

MEMORANDUM

February 10, 2009

To: Official Committee of Unsecured Creditors (the "Committee") of VeraSun Energy Corporation, et al. (the "Debtors")

From: Akin Gump Strauss Hauer & Feld LLP ("Akin Gump")

Re: VeraSun Energy Corporation, et al. – Summary of Recently Filed Motion

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**Motion Pursuant to 11 U.S.C. §§ 105(a), 363, 365 and Fed. R. Bankr. P. 2002, 6004, 6006 for (i) Entry of an Order (A) Establishing Bidding and Auction Procedures; (B) Approving Bid Protections for Sale of VSE Assets; (C) Authorizing the Debtors to Enter into Additional Stalking Horse Agreements with Bid Protections in Connection with Sale of Assets; (D) Scheduling an Auction and Sale Hearing for the Sale of the Debtors' Assets; (E) Permitting Credit Bidding Pursuant to Bankruptcy Code Section 363(k); (F) Establishing Certain Notice Procedures for Determining Cure Amounts; and (G) Granting Certain Related Relief; and (ii) Entry of an Order (A) Approving the Sale of Debtors' Assets Free and Clear of all Liens, Claims, Encumbrances and Interests; and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases (the "Motion")**

By the Motion, the Debtors seek entry of an order (A) establishing bidding and auction procedures (the "Bidding Procedures") in connection with the potential sale of substantially all of the Debtors' assets (the "Assets"), free and clear of all claims and any other interests, liens, mortgages, pledges, security interests, rights of first refusal, obligations and encumbrances of any kind whatsoever (collectively, the "Interests"), except to the extent identified in a Successful Bidder's (defined below) asset purchase agreement; (B) approving the proposed bid protections to Valero Energy Corporation ("Valero" or the "VSE Stalking Horse Bidder") in accordance with that certain Asset Purchase Agreement which was filed in connection with the Motion, (the "VSE Asset Purchase Agreement") for the purchase of the VSE Assets;<sup>1</sup> (C) authorizing the Debtors to enter into stalking horse agreements (each, an "Additional Stalking Horse Agreement") containing bid protections with respect to any additional stalking horse bidders (the "Additional Stalking Horse Bidders") for the sale of all or a portion of the Assets; (D) scheduling an auction and setting a date and time for a sale hearing (the "Sale Hearing") for the Sale of the Assets; (E) permitting credit bidding pursuant to Bankruptcy Code section 363(k); and (F) establishing procedures for noticing and determining cure amounts. The Debtors further request that at the

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<sup>1</sup> The "VSE Assets" consist of substantially all of the assets of (i) VeraSun Aurora, LLC, (ii) VeraSun Charles City, LLC (iii) VeraSun Fort Dodge, LLC, (iv) VeraSun Hartley, LLC, (v) VeraSun Welcome, LLC, (vi) VeraSun Reynolds, LLC, and (vii) VeraSun Marketing, LLC.

Sale Hearing, subject to the results of the Auction and the Bidding Procedures, the Bankruptcy Court enter one or more orders (A) approving and authorizing the sale of Assets (the “Sale”), free and clear of all Interests, except to the extent set forth in a Successful Bidder's (defined below) asset purchase agreement; and (B) authorizing the assumption and assignment of certain executory contracts and unexpired leases.

### **Background**

As described in the Motion, the Debtors are currently facing severe liquidity constraints and believe they have exhausted all options for addressing this issue. Specifically, under the terms of the AgStar DIP Facility,<sup>2</sup> the Debtors are required to complete the Sale process with respect to the US BioEnergy Segment<sup>3</sup> by March 31, 2009. Likewise, under the terms of the ASA DIP Facility,<sup>4</sup> the Debtors are required to complete the Sale process with respect to the ASA Segment<sup>5</sup> by April 15, 2009. Additionally, the Debtors contend that they may not have sufficient liquidity to operate much beyond March 31, 2009 with respect to the VSE Segment<sup>6</sup> or the Marion Segment.<sup>7</sup> In addition to their severe liquidity constraints and the requirements under their various post-petition financing arrangements to conduct a sale of all Assets, the Debtors believe that their underlying business faces the distinct possibility of continued financial deterioration. Thus, the Debtors have decided to pursue a Sale of all or a portion of the Assets and maintain that they should be permitted to conduct the process in the manner discussed below.

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<sup>2</sup> The “AgStar DIP Facility” consists of: (i) the six separate postpetition debtor-in-possession credit facilities that provided \$24.5 million in incremental financing to each Debtor in the US BioEnergy Segment (as defined below) other than VeraSun Janesville, LLC (the “Initial AgStar DIP Facility”); (ii) the \$500,000 postpetition debtor-in-possession facility for VeraSun Janesville, LLC provided by AgStar (the “Janesville Facility”); (iii) the interim postpetition debtor-in-possession facility with AgStar (the “AgStar DIP Facility”) of up to \$81.7 million in the aggregate; and (iv) the additional \$28.9 million approved pursuant to a final order scheduled to be entered on a final basis on or about February 10, 2009.

<sup>3</sup> The “US BioEnergy Segment” consists of substantially all of the assets of: US BioEnergy Corporation; VeraSun Albert City, LLC; VeraSun Central City, LLC; VeraSun Dyersville, LLC; VeraSun Hankinson, LLC; VeraSun Janesville, LLC; VeraSun Ord, LLC; and VeraSun Woodbury, LLC.

<sup>4</sup> The “ASA DIP Facility” is the \$20 million postpetition debtor-in-possession facility provided by certain of the lenders under the ASA Senior Credit Facility authorized by the court on a final basis on February 5, 2009.

<sup>5</sup> The “ASA Segment” consists of substantially all of the assets of: ASA Albion, LLC; ASA Bloomingburg, LLC; ASA Linden, LLC; and ASA OpCo Holdings.

<sup>6</sup> The “VSE Segment” consists of VeraSun Aurora Corporation, LLC; VeraSun Charles City, LLC; VeraSun Fort Dodge, LLC; VeraSun Hartley, LLC; VeraSun Reynolds, LLC; VeraSun Welcome, LLC; VeraSun Marketing, LLC. The assets of VeraSun BioDiesel, LLC, VeraSun Litchfield, LLC, VeraSun Granite City, LLC, VeraSun Tilton, LLC, which consist exclusively of undeveloped property (the “Development Sites”), are not part of this Auction process and will be sold separately

<sup>7</sup> The “Marion Segment” consists of substantially all of the assets of US Bio Marion, LLC.

### **The Debtor's Marketing and Sales Efforts**

The Debtors represent that, with the assistance of their advisors, they have been actively marketing substantially all of their assets for the last five months. On September 18, 2008, the Debtors retained Morgan Stanley & Co. Incorporated ("Morgan Stanley") to act in an advisory capacity to evaluate strategic alternatives, including the sale of the Assets. According to the Motion, the Debtors and Morgan Stanley contacted approximately 57 potential financial and strategic counterparties. The Debtors assert that 13 parties who were contacted pre-petition were willing to become restricted, 9 executed confidentiality agreements, and 7 have been granted access to comprehensive due diligence materials, including an electronic data site.

In July of 2008, the Debtors engaged Rothschild, Inc. ("Rothschild") to help further evaluate their strategic alternatives. The Debtors contend that since the petition date, approximately 64 parties (the "Interested Parties") have either contacted or been contacted by the Debtors and expressed interest in purchasing some or all of the Debtors' Assets. To date, of the Interested Parties, 15 have executed confidentiality agreements, and 13 have been granted access to comprehensive due diligence materials, including the data site. The Debtors maintain that they have had, and continue to have, discussions with several of these Interested Parties regarding their interest in purchasing certain of the Debtors' Assets, and have received letters of interest (each an "LOI") from six different Interested Parties.

In late November 2008, the Debtors received an unsolicited non-binding LOI from Valero. Valero later submitted a revised LOI in January 2009. The Debtors represent that since receiving the first LOI, Rothschild and the Debtors have been in active negotiations with Valero regarding the terms and conditions of the VSE Asset Purchase Agreement and have facilitated various diligence requests with Valero's representatives and advisors.

### **The Valero Asset Purchase Agreement**

The material terms of the Asset Purchase Agreement (the "APA") are as follows:

Purchase Price: Cash consideration. Cash in the amount of \$280 million, plus value of inventory and certain pre-paid expenses (for natural gas, utilities and rail), minus adjustments for allocation of certain taxes and other items.

Payment of certain Administrative Expenses. Amounts required to pay cure costs (to the extent Buyer is not responsible therefor), transaction-related professional fees and certain other allowed administrative expense claims would be paid (subject to specified caps) directly from the cash consideration at the closing of the asset sale and, after the closing, from an additional portion of the cash consideration to be held in escrow for such purpose.

Deposit: Buyer will be required to make a deposit of \$10 million, which would be applied toward the purchase price at closing.

Acquired Assets: The Aurora, Charles City, Fort Dodge, Hartley, Reynolds and Welcome production facilities and related equipment and inventory (including inventory held by VeraSun Marketing), as well as substantially all of the other assets associated exclusively with those facilities; intellectual property including the VE85 trademarks and patents relating to corn oil extraction; and specified other assets as set forth in the APA, including the Company's former headquarters building in Brookings.

### **The Bidding Procedures**

Any person that wishes to participate in the Bidding Process (a "Potential Bidder") must become a "Qualified Bidder." To become a Qualified Bidder, a Potential Bidder must deliver to the Debtors, not later than March 2, 2009:

- i. An executed confidentiality agreement in form and substance acceptable to the Debtors;
- ii. A letter of indication stating on which of the Assets the Potential Bidder is interested in bidding and the estimated purchase price and consideration for such Assets; and
- iii. Sufficient information to allow the Debtors to determine that the bidder has the financial wherewithal to close a sale of the Assets on which the bidder intends to bid.

A "Qualified Bidder" is a Potential Bidder that delivers the documents described in (i) – (iii) above, and that the Debtors determine is reasonably likely to submit a bona fide offer and be able to consummate a sale if selected as the Successful Bidder (defined below). The VSE Stalking Horse Bidder, the Debtors' prepetition secured lenders (the "Prepetition Secured Lenders") and the lenders under the Debtors' existing debtor-in-possession financing facilities (the "DIP Lenders" and together with the Prepetition Secured Lenders, collectively, the "Secured Lenders") will be deemed Qualified Bidders.

Designation of Additional Stalking Horse Bidders: The Debtors will have until March 2, 2009 (the "Additional Stalking Horse Date") to designate a Qualified Bid (defined below) to be an Additional Stalking Horse Bid (defined below) and provide such Additional Stalking Horse Bidder bid protections not to exceed the bid protections approved pursuant to the Bid Procedures Order.

Bid Deadline: 5:00 p.m. (prevailing eastern time) on March 13, 2009.

Bid Requirements: The following summarizes the principal information and documents which must accompany all bids, other than the VSE Stalking Horse Bid, (the "Required Bid Materials"):

i. For bids that cover the VSE Assets, a purchase price equal to or greater than \$291 million (representing the \$280 million cash consideration, a \$10 million Break-Up Fee (as defined below) and up to \$1 million of Expense Reimbursements (as defined below)) plus the fair market value at closing of Inventory (as defined in the VSE Asset Purchase Agreement);

ii. In the event that the Debtors enter into an Additional Stalking Horse Agreement for certain of the Assets, the purchase price submitted by any Qualified Bidder for such Assets must be equal to or greater than the sum of (a) the purchase price set forth in any Additional Stalking Horse Agreement, (b) any break up fee ("Break-Up Fee"), (c) any reimbursement for reasonable expenses incurred in connection with such Additional Stalking Horse Bidder's attempted purchase of all or a portion of the Assets (the "Expense Reimbursement"), and (d) the Overbid Amount<sup>8</sup>, as applicable;

iii. In the event that no Additional Stalking Horse Bidder is designated for all or a portion of the Assets, the purchase price proposed by the Qualified Bidder for the Assets for which they are submitting a bid;

iv. A letter stating that the bidder's offer is irrevocable until two business days after the Assets on which the Qualified Bidder is submitting a bid have been sold pursuant to the closing of the sale or sales approved by the Bankruptcy Court;

vi. A deposit in the amount of 5% of the proposed purchase price, unless otherwise specified in the VSE Asset Purchase Agreement or any Additional Stalking Horse Agreement, as applicable; provided that with respect to bids that cover the VSE Assets, \$11,000,000 out of such deposit (such portion, "VSE Bid Deposit") will be placed in a segregated account (the "BUFER Account"). Funds will be disbursed from the BUFER Account only as follows: (i) if the Qualified Bidder becomes the Successful Bidder for the VSE Assets, its VSE Bid Deposit will be used to satisfy any Break-Up Fee and/or Expense Reimbursement to which the VSE Stalking Horse Bidder is entitled by reason of its not being the Successful Bidder for the VSE Assets, with the balance, if any, to be released to the Debtors or applied as provided under any asset purchase agreement between the Debtors and such Successful Bidder;

vii. Written evidence of a commitment for financing or other evidence of proposed purchaser's ability to consummate the proposed transaction; and

viii. A list of the Debtors' executory contracts and unexpired leases with respect to which the bidder seeks assignment from the Debtors.

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<sup>8</sup> The "Overbid Amount" will mean the amount by which any initial Qualified Bid will exceed the purchase price submitted by an Additional Stalking Horse Bidder, as applicable, as stated in any Additional Stalking Horse Agreement.

A bid received from a Qualified Bidder that includes all of the Required Bid Materials is a “Qualified Bid.” No bid for the VSE Assets will constitute a Qualified Bid unless it provides for the payment of a least \$291,000,000 for the VSE Assets, plus the market value of the Inventory and must otherwise meet the requirements of these Bidding Procedures.

The Auction and Auction Procedures: If a Qualified Bid, other than that submitted by the VSE Stalking Horse Bidder or any Additional Stalking Horse Bidder, has been received by the Debtors, the Debtors may conduct an auction (the “Auction”). The Auction will be conducted in Wilmington, Delaware at 11:00 a.m. (et) on March 16, 2009.

If Qualified Bidders submit Qualified Bids, the Debtors will (i) review each Qualified Bid on the basis of the financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Sale and (ii) identify the highest or otherwise best offers for the Assets (to the extent any such bid is acceptable to Debtors, in consultation with the Committee and the Secured Lenders, each a “Successful Bid” and each bidder making such bid, a “Successful Bidder”). At the Sale Hearing, the Debtors, after consultation with the Committee and the Secured Lenders, may present any Successful Bids to the Bankruptcy Court for approval.

#### **Valero Stalking Horse Agreement and Bid Protections**

In order to provide an incentive and to compensate the VSE Stalking Horse Bidder for entering into the VSE Asset Purchase Agreement, the Debtors have agreed to (i) a Break-Up Fee in the amount of \$10 million and (ii) to reimburse Valero for up to a maximum of \$1,000,000 for all reasonable expenses incurred in connection with the VSE Stalking Horse Bidder's attempted purchase of the VSE Assets.

#### **Designation of Additional Stalking Horse Bidders and Bid Protections**

By the Motion, the Debtors have also requested that the Bankruptcy Court authorize the Debtors to offer, in consultation with the Committee, potential bidders a Break-Up Fee and Expense Reimbursement of up to 3% of the cash purchase price payable on such terms and conditions as set forth in any Additional Stalking Horse Agreement that the Debtors enter into on or prior to the Additional Stalking Horse Date. The Debtors state that any Break-Up Fee and Expense Reimbursement will only be paid if the Additional Stalking Horse Bidder is not the Successful Bidder at the Auction or as may otherwise be set forth in the Additional Stalking Horse Agreement. In no event will the Debtors provide any Break-Up Fee and Expense Reimbursement to potential bidders if their Additional Stalking Horse Agreement contains a “due diligence” or financing contingency. In addition, the Debtors will not be permitted to offer two Break-Up Fees and Expense Reimbursements with respect to any proposals covering the same Assets.

### **Credit Bidding**

In connection with the Sale of all or any of the Assets, the Debtors' Secured Lenders may seek to credit bid some or all of their claims for their respective collateral (a "Credit Bid").

### **Cure Notice Procedures**

The Debtors have proposed certain procedures (the "Cure Procedures") for notifying counterparties to executory contracts and unexpired leases of potential cure amounts in the event the Debtors decide to assume such contracts or leases. The material terms of the Cure Procedures are as follows:

1. Within five (5) business days after entry of an order approving the Bidding Procedures, the Debtors will file a notice of cure amount (the "Cure Notice"), with the Court and serve the Cure Notice on each non-debtor party to those executory contracts and unexpired leases that the Debtors' determine, in the exercise of their business judgment, are necessary to maximize value of any proposed transaction.
2. The Cure Notice will state the cure amounts that the Debtors believe are necessary to assume such executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code (the "Cure Amount") and set the deadline to object to any Cure Amount ten (10) days after service of the Cure Notice.