

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

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

**BROWARD COUNTY’S LIMITED OBJECTION AND REQUEST FOR ADEQUATE
ASSURANCE OF FUTURE PERFORMANCE
REGARDING DEBTORS’ PROPOSED SALE OF TRANSIT ASSETS AND
ASSIGNMENT OF CONTRACTS TO PHOENIX MOTOR, INC.**

Broward County, a political subdivision of the State of Florida (the “County”), hereby files this Limited Objection and Request for Adequate Assurance in response to the Debtors’ *Notice of (A) Successful Bidder Regarding Debtors’ (I) Transit Assets* etc. [ECF 529] and *Second Amended Notice of (I) Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* etc. [ECF 528].

Summary and Relief Sought

The County seeks adequate assurances that the Debtors’ proposed buyer of its transit assets, Phoenix Motor, Inc. (“Phoenix”), can perform on the Debtors’ warranty obligations owed to the County. The County has purchased 42 electric transit buses plus related equipment, parts, and services from the Debtors for approximately \$54 million. The buses delivered so far have proven unreliable: Those from the first lot are out of service approximately half the time and break down approximately once every 600 miles, compared to once every 4,500 miles for the County’s aging fleet of diesel buses. Other Governmental Customers report similar or worse performance.¹

¹ The undersigned speaks only for Broward County but has been in communication with counsel for a number of similarly situated Governmental Customers who have similar concerns.



Debtors now propose to sell Proterra's transit assets and assign the contracts of the County and other Governmental Customers to Phoenix, which does not appear to have the experience or financial wherewithal to perform.

The County respectfully asks this Court to enter an order requiring Phoenix to post a letter of credit or bond to ensure its performance. The County also asks that Phoenix provide written assurance of its eligibility to be a governmental contractor under Florida and federal law.

Background

1. The Objector, Broward County, is a political subdivision of the State of Florida, within the meaning of Article VIII, Section 1(a), of the Florida Constitution.

2. Pursuant to the Florida Constitution, as a charter county, the County has "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VIII, § 1(g), Fla. Const.

3. The Debtors filed a *Second Amended Notice of (I) Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases*, etc. [ECF 528] on November 10, 2023, proposing the "potential" assumption and assignment of hundreds of contracts listed in Appendix A. Thirteen lines in the Appendix reference Broward County.²

4. The Debtors filed a *Notice of (A) Successful Bidder Regarding Debtors' (I) Transit Assets*, etc. [ECF 529] on November 13, 2023. This paper identified Phoenix as the successful bidder for the transit assets and gave an objection deadline of November 21, 2023.

² The County does not concede that each line of the Debtor's spreadsheet represents a different or separate contract.

5. On November 16, 2023, the County propounded informal interrogatories to the Debtors³ asking about Phoenix's ability to perform on the Debtors' contracts with the County.

6. On November 17, 2023, the County provided the Debtors' counsel with a proposed declaration attesting to Phoenix's eligibility to be a governmental contractor under Florida and federal law.

7. To date, the County has not received substantive responses to its inquiries, but Debtors' counsel informs the undersigned that a "package" of adequate assurances will be forthcoming.

8. Phoenix trades on the NASDAQ under the ticker symbol PEV.

9. On April 18, 2023, Phoenix filed a Securities and Exchange Commission ("SEC") Form 8-K disclosing that NASDAQ had informed Phoenix it was out of compliance with a NASDAQ rule because the company's share price had closed below \$1.00 for the previous 30 consecutive business days.

10. On October 17, 2023, Phoenix filed a Form 8-K stating that it had received a six-month extension to come into compliance with NASDAQ's \$1.00-share-price rule.

11. According to Phoenix's most recent SEC Form 10-Q, filed November 14, 2023, the company's shareholder equity was approximately \$5 million as of September 30, 2023. Cash and cash equivalents on hand were \$186,000.

12. According to public sources, Phoenix's market capitalization is around \$22 million.

³ The Debtors' counsel have requested that the County direct these inquiries to them rather than to Phoenix, which has not entered an appearance. The County is accommodating this request but reserves all rights to seek information directly from Phoenix should the County deem that necessary.

13. According to Phoenix's website, it manufactures small shuttle buses and box trucks, but the site gives no indication the company manufactures full-size buses or other heavy-duty vehicles.

14. The County's two orders with Proterra total more than \$54 million, although the County is informed and believes that most of the buses ordered are at or near completion. The County's orders include 42 buses, plus, inter alia, charging equipment, spare parts, and warranties.

15. The County and many of the other Governmental Customers purchase rolling stock from the Debtors using federal funds channeled through the Federal Transit Administration ("FTA"). Congress has been especially interested in assisting states and localities with purchasing low- and no-emissions vehicles such as those manufactured by the Debtors. The FTA therefore pays 80% of the cost for such vehicles purchased by such governments. *See generally* 49 U.S.C. § 5339; Federal Transit Administration, *Grants for Buses and Bus Facilities Program*, available at <https://www.transit.dot.gov/bus-program>. The County also uses a sales surtax dedicated to transportation to pay for buses.

16. The Debtors' electric buses use a new technology that is unreliable, so the County and others rely heavily on the repair obligations of the Debtors' warranty service, which is included in and integral to Proterra's contracts with the County. The County's aging fleet of diesel buses typically averages approximately 4,500 miles between failures, but the Proterra vehicles are currently averaging 600 miles between failures for the first lot of buses delivered, and 1,800 miles between failures for the first six buses in the second lot. On average, half of the first lot of Proterra buses and about one-third of the second lot are out of service at any given time.

17. Other Governmental Customers have reported problems similar to, or worse than, those experienced by the County. *See, e.g.*, Objection of the Southeastern Pennsylvania

Transportation Authority [ECF 392]; Limited Objection of Central Florida Regional Transportation Authority [ECF 398]; Objection of Santa Clara Valley Transportation Authority [ECF 415]; Objection of the City of Edmonton [ECF 450]; Objection of BC [British Columbia] Transit [ECF 504].

ARGUMENT

I. Phoenix should be required to post a letter of credit or performance bond to ensure that it can meet its obligations to the County and other Governmental Customers.

Based on the information available to the County at this time, Phoenix does not appear to have the financial wherewithal to perform on the assigned contracts.

Under Section 365(f)(2)(B) of the Bankruptcy Code, a debtor may assign an executory contract only if adequate assurance of future performance can be provided, regardless of whether the contract is in default. “Adequate assurance of future performance” is not defined in the Bankruptcy Code. Courts have said the definition depends on the facts of a particular case. *E.g.*, *Matter of U. L. Radio Corp.*, 19 B.R. 537, 542 (Bankr. S.D.N.Y. 1982). “Financial statements, tax returns, bank statements, letters of credit, loan commitments, bonds, as well as cash are some of the evidence of adequate assurance” that may be offered, but “unsubstantial promises” are insufficient. *In re Memphis-Friday’s Assocs.*, 88 B.R. 830, 841 (Bankr. W.D. Tenn. 1988). *See also In re Tama Beef Packing, Inc.*, 277 B.R. 407 (Bankr. N.D. Iowa 2002) (“[I]t is helpful for party to show sufficient financial backing, escrow deposit or similar forms of security.”); *In re Texas Health Enterprises Inc.*, 72 Fed. Appx. 122, 127 (5th Cir. 2003) (“Evidence of prior defaults ... is probative of whether the debtor will be able to perform in the future.”).

Here, Phoenix does not appear to have been consistently profitable, and the company is under threat of delisting, suggesting a lack of confidence on the part of potential investors. Phoenix’s most recent quarterly report shows less than \$200,000 in cash on hand. Phoenix appears

to have no experience making or repairing full-size transit buses or other heavy-duty vehicles. Meanwhile, the County and other Governmental Customers report that the Proterra buses require frequent repairs to keep them in service. These and other publicly available facts and figures suggest that Phoenix lacks the financial capability to perform on its contracts, especially the warranty provisions. Indeed, based upon the information now available, the County knows of no evidence suggesting that Phoenix could perform on the warranty obligations.

Therefore, the County respectfully asks this Court to require that any orders approving the proposed sale of the transit assets and assignment of the County's contracts be contingent upon adequate assurance in the form of a letter credit or bond to ensure performance on the warranty obligations.

II. The Court should not enter orders approving the contract assignments and sale until the County has had a reasonable opportunity for discovery.

The fundamental requirement of due process is meaningful notice and opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). To be effective, notice must be

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314-15 (1950) (cleaned up).

This rule is, of course, as applicable in bankruptcy courts as anywhere else in the United States' legal system. *See, e.g., In re Maylin*, 155 B.R. 605, 611 (Bankr. D. Me. 1993) (noting that secured creditor's liens cannot be extinguished without "meaningful notice and an opportunity to

be heard”). The Bankruptcy Code is replete with requirements that various actions may occur only after “notice and a hearing.”

Here, the Bankruptcy Code provides a right to adequate assurance of future performance, and the extent of this right should not be adjudicated while the Debtors and/or Phoenix have full knowledge of Phoenix’s ability to perform, but the County is still awaiting answers to basic questions. Entry of orders under these circumstances would deprive the County of “meaningful” notice and opportunity to be heard because the County does not have the facts it needs to respond intelligently to the Debtors’ and Phoenix’s proposals.

Therefore, if the Court determines that the record does not yet support requiring a letter of credit or bond, the Court should postpone adjudication of the Debtors proposed sale and assignment until the County and other Governmental Customers have had time to learn more about Phoenix’s ability to perform.

III. The Court should not cut off the County’s right to object to the Debtors’ characterization of the contracts between the County and the Debtors.

The County maintains that it has just two contracts with Proterra, but the Debtors identify approximately 13 contracts in their *Second Amended Notice of (I) Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases*, etc. [ECF 528].

How the contracts are characterized could have critical legal significance. Section 365 of the Bankruptcy Code authorizes a debtor to assume or reject a contract, but not to rewrite it. “This election is an all-or-nothing proposition—either the whole contract is assumed, or the entire contract is rejected.” *In re CellNet Data Sys., Inc.*, 327 F.3d 242, 249 (3d Cir. 2003). A debtor and counterparties could find themselves with significantly different rights and obligations depending on how a contract is defined.

The County has discussed this with the Debtors' counsel, and believes the parties now agree that there were two contracts and no more. However, the docket does not yet show this agreement.⁴

Therefore, the County asks that it be granted a reasonable period of time to confer with the Debtors and reach agreement about how to correctly characterize the contracts between them, and if agreement cannot be reached, to assert its rights before this Court.

IV. The Debtors should not be allowed to sever any warranty obligations from other rights and responsibilities contained in the same contract.

Just as a debtor should not be allowed to split a single contract ordering 30 buses into, for example, one contract ordering seven buses and another ordering 23, a debtor also cannot split different *types* of rights and responsibilities contained in the same agreement. In particular, where warranties are contained in an assumed or assigned agreement, the warranty rights and obligations necessarily travel with the assumed or assigned agreement.

The County believes it has reached agreement with the Debtors' counsel on language to address this issue, but here again, the record does not yet reflect this.

Therefore, the County asks that the Court preserve the County's rights to object to any assumption or assignment of any contract with the County to the extent the Debtor or assignee attempts to sever the warranty commitments from the rest of any assumed or assigned agreement.

V. The contracts with the County may not be assignable, or not assignable to certain persons, under applicable non-bankruptcy law.

The County may be prohibited by applicable nonbankruptcy law from doing business with certain companies, such as discriminatory vendors, companies that have engaged in a boycott of

⁴ Debtors' counsel confirms this was a clerical error in the most recent list of potential assumed contracts and will be corrected.

Isarel, or companies that do business with Cuba or Syria. *See, e.g.*, §§ 287.133, 287.134, 287.135, Fla. Stat.; 11 U.S.C. § 365(c)(1).

The County has asked Phoenix, through the Debtors' counsel, to provide sworn statements attesting to Phoenix's eligibility to contract with governmental entities under Florida and federal law but has not yet received a response.

For this reason, the County asks that the Court preserve the County's right to object to any assumption/assignment, and the County's right to demand adequate assurance of future performance, based upon illegality under applicable nonbankruptcy law.

Prayer for Relief

WHEREFORE, the County respectfully asks this Court to:

- (A) Make approval of any sale of the transit assets or assignment of the County's contracts contingent upon Phoenix's provision of a letter of credit or performance bond sufficient to ensure performance on the warranty obligations; OR
- (B) Delay entry of an order on the proposed sale and assignment until the County has had sufficient time to inquire further into Phoenix's ability to perform; AND
- (C) In either case, preserve the County's rights to object to: (i) the Debtors' characterization of the contracts between the County and Proterra; (ii) Phoenix's ineligibility to be a government contract under Florida or federal law; or (iii) any attempt to sever Proterra's warranty obligations from its sales contracts with the County.

Respectfully submitted,

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Chapter 11

PROTERRA INC, et al.,

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Debtors.

(Jointly Administered)

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CERTIFICATE OF SERVICE

I hereby certify that in addition to the notice and service provided through the Court's ECF system, on November 21, 2023, I caused a true and correct copy of *Broward County's Limited Objection and Request for Adequate Assurance of Future Performance Regarding Debtors' Proposed Sale of Transit Assets and Assignment of Contracts to Phoenix Motor, Inc* to be served by email on:

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Dated: November 21, 2023,

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