

MEMORANDUM

January 7, 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.

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**Amended Final Order Authorizing Use of Cash Collateral of, and Providing Adequate Protection to, UBS AG, Stamford Branch Under 11 U.S.C. §§ 105, 361 and 363 (the "Amended Cash Collateral Order")**

**Stipulation and Order Setting Forth Briefing Schedules For Motions to Dismiss the Complaint (the "Briefing Schedule")**

I. The Amended Cash Collateral Order

On December 23, 2008, AgStar Financial Services, PCA ("AgStar") filed a complaint (the "Complaint") against (i) VeraSun Marketing, LLC ("Marketing"), (ii) UBS AG, Stamford Branch (agent for the prepetition secured lenders) ("UBS"), (iii) Wells Fargo, N.A. (indenture trustee for the prepetition secured noteholders) ("Wells Fargo"), and (iv) Wilmington Trust Company (agent for the VSE DIP lenders) ("Wilmington Trust" and together with Marketing, UBS and Wells Fargo, the "Defendants"). As previously reported to the Committee, the filing of the Complaint constitutes an Event of Default under the UBS cash collateral order entered by the Bankruptcy Court on December 4, 2008 (the "UBS Cash Collateral Order").

Also as previously reported, on December 29, 2008, and in response to the Complaint, UBS sent a remedies notice (the "Remedies Notice") to the Debtors. As a result of the Remedies Notice, the Debtors' authority to use the UBS cash collateral will terminate on January 9, 2009.

On January 6, 2009, Debtors' counsel circulated a draft of the Amended Cash Collateral Order. We have been advised that the Debtors currently intend to submit a proposed form of the Amended Cash Collateral Order at the hearing scheduled on January 8, 2009.<sup>1</sup> By the Amended Cash Collateral Order, the Debtors hope to resolve the Remedies Notice and the accompanying

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<sup>1</sup> We are also advised that the form of Amended Cash Collateral Order that the Debtors intend to submit at the hearing will be substantially the same as the draft circulated on January 6, 2009.

termination of the Debtors' use of the UBS cash collateral. The key terms of Amended Cash Collateral Order are as follows:

- counsel for the Debtors and counsel for AgStar will state on the record at the hearing on January 8, 2009 that \$17,517,000 is the maximum amount of all post-petition claims relating to the sale of ethanol to Marketing that are held or that could be held by the US BioEnergy Debtors or AgStar;
- UBS will waive the existing Events of Default under the UBS Cash Collateral order, subject to (i) the entry of the Amended Cash Collateral Order and (ii) finalized arrangements for a collateral audit by UBS and a site visit by designees of UBS on terms and conditions consistent with the UBS prepetition credit documents and/or as otherwise acceptable to UBS and the Debtors; and
- The Debtors will continue to provide daily Borrowing Base reports (calculated in accordance with the UBS prepetition credit documents), and the sum of the Borrowing Base plus cash held in the Debtors' pledged deposit accounts at First National Bank of Omaha must at all times exceed the aggregate amount owed under the UBS prepetition credit documents by approximately \$20 million, failing which UBS will be entitled to send a remedies notice. As is the case in the existing Final Order, after the receipt of such a remedies notice, the Debtors will be entitled to use UBS' cash collateral in accordance with the Budget for three business days after which point the Debtors' right to use UBS' cash collateral shall terminate, unless the Bankruptcy Court decides within such time that an Event of Default has not occurred or does not exist.

## II. The Briefing Schedule

In addition, on January 6, 2009, Debtors' counsel circulated a draft of the Briefing Schedule. We have been advised that the Debtors currently intend to submit a proposed form of the Briefing Schedule at the hearing scheduled on January 8, 2009.<sup>2</sup> The key terms of the Briefing Schedule are as follows:

- Each Defendant's motion to dismiss the Complaint, and all supporting papers, if any, shall be served and filed on or before February 3, 2009;
- AgStar's papers in response to the Defendants' motions to dismiss the Complaint shall be served and filed on or before February 17, 2009;
- Each Defendant's papers in reply on its motion to dismiss the Complaint shall be served and filed on or before March 3, 2009;

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<sup>2</sup> We are also advised that the form of the Briefing Schedule that the Debtors intend to submit at the hearing will be substantially the same as the draft circulated on January 6, 2009.

- The foregoing schedule may be revised in whole or in part by consent of all the parties without further Order of the Bankruptcy Court; and
- There shall be no formal discovery in the adversary proceeding until the Bankruptcy Court rules on the Defendants' motions to dismiss.