IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FULCRUM BIOENERGY, INC., *et al.*	Case No. 24-12008 (TMH)
Debtors[1]	(Jointly Administered)
	Re: D.I. 456
	Hearing Date: April 14, 2025 at 10:00 a.m. (ET) **Obj. Deadline (as extended): April 3, 2025 at 4:00 p.m. (ET)**

OBJECTION TO CONFIRMATION
OF DEBTORS' AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION

Abeinsa Abener Teyma General Partnership ("AATGP") and its parent Abengoa S.A. ("Parent" and collectively with AATGP, "Abengoa" or the "Abengoa Entities"), by and through their undersigned counsel, hereby file this objection (this "Objection") to the confirmation of the *Amended Joint Plan of Liquidation* [D.I. 456-1] (as modified, amended, or supplemented from time to time, the "Plan").[2] In support of this Objection, the Abengoa Entities respectfully state as follows:

PRELIMINARY STATEMENT

1. AATGP was the prime contractor for the Debtors' most significant construction project—a first-of-a-kind plant intended to convert waste to syncrude and eventually jet fuel (the "Project")—and is one of the Debtors' largest creditors other than holders of funded debt. In pending prepetition litigation and arbitration proceedings, the Abengoa Entities and Fulcrum have

[1] The Debtors and Debtors in possession in these chapter 11 cases, along with each debtor's federal tax identification numbers are: Fulcrum BioEnergy, Inc. (3733); Fulcrum Sierra BioFuels, LLC (1833); Fulcrum Sierra Finance Company, LLC (4287); and Fulcrum Sierra Holdings, LLC (8498). The location of the Debtors' service address is: Fulcrum BioEnergy Inc., P.O. Box 220 Pleasanton, CA 94566. All Court filings can be accessed at: https://www.veritaglobal.net/Fulcrum.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

asserted claims against each other in excess of $100 million each. The Abengoa Entities object to the Plan, the Plan Supplement (including, without limitation, the Liquidation Trust Agreement), the Confirmation Order, or any filings, documents, or agreements relating to any of the foregoing (collectively, the "Plan Documents") on the following grounds.

2. ***First***, the Plan Documents improperly purport to extinguish creditors' recoupment and setoff rights, disregarding both the plain text of the Bankruptcy Code itself and established Third Circuit precedent. Because recoupment is, by definition, a defense, it is not a "claim" that can be discharged or "stripped off" in bankruptcy. As to setoff, the Third Circuit has long held that a creditor's rights are preserved post-confirmation if it expressly asserted its right in a timely filed proof of claim and objected to the plan to the extent the plan would extinguish such right. The Abengoa Entities have done both of those things. Furthermore, the Plan's failure to classify the Abengoa Entities' secured setoff claims should not prejudice the Abengoa Entities' rights to assert any applicable defense or claim, including but not limited to recoupment or setoff.[3]

3. ***Second***, nothing in the Plan Documents should provide for or be construed to limit the Abengoa Entities' ability to request that their Claims and the Debtors' Counterclaims be adjudicated in the pending ICC Arbitration or any other forum of competent jurisdiction. The Abengoa Entities expressly reserve their rights to seek such relief at a later date.

4. ***Third***, the Disputed Claims Reserve should appropriately reserve for an amount that reasonably approximates the distribution that would otherwise be made to the Abengoa Entities assuming such Claims were to be Allowed in the amount set forth on the Abengoa Entities' Proofs of Claim.

[3] To be clear, the Abengoa Entities are not asking the Court today to decide the degree and extent to which the Abengoa Entities have valid setoff, recoupment, or other defenses or any underlying issues in the parties' litigation. Rather, the Abengoa Entities seek to ensure that the rights to which they are entitled as a matter of law are not inappropriately eviscerated or curtailed by confirmation of the Plan.

5. ***Fourth***, the Abengoa Entities request, for the avoidance of doubt, clarification that because they abstained from voting on the Plan, they are not "Releasing Parties' or "Released Parties" under the Plan.

6. ***Fifth***, the Plan, as currently drafted, would automatically deem a Claim Disallowed if a party in interest objected to such claim based on timeliness, without providing the requisite notice and hearing, contrary to the requirements of the Bankruptcy Code, Bankruptcy Rules, and due process.

7. The Abengoa Entities have been engaged in discussions with the Debtors regarding proposed language for the Confirmation Order resolving the Abengoa Entities' informal objections since mid-March. To that end, the parties extended the Abengoa Entities' deadline to object to the Plan to April 3, 2025 at 4:00 p.m. (ET) as they continued negotiations.

BACKGROUND

A. The Abengoa Entities' Claims

8. AATGP and Parent are each creditors of Debtors Fulcrum Sierra BioFuels, LLC ("BioFuels") and Fulcrum Bioenergy, Inc. ("Bioenergy" and collectively with BioFuels, "Fulcrum"). The Abengoa Entities have been embroiled in litigation with Fulcrum since April 2020.

9. On October 18, 2017, the parties entered into (a) an Engineering, Procurement and Construction Contract (the "EPC Contract"), wherein AATGP was to serve as the prime contractor for the Project, and (b) a Project Equity Reimbursement Agreement (the "PERA" and together with the EPC Contract, the "Agreements"). The parties entered into several related agreements and supporting documents to facilitate construction of the Project.

10. The parties' dispute spans two state court actions brought by the Abengoa Entities against Fulcrum pending in Nevada's Second Judicial District (the "Washoe County Litigation")

and First Judicial District (the "Mechanics Lien Litigation"), as well as an arbitration brought in May 2020 by the Abengoa Entities against Fulcrum and administered by the International Chamber of Commerce, International Court of Arbitration (the "ICC Arbitration"). Both state court actions were stayed, prior to the Petition Date (as defined below), pending the outcome of the ICC Arbitration. The Abengoa Entities and Fulcrum assert claims against one another based on the same general set of facts, circumstances, and construction contracts. Each party's claims against the others exceed $100 million.

11. The Abengoa Entities' claims are secured (by mechanics liens and rights to setoff) and these claims each exceed $100 million. The claims were further secured by two mechanics' liens recorded in Storey County, Nevada, the site of the Fulcrum property.

12. The factual underpinnings that create Fulcrum's nine-figure liability to Abengoa are supported by the allegations contained in the Mechanics Lien Litigation Complaint, the Washoe County Litigation First Amended Verified Complaint, and the ICC Arbitration Amended Request for Arbitration (the "Arbitration Demand"). A brief, non-exhaustive summary of those claims follows:

a. Fulcrum repeatedly breached the EPC Contract and related construction contracts by failing to timely reimburse Abengoa for work performed, failing to timely approve change orders required by Fulcrum's ever expanding and shifting project demands that exceeded the construction contracts, and failing to pay those change orders once approved.

b. As early as May 2020, Abengoa identified "Fulcrum's Current Insolvent Position and Indebtedness to [Abengoa]."

i. One of the many reasons Fulcrum was able to delay its petition to September 2024, and default on tens of millions of dollars of obligations to creditors after incurring the Abengoa debt was its fraudulent draw against an irrevocable $18,200,000 Letter of Credit by Applicant Abengoa.

ii. Fulcrum's fraudulent draw on the $18,200,000 Letter of Credit remains an Abengoa claim in the pending ICC Arbitration.

c. Abengoa's 101-page Amended Arbitration Demand provides a more developed factual record supporting its claims against Fulcrum and evidence of the pre-petition debts Fulcrum owes it. By way of example only, Fulcrum's nine-figure prepetition debt owed to Abengoa is supported by the following:

i. Fulcrum's breach of the EPC Contract and related contracts. Fulcrum breached numerous provisions in the energy, procurement, and construction "EPC" contract and related contracts by, amongst other things:

(1) Failing to timely respond to change order requests and other Project documents that required Fulcrum's input;

(2) Failing to timely approve necessary or owner-directed change orders;

(3) Failing to cooperate with Abengoa in good faith during performance;

(4) Refusing to execute and/or pay for change orders for necessary or owner-directed changes;

(5) Failing to reimburse and/or make payments that were due and owing to Abengoa for work on, or materials purchased for, the Project;

(6) Failing to adequately administer or fund the Project;

(7) Wrongfully rejecting Project schedule updates and/or delays in reviewing Project schedule updates;

(8) Failing to create or maintain an appropriate Project schedule;

(9) Directing Abengoa's means and methods;

(10) Insisting on artificial and impossible contract schedule milestones;

(11) Wrongfully attempting to draw the Letter of Credit without a contractual justification and without providing the contractually required notice;

(12) Wrongfully and needlessly accelerating Abengoa's work on the Project without intending to pay for the increased costs of doing so;

(13) Providing Abengoa preliminary engineering materials for and technical descriptions of the Project which were inadequate;

(14) Hindering and delaying Abengoa's progress and work on the Project; and

(15) Wrongfully replacing Abengoa with a substitute and unlicensed contractor and purporting to terminate Abengoa for cause.[4]

ii. Fraudulent concealment. In breach of its duty to disclose, Fulcrum fraudulently concealed, among other things, that it:

(1) Intended to underfund the Project while simultaneously forcing Abengoa to continue work despite nonpayment;

(2) Intended to wrongfully draw on the Letter of Credit if Abengoa did not continue work on the Project despite nonpayment;

(3) Intentionally planned to breach the Nevada Prompt Payment Act by using the Agreements as a shield from paying for work performed on the Project and eliminating Abengoa's contractual right to stop work and demand payment from Fulcrum;

(4) Provided initial Project engineering and information, including P&ID's, technical specifications and cost estimates which were insufficient and inadequate; and

(5) Needed or intended to make substantial changes to Project design, procurement, and budgeting which would have substantial impacts on the Project cost and schedule.

iii. Alter ego. Bioenergy was the alter ego of BioFuels and is thus liable for BioFuels' obligations and liabilities. BioFuels was influenced and governed by Bioenergy. Further, there is a unity of interest and ownership such that BioFuels and Bioenergy are inseparable from each other. For example, at all relevant times, the directors and officers of BioFuels and Bioenergy were largely the same, if not identical. Thus, the same individuals purported to represent and act on behalf of both Bioenergy and BioFuels with respect to the Project. Under this ruse, the Fulcrum representatives, officers, and directors would later attempt to wrongfully qualify and limit their actions as having been on behalf of only one of the Fulcrum entities, to recast the authority under which they spoke, and claim they were never informed of payment requests under the PERA because they were communicating only on behalf of one Fulcrum entity. Adherence to the corporate and limited liability fiction of BioFuels and Bioenergy as separate entities would sanction

[4] Because Fulcrum's default termination was wrongful, the termination may be seen as one for convenience under the EPC.

the fraudulent actions and conspiratorial behavior explained herein and promote manifest injustice.

This is particularly true because Fulcrum induced Abengoa to enter into the PERA in reliance on Bioenergy's agreement that it, and not its subsidiary BioFuels, would be liable for damages Abengoa suffers under the EPC contract due to BioFuels' breach.

iv. Additional claims sounding in contract, equity, and tort are set forth in detail in the Amended Arbitration Demand.

d. Abengoa's Mechanics Lien Complaint. As part of its efforts to perfect the Mechanics Liens, Abengoa filed the Mechanics Lien Complaint against debtor BioFuels and asserted causes of action to foreclose on the two mechanic's liens previously recorded. That complaint was stayed by stipulation and Court order until the conclusion of the ICC Arbitration.

B. Fulcrum's Counterclaims Against the Abengoa Entities

13. Fulcrum, in turn, alleges that the Abengoa Entities lacked the resources and expertise to construct the Project, thereby breaching the EPC Contract and causing the Project to exceed budget. As of the date of Fulcrum's August 2, 2021 counterclaim in the ICC Arbitration (the "Counterclaim"), Fulcrum alleged that the Project cost Fulcrum $107.3 million more than the "Fixed Construction Price" set forth in the parties' various construction contracts. Fulcrum terminated Abengoa on April 23, 2021, hired a new general contractor to complete the Project, and incurred tens of millions of dollars in its failed attempt to complete the Project.

C. The Chapter 11 Cases, Asset Sales, and the Plan

14. On September 9, 2024 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue to manage their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

15. On September 19, 2024, the United States Trustee for Region 3 (the "U.S. Trustee") appointed the official committee of unsecured creditors (the "Committee"). *See* D.I. 74.

16. On September 11, 2024, the Debtors filed a motion to approve bidding procedures for the sale of substantially all of the Debtors' assets and scheduling an auction and sale hearing (the "Bidding Procedures Motion"). *See* D.I. 12.

17. On October 11, 2024, the Court entered an order approving the Bidding Procedures Motion (the "Bidding Procedures Order"). *See* D.I. 153.

18. On October 25, 2024, the Abengoa Entities filed their *Objection to Debtors' Motion to Sell Assets Free and Clear of Claims, Liens and Encumbrances* [D.I. 201] (the "Sale Objection") asserting that, among other things, the proposed APA sought to improperly strip the Abengoa Entities of their rights to assert recoupment, setoff, and other defenses. *See generally id.*

19. After extensive negotiations, the Abengoa Entities, the Debtors, and the proposed purchasers negotiated language to insert into the sale orders (together, the "Sale Orders") [D.I. 264 & 265] preserving the Abengoa Entities' rights to assert recoupment, setoff, and other defenses and clarifying that the Debtors' claims against the Abengoa Entities would remain property of the estates and not transferred to any purchaser. *See* D.I. 264 ¶ 48 & D.I. 265 ¶ 21.

20. On November 21, 2024, the Debtors filed a notice of hearing on a proposed credit bid sale for certain of Bioenergy's assets to PCL Administration LLC ("PCL" and such sale, the "PCL Sale") pursuant to the Bidding Procedures Order. *See* D.I. 260.

21. On November 20, 2024, the Abengoa Entities filed their *Supplemental Limited Objection to Debtors' Motion to Sell Assets Free and Clear of Liens, Claims, and Encumbrances* (the "Supplemental Sale Objection") [D.I. 277].

22. Following the filing of the Supplemental Sale Objection, the Debtors adjourned the hearing on the PCL Sale to January 17, 2025. *See* D.I. 367. Subsequently, the Debtors agreed to

include language in the order approving the PCL Sale (the "PCL Sale Order") [D.I. 394] preserving the Abengoa Entities' rights to assert recoupment, setoff, and other defenses and clarifying that the Debtors' claims against the Abengoa Entities would remain property of the estate and not sold to PCL.

23. On February 17, 2025, the Debtors filed a motion to approve their disclosure statement the "Disclosure Statement") [D.I. 455-1] and procedures for soliciting votes on the Plan (the "Solicitation Procedures Motion") [D.I. 415].

24. On March 7, 2025, the Court entered an order approving the Solicitation Procedures Motion (the "Solicitation Procedures Order") [D.I. 458]. The Solicitation Procedures Order, among other things, established March 31, 2025 at 4:00 p.m. (ET) as the deadline for parties to vote on the Plan and to file objections to the confirmation of the Plan. *See id.* ¶¶ 5, 10.

25. Pursuant to discussions with the Debtors, the Abengoa Entities agreed to abstain from voting their Ballots in order to avoid the need for the Debtors to object to the Abengoa Entities' filed Proofs of Claim prior to solicitation of votes on the Plan for the purpose of determining the amount of such claims for which the Abengoa Entities were entitled to vote.

26. On March 24, 2025, the Debtors filed the *Plan Supplement to Debtors' Amended Plan of Liquidation* [D.I. 487] (the "Plan Supplement"), which included the Liquidation Trust Agreement (the "LTA"). *See id.* at Ex. A.

OBJECTION

I. The Plan Documents Purport to Divest Creditors of Recoupment and Setoff Rights Improperly

27. The Plan Documents contain several objectionable provisions that purport to divest creditors of their setoff and recoupment rights, compelling the Abengoa Entities to object for the third time in these Chapter 11 Cases to ensure they retain all rights of setoff and recoupment that they may have under applicable law.

28. The Debtors' claims against the Abengoa Entities (including, without limitation, the Abengoa Claims and Counterclaims) are "Causes of Action" that are "Liquidation Trust Assets" to be transferred to the Liquidation Trust upon the Effective Date:

> "Causes of Action" means, without limitation, any and all actions, proceedings, agreements, causes of action, controversies, demands, rights, Liens, indemnities, guaranties, accounts, defenses, offsets, powers, privileges, licenses, liabilities, obligations, rights, suits, damages, judgments, Claims, any right of setoff, counterclaim, or recoupment, any claim for breach of contract or for breach of duties imposed by law or in equity, any claim or defense including fraud, and any demands whatsoever owned by the Debtors, whether known or unknown, reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, suspected or unsuspected, foreseen or unforeseen, disputed or undisputed, secured or unsecured, whether assertable directly, indirectly, derivatively or in any representative or other capacity, existing or hereafter arising, in contract or in tort, in law or in equity, or otherwise pursuant to any other theory of law, based in whole or in part upon any act, failure to act, error, omission, transaction, occurrence or other event arising or occurring prior to the Petition Date or during the course of the Chapter 11 Cases, including through the Effective Date.

Plan § 1.31; *see also* Plan § 1.99 (providing that certain Causes of Action will be Liquidation Trust Assets).[5]

29. The Plan and the LTA contain several provisions purporting to effect this transfer free and clear of all claims, liens, and encumbrances, which would include the Abengoa Entities' rights to assert setoff, recoupment, or other defenses. Such provisions include, without limitation, the following:

a. Section 6.3(c) – Liquidation Trust Assets.

> … Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date, the Debtors shall be deemed to have transferred all of the Liquidation Trust Assets held by the Debtors to the Liquidation Trust, and all Liquidation Trust Assets shall vest in the Liquidation Trust on the Effective Date, to be administered by the Liquidation Trustee, in accordance with this Plan and the Liquidation Trust Agreement, ***free and clear of all Liens, Claims, encumbrances and other Interests***.

[5] Although certain Causes of Action will not become Liquidation Trust Assets, none of those exceptions apply to the Debtors' Causes of Action against the Abengoa Entities.

Plan § 6.3(c) (emphasis added).

b. Section 6.12 – Preservation of Rights of Action

> …the Debtors reserve any and all Causes of Action, and on the Effective Date, such causes of Action shall vest in the Liquidation Trust, ***free and clear of all Claims, Liens, encumbrances and other interests***, and shall become Liquidation Trust Assets.

Plan § 6.12 (emphasis added).

c. Section 12.1 – Release of Liens.

> Except as otherwise provided in the Plan or in any contract, instrument, release, or other agreement or document created pursuant to the Plan, on the Effective Date, ***all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released, settled, and compromised and all property of the Estates shall revert to the Debtors and vest in the Liquidation Trust free and clear of any liens, security interests, or other interests***.

Plan § 12.1 (emphasis added).

d. LTA Article 1.5(a) – Transfer of Assets to Create Liquidation Trust.

> In accordance with Section 6.3 of the Plan, the Debtors and the Estates hereby irrevocably grant, release, assign, transfer, convey and deliver, for and on behalf of the Liquidation Trust Beneficiaries, to the Liquidation Trust all of their rights, title, and interests in and to all of the Liquidation Trust Assets, including, but not limited to, all of the remaining assets of the Debtors, ***including Causes of Action*** and all such assets held or controlled by third parties … In accordance with section 1141 of the Bankruptcy Code, except as otherwise provided herein or in the Plan, the Liquidation Trust Assets shall automatically vest in the Liquidation Trust ***free and clear of all claims, liens, interests and contractually imposed restrictions*** ….

LTA Art. 1.5(a) (emphasis added).

A. The Plan May Not and Cannot Be Permitted to Eliminate or Impinge on the Abengoa Entities' Recoupment Rights as a Matter of Law or Equity

30. It is beyond dispute that a creditor's right to recoupment is preserved in bankruptcy and cannot be discharged. *See Reiter v. Cooper*, 507 U.S. 258, 265 n.2 (1993) ("It is well settled, moreover, that a bankruptcy defendant can meet a plaintiff-debtor's claim with a counterclaim arising out of the same transaction, at least to the extent that the defendant merely seeks

recoupment."); *see also Folger Adam Security, Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 260 (3d Cir. 2000) (holding that a right of recoupment is a defense and not an interest in property and therefore is not extinguished by a section 363(f) sale); *Megafoods Stores v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031, 1037 (3d Cir. 1995) (concluding that confirmation of plan does not affect right of recoupment); *In re Ditech Holding Corp.*, 606 B.R. 544, 595–601 (Bankr. S.D.N.Y. 2019) (holding that recoupment rights cannot be extinguished in bankruptcy through either a plan or disclosure statement because they are neither "claims" nor "debts" nor "interests"). Bankruptcy courts must consult and apply state law in determining the validity of claims subject to recoupment. *Travelers Casualty & Surety Co. of Am. v. Pacific Gas and Elec. Co.*, 127 S. Ct. 1199, 1204–05 (2007) (referring to the "settled principle that [c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtors' obligation, subject to any qualifying or contrary provision of the Bankruptcy Code.").

31. The Plan Documents purport to strip the Abengoa Entities of their defenses, recoupment rights, and setoff rights against claims or counterclaims that the Debtors or the Liquidation Trust, as applicable, may elect to pursue against either or both of the Abengoa Entities (including those that have already been asserted by Fulcrum in prepetition litigation and the ICC Arbitration). Without the ability to assert recoupment, setoff, or *any* other defense that may be available under applicable law, the Abengoa Entities could be required unfairly to pay amounts for which they otherwise have complete (or even partial) defenses.

32. Accordingly, any provision of the Plan that purports to discharge, release, eliminate, restrict, or in any way impact adversely any claimant's rights to assert recoupment or another affirmative defense is improper and unenforceable as a matter of law. Rather, the Plan and any order confirming it should expressly *preserve* these rights to prevent any ambiguity.

B. The Abengoa Entities' Timely Assertion of Setoff Rights Pursuant to Section 553(a) Precludes Extinguishment of Such Setoff Rights

33. Additionally, section 553(a) of the Bankruptcy Code expressly preserves a creditor's setoff rights under non-bankruptcy law:[6]

> [T]his title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.

11 U.S.C. § 553(a).

34. The contracts giving rise to Fulcrum's and the Abengoa Entities' claims against each other are governed by Nevada state law. Nevada law recognizes the equitable right to setoff provided that each party has a valid and enforceable debt against the other party. *See, e.g.*, *Aviation Ventures, Inc. D/B/A Vision Air v. Joan Morris, Inc. D/B/A Las Vegas Tourist Bureau*, 121 Nev. 113, 120 (2005) (recognizing setoff rights under Nevada law). Here, the parties each believe they have a valid and enforceable debt against the other, though the validity and enforceability of such asserted debts has not yet been determined.

35. In order to preserve a right of setoff under section 553 of the Bankruptcy Code, a creditor must prove "1. A debt exists from the creditor to the debtor and that debt arose prior to the commencement of the bankruptcy case; 2. The creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case; [and] 3. The debt and the claim are mutual obligations." *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1035 (5th Cir. 1987) (quoting *In re Nickerson & Nickerson, Inc.*, 62 B.R. 83, 85 (Bankr. D. Neb. 1986)). "The debts and claims do not have to be of the same character before setoff may be applied." *In re Braniff Airways, Inc.*, 42 B.R. 443, 447 (Bankr. N.D. Tex. 1984). Not only are setoff rights

[6] Recoupment and setoff rights are governed by nonbankruptcy law, ordinarily state law. *See Travelers Casualty*, 127 S. Ct. at 1205.

preserved under section 553, but pursuant to section 506(a), "a setoff right gives rise to an allowed secured claim to the extent of the amount subject to setoff." 11 U.S.C. § 506(a).

36. As described above, the claims asserted by Fulcrum and the Abengoa Entities against each other[7] relate solely to prepetition events and are the subject of the prepetition litigation and arbitration described above. Therefore, the first two requirements for setoff under section 553 are satisfied here.

37. The mutuality requirement is also satisfied here. To establish mutuality, "each party must own his claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally." *Braniff*, 814 F.2d at 1036 (internal quotation marks and citations omitted). Both Abengoa Entities and both Fulcrum entities have asserted the same claims against both counterparty entities relating to the Project (and such claims of the Debtors' bankruptcy estates are Liquidating Trust Assets that will vest in the Liquidating Trust upon the Effective Date). Indeed, Fulcrum's own Counterclaim alleges:

> As previously discussed, it is the Respondents [*i.e.*, debtors BioFuels and Bioenergy] that were damaged and that are entitled to reimbursement of many millions of dollars as set forth in their Counterclaim below. To the extent the Tribunal determines that Claimants [*i.e.* AATGP and Parent] are entitled to any reimbursement for amounts claimed in various CVOs or otherwise, those amounts will be vastly eclipsed by the damages [AATGP and Parent] themselves caused. As such, any amounts due to the Claimants must be ***offset*** against amounts due from the Claimants to the Respondents, including liquidated damages and ***setoffs*** against funds already paid in excess of the earned Fixed Construction Price, and additional costs to complete the Project.

Counterclaim ¶ 242 (emphasis added).

38. As the Third Circuit has recognized, a creditor's right of setoff is preserved in bankruptcy under section 553 so long as it is exercised in a timely fashion and in accordance with other provisions of the Bankruptcy Code. *See In re Continental Airlines*, 134 F.3d 536, 541 (3d

[7] To be clear, each of AATGP and Parent hold claims subject to potential rights of setoff and recoupment against both BioFuels and Bioenergy. BioFuels and Bioenergy have each asserted counterclaims against each of AATGP and Parent.

Cir. 1998) (holding that where creditor asserted its setoff rights only after the plan was confirmed, creditor is precluded from exercising setoff right); *accord Carolco Televisions, Inc. v. Nat'l Broadcasting (In re De Laurentiis Ent. Group, Inc.)*, 963 F.2d 1269, 1276–77 (9th Cir. 1992) (holding that preservation of right of setoff under section 553 takes precedence over confirmation of plan under section 1141), *cert. denied*, 506 U.S. 918 (1992). *Continental Airlines* addressed preservation of setoff rights in the confirmation context and held that for setoff rights to survive confirmation, all a creditor must do is assert such right and object to the plan. *See Continental Airlines*, 134 F.3d at 541. That is precisely what has occurred here: the Abengoa Entities are timely asserting their setoff rights by objecting to the Plan. In fact, this is no less than the third time the Abengoa Entities have asserted their setoff rights, having already objected to the Debtors' proposed sale transactions twice on the basis that such transactions could not extinguish or curtail, among other things, the Abengoa Parties' setoff or recoupment rights. In addition, the Abengoa Entities expressly asserted setoff rights in their timely filed Proofs of Claim. *See* Proofs of Claim Nos. 111, 112, 117, 118, 126, 127, 131, & 133.[8]

39. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances." *Niagara Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.)*, 41 B.R. 941, 944 (N.D.N.Y. 1984); *see also N.J. Nat'l Bank v. Gutterman (In re Applied Logic Corp.)*, 576 F.2d 952 (2d Cir. 1978) ("The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust."). Compelling circumstances generally entail criminal conduct or

[8] There are only four unique claims (Parent against BioFuels, Parent against Fulcrum, AATGP against BioFuels, and AATGP against Fulcrum). However, after e-filing those four Proofs of Claim, the Abengoa Entities also submitted copies by overnight mail out of an abundance of caution, resulting in duplicate claims being listed on the claims register.

fraud by the creditor. *In re Whimsy, Inc.*, 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here.

40. Accordingly, the Plan should make it crystal clear that creditors' (and specifically the Abengoa Entities') setoff rights under applicable law are preserved and may be asserted *defensively* where such rights have been asserted prior to the confirmation of the Plan, as many courts have permitted creditors to do. *See, e.g.*, *Bernstein v. IDT Corp.*, 76 B.R. 275, 281 (S.D.N.Y. 1987) ("Counterclaims and set-offs may be asserted in a plenary suit notwithstanding the fact that no proof of claim had been filed in Bankruptcy Court. A creditor may be content not to file such a claim so long as no affirmative relief is sought from it by the bankrupt, but once the Trustee asserts a claim against the creditor, equity requires that the creditor be permitted to assert authorized counterclaims.").

41. Unless and until these very serious defects are fixed, the Plan, as currently drafted, should not be approved. The Plan is simply and flatly incompatible with applicable law, which clearly provides that defenses, including setoff (where such right is being timely asserted and preserved as it is here) and recoupment, cannot be discharged or stripped off through the bankruptcy process.

C. The Abengoa Entities' Defenses Must Be Preserved Notwithstanding the Plan's Failure to Classify and Treat the Abengoa Entities' Secured Claims as Required by Section 1123(a) of the Bankruptcy Code

42. The Plan does not classify or treat any claims asserting a right of setoff (including the Abengoa Entities' Claims) as secured claims under the Bankruptcy Code, and therefore the Plan also fails to specify whether such claims are impaired or unimpaired.

43. The Plan defines "Secured Claim" as "a Claim to the extent, under applicable nonbankruptcy law, that it is … (ii) ***secured by the amount of any rights of setoff of the holder***

thereof under section 553 of the Bankruptcy Code." Plan § 11.131 (emphasis added). Pursuant to this definition, the Abengoa Entities' setoff rights are "Secured Claims" under the Plan.

44. However, the Plan defines "Secured Creditor" as "(i) the Prepetition Loan Secured Parties, (ii) the Prepetition Holdings Bonds Secured Parties, and (iii) the Prepetition BioFuels Bonds Secured Parties." Plan § 1.132. This definition improperly excludes the Abengoa Entities, which hold Secured Claims to the extent the Abengoa Entities hold valid setoff rights.

45. The only Classes of Secured Claims in the Plan are Class 2A – Fulcrum Prepetition Loan Secured Claims, Class 2B – Holdings Prepetition Bond Secured Claims, and Class 2C – BioFuels Prepetition Bond Secured Claims. Again, the Plan fails to provide for claims secured by rights of setoff, such as those held by the Abengoa Entities.

46. These Plan provisions, by their omissions, run afoul of the Bankruptcy Code's requirements. "Section 1129(a)(1) provides that a plan must comply with the applicable provisions of 'this title.' Thus, it incorporates the requirements of 11 U.S.C. § 1123(a) which sets forth the mandatory requirements of a plan of reorganization." *In re Haardt*, 65 B.R. 697, 700 (Bankr. E.D. Penn. 1986) (citing 11 U.S.C. § 1129(a)(1); *In re AOV Indus.*, 792 F.2d 1140, 1150 (D.C.Cir.1986)). One of those requirements is that a plan must "designate … classes of claims […and classes of interests]." *See Haardt*, 65 B.R. at 700 (citing 11 U.S.C. § 1123(a)(1)). "Debtor's plan completely ignores the classification requirement of § 1123(a)(1). In light of the binding effect confirmation would have on the creditors, this Court is not prepared to confirm a plan which fails to classify claims. The lack of classification also hinders the Court's analysis of the plan's confirmability under 11 U.S.C. § 1129(a)(8). For these reasons alone, the Court would deny confirmation." *Id.* (citing *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 954 n.5 (Bankr. D. Utah 1981) ("Failure to specify the class to which these interests belong and whether it is

impaired or unimpaired runs afoul of 11 U.S.C. § 1123(a)(2) and section 1123(a)(3) and constitutes a basis for denying confirmation under 11 U.S.C. § 1129(a)(1).").

47. Accordingly, either the Plan must be amended to include a separate class for secured setoff claims, including those of the Abengoa Entities, or necessary and sufficient language must be inserted into the Confirmation Order preserving the Abengoa Entities' setoff rights notwithstanding the Plan's failure to classify such Secured Claims.

II. The Plan May Not Limit the Abengoa Entities' Rights to Demand, Request, or Assert That Their Claims and the Debtors' Counterclaims Be Adjudicated in the Pending ICC Arbitration

48. The Confirmation Order should clarify that nothing in the Plan limits in any way the Abengoa Entities' rights to request that their Claims and/or the Debtors' Abengoa Claims be adjudicated in any forum of competent jurisdiction, including, without limitation, in the ICC Arbitration that has been pending for nearly five years. Specifically, Plan Sections *12.7 – Injunction*, *8 – Procedures for Disputed Claims*, and *13 – Retention of Jurisdiction* could be interpreted to require that such Claims and Counterclaims be adjudicated solely in the Bankruptcy Court and not in any other appropriate forum, such as the pending ICC Arbitration.

49. While the Abengoa Entities assert that their Claims and the Debtors' Abengoa Claims should be adjudicated in the pending ICC Arbitration (which commenced in 2021 and was well advanced prior to being stayed) consistent with applicable law,[9] the Abengoa Entities are not

[9] There is a "liberal federal policy favoring arbitration agreements." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). "[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Techs., Inc. v. Commc'ns Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf*, 363 U.S. 574, 582-83 (1960). Moreover, filing a proof of claim is not a waiver of a claimant's contractual right to arbitration. *See, e.g.*, *In re The Consolidated FGH Liquidating Trust*, 419 B.R. 636, 644–46 (Bankr. S.D. Miss. 2009).

Where the parties have agreed to arbitrate a dispute, the "burden is on the party opposing arbitration … to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987). "The key question, therefore, is

seeking a determination at this stage of the Debtors' bankruptcy cases whether such claims and counterclaims should be adjudicated in the ICC Arbitration. Rather, the Abengoa Entities simply wish to expressly preserve their rights to do so following confirmation of the Plan notwithstanding anything in the Plan Documents that may be construed to limit in any way the Abengoa Entities themselves from doing so or their rights generally.

III. The Disputed Claims Reserve Must Adequately Reserve for the Abengoa Entities' Claims

50. The LTA defines "Disputed Claims Reserves" as follows:

> Disputed Claims Reserve. In determining the amount of distributions to be made under the Plan to holders of Allowed Claims, the appropriate distribution required by the Plan shall be made according to estimates and subject to the provisions of the Plan. The Liquidation Trust may, in its sole discretion, establish a reserve ("Disputed Claim Reserve") for each Disputed Claim ***in an amount that reasonably approximates the distribution that would otherwise be made to such holder of a Claim assuming such Claim were to be Allowed in the amount set forth on the holder of a Claim's proof of Claim*** or as estimated pursuant to agreement with the holder of a Claim or order of the Bankruptcy Court. The Liquidation Trust shall fund the Disputed Claim Reserve from the Liquidation Trust Assets.

LTA Art. 7.3 (emphasis added).

51. Pursuant to Article 7.3 of the LTA, the Disputed Claim Reserve should reserve the Abengoa Entities' pro rata share in the face amount of the claims asserted by the Abengoa Entities in their timely filed Proofs of Claim, *i.e.,* $106,332,179.00 against each Fulcrum entity.[10] This

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whether there is an inherent conflict between arbitration and the underlying purposes of the [Bankruptcy] Code in relation to the particular dispute for which a party seeks to enforce an arbitration clause." *In re Johnson*, 649 B.R. 735, 747 (Bankr. N.D. Ill. 2023) (citing *McMahon*).

The Abengoa Entities believe there is no inherent conflict between adjudication of the parties' claims and counterclaims in the ICC Arbitration and the purposes of the Bankruptcy Code.

[10] The Abengoa Entities filed the following four claims: (a) AATGP's Class 4A Claim against Bioenergy in the amount of $106,332,179.00; (b) Parent's Class 4A Claim against Bioenergy in the amount of $106,332,179.00; (c) AATGP's Class 4C Claim against BioFuels in the amount of $106,332,179.00; and (d) Parent's Class 4C Claim against BioFuels in the amount of $106,332,179.00. The Abengoa Entities both filed claims against each of the Fulcrum entities, in the same amount and based on the same underlying acts giving rise to the liability, but the cap on each of the Fulcrum entities' liability, is the face amount of $106,332,179.00. The Disputed Claim Reserve should therefore only reserve for the face amount once with respect to each Fulcrum entity.

reserve is appropriate because the Plan does not provide for substantive consolidation of the Estates; therefore, the Disputed Claims Reserve must reserve for claims on an entity-by-entity basis.

52. The Plan's failure to reserve such amounts would run afoul of section 1123(a)(4) of the Bankruptcy Code, which provides that a plan must provide the same treatment for each claim or interest within a particular class unless a holder agrees to less favorable treatment. *See* 11 U.S.C. § 1123(a)(4). The Abengoa Entities have not agreed to less favorable treatment.

53. Moreover, if distributions were made to Holders of Allowed Claims in Classes 4A and 4C without establishing a reserve for the Abengoa Entities' Disputed Claims, then there may be insufficient funds to satisfy such Claims to the extent they become Allowed after other creditors in the applicable Classes have already received a Distribution. Failure to establish appropriate reserves also violates the requirement to provide adequate means for implementation of a plan pursuant to section 1123(a)(5). *See In re FB Liquidating Estate*, No. 09-11525 (MFW), 2010 WL 6787729, at *3 (Bankr. D. Del. Jan. 26, 2010) (in determining whether debtor's plan provided for adequate means for implementation, court found that plan established appropriate reserves for disputed claims); *see also In re Abeinsa Holding, Inc.*, 526 B.R. 265, 276 (Bankr. D. Del. 2016) (plan was feasible where disputed claim reserve retained the amount estimated as necessary to fund pro rata distributions to holders of disputed claims, if such claims were allowed).

54. Accordingly, to satisfy applicable confirmation standards, an appropriate reserve must be established to ensure that the Abengoa Entities' Claims, if ultimately Allowed in their full face amount, are not treated worse than other claims in the Class to which the Abengoa Entities' Claims would reside.

IV. Miscellaneous Objections and Requests for Clarification

A. The Abengoa Entities Are Not "Releasing Parties" Under the Plan

55. The Plan defines "Releasing Parties" as "collectively, and in each case, solely in their respective capacities as such: (i) the Released Parties and (ii) all holders of Secured Claims in Classes 2A–2C, Deficiency Claims in Classes 3A–3C, and Undersecured and General Unsecured Claims in Classes 4A–4C, who vote to accept the Plan and do not opt out of the voluntary release contained in Section 12.5 of the Plan by checking the 'opt out' box on the ballot and returning it in accordance with the instructions set forth thereon." Plan § 1.126.

56. As noted above, none of the Abengoa Entities voted on the Plan and, therefore, for the avoidance of doubt, the Abengoa Entities are neither Releasing Parties nor Released Parties under the Plan.

B. The Abengoa Entities' Claims Shall Not Automatically Be Deemed Disallowed if the Debtors (or Any Other Party with Standing) Object to Timeliness of the Abengoa Entities' Proofs of Claim

57. The Plan defines "Disallowed" as follows:

> "Disallowed" means a Claim against a Debtor, or any portion thereof, (i) that has been disallowed by a Final Order of the Bankruptcy Court, a settlement, or the Plan, (ii) that is listed in the Schedules at zero or as contingent, disputed, or unliquidated and as to which a Bar Date has been established but no Proof of Claim has been timely filed ***or if filed (a) has been objected to on the basis of timeliness*** or (b) has not been deemed timely filed with the Bankruptcy Court pursuant to either the Bankruptcy Code or any Final Order of the Bankruptcy Court or applicable law, or (iii) that is not listed in the Debtors' Schedules and as to which a Bar Date has been established but no Proof of Claim has been timely filed ***or if filed (a) has been objected to on the basis of timeliness*** or (b) has not been deemed timely filed with the Bankruptcy Court pursuant to either the Bankruptcy Code or any Final Order of the Bankruptcy Court or under applicable law.

Plan § 1.48 (emphasis added).

58. It is inappropriate for a Claim to be automatically Disallowed solely because the Debtors (or any other party in interest with standing) have lodged an objection to such Claim, on the basis of timeliness or otherwise. The Bankruptcy Code, the Bankruptcy Rules, and due process

require that a claimant be afforded the opportunity to object to the disallowance of such Claim. If an objection to a claim is filed, "the court, ***after notice and a hearing***, shall determine the amount of such claim …." 11 U.S.C. § 502(b) (emphasis added); *see also In re Argiannis*, 156 B.R. 683, 687 (M.D. Fla. 1993) ("Upon objection, § 502 provides that the Court determine the extent of a claim's validity."). Bankruptcy Rule 3007 likewise requires that "[a]n objection to a claim and a notice of the objection must be filed and served at least 30 days before a scheduled hearing on the objection or any deadline for the claim holder to requires a hearing." Fed. R. Bankr. P. 3007(a). Additionally, a claimant is deprived of its due process rights where such claimant is not given an opportunity to object through proper notice. *In re La Rouche Indus., Inc.*, 307 B.R. 774, 781 (D. Del. 2004).

59. As the Plan is currently drafted, the Abengoa Entities' Claims could be deemed to be automatically Disallowed without proper notice and an opportunity for the Abengoa Entities to challenge such objection, in violation of the Bankruptcy Code, Bankruptcy Rules, and due process.

60. Notwithstanding the above deficiency, there can be no question that the Abengoa Entities' Proofs of Claim were timely filed prior to the January 23, 2025 General Bar Date.

PROPOSED LANGUAGE RESOLVING THIS OBJECTION

61. Although the Abengoa Entities have numerous objections to the Plan, the Abengoa Entities would be amenable to resolving these objections by inserting the following language (precisely and in its entirety) into the Confirmation Order (the "Proposed Insert").[11]

> Notwithstanding anything in the Plan, the Plan Supplement (including, without limitation, the Liquidation Trust Agreement), this Confirmation Order, or any filings, documents, or agreements relating to any of the foregoing (collectively, the "Plan Documents") to the contrary:

[11] The Abengoa Entities reserve the right to argue any or all of their Plan objections in the event any language in the Proposed Insert (which has been shared with counsel for the Debtors and other parties-in-interest) is deleted or modified in any way without the consent of the Abengoa Entities.

(i) all claims, rights, actions, or causes of action of any of the Debtors (including, without limitation, the Abengoa Claims and any other claim, right, action, or cause of action that will vest in the Liquidation Trust upon the Effective Date) that they, any of them, or any of their successors and assigns (including, without limitation, the Liquidation Trust) may assert against either (or both) of Abeinsa Abener Teyma General Partnership ("AATGP") or Abengoa, S.A. ("Abengoa" and collectively with AATGP, the "Abengoa Entities") shall be subject to and without prejudice to all rights, remedies, and defenses that may be asserted by the Abengoa Entities (or either of them), including, without limitation, any setoff or recoupment defenses (collectively, the "Abengoa Defenses"). Any transfer or vesting of any such claims, rights, actions, or causes of action held by any of the Debtors against any of the Abengoa Entities to any person or entity (including to or with the Liquidation Trust) pursuant to the Plan Documents or otherwise, shall be subject to, and shall not be free and clear of, the Abengoa Defenses (including any right of setoff or recoupment). The Abengoa Entities shall retain and be able to assert the Abengoa Defenses, including any right of setoff or recoupment, notwithstanding the failure of the Plan to classify or treat any such claims subject to an asserted right of setoff as secured claims under the Bankruptcy Code;

(ii) nothing in the Plan Documents shall release, waive, discharge, or in any way adversely affect any claims of either of the Abengoa Entities against any of the Debtors or the Liquidation Trust including, without limitation, any claims that may be subject to a right of setoff or recoupment;

(iii) nothing in the Plan Documents (including, without limitation, any injunction provision or any provision addressing claim disputes and/or claim allowance procedures), shall in any way limit the rights of the Abengoa Entities' to demand, request, or assert (whether by objection, motion, request, adversary proceeding, or otherwise) that their claims against the Debtors (or any of them) and the counterclaims of the Debtors (or any of them) against the Abengoa Entities should be adjudicated in the pending arbitration before the International Court of Arbitration of the International Chamber of Commerce (the "ICC Arbitration") and not in another forum (including the Bankruptcy Court);

(iv) the Debtors, their bankruptcy estates, and all of their respective successors and assigns hereby agree and acknowledge that all proofs of claim filed by AATGP or Abengoa (specifically, Proofs of Claim Nos. 111, 112, 117, and 118 (collectively, the "Abengoa Proofs of Claim")) were timely filed prior to the applicable proof of claim bar date (the "Bar Date") and shall not be subject to any objection by the Debtors, the Liquidation Trust, or any other party-in-interest in the Debtors' bankruptcy cases, that the Abengoa Proofs of Claim were not timely filed by the Bar Date;

(v) neither of the Abengoa Entities has voted on the Plan and, therefore, the Abengoa Entities are neither Releasing Parties nor Released Parties under the Plan; and

(vi) solely for purposes of Article 7.3 of the Liquidation Trust Agreement regarding establishment of the Disputed Claim Reserve (and, for the avoidance of doubt, not for purposes of allowance of any claim asserted by either or both of the Abengoa Entities against the Debtors or the Liquidation Trust), the Disputed Claims Reserve shall reserve for the Abengoa Entities' pro rata share of any distributions utilizing the face amount of the Abengoa Entities' timely filed Proofs of Claim in (i) Class 4A against Fulcrum in the amount of $106,332,179.00 and (ii) Class 4C against BioFuels in the amount of $106,332,179.00.

RESERVATION OF RIGHTS

62. The Abengoa Entities expressly reserve all of their rights in all respects, including, without limitation, their rights to supplement this Objection, to object to any modified or alternative Plan Document proposed by the Debtors or any other party in these Chapter 11 Cases, and to move for additional and further relief.

[Remainder of page left blank intentionally]

CONCLUSION

For the foregoing reasons, the Abengoa Entities respectfully request that the Court enter an order (i) denying confirmation of the Plan or, in the alternative, modifying the Confirmation Order to cure the defects described herein; and (ii) granting such further and additional relief as the Court deems proper and just.

Dated: April 3, 2025
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Henry J. Jaffe, hereby certify that on this 3rd day of April 2025, the foregoing *OBJECTION TO CONFIRMATION OF DEBTORS' AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION* was served on all parties registered to receive CM/ECF notifications in this matter and upon the parties identified in the attached service list.

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