IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PROTERRA INC, *et al.*,[1]	Case No. 23-11120 (BLS)
Debtors.	**Re: Docket Nos. 44, 72 & 142**

OBJECTION, REQUEST FOR CONTINUANCE, AND RESERVATION OF RIGHTS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO FINAL APPROVAL OF THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION, (III) MODIFYING THE AUTOMATIC STAY, AND (IV) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 bankruptcy case (the "Chapter 11 Cases") of the above-captioned debtors and debtors-in-possession (the "Debtors"), by and through its proposed counsel, hereby submits this objection, request for continuance, and reservation of rights (the "Objection") in response to the final approval of the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 44] (the "Motion")[2]. In support of the Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT AND REQUEST FOR CONTINUANCE

1. In the short time since its appointment, the Committee has been working expeditiously to get up to speed on the Chapter 11 Cases and pending first and second day

[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 in this Objection but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

relief sought by the Debtors. To that end, the Committee is pleased to report that the vast majority of the Commiteee's issues with and comments to the first and second day motions have been resolved consensually and incorporated into proposed final orders, allowing the Debtors to focus on the operation of their businesses and at the same time providing necessary—but not overreaching—protections for the Debtors' estates and unsecured creditors. Accordingly, the Committee has determined not to object to the majority of the relief sought in the first and second day motions and anticipates that the Debtors will be submitting agreed orders.[3]

2. To date, however, no consensual resolution has been reached on the terms of a final cash collateral order (the "Proposed Final Order"). Indeed, as of the filing of this Objection, ***the Debtors and Second Lien Secured Parties are still negotiating certain of the most important and case determinative terms of the proposed relief***. The terms include significant and overreaching new protections in favor of the Second Lien Secured Parties that, were not outlined (or even contemplated) by the Motion, or included in the Second Interim Order, and should not be granted generally, let alone without the appropriate notice and input from parties in interest, including the Committee. As a result, the Committee, having only first learned of the new protections on September 3, 2023, requests that the Court extend the terms of the Second Interim Order and schedule a hearing on the Proposed Final Order upon proper notice pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-2.

[3] At present, the Committee does not oppose the approval of the Debtors remaining first and second day motions, each in its current form. However, the Committee reserves all rights with respect to the pending motions, including the proposed order to the bidding procedures motion [Docket No. 36] (the "Bidding Procedures Motion"), which is undergoing review by the Second Lien Secured Parties, and any modification, change, or revision to the proposed orders, including but not limited to the right to object on any basis.

3. By the Debtors' own admission, and supported by available evidence, the Prepetition Secured Parties' interests are adequately protected by, among other bases, a substantial equity cushion and a substantial net increase in the Debtors' cash position during these Chapter 11 Cases as compared to their operations outside of bankruptcy in the ordinary course. *See* Motion, ¶¶ 31–42. On the other hand, the Prepetition Secured Parties have not met their burden to prove actual or threatened diminution in value of their collateral that would entitle them to as expansive of an adequate protection package as they are currently seeking. To the contrary, there is no evidence that the prepetition collateral is declining in value or that any of the excessive forms of adequate protection outlined in the Proposed Final Order are required to meet the Debtors' adequate protection burden. Indeed, the Debtors believed they could meet the legal standards for use of the Preptition Secured Parties' collateral without the Second Lien Secured Parties' consent and with a significantly paired down adequate protection package. *Id.*

4. Nevertheless, the newly proposed "adequate protection" includes, among other things, the payment of the Second Lien Secured Parties' fees, including, among others, fees for their investment banker for services performed in their capacity as buyer or plan proponent and not just the financing being contemplated by this Motion or ordinary course monitoring of the Debtors' operations to ensure that the value of their collateral is preserved. The Motion provides no support for this requested relief nor does it reference any relevant provisions of the underlying security agreements that require the Debtors to undertake these obligations. The Committee is still in the process of reviewing the terms of the Second Lien Secured Parties' professionals' proposed engagements (which have yet to be finalized), and include the Debtors as a party thereto. However, it is already clear that the payment of the significant

fees contemplated by the engagements—including more than $4 million in investment banking fees—will directly and negatively impact unsecured creditors' potential recoveries and cannot be approved without satisfying the relevant evidentiary burden through, among other things, adequate disclosure of the proposed engagement terms so parties in interest can vet the scope of services and reasonablenss of the fees sought therein.

5. The Proposed Final Order includes other value-stripping provisions that have the effect of rerouting the unsecured creditor constituencies' non-sale related avenues for recovery to the Prepetition Secured Parties. This relief is all the more offensive given that the existence of an equity cushion that obviates the need for such excessive adequate protection. Indeed, among other things, the Proposed Final Order improperly:

- provides excessive adequate protection to the Prepetition Secured Parties by allowing liens on unencumbered assets, including the proceeds of avoidance actions, and commercial tort claims;
- permits the calculation of the diminution in value of collateral to include the payment of the Second Lien Secured Parties' excessive professional fees;
- includes a waiver of any claim or charge arising out of section 506(c) of the Bankruptcy Code, the "equities of the case" exception under section 552, and the equitable doctrine of marshalling;
- constrains the Committee's rights to challenge any alleged liquidation premium arising under that certain Note Purchase Agreement by establishing an unreasonably condensed protocol to address any such premium; and
- contemplates a budget for professional fees[4] that disadvantages the Committee by providing for disparate treatment of the Committee's professionals fees compared to the Debtors' professional fees and hamstrings the Committee and frustrates its ability to carry out its fiduciary responsibilities.

[4] The professional fee budget referenced was based on the second interim budget. To date, the Committee has not seen an updated budget.

6. The Committee believes adjournment of the hearing on the Proposed Final Order is necessary and will (i) allow the Debtors to comply with their notice requirements under the Local Rules, (ii) provide the parties with additional time to work towards a consensual resolution, and (iii) provide adequate time for the parties to brief and submit evidence regarding whether, and to what extent, the Prepetition Secured Parties are entitled to adequate protection to the extent a consensual resolution is not feasible. To that end, the Committee requested the parties agree to continue to operate under the terms of the existing Second Interim Order for a short period of time. The parties declined. Accordingly, the Committee files this Objection.

BACKGROUND

7. On August 7, 2023 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Court"). No trustee or examiner has been appointed in the Chapter 11 Cases.

8. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors in possession.

9. On August 24, 2023, the Office of the United States Trustee (the "U.S. Trustee") appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code [Docket No. 126[5]]. The Committee is comprised of four members: (i) Power Electronics USA, Inc.; (ii) Ms. Michele Thorne; (iii) TPI, Inc.; and (iv) Sensata Technologies, Inc.

10. On August 26, 2023, the Committee selected Lowenstein Sandler LLP ("Lowenstein") and Morris James LLP ("Morris James") to serve as its lead and local counsel,

[5] On August 26, 2023, the U.S. Trustee filed an *Amended Notice of Appointment of Committee of Unsecured Creditors* [Docket No. 133] solely to correct certain Committee member contact information.

respectively. The Committee subsequently selected Berkeley Research Group, LLC ("BRG") to serve as its financial advisor, and Miller Buckfire, a business division of Stifel, Nicolaus & Co., Inc., together with the rest of Stifel, Nicolaus & Co., Inc. ("Miller Buckfire," and together with BRG, Lowenstein, and Morris James, the "Committee's Professionals") to serve as its investment banker in the Chapter 11 Cases.

11. Information regarding the Debtors' history, business operations, capital structure, secured indebtedness, and the events leading up to the commencement of the Chapter 11 Cases can be found in the *Declaration of Gareth T. Joyce in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 16].

12. On August 7, 2023, the Debtors filed the Motion without the consent of the Second Lien Secured Parties. The Motion proposed a comprehensive adequate protection package for the Prepetition Secured Parties, including, but not limited to, replacement liens (the "Adequate Protection Liens") on any and all presently owned and hereafter acquired personal property, real property, and all other assets of the Debtors, together with any proceeds thereof (collectively, the "Post-Petition Collateral"), allowed superpriority administrative expense claims, adequate protection payments (the "Adequate Protection Payments") and the payment of certain fees. The Post-Petition Collateral proposed ***did not include*** any causes of action under chapter 5 of the Bankruptcy Code.

13. On August 10, 2023, the Court entered the *Interim Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 72] (the "First Interim Order"). The First Interim Order provided the Prepetition Secured Parties a similar adequate protection package, including the Adequate Protections Liens, allowed superpriority administrative expense claims,

and Adequate Protection Payments and fees. Notably however, the Post-Petition Collateral still excluded "any causes of action under chapter 5 of the Bankruptcy Code or the proceeds thereof." *See First Interim Order* 4(a).

14. On August 25, 2023, the Court entered the *Second Interim Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 142] (the "Second Interim Order"). The Second Interim Order modified the adequate protection package, most critically, including the proceeds of Avoidance Actions as part of the Prepetition Secured Parties' collateral package. *See Second Interim Order* 4(1).

15. On August 29, 2023, the Debtors agreed to extend the Committee's deadline to object to the Motion (the "Objection Deadline") from August 31, 2023 to September 4, 2023 at 4:00 p.m. ET.

16. On September 3, 2023, the Committee learned for the first time that the Proposed Final Order sought to unnecessarily expand the adequate protection package and contained backdoor approval of the payment by the estates of significant fees for certain yet-to-be-retained financial professionals to the Second Lien Secured Parties, without any notice as to the terms of the engagements, disclosure concerning the impact on the estates, and satisfaction of the requirements of the Bankruptcy Code. Additionally, the Proposed Final Order continued to provide the Prepetition Secured Parties with adequate protection liens on unencumbered assets, including Avoidance Actions, commercial tort claims and the proceeds thereof.

17. On September 4, 2023, the Debtors agreed to extend the Objection Deadline to September 5, 2023 at 11:00 a.m. ET.

18. A final hearing of the Motion (the "Hearing") is scheduled for September 7, 2023 at 11:00 a.m. ET.

OBJECTION

19. Financing or an agreement on the use of cash collateral should only be approved if it is fair and reasonable under the circumstances, comports with basic notions of fairness and equity, and will ultimately inure to the benefit of the debtor's estate. *In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 37–40 (Bankr. S.D.N.Y. 1990). Courts routinely recognize that "[d]ebtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a prepetition lien on cash collateral." *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992). As a result, courts are hesitant to approve financing terms that are considered harmful to an estate and its creditors. *See, e.g., Ames Dep't Stores*, 115 B.R. at 40 (noting that "the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest"). Thus, while certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts have not approved financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole (or primary) benefit of the lender. *See, e.g., Ames Dep't Stores*, 115 B.R. at 38.

A. Adequate Notice of the Terms of the Proposed Final Order has not been Provided.

20. The Debtors filed the Motion without notice to, or consent from, the Second Lien Secured Parties. Over the last several weeks, the Debtors and Second Lien Secured Parties have worked to agree on the terms of the Proposed Final Order. As a result, the relief

requested in the Motion differs significantly from the terms of the Proposed Final Order. Indeed, even since the entry of the Second Interim Order, negotiations between the Debtors and Second Lien Secured Parties have continued and material modifications in favor of the Second Lien Secured Parties have been made to the already overly-generous adequate protection package. As of the filing of this Objection, the terms of the Proposed Final Order have not been agreed to between the Debtors and Second Lien Secured Parties. It is clear, however, from the most recent iteration of the Proposed Final Order that, the Debtors intend to provide the Prepetition Secured Parties with an adequate protection package that includes multiple forms of adequate protection neither contemplated by the relief sought in the Motion, nor properly noticed pursuant to Bankruptcy Rule 4001 and Local Rule 4001-2.

21. Specifically, Local Rule 4001-2 requires that a cash collateral motion highlight and justify certain provisions, like the newly-added provisions here, including those that: (i) seek to immediately grant the prepetition secured creditor liens on the debtor's claims and causes of action arising under sections 544, 545, 547, and 548 of the Bankruptcy Code or, in each case, the proceeds thereof; (ii) require the debtor to pay an agent's or lender's expenses and attorneys' fees in connection with the proposed financing or use of cash collateral; (iii) pricing and economic terms and any other fees; (iv) immediately seek to affect the Court's power to consider the equities of the case doctrine under section 552(b)(1) of the Bankruptcy Code; and (v) immediately shield the lender from the equitable doctrine of "marshalling". L.B.R. 4001-2(a)(i)(B), (K), (U), (W), and (X). Here, the Motion is silent as to these five (5) new forms of adequate protection nor does the Motion provide any justification for the relief as required by the Local Rule and Bankruptcy Rules, yet these forms of relief are being sought in the Proposed Final Order.

22. The Committee requests that the Court extend the terms of the Second Interim Order and schedule an evidentiary hearing on the relief sought in the Proposed Final Order upon proper notice pursuant to Bankruptcy Rule 4001 and Local Rule 4001-2. To the extent the Court is inclined to move forward with the hearing, absent an order which satisfactorily addresses the Committee's Objections, the Motion should be denied.

B. The Extent of Adequate Protection Sought is Inappropriate, Improper, and Premature.

23. The final hearing on the Motion is not time sensitive, but a matter that will benefit greatly from a deferral and additional negotiation. The new provisions contained in the Proposed Final Order would be highly prejudicial to the interests of unsecured creditors and it would be premature for the Court to consider such extraordinary and excessive relief absent an evidentiary hearing to determine whether, and to what extent, the Prepetition Secured Parties are adequately protected.

1. <u>The Prepetition Secured Parties are Adequately Protected by a Significant Equity Cushion and the Debtors' Enhanced Cash Position.</u>

24. Upon the request of an entity with an interest, the court must prohibit or condition use of cash collateral as necessary to provide the creditors adequate protection. 11 U.S.C. § 363(e). The creditors have the burden of proof on issues of the validity, priority, or extent of their liens. 11 U.S.C. § 363(p). The debtor has the burden of proof on the issue of adequate protection. *See id.* It is well-settled that adequate protection is not to be granted absent a showing of diminution in value. *In re Continental Airlines, Inc.*, 146 B.R. 536, 539 (D. Del. 1992) ("Post-*Timbers* courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral.").

25. What constitutes adequate protection is "decided on a case-by-case basis." *In re Satcon Tech. Corp.*, No. 12-12869-KG, 2012 WL 6091160, at *6 (Bankr. D. Del. 2012). "The

focus of this requirement is to protect a secured creditor from diminution in the value of its interest in the particular collateral during the period of use by the debtor." *Id.* (citing *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994)). An equity cushion "provides adequate protection if it is sufficiently large to ensure that the secured creditor will be able to recover its entire debt from the security at the completion of the case." *Id.* (quoting *In re Elmire Litho, Inc.*, 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994)); *see also In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 305 (Bankr. D. Del. 2011) ("[M]ost courts engage in an analysis of the property's 'equity cushion'–the value of the property after deducting the claim of the creditor seeking relief from the stay and all senior claims' while ignoring junior liens[.]") (quoting *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 207 (3d Cir. 1995)).

26. "Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection." *In re McKillips*, 81 B.R. 454, 458 (Bankr. N.D. Ill. 1987); *see also In re Satcon*, 2012 WL 6091160, at *7 (finding that the debtors' valuation analysis and liquidation analysis demonstrated a significant equity cushion). The Debtors have already submitted evidence in support of the Motion that the Prepetition Secured Parties are adequately protected by a substantial equity cushion that far exceeds 20%. *See Declaration of Justin D. Pugh in Support of Debtors' (I) Cash Collateral Motion and (II) Vendor Claimants Motion* [Docket No. 45] (the "Pugh Declaration"), ¶¶ 10–12.

27. The Prepetition Secured Parties are adequately protected by sales processes that propose to sell the Debtors' assets on an expedited timeframe. The Prepetition Secured Parties are further protected by the Debtors' enhanced cash balances compared to their out-of-bankruptcy status quo as the Debtors' Projected Cash Flows demonstrate that, at all times during the Chapter

11 Cases, the Prepetition Secured Parties will maintain an equity cushion in excess of 20%. *Id.* at 13–15.

28. The scope of adequate protection proposed to be provided by the Debtors in the Proposed Final Order is inappropriate and goes far beyond the scope of what is contemplated under the Bankruptcy Code. Therefore, an evidentiary hearing is necessary to determine what, if any, adequate protection the Prepetition Secured Parties would be entitled to in any final order approving the Motion.

2. The Proposed Final Order Improperly Grants the Prepetition Secured Parties Liens on and Claims in Unencumbered Assets.

29. Despite the Prepetition Secured Parties' equity cushion and other forms of adequate protection, the Motion seeks to provide an adequate assurance package to the detriment of the Debtors' estates and unsecured creditors. The proposed adequate protection includes adequate protection claims and liens on the Post-Petition Collateral, payment of interest and fees for numerous profesionals, and the waiver of rights afforded to the Debtors under the Bankruptcy Code.

30. Perhaps most egregiously, the Proposed Final Order seeks to include liens on, and claims in, unencumbered assets, including the proceeds of Avoidance Actions and commerical tort claims (the "Unencumbered Collateral"). As the Prepetition Secured Parties are providing no new money to facilitate the liquidation of their collateral, it is imperative that the value of Unencumbered Collateral remain unencumbered and available for the benefit of the Debtors' unsecured creditors.

31. Granting the Prepetition Secured Parties liens on the proceeds of all Avoidance Actions contravenes the intended purpose of avoidance actions and robs the estates and their unsecured creditors of an important source of value. Indeed, avoidance actions are statutory

rights created solely for the benefit of the debtors' estate and not intended to inure exclusively to a subset of its creditors. *See, e.g., Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics Corp.),* 330 F.3d 548, 568 (3d Cir. 2003) (explaining that in granting power to pursue avoidance actions, Congress intended that the "trustee or debtor would avoid fraudulent transfers, thus maximizing the value of the estate and allowing creditors to recover their claims from that estate."); *In re Tribune Co.*, 464 B.R. 126, 171 (Bankr. D. Del. 2011) (noting "that case law permits all unsecured creditors to benefit from avoidance action recoveries"). Accordingly, the Proposed Final Order must be modified to remove Avoidance Actions and their proceeds from the Prepetion Secured Parties' Collateral, as such result would be unduly prejudicial to general unsecured creditors.

32. The Post-Petition Collateral is also poised to include liens on commercial tort claims and their proceeds. At this early juncture in the Chaper 11 Cases, the Committee and the Committee's Professionals have not yet had the opportunity to vet whether the estates hold any valuable commercial tort claims, including those against the Debtors' directors and officers. To the extent such claims exist, these claims should not be earmarked for the benefit of the Prepetition Secured Parties. These claims, which together with the proceeds of Avoidance Actions, and other unencumbered assets, may form the only material non-sale source of recovery for unsecured creditors, and should be available for distribution to the Debtors' unsecured creditors.

33. Courts in this district have excluded unencumbered assets from the scope of adequate protection liens and superpriority claims. *See, e.g., In re Promise Healthcare Group, LLC*, Case No. 18-12491 (CSS), [Docket No. 218, ¶¶ 15, 18] (Bankr. D. Del. Feb. 15, 2019) (excluding avoidance actions and the proceeds thereof and commercial tort claims and the

proceeds thereof, in part, from adequate protection liens and claims); *In re The Weinstein Company Holdings LLC*, Case No. 18-10601 (MFW), [Docket No. 267 at ¶ 12(d)–(e)] (Bankr. D. Del. Apr. 19, 2018) (excluding avoidance actions and commercial tort claims from adequate protection liens and claims); *In re SFX Entertainment, Inc.*, Case No. 16-10238 (MFW), [Docket No. 203 at ¶ 11(a)(i)–(ii)] (Bankr. D. Del. Mar. 8, 2016) (excluding avoidance actions and the proceeds thereof from adequate protection liens and claims). Accordingly, the Court should not permit inclusion of these categories of assets as Post-Petition Collateral.

3. The Professional Fees for the Second Lien Secured Parties' Investment Banker as Part of the Adequate Protection Package Strips Value from the Debtors' Estates.

34. As part of the adequate protection package, the Debtors intend to pay the postpetition interest and fees of the Prepetition Secured Parties regardless of the actual diminution of value. While the Committee is amenable to the provision of reasonable adequate protections to Prepetition Secured Parties, including reasonable fees and expenses, the protections currently sought go beyond anything contemplated by the Bankruptcy Code. *See In re Pine Lake Vill. Apt. Co*., 19 B.R. 819, 824 (Bankr. S.D.N.Y. 1982) ("The concept of adequate protection [should not] go beyond the scope of protecting the secured claim holder from a diminution in the value of the collateral securing the debt."); *see also In re Blehm Land & Castle Co*., 859 F.2d 137 (10th Cir. 1988) (stating that the "adequate protection provided must not substantially exceed that to which the secured creditor is entitled"); *In re Gunnison Ctr. Apts., LP*, 320 B.R. 391, 396 (Bankr. D. Colo. 2005) (secured creditor "must, therefore, prove this decline in value – or the threat of a decline – in order to establish a prima facie case.").

35. Notably, the Proposed Final Order proposes not only to reimburse the Prepetition Secured Parties for postpetion legal fees and out-of-pocket expenses, as originally contemplated by the Motion, but also contemplates the employment and compensation of the

Second Lien Secured Parties' investment banker Houlihan Lokey Capital, Inc. ("H&L") and financial advisor Alvarez & Marsal North America, LLC ("A&M", and together with H&L and the First Lien Secured Parties' professionals, the "Lenders' Professionals"), to which the Debtors are parties to the respective engagements.

36. The Committee is most concerned with the retention of H&L and the Debtors' agreement to fund the significant fees and expenses in excess of $4 million as adequate protection payments regardless of whether the Second Lien Secured Parties suffer any diminution in value of their prepetition collateral. Such payments should not be borne by the Debtors' estates, especially where the services being provided go well beyond the Second Lien Secured Parties' role as a lender and extend to services for the Second Lien Secured Parties as a potential purchaser and/or plan sponsor (without any such agreement or commitment as to either).[6] Accordingly, the payment of the Lenders' Professionals' fees, especially that for the investment banker, should be stricken as a form of adequate protection from the Proposed Final Order.

37. In addition, to the extent the Proposed Final Order provides for that the payment of the Prepetiton Secured Parties' post-petition fees over the Committee's objections (including the Lenders' Professionals), the payment of such fees should not be included in the calculation of diminution in value. The Proposed Final Order should also clearly provide that all such payments are subject to section 506(b) of the Bankruptcy Code and may be charged or reallocated against these parties' principal and/or are disgorgeable should such claims

[6] The Second Lien Secured Parties' positioning as a potential buyer in these Chapter 11 Cases is clearly contemplated in the revised proposed order to the Bidding Procedures Motion that will be filed in the coming days. To the extent the Second Lien Secured Parties wish to seek reimbursement for their professionals in connection with the success of a sale or the implementation of a plan of reorganization, they can do so by application to the Court for a substantial contribution expense claim or through the terms of a plan support agreement.

ultimately prove undersecured (as a result of, for example, lien avoidance). Without these modifications, the Motion should not be approved on a final basis.

C. The Waivers of Sections 506(c), 552(b) of the Bankruptcy Code and the Doctrine of Marshalling are Unjustified at this Time.

38. No waiver of section 506(c), 552(b) or marshalling should be granted in these Chapter 11 Cases until administrative solvency is reasonanably assured, and the Motion should not be approved on a final basis until the Proposed Final Order is further modified as set forth herein. To obtain such relief, the Prepetition Secured Parties must pay the freight[7] and ensure all administrative claims are paid in full, including section 503(b)(9) claims, stub rent, and a reasonable allocation for Committee's Professionals fees.[8]

39. The Debtors should not waive any rights with respect to the marshalling doctrine in the Proposed Final Order. Such rights should be preserved for the estates and general unsecured creditors. Marshalling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." *Meyer v. United States***,** 375 U.S. 233, 237

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[7] Many bankruptcy courts have concluded that adequate provision must be made to assure that administrative expenses will be paid in full before debtor-in-possession financing can be approved. For example, in *In re Townsends, Inc.,* when the debtors proposed postpetition financing that would pay most administrative claims but leave the section 503(b)(9) claims behind, Judge Sontchi stated, "if it appears that the case is administratively insolvent, I would be inclined to . . . either convert or dismiss the case . . . . " Hr'g Tr. at 23:25–24:22, *In re Townsends, Inc., et al.*, Case No. 10-14092 (Bankr. D. Del. January 21, 2011). *See, e.g.*, Hr'g Tr. at 100:17–20, *In re NEC Holdings Corp., et al.*, Case No. 10-11890 (Bankr. D. Del. July 13, 2010); Hr'g Tr. at 10:1–12:22, *In re Family Christian, LLC et al.*, Case No. 15-00643 (Bankr. W.D. Mich. April 14, 2015). As a result of the *Townsends* Court's refusal to approve postpetition financing that did not provide for payment in full of section 503(b)(9) claims, the court approved the postpetition financing based on a revised budget that included a carve-out with sufficient funds to pay the section 503(b)(9) claims in full. *See In re Townsends, Inc., et al.*, Case No. 10-14092, [Docket No. 227] (Bankr. D. Del. Jan. 28, 2011); *see also In re Golden County Foods, Inc., et al.*, Case No. 15-11062 (KG), [Docket No. 175 at ¶ 31] (Bankr. D. Del. June 22, 2015) (final DIP financing order required that sale proceeds in excess of postpetition financing obligations be available to pay administrative expense claims prior to the payment of alleged prepetition secured debt).

[8] The unfiled detail of the budget proposed by the Debtors and Prepetition Secured Parties allocates less than 18% of the allotted professionals' fees towards the allowed and unpaid fees and expenses incurred by the Committee's Professionals, which does not even take into account the proposed H&L fees of $4 million. The budget must adequately provide for payment of the Committee's Professional fees that are necessary to allow the Committee to carry out its fiduciary duties in these cases.

(1963). There is no justification for the broad scope of the marshalling waiver. If the Court upholds the Debtors' request to encumber certain unencumbered assets and proceeds of Avoidance Actions and commercial tort claims, the Prepetition Secured Parties should be required to exhaust all other collateral before seeking satisfaction from unencumbered assets (including, if allowed by the Court, the proceeds of Avoidance Actions and commercial tort claims), the value of which would otherwise be available for the benefit of unsecured creditors. *See In re Advanced Marketing Servs., Inc.*, 360 B.R. 421, 427 n.8 (Bankr. D. Del. 2007) (noting that marshalling "requires the senior secured creditor to first collect its debt against the collateral other than that in which the junior secured creditor holds an interest, thereby leaving that collateral for the junior secured creditor's benefit.").

40. The Debtors are also seeking a waiver of the estates' right to surcharge collateral pursuant to section 506(c) of the Bankruptcy Code, as well as a waiver of the estates' right under section 552(b) of the Bankruptcy Code. Absent agreement on a budget, which budget has yet to be shared with the Committee, these waivers are inappropriate here and should be stricken.

41. Section 506(c) of the Bankruptcy Code is borne out of a rule of fundamental fairness for all parties-in-interest, providing that secured creditors share some of the burden of administration in a bankruptcy case where it is reasonable and appropriate for surcharges to be ordered, and, importantly, estate assets are to be protected for the sole benefit of secured parties. A section 506(c) waiver would eliminate a future avenue of recovery for the Debtors' estates and guarantee that the costs of the Debtors' reorganization will be borne by the unsecured creditors alone. *See Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.*), 57 F.3d 321, 325 (3d Cir. 1995) ("[Section] 506(c) is designed to prevent a windfall to the secured creditor . . . . The rule understandably shifts to the secured party . . . the costs of preserving or disposing of

the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate . . . .") (internal citation omitted). Unsecured creditors cannot be put in a position at the outset of the cases that will potentially prejudice them and invade their recoveries.[9] Waiver of the Debtors' surcharge rights forces unsecured creditors alone to bear the costs of preserving the prepetition collateral and the Debtors should not be permitted to unilaterally extinguish this valuable remedy at this time.

42. Finally, the Debtors are seeking a waiver of the section 552(b) "equities of the case" exception, which allows the Debtors, the Committee and other parties-in-interest to assert that equitable considerations justify the exclusion of postpetition proceeds from the Collateral. *See* 11 U.S.C. § 552(b). "The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which normally would go to general creditors) to cause the appreciated value." *In re Muma Servs.*, 322 B.R. 541, 558–59 (Bankr. D. Del. 2005); *Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n* (*In re TerreStar Networks, Inc.*), 457 B.R. 254, 272–73 (Bankr. S.D.N.Y. 2011) (request for section 552(b) waiver was premature because factual record not fully developed).

43. The Committee submits that any prospective waiver of the "equities of the case" exception set forth in section 552(b) of the Bankruptcy Code is inappropriate and improper.

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[9] This Court has viewed such prospective waivers with skepticism and will not approve them absent Committee consent. *See, e.g.*, Hr'g Tr. at 63:9–13, *In re Loot Crate, Inc*., Case No. 19-11791 (BLS) (Bankr. D. Del. Sept. 3, 2019) [Docket. No. 129] ("I would struggle, I guess, to find a situation where I have approved a 506(c) waiver over a committee objection"); Hr'g Tr. at 120:8–19, *In re Motor Coach Indus. Int'l, Inc.*, Case No. 08-12136 (BLS) (Bankr. D. Del. Oct. 17, 2008) [Docket No. 282] (court declined to approve Section 506(c) waiver over committee objection, stating: "I cannot recall a case . . . where I have approved this kind of relief, that being liens on avoidance actions and a 506(c) waiver, over a committee objection."); Hr'g Tr. 21:7–13, *In re Mortg. Lenders Network USA, Inc.*, Case No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) [Docket No. 346] (court stating: "Well, let me tell you what the law in this Court's been for at least the last five years. If the Committee doesn't agree with the waiver, it doesn't happen.").

D. The Proposed Final Order Inappropriately Constrains the Committee's Rights to Challenge any Alleged Liquidation Premium Arising Under that Certain Note Purchase Agreement by Establishing a Challenge Period.

44. In addition to the foregoing terms, which skew the Chapter 11 Cases in favor of the Prepetition Secured Parties, the Proposed Final Order now delineates formal deadlines concerning the Committee and other parties in interests' rights to challenge any alleged liquidation premium the Second Lien Secured Parties may assert in connection with that certain Note Purchase Agreement. By establishing such expedited deadlines, including a second challenge period, the relief proposed here is yet another interference with the fulfillment of the Committee's fiduciary duties and functions.

45. The Committee is willing to discuss an appropriate protocol for the resolution of the asserted liquidation premium, but any such protocol should not be unnecessarily expedited and otherwise interfere with the timing of the multiple sales processes being conducted in these cases. The current proposed protocol will distract the parties from focusing on the sales processes, which should be every party's priority at this stage of the Chapter 11 Cases.

E. To the Extent the Court is Inclined to Grant the Motion on a Final Basis, the Court Should Determine that the Prepetition Secured Parties are Already Adequately Protected.

46. If the Court is inclined to grant the Motion on a final basis, the Committee respectfully request that the Court deem the Prepetition Secured Parties' equity cushion to be sufficient adequate protection because (i) the substantial net increase in the Debtors' cash position during these Chapter 11 Cases as compared to its operation in the ordinary course outside of bankruptcy, and (ii) the expedited sales processes being administered for the Prepetition Secured Parties' benefit. The Prepetition Secured Parties are free at any time in the

future to ask for additional adequate protection at such time (if ever) as an actual quantifiable diminution in value can be demonstrated.

47. To the extent, however, that the Court finds that the Prepetition Secured Parties are entitled to additional adequate protection, such protections should be conditioned on a subsequent showing of actual diminution in collateral value sufficient to meet the Prepetition Secured Parties' evidentiary burden.

RESERVATION OF RIGHTS

48. The Committee will continue discussions with the various stakeholders with the goal of resolving as many issues as possible prior to the time of the Hearing.

49. Accordingly, the Committee expressly reserves all rights, claims, arguments, defenses, and remedies with respect to the Motion to the fullest extent, and to supplement this Objection prior to the Hearing, to seek discovery, and to present argument at the Hearing, if necessary.

CONCLUSION

50. For the reasons stated above, the Committee respectfully requests that the Court continue the Hearing on the Motion to provide proper notice of the relief being granted and adequate time for the parties to brief and submit evidence regarding whether, and to what extent, the Prepetition Secured Parties are entitled to adequate protection. To the extent the Court is inclined to grant final approval of the Motion at the Hearing, the Committee respectfully requests the Motion be denied unless or until the issues, objections, and concerns of the Committee are

addressed and modified, and discussed herein.

Dated: September 5, 2023

Respectfully submitted,

MORRIS JAMES LLP

/s/ *Eric J. Monzo*

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Proposed Counsel for the Official Committee of Unsecured Creditors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PROTERRA INC, *et al.*,[1]	Case No. 23-11120 (BLS)
Debtors.	(Jointly Administered)

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2023, I caused to be filed with the Court electronically, and I caused to be served a true and correct copy of the *Objection, Request for Continuance, and Reservation of Rights of the Official Committee of Unsecured Creditors to Final Approval of the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* upon the parties that are registered to receive notice via the Court's CM/ECF notification system and additional service was completed by electronic mail on the parties indicated on the attached service list.

/s/ Eric J. Monzo
Eric J. Monzo (DE Bar No. 5214)

[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 (1379); and Proterra Operating Company, Inc. (8459). The location of the Debtors' service address is: 1815 Rollins Road, Burlingame, California 94010.

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