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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

AUG 28 2009

In re:

VERASUN ENERGY CORPORATION, *et al.*,¹

Debtors.

) Chapter 11 Cases
) *Jointly Administered*
)
) Case No. 08-12606 (BLS)

PUBLIC SERVICE COMMISSION

Re: Docket No.

OBJECTION OF LIBERTY MUTUAL INSURANCE COMPANY TO MOTION FOR
RELIEF FROM STAY FILED BY NORTH DAKOTA PUBLIC SERVICE
COMMISSION

COMES NOW, Liberty Mutual Insurance Company ("Liberty"), by and through its undersigned counsel, and hereby submits this Objection to the Motion for Relief from Stay Filed by the North Dakota Public Service Commission (the "Commission"). As grounds for this Objection, Liberty states the following:

Summary of Objection

By its Motion, the Commission asks this Court to grant it relief from the automatic stay imposed by 11 U.S.C. § 362 so that the Commission may commence an insolvency proceeding under North Dakota law pursuant to which the Commission is appointed as trustee of a trust comprised of, among other items, grain and other assets of Verasun Hankinson, LLC (the "Hankinson Debtor"), which, under the state insolvency proceeding, may be liquidated and

¹ The Debtors consist of: VeraSun Energy Corporation (EIN: 20-3430241); ASA OpCo Holdings, LLC (EIN: 68-0609122); US BioEnergy Corporation (EIN: 20-1811472); VeraSun Albert City, LLC (EIN: 20-2264707); VeraSun Albion, LLC (EIN: 55-0907221); VeraSun Aurora Corporation (EIN: 46-0462174); VeraSun BioDiesel, LLC (EIN: 55-0816855); VeraSun Charles City, LLC (EIN: 20-3735184); VeraSun Dyersville, LLC (26-3594945); VeraSun Fort Dodge, LLC (EIN: 42-1630527); VeraSun Granite City, LLC (EIN: 20-5381200); VeraSun Janesville, LLC (EIN: 20-4420290); VeraSun Linden, LLC (EIN: 55-0907228); VeraSun Litchfield, LLC (EIN: 20-8621370); VeraSun Marion, LLC (EIN 20-3477343); VeraSun Marketing, LLC (EIN: 20-3693800); VeraSun Ord, LLC (EIN: 75-3204878); VeraSun Reynolds, LLC (EIN: 20-5914827); VeraSun Tilton, LLC (EIN: 26-1539139); VeraSun Welcome, LLC (EIN: 20-4115888); VeraSun Woodbury, LLC (EIN: 20-0647425).

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distributed to certain farmers who allege they have not been paid for grain they delivered to a public warehouse facility operated by the Hankinson Debtor. Upon information and belief, these farmers (hereinafter the "Grain Growers") presented the Commission with claims (the "Grain Grower Claims") based, either in whole or in part, upon certain receipts, settlement/assembly sheets and other documents (the "Grain Documents"). These Grain Documents purport to evidence either (i) the Grain Growers' respective ownership interests in and to grain delivered by the Grain Growers to the facility, (ii) the Grain Growers' respective first priority lien rights in and to grain delivered by the Grain Growers, or (iii) claims against the Hankinson Debtor for non-payment under credit sale contracts.

Liberty issued Grain Elevator Warehouse Bond No. 674012345 (the "Warehouse Bond") naming "Hankinson Debtor" as principal and the Commission as obligee. Liberty issued the Warehouse Bond in support of the Hankinson Debtor's license to operate a public grain elevator warehouse in the State of North Dakota.

Earlier in these cases, the Hankinson Debtor, along with certain other of the Debtors (the "Selling Hankinson Debtors") filed a Motion seeking approval of the Selling Hankinson Debtors' sale of certain assets, including assets that may have been subject to the Grain Documents, to a qualified bidder under the terms of a certain Asset Purchase Agreement referenced in said Motion (Docket Entry No. 622). Because Liberty issued certain surety bonds associated with the assets to be transferred, Liberty filed an objection to the Hankinson Asset Sale (and other sales) stating that its bonds were not transferable and seeking that the Hankinson Debtor segregate the proceeds of any sales to fund obligations underlying these surety bonds (the "Surety Bonds"). The Warehouse Bond at issue in this Motion is one of the Surety Bonds.

This Court entered an Order (Docket No. 1004) on April 6, 2009 approving the sale of

the Hankinson Debtor's Assets to RBF Acquisition IV, LLC by virtue of a credit bid submitted by AgStar Financial Services, PCA, as Agent to the Pre-Petition Secured Parties (all of the foregoing collectively, the "Buyer," transaction the "Hankinson Asset Sale," and the Order the "Hankinson Sale Order"). Under the Hankinson Sale Order, this Court determined that the Surety Bonds were not transferable, and that, notwithstanding the terms of Hankinson Asset Sale or the Hankinson Sale Order, nothing therein would be deemed to alter, modify or limit the rights of the Debtors or Liberty under applicable bankruptcy or non-bankruptcy law as it pertains to the Surety Bonds or the obligations relating thereto.

Liberty objects to the Commission's Motion on the basis that the insolvency and liquidation proceeding contemplated by the Motion conflicts with the liquidation process the Debtors proposed under Federal bankruptcy law, and is therefore preempted (procedurally) by Federal law. Although Federal bankruptcy law preempts the state insolvency proceeding, this Court must look to State law to determine the substantive rights of the Grain Growers under the Grain Documents, as well as the related rights and obligations of the Hankinson Debtor, the Commission, Liberty, and the Buyer secured lender, in and to the grain referenced in the Grain Documents. These rights have been reserved under the terms of the Hankinson Sale Order. Finally, the preemption of the state insolvency proceeding by this case will not bar a later insolvency proceeding under State law at least to the extent that Commission seeks to pursue claims on behalf of the Grain Growers whose rights are not fully adjudicated or otherwise funded during the pendency of the Hankinson Debtor's case.

Accordingly, (i) because Federal bankruptcy law preempts (procedurally) the state insolvency proceeding contemplated by the Commission's Motion, (ii) because this Court can give effect to the substantive rights of Liberty, the Hankinson Debtor, the Commission, and

others under North Dakota law, as reserved by the Hankinson Sale Order, and (iii) because the interests of judicial economy would not be served by allowing a parallel proceeding to move forward in North Dakota state court, the Commission's Motion should be denied.

I. BACKGROUND

1. On October 31, 2008 (the "Petition Date"), VeraSun Energy Corporation ("VeraSun") and certain of its affiliates and subsidiaries (VeraSun and the foregoing affiliates and subsidiaries collectively, "Debtors") each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2. Prior to the Petition Date, Liberty issued Grain Elevator Warehouse Bond No. 674012345 (the "Warehouse Bond") naming VeraSun Hankinson, LLC (the "Hankinson Debtor") and the Commission as obligee. Liberty issued the Warehouse Bond in support of the Hankinson Debtor's license to operate a public grain elevator warehouse in the State of North Dakota. The Hankinson Debtor operated the subject public warehouse for the purpose of receiving grain for buying, selling, storing or shipping for compensation under applicable North Dakota law.

3. Prior to the Petition Date, certain Grain Growers delivered grain to the Hankinson Debtors' public grain elevator and, in exchange received certain Grain Documents from the Hankinson Debtor. Thereafter, the Hankinson Debtor issued checks to some or all of the Grain Growers as payment for the grain delivered.

4. After the Petition Date, one or more of the Grain Growers negotiated the checks delivered to them by the Debtors for payment. Pursuant to this Court's Order Approving Cash Management entered earlier in the case (the "Cash Management Order"), the Debtors stopped payment on the Grain Grower checks. Thereafter, the Grain Growers notified the Commission

of potential claims against the Hankinson Debtor and its surety for alleged non-payment for grain delivered to the Hankinson Debtor's grain elevator.

II. THE COMMISSION MOTION AND THE STATE INSOLVENCY PROCEEDING

5. The Commission filed the instant Motion seeking relief from stay to commence an action against Liberty under the Bond, and additionally, to pursue an action in North Dakota District Court to secure the Commission's appointment as Trustee under Chapter 60-04 of the North Dakota Century Code. That chapter provides, in pertinent part, that upon entry of an order approving the Commission's appointment as trustee thereunder, a trust fund shall be established and be comprised of the following:

1. grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.
2. the proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency until the commission is appointed ...
3. The proceeds of insurance policies upon grain destroyed in the elevator.
4. The claims for relief, and proceeds therefrom, for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of a warehouseman.
5. The claim for relief, and the proceeds therefrom, for the conversion of any grain stored in the warehouse.
6. Unencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated the insolvency.
7. Unencumbered equity in grain hedging accounts.
8. Unencumbered grain product assets.

N.D. Cent. Code § 60-04-03.1.

6. Additionally, upon its appointment as trustee, the Commission is empowered to

seek possession of the grain to be included in the trust fund. N.D. Cent. Code § 60-04-03.2. The Commission may also take possession of “relevant books and records of the warehouseman.” N.D. Cent. Code § 60-04-04. The Commission must also publish a notice of its appointment as trustee requiring holders of outstanding receipt holders to file claims with the Commission. N.D. Cent. Code § 60-04-04.

7. N.D. Cent. Code 60-02-25 provides that “[w]henver any grain shall be delivered to any public warehouse and an unconverted scale ticket or a warehouse receipt is issued therefore, such delivery shall be a bailment of the grain and not a sale of the grain so delivered.” Additionally, N.D. Cent. Code 60-02-25.1 provides that “[g]rain contained in a warehouse, including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receipt holders storing, selling, or depositing grain in the warehouse” and “[this] lien . . . shall be preferred to any lien or security interest in favor of any creditor of the warehouseman regardless of the time when the creditor’s lien or security interest attached to the grain.”

8. Liberty, as surety, must be joined as a party to the insolvency proceeding by motion “when the commission believes that proceeds from the warehouseman’s bond *may* be needed to redeem the *outstanding receipts* issued by the warehouseman.” (emphasis added). N.D. Cent. Code § 60-04-03.3.

9. This Court entered the Hankinson Sale Order approving the sale of certain of the Hankinson assets to Buyer, which may be subject to the claims of the Grain Growers under the Grain Documents. The Hankinson Sale Order reserves Liberty’s and the Debtors’ rights with respect to the transfer of those assets to the extent related to Liberty’s bonds or the obligations relating thereto. The Commission is pursuing a state insolvency proceeding involving certain of the grain assets subject to the Hankinson Asset Sale, and further asserts that the alleged failure or

the Hankinson Debtor to pay for said grain assets may support a claim under Liberty's Warehouse Bond.

III. PREEMPTIVE EFFECT OF FEDERAL BANKRUPTCY LAW ON STATE INSOLVENCY PROCEEDING

8. "Once a bankruptcy case is filed the bankruptcy court acquires exclusive jurisdiction over the estate created and this jurisdiction preempts state insolvency proceedings." *See In re Woods Farmers Cooperative Elevator Co.*, 107 B.R. 678, 683 (Bankr. N.D. 1989) (citing *State of Mo. v. U.S. Bkrcty. Court, Etc.*, 647 F.2d 768, 776 (8th Cir.1981)). Additionally, "[t]he trust fund envisioned by N.D.Cent.Code § 60-04-03.1 would be inclusive of property coming into the bankruptcy estate and thus can have no effect in a bankruptcy context since its operation would be directly opposed to section 541." *Id.* Additionally, "[a]lthough the Bankruptcy Court has exclusive jurisdiction over the estate and the Code provides the exclusive procedure for assuming control over property belonging to the Debtor, the court must still resort to state law to determine the ownership rights of holders of documents of title and the priorities in fungible goods where, as here, there is insufficient grain of a particular type and grade to satisfy all receipt holders." *Id.* (citing *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *State of Mo.*, 647 F.2d at 774; *In re Schauer*, 835 F.2d 1222 (8th Cir.1987); *Nelson v. Cavalier Rural Elec. Co-op.*, 68 B.R. 910 (Bankr.N.D.1987); and *In re Bearhouse, Inc.*, 84 B.R. 552, 566 (Bankr.W.D.Ark.1988)).

9. By its Motion, the Commission seeks stay relief to allow it to commence an insolvency proceeding under N.D. Cent. Code § 60-04 in which the Commission is empowered to take possession of certain of the Hankinson Debtor's assets and include them in a trust fund to be administered for the benefit of certain persons identified by statute. The Commission also seeks to include in the trust fund the proceeds of the Warehouse Bond issued by Liberty.

10. As outlined above, the Grain Growers have in their possession certain Grain Documents which may give them ownership in and to grain and proceeds of grain that are or were assets of the Hankinson Debtor as of the Petition Date. As such, any attempts to transfer related grain assets may be ineffective under state law notwithstanding any order in this Case to the contrary. Further, the Grain Documents may support or establish lien rights in favor of the Grain Growers which may still exist or otherwise attach to grain or proceeds of grain in possession of the Debtors.

10. As outlined in *In re Wood Farmers*, this Court's jurisdiction preempts (procedurally) the state insolvency proceeding contemplated by North Dakota law. This Court must, however, determine the rights of the Grain Growers, the Hankinson Debtor, the Commission, Liberty, and the Hankinson Debtor's Secured Lender in and to the grain and proceeds of grain under North Dakota law. Once the Court determines the relative rights and interests of these constituencies under North Dakota law (which rights were reserved by a finding by this Court in the Hankinson Sale Order, those rights and interests can be adjudicated in the context of a claims and distribution process that should proceed before the contemplated state insolvency proceeding moves forward. Once the proceeding in this Court concludes, and provided that the rights and interests of the Grain Growers has not been fully adjudicated, the Commission will have an opportunity to pursue such remedies as may be available under North Dakota law.

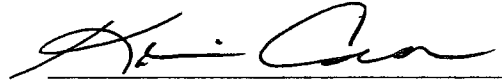
IV. CONCLUSION

For these reasons, the Commission has failed to demonstrate sufficient cause to modify or lift the stay for it to pursue the contemplated insolvency proceeding under North Dakota law, and its Motion should therefore be denied.

Dated: August 27, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2009, a copy of the foregoing *Objection of Liberty Mutual Insurance Company to Motion for Relief from Stay Filed by North Dakota Public Service Commission* was caused to be served upon the following parties, in the way so indicated:

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A handwritten signature in black ink, appearing to read "Kevin G. Collins", written over a horizontal line.

Kevin G. Collins (#5149)

File an answer to a motion:

08-12606-BLS VeraSun Energy Corporation

Type: bk Chapter: 11 v
Assets: y Judge: BLSOffice: 1 (Delaware)
Case Flag: LEAD, CLMSAGNT,
MEGA, NTCDSM**U.S. Bankruptcy Court
District of Delaware**

Notice of Electronic Filing

The following transaction was received from Kevin G. Collins entered on 8/27/2009 at 5:46 PM EDT and filed on 8/27/2009

Case Name: VeraSun Energy Corporation
Case Number: 08-12606-BLS
Document Number: 1750**Docket Text:**Objection of *Liberty Mutual Insurance Company* to Motion for Relief from Stay Filed by North Dakota Public Service Commission (related document(s)[924], [975]) Filed by Liberty Mutual Insurance Company (Attachments: # (1) Certificate of Service) (Collins, Kevin)

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**C:\fakepath\Objection.pdf**Electronic document Stamp:**[STAMP bkecfStamp_ID=983460418 [Date=8/27/2009] [FileNumber=7590451-0]
[94b7299bfe86f72bec2899433fcc189766b846bb5bfa1e5a83db7c6b235168e5afd1
47c35ebfada55693e32eb4b4cf65cd169b771c3a85633f0732290233b38]]**Document description:**Certificate of Service**Original filename:**C:\fakepath\COS.pdf**Electronic document Stamp:**[STAMP bkecfStamp_ID=983460418 [Date=8/27/2009] [FileNumber=7590451-1]
[4d23666555a441cde950a8d03cd61042afbf17567ee7dda59ebae471859390f73f1e
a57660e5e135a1b0c66d80c686618c88e9cab1261473fa3561c74aada221]]**08-12606-BLS Notice will be electronically mailed to:**Mary E. Augustine on behalf of Attorney Anderson, Bottrell, Sanden & Thompson
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