

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re	)	Chapter 11
VERASUN ENERGY CORPORATION, <u>et al.</u> ,	)	Case No. 08-12606 (BLS)
	)	
Debtors.	)	Jointly Administered
	)	<b>Ref. Docket No. 486</b>

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**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF  
VERASUN ENERGY CORPORATION, ET AL. TO MOTION PURSUANT TO  
BANKRUPTCY CODE SECTIONS 105, 361, 362, AND 364 AND BANKRUPTCY RULES  
2002, 4001, AND 9014 FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING  
DEBTORS TO OBTAIN POST-PETITION FINANCING TO FUND OPERATIONS AT  
SEVEN US BIOENERGY FACILITIES, (II) GRANTING ADEQUATE PROTECTION  
TO PREPETITION SECURED LENDERS AND (III) SCHEDULING  
INTERIM AND FINAL HEARINGS**

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of VeraSun Energy Corporation, et al. (collectively, the “Debtors”), by and through its undersigned co-counsel, hereby files this objection (the “Objection”) to the Debtors’ Motion for Interim and Final Orders (i) Authorizing the Debtors to Obtain Post-Petition Financing to Fund Operations at Seven US BioEnergy Facilities, (ii) Granting Adequate Protection to Prepetition Secured Lenders and (iii) Scheduling Interim and Final Hearings (the “Motion”). In support of its Objection, the Creditors’ Committee respectfully represents the following:

**PRELIMINARY STATEMENT**

1. By the Motion, filed on less than 48 hours’ notice, the US BioEnergy Debtors<sup>1</sup> seek approval of seven separate DIP facilities (the “DIP Facilities”) which, if approved, will provide the US BioEnergy Debtors and their estates with up to \$110,600,000 of “new” first-

priority, senior secured debt obligations on terms that are inequitable to the US BioEnergy Debtors and their unsecured creditors. While the Creditors' Committee was provided with drafts of the proposed Interim DIP Order, the DIP Credit Agreement, and the multiple related documents on Friday, such documents were not in final form and continue to be negotiated among the parties through today. Additionally, the Creditors' Committee did not receive a copy of the proposed DIP Budget until yesterday – a budget which, as of the filing of this Objection, continues to be negotiated between the Debtors and AgStar. As a result, the Creditors' Committee and its advisors have not had sufficient time to fully analyze the adequacy and appropriateness of the proposed DIP Facilities.

2. The Creditors' Committee understands the Debtors' significant need for additional financing and is involved in ongoing negotiations with the Debtors and AgStar in an effort to resolve the Creditors' Committee's concerns. However, approval of certain terms of the proposed financing at this time and on 48 hours' notice, including, but not limited to, the sales process timeline and the "roll-up" provision is entirely inappropriate. While the Creditors' Committee believes that these terms should never be approved, at a minimum, consideration of these matters should be deferred to the final hearing on the Motion to ensure that the Creditors' Committee and other parties in interest have had sufficient time to fully analyze the relief requested and the impact such relief will have on the US BioEnergy Debtors, their estates and unsecured creditors and negotiate more favorable terms.

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion and, as applicable, the accompanying DIP Credit Agreement and Interim DIP Order.

## **BACKGROUND**

3. On October 31, 2008 (the “Petition Date”), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

4. Since the Petition Date, the Debtors have continued in possession of their properties and have continued to operate and manage their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On the Petition Date, the Court entered an order pursuant to Bankruptcy Rule 1015 jointly administering these chapter 11 cases for procedural purposes only.

5. On November 14, 2008, pursuant to section 1102 of the Bankruptcy Code, the United States Trustee for the District of Delaware appointed the Creditors’ Committee.<sup>2</sup>

### **Prepetition Secured Financing at US BioEnergy**

6. Prior to the Petition Date, each of the US BioEnergy Debtors entered into stand-alone credit facilities (collectively, the “Prepetition Credit Facilities”) under which AgStar Financial Services, PCA (“AgStar”) serves as the agent for a group of lenders (collectively with AgStar, the “Prepetition Lenders”). Each of the Prepetition Credit Facilities is secured by liens on substantially all of the respective assets of the US BioEnergy Debtors.<sup>3</sup> As of the Petition Date, the aggregate outstanding debt under the Prepetition Credit Facilities was approximately \$464.9 million.

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<sup>2</sup> The Creditors’ Committee is comprised of the following entities: HSBC Bank USA, National Association; The CIT Group/Equipment Financing, Inc.; Trotter, Incorporated; Haas TCM Processing LLC; and Crown Iron Works. In addition, Aegon USA Investment Management, LLC, Whitebox Advisors, LLC and an ad hoc group of corn vendors serve as ex-officio members of the Creditors’ Committee.

<sup>3</sup> The validity, enforceability, priority and/or extent of these liens are subject to the rights of any party in interest, including the Creditors’ Committee, to challenge such liens.

### **The Existing AgStar DIP Facilities**

7. On November 3, 2008, the Debtors filed a motion for entry of interim and final orders authorizing the US BioEnergy Debtors to enter into six separate debtor in possession financing facilities (collectively, the “Initial Existing AgStar DIP Facilities”) arranged by AgStar to fund the operations and working capital requirements of the US BioEnergy Debtors through January 15, 2009.<sup>4</sup> The Court entered interim and final orders authorizing the Existing AgStar DIP Facilities on November 3, 2008 and December 4, 2008, respectively. The aggregate amount of DIP financing committed under the Existing AgStar DIP Facilities is approximately \$25 million.

### **The Proposed DIP Facilities**

8. On January 12, 2009, the Debtors filed the Motion for entry of interim and final orders authorizing the US BioEnergy Debtors to enter into seven debtor in possession financing facilities (collectively, the “DIP Facilities”) arranged by AgStar and a syndicate of other lenders (collectively with AgStar, the “DIP Lenders”). Upon information and belief, the DIP Lenders consist entirely of Prepetition Lenders. The proceeds of the DIP Facility will be used to, among other things, (i) payoff approximately \$25 million of debt owed under the Existing AgStar DIP Facilities; (ii) roll-up approximately \$55.3 million of prepetition indebtedness held by participating Prepetition Lenders; (iii) make Adequate Protection Payments; (iv) finance the US BioEnergy Debtors’ working capital and general corporate needs in accordance with the DIP

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<sup>4</sup> On December 11, 2008, the Debtors filed a motion for authorization of a debtor in possession financing facility arranged by AgStar to maintain insurance coverage and fund certain limited working capital requirements of VeraSun Janesville, LLC (the “Janesville DIP Facility” and together with the Initial AgStar DIP Facilities, the “Existing AgStar DIP Facilities”). The Court entered an interim and final order authorizing the Janesville DIP Facility on December 15, 2008 and January 8, 2009, respectively.

Budgets; (v) pay certain fees and expenses of AgStar; and (vi) finance the US BioEnergy Debtors' pro rata share of the general, administrative, and overhead expenses of all of the Debtors other than VeraSun Marketing, LLC ("VeraSun Marketing").

### **LIMITED OBJECTION**

#### **I. Approval of the DIP Facilities Should be Conditioned upon Striking Certain Provisions of the DIP Credit Agreement.**

9. As stated above, the Creditors' Committee understands the US BioEnergy Debtors' desire for approval of the proposed DIP Facilities because they satisfy the US BioEnergy Debtors' continued need for access to liquidity. However, despite the satisfaction of this need, the terms of the DIP Facilities that provide for (i) a rigid, aggressive timeline for a sale of the Debtors' assets, (ii) an inappropriate "roll-up" of \$55.3 million of prepetition indebtedness and (iii) the triggering of an event of default if any of the US BioEnergy Debtors' exclusive right to file a plan of reorganization is terminated are entirely inappropriate and should be stricken.

#### **A. The Proposed Timetable for Marketing and Selling the US BioEnergy Debtors' Assets is Unrealistic and Should be Removed from the DIP Credit Agreement.**

10. As a condition to the closing of the DIP Facilities, the US BioEnergy Debtors are required to market and sell their assets on an extremely aggressive timeframe. Specifically, the DIP Facilities require the US BioEnergy Debtors to adhere to the following timeline:

<b>Milestone</b>	<b>Deadline</b>
File Bid Procedures Motion	January 27, 2009
Approval of Bid Procedures	February 5, 2009
Auction	March 16, 2009
Approval of Sale	March 17, 2009
Closing of Sale	March 31, 2009

See DIP Credit Agreement, § 5.01(m). Moreover, the US BioEnergy Debtors' failure to adhere to the specified milestones is an event of default under the DIP Credit Agreement which cannot

be cured and, among other things, terminates the US BioEnergy Debtors' use of cash collateral and immediately accelerates the DIP Facilities. See DIP Credit Agreement, §§ 6.01 and 6.02.

11. This proposed timetable is extremely aggressive and impractical. While completion of any sales process on this tight timeframe would be ambitious, the proposed timeline necessitates that the US BioEnergy Debtors complete their marketing process to prospective buyers – a process during which prospective bidders will be required to, among other things, execute confidentiality agreements, conduct diligence at seven different locations, review hundreds of contracts and determine which contracts to assume and reject, establish an appropriate purchase price, and draft and submit the appropriate documents – in only *four weeks'* time. Then, even if the US BioEnergy Debtors are able to reach this milestone by March 2, the US BioEnergy Debtors would have only *two weeks* to negotiate and document the proposed transaction and qualify prospective bidders in order to conduct an auction prior to the March 16, 2009 deadline. Thus, even the slightest deviation from an already incredibly tight timeframe would create an automatic default under this rigid timetable.

12. While the Creditors' Committee is hopeful that the US BioEnergy Debtors' sale efforts will be successful, the Creditors' Committee believes that the proposed sales process timeline is much too abbreviated to afford the US BioEnergy Debtors and their creditors the opportunity to achieve a successful sale. Accordingly, in order for the US BioEnergy Debtors to conduct a successful sales process, the sales process timeline should be stricken from the

Agreements or, as an alternative, appropriately extended to provide the US BioEnergy Debtors sufficient time to market and sell their assets.<sup>5</sup>

**B. The Roll-up of the Prepetition Lenders' Debt is Inappropriate.**

13. Approximately one-half, or \$55.3 million, of the proposed DIP financing consists of rolled-up prepetition indebtedness held by the Prepetition Lenders under the Prepetition Credit Facilities. Courts have held that roll-ups, such as the one proposed here, are extraordinary remedies that must be assessed with great scrutiny. See, e.g., Saybrook Mfg. Co. Inc., 963 F.2d 1490 (11th Cir. 1992) (holding that a secured creditor's pre-petition debt balance may not be paid off and/or "rolled into" a postpetition line of debtor-in-possession financing, with resultant enhancement of collateral position and administrative priority); In re Barbara K. Enterprises, Inc., No. 08-11474, 2008 WL 2439649, at \*9-10, (Bankr. S.D.N.Y. June 16, 2008); In re Equalnet Commc'ns Corp., 258 B.R. 368 (Bankr. S.D. Tex. 2000); In re Tri-Union Dev. Corp., 253 B.R. 808, 814 (Bankr. S.D. Tex. 2000).

14. Moreover, courts in this and other jurisdictions have refused to approve roll-ups on an interim or emergency basis because roll-ups, by their nature, directly contravene the priority scheme in the Bankruptcy Code. See, e.g., In re Landsource Communities Development LLC, Case No. 08-11111 (KJC) (Bankr. D. Del.); In re Buffet Holdings, Inc., Case No. 08-10141 (Bankr. D. Del.); In re Wellman, Inc., Case No. 08-10595 (SMB) (Bankr. S.D.N.Y.); In re Loews Cineplex Entertainment Corporation, Case No. 01-40346 (ALG) (Bankr. S.D.N.Y.); In re Equalnet Communications Corp., Case No. 00-37350 (WG) (Bankr. S.D. Tex.); see also S.D.N.Y.

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<sup>5</sup> In addition, the proposed two weeks afforded under the DIP Credit Agreement to close any sale is insufficient. During such time, the prevailing purchaser will need to satisfy numerous conditions precedent, including but not limited to, finalizing cure amounts, obtaining regulatory approvals and generally executing documentation necessary to transfer ownership of the US BioEnergy Debtors to a new entity. The two week period

Bankr. General Order No. M-274 at 2 (providing that extraordinary provisions will ordinarily not be approved in interim orders “without substantial cause shown, compelling circumstances and reasonable notice given.”).

15. There is simply no justification for the approval of the roll-up on an interim basis, particularly where the terms of the proposed DIP Facilities were provided on such shortened notice. With less than 48 hours’ notice of any of the terms of the proposed DIP Facilities, the roll-up could not possibly be assessed with “great scrutiny.” To the contrary, the Creditors’ Committee has not even been afforded a meaningful opportunity to analyze the terms of the proposed DIP Facilities, the roll-up proposed therein or the impact of the proposed financing on the US BioEnergy Debtors’ estates and their creditors.<sup>6</sup> Accordingly, the roll-up should be stricken from the DIP Facilities or, at a minimum, consideration of the proposed roll-up should be deferred until the final hearing on the Motion.

**C. Termination of Exclusivity Should Not Constitute an Event of Default.**

16. Under the DIP Credit Agreement, a Change of Control occurs if any of the US BioEnergy Debtors cease to have the exclusive right to file a plan of reorganization. The occurrence of such a Change of Control constitutes an Event of Default and gives the DIP Lenders the ability to, among other things, immediately terminate the DIP Facilities. See DIP Credit Agreement, §§ 6.01(h), 6.02. These provisions are inappropriate and should be stricken as

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allotted under the DIP Credit Agreement for this transition is not sufficient and, therefore, this part of the timetable should likewise be stricken or modified accordingly.

<sup>6</sup> In addition, the duty of the Creditors’ Committee to investigate the validity of the Prepetition Lenders’ prepetition claims and liens will be rendered academic if the roll-up is approved. The Interim DIP Order grants new senior secured postpetition liens to the Prepetition Lenders to secure their claims under the DIP Facilities in addition to their rolled-up prepetition debt, thereby nullifying the Creditors’ Committee’s ability to challenge the Prepetition Lenders’ prepetition claims and liens. In the event this provision is approved in the Final Order, and the Prepetition Lenders’ prepetition liens are ultimately avoided, the Prepetition Lenders should be required to return any recoveries related to such claims to the US BioEnergy Debtors and their estates.

they deprive the Creditors' Committee and other parties in interest of their statutory rights under the Bankruptcy Code to seek to file a plan of reorganization. See In re Ames Department Stores, Inc., 115 B.R. 34, 38 (Bankr. S.D.N.Y.1990) (holding that event of default provisions tied to exclusivity are inappropriate). In the event the Creditors' Committee or (any other party in interest) determines that it is appropriate to seek to propose its own plan of reorganization, the Creditors' Committee should not be placed in the position where it must balance its statutory right to seek to file a plan against the possibility of triggering a default under the DIP Facilities.

17. Moreover, the DIP Lenders will not be prejudiced in any way if the Debtors' exclusivity period is terminated because, pursuant to the Interim DIP Order, any plan of reorganization filed in these cases – whether by the Debtors or any other party in interest – must, among other things, pay the DIP Lenders' postpetition claims in full. Specifically, paragraph 20 of the Interim DIP Order provides that if a plan fails to pay such claims in full, the DIP Lenders' claims and liens will remain in full effect post-confirmation, notwithstanding section 1141 of the Bankruptcy Code. See Interim DIP Order § 20. Thus, the Motion should not be approved unless the termination of exclusivity provision is stricken because it is improper, as well as unnecessary to protect the DIP Lenders' interests.

## **II. Additional Modifications Should be Made to the Proposed DIP Facilities.**

18. In addition to the inappropriate provisions discussed above, the Creditors' Committee is troubled by certain other provisions of the proposed DIP Facilities and, as a condition of approval thereof, requests that the following provisions be clarified or modified, as appropriate:

- DIP Budgets. While the Creditors' Committee continues to review the proposed DIP Budgets, based upon its initial review, the Creditors' Committee is concerned that the budgeted amounts do not provide adequate financing for the US BioEnergy Debtors through April 30, 2009. The Creditors' Committee has a general objection to the approval of the

proposed DIP Facilities based upon budgeted amounts that will not satisfy the financial requirements of the US BioEnergy Debtors in April. Accordingly, approval of the DIP Budgets should be deferred until final hearing on the Motion so that the parties can fully understand whether the DIP Budgets satisfy the US BioEnergy Debtors' needs.

- No Variance to DIP Budgets. As currently drafted, the US BioEnergy Debtors cannot spend in excess of any of the amounts set forth in the DIP Budgets. See DIP Credit Agreement, §§ 5.01(k), 5.02(h). While we understand that the DIP Lenders have agreed to amend the DIP Credit Agreement to provide for a cumulative variance, they have refused to allow any line-item variance. This is inappropriate. Even with a cumulative variance, the Debtors are at significant risk of a default under the DIP Credit Agreement if there is no cushion with respect to line-item expenses. Accordingly, the DIP Budgets should be modified to provide for appropriate line-item variances.

- Liens or Superpriority Claims on Avoidance Actions. The Interim DIP Order provides that the Postpetition Liens, the Adequate Protection Liens, the Adequate Protection Claim and the DIP Lenders' superpriority administrative expenses claims do not extend to avoidance actions other than "causes of action related to transfers of Prepetition Collateral or Postpetition Collateral to any of the Debtors." The foregoing limitation is overly broad and should either be stricken or solely limited to the transfers of ethanol that are the subject of the adversary proceeding commenced by AgStar on December 23, 2008 against VeraSun Marketing and the VeraSun Debtors' pre- and post-petition secured lenders.

- Acceleration of Prepetition Debt. Upon the occurrence of a maturity event, the right to use cash collateral terminates and all Prepetition Indebtedness and Postpetition Obligations become immediately due and payable in cash. See Interim DIP Order § 5(b). This provision is inappropriate. Contrary to the fundamental priority scheme of the Bankruptcy Code, this provision operates to elevate prepetition debt to the level of first-priority, senior secured postpetition debt. Accordingly, this provision should be modified so as not to permit a future "roll-up" of any amounts in addition to those already discussed above.

- DIP Facilities Should Cover Overhead Expenses of VeraSun Marketing. Proceeds of the DIP financing may be used to pay a percentage of the general, administrative and overhead expenses of all of the Debtors other than VeraSun Marketing. See Interim DIP Order § 9. The prohibition on the payment of the VeraSun Marketing SG&A could result in a portion of the Debtors' overall overhead having no funding. To the extent that VeraSun Marketing has significant overhead expenses, this prohibition should be removed so as not to impair the Debtors' overall operations.

- Limitation on Fees and Expenses Paid Pursuant to the DIP Credit Agreement. Section 7.04 of the DIP Credit Agreement requires the payment of all reasonable costs and expenses of advisors for each participant lender in the Postpetition Loan. The payment of fees and expenses to each participant lender's advisors is inappropriate. The payment of fees and expenses pursuant to the DIP Credit Agreement should be limited only to those incurred by AgStar's advisors.

## CONCLUSION

For all of the foregoing reasons, the Creditors' Committee respectfully requests that the Court: (i) deny the relief requested in the Motion unless the Interim DIP Orders and/or the accompanying DIP Credit Agreements, as appropriate, are amended to address the objections set forth herein and (ii) grant such other relief as the Court deems just, proper and equitable.

Dated: January 13, 2009

/s/ Sandra G. M. Selzer  
Donald J. Detweiler (No. 3087)  
Sandra G.M. Selzer (No. 4283)  
**GREENBERG TRAUIG, LLP**  
The Nemours Building  
1007 North Orange Street, Suite 1200  
Wilmington, DE 19801  
(302) 661-7000 (Telephone)  
(302) 661-7360 (Facsimile)  
detweilerd@gtlaw.com  
selzers@gtlaw.com

- and -

Michael S. Stamer (admitted *pro hac vice*)  
David H. Botter (admitted *pro hac vice*)  
**AKIN GUMP STRAUSS HAUER & FELD LLP**  
One Bryant Park  
New York, New York 10036  
(212) 872-1000 (Telephone)  
(212) 872-1002 (Facsimile)

Co-Counsel for the Official Committee of  
Unsecured Creditors of VeraSun Energy Corporation, et  
al.