

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
VERASUN ENERGY CORPORATION, .  
*et al.*, . Case No. 08-12606(BLS)  
Debtors. . Nov. 3, 2008 (10:05 a.m.)  
(Wilmington)

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

Proceedings recorded by electronic sound recording;  
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1 THE CLERK: All rise.

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

4 MR. CHEHI: Good morning, Your Honor. Mark Chehi of  
5 Skadden, Arps, Slate, Meagher & Flom for VeraSun Energy  
6 Corporation and its affiliated debtors who filed their cases  
7 late Friday, October 31<sup>st</sup>. We want to thank the Court  
8 especially for making itself available on such short notice  
9 here today -

10 THE COURT: Happy to oblige.

11 MR. CHEHI: - and for scheduling the hearing  
12 tomorrow at 11. Before turning the podium over to my Chicago  
13 partner, Timothy Pohl, I want to ask the Court to permit each  
14 of my partners from that office to appear *pro hac* today until  
15 their orders are entered.

16 THE COURT: That's fine.

17 MR. CHEHI: Thank you, Your Honor.

18 THE COURT: And let me make an observation for  
19 anyone else. Mr. Pohl, you can come up. I'm happy to hear  
20 from anybody today irrespective of whether their admission  
21 has been moved *pro hac*. So anybody that wants to be heard is  
22 welcome to step up. Mr. Pohl, good morning.

23 MR. POHL: Good morning, Your Honor. Thank you,  
24 again for accommodating us this morning. If it pleases the  
25 Court, what I thought we would do this morning is begin with

1 sort of an introduction of who we are and particularly spend  
2 a little time on the corporate and capital structure because  
3 it will lay the predicate for the relief that we're going to  
4 be seeking today.

5 THE COURT: Well, let me ask you a question about  
6 what we're doing today.

7 MR. POHL: Uh-huh.

8 THE COURT: I've had an opportunity, and I  
9 appreciate counsel's efforts in getting these documents to me  
10 and I did receive the DIP binder early this morning, and I  
11 appreciate that. And I understand that the debtor is looking  
12 for orders that relate to wages, that relate to shippers, and  
13 then 503(b)(9), which I assume are effectively in a vein of  
14 critical vendor type of things. These are people with  
15 product in transit, and then the debtor is also looking for  
16 its financing. Is the debtor looking for approval of DIP  
17 financing orders all today so we won't have any kind of  
18 interim hearing tomorrow?

19 MR. POHL: On the financings, yes, Your Honor.

20 THE COURT: That seems a bit ambitious.

21 MR. POHL: It is, Your Honor, and I think when we  
22 walk through it what we can articulate for you is why it was  
23 so critical to get in today as opposed to tomorrow.

24 THE COURT: Well, no, I understand that, but as a  
25 general proposition, and I'm sure you know this, but as a

1 general proposition, we often have these emergency-emergency  
2 hearings on day one to deal with things like we just  
3 described, and typically what will come in then is either a  
4 cash collateral or a financing order that provides for the  
5 relief that's necessary to get you through until Tuesday, and  
6 I understand that that may be less than ideal for purposes of  
7 what you can communicate to the vendor community, but I do  
8 have some concerns about the sufficiency of notice here for  
9 parties given that at least - I don't know what time it got  
10 filed. I assume it got filed this morning.

11 MR. POHL: It did, Your Honor.

12 THE COURT: Okay. So that I do have some concerns  
13 about that, but I'm happy to move forward.

14 MR. POHL: Okay, and why don't we do this, if I  
15 could just suggest, why don't we go through it -

16 THE COURT: Yeah.

17 MR. POHL: - let's talk about it, and then, because  
18 I think you're going to find that (a) it's largely consensual  
19 -

20 THE COURT: Okay, that helps.

21 MR. POHL: In fact, completely consensual -

22 THE COURT: Okay.

23 MR. POHL: Number two, maybe we can come up with  
24 some sort of a negative notice if someone wants to come back  
25 in and object, they can, but I think - Why don't we go

1 through it first and then see -

2 THE COURT: Sure.

3 MR. POHL: - what pleases Your Honor.

4 THE COURT: Right and I did not want to - I'm not  
5 looking to throw a wrench into the process. I was not  
6 certain from the papers, I guess in fairness, just because of  
7 our prior practice, how we've dealt with this, that we often  
8 have kind of an interim financing or cash collateral that  
9 gets those numbers paid until the next day, and there were -  
10 It was not entirely clear from the papers that the financing  
11 facilities themselves and the priming structures are  
12 consensual, and obviously that would weigh heavily into any  
13 decision I would have to move forward today on anything  
14 expansive beyond what you absolutely need. Why don't we turn  
15 to the business.

16 MR. POHL: Thank you, Your Honor. Just a couple of  
17 introductory things, and I won't repeat all the background  
18 paragraphs in all the pleadings that we filed. VeraSun  
19 entities are the country's and, I think, the world's largest  
20 single ethanol producer. They operate 14 plants that are up  
21 and running today across eight states. There are a handful  
22 more that are either completed and not yet running or in  
23 various stages of -

24 THE COURT: By year end.

25 MR. POHL: - completion by year end, is the plan,

1 assuming there's sufficient capital to bring them on line.  
2 This company consumes about 5 percent of the United States'  
3 annual corn crop. That's a lot of corn.

4 THE COURT: That's a lot of corn.

5 MR. POHL: It's a lot of corn. Annual revenues for  
6 this company *pro forma* for fiscal 2008 are slated to be in  
7 the neighborhood of \$4 billion, and so this is quite a large  
8 company, and what I'd like to do next, Your Honor, is turn  
9 your attention to that chart.

10 THE COURT: Okay.

11 MR. POHL: And we have handouts of this for others,  
12 but this company is really the product of three separate  
13 companies being put together with very separate balance  
14 sheets and capital structures.

15 THE COURT: Right. I read about the mergers or the  
16 acquisitions, and it did seem to me like that they seemed to  
17 retain some separate character, given the financing  
18 structures as well.

19 MR. POHL: They absolutely have, and that's exactly  
20 what has led to some of the complexity around the various  
21 financings that we needed to try and put in place.

22 THE COURT: Okay.

23 MR. POHL: First, Your Honor, just staring at the  
24 chart over there, the yellow box is the holding company.

25 THE COURT: I see.

1 MR. POHL: That owns everything.

2 THE COURT: Right.

3 MR. POHL: And that's the company that is the  
4 primary borrower under a \$125 million secured facility from  
5 UBS that's secured basically by working capital of what we  
6 call the VeraSun silo.

7 THE COURT: Thank you, okay.

8 MR. POHL: So, we think about this company as three  
9 silos, no pun intended, three groupings of companies. The  
10 grouping on the left, which is sort of that bluish color, we  
11 call those the ASA debtors.

12 THE COURT: Okay.

13 MR. POHL: Then you have the two shades of green in  
14 the middle, we call those the VeraSun debtors, and they're  
15 two different shades because the dark colored green companies  
16 own the plants. The light shaded ones are other operating  
17 entities, and depending on whether you're looking at the  
18 light green or the dark green depends on exactly where the  
19 credit is at VeraSun. So, all of the companies are guarantor  
20 of the public bonds, both secured and unsecured, all of the  
21 green companies.

22 THE COURT: Okay.

23 MR. POHL: But only the dark green companies are  
24 parties to the UBS facilities.

25 THE COURT: Got it.

1 MR. POHL: Okay? And then - So that's what we call  
2 the VeraSun silo and then over on the far right are the  
3 purple companies under the orange U.S. BioEnergy -

4 THE COURT: U.S. BioEnergy.

5 MR. POHL: That's the BioEnergy silo, and the ASA  
6 silo was acquired in '07 and the BioEnergy silo was acquired  
7 in April of '08. So that's the corporate structure. Now,  
8 let me tell you how the capital structure works. Starting  
9 with the ASA silo -

10 THE COURT: Right.

11 MR. POHL: - there's a facility agented by West LB,  
12 senior secured facility secured by all the assets in the ASA  
13 silo, PP&E as well as working capital, and that's a \$275  
14 million facility. I can't tell you off the top of my head  
15 the exact balance today -

16 THE COURT: Okay.

17 MR. POHL: - but it's about there. That's how that  
18 silo was financed. When you look at the VeraSun silo, you  
19 have three principal credit facilities. You have the  
20 unsecured bond debt of \$450 million.

21 THE COURT: Right.

22 MR. POHL: You have \$210 million of secured bond  
23 debt, and that debt is basically secured by the plants, the  
24 PP&E, secured by everything other than what secures the UBS  
25 facility. And the third facility is the UBS facility, and

1 that's secured by working capital assets, so cash inventory  
2 and receivables. So you have a split there.

3 THE COURT: Okay.

4 MR. POHL: And then over, just to make it a little  
5 more complicated, over on the BioEnergy side, all of those  
6 purple companies have standalone project financings, not  
7 cross-collateralized. AgStar is the agent for six of the  
8 seven project financings, and so they financed Albert City  
9 and Woodbury and Jamesville and Central City and Hankinson  
10 and Dyersville, and then, three down on the left-hand column  
11 of the purple boxes you see U.S. BioMarion.

12 THE COURT: Yup.

13 MR. POHL: While it's in that silo it's financed  
14 differently. It's not financed by AgStar. It has its own  
15 term loan secured by the PP&E, and its own revolver secured  
16 by working capital assets. And all of these facilities, none  
17 of them are cross-collateralized at all.

18 THE COURT: Okay.

19 MR. POHL: Okay? So that's the pre-petition capital  
20 structure. Now let's move away from that back to sort of  
21 recent events to get us to today. Essentially recent events  
22 have drained all of this company's available liquidity,  
23 volatile corn and ethanol prices over the summer and the  
24 spring. This business is very sensitive to commodity  
25 fluctuations -

1           THE COURT: You know, let me ask you a question  
2 about that. I saw that in the affidavit, and I thought it  
3 was interesting that the company is, as a general  
4 proposition, unable to pass off on its customers increases in  
5 its commodity cost. Why is that?

6           MR. POHL: Well, you sell ethanol to big oil.

7           THE COURT: Right.

8           MR. POHL: You sell it to Exxon, you sell to Shell,  
9 you sell it to Mobile, and, you know, they have a lot of  
10 leverage.

11          THE COURT: Okay. It's like Wal-Mart.

12          MR. POHL: Yeah, it's like Wal-Mart.

13          THE COURT: Okay.

14          MR. POHL: So, that's number one. A lot of  
15 commodity price fluctuation in recent times. Number two, as  
16 you can tell, I didn't give you the numbers of all of these  
17 facilities, but there's a lot of debt.

18          THE COURT: Yeah.

19          MR. POHL: Okay? Everything is pledged, over a  
20 billion and a half dollars of debt when you add it all up, so  
21 a highly levered company as a result of these acquisitions.  
22 Hedging losses this past summer, you may have read about this  
23 in some of the articles that came out, corn prices were  
24 extremely high in June, July. People thought they were  
25 rising. The company hedged in order to not expose themselves

1 and then it went exactly the other way. So, big losses on  
2 hedging, drained a lot of cash, and then you had trade  
3 constriction. All these things were happening at the same  
4 time, and the company was out in the capital markets looking  
5 for equity -

6 THE COURT: It's not a happy place right now.

7 MR. POHL: Yeah, so you know about the capital  
8 markets as well as I do. Equity capital raises died, debt  
9 capital raises died, asset sales to bring in liquidity died.  
10 Everything fell through. So, it was - I know people say this  
11 all the time, if you get here, you usually think you're the  
12 victim of the perfect storm, so I'll say it again, we were.  
13 And so that's what was happening over the summer and the  
14 fall. The last three weeks were really particularly dire for  
15 the company. We began work on contingency planning. The  
16 company hired Rothschild to go out and try to secure DIP  
17 financing as a way to access liquidity. Last Tuesday,  
18 Debtwire storey broke. We had been talking to Ableco about a  
19 senior secured priming facility because that the was the only  
20 thing and we'll present some evidence later in the hearing,  
21 Your Honor, if Your Honor wants it with respect to the  
22 efforts to go out and obtain third-party financing, but  
23 essentially we had not many options, and we were talking to  
24 them about a senior secured facility that would have primed  
25 everybody. It would have included some significant roll-up

1 and was not exactly cheap money. That was what we were doing  
2 heading into Tuesday night. Tuesday night the Debtwire story  
3 broke. Wednesday morning everybody read that story. Trade  
4 credit started to constrict, what little was left evaporated.  
5 Our working capital lender who we were on daily applying  
6 reset borrowing from every single day said, No more, we're  
7 not sure you can make your solvency rep, and we woke up, we  
8 got to the end of the day Wednesday trying to figure out how  
9 we were going to pay payroll and how we were going to keep  
10 checks from bouncing on Thursday and Friday with no DIP  
11 financing from anybody, and not one penny to pay a commitment  
12 fee to anybody. So we did not have any available cash to  
13 close out the Ableco financing, which required the payment,  
14 as you would expect of a commitment fee. So that financing  
15 died. So, fortunately, with some help and cooperation from  
16 UBS, our working capital lender in the VeraSun silo, we were  
17 able to arrange for them to continue to advance certain  
18 funds, to clear certain checks, and pay for critical items to  
19 stay in business on Thursday and Friday while we tried to  
20 cobble together some financing to bring into the Bankruptcy  
21 Court. Starting really in earnest Friday morning, we started  
22 working with a lot of the people in this room to try to pull  
23 together financings and uses of cash collateral to enable us  
24 to continue operating starting today. The company needs to  
25 access portions of this liquidity today, otherwise it's going

1 to have to start shutting down plants. We have zero dollars  
2 in the bank.

3 THE COURT: Let me ask you a question, take a step  
4 back from this, but I'm going to ask you to either correct or  
5 confirm an understanding of mine -

6 MR. POHL: Sure.

7 THE COURT: - at least from other industries and  
8 other businesses. These are basically distilleries; right?

9 MR. POHL: Yup.

10 THE COURT: Refining distilleries -

11 MR. POHL: Yup.

12 THE COURT: - effectively. I have run into this  
13 kind of business. I assume that you cannot shut these things  
14 down and start them back up in real time.

15 MR. POHL: It is not easy - You're right, Your  
16 Honor. You have to buy corn every day to keep the plants  
17 running to make ethanol, and when you stop, depending on the  
18 weather and where it is, you have to buy natural gas every  
19 day. Gas is what fires the plants up, and I'm not going to  
20 get this exactly right, and we do have the company's chief  
21 financial officer here if you want to spend a little more  
22 time on this, you know, now or later -

23 THE COURT: We'll probably do that tomorrow.

24 MR. POHL: - but I think we'll probably do it  
25 tomorrow, right.

1 THE COURT: Okay.

2 MR. POHL: Okay. But you are exactly right, Your  
3 Honor, you can't exactly just shut them down and start them  
4 up tomorrow. Pipes freeze. You have to lock the door behind  
5 you. You have to have security. Exactly.

6 THE COURT: Right. I assume that this was the case  
7 and that it was implicit in the affidavit that the need for  
8 the immediate relief that you're looking for is basically  
9 because you can't suspend operations of these facilities.

10 MR. POHL: That's right, that's right.

11 THE COURT: And I've seen and my experience - I have  
12 no experience with this particular industry, but I've  
13 certainly seen the petrochemical industry and the steel mills  
14 and things like that, and you just don't shut them down and  
15 start them again.

16 MR. POHL: You don't. Not only that, Your Honor,  
17 but we're sending people to work every single day. People  
18 get paid in arrears.

19 THE COURT: No, I understand.

20 MR. POHL: You're not comfortable letting them go  
21 tomorrow and work if you don't think you have liquidity to  
22 pay them for tomorrow.

23 THE COURT: No, that I understand.

24 MR. POHL: So, that's pretty important too.

25 THE COURT: Yeah, my - the thrust of my question was

1 really the mechanical one about how the facilities work.

2 MR. POHL: You are absolutely correct.

3 THE COURT: Okay.

4 MR. POHL: So, what we ended up doing over the last  
5 three days is working with each respective secured lender to  
6 provide either access to cash collateral and/or, depending on  
7 whom I'm talking about, and I'll go through it with  
8 precision, incremental DIP financing, and conceptually, Your  
9 Honor, while there are a lot of different financings and the  
10 words aren't all parallel, every lender wanted to draft their  
11 own order, and so they're not all uniform in the way that  
12 they phrase things, conceptually, here's what we have:  
13 Conceptually we have each lender funding their own assets,  
14 not cross-collateralizing - there's some exceptions to this  
15 and I'll get to those, but generally speaking, not cross-  
16 collateralizing outside of the silos. There's no exceptions  
17 to that. So, the ASA silo is being funded only by ASA  
18 assets. The VeraSun silo is being funded with liens only on  
19 the VeraSun assets, and the same is true plant by plant over  
20 at BioEnergy. So, each separate facility is providing cash  
21 collateral and in some cases DIP usage only to be used for  
22 that silo and only secured by liens against that silo's or  
23 that company's assets, and the same with super-priority  
24 claims, only against those debtors. So, no cross-  
25 pollenization of claims or liens across the silos, and no use

1 by the debtors of new money provided by a lender in any silo  
2 to fund anything in any silo other than a corporate overhead  
3 allocation pursuant to a budget, which has been agreed upon.  
4 Okay?

5 THE COURT: Actually I was going to ask that. I  
6 don't believe I saw a budget. Did I miss it in the binder?

7 MR. POHL: No, you didn't -

8 THE COURT: Okay.

9 MR. POHL: - because it was still a work in  
10 progress at the time that that was filed.

11 THE COURT: That's why I didn't call and ask for it.  
12 It seemed to be unlikely that I wouldn't have seen it.

13 MR. POHL: There will be agreed budgets attached to  
14 the orders.

15 THE COURT: Okay.

16 MR. POHL: The one place where there's a little  
17 cross-pollenization of liens is the VeraSun silo, and that's  
18 because we really have two separate deals going on there.  
19 Number one, we have a subset of secured bondholders providing  
20 DIP financing, and that DIP financing is essentially going to  
21 be secured by senior secured priming liens on the assets that  
22 the bonds have, i.e., the PP&E, and they're going to get -  
23 "they" being the DIP lenders as well as adequate protection,  
24 the bondholder who are being primed, and I'll get to the  
25 adequate protection packages in a second, junior liens,

1 silent junior liens on the working capital assets that are  
2 pledged to UBS. UBS is going to provide the ongoing use of  
3 cash collateral, and they're going to get replacement liens  
4 on post-petition inventory and receivables senior to any of  
5 the liens being granted to the PP&E lenders, the bondholders,  
6 and junior silent liens on the PP&E. So nobody's priming  
7 anybody outside their own asset class. The only priming  
8 that's going on is that the bondholders' DIP money is going  
9 to prime the bondholders' pre-petition liens. The group of  
10 bondholder lenders that are making this loan, hold over 50  
11 percent of the pre-petition bondholder debt.

12 THE COURT: Okay.

13 MR. POHL: The other thing that is going to happen,  
14 but it is not happening - I'm going to tell you what we're  
15 not asking for until final orders: Number one, there are no  
16 506(c) waivers at the interim stage. People have asked for  
17 it subject to entry of a final order, and we'll see what the  
18 objections are and what the U.S. Trustee's position is and  
19 what Your Honor's view is but we're not asking for 506(c)  
20 waivers today anywhere. Number two, no liens on avoidance  
21 actions or the proceeds thereof for anybody either for DIP  
22 financing or adequate portection. The bondholder DIP  
23 facility will be the one facility that includes the concept  
24 of a roll-up.

25 THE COURT: On the final.

1           MR. POHL: On the final. No roll-up being sought  
2 today, but the bondholders who are providing the DIP  
3 financing are seeking -

4           THE COURT: A hundred and ten percent of money  
5 advanced.

6           MR. POHL: Yeah, it's what they hold but capped at,  
7 you know, they hold a certain amount of bonds today. They  
8 want to roll up their pre-petition bonds. The math is, it's  
9 110 percent of the new money, and they've capped themselves  
10 at that. If they went out and bought more bonds tomorrow,  
11 they wouldn't be able to roll up all their bonds.

12          THE COURT: Okay.

13          MR. POHL: None of that is being sought today. Any  
14 of the fees that we're proposing to pay are staged as  
15 percentages against what gets authorized in the interim and  
16 then finals of interim relief is entered for somebody and  
17 they have a fee, they'll get that fee multiplied by the  
18 principal that they're advancing on an interim basis and the  
19 upsides of the final order if it's granted, the fees get  
20 staged as the money becomes available. That's an overview of  
21 how conceptually these financings work. So when I said at  
22 the beginning, Your Honor, that I think we take the view that  
23 these are consensual, I can't tell you that the entire  
24 bondholder community is here in court today consenting to the  
25 priming of their liens by the new money coming in from some,

1 but I can tell you that those who are providing the financing  
2 comprise over 50 percent of the debt.

3 THE COURT: May I ask you a question though about  
4 those who are not participating in the DIP facility and  
5 therefore are being primed, and again, I'm not surprised that  
6 they're not here today, but can you describe for me what if  
7 any adequate protection the debtor is proposing to provide.

8 MR. POHL: I can. And this is actually going to be  
9 true everywhere because technically, of course, for example  
10 in the AgStar facilities over in the purple boxes, the new  
11 money is going to prime the old money on that plan. The same  
12 thing over at - I'm going to get to ASA in a second. Today  
13 ASA, West LB is only cash collateral. We are anticipating  
14 coming back later with actual DIP financing.

15 THE COURT: Later today?

16 MR. POHL: No, not later today. I would have been  
17 dead or otherwise you would have killed me, so, no.

18 THE COURT: Mr. Pohl, you've got a head of steam  
19 going, so I didn't want to take anything for granted.

20 MR. POHL: No, no, no, that's a fair question, but I  
21 just - because it's important for people to understand that  
22 part of why we think all of this works is because while not a  
23 hundred percent of what we think we're going to have is  
24 before the Court today and there are actually some DIP  
25 financings that we think are not covered by this motion, and

1 we're going to come back to you soon, probably before the  
2 final hearing on separate motions to do classic, interim, and  
3 final that includes what we hope to have happen based on our  
4 conversations with West LB to date over in the ASA silo.

5 THE COURT: Okay.

6 MR. POHL: Everybody's pre-petition debt would  
7 continue to receive the payment of post-petition interest at  
8 the non-default rate subject to the full panoply of rights,  
9 reservations so people can later come back in if someone  
10 thinks that someone was under-secured, the 506(c)  
11 reallocation. People have their rights to come in and ask to  
12 accrue or be paid default interest.

13 THE COURT: Subject to everyone's rights, reserved  
14 rights, especially the debtors. Is it the debtors'  
15 understanding that the secured lenders in these cases are  
16 over-secured?

17 MR. POHL: On a going-concern basis, yes.

18 THE COURT: Okay.

19 MR. POHL: Yes, it is. So the pre-petition secured  
20 bondholder debt, their adequate protection package is, number  
21 one, current payment of post-petition interest. Number two,  
22 replacement liens on post-petition assets of their same asset  
23 class junior to the DIP. Replacement liens - not replacement  
24 liens, but adequate protection liens on the working capital  
25 assets that secure the UBS facility but junior to the pre-

1 petition liens of UBS on those assets and junior to adequate  
2 protection liens granted to UBS on those assets. So bottom  
3 of the waterfall, replacement liens on the PP&E, they do not  
4 have liens on those assets today, that plus current payment  
5 of post-petition interest.

6 THE COURT: Okay.

7 MR. POHL: Okay? That's essentially the same  
8 adequate protection package for everybody. So whether or not  
9 you're talking about usage of cash collateral, so for UBS  
10 their adequate protection package from the continued use of  
11 their cash collateral includes continued payment of post-  
12 petition interest, replacement liens on their same asset  
13 class generated post-petition, inventory and receivables that  
14 we create. We buy corn next month, they're going to get a  
15 lien on that corn. And junior liens, bottom of the waterfall  
16 on the PP&E of the VeraSun debtors, junior to all the liens  
17 granted to the bondholders both pre-petition and post-  
18 petition, as well as, at least for UBS, and I think this is  
19 important, as well as continued monitoring of their  
20 collateral. So, we borrow - have been borrowing pre-petition  
21 from them based on a borrowing base for inventory and  
22 receivables, that borrowing base gets submitted every single  
23 day. We're going to continue to submit it every single day  
24 so they will be able to monitor every day. Our compliance  
25 with the borrowing base, to the extent that they think we're

1 out of formula or otherwise they're not satisfied that  
2 they're protected enough, they have the right to come in and  
3 ask for additional adequate protection and we have our rights  
4 to object, but the hope is that we will continue to stay in  
5 formula, and that won't be necessary, but if not, we have not  
6 waived our right to ask you to continue to approve use of  
7 cash collateral even if they're out of formula. We think we  
8 could demonstrate the propriety of that if we had to. They  
9 haven't waived their right to come in and say, No, we don't  
10 think it's enough.

11 THE COURT: Okay.

12 MR. POHL: That is a pretty good overview of how the  
13 facilities work. I haven't walked you through the details of  
14 interest rates and fees. They're contained in the documents.  
15 I'm happy to do that if you want me to walk through it.

16 THE COURT: Not at this point.

17 MR. POHL: Okay.

18 THE COURT: And we'll - I guess I want to turn - I  
19 understand the financings, and as I said, I did go through  
20 them as best I could this morning, and I certainly understand  
21 the circumstances under which you've been operating so I  
22 don't mean that a slight, but I mean, I did look quickly at  
23 the rates and fees, and again, it is what it is.

24 MR. POHL: Yeah, and I think - Your Honor, Mr.  
25 Augustine is here from Rothschild.

1 THE COURT: Okay.

2 MR. POHL: He is certainly prepared to testify about  
3 any of the factual things that you sort of heard me recite,  
4 as well as little more detail about the history of going out  
5 and searching for third-party financing and then how we  
6 negotiated these deals. His view as to how these deals  
7 compare to what could be available in the marketplace for  
8 these debtors under these circumstances, the good faith, the  
9 arm's length dealings, et cetera, et cetera. I can certainly  
10 tell you, Your Honor, that all of these orders and financings  
11 were pretty heavily negotiated even though the time frame was  
12 short, and in fact, I'm sure that the orders that you have in  
13 front of you, there's minor word smithing still going on.  
14 I'm aware of some blacklines that will need to be handed up,  
15 but I can also tell you that it is all - you know, there's  
16 definitions that don't quite work or some word smithing.  
17 There's nothing substantively changing from what I described  
18 or what was submitted last night based on the drafts that we  
19 had at that time.

20 THE COURT: Okay.

21 MR. POHL: So, it's really, you know, Your Honor's  
22 pleasure at this point. Mr. Augustine is here. I could put  
23 him up for some brief testimony.

24 THE COURT: No, I don't believe that I need  
25 testimony. I think I'd be happy to hear before we turn to

1 the other motions that the debtor has, I'd be happy to hear  
2 from any of the lenders. I'm still not a hundred percent  
3 sure about how we're going to proceed. I accept your  
4 representations. I understand the financing a bit better  
5 than I did about a half an hour ago.

6 MR. POHL: Yeah.

7 THE COURT: But - We've got to fix that clock. But  
8 I'd like to hear from some of the other lenders before we  
9 figure out exactly what our game plan is for purposes of  
10 today and tomorrow.

11 MR. POHL: Sure, thank you, Your Honor.

12 THE COURT: Okay? Mr. Stratton?

13 MR. STRATTON: Good morning, Your Honor, David  
14 Stratton, Pepper Hamilton for AgStar Financial Services. Your  
15 Honor, I'd like to introduce my co-counsel, Phillip Kunkel  
16 with the Gray Plant Moody firm. I don't know if we have  
17 anything to add to the recitation. I think based on the  
18 extensive knowledge I have in this matter, gained over the  
19 last two days, that Mr. Pohl recited accurately our piece of  
20 the - we're the lenders to the purple entities with the one  
21 exception, which makes it even more complicated. And I don't  
22 think we have anything more to add to that.

23 THE COURT: Okay.

24 MR. STRATTON: Thank you. Oh, we have, I think,  
25 finalized our DIP orders and term sheets and so we're ready -

1 we hope we're ready to go today.

2 THE COURT: Okay.

3 MR. STRATTON: Thank you.

4 MR. ZINK: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. ZINK: I'm Ted Zink with Chadbourne & Parke on  
7 behalf of West LB.

8 THE COURT: Good morning.

9 MR. ZINK: And we're the lenders to the blue group  
10 of companies on the far left. I likewise don't have anything  
11 much to add to Mr. Pohl's representations to the Court. They  
12 are, as we understand them to be, and there's one minor  
13 change to our order, but we have agreement on that, and  
14 that's with respect to the length of time that they can use  
15 our cash collateral as opposed to November 30, it's November  
16 14, subject to an extension to be granted by the agent  
17 without further order of the Court.

18 THE COURT: Okay, good.

19 MR. SWETT: Good morning, Your Honor. Brian Swett,  
20 Winston & Strawn on behalf of UBS which as Mr. Pohl described  
21 is the working capital lender to the VeraSun silo. Mr. Pohl  
22 accurately and fairly described the agreement that we have  
23 with respect to the use of cash collateral. I have nothing  
24 to add but would make one clarification as to the  
25 relationship between the consensual use of cash collateral

1 and DIP financing within the VeraSun silo. As we read the  
2 term sheet for the DIP financing, it indicated that the DIP  
3 lender or the agent for the DIP lenders would have a first  
4 priority lien against all cash accounts. Both Mr. Pohl as  
5 well as the counsel for the agent for the DIP lenders in the  
6 VeraSun silo have confirmed that those liens will not apply  
7 to cash accounts into which the proceeds of working capital  
8 are deposited but will only apply to those accounts into  
9 which the term loan DIP proceeds will be funded. So, with  
10 that clarification, I thank Mr. Pohl for his fair and  
11 accurate description.

12 THE COURT: Okay. Mr. Davis.

13 MR. DAVIS: Good morning, Your Honor. I rise just  
14 to say that I represent the noteholders who are providing the  
15 DIP financing to the VeraSun group. I think Mr. Pohl did a  
16 very nice job and accurately described our financing, and I'm  
17 prepared also to clarify that to the extent that there's any  
18 changes necessary to the order or the term sheet which  
19 reflect the lien priorities in the cash accounts, the counsel  
20 who stood before me accurately described our understanding of  
21 the priorities in those accounts. The only clarification I'd  
22 like to make to what Mr. Pohl had mentioned is that the  
23 noteholders who will be providing the DIP financing own  
24 approximately 50 percent, slightly under 50 percent - I'm not  
25 sure it makes a difference for today's purposes, but just for

1 purposes of the record, I just wanted to make that clear.

2 THE COURT: Okay. Ms. Fatell.

3 MS. FATELL: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. FATELL: Bonnie Fatell from Blank Rome on behalf  
6 of Dougherty Funding. We are the lender to the sole purple  
7 entity that is not part of the other group funding. We have  
8 been negotiating over the weekend for use of cash collateral  
9 to approximately two and a half million dollars. We have not  
10 finalized, there are still a lot of blanks in the stip, but  
11 most importantly we have not yet gotten approval from the  
12 participants. There is a call at 2 o'clock today. We're  
13 hoping to get the approval so, to the extent we finalize an  
14 order and submit it today, it would be conditional on the  
15 requisite approval from the participants.

16 THE COURT: Okay. Ms. Heilman?

17 MS. HEILMAN: Good morning, Your Honor. For the  
18 record, Leslie Heilman, Ballard Spahr Andrews & Ingersoll.  
19 Ballard Spahr represents the First National Bank of Omaha.  
20 We are the debtors' cash management bank. I rise before you  
21 at present because there may be an issue with respect to  
22 priming with respect to the cash management accounts. Your  
23 Honor, my client, First National, does have a control  
24 agreement, a pre-petition control agreement concerning the  
25 deposit accounts with UBS and the debtors. It does give UBS

1 a first lien on all the deposit accounts with the exception  
2 of one account. One account was exempted from that first  
3 lien and is an account that is a money market account for a  
4 letter of credit that was issued by First National Bank of  
5 Omaha, and First National Bank does maintain a first lien on  
6 that account. It is second in line with respect to all other  
7 deposit accounts at First National. So, Your Honor, I rise.  
8 Our first priority is that the cash management order get  
9 entered today, however, we do have a concern with respect  
10 that UBS and the debtors are going to abide by that deposit  
11 control agreement and the carve-out for that one account as  
12 well as we'd like some clarification on the record. It does  
13 seem that everything that was pre-petition is going for a  
14 post-petition, but there seems to be some lien priorities and  
15 cash accounts, so we do want some clarification on the record  
16 that there is no priming lien on that deposit account that  
17 was carved out at the control agreement, as well as, Your  
18 Honor, there was an irrevocable standby letter of credit  
19 agreement that was issued by UBS, and for, I believe, about  
20 \$10 million. We also want to make sure that that is going  
21 forward and that that will be abided by as well.

22 THE COURT: Okay.

23 MS. HEILMAN: Thank you.

24 THE COURT: Mr. Pohl, can you actually respond to  
25 that particular issue?

1           MR. POHL: I can confirm all of those things are  
2 correct.

3           THE COURT: Good, okay.

4           MR. POHL: Thank you.

5           THE COURT: I'd like to hear from the UST. Mr.  
6 Kenney? You've got a busy weekend.

7           MR. KENNEY: Good morning, Your Honor. Mark Kenney  
8 on behalf of the United States Trustee. It's really  
9 interesting, Your Honor, there's a lot of moving parts here.  
10 I think because they're dealing with so many different  
11 lenders, I've had a brief opportunity to look at the orders  
12 and cash collateral orders. I have not had a chance to look  
13 at the actual financing agreements. I know from the time I  
14 got in this morning, as soon as I finished downloading it, of  
15 course, a bound copy arrived. I can see little bits of  
16 disharmony among the different packages that I think we do  
17 need to sit down jointly and try to harmonize certain  
18 provisions. I think a lot of the intent is the same among  
19 the different lenders, it's just, as Mr. Pohl said, word  
20 smithing. I did have a couple of issues with respect to -  
21 Well, one, the timing of it, we did have discussions with  
22 debtors' counsel last week about the timing issues and  
23 especially the fact that just from the time of the filing of  
24 this case, the ability to get adequate notice to different  
25 creditors of this hearing, dealing with that in contrast to

1 their need to have cash to basically buy corn for tomorrow or  
2 have to shut down their plant, which, as Your Honor said, is  
3 - I think you kind of foreshadowed it that, while  
4 theoretically you could shut down the plant, it's practically  
5 an impossibility. The cost of essentially mothballing a  
6 plant and then reopening it would be prohibitive and would  
7 probably ultimately be very harmful to the estate. So, we  
8 understand the timing issues and we discussed with the  
9 debtors obtaining very, very limited relief today, basically  
10 just enough to kind of keep the fires going until tomorrow.  
11 I think the only - Having looked at the DIP orders, the only  
12 issue that I'm going to have to harmonize with people, and  
13 I'm hoping people agree to this is, is aside from the 506(c)  
14 things which I think it just kind of disconnects internally  
15 within orders where one part of it says they get it now and  
16 another part said we don't get it now. We can get it final,  
17 and the other thing is -

18 THE COURT: Well, I'm satisfied that the record is  
19 pretty clear on that.

20 MR. KENNEY: I think it is, Your Honor, and just  
21 harmonizing the look-back periods, if we can get everybody to  
22 agree that it's - the look-back period applies to any party  
23 in interest who has requisite standing and that during the  
24 challenge period, that would apply to any trustee in the  
25 cases and it will be 60 days from Committee formation, so,

1 and for all other parties' interest, 75 days, and I did see  
2 that language in a couple of places, Your Honor, and I think  
3 it's just a question of if other people agree to it, it's the  
4 final word smithing that goes into everything.

5 THE COURT: Okay.

6 MR. KENNEY: Okay, and Your Honor did raise one  
7 issue about the other noteholders because apparently it's now  
8 slightly under 50 percent and don't know if this is feasible  
9 because I don't know who's controlling the decision on those  
10 notes, but obviously, to the extent that any other noteholder  
11 wanted to participate in that, I don't know if the ones who  
12 are actually - if the two noteholders who are funding the  
13 minority, the slightly under majority interests, let's call  
14 it, if they want to allow other people to participate in that  
15 because I think that would probably be the primary interest  
16 in terms of somebody who's not already a participant, simply  
17 would they be allowed to participate if they wanted to.

18 THE COURT: Okay.

19 MR. KENNEY: And I think, obviously, given the short  
20 notice and effect that these are publicly held, that might be  
21 kind of hard to track down.

22 THE COURT: Okay. Does anyone else wish to be heard  
23 before I hear from the debtor? Okay. Mr. Pohl?

24 MR. STRATTON: Your Honor, one other thing that Mr.  
25 Kunkel whispered in my ear about, and we think you should be

1 aware of. In terms of the emergent nature of this hearing  
2 and the need to have DIP financing in place today, and it  
3 went to your question about shutting down what is essentially  
4 a big pot of corn being cooked into alcohol, you can't just -

5 THE COURT: Oh, I know about distilling. Wondering  
6 why you're wasting all this in the fuel system instead of  
7 putting it into charred-oak barrels.

8 MR. STRATTON: Yeah, you just don't flip the switch  
9 and the corn stops turning into mash alcohol. But on the  
10 other hand, if the worse were to happen and word got out that  
11 these plants might shut down, the farmers who grow the corn  
12 are never going to ship and they won't resume shipping  
13 without getting paid ahead of time, which I don't know all  
14 that much about the case, and I'm going to guess Mr. Pohl  
15 will agree me though that that would be just a disaster and  
16 the going concern value is the issue here, so, we need to  
17 keep that foremost in mind, so we thought you should have  
18 that in front of you too.

19 MR. POHL: And, Your Honor, if I just could, a  
20 couple of things to add. One, and I couldn't agree with Mr.  
21 Stratton more. Two, I can't believe there's going to be any  
22 problem with the harmonizing as it relates to 60 and 75 days  
23 and when you start counting, and I can dare somebody to  
24 object to that, and because it's in everybody's order in some  
25 version already. And lastly, in terms of notice, Your Honor,

1 I mean, we knew when we filed Friday evening that we were  
2 going to be asking the Court to approve some type of  
3 financing today, and although we didn't know exactly how it  
4 was going to be pieced together, we did send out a fairly  
5 detailed notice at that time.

6 THE COURT: I saw that.

7 MR. POHL: In order to try to deal with the most  
8 notice that we could give. It was an over-inclusive notice.  
9 It said we might be asking for things that would have been  
10 much more a confrontational or adversarial than what we're  
11 actually doing today. We said we might be seeking to prime  
12 people over their objection, use cash collateral over their  
13 objection, roll-up debt on the first day, all stuff that at  
14 the time that we filed that notice was what was on the table.  
15 So, I think from a notice point of view, we did the best that  
16 we could. As I said earlier, we've essentially been talking  
17 to almost all of the major creditors in this case. They're  
18 all here, and I think that that's pretty important, and as I  
19 said at the beginning, nobody is being primed outside of  
20 their own asset class already, and no priming money that is  
21 coming in is being used outside of the silo. So, it's a  
22 fairly unique situation. You know the timing of - you've got  
23 to buy corn every single day. You've got to keep the plants  
24 running every single day. There have been a lot of negative  
25 stories out there about our liquidity situation, which were

1 true, and which this is designed to remedy with a lot of  
2 nervous employees and a lot of nervous farmers, and a great  
3 bulk of these dollars have to be spent over the next day or  
4 two. And so, I think we believe that, and that's why we  
5 thought it was so important to get in today. All the other  
6 first-day relief, you know two-stepping it between today and  
7 tomorrow, obviously is fine, although in fairness, very  
8 little of it is controversial. It's fairly routine stuff.  
9 So, it doesn't make much difference to us one way or the  
10 other, but the ability to tell people that we have this  
11 financing today and to be able to use the money, I think we  
12 respectfully submit, Your Honor, is very important to the  
13 long-term viability of all of these debtors.

14 THE COURT: Okay.

15 MR. POHL: Thank you.

16 THE COURT: Yes, sir?

17 MR. SCHEIN: Good morning, Your Honor. Michael  
18 Schein for Vedder Price on behalf of the CIT Group/Equipment  
19 Financing, Inc. We have about 1,400 railcars outstanding  
20 with the debtors. The clarification, we just spoke with  
21 debtors' counsel this morning, is our agreements provide that  
22 the leases themselves are not to be encumbered, and we just  
23 want clarification that all these replacement liens, that  
24 liens aren't going to actually encumber the leases. They  
25 have liens on the proceeds to the extent they assume and

1 assign, but that's consistent with the documents that the  
2 debtors have signed.

3 THE COURT: Mr. Pohl, is that accurate?

4 MR. POHL: It is, Your Honor.

5 THE COURT: Okay.

6 MR. SCHEIN: Thank you.

7 THE COURT: All right. Does anyone else wish to be  
8 heard regarding the financing request? Okay. Here's what  
9 we're going to do, and I certainly don't want to be in a  
10 groundhog day situation, but I'm prepared, based upon the  
11 record before me, to approve and authorize the debtors'  
12 request for entry into post-petition debtor-in-possession  
13 financing as well as consensual use of cash collateral, and  
14 effectively, my order will be revisited tomorrow. It is an  
15 interim order by definition, and we're going to rehear this  
16 tomorrow. You don't need to restate the record. We don't  
17 need to go through the exercise that we've just done, but  
18 obviously circumstances conspired against this debtor to  
19 afford him the type of notice that's contemplated under the  
20 Code and that is certainly preferable under the  
21 circumstances. I'm satisfied with the record before me and  
22 specifically with the representations contained in Mr.  
23 Herron's affidavit that the financing is absolutely necessary  
24 to avoid immediate and irreparable harm to this debtors'  
25 operations and its prospects for restructuring. I also note

1 that while it is perhaps not evidence before me, I'm under no  
2 illusions about the amount of time, effort, and energy that  
3 has gone into this process in the last five days to get to  
4 the point that you're currently at, but there are parties,  
5 there are creditors that may not be aware of this.  
6 Proceeding there may not be creditors that may not be fully  
7 aware of exactly what's going on and frankly, I think the  
8 record does reflect that many of the orders themselves and  
9 the budget which we so far have not seen, is a work in  
10 progress, and I understand why that is, and I understand how  
11 this process works but where I would typically on a first day  
12 hearing grant interim relief and will revisit the issue in  
13 15, 18 or 20 days, I want to authorize and approve the  
14 debtors' proposal for financing. I find that the debtors  
15 have carried their burden under § 364 of the Code for  
16 approval of emergency DIP financing and I likewise find that  
17 they have carried their burden under Bankruptcy Rule 4001 for  
18 approval of that authority on an interim basis, but I want to  
19 revisit this issue tomorrow at a minimum to give me and the  
20 U.S. Trustee and any other party in interest a more fulsome  
21 opportunity to review the actual forms of order. There are  
22 numerous financing and/or cash collateral orders. I  
23 understand that's why you've done it this way, but I picked  
24 up this binder at about 6:30 this morning, and there's a lot  
25 of stuff in there, but I'm satisfied that the debtors have

1 carried their burden that they need the financing and that  
2 they need it today, and again, I place great weight on the  
3 support of a substantial portion of the debtor community, and  
4 as you heard from my questions, I have concerns about those  
5 creditors who may not have notice of this or who are being  
6 primed and may not necessarily agree with that or agree with  
7 the sufficiency of the adequate protection that's being  
8 proposed by the debtor, but I don't think on this record it  
9 is fair to me to enter this order and require them to simply  
10 sit tight for another two weeks while the debtor uses the  
11 financing. I know the debtor does need the financing and I'm  
12 going to authorize and approve it, but we're going to revisit  
13 this question tomorrow. We may have issues with respect to  
14 the forms of the order, and I think - my guess is that an  
15 awful lot of it is probably word smithing as you've  
16 described. Things like deadlines, consistent definitions,  
17 those sorts of things I expect to be able to visit but for  
18 purposes of today, I'm prepared to approve and authorize the  
19 financing, and it goes without saying that I would prefer  
20 that this were on more standard notice, or that the relief  
21 being requested were limited as we described. But I  
22 understand with the fairly complex financing structure that  
23 the debtor has and its urgent need for funding across each of  
24 those three silos, that this is really the best that you  
25 could do under the circumstances, and I'm satisfied with

1 that. As I said at the outset, a typical situation with this  
2 is you come in with a two-line cash collateral order that  
3 says, We're going to pay some people today and this is going  
4 to authorize that. I understand why we don't have that now,  
5 but I think we'll be able to have a more informed discussion  
6 and I will basically treat this matter for a further hearing  
7 tomorrow, but I'm prepared to approve and authorize it today.  
8 Let's talk about orders.

9 MR. POHL: Yeah, I was just going to get to the  
10 mechanics, as I appreciate everything you just said, and I'm  
11 just going to make sure we understand mechanically. At least  
12 with respect to - actually with respect to all of the cash  
13 collateral orders and the DIP financings, and we don't have  
14 DIP documents for either of the two DIP financings and those  
15 lenders have agreed to fund -

16 THE COURT: Without them.

17 MR. POHL: - without them based on the orders which  
18 have the term sheets on the back and so I think, and I'm just  
19 thinking out loud, Your Honor, I think what we need to do is  
20 actually execute those orders. We've got a few changes to  
21 make that we could then submit cleans and blacklines, but  
22 they're technical, so that technically people are comfortable  
23 closing and funding off of those orders and those term sheets  
24 this afternoon, we're going to need money.

25 THE COURT: Okay.

1           MR. POHL: We can come back tomorrow and if there  
2 are further changes that anybody wants for any reason,  
3 including obviously, Your Honor, to any of these orders,  
4 we'll just, you know, amend and supercede today's orders, but  
5 at least we have some loan documentation, so to speak, that  
6 people can fund off of between today and tomorrow, and if  
7 there have to be any changes, we'll have amended and super-  
8 ceded orders.

9           THE COURT: Okay.

10          MR. POHL: So, I think if that works for Your Honor,  
11 that should work for the lenders.

12          THE COURT: I think that works.

13          MR. POHL: The second question I have, just because  
14 we have - and we can do anything we need to, we're trying to  
15 figure out where people should be tomorrow because we do have  
16 a chief financial officer here who probably could be at the  
17 company tomorrow doing valuable things at the company. He  
18 certainly could stay here, but he could also participate by  
19 telephone. I'm not sure that he would be a witness tomorrow.

20          THE COURT: That's a judgment call on your part.  
21 He's the affiant.

22          MR. POHL: Yup.

23          THE COURT: And obviously you can put anybody on you  
24 want as a witness if indeed we require live testimony. I  
25 will not permit a witness to testify by phone. I don't think

1 that's fair to any other party.

2 MR. POHL: That's fine.

3 THE COURT: So, that's kind of judgment call, and I  
4 simply don't know. My guess is you're not certain about  
5 exactly who may come out of the woodwork tomorrow, so, I will  
6 leave that to your determination about whether you want him  
7 here. My guess is that you'll need a witness of some sort  
8 and more than simply a financial witness.

9 MR. POHL: I think that's right.

10 THE COURT: As we look to the balance of the relief  
11 that you're requesting.

12 MR. POHL: I think that's right, and I think - and  
13 my last question, Your Honor, is -

14 THE COURT: Yes.

15 MR. POHL: In the event that we are fortunate enough  
16 to come tomorrow, while we may have some changes to the  
17 orders based on agreements among the parties to supercede  
18 today's orders, assuming that no other party comes and  
19 objects, would it be your intention to actually take some  
20 live testimony at that time? Or -

21 THE COURT: In the absence of additional objections,  
22 no, I don't think so. And let me put it this way: I'm under  
23 no illusions about the current state of the credit markets,  
24 and I have read the debtors' affidavit and I've read the  
25 financing papers pretty carefully, and so I don't know that

1 the debtor needs additional live testimony to say that a  
2 private financing structure was not immediately available or  
3 that anybody was willing - was not willing to lend on an  
4 unsecured subordinate position that defies financial sense.  
5 So I don't really need live testimony on that. I think as we  
6 talk about these issues and the mechanics of the orders, it  
7 really turns on some legal principles of the terms of the  
8 orders. It's not really a financing issue.

9 MR. POHL: Okay, that's very helpful, Your Honor.

10 THE COURT: Okay.

11 MR. POHL: Thank you.

12 THE COURT: Sure.

13 MR. POHL: With that, I am going to turn the podium  
14 over to my partner, Felicia Perlman to handle the balance of  
15 the agenda. Thank you.

16 THE COURT: Okay. Ms. Perlman.

17 MS. PERLMAN: For the record, Felicia Perlman on  
18 behalf of the debtors. As an initial and very administrative  
19 matter, we obviously filed a joint administration motion -

20 THE COURT: I'll sign it.

21 MS. PERLMAN: - and would like that to be signed  
22 first.

23 THE COURT: Okay. I assume no one wishes - any  
24 objections to joint administration? Very well, we'll enter  
25 it. Ms. Perlman, as it relates to the other three, these

1 are, as I understood from Mr. Chehi's letter, these are being  
2 heard today on an emergency basis. They'll be heard for a  
3 further interim tomorrow.

4 MS. PERLMAN: That's correct, Your Honor.

5 THE COURT: But in the proposed forms of order that  
6 were submitted, there weren't any caps or estimates of the  
7 amounts that you expect that you would need to pay today.  
8 Does the company have any sense of what it is they're going  
9 to need to pay?

10 MS. PERLMAN: I can give you some estimates. We  
11 didn't put caps in there, just because of the uncertainty.  
12 With respect to the employees, it is obviously just to pay  
13 anything that gets presented to the company. Today most of  
14 the payments to employees are ADP and wire so we don't expect  
15 much. There's an anticipation of approximately \$100,000 that  
16 can come due in the next day.

17 THE COURT: Okay.

18 MS. PERLMAN: With respect to shippers, that amount  
19 is higher and also a bit uncertain but the shippers both  
20 deliver corn and other product to the company and perhaps  
21 even more importantly they deliver the ethanol to the  
22 customers, and we're assuming about half of the amount that's  
23 in the motion, the motion says it will be about \$2 million,  
24 about half of that will probably come due actually in the  
25 next day or two.

1 THE COURT: Okay.

2 MS. PERLMAN: As you're aware, given the tightening  
3 of the company's liquidity, many its service providers as  
4 well as providers of product have moved to much shorter terms  
5 often cash in advance. With respect to 503(b)(9), that is  
6 mostly the providers of corn which is obviously the basis of  
7 ethanol and gas and some of the other chemicals that are used  
8 in there, and the company anticipates it could be \$15 to \$20  
9 million that it needs to pay in the next day or two prior to  
10 entry of the order tomorrow. These payments are necessary to  
11 be made because absent making these payments the plants are  
12 likely to shut down, at least some of them, irreparably  
13 harming the debtors, perhaps causing additional costs to be  
14 incurred to start these plants back up. Mr. Herron, the CFO  
15 and president who filed the declaration today, if called to  
16 testify would testify to the necessity of making these  
17 payments to the fact that corn is being delivered on a daily  
18 basis, most of the farmers will not deliver corn at this  
19 point absent cash in advance. On a historical basis, Tuesday  
20 was corn day and the largest amount of corn payments went out  
21 on Tuesday morning. So to the extent that there were farmers  
22 that were still delivering more in the ordinary course, those  
23 payments would all be going out tomorrow morning anyways.

24 THE COURT: And how much was a typical corn day  
25 payment?

1           MS. PERLMAN: It was typically about \$35 to \$40  
2 million a week, I believe, if I could turn around for  
3 confirmation.

4           THE COURT: Okay.

5           MS. PERLMAN: And as a result of that, we would  
6 request - I'm sure those emergency orders authorizing us to  
7 make the necessary payments to the employees, to shippers,  
8 and to vendors who fall under 503(b)(9) today and until entry  
9 of the order tomorrow. Tomorrow we will represent the  
10 motions in a more traditional manner, and if there are  
11 parties here who wish to be heard, obviously, we'll hear them  
12 at that point, and otherwise hand up a final or full orders  
13 with respect to those reliefs.

14          THE COURT: Okay, Mr. Kenney?

15          MR. KENNEY: Your Honor, we're fine with that.

16          THE COURT: Okay. Does anyone else wish to be  
17 heard, and I'm obviously collapsing the three orders since  
18 we're going to do all this again tomorrow. Does anyone wish  
19 to be heard? All right, I will deal with them in series. As  
20 it relates to the debtors' request for authorization to pay  
21 the obligations to their employees, I find that the debtors  
22 have carried their burden under Bankruptcy Rule 6003, and it  
23 is of paramount consideration to this Court that there be a  
24 minimum of disruption to the lives of the rank and file  
25 employees who have otherwise relatively limited control over

1 this process. And I understand from counsel's  
2 representations today that what we're talking about is  
3 payment of an amount in the amount of about \$100,000, perhaps  
4 a bit more, perhaps a bit less, and that's the range that I'm  
5 authorizing and approving. In so ruling, I note that the  
6 debtors have and I base my ruling upon the affidavit of Mr.  
7 Herron. I find that the debtors have carried their burden  
8 under Bankruptcy Rule 6003 to authorize the use of money to  
9 pay pre-petition liabilities on a post-petition basis in that  
10 in the absence of maintaining regular payments to the  
11 employees, that the debtors will suffer the risk of immediate  
12 and irreparable harm in the absence of payment. So I am  
13 satisfied by that, and I will approve and authorize the  
14 payment. As it relates to shippers, similarly, I'm satisfied  
15 with the representations contained in Mr. Herron's affidavit,  
16 and this Court's long experience tells us that if you don't  
17 pay shippers very few good things happen, and so I am  
18 prepared to approve and authorize the financing - or I'm  
19 sorry the payment of the obligations, and I'm authorizing  
20 that payment up to one million dollars. To the extent that  
21 there is an amount beyond that, it needs to be basically  
22 within spitting distance of that range. Okay? If there's an  
23 issue you can tell a shipper that we'll deal with this  
24 tomorrow, but you're getting limited authority to carry you  
25 through the next 24 hours, and so, actually, I think that the

1 authority that I'm giving you is basically in the range of  
2 one million dollars. Okay? And I recognize again, given how  
3 quickly this has moved, that the debtors may have some  
4 difficulty identifying with certainty the amounts that are  
5 going to get paid within the next 24 hours, but again, I'm  
6 satisfied with the representations contained in Mr. Herron's  
7 affidavit that a steady supply is absolutely essential to the  
8 debtors' ordinary operation and again, compared to the  
9 potential loss that they would suffer, the cost associated  
10 with transport are effectively *de minimis*, although it looks  
11 like a substantial number. Finally, and - Let me ask you a  
12 question: On the \$15 to \$20 million and 503(b)(9) claims, how  
13 much of the universe of 503(b)(9) claims would this be?

14 MS. PERLMAN: It is approximately half of the  
15 universe of 503(b)(9) claims. Which is similar to shippers,  
16 it's just how the business works.

17 THE COURT: Okay. Okay, well, based upon the record  
18 before me and in the absence of opposition from any party in  
19 interest, I will approve and authorize the debtors' request  
20 up to a cap of \$20 million. And again, this is a substantial  
21 sum, but given the representations from counsel that are  
22 basically assented to by the affiant sitting in the back,  
23 it's my understanding that basically tomorrow is a  
24 substantial payday and so while it may seem that this is a  
25 substantial sum to pay over the next 24 hours, I understand

1 why that sum would spike and also that it is less than the  
2 debtor would normally pay on a typical Tuesday. So, again,  
3 the record is satisfactory to me today based upon Mr.  
4 Herron's affidavit, but in the absence of payment the debtors  
5 face the prospect of a shutdown or cessation of delivery of  
6 product and that that cessation would give rise to an  
7 immediate and irreparable harm to the debtors business  
8 operations and their prospects for reorganization. And  
9 again, at this stage, the representations of both the  
10 debtors' creditors that are present in the courtroom and the  
11 debtors are uniform that the value here for recovery rests  
12 with the continued going concern and that these payments are  
13 necessary to insure the uninterrupted operation of the  
14 debtors. So, again, based upon that and based upon Mr.  
15 Herron's affidavit I'm satisfied, and I will enter those  
16 orders. And again, your relief today is - that \$20 million  
17 is a hard number.

18 MS. PERLMAN: Okay. Thank you.

19 THE COURT: If \$20 million is not enough to get you  
20 through 24 hours, you need to come back.

21 MS. PERLMAN: We'll be back in 24 hours regardless.

22 THE COURT: You'll be back in 24 hours. Okay. I  
23 have those three orders, and I note that those orders do not  
24 have built into them the caps. I'm satisfied with my  
25 comments to counsel that the two caps of \$100,000 and \$1

1 million are essentially loose caps if basically you need to  
2 go beyond an order of magnitude, you ought to talk to Mr.  
3 Kenney or you need to come back to me. With respect to the  
4 503(b)(9) claims that \$20 million is a hard cap and we'll  
5 revisit the question tomorrow. Okay?

6 MS. PERLMAN: Thank you, Your Honor.

7 THE COURT: All right, I have all three of these  
8 orders. Have there been any changes to the orders since they  
9 were submitted in the binder? Okay.

10 MS. PERLMAN: I don't believe there have been, Your  
11 Honor.

12 THE COURT: Okay, I have signed each of the four  
13 orders submitted, joint administration, and then the  
14 emergency pay orders. I'll have all of them on the docket  
15 within the next half hour.

16 MS. PERLMAN: There's one additional motion that was  
17 up for today which was cash management.

18 THE COURT: Oh, okay.

19 MS. PERLMAN: Your Honor, obviously none of this  
20 works without the cash management system staying in place  
21 that is currently in place. The cash management system  
22 tracks the corporate structure that's been discussed by Mr.  
23 Pohl and the various lenders here. There are three separate  
24 silos of bank accounts that correspond to our lovely color-  
25 coded chart. There are 53 bank accounts in total, 13 at

1 VeraSun, 18 at U.S. BioEnergy, and 22 at the ASA entities,  
2 and we would ask that debtors be authorized to continue using  
3 the cash management system that's in place.

4 THE COURT: Okay. Does anyone wish to be heard  
5 regarding cash management? Okay. Again, we're revisiting  
6 this motion tomorrow as well; correct?

7 MS. PERLMAN: This motion was not actually set to be  
8 revisited tomorrow. We'd be happy to do so.

9 THE COURT: All right, well, here's what we'll do.  
10 I'm prepared to enter and approve the application. It looks  
11 fairly routine to me, and again I'm satisfied with the U.S.  
12 Trustee's lack of opposition to the motion, and consistent  
13 with how we're dealing with the interim financing, to the  
14 extent that any party wishes to be heard or wishes me to  
15 revisit that tomorrow, I'd be happy to do so. Again, this  
16 has moved very, very quickly, but I recognize that none of  
17 the relief that's being provided works unless you can access  
18 your bank accounts, and I also take comfort from the fact  
19 that the concerns raised by Ms. Heilman have been dealt with  
20 on the record by the debtor. So, based upon that, I will  
21 approve the relief requested. Do you have a form of order?

22 MS. PERLMAN: We do. And if I can ask one question  
23 about tomorrow's hearing -

24 THE COURT: Yes, ma'am.

25 MS. PERLMAN: Similar to the question Mr. Pohl asked

1 earlier. Absent objections to the various orders that we  
2 will request the Court enter tomorrow, will the Court still  
3 be interested live testimony for Mr. Herron on the various  
4 orders or will proffers be sufficient?

5 THE COURT: I'd expect the proffers would be  
6 satisfactory. If any party objects to the proffer then  
7 you're going to put him on.

8 MS. PERLMAN: Okay, thank you, Your Honor. Those  
9 are all the motions that we presented before the Court today.  
10 We appreciate the Court's hearing all these motions on such  
11 short notice, and we'll be back before you in about 24 hours,  
12 on these and other matters.

13 THE COURT: Okay, well I want to revisit the  
14 question of what we're doing with the financing orders with  
15 Mr. Pohl. As you may be aware, there's a seminar going on  
16 today. Most of you have already signed up for it, but so  
17 you're missing, I think, Judge Walrath right now. I'm  
18 scheduled to be on the panel at 3 o'clock this afternoon.  
19 What are your prospects of getting whatever orders you want  
20 before then? I assume you need funding before then.

21 MR. POHL: High.

22 THE COURT: High? Have you got a range for what  
23 time? Do I get to go to lunch or not?

24 MR. POHL: Yeah, I mean, if I have to guess, I'm  
25 going to predict that we will be able to get you orders by

1 1:30 or 2 o'clock. I mean the orders are basically done for  
2 some of them - Oh, that's an hour fast, right, it's 11. Then  
3 for sure that's true.

4 THE COURT: We're doing everything we can to throw  
5 you off.

6 MR. POHL: Thank you. I will, I think we're going  
7 to get most of the orders in very quickly.

8 THE COURT: Okay.

9 MR. POHL: Really within the next hour, hour and a  
10 half.

11 THE COURT: All right, well, let's do this, it is  
12 just after 11 now. I will expect all of the orders delivered  
13 in hard copy to my chambers no later than 1 p.m. today; okay?  
14 And I don't mean that in a threatening way, but I'm just  
15 assuming, and I will plan for that. If there is any kind of  
16 pickup, get me what you have, and I will review them and  
17 presumably enter them promptly and if there's one of these  
18 that's an outlier, then let me know, but I do - I think I do  
19 have to be on this panel at 3 so I'd like to see what we can  
20 do, but so 1 o'clock - Did I say 1 or 1:30?

21 MR. POHL: You said 1, but let's say 1:30, and we'll  
22 shoot for 1.

23 THE COURT: All right let's say 1:30. All right, so  
24 I will be in chambers at 1:30. I'd like all of them  
25 delivered. If there's any uncertainty or if there's any

1 problem give a call to my chambers and just let me know what  
2 the game plan is, but otherwise I think we should be in good  
3 shape, and again, we will revisit these issues tomorrow to  
4 the extent that parties wish to be heard, and after I've had  
5 a chance to frankly more carefully review the proposed forms  
6 of order. Okay?

7 MR. POHL: We will be able to do that, Your Honor.

8 THE COURT: All right, very good. Are there any  
9 questions?

10 MR. POHL: Thank you very much.

11 THE COURT: We stand in recess, thank you, counsel.

12 ALL: Thank you, Your Honor.

13 (Whereupon at 11:09 a.m., the hearing in this  
14 matter was concluded for this date.)

15

16

17

18 I, Elaine M. Ryan, approved transcriber for the  
19 United States Courts, certify that the foregoing is a correct  
20 transcript from the electronic sound recording of the  
21 proceedings in the above-entitled matter.

22

23 /s/ Elaine M. Ryan November 12, 2008  
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