

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
VERASUN ENERGY CORPORATION, .
et al., . Case No. 08-12606(BLS)
. (Jointly Administered)
. Nov. 4, 2008 (11:06 a.m.)
Debtors. . (Wilmington)

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

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 THE CLERK: All rise.

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

4 MR. POHL: Good morning, Your Honor. Your Honor, I
5 think if it pleases the Court, we'd like to start with
6 finishing up the financings.

7 THE COURT: Sure.

8 MR. POHL: As I know Your Honor knows, we submitted
9 all of the orders yesterday, because I know that you signed
10 them. A couple of things from our standpoint to start it
11 off, number one, and I've mentioned this to a number of
12 different parties in the courtroom who asked me to do this,
13 but all of the different representations that were made on
14 the record yesterday apply today as well.

15 THE COURT: Okay.

16 MR. POHL: None of those have changed.

17 THE COURT: Okay.

18 MR. POHL: Number two, I think from the parties who
19 drafted those various orders, I'm not aware of any changes
20 from what you signed that anybody on this side of the podium
21 is requesting today.

22 THE COURT: Okay.

23 MR. POHL: Number three, a couple of things, in the
24 cash collateral order for U.S. BioMarion that you signed,
25 that's the one standalone plant on the AgStar side -

1 THE COURT: I recall.

2 MR. POHL: - that is not Agstar. There was a
3 provision in that order that said that that order works but
4 is subject to the consent of the lender group, which hadn't
5 been obtained by the time that you signed it yesterday. I
6 can represent on the record today that it has been obtained.
7 We have agreed with them and so I'll just state this on the
8 record and their counsel is here that we will only be
9 utilizing that cash collateral for specific funding requests
10 that we make to them and that they approve.

11 THE COURT: And to be used then within exclusively
12 that entity.

13 MR. POHL: Correct. They just want to make sure
14 that we'll be taking the money to buy corn, pay for natural
15 gas, et cetera, et cetera.

16 THE COURT: Sure.

17 MR. POHL: Pay employees, et cetera. So that
18 condition in that order is satisfied. Third or fourth, I
19 just wanted to tell the Court and talk a little bit about
20 some dates. With respect to the ASA debtors, you signed
21 yesterday a cash collateral order, we are working with West
22 LB and have last night received, as we expected to, a DIP
23 proposal from them that's similar to the other financings
24 with ring fenced, if you will, within that group of debtors.
25 That is a proposal that they haven't agreed to and we haven't

1 accepted, but it is headed towards a \$30 million incremental
2 DIP financing to be used in that silo.

3 THE COURT: New money?

4 MR. POHL: New money.

5 THE COURT: Okay.

6 MR. POHL: Fifteen on an interim basis, 30 on a
7 final basis. The reason I'm mentioning it to you today is
8 because the use of cash collateral that's covered by the cash
9 collateral order is going to run out sooner rather than later
10 and we're going to need to access that money.

11 THE COURT: What's the expiry date on it?

12 MR. POHL: Well, there's no expiry date in the
13 order, maybe it's a month or maybe it's two weeks.

14 THE COURT: But the money's going to run out.

15 MR. POHL: But the money's going to run out.

16 THE COURT: Okay.

17 MR. POHL: So, we intend to file a motion seeking to
18 approve that DIP financing, a standalone motion for that
19 standalone DIP financing later this week. At the time that
20 we file it, maybe we'll still be negotiating, I would expect,
21 but what we'd like to do, if Your Honor has time, is be able
22 to plan around when we could have an interim hearing to
23 access the interim amounts.

24 THE COURT: Sometimes early next week?

25 MR. POHL: Yes, and we were hoping that you had time

1 on Tuesday morning.

2 THE COURT: The Court is closed on Tuesday.

3 MR. POHL: Ah, Veterans Day, thank you. Let's do it
4 Monday, if you have time. And that could be any time in the
5 day, it's Tuesday that we're trying to access funds.

6 THE COURT: Okay. Well why don't we do this, we'll
7 deal with all scheduling questions at the conclusion of the
8 hearing.

9 MR. POHL: Fine.

10 THE COURT: I think I can probably accommodate you,
11 but before I set that date, I'd want to hear from anybody
12 else that wants to weigh in on any of these issues and I
13 certainly want to hear from the U.S.T. if he's got any
14 issues, but -

15 MR. POHL: Sure. And the reason I was mentioning it
16 is because we will file - whatever the date turns out to be
17 we will file the motion enough in advance so that there are
18 not notice concerns.

19 THE COURT: That would be a nice change.

20 MR. POHL: Yes. That will be our plan.

21 THE COURT: Just making sure you're listening, Mr.
22 Pohl.

23 MR. POHL: Yes, we are. We are, Your Honor.

24 THE COURT: Okay. I think you can be pretty
25 confident, but we're going to talk about a bunch of different

1 dates going out because you're going to need a second day
2 hearing. Mr. Kenney, have you had an opportunity to schedule
3 a formation meeting?

4 MR. KENNEY: We have not yet, Your Honor.

5 THE COURT: Okay. So, we're going to talk about
6 some dates but I'm pretty confident I can accommodate that.
7 I don't want to plug that date in in blue ink until I hear
8 from anybody else that wants to weigh in on the issue, but -

9 MR. POHL: Sure.

10 THE COURT: - so, before the conclusion of the
11 hearing, we'll figure out what your scheduling needs are and
12 we'll get that done.

13 MR. POHL: Great, thank you, Your Honor.

14 THE COURT: Okay.

15 MR. POHL: And that's really all that I have other
16 than responding to what you have.

17 THE COURT: Okay, well, before we move forward past
18 the financing, what I'd like to do is note again on the
19 record that we dealt with this matter as a legitimately
20 exigent circumstance. I think the uncontroverted record
21 before me was that the debtor had an absolute compelling need
22 for financing, and I did find under Rule 4001 that there was
23 a risk of immediate and irreparable harm. As I said also, it
24 is an understatement to say that the Court would prefer more
25 time and more notice, but I'm confident Mr. Pohl, that you

1 would have preferred more time and more notice so we deal
2 with the facts as we have them. But I deliberately entered
3 those orders yesterday with the caveat that we were going to
4 have this further hearing today because I wanted the
5 opportunity to review the orders, and also I wanted to give
6 anyone else that was either in the courtroom or not in the
7 courtroom an opportunity, such as it is, to review those
8 orders and weigh in further. So, before we move further, I
9 would hear from any party that wishes to be heard, parties
10 that addressed the Court yesterday that don't have issues
11 with their orders or who had reservations of rights or
12 notations on the record, they remain so noted, but I'd hear
13 from anybody that wishes to be heard regarding the various
14 financing orders that the Court has entered. Okay. I had an
15 opportunity last night to more carefully review all of the
16 orders and there are obviously, and I expect the U.S. Trustee
17 had the same reaction, there are obviously elements of them
18 that in another circumstance I would probably walk through
19 them on a line-by-line basis and expect modifications or
20 changes subject to a further and final hearing, but under the
21 circumstances, having entered the orders yesterday, and I
22 don't feel terribly bound by the business expectations of
23 those lenders that are subject to or party to those orders,
24 but it is not my intention today to revisit those orders on a
25 line-by-line basis. The observation I would make for you and

1 for Committee counsel, once appointed, and for any other
2 party is that we generally regard a second day hearing, a
3 final hearing as a new hearing, and I think that that point
4 would apply with special force here, that this process has
5 moved very, very quickly. I understand why it has, but the
6 parties that wish to raise issues with respect to the form of
7 the order I think the way I put it is that if you are either
8 the debtor or the lender with this form of order that's been
9 signed and we get to a final hearing I would not regard it as
10 that you've got the wind at your back when we get to this.
11 So I will hear from parties on really all elements of the
12 proposed forms of order, but I don't believe that there's a
13 material benefit to be served by walking through these
14 issues, and I would also note that the changes that I would
15 have to these are not material from my point of view. I
16 guess the last point I want to say is don't cite these orders
17 back to me.

18 MR. POHL: I promise.

19 THE COURT: So, you'll cite them to my colleagues
20 who will come and complain to me, but I think that that's
21 probably the most prudent course and mainly because of the
22 circumstances under which they were presented and I
23 understand why that happened, but again, the more standard
24 procedure that we employ is what will still govern in this
25 jurisdiction on a going-forward basis, and we'll leave it at

1 that. So, again, the orders were entered on what I would
2 call an interim-interim basis yesterday, and I don't believe
3 that there's a need to revisit them. The one point that I
4 would make, and again we'll deal with this at the end, is, I
5 believe I left all of the orders blank as it related to a
6 scheduling of a final hearing.

7 MR. POHL: Right.

8 THE COURT: And I don't know how you want to deal
9 with that, whether we do errata or whether we simply do
10 noticing so the parties know when a final hearing is up, but
11 I didn't believe it was appropriate to enter or one, to just
12 pick a date for that, and two, that I figured that we would
13 have a further hearing if the parties wanted to be heard on
14 it. I didn't want to have set final hearing dates under the
15 circumstances. So, those blanks are out there. You know it,
16 we know it, we need to deal with that. Mechanically however
17 you want to deal with that is really up to you just to try to
18 maximize notice to affected parties, and the most significant
19 issue that I see in terms of adequacy of notice is to the
20 roughly 50 percent of the bondholders that are not
21 participants in the new DIP money, who are being primed and
22 who are entitled to the adequate protection that was
23 identified in the form of order, and again, for those folks
24 and for anybody else that wants to revisit these issues, the
25 final hearing will basically be an open affair. They can

1 raise any point that they would wish to raise, and we'll deal
2 with it then; okay?

3 MR. POHL: I appreciate that, Your Honor, and that
4 was one of the things when we get to it for the calendaring
5 and then we'll figure out a way to make sure everyone has the
6 appropriate notice.

7 THE COURT: Okay, and the other point, and I'm sure
8 Mr. Chehi and your colleagues would take care of this but
9 we'll get you dates that get you through basically your
10 second day hearing, and then if you get in touch with Ms.
11 Bello in my office, she'll get you dates going out several
12 months and then parties can have a measure of confidence. I
13 would imagine we typically either go once or twice a month,
14 and but I'm confident that we can accommodate the debtors'
15 scheduling needs.

16 MR. POHL: Thank you, Your Honor.

17 THE COURT: Okay.

18 MR. POHL: I'll now turn it over to Ms. Perlman.

19 THE COURT: Okay. Ms. Perlman, one other point,
20 other than joint administration, which I signed and I didn't
21 sign it on an interim basis, the other - and I believe I've
22 approved cash management, and that's fine, so we'll leave
23 that where it is.

24 MS. PERLMAN: Okay.

25 THE COURT: Unless anybody wishes to be heard. With

1 respect to the other three, the payment motions, the
2 shippers, the 503(b)(9) which I effectively deem as a
3 critical vendor concept -

4 MS. PERLMAN: Uh-huh.

5 THE COURT: - and -

6 MS. PERLMAN: Employees.

7 THE COURT: - employees, I want to treat those
8 motions as basically I want the full record on them today so
9 we'll deal with them for the full substantive hearing, and
10 also to the extent that I note that a matter is routine and
11 doesn't require a presentation, that is without prejudice to
12 the rights of the U.S. Trustee of course and any other party
13 to a weigh-in based upon my review, sometimes I note that
14 something looks routine but the circumstances of a particular
15 case make something perhaps more controversial than I would
16 appreciate, so, again, parties are invited to jump up if
17 they're concerned. I think the first item that's on after
18 joint administration is the KCC engagement?

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

20 THE COURT: Okay.

21 MS. PERLMAN: We're requesting the retention of KCC
22 as our claims noticing, soliciting, and balloting agent.

23 THE COURT: Okay. Mr. Kenney, how's it work for
24 you?

25 MR. KENNEY: Your Honor, for the record, Mark Kenney

1 for the United States Trustee. Your Honor, we reviewed it,
2 the order's fine and the agreement's fine.

3 THE COURT: Okay. Yeah, I think we've managed to
4 get these guys to mostly fix their engagement letters on the
5 things that we've both always complained about, so, that's
6 fine. I've reviewed the application. Does anyone else wish
7 to be heard regarding the Kurtzman Carson engagement? Very
8 well. I will enter the order authorizing the retention.
9 Cash management is done, but I would offer and afford any
10 party in interest the opportunity to be heard. The order was
11 approved at yesterday's hearing on obviously very limited
12 notice. Does anyone wish to be heard regarding the cash
13 management motion? Very well, the order will remain in
14 effect. 345?

15 MS. PERLMAN: That's correct.

16 THE COURT: Okay, let's talk about it.

17 MS. PERLMAN: Your Honor, we're requesting an
18 interim order at this point. The U.S. Trustee has requested
19 that we modify it so that instead of the interim order going
20 to the first omnibus hearing date that it goes out to the
21 second omnibus hearing date, and we have agreed with that,
22 and we are as is standard, asking for relief from the
23 requirement of using of the investment and deposit
24 requirements to be able to continue with the accounts that we
25 have and we believe they are safe and stable, accounts at

1 least as much as they could be given the current environment
2 that we are all aware of.

3 THE COURT: Yeah, I have no comment on that. Mr.
4 Kenney, anything to add?

5 MR. KENNEY: Your Honor, I think moving out to the
6 second date, the reason for that is we don't currently have a
7 uniform depository agreement with First National Bank of
8 Omaha. This gives us time to work with them to do it. We're
9 finding that in the current environment a lot of bank general
10 counsel kind of look cross-eyed at that collateralization
11 agreement.

12 THE COURT: Well, they're a little busy right now.

13 MR. KENNEY: They have a hard time digesting it.

14 THE COURT: Okay, all right, that's fine. Pushing
15 the 345 out to, I assume that that's at least 30 days out?
16 Okay. That's fine, I expect that the parties will be able to
17 work through that. If there's an issue about it, then tee it
18 up; okay?

19 MS. PERLMAN: Certainly, thank you, Your Honor.

20 THE COURT: Next item is wages.

21 MS. PERLMAN: Your Honor, the employee motion, again
22 as you stated earlier, it was entered on an emergency basis
23 yesterday. The debtors are seeking authority to continue
24 with all their employee benefits programs to allow the
25 debtors to pay the pre-petition wages that accrued and to

1 continue pre-petition vacation policies, health insurance, et
2 cetera, and directing the banks to make the appropriate
3 payments when checks are otherwise presented to them.

4 THE COURT: Okay.

5 MS. PERLMAN: We - sorry.

6 THE COURT: I'm sorry, go on.

7 MS. PERLMAN: Yesterday we entered into evidence,
8 Danny Herron's affidavit. He is here to testify today if
9 necessary. If he were called on to testify, he would testify
10 that the relief sought in the motion is necessary to maintain
11 the value of the business and the ongoing operations.
12 Without this relief there would be immediate and irreparable
13 harm. The relief is necessary to maintain employee morale.
14 Without the employees, the plants obviously would shut down
15 and given that many of the plants are in small rural areas,
16 there's not a workforce that would even be available to
17 replace the employees.

18 THE COURT: Okay. I note at paragraph (50) on page
19 21 of Mr. Herron's affidavit, that he makes representation
20 that there are no employees that are owed in excess of the
21 \$10,950 cap. Can you confirm that for me?

22 MS. PERLMAN: Absolutely, we can confirm that.

23 THE COURT: Okay. Mr. Kenney, does the U.S. Trustee
24 have any issues with this motion?

25 MR. KENNEY: No issues, Your Honor.

1 THE COURT: Okay. Does anyone else wish to be heard
2 regarding the wages motion? Okay. I have carefully reviewed
3 the motion as you know we did authorize limited relief
4 yesterday to insure basically that checks were not going to
5 bounce, but I have reviewed the motion itself and I have
6 reviewed Mr. Herron's affidavit as well, and I am prepared to
7 enter the order approving the application. I note, as I
8 often do, that this is standard relief in this jurisdiction,
9 but that does not - the fact that it is standard does not
10 minimize the fact that it is absolutely crucial to the
11 debtors' ongoing operation, and the Court makes that
12 observation based upon the record before it today, and also
13 on its experience in other cases. In addition, the
14 application itself implicates Bankruptcy Rule 6003, and I
15 find based upon my review of Mr. Herron's affidavit that the
16 debtor has established that there is a risk of immediate and
17 irreparable harm in the absence of payment and honoring the
18 wages and salary obligations. So I'm prepared to enter the
19 order and it goes without saying that one of the primary
20 considerations of this Court, I think, me and my colleagues,
21 is that we do what we can to minimize the impact, the
22 negative impact, where possible on the lives of the
23 employees. So, this is essential relief and I'm prepared to
24 enter the order.

25 MS. PERLMAN: Thank you, Your Honor.

1 THE COURT: Okay. Our next one is utilities?

2 MS. PERLMAN: Your Honor, on the utilities motion,
3 we are seeking several forms of relief. First is prohibiting
4 utility companies from altering or discontinuing service on
5 account of unpaid pre-petition invoices, approving adequate
6 assurance deposits, approving adequate assurance procedure,
7 and also want to note that the order is an interim order. We
8 will set it for a final hearing if there are objections.
9 Your Honor, the company uses approximately 75 utility
10 providers. They were noticed with the motion and are listed
11 on an attached exhibit. The approximate monthly amounts
12 spent on utilities is \$3.6 million. The debtors believe
13 there are no amounts past due absent something being caught
14 up in the bankruptcy filing. The debtors are proposing as an
15 adequate assurance deposit to put one month's worth of
16 utility bills on average into a segregated interest bearing
17 account, that would be \$3.64 million within 20 days of the
18 petition date. If the debtors do become delinquent on any
19 utility company bill, the utility company may file a notice
20 of such delinquency with the Court and serve notice on the
21 debtors or other parties and then request additional adequate
22 assurance. With respect to the adequate assurance
23 procedures, the debtors are requesting that parties who are
24 not satisfied with the adequate assurance be given 45 days to
25 serve such a notice on the debtors. The debtors will then

1 have 45 days to negotiate with that party. If the parties
2 can reach an agreement, they will do so without further order
3 of the Court and otherwise the debtors will approach the
4 Court and set a hearing on such a dispute. In the meantime,
5 while a dispute is pending, the debtors request that the
6 utility company be prohibited from altering or refusing
7 service.

8 THE COURT: Okay. Does anyone else wish to be heard
9 regarding the utility application? All right, I find as I
10 have in other cases, that the relief sought by the debtors is
11 largely procedural in nature and sets up a process that
12 honors the requirements of § 366 of the Code while balancing
13 the debtors' need to insure that it has an uninterrupted
14 supply of utility services, and I further note that for
15 purposes of entry of an interim order that the proposed
16 adequate assurance is sufficient to satisfy those
17 requirements. In addition, I note that the relief is being
18 approved on an interim basis, and it is my expectation that
19 final relief will be sought within the 30 days so that to the
20 extent that there is any utility that has issues, they would
21 have the opportunity to seek redress in this Court within the
22 period contemplated under § 366, and we don't often see these
23 fights, but my experience has been again that to the extent a
24 utility is unsatisfied for its own particular circumstances
25 or generally with the procedure, that they appear promptly in

1 the Court and I expect that that would happen. So, again,
2 based upon the record before me, I do find that the relief is
3 consistent with the requirements of § 366 and established
4 practice in this jurisdiction, and I will enter the order.

5 MS. PERLMAN: Your Honor, I should note there was
6 actually one typo in the section of the order dealing with
7 service, just a one-word typo, and we have corrected it and
8 would like to hand up a clean order without such typo.

9 THE COURT: Why don't you give me all the orders at
10 the end of the hearing.

11 MS. PERLMAN: Okay. Thank you, Your Honor.

12 THE COURT: Okay. Sales and use.

13 MS. PERLMAN: Your Honor, pursuant to this motion
14 the debtors seek to pay approximately \$1.2 million of taxes
15 that are commonly classified as sales and use taxes that are
16 owed pre-petition. These taxes are primarily taxes that
17 would be defined as trust fund taxes or taxes that would
18 otherwise be entitled to priority under the Bankruptcy Code
19 so there is no issue with the amount that such taxing
20 agencies would be entitled to. It's more a matter of timing.
21 These taxes fall into some unusual categories given the type
22 of business that we have. There are inspection fees, excise
23 taxes, and inventory taxes, all relating to the purchase and
24 sale of ethanol, but we do believe that these taxes fall into
25 the categories that are commonly approved by the Court.

1 THE COURT: Okay. Does anyone wish to be heard
2 regarding the debtors' sales and use tax motion? Okay.
3 Again, I regard this relief as fairly standard in this
4 jurisdiction and the affidavit does support the requests for
5 the relief. The only one that would I think attract any
6 attention or perhaps fall outside of the scope of the
7 standard relief is the commercial feed inspection fee, but I
8 note that that's about \$4,000 a month and in the context of
9 this case, my guess is that the potential disruption of the
10 debtors' operation from failing to pay those obligations
11 vastly outweighs the cost to the estate, so, without - I will
12 confess, without researching commercial feed inspection fees
13 in various states, I'm satisfied otherwise with the relief
14 requested, and I will enter an order approving the
15 application.

16 MS. PERLMAN: Thank you, Your Honor.

17 THE COURT: Okay. Procedures.

18 MS. PERLMAN: Excuse me, Your Honor, which one is -

19 THE COURT: I believe we're up to the equity and
20 claims trading.

21 MS. PERLMAN: Yes, right. Your Honor, for this
22 motion I want to note that on the phone is Cliff Gross from
23 our D.C. office who has also been involved in this motion.

24 THE COURT: He's the tax guy.

25 MS. PERLMAN: He is the tax guy exactly.

1 THE COURT: You always have to have one.

2 MS. PERLMAN: To the extent there are tax questions,
3 we can direct them to the phone. So -

4 MR. GROSS (TELEPHONIC): (Microphone not recording.)

5 THE COURT: I'm sorry, sir?

6 MR. GROSS (TELEPHONIC): (Microphone not recording.)

7 THE COURT: We need them desperately.

8 MS. PERLMAN: Thank you.

9 THE COURT: Okay.

10 MS. PERLMAN: This motion is a motion that's
11 commonly referred to as an NOL motion. In this motion the
12 debtors request authority to establish procedures with
13 respect to claims and equity securities trading in an attempt
14 to preserve the debtors' tax attributes and NOLs. As set
15 forth in Mr. Herron's declaration, the debtors believe they
16 currently have approximately \$430 million of net operating
17 losses and other tax attributes which could result in a tax
18 savings, future tax savings in excess of \$150 million. Given
19 the magnitude of that number, it is very important that the
20 debtors preserve this value. As a result of this, we're
21 looking to set up procedures, two separate procedures, one
22 with respect to trading and equities and one with respect to
23 trading and claims. With respect to equity trading,
24 unrestricted trading and equity could lead to an ownership
25 change of VeraSun under § 382 of the Internal Revenue Code.

1 THE COURT: Has the public stock been delisted? Do
2 you know?

3 MS. PERLMAN: As of yesterday it happened.

4 THE COURT: Is it still trading in the pinks? Okay.

5 MS. PERLMAN: This could lead to a severe limitation
6 on VeraSun's ability to use the tax attributes. Such an
7 ownership change occurs if one or more 5 percent shareholders
8 has increased their holdings by more than 50 percentage
9 points over the lowest percentage point of stock owned by the
10 shareholder in the previous three years. Therefore, to
11 prevent such limitation from occurring, the debtors are
12 proposing the following procedures: the debtors would propose
13 an equity security - substantial equity holders who are
14 equity holders that hold approximately 4.75 percent of the
15 outstanding shares of the company, which is obviously just
16 below the 5 percent -

17 THE COURT: Right.

18 MS. PERLMAN: - cutoff, would be required to notify
19 VeraSun of their existence within 20 days of the
20 effectiveness of this order or 10 days of becoming a
21 substantial equity holder if they do so after the entry of
22 this order. The procedures with then require such holders to
23 notify VeraSun upon any transfer of equity that would result
24 in an increase or decrease of the stock they hold. The
25 debtors would then have 30 days to object to the proposed

1 transfer. If the debtors object to the proposed transfer,
2 the transfer would not be effective without an order from
3 this Court. If the debtors do not object, the transfer could
4 proceed without further order of the Court. The second issue
5 is with respect to claim holders who hold - who are
6 substantial claim holders and these are claim holders who
7 hold enough unsecured debt such that under a plan they could
8 end up causing a problem under § 382(L) (5) of the Internal
9 Revenue Code. We, therefore, request that such claim holders
10 be put on notice now, that the order would require the
11 substantial claim holders to provide notice to the debtors of
12 the amount of their claim, including the protected amount,
13 and the protected amount is the amount of the claims that
14 they hold on this date. Therefore, if the debtors propose a
15 plan that implicates 382(L) (5) the debtors can require such
16 claim holders to sell down the claims that they hold so as
17 not to cause a limitation under 382(L) (5). It should be
18 noted that the debtors cannot require claim holders to sell
19 down the protected amount, which is the amount, as I stated,
20 that they hold on this date. The U.S. Trustee has requested
21 that in addition to the Creditors Committee being given 10
22 days from their formation to object to this relief that we
23 include other parties in interest, and we have agreed to
24 that. The U.S. Trustee has also requested a few other
25 changes to the order, the first that it be an interim order,

1 being scheduled for the second omnibus hearing, and we have
2 agreed to that. The U.S. Trustee has also requested that
3 there's a provision in the order that the indenture trustee
4 provide notice to the substantial holders, that we add the
5 brokerage houses to that as well, and add a provision
6 authorizing the debtors to reimburse the brokerage houses if
7 they request for the cost of providing the notice.

8 THE COURT: The U.S. Trustee stole my thunder a
9 little bit on this. To the extent that I am prepared to
10 enter this order, I was going to do it as an interim order.
11 But is there then a little bit of a disconnect about who gets
12 to object and what the effect of the objection is? Aren't we
13 approving this on an interim basis and then we have a further
14 or final hearing on it and the Committee or any other party
15 in interest could object, but I guess the procedure
16 contemplated that was on sort of a negative notice that if
17 nobody objected it became final, and now what we're doing,
18 and I think more appropriately is, we're teeing it up today.
19 I understand why the debtor needs it, and that's obviously
20 subject to hearing from anyone that wishes to be heard on the
21 motion right now. But, is there a little bit of a disconnect
22 there?

23 MS. PERLMAN: I can see what you're saying. Why
24 don't we do this, why don't we set it up for the second
25 omnibus hearing and then choose an objection deadline and set

1 an amount of time before that hearing that parties can object
2 to the motion if they want to before then.

3 THE COURT: Okay. Yeah, I don't - I think we're all
4 pulling in the same direction, but I think that if you don't
5 marry up those two pieces it looks like either it becomes
6 final on its own, which I generally don't like.

7 MS. PERLMAN: Right.

8 THE COURT: Or that the interim order would be of
9 limited affect or duration. So, I think that's probably just
10 a word smithing issue. Okay. Does anyone else wish to be
11 heard regarding the claim and equity trading procedures? Mr.
12 Davis.

13 MR. DAVIS: Just a point of clarification, Your
14 Honor. I believe Ms. Perlman said that to the extent that
15 there will be a restriction on trading of claims that relate
16 to unsecured claims. When I looked at the order, the
17 definition of claims seemed to be the definition in the
18 Bankruptcy Code, so I just want to clarify we're not talking
19 about trading up secured claims.

20 MS. PERLMAN: Your Honor, I'm going to defer to tax
21 counsel on the phone regarding which claims are at issue.

22 MR. GROSS (TELEPHONIC): This is Cliff Gross. The
23 concept that - and is that Mr. Davis?

24 THE COURT: Yes.

25 MR. GROSS (TELEPHONIC): Mr. Davis, the concept is

1 to pick up all claims not just unsecured claims.

2 MS. PERLMAN: That was my error in speaking then.

3 MR. GROSS (TELEPHONIC): Because the notion is, and
4 again, there's no restriction on trading in claims during the
5 pendency of the case. The only thing that this would do is
6 essentially it puts in place the procedures that would put
7 people on notice now that if a company, when it goes to a
8 merge or to adopt a so-called 382(L)(5) plan, that claim
9 holders might be required to sell down such that they end up
10 getting less than 5 percent of the stock in the reorganized
11 company, but there's no restriction today on claims trading.
12 There is a restriction today, so everyone's clear, on equity
13 trading.

14 MR. DAVIS: That was helpful.

15 MR. GROSS (TELEPHONIC): Does that answer your
16 question, Mr. Davis?

17 THE COURT: Mr. Davis has noted that the
18 clarification was helpful. Okay, does anyone else wish to be
19 heard regarding the procedures? Actually, I found the
20 clarification helpful as well because it seemed to me that
21 the issue with respect to claims trading was at least for
22 purposes of today a rather attenuated concern because we
23 don't know what the plan would look like and whether or not
24 the plan would contemplate a distribution scheme that would
25 actually give rise to a potential change of control and a

1 whole bunch of dominoes would have to be lined up that are
2 currently not lined up. But I think that the clarification
3 was helpful, and I do believe that it is - my expectation is
4 that a Committee is probably going to want to weigh in on
5 these issues as well, and I think any secured lender that
6 feels that they may be affected by this, I think it's
7 important that they be advised of this and that they have an
8 opportunity in the context of a final hearing to appear and
9 be heard and protect their interests because the issue with
10 respect to preservation of NOLs through requirement or
11 procedures as it relates to equity securities is pretty
12 standard. The claims trading issue is not entirely novel,
13 but it's not as standard, and again, it's dependent almost
14 entirely on future events that no one can predict today, but
15 based upon the record before me and understanding that the
16 relief is basically to impose and implement a procedure that
17 allows the debtor to safeguard what is otherwise a valuable
18 asset, I'm prepared to approve and authorize the relief on an
19 interim basis, and we'll tee the matter up for a further
20 hearing once we've got a Committee onboard and also once
21 we've got an opportunity for further notice for potentially
22 and actually affected parties; okay?

23 MS. PERLMAN: Your Honor, then to that end, with
24 respect to that order, we will modify that order after the
25 hearing.

1 THE COURT: Okay, we'll look for it under
2 certification. Okay. Shippers?

3 MS. PERLMAN: Your Honor, again, this is a motion
4 that was presented on an emergency basis yesterday. The
5 debtors are seeking the ability to pay pre-petition amounts
6 owed to certain shippers. These shippers, shippers and
7 warehousemen are carrying products to and from the debtors
8 and the warehousemen's store, the ethanol for delivery to
9 customers. These parties all likely have the ability to
10 assert liens on the product that is being held and require
11 the debtors to pay prior to the release of those products.

12 THE COURT: You know, who moves ethanol? Does it
13 move through pipelines or barges, trucks?

14 MS. PERLMAN: We have barges. We have railcars.
15 There is some trucks, but it is more railcars and barges, and
16 then it gets stored in terminals, they are referred to, prior
17 to delivery to customers.

18 THE COURT: Where is it mixed? Does it go - When
19 you say to a customer, then it would go to Exxon Mobile -

20 MS. PERLMAN: Exxon, exactly.

21 THE COURT: And is it mixed at their refinery or is
22 it mixed at a terminal facility?

23 MR. HERRON: Your Honor, it's -

24 THE COURT: Come on up.

25 MS. PERLMAN: I'm going to call Mr. Herron up.

1 THE COURT: Okay. Mr. Herron, you may consider
2 yourself under oath.

3 MR. HERRON: Okay. Thank you. It's generally mixed
4 at the terminal where gasoline is mixed. The refiners have
5 switched their product generally speaking to a reformulated
6 gasoline that requires ethanol to be mixed to make it a
7 sellable gasoline product. So it's normally done at the
8 terminals. For instance there's a terminal in Sewaren, New
9 Jersey, it's the largest East Coast receiving terminal for
10 unitrains of ethanol.

11 THE COURT: And so the ethanol basically leaves your
12 facilities in the mid-west and heads to either the east or
13 west coast or down south to the terminal facilities for
14 mixing.

15 MR. HERRON: It does of ours. It could be as close
16 as 50 miles away there could be a terminal where ethanol
17 would be put into tanks and then it would mix with gasoline
18 before it's put into the tanker trucks that you see
19 delivering to gas stations.

20 THE COURT: And the standard mix is 10 percent or
21 15?

22 MR. HERRON: Ten percent.

23 THE COURT: Ten percent. And then you have an
24 edified fuel that's 85 percent ethanol and 15 percent
25 gasoline?

1 MR. HERRON: That's correct, that's correct.

2 THE COURT: is that only for a special vehicle?

3 MR. HERRON: It's for flex-fueled vehicles, so it is
4 special vehicle. There's about 6 million of them on the road
5 today, and Detroit makes about currently 35 to 40 percent of
6 their production is flex-fueled vehicles.

7 THE COURT: And the company's, as we've heard plenty
8 of times, the company's primary feedstock is corn.

9 MR. HERRON: Is corn.

10 THE COURT: But there were references, I think,
11 perhaps not in your affidavit but somewhere else to switch
12 grass and other, I guess, biomass products. Does the company
13 use other feedstock other than corn?

14 MR. HERRON: The only other feedstock we've used
15 successfully is milo. At times you can blend in about 10
16 percent in with corn and get a better yield out of the
17 product, but switch grass and things like that it's more
18 commonly referred to as cellulosic ethanol.

19 THE COURT: Right.

20 MR. HERRON: It's still really in the research
21 stage.

22 THE COURT: And that's because of the difficulty of
23 breaking down the -

24 MR. HERRON: The sugars -

25 THE COURT: The sugars, the long starch chains into

1 simpler sugars?

2 MR. HERRON: That's correct. And the biggest issue,
3 there also is the capital cost with building those. They're
4 not commercially viable at this point.

5 THE COURT: And then at the conclusion of that
6 process, you've basically drawn all the starch out of the
7 corn, and I assume then what remains is a high protein mush;
8 right?

9 MR. HERRON: It is, it's called dried distillers
10 grain. We take it and dry it, take the moisture out of it,
11 and it's sold as an animal feed product.

12 THE COURT: Is it a direct feed product or is it
13 mixed into a feed.

14 MR. HERRON: It's mixed into feed just like corn is
15 with sillage and other nutrients.

16 THE COURT: Okay. All right, I don't have any
17 further questions on that, but I appreciate it, and you
18 should expect as I learn a little bit more about this, I may
19 want to hear more from you.

20 MR. HERRON: Okay, thanks.

21 THE COURT: All right, thank you.

22 MS. PERLMAN: Thank you.

23 THE COURT: I've noted that I find, having practiced
24 law for so long, I find it interesting to talk to people that
25 actually do things. Okay. Does anyone wish to be heard

1 regarding the shippers' motion? Okay. I'm satisfied with
2 the record before me today, and I rely directly upon the
3 affidavit of Mr. Herron. The record is, again, satisfactory
4 and uncontroverted that the debtor has product in transit and
5 the debtors' representations and this Court's experience
6 reflects that if you don't pay shippers they don't deliver,
7 and again, the record from Mr. Herron's affidavit reflects
8 that the debtor is almost entirely reliant on a steady stream
9 coming in and going out and disruption to that would create a
10 risk of immediate and irreparable harm to the debtors'
11 business operations. And by so noting, I do find that the
12 debtors have carried their burden under Bankruptcy Rule 6003,
13 and I am prepared to enter the order. Okay, 503(b)(9)?

14 MS. PERLMAN: Your Honor, this is the last of the
15 motions that was entered on an emergency basis yesterday.
16 With respect to this motion, the debtors are asking for
17 authority to in their discretion pay for product that was
18 delivered within 20 days of the bankruptcy. Bankruptcy Code
19 § 503(b)(9) grants those claims administrative claims
20 priority, so it would not be altering the amounts that is
21 paid to the vendors, merely the timing. As provided in Mr.
22 Herron's declaration and as alluded to when Mr. Herron was
23 just up at the podium, the debtors do not keep a large store
24 of any of the products they use for making the ethanol,
25 particularly the corn and natural gas. It is a daily stream

1 of such products into the plants. Absent paying for those
2 products, the farmers and the providers of the gas will not
3 deliver the products to the plants and the plants will be
4 shut down and ethanol will not be produced. If called to
5 testify, Mr. Herron would testify that the relief sought in
6 this motion is necessary to maintaining the business and the
7 value of the ongoing business operations. Without this
8 relief, there would most definitely be immediate and
9 irreparable harm and, therefore, we ask this Court to enter
10 this order now on a complete and final basis.

11 THE COURT: Okay, I do have a question of - we
12 talked a lot about the delivery of corn. Is that coming
13 directly from farmers' co-ops or from large industrial
14 farmers or is there an intervening processing facility?

15 MS. PERLMAN: It is coming directly from farmers,
16 co-ops, and other entities that provide the corn.

17 THE COURT: Okay. Okay. Does anyone else wish to
18 be heard regarding the debtors' application under
19 § 503(b)(9)? Very well. The record does reflect that the
20 Court entered an interim order, interim-interim order
21 yesterday, again based upon an emergency showing by the
22 debtors that certain payments needed to be made or operations
23 would be suspended, and the Court did enter that order. I am
24 prepared to enter and approve the application today to
25 authorize the debtor but not direct the debtor to pay claims

1 arising and qualified for payment under § 503(b)(9). I will
2 note that I am treating this motion more accurately or for
3 functional purposes as basically a critical vendor
4 application. It is clear under our case law and under the
5 Code that § 503(b)(9) gives rise to an allowed administrative
6 claim. There is a good deal of case law and litigation
7 pending in various jurisdictions about the appropriate timing
8 of payment for a § 503(b)(9) claim, and I believe Judge
9 Gross, has recently opined on that issue, but I do find for
10 purposes of today that while the debtors have couched their
11 application under § 503(b)(9) I'm treating it as a critical
12 vendor application. It is an easier analytical exercise with
13 § 503(b)(9) because it goes to a question of timing of
14 payment rather than entitlement to payment on a priority
15 basis, and so in some ways, as a legal matter, it is easier
16 for the Court to walk through that and to accept the showing,
17 but nevertheless, even in the absence of a § 503(b)(9)
18 showing, I would find that the debtors have carried their
19 burden, that in the absence of a timely payment of these that
20 there is, one, the very likely prospect that all or many of
21 the suppliers would refuse to supply on a going-forward
22 basis, and two, that the cessation or interruption of
23 delivery of product to the debtors would give rise to an
24 immediate and irreparable harm both to their operations and
25 to their prospects for a successful reorganization. So,

1 having reviewed Mr. Herron's affidavit and on his testimony
2 or comments to the Court today, I'm satisfied that the
3 debtors have carried their burden, and I will approve and
4 authorize the relief.

5 MS. PERLMAN: Thank you, Your Honor.

6 THE COURT: Okay. I believe that concludes the
7 motions that are actually up for today; is that correct?

8 MS. PERLMAN: I believe that's correct.

9 THE COURT: Okay, let's talk scheduling.

10 MR. POHL: Maybe we can do the easy part first.

11 Final DIP or cash collateral hearings?

12 THE COURT: Well, actually can we talk about next
13 week.

14 MR. POHL: Sure.

15 THE COURT: My problem is that if you want to be
16 heard on the 10th, I have relatively little time.

17 MR. POHL: Okay.

18 THE COURT: Which means that you either need to have
19 basically an uncontested hearing or we do a quick and earn
20 DIP. I do have time on the 12th. So, maybe there's -

21 MR. POHL: I think, Your Honor, this is going to -

22 It's impossible for me to imagine that this is anything than
23 quick and uncontested, because there's nobody to be primed.

24 This is going to be West LB priming literally themselves with
25 their own money only to fund their own silo, and so I don't

1 think it's going to affect - and that money then will only be
2 used in that silo and the consequence of not obtaining that
3 financing is those plants would have to be closed.

4 THE COURT: Okay.

5 MR. POHL: So I don't think it's going to affect
6 anybody else and I think the reason I'm pushing for Monday,
7 Your Honor, if at all possible is that it's hard to predict
8 these inflows and outflows -

9 THE COURT: You need the money.

10 MR. POHL: - precisely, but I'm nervous about not
11 having the money.

12 THE COURT: I understand. Okay.

13 MR. POHL: And I think that if we had time on
14 Monday, our plan would be to file a motion with the term
15 sheet that we have, even if it's not done, if anything it's
16 going to get better from that point forward from the estate's
17 point of view, you know, not later than Wednesday night. So
18 there would be full Thursday and Friday and Saturday and
19 Sunday notice.

20 THE COURT: Okay. Does anyone wish to be heard
21 regarding the proposed scheduling request? All right. Mr.
22 Pohl, what I can do is I can hear you a 9:30 a.m. on the 10th.

23 MR. POHL: That's fine, Your Honor.

24 THE COURT: And if there is a problem or if there's
25 a substantial fight you'll be pushed over to Wednesday

1 afternoon, and I would be able to find time for you, but if
2 you've got - if you need to walk through what ought to be an
3 uncontested interim financing facility then I don't think
4 we'll have a problem getting it done, but I really don't have
5 any time after that on the 10th. So, we'll do what we can at
6 9:30 and if it's all together then we'll be in fine shape,
7 otherwise we'll be on for Wednesday.

8 MR. POHL: Thank you, Your Honor.

9 THE COURT: Okay.

10 MR. POHL: And if between, you know, over the next
11 day or two if we convince ourselves, as we watch what happens
12 over the next few days, that we can make till Wednesday, we
13 can push it out.

14 THE COURT: Yeah. I think that would be fine if
15 need be. Okay. Then, with respect to the final financing
16 hearing.

17 MR. POHL: I think I would like to propose, and I
18 haven't had a chance to add up with the other parties whose
19 calendars also matter, but given that we're heading into the
20 Thanksgiving holiday, I was going to propose, if Your Honor
21 has time, either Tuesday, December the 2nd or Thursday,
22 December 4th. I think in all the various orders that were
23 entered yesterday we either have an end date that is after
24 that, for example the AgStar facilities say not later than
25 December 10th, or we have 30 days indicated. So I think that

1 something that week would be within the scope of all of the
2 orders, Monday December 1st is the day after Thanksgiving
3 weekend, so I'm trying to avoid it.

4 THE COURT: I don't want to do that.

5 MR. POHL: Glad to hear that because I don't either.

6 THE COURT: December 2, 10 a.m.

7 MR. POHL: Okay. And I think, Your Honor, for some
8 of the first day - for some of the other motions to the
9 extent that they are interim and set over for final, maybe we
10 could use that day as well.

11 THE COURT: I think that would be fine. I would
12 treat that - why don't you treat that as basically your
13 second day hearing. You can treat it as a full omnibus. If
14 you get retention applications and the other fairly routine
15 items, if you can get them on in a standard notice, and
16 you've got the better part of a week to do that, I think that
17 that would be just fine.

18 MR. POHL: We will shoot for that.

19 THE COURT: Okay. And then as it relates to dates
20 going forward, you can get in touch with my chambers, and
21 they can give you whatever dates you might need. While we're
22 talking about scheduling and where we're going, where are we
23 going? I realize that this case has filed in an emergency
24 situation and I think I have a pretty good handle on what's
25 going on, but I guess I'd be interested to know and I don't

1 want you to show your hand or otherwise impair the debtors'
2 position, but I'm interested in your expectation about how
3 this process plays out.

4 MR. POHL: That's fair, Your Honor. Look, I think
5 there's no hidden agenda. I think that issue number one was
6 obtaining financing to keep the plants running to stabilize
7 things. We expect over the next week or 10 days, and we'll
8 talk to the U.S. Trustee, of course, but there will be a
9 Committee formation meeting, the usual inbound calls are
10 already coming about people looking to become involved, so
11 there will be a Creditors Committee. I expect that it will
12 be - I have no idea who will be on the Committee, but given
13 the type of business that this company is in and the payments
14 that you've just approved, the biggest unsecured creditors
15 both in the aggregate and individually will be bondholders.
16 There's a \$450 million bond issue, and day-to-day trade is
17 basically getting paid because of the short time -

18 THE COURT: Right.

19 MR. POHL: - frame but that doesn't mean there won't
20 be any other creditors but as far as the magnitude, it's
21 going to be a bond deal. I know they're organizing. You
22 know that the Secured Bondholder Committee, Ad Hoc Committee,
23 is sort of organized, based on the DIP financing, and others
24 are starting to raise their hands and say we're going to
25 participate in someway in this case. So I expect between now

1 and that final hearing the parties will come to the table.
2 They'll get organized. They'll hire their advisors. We'll
3 start getting them up to speed, and with the appropriate
4 liquidity this company is the type of business that, at least
5 we think, operates fairly calmly in a Chapter 11 environment,
6 unlike some other industries, and we'll start talking to our
7 creditor groups about the long-term vision for the company.
8 The company and its financial advisors will start working on
9 long-term business planning, really getting a chance to look
10 at ways to improve the business for the long term and you
11 know, I think this is sort of a conventional Chapter 11 case,
12 unlike some of the cases that have been filed in recent years
13 where there's some reason they have to emerge or be sold in
14 60 days or 30 days or 90 days. I think this is an old style
15 traditional Chapter 11.

16 THE COURT: Well, it seems to me that the company -
17 it's a very interesting industry, and obviously, I was a
18 little bit flip with Mr. Herron, but I do find the mechanics
19 of these industries to be particularly interesting.

20 MR. POHL: Uh-huh.

21 THE COURT: But one of the things that it seems to
22 me as I was going through the materials, this seems to be in
23 some ways a difficult industry given that it's so commodity-
24 dependent. You are basically reliant upon the oil market and
25 the corn market. So you're dependent upon the Middle East

1 and Venezuelan politics and the weather.

2 MR. POHL: Well, and I was not flip with someone - I
3 was trying not to be flip with someone I was speaking to
4 yesterday who was asking me sort of the same question, and I
5 said, Well, you tell me what corn and ethanol prices are
6 going to be next year, and we'll tell you what the business
7 is going to look like.

8 THE COURT: Yeah, I find that the industry and the
9 way and the context in which it arises and the mechanics of
10 the business I find very interesting, so, okay. Well, I
11 appreciate the report, and I think you have a handful of
12 orders to hand up.

13 MR. POHL: I think we do.

14 THE COURT: Ms. Perlman?

15 MS. PERLMAN: We need a second omnibus as well,
16 because a number of the orders are interim until the second
17 hearing, so if we could set that date to put that date into
18 those orders as well.

19 THE COURT: Isn't that - is that going to be the 2nd
20 or do we need a date sooner than that?

21 MR. POHL: Why don't we make it the 2nd.

22 MS. PERLMAN: The 2nd, that's fine.

23 MR. POHL: We'll do it the 2nd.

24 THE COURT: Yeah, I think - to do it anytime sooner
25 you're going to have a problem. The Committee's going to ask

1 for an adjournment as soon as they get appointed, so -

2 MR. POHL: I want to make sure the 2nd is late enough
3 for the U.S. Trustee. Okay.

4 THE COURT: I would expect -

5 MR. KENNEY: My one concern would be the amount of
6 time that shareholders might need if it was coming to them
7 through their brokerage houses because brokerage houses
8 aren't always quick on the dime, and I think for those two
9 motions maybe if we put those up to the next hearing after
10 that. I think once you get the date, maybe we just set the
11 objection deadline for a week ahead of that.

12 THE COURT: I'll tell you what, on those why don't
13 you - you can visit with the U.S. Trustee, you can plug in
14 the dates. If there's a concern about that, that's nearly 30
15 days out, which is a fairly substantial - compared to a lot
16 of other cases, that's a fairly substantial chunk of time.

17 MR. POHL: Well, and today as we all know, you know,
18 it's on the internet, it's on the website. I mean, the
19 ability for communication travel even to remote corners of
20 bondholders is pretty -

21 THE COURT: But I'll leave that to your judgment.

22 MR. KENNEY: You know, if we are going out 30 days,
23 December 2nd ought to be fine.

24 THE COURT: Okay, and there is no secret, to the
25 extent that there are parties that can raise concerns about

1 whether or not they've had sufficient notice, I'm happy to
2 hear from them. Okay? All right, so I'll look for then -
3 why don't we do this, you can get the orders to the court
4 reporter at the conclusion of the hearing, I will enter them,
5 and you can be confident they'll be on the docket today.

6 MR. POHL: And, Your Honor, again, thank you for
7 your help.

8 THE COURT: Happy to oblige. Is there anything
9 further? Very well, we'll stand in recess. Thank you,
10 counsel.

11 (Whereupon at 11:57 a.m., the hearing in this
12 matter was concluded for this date.)

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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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