

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

)	
In re:)	Chapter 11
)	
PROTERRA INC, <i>et al.</i> , ¹)	Case No. 23-11120 (___)
)	
Debtors.)	(Joint Administration Requested)
)	

DEBTORS’ MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO REJECT THE TPI AGREEMENT, EFFECTIVE AS OF THE PETITION DATE, AND (II) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (together, the “Debtors”) respectfully state as follows in support of this motion (this “Motion”):²

Relief Requested

1. The Debtors seek entry of an order (the “Proposed Order”), substantially in the form attached hereto as **Exhibit A**, (a) authorizing, but not directing, the Debtors to reject the TPI Agreement (as defined below), effective as of the Petition Date, and (b) granting related relief.

2. In support of this Motion, the Debtors submit the *Declaration of Justin D. Pugh in Support of Debtors’ Motion for Entry of an Order (I) Authorizing the Debtors to Reject the TPI Agreement, Effective as of the Petition Date, and (II) Granting Related Relief* (the “Pugh Declaration”) filed contemporaneously herewith and incorporated herein by reference.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Proterra Inc (9565); and Proterra Operating Company, Inc. (8459). The location of the Debtors’ service address is: 1815 Rollins Road, Burlingame, California 94010.

² A detailed description of the Debtors and their business, including the facts and circumstances giving rise to these chapter 11 cases and supporting this Motion, is set forth in the *Declaration of Gareth T. Joyce in Support of Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”), filed contemporaneously herewith and incorporated herein by reference. Capitalized terms used but not defined in this Motion have the meanings ascribed to them in the First Day Declaration.



Jurisdiction and Venue

3. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the “Amended Standing Order”). This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors consent to a final order with respect to this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. Venue of these chapter 11 cases and this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The bases for the relief requested herein are sections 105(a) and 365(a) of Title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

I. General

7. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors have contemporaneously filed a motion requesting procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No request for the appointment of a trustee or examiner has been made

in these chapter 11 cases, and no committees have been appointed or designated. Additional factual background relating to the Debtors' business, capital structure, and the commencement of the Debtors' chapter 11 cases is set forth in detail in the First Day Declaration.

II. The Debtors' Business and the Goals of These Chapter 11 Cases

8. As set forth in greater detail in the First Day Declaration, the Debtors operate three distinct business lines: Proterra Powered, Proterra Energy, and Proterra Transit. As also set forth in greater detail in the First Day Declaration, prior to the commencement of these chapter 11 cases, the Debtors, together with their advisors, engaged in a marketing process with the goal of facilitating a sale of Proterra Transit. While Proterra Transit was the Debtors' original flagship business line, which helped to position the Debtors' other business lines for success, it has faced industry-wide headwinds during the past year which have resulted in Proterra Transit requiring substantial working capital investments. Macroeconomic changes such as inflation and supply chain issues have also made many of Transit's customer and vendor contracts unprofitable, or uneconomic, respectively. These headwinds have limited the Debtors' ability to invest in growing the Proterra Powered and Proterra Energy business lines. Given the operationally segregable nature of the Debtors' business lines and the potential to unlock value at the Proterra Powered and Proterra Energy business lines, the Debtors determined prepetition that the value-maximizing path forward was to pursue a sale of the Proterra Transit business.

9. Unfortunately, the Debtors' prepetition marketing efforts failed to yield an executable sale transaction with respect to Proterra Transit. As the Debtors and their advisors engaged with various potential counterparties during the two-stage marketing process described in further detail in the First Day Declaration, it became clear through feedback provided by these counterparties that certain liabilities, including burdensome contracts related to the Proterra Transit

business line, would prevent the Debtors from successfully achieving a value-maximizing out-of-court transaction.

10. As explained in the First Day Declaration, the Debtors' primary goal in these chapter 11 cases is to take advantage of the tools provided by the Bankruptcy Code to preserve and maximize value for the benefit of the Debtors' estates and stakeholders. In furtherance thereof, the Debtors filed the *Debtors' Motion for Entry of: (I) an Order (A) Approving Bidding Procedures to Govern the Sale of All or Substantially All of the Debtors' Assets Pursuant to Section 363 of the Bankruptcy Code, (B) Approving Procedures Regarding Entry Into One or More Stalking Horse Agreements, (C) Establishing Procedures for the Assumption and Assignment of Executory Contracts and Unexpired Leases, (D) Approving the Form and Manner of the Notice of Assumption and Assignment of Executory Contracts and Unexpired Leases, (E) Scheduling Auctions for the Sales of the Company Assets and Hearings to Consider Approval of the Sales and Approving the Form and Manner of the Notice Thereof, (F) Approving Certain Wind-Down Procedures, and (G) Granting Related Relief; and (II) an Order (A) Authorizing and Approving the Debtors' Entry Into One or More Asset Purchase Agreements, (B) Authorizing the Sale of All or Substantially All of the Debtors' Assets Free and Clear of Liens, (C) Approving the Assumption and Assignment of the Assumed Executory Contracts and Unexpired Leases, and (D) Granting Related Relief* contemporaneously herewith, which seeks, among other things, Court approval of certain bidding procedures to be implemented in connection with the potential sale of the Debtors' viable assets. As part of their efforts to prepare for a successful postpetition marketing process, following feedback from potential investors in their prepetition marketing process, the Debtors and their advisors have worked to identify any particularly burdensome contracts which should be rejected at the outset of these chapter 11 cases.

11. Thus far, the Debtors and their advisors have identified the *Amended and Restated Product Supply Agreement* between Proterra Operating Company, Inc. and TPI, Inc. (the “TPI Agreement”) for rejection. As described in further detail in the First Day Declaration and the Pugh Declaration, the TPI Agreement includes burdensome minimum purchase quantities, which have historically exceeded the Debtors’ production requirements and thus required the Debtors to either expend capital to purchase surplus materials, or face significant penalties under the TPI Agreement. Even following renegotiation of the TPI Agreement to reduce these minimum purchase quantities, the Debtors were unable to meet these minimum purchase requirements in a way that aligned with their business needs, and determined that potential avenues to increase production volume to comply with the terms of the TPI Agreement were prohibitively costly due to supply chain difficulties and associated cost inefficiencies.

12. The TPI Agreement is thus representative of the burdensome liabilities which contributed to the Debtors’ inability to achieve a value-maximizing sale transaction on an out-of-court basis. Rejection of the TPI Agreement will allow the Debtors to better align their supply intake with their production needs without the risk of incurring substantial penalties, resulting in an immediate accretion in the value of the assets that the Debtors hope to market in the sale process underlying these chapter 11 cases, which will inure to the benefit of the Debtors, their estates, and their stakeholders.

Bases for Relief

I. Rejection of the TPI Agreement is a Sound Exercise of the Debtors’ Business Judgment

13. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor-in-possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the Debtor.” 11 U.S.C. § 365(a). Section 365(a) is intended “to permit the

trustee or debtor-in-possession to use valuable property of the estate and to renounce title to and abandon burdensome property.” *In re Republic Airways Holdings Inc.*, 547 B.R. 578, 582 (Bankr. S.D.N.Y. 2016) (quoting *In re Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993)); *see also In re Buffets Holdings, Inc.*, 387 B.R. 115, 119 (Bankr. D. Del. 2008) (“the authority to reject an executory contract is vital to the basic purpose to a chapter 11 reorganization, because rejection can release the debtor’s estate from burdensome obligations that can impede a successful reorganization.”) (quoting *N.L.R.B. v. Bildisco & Bildisco (In re Bildisco)*, 465 U.S. 513 (1984)).

14. The standard applied by courts to determine whether the assumption or rejection of an executory contract should be authorized is the “business judgment” test, which “merely requires a showing that rejection will benefit the debtor’s estate.” *In re Extraction Oil & Gas*, 622 B.R. 608, 615 (Bankr. D. Del. 2020). In applying the business judgment test in this context, courts will generally defer to a debtor’s judgment in reaching the decision to reject. *See Mission Product Holdings, Inc. v. Tempnology*, 139 S.Ct. 1652, 1658 (2019) (following a decision by a debtor that an executory contract is not a “good deal,” “the bankruptcy court will generally approve” a debtor’s decision to reject an executory contract); *see also In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001) (“A debtor’s decision to reject an executory contract must be summarily affirmed unless it is the product of ‘bad faith, or whim or caprice.’”) (quoting *Wheeling-Pittsburgh Steel Corp. v. W. Penn. Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 849-50 (Bankr. W.D. Pa. 1987)); *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36 (3d Cir. 1989) (A debtor’s motion to reject an executory contract is properly granted upon a finding that “rejection would benefit the estate” under the traditional business judgment test).

15. Under this standard, the Debtors submit that rejection of the TPI Agreement is well within the Debtors' business judgment and will serve to maximize the value of the Debtors' estates. The burdensome minimum purchase quantity requirements in the TPI Agreement, if not rejected, would require the Debtors to purchase supplies far in excess of their anticipated requirements for immediate production, resulting in costs to the estate which substantially outweigh any near-term benefits that access to supplies under the TPI Agreement might provide. Under the TPI Agreement, as amended, these minimum order requirements increase year-over-year through 2024, and, because the penalties for failing to meet these minimum order quantities are calculated on a per-unit basis, *i.e.*, these penalties increase for each unit by which the Debtors fail to meet them, the TPI Agreement will become increasingly more costly over time. As discussed above, the Debtors have determined that increasing production to meet these minimum requirements is cost-prohibitive. For these same reasons, the Debtors have determined that it is unlikely potential purchasers of the Proterra Transit business line will be interested in retaining the TPI Agreement as part of any sale transaction in its current form, and so rejecting the TPI Agreement would facilitate, as opposed to hinder, the Debtors' ability to effect a successful marketing process for Proterra Transit during these chapter 11 cases.

16. As such, after evaluating and analyzing the merits of the TPI Agreement in consultation with their advisors, the Debtors have determined, in the exercise of their sound business judgment, that there is no net benefit to retaining the TPI Agreement given its burdensome requirements, penalties, and inconsistencies with the Debtors' anticipated near-term business needs. Accordingly, the Debtors have concluded that the rejection of the TPI Agreement is in the best interest of the Debtors' estates, their creditors, and other parties in interest.

II. The Court Should Deem the TPI Agreement Rejected Effective as of the Petition Date

17. Courts in this district and others have recognized that section 365 of the Bankruptcy Code permits courts to approve the rejection of executory contracts and unexpired leases retroactive to the rejection motion filing date. *In re Chi-Chi's, Inc.*, 305 B.R. 396 (Bankr. D. Del. 2004); *see also In re The Collected Group, LLC*, Case No. 21-10663-LSS (Bankr. D. Del. Apr. 26, 2021) (approving rejection retroactively so as to be effective as of the Petition Date); *In re Romacorp, Inc.*, 2006 WL 6544088 at *4 (Bankr. N.D. Tex. Feb. 2, 2006) (Noting that “[t]his Court is not alone in allowing retroactive rejection of unexpired leases; in fact, a number of other courts around the country have recognized this equitable practice,” collecting cases). The entry of an order authorizing rejection retroactively, including retroactively to the petition date, is appropriate where the balance of the equities favors such relief. *In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1st Cir. 1995) (“Bankruptcy courts are courts of equity, and, particularly in the chapter 11 context, they may sometimes abandon mechanical solutions in favor of the pliant reins of fairness. In the section 365 context, this means that courts may enter retroactive orders of approval, and should do so when the balance of the equities preponderates in favor of such remediation.”) (internal quotations omitted).

18. Courts in this district have recognized that the balance of the equities justifies the authorization of retroactive rejections where debtors no longer needed the services provided under a rejected contract as of the applicable rejection date, where debtors cannot satisfy their obligations under the applicable contracts, or where the contracts to be rejected create burdens on a debtor's estate. *In re Rupari Holding Corp.*, 2017 WL 5903498 at *6 (Bankr. D. Del. Nov. 28, 2017). Such is the case with respect to the TPI Agreement: as of the filing of this Motion, the Debtors' forecasted need for immediate supplies is far lower than the required minimums under the TPI Agreement. As further described in the First Day Declaration and Pugh Declaration, this

anticipated gap between the Debtors' future near-term production needs and the requirements under the TPI Agreement is more than mere speculation: the Debtors have historically been unable to meet these minimums, which will increase over time. Additionally, absent retroactive relief, the Debtors could incur additional postpetition expenses during the postpetition, pre-rejection period pursuant to an agreement which provides the Debtors' estates with little-to-no benefit.

19. Furthermore, TPI, Inc. will not be unduly prejudiced if the TPI Agreement is rejected effective as of the Petition Date, as the Debtors will serve TPI, Inc. this Motion by electronic mail and/or facsimile, to the extent such contact information is known, and by overnight mail, substantially concurrently with the filing of this Motion. Therefore, based on the Debtors' desire, informed by their reasonable business judgment, to eliminate the potential for administrative claims against their estates, and to avoid the potential alleged accrual of any further penalties under the TPI Agreement, the Debtors respectfully submit that retroactive rejection of the TPI Agreement as of the Petition Date is appropriate.

Reservation of Rights

20. Nothing contained herein or any actions taken pursuant to such relief requested is intended to be or should be construed as: (a) an implication or admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (f) a waiver or limitation of the Debtors', or any other party in interest's,

rights under the Bankruptcy Code or any other applicable law; (g) a waiver of the obligation of any party in interest to file a proof of claim; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in this Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens.

Notice

21. The Debtors will provide notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) the United States Attorney's Office for the District of Delaware; (d) the Internal Revenue Service; (e) the state attorneys general for states in which the Debtors conduct business; (f) the Securities and Exchange Commission; (g) counsel to the Cowen Parties; (h) counsel to Bank of America (i) TPI, Inc. (via electronic mail and overnight delivery); and (j) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: August 7, 2023
Wilmington, Delaware

Respectfully submitted,

**YOUNG CONAWAY STARGATT &
TAYLOR, LLP**

/s/ Andrew L. Magaziner

Pauline K. Morgan (No. 3650)
Andrew L. Magaziner (No. 5426)
Shella Borovinskaya (No. 6758)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: pmorgan@ycst.com
amagaziner@ycst.com
sborovinskaya@ycst.com

- and -

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

Paul M. Basta (*pro hac vice* admission pending)
Robert A. Britton (*pro hac vice* admission pending)
Michael J. Colarossi (*pro hac vice* admission pending)
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 373-3000
Fax: (212) 757-3990
Email: pbasta@paulweiss.com
rbritton@paulweiss.com
mcolarossi@paulweiss.com

*Proposed Counsel to the Debtors and
Debtors in Possession*

Exhibit A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

)	
In re:)	Chapter 11
)	
PROTERRA INC, <i>et al.</i> , ¹)	Case No. 23-11120 (___)
)	
Debtors.)	(Jointly Administered)
)	
)	Re: Docket Nos. __ & ___

**ORDER (I) AUTHORIZING THE DEBTORS TO REJECT THE TPI AGREEMENT
EFFECTIVE AS OF THE PETITION DATE AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”) of the Debtors² for entry of an order (this “Order”), pursuant to sections 105(a) and 365(a) of the Bankruptcy Code, (a) authorizing the Debtors to reject the TPI Agreement, effective as of the Petition Date, and (b) granting related relief, all as more fully set forth in the Motion; and upon consideration of the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Proterra Inc (9565); and Proterra Operating Company, Inc. (8459). The location of the Debtors’ service address is: 1815 Rollins Road, Burlingame, California 94010.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing, if any, before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing, if any, 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 Motion is GRANTED on a final basis as set forth herein.
2. Pursuant to sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006, the TPI Agreement, identified on Schedule 1 hereto, is hereby rejected by the Debtors, with such rejection being effective as of the Petition Date.
3. Nothing herein shall prejudice any party's rights to assert that the TPI Agreement is not, in fact, executory within the meaning of section 365 of the Bankruptcy Code.
4. Any person that holds a claim that arises from the TPI Agreement must file a proof of claim based on the rejection of the TPI Agreement by the applicable deadline for filing proofs of claim established in these chapter 11 cases, as set by an order of this Court.
5. Notwithstanding the relief granted herein and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in the Motion or any order granting the relief requested by the Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) an admission as to the validity, priority,

enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (f) a waiver or limitation of the Debtors', or any other party in interest's, rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in the Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens.

6. The rights of the Debtors and their estates to assert that the TPI Agreement expired by its own terms or was terminated prior to the date hereof are fully preserved, and the Debtors and their estates do not waive any claims that they may have against TPI, Inc., whether or not such claims arise under, are related to the rejection of, or are independent of, the TPI Agreement.

7. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

8. The requirements of Bankruptcy Rule 6006 are satisfied.

9. The Debtors are authorized to execute and deliver all instruments and documents, and take such other actions as may be necessary or appropriate, to implement and effectuate the relief granted in this Order.

10. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

SCHEDULE 1

Rejected Executory Contract

Counterparty & Address	Contract Description	Rejection Date
TPI, Inc. 373 Market St, PO Box 367, Warren, RI 02885 US	Purchase and Supply Agreement with Transit Bus Body Provider	8/7/2023