

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

In re:)	
)	Chapter 11
FULCRUM BIOENERGY, INC., <i>et al.</i> , ¹)	
)	Case No. 24-12008 (TMH)
)	
Debtors.)	(Jointly Administered)
)	Re: Docket Nos. 153, 157, and 175
)	

**JOHNSON MATTHEY DAVY TECHNOLOGIES LTD.'S (A) LIMITED OBJECTION
TO ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND (B) LIMITED
OBJECTION AND REQUEST FOR ADEQUATE PROTECTION
IN CONNECTION WITH ANY SALE OF THE DEBTORS' ASSETS**

Johnson Matthey Davy Technologies Ltd. ("Johnson Matthey") hereby (A) objects to the *Notice of (I) Possible Treatment of Contracts and Leases, (II) Fixing of Cure Amounts, and (III) Deadline to Object Thereto [D.I. 157]* and the *Revised Notice of (I) Possible Treatment of Contracts and Leases, (II) Fixing Cure Amounts, and (III) Deadline to Object Thereto [D.I. 175]* (collectively, the "Cure Notices") and (b) objects to, and requests adequate protection in connection with, any sale of Johnson Matthey's confidential and proprietary information, including that related to the Associated Equipment and Basic Engineering Package (both defined below), pursuant to the bidding procedures order [D.I. 153] (the "Limited Objection"). In support of this Limited Objection, Johnson Matthey states as follows:

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.



BACKGROUND

1. Johnson Matthey owns and licenses certain technology which debtor Fulcrum Sierra BioFuels LLC (“Fulcrum Sierra”) used in connection with the Debtors’ Nevada facility through several agreements, including (a) the *Project License Agreement*, dated July 19, 2018, (b) the *Project Engineering Agreement*, dated July 19, 2018, and (c) the *Project Engineering Agreement*, dated April 21, 2022. Through the foregoing agreements, Johnson Matthey licenses to Fulcrum Sierra a non-exclusive, non-transferrable right to certain intellectual property specified in the Johnson Matthey Agreements, and defined in the Johnson Matthey Agreements as the “JM Davy IP.” Additionally, Fulcrum Sierra and Johnson Matthey were parties to that certain *Master Catalyst Supply Agreement*, dated as of July 19, 2018, pursuant to which the Debtors purchased filled cannisters of catalysts (the “FT CANS”). These agreements (collectively, the “Johnson Matthey Agreements”) were listed in the Debtors’ Cure Notices.

2. The Johnson Matthey Agreements contain confidentiality provisions. For example, paragraph 7.1 of the Project License Agreement provides,

The receiving Party and its Permitted Recipients shall hold in confidence the Confidential Information of the disclosing Party provided directly or indirectly by the disclosing Party and/or its Permitted Representatives, and will not disclose it nor permit it to be disclosed to any other third party except as expressly permitted by this Article 7 and will not use it for any purpose other than for the detailed design of, procurement of equipment for, and the construction, commissioning, testing, operation and maintenance of, the Licensee’s Plant including the Licensed Facility for which such Confidential Information has been provided in accordance with this Agreement and the manufacture of the Product in accordance with this Agreement or to fulfil any other of its rights and obligations hereunder. . . .

3. Johnson Matthey believes that approximately 36,000 of the FT CANS sold to the Debtors are currently unused, and currently located at an offsite warehouse associated with the

facility. Johnson Matthey believes that some of the FT Cans were used when the site was operated, and are currently in the reactor at the facility.

4. Additionally, the facility contains equipment (the “Associated Equipment”) associated with Johnson Matthey’s licensed process. This equipment is based on Johnson Matthey’s designs (i.e., JM Davy IP that was licensed through the Johnson Matthey Agreements), but were not manufactured or sold to the Debtors by Johnson Matthey. As such, Johnson Matthey can make no representation or provide any guidance as to the equipment’s safe decommissioning. However, the Associated Equipment encompasses Johnson Matthey’s explicitly confidential licensed technology, and so their specifications cannot be made public or provided to third parties.

5. In connection with the Agreements, Johnson Matthey provided a design package for its licensed process, which included a comprehensive package of drawings, manuals, and other papers (the “Basic Engineering Package”), which are explicitly confidential under the Johnson Matthey Agreements. Johnson Matthey expects that this information (both in paper form and electronically) would be stored at the Debtors’ facility.

LIMITED OBJECTION

I. The Licenses of JM Davy IP Are Not Assignable Absent Johnson Matthey’s Consent.

6. A debtor in possession may not assume an executory contract over the nondebtor’s objection if applicable law would bar assignment to a hypothetical third party. See, e.g., 11 U.S.C. § 365(c) (“The trustee may not assume or assign any executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if . . . applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights or delegation

of duties; and such party does not consent to such assumption or assignment”); see also, e.g., In re West Electronics, Inc., 852 F.2d 79, 83 (3d Cir. 1988) (providing that section 365(c)(1) of the Bankruptcy Code’s limitation on assumption of contracts “is applicable to any contract subject to a legal prohibition against assignment”). In this regard, Johnson Matthey submits that the Johnson Matthey Agreements, which include a non-exclusive license of intellectual property, can be assumed and assigned only if Johnson Matthey consents to such a transaction. See, e.g., In re Trump Entertainment Resorts, Inc., 526 B.R. 116, 126 (Bankr. D. Del. 2015) (“Non-exclusive . . . copyright licenses create only personal and not property rights in the licensed intellectual property and so are not assignable”).

7. Subject to the foregoing objection, and reserving all rights, Johnson Matthey may be willing to consent to the assumption and assignment of the licenses to a buyer that wishes to operate the facility. Johnson Matthey has communicated this willingness to the Debtors, and stands willing to confer on such issues with any potential buyer.

II. Assuming that the Johnson Matthey Agreements May Be Assumed and Assigned, the Amount Necessary to Cure Defaults as of the Petition Date Is \$1,109,070.62.

8. Subject to and without waiver of the foregoing objection, Johnson Matthey also hereby objects to the cure amount asserted in the Cure Notices. The Debtors’ Cure Notices list the amount necessary to cure defaults under “Project Engineering Agreement for Basic Engineering and Engineering Services” as \$862,741.40. \$1,109,070.62 is owed by the Debtors under that agreement relating unpaid engineering services, plus interest that accrued prior to the petition date.

III. Johnson Matthey Objects and Requests Adequate Protection in Connection to Any Sale of Its Confidential and Proprietary Information.

9. The facility may be sold to a buyer that has no intention of operating it. In which case, the buyer may have no need for any of the intellectual property, the intellectual property

licenses, Johnson Matthey Agreements, the Basic Engineering Package, the Associated Equipment, the unused FT CANS, the equipment associated with Johnson Matthey's licensed product, and other proprietary information and property relating to Johnson Matthey.

10. However, to the extent that such property is to be sold, Johnson Matthey hereby objects to any such sale, and requests, pursuant to Section 363(e) of the Bankruptcy Code, for adequate protection of its proprietary interests. Section 363(e) prohibits the sale from proceeding as to Johnson Matthey's proprietary and protected rights unless those rights are adequately protected. See, e.g., 11 U.S.C. § 363(e) ("Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. . . ."); see also 11 U.S.C. § 107(b) ("On request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information . . .").

11. Johnson Matthey's Limited Objection should be sustained on this issue, and any sale of any property relating to Johnson Matthey's proprietary and confidential information, including the Associated Equipment and Basic Engineering Package, should be conditioned on granting adequate protection acceptable to Johnson Matthey protecting Johnson Matthey's proprietary and confidential information and interests relating thereto.

CONCLUSION

12. For the reasons stated above, Johnson Matthey requests that the Court sustain this Limited Objection, and condition approval of the assumption and assignment of any of the Johnson Matthey Agreements or the sale of Johnson Matthey's proprietary and confidential information

upon agreement with Johnson Matthey or other resolution of the issues raised in this Limited Objection.

Dated: November 7, 2024

SAUL EWING LLP

/s/ Lucian B. Murley

Lucian B. Murley (DE Bar No. 4892)

1201 N. Market Street, Suite 2300

P.O. Box 1266

Wilmington, DE 19899

Telephone: (302) 421-6898

luke.murley@saul.com

Attorneys for Johnson Matthey Davy Technologies Ltd.

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

In re:)	
)	Chapter 11
FULCRUM BIOENERGY, INC., <i>et al.</i> ,)	
)	Case No. 24-12008 (TMH)
Debtors.)	(Jointly Administered)
)	

CERTIFICATE OF SERVICE

I, Lucian Murley, Esquire, hereby certify that on November 7, 2024, a copy of the *Johnson Matthey Davy Technologies Ltd.'s (A) Limited Objection to Assumption and Assignment of Contracts and (B) Limited Objection and Request for Adequate Protection in Connection with Any Sale of the Debtors' Assets* was served through the Court's CM/ECF system upon all registered electronic filers appearing in this case and via Electronic Mail on the parties on the attached service list.

SAUL EWING LLP

By: /s/ Lucian Murley

Lucian Murley (DE Bar No. 4892)
1201 North Market Street, Suite 2300
P. O. Box 1266
Wilmington, DE 19899
(302) 421-6898

Dated: November 7, 2024

SERVICE LIST

Robert J. Dehney Sr., Esquire
Daniel B. Butz, Esquire
Clint M. Carlisle, Esquire
Avery Jue Meng, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899-1347
rdehney@morrisnichols.com
dbutz@morrisnichols.com
ccarlisle@morrisnichols.com
ameng@morrisnichols.com

Rosa Sierra-Fox, Esquire
Office of the United States Trustee
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
rosa.sierra-fox@usdoj.gov

Brian S. Rosen, Esquire
Adam Goldberg, Esquire
Latham & Watkins LLP
1271 Avenue of the Americas
New York, NY 10020
Brian.Rosen@lw.com
Adam.Goldberg@lw.com

Michael J. Merchant, Esquire
Richards Layton & Finger, P.A.
920 N. King Street
Wilmington, DE 19801
Merchant@RLF.com

Alexander Woolverton, Esquire
Douglas Buckley, Esquire
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10065,
awoolverton@kramerlevin.com
dbuckley@kramerlevin.com

Andrew Magaziner, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square, 1000 North King Street
Wilmington, DE 19801
amagaziner@ycst.com

Jeffrey R. Waxman, Esquire
Eric J. Monzo, Esquire
Christopher M. Donnelly, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801
jwaxman@morrisjames.com
emonzo@morrisjames.com
cdonnelly@morrisjames.com

Todd C. Meyers, Esquire
Eversheds Sutherland (US) LLP
999 Peachtree Street NW, Suite 2300
Atlanta, GA 30309
ToddMeyers@eversheds-sutherland.com

Todd C. Meyers, Esquire
Jennifer B. Kimble, Esquire
Sameer M. Alifarag, Esquire
Eversheds Sutherland (US) LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036
ToddMeyers@eversheds-sutherland.com
JenniferKimble@eversheds-sutherland.com
SameerAlifarag@eversheds-sutherland.com