

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

In re:

NINE POINT ENERGY HOLDINGS, INC.
et al.,¹

Debtors.

Chapter 11

Case No. 21-10570 (MFW)

(Jointly Administered)

RE: D.I. 28

**CALIBER’S OBJECTION TO DEBTORS’ MOTION FOR ENTRY OF AN
ORDER APPROVING (I) THE SALE OF SUBSTANTIALLY ALL OR
ANY PORTION OF THE DEBTORS’ ASSETS FREE AND CLEAR
AND (II) THE DEBTORS’ ASSUMPTION AND ASSIGNMENT
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Caliber North Dakota, LLC (d/b/a Caliber Midstream North Dakota, LLC), Caliber Measurement Services, LLC, and Caliber Midstream Fresh Water Partners, LLC (collectively, “**Caliber**”), parties-in-interest in the above-captioned cases (the “**Chapter 11 Cases**”) and creditors of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**” or “**NPE**”), by and through their undersigned counsel, hereby submit this objection (the “**Objection**”) to the Debtors’ *Motion for Entry of an Order Approving (I) the Sale of Substantially All Or Any Portion of the Debtors’ Assets Free and Clear and (II) the Debtors’ Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [D.I. 28] (the “**Sale Motion**”).² In support of its Objection, Caliber respectfully represents as follows:

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Nine Point Energy Holdings, Inc. (8331); Nine Point Energy, LLC (0717); Foxtrot Resources, LLC (6690); and Leaf Minerals, LLC (9522). The Debtors’ address is 1001 17th Street, 14th Floor, Denver, Colorado 80202.

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

PRELIMINARY STATEMENT

1. Caliber has statutory senior liens on a material portion of the assets the Debtors propose to sell, including the vast majority of the Debtors' oil and gas wellheads and the leaseholds on which they are situated. The Debtors seek to sell those assets free and clear of Caliber's senior liens – *but* they can do so only if they provide Caliber with adequate protection. 11 U.S.C. § 363(e) (requiring adequate protection “[n]otwithstanding any other provision of this section”). “Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale.” H.R. Rep. No. 95-595 (1978).

2. Here, the Debtors propose to sell their assets to a credit bidder, and as a result, no sale proceeds will be available. Under these circumstances, Caliber's interests can be protected only if (i) its senior liens “ride through” the sale and remain attached to the purchased assets, or (ii) the credit-bidding purchaser funds an escrow, posts security, or provides other assurances that Caliber's senior liens will be paid.

3. The Debtors dispute the existence and priority of Caliber's statutory liens, but this is irrelevant. While the existence of a “bona fide” dispute may permit the Debtors to sell their assets free and clear of Caliber's liens, *see* 11 U.S.C. § 363(f)(4), it in no way diminishes the Debtors' obligation to provide adequate protection to senior lien holders, including those whose liens are in dispute. *See, e.g., In re River Road Hotel Partners, LLC*, 2010 WL 6634603, at *2 (Bankr. N.D. Ill. Oct. 5, 2010) (noting that “courts have required secured creditors to put cash in escrow, pay a portion of the bid in cash, or furnish a letter of credit when the amount and validity of an alleged senior lien is in dispute”).

4. Caliber does not oppose the Debtors' efforts to sell their assets. However, any sale must preserve Caliber's interests pending a final determination of its secured status. The Proposed

Order fails to do so. Instead, it purports to provide holders of interests or claims adequate protection in the form of attachment to the “net cash proceeds of the Sale.” But because the sale process contemplates that the Prepetition Lenders and DIP Lenders (collectively, the “**Lenders**”) will credit bid their debt, there will be *no cash proceeds* if they are the winning bidder. Absent the provision of adequate protection for Caliber’s senior secured interests, the Sale Motion must be denied.

BACKGROUND

A. General Background

5. On March 15, 2021, the Debtors filed voluntary petitions 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**”).

6. On April 12, 2021, the Court entered the *Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral on a Limited Basis, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Granting Related Relief* (the “**DIP Order**”) [Dkt. No. 240].

B. The Caliber Secured Claim

7. Pursuant to its various contracts and agreements with Nine Point and TUSA, Caliber (a) constructed and maintained pipelines specifically for Nine Point and its wells and drilling plan and (b) provided ongoing materials and services through those pipelines for use in the drilling and operating of the oil and gas wells on the Dedicated Properties.

8. To secure payment for labor, material, and services provided under the Caliber contracts, North Dakota law provides Caliber statutory well and pipeline construction liens (the

“**Statutory Well Liens**”) that extend to certain of NPE’s leasehold interests. *See* N.D. Cent. Code Ann. § 35-24 *et seq.* Among other things, the statute provides that:

Any person who shall, under contract with the owner of any leasehold for oil or gas purposes or any pipeline, perform any labor or furnish any material or services used or employed, or furnished to be used or employed in the drilling or operating of any oil or gas well upon such leasehold, in the construction of any pipeline, or in the constructing, putting together, or repairing of any material so used or employed, or furnished to be used or employed, is entitled to a lien under this chapter . . . for the amount due that person for the performance of such labor or the furnishing of such material or services

N.D. Cent. Code Ann. § 35-24-02.

9. The Statutory Well Liens secure approximately \$7 million for unpaid prepetition services rendered under certain of Caliber’s contracts. The Statutory Well Liens also secure approximately \$150 million owing under that certain Revenue Commitment Agreement by and among Caliber and TUSA, dated September 12, 2013 (the “**Revenue Commitment Agreement**”) – an agreement that was designed to compensate Caliber for its substantial upfront and ongoing costs of construction and maintenance of the gathering system that services Nine Point’s wells.

10. In accordance with the North Dakota well and pipeline construction statute, Caliber’s Statutory Well Liens arose on the dates of first labor, materials, and service at each of Nine Point’s leaseholds. In that regard, the labor, materials, and services Caliber has provided to Nine Point date back at least as far as 2013, long prior to the Debtors’ entry into their prepetition secured credit agreement (the “**Prepetition Credit Agreement**”) and related credit documents on June 7, 2019, and the grant of liens to the Prepetition Secured Parties in connection therewith. The Caliber entities perfected their Statutory Well Liens by the filing of statements (the “**Lien Statements**”) with the offices of the recorder of McKenzie and Williams Counties, North Dakota within six months of the date of last service.

11. Upon receipt of copies of the recorded Lien Statements, Caliber will file notices of lien on the bankruptcy docket (the “**Notices of Lien**”).

12. On May 27, 2021, Caliber timely filed a proof of claim (the “**Caliber POC**”) asserting secured claims under North Dakota law in excess of \$157 million, comprising claims of not less than (i) \$157,215,240.86 by Caliber North Dakota, (ii) \$477,055.88 by Caliber Measurement, and (iii) \$83,396.14 by Caliber Fresh Water (collectively, the “**Caliber Secured Claim**”).

13. On June 1, 2021, Caliber filed a Complaint for Declaratory Judgment [Adv. Pro. Dkt. 382] seeking declaratory judgment to establish the existence, validity, and priority of certain statutory liens held by Caliber (the “**Caliber Complaint**”). As set forth more fully in the Caliber Complaint, Caliber’s Statutory Well Liens take priority over any liens granted in connection with the Prepetition Credit Agreements. In addition, because Caliber’s Statutory Well Liens are Permitted Encumbrances and Permitted Liens under the Prepetition Credit Agreement (as set forth more fully in Caliber’s complaint), they take priority over any liens granted in connection with the DIP.

14. On June 1, 2021, the Debtors filed the proposed order approving the Sale Motion [Dkt. No. 385] (the “**Proposed Order**”).

OBJECTION

15. The Debtors’ Proposed Order calls for the sale of the Assets free and clear of Caliber’s senior liens. Proposed Order ¶ HH. But rather than provide Caliber with any actual form of adequate protection, the Proposed Order simply states that holders of interests or claims “are adequately protected by having their Interests or Claims, if any...attach to the net cash proceeds of the Sale.” Proposed Order ¶ II. The statement, which is contained in what the Debtors have

proposed as the Court's findings of fact, is nonsensical on its face. In a credit bid, there *are* no cash proceeds. The Debtors have effectively abdicated their statutory obligation to provide adequate protection to Caliber or any other party.

16. Section 363(f) of the Bankruptcy Code permits a debtor to sell an asset free and clear of a creditor's interest if, among other things, such interest is "in bona fide dispute." 11 U.S.C. § 363(f)(4). This power is subject to a crucial caveat, however: any entity that has an interest in the property is entitled to adequate protection. *See* 11 U.S.C. § 363(e). As the legislative history quoted above makes clear, the most typical form of adequate protection is the attachment of the creditor's lien to the proceeds of the sale. *See* H.R. Rep. No. 95-595 (1978); *see also In re Old Cold, LLC*, 976 F.3d 107, 118 (1st Cir. 2020) ("The Bankruptcy Code itself plainly protects a security interest even when the assets to which the interests attach are sold in a section 363(f) sale, 11 U.S.C. § 363(e), which often means that those security 'interests attach to the proceeds of the sale.'"); *In re American Home Mort. Holdings*, 402 B.R. 87, 102 (Bankr. D. Del. 2009) (finding that a free and clear sale under § 363(f) triggered creditor's rights to adequate protection under § 363(e) in the form of sale proceeds).

17. In the case of a credit bid, the absence of cash proceeds requires a different form of protection. Most frequently, adequate protection requires the payment of senior indebtedness in full. *See e.g. Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1265 (7th Cir. 1986) ("The foreclosing lender is allowed to credit bid because if the lender is the highest bidder and is required to bid with cash, the lender would pay itself with the same cash it bid. A junior lienor, however, must bid in cash.") (internal citation omitted); *In re Daufuskie Island Props., LLC*, 441 B.R. 60, 64 (Bankr. D.S.C. 2010) ("In purchasing property by credit bid under § 363(k), the credit bidding creditor must pay the mortgages and liens (if any) which have priority senior to its mortgage.")

(citing *In re Simpson Creek Development, Inc.*, Case No. 90–03836–WTB, slip op. at pages 17 and 24 (Bankr. D.S.C. 11/27/1991) (“In applying the Section 363(k) offset bid provision to the trustee's sale, a junior lienholder can offset bid its lien claim against the purchase price of the property only after all senior lien indebtedness on the particular property has been satisfied.”)); *Bank of Am. v. Hoy*, No. 6:10-CV-1029, 2010 WL 5463103, at *2 (M.D. Fla. Dec. 29, 2010) (granting creditor’s request to credit bid provided that it agreed to pay off senior debt in full); *see also 3 Collier on Bankruptcy P 363.09* (16th 2021) (“If the creditor has a junior lien, the creditor will be required to pay off or otherwise settle with the senior lienors in the sale.”).

18. The Debtors may contend that their intention to dispute Caliber’s claim renders such protection unnecessary, but there is no support for this position. Caliber has filed a proof of its secured claim, and that proof of claim – together with the underlying Lien Statements – is prima facie evidence of the validity of Caliber’s senior security interests. *See* 11 U.S.C. § 502(a) (“A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest....objects.”); BANKR. R. 3001(d) (“If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected”); BANKR. R. 3001(f) (“A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim”). This showing is sufficient to meet any initial burden of proof that Caliber may have under the Bankruptcy Code. *See generally* 11 U.S.C. § 363(p)(2); *see also, e.g., In re Heritage Highgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012) (“The initial burden should be on the party challenging a secured claim's value, because 11 U.S.C. § 502(a) and Bankruptcy Rule 3001(f) grant prima facie effect to the validity and amount of a properly filed claim”) (internal citation omitted); *In re Grant Broad. of Philadelphia, Inc.*, 71 B.R. 376, 385–86 (Bankr. E.D. Pa.), *aff’d*, 75 B.R. 819 (E.D. Pa. 1987).

19. Thus, while the existence of a dispute as to Caliber’s liens may permit the Debtors to sell their assets free and clear of those liens, it does not vitiate section 363(e)’s express requirement that Caliber be provided adequate protection. *Compare* 11 U.S.C. § 363(f)(4) (permitting sale free and clear where lien is subject to bona fide dispute) *with* 11 U.S.C. § 363(e) (requiring adequate protection “[n]otwithstanding any other provision of this section”). Under section 363(f)(4) no less than under any other prong of section 363(f), courts require adequate protection of any asserted senior lien, even if disputed. For example, this Court did so in *In re DVI, Inc.*, 306 B.R. 496, 503-04 (Bankr. D. Del. 2004) (Walrath, J.) (authorizing sale of asset under section 363(f)(4) free and clear of creditor’s interest, but requiring escrow of sale proceeds until creditor’s interest could be determined); *see also, e.g., In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 590-91 (Bankr. D. Ariz. 2009) (holding that adequate protection was required for an interest that was in “bona fide dispute,” and denying sale motion on grounds that such interest was not adequately protected).³

20. In the credit bid context, a nearly identical issue arose in *River Road Hotel Partners, LLC*, 2010 WL 6634603 (Bankr. N.D. Ill. Oct. 5, 2010). There, as here, statutory (mechanics) liens had been asserted against assets the debtors sought to sell, and there, as here, the amount and priority of those statutory liens was unresolved. The debtors sought to preclude their secured lenders from credit bidding on the assets on the grounds, among others, that the status of the mechanics’ liens was unresolved. But rather than preclude the credit bid, the court instead held that a condition on the lenders’ right to credit bid was warranted to protect the mechanics’ liens. This condition could require the “secured creditors to put cash in escrow, pay a portion of the bid

³ If the existence of an actual or potential dispute as to a secured creditor’s lien were enough to preclude adequate protection, then prepetition secured lenders, whose liens are almost always made expressly subject to challenge in a DIP order, would not be entitled to adequate protection.

in cash, or furnish a letter of credit when the amount and validity of an alleged senior lien is in dispute.” *River Rd. Hotel Partners*, 2010 WL 6634603, at *4-*5 (N.D. Ill 2011) (“In this instance, a [] condition on credit bidding appears to be warranted to ensure that all mechanics’ liens that are senior to the Lenders are protected.”).

21. In other cases where (as here) the priority of a credit bidder’s lien is in dispute, courts have found “cause” to limit or condition the credit bid under section 363(k). *See United States SEC v. Equitybuild, Inc.*, No. 18 CV 5587, 2019 U.S. Dist. LEXIS 74153, at *9 (N.D. Ill. May 2, 2019) (if a party establishes “a ‘bona fide dispute’ as to the validity of any lender’s debt and provides sufficient support for the bona fide nature of the dispute, then the lender seeking to submit a credit bid must post an irrevocable letter of credit . . . And because there may be disputes over the priority of various liens, the letter of credit must require payment of up to the amount of the credit bid should the court ultimately determine that the bidder’s lien is inferior to competing liens.”); *In re RML Dev., Inc.*, 528 B.R. 150 (Bankr. W.D. Tenn. 2014) (holding that, where creditor’s senior status was subject to a bona fide dispute, “cause” existed to limit that creditor’s right to credit bid the disputed portion of its claim, and require it to pay the disputed portion in cash to be held in escrow pending resolution of its claim); *In re Diebart Bancroft*, No. 92-3744, 1993 WL 21423, at *5 (E.D. La. Jan. 26, 1993)(affirming bankruptcy court order finding “cause” existed under § 363(k) to require lienholder to deposit cash in light of a lien priority dispute).

22. Consequently, any order approving the sale must include language protecting Caliber’s unadjudicated interests – for example, the funding of an escrow, the posting of a letter of credit, or the furnishing of other collateral or assurance of payment. If the Lenders do not provide such collateral, they may not be permitted to credit bid.

23. Finally, pursuant to certain of the Caliber contracts, the Debtors' granted and conveyed to Caliber certain real property interests that constitute dedications and covenants that run with the land and may not be divested by a sale of assets under § 363(f). Therefore, Caliber submits that any potential sale of the Debtors' assets should include language in the sale order that the purchaser expressly agrees to satisfy, and remain bound to, these dedications and covenants, and absent such express language and agreement, the sale should be denied.⁴

RESERVATION OF RIGHTS

24. Caliber reserves all rights to supplement this Objection and raise additional objections in connection with the Sale Motion as may be necessary.

CONCLUSION

WHEREFORE, for the foregoing reasons, Caliber requests that any order granting the Sale Motion provide that (i) the sale of the Debtors' assets cannot be sold "free and clear" of Caliber's Statutory Well Liens without paying them in full; (ii) to the extent there is any dispute regarding the amount and validity of Caliber's Statutory Well Liens, any purchaser must provide sufficient collateral or other assurance of payment to protect Caliber's Statutory Well Liens; and (iii) Caliber's dedications and covenants that run with the land cannot be divested by the sale.

⁴ Caliber acknowledges that the Court has previously rejected its contention that the Caliber contracts contain covenants that run with the land. However, on May 26, 2021, Caliber filed a *Motion to Certify as Final Or in the Alternative For Leave to Appeal The Order Granting Plaintiffs' First Motion for Partial Summary Judgment* [Adv. Pro. Dkt. No. 91]. Thus, Caliber reserves all rights with respect to this argument.

Dated: June 1, 2021
Wilmington, Delaware

/s/ Curtis S. Miller

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CERTIFICATE OF SERVICE

I, Nader A. Amer, hereby certify that I am not less than 18 years of age, and that on June 1, 2021 I caused the foregoing document to be served via CM/ECF notification on all parties requesting service pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure and Rule 2002-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware.

Date: June 1, 2021
Wilmington, Delaware

/s/ Nader A. Amer
Nader A. Amer (No. 6635)