UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

UNITED STATES' OBJECTION TO CONFIRMATION OF THE SIXTH AMENDED JOINT PLAN OF REORGANIZATION OF FIRSTENERGY SOLUTIONS CORP., *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

The United States objects to confirmation of the *Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2934] ("Sixth Amended Plan").[2] As set forth below, the Sixth Amended Plan cannot be confirmed because it improperly enjoins the United States' claims against non-Debtors through overly broad exculpations and improperly forces the United States into a non-consensual "settlement."

[1] The Debtors in these jointly administered 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), Norton Energy Storage L.L.C. (6928), Case No. 18-50764.

[2] Any capitalized term not defined herein shall have the meaning ascribed to it in the Sixth Amended Plan.

BACKGROUND

1. On March 31, 2018 (the "Petition Date"), the above-captioned debtors (the "Debtors") filed petitions for relief under chapter 11 of the Bankruptcy Code.

A. The Plan Process

2. On February 11, 2019, the Debtors filed the *Disclosure Statement for the Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2119] ("Initial Disclosure Statement") and the *Joint Plan of Reorganization of FirstEnergy Solutions Corp, et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2120] ("Initial Plan"). The Debtors also filed a motion seeking approval of the Initial Disclosure Statement, approving procedures for solicitation, and scheduling a hearing for confirmation of the Initial Plan. *See* Docket No. 2121.

3. The Initial Plan provided, *inter alia*, that holders of claims or interests would be deemed to have granted a broad non-debtor release to the Debtors' non-debtor affiliates (the "Non-Debtor Releases") upon confirmation. *See* Initial Plan, Art. VIII.E. The Initial Plan did not include an opt-out option with respect to the Non-Debtor Releases. *See generally* Initial Plan, Art. VIII.E.

4. Various federal agencies and other interested parties objected to the approval of the Initial Disclosure Statement related to the Initial Plan because the Non-Debtor Releases rendered the Initial Plan patently unconfirmable. *See, e.g.*, Docket Nos. 2266, 2276, 2279, 2393.

5. After supplemental briefing and oral argument, the Court issued an oral ruling that the Initial Plan was patently unconfirmable because the non-consensual Non-Debtor Releases could not satisfy the standard set forth in *Official Committee of Unsecured Creditors v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 658 (6th Cir. 2002). On April 11, 2019,

the Court entered an order denying approval of the Initial Disclosure Statement. *See* Docket No. 2500.

6. On May 17, 2019, the Debtors filed their *Fifth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2658] ("Fifth Amended Plan") and related disclosure statement [Docket No. 2661] ("Amended Disclosure Statement"). On May 29, 2019, the Court approved the Amended Disclosure Statement and permitted solicitation of the Fifth Amended Plan. *See* Docket No. 2714.

7. On July 23, 2019, the Debtors filed the Sixth Amended Plan.

B. Provisions of the Sixth Amended Plan

8. The Plan continues to provide a non-consensual third-party release through an Exculpation provision, which releases liability for:

> any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Restructuring Support Agreement, the Process Support Agreement, the Standstill Agreement, the FE Settlement Agreement, the Mansfield Settlement, the Mansfield Owner Parties' Settlement, the Disclosure Statement, the Plan, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Restructuring Support Agreement, the Process Support Agreement, the Standstill Agreement, the FE Settlement Agreement, the Mansfield Settlement, the Mansfield Owner Parties' Settlement, the Disclosure Statement, the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation.

Sixth Amended Plan, Art. VIII.F.

9. The Plan purports to release and exculpate:

> (i) the Debtors; (ii) the FE Non-Debtor Parties; (iii) the Indenture Trustees; (iv) the Consenting Creditors; (v) the Committee and each of its members, in their capacities as such; (vi) the FE Owner Trustee; and (vii) with respect to

each of the foregoing Entities in clauses (i) through (vi), such Entity and its current and former Affiliates and members (except any such member of the Ad Hoc Noteholders Group, the Mansfield Certificateholders Group, or the FES Creditor Group that voted to reject the Plan and has not changed its vote to accept the Plan by the Confirmation Date), and such Entities' and their current and former Affiliates' current and former directors, managers (including all Independent Directors and Managers), officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, managed/advised funds or accounts, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such"

Sixth Amended Plan, Art. I.A (77) (defining "Exculpated Parties").

10. In addition, the Sixth Amended Plan also includes a broad injunction enjoining claims against not only the Reorganized Debtors, but also the Released Parties, which include numerous non-Debtors. *See* Sixth Amended Plan, VIII.G.

11. The Sixth Amended Plan also contains provisions purporting to settle and compromise the claims and interests of the United States.

> Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits under the Plan, the Plan shall constitute a good faith settlement of any and all potential claims, disputes, causes of action or objections with respect to the allocation of value of the Debtors' Estates (including the value of the Debtors' generation assets and other businesses) between and among the Debtors and their Creditors.

See Sixth Amended Plan, Art. IV.A (7) (emphasis added); *see also* Sixth Amended Plan, Art. VIII.C. The Plan contains no definition for "Creditors." *See* Sixth Amended Plan, Art. I.A.

12. The United States files this objection on behalf of federal agencies who have not

filed claims in this case, but similar and/or additional objections may be filed on behalf of other federal agencies.

ARGUMENT

I. THE SIXTH AMENDED PLAN CANNOT BE CONFIRMED BECAUSE THE EXCULPATION AND INJUNCTION ARE IMPROPER.

14. The United States objects to the Sixth Amended Plan because it would improperly release and enjoin claims against numerous non-Debtors.

15. The non-consensual third party releases contained in the Sixth Amended Plan's Exculpation and Injunction provisions render it unconfirmable. *See* Sixth Amended Plan, Art. VIII.C, D, F, G. In order to resolve the United States' issues regarding the releases contained in Article VIII.C and Article VIII.D of the Sixth Amended Plan, the Debtors and the FE Non-Debtor Parties have agreed to the inclusion of the following language in the Sixth Amended Plan:

> Additionally, for the avoidance of doubt, the releases contained in Article VIII.C and VIII.D shall not act as a release of any non-derivative claims and causes of action of the United States, Ohio Environmental Protection Agency, Ohio Department of Natural Resources, and Pennsylvania Department of Environmental Protection against any non-debtor parties.

16. However, the Sixth Amended Plan continues to have impermissible non-consensual third-party releases in the form of the Exculpation provision. *See* Sixth Amended Plan Art. VIII.F. As the Court already acknowledged at the disclosure statement stage, it may only approve non-consensual third party releases under the standard set forth in *Dow Corning*. As a result, non-consensual third party releases, such as exculpations, may only be approved in the "unusual circumstance" where *all* the following factors are present: (i) there is an identity of interest between the debtor and third party, (ii) the non-debtor had to contribute substantial assets to the reorganization, (iii) the injunction is essential to the plan, (iv) the impacted classes

overwhelmingly voted to accept the plan, (v) the plan provides a mechanism to pay for all, or substantially all, of the classes affected by the injunction, (vi) the plan provides an opportunity for claimants who choose not to settle to recover in full, and (vii) the court has to make these specific factual findings in concluding an injunction may issue. *In re Dow Corning Corp.*, 280 F.3d at 658.

17. The Debtors have failed to demonstrate that the requirements of the *Dow Corning* test are met here. Under *Dow Corning*, a third party receiving a release must have "an identity of interests . . . usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." *Id.* The Sixth Amended Plan continues to provide exculpations to a wide array of non-Debtors, including non-Debtor affiliates, creditors that support the Sixth Amended Plan, and also

> former directors, managers (including all Independent Directors and Managers), officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, managed/advised funds or accounts, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals.

See Sixth Amended Plan, Art. I.A (77) (defining "Exculpated Parties"). To satisfy the *Dow Corning* test, exculpated parties must have an identity of interest with the debtor with respect to the released claims, but here the Exculpated Parties include creditors of the estate, who do not share an identity of interest with the Debtors. In fact, their position as creditors would have them opposed to the Debtors with respect to the activities they seek exculpations for. *See* Sixth Amended Plan, Art. I.A (77).

18. Second, there is no evidence that the Exculpated Parties have provided "substantial assets" to the reorganization. Third, currently there is no evidence that the voting classes have

accepted overwhelmingly the Sixth Amended Plan. Lastly, the exculpations do not satisfy *Dow Corning* because the Sixth Amended Plan does not provide an avenue for the United States to receive full recovery on claims subject to the exculpation. Moreover, the *Dow Corning* standard cannot be satisfied with respect to federal agencies that have not filed claims against the estates, will not vote on the Sixth Amended Plan, and, as a result, will not receive plan distributions in full on account of any claims. Accordingly, the Sixth Amended Plan cannot be confirmed because it contains exculpation provisions that do not satisfy the requirements for third-party releases under *Dow Corning*.

19. To the extent the Court adopts a less stringent requirement for approving exculpations, the Sixth Amended Plan is still unconfirmable because the exculpations are overbroad. The Exculpation provisions improperly release claims against entities and individuals who are not estate fiduciaries. In the Third Circuit, in which binding precedent permits exculpations under a less stringent standard than third party releases, exculpations are only warranted for estate fiduciaries as they are fulfilling their responsibilities under the Bankruptcy Code. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (exculpations permissible for the committee, its members and estate professionals); *In re Washington Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) ("The exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers."). Here, the exculpations go far beyond estate fiduciaries, covering parties such as non-Debtor affiliates, indenture trustees, and the Consenting Creditors. *See* Sixth Amended Plan, Art. I.A (77) (defining "Exculpated Parties"), VIII.F.

20. Moreover, the exculpations are overly broad, releasing claims unrelated to acts

taken by the creditors' committee pursuant to a fiduciary responsibility established under the Bankruptcy Code. *See* 11 U.S.C. § 1103(c) (committee fiduciary duties include consultation with the debtor regarding administration of the case, investigation of acts matters pertaining to the debtors' formulation of the plan and formulation of the plan and advice to the committee and its constituency regarding the plan). Exculpation must be "limited to acts taken solely in connection with the Chapter 11 case" during the post-petition period. *In re Midway Gold US, Inc.*, 575 B.R. 475, 511 (Bankr. D. Colo. 2017); *see also* In re Fraser's Boiler Service, Inc., 593 B.R. 636, 640 (Bankr. W.D. Wash. 2018) (exculpation only for "limited post-petition acts and omissions related to this bankruptcy case").

21. In sum, no controlling Sixth Circuit law authorizes exculpations at all, and the proposed exculpations are so overly broad that they would even fail to satisfy the Third Circuit's rule permitting limited exculpations for estate fiduciaries to the extent they are fulfilling their fiduciary duties under the Bankruptcy Code. Thus, the Sixth Amended Plan cannot be confirmed if it includes such broad exculpations.

II. THE SIXTH AMENDED PLAN CANNOT BE CONFIRMED BECAUSE IT CONTAINS PROVISIONS FORCING THE UNITED STATES TO "SETTLE" ITS CLAIMS AND INTERESTS WITHOUT ITS CONSENT.

22. Section 1123(b)(3)(A) of the Bankruptcy Code provides for the settlement or adjustment of any claim belonging to the debtors or to the estate. The Debtors here are not settling only their own claims but also are attempting to settle with undefined "Creditors" without providing adequate notice or obtaining actual agreement or consent by such creditors.[3] For

[3] The United States understands that the Sixth Amended Plan includes a provision clarifying that it does not settle the United States' claims against non-Debtor parties, except as set forth in Article VIII.D and VIII.E of the Sixth Amended Plan. *See* Sixth Amended Plan, Art. IV.A.

instance, the Sixth Amended Plan states "the Plan shall constitute a good faith settlement of *any and all potential* claims, disputes, cause of action or objections with respect to the allocation of value of the Debtors' Estates (including the value of the Debtors' generation assets and other businesses) *between and among the Debtors and their Creditors*." *See* Sixth Amended Plan, Art. IV.A.7 (emphasis added). The Sixth Amended Plan does not define "Creditors," and thus could be interpreted to improperly force federal agencies that have not filed any claims against the estates into a "settlement." However, agencies that have not filed claims have not waived sovereign immunity and have not consented to any "settlement," and, thus, a plan cannot be utilized to force those agencies to "settle." In order to resolve this issue, the Sixth Amended Plan should be modified to define "Creditors" and to clarify that the purportedly settling "Creditors" do not include any federal agency that has not filed a claim against the estates. Without this modification, the overbroad settlement language in the Sixth Amended Plan renders it unconfirmable.

CONCLUSION

For the foregoing reasons, the Court should not confirm the Sixth Amended Plan unless modifications are made to protect the rights of the United States consistent with the foregoing objections.

Dated: August 2, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 2, 2019, a true and correct copy of this pleading and supporting declarations was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System in the above-captioned action and through first class mail on the parties listed below.

/s/ Marc S. Sacks