

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Case No. 08-12606 (BLS)
) (Jointly Administered)
)
VERASUN ENERGY) Chapter 11
CORPORATION, et al.,)
) Courtroom 1
) 824 Market Street
Debtors.) Wilmington, Delaware
)
) February 5, 2009
) 10:00 a.m.

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

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1 WILMINGTON, DELAWARE, THURS., FEBRUARY 5, 2009, 10:33 A.M.

2 THE COURT: Please, be seated. Mr. Nash, good
3 morning.

4 MR. NASH: Good morning, Your Honor. Pat Nash
5 from Skadden Arps on behalf of the VeraSun Debtors. As Your
6 Honor knows, we're here for our regularly-scheduled February
7 Omnibus Hearing. Your Honor, I do think we're going to have
8 a very short hearing today.

9 THE COURT: Okay.

10 MR. NASH: I'm sure Your Honor's had an
11 opportunity to look at the agenda.

12 THE COURT: I have. We amended the agenda that
13 we got last night for this morning.

14 MR. NASH: Ten items on the agenda, Your Honor.
15 Eight of them have already, as I understand it, been
16 adjourned to March 5, so if it pleases the Court, I will
17 ignore those items for purposes --

18 THE COURT: That's fine.

19 MR. NASH: Okay.

20 THE COURT: I've seen that, and yes, that is
21 fine, so --

22 MR. NASH: Two items up today, Your Honor. One
23 is number ten on the agenda. That's the Debtors' Motion to
24 establish the amount of the intercompany claim related to
25 ethanol sales to the U.S. Bio Debtors to the VeraSun

1 Marketing Debtors.

2 THE COURT: And the GE Railcar objection?

3 MR. NASH: GE Railcar objection, Your Honor, now
4 it's going to be our intention to continue that to March 5.

5 THE COURT: Okay.

6 MR. NASH: I don't think we're going to have any
7 objection to that.

8 THE COURT: Okay.

9 MR. NASH: And that Motion, Your Honor, I'll say
10 two -- a couple things about it. That Motion, as Your Honor
11 may recall, is important, because it enables us to fix, or
12 certainly put a stake in the ground, in terms of what is at
13 issue in the AgStar [ph] complaint.

14 THE COURT: Um-hum.

15 MR. NASH: It's important to do that, Your Honor,
16 because that then enabled us to adequately protect UBS.

17 THE COURT: All right. This was the issue about
18 the ethanol that left -- that was part of their collateral
19 base that left the U.S. Bio entities into VeraSun Marketing
20 for sale throughout and the concern that AgStar had was that
21 the -- their -- basically, they weren't being adequately
22 protected, right?

23 MR. NASH: Correct, Your Honor.

24 THE COURT: Okay.

25 MR. NASH: And then, from UBS's point of view,

1 what did we need to do additional for UBS in order to
2 adequately protect UBS --

3 THE COURT: Right.

4 MR. NASH: -- notwithstanding that litigation.

5 THE COURT: Okay.

6 MR. NASH: GE's objection, Your Honor, I think
7 two-fold. Number one was objecting to any payment at this
8 point in time of intercompany administrative claims, and
9 we're not seeking to do that by this Motion.

10 The other point that GE raised, Your Honor, and it's a
11 fair point and a good point, is the lack of evidence in the
12 Motion itself with respect to how it is the Debtors have
13 valued --

14 THE COURT: Right.

15 MR. NASH: -- the ethanol. And for reasons that
16 I'll get into in a moment, Your Honor, Mr. Bonsal [ph] is
17 back in Sioux Falls working on items related to the sale.

18 THE COURT: I'll bet it's cold there.

19 MR. NASH: It's very cold there, Your Honor.
20 It's warm here, compared to Sioux Falls.

21 So, Mr. Bonsal is in South Dakota. We don't have him
22 here today, Your Honor, but with the agreement of all
23 parties, we'll continue this to March 5 --

24 THE COURT: Okay.

25 MR. NASH: -- hopefully resolve it. If not,

1 we'll be prepared to put on evidence on March 5.

2 THE COURT: Okay.

3 MR. NASH: So, we'll submit an Order to chambers
4 doing that, Your Honor.

5 THE COURT: Okay. Mr. Cobb?

6 MR. COBB: Good morning, Your Honor. Richard
7 Cobb on behalf of AgStar.

8 Your Honor, I spoke with Mr. Nash prior to the hearing
9 with regard to this continuation, and Your Honor, AgStar
10 does not oppose the continuation, based upon the
11 circumstances and the facts that were described to me by Mr.
12 Nash, but we, obviously, have an interest. Your description
13 of the collateral leaving is now quite how my client would
14 put it, but in any event, the -- I understand, Your Honor.
15 But I -- the -- that was not intended to do anything more
16 than underscore AgStar's --

17 THE COURT: Sure.

18 MR. COBB: -- interest in this Motion and that we
19 would like to see it prosecuted expeditiously, but we do
20 understand that, at this time, it does not -- we will not
21 oppose this continuance. Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 MR. WEIS: Good morning, Your Honor. Martin Weis
24 on behalf of GE Railcar. March 5 is fine with us.

25 THE COURT: Okay. Mr. Nash, as we've talked

1 about before, if -- obviously, if the matters resolve,
2 that's fine, or if it can be consensually put up in one form
3 or another, that's fine. Since March 5 is an Omnibus date,
4 if you expect that you have substantial evidence that's
5 going to go on, or if it's really contested, let us know.
6 You know better than I do what your timing needs would be.
7 I'm confident we can accommodate them, but when we have
8 these kind of hearings, I'm always leery about bringing my
9 people in for a variety of matters and not being able to get
10 through the docket, particularly for non-Debtors and for
11 individuals and witnesses. So, I'll expect the Debtor to be
12 able to try to manage that docket. And if you need
13 different scheduling, then just let us know. I think we can
14 take care of it. Okay?

15 MR. NASH: Yes, thank you, Your Honor.

16 The other matter we have up today, Your Honor, is the
17 financing, DIP financing on a final basis from WestLB [ph]
18 for the ASA Silo [ph]. I'm pleased to report, Your Honor,
19 that we are prepared today to enter a Final Order. The
20 Committee has been actively involved in reviewing the Credit
21 Agreement and the Form of Order. We have no issues that we
22 would need to highlight for the Court, other than to point
23 out that what we have, by virtue of this DIP financing, Your
24 Honor, is a \$20 million term loan, budgeted DIP financing
25 facility. It is similar to the AgStar financing, albeit

1 with a slightly more flexible time schedule. It is bridge-
2 to-sale financing. This financing would require us to
3 conduct an auction by March 31. This financing would
4 require us to have a Sale Order entered by April 7. And it
5 would require us to close a sale transaction by April 15.

6 THE COURT: Okay. Do I have you on my calendar
7 for a sale appearance?

8 MR. NASH: You do, Judge. We, I believe, have
9 reserved with chambers March 18 for a sale hearing.

10 THE COURT: Okay.

11 MR. NASH: So, we will --

12 THE COURT: Yes.

13 MR. NASH: We will fit comfortably within the ASA
14 timeframe.

15 THE COURT: Okay.

16 MR. NASH: We --

17 THE COURT: That actually should be fine. Okay.
18 I see that.

19 MR. NASH: We have just two or three -- one's a
20 typo and two are very non-substantive changes to the Form of
21 Order, Your Honor.

22 THE COURT: Changes from what you gave me this
23 morning?

24 MR. NASH: Changes from what we gave you this
25 morning. So, after the hearing, we will send over a Final

1 Order by agreement with the final DIP credit agreement
2 attached.

3 THE COURT: Okay. Does it have to be on the
4 docket today?

5 MR. NASH: It would be good if it's on the docket
6 today, Your Honor.

7 THE COURT: We can get it on the docket. Mr.
8 Wright, if you'd be kind enough just to give us a call when
9 it's coming over so we'll keep an eye out for you?

10 MR. WRIGHT: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. NASH: So, thank you, Your Honor. And then,
13 let me touch upon with respect to, you know, how I see the
14 next month playing out.

15 THE COURT: Sure.

16 MR. NASH: It is our expectation that no later
17 than tomorrow, we will file a Motion to approve bidding and
18 sale procedures with respect to all of the assets, all of
19 the Debtors' assets, Your Honor. It is my hope and
20 expectation that we will have a stalking-horse bidder signed
21 up for certain of the assets. I believe that we will be
22 commencing a naked auction with respect to other of the
23 assets.

24 THE COURT: Okay.

25 MR. NASH: We have worked, and we appreciate Your

1 Honor. We've worked with your chambers. You got -- you --
2 your -- the Court has set aside February 19, I believe, as a
3 bid procedures hearing date.

4 THE COURT: Okay.

5 MR. NASH: And the sale timeline, Your Honor, and
6 I might as well touch upon this now, because I know that
7 there are people listening, and the more notice that they
8 have, the better.

9 THE COURT: Sure.

10 MR. NASH: We would anticipate having the bid
11 procedures hearing again on February 19 at 10:00. Your
12 Honor has already reserved for us a sale hearing date of
13 April -- of March 18, I believe. We anticipate, Your Honor,
14 that the bid procedures that will seek approval of would
15 propose an auction date, I think, of March 16. And it would
16 be our hope and intention to close sale or sales
17 transactions by the end of March.

18 THE COURT: Okay.

19 MR. NASH: I can also tell the Court that the
20 proposed bidding procedures that we will be seeking approval
21 of have already been reviewed more than once by the
22 Committee, commented on by the Committee. And I don't want
23 to steal Ms. Freeman's thunder, but I don't think we're
24 going to have any objection -- well, there'll be certain
25 objections, but in any event, we're including as many people

1 as we can in the process, Your Honor.

2 THE COURT: Somebody will object.

3 MR. NASH: Somebody, we know that, Judge.

4 THE COURT: Okay.

5 MR. NASH: And --

6 THE COURT: You've got to give me something to
7 do.

8 MR. NASH: I agree. Is it -- Your Honor, can we
9 -- can the record reflect -- you were willing to do this the
10 last time when it was hoped and anticipated that we would
11 file a Motion January 27. Can we -- can the record reflect
12 that notice has been shortened, assuming we file a Motion
13 this week for February 19?

14 MS. FREEMAN: Good morning, Your Honor. First of
15 all, thank you for your flexibility this morning. I'm from
16 Akin --

17 THE COURT: I'm happy to oblige.

18 MS. FREEMAN: From Akin Gump Strauss Hauer & Feld
19 on behalf of the Creditors' Committee. The -- this short
20 notice is fine with us. As Mr. Nash said, we have been
21 involved and commenting. I cannot say that we will not have
22 an objection. There is, in fact, one sticking point that we
23 are hoping to resolve, but we are okay with the notice.

24 THE COURT: Okay. Yeah, I will -- one, I'm going
25 to require that if you're not -- if I'm going to give you

1 the 19th, then I want it filed by tomorrow. Can you file it
2 tomorrow? I want you to use your very best efforts.

3 MR. NASH: We will use our very best efforts.

4 THE COURT: Okay. And one of the reasons is that
5 with e-filing, I don't believe it technically changes the
6 notice requirements, but as a practical matter, I take a
7 good deal of comfort from the fact that a lot of people know
8 the moment that you file it, and they can look at it and see
9 it. They're not waiting for a hand-delivered copy or a
10 FedEx'd copy. And again, with the record that we've made
11 today and advised the parties of what the Debtors' intended
12 course is, I'm satisfied that the notice would be
13 sufficient.

14 Let me make an observation, though. It -- obviously,
15 you're certainly familiar with the standards this Court has
16 imposed for bid procedures, break-up fees, bid protections,
17 those sorts of things, and we'll deal with them when you
18 have them. One issue that often comes up with what you've
19 described as a naked auction or -- is a situation where a
20 Debtor proposes break-up fees prospectively, and as I read
21 -- I don't know if I've given you this speech. I just gave
22 it to somebody within the last couple of weeks. But as I --

23 MR. NASH: You haven't, Judge.

24 THE COURT: Oh, okay. We have a lot of sales.

25 MR. NASH: It's -- and it's relevant.

1 THE COURT: Okay. Well, what I often see, and
2 that is that I think is a problem, is the idea that because
3 we will typically approve break-up fees in the one- to
4 three-percent range, that the Debtor will actually
5 prospective approval. And as I, and I think my colleagues,
6 read the *O'Brien* [ph] opinion from the third circuit, I
7 don't think that we can prospectively approve. You
8 understand what the standards are, but I think *O'Brien*
9 requires us basically to look the buyer in the eye and ask
10 whether or not it's a necessary expense.

11 So, we have dealt with that in a bunch of different
12 ways. If you get a stalking horse after the bid procedures
13 are entered, we'll entertain a short -- a hearing on short
14 notice to see if they're insisting on bid protections and
15 that sort of things. But just for your drafting purposes,
16 if that's something that you've got in there, I don't think
17 it's going to fly. Okay?

18 MR. NASH: Okay, Your Honor. One other thing
19 that I'd like to address, if I --

20 THE COURT: Sure.

21 MR. NASH: -- could. We've got an agreed-upon
22 litigation schedule with respect to the AgStar complaint.

23 THE COURT: Okay.

24 MR. NASH: That agreed-upon litigation schedule
25 would've required Motions to Dismiss or Answers to be filed

1 by February 10. The parties, Your Honor, I'm pleased to
2 report, have agreed to kick that schedule out more than a
3 month. The new date for filing of Motions to Dismiss or
4 Answers would be March 20 with subsequent dates then keyed-
5 off of that date. I think it's fair to say that the
6 parties, depending on where we're at in the sale process and
7 what people's recoveries are as we get further into March,
8 maybe we'll be kicking that date out again.

9 THE COURT: Well, you'll know more about what
10 you're fighting for.

11 MR. NASH: We'll know more about what we're
12 fighting over, Your Honor.

13 THE COURT: Okay.

14 MR. NASH: Now one -- Now, UBS's counsel is here
15 in the courtroom, and UBS's counsel, as I think it's fair to
16 say, as a condition of its willingness to kick out the
17 briefing schedule or the litigation schedule, has asked that
18 I make the following representation, and that representation
19 would be that depending upon where a sale may play out and
20 depending upon values that may be achieved as part of a
21 sale, it would be the Debtors' current intention to pay out
22 UBS at the closing of any such sale out of the proceeds of
23 its collateral. It goes without say, Your Honor, given that
24 I have not even filed a Sale Motion, that all parties'
25 rights are reserved with respect to that. Even though it

1 goes without saying, I was asked to say it, so I have said
2 it.

3 Thank you, Your Honor.

4 THE COURT: Mr. Swett, do you have anything to
5 answer? Good morning.

6 MR. SWETT: Thank you, Your Honor. Good morning.
7 Brian Swett on behalf of UBS. Mr. Nash has made the
8 statement on the record to which we agreed, and I have
9 nothing to add. Thank you, Your Honor.

10 THE COURT: Very good. Okay. All right. Well,
11 I appreciate the game plan with where the Debtor is headed
12 over the next 30 or 60 days, and it looks like you've got
13 the dates that are necessary on my calendar already.
14 Obviously, if they need to change, just give us a call, but
15 otherwise, I will look for the Order.

16 Let me make -- so that the record is sufficient, we've
17 moved rather quickly through the matter, but I did have an
18 opportunity to review the Motion. This is obviously a Final
19 Hearing. The Court has previously entered an Interim Order.
20 And I am satisfied that the Debtors have carried their
21 burden under Bankruptcy Code Section 364 and 361 and
22 Bankruptcy Rule 4001 for purposes of entry of the Final
23 Order, and in so ruling, I note that the Debtors have timely
24 filed a Proposed Form of Final Order that has technical
25 changes coming over in the final version. But I did have an

1 opportunity in advance to review that, and I'm satisfied and
2 would be prepared to enter that Order. Okay?

3 Mr. Nash, is there anything further this morning?

4 MR. NASH: Nothing further, Your Honor.

5 THE COURT: Very well. We'll stand in recess.

6 Thank you, Counsel.

7 (Proceedings adjourned at 11:01 a.m.)

8

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

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14 _____
Shelley M. Kohr
Transcriber

11 February 2009
Date

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