpose of executing this Stipulation shall be deemed an original signature for purposes of this Stipulation. This Stipulation may be executed in two or more

counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Stipulation on the dates set forth below.

FOR SETTLEMENT CLASS CLAIMANT:

By: _____ Dated: November 20, 2019

William C. Fredericks
Judith S. Scolnick
Scott Jacobsen
Kassandra Nelson
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-and-

Geoffrey M. Johnson (0073084)
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12434 Cedar Road, Suite 12
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Fax: (860) 537-4432
gjohnson@scott-scott.com

By: _____ Dated: November 20, 2019

Peter Turner (0028444)
Richard Bain (0016525)
David Neumann (0068747)
Carolyn Blake (0086279)
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Counsel for Settlement Class Claimant Schwebel Baking Company and the Proposed Settlement Class

FOR FES AND THE OTHER DEBTORS:

By: _____ Dated: _____

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By: _____ Dated: _____

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Counsel for Settlement Class Claimant Schwebel Baking Company and the Proposed Settlement Class

FOR FES AND THE OTHER DEBTORS:

By: _____ Dated: 11-20-19

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GPhillips@beneschlaw.com

Additional Counsel for the Debtors

EXHIBIT A

[Proposed] Preliminary 7023 Approval Order

[EXHIBIT A]

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

ORDER PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 7023 (A) PRELIMINARILY APPROVING PROPOSED SETTLEMENT; (B) CERTIFYING SETTLEMENT CLASS FOR SETTLEMENT PURPOSES ONLY, (C) APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL; (D) APPROVING THE FORM AND MANNER OF NOTICE TO SETTLEMENT CLASS MEMBERS; AND (E) SCHEDULING A FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF THE SETTLEMENT

Upon consideration of the *Motion of Schwebel Baking Company Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 7023 to (A) Preliminarily Approve Settlement (B) Preliminarily Certify Proposed Settlement Class; (C) Appoint Schwebel Baking As Class Representative And Its Counsel As Class Counsel; (D) Approve Form And Manner Of Notice; (E) Schedule Fairness Hearing and (F) Grant Related Relief* [Dkt. No. ___] (the "Preliminary 7023 Approval Motion")[2], and the Court having considered the Preliminary 7023 Approval Motion and any objections or oppositions thereto; and this Court having found that proper and

[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 L.L.C. (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 them in the Settlement Agreement attached as an exhibit to the Preliminary 7023 Approval Motion and thereto.

sufficient notice of the Preliminary 7023 Approval Motion has been given; and the Court having determined, based on the range of possible outcomes and the cost, delay, and uncertainty associated with further litigation, that the proposed Settlement appears to be sufficiently fair, reasonable and adequate to the members of the proposed Settlement Class (as well as administratively cost-effective and consistent with the interests of the Debtors' estates) such as to warrant preliminary approval and the granting of the requested relief; and the Court having determined that the legal and factual bases set forth in the Preliminary 7023 Approval Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The Court reaffirms it prior Order. ECF Doc. 1451, directing the application of Bankruptcy Rule 7023 to these Bankruptcy Proceedings with respect to class certification matters relating to resolution of the Class Proof of Claim filed by Schwebel (claim no. 934), including with respect the proposed Settlement.

3. The Settlement, as set forth in the Settlement Agreement, is preliminarily approved pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 7023 (and Fed. R. Civ. P. 23 as applicable under Rule 7023), subject to final approval at the Fairness Hearing.

4. The Settlement Class is certified pursuant to Federal Rule of Civil Procedure 23, as applicable through Bankruptcy Rule 7023, and is comprised of all current or former Large and Mid-Sized Commercial or Industrial Business Customers of FES (as reflected in Debtors' books and records) that (a) had one or more accounts with FES that were invoiced, by or on behalf of

FES, for Polar Vortex Surcharges in 2014; and (b) paid all or a portion of such Polar Vortex Surcharges, excluding any such customer that has settled or released any claims against the Debtors relating to its payment of all or any portion of its Polar Vortex Surcharges; provided, however, that such Settlement Class shall be certified for settlement purposes only.

5. Schwebel is appointed Class Representative for the Settlement Class.

6. Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Meyers, Roman, Friedberg & Lewis ("Meyers Roman") are appointed Class Counsel for the Settlement Class pursuant to Federal Rule of Civil Procedure 23(c)(1)(B).

7. For purposes of voting on Debtors' Plan (as may be amended or modified from time to time), pursuant to Bankruptcy Rule 3018(a), Claim No. 934 (the Class Proof of Claim) shall be temporarily allowed (to the extent it has not already been allowed) in the amount of $12,000,000.00.

8. The forms of Website Notice and Individual Notice, substantially in the form attached to the Settlement Agreement as Exhibits A-1 and A-2 respectively, are hereby approved.

9. Issuance of the Individual Notice to the Settlement Class Members, as identified in the Records File provided to the Claim Administrator by the Debtors, by first class mail, postage prepaid, at their last known address is reasonable and the best notice practicable under the circumstances and constitutes due and sufficient notice to all potential Settlement Class Members in compliance with the notice requirements of Federal Rule of Civil Procedure 23 and due process.

10. The Court hereby appoints Heffler Claims Group as the Claims Administrator. The Claims Administrator shall have the responsibilities given to it under the Settlement

Agreement, and shall, as set forth herein and in the Settlement Agreement, (a) cause the Individual Notices to be prepared and mailed to Settlement Class Members and (b) cause the Website Notice to be published on a dedicated settlement website (the "Settlement Website").

11. Because the effectiveness of the proposed Settlement (i.e., the occurrence of the "Settlement Effective Date") is conditional upon Debtors' proposed Plan becoming effective, the Court finds that it is cost-effective and otherwise fair, reasonable and appropriate to delay the issuance and mailing of the Individual Notice until after the Debtors' Plan has become effective.

12. Subject to ¶18 below, however, the Claims Administrator shall (a) complete the mailing of the Individual Notice to Settlement Class Members and (b) cause the Website Notice to be published on the Settlement Website) as soon as practicable after the Plan Effective Date (*i.e.,* the date the Debtors' Plan becomes effective), and in no event less than sixty (60) days before the date (or any revised date) of the Fairness Hearing scheduled under ¶18.

13. The reasonable expenses of preparing, printing and mailing the Individual Notice to Settlement Class Members and of establishing the Settlement Website, as required by this Order, and of all other fees, costs or expenses relating to the noticing or administration of the Settlement, shall be payable as provided in the Settlement Agreement, subject to review and approval by the Court.

14. Each Settlement Class Member shall be bound by the terms of the Settlement Agreement and the proposed Final Approval Order, unless it requests exclusion from the Settlement Class in a timely and proper manner, as provided herein. In order to be considered a valid exclusion request, one or more duly authorized representatives of a Settlement Class Member must mail a written request to be excluded from the Settlement and the Class that it is *received* at least thirty (30) calendar days before the Fairness Hearing (the "Opt-Out Deadline"),

and that otherwise complies with the requirements of this paragraph. Any requests for exclusion must be sent either (a) by first class mail, in which case they must be postmarked at least five business days before the Opt-Out Deadline, or (b) by Priority Express Mail or by a reliable delivery service (such as Federal Express, UPS or DHL) for delivery on or before the Opt-Out Deadline, and addressed to the Claims Administrator at the following address:

Heffler Claims Group
Attn:_____
[Insert address]

Any such request must also (1) be signed, (2) include the printed name, business title or position, address and business telephone number of the person(s) executing the opt-out request on behalf of the Settlement Class Member, (3) clearly manifest an intent to exclude the Settlement Class Member from the Settlement Class; and (4) include a statement that the person(s) executing the request is authorized to do so on behalf of the Settlement Class Member, and attach a separate document (such as a corporate resolution or power of attorney) if the person(s) executing the request is not an officer or other duly-authorized employee of a Settlement Class Member that is a corporate entity. Requests for exclusion must be individually made on behalf of each Settlement Class Member who seeks exclusion. Any class, mass, or collective requests for exclusion will be invalid. The Claims Administrator shall promptly furnish to counsel for Debtors and Class Counsel copies of any exclusion requests that come into its possession. Within 20 days after the Opt-Out Deadline, any Party to the Settlement Agreement may file a motion with the Court challenging the validity of any particular request for exclusion. At the Fairness Hearing, Class Counsel shall identify for the Court any person(s) that may have sought to opt-out of the Class.

15. A Settlement Class Member may object to the fairness, reasonableness, or adequacy of the Settlement or the Plan of Allocation, or to the fairness and reasonableness of any proposed award of attorneys' fees and expenses (including any service award to the Settlement Class Claimant). The Court will consider objections only if such objections and any supporting papers are filed in writing with the Clerk of Court, United States Bankruptcy Court for the Northern District of Ohio, John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio 44308. Copies of objections and all supporting papers must be both (i) *received* by the Clerk of the Court at least 20 days prior to the date of the Fairness Hearing, and (ii) served (by certified or registered mail, return receipt requested, or by a reliable delivery service for overnight or two-day delivery) at least 20 days prior to the date of the Fairness Hearing upon each of the following:

William C. Fredericks
SCOTT+SCOTT, ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Ave., 17th Floor
New York, NY 10169
Tel: (212) 223-6444
Fax: (212) 223-6334

(on behalf of the Settlement Class)

Seamus C. Duffy
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market St. #4100
Philadelphia, P.A. 19103
Telephone: (215) 965-1200
Facsimile: (212) 965-1210

(on behalf of the Debtors)

In its objection, any Settlement Class Member who objects must (a) state all supporting bases and reasons for the objection; (b) provide a statement or attach documentary evidence confirming that the person submitting the objection has been authorized to do so on behalf of the Settlement Class Member; (c) clearly identify any and all witnesses, documents and any other evidence of any kind that it may seek to proffer at the Fairness Hearing in connection with its objection; and (d) provide a summary description of the substance of any testimony that it may

wish to offer itself or through any supporting witnesses in support of its objection. Any Settlement Class Member who does not object in the manner prescribed herein (and as further described in the Settlement Class Notice) shall be deemed to have waived such objection and shall be foreclosed from making any objection to (A) the fairness, adequacy or reasonableness of the Settlement, the Plan of Allocation, or any Final Approval Order that may be entered that approves the Settlement and allows the Class Proof of Claim, and to any proposed award of attorneys' fees and expenses.

16. Any objector who files and serves a timely objection in accordance with the immediately preceding paragraph may also request permission to appear at the Fairness Hearing, either in person or through counsel retained at the objector's expense. Objectors or their counsel intending to appear at the Fairness Hearing must follow the procedures as prescribed in the Settlement Class Notice and in the immediately preceding paragraph 15. Any objector who does not timely file and serve a notice of intention to appear in accordance with this paragraph and the procedures set forth in the Notice shall not be permitted to appear at the Fairness Hearing, except for good cause shown

17. Class Counsel shall file, no later than forty-five (45) days prior to the Fairness Hearing, motions for final approval of the Settlement and the proposed Plan of Allocation, and any Professional Fees and Expenses Application (and any application for a Service Award to the Class Representative), together with any papers in support thereof. Class Counsel shall also cause the Claims Administrator to promptly post such any such filed materials on the Settlement Website.

18. Consistent with the Court's intention to schedule the Fairness Hearing regarding the Settlement on a date that is at least seventy-five (75) days after the Plan Effective date (and to

allow time for the Individual Notices to be printed and mailed to Settlement Class Members at least sixty (60) days *before* the Fairness Hearing), the Fairness Hearing is hereby scheduled to be held on _____, **2020, at ____ __.m., prevailing Eastern Time**, at the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, located in the John F. Seiberling Federal Building, 2 South Main Street, Akron, Ohio 44308. However, should the Plan Effective Date ultimately occur on a date that is less than 75 days before the date set for the Fairness Hearing in the preceding sentence, or for other good cause at any time prior to actual issuance of the Notice, counsel for the Parties shall promptly ask the Court to set a new date and time for the Fairness Hearing that is at least 75 days after the Plan Effective Date (in which case, absent contrary Order of the Court, the deadline for the Claims Administrator to issue the Notice under ¶12 shall be reset to the first business day falling fifteen (15) days after entry of the Order setting a new date and time for the Fairness Hearing.

19. The Fairness Hearing may also be rescheduled or continued from time to time by the Court even after issuance of the Notice, without further notice to the Parties or to any Settlement Class Members beyond (a) the Court's entry of an order rescheduling or continuing the Fairness Hearing, or (b) the posting of appropriate Notice of such order and the rescheduled Fairness Hearing date on the Settlement Website.

20. The Court shall retain jurisdiction over all matters arising pursuant to or related to the relief granted by this Order.

DATED: _____, 2019

_____
Hon. Alan M. Koschik

United States Bankruptcy Judge

Prepared by:

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[EXHIBIT B TO STIPULATION OF SETTLEMENT]

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

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

ORDER APPROVING SETTLEMENT BETWEEN DEBTORS AND SCHWEBEL BAKING COMPANY PURSUANT TO BANKRUPTCY RULE 9019

Upon consideration of the *Motion of the Debtors for Entry of an Order Approving the Settlement Between Debtors and Schwebel Baking Company Pursuant to Bankruptcy Rule 9019* (the "9019 Motion");[2] and the Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

[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 L.L.C. (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 given them in the Stipulation of Settlement that has been filed as an Exhibit to Schwebel Baking Company's separate motion (the "Preliminary 7023 Approval Motion", [Dkt. No. __]) for entry of an Order Pursuant to Section 105 of the Bankruptcy Code, Bankruptcy Rule 7023 and FRCP 23 (I) Applying Bankruptcy Rule 7023 to These Proceedings, (II) Certifying Class for Settlement Purposes Only (III) Approving the Form and Manner of Providing Notice to Settlement Class Members, (IV) Appointing Class Representative and Class Counsel, and (V) Providing a Schedule for a Fairness Hearing (the "Preliminary 7023 Approval Order").

1. The Settlement is APPROVED pursuant to Bankruptcy Rule 9019 as set forth herein.

2. This approval pursuant to Bankruptcy Rule 9019 is subject to this Court's (a) preliminary approval and (b) final approval (after conducting a Fairness Hearing on the Settlement following issuance of notice to Settlement Class Members in conformity with the Preliminary 7023 Approval Order) of the Settlement under Bankruptcy Rule 7023.

3. The form and timing of notice of the Settlement to the Settlement Class, the procedures and deadlines for Settlement Class Members to opt out of or object to the Settlement, and the procedures and schedule for the Fairness Hearing, are (or shall be) as set forth in the Preliminary 7023 Approval Order that has been (or will be) entered by the Court, the terms of which are hereby incorporated by reference.

4. The Parties are authorized to execute, deliver, implement and fully perform any and all obligations, instruments, documents and papers to take any and all actions reasonably necessary or appropriate to consummate, complete, execute, implement and comply with the terms of the Settlement without the need for further orders from this Court, except to the extent that further orders from the Court are required or contemplated under the Stipulation or the Preliminary 7023 Approval Order.

5. Subject to this Court's (a) preliminary approval and (b) final approval (after conducting a Fairness Hearing on the Settlement following issuance of notice to Settlement Class Members in conformity with the Preliminary 7023 Approval Order) of the Settlement under Bankruptcy Rule 7023, the releases contained in paragraphs 13.1 and 13.2 of the Settlement are hereby approved. Notwithstanding the possible applicability of Bankruptcy Rules 6004, 6006 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable

upon its entry.

6. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

###

DATED: _____, 2019

_____
Hon. Alan M. Koschik
United States Bankruptcy Judge

SUBMITTED BY:

/s/ Kate Bradley
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EXHIBIT C

[Proposed] Final Approval Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

FINAL ORDER APPROVING CLASS ACTION SETTLEMENT UNDER BANKRUPTCY RULE 7023 AND FEDERAL RULE OF CIVIL PROCEDURE 23

WHEREAS, by Order dated _____, 2019 [Dkt. No. ___ (the "Preliminary 7023 Approval Order"), the Court, pursuant to Section 105 of the Bankruptcy Code, Bankruptcy Rule 7023 and Federal Rule of Civil Procedure Rule 23, granted the *Motion of Schwebel Baking Company Pursuant to Section 105 of the Bankruptcy Code, Bankruptcy Rule 7023, and Federal Rule of Civil Procedure 23 for the Entry of an Order (I) Applying Bankruptcy Rule 7023 to these Proceedings (II) Certifying the Settlement Class for Settlement Purposes, (III) Appointing Class Counsel and Class Representative, (IV) Approving the Form and Manner of Notice to Settlement Class Members of the Settlement, and (V) Providing a Schedule for Fairness Hearing* [Dkt. No. ___] (the "Preliminary 7023 Approval Motion");[1]

WHEREAS, by Order dated _____, 2019 [Dkt. No. ___] (the "9019 Order"), the Court, pursuant to Bankruptcy Rule 9019, granted the *Motion of Debtors for Entry of Order Approving Settlement Between Debtors and Schwebel Baking Company Pursuant To Bankruptcy Rule 9019* [Dkt. No. ___] (the "9019 Motion"); and

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Stipulation of Settlement (the "Settlement Agreement" or "Settlement") previously submitted at Dkt. No. [____] as an exhibit to the Preliminary 7023 Approval Motion.

WHEREAS, the Court having considered the Preliminary 7023 Approval Motion, the 9019 Motion, the Settlement Agreement, the Plan of Allocation, and Class Claimant's Motion in Support of Entry of a Final Approval Order (the "Final Approval Motion"), and any objections or oppositions thereto; and the Court having held a final Fairness Hearing in connection with its consideration of the Settlement in accordance with Bankruptcy Rule 7023(e) and following the issuance of Notice to Settlement Class Members as directed by the Preliminary 7023 Approval Order; and the Court, after due deliberation, having determined that the legal and factual bases set forth in the Final Approval Motion establish just and sufficient cause for the relief requested therein,

IT IS HEREBY ORDERED, ADJUDGED, FOUND AND DECREED THAT:

1. This Court has jurisdiction over this matter pursuant to 28 USC §1334.

2. This is a core proceeding pursuant to 28 USC §157(b)(2).

3. The Final Approval Motion is GRANTED in its entirety.

4. All objections (if any) to the Final Approval Motion, the Settlement Agreement, the Plan of Allocation, the allowance of the Class Proof of Claim as provided in the Settlement Agreement, or the other relief requested in Final Approval Motion, that have not been withdrawn, waived, compromised, settled or released, and all reservations of rights in such objections (if any), are hereby OVERRULED in all respects on the merits and denied.

5. Appropriate and adequate notice of the proposed Settlement, the Plan of Allocation and the Fairness Hearing, in accordance with the Court's Preliminary 7023 Approval Order, due process, the Bankruptcy Rules, and Federal Rule of Civil Procedure 23, was duly provided to the Settlement Class.

6. The Settlement embodied in the Settlement Agreement is fair, reasonable, and adequate, is in the public interest, and merits approval under Bankruptcy Rule 7023 and Federal Rule of Civil Procedure 23, for the following reasons, *inter alia*:

a. If the Settlement is not approved, the continued litigation of the relevant claims will likely be complicated, protracted and expensive, thereby depleting the Debtors' estate and delaying and diminishing distributions to creditors, including Settlement Class Members, with uncertain results;

b. The Settlement Agreement was reached only after Class Counsel conducted significant formal and informal discovery, analyzed the applicable law, and weighed the likelihood of success against the risks of further litigation (including the risk that, even if the Settlement Class Representative were to prevail on behalf of the Settlement Class on all Settlement Class claims and were to obtain a greater recovery after trial, any such recovery would still face the risk of being overturned or reduced on appeal);

c. The Settlement, which grants the Settlement Class an allowed unsecured claim equal to roughly 50% of the amount of the Settlement Class's estimated total alleged damages, is well within the range of reasonableness given (1) the risk that the Settlement Class Representative (and other Class Members) would be unable to establish that Debtor FES's imposition of the disputed Polar Vortex Surcharges breached FES's contracts with any Settlement Class Members, and (2) the risk that, even if the Settlement Class Representative (and other Settlement Class Members) established breaches of the relevant contracts, the Debtors could still defeat the claims because of the voluntary payment doctrine, laches, waiver, or one or more of the Debtors' other affirmative defenses; and

d. The Settlement Agreement was negotiated in good faith and at arm's length by experienced counsel on both sides, who had acquired a thorough understanding of the strengths and weaknesses of the Parties' respective claims and defenses in the course of approximately two years' of vigorously contested litigation (including in the District Court as well as subsequently in this Court), and who were therefore well-positioned to evaluate the benefits of the Settlement, taking into account the expense, risk and uncertainty of further litigation.

In addition to considering the complexity, expense, likely duration and risks of further litigation, the stage of the proceedings (including the amount of discovery completed) and the range of reasonableness of the Settlement in light of the best possible recovery, the Court has also considered the reaction of the Settlement Class in deciding to approve the Settlement, as well as

the benefits to the Debtors' estate and Debtors' other creditors in efficiently and fairly resolving the claims that are being settled and resolved under the Stipulation.

7. In accordance with Federal Rule of Civil Procedure 23(e)(2)(A), the Settlement Class Claimant and Settlement Class Counsel have adequately represented the Settlement Class.

8. The Plan of Allocation is fair, reasonable and adequate, and (in conjunction with the Settlement Agreement) provides for an effective and cost-efficient method of distributing relief to the Settlement Class that treats Settlement Class Members equitably relative to each other, and that the Settlement and the Plan of Allocation merit approval under Federal Rule of Civil Procedure 23(e)(2).

9. On the Settlement Effective Date, the Settlement Agreement and the terms of this Order shall become final and binding upon the Parties and all members of the Settlement Class who did not timely and properly elect to exclude themselves in accordance with the Settlement Class Notice and Preliminary 7023 Approval Order.

10. The entry of this Order is without prejudice to the relief granted in the Preliminary 7023 Approval Order or the 9019 Order, and the Court's prior certification (for settlement purposes only) of the Settlement Class and appointment of Class Counsel and the Settlement Class Claimant on the grounds set forth in the Preliminary 7023 Approval Order are hereby reconfirmed.

11. The entry of this Order shall not serve to extend or stay the time of filing any appeal regarding any of the relief granted in the Preliminary 7023 Approval Order or the 9019 Order.

12. The Parties are hereby authorized, empowered and directed to take such steps and perform such acts as may be necessary and appropriate to carry out the terms of this Order and the Settlement Agreement.

13. Upon the occurrence of the Settlement Effective Date, all Released Claimants' Claims of each Released Claimant Party as against each Released Debtor Party, and all Released Debtors' Claims of each Released Debtor Party as against each Released Claimant Party, shall be fully, finally and forever compromised, settled, released, relinquished, discharged and dismissed with prejudice (and without costs except as provided herein or in the Settlement Agreement or documents incorporated therein).

14. Contingent on the occurrence of the Settlement Effective Date, (a) Claim No. 934 (the Class Proof of Claim) shall, without further order of the Court, be ALLOWED in so far as the Class shall be allowed a non-priority unsecured class claim in the amount of $12,000,000.00; and and (b) Claim No. 935 shall, in accordance with the terms of the Settlement Agreement, be deemed WITHDRAWN.

15. Payment or transfer of the distributions on the Allowed Claim shall be made into the Escrow Account in accordance with the Debtor's Plan and subject to all of the terms and conditions set forth in the Settlement Agreement.

16. The Court finds that all Parties and their counsel have complied with each requirement of Federal Rule of Civil Procedure 11 as to all proceedings relating to the subject matter of the Class Proof of Claim.

17. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and/or implementation of this Order.

18. There is no just reason for delay in the entry of this Order and immediate entry by the Clerk of the Court is expressly directed.

19. This Order is effective immediately upon entry.

DATED: _____, 2019

_____
Hon. Alan M. Koschik
United States Bankruptcy Judge

Prepared by:

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