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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: . Case No. 08-12606 (BLS)
. (Jointly Administered)
. Chapter 11
VERASUN ENERGY CORPORATION, .
et al., . Courtroom 1
. 824 Market Street
. Wilmington, DE 19801
. .
Debtors. . January 14, 2009
. . 11:00 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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25

1 WEDNESDAY, JANUARY 14, 2009, WILMINGTON, DE

2 THE COURT: Please be seated. Good morning.
3 Ready to proceed?

4 MR. NASH: Good morning, Your Honor. Pat Nash
5 from Skadden Arps on behalf of the debtors. Your Honor,
6 we're here on the debtors' emergency motion to obtain DIP
7 financing with respect to the US Bio Silo. In referring to
8 US Bio Silo, Your Honor, I'm not referring to the --

9 THE COURT: You brought your chart.

10 MR. NASH: Brought the chart today. The one
11 hearing where we may not need it. We're actually only
12 talking about one silo. But lawyer for Marion, Your Honor,
13 is continually frustrated with me because I do not remind
14 the court that when I talk about the US Bio Silo I'm not
15 talking about Marion.

16 THE COURT: Okay.

17 MR. NASH: Marion is its own silo. So we're
18 not --

19 THE COURT: That's what I recall.

20 MR. NASH: We're not dealing with Marion today.
21 Your Honor, we are here on very short notice. If there's
22 one good thing, Your Honor, that I can say about the notice
23 that we did provide is it -- the notice is consistent with
24 what I laid out for the court when I was before Your Honor
25 on Thursday. We received a financing proposal from AgStar

1 Thursday night. Mr. Botter will -- would agree that
2 immediately upon my receiving the proposal literally on my
3 Blackberry I forwarded it to Mr. Botter and some of his
4 colleagues at Akin Gump.

5 So the Committee has been involved every step of
6 the week as quickly as the debtors have been. And I think
7 before we get into the specifics, Your Honor, of this
8 financing and the adequacy of the notice and what really
9 will be before the court today, I think we think it makes
10 sense -- there are a couple of parties in the courtroom
11 today who would like to make a statement on the record
12 and/or would like to hear Mr. Athenas make a statement on
13 the record which would then resolve their issues so that
14 they can leave and then I'll be able to walk Your Honor
15 through what I think I would like to accomplish today.

16 THE COURT: Okay. Is that all right? Mr.
17 Botter, that works for you?

18 MR. BOTTER: Yes, Your Honor. That would.

19 THE COURT: Okay. Mr. Athenas, good morning.

20 MR. ATHENAS: Good morning, Your Honor. Joe
21 Athenas on behalf of AgStar. Specifically with respect with
22 recoupment rights, like setoff rights and security
23 interests, if they're valid, perfected and unavoidable and
24 superior in priority to AgStar's pre-petition liens, then
25 we're not priming and they're superior to AgStar's post-

1 petition liens.

2 THE COURT: Okay.

3 MR. ATHENAS: I think that should take care of
4 it.

5 THE COURT: Mr. Miller?

6 MR. MILLER: Good morning, Your Honor.

7 THE COURT: Morning.

8 MR. MILLER: For the record, Stephen Miller on
9 behalf of Provista Renewable Fuels Marketing, LLC, CHS,
10 Inc., and Northwest Rural Electric Cooperative.

11 Our concern was to make sure that no recoupment
12 rights were being affected by any order that was going to be
13 entered with respect to this financing and I appreciate the
14 comments of counsel for the lenders. I also appreciate
15 debtors' counsel and lenders' counsel letting us address
16 this with Your Honor first.

17 The one clarification I would like to make is
18 that recoupment rights are different than setoff rights as
19 Your Honor is well aware and I just want to make it clear
20 for the record that our understanding is that recoupment
21 rights are not being effected in any way. I don't think it
22 really goes to the issue of whether there was perfection or
23 other matters with respect to that. To the extent you have
24 recoupment rights, those rights are preserved and you have
25 those post-petition and I think that that that's the

1 clarification.

2 I think there is a distinction as I said between
3 setoff rights and that goes to the perfection of that issue
4 where you fall in the chain with respect to the debtors and
5 the lender. But with respect to recoupment rights, I don't
6 think that an order can affect those rights and I just want
7 to make it very clear that we're taking the position that
8 recoupment rights sail through the bankruptcy process and
9 they are whatever they are. If you have recoupment rights,
10 you have them. They're a defense and you have them.

11 THE COURT: Well, I think what I heard Mr.
12 Athenas say is that post form of order does not effect
13 either recoupment or setoff rights, and I think that that
14 should be sufficient. The philosophical principle whether
15 they sail through unaffected or anything I don't think I
16 need to get to today --

17 MR. MILLER: That --

18 THE COURT: -- because he's told you that this
19 order doesn't affect you.

20 MR. MILLER: And that's quite all right, Your
21 Honor.

22 THE COURT: That this is the advisory --

23 MR. MILLER: I just wanted to make the
24 statement --

25 THE COURT: -- opinion --

1 MR. MILLER: That's right.

2 THE COURT: -- section of the --

3 MR. MILLER: Exactly, Your Honor.

4 THE COURT: Section. Okay. No. I understand
5 your point and it certainly has been raised before, but I'm
6 satisfied with the representations and I assume that you are
7 as well. That this order --

8 MR. MILLER: I am also --

9 THE COURT: -- does not adversely or otherwise
10 affect setoff or recoupment rights.

11 MR. MILLER: That's --

12 THE COURT: Okay.

13 MR. MILLER: Thank you very much, Your Honor. I
14 appreciate it. With that, may I be excused?

15 THE COURT: You may.

16 MR. MILLER: Thank you, Your Honor.

17 THE COURT: Mr. Swett?

18 MR. SWETT: Good morning. Brian Swett on behalf
19 of UBS AG, Stamford Branch. Similarly, Your Honor, I just
20 wanted to make it clear for the record that our
21 understanding is that the AgStar financing to be provided
22 subject to the court's order in the US Bio Silo will not
23 impact any of the rights or defenses or claims of any of the
24 parties in the litigation initiated by AgStar with respect
25 to ethanol sold and transferred to the VeraSun Silo.

1 Thank you.

2 THE COURT: Mr. Athenas?

3 MR. ATHENAS: I guess we'll have to take out the
4 paragraph that says that we get a prior lead on all their
5 assets. Yes, Your Honor. That's correct.

6 THE COURT: Oh, that didn't show up on the
7 bylaws.

8 MR. ATHENAS: Thank you.

9 THE COURT: Okay. That's fine. I assume that
10 those representations are satisfactory.

11 MR. SWETT: Yes. Thank you, Your Honor.

12 THE COURT: Very good. Okay.

13 MR. NASH: So, Your Honor, in terms of the
14 process today and what I think will happen in court, first
15 we -- the Committee has of course objected as Your Honor is
16 aware and we've been dealing with the Committee. From Mr.
17 Botter and the debtors' perspective, we will not be having
18 an evidentiary hearing per say. We -- I will be walking the
19 court through the financing. Mr. Botter has a number of
20 points that he would like to raise with the court.

21 The debtors would then be proposing to proffer
22 the testimony of Mr. Parkhill from Rothchild that we do have
23 an evidentiary basis to support the entry of the orders, but
24 it is not Mr. Botter's intention to cross examine Mr.
25 Parkhill.

1 THE COURT: Mr. Botter, is that all right with
2 you?

3 MR. BOTTER: That's fine, Your Honor. I would
4 just the issues that we've identified in our objection.

5 THE COURT: Sure. And that's fine with me. I
6 often find in these cases that the evidentiary predicate is
7 not in dispute by either one of the objectors because
8 there's no -- generally no disagreement regarding the
9 sufficiency of marketing the need for the financing and its
10 unavailability and other terms. It's usually walking
11 through the form of the order and the different deal points
12 that we will consider and rule upon.

13 And then we have a threshold issue of sufficiency
14 of notice and the sufficient opportunity to deal with it.
15 So I think that's the final threshold.

16 MR. NASH: So, Your Honor, I'll move to the
17 financing. What we see -- as the court is well aware, the
18 existing financing that we have at the US Bio Silo matures
19 on January 15, which is tomorrow. At the US Bio Silo as
20 Your Honor knows, we have seven specific financings. They
21 are plant specific.

22 What we seek approval of here today, Your Honor,
23 is seven specific plant financings to refinance the existing
24 post-petition indebtedness, provide incremental liquidity to
25 the debtors and also, Your Honor, to roll up a portion of

1 the pre-petition indebtedness. Your Honor, it is -- nobody
2 disputes that the debtors need financing and the -- certain
3 things of -- aspects of the financing, Your Honor, that are
4 often in dispute are not in this case at this time.

5 For example, the adequate protection arrangement
6 remains unchanged. The nature of the 506(C) waivers remains
7 unchanged. The carve-out remains unchanged. The blood-
8 letting that went on over the form of the order a month ago,
9 Your Honor, was useful in that the form of the order that we
10 presented to the court and the orders that we have in court
11 today are not going to change.

12 What is in dispute from Mr. Botter's point of
13 view, Your Honor, is the fact that not only is this bridge
14 -- is this financing specifically tied to a sale. This is a
15 -- financing is a bridge to a sale. And the AgStar lenders
16 are predicating their willingness to loan money on our
17 pursuit of a sale process pursuant to a timeline, Your
18 Honor, that is admittedly a tight timeline.

19 So we've got bridge-to-sale financing, Your
20 Honor, and we also have a roll-up component and with -- so
21 before I get into the roll-up component, \$30.3 million of
22 incremental financing, Your Honor, is being provided. That
23 \$30.3 million is being provided as I articulated earlier to
24 allow the debtors to pursue a sale process.

25 The -- in addition to the \$30.3 million of

1 incremental financing, Your Honor, we've got financing to
2 refinance the \$25 million of existing post-petition
3 indebtedness. So that's \$55.3 million of financing. The
4 AgStar lenders absolutely, Your Honor, have predicated their
5 willingness to provide that \$55.3 million of financing on a
6 roll up of \$55.3 million of existing pre-petition
7 indebtedness.

8 The proffer that we will produce, Your Honor, or
9 introduce into the record will establish the need for the
10 roll up in the fact that from the debtors' perspective, we
11 would not have this financing absent the roll up. From the
12 debtors' perspective, Your Honor, we're rolling up \$55
13 million of \$464 million of pre-petition indebtedness.

14 I don't think anybody in this case seriously
15 contests whether or not when you're looking at \$464 million
16 of pre-petition indebtedness, you know, whether or not the
17 collateral value gets you through \$55 million. I think what
18 you'll hear from Mr. Botter is Mr. Botter objects to the
19 fact that AgStar has insisted that the roll up happen at the
20 interim stage. So the orders that Your Honor would be
21 entering today would effectuate the roll up.

22 Now the debtors were successful, Your Honor, in
23 having a mechanic in the order whereby if at the final
24 hearing, Your -- you know, due to an objection filed or a
25 record made Your Honor wishes to unwind the roll up or if

1 there's some basis upon which to unwind the roll up, there
2 is a mechanic for us to do that, Your Honor. We can deem
3 the roll up effectively to have not happened.

4 Now what that will have cost the estate is it
5 will have cost the estate the interest on the rolled-up
6 money for one month. So to the extent that between now and
7 the final hearing if the roll up is determined to not have
8 been appropriate, we can deem -- what is essentially being
9 deemed post-petition money or post-petition borrowings can
10 be deemed to have been pre-petition borrowings. And we've
11 been able to work that out with Mr. Athenas.

12 So from that perspective, the fact that Your
13 Honor would be authorizing the roll up today at interim is
14 not something that it would be impossible to unwind.

15 THE COURT: What is the -- as a general
16 proposition -- I understand that it was part of the
17 negotiation. But I'm sure you're aware that under our
18 practice and under our local rules, roll ups certainly on
19 the first day are not favored. I forget the language, but
20 it's basically that it requires an extraordinary showing to
21 get it on the first day, and this is effectively the first
22 day.

23 And what I've asked in other cases is what --
24 other than you need it and other than that the lender
25 insisted upon it, what circumstances are there in this case

1 that warrant it that wouldn't be pertinent to any other
2 case?

3 MR. NASH: The circumstances in this case that
4 convinced the debtors, Your Honor, to stand up and ask for
5 the roll up are the fact that Mr. Athenas convinced me and
6 Karl Marx convinced Rothchild that the roll up was necessary
7 in order to obtain the commitments for the post-petition
8 financing.

9 THE COURT: How is that different from they want
10 it?

11 MR. ATHENAS: Your Honor, perhaps I can give some
12 flavors to these bank group meetings.

13 THE COURT: Okay.

14 MR. ATHENAS: Your Honor, Joe Athenas on behalf
15 of AgStar. What the bank group did was -- we had a problem.
16 Early in the case as Your Honor knows, there's this
17 litigation regarding this sort of collateral going out the
18 door and we had a bank group that was angry. We have a bank
19 group that thought a sale process was going to happen right
20 away and months have passed and nothing's happened and it's
21 not for lack of effort by the debtors. It just takes time
22 for a sale process to come to fruition.

23 But we had a bank group that really didn't want
24 to lend any money beyond January 15 and what we had to do
25 was convince our group to come in when many of them were

1 unwilling to come in. And normally, you know, you don't
2 have quite as bad a situation with your bank group as we had
3 in this particular case.

4 We have -- there's only one lender in these post-
5 petition loans and that's AgStar. But AgStar participates
6 out these loans to a large group of lenders and then they
7 sub-participate these loans to even larger groups of
8 lenders. So we have our bank group meetings in ballrooms at
9 hotels and we did that on Thursday and Friday. It was a
10 two-day meeting to convince the banks that they need to stay
11 in and lend additional money to this debtor.

12 It was unlike any bank group meeting I've ever
13 attended before. There were a lot of very difficult
14 questions asked. There were (sic) a lot of fighting among
15 the various fights. Certain banks said they absolutely
16 would not participate under any circumstances. Other banks
17 said well, I'm not paying his share unless I'm getting
18 something for it.

19 And in order to get anyone to lend any money, we
20 were forced to say to what I'll call the good guys, the guys
21 who were willing to participate under some circumstances at
22 least we will give you a roll up. We will give you higher
23 interest. We will give you these things that put you in a
24 better position than the people who are unwilling to
25 participate because you're essentially funding their share

1 for them. And so as a benefit of that, you are going to
2 jump ahead of them in priority on some of your pre-petition
3 loans.

4 That was absolutely a basis for a large
5 proportion of our bank group being willing to participate
6 and without that proportion -- we ended up getting about 90
7 percent even with all these protections, not 100 percent.
8 And so the roll up is really meant to encourage people to
9 participate in a loan that many people were very willing to
10 participate in.

11 And normally I don't talk about the inter-
12 workings of the bank group, but here I think it's very
13 relevant. It is very unusual for a bank group to be that
14 contentious among itself and is very unusual for it to be
15 that large. And those are the kinds of things we're dealing
16 with in this case and I kept the debtors informed on the
17 play-by-play as we went through the meetings.

18 But, you know, there wasn't a single line item in
19 the budgets that wasn't debated. There wasn't a single
20 major term that wasn't debated. In fact where we started to
21 give an example was at first no one in the bank group, not a
22 single lender would lend any money unless the debtors had
23 already filed before today a sale motion.

24 And it took us a very long time and a lot of
25 negotiations to get to the point where the debtors told us a

1 reasonable sale schedule and we got the bank group to agree
2 to it. So this case is extraordinary in terms of the
3 underlying bank group dynamics which are highly unusual and
4 something certainly in the time I've practiced I've never
5 experienced before.

6 But I'm very pleased to say that, you know, we
7 were able to get there. The 90 percent that did participate
8 took on the other 10 percent's share and we're able to give
9 the debtor the money they need and that's where we currently
10 stand. But unfortunately, you know, it's got to be on these
11 terms or we don't have the money to lend.

12 THE COURT: Okay.

13 MR. ATHENAS: Thank you, Your Honor.

14 MR. NASH: Your Honor, another point that should
15 be made is given the silo's specific nature of the financing
16 and given the fact that we're dealing with one secured
17 lender group, it's hard for me -- part of what I was talking
18 with Mr. Athenas about over the weekend is it's hard for me
19 to see even how this really benefits the lenders. It's also
20 hard for me to see how it disadvantages the Committee in
21 that the unsecured creditors of each of these silos are
22 going to be behind the same amount of secured indebtedness
23 whether we're deeming, Your Honor, seven million of it at a
24 specific silo to be -- we're going to now deem that to be
25 post-petition indebtedness as opposed to pre-petition

1 indebtedness. And we are only deeming a very small
2 percentage of the pre-petition indebtedness to be post-
3 petition indebtedness.

4 So to be sure from the debtors' perspective, my
5 discussions with Mr. Athenas focused on why are you making
6 me do this. Why are you making me get up and ask for a roll
7 up on day one of the case? Now I am convinced, Your Honor,
8 that's nobody's ox is being gored in terms of this roll up.
9 We've got approximately 90 percent of the pre-petition
10 AgStar Group who is participating in the roll up.

11 So it is only as to a very small percentage of
12 the existing lenders who have made their own decision to not
13 participate in the financing and we're very well aware of
14 the nature of the financing and the effect of the roll up.
15 I don't -- the debtors, I'm very comfortable standing up
16 here and articulating to the court that I do not believe
17 that at the end of the day we are prejudicing the rights of
18 the unsecured creditors of each of the silos by effectuating
19 the roll up. This truly is, Your Honor, a timing issue, but
20 not an insignificant one.

21 From the debtors' perspective, I don't want to
22 see what the AgStar lenders do or don't do in the event that
23 Your Honor is unwilling to approve the roll up today.

24 THE COURT: Mr. Botter?

25 MR. BOTTER: Just a brief clarification on the

1 point that Mr. Nash just made which is -- and I think we've
2 had -- we've gone around a little bit in circles in our
3 discussions over the course of the past few days. He -- Mr.
4 Nash said that our ox would not be gored. If you roll a
5 portion of the pre-petition indebtedness and ultimately it
6 turns out the pre-petition liens were no good and we've not
7 obviously finished income review and analysis of that, to
8 the extent that it's been rolled into a post-petition lien
9 scenario, then we -- our ox will be gored --

10 THE COURT: Well, I --

11 MR. BOTTER: -- in this thing.

12 THE COURT: I've had -- I don't think I've had
13 this discussion in this case and I would want to go back and
14 look at it, but when I see roll ups either -- at any point
15 prior to completion of the lien investigation, any -- the
16 predicate for rolling up debt to the extent it's favored or
17 -- is a good lien.

18 MR. BOTTER: Um-hum.

19 THE COURT: And so that whether it actually says
20 it in the documents or not, rolling up debt that -- or
21 rolling up what was actually unsecured debt simply doesn't
22 happen. And so whether it's articulated as a claw back or
23 anything else, I mean if the liens aren't bad -- I'm sorry.
24 If the liens aren't good then the roll up never happened.
25 And I think that's -- and I think there's no principle

1 argument in opposition to that. You know, that -- and I've
2 never heard a lender say that whether it's good or bad it's
3 rolled up today, otherwise we don't go forward because
4 that's a non-starter.

5 You know, often -- I mean I find roll ups very
6 interesting, the concept of it because what I hear often
7 from counsel is that it's an accounting function one way or
8 the another. It's a line here. It's a line there. It
9 doesn't change it and in circumstances where it actually
10 does change it, then it catches everybody's attention.

11 But, you know, taking for example Mr. Nash's
12 comments at face value and presuming such a tier
13 investigation of the -- that the liens are valid, then other
14 than perhaps some interest issues, et cetera or
15 availability, that kind of thing, it typically doesn't have
16 a material effect. But, you know, on that I'm expecting
17 that Mr. Nash is going to tell me other ones were going to
18 write it in. But if the liens get unwound, the roll up
19 never happened.

20 MR. BOTTER: Thank you, Your Honor.

21 THE COURT: Okay.

22 MR. BOTTER: We'll come back to the other --

23 THE COURT: Sure. No. That's just fine. Okay.

24 Mr. Nash?

25 MR. NASH: And we will make that clear, Your

1 Honor, that --

2 THE COURT: Sure. Okay.

3 MR. NASH: -- if the liens do get unwound, the
4 roll up never happened.

5 THE COURT: Okay.

6 MR. NASH: So the other -- two other points that
7 I certainly want to highlight, Your Honor, and that is --
8 and in part this does go to when I was last in front of Your
9 Honor on Thursday. You mentioned that it might be
10 appropriate or interesting to provide a point of view in
11 terms of where these cases are going. And the AgStar
12 financing and the nature of the AgStar financing does create
13 an opportunity to address certain of those issues.

14 It is no secret, Your Honor, that the ethanol
15 market is in a state of depression or a downturn. A very
16 troubling time for the ethanol industry. You can Google any
17 number of newswires and stories about the challenging
18 climate that we're in for the ethanol industry. It's a
19 challenging climate and it is an operationally stressed
20 industry, even for those few ethanol manufacturers who are
21 adequately capitalized.

22 It is an increasingly and very I'll say
23 challenging time for the debtors in what is a challenging
24 economic climate, a challenging operating environment and
25 the liquidity stresses and the stresses associated with

1 trying to run a business while also, you know, finding
2 yourself in bankruptcy and having to deal with the
3 bankruptcy process. It feels as if we've been to me anyway
4 in this case for quite some time. It's really only been not
5 quite two-and-a-half months.

6 But as Your Honor knows when I was in front of
7 you in the beginning of December, I publicly -- I stated in
8 court and the debtors issued a press release indicating that
9 a very significant strategic player had sent the debtors an
10 expression of interest, a letter of intent expressing an
11 interest in acquiring certain of the debtors' assets. I
12 said at that time -- at least I think I did. I said at that
13 time that the debtors felt as if that was something that we
14 had to run to ground. We had to explore that expression of
15 interest and we had to attempt to see where that would lead
16 us.

17 Since that time, Your Honor, we have done just
18 that. We have continued to work with that strategic party.
19 That strategic party has done a significant amount of due
20 diligence. That strategic party, Your Honor, has refined
21 its view of the assets that it would wish to acquire and the
22 price that it would wish to pay for those assets. The
23 debtors have made no commitment to sell all the assets of
24 the company or any of the assets of the company. The
25 debtors have made no commitment to pursue any one stalking

1 horse to exclusion of any other.

2 But we have been, Your Honor, working with that
3 strategic party since the beginning of December. Also, Your
4 Honor, since the beginning of December, we -- the debtors
5 have entered into more than 10 but not 15 -- I don't know
6 the exact number -- confidentiality agreements with
7 interested parties who are due diligencing the debtors'
8 assets, Your Honor. So we do have a number of parties who
9 are very seriously exploring the possibility of acquiring
10 some or all of the debtors' assets.

11 Which leads us to the fact that AgStar has
12 conditioned its willingness to provide financing on our
13 pursuit of a sale time or a sale process and pursuant to a
14 very specific time. It would not -- it is incorrect, Your
15 Honor, for anyone to draw a conclusion or an inference that
16 we are pursuing a sale process now because of the AgStar
17 financing. It's simply not correct.

18 We have -- our secured creditors at each of the
19 silos, Your Honor, are increasingly focused on a sale
20 process. The debtors have not committed to sell any of our
21 assets. I want to reiterate that. But there's no question
22 that when we look at the liquidity challenges of the
23 business that a sale process and a sale of the assets is
24 certainly a very likely outcome.

25 Now the AgStar financing and the specific AgStar

1 timeline, Your Honor, which is an aggressive timeline, it's
2 a tight timeline, but it's a timeline that the debtors are
3 committed to attempt to live with. The AgStar financing
4 would require the debtors to file a bidding procedures
5 motion by January 27 to obtain approval of that -- of the
6 bidding procedures by February 9.

7 So effectively, Your Honor, we have a February 5
8 omnibus. We have a February 5 Omnibus Hearing. So I think
9 as a practical matter if we're going to live within the
10 confines of the AgStar financing, we'll be getting the bid
11 procedures approved with respect to the US Bio Silo on
12 February 5.

13 THE COURT: Or the 9th.

14 MR. NASH: Or the 9th or the 11th. You know, who
15 knows, Judge. Right? So the AgStar financing though would
16 require essentially, Your Honor, that the sale close at the
17 end of March. Auction March 16, sale hearing March 17. As
18 a practical matter, Your Honor, those dates may move. I
19 think the date that we do need to shoot for from the
20 debtors' perspective, Your Honor, is the end of March.

21 THE COURT: Let me ask you a question going back.
22 I don't want you disclose anything that is confidential or
23 sensitive, but is it your expectation that the bid
24 procedures motion that you're currently obligated to file or
25 that you would be obligated to file on January 27 would

1 reflect the March proposal?

2 MR. NASH: We would hope so, Your Honor. So the
3 real operative date, Your Honor.

4 THE COURT: Okay.

5 MR. NASH: And of course to be clear, AgStar's
6 financing is conditioned upon a sale process with respect to
7 only the US Bio Silo obviously. And in terms of being
8 obligated, Your Honor, to close a sale by the end of March
9 from my perspective -- and I think I said this in front of
10 Your Honor on Thursday. I know we put a statement to this
11 effect in our motion and I've been saying it to Mr. Athenas
12 until I've been blue in the face for the last three or four
13 days.

14 The AgStar financing has to and we believe that
15 it does allow the debtors to pay the administrative costs of
16 running the business and administering these cases through
17 the date by which we would be obligated to close the sale.
18 If that's not the case, this financing makes no sense. But
19 because the AgStar financing and the budgets associated with
20 the AgStar financing, Your Honor, will enable the debtors in
21 our view to pay the administrative costs of the case through
22 the date by which we would be obligated to close the sale,
23 we think the financing makes sense.

24 We have people in the data room who have
25 expressed an interest in these assets, diligencing these

1 assets. Would the debtors prefer their -- would the debtors
2 prefer to have financing from AgStar not specifically tied
3 to a sale? Absolutely. Would we still -- would we be doing
4 anything different? I'm not sure we would, Your Honor.

5 We would continue to work with those parties that
6 have expressed an interest in the AgStar assets. But faced
7 with the prospect of having our financing mature tomorrow
8 and faced with the prospect of not having the ability, Your
9 Honor, to maximize the value of those assets in the absence
10 of the financing that we need in order to preserve the
11 collateral value to give the parties that have expressed an
12 interest in these assets an opportunity to do their
13 diligence, from our point of view, Your Honor, that
14 certainly is not in the best interest of the estate.

15 I don't think Mr. Botter thinks it's in the best
16 of the estate. I think that Mr. Botter understandably so,
17 Your Honor, believes that the sale timeline is too tight, to
18 restrictive. I do want to stress to the court that --

19 THE COURT: What's the termination date for the
20 proposed AgStar financing? I know I saw it earlier. I --

21 MR. NASH: April 30, Your Honor. And again in
22 the interest of full candor, Your Honor, because it's
23 important to make clear the liquidity provided by the AgStar
24 financing in our view, Your Honor, gets very tight out into
25 April. I'm not prepared to stand up in front of Your Honor

1 and tell Your Honor that I'm convinced as I stand here today
2 that the AgStar financing would enable us to pay the
3 administrative costs of the case through the end of April.

4 Having said that, I am prepared to articulate to
5 the court Mr. Bonsal, the chief restructuring officer of
6 Alex Partners is here with us today and he's here not so
7 much because I think we're going to need to put him on the
8 stand, but he's here because last night and this morning and
9 probably while he's sitting out where he's sitting right
10 there, we have been working on the budgets and making
11 certain that I would be able to stand up in front of Your
12 Honor and represent that the debtors believe that the
13 financing provided will enable us to pay the administrative
14 expenses through the end of March.

15 The maturity of the DIP financing is out into
16 April 30. There was discussion, Your Honor, well, maybe we
17 should just have the DIP financing mature, you know, at the
18 end of March. Now I -- to me I wouldn't want to see that
19 happen because these budgets are projections. We may do a
20 little better than we think. If we do a little better than
21 we think, we may have a little bit more liquidity.

22 If we have a little bit more liquidity and we
23 need to close the transaction in the first week or two of
24 April and we have the money to do it, we'll be glad that we
25 have a maturity date of April 30. But I don't want there to

1 be any ambiguity about the amount of money being provided
2 and whether or not the debtors think that it gets us all the
3 way through the end of April.

4 THE COURT: I understand.

5 MR. NASH: So, you know, in terms of the
6 timeline, Your Honor, and the appropriateness of approving a
7 sale timeline on an interim basis and on, you know, 41 hours
8 notice, the debtors are not asking Your Honor to approve a
9 sale timeline. We have not filed a sale motion. We --
10 there -- I'm not making a record.

11 I'm not prepared to make a record about the
12 sufficiency of marketing the assets and whether or not
13 between now and March 31 is enough time to maximize the
14 value of the assets. I know that at this point in time
15 that's all the time AgStar is willing to give me. I am
16 cognizant of the fact of if you get into February of March
17 timeframe and AgStar sees interest, AgStar sees people
18 expressing an interest in the assets, it may or may not be
19 in AgStar's best interest to extend that timeline.

20 Your Honor may determine when we do file a
21 bidding procedures motion that the timeline that we set
22 forth is not an appropriate timeline. All of Mr. Botter's
23 rights would be reserved. With respect to the timeline
24 that's before Your Honor, the only thing that this timeline
25 obligates the debtors to do between today and a final

1 hearing on February 5 is file a bid procedures motion.

2 January 27 would be our deadline within the
3 confines of this financing to file a bid procedures motion.
4 Now that's something that the debtors can do. We'll be in
5 front of Your Honor on February 5 to approve this financing
6 on a final basis and at that time we'll see where we stand
7 with these dates and these timelines.

8 But in terms of entering an order today, Your
9 Honor, and what it would obligate the debtors to do between
10 now and a final hearing, it's only the filing of a bid
11 procedures motion, Your Honor, and that is something that
12 the debtors can do and would intend to do consistent with
13 the requirements of the financing. So perhaps I'll yield.
14 I'm sure Mr. Botter has some points he wants to make and,
15 you know, we'll -- we have a proffer that we would be
16 preparing -- presenting at some point.

17 THE COURT: Why don't we do this. Why don't you
18 get your proffer done.

19 MR. NASH: Okay.

20 THE COURT: I presume Mr. Botter is not going to
21 want to cross examine. Obviously if you wish to do so
22 you're welcome to do so. But --

23 MR. BOTTER: Thank you, Your Honor.

24 MR. NASH: In the courtroom with us today, Your
25 Honor, is Mr. Homer Parkhill called to testify and Mr.

1 Parkhill would testify as follows. He is a managing
2 director at the investment banking firm of Rothchild, Inc.
3 Mr. Parkhill is familiar with the events leading to the
4 filing of these Chapter 11 cases. He is familiar with the
5 debtors' pre and post-petition capital structure. Mr.
6 Parkhill is familiar with the debtors' search for DIP
7 financing in the weeks leading up to the commencement of the
8 cases. He's familiar with the debtors' efforts to obtain
9 additional liquidity on a post-petition basis, Your Honor.

10 With respect to the financing that we seek
11 approval of today, Mr. Parkhill would testify that he is
12 familiar with the US BioEnergy debtors' cash and financing
13 needs and that the DIP financing was the most favorable,
14 indeed the only financing available to the US BioEnergy
15 debtors within the timeframe required by their needs to
16 avoid immediate and irreparable harm.

17 Mr. Parkhill would testify that the US BioEnergy
18 debtors are unable to obtain financing on more favorable
19 terms from sources other than AgStar and other than -- and
20 on terms any different from those in the proposed DIP credit
21 agreement, Your Honor. Mr. Parkhill would testify that the
22 debtors are unable to obtain unsecured credit or credit that
23 would be secured only by an administrative expense under
24 364(C)(1) of the Bankruptcy Code, Your Honor.

25 Mr. Parkhill would testify that the US BioEnergy

1 debtors are unable to obtain credit secured only by liens
2 under 364(c)(2) and 364(c)(3) of the Bankruptcy Code. Mr.
3 Parkhill would testify that the debtors-in-possession
4 financing that we seek approval of today and any debtor-in-
5 possession financing was only available on a priming basis
6 under Section 364(D) of the Bankruptcy Code, Your Honor, and
7 that the debtors in the exercise of their business judgment
8 determined that the financing offered by AgStar was in the
9 best interest of the estates.

10 Mr. Parkhill would testify, Your Honor, that the
11 US BioEnergy debtors have an immediate need to obtain the
12 DIP financing to refinance existing post-petition
13 indebtedness which matures on January 15, 2009. They have
14 -- that the debtors -- US BioEnergy debtors have an
15 immediate need for DIP financing to fund working capital and
16 operational needs of the US BioEnergy facilities to preserve
17 and maintain the going concerned value of those facilities.

18 Mr. Parkhill would testify that the relief
19 requested in the motion is necessary, essential and
20 appropriate and is in the best interests of and will benefit
21 the US BioEnergy debtors, their creditors and their estates,
22 as the implementation of the financing will provide the US
23 BioEnergy debtors with the necessary liquidity to preserve
24 and maximize the value of the US BioEnergy estates for the
25 benefit of all creditors and avoiding the immediate and

1 irreparable harm that would result to the US BioEnergy
2 debtors, Your Honor, if the existing post-petition financing
3 were to mature with there being no ability to refinance it.

4 With respect to the specific terms of the AgStar
5 -- of this AgStar financing, Mr. Parkhill would testify that
6 the financing is on a plant-by-plant basis and that there
7 will be seven separate financing facilities. Mr. Parkhill
8 would testify that he is familiar that the financing is
9 specifically tied to a sale process and sale milestones.

10 Mr. Parkhill would testify that given the options available
11 to the US BioEnergy debtors, financing tied to a specific
12 sale process is nonetheless in the best interest of the
13 debtors' estates.

14 Mr. Parkhill would testify that the terms and
15 conditions of the financing are appropriate and fairly
16 balance the lender's interest with the US BioEnergy debtors'
17 interest in having sufficient flexibility and runway to
18 pursue a sale of substantially all the assets of the US
19 BioEnergy debtors while paying the administrative expenses
20 of the estates. The aggregate amount of the final
21 financing, Your Honor, is approximately \$110,600,000; 30.3
22 million of this represents incremental liquidity to the
23 debtors, 25 million of the -- of that financing, Your Honor,
24 is to pay off the existing post-petition indebtedness, 55.3
25 million of the financing, Your Honor, would be used to roll

1 up pre-petition debt under the AgStar pre-petition secured
2 credit facilities.

3 Mr. Parkhill would testify, Your Honor, that he
4 believes that the DIP financing is sufficient to finance the
5 US BioEnergy debtors through the consternation of a sale
6 process pursuant to the contemplated timeline. With respect
7 to the roll up of the pre-petition debt, Your Honor, Mr.
8 Parkhill would testify that the roll up indebtedness amount
9 of \$55.3 million and he would testify that he is familiar
10 that the aggregate amount of the pre-petition indebtedness,
11 Your Honor, secured indebtedness is \$464.9 million.

12 Mr. Parkhill would testify that the debtors were
13 able to -- and we think it's significant -- able to work out
14 a mechanic with Mr. Athenas and with the AgStar lenders that
15 if by the time we get to final hearing for some reason the
16 roll up is determined to not have been proper, we think we
17 have a way to fix that, Your Honor. Mr. Parkhill would
18 testify that the debtors resisted the roll up but that
19 AgStar insisted on the roll up.

20 Mr. Parkhill would testify that in his judgment
21 the debtors would not have been able to obtain the financing
22 absent the roll up. Mr. Parkhill would testify that he does
23 believe that the roll up was necessary in order for AgStar
24 as agent to obtain the necessary commitments, to put us in a
25 position to have the financing that we seek here today.

1 Mr. Parkhill would testify that he's familiar
2 with the interest rate, Your Honor. The interest rate is 12
3 percent, LIBOR plus 12 percent, Your Honor, with a LIBOR
4 floor of three percent. Mr. Parkhill would testify that
5 under the facts and circumstances of this case and the
6 credit markets that that interest rate is reasonable.

7 Mr. Parkhill would testify that the two-percent
8 commitment fee, Your Honor, is reasonable, particularly in
9 light of the fact that we were able to negotiate. We are
10 not paying the commitment fee, Your Honor, with respect to
11 the rolled-up money. Mr. Parkhill would testify that the
12 existing adequate protection arrangement which nobody has
13 made an issue of, Your Honor, continued to adequately
14 protect the interests of the AgStar lenders in any
15 diminution in value in their pre-petition collateral
16 position.

17 Mr. Parkhill would testify that he is familiar
18 with the budgets that have been prepared and would be --
19 form the basis upon which the AgStar financing would be
20 provided. Mr. Parkhill would testify that the DIP budgets
21 have been thoroughly reviewed by debtors and the debtors'
22 management, that the DIP budgets are negotiated, Your Honor,
23 and that the DIP budgets in the debtors' view enable the
24 debtors to pay the administrative expenses of the estate
25 through the date by which we would be obligated to close the

1 sale, that being March 31.

2 Mr. Parkhill would testify that the proposed
3 financing is the product of arms-length negotiation, that
4 the terms of the financing are fair and reasonable and given
5 the options facing the debtors that the debtors entry into
6 the financing is a prudent and reasonable exercise of the
7 debtors' business judgment. Mr. Parkhill would testify that
8 the AgStar lenders negotiated in good faith with respect to
9 the providing of the financing and that the financing has
10 been provided and is being entered into on a good-faith
11 basis.

12 And with that, Your Honor, that would conclude
13 the proffer of Mr. Parkhill.

14 THE COURT: Mr. Parkhill, do you wish to cross
15 examine?

16 MR. BOTTER: No, Your Honor.

17 THE COURT: Very well. All right. I'll accept
18 the proffer. Mr. Botter?

19 MR. BOTTER: Good afternoon, Your Honor. David
20 Botter, Akin Gump on behalf of the creditors' committee. I
21 know Your Honor has read the papers and so I'm not going to
22 go through -- back through each of the points. The one
23 point I did want to start with was the threshold issue that
24 Your Honor identified which is the sufficiency of notice.

25 Clearly we would've preferred to have dealt with

1 that in the interim final distinction. Frankly a number of
2 these issues are more appropriately dealt with at a final
3 hearing as opposed to the interim hearing and principle of
4 which would be the sales process, the very aggressive sales
5 process timeline as well as the roll up.

6 We attempted -- Mr. Nash is absolutely correct
7 has throughout these cases kept us in the loop as quickly as
8 possible and obviously forwarded that document to us as soon
9 as he had it and we have attempted throughout the weekend
10 and through today's hearing to try to negotiate a resolution
11 or really to negotiate a period of time to allow us to get
12 to a resolution. Unfortunately that has not been
13 successful.

14 In the context of the sale process timeline when
15 I look at my financial advisor over the course of the last
16 48 hours and I say to Hoolihan guys, you know, tell me what
17 it is that we need here -- and unfortunately they don't even
18 have the information necessary for us to make an ask of
19 extended this process. The debtors' advisors have been very
20 busy and in terms of Hoolihan's interaction with Rothchild,
21 we weren't able to formulate the ask to expand the process.

22 But it -- you know, just looking at the
23 particular process that we see in front of us, there's four
24 weeks to basically go from soup to nuts and having done this
25 for a little bit of time, it's a very aggressive timeline.

1 Again we'd like to see that timeline expanded to whatever it
2 is that makes sense for these estates to maximize value and
3 frankly we'd like to see that negotiation take place between
4 now and February 5.

5 You know, Mr. Nash said the only thing that the
6 debtors are seeking today or will be required to do today is
7 to file that motion on January 27. Not completely true
8 because if in fact this credit agreement gets approved with
9 this provision, the timeline built into it, what we and the
10 debtors will be facing is in event of default if we don't
11 comply with the remainder of the timeline.

12 So I think this is a perfect situation where we
13 all should take a step back and say what is the appropriate
14 timeline here, realizing that there are liquidity concerns
15 and clearly liquidity needs here. But let's step back and
16 say how are we going to maximize value here, what's the
17 appropriate process here and let's not lock ourselves in an
18 interim DIP hearing to a timeline that's going to -- may or
19 may not work for these companies. So that's with respect to
20 the timeline and frankly I think that -- from a maximization
21 of value point of view that is the largest issue here.

22 In terms of the roll, I heard Your Honor ask how
23 is it that different -- how is it different than we want it.
24 And I know Mr. Athenas described what the process was and I
25 think I came to the conclusion that they want it. And it

1 was interesting because Mr. Athenas said that --

2 THE COURT: I think his argument was that they
3 really, really want it.

4 MR. BOTTER: Well, that's true. Correct, Your
5 Honor. That's correct. And he had said that the lenders
6 are angry, that they wanted a quick sales process and I
7 gather that the roll up was a way to placate them and to get
8 them to lend additional money, and as you said, they really,
9 really wanted it.

10 Now we've got a roll up that's being -- the
11 approval of which is being sought here at interim which will
12 theoretically placate them, but they also want the quick
13 sales process. So I'm not so sure that they should be
14 getting their cake and eating it, too.

15 In terms of the issue that we talked about
16 earlier in the hearing of unwinding, I think that that will
17 get taken care of. There are a few other issues. Obviously
18 the exclusivity trigger, we just don't think that makes
19 sense especially in the context of a loan which provides for
20 full payment no matter what a plan says and we're not
21 looking -- we don't think it's appropriate to --

22 THE COURT: Well, it's a bridge facility.

23 MR. BOTTER: Well, it's a bridge to a sale.
24 That's correct. And -- so that becomes somewhat of a lesser
25 point than obviously expanding to the sales process. The

1 other points in light of our objection with respect to the
2 sale process are smaller, but, you know, still significant.
3 As Mr. Nash said, the DIP budgets have been the subject of
4 negotiation through this morning. They have been moving
5 targets.

6 We are concerned that we've not had an adequate
7 opportunity to fully assess the adequacy of those and the
8 appropriateness of those budgets, and frankly we are also
9 concerned that there is no line-item variance whatsoever
10 contained in those budgets. The debtors were able to
11 negotiate a cumulative variance, but to the extent that they
12 exceed by a dollar any of the line-item items, that's the
13 basis for calling a default.

14 The other stuff, Your Honor, is smaller and as I
15 said, I'm not going to rehash everything contained in our
16 objection. We are very concerned, however, about the
17 aggressive sales process and we would like to see that the
18 subject of a negotiation over the course of -- between now
19 and February 5.

20 THE COURT: Okay.

21 Thank you, Your Honor.

22 THE COURT: Then I'll switch gears. Mr. Athenas?

23 MR. ATHENAS: Your Honor, Joe Athenas on behalf
24 of AgStar. I guess two things. If there's any specific
25 things Your Honor would like to address, I'm happy to

1 address those. But also I wanted to talk about the roll up
2 and the unwinding of the roll up.

3 I mean we see that working the same way. If our
4 liens are avoided as it would if at the final hearing Your
5 Honor decides it's not appropriate and that would be --

6 THE COURT: Sure.

7 MR. ATHENAS: We'd get the interest, but it gets
8 converted back to pre-petition loans.

9 THE COURT: Well, we can -- I don't think you
10 need to respond to that right now. The --

11 MR. ATHENAS: And another way to do that would be
12 just to increase our closing fee to make it a really large
13 closing fee and then --

14 THE COURT: Now his head is going to explode.
15 No. The point is -- and I'm not going to word-smith --
16 we've all been down this path before. My point is a simple
17 one which is if you're asking for a roll up and if I approve
18 a roll up which I'm not ruling right now, but if I were to
19 approve a roll up, it is predicated upon the assumption that
20 you have good liens. If those liens get unwound then what I
21 converted to pre-petition to post-petition debt does not
22 gain or retain the benefits of becoming valid, secured post-
23 petition debt if it wasn't valid, secured pre-petition debt.

24 This doesn't relate to new money. This is only a
25 question of rolling over, converting pre-petition debt that

1 is only converted and only granted those more substantial
2 protections on the basis that it's fully valid, fully
3 perfected, liened-up secured debt. And, I mean, I think in
4 almost every case that I see this becomes a discussion, but
5 it's always built in that there is a claw back. The
6 Committee has not done its investigation.

7 We often see roll ups and in usually the final
8 and -- but even at a final, the Committee is only beginning
9 its investigation and they say well, we're not comfortable
10 with this and then often what's negotiated is look, if it's
11 not valid, if the Committee finds something and that's not a
12 comment that the Committee does or doesn't have any meat on
13 the bone, but rather that the court is granting relief today
14 based upon the assumption that this is valid debt. And if
15 it's not then it didn't happen. I think that's not allowed.

16 I don't -- I mean I think you understand what I'm
17 talking about and I don't think it's terribly complex to
18 word-smith it. I mean I've certainly seen it done.

19 MR. ATHENAS: No. Yeah. And I think the issue
20 that I have to back to the bank group on is whether or not
21 during that period -- let's assume for a moment that the
22 liens were invalid.

23 THE COURT: Right.

24 MR. ATHENAS: The question is during the period
25 between today, you know, assuming Your Honor were to approve

1 the roll up and the day that it was found that our liens are
2 invalid, do we get interest at the post-petition rate on
3 that money or not? And I think Your Honor is saying no, you
4 don't.

5 THE COURT: And I think the answer is that you
6 wouldn't.

7 MR. ATHENAS: Okay. I understand Your Honor's --

8 THE COURT: Well, really to be honest --

9 MR. ATHENAS: Yeah.

10 THE COURT: -- I mean when you talk to your
11 lenders, I mean the way that I would couch it is if all our
12 liens get unwound, we have much bigger problems than the
13 interest.

14 MR. ATHENAS: I'm not --

15 THE COURT: But you know --

16 MR. ATHENAS: -- disagreeing with Your Honor on
17 that on that particular point.

18 THE COURT: -- maybe I'm being a little flip.
19 But, you know, I see --

20 MR. ATHENAS: No. And look, the purpose of
21 the --

22 THE COURT: I never actually --

23 MR. ATHENAS: -- roll up --

24 THE COURT: -- let me tell you. I've had this
25 discussion about the claw-back concept many, many times and

1 I think the principle is fairly clear. But frankly nobody's
2 ever actually asked about what happens because it's never
3 happened.

4 MR. ATHENAS: Right.

5 THE COURT: Nobody's ever asked, you know, well,
6 what happens when we go back and I think the answer is that
7 frankly we all have much bigger problems, we've got much
8 bigger fish to fry if it starts to get unwound about what
9 the actual -- at the end of the day what the remedy is.

10 MR. ATHENAS: Well, we understand, Your Honor,
11 and I think the key point of the roll up from our
12 perspective is the inter-lender issue. How do you get
13 people to pony up for people who won't pony up and this was
14 a way to do that and that's where we're coming from. If
15 there's any other specific issues Your Honor would like me
16 to --

17 THE COURT: No. Here's --

18 MR. ATHENAS: -- address I will or I'll --

19 THE COURT: Let me tell you what I'd like to do.
20 The first issue that was raised by the Committee in their
21 objection and Mr. Nash and I had a colloquy about this last
22 week about whether or how this hearing can go. This has
23 obviously happened very, very quickly. I appreciate how
24 this works and I accept counsel's efforts and frankly the
25 Committee acknowledged that you've done everything that you

1 could. But it comes very, very quickly and my guess is that
2 Mr. Botter and his constituents and his other professionals
3 have both frantically going over this as well as preparing
4 their substantive objection which was helpful and I do
5 appreciate it this morning.

6 What I'd like to do is give you a little bit of
7 time today to try to talk through a couple of these issues.
8 Not much time because I think the issues themselves are
9 fairly straightforward, but I think mister -- and some of
10 these issues I just don't think you've had an opportunity to
11 talk through and maybe you can listen to Mr. Botter and
12 either convince him or we'll come and I will rule today. I
13 understand that the -- there is no dispute that the existing
14 lending expires and that this debtor needs lending.

15 But -- I will deal with the issue today, but I
16 want you to have at least a few minutes to go over this and
17 in this context, I have a couple observations. The first is
18 that I share the Committee's concerns regarding exclusivity
19 termination. That seems to be to me an odd provision to
20 have and -- you know, financing that only goes out to March
21 31. I'm not sure why it's there. I understand why with a
22 classic full DIP facility covering everything that a lender
23 wants that kind of control and those are discussions we
24 often have.

25 To my point of thinking, it seems to me highly

1 unlikely that the provision itself would ever really come
2 into play or would be significant one way or the other at
3 least based upon the current context of this with, you know,
4 a sale process going on through the next several months.
5 You know, I don't know whether the Committee is looking to
6 terminate exclusivity, but we're already in the middle of
7 January and it is not happening anytime soon and so I don't
8 see that as being -- I'm not clear whether it means anything
9 with it in there, but I'm not sure why it's in there.

10 I have concerns that I shared with you regarding
11 your early roll up and part of it is simply a principle
12 discussion of our local rules, Judge Walsh's letter going
13 back to 1998 about things that should and shouldn't be
14 proposed on the first day and we should have a full and fair
15 opportunity to review them. And so there is a -- and I'll
16 be candid with you that there is -- that part of it is just
17 that these are the sorts of things that are typically and
18 appropriately granted on full notice, longer time to look at
19 it for everyone to get comfortable and generally up front
20 require extraordinary circumstances. And neither our local
21 rules nor Judge Walsh's letter laid out what those
22 extraordinary circumstances are.

23 I -- and I expect at face value your statement
24 regarding a recalcitrant and large lender group and perhaps
25 they are extraordinary circumstances. I also note that

1 there's a legitimate question right now about whether or not
2 there is any economic difference here and if it is -- I
3 don't want to belittle it, but if it is window dressing that
4 keeps a lender group happy and allows them to go forward
5 without any economic consequence to the estate and to the
6 unsecured creditors, then maybe I don't care as much.

7 I don't know that Mr. Botter has enough
8 information today, but I think he -- you know, he's heard
9 from Mr. Nash and I think maybe we can talk through that a
10 little bit that if there is no -- if there's an economic
11 consequence and it's part of a negotiated deal, then perhaps
12 it's appropriate.

13 With respect to some of the other technical
14 issues, I did go back and try to understand the budget in
15 question. I frankly am a little bit leery about DIP budgets
16 and DIP facilities that don't have any sort of variance or
17 wiggle room and I'll say it from a selfish point of view
18 because what they often create then is a Friday-afternoon
19 frantic teleconference or hearing that doesn't allow -- that
20 -- you know, because somebody's out of formula. And I
21 understand completely why a lender who is lending money to a
22 company in distress or in a difficult situation wants as
23 much control over where his money is going.

24 But, you know, the question of a little bit of
25 flexibility is something that I generally embrace both to

1 recognize the practicalities but also to try to avoid
2 emergency motion practice which -- and I often see emergency
3 motion practice when it's entirely consensual. But, you
4 know, lenders won't lend without orders, nobody can get an
5 order without filing a motion, somebody's got to get me on
6 the phone and it's a big headache and it always happens on
7 Fridays.

8 MR. ATHENAS: The good news, Your Honor, on that
9 particular point is we can amend it just between us and the
10 debtors. Hopefully we'd never have to actually show up in
11 front of Your Honor.

12 THE COURT: Well, now you know how I feel about
13 it. There are a couple other points that were made by the
14 Committee in their bullet-point objections on pages nine and
15 ten that are the subject commonly of negotiation one way or
16 the other and I'm not going to rule or pick through them.
17 But I think that you would benefit if you took maybe a half
18 an hour and talked through some of these issues and again
19 I'm prepared to rule. I'm satisfied with the record. But I
20 do believe that at least some of this -- some of these
21 issues can get addressed.

22 With respect to the timeline, I'm in a bit of a
23 quandary about exactly what to do with that and again I want
24 you to talk with Mr. Botter. But it's tight. You know it,
25 Mr. Nash stood up and said at the outset, mister -- I think

1 everybody's in agreement that this is tight and I can't
2 really substitute my business judgment for your lender or
3 for the debtors as to what is and what isn't reasonable.
4 Every debtor believes if I had more time, I could bring more
5 people in. I could flush the process out. That's played
6 against the business realities that everybody's in.

7 So at least at this point I don't have any
8 comments about what I would do or not do with this timeline
9 that's been proposed. But I want to look at it and think
10 about it a little bit more and again if you have a
11 discussion about that, that's fine. I'm not telling anybody
12 to go settle, but frankly in this kind of context having the
13 opportunity to talk a little bit more once the documents are
14 now final and you've gotten to -- you know, not --
15 everything is not in flux -- Mr. Botter knows exactly what
16 it is you're proposing. You understand exactly what his
17 concerns are. I want to give you a chance to have that
18 discussion.

19 And then what I'd like to do is reconvene at one
20 o'clock sharp. Okay?

21 MR. ATHENAS: Thank you, Your Honor.

22 THE COURT: Any questions?

23 UNIDENTIFIED SPEAKER: None.

24 THE COURT: Okay. Very well. We're in recess
25 until one o'clock.

1 UNIDENTIFIED SPEAKER: Thank you, judge.

2 (Recess)

3 MR. NASH: -- Your Honor is that Mr. Athenas and
4 Mr. Botter remain friends. The bad news --

5 THE COURT: I would expect nothing less.

6 MR. NASH: We made some progress, not -- we're
7 not able to make progress, Your Honor, on the two most
8 important points, being the sale timeline and the roll up.
9 Mr. Botter I think would like to address the court.

10 THE COURT: Sure. Mr. Botter?

11 MR. BOTTER: Good afternoon, Your Honor. That is
12 correct. We've not made any -- there is no agreement on
13 those two open points and our objection still stands. On
14 DIP budgets, I think we are comfortable. We've not gotten a
15 line-item variance, but we've spoken with the company and I
16 think that they are as comfortable as they can get. So that
17 would cover those first two points.

18 The liens on the -- or super priority claims with
19 respect to avoidance actions, that is limited to the claim
20 by the AgStar lenders that some of their collateral and I'm
21 -- this is just for lack of a better term -- may have been
22 converted by another debtor for use at the other debtors'
23 silo --

24 THE COURT: Is that --

25 MR. BOTTER: -- and the --

1 THE COURT: -- the subject of the second motion?

2 MR. BOTTER: It's actually not.

3 THE COURT: Okay.

4 MR. BOTTER: It's actually a little bit
5 different. And to the extent that they -- that there is an
6 action, whether sounding convergence, conveyance or
7 something else where they are able to prove that in fact
8 their collateral was taken and used by another silo, they
9 want to retain a lien on that. I'm fine with that, Your
10 Honor.

11 THE COURT: Okay.

12 MR. BOTTER: Okay?

13 THE COURT: Well, as to the super priority does
14 it extend -- and the lien, does it -- would it not then
15 otherwise extend to garden variety Chapter 5 causes of
16 action?

17 MR. BOTTER: That's correct, Your Honor.

18 THE COURT: Okay.

19 MR. BOTTER: That's correct, Your Honor.

20 THE COURT: Okay.

21 MR. BOTTER: On -- the point we made with respect
22 to acceleration of pre-petition debt, there was a provision
23 in the order which made it appear as though the non-rolled-
24 pre-petition debt would get the benefits of the post-
25 petition order and so therefore we would not have to go

1 through the procedural safeguards in terms of the code in
2 terms of lifting the stay, et cetera. That's not the case
3 and I believe that Mr. Athenas has agreed that that's not
4 the case.

5 THE COURT: Okay.

6 MR. BOTTER: The only other point that is of
7 significance is that we made the point that there should be
8 a limitation on fees and expenses to one counsel rather than
9 each individual lender and we still are pressing that
10 objection. I'm not sure that you're going to hear any
11 response back on that particular point.

12 THE COURT: Okay.

13 MR. BOTTER: Okay? And with that, Your Honor, we
14 are still as I said open on the first two big ones.

15 THE COURT: Okay. Mr. Athenas?

16 MR. ATHENAS: Your Honor, Joe Athenas on behalf
17 of AgStar. With respect to the two big points, you know,
18 I've been told by my lender group that I've got nothing to
19 give. But with respect to for example the fee point, if
20 Your Honor were to overrule that although I can't agree, you
21 know, it's not going to stop the financing.

22 THE COURT: Okay.

23 MR. ATHENAS: The -- in terms of specifically I
24 think he -- Mr. Botter did a fine job of describing where we
25 are on everything else. The one thing I think he did not

1 mention is we also agreed to take out the exclusivity
2 default in the credit agreement and we're going to take out
3 the reference in the acceleration to pre-petition
4 indebtedness as he described and I think, you know, we'll
5 also make it clear that in terms of the mechanic of fixing
6 what happens if our liens are not valid, I think what we do
7 is --

8 THE COURT: Well, that's for another day.

9 MR. ATHENAS: Yeah. We get all this interest
10 and, you know, we can only keep what we're entitled to keep
11 on the pre-petition and the rest goes back to pay back post-
12 petition obligations and we're out of here.

13 THE COURT: I understand.

14 MR. ATHENAS: That's it.

15 THE COURT: All right. Does anyone else wish to
16 give their -- okay. The matter before the court is the
17 debtors' request for financing pursuant to Bankruptcy Code
18 §§ 105, 361 and 364 and Bankruptcy Rule 4001. We are here
19 on an emergency interim basis and I will grant the motion
20 subject to certain comments and revisions.

21 As a threshold matter, I note that the record is
22 uncontroverted that the debtor requires the financing. Mr.
23 Parkhill's proffered testimony was unequivocal that the
24 debtor needs the money. The existing facility expires
25 tomorrow or the day after -- no. Tomorrow. And that other

1 financing was not available on an unsecured or mere priority
2 basis. In addition, Mr. Parkhill's testimony adequately
3 articulated the debtors' efforts to obtain proposals for
4 financing and that this is the best and frankly the only
5 financing that is available to this debtor.

6 The -- I will approve and authorize the motion.
7 As I said, I have comments and some issues. There were
8 specific issues that were raised by the Committee that I
9 will address. I appreciate taking the exclusivity
10 termination provision out. I just didn't think it made any
11 sense in the context of this case and of the financing
12 that's being proposed, so I appreciate the accommodation in
13 that regard.

14 With respect to the proposed roll up of I believe
15 \$55.3 million, I will approve and authorize that. I am
16 hesitant to do so. I believe that a -- our local rules
17 don't favor them and I noted that and I believe that a
18 substantial showing needs to be made and I'm satisfied that
19 it's been made here, and I think it's been made in a couple
20 different ways.

21 But perhaps most important is that there is at
22 least a strong possibility that there is no material
23 economic effect to the estate or to the unsecured creditors
24 with the existence of the roll up and I will accept at face
25 value lenders' counsel's representations regarding for lack

1 of a better phrase trying to herd cats in this process
2 incentivizing parties to participate in financing that again
3 the record reflects is absolutely essential to the survival.

4 So I will approve and authorize it and I also I
5 note that my approval is based upon the understanding that
6 there's some sort of claw-back mechanism in the event -- in
7 the unlikely event at least based upon my experience that
8 the liens themselves are not -- are invalid. But frankly
9 the basis for a roll up under any circumstances is an
10 assumption that the liens are valid and the Committee is
11 doing its investigation. That investigation is not over, so
12 we'll allow that process to play out. But the roll up we'll
13 allow to occur as well.

14 With respect to the scheduling, I don't think
15 that there's any dispute that this is a tight schedule, that
16 this is aggressive scheduling, and we are where we are. I'm
17 frankly not in a position today to say that this is
18 reasonable, that this is unreasonable, that it's
19 inappropriate. What it is, is this is a timeframe that's
20 been negotiated in the context of financing. I don't have a
21 bid procedures and sale procedures in front of me today. So
22 it may be that Mr. Botter is correct that approval of this
23 perhaps for our days or at least he's up for next fight, but
24 frankly I'm willing to deal with this issue essentially on a
25 clean slate at the next fight.

1 I understand the lenders need for certainty as to
2 the timing of the sale of their certain collateral, but, you
3 know, sales occurs on all sorts of different schedules and
4 right now we don't have anything other than for making
5 assertions that are plausible that this is simply not enough
6 time. But I will approve and authorize the financing with
7 the proposed scheduling.

8 But -- I don't say it so much as warning, but I
9 wanted to give you a heads-up that I will consider the
10 debtors' bid procedures motion on its own merits so that
11 this doesn't fore-ordain it and I'm aware that somebody's
12 going to stand up at that hearing and tell me that the
13 consequences of not blessing this are the default and that's
14 what we do here.

15 The one tinkering -- and I trust from Mr. Athenas
16 that this not going to be a material issue, but I'm looking
17 at my schedule. I have a problem on the 5th. I have time
18 for you, but I do have issues on that day and what I would
19 like to do would be give you time on the 10th which takes
20 you a day past. Is that going to be a problem at to
21 whether --

22 MR. ATHENAS: No, Your Honor.

23 THE COURT: Okay.

24 MR. ATHENAS: No.

25 THE COURT: Good. That just gives me more time.

1 I will hear you at 10:00 a.m. on the 10th and my hope is
2 that that gives then Committee and any other party able to
3 put more time to evaluate the entire context. But -- and
4 I'll let you work out what the objection deadlines are.
5 You're going to file your motion by the 27th. That for me
6 to hear it on the 10th requires a reduction in time and I
7 will preemptively approve that reduction in time without
8 prejudice to a Committee or any other party's right to
9 complain that the process itself is simply too -- is too
10 aggressive.

11 But in approving the DIP financing, I think I
12 frankly need to give you that date. I think that it's
13 implicit in my ruling on the financing structure that a bid
14 procedures motion is going to come on and also in these kind
15 of cases I rely heavily on the Official Committee of
16 Unsecured Creditors and today is the 14th of 15th of
17 January. You know it's coming.

18 And I also take a measure of comfort from the
19 professional and cooperative approach that the debtors and
20 the lenders have taken with the Committee so that you're not
21 going to get hit on the 27th with something that you never
22 imagined and never thought was coming. So I do believe that
23 the reduction of time under those circumstances is
24 appropriate.

25 Last with respect to the limitation on fees and

1 expenses, what I'm going to do is I'm not going to approve
2 that today. I will hold that for final because I have some
3 discomfort about the number of lenders that may be involved.
4 I simply don't know what I'm being asked to approve. If you
5 had an opportunity to communicate with Mr. Botter and you
6 want to tee that issue up for the hearing on the 10th, I
7 think that that would be fine.

8 MR. ATHENAS: And, Your Honor, if you wanted to
9 overrule that right now, I would have no problem with that.

10 THE COURT: Your request is overruled that it
11 will --

12 MR. ATHENAS: Thank you.

13 THE COURT: -- be stricken from the application.
14 And then finally I think the question of the liens and the
15 extent of the super priority has been addressed on the
16 record, so I think that that's satisfactory.

17 Mr. Nash, is there anything further that I
18 haven't covered?

19 MR. NASH: Just a point of clarification, Judge.
20 We'll still keep an omnibus of February 5 --

21 THE COURT: Yes.

22 MR. NASH: -- for other matters?

23 THE COURT: Omnibus of February 5, but it seems
24 to me that there may be some other open issues. And frankly
25 I want to give a little bit more time to this process. If

1 there are debates over the timing, I think your comment in
2 response to my question was you're hopeful that you'll have
3 -- you may have a stalking horse. You may not.

4 But again I'm just not -- the 5th of February is
5 pretty tight for bid procedures, even though we know today
6 that that process is coming. So giving you a little bit
7 more time may allow us to communicate a little bit more.
8 Doesn't necessarily indicate that this stuff is going to get
9 resolved, but at least we have a more substantial record.

10 MR. NASH: We agree and thank you.

11 THE COURT: Okay. All right. Mr. Nash, is there
12 anything further? Am I going to get a revised form of order
13 coming in or do we have to deal with it clean?

14 MR. NASH: We'll have to make a few -- it
15 would've been our first time, Judge. It would've been
16 clean. But we'll have to make a few changes and we'll send
17 them over to chambers this afternoon.

18 THE COURT: Okay. Do me a favor. When you send
19 it, if you would be kind enough just to call as soon as the
20 runner is on his way because I know that you're existing
21 facility expires tomorrow and I don't want any hiccup with
22 the debtors' financing or anybody's payroll or anything
23 else. So let us know when it's coming and I will enter it
24 promptly and we'll have it on the docket.

25 MR. NASH: Thank you again, Your Honor.

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THE COURT: Is there anything further?

MR. ATHENAS: Thank you, Your Honor.

THE COURT: We'll stand in recess. Thank you,
counsel.

(Whereupon at 1:14 P.M. the hearing was adjourned)

I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

Date: January 25, 2009

Nancy O. Bowders
Transcriber