

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
VERASUN ENERGY CORPORATION, .  
*et al.*, . Case No. 08-12606(BLS)  
Debtors. . (Jointly Administered)  
. Dec. 2, 2008 (10:20 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. Good morning.

3 MS. CLEGHORN: Good morning, Your Honor. Megan  
4 Cleghorn of Skadden, Arps, Wilmington. I'm here on behalf of  
5 the debtors today.

6 THE COURT: Okay.

7 MS. CLEGHORN: With me today and admitted *pro hac*  
8 are my colleagues, Patrick Nash, Felicia Perlman, Pete Krebs,  
9 and Lisa Diaz.

10 THE COURT: Okay.

11 MS. CLEGHORN: I believe that Mr. Nash and Ms.  
12 Perlman will be addressing the Court today.

13 THE COURT: Very good.

14 MS. CLEGHORN: If I may turn the podium over to Mr.  
15 Nash?

16 THE COURT: Sure.

17 MR. NASH: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. NASH: Pat Nash of Skadden, Arps, Chicago on  
20 behalf of the debtors. I believe we have Mr. Pohl with us by  
21 telephone.

22 THE COURT: Okay.

23 MR. NASH: Your Honor, we, of course, filed an  
24 agenda, and I'm here with, among other people, my colleague  
25 Ms. Perlman, and Ms. Perlman and I are going to be handling

1 different aspects of the agenda.

2 THE COURT: Okay.

3 MR. NASH: Prior to getting into the items on the  
4 agenda though, Your Honor, I thought it might be a good idea  
5 to provide you with a little bit of information in terms of  
6 what's transpired since we were last in front of you since  
7 it's been awhile since we've been here.

8 THE COURT: Sure.

9 MR. NASH: Your Honor, since we were last in front  
10 of you on November 4<sup>th</sup>, we have accomplished a lot and a lot  
11 has happened. Perhaps not quite as much as what we  
12 accomplished between Halloween and November 3<sup>rd</sup>, but we've  
13 been very busy. Since that time, Your Honor, the Committee  
14 was formed. The Committee has retained Akin Gump and  
15 Houlihan and local counsel as well, Mr. Detweiler is here,  
16 Mr. Stamer, Mr. Botter.

17 THE COURT: Okay. Gentlemen, welcome.

18 UNIDENTIFIED SPEAKER: Good morning, Your Honor.

19 THE COURT: Good to see you again.

20 MR. NASH: Since the Committee's been formed, Your  
21 Honor, we've been working very closely with them. We've been  
22 having - I think it's fair to say, daily update calls. We,  
23 on our part, have worked very hard to make sure that the  
24 Committee has been able to get up to speed as quickly as  
25 possible in terms of the issues facing these debtors. For

1 their part, Your Honor, the Committee has been incredibly  
2 constructive in terms of working with the debtors to get up  
3 to speed and participate in constructive negotiations, for  
4 example, with our DIP lenders. So, all in all, the Committee  
5 has been, I think, very supportive of what the debtors have  
6 been able to accomplish thus far and generally supportive of  
7 the relief that we seek today.

8 THE COURT: Okay.

9 MR. NASH: Also since we were last in front of Your  
10 Honor, Mr. Danny Herron, the president and CFO of the  
11 company, the former president and CFO of the company, and  
12 that's because, Your Honor, since we were last here, Mr.  
13 Herron is no longer with the company. The company filed an  
14 8K in the last couple of weeks, Your Honor, announcing that  
15 Mr. Herron had been terminated. In Mr. Herron's absence,  
16 Your Honor, the financial function and the operational  
17 function of the firm has been largely overseen by Mr. Jim  
18 Bonsall of AlixPartners, and Mr. Bonsall is here with us in  
19 the courtroom - Jim, if you wouldn't mind.

20 THE COURT: Okay.

21 MR. NASH: Mr. Bonsall, Your Honor, is subject to  
22 this Court's approval later today. The debtors have retained  
23 Mr. Bonsall as the company's chief restructuring officer.

24 THE COURT: I saw the motion.

25 MR. NASH: And senior vice president. Mr. Bonsall

1 arrived at the company on Monday, November 3<sup>rd</sup>, that is the  
2 date that we were here for our first day hearing. So, Mr.  
3 Bonsall has had a steep learning curve, but he is getting up  
4 to speed and more than getting up to speed, and getting his  
5 arms around the financial aspects of the firm, the debtors'  
6 liquidity needs, and also the operational aspects of the  
7 firm.

8 THE COURT: Okay.

9 MR. NASH: Of the company. Your Honor, with respect  
10 to the operations of the company, if I could draw your  
11 attention to the multicolored chart that we have here in the  
12 courtroom.

13 THE COURT: Yep.

14 MR. NASH: We have, as Your Honor knows, essentially  
15 three operating silos, the ASA silo, the VeraSun silo, and  
16 the US BioEnergy silo. The ASA silo, Your Honor, is up and  
17 operating. The VeraSun Energy silo, Your Honor, is up and  
18 operating, producing ethanol. The US Bio silo, Your Honor,  
19 is not operating at the moment. Those plants are in hot-  
20 idle. Hot-idle is a term of art in the ethanol industry that  
21 what it essentially means is, is that there are employees  
22 there, the current bills are being paid. To the extent that  
23 financing is provided that it makes sense to operate the  
24 plants, the debtors would be in a position to quickly get  
25 those plants back online and back up and running.

1 THE COURT: Okay. So the plants have not been  
2 mothballed.

3 MR. NASH: The plants have not been mothballed, Your  
4 Honor.

5 THE COURT: Okay, I understand.

6 MR. NASH: Also since we were last in front of Your  
7 Honor and as the debtors publicly announced in a press  
8 release that we filed on November 24<sup>th</sup>, the debtors have  
9 received a confidential letter of intent from a very serious  
10 party who has expressed an interest in acquiring  
11 substantially all the assets of the company, and that -

12 THE COURT: All three silos?

13 MR. NASH: All three silos, Your Honor.

14 THE COURT: Okay.

15 MR. NASH: And that party is interested in serving  
16 as a stalking horse in a 363 transaction. Like most letters  
17 of intent, Your Honor, there certainly is a level of  
18 conditionality as expressed in their letter and other aspects  
19 of their letter that the debtors would absolutely want to  
20 negotiate before pursuing any further. Nevertheless, Your  
21 Honor, given the very serious, what we perceive and what  
22 Rothschild perceives to be what is a serious offer from a  
23 serious player, we felt it important to not only publicly  
24 announce the existence of the offer, but also to obtain  
25 certain permission from the provider of the offer that we

1 could share details of the offer with at least the  
2 professionals of our key creditor constituencies. That would  
3 be our secured creditors as well as Mr. Stamer and the  
4 Committee. And for obvious reasons, Your Honor, it was  
5 important that we do that because what we've been doing over  
6 the last month largely, in addition to trying to stabilize  
7 the operations is really drill down on the type of financing  
8 that each silo is willing to provide and the purposes for  
9 which they're willing to provide it, and so, as you're  
10 negotiating with those parties about financing and attempting  
11 to convince them to make additional liquidity available to  
12 the debtors and they're asking you, Well, what do you intend  
13 to do with this financing? It felt important to us that we  
14 let those parties know that we had received this offer.  
15 Certainly, we have no intention of necessarily selling the  
16 company, all or any part of it, but we do think that because  
17 it is a serious offer, that it is something that we do intend  
18 to run the ground and pursue.

19 THE COURT: Okay.

20 MR. NASH: The DIP financing that we're going to be  
21 presenting here today and seeking approval of, is none of the  
22 DIP financing is conditioned on a sale, and the DIP financing  
23 that we do have is, I think, Your Honor, largely agreed to.  
24 Mr. Schaffer is here on behalf of the indenture trustee with  
25 respect to the secured noteholders. As you would expect, Mr.

1 Schaffer, I believe, wants to be heard with respect in  
2 particular to the roll-up components of the bondholder DIP  
3 financing, and when I say that I believe we are basically  
4 agreed with respect to the DIP financing, I think, Your  
5 Honor, that we will need an opportunity, perhaps, while Ms.  
6 Perlman goes through the other aspects of the agenda, certain  
7 of us may break out in the hallway and button up any open  
8 issues with respect to the financing.

9 THE COURT: Okay.

10 MR. NASH: And with that, Your Honor, I think I've  
11 concluded my introductory remarks, unless Your Honor has any  
12 questions.

13 THE COURT: No, I don't have any questions right  
14 now. I appreciate the report.

15 MR. NASH: With that, I'll turn the podium over to  
16 Ms. Perlman.

17 THE COURT: Very good. Ms. Perlman?

18 MS. PERLMAN: Good morning, Your Honor. Felicia  
19 Perlman on behalf of the debtors. I'm going to address, as  
20 Mr. Nash said, the other items on the agenda. I will go, for  
21 ease, in order of the agenda.

22 THE COURT: Okay, I have your amended agenda.

23 MS. PERLMAN: The first matter on the agenda is the  
24 motion for waiver of the 345 acquisitions and at the request  
25 of the U.S. Trustee, we have agreed to continue that to the

1 January 8<sup>th</sup> omnibus hearing.

2 THE COURT: Okay.

3 MS. PERLMAN: The next matter on the agenda is the  
4 debtors' request for an extension of time to file schedules.  
5 We have requested and we have consulted with the U.S. Trustee  
6 who has agreed to support an extension through January 14<sup>th</sup>,  
7 2009.

8 THE COURT: And I've signed that order.

9 MS. PERLMAN: Thank you, Your Honor.

10 THE COURT: Okay.

11 MS. PERLMAN: The next matter is the retention of  
12 McGladre & Pullen.

13 THE COURT: I have signed that as well.

14 MS. PERLMAN: Thank you. Your Honor, there has been  
15 one change to that order.

16 THE COURT: Is that the order that came under a CNO?  
17 Is it a revised order that came in under a CNO?

18 MS. PERLMAN: It is a revised -

19 THE COURT: I'll tell you what -

20 MS. PERLMAN: I think we're going to submit a new  
21 one -

22 THE COURT: - take a look at whatever shows up on  
23 the docket.

24 MS. PERLMAN: The providers of the debtor-in-  
25 possession financing have requested that all of the

1     retentions be subject to a silo-by-silo allocation -

2             THE COURT: Okay.

3             MS. PERLMAN: - of fees. I'm not certain if what  
4     was submitted to you had that. If it does not, we will  
5     submit a new order and if it does we will stand by that one.

6             THE COURT: All right. Well, I have signed the  
7     order, so I believe it's on the docket or it's on its way to  
8     the docket, so -

9             MS. PERLMAN: Okay, hopefully it has that language  
10    in there, and if not -

11            THE COURT: If it doesn't just send me a new order  
12    under certification, and we'll vacate the prior order.

13            MS. PERLMAN: Great, thank you, Your Honor.

14            THE COURT: Okay.

15            MS. PERLMAN: The next item up is the utilities  
16    motion.

17            THE COURT: Right.

18            MS. PERLMAN: The utilities motion had four  
19    objections from different parties. We have reached  
20    agreements with all of those parties. Primarily, the  
21    agreement is to provide those parties who objected with  
22    shorter terms on their billing, which they believe provides  
23    them additional protection.

24            THE COURT: Uh-huh.

25            MS. PERLMAN: We'll be documenting those agreements

1 individually after the order and there's language in the  
2 order that reflects that. Absent that, there are no  
3 outstanding objections.

4 THE COURT: So these objectors will either be carved  
5 out from the order or the order will provide for their  
6 treatment.

7 MS. PERLMAN: The order has language in it providing  
8 that we have reached agreement and that documentation will be  
9 following.

10 THE COURT: Okay. That's fine. Do you have a form  
11 of order?

12 MS. PERLMAN: We do, Your Honor.

13 THE COURT: Okay. Thank you. All right, does  
14 anyone else wish to be heard regarding the utilities motion?  
15 Okay. Let me look at the blackline.

16 MS. PERLMAN: As I've seen parties head out on the  
17 DIP, I feel like I should slow down my presentation here to  
18 provide other parties time.

19 THE COURT: You don't need to stall it. If they  
20 need more time, we'll take a break.

21 MS. PERLMAN: I could filibuster or something. The  
22 next item on the agenda is the motion for a variety of relief  
23 to protect the NOL and other tax attributes of the debtors.  
24 We have revised the order from the order initially provided  
25 to this Court at the first day hearing, if you recall. We

1 presented that motion and the U.S. Trustee requested that  
2 notice be provided, which we did. The Committee had a  
3 variety of changes that were - didn't affect the relief  
4 requested, just provided additional notices to the Committee  
5 and the like, which we have accepted, and in addition, with  
6 respect to the relief requiring the sell down of claims if a  
7 382-out plan is proposed, we have at the request of parties  
8 carved out the DIP lenders loans which will be post-petition  
9 obligations anyways, as well as the secured noteholders.  
10 Other than that there are no objections to the relief  
11 requested in that motion, and we'd request Your Honor sign  
12 that order.

13 THE COURT: Okay. Does anyone else wish to be heard  
14 regarding the motion? Yes, sir.

15 MR. SCHWARTZ: Good morning, Your Honor. Steve  
16 Schwartz, Winston & Strawn on behalf of UBS. We did not file  
17 an objection to the motion, and we were okay with the motion  
18 as filed, however, based on the representation of counsel  
19 that certain of the secured claims are going to be excluded,  
20 we think that all the secured claims should be excluded. It  
21 doesn't make any legal sense or factual sense in my mind to  
22 exclude one set of secured claims and not the other. So if  
23 the order is going to be revised to exclude the secured  
24 noteholder claims, it should be revised to exclude all  
25 secured claims including that of UBS.

1 THE COURT: Ms. Perlman?

2 MS. PERLMAN: Your Honor, in reaching an agreement  
3 with the secured noteholders after they did file an  
4 objection, the debtors looked at where the different secured  
5 holders sat with the likelihood of what their treatment would  
6 be based on the different collateral packages they had and  
7 made a determination that the secured noteholder claims that  
8 are carved out would not affect 382(L) plans viewing the case  
9 in the variety of ways it is and the variety of plans that  
10 might be proposed, and that's why we reached an agreement.  
11 We don't believe it's appropriate to have a blanket carve-out  
12 for all secured claims because that would require a different  
13 analysis.

14 THE COURT: I understand. Mr. Schwartz?

15 MR. SCHWARTZ: Well, Your Honor, I'm not sure that  
16 all secured claims would have a different analysis, but  
17 certainly the secured claims of UBS, which has a first  
18 priority lien on the inventory and accounts receivable  
19 collateral, would have a similar analysis as the noteholders  
20 from a tax standpoint under the Internal Revenue Code and the  
21 same rationale that would apply to the noteholders would  
22 apply to the UBS claims. So, I don't see a basis for making  
23 that kind of a distinction.

24 THE COURT: Well, here's what we'll do. I am  
25 prepared to enter the order that would approve and authorize

1 the relief requested. I understand and kind of expected that  
2 the limited objection of the DIP lenders would get resolved  
3 as you've described, but what I'd like you to do is, I think  
4 that this has come in fairly quickly. If you have had an  
5 opportunity to hear from Mr. Schwartz beforehand, maybe this  
6 matter would have gotten itself resolved. So, at some point  
7 we're going to take a break today, and if you can resolve it,  
8 that's fine. If not, then I will consider it, but frankly on  
9 the question that you're raising, I'd need to go back and  
10 look at it a little bit more closely because I'm not sure  
11 that I accept your proposition that all secured creditors  
12 would or should be carved out of it. Frankly, I'm not sure  
13 that that does make sense. So, that sort of threshold  
14 proposition I'm not necessarily accepting, and I would need  
15 to go back and sort of look at exactly where UBS stands to  
16 decide whether or not if it's not resolved, whether you  
17 should or should not be carved out of it, so, I think you'd  
18 benefit from a short opportunity to confer perhaps with Ms.  
19 Perlman, but as for - basically as for everybody else, I  
20 understand the nature of the relief, and I believe it's  
21 appropriate, so, why don't you talk about that, and we can  
22 address it later and if we need to deal with it subsequently,  
23 we can, but as far as the other relief, the basic relief that  
24 the debtor's requesting, other than this little wrinkle, I  
25 don't have any issue; okay?

1 MR. SCHWARTZ: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. PERLMAN: Thank you, Your Honor. The next  
4 motion on the agenda is the DIP which we will pass over.

5 THE COURT: Okay.

6 MS. PERLMAN: And then the next motion is the motion  
7 for the interim compensation procedures. We made one  
8 technical modification with respect to when the fee apps will  
9 be filed, which is on or before - from on or before the 15<sup>th</sup>  
10 day of the month to on or after, and that was at the request,  
11 I believe, of the U.S. Trustee, and other than that, we  
12 received no objections to that motion.

13 THE COURT: Okay. I'll enter the order. I regard  
14 the matter as routine.

15 MS. PERLMAN: Thank you, Your Honor. The next  
16 matter on the agenda is the motion for retention of certain  
17 professionals in the ordinary course. Your Honor, we  
18 negotiated with the Committee with respect to this order, and  
19 at their request, several changes were made. Most notably  
20 that there was a \$300,000 cap per professional added. The  
21 cap can be exceeded with the consent of the Creditors  
22 Committee. In addition there was a \$3 million cap for all  
23 ordinary course professionals during the course of this case  
24 that was added.

25 THE COURT: Is the \$300,000 cap for the life of the

1 case for any -

2 MS. PERLMAN: For the life of the case for any  
3 ordinary course professionals with the ability to -

4 THE COURT: Sure.

5 MS. PERLMAN: - extend that cap with the consent of  
6 the Committee.

7 THE COURT: Okay.

8 MS. PERLMAN: And the debtors have accepted those  
9 changes and believe they do not provide any issues with  
10 respect to their ability to operate and use those  
11 professionals.

12 THE COURT: What's the mechanic for raising the cap  
13 on a particular professional? Will there be notice or is it  
14 simply an agreement between the Committee -

15 MS. PERLMAN: Simply an agreement between the  
16 Committee and the debtors.

17 THE COURT: I think if it's going to get modified, I  
18 expect it would be routine, and if you've got the consent of  
19 the Committee I think there ought to be at least a filing of  
20 a notice, but other than that, I don't have an issue with the  
21 relief requested, and I think the caps are appropriate.

22 MS. PERLMAN: Thank you, Your Honor. The debtors  
23 will, if we reach that point, file a notice, and we'll add  
24 language in the order to reflect that.

25 THE COURT: Yeah, why don't we tinker with the

1 order. I'll take that under certification, but the relief  
2 will be granted.

3 MS. PERLMAN: Thank you, Your Honor. The next  
4 matter on the agenda and I believe I'm looking at the agenda  
5 correctly, to some extent I'll address the next three  
6 together -

7 THE COURT: Sure.

8 MS. PERLMAN: - which are the retentions of Skadden  
9 as counsel, AlixPartners to retain Jim Bonsall as CRO and  
10 senior vice president, and the Rothschild retention. Your  
11 Honor, with respect to each of those retentions and I'll do  
12 them individually in a minute, but there is a provision that  
13 has been added at the request of various DIP lenders to each  
14 of those to provide that professional fees be funded on a  
15 silo-by-silo basis, allocated on a nameplate capacity and  
16 then tied to the DIP.

17 THE COURT: What does "allocated on a nameplate  
18 capacity" mean?

19 MS. PERLMAN: I'm going to use a simple example, so  
20 -

21 THE COURT: Sure.

22 MS. PERLMAN: - I don't show the fault of my math,  
23 but if there was a thousand units of ethanol produced and the  
24 VeraSun entities produced 500,000 of those and each of the  
25 others produced 250,000 of those or had the capacity to

1 produce 250,000 -

2 THE COURT: Right.

3 MS. PERLMAN: - the fees would be allocated  
4 according to that capacity, so a quarter or half a quarter  
5 all tied to a budget that is consistent with respect to the  
6 different DIP lenders. It provides that each of the lenders  
7 will be financing, essentially, a portion of the fees that  
8 they view as benefitting -

9 THE COURT: Allocated to their collateral.

10 MS. PERLMAN: Their collateral, as opposed to being  
11 jointly and severely liable for one hundred percent of the  
12 fees.

13 THE COURT: And so what you're not doing then is a  
14 breakout of whether or not certain services relate to one  
15 debtor or another debtor.

16 MS. PERLMAN: That's correct. Billing will be  
17 consistent, but the allocation will take into account the  
18 various debtors and -

19 THE COURT: Well, frankly, that's preferable because  
20 I've been - I've had situations, particularly, the worst is  
21 where you have to go back and start to allocate and then it  
22 becomes a fiction writing exercise.

23 MS. PERLMAN: When the issue was raised, we all  
24 looked at the various alternatives to provide appropriate  
25 payment and allocation of the fees, and the parties

1 determined this was the appropriate method. The language  
2 with respect to that is either final or substantially final,  
3 but because of that and to make sure everybody has had an  
4 opportunity to review that language, while I believe we  
5 submitted orders earlier, we would like to resubmit orders  
6 that have been finally signed off on by each of the  
7 professionals and the various secured parties and the  
8 Committee, and we will keep that paragraph in each order  
9 consistent between the three retentions for clarify.

10 THE COURT: Okay. Mr. Jaffe, do you wish to be  
11 heard?

12 MR. JAFFE: Yes, Your Honor. Good morning, Your  
13 Honor.

14 THE COURT: Good morning.

15 MR. JAFFE: May it please the Court, Henry Jaffe at  
16 Pepper Hamilton. I'm here for Agstar Financial, Your Honor.  
17 I'd like to introduce my co-counsel from Latham & Watkins,  
18 Caroline Reckler.

19 THE COURT: Great, okay.

20 MS. RECKLER: Good morning, Your Honor. Just  
21 briefly, it's Agstar's understanding that none of the  
22 professional fees either of Alix, Rothschild, or Skadden will  
23 be allocated to the Janesville plant except for any fee  
24 related to the role of Janesville.

25 MS. PERLMAN: That is correct, Your Honor.

1 THE COURT: Okay.

2 MS. PERLMAN: In addition, with respect to  
3 AlixPartners and Rothschild, they have what we refer to as  
4 non-monthly fees, the success fees, restructuring fees and  
5 the like and there's a paragraph in each of those orders that  
6 provided those fees will also be tied to the silos so if  
7 financing is obtained for the VeraSun entities, the fee for  
8 that will be paid out of those entities and not out of the  
9 ASA or the US Bio entities.

10 THE COURT: Okay.

11 MS. PERLMAN: Your Honor, there are no other  
12 objections with respect to the retentions other than those  
13 issues. To go to Rothschild for one second, as I see the  
14 Committee standing up, the Committee also requested certain  
15 changes with respect to the payment of those fees and certain  
16 modifications of their fees. Those have all been built into  
17 the order. The order is currently circulating to make sure  
18 all parties sign off on it and once they do, we will submit  
19 that order as well. And I don't know if that's what you're  
20 going to, if not -

21 MR. STAMER: Just thirty seconds, if I may, Your  
22 Honor.

23 THE COURT: Sure.

24 MR. STAMER: For the record, Michael Stamer from  
25 Aiken Gump Strauss Hauer & Feld here on behalf of the

1 Official Committee.

2 THE COURT: Good morning.

3 MR. STAMER: Good to see you, Judge. We had a  
4 slight concern with respect to the Alix retention, which I  
5 believe has been satisfied with respect to the order, and  
6 that is that their terms of engagement contemplate a success  
7 fee or a transaction fee, which is not being pre-approved.  
8 That was our concern. Again, I think the language in the  
9 order is sufficient, so I just wanted to highlight that for  
10 the record.

11 THE COURT: Okay.

12 MR. STAMER: With respect to Rothschild, we did  
13 spend the better part of a few days negotiating what we  
14 thought were acceptable modifications to the Rothschild  
15 success fee and terms of engagement, which included an all-in  
16 cap, certain modifications to the success fees to deal with  
17 incentives. Again, we think it will - no need to go through  
18 it in detail on the record. It will all be set forth in the  
19 order, and based upon the modifications we have no objection  
20 to either of those two retentions.

21 THE COURT: Okay.

22 MR. STAMER: Thank you, Judge.

23 MS. PERLMAN: Your Honor, I've been asked to clarify  
24 also with respect to AlixPartners that the fees will not be  
25 allocated to Janesville, with the exception of fees that are

1 specifically for - None of the Alix fees will be allocated to  
2 Janesville.

3 THE COURT: Okay. All right, so as I understand it,  
4 then I should expect to see under certification proposed  
5 orders for AlixPartners and for Rothschild; is that correct?  
6 Or is the -

7 MS. PERLMAN: And for Skadden.

8 THE COURT: Oh, is Skadden being revised or is  
9 Skadden -

10 MS. PERLMAN: To the extent that the paragraph on  
11 they silo-by-silo -

12 THE COURT: Needs to get built in.

13 MS. PERLMAN: - changed, I want to make sure it's  
14 consistent between the three orders for a lack of confusion  
15 in the allocation. So we will get sign-off on that language.  
16 If it changes from what has been submitted, we will resubmit  
17 all three orders.

18 THE COURT: Okay. Ma'am, do you wish to be heard?

19 MS. JONES: Yes. Shaunna Jones of Willkie Farr &  
20 Gallagher here on behalf of AlixPartners. I just wanted to  
21 make one statement on the record. We accept the proposed  
22 order as submitted and obviously the firm appreciates the  
23 opportunity to be retained in these cases, however, there is  
24 one provision in the order regarding restrictions on APS's  
25 affiliates' investments. We think it overly broad and we

1 just want to reserve our rights with respect to that type of  
2 language in future engagements. We didn't want this  
3 retention order to -

4 THE COURT: Well, people always cite orders back to  
5 me all the time.

6 MS. JONES: Uh-huh.

7 THE COURT: I mean, I think each order largely  
8 stands on its own. The question I'm asking - I guess, the  
9 question I'm going to ask is, Are you satisfied with whatever  
10 - I haven't seen the language on the restrictions, are you  
11 satisfied for purposes of this case and what you want to note  
12 is that you don't want that order - your client doesn't want  
13 that order thrown back at them in the next case.

14 MS. JONES: Correct, Your Honor. We're fine with  
15 this order.

16 THE COURT: I understand the reservations.

17 MS. JONES: Thank you.

18 THE COURT: Okay. All right, does anyone else wish  
19 to be heard? We've collapsed the three retentions. Does  
20 anyone else wish to be heard on these retentions? Okay. I  
21 have reviewed each of the applications and the responses that  
22 were filed, and I followed generally counsel's description of  
23 the revisions, which are not surprising or controversial, at  
24 least as far as I understand them. What I expect to see from  
25 counsel then are three separate orders approving the

1 retention applications for Skadden, and for AlixPartners, and  
2 for Rothschild, and I would request that they arrive with  
3 blacklines as well. To the extent that I have concerns or  
4 questions about the language then what I would expect to do  
5 would be to get parties on the phone and we'd sort through  
6 that, but as a general proposition, the request for  
7 retentions are acceptable and they will be approved.

8 MS. PERLMAN: Thank you, Your Honor. Two things, we  
9 hope to have them over this afternoon, so perhaps while the  
10 DIP orders are being -

11 THE COURT: And hopeful you'll be out of here by  
12 then.

13 MS. PERLMAN: And then - that's true. We referred  
14 to McGladre earlier and that we were going to check their  
15 order. It's going to be consistent with the language in  
16 their order with respect to the silo-by-silo allocation as  
17 well.

18 THE COURT: I understand. Okay.

19 MS. PERLMAN: The remaining motion on the agenda,  
20 before returning to the DIP, is the debtors' rejection  
21 motion. This motion seeks two separate forms of relief, and  
22 I will address them that way. Initially, it seeks approval  
23 of the rejection of some corn contracts and sale contracts  
24 with respect to the Janesville and Welcome plants. Those  
25 plants are both not operating. Their construction has been

1 substantially complete. Due to financing and certain other  
2 market conditions, decisions have been made not to operate  
3 those plants at this time. Let me break down the two  
4 different types of contracts that are being rejected.  
5 Initially, there are corn purchase contracts. These are  
6 contracts pursuant to which the debtors have committed to  
7 purchase certain volumes of corn at set prices during the  
8 months of October, November, and December - or during the  
9 months of November and December, given the filing date, and  
10 given the fact that the plants are idle, the debtors have  
11 made a decision in their business judgment that purchasing  
12 the contracts for idle plants would not be in the best  
13 interest of their estates. With respect to the sale  
14 contracts, it's kind of the flip side of the same thing where  
15 the debtors have committed to selling certain quantities of  
16 ethanol to various parties. Due to the fact that the plants  
17 are not producing ethanol, the debtors determined in their  
18 business judgment - the decision was to reject those  
19 contracts. Your Honor, we have Mr. Bonsall in the court  
20 today. If called to testify, Mr. Bonsall would testify that  
21 the debtors reviewed the contracts, determined, based on the  
22 fact that the plant was not operating, that it would be  
23 beneficial to reject those contracts. We have received only  
24 one objection with respect to that portion of the relief, and  
25 we would ask Your Honor to overrule that objection.

1           THE COURT: Okay. Well, before we turn to the  
2 mechanics of the rejection procedures, I do note that there  
3 was an objection to the debtors' business judgment in that  
4 regard, and I will accept the proffer of Mr. Bonsall. Does  
5 anyone wish to cross-examine Mr. Bonsall on the discreet  
6 issue of the debtors' exercise of their business judgment?  
7 Okay. Subject to parties' rights to cross-examine him should  
8 there be further testimony or proffer on the rejection  
9 procedures, I'll accept the proffer. I think what I want you  
10 to do is we'll go through the rejection procedures as well,  
11 and then I will hear from any objectors, and if we could  
12 recall Mr Bonsall or proffer more testimony to address any  
13 particular issues, then we'll do so -

14           MS. PERLMAN: Absolutely, Your Honor.

15           THE COURT: - when we turn to the procedures.

16           MS. PERLMAN: It seems we'll be able to break it  
17 into the two different components. The second portion of the  
18 motion, proposed rejection procedures. As the debtors  
19 continue to evaluate their operations, the different  
20 strategic alternatives that they may be presented with in the  
21 financing that may be available to them, the debtors are  
22 likely to determine that there are multiple additional  
23 contracts that may need to be objected, whether they be for  
24 the purchase of corn at certain plants at above market prices  
25 or at plants that are operating at less than full capacity,

1 contracts for the sale of ethanol or other contracts related  
2 to the operations. Due to the number of contracts that may  
3 need to be objected, the debtors determined that -

4 THE COURT: Rejected; right?

5 MS. PERLMAN: Rejected, I'm sorry if I said  
6 otherwise.

7 THE COURT: Let me ask you a question, I don't want  
8 to interrupt, but I saw your reply to the various objections  
9 and you note that in response to a bunch of the concerns  
10 raised about the rejection procedures, the order and the  
11 procedures will be modified in various forms. Do you have a  
12 revised form of order that perhaps we can share with the  
13 objectors?

14 MS. PERLMAN: We do.

15 THE COURT: Okay.

16 MS. PERLMAN: Anybody who would like the revised  
17 form of order could pick one up over there. Essentially,  
18 what we modified was the notice procedures to insure broader  
19 notice of the rejection. Any party who in their objection to  
20 our motion requested that they receive notice was added to  
21 that list. In addition, if any party requests in the future  
22 to receive notice of these rejection procedures we will  
23 provide such notice to them. We also changed the notice  
24 provision to provide 10 business days' notice rather than 10  
25 calendar days' notice of the rejection request. We stated

1 that we would provide a statement regarding our business  
2 judgment and why we are seeking rejection and that we would  
3 file the notice with the Court. Your Honor, the debtors  
4 believe that proceeding with rejections pursuant to these  
5 procedures will save significant administrative costs and  
6 will provide for a more effective and efficient  
7 administration of these estates both from the debtors' and  
8 the Court's point of view. The right to reject contracts is  
9 provided to the debtors pursuant to 365 of the Bankruptcy  
10 Code. The courts have said, the debtors can reject contracts  
11 subject to their business judgment. As stated earlier, the  
12 notice will provide the business judgment and no parties are  
13 prejudiced by these procedures as the procedures will provide  
14 at least as much notice as are required by the Bankruptcy  
15 Code and the Delaware Local Rules and will also provide the  
16 parties an opportunity to object. So if a party does not  
17 believe that the debtors' business judgment is appropriate,  
18 the party may object, and we will then either reach an  
19 agreement or appear before this Court just as we would if  
20 individual motions were being heard.

21 THE COURT: Well, the right to object wouldn't be  
22 limited simply to the question of business judgment. I mean,  
23 I would assume somebody can respond that it's not an  
24 executory contract so rejection is inappropriate or that  
25 there's some substantive defense to the request for

1 rejection; right?

2 MS. PERLMAN: Absolutely, Your Honor. All rights to  
3 object are preserved. I raised business judgment just  
4 because that was what was raised in the various objections.

5 THE COURT: Right.

6 MS. PERLMAN: And based on that, Your Honor, the  
7 debtors believe that the approval of these procedures is in  
8 the best interest of the estates and does not prejudice any  
9 parties. We request the Court approve the motion.

10 THE COURT: Okay, I'll hear from any party that  
11 wishes to be heard.

12 MS. RECKLER: Good morning, Your Honor. Caroline  
13 Reckler on behalf of Agstar. Your Honor, I believe that the  
14 debtors' revised order addresses our concerns as to the  
15 rejection procedures and as to the remainder of our objection  
16 as to whether the debtor has satisfied the business judgment  
17 standard, we'll rest on our papers.

18 THE COURT: I understand. Okay. Mr. Lemisch?

19 MR. LEMISCH: Good morning, Your Honor. Ray  
20 Lemisch, Benesch, Friedlander, Coplan & Aronoff on behalf of,  
21 I think at this point, over 120 different corn growers. With  
22 me today is Joe Peiffer of the firm of Day Rettig & Peiffer.  
23 His motion *pro hac* is pending.

24 THE COURT: I'm happy to hear from him.

25 MR. LEMISCH: Thank you, Your Honor.

1 THE COURT: Mr. Peiffer.

2 MR. PEIFFER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. PEIFFER: I'd like to take a little time and lay  
5 out a little bit of a background of the problems that the  
6 VeraSun bankruptcy has caused for farmers. I represent  
7 farmers currently in six states: North Dakota, South Dakota,  
8 Nebraska, Minnesota, Iowa, and Michigan. From viewing the  
9 debtors' chart, they probably have contracts with two of the  
10 three silos, the one that they probably don't have are the  
11 ones in the far left, because those Cargill providing the  
12 grain to them, and Cargill has its own set of offset rights  
13 and it's my understanding Cargill is in a position to honor  
14 the contracts with those growers. Unfortunately, the growers  
15 in the other two silos find it's fortunate to have a Cargill  
16 there to stand in the gap for them. The growers in the other  
17 two silos, outside of bankruptcy if they were to learn that  
18 VeraSun perhaps were insolvent, would have certain rights  
19 under the UCC. The rights under the UCC would be to send a  
20 request for adequate assurance of performance and the debtor  
21 would - VeraSun would have 30 days within which to give  
22 adequate assurance of their ability to perform the contract.  
23 If VeraSun did not provide adequate assurance within 30 days,  
24 they could then repudiate the contract unilaterally. That  
25 right does not exist in the Bankruptcy Court. Theoretically,

1 there are some cases that say they could make those notices  
2 and some courts say no, that could be a violation of the stay  
3 to request that at this time. So the only way that the  
4 farmer knows for sure his grain is free and he can sell it,  
5 is either have a rejection whenever the debtor gets around to  
6 it or to file a motion to assume or reject the contract. So,  
7 perhaps instead of streamlining the process, what the debtor,  
8 by setting up the procedure it has set up, has set itself up  
9 for literally thousands of motions to assume or reject  
10 contracts. On the plane flying in last night, I was trying  
11 to get a grip on the contracts that the farmers I represent  
12 have, and I have elevators as well. It isn't just farmers.  
13 I also represent elevators, and some farmers have a dispute  
14 with one contract. I found one farmer that had about 30  
15 contracts. Elevators have many, many more contracts.  
16 Contracts are from a low of about 450 bushels of corn. The  
17 largest I saw thus far is 80,000, and I'm not even - I'm  
18 about a third of the way through the people I have. I don't  
19 know what the total is, can't tell you. So, because of that  
20 the farmer in particular is placed in particular peril. For  
21 example, many people have payments and mortgages that are due  
22 right at the end of the year, January 2<sup>nd</sup>. And they were  
23 counting on VeraSun contracts to have the money to pay the  
24 mortgage. And perhaps a VeraSun contract would have been a  
25 March contract at maybe 6 bucks a bushel. They go to the

1 banker to borrow the gap or bridge loan, if you will, to get  
2 them from January till March when they're going to sell the  
3 grain, and the bank is going to ask, Is your grain sold?  
4 They'll say, Yes. They say VeraSun. He's going to say,  
5 What's it worth? And they don't know because the grain is  
6 held and the farmer or the grain supplier is obligated to  
7 perform to VeraSun until either rejection or the stay is  
8 lifted allowing them to take the move and go forward. So,  
9 today we don't know what the price will be. For example, if  
10 we looked in Central City, Nebraska, my understanding that  
11 the price on October 31<sup>st</sup> was approximately 4 bucks a bushel  
12 at the other ethanol plants. As of the day before  
13 Thanksgiving, that price had dropped by over 40 cents a  
14 bushel, and there were contracts that were for November that  
15 haven't been honored and 10 percent of the market value of  
16 that crop has evaporated. So the farmers are at a real  
17 peril. The market can go up and down, if the farmer now  
18 attempts to sell that grain to somebody else, saying, Well,  
19 they're never going to honor my contract. For example, let's  
20 assume there's a \$6 contract for February, and the farmer  
21 looks at it today and says, Well, the market price is 3.50 or  
22 below. They're never going to worry about - they're not  
23 going to accept it. A problem could happen that they go sell  
24 the grain somewhere else, and then the market flips, like it  
25 did last year, and in February of last year the market price

1 was 7 bucks a bushel. So the farmer doesn't have the grain  
2 release, and he sells the grain, and the market flips under  
3 the debtors' procedure, you're right, they could wait, see  
4 that the market's now - they're in the money on it, they'll  
5 now assume. The farmer's taken the risk of selling the grain  
6 at 3.50 and now if it goes to 7, they've got to make up a  
7 buck a bushel to VeraSun. There we're thinking we got 2.50 a  
8 bushel for the grain. Cost production of grain in the  
9 Midwest, corn is about \$4 a bushel, Your Honor. We're  
10 already at market prices below the cost of production, and  
11 they may drop further. We don't know. Nobody has a crystal  
12 ball. As long as the grain is held there, unless the farmer  
13 has enough other grain to cover, they can't sell that grain  
14 without risk. So if all the farmers are sitting there  
15 concerned not only about year-end financing, not only do we  
16 look at after the first of the year mortgage payments,  
17 typically farmers do tax planning, and they will buy inputs  
18 at the end of the year because their cash based as taxpayers,  
19 so they will buy inputs now before December 31 that they can  
20 deduct. They can't borrow the money to buy those inputs that  
21 they'll use next year.

22 THE COURT: When you say "inputs", you're talking  
23 about either seed for next year.

24 MR. PEIFFER: Fertilizer, seed -

25 THE COURT: Fertilizer, okay, I understand.

1 MR. PEIFFER: Chemicals, many other things.

2 THE COURT: Sure.

3 MR. PEIFFER: And normally they would prepay those,  
4 take delivery of that commodity or that input in the spring.  
5 So they buy a bunch today, deduct it, cuts their taxes down.  
6 If they have to borrow money to do that, they're unable to do  
7 so at this time because they have no idea what their corn is  
8 worth. By the time VeraSun gets around to rejecting a  
9 contract, it may drop another 50 cents a bushel or it may go  
10 up. We don't know. Typically, when you go to the bank and  
11 if your grain is contracted for a price certain, the bank  
12 will view that as collateral at that price certain. Bankers  
13 won't do that with VeraSun contracts. They won't even take  
14 today's market price and say that's what would be there. So  
15 the farmer is impaled upon the horns of a dilemma, and the  
16 question is, do I move forward and sell and take the risk  
17 that the market might go up, but at least I know where I'm at  
18 today, or do I sit and ride it out and let VeraSun speculate  
19 with my future using my money, and they get to see the fly up  
20 on the Texas Holding game before they place their bet. It's  
21 an untenable position for the farmer and the grain supplier  
22 to be in, in this case. What's another alternative a farmer  
23 has? If he can't get financing from his local bank based on  
24 this, he can go to the local FSA office, Farm Service Agency,  
25 and at the Farm Service Agency they're allowed to seal grain.

1 That means take a loan out where FSA gets the first security  
2 interest on it and then we could move forward with that  
3 money. They can spend that money, perhaps, for year-end  
4 financing. Got a copy of the Floyd County FSA office's nine  
5 months loan rates. Floyd County is where the Charles City  
6 plant in Iowa is located. The corn loan rate is \$1.90 a  
7 bushel. There are many people that have contracts with  
8 VeraSun at over \$6 a bushel. They can borrow a buck ninety.  
9 That's all they can borrow, and nobody can borrow it right  
10 now. That puts them in a really difficult position. So they  
11 can't use the UCC remedies without coming back in. We don't  
12 have an orderly procedure that sets a deadline when we're  
13 going to know whether the contracts are assumed or rejected  
14 since the schedules haven't been filed. We don't even know  
15 how many contracts there are, at what prices, and whether or  
16 not there will be a situation where farmers and the debtors  
17 could work out something because with the market crises being  
18 relatively low for corn, perhaps they could take 8 or 10  
19 bushels of market price grain, match it with 1 bushel or 2  
20 bushels of higher price grain, get a blend that would work,  
21 and - which would be good for both sides because we need to  
22 get - I understand they can't pay 6 and 8 bucks a bushel  
23 given what's going on. I don't know if there's a way that it  
24 can work. There has not been discussion between VeraSun and  
25 my group regarding this whatsoever, but we're concerned

1 because there is no date certain set and that's a big problem  
2 for us. I understand that VeraSun would prefer that we file  
3 a separate motion to do that, and we are prepared to do so if  
4 we're unable to reach some accommodation that makes sense,  
5 and candidly, if we do file a separate motion, I'd be asking  
6 the Court's indulgence in having that set and heard on a  
7 separate day as opposed to waiting till January 8<sup>th</sup>. This  
8 issue is that pressing to the people that are out there. So,  
9 it's very important for us to look at this and to also weigh  
10 the burden on the other effected parties to these contracts,  
11 and it's not appropriate to let VeraSun wait until  
12 conceivably the time of plan confirmation. And then another  
13 problem just comes to mind and that is, What do you do with a  
14 December contract?

15 THE COURT: Meaning a December delivery contract?

16 MR. PEIFFER: A December delivery contract. One of  
17 my clients who happens to be in the room, Mark Quiram, has a  
18 December delivery contract with VeraSun at 6.03 a bushel. He  
19 called them this morning and said, I'm ready to deliver the  
20 grain. And the reply was, We're not making any decisions on  
21 whether we're taking any contracts until after today's  
22 hearing. But, he's ready, willing, and able to deliver, but  
23 they're not ready, willing, and able to take it and pay him a  
24 contract price. There have been numerous instances in the  
25 past where farmers have brought grain and then been told by

1 VeraSun grain buyers, I'm sorry, you have two choices, accept  
2 the market price or take your grain home. So that we're  
3 honoring the contracts even though the farmers are bringing  
4 in the grain. And another problem that came up in the first  
5 day orders that perhaps hadn't been contemplated was the  
6 restrictive endorsement whereby the behind claims could be  
7 paid now provided they would agree to accept the going market  
8 price. One of my clients received a check for \$88,000. He  
9 had a 114,000 bushels of grain contract with the Dyersville,  
10 Iowa plant at about a buck fifty above market at the time. I  
11 contacted VeraSun's attorneys and said, Well what happens in  
12 that instance if he cashes the check? Are you going to pay  
13 him contract or market price? It's our position we'll pay  
14 him market because he's agreed to something different. No  
15 producer and no supplier received notice of that motion. No  
16 producer and no supplier, except perhaps the one that's on  
17 the Unsecured Creditors Committee, received notice of the  
18 motion today. So, the first that we knew of this motion at  
19 all was on the 18<sup>th</sup>. It was filed on the 14<sup>th</sup> and an objection  
20 date of the 21<sup>st</sup>. So we've been working our tails off trying  
21 to get people organized, trying to put something together,  
22 but now if you've got a December contract, what happens?  
23 When does that have to be rejected? Some of the contracts  
24 will say December 1<sup>st</sup> to December 15<sup>th</sup>. Some December 16<sup>th</sup> to  
25 December 31. Some December 1 to December 31, and all the way

1 through, I've seen contracts going through the end of 2010  
2 thus far. I am told there are contracts that may go into  
3 2011. Right now the 2008 crops and the 2009 crops are a  
4 problem for these producers. The 2009 crops, the lenders  
5 aren't going to be willing to make loans on those crops  
6 unless they know what the sale price is, and if it's sold to  
7 VeraSun, it doesn't count. It's worse than doesn't count  
8 because you can't go sell it elsewhere. So they're going to  
9 need to make those decisions on the 2009 crops that will be  
10 delivered starting basically in October all the way through  
11 till September of 2010. So, we've got contracts that go a  
12 long ways out that are immediately impacting the corn  
13 suppliers, and for those reasons, we don't believe the  
14 procedure should be approved. We appreciate the token  
15 gestures by the debtor in changing the procedure, but it's  
16 not enough to address the problems and the widespread  
17 problems that are out there for the corn suppliers.

18 THE COURT: Well, but it seems that your issue is  
19 not so much with the procedures but rather with the fact that  
20 your people need to know.

21 MR. PEIFFER: Yes, that is our biggest concern.

22 THE COURT: I understand. Okay.

23 MR. PEIFFER: One other question that I would have  
24 and that is they indicated that the Janesville and the  
25 Welcome, Minnesota contracts, one of the people I represent

1 and in fact two people have filed objections, Mr. Quiram and  
2 L & B Theis, are part of my constituents.

3 THE COURT: Okay.

4 MR. PEIFFER: They filed just prophylactically to  
5 have something on file, not knowing whether it will get -

6 THE COURT: I saw both of them.

7 MR. PEIFFER: Now, one of those gentleman brought  
8 something to my attention and that is that the list of  
9 contracts to be rejected in Welcome and Janesville are only  
10 those that are above market, not those that are below market,  
11 and I can appreciate that, but if the debtor wants to keep  
12 goodwill in the industry and they assume the below market  
13 contracts and stiff the above market contracts, I think it's  
14 going to be very difficult to get a bushel of grain delivered  
15 to those at any point in the future.

16 THE COURT: And I think I saw that in your  
17 responsive papers or they were in somebody's objection. All  
18 right, thank you, sir. Mr. Chipman?

19 MR. CHIPMAN: Good morning, Your Honor. For the  
20 record, William Chipman, Edwards Angell Palmer & Dodge on  
21 behalf of another Ad Hoc Committee of corn suppliers. I  
22 believe, Your Honor, on the phone are two of my co-counsel,  
23 David Lander from Thompson & Coburn and Don Swanson from  
24 Koley & Jessen.

25 MR. LANDER (TELEPHONIC): Good morning, Your Honor.

1 Thank you for allowing us to participate by telephone.

2 THE COURT: Happy to oblige.

3 MR. CHIPMAN: Your Honor, we did file a response  
4 also.

5 THE COURT: I saw it.

6 MR. CHIPMAN: We didn't file a response. We did  
7 object to the procedures for a lot of the reasons that Mr.  
8 Peiffer has already articulated. I won't go into repeating  
9 several of the arguments, a lot of those arguments do apply  
10 to our Committee. Your Honor, our Committee, just for the  
11 record, consists of the following members and it's currently  
12 changing because people are being added and we're constantly  
13 working to form the Committee and additional members are  
14 asking to join, but some of the members on the Committee  
15 already, Your Honor, include Ron Litterer. He is a corn  
16 supplier to the debtors. He's also the National Corn Grower  
17 Association Chairman of the Board. We also have Dennis  
18 Boyerson (phonetical) who is a corn supplier who's affiliated  
19 with the Michigan Corn Growers Association. We have Joseph  
20 Brecker (phonetical) who is a corn supplier to the debtors.  
21 He's affiliated with the North Dakota Corn Growers  
22 Association. Greg Whitmore, another supplier who's  
23 affiliated with the Nebraska Corn Growers Association.  
24 Rickets Farm, Inc., (phonetical) which is affiliated with the  
25 Ohio Corn Growers Association, and Walt Bones who's

1 associated with the South Dakota Corn Growers Association.  
2 We also have three members from Nebraska, Gaylord Boyerson  
3 (phonetical), Richard Bosson (phonetical), and Dean Heartway  
4 (phonetical). And Your Honor, in my response, I told you  
5 that I would identify the Committee members at the hearing,  
6 so -

7 THE COURT: Sure.

8 MR. CHIPMAN: - I'm taking care of that. Your  
9 Honor, our members represent other members who are not  
10 members of the Committee but they've been getting calls and  
11 they support the members on the Committee. Your Honor,  
12 there's several members that have contracts with the debtors  
13 and also elevator operators. The purpose of the corn  
14 suppliers and the elevator operators to get organized was  
15 really to advocate for a common interest of corn suppliers in  
16 these cases and present a uniform voice for corn supplier  
17 members to the Court and to the debtors and the Committee.  
18 The goal was to continue to supply corn to the debtors under  
19 agreeable circumstances. We're not here to try and upset the  
20 proceedings or upset the debtor. We want to work with the  
21 debtors. So far, nobody's really contacted us to work with  
22 us, but that's part of the goal. Two other goals, Your  
23 Honor, stated in our response were to keep the members  
24 informed of the debtors' activities in these cases because,  
25 as you know, this is a widely disbursed group of individuals

1 and through the National Corn Growers Association, we have  
2 the ability to issue press releases to a lot of the members,  
3 and also to keep the Court informed of the corn supplier  
4 member concerns. I believe Mr. Peiffer did an adequate job  
5 of articulating some of the concerns. Your Honor, just a few  
6 other points to add -

7 THE COURT: Sure.

8 MR. CHIPMAN: - in response to what Mr. Peiffer  
9 presented to the Court earlier. It goes without saying that  
10 the corn suppliers are a constituency critical to the future  
11 long-term success of the debtors. The debtors admitted this  
12 in their omnibus response on page 2. This case is very  
13 different than your typical large Chapter 11 case, Your  
14 Honor, in several regards. The separate nature of the  
15 various plants and entities, is not typical in a large  
16 Chapter 11 case, especially the number and the liens and  
17 loans that are supplied to each individual silo and actually  
18 different plants. The separate funding of each is an issue.  
19 The reliance of the debtors on local corn markets, Your  
20 Honor, if the debtors do not pay attention to goodwill of the  
21 local corn suppliers and they may find it difficult or a  
22 purchaser may find it difficult to continue.

23 THE COURT: You know, on that point, I understand  
24 exactly what you're saying, and as a practical matter that's  
25 an issue that arises in any operating Chapter 11 case. There

1 are always relationships that are at risk or positively  
2 damaged by the consequences of a bankruptcy filing, and I  
3 understand the need to communicate that point about  
4 maintaining those relationships so that the debtors and the  
5 Committee and the lenders who are often simply focused on the  
6 economics of a particular case or the financial structure are  
7 aware of the fact that the value in the business derives  
8 often from those types of relationships with vendors and with  
9 customers. But, the question, having accepted that, was the  
10 issue that's being raised to me is the debtors' decision to  
11 reject or assume, and the standard is business judgment, and  
12 I think the concern is something that doesn't necessarily go  
13 to whether a particular contract gets rejected or not. I  
14 think the concern that you're raising is that when you call,  
15 the debtor ought to pick up the phone.

16 MR. CHIPMAN: Your Honor, that is a concern, and I  
17 also want to point out an example of business judgment that  
18 may affect -

19 THE COURT: Sure.

20 MR. CHIPMAN: - the procedures in a small regard.  
21 Your Honor, we don't dispute the fact that the debtors in  
22 their business judgment can assume or reject contracts.

23 THE COURT: Right.

24 MR. CHIPMAN: We all understand the case law on  
25 that. The purpose of our objection was to make sure that the

1 corn suppliers' issues were heard by the Committee, the  
2 lenders, the various lenders, and the debtors. One example  
3 that we found out today was if you look at the US Bio  
4 Corporation debtors, we just recently learned that they're -  
5 I don't want to say they're mothballed, but they haven't been  
6 operating at full capacity, most of them, since October, and  
7 now they're telling us that I think you'll hear in the DIP  
8 portion of the hearing, this is kind of putting the cart  
9 before the horse, that there's really only enough funding to  
10 keep those, I guess, slightly operational through January.  
11 It's our understanding, through talking to our constituents,  
12 that that will most likely, potentially cause damage to those  
13 plants, number one, unless they keep them operating at a  
14 certain level. But number two, if they don't need the  
15 November corn, they don't need the December corn, let's get  
16 those contracts, let's get some kind of a deadline at least  
17 for the US Bio Corporation debtors because we're sitting here  
18 with a ton of corn that's being stockpiled through November  
19 and we're already into December, and the same issue is going  
20 to happen in December. If they're not planning on operating  
21 those plants, why do they need these contracts? Let's get a  
22 motion on now or get a notice out immediately, and that goes  
23 to a timing issue but it is an issue of concern. We need to  
24 know what to do with our corn. Your Honor, basically what  
25 we're saying is, I think the debtors and the Committee need

1 to be mindful of balancing all the interests here. Again, I  
2 was going to go into along presentation, but I think Mr.  
3 Peiffer already adequately addressed a lot of the issues.  
4 The Ad Hoc Committee, Your Honor, stands ready to do all it  
5 can to facilitate a line of communication with the debtors,  
6 the Committee, and the lenders in cooperation, which we hope  
7 will be beneficial to both the debtors and the corn suppliers  
8 going forward and we have, you know, maybe a potential buyer  
9 we heard about today, and, Your Honor, hopefully I didn't  
10 miss too much of my presentation by truncating it, but I'm  
11 sure my co-counsel on the phone will step in and address the  
12 Court if I've missed anything.

13 MR. LANDER (TELEPHONIC): Thank you, Your Honor.  
14 This is David Lander, may I speak for a moment?

15 THE COURT: Sure.

16 MR. LANDER (TELEPHONIC): Thank you, just one very  
17 brief point and it's in one of the footnotes in our  
18 objection. That is we're discussing the contracts that our  
19 folks on the Ad Hoc Committee have to determine whether the  
20 § 556 applies to them and which would affect some of their  
21 rights. We simply haven't gotten through all of that. We  
22 put in a footnote that nothing we do here today is meant to  
23 waive any of those rights and we will be analyzing those as  
24 we go along. And the second simple point is that we need a  
25 way for corn growers out there in the Midwest and elsewhere

1 to understand this process and to have their views presented  
2 to the debtor, the Committee, the other constituencies, and  
3 of course the Court in an organized way, and we stand ready  
4 and hopeful that we might be able to fulfill that function.

5 THE COURT: Okay, thank you.

6 MR. SWANSON: Your Honor, this is Don Swanson from  
7 the Koley Jessen firm, if I may speak on a couple of points?

8 THE COURT: Sure.

9 MR. SWANSON: First of all, I want to emphasize the  
10 shutdown of the US BioEnergy plant, the facility and that  
11 silo, as we've been calling it. It seems that that is  
12 effectively a rejection of all the contracts to be delivered  
13 during the period of that shutdown, and I think we'll find  
14 out later that they're anticipating doing that through mid-  
15 January, and we can tell you from our group out here that the  
16 Ord facility has not been producing at all. There isn't even  
17 steam coming out of it since the bankruptcy was filed. And  
18 so, I think the shutdown of those plants for an extended time  
19 period is effectively a rejection of all those corn  
20 contracts, and I suggest that we ought not pretend otherwise.  
21 The second thing is a little more generally and that is on  
22 the US BioEnergy silo we have a major concern out here that  
23 that silo is getting the short shrift in all of this, that it  
24 seems like from the information that we can gather, that  
25 everything is being taken out of that silo, put elsewhere and

1 that silo has been, from our perspective, abused to some  
2 extent, and we're concerned as we go forward whether that will  
3 continue. Thank you.

4 THE COURT: Thank you.

5 MR. CHIPMAN: Unless Your Honor has any questions?

6 THE COURT: No, I don't have any questions.

7 MR. CHIPMAN: Thank you, Your Honor.

8 THE COURT: Thank you. All right, does anyone else  
9 wish to be heard regarding the motion? All right, debtors'  
10 response.

11 MS. PERLMAN: Your Honor, let me respond in a  
12 multiple of ways. Let me start out by saying that we respect  
13 and appreciate the difficulty that this case causes for the  
14 corn growers, for the farmers. We also respect and  
15 appreciate the role that corn and the corn suppliers provide  
16 to the company if the company is to continue to operate in a  
17 sale process. That being said, bankruptcy is all about  
18 balance. There are many parties that are going to be harmed  
19 in this case and unfortunately every other bankruptcy case,  
20 and the role of the Bankruptcy Code is to provide guidelines  
21 for the harm and the balance between the parties, and § 365  
22 is one of those provisions and provides the debtors an  
23 opportunity to reject based on their business judgment if  
24 such rejection in balance will provide a benefit to the  
25 estate, and it provides an opportunity for the parties as

1 contracts are being rejected to be heard. These cases have  
2 been moving fast in - to say dozens of different directions  
3 would be an understatement. The debtors on a day-by-day,  
4 perhaps hour-by-hour basis have been evaluating what  
5 financing it has at the different silos and within the US Bio  
6 within the different plants at each silo, whether the  
7 financing would provide enough liquidity for operating or for  
8 not operating, recently received the offer for a potential  
9 sale, which they have been evaluating. The debtors have been  
10 working as quickly as they can to determine what that means  
11 for their operations and with respect to contract parties.  
12 We stood here today understanding that Welcome and Janesville  
13 were down and looking to reject those contracts. As this  
14 hearing has been going on over the last few minutes,  
15 evaluating what the financing would be at the different  
16 entities, I can stand here today and say - I think I've let  
17 my sheet here, that the debtors do intend to and can do it  
18 pursuant to these notice procedures so that we provide notice  
19 or effective today, depending on what the corn growers  
20 request, will be rejecting all corn contracts for the  
21 purchase of corn at the US Bio entities excluding Marion,  
22 that provided for delivery of corn through January 15<sup>th</sup>, in  
23 addition, all contracts for the purchase of corn that  
24 provided delivery of corn through January 31<sup>st</sup> at the Welcome  
25 plant. The debtors are continuing to evaluate all the other

1 plants in terms of what their needs will be, the capacity at  
2 which they are operating, the financing at those plants, the  
3 interest of the current potential stalking horse or anyone  
4 else who comes forward to offer a strategic alternative in  
5 this case. This is what the debtors are required to do in  
6 exercising their fiduciary duty. We are doing it in  
7 consultation with the Committee who is fiduciary for the  
8 unsecureds and with consultation, so to speak, with all the  
9 secured creditors who would be providing the financing for  
10 the operations. The procedures here do not in any way impact  
11 negatively the farmers based - on the corn growers based on  
12 what was presented here today. In fact, that is part of why  
13 we looked to implement these procedures so that we can  
14 quickly and effectively and efficiently respond to the  
15 changes in the business and reject contracts on a rolling  
16 basis as we determine that we will not have the liquidity to  
17 perform under contracts or that operations will not be going  
18 on at certain plants. Parties always have the right to come  
19 in and file a motion to compel assumption or rejection of a  
20 contract, and the debtors would then respond to that based on  
21 the circumstance of that contract. That is a contract-by-  
22 contract decision. It would not be the same based on  
23 contracts for corn at various entities, at various prices, or  
24 for delivery of contracts at various times. It was suggested  
25 earlier that there are contracts out there for delivery of

1 corn throughout 2009, 2010, 2011. Obviously, the balance and  
2 the debtors' knowledge of what it will need at those times  
3 differs and would also differ based on the price of those  
4 contracts. We intend to and desire to work with the corn  
5 growers to give them notice, to be respectful and  
6 understanding of their position in the case. That being  
7 said, the debtors have an obligation to exercise their  
8 business judgment, protect the estate, and maximize the value  
9 of the estates for all the constituents which include the  
10 corn growers and everybody else in this courtroom today, and  
11 therefore, we respectfully request that the Court grant this  
12 motion allowing for the procedures. Assuming the motion is  
13 granted, if it is, we will follow the procedures with respect  
14 to these contracts or any other procedures the Court or the  
15 parties in this courtroom would request.

16 THE COURT: Okay. Does anyone else wish to be heard  
17 regarding the motion? Mr. Lemisch?

18 MR. LEMISCH: I think the procedures are clear on  
19 this, but I just want to make sure. There's obviously no  
20 conclusion for any farmer with a contract or anyone else with  
21 a contract to take their own 365 rights and file motions to  
22 request decisions by the debtors prior to the decision time  
23 frame the debtors are putting together on their own.

24 THE COURT: I think that's - I want to confirm that,  
25 but I think that's what counsel just said.

1 MS. PERLMAN: The motion itself is not precluded. I  
2 believe I just stated that on the record and to the extent  
3 corn growers believe they have specific issues, we would  
4 suggest and hope that they would reach out to us, and we  
5 would look to negotiate with them in good faith, and if we  
6 cannot reach any agreement, obviously they retain their  
7 rights to appear before this Court.

8 THE COURT: Okay, anyone else? All right, I'm going  
9 to grant the motion as it's been revised on the record and as  
10 has been shared with the parties, and I have a number of  
11 observations. First, these types of procedures have been  
12 developed in a number of cases and I think fairly operate to  
13 the benefit both of the debtors by allowing them a fairly  
14 streamlined process, but as a practical matter, they also  
15 provide a measure of benefit to the contract counter-parties.  
16 While it may not be intuitive that streamlined procedures for  
17 rejection of contracts are of assistance to non-debtor  
18 parties, one of the things that is occurring in this case and  
19 that occurs regularly is that counter-parties simply need to  
20 know, and if the debtors have a procedure that moves more  
21 quickly and with a measure of efficiency, I think that that  
22 is to be encouraged. Likewise I note that I have approved  
23 these types of procedures in other cases. They're very  
24 common in the retail environment, and again, they save the  
25 estate a little bit of money and ease the burden on the

1 Court's docket by not requiring a multitude of motions. In  
2 addition, I note that the revisions that have been requested,  
3 negotiated, and ultimately agreed to by the debtors are  
4 welcome, because this is a balance of the sufficiency of  
5 notice versus the efficiency of the procedure, and I think  
6 that with the 10 business days' notice that there is  
7 sufficient time, and I think parties that have an objection  
8 or an issue with the rejection can get a summary response in  
9 and the matter would ultimately go to a hearing, and I'd be  
10 happy to conduct that hearing. With respect to the  
11 objections that were raised by counsel for the, I guess, Ad  
12 Hoc Committees of corn growers, I'm sensitive to those  
13 concerns, and frankly, as I said to, I believe, Mr. Peiffer  
14 that the issue isn't so much with the rejection procedures  
15 that are being proposed by the debtors, it is the need for  
16 the farmers to know, and I recognize that I don't have before  
17 me any evidence on this issue, but I will accept counsel's  
18 representations, I don't think they're actually in dispute,  
19 that farmers need to know whether or not the debtor's going  
20 to buy the corn under the contract or they need to go and  
21 find somebody else to sell it to, and each of those  
22 circumstances would rise and fall on its own merits, but  
23 there's no restriction on a grower's ability to file a motion  
24 to compel assumption or rejection, and the Court will  
25 consider them. So, I realize that I am faced with the

1 prospect of a flood of motions, and I would prefer to avoid  
2 that, but I'm not in a position to - I'm certainly not in any  
3 position to curtail a grower's right to file that motion, and  
4 what I would recommend is, to the debtor, that I think you  
5 need to detail some people to answer the phone because I  
6 think a lot of these decisions, and I appreciate counsel's  
7 comments at the outset, so that I don't know how many  
8 contracts you just covered in your comment that you're going  
9 to be rejecting all the contracts within a certain - that  
10 relate to certain entities, but perhaps, you know, this  
11 morning a number of growers have gotten the certainty that  
12 they need. But I think that a lot of these decisions can be  
13 made by the debtor fairly quickly, and if they can't, then  
14 parties will file a motion, and I will balance the need of  
15 the grower versus the need of the debtor, and there's  
16 abundant case law that gives me guidance in how to conduct  
17 that exercise. So, that's a fair amount of editorializing  
18 but I think I got some guidance from the growers as to what  
19 their concerns are, and I read and carefully considered all  
20 of their issues, but I don't think that those issues are  
21 really before me today, and the debtors' request to implement  
22 procedures for the efficient rejection of contracts makes  
23 abundant sense. It's consistent with what the Court has  
24 approved in the past, and I'll enter that order. Do you have  
25 a form of order for me? Thank you.

1 MS. PERLMAN: Your Honor, I believe that the only  
2 remaining issues on the agenda relate to the debtor-in-  
3 possession financing, and Mr. Nash will proceed with that.

4 THE COURT: Okay.

5 MR. NASH: Thank you, Your Honor. Pat Nash from  
6 Skadden, Arps again on behalf of the debtors. With respect  
7 to the DIP financing, Your Honor, big picture as I think Your  
8 Honor knows, and I'll touch upon this, what we've essentially  
9 got and what we will be going forward with today is silo-by-  
10 silo financing. What we also essentially have, Your Honor,  
11 is buy-off with respect to most parties in interest, again  
12 with respect to the indenture trustee on the roll-up.

13 THE COURT: Buy-off?

14 MR. NASH: Support, Your Honor.

15 THE COURT: Oh. You might want to find a different  
16 word.

17 MR. NASH: So noted, Your Honor. What we have, Your  
18 Honor, is general support from the Committee - I believe Mr.  
19 Botter will probably have a few comments to make, general  
20 support from the Committee and general support from the  
21 secured lenders and absence of objection again with the  
22 exception of the indenture trustee on the nature of the  
23 financing, the financing that we're going forward with today.  
24 Now, two significant issues remain outstanding that I'm  
25 highly confident that we will be able to resolve this

1 afternoon.

2 THE COURT: Okay.

3 MR. NASH: The first of those issues, Your Honor, is  
4 the fact that nobody is going to provide financing other than  
5 pursuant to an agreed-upon budget, and we will need to go  
6 back to Skadden, Arps after this hearing and give everybody a  
7 chance to sign off on their respective budgets on a final  
8 basis. One issue in particular that I believe the Committee  
9 will raise and the debtors will raise as well with the  
10 lenders with respect to the budget is the amount of  
11 professional fees that are allocated in the budget with  
12 respect to the Committee. Currently that number is \$250,000,  
13 and the \$250,000 is a monthly aggregate number that then gets  
14 allocated to each of the silos according to the budget. The  
15 Committee is of the view that that is an insufficient level  
16 of financing. The debtors, frankly, support that view, Your  
17 Honor. We have no doubt that Akin Gump will be proceeding,  
18 certainly for the foreseeable future, it would be our  
19 expectation that a run rate in excess of \$250,000. So that's  
20 something that we intend to address when we leave the hearing  
21 here today. The other issue that we intend to address with  
22 respect to the budgeting, and we don't think that there will  
23 be any issue with respect to this is that the professional  
24 fee budgeted amounts on a monthly basis, that there will be  
25 an opportunity to roll forward and to look back with respect

1 to any excess cushion. So that's the issue with respect to  
2 the budget, Your Honor. The other significant though  
3 solvable issue that remains to be drafted in the revised  
4 orders has to do with the fact that because this is silo-by-  
5 silo financing but it's still one company, and there are then  
6 a number of challenges posed in terms of putting in place  
7 silo-by-silo financing but also doing our best to accommodate  
8 lenders who seem to have a religious principle against  
9 allowing one nickle of their financing to go to anybody  
10 else's silo. But everybody has been cooperative as we have  
11 worked together to try to put in place mechanisms that would  
12 insure that the lenders, to the extent practicable, are  
13 funding their own silos. To that end, Your Honor, the  
14 bondholder DIP financing that we will be going forward with  
15 today has baked in it a concept whereby they would get - the  
16 bondholder DIP lenders would get a junior lien, completely  
17 junior lien with respect to the other silos only to the  
18 extent, Your Honor, that the other silos do not reimburse  
19 intercompany overhead allocation. The reason that this is  
20 especially relevant to the bondholders is because the VeraSun  
21 silo that they are providing the financing for, it is that  
22 silo that in the first instance funds the corporate overhead  
23 which is then allocated down to the other silos. So to the  
24 extent that the other silos are not in a position to refund  
25 corporate overhead allocation that they've received the

1 benefit of, the VeraSun bondholder DIP lenders believe it  
2 appropriate that they would have a completely junior lien  
3 securing any non-repaid intercompany allocations. While that  
4 in principle seems reasonable, the other lenders at the other  
5 silos are very uncomfortable with and opposed to the notion  
6 of there being a junior lien or perhaps even a super-priority  
7 claim with respect to these intercompany allocations. Now,  
8 the problem for the debtors, Your Honor, is, is that what we  
9 can't do is we cannot make any of the other lenders loan  
10 additional dollars in terms of DIP financing if they are  
11 unwilling to loan those additional dollars to the extent that  
12 we are insisting upon slapping a junior lien on their  
13 collateral. So, faced with that dilemma, Your Honor, we are  
14 working very diligently with each of the secured lenders to  
15 come up with something that each of the three secured lenders  
16 can live with to provide for a mechanism that would allow for  
17 the intercompany claims to be made and the allocations to be  
18 refunded and to the extent they're not, some measure of  
19 security or some measure of assurance that there will be an  
20 ability to get repaid and that that type of a mechanism that  
21 we would be putting in place, there's no reason that it  
22 wouldn't exist for the benefit of each of the silos to the  
23 extent that any of the silos, inadvertently or otherwise,  
24 funds somebody else's collateral. So, Your Honor, that, I  
25 think, is - those are the two issues that remain outstanding

1 with respect to the DIP financing. What I would propose that  
2 we do is I will run through the financing that we are seeking  
3 approval of, deal with all of the other issues that  
4 undoubtedly will come up. We will hear from Mr. Schaffer on  
5 behalf of the indenture trustee. We're prepared to go ahead  
6 with a proffer. We would think a proffer would be efficient  
7 of Neil Augustine, of Rothschild in support of the DIP  
8 financing subject to anybody's ability to cross-examine Mr.  
9 Augustine. So, perhaps what makes sense, Your Honor, is for  
10 me to run through each of the DIP financings, proffer Mr.  
11 Augustine's testimony, and then hear from anybody that wishes  
12 to be heard.

13 THE COURT: And so, the idea would be that you'd  
14 want to essentially make your record. The budget - as I  
15 understand it from your comments, the budget remains in  
16 discussion, and then the issue of the mechanic of either the  
17 junior lien or how the corporate overhead gets treated is  
18 something that you're going to go back to your office and try  
19 to negotiate through those two pieces. So, what you want is  
20 essentially a record and then assuming that you can come to  
21 closure on those two remaining pieces, I would likely see an  
22 order under certification and if I have problems with it,  
23 I'll bring you back in or get you on the phone, but  
24 otherwise, you're looking to essentially close the record on  
25 this, subject to the assumption that you're going to be able

1 to get agreement on those two remaining pieces; right?

2 MR. NASH: Yes, Your Honor.

3 THE COURT: Okay, I understand, proceed.

4 MR. GWYNNE: Good morning, Your Honor. Kurt Gwynne  
5 from Reed Smith on behalf of Wells Fargo as indenture  
6 trustee. I won't go into the detail now -

7 THE COURT: Okay.

8 MR. GWYNNE: - but I just want to point out we do  
9 disagree with closing the record today.

10 THE COURT: Well, then, let me make a point.  
11 Perhaps I was - I spoke a little bit too freely. I'm not  
12 necessarily assuming that the record would be closed as of  
13 today. My point was just trying to figure out exactly where  
14 counsel was looking to go with this, but I think we can  
15 address any concerns that you have about whether or not the  
16 record is sufficient.

17 MR. GWYNNE: And part of the issue, Your Honor, is  
18 that the terms of the final order and the Bankruptcy Code  
19 will render the provisions of the credit agreement binding if  
20 the lenders are good-faith lenders, notwithstanding even in  
21 the appeal, the former credit agreement, which is 85 pages,  
22 wasn't filed until 11:35 last night. Understand debtors'  
23 counsel has been very busy, I'm not being critical, but  
24 they're purporting to prime our pre-petition lien which in  
25 and of itself raises due process concerns, and we want to

1 make sure we have that due process. Under Rule 4001(c)(1) a  
2 copy of the agreement is supposed to be attached to the  
3 motion. Here all we had was a term sheet, but that was the  
4 agreement for purposes of the interim financing that was  
5 okay, but now, having one business hour's notice of an 85-  
6 page credit agreement that will govern the terms pursuant to  
7 which Wells Fargo's lien would be primed if the debtors  
8 succeed in convincing Your Honor that there's been adequate  
9 protection, we submit it isn't really adequate notice, and we  
10 won't know until we've had a chance to go through that  
11 agreement whether there are questions beyond those Mr.  
12 Schaffer may have today for Mr. Augustine that are relevant  
13 to our objection because the nature of our objection could  
14 change having finally had the opportunity to review the  
15 agreement. Now, I did mention to Mr. Nash before the hearing  
16 that we would like some more time so that we can review the  
17 credit agreement, and I don't know what the debtors' position  
18 is or the lenders' but I would point out in the limited time  
19 that we did have to review the credit agreement in § 8.1(s)  
20 on page 67, which is a default provision, says it's a default  
21 if a final order isn't entered until 32 days after the  
22 interim order. The interim order was November 3<sup>rd</sup>, so 32 days  
23 thereafter, as I calculate it, assuming I did it right while  
24 I was trying to listen, would be December 5<sup>th</sup>, so we do have  
25 more time, don't have to close the record, and shouldn't have

1 to have an order handed up without an opportunity for someone  
2 whose liens would be primed to review the credit agreement.

3 THE COURT: Okay, I understand.

4 MR. GWYNNE: Thank you.

5 THE COURT: Mr. Nash?

6 MR. NASH: Your Honor, I'll respond to Mr. Gwynne,  
7 the indenture trustee's arguments at the conclusion -

8 THE COURT: Later.

9 MR. NASH: - later, thank you, Judge. Your Honor,  
10 as Your Honor no doubt recalls from the interim hearing we've  
11 got essentially three secured facilities and three operating  
12 silos. Moving from left to right, Your Honor, as we look at  
13 the multicolored chart, the light blue entities, the ASA  
14 silo, the existing secured indebtedness there, Your Honor, is  
15 under two facilities agented by West LB, approximately \$262  
16 million outstanding secured by substantially all of the  
17 assets of the ASA silo. When we were last in front of Your  
18 Honor on November 3<sup>rd</sup>, what we obtained and achieved at that  
19 time was consensual use of cash collateral at the ASA silo.  
20 The consensual use of cash collateral has enabled us to fund  
21 operations at those silos up to and through today. What we  
22 are going forward with today, Your Honor, at the ASA silo is  
23 a request for interim approval of \$10 million of a \$20  
24 million revolving credit facility. The revolving credit  
25 facility that is being provided, Your Honor, is being

1 provided by 10 of the 19 lenders, as I understand it, who  
2 make up the existing pre-petition facility. They would be  
3 getting, as you would expect, Your Honor, priming liens,  
4 priming the existing pre-petition facility and as adequate  
5 protection to the lenders who are being primed, we would  
6 propose to provide those lenders with replacement liens and  
7 super-priority claims to secure any diminution in value, any  
8 diminution in the pre-petition collateral value over the life  
9 of these cases, Your Honor. The facility that the West LB  
10 lenders are proposing to provide is a six-month facility. It  
11 has associated with it, as you'll hear from Mr. Augustine,  
12 reasonable fees and interest rates under the circumstances.  
13 Significantly, Your Honor, none of the liens and claims being  
14 provided under the facility will attach to or be paid out of  
15 avoidance actions or the proceeds of avoidance actions. And  
16 while there is a provision in the order for a 506(c) waiver,  
17 Your Honor, that provision is not operable until final order.  
18 And I would also point out, Your Honor, that the West LB DIP  
19 lenders have agreed to provide a carve-out similar and  
20 identical, frankly, to the carve-outs being provided at each  
21 of the other facilities, that would be a carve-out for what  
22 had been accrued but unpaid pursuant to the budget prior to  
23 the sending of a default notice and then up to a million  
24 dollars, up after the sending of a default notice. So, with  
25 that, Your Honor, and with the record that we will make with

1 Mr. Augustine through his proffer, we think that the  
2 financing at the ASA silos is in the best interest of the  
3 company, permits the company to continue to fund operations  
4 as it either bridges to a sale or some other value maximizing  
5 strategy, and again, is in the best interest of the debtors  
6 and all the creditors.

7 THE COURT: May I ask you a question: Are you going  
8 to have Mr. Augustine testify or proffer regarding the final  
9 orders on the other financings?

10 MR. NASH: Yes.

11 THE COURT: Do you want to do that now as well?

12 MR. NASH: You know, I'll save Mr. Augustine's  
13 proffer until the end, Your Honor, if that makes sense?

14 THE COURT: Okay, that will be fine. Why don't we  
15 turn to the other financings.

16 MR. NASH: If we turn to the other financings, Your  
17 Honor, we're turning now to the - I guess I'll go with the  
18 simplest first, Your Honor, I'll skip the VeraSun silo for a  
19 second, and I'll turn our attention to the US Bio silo. And  
20 when we were last in front of Your Honor on November 3<sup>rd</sup>, what  
21 we went forward with at that time was \$15 million of a \$25  
22 million facility being provided by Agstar, the existing  
23 project finance lender at each of the US Bio companies with  
24 the exception of Marion. What we got achieved at the interim  
25 hearing, Your Honor, was \$15 million on a - that's the

1 aggregate number which was then applied to the various  
2 plants. We now are going forward with today, Your Honor, on  
3 a final basis, the incremental \$10 million. The incremental  
4 \$10 million, Your Honor, is again, an aggregate number that  
5 will be applied on a plant-by-plant basis, and this is ring-  
6 fenced financing, Your Honor. It's my understanding that  
7 each of the members of the pre-petition bank group are also  
8 participating in the post-petition financing. The adequate  
9 protection's liens and claims as set forth in the order, Your  
10 Honor, do not attach to avoidance action or the proceeds of  
11 avoidance actions. There is a 506(c) waiver under the final  
12 order, but I'll point out that we think it appropriate,  
13 particularly in light of the fact that Agstar has agreed to  
14 provide a carve-out, a million dollar carve-out similar to  
15 the other silos. When you look at each of the orders, Your  
16 Honor, the carve-out is a \$167,000 carve-out at each  
17 facility. I think roughly when you do the math, you get to  
18 about a million dollars. The US Bio financing, Your Honor,  
19 the incremental \$10 million is sufficient to permit the  
20 company to essentially hot-idle those plants through January  
21 15<sup>th</sup>. That would be our projection for how long this  
22 incremental financing lasts. The objective and what we  
23 intend to do between now and January 15<sup>th</sup>, Your Honor, is meet  
24 with Agstar, and I understand that it is Agstar's intention,  
25 no doubt nobody's committing to do anything, but the

1 intention on the part of Agstar is that they will make a  
2 proposal to provide the debtors with more permanent financing  
3 for the US Bio entities and that financing will have to see  
4 for the duration and what we'll be permitted to use that  
5 financing to do, but the intention between now and January  
6 15<sup>th</sup>, Your Honor, is to engage Agstar and to receive a  
7 proposal from Agstar for more permanent financing at the US  
8 Bio facilities.

9 THE COURT: Okay.

10 MR. NASH: At the VeraSun silo, Your Honor, as Your  
11 Honor is aware, the way the pre-petition capital structure  
12 works there, you've a \$125 million pre-petition revolving  
13 credit facility agented by UBS. UBS and the pre-petition  
14 revolving credit lenders have a fist lien essentially on the  
15 working capital, the pre-petition working capital of the  
16 VeraSun silo. They, as a matter of the adequate protection  
17 liens and claims that were granted under the cash collateral  
18 stipulation, they've got a lien on the post-petition working  
19 capital of the working VeraSun silo to the extent of any  
20 diminution in their pre-petition collateral value and  
21 interest. We also have, Your Honor, a secured note facility  
22 in the amount of \$210 million with the first lien on the PP&E  
23 of the VeraSun silo. Those secured noteholders, Your Honor,  
24 are the ones who have provided the DIP financing for which we  
25 seek final approval today. When we were in front of Your

1 Honor on November 3<sup>rd</sup>, what was approved on an interim basis  
2 was \$25 million of a \$195 million priming DIP facility. It's  
3 my understanding, Your Honor, that approximately 60 percent  
4 of the existing secured noteholders are participating in the  
5 DIP financing. It is also my understanding, and we'll hear  
6 from Mr. Davis on this, that any existing noteholder and all  
7 existing noteholders who have requested to be permitted to  
8 participate in the post-petition financing have been allowed  
9 to participate in the post-petition financing. So what we  
10 are seeking today, Your Honor, is final authority to borrow  
11 \$68 million of new money and a \$102 million, Your Honor, of  
12 financing that will be used to repurchase and effectively  
13 roll the \$102 million of existing senior secured notes. The  
14 definitive DIP documentation with respect to this financing,  
15 Your Honor, was executed very recently and as Your Honor  
16 heard from Mr. Gwynne filed late last night. The definitive  
17 DIP documentation contains a covenant package that you'll  
18 hear from Mr. Augustine that we believe works for the company  
19 and provides a 12-month runway. This financing has a 12-  
20 month term. The runway that we believe that is provided by  
21 this DIP financing, we believe that it's real, Your Honor,  
22 and that the covenant package provides the company with  
23 sufficient flexibility in order to operate in what are no  
24 doubt challenging times in the ethanol industry. We'll also  
25 hear from Mr. Augustine's proffer, Your Honor, that we were

1 able to get through the assistance of the Committee a number  
2 of concessions with respect to the fees associated with this  
3 DIP financing. In particular, Your Honor, there will be no  
4 origination fee on the rolled money. There will be no exit  
5 fee, no increased exit fee on the rolled money as well. No  
6 exit fee at all, Your Honor, on the rolled money.

7 THE COURT: Okay.

8 MR. NASH: Under this facility, Your Honor, in terms  
9 of adequate protection, the adequate protection that is being  
10 granted to the existing senior secured noteholders is liens  
11 on PP&E junior to the DIP lenders, liens to secure any  
12 diminution in value in the pre-petition collateral interests,  
13 liens, and super-priority claims. Also, Your Honor, the  
14 existing senior secured noteholders are getting junior liens,  
15 junior to UBS and junior to the DIP lenders on the UBS  
16 working capital and the UBS collateral. We also propose,  
17 Your Honor, to make current cash pay interest at the non-  
18 default rate to the pre-petition senior secured noteholders  
19 as another means of adequate protection. Significantly, Your  
20 Honor, none of the liens and claims granted under the  
21 bondholder DIP financing, including the adequate protection  
22 liens and claims, none of those liens and claims can be  
23 satisfied out of avoidance actions or the proceeds thereof.  
24 With respect to UBS, Your Honor, and the working capital, and  
25 USB's agreement to allow the debtors to continue to use cash

1 collateral.

2 THE COURT: Right.

3 MR. NASH: When we were here on November 3<sup>rd</sup>, Your  
4 Honor, we had an agreed interim use of cash collateral. We  
5 are prepared and will be prepared, we believe, later today to  
6 hand up an agreed final order. I was on the phone with UBS  
7 this morning, and I can outline for Your Honor the terms and  
8 conditions under which UBS has agreed to permit us to  
9 continue to use cash collateral. We were not able to reduce  
10 that to an order and prepare a blackline, but I have no doubt  
11 that we'll be able to do that promptly this afternoon.

12 THE COURT: Okay.

13 MR. NASH: Your Honor, what we proposed to - UBS has  
14 agreed to permit consensual use of cash collateral through  
15 March 31, 2009. UBS has agreed that - We have agreed with  
16 UBS that we will provide additional reporting, is one way to  
17 characterize it. For example, Your Honor, under the VeraSun  
18 bondholder DIP documentation, there's a process under that  
19 DIP documentation for rolling forward and refreshing the  
20 VeraSun DIP budget. At the point in time when we provide our  
21 proposed roll-forward VeraSun DIP budget to the VeraSun DIP  
22 lenders, we will provide that request to UBS, and UBS will  
23 see in real time how it is that we are proposing to roll  
24 forward the VeraSun DIP budget because it does impact on  
25 their adequate protection and their collateral coverage. We

1 also, Your Honor, have committed to providing UBS, as is the  
2 case under the interim order, with a daily borrowing base  
3 certificate. It is our intention to remain in formula. It's  
4 not an event of default under the current cash collateral  
5 order if we go out of formula, UBS had the right, and they're  
6 going to be looking at this borrowing base certificate every  
7 day. UBS, of course, has the right at any time to come in  
8 and ask Your Honor for additional adequate protection, and we  
9 believe the fact that they will be seeing that borrowing base  
10 on a daily basis, we believe that to be very significant.  
11 The other big change and a change that's frankly appreciated,  
12 Your Honor, is that under the interim order, while UBS had a  
13 provision for a carve-out, that carve-out under the interim  
14 cash collateral order was conditioned on and tied to there  
15 being a reserve under and in connection with the VeraSun  
16 bondholder DIP documentation. There is no reserve under the  
17 VeraSun DIP credit facility with respect to the carve-out.

18 THE COURT: Okay.

19 MR. NASH: So, you know, from the debtors' point of  
20 view, we really weren't getting a carve-out, and when I  
21 raised this issue with UBS, Your Honor, we were able to work  
22 through, by agreement, UBS will be providing a carve-out  
23 equal to anything that is accrued but not yet paid prior to  
24 the sending of a remedies notice under the stipulation  
25 allocable to the VeraSun silo, and then on a post-default

1 basis, Your Honor, a \$750,000 carve-out for fees and expenses  
2 incurred related to the VeraSun silo under the appropriate  
3 allocation mechanisms, and that, again, related to the  
4 VeraSun silo and fees and expenses incurred on a post-default  
5 basis. The adequate protection and UBS under the - UBS is  
6 also, Your Honor, getting an adequate protection senior lien  
7 on their existing pre-petition UBS collateral.

8 THE COURT: Okay.

9 MR. NASH: And they're also getting a junior lien to  
10 the extent of any diminution in their pre-petition collateral  
11 value on the PP&E, junior to the bondholder DIP financing  
12 limits. So, Your Honor, it's our belief that UBS is  
13 certainly adequately protected, and that we will be able to  
14 present to Your Honor what will be an agreed upon cash  
15 collateral stipulation with respect to UBS. One issue that  
16 also remains outstanding with respect to the UBS cash  
17 collateral stipulation, and I believe it's a detail that  
18 remains open with the bondholder DIP financing order, Your  
19 Honor, is First National Bank of Omaha. First National Bank  
20 of Omaha is the debtors' cash management bank. First  
21 National Bank of Omaha, Your Honor, has provided a letter of  
22 credit facility in the amount of \$11.9 million. There's  
23 certain cash sitting in the letter of credit facility to  
24 secure the obligations thereunder. First National Bank of  
25 Omaha has requested adequate protection liens and claims to

1 secure any diminution in value with respect to their pre-  
2 petition interest in their collateral securing the LC  
3 applications, and that is not troubling, Your Honor, to the  
4 debtors and I don't believe that's troubling any other party  
5 in the case. We do need to work on the specific language  
6 with respect thereto. The other issue, Your Honor, with  
7 respect to First National Bank of Omaha, is they have  
8 requested that as a form of adequate protection, and it would  
9 have to be subject to everybody's rights under 506(c), that  
10 certain pre-petition interest and expenses be paid in the  
11 ordinary course, again subject to 506(c) rights. We need to  
12 talk about that with counsel for the First National Bank of  
13 Omaha, Your Honor, in terms of (a) whether it really is  
14 appropriate and (b) you know, almost as important, Your  
15 Honor, the debtors can't agree to pay it unless the  
16 bondholders agree to fund it. So that's a discussion that we  
17 need to have when we break today, and I have no doubt though  
18 that we'll be able to resolve that issue as well.

19 THE COURT: Okay. Let me do this. I don't want to  
20 - the parties will have a full and fair opportunity to raise  
21 and present their objections, but I'd like to, before we turn  
22 to Mr. Augustine's proffer, I'd like to hear from anybody  
23 that wishes to address the Court on their objections or where  
24 we stand. Mr. DeBaecke.

25 MR. DeBAECKE: May I have a minute, Your Honor?

1 THE COURT: Sure.

2 MR. NASH: Counsel for US Bio Marion, Your Honor,  
3 has reminded me that I failed to address US Bio Marion.

4 THE COURT: Okay.

5 MR. NASH: When we were here on November 3<sup>rd</sup>, Your  
6 Honor, we had an interim agreed cash collateral order to  
7 provide for the use of the cash collateral of the existing  
8 lenders, Dougherty, the existing construction lender,  
9 Dougherty, and First Bank & Trust, the existing revolving  
10 lender. We had authority to use cash collateral on an agreed  
11 basis, Your Honor. We're here today to get final approval of  
12 that stipulation with three minor modifications. The sunset  
13 on that stipulation, Your Honor, has been extended out by  
14 agreement to Friday, December 5<sup>th</sup>. We can extend that with  
15 the consent of the cash collateral provider. The objective,  
16 Your Honor, with respect to Marion is to enter into a  
17 commitment for DIP financing provided by the existing lenders  
18 where the existing lenders at Marion we expect, Your Honor,  
19 will also be bridging, we would hope, largely consistent  
20 perhaps with what Agstar will be prepared to do, but again,  
21 Your Honor, it's our intention that we'll be back in front of  
22 this Court with a request that we approve DIP financing with  
23 respect to the US Bio Marion facility at some point in the  
24 very near future. The cash collateral stipulation that we  
25 would seek approval of today on a final basis, Your Honor,

1 does not - the liens and claims do not attach to avoidance  
2 actions. There is a 506(c) waiver, Your Honor, but there's  
3 also a carve-out under that stipulation.

4 THE COURT: Okay.

5 MR. NASH: With that, Your Honor, I'll yield the  
6 podium to anybody that wishes to be heard.

7 THE COURT: Okay. Mr. Botter.

8 MR. BOTTER: Good afternoon, Your Honor. David  
9 Botter, Akin Gump Strauss Hauer & Feld on behalf of the  
10 Creditors Committee. Your Honor, I just wanted to give you a  
11 status report on where we are. We've spent a good deal of  
12 time negotiating with all three lending groups, certainly  
13 working with Skadden. I'll take it in the order that Mr.  
14 Nash presented. On West LB, we are nearly done. Now, West  
15 LB is, of course, an interim order today, and so there is an  
16 opportunity to continue our negotiations at the final order  
17 stage. There are some economic issues that are still open.  
18 The length of time the DIP facility is outstanding, the six  
19 months is an issue that we're discussing. Additionally, to  
20 the extent there's an extension of that length of time of the  
21 open facility, the interest rate will ratchet up based upon a  
22 three month and three-month extension. So we're still  
23 talking about that. Most importantly, there is a operating  
24 loss trigger event which is based upon a rolling two-month  
25 operating report. We're concerned given that we don't even

1 have finalized budgets at this point, that we would have just  
2 two months of operations to look at a default situation. So  
3 those are issues that we are still working on, and we'll  
4 continue to work through. With respect to other issues that  
5 we're going to reserve for final, there's a covenant default  
6 provision. We don't have covenants yet, so obviously that's  
7 something that we are concerned about and West LB has agreed  
8 that that will be kicked to final and there will not be a  
9 default situation until that point. Additionally, as I said,  
10 the budget is not yet worked out, and there is a default  
11 provision which says that if they exceed the budget by one  
12 dollar that will be a problem, still working on those issues.  
13 That's it for West LB. With respect to VSE, we've spent  
14 probably the most time because we've had the most time with  
15 documentation regarding VSE. We are singed off on VSE but  
16 for the budget issue which Mr. Nash identified as well as the  
17 inter-creditor interest silo issue that we are working on  
18 with all the lenders and the debtor. Finally, Your Honor, we  
19 did spend an awful lot of time with the Agstar lenders last  
20 night, narrowed down, really, all of our issues to just a  
21 couple. The Agstar lenders had built into their  
22 documentation the pre-petition credit agreement events of  
23 default. So, unfortunately, some of those just don't make  
24 sense anymore. So, it's out intent to go back to Skadden and  
25 hopefully clean that up, so that will be good. The only

1 other point with respect to Agstar, again, aside from the  
2 budget issue and the inter-creditor issue is that the Agstar  
3 facility provides for the possibility of the estate  
4 reimbursing every single professional for all of the distinct  
5 Agstar lenders rather than just Latham, local counsel, et  
6 cetera. To us that is really overkill. Certainly, Latham is  
7 able to handle that, and we're hopeful we'll be able to work  
8 that out as well. So, with that, Your Honor, we will be  
9 signed off subject to completing those particular issues.  
10 Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 MR. SCHAFFER: Your Honor, Eric Schaffer from Reed  
13 Smith for Wells Fargo as indenture trustee. Your Honor, one  
14 bit of housekeeping. I know that Agstar had filed an  
15 emergency motion. I'm interested in knowing if that's going  
16 forward or not because -

17 THE COURT: That's not going forward today but I'm  
18 prepared to discuss scheduling on that.

19 MR. SCHAFFER: Okay. That helps Mr. Gwynne's  
20 schedule because he's supposed to be on the phone with Judge  
21 Dellar (phonetical) shortly.

22 THE COURT: I don't want to get in Judge Dellar's  
23 way.

24 MR. SCHAFFER: That's Mr. Gwynne's view. Your  
25 Honor, I think you come first, but -

1           THE COURT: Not if you ask Judge Dellar. Please  
2 give him my regards.

3           MR. SCHAFFER: Your Honor, I understand that there  
4 will be a proffer or testimony from Mr. Augustine, and what  
5 I'd like to do is reserve any argument I might have until  
6 after I've heard the testimony and conducted whatever cross  
7 may be necessary.

8           THE COURT: Okay, I understand. Mr. Jaffe?

9           MR. JAFFE: Henry Jaffe for Pepper Hamilton. Your  
10 Honor, I am going to address the comments about the Agstar  
11 motion which I'm sure Your Honor has seen -

12          THE COURT: I have.

13          MR. JAFFE: - and I know you referred to before  
14 that, and our position with respect to the matters that are  
15 going forth today is that they're going forward with Agstar's  
16 reservation of rights as to what precisely its interest is in  
17 any property that it may have transferred through. As Your  
18 Honor knows, we have certain ethanol that has left -

19          THE COURT: I saw that. I saw your motion.

20          MR. JAFFE: - and it's been transferred and the  
21 concern is that's collateral that, unless we have some type  
22 of protection, we may never see rights in again. So, I did  
23 want to let Your Honor know that, and at some point we  
24 certainly would like to discuss the scheduling of that  
25 motion. I will let Your Honor know that the parties have

1 been in discussions. There's nothing binding. We haven't  
2 reached a full agreement among all the parties, but we are  
3 trying to resolve at least some of the procedural aspects of  
4 the motion, and at least stop the bleeding going forward and  
5 I think we're getting there, but obviously I think you just  
6 having a schedule for that motion will help the parties focus  
7 their efforts.

8 THE COURT: Okay. Anyone else? Yes, sir.

9 MS. WINFREE: Good afternoon, Your Honor. Amanda  
10 Winfree, Ashby & Geddes on behalf of Cargill AG Horizon and  
11 Cargill, Inc. Your Honor, with me in the courtroom today is  
12 my co-counsel, Michael Stewart of Fager & Benson, and Mr.  
13 Stewart was admitted *pro hac vice* by order of this Court  
14 dated November 6<sup>th</sup>.

15 THE COURT: Very good.

16 MR. STEWART: Thank you, Your Honor. On behalf of  
17 Cargill, just wanted to point out, we don't have any  
18 objection to the DIP financings. Cargill's got a series of  
19 contracts with the AOC debtors. We've provided corn. We've  
20 provided natural gas. We buy ethanol. We buy distiller's  
21 grains. Pursuant to - and we have various other contracts  
22 with the AOC debtors. We have various setoff and netting  
23 rights under the terms of the contracts. I've been in  
24 consultation with counsel for West LB regarding some language  
25 in the West LB DIP financing order to clarify that Cargill's

1 setoff rights under the various contracts and under 556 and  
2 561 won't be affected by the priming liens and so on and will  
3 be granted under the DIP financing order.

4 THE COURT: Okay.

5 MR. STEWART: Thank you.

6 THE COURT: Ms. Heilman.

7 MS. HEILMAN: Good afternoon, Your Honor. Leslie  
8 Heilman, Ballard Spahr Andrews & Ingersoll. I rise solely to  
9 reserve First National Bank of Omaha's rights on the record.  
10 Your Honor, the debtors have correctly summarized our  
11 remaining issues.

12 THE COURT: It's the LC?

13 MS. HEILMAN: Yes, with respect to the LC as well as  
14 the cash management claims of First National Bank of Omaha.  
15 Your Honor, we have worked diligently with the debtors, the  
16 secured noteholders, as well as UBS and for the most part, I  
17 believe we have come to a consensual agreement with respect  
18 to a carve-out of our collateral that is securing the letters  
19 of credit. We do have some outstanding issues with the  
20 secured noteholders with respect to our adequate protection  
21 concerns. We have reached an agreement, we believe, with UBS  
22 and the debtors, however, we do believe certain protections  
23 also need to be in the VeraSun DIP order so that they are  
24 consistent with the UBS cash collateral order. Your Honor,  
25 to the extent we cannot resolve those concerns we have, we

1 will be back before Your Honor, and I just rise because there  
2 was a concern that we were closing the record today, and we  
3 do still need to discuss this.

4 THE COURT: I regret that phrase.

5 MS. HEILMAN: Thank you, Your Honor.

6 THE COURT: All right. Mr. Miller?

7 MR. MILLER: Good afternoon, Your Honor. Stephen  
8 Miller on behalf of Provista and CHS, and I just rise to echo  
9 the comments of counsel for Cargill with respect to issues  
10 having to do with setoff rights, recoupment rights 556, 561,  
11 and documentation was filed last evening, and it's unclear to  
12 me whether the debtors are indeed seeking to affect by  
13 granting to the lenders and the lenders are seeking to obtain  
14 rights that would prejudice my client, and quite frankly, I  
15 believe other clients that would be in the same position,  
16 other parties that would be in the same position with respect  
17 to corn contracts and things of that nature. I don't think  
18 they're permitted to do that by the Code and by the  
19 applicable law, but I started reading through it last night  
20 and it was unclear to me how do they anticipate or are  
21 attempting to do so. If they're not, then we don't have any  
22 objection. To the extent they are, then we do have an  
23 objection.

24 THE COURT: Okay.

25 MR. MILLER: Thank you.

1 THE COURT: All right.

2 MR. SHEIN: I guess, good afternoon, Your Honor.

3 Michael Shein, Vedder Price on behalf of the CIT  
4 Group/Equipment Financing, Inc., one of the railcar lessors -

5 THE COURT: Right.

6 MR. SHEIN: And also a member on the Committee. We  
7 just want to put on the record, back at the last hearing,  
8 there was a carve-out on the interim DIP orders in that there  
9 wouldn't be any lien placed on the equipment leases. That's  
10 specifically carved out with respect to the railcars, and  
11 having not seen the documents I just want to make sure that  
12 same carve-out applies for all the final orders across  
13 VeraSun and US Bio.

14 THE COURT: Okay. All right. Mr. Nash - I think  
15 he's looking for comfort. Mr. Davis, good afternoon.

16 MR. DAVIS: Good afternoon, Your Honor. The same  
17 provisions that were found agreeable in connection with the  
18 interim order will be contained in the final order.

19 THE COURT: Okay.

20 MR. SHEIN: Thank you, Your Honor.

21 THE COURT: Sure. Okay, Mr. Nash, here's what I  
22 want to do. I want to take a 15-minute break to allow you to  
23 discuss some scheduling issues. My problem is that I don't  
24 believe, actually I know that I do not have time this  
25 afternoon to hear you for anything really substantial in the

1 afternoon, and what I have heard from almost every party is  
2 that they want an opportunity to review the orders. Frankly,  
3 I got it this morning, and I don't raise that as a criticism.  
4 I understand how these processes work, but I think everybody  
5 wants to take a look at the forms of the order. There are a  
6 number of issues that I have every expectation will get  
7 resolved by parties simply having an opportunity to look at  
8 the language, and I know that there are a couple of issues  
9 that remain in discussion. I have time tomorrow morning at  
10 10:30, and I will be prepared to hear you then, and I think  
11 that the parties would benefit from an opportunity to look at  
12 the final forms of order that were circulated last night and  
13 the financing agreement as well, and if there are still  
14 issues, I have time tomorrow to hear them. Those matters  
15 that are not in dispute I would be generally prepared to take  
16 under certification. I'd want to take a closer look at them,  
17 but I think you want to winnow through those items that are  
18 in dispute, those financings, I think we have now 9 separate  
19 financing orders or stipulations, and again, you've got a lot  
20 going on. What I want to do is take a 15-minute break to  
21 allow you to sort of figure out the scheduling question, and  
22 also whether or not you want to proceed and put Mr. Augustine  
23 on and deal with the record but if there are still issues  
24 tomorrow, then we're going to have a hearing tomorrow. So, I  
25 want you to have an opportunity to think through that, and

1 frankly, I think you know a lot better than I do about where  
2 a lot of these things stand and what's likely to settle,  
3 what's likely to be an issue. So, I want to give you a few  
4 minutes to think through that. I realize that that's a  
5 change to the schedule, but my problem is that I think it's  
6 going to take you a little bit of time to get through all of  
7 these orders. You have a lot of people that want a chance to  
8 look at stuff, and I think they should have that opportunity.

9 MR. NASH: I appreciate your willingness to hear us  
10 tomorrow, Your Honor.

11 THE COURT: Sure.

12 MR. NASH: I appreciate your comments.

13 THE COURT: Okay.

14 MR. NASH: Okay.

15 THE COURT: Any questions?

16 MR. NASH: No.

17 THE COURT: All right, why don't we take a - this  
18 will be an actual 15-minute break, and we'll be back on at  
19 12:30. Stand in recess. Thank you, counsel.

20 UNIDENTIFIED SPEAKER: Than you, Your Honor.

21 (Whereupon at 12:13 p.m., a recess was taken in the  
22 hearing in this matter.)

23 (Whereupon at 12:35 p.m., the hearing in this  
24 matter reconvened and the following proceedings were had:)

25 THE CLERK: All rise.

1           THE COURT: Please be seated. Mr. Nash. What's our  
2 game plan.

3           MR. NASH: Thank you, Your Honor, and we have a game  
4 plan. Your Honor, we think it probably best and prudent to  
5 take you up on your offer to return tomorrow to consider  
6 entry of the orders and the blackline orders.

7           THE COURT: Okay.

8           MR. NASH: In particular, while we do think that the  
9 lawyers with respect to each of the silos, for example, have  
10 an understanding about how they would intend to address the  
11 issues. Certain of them for sure need to convene some calls  
12 with their clients, get their clients up to speed. All I  
13 needed to do was hear that, Your Honor, and I knew that I did  
14 not want to be in a position of promising to Your Honor that  
15 we would not need tomorrow and that I thought that we could  
16 get it all done today.

17           THE COURT: Yeah, I think you need it.

18           MR. NASH: I think we do too, Your Honor.

19           THE COURT: At a minimum, because I think even if  
20 you did button it all up, people would want the opportunity  
21 to come in and note reservations on the record or walk  
22 through it, so, okay, I understand.

23           MR. NASH: One thing that we do need to do though,  
24 Your Honor, I think, and I think with your Court's permission  
25 we can - Your Honor's permission, I think we can accomplish

1 today is, Mr. Augustine is here today. He's prepared to be  
2 proffered. He's prepared to be crossed. I believe Mr.  
3 Schaffer is prepared to cross Mr. Augustine. I'm comfortable  
4 that we could present Mr. Augustine today and lay the factual  
5 predicate for the relief that we seek and then whether or not  
6 we can come to final terms on language, I don't think will  
7 turn on the factual -

8 THE COURT: His testimony.

9 MR. NASH: Correct, Your Honor.

10 THE COURT: Okay. Mr. Schaffer, does that work for  
11 you?

12 MR. SCHAFFER: It does, Your Honor, thank you.

13 THE COURT: Okay. Is it all right with you if  
14 counsel proceeds by proffer and then you can cross or do you  
15 want direct?

16 MR. SCHAFFER: No, I think that would be efficient.

17 THE COURT: Very good. Mr. Nash, you may proceed.

18 MR. NASH: Your Honor, in the courtroom today with  
19 us is Mr. Neil Augustine. If called to testify, Mr.  
20 Augustine would testify as follows: Mr. Augustine is a  
21 managing director at the investment banking firm of  
22 Rothschild, Inc. Rothschild is a member of one of the  
23 world's leading independent investment banking groups with  
24 expertise in domestic and cross-border restructurings,  
25 mergers and acquisitions, and other investment banking

1 services and with particular experience in providing high  
2 quality investment banking services to financially troubled  
3 companies. Rothschild has developed -

4 THE COURT: I'm familiar with Mr. Augustine and with  
5 Rothschild. Mr. Schaffer's welcome to cross on that issue if  
6 he wishes to do so.

7 MR. SCHAFFER: I will accept that, Your Honor.

8 THE COURT: Very well, why don't we move on.

9 MR. NASH: Rothschild was engaged by VeraSun, Your  
10 Honor, in July 2008, primarily to review and analyze the  
11 debtors' assets and financial strategies, review and analyze  
12 business plan and financial projections, identify and  
13 initiate potential financings and assist with the review of  
14 any proposed financings and assist the debtors in evaluating  
15 their strategic alternatives in that regard. Mr. Augustine  
16 would testify, Your Honor, with respect to the events that  
17 led to the commencement of the Chapter 11 cases, that the  
18 company's liquidity is materially affected by uncertain  
19 commodity prices for corn, natural gas, and ethanol. Corn  
20 and ethanol prices have been highly volatile during 2008 and  
21 are impacted by numerous factors beyond the company's  
22 control. Prior to the petition date, Your Honor, the company  
23 was adversely impacted by hedging activities in relation to  
24 the purchase of corn. Ultimately, sizeable fluctuations in  
25 the price of corn, natural gas, and ethanol, coupled with

1 obligations to service the company's existing funded  
2 indebtedness in the face of continued lack of liquidity in  
3 the credit markets and the inability to raise additional  
4 investment capital from distressed equity markets  
5 precipitated these Chapter 11 cases. Mr. Augustine would  
6 testify, Your Honor, that he is familiar with the debtors'  
7 pre-petition capital structure. The company's total  
8 consolidated funded debt obligations were approximately \$1.5  
9 billion as of the petition date. This consists of a UBS  
10 revolving credit facility, a \$125 million credit facility  
11 secured by substantially all the inventory and accounts  
12 receivable of VeraSun Energy Corporation and its subsidiaries  
13 in what we've referred to, Your Honor, as the VeraSun silo.  
14 Mr. Augustine would testify that he is familiar with the  
15 VeraSun Energy Corporation's secured notes issued in the  
16 amount of \$210 million, which we've talked about in these  
17 cases. Those secured notes, Your Honor, are secured by a  
18 first lien on a pre-petition basis on the PP&E, the property  
19 plant and equipment, with respect to the VeraSun Energy silo  
20 essentially all of the VeraSun Energy silo assets other than  
21 those that are pledged to UBS. Mr. Augustine would testify  
22 that he's familiar with the unsecured notes that were issued  
23 by VeraSun Energy Corporation. He would testify that with  
24 respect to the ASA facility, that he is familiar with the  
25 West LB ASA senior credit facility originally in the amount

1 of approximately \$275 million in two tranches, a \$175 million  
2 tranche (A) and a \$100 million tranche (B). Approximately  
3 \$262 million, Your Honor, was outstanding under that facility  
4 as of the petition date. Mr. Augustine is familiar with the  
5 fact that the debtors' obligations under that facility are  
6 secured by substantially all of the assets under the ASA  
7 silo. Mr. Augustine would testify that he is familiar with  
8 the funded debt at the US Bio silo, that being the Agstar  
9 debt on a plant-by-plant basis and with respect to the Marion  
10 facility, he's familiar with the Dougherty construction loan  
11 and the First Bank & Trust revolving credit facility. With  
12 respect to Mr. Augustine's pre-petition efforts to locate  
13 alternative financing, Your Honor, Mr. Augustine would  
14 testify that in his capacity as the debtors' investment  
15 banker, he has become familiar with the day-to-day operations  
16 of the business and the challenges to its continued viability  
17 on account of its capital structure and liquidity needs. Mr.  
18 Augustine would testify that in the face of declining  
19 liquidity, the debtors attempted to raise cash through a  
20 number of different transactions, including a public offering  
21 and private financings. These are efforts undertaken on a  
22 pre-petition basis. In the weeks leading up to the  
23 bankruptcy filing, Rothschild assisted the debtors in seeking  
24 various financing proposals from institutions in an effort to  
25 obtain a commitment for alternative sources of financing.

1 The debtors contacted over eight parties and received a  
2 preliminary interest from two parties, and this with respect  
3 to potentially providing debtor-in-possession financing, Your  
4 Honor. These alternative financing efforts proved unavailing  
5 and with the company out of cash to sustain operations, the  
6 companies commenced these Chapter 11 cases to access the only  
7 available source of funds to keep operations alive and  
8 maximize the value of the debtors' assets, that being debtor-  
9 in-possession financing. Mr. Augustine would testify that in  
10 the weeks leading up to the commencement of these Chapter 11  
11 cases, Your Honor, the debtors, with the assistance of Mr.  
12 Augustine, were working on proposed DIP financing that would  
13 have been provided by a third party lender that would have  
14 been all company financing on a priming basis, Your Honor,  
15 secured by all the assets of the company. Mr. Augustine  
16 would testify that the debtors were unable to finalize the  
17 terms of the DIP financing with that third party lender and  
18 that while they were attempting to finalize the terms of the  
19 DIP financing with the third party lender, Mr. Augustine  
20 would testify that the debtors' existing liquidity evaporated  
21 and that the debtors had no choice, Your Honor, but to turn  
22 to the only potential source of financing that was available  
23 to the debtors, that being the debtors' existing secured  
24 lenders. Without a DIP financing proposal from a third  
25 party, Your Honor, turning to their existing secured lenders,

1 Mr. Augustine would testify that each of the secured lenders  
2 responded very quickly to the debtors' request for potential  
3 DIP financing. In particular, Your Honor, Mr. Augustine  
4 would testify that he Augustine and the debtors contacted the  
5 secured noteholders, Your Honor, on approximately Thursday,  
6 October 30<sup>th</sup> with respect to the prospect of providing DIP  
7 financing for the VeraSun Energy silo. Mr. Augustine would  
8 testify that the secured noteholders or a subset of the  
9 secured noteholders were willing to work literally around the  
10 clock, Your Honor, October 30<sup>th</sup>, 31, November 1, and November  
11 2 in order to provide a commitment to these debtors for DIP  
12 financing that the debtors would be able to access on an  
13 interim basis at the interim hearing and ultimately on a  
14 final basis here today, Your Honor. The negotiations  
15 culminated in a term sheet and interim DIP financing and then  
16 ultimately, Your Honor, the credit agreement that we were  
17 able to sign up in recent dates. As a general matter, Your  
18 Honor, with respect to the DIP financing and then we'll talk  
19 about each of the silos. As a general matter, Mr. Augustine  
20 would testify that he is familiar with the debtors' cash and  
21 financing needs. He is familiar the proposed financings were  
22 the most favorable financings available to the company within  
23 the time frame required by the company's needs to avoid  
24 immediate and irreparable harm. The debtors are unable to  
25 obtain financing on more favorable terms from sources other

1 than the DIP lenders, and under the DIP documents - other  
2 than from the DIP lenders under the DIP documents, Your  
3 Honor. Mr. Augustine would testify that the debtors are  
4 unable to obtain adequate unsecured credit, allowable under  
5 § 503(b)(1) of the Bankruptcy Code as an administrative  
6 expense or unsecured credit with the enhanced priority  
7 afforded by § 364(c)(1) of the Bankruptcy Code. Mr.  
8 Augustine would testify, Your Honor, that the debtors are  
9 unable to obtain secured credit allowable under §§ 364(c)(2)  
10 and 364(c)(3) of the Bankruptcy Code without granting to the  
11 DIP lenders, subject to the carve-out, Your Honor, the DIP  
12 liens and super-priority claims under the terms and  
13 conditions as set forth in the final orders and the DIP  
14 documents. Mr. Augustine would testify that the debtor-in-  
15 possession financing was available only under §§ 364(c) and  
16 364(d) of the Bankruptcy Code, and that the debtors  
17 determined in the exercise of their business judgment that  
18 the financing offered by each of the pre-petition secured  
19 lenders was in the best interest of the estates. Mr.  
20 Augustine would testify that the debtors have requested from  
21 the DIP lenders and the DIP lenders - Pardon me, Your Honor.  
22 Mr. Augustine would testify that the debtors have requested  
23 certain loans and advances and other financial  
24 accommodations, Your Honor, as more particularly described  
25 and on the terms and conditions as set forth in the final DIP

1 orders, the final cash collateral orders, and the DIP  
2 documents. Mr. Augustine would testify that the debtors have  
3 an immediate need to obtain DIP financing and the continued  
4 use of cash collateral in order to permit, among other  
5 things, the orderly continuation of the operation of their  
6 businesses, maintain business relationships with vendors and  
7 customers, make payroll, and satisfy other working capital  
8 and operational needs. The DIP financings and use of cash  
9 collateral is necessary in Mr. Augustine's judgment, Your  
10 Honor, to insure the debtors have sufficient working capital  
11 and liquidity to preserve and maintain the going concern  
12 value of the debtors' estates. Mr. Augustine would further  
13 testify, Your Honor, that the relief requested in the motion  
14 is necessary, essential, and appropriate, that it's in the  
15 best interest of the debtors, their creditors, and their  
16 estates, and that the implementation of the DIP financing  
17 will, among other things, provide the debtors with the  
18 necessary liquidity to minimize destruction of their  
19 businesses, preserve value of the estates for the benefit of  
20 all stakeholders, and avoid immediate and irreparable harm to  
21 the debtors, their creditors, and their businesses. With  
22 respect to the silo-by-silo financing, Your Honor, Mr.  
23 Augustine would testify in connection with the DIP financing  
24 proposed to be provided by West LB at the ASA silo. He would  
25 testify that he is familiar with that DIP financing, that he

1 participated in the negotiation and the securing and the  
2 procurement of the DIP financing. He would testify that he  
3 is familiar that West LB is willing to provide interim  
4 financing of \$10 million. He would testify that he is  
5 familiar that the \$10 million is \$10 million with respect to  
6 a \$20 million revolving credit facility. He has reviewed the  
7 terms of the DIP financing, is familiar with the terms and  
8 conditions. He believes that such terms and conditions are  
9 appropriate and fairly balance the lenders' interest with the  
10 company's interest and having sufficient flexibility and  
11 runway to preserve value maximizing opportunities. The  
12 proposed interim DIP financing, Your Honor, is sufficient to  
13 finance the ASA operations until an incremental \$10 million  
14 is provided pursuant to a credit agreement and final order  
15 presumably at the January 2009 omnibus hearing, Your Honor.  
16 Mr. Augustine is familiar that the term of the facility is 6  
17 months. Mr. Augustine would testify that while the debtors  
18 negotiated for a facility with a term of 12 months, that the  
19 West LB was unwilling to provide a facility with a duration  
20 of 12 months, that the most that we could get on a negotiated  
21 basis was a 6-month facility. With respect to the interest  
22 rate and the fees under the facility, Your Honor, Mr.  
23 Augustine would testify that the interest rate of libor plus  
24 10 percent is reasonable under the circumstances. A  
25 structuring fee of 0.5 percent of the aggregate principal

1 amount of the DIP revolving facility is reasonable and  
2 appropriate under the circumstances. The underwriting fee of  
3 0.5 percent is also reasonable and appropriate under the  
4 circumstances. A facility fee of 2 percent of the aggregate  
5 principal amount of the DIP revolving facility, Your Honor,  
6 in Mr. Augustine's judgment is appropriate and reasonable  
7 under the circumstances. Mr. Augustine would also testify  
8 that a 2 percent commitment fee and a 1 percent letter of  
9 credit funding fee under the circumstances, Your Honor, is  
10 reasonable and in the best interests of the debtors' estates.  
11 Mr. Augustine would testify that he's familiar with the  
12 adequate protection proposed to be provided to the existing  
13 lenders under the West LB pre-petition facility. Mr.  
14 Augustine would testify that he believes that the debtors  
15 have adequately protected the interests of the existing  
16 secured creditors in any potential diminution in the value of  
17 their pre-petition security interest through the granting of  
18 liens with respect to all of the debtor - the ASA debtors'  
19 collateral, Your Honor, liens to secure on a replacement  
20 basis any diminution in interest, super-priority claims, Your  
21 Honor, to secure any diminution in interest. Mr. Augustine  
22 would also testify that the pre-petition lenders' overall  
23 interest in the collateral is enhanced by the imposition of  
24 the DIP financing in that those facilities, their highest and  
25 best use, Your Honor, is other than in a mothball state.

1 With respect to the VeraSun silo, Your Honor, Mr. Augustine  
2 would testify that the VeraSun DIP financing is being  
3 provided by a subset of the existing senior secured  
4 noteholders. Mr. Augustine would testify that upon  
5 information and belief approximately 60 percent of the  
6 existing senior secured noteholders are providing that  
7 financing. Mr. Augustine would testify that he was  
8 intimately involved in the negotiations with the secured  
9 bondholder/DIP lenders on the terms and conditions of the  
10 VeraSun DIP facility. Mr. Augustine would testify that he is  
11 familiar with the VeraSun DIP facility, and he is familiar  
12 with the credit agreement in particular. He's familiar with  
13 the fact that there is proposed to be \$196 and a half million  
14 borrowed on a final basis under the DIP credit agreement.  
15 Approximately \$93.6 million of the borrowings, Your Honor,  
16 represents new money and new liquidity to the debtors.  
17 Approximately \$102,950,000, Your Honor, of the borrowings  
18 will be used to redeem and effectively roll up existing  
19 senior secured indebtedness. Mr. Augustine would testify  
20 that he has reviewed the fees and the interest rate under the  
21 senior secured bondholder DIP document. He would testify  
22 that an origination fee of 2 percent on the new money, Your  
23 Honor, is reasonable under the circumstances and appropriate  
24 and in the best interest of the estate. He would testify  
25 that an exit fee of 5 percent, which drops down to 2 percent,

1 Your Honor, to the extent that the loan is repaid at maturity  
2 12 months out. He would testify that that exit fee is  
3 reasonable and appropriate under the circumstances. Mr.  
4 Augustine would testify that the interest rate of 16 1/2  
5 percent is reasonable and appropriate under the  
6 circumstances. Mr. Augustine would testify that the fees and  
7 the interest rates under the VeraSun bondholder DIP document  
8 was the subject of intense negotiation and that through the  
9 result of good faith and arm's length negotiation that the  
10 debtors were able to achieve the best and most opportunistic  
11 financing at the VeraSun silo that was available to them  
12 under the circumstances. Mr. Augustine would testify that he  
13 is familiar with the covenants contained in the credit  
14 agreement. Mr. Augustine believes that such covenants are  
15 appropriate and fairly balance the lenders' interests with  
16 the company's interest and having sufficient flexibility and  
17 runway to pursue value maximizing strategies. Mr. Augustine  
18 would testify that, in his judgment, the senior secured  
19 noteholders were unwilling to provide the financing for which  
20 we seek approval today absent the roll-up. Mr. Augustine  
21 would testify that the debtors resisted the roll-up, that the  
22 debtors negotiated intensely to limit and/or eliminate if at  
23 all possible, the roll-up. Mr. Augustine would testify that  
24 in his judgment the financing for which we seek approval  
25 today would not have been offered and provided in the absence

1 of the roll-up. Mr. Augustine would testify that he believes  
2 that the roll-up was a significant inducement to get  
3 creditors who would otherwise have been unwilling to loan new  
4 money, particularly in the current economic and financial  
5 climate to make the commitment to provide the debtors with a  
6 meaningful amount of incremental financing that being  
7 approximately \$93 1/2 million of new money. Mr. Augustine  
8 would testify that in terms of the defense-ability of the  
9 roll-up, his opinion in that regard, Your Honor, is impacted  
10 by the fact that upon information and belief, any and all of  
11 the existing senior secured creditors that asked to be  
12 included in the roll-up were in fact included in the roll-up.  
13 Mr. Augustine would testify that with respect to the adequate  
14 protection claims and the priming lien that is being granted,  
15 Mr. Augustine would testify that the existing senior secured  
16 noteholders are being adequately protected by the debtors'  
17 adequate protection package under this financing. That  
18 adequate protection package, Your Honor, includes current  
19 cash pay interest at the non-default rate. That adequate  
20 protection package includes junior liens to securing  
21 diminution in the interest of the senior secured noteholder's  
22 pre-petition collateral. That would be junior liens on their  
23 existing collateral, the property, plant, and equipment at  
24 the VeraSun silo. In addition, Your Honor, Mr. Augustine  
25 would testify that an important additional piece of adequate

1 protection is the fact that the senior secured noteholders  
2 are getting liens that they don't currently have today, that  
3 being junior liens with respect to the working capital at the  
4 VeraSun silo. Based upon all of that, Your Honor, and the  
5 fact that the VeraSun bondholder DIP financing was the  
6 product of intense arm's length negotiation, Mr. Augustine  
7 believes that the VeraSun bondholder DIP financing, while  
8 expensive and with the roll-up is undoubtedly in the best  
9 interest of the debtors and ultimately in the best interest  
10 of all of the creditors of the VeraSun silo, given the  
11 importance of continuing the operation of those assets and  
12 the inability to do so in the absence of the DIP financing.  
13 With respect to the US BioEnergy silo, Your Honor, Mr.  
14 Augustine would testify that he is familiar with the DIP  
15 financing that has been provided to date by Agstar and he is  
16 familiar with the fact that there was \$15 million provided on  
17 an interim basis and that \$15 million is an aggregate number,  
18 Your Honor, that was then allocated to each of the plants.  
19 Mr. Augustine would testify that he is familiar with the  
20 incremental \$10 million, approximately \$10 million, proposed  
21 to be borrowed on a final basis that again being an aggregate  
22 number. Mr. Augustine would testify that the incremental \$10  
23 million, Your Honor, is sufficient in order to enable the  
24 debtors to preserve the value of the US BioEnergy assets and  
25 maintain those assets between now and approximately January

1 15<sup>th</sup>. Mr. Augustine would testify that the preservation and  
2 the value of those assets is certainly in the best interests  
3 of all of the creditors and stakeholders at the VeraSun  
4 Energy silo. The reasonableness, Your Honor, of the Agstar  
5 financing, Mr. Augustine would testify is undoubtedly  
6 impacted by the fact that that is entirely ring-fenced and  
7 that the Agstar creditors are participating on a pre- and  
8 post-petition basis, secured creditors in that financing.  
9 Mr. Augustine would testify that he's familiar with the term  
10 sheets pursuant to which the financing is being provided. He  
11 believes that the interest rate of LIBOR plus 7 is  
12 reasonable. Mr. Augustine believes that the closing fee of 1  
13 1/2 percent is also reasonable. Mr. Augustine believes that  
14 the adequate protection being offered to the existing lenders  
15 is reasonable in light of the fact that they are getting  
16 replacement liens and in light of the fact that they are also  
17 getting current cash pay interest at the non-default rate,  
18 Your Honor.

19 THE COURT: Okay.

20 MR. NASH: Mr. Augustine would testify, Your Honor,  
21 that the preparation - that he was involved in the  
22 preparation of the DIP budgets. He would testify that the  
23 debtors have prepared and delivered DIP budgets by plant to  
24 the DIP lenders and that the DIP budgets will be exhibits to  
25 the DIP financing and cash collateral orders. Such DIP

1 budgets have been thoroughly reviewed by the debtors and  
2 their management. The debtors represent that the DIP budgets  
3 are achievable and will allow the debtors to operate their  
4 businesses and otherwise preserve the value of the collateral  
5 as set forth in the final order in the DIP budgets and for  
6 the time period set forth in the final order of the DIP  
7 budgets. Mr. Augustine would testify that the DIP lenders  
8 are relying upon the debtors' compliance with the DIP budgets  
9 in accordance with the final orders in determining whether to  
10 enter into post-petition financing arrangements and the use  
11 of cash collateral. The debtors' pre-petition lenders, Your  
12 Honor, are likewise relying upon the debtors' compliance with  
13 the DIP budgets in accordance with the final DIP financing  
14 orders and cash collateral orders in determining to consent  
15 to the form of adequate protection being provided therein.  
16 Mr. Augustine would testify, Your Honor, that the proposed  
17 DIP financings in summary were the product of intense arm's  
18 length negotiation. That the DIP financings permit the  
19 company to fund working capital and general corporate  
20 purposes in the administration of these Chapter 11 cases  
21 thereby preserving the going concern of value of the debtors'  
22 assets. The debtors' believe that the terms of the DIP  
23 financing are fair and reasonable, reflect the debtors'  
24 exercise of prudent business judgment consistent with their  
25 fiduciary duties, and are supported by reasonably equivalent

1 value and fair consideration. The debtors believe that the  
2 DIP documents and the final orders and the terms and  
3 conditions thereof have been negotiated in good faith and at  
4 arm's length between the debtors and each of the proposed DIP  
5 lenders, Your Honor. All the debtors' obligations and  
6 indebtedness in respect of the DIP financing were extended by  
7 the DIP lenders in good faith in Mr. Augustine's judgment,  
8 and in expressed reliance in Mr. Augustine's judgment on the  
9 protections of the Code afforded by § 364(e) of the  
10 Bankruptcy Code. Mr. Augustine believes that the debtors  
11 should be entitled to the full protection of § 364(e) in the  
12 event that the final DIP financing orders or cash collateral  
13 orders or any provision thereof is reversed or modified on  
14 appeal or otherwise. That would conclude the proffer of Mr.  
15 Augustine's testimony, Your Honor.

16 THE COURT: Okay. Cross-examination. Mr.  
17 Augustine. Swear the witness.

18 NEIL AUGUSTINE  
19 having been duly sworn testifies as follows:

20 THE CLERK: Please state your full name and spell  
21 your last name for the record.

22 THE WITNESS: Neil Alan Augustine, A-u-g-u-s-t-I-n-  
23 e.

24 THE COURT: Thank you, you may be seated.

25 CROSS-EXAMINATION

1 BY MR. SCHAFFER:

2 Q. Mr. Augustine, my name is Eric Schaffer. I'm from the  
3 law firm of Reed Smith here on behalf of Wells Fargo Bank as  
4 indenture trustee for the senior secured notes. A few  
5 questions about the proffer. Am I correct that it was on  
6 October 30 that you contacted holders of the senior secured  
7 notes with regard to what became the proposed DIP facility?

8 A. I believe that was approximately the date. I believe it  
9 was the date prior to Halloween that we reached out to some  
10 of the secured noteholders that we understood were forming a  
11 Secured Noteholder Committee, and at the time, per my  
12 proffer, the third party financing that we were working on  
13 fell apart due to the inability to pay the commitment fee for  
14 that financing.

15 Q. Did you reach out to all of the holders of the senior  
16 secured notes?

17 A. It's impossible to do that. As typically occurs in these  
18 situations, Committees are formed and those Committee in  
19 effect represent the entirety of the noteholder constituency.  
20 As a financial advisor to a company and to a debtor, it's  
21 impossible not only to contact all the noteholders, it is  
22 impossible to note who all the noteholders are. These notes  
23 are held in various collateralized obligation-type funds.  
24 They're not necessarily held in beneficial name, they're held  
25 in street name. So this is not publicly available

1 information. This is not information that the company has  
2 available to itself. So we did the best that we possibly  
3 could to reach out to those large noteholders that we knew  
4 existed within the secured noteholder constituency.

5 Q. At that time, what percentage of the holders were in this  
6 informal committee?

7 A. As has been represented to us at the time, it was  
8 approximately 50 percent of the noteholders.

9 Q. Now, you stated that they represent the entirety of the  
10 holders?

11 A. They represent the interest of the holders.

12 Q. But the other 50 percent were not invited to participate  
13 in this financing; were they?

14 A. They were. As I understood it, the professionals that  
15 were retained by that Committee had been very diligent and  
16 eliciting to the bondholders that they represent to the  
17 extent that they had an interest in participating in this DIP  
18 financing. Just to give a little color to that, I mean, we  
19 had a situation where we had a very large company that  
20 employs a number of people, and we were in a situation that  
21 the company was effectively in deathcom five (phonetical)and  
22 without getting financing for the company we were going to be  
23 very quickly in a liquidation. Our view was, you know, it  
24 was necessary to get financing in places quickly as we  
25 possibly could to preserve the value of these assets for the

1 benefit of its various stakeholders.

2 Q. Mr. Augustine, perhaps I'm confused, as I understand it  
3 you stated it's impossible to determine what the entire  
4 universe of noteholders is at any given time, but I asked you  
5 whether there was a negotiation with all of the holders or  
6 just with this 50 percent. Am I correct that it was only  
7 with this roughly 50 percent that you had the negotiations on  
8 the DIP financing?

9 A. I think that's what I testified to.

10 Q. Okay, thank you. Is there a reason why you did not try  
11 and reach the other 50 percent?

12 A. If you'd like me to repeat myself, I will. I did not, if  
13 I can conclude, I did not know who the holders were. The  
14 company did not know who the holders were. Those bondholders  
15 that did contact us, we reached out to and made sure that we  
16 either spoke to them directly or they were speaking to the  
17 group that was being represented by Aiken Gump and by  
18 Jefferies who obviously have the specialty to represent their  
19 interests and have done it numerous times over many years.  
20 So, from our perspective, everyone who reached out to us, we  
21 made sure that we spoke to directly, that we fed them into  
22 the Committee that had been organized, and this has been  
23 represented to us. Every bondholder that reached out to  
24 either the bondholders on that Committee or reached out to  
25 those professionals were talked to. So, as far as I know,

1 there has not been a bondholder that reached out to us or  
2 reached out to the Committee that did not get a hearing with  
3 respect to participating in this DIP.

4 Q. So, there was no ability to contact the other 50 percent  
5 then?

6 A. I had no ability to contact them because I didn't know  
7 who they were.

8 Q. Okay, and couldn't the company contact them through DTC  
9 or through the trustee? Was there any effort made to reach  
10 those who did not affirmatively take it upon themselves to  
11 come to you?

12 A. There was every effort that is typically pursued in every  
13 restructuring that I've been involved in in 20 years of doing  
14 this. I've never seen a press release taken out by a debtor  
15 saying, Please call Mr. Augustine at such a number to discuss  
16 debtor-in-possession financing. The tradition that existed  
17 in almost every restructuring I've been involved in, is you  
18 get committees that represent the interests of the various  
19 holders, and those are the ones that are effectively driving  
20 the process. There's not an ability to reach out and contact  
21 everyone. If we conducted the effort that you're requesting,  
22 we would have been spending all of our time reaching out,  
23 trying to reach out to parties not likely having success in  
24 reaching them and now spending the time that we needed to  
25 spend to be able to pull together the financing package that

1 we did in order to maintain the viability and the value of  
2 these assets and of these debtors.

3 Q. So, no notice was sent, there was no attempt to send a  
4 notice through DTC to reach all of the holders?

5 A. There was no notice sent through the DTC nor have I ever  
6 been involved in a DIP financing where notice has been  
7 provided via DTC to noteholders.

8 Q. Were you here at the interim hearing on the DIP  
9 financing?

10 A. I was.

11 Q. It's my understanding at that time that the noteholders  
12 who were involved in DIP financing were about 45 percent,  
13 something under 50 percent, and that now it's up to 60  
14 percent; is that correct?

15 A. My understanding and what was represented in court on the  
16 initial first day, if there is such a thing, since we did  
17 have in essence two first days, one on Monday and one on  
18 Tuesday, was Cadwalader represented that they represented  
19 approximately 50 percent of the secured noteholders. I'm not  
20 sure if it was stated 45 percent or not. I know it was  
21 stated it was greater than 50 percent, and as I understand  
22 now, the Committee represents approximately 60 percent of the  
23 noteholders and that's what's been represented to me.

24 Q. Am I correct, that's because 4 noteholders have come  
25 forward and joined the group?

1 A. I'm not sure how many noteholders have come forward and  
2 joined the group, but I do know that noteholders have come  
3 forward and joined the group, and as I testified to earlier,  
4 there's an openness and a willingness both on the company  
5 side as well as on the Committee's side to hear from all  
6 noteholders that wanted to participate in this DIP financing  
7 to make sure it was fair to all the noteholders that  
8 currently own the secured notes.

9 Q. Okay. Listening to the numbers, there's a total of new  
10 money of 93 million out of a facility for 196.5 million and  
11 there's a \$102 million roll-up. As I'm doing the math, it  
12 sounds like not all of the noteholders who are participating  
13 in the DIP financing are being rolled up in their entirety.  
14 Some of them have some parts of their notes left in place; is  
15 that correct?

16 A. I don't have the information to know to what extent  
17 noteholders are rolling up all of their pre-petition secured  
18 debt or some of their pre-petition secured debt. That is not  
19 information that was available to me. The representatives of  
20 the Secured Noteholder Committee I'm sure could give you that  
21 information, but it's not just something that I have. I  
22 understand the mechanism by which it worked, that in essence  
23 that for every dollar of new money that went in, there was  
24 110 percent of existing pre-petition secured debt that was  
25 rolled into the DIP on an old money basis.

1 Q. All right. I think the mathematics speak for themselves.  
2 Let me move on to something different. The proffer was made  
3 that the debtors resisted the roll-up initially; why?

4 A. We resisted a number of things with respect to the  
5 proposal that was initially made by the secured noteholders  
6 over the lengthy Halloween weekend. We were trying to get  
7 the best terms that we possibly could, and in any situation  
8 where you're representing the debtor you do you best not to  
9 roll up, but there's a number of situations where the need  
10 for financing clearly outweighs the roll-up issue that one is  
11 facing. So, we pushed back directly to some of the  
12 noteholders on the Committee. At the time we pushed back  
13 through Jefferies as representative to the Secured  
14 Noteholders Committee on the financial advisory side.  
15 Skadden pushed back through Cadwalader who was representing  
16 the Secured Noteholder Committee for the legal side. So we  
17 did everything we possibly can to push back on those and  
18 other terms and we get the best financing that we possibly  
19 could given the situation.

20 Q. Switching subjects. What is the value of the collateral  
21 that secures the senior secured notes?

22 A. I have not done a valuation analysis of the collateral.

23 Q. Do you have any opinion?

24 A. No, not at this moment.

25 Q. To your knowledge, does the company have an opinion as to

1 the value?

2 A. Not at this moment, we do not have an opinion. I cannot  
3 speak for the company, I can only speak for Rothschild.  
4 You'd have to speak to one of the management representatives  
5 as to the company.

6 Q. Is it the company's position that senior secured notes  
7 are over-secured at this time?

8 A. It's Rothschild's view at this point in time that we have  
9 not performed a valuation analysis. So, could not give a  
10 conclusion to this Court as to whether or not they're under-  
11 secured or over-secured.

12 Q. So, the same would be true then with or without the  
13 noteholder DIP financing in place?

14 A. When you say "same would be true with or without" I'm not  
15 sure what exactly the question you're asking.

16 Q. As I understand your testimony, you're saying that at  
17 this time, the Court not yet having considered approval of  
18 the final order, you don't have an opinion as to whether the  
19 senior secured notes are over-secured or under-secured?

20 A. I have not performed that evaluation to assess whether or  
21 not they're over or under-secured.

22 Q. And if the Court were to enter a final order approving  
23 the noteholder DIP financing, would it still be your position  
24 that you don't know whether the senior secured notes are  
25 over-secured or under-secured?

1 A. My previous testimony sort of stands what I indicated. I  
2 do not - Rothschild does not have an opinion as to the  
3 underlying value of that collateral at this moment.

4 Q. Has anyone asked you to perform any sort of valuation  
5 analysis?

6 A. No.

7 Q. Do you know whether the company has or intends to do any  
8 valuation analysis?

9 A. Not to my knowledge.

10 Q. If an analysis were to be performed, what would be the  
11 appropriate basis for valuing the collateral that secures the  
12 senior secured notes?

13 A. To the extent it was a going-concern valuation that would  
14 need to be conducted, we would perform the traditional  
15 valuation work that one would do. We'd look at comparable  
16 company analysis. We'd look at multiples of publicly traded  
17 companies. We'd look at precedent transactions, so multiples  
18 at which companies in a similar situation traded in the  
19 private market. We'd be looking at a discounted cashflow  
20 analysis. Those would be the three traditional valuation  
21 methodologies that we would evaluate with respect to a going-  
22 concern value of the company to then be able to look at the  
23 underlying collateral value for the notes.

24 Q. Focusing on the collateral that secures the senior  
25 secured notes, what type of events could have a material

1 effect on the value of that collateral - Let me make that a  
2 material adverse effect on the value?

3 A. The biggest issue is, to the extent the plant gets  
4 mothballed and to the extent there's not financing available  
5 to keep the plants at a minimum hot-idle, there would be a  
6 significant impairment of value to the extent that financing  
7 wasn't available to maintain employees to watch over those  
8 facilities, those plants could be vandalized and therefore  
9 the underlying collateral for the secured noteholders would  
10 be substantially impaired in that situation as well. I mean  
11 those are two of the biggest issues that I would see.

12 Q. Are there any market issues, such as the price of corn,  
13 the price of ethanol?

14 A. I think there's a tremendous amount of volatility right  
15 now in the marketplace relating to both the commodity-based  
16 inputs for the company as well as the ethanol output for the  
17 company, and that volatility, I don't think anyone really  
18 knows for certain today whether or not the best strategy for  
19 the business is to effectively take capacity out of the  
20 market and when you take capacity out of the market,  
21 Economics 101 sort of tells you that as supply goes down and  
22 demand stays the same, it should have some sort of long-term  
23 impact with respect to the pricing of your output, and that  
24 is something currently that the management team is evaluating  
25 in terms of how best to maximize value for the benefit of all

1 the stakeholders. Is the best way to maximize value to keep  
2 the plants up and running or is the best way to maximize  
3 value to take plants down and take capacity out of the market  
4 and hopefully drive to what the higher crush spreads, the  
5 higher profitability and therefore higher value. That's  
6 something that we'll have to determine as we work with the  
7 management team to develop a long-term business plan.

8 Q. Does market demand for ethanol affect the value of the  
9 collateral?

10 A. Market value - the market demand for ethanol in effect is  
11 not so much a market demand, number one, as it is partially  
12 in essence a required usage of ethanol, and on top of that  
13 then you have the economics that interplay with the refiners  
14 as to whether or not the economics and the subsidies provided  
15 are better off for the refiners to blend in above and beyond  
16 the minimum regulated levels that need to be provided and  
17 utilized on an annual basis.

18 Q. Pursuing that, would it be correct that if the demand for  
19 gasoline or gasoline substitutes is reduced, that necessarily  
20 means there's less demand for ethanol regardless of what may  
21 be legislatively mandated?

22 A. I'm not a specialist with respect to or an expert with  
23 respect to exactly how the minimum levels actually work and  
24 what needs to be utilized and exactly what the details of  
25 that are, so I'm sure there's probably someone within the

1 company from a regulatory perspective that could give you a  
2 better answer than I could.

3 Q. Okay. Focusing again only on the collateral for the  
4 senior secured notes, are any of these plants on hot-idle or  
5 mothballed?

6 A. On the VeraSun side, the only collateral that I know of  
7 is the Reynolds facility that is about 25 percent  
8 constructed. So it's not complete. With respect to the  
9 actual day-to-day up and running or idle, that's something  
10 that you'd have to ask the management team. I'm not in  
11 charge of the operations of the plant. I do get updates, but  
12 things do change on a daily basis. You also need to  
13 understand, some of the routine operating decisions could be  
14 to take a plant down for maintenance purposes and they could  
15 have taken a plant down for maintenance purposes that I'm not  
16 aware of, so it's hard for me to give you an exact answer in  
17 terms of what's up and running today on the VeraSun silo. I  
18 do know what's happening with respect to Reynolds.

19 MR. SCHAFFER: Your Honor, I have no further  
20 questions for this witness.

21 THE COURT: Okay. Does anyone else wish to cross?  
22 Redirect?

23 MR. NASH: I'll be brief, Your Honor. Pat Nash from  
24 Skadden, Arps on behalf of the debtors.

25

REDIRECT EXAMINATION

1 BY MR. NASH:

2 Q. Mr. Augustine, if you could have identified 100 percent  
3 of the existing senior secured noteholders, in your  
4 estimation would it have been practical to negotiate with  
5 them?

6 A. Not at all. I mean, that's typically why committees are  
7 formed in restructurings like this is to drive the process  
8 and have an efficient process like I believe we did have  
9 here.

10 Q. Mr. Augustine, are you aware of any financing that has  
11 been offered to the company or made available to the company  
12 in the absence of the financing to be provided by the senior  
13 secured noteholders that would enable the debtors to preserve  
14 the value of the senior secured noteholders' collateral be it  
15 through continued operations or even hot-idling the plants in  
16 a responsible fashion?

17 A. I'm not aware and since the interim approval of the DIP,  
18 we have not been contacted by any third parties willing to  
19 provide debtor-in-possession financing on more favorable  
20 terms, so, this is the only financing alternative that the  
21 VeraSun entities have available to them and therefore is the  
22 best financing option that the company has and should be  
23 consummated.

24 MR. NASH: Nothing further, Your Honor.

25 THE COURT: Okay. Any recross?

1 MR. SCHAFFER: No, Your Honor.

2 THE COURT: Very well, you may step down, thank you.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Mr. Nash, any other witness?

5 MR. NASH: No, Your Honor.

6 THE COURT: Okay, so I think where we are now then  
7 is we will break and then reconvene tomorrow morning and  
8 hopefully parties will have an opportunity to get through -  
9 or do you have a witness, sir?

10 MR. SCHAFFER: Your Honor, I do not have a witness.  
11 If it's useful before we conclude, I can just make brief  
12 argument with regard to the points that Wells Fargo would  
13 have as trustee. If the Court prefers to hear that tomorrow  
14 -

15 THE COURT: I think I'd prefer to hear that tomorrow  
16 because I think that there are parties that may have either  
17 reservations or pending objections or concerns. So I'm going  
18 to hear from folks tomorrow and so I think that it would be  
19 more appropriate to hear it then. I have reviewed your  
20 objection but I think it would probably be better to do it  
21 then and then anybody else that wishes to argue at that point  
22 that would be fine, but I think, my hope would be that in  
23 circulating the form of the order, that you may resolve at  
24 least some of the objections that are either purely legal or  
25 word-smithing in nature. So, is there anything further for

1 us to do today?

2 MR. NASH: I don't think so, Your Honor.

3 THE COURT: All right, we'll reconvene at 10:30  
4 tomorrow morning. We stand in recess.

5 UNIDENTIFIED SPEAKER: Your Honor, if I might?

6 THE COURT: Yes, sir. You're a little slow on the  
7 trigger there.

8 MR. NASH: Mr. Swett has reminded me of one thing,  
9 Your Honor. This would be with respect to Agstar's adequate  
10 protection motion. If I could address that briefly, Your  
11 Honor?

12 THE COURT: That would be great.

13 MR. NASH: Also it ties in with scheduling as well.

14 THE COURT: Sure.

15 MR. NASH: Agstar's adequate protection motion, Your  
16 Honor, to the extent that it was an emergency, it was an  
17 emergency due to Agstar's desire that the debtors stop  
18 transferring ethanol in the manner in which the Agstar  
19 lenders find objectionable. To that end, Your Honor, in a  
20 form of a stipulation that we, we being the debtors UBS and  
21 Agstar are working on, we are prepared to stipulate in a  
22 stipulation and I'm prepared to announce here on the record  
23 that since November 25<sup>th</sup>, the day before in fact Agstar filed  
24 its motion, the debtors are no longer transferring ethanol in  
25 the manner in which Agstar found objectionable. So in terms

1 of the emergency nature of the relief that Agstar seeks, and  
2 Agstar's desire that reserve its rights as to things that  
3 have happened in the past, but then get the debtors to stop  
4 doing that which they no longer want the debtors to do, I can  
5 represent to the Court that since November 25<sup>th</sup> we haven't and  
6 we won't going forward.

7 THE COURT: Okay.

8 MR. NASH: Now, with respect to the motion filed by  
9 Agstar and the scheduling for that motion, one complication  
10 for the debtors, Your Honor, is that the pendency, for better  
11 or worse, of a motion seeking a priming lien with respect to  
12 UBS's collateral constitutes a default under the UBS cash  
13 collateral stipulation. UBS does not want the debtors to be  
14 in default under the cash collateral stipulation. I don't  
15 even think Agstar wants the debtors to be in default under  
16 the UBS cash collateral stipulation, Your Honor. So, if it  
17 pleases Your Honor, I think one of the things that we would  
18 like to do tomorrow is present a stipulation, some type of a  
19 stipulation or agreement with respect to the statement that I  
20 made on the record about what the debtors are no longer  
21 doing, which is very important to Agstar, and then I believe  
22 the stipulation will also address parties' reservations of  
23 rights, which I think - I don't know that you have to reserve  
24 rights to not waive rights, but that is nonetheless -

25 THE COURT: But they seem to.

1           MR. NASH: That's nonetheless addressed in the  
2 stipulation, Your Honor, and also perhaps, Your Honor, we can  
3 have view when we come before you tomorrow with respect to  
4 scheduling.

5           THE COURT: I think that makes good sense. My  
6 expectation on the Agstar matter when it was raised this  
7 morning was that I understood that there were some  
8 discussions going on and that some of these issues may or may  
9 not rise and fall with the DIP issues, but I think the DIP  
10 matters that are before me and the financing matters that are  
11 before me are at least implicated by it. So, that sounds  
12 fine, and that will give you a chance then to finalize that  
13 stipulation. If there's an issue with it, then I'd be  
14 prepared to discuss substantive scheduling tomorrow morning,  
15 but it sounds like you're on a path that should lead to at  
16 least for the interim a consensual resolution. Yes, sir.

17           MR. SWETT: Good afternoon, Your Honor. Brian  
18 Swett, Winston & Strawn on behalf of UBS. I appreciate Mr.  
19 Nash's comments and the Court's observations especially in  
20 the vein that we see a very close relationship between the  
21 adequacy of our protection that is of course a fundamental  
22 tenant of our agreement to provide continued cash collateral  
23 use and the resolution on an expedited basis of the alleged  
24 priming lien with respect to what constitutes a significant  
25 portion of what we certainly believe is our first priority

1 collateral. So, again, I appreciate the Court's willingness  
2 to conduct a hearing tomorrow to consider a stipulation for  
3 the resolution of the motion. It would be a resolution that  
4 we would not think appropriate or complete but for the  
5 inclusion in that resolution of scheduling to resolve the  
6 matter. So, again, we appreciate the Court's willingness to  
7 hear us tomorrow morning as to that matter at the same time  
8 that the orders, including our adequate protection, cash  
9 collateral order will be presented to the Court.

10 THE COURT: Is it your expectation then that  
11 tomorrow, as we talk about that stipulation you identified  
12 that you'd be asking me for a hearing date to deal with the  
13 Agstar motion on the merits?

14 MR. SWETT: I think that the motion will be  
15 withdrawn by agreement of the parties that would obviate the  
16 existence of a default day one under the order, but what we  
17 would be asking the Court to do and what we're in  
18 negotiations regarding at this point is a deadline by which a  
19 priming lien would have to have been alleged by whatever  
20 procedural mechanism is appropriate or otherwise waived.

21 THE COURT: Okay.

22 MR. SWETT: Our bottom-line is we don't want to  
23 conduct the case with this issue hanging over our heads  
24 indefinitely.

25 THE COURT: I understand. Okay, I'd be happy to

1 address the scheduling questions if the parties need guidance  
2 from me on that tomorrow morning.

3 MR. SWETT: Thank you, Your Honor.

4 THE COURT: Okay. Mr. Nash, anything further?

5 MR. NASH: Nothing further, Your Honor.

6 THE COURT: We'll stand in recess, 10:30 tomorrow  
7 morning. Thank you, counsel.

8 ALL: Thank you, Judge.

9 (Whereupon at 1:26 p.m., the hearing in this matter  
10 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 December 8, 2008  
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