

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

PROTERRA INC, et al.,¹

Debtors

Chapter 11

Case No. 23-11120-BLS

Jointly Administered

Re: Docket Number 279

Obj. Deadline: 10/16/23 at 4:00 p.m. (ET)

**OBJECTION OF THE WAYNE COUNTY AIRPORT AUTHORITY TO NOTICE OF
(I) POTENTIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY
CONTRACTS AND UNEXPIRED LEASES AND (II) PROPOSED CURE AMOUNTS**

The Wayne County Airport Authority (“Authority”), by and through its undersigned counsel, objects to the *Notice of (I) Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (II) Proposed Cure Amounts* (“Notice,” Doc. No. 279), respectfully stating as follows.

1. The Notice lists three purported contracts with the Authority:

- 2672 Agreement for Transit Buses and Charging Stations (Contract No. 2050207) 10/21/2020
- 2673 (PO No. 20205234-00) 2/2/2021
- 2674 (PO No. 20220581-00) 6/6/2022

With respect to these purported contracts, the Authority has the following objections.

2. These are all believed to be the same contract (the “Authority Contract”),² entered into

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 The Debtors’ notation on the Notice are not entirely clear; this represents the Authority’s interpretation of the items listed on the Notices.



on October 21, 2020, and amended April 20, 2022. Items #2673 and 2674 appear to be enabling purchase orders under the Authority Contract. Because these are all part of one contract -- the Authority Contract -- they cannot be assumed or rejected piecemeal. *In re Fleming Cos., Inc.*, 499 F.3d 300, 308 (3d Cir. 2007). The Authority objects to any attempt to characterize the Authority Contract in any other manner than as a single agreement, assumable or rejectable *cum onere*.

3. The remainder of this Objection treats the Notice as proposing assumption of a single contract with the Authority, the Authority Contract, for which Proterra asserts that there is no cure amount due.

4. The Notice implements paragraph 5d of the Bidding Procedures Order,³ which requires the filing of

Objections . . . if any, to one or more of (i) a scheduled Cure Amount, (ii) the ability of the Stalking Horse Bidders, if any, to provide adequate assurance of future performance, and (iii) the proposed assumption, assignment, and/or transfer of such Contract (including the transfer of any related rights or benefits thereunder), other than objections that relate specifically to the identity of any Successful Bidder (other than the Stalking Horse Bidders, if any)

Bidding Procedures Order, ¶ 5d. As of the date of this Objection, the Authority has not received any notice identifying any Stalking Horse bidders.

5. For its part, the Notice states

If you disagree with the proposed Cure Amount, object to the proposed assumption and assignment of the Contract(s) to the Successful Bidder, or object to the Successful Bidder's ability to

³ 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, and (F) Granting Related Relief, Docket Number 218.

provide adequate assurance of future performance with respect to any Contract(s), you must file an objection (a “Cure/Assignment Objection”), stating with specificity the nature of your objection
. . . .

Notice, ¶ 5. Taking these points in turn, the Authority has the additional following limited objections.

6. **Cure Amount.** For purposes of Bankruptcy Code § 365, the Authority Contract is an executory contract, not an unexpired lease of real property. Thus, speaking broadly, to assume the Authority Contract, the Debtor must cure all non-penalty defaults under it, or provide adequate assurance of prompt cure of such defaults. As the Authority is a buyer of goods and services from the Debtors, rather than a seller, the Authority does not believe it is currently due any money under the Authority Contract (but it may have claims under the Authority Contract).

7. That said, the Authority Contract contains a number of forward-looking provisions, such as warranty provisions which have not yet expired. Under certain legal principles, claims under these provisions might arguably “relate back” to as early as the date that the Authority Contract became effective. *See In re City of Detroit, Mich.*, 548 B.R. 748, 751 (Bankr. E.D. Mich. 2016) (discussing the “fair contemplation” test and its use in determining which claims arise prepetition). Claims that arise under a contract are generally considered within the “fair contemplation” of the parties and thus can be considered pre-petition claims. And this principle, taken with the language proposed by the Debtors for its orders, could lead to such claims being lost as part of the contract assumption and assignment process.

8. The Debtors’ language triggers these concerns. For example, paragraph 5f of the Bidding Procedures Order could be interpreted in this fashion. Contract counterparties that fail to object

(i) be forever barred from objecting to the Cure Amount and from asserting any additional cure or other amounts with respect to such

Contract in the event it is assumed and/or assigned by the Debtors....; and (ii)...shall be forever barred and estopped from . . . asserting or claiming against the Debtors or the applicable assignee that any additional pre-assignment amounts are due or defaults exist, or conditions to assumption, assignment, and/or transfer must be satisfied under such Contract, that any related right or benefit under such Contract cannot or will not be available to the relevant assignee, or that the assignee failed to provide such Non-Debtor Counterparty with adequate assurance of future performance.

Bidding Procedures Order, ¶ 5f. A warranty claim is arguably a pre-petition claim for bankruptcy purposes, which makes it is a pre-assignment claim. Under this directive, failure to object could be read to mean loss of the warranty claim, even though the contract has been assumed.

9. The proposed Sale Order filed at Docket Number 278 contains even stronger language.

The payment of the applicable Cure Amounts (if any), or any other cure amount reached by agreement after any Cure/Assignment Objection, will effect a cure of all defaults and all other obligations or liabilities under any Assumed Contract existing, occurring, arising, or accruing prior to the date that such executory contracts or unexpired leases are assumed and compensate for any actual pecuniary loss to such Non-Debtor Counterparty resulting from such default.

Sale Order, ¶ 22 (emphasis added).⁴ For further example from the Sale Order,

Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, all counterparties to the Assumed Contracts are forever barred from raising or asserting against the Debtors and their estates or the Buyer any assignment fee, default, breach, claim, pecuniary loss, or condition to assignment, arising under or related to the Assumed Contracts, existing as of the date that such Assumed Contracts are assumed or arising by reason of or in connection with the Closing.

Sale Order, ¶ 35 (emphasis added).

10. “Claim” is defined very broadly in the Bankruptcy Code. 11 U.S.C. § 101(5). As noted previously, the “fair contemplation” test makes contingent claims, like warranty claims, prepetition claims so that they can be dealt with in the bankruptcy context. *See City of Detroit*,

⁴ An objection to the Sale Order is being filed contemporaneously with this Objection.

548 B.R. at 751. But what works for claim resolution does not work well for contract assumption. The cure provisions and Sale Order language are drafted so broadly that they could dispose of these claims without payment, as there is no monetary “cure” amount due for them. Such a result takes the admirable goal of dealing with all claims at once and turns it on its head to vitiate the protections of Bankruptcy Code § 365.

11. There is no need for such broad language; Bankruptcy Code § 365 provides all the protections required. Thus, the Authority is both objecting separately to the proposed Sale Order and objecting here to the \$0 cure amount proposed to the extent that it might be interpreted as including any future contractual performance obligations within it.

12. For this reason, the Authority objects to any interpretation of the Authority Contract and bankruptcy law that would hold that failure to insist on a non-zero cure amount under the Authority Contract operates to waive the Authority’s future right to demand performance under any provision of the Authority Contract, regardless of when the Authority’s right to demand performance may be considered to have arisen.

13. Adequate Assurance. As worded in the above-quoted section of the Notice, the Authority is to identify any objections it has with respect to “the Successful Bidder’s ability to provide adequate assurance of future performance with respect to [the Authority’s contract].” This is not yet possible because the identity of the Successful Bidder (including any Stalking Horse bidders) is not known. The Bidding Procedures Order also requires the Authority to object to the ability of the Stalking Horse Bidders, if any, to provide adequate assurance of future performance. The Authority is not aware of a Stalking Horse Bidder. To the extent there is one, the Authority has not received any adequate assurance of future performance and objects on that basis.

14. “The statutory requirement of adequate assurance of future performance by the

assignee affords needed protection to the non-debtor party because the assignment relieves the trustee and the bankruptcy estate from liability for breaches arising after the assignment.” *Fleming Cos.*, 499 F.3d at 305. Assignment of a contract cannot occur without the Debtors making this showing. 11 U.S.C. § 365(b)(1)(C)). Here, without the identity of the assignee known, there is no way this showing can be made.

15. To be clear, the Authority is aware that paragraph 8 of the Notice appears to preserve this objection for when the identity of the Successful Bidder, if any, becomes known. Further, counsel for the Debtors have communicated that, paragraph 5 of the Notice notwithstanding, it is not the Debtors’ intent to require such objections at this stage of the process. However, because the language of paragraph 5 of the Notice does not match this understanding, and because paragraph 5d of the Bidding Procedures Order expressly carves out Stalking Horse bidders from this understanding, the Authority must expressly reserve its rights to object to assignment of the Authority Contract to any specific entity, and further to that entity’s ability to perform under the contract, for such time as when the identity of the entity officially is made known to the Authority and the entity’s ability to perform can be reviewed.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen C. Bifferato, hereby certify that on the 16th day of October 2023, a copy of the foregoing was served via the Court's Electronic Filing (ECF) system on all parties registered to receive electronic notices in this case, and also upon the parties listed below by electronic mail.

/s/ Karen C. Bifferato
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