

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

PROTERRA INC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 23-11120 (BLS)

(Jointly Administered)

Re: D.I. 1039, 934

**Hearing Date:** March 5, 2024 at 10:00 a.m.

**Obj. Deadline:** Feb. 29, 2024 at 12:00 p.m.  
(for U.S. Trustee)

**UNITED STATES TRUSTEE’S OBJECTION TO CONFIRMATION OF THE FOURTH  
AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR  
PROTERRA INC AND ITS DEBTOR AFFILIATE (D.I. 1039)**

Andrew R. Vara, the United States Trustee for Region 3 (“U. S. Trustee”), through his counsel, files this objection (the “Objection”) to confirmation of the *Fourth Amended Joint Chapter 11 Plan Of Reorganization For Proterra Inc And Its Debtor Affiliate* (“Plan”) [D.I. 1039] and in support of his Objection, states:

<sup>1</sup> 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: 500 Pennsylvania Avenue, PO Box 2205, Greer, SC 29652.



### **PRELIMINARY STATEMENT**

1. The U.S. Trustee objects to confirmation of the Plan because it (a) it provides exculpation for future actions; and (b) it alters the requirement to pay quarterly fees. For the reasons set forth below,<sup>2</sup> the U.S. Trustee submits that the Plan should not be confirmed.

### **JURISDICTION, VENUE, STANDING**

2. This Court has jurisdiction over the above-captioned cases pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and determine confirmation of the Plan and the Objection pursuant to 28 U.S.C. § 157(a, b), and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the cases is proper in this District pursuant to 28 U.S.C. § 1408(1).

3. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This duty is part of the U.S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has “public interest standing” under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”).

4. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in chapter 11 cases and to comment on such plans and disclosure statements.

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<sup>2</sup> The U.S. Trustee has raised additional concerns with the Debtors. These concerns have either (i) been resolved pending review of revised documents or (ii) are close to being resolved at the time of this filing. The U.S. Trustee reserves the right to raise these concerns at confirmation.

5. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to Plan confirmation and this Objection.

### **FACTS**

6. The above-captioned Debtors filed voluntary petitions for relief under chapter 11 in this Court on August 7, 2023.

7. On August 24, 2023, the U.S. Trustee appointed an official committee of unsecured creditors (the “Committee”). D.I. 126. An additional creditor was added to the Committee on September 21, 2023. D.I. 268.

8. The Debtors have utilized section 363 of the Bankruptcy Code to pursue sales of substantially all their assets. The Court has entered two orders approving the sales of the Debtors’ Powered and Transit assets, as well as the sale of certain battery lease assets. The remaining assets, constituting the Debtors’ Energy business, will either be reorganized through the Plan or wound down if a Plan Support Agreement Termination<sup>3</sup> occurs.

9. On January 25, 2024, this Court entered an order approving a disclosure statement and solicitation procedures relating to the Debtors’ third amended plan. D.I. 951. The Debtors’ fourth amended plan was filed on February 8, 2024. D.I. 1039. Throughout this objection, the defined term “Plan” refers to the fourth amended plan.

### ***Exculpation***

10. The exculpation provision provides:

To the fullest extent permitted by applicable law, no Exculpated Party will have or incur any liability to any person or Entity for, and each Exculpated Party is hereby released and exculpated from, any Cause of Action related to any act or omission in connection with, relating to, or arising out of, the Debtors’ restructuring efforts, the Chapter 11 Cases, preparation for the

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<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan.

Chapter 11 Cases, the filing of the Chapter 11 Cases, formulation, preparation, dissemination, negotiation, filing, or termination of the Sale Documents, the Plan Support Agreement, the Disclosure Statement, or the Plan, including the Plan Supplement, or any Restructuring Transaction, contract, instrument, release, or other agreement or document (including providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with any of the foregoing, the Sales, the funding of the Plan, the occurrence of the Effective Date, the pursuit of Confirmation, the pursuit of consummation, the administration and implementation of the Plan, the issuance of securities pursuant to the Plan, the issuance of the New Common Stock, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omission that is determined in a Final Order to have constituted actual fraud, gross negligence, or willful misconduct, but in all respects such Persons will be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The foregoing shall not be deemed to release, affect, or limit any post-Effective Date rights or obligations of the Exculpated Parties under the Plan, any Restructuring Transaction, or any other document, instrument, or agreement executed to implement the Plan (including those set forth in the Plan Supplement).

The Exculpated Parties have, and upon consummation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of, and distribution of consideration pursuant to, the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

Plan at Article IX.D. (emphasis removed).

### ***Statutory Fees***

11. The Plan provides the following regarding U.S. Trustee quarterly fees:

All Statutory Fees due and payable prior to the Effective Date shall be paid by the Debtors on the Effective Date. After the Effective Date, the Distribution Trustee or any Disbursing Agent appointed by the Distribution Trustee in accordance with the terms of this Plan, the Distribution Trust Agreement, and the Confirmation

Order shall be obligated to pay all Statutory Fees until the applicable Debtor's Chapter 11 Case is closed in accordance with the terms set forth herein, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code. The Debtors shall file all monthly and quarterly reports due prior to the Effective Date when they become due, in a form reasonably acceptable to the U.S. Trustee. After the Effective Date, the Distribution Trustee shall file with the Bankruptcy Court quarterly reports when they become due, in a form reasonably acceptable to the U.S. Trustee, which reports shall include a separate schedule of disbursements made by the Debtors during the applicable period, attested to by an authorized representative of the Debtors or Reorganized Debtors, as applicable. With respect to the period after the Effective Date, the Distribution Trustee or its appointed Disbursing Agent shall remit, on behalf of each Debtor, all Statutory Fees, from the Distribution Trust Expense Reserve to the U.S. Trustee, and such obligation shall continue until such time as the applicable Debtor's Chapter 11 Case is closed in accordance with the terms set forth herein, dismissed, or converted to a case under chapter 7 of the Bankruptcy Code. Notwithstanding anything to the contrary in this Plan, the U.S. Trustee shall not be required to file a proof of claim for administrative expenses.

### **ARGUMENT**

#### **A. The Debtors Impermissibly Seek to Exculpate Parties for Future Acts.**

12. The U.S. Trustee objects to the Plan's Exculpation provision because the Debtors seek to exculpate parties for future actions.<sup>4</sup>

13. Exculpation applies to service as an estate fiduciary, and only applies to the period during which the estate is in existence, i.e., between the Petition Date and the effective date of the Plan. *See In re Washington Mut., Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011) (exculpation is to cover only "actions in the bankruptcy case"), *citing In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000). Here, exculpation extends to acts relating to "the funding of the Plan, . . . the administration and implementation of the Plan, the issuance of securities pursuant to the Plan, the

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<sup>4</sup> The Plan as filed did not limit exculpation to acts occurring post-petition. The U.S. Trustee understands that the Debtors have agreed to make this change.

issuance of the New Common Stock, or the distribution of property under the Plan or any other related agreement.” These are all events that will, or likely will, occur after the Effective Date, and potentially well into the future.

14. Unless the Exculpation provision in the Plan is amended to exculpate only acts and omissions prior to the Plan Effective Date, the Plan should not be confirmed.

**B. The Plan’s Reporting and Statutory Fee Provisions Are Not Sufficient to Ensure Reporting and Payment of Quarterly Fees as Required Under Applicable Regulations.**

15. The Plan does not include sufficient language regarding the filing of post-confirmation reports or the payment of statutory quarterly fees arising under 28 U.S.C. § 1930 to the U.S. Trustee after the Effective Date. The U.S. Trustee has requested that the Debtors revise Art. II.D of the Plan so that it provides as follows, to comply with the reporting and quarterly fee obligations:

All fees due and payable pursuant to section 1930 of Title 28 of the U.S. Code (“Quarterly Fees”) prior to the Effective Date shall be paid by the Debtors on the Effective Date. After the Effective Date, the Debtors, the Reorganized Debtors, and the Distribution Trustee or other applicable Disbursing Entity, if any, shall be jointly and severally liable to pay any and all Quarterly Fees when due and payable. The Debtors shall file with the Bankruptcy Court all monthly operating reports due prior to the Effective Date when they become due, using UST Form 11-MOR. Within two business days of the Effective Date, the Reorganized Debtors and any other authorized parties who have been charged with administering the confirmed plan shall file a Notice of Occurrence of the Effective Date, identifying the Effective Date and indicating that it has occurred. After the Effective Date, the Distribution Trustee or other applicable Disbursing Entity, and each of the Reorganized shall file with the Bankruptcy Court separate UST Form 11-PCR reports when they become due. Each and every one of the Debtors, the Reorganized Debtors, and Distribution Trustee or other applicable Disbursing Entity shall remain obligated to pay Quarterly Fees to the Office of the U.S. Trustee until the earliest of that particular Debtor's case being closed, dismissed or converted to a case under Chapter 7 of the Bankruptcy Code. The U.S. Trustee shall not be required to file any Administrative Claim in the case and shall not

be treated as providing any release under the Plan. To the greatest degree possible, such payments shall be made from the Distribution Trust Expense Reserve.

16. The Plan cannot be confirmed because Article II.D as currently drafted violates 28 U.S.C. § 1930(a)(6), 28 U.S.C. § 589b and 28 C.F.R. § 58.8 (2020). Specifically, the Plan only obligates the Distribution Trustee to file quarterly reports and only the Distribution Trustee is obligated to pay quarterly fees, limited to the Distribution Trust Expense Reserve. The Plan eliminates the Reorganized Debtors' obligation to file quarterly reports and pay quarterly fees.

17. The Debtors and the Reorganized Debtors are obligated to pay quarterly fees and file quarterly reports until their cases are closed, dismissed or converted. *See* 28 U.S.C. §1930(a)(g), 28 U.S.C. § 589(b) and 28 C.F.R. § 58.8. The Plan cannot eliminate the Debtors' and the Reorganized Debtors' statutory duty to pay quarterly fees. The U.S. Trustee does not agree to release the Reorganized Debtors from their obligation to pay quarterly fees.

#### **RESERVATION OF RIGHTS**

18. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, objections (including additional objections to confirmation of the Plan), remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate motion and/or conduct any and all discovery as may be deemed necessary or as may be required, and to assert such other grounds as may become apparent upon further factual discovery.

**CONCLUSION**

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying confirmation of the Plan and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: February 29, 2024  
Wilmington, Delaware

Respectfully submitted,

**ANDREW R. VARA**  
**UNITED STATES TRUSTEE, REGION 3**

By: /s/ Linda J. Casey

Linda J. Casey

Trial Attorney

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**CERTIFICATE OF SERVICE**

I, Linda J. Casey, hereby attest that on February 29, 2024, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties via email:

Proterra Inc & Proterra Operating Company, Inc. 1815 Rollins Road Burlingame, CA 94010 Attn: Jeff Mitchell, General Counsel Email: jmittell@proterra.com	Paul, Weiss, Rifkind, Wharton & Garrison LLP 1285 Avenue of the Americas New York, New York 10019 Attn: Paul M. Basta, Robert A. Britton, and Michael J. Colarossi Email: pbasta@paulweiss.com, rbritton@paulweiss.com, mcolarossi@paulweiss.com
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/s/Linda J. Casey, Esq.

Linda J. Casey