

JURISDICTION AND VENUE

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

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

3. The bases for the relief requested in this Motion are sections 105 and 365(a) of title 11 of the United States Code (the “Bankruptcy Code”) and rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

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

5. The Debtors continue to operate their businesses and manage their property as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On April 11, 2018, the United States Trustee for the Northern District of Ohio (the “US Trustee”) appointed the official committee of unsecured creditors (the “Official Committee of Unsecured Creditors”) pursuant to Bankruptcy Code Section 1102. No trustee or examiner has been appointed in these Chapter 11 Cases.

6. Debtor FirstEnergy Solutions Corp. (“FES”) sells power and provides energy-related products and services to retail and wholesale customers. Debtor FirstEnergy Nuclear Generation LLC (“NG”) owns three nuclear generation plants, composed of four units, which are operated by FirstEnergy Nuclear Operating Company (“FENOC”) pursuant to a Master Nuclear Operating Agreement. Debtor FG owns and operates four generation plants that are powered by

fossil fuels. A more detailed description of the Debtors' business and the reasons for filing these Chapter 11 Cases is set forth in the *Declaration of Donald R. Schneider in Support of Chapter 11 Petitions and First Day Motions* (the "First Day Declaration")² filed previously with this Court [Docket No. 55] and incorporated by reference as if fully set forth herein.

RELIEF REQUESTED

7. By this Motion, the Debtors seek entry of the Order authorizing the Debtors to reject the Coal Sales Agreement effective *nunc pro tunc* to the Filing Date.

8. As set forth in the Mellody Declaration, FG is a party to the Coal Sales Agreement with Consol. Pursuant to the Coal Sales Agreement, FG purchases coal to operate one of its fossil fuel generation plants—the Bruce Mansfield Plant in Shippingport, Pennsylvania. The Coal Sales Agreement provides for minimum volume requirements that cause the Coal Sales Agreement to be burdensome for the Debtors. Under the Coal Sales Agreement, FG is required to purchase 6,500,000 tons of coal annually through 2028. Due to a fire at the Bruce Mansfield Plant on January 10, 2018 and the subsequent unavailability of Bruce Mansfield Units 1 and 2, the volume of coal required to operate the Bruce Mansfield Plant has decreased significantly.³ FG only needs 2,500,000 tons of coal in 2018 and projects it will only need 3,600,000 tons of coal in 2019 to operate the Bruce Mansfield and Sammis plants. There is currently a 110 day supply of coal at the Mansfield Plant based on typical operating consumption. Thus, the minimum volume of coal that FG is required to purchase under the Coal Sales Agreement significantly exceeds FG's projected needs. In an effort to address this issue, FG and Consol have engaged in negotiations since the Petition Date, but the parties have been unable to come to an agreement to amend the Coal Sales Agreement satisfactory to both parties.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

³ The January 10, 2018 fire at the Bruce Mansfield Plant is described in greater detail in the First Day Declaration.

FG estimates that it will save approximately \$20.0 million in 2018 and approximately \$14.5 million in 2019 by rejecting the Coal Sales Agreement and purchasing the required coal at the current market rate.

BASIS FOR RELIEF

a. Rejection of the Coal Sales Agreement Reflects the Debtors' Sound Business Judgment

9. Section 365(a) of the Bankruptcy Code allows a debtor to assume or reject any executory contract or unexpired lease. 11 U.S.C. § 365(a). It is well-settled in the Sixth Circuit that where “the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other,” a contract is considered executory. *In re Terrell*, 892 F.2d 469, 471 n.2 (6th Cir. 1989); *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984); *In re AutoStyle Plastics, Inc.*, 227 B.R. 797, 801 (Bankr. W.D. Mich. 1998); *see also In re StarNet Inc.*, 355 F.3d 634, 635 (7th Cir. 2004) (“Bankruptcy law allows debtors to reject the executory portions of their contracts.”); *Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (“The language of [section 365] is clear: the trustee may assume or reject any executory contract of the debtor.”). A showing of materiality is made by demonstrating that some performance is yet due from both parties to the contract. *Matter of Pa. Tire Co.*, 26 B.R. 663 (Bankr. N.D. Ohio 1982); *Cloyd v. GRP Records*, 238 B.R. 328 (Bankr. E.D. Mich. 1999).

10. A debtor may assume or reject an executory contract or unexpired lease if the assumption or rejection represents a reasonable exercise of business judgment. *See, e.g., Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948 (N.D. Ohio 1997); *Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. 484 (Bankr. S.D. Ohio 1982); *In re Penn Traffic Co.*, 524 F.3d

373 (2d Cir. 2008). Under the business judgment test, the debtor need demonstrate only that the assumption or rejection of the executory contract or unexpired lease will benefit the estate. *Granada Invs., Inc. v. DWG Corp.*, 823 F. Supp. 448, 454 (N.D. Ohio 1993) (“The business judgment rule presumes that in making a business decision, actions have been taken on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the company”) (citations omitted); *In re Goodyear Tire & Rubber Co. Deriv. Litig.*, No. 5:03-cv-2180, 2007 WL 43557, at *10 (N.D. Ohio Jan. 5, 2007) (holding that there is a presumption that in making business decisions that the directors exercised duties “with due care, without self-dealing, and in good faith”).

11. The Debtors, in an exercise of their sound business judgment, have determined that the Coal Sales Agreement is no longer a source of potential value for the Debtors’ future operations or for their creditors or other parties in interest. As explained above, the Coal Sales Agreement provides for minimum volume requirements that are burdensome for the Debtors, and the Coal Sales Agreement constitutes an unnecessary ongoing obligation with adverse impacts on the Debtors’ cash flow. By rejecting the Coal Sales Agreement, the Debtors would save \$20.0 million in 2018 and approximately \$14.5 million in 2019. Accordingly, the Debtors respectfully represent that rejecting the Coal Sales Agreement is appropriate under the circumstances and reflects the exercise of the Debtors’ sound business judgment.

12. Courts in this jurisdiction have approved similar relief to that requested herein. *See, e.g., CH Liquid. Ass’n*, No. 16-51552 (AMK) (Bankr. N.D. Ohio Dec. 22, 2016) [Docket No. 322] (authorizing rejection of certain executory contracts and unexpired leases); *In re QSL of Medina, Inc.*, No. 15-52722 (AMK) (Bankr. N.D. Ohio Dec. 15, 2015) [Docket No. 105] (same); *In re Bucyrus Cmty. Hosp., Inc.*, No. 10-61078 (RK) (Bankr. N.D. Ohio June 2, 2010) [Docket

No. 204] (same); *In re B&C Corp., Inc.*, Case No. 09-51455 (AMK) (Bankr. N.D. Ohio June 4, 2009) [Docket No. 108] (same).

13. This Court has previously granted the Debtors authority to reject certain executory contracts and unexpired leases in the *Order Authorizing Debtors to Reject Certain Uranium Supply Executory Contracts Nunc Pro Tunc to the Petition Date* [Docket No. 429], the *Order Authorizing FirstEnergy Generation, LLC to Reject Certain Rail Transportation Executory Contracts Nunc Pro Tunc to the Petition Date* [Docket No. 430], the *First Omnibus Order Authorizing the Debtors to Reject Certain Executory Contracts and Unexpired Leases* [Docket No. 501] and the *Second Omnibus Order Authorizing the Debtors to Reject Certain Executory Contracts and Unexpired Leases* [Docket No. 725].

b. The Court Should Authorize but Not Direct Rejection of the Contracts Effective Nunc Pro Tunc to the Filing Date

14. The Debtors respectfully request that the Filing Date be deemed the effective date of rejection for the Coal Sales Agreement. Bankruptcy courts are empowered to authorize retroactive rejection of an executory contract or unexpired lease under section 365(a) of the Bankruptcy Code when the balance of the equities favors retroactive rejection. *See, e.g., In re At Home Corp.*, 392 F.3d 1064, 1067 (9th Cir. 2004) (approving rejection of unexpired nonresidential lease retroactive to the motion filing date); *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1028–29 (1st Cir. 1995) (holding that when principles of equity dictate, bankruptcy courts may approve rejection of leases retroactive to motion filing date); *In re Rupari Holding Corp.*, No. 17-10793 (KJC), 2017 WL 5903498, at *6 (Bankr. D. Del. Nov. 28, 2017) (authorizing rejection of certain executory contracts *nunc pro tunc* to the closing date of a sale of substantially all of the debtors' assets); *BP Energy Co. v. Bethlehem Steel Corp.*, No. 02-CIV-6419 (NRB), 2002 WL 31548723, at *3 (S.D.N.Y. Nov. 15,

2002) (concluding that a bankruptcy court may assign a retroactive rejection date when “the principles of equity so dictate”); *In re Jamesway Corp.*, 179 B.R. 33, 36-37 (S.D.N.Y. 1995) (stating that section 365 does not include “restrictions as to the manner in which the court can approve rejection”); *see also In re CH Liquid. Ass’n*, No. 16-51552 (AMK) (Bankr. N.D. Ohio Dec. 22, 2016) [Docket No. 322] (authorizing rejection of certain executory contracts and unexpired leases *nunc pro tunc*); *In re Contech U.S., LLC*, No. 09-42392 (SWR) (Bankr. E.D. Mich. June 29, 2009) [Docket No. 645] (same). Likewise, Courts in this district have found that the equitable power under Bankruptcy Code section 105(a) also confers the authority to grant *nunc pro tunc* relief as “an appropriate remedy in furtherance of Bankruptcy Code objectives.” *See In re Ottawa River Steel Co.*, 331 B.R. 340, 344 (Bankr. N.D. Ohio 2005) (noting *nunc pro tunc* orders are an example of the bankruptcy courts’ authority to give orders and judgments antecedent and prospective effectiveness).

15. This Court has previously granted *nunc pro tunc* relief in the *Order Authorizing Debtors to Reject Certain Uranium Supply Executory Contracts Nunc Pro Tunc to the Petition Date* [Docket No. 429], the *Order Authorizing FirstEnergy Generation, LLC to Reject Certain Rail Transportation Executory Contracts Nunc Pro Tunc to the Petition Date* [Docket No. 430], the *First Omnibus Order Authorizing the Debtors to Reject Certain Executory Contracts and Unexpired Leases* [Docket No. 501] and the *Second Omnibus Order Authorizing the Debtors to Reject Certain Executory Contracts and Unexpired Leases* [Docket No. 725].

16. In this case, the balance of the equities favors the relief requested. Absent a retroactive rejection date, the Debtors will be forced to incur unnecessary administrative expenses for the Coal Sales Agreement—which does not provide equivalent benefits to the Debtors’ estates. *See* 11 U.S.C. § 365(d)(3). Consol will not be unduly prejudiced by rejection

nunc pro tunc to the Filing Date. Contemporaneously with the filing of this Motion, the Debtors will cause notice of the Motion to be served on Consol, providing Consol with sufficient opportunity to respond accordingly. The Debtors have sought the requested relief early on in the Chapter 11 Cases and do not seek to reject the Coal Sales Agreement effective *nunc pro tunc* to the Filing Date due to delay on the Debtors' part. Additionally, absent *nunc pro tunc* relief, Consol may attempt to perform at unfavorable prices to the estates and subsequently assert administrative expense priority for such performance, notwithstanding that the Debtors have cheaper alternative sources available. For these reasons, the Debtors believe that the equities weigh in favor of *nunc pro tunc* relief.

17. Accordingly, the Debtors respectfully submit that it is fair and equitable for the Court to authorize, but not direct, rejection of the Coal Sales Agreement *nunc pro tunc* to the Filing Date.

SATISFACTION OF BANKRUPTCY RULE 6006(C)

18. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6006(c).

RESERVATION OF RIGHTS

19. Nothing contained in this Motion or any actions taken by the Debtors pursuant to the relief granted in the Order is intended or should be construed as: (a) an admission as to the validity or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors' rights to dispute any particular claims on any grounds; (c) a promise or requirement to pay any particular claims; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) a waiver or limitation on the Debtors' rights under the Bankruptcy Code or any other applicable law; (f) an admission that the Coal Sales Agreement is integrated

with any other contract or lease; (g) a waiver by the Debtors or Consol of their right to assert that the Coal Sales Agreement was terminated prior to the Petition Date; or (h) a concession or evidence that the Coal Sales Agreement has expired, been terminated, or otherwise currently is not in full force and effect.

NOTICE

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

NO PRIOR REQUEST

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

WHEREFORE the Debtors respectfully request that the Court enter the Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion and granting such other and further relief as is appropriate under the circumstances.

Dated: July 27, 2018

Respectfully submitted,

/s/ Kate M. Bradley

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Exhibit A

Proposed Order

the opportunity for a hearing on the Motion under the circumstances; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing, if any, before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. Pursuant to section 365(a) of the Bankruptcy Code, the Coal Sales Agreement is deemed rejected by the Debtors *nunc pro tunc* to the Filing Date.
3. Any proof of claim for damages arising out of the rejection of the Coal Sales Agreement shall be filed by the later of 30 days after entry of this Order or any deadline set for the filing of claims pursuant to an order of the Court in accordance with Bankruptcy Rule 3003(c)(3). If the holder of such claim fails to file a timely proof of claim, such holder shall forever be barred from pursuing said claims.
4. The Debtors are authorized, but not directed, to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.
5. Notice of the Motion as provided therein shall be deemed good and sufficient.
6. The rejection of the Contracts complies with the requirements of Bankruptcy Rule 6006(c).
7. Notwithstanding the possible applicability of Bankruptcy Rules 7062, 9014, or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Order.

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SUBMITTED BY:

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