IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
VERASUN ENERGY CORPORATION, et al.,	)	Case No. 08-12606 (BLS)
	)	Jointly Administered
	)	
Debtors.	)	**Re: Docket No. 1642**

OBJECTION OF LIBERTY MUTUAL INSURANCE COMPANY TO THE JOINT PLAN OF LIQUIDATION OF VERASUN ENERGY CORPORATION AND ITS AFFILIATED DEBTORS

COMES Liberty Mutual Insurance Company ("Liberty"), by its undersigned counsel, and hereby submits this Objection to the Joint Plan of Liquidation (the "Plan") of VeraSun Energy and its Affiliated Debtors[1] (collectively, the "Debtors"). In support thereof, Liberty states the following:

I. SUMMARY OF OBJECTIONS

The Debtors seek approval of a Plan that fails (i) to classify claims of holders of lien and/or property interests that prime the rights of the Debtors' secured lenders and other constituents that acquired property under Sale Orders previously entered by the Court in these cases, and (ii) to otherwise provide a mechanism for recovery of collateral or equivalents to pay in full payables owing by the Debtors to holders of these lien and/or property interests. The holders of these lien and/or property interests are certain farmers (the "Growers") that delivered corn and other grain commodities (the "Grain") to one or more of the Debtors but have not

[1] The Additional Sellers under the form of Asset Purchase Agreement for which Debtors' seek approval are VeraSun Aurora Corporation, VeraSun Charles City, LLC, VerasSun Fort Dodge, LLC, VeraSun Hartley, LLC, VeraSun Marketing, LLC, VeraSun Welcome, LLC, and VeraSun Reynolds, LLC. Reference to Additional Sellers in this Comment and Limited Objection will be to each of the Additional Sellers unless the context designates otherwise.

received payment or the return of the Grain by the Debtors. The Debtors disclosed to Liberty approximately $500,000 in accounts payable to holders of these lien and/or property interests in North Dakota, South Dakota and Nebraska in connection with Liberty's withdrawal of its Disclosure Statement Objection. Liberty issued certain surety bonds in connection with Debtors' operations in these states, and while Liberty's actual obligation, if any, in respect of these payables is unknown, to the extent Liberty has any obligation under its bonds in respect of these payables, it may, by subrogation, pursue the Growers' respective rights as holders of liens and/or property interests in these cases. These lien and/or property interests, at least in the context of the Grain and Grain Proceeds to be administered under the Plan, have been reserved in this Court's Orders summarized in the chart below:

Transaction	**Acquiror**	**Sale Order Docket No.**	**Paragraph**
VSE Assets (includes VeraSun Aurora)	Valero Renewable Fuels Company	949	¶ 25
VeraSun Ord, LLC	RBF Acquisition VI for AgStar Financial Services, PCA	1002	¶ 24
VeraSun Hankinson, LLC	RBF Acquisition IV for AgStar Financial Services, PCA	1004	¶ 25
VeraSun Central City, LLC	RBF Acquisition II for AgStar Financial Services, PCA	1006	¶ 24

The reserved lien and/or property interests (the "Reserved Grower Interests") at issue in this Objection relate to payables associated with VeraSun Hankinson, LLC (North Dakota) (the "Hankinson Debtor"), VeraSun Energy d/b/a VeraSun Aurora (South Dakota) (the "VeraSun Aurora Debtor"), VeraSun Central City, LLC (Nebraska) (the "VeraSun Central City Debtor"), and VeraSun Ord, LLC (Nebraska) (the "VeraSun Ord Debtor") (the payables hereinafter the "Grower Payables"). In general, certain statutes in North Dakota, South Dakota and Nebraska provide that Growers who deliver Grain to the Debtors retain their ownership interests in the

Grain or otherwise hold first-priority liens in the Grain. To the extent these Growers retain ownership interests in the Grain or otherwise retain first-priority liens in the Grain, Liberty, as contingent subrogee of the Growers, reserved these Growers' rights and interests in the Grain under Sale Orders entered by this Court.

The Plan contemplates the liquidation of the Debtors by Debtor Group – the VeraSun Aurora Debtor in the Group 1 VSE Group, the VeraSun Central City Debtor in Group 5 of the same name, the VeraSun Hankinson Debtor in Group 7 of the same name, and the VeraSun Ord Debtor in Group 9 of the same name. Claims in each Debtor Group are divided into lettered Classes. Class A consists of Prepetition Secured Lender Claims, while Class B consists of Other Secured Claims. Claims in Class A "receive, to the extent not previously received . . . [a] Pro Rata share of the proceeds of the Collateral, if any, securing [the Debtor's] obligations under the Prepetition [Secured Lender Agreement]." Class B claims "receive, to the extent no previously received . . . [a] Pro Rata share of the proceeds of the Collateral, if any, securing the Other Secured Claim . . . ." Although Liberty asserts that the Reserved Grower Interests should be separately classified, it appears that the Debtors intend such interests to fall within Class B of each Debtor Group under the Plan.

The mere fact that both classes, as secured creditors, receive pro rata distributions of collateral is problematic on its face because, as discussed in more detail below, it fails to give such creditors the benefit of their respective priority lien status. Aside from that fact, the additional problem is that claims in Class A receive distributions from collateral (Grain) in which the Reserved Grower Interests in Class B have superior rights. The net effect is to treat, as subordinate to Class A (the Prepetition Secured Lender Claims), the claims of the Reserved Grower Interests in Class B notwithstanding that the Growers, and Liberty as contingent

subrogee, prime the rights of the creditors in Class A in collateral to be distributed to the Prepetition Secured Lenders either as cash distributions or as credits against Prepetition Secured Debt.

Thus, the Plan should provide a mechanism in which the Debtors and/or the Debtors' secured lenders, including the RBF Acquisition entities for AgStar Financial Services, PCA (the "Secured Lenders"), and buyers, including Valero Renewable Fuels Company ("Valero"), that acquired Grain Assets subject to the Reserved Grower Interests fund a reserve or similar collateral pool to apply to claims of the Reserved Grower Interests, and Liberty as subrogee, in respect of the Grain transferred in the acquiring transaction. To the extent sale proceeds are unavailable from the Debtors as the result of a Secured Lender Credit bid, the Debtors must recover cash or cash equivalents from the Secured Lenders to fund the Grower Payables. The Debtors' Plan does not reserve the Debtors' right to pursue such a recovery post-confirmation and does not provide any mechanism to accommodate this process. Consequently, the Plan is not confirmable in its current form.

Finally, under the Plan, holders of Allowed Claims in Class B receive a "Pro Rata share of the proceeds of the Collateral, if any, securing such Other Secured Claim in an amount up to the amount of such Allowed Other Secured Claim." The Plan also provides that Claims in Class B are "unimpaired." Assuming that the Reserved Grower Interests fall within this Class, it is conceivable that claims in Class B will not be paid in full. Such a result would be contrary to the rights that may be afforded the Reserved Grower Interests under state law. As a result, because the Plan alters the legal rights of Reserved Grower Interests and because the Plan does not provide a cure mechanism within the meaning of 11 U.S.C. § 1124, those claims could not be "unimpaired" as represented by the Debtors under the Plan. As such, the Plan is not confirmable

without appropriate Plan amendments to address these potentially "impaired" interests under the Plan.

As a result, the Plan is not confirmable because (i) it does not comply with 11 U.S.C. § 1122, (ii) it does not comply with 11 U.S.C. § 1124, (iii) it does not comply with 11 U.S.C. § 1129(b)(2)(C), (iv) it does not comply with 11 U.S.C. § 1129(a)(11), and (v) it does not comply with 11 U.S.C. § 1129(a)(7).

II. JURISDICTION

1. This Court has jurisdiction over this "core" proceeding pursuant to 28 U.S.C. §§ 157 and 1334.

2. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. FACTUAL BACKGROUND: DEBTORS' OPERATIONS, LIBERTY'S BONDS AND DEBTORS' ASSET SALES

3. On October 31, 2008 (the "Petition Date"), VeraSun Energy Corporation ("VeraSun") and certain of its subsidiaries and affiliates (collectively, "Debtors"), filed petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§101 et seq., as amended (as amended, the "Code") commencing these proceedings.

4. Prior to the Petition Date, Liberty issued numerous surety bonds in favor of various state and federal regulatory authorities (the "Bonds") at the request of VeraSun. The Bonds supported various licenses and permits for each segment of Debtors' business operations. A representative list of these Bonds is attached as **Exhibit A** to this Objection. The Bonds guarantee certain payment and performance obligations of the Debtors to these state and federal regulatory authorities. In the absence of these Bonds (or some other instrument of guaranty), Debtors would have been unable to operate their businesses.

5. In conjunction with the issuance of the Bonds, VeraSun executed that certain General Agreement of Indemnity dated March 20, 2008 (the "Indemnity Agreement"), in which VeraSun agreed to, among other things, exonerate, indemnify and save harmless Liberty from and against all losses, costs and damages of whatsoever kind or nature incurred or sustained by Liberty as a result of its having issued the Bonds, whether on behalf of VeraSun or any other of its affiliates as principal. Additionally, each Debtor that is a principal under a bond owes a common law obligation to exonerate and indemnify Liberty, as surety under such bond. As surety to the Debtors, both under the indemnity agreement and the common law, Liberty has certain contingent equitable subrogation rights that allow it to step into the shoes of the Growers, and therefore, Liberty has standing to pursue their interests in this case. *See Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 141 (1962); *In re Larbar Corp.*, 177 F.3d 439, 446 (6th Cir. 1999); *New Mexico Highway & Transp. Dept. v. Gulf Ins. Co.*, 996 P.2d 424, 428 (N.M. Ct. App. 1999) (quoting *National Shawmut Bank v. New Amsterdam Cas. Co.*, 411 F.2d 843, 848 (1st Cir. 1969).

6. Earlier in these cases, Debtors sought approval of certain procedures applicable to the sale of substantially all of Debtors' assets (the "Assets"). The Debtors sought approval of a form of Asset Purchase Agreement (the "Asset Purchase Agreement") pursuant to which the Debtors were to sell the assets to qualified bidders. Among these assets were licenses and permits necessary to the conduct of Debtors' business. Although the licenses and permits may have been assignable as part of the contemplated transactions, the surety bonds required to support them were not.

7. In furtherance of its equitable subrogation rights, Liberty objected to the proposed sales, asserting that certain of the Assets (like ethanol or grain inventory) were impressed with

express or constructive liens or trusts in favor of certain state and federal taxing and regulatory authorities and/or third parties, and to Liberty to the extent of its potential obligations under the Bonds. *See cf. In re Modular Structures*, 27 F.3d 72, 77-78 (3d Cir. 1994). Liberty asserted (and still asserts) that Debtor is obligated to hold all future proceeds of such inventory in trust for the benefit of these regulatory authorities and/or third parties, and in accordance with the principles of equitable subrogation. *See* 11 U.S.C. § 541(d); *cf. In re Gittens & Sprinkle Enterprises, Inc.*, 960 F.2d 366, 373 (3d Cir. 1992). As such, Liberty sought the entry of an order requiring that Debtors to segregate the proceeds of any sale in fulfillment of Debtors' obligations to those authorities or third parties, as applicable, and in furtherance of its duty to exonerate Liberty, as surety, under the Bonds.

8. Liberty further argued that sales of Assets without (i) segregating funds for the fulfillment of obligations relating to Liberty's Bonds or (ii) having assured Liberty of Debtors' performance of those obligations, could have unintended, negative consequences that the Debtors and the subject transferees had not contemplated. Among these was the potential loss of an underlying license or permit, or, the restriction or elimination of the surety bond credit needed to support same. More importantly to the Debtors and the Buyers, one of the purposes of Liberty's Objection was to place the Debtors, the Buyers, and others on notice of the potential negative implications in the event the Debtors did not segregate sale proceeds to satisfy the interests of Growers in Grain to be transferred in connection with the proposed sales.

9. Based upon Liberty's objections, the Court entered orders providing (i) that the bonds underlying the assets to be sold were not transferable and were therefore not transferred in connection with the sales and (ii) that notwithstanding the terms of such order or any asset purchase agreement relating thereto, nothing in the order nor in the subject purchase agreements

would be deemed to alter, modify or limit the rights of the Debtors or their sureties under applicable law as it pertains to the surety bonds or the obligations relating thereto. Without waiving any of its rights under any of the Sale Orders, the rights at issue in this Objection are the rights reserved by Liberty in the following Sale Orders:

Transaction	Acquiror	Sale Order Docket No.	Paragraph
VSE Assets (includes VeraSun Aurora)	Valero Renewable Fuels Company	949	¶ 25
VeraSun Ord, LLC	RBF Acquisition VI for AgStar Financial Services, PCA	1002	¶ 24
VeraSun Hankinson, LLC	RBF Acquisition IV for AgStar Financial Services, PCA	1004	¶ 25
VeraSun Central City, LLC	RBF Acquisition II for AgStar Financial Services, PCA	1006	¶ 24

10. The proposed Plan does not account for the Reserved Grower Interests which have been preserved in the above-referenced Sale Orders.

IV. RESERVED GROWER INTERESTS UNDER STATE LAW

11. In connection with Liberty's Disclosure Statement Objection, the Debtors disclosed to Liberty approximately $500,000 in accounts payable in respect of Grain delivered to the VeraSun Hankinson Debtor, the VeraSun Aurora Debtor, the VeraSun Central City Debtor, and the VeraSun Ord Debtors summarized as follows:

Debtor	Debtor Grower Payables (Total)
VeraSun Central City Debtor	$187,140.38
VeraSun Aurora Debtor	$134,203.21
VeraSun Hankinson Debtor	$132,784.85[2]
VeraSun Ord Debtor	$44,192.81

[2] The amount set forth in this Objection is an amount indicated by the Debtors. The identity of grower payables for the Hankinson Debtor are the subject of a state insolvency proceeding pending in North Dakota State Court

12. The VeraSun Hankinson Debtor, the VeraSun Aurora Debtor, the VeraSun Central City Debtor, and the VeraSun Ord Debtor operated warehouses or engaged in Grain acquisition transactions in North Dakota, South Dakota, and Nebraska. Liberty issued three of the Bonds on Exhibit A in connection with certain of Debtors' warehouse operations and transactions in these states. While Liberty's actual obligation, if any, in respect of the Grower Payables is unknown, to the extent Liberty has any obligation under its bonds in respect of the Grower Payables, it may, by subrogation, pursue the Growers' respective rights as holders of liens and/or property interests in these cases. *See Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 141 (1962); *In re Larbar Corp.*, 177 F.3d 439, 446 (6th Cir. 1999); *New Mexico Highway & Transp. Dept. v. Gulf Ins. Co.*, 996 P.2d 424, 428 (N.M. Ct. App. 1999) (quoting *National Shawmut Bank v. New Amsterdam Cas. Co.*, 411 F.2d 843, 848 (1st Cir. 1969).

A. North Dakota

13. N.D. Cent. Code 60-02-25 provides that "[w]henever 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 receiptholders 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."

14. Under the above-referenced North Dakota statutes, Growers delivering Grain to the VeraSun Hankinson Debtor either retain ownership in the Grain delivered, or they have first-

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described in the Stipulation and Agreed Order among the Debtors, Liberty and the North Dakota Public Service

priority liens in the Grain. The Secured Lender for the VeraSun Hankinson Debtor acquired Grain subject to these interests because these interests have been reserved by Liberty[3] in the Sale Order entered by this Court with respect to the sale of the Hankinson Debtor's assets (¶ 25, Docket Entry No. 1004). As a result, the Growers either hold title to the Grain in the hands of the Secured Lender, or the proceeds of the Grain in the hands of the Debtors as a first priority lien which must be paid in full prior to payment of (or credit to) any Secured Lender claim for the Hankinson Debtor.

B. South Dakota

15. South Dakota employs a similar statutory framework to address the interests of Growers under South Dakota law. First, S.D.C.L. § 49-43-2 provides,

> If any grain is delivered to any person doing a public grain warehouse business in this state and is held in open storage, in a grain bank account, or placed on a warehouse receipt, the delivery is a ***bailment and not a sale of the grain.*** (emphasis added).

16. S.D.C.L. § 49-43-1.1 defines "grain bank", "open storage grain" and "public grain warehouse" as follows:

> (1A) 'Grain Bank,' grain which is received by a public grain warehouse from depositors for storage and is to be withdrawn and processed into feed as needed;
>
> (1B) 'Open storage grain,' grain received by a public grain warehouse from a depositor for which a warehouse receipt has not been issued or a purchase made and is not a grain bank;
>
> (2) 'Public grain warehouse,' any public warehouse where grain . . . is received for storage for hire. A public grain warehouse may also purchase, receive or handle grain in accordance with the provisions of chapter 49-45

Commission entered September 14, 2009.

[3] Liberty's actual obligation, if any, in respect of the Hankinson Debtor payables is not known. Nothing herein shall be deemed to constitute an admission of liability for or in respect of the Hankinson Debtor payables. Liberty reserves all rights and defenses with respect thereto.

relating to grain buyers . . . .

17. Under, S.D.C.L. § 49-45-10, "[a] grain buyer shall pay the purchase price to the owner or the owner's agent for grain upon delivery or demand of the owner or agent unless payment is to be made in accordance with the terms of a voluntary credit sale which complies with the requirements of this chapter and rules promulgated thereto." A "voluntary credit sale" is "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred." S.D.C.L. § 49-45-1.1.

18. The foregoing statutes provide that, absent an agreement in a form that complies with the statute, Grain delivered to the VeraSun Aurora Debtor qualifies either as a warehouse receipt transaction or as an open storage grain transaction. In either instance, the transaction qualifies as a bailment, not a sale, and therefore, the Growers retain title in the Grain delivered to the VeraSun Aurora Debtor. Under controlling South Dakota case law, while the bailee holds the right to possess the grain, the bailee can "neither assert title in himself nor in a third person." *Street v. Farmers' Elevator Co. of Elkton*, 146 N.W. 1077, 1079 (S.D. 1914). In the *Street* case, the subject grower delivered grain to the warehouse and received a receipt in return. *Id.* The warehouse sold the grain and refused to deliver the grain or the proceeds of the grain to the grower when the latter presented its receipts to the warehouse and demanded that the warehouse return the grain. *Id.* The South Dakota Supreme Court held that the receipt "shall be deemed and held, so far as the duties, liabilities, and obligations of such bailee are concerned, conclusive evidence of the fact that the party to whom the same was issued, or his assigns thereof, is the owner of such grain." *Id.* at 1081.

19. South Dakota statutes further protect the rights of Growers upon the insolvency of

a grain warehouse. Specifically, S.D.C.L. § 49-43-3 provides:

> In no case is the grain stored under a receipt as required by § 49-43-2.1, open storage grain, or grain bank liable to seizure upon process of any court in any action against the bailee, except an action by the owner of open storage grain, owner of grain bank, or owner of holder of a warehouse receipt to enforce the terms of the same. ***In the event of failure or insolvency of the bailee, grain on hand in the public grain warehouse shall first be applied to the redemption and satisfaction of outstanding receipts issued by the warehouse*** and to owners of open storage grain and grain bank. (emphasis added).

20. Based upon these statutes and controlling case authority, to the extent they hold valid receipts or transferred Grain to the VeraSun Aurora Debtor in an open storage grain transaction, the Growers retain title to the Grain. Upon the insolvency of the VeraSun Aurora Debtor, the Growers were entitled to the return of the Grain in redemption of their interests. Because the Debtors never took title to these Grain assets, the Debtors' transferee (Valero) never acquired title to these assets, and the Debtors never acquired title to the Grain proceeds, as Liberty reserved[4] those rights under the Sale Order entered by this Court with respect to the sale of the VeraSun Aurora Debtor's assets (¶ 25, Docket Entry No. 949). As a result, the Growers either hold title to the Grain in the hands of Valero, or title to the Grain proceeds in the hands of the VeraSun Aurora Debtor. The Debtors are obligated to seek the return of the Grain in redemption of the Growers' interests, or they are obligated to turnover Grain proceeds to the Growers so that they are paid in full.

C. Nebraska

21. Nebraska statutes afford first-priority liens to grain owners in and to grain delivered to a Nebraska grain warehouse and in and to the proceeds of that grain. *See Neb. Rev.*

[4] Liberty's actual obligation, if any, for or in respect of the VeraSun Aurora Debtor payables is not known. Nothing herein shall constitute an admission of liability for or in respect of the VeraSun Aurora Debtor payables. Liberty reserves all rights and defenses with respect thereto.

Stat. § 88-525, *et. seq.* Those statutes do not independently afford first-priority lien treatment to growers delivering and selling grain to a Nebraska grain dealer. *See Neb. Rev. Stat.* § 75-904, 905. Whether the Nebraska Growers with respect to the identified Grower Payables have first-priority liens depends upon the nature of their transactions with the VeraSun Central City Debtor and the VeraSun Ord Debtor, respectively. Additionally, their rights may be affected by other state law to the extent the payables relate to transactions affected by statutes in those states. To the extent they hold first-priority liens that prime the rights of the Secured Lenders, their claims must be paid in full prior to payment of (or credit to) any Secured Lender claim.

22. While Liberty's actual obligation, if any, in respect of these payables is not known, to the extent Liberty has any obligation in respect of these payables[5], it reserved the right to pursue those first-priority rights against the VeraSun Central City Debtor and the VeraSun Ord Debtors under Sale Orders entered by this Court with respect to the sale of each entity's respective assets (¶ 24, Docket Entry No. 1002, ¶ 24, Docket Entry No. 1006).

23. All of the Sale Orders entered during the pendency of these cases include Liberty's reservation of the right to seek, as equitable subrogee, any first-priority, ownership, or administrative treatment in respect of these Reserved Grower Interests to the extent they relate to any Grain assets transferred to any of the Secured Lenders or Buyers.

V. PLAN DEFICIENCIES

24. The Plan contemplates the liquidation of Grain assets and proceeds of Grain assets without any mechanism to account for or otherwise classify the Reserved Grower Interests in accordance with rights provided to them under North Dakota, South Dakota or Nebraska law, or

[5] Nothing herein shall constitute an admission of liability for or in respect of the VeraSun Ord Debtor or the VeraSun Central City Debtor payables. Liberty reserves all rights and defenses with respect thereto.

in other jurisdictions affording similar rights. As such, the Debtors propose the liquidation of Grain assets and proceeds of Grain assets in which the Debtors have no interest, or in which other constituents, including those Growers and Liberty, as contingent equitable subrogee, have first priority interests that prime the rights of Debtors' Secured Lenders, Valero and other constituents in the case. Liberty therefore objects to the Plan because it fails to provide a classification that satisfies the Grower Payables in full, or otherwise provide for replacement collateral or recovery of assets from the Secured Lenders and/or Valero (with related credit bid and/or purchase price adjustments as the case may be) who took possession of the Grain Assets subject to the Reserved Grower Interests identified in the above-referenced Sale Orders.

A. The Plan Fails to Properly Classify the Reserved Grower Interests as Required by § 1122 of the Bankruptcy Code

25. The Plan fails to provide a classification for the Reserved Grower Interests, which, as stated prime the rights of the Secured Lenders and Valero in and to Grain Assets sold to the Secured Lenders and Valero, respectively, and proceeds of Grain Assets to be distributed by the Debtors under the Plan. Section 1123(a)(1) of the Bankruptcy Code requires the plan proponent to classify all claims and interests in accordance with § 1122 of the Bankruptcy Code. Section 1122 provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." The claims/interests of the Growers are not substantially similar to any other claims and do not properly fit within any of the classes of claims or interests designated in the Plan. While the Plan appears to provide that Grower claims fall within the Class B Other Secured Claims, the Plan's description of the claims in such Class is not consistent with the status of the Growers, as owners of the Grain, nor is it consistent with the rights of the Growers to receive payment from the

proceeds of the prior sales of Grain in the case. In light of the preferred status of the Growers claims/interests, the Growers are not properly classified in any of the existing classes under the Plan. Accordingly, the Plan should not be confirmed in the absence of proper classification and treatment of the Grower claims.

B. The Plan Improperly Designated Class B Other Secured Claims as Unimpaired and Improperly Denied the Creditors in Such Class the Right to Vote to Accept or Reject the Plan.

26. To the extent that the Reserved Grower Interests are classified in Class B Other Secured Claims, the Plan improperly designates such class as unimpaired. Pursuant to 11 U.S.C. § 1124, a class of claims or interests is unimpaired only if the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest" or, notwithstanding default and acceleration of the debt, cures existing defaults, reinstates the maturity of the debt, compensates the holder of the debt for any damages, and "does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest." Under the Plan, Class B Other Secured Claims will receive a pro rata share of the proceeds of the sale of the collateral for the secured claims in that class. Under no legitimate interpretation of § 1124 of the Bankruptcy Code can such treatment be deemed to render the holders of Class B Other Secured Claims unimpaired. There is no question that such treatment substantially alters the legal, equitable and contractual rights that the holders of the Class B Other Secured Claims would be entitled.

27. The failure to properly designate Class B Other Secured Claims as impaired improperly denied the holders of claims in such class their statutory right to vote for or against the Plan. Accordingly, the Plan does not comply with § 1124 of the Bankruptcy Code and

confirmation of the Plan should therefore be denied because the Plan does not comply the applicable provisions of Bankruptcy Code as required by § 1129(a)(1).

C. *The Plan Violates the Absolute Priority Rule set forth in 11 U.S.C. § 1129 (b)(2)(C)*

28. The Plan violates the absolute priority rule set forth in 11 U.S.C. § 1129(b)(2)(C) and cannot be confirmed absent acceptance by all classes. Under the absolute priority rule, the plan will be deemed fair and equitable only if:

> (A) With respect to a class of secured claims, the plan provides—
>
> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

29. The Plan contemplates the liquidation of the Debtors by Debtor Group – the VeraSun Aurora Debtor in the Group 1 VSE Group, the VeraSun Central City Debtor in Group 5 of the same name, the VeraSun Hankinson Debtor in Group 7 of the same name, and the VeraSun Ord Debtor in Group 9 of the same name. Claims in each Debtor Group are divided into lettered Classes. Holders of Allowed Claims in Class B receive a "Pro Rata share of the

proceeds of the Collateral, if any, securing such Other Secured Claim in an amount up to the amount of such Allowed Other Secured Claim."

30. There is no basis under the Bankruptcy Code for a pro rata distribution to secured creditors and such treatment does not satisfy the absolute priority rule. In light of the proposed liquidation of all of the collateral securing the Class B claims, the Plan can satisfy the absolute priority rule only if the Class B claim holders retain their liens and receive the present value of their allowed claim or such creditors receive the indubitable equivalent of their claims. A pro rata distribution to secured creditors from the liquidation of collateral means inevitably that some creditors will receive more than they are entitled to and some will receive less. The Plan fails to satisfy the absolute priority rule with respect to those who will receive less.

31. Additionally, the Plan appears to allow for the funding of claims in Class A with collateral (Grain and Grain proceeds) attributable to the Reserved Grower Interests. Since the treatment of Class A claims appears to bless the distribution of sale proceeds and credit bid sales that occurred during the case without provision for recovery of funds necessary to satisfy the Reserved Growers Interests, the Plan does not provide for the Growers to receive the allowed amount of their claims or the indubitable equivalent of the same. The net effect is to treat, as subordinate to Class A (the Prepetition Secured Lender Claims), the claims of the Reserved Grower Interests in Class B notwithstanding that the Growers, and Liberty as contingent subrogee, prime the rights of the creditors in Class A in Grain and Grain proceeds. Such treatment violates the absolute priority rule.

D. *The Plan Is Not Feasible As Required by § 1129(a)(11) of the Bankruptcy Code and Should Not Be Confirmed.*

32. The Plan is not feasible as required by § 1129(a)(11) of the Bankruptcy Code and should not be confirmed. "The purpose behind th[e] statutory requirement of feasibility is to 'prevent confirmation of visionary schemes which promise creditor and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.'" *In re Frascella Enterprises, Inc.*, 360 B.R. 435, 453 (Bankr. E.D. Pa. 2007).

33. Because the Debtors have apparently not considered the Reserved Grower Interests in formulating the Plan, and because the Reserved Grower Interests have no appropriate classification under the Plan, the Debtors propose distributions to the Secured Lenders, or account for prior distributions (either in cash or as credits against secured debt) to the Secured Lenders, in amounts greater than the Debtors can actually distribute to them or on their account. The Plan does this by shifting Grain and Grain proceeds collateral to the Prepetition Secured Lender Debt. As a consequence, the Debtors, the Secured Lenders and Valero face the prospect of litigation regarding the relative rights and interests of the Debtors, the Secured Lenders, Valero, the Growers, and Liberty in and to the Grain Assets transferred during these cases, and Grain proceeds received by the Debtors (either in actual amounts or in credits against prepetition secured debt). In the event that this Court determines that these Growers have rights in the Grain and Grain Assets and that their rights prime the rights of other constituents in the case, they will need to be classified in a manner that pays them in full or recovers for their benefit Grain or the proceeds of Grain from these constituents. In the absence of this type of provision, Plan is not feasible.

E. The Plan Should Not Be Confirmed Because It does Not Satisfy the Best Interests of Creditors Test.

34. The Plan does not satisfy the requirements of Section 1129(a)(7) and should not be confirmed. Under Section 1129(a)(7), the Court shall confirm the Plan only if the Plan is in the best interests of creditors as follows:

> With respect to each impaired class of claims or interests – (A) each holder of a claim or interest of such class – (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interests property of a value as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

35. "The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan." *Lisanti Foods, Inc.*, 329 B.R. 491, 500 (Bankr. D. N.J. 2005) quoting *Bank of America Nat. Trust & Sav. Ass'n v. 2003 North LasSalle St. Partnership*, 526 U.S. 434, 442 n.13 (1999). The Plan does not satisfy 11 U.S.C. § 1129(a)(7) because it fails to provide for Liberty and/or the Growers to receive or retain under the Plan property of a value as of the Effective Date that is not less than the amount that Liberty and/or the Growers would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. Specifically, while a chapter 7 trustee would be obligated to recover from the Secured Lenders who provided credit bids sufficient cash to pay the senior secured claims of the Growers, the Plan does not preserve such causes of action for the Debtor or for the Growers and/or Liberty. Further, the Plan does not adequately provide for the distribution to Liberty and/or the Growers the proceeds of the sale of the Growers' Grain. Rather, as noted above, the Plan provides only for a pro rata distribution to secured creditors. In a Chapter 7 liquidation, claims are to be paid from liquidation of collateral on the basis of the secured status of the claim and in the order of such claim's priority in the collateral. By failing to recognize the priority of the Growers

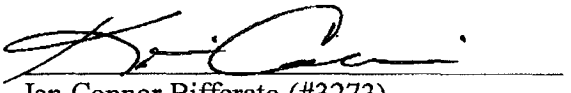
claims/interests, failing to preserve rights of recovery against secured creditors that were improperly paid the proceeds of collateral in which the Growers interest was superior, and by providing for a pro rata distribution to secured creditors rather than a distribution based on priority of liens in the collateral, the Plan does not satisfy the "bests interests" test under Section 1129(a)(7) and should not be confirmed.

36. The Grower Payables disclosed to Liberty may not reflect the total value of claims asserted against the Debtors in the referenced States and elsewhere. In this respect, the referenced Plan deficiencies may impact a larger group of growers than those associated with the Grower Payables. The Sale Orders entered earlier in these cases preserve the interests of such growers, and Liberty as contingent subrogee thereto. To the extent additional claims are asserted against the Debtors in the referenced States and elsewhere, and although Liberty's actual obligation, if any, in respect of those claims is not known, Liberty intends that this Objection be applicable to their respective interests.

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons, Liberty requests that this Court deny confirmation of the Plan unless or until the deficiencies noted herein are satisfied.

DATED: October 16, 2009

BIFFERATO LLC



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ATTORNEYS FOR LIBERTY MUTUAL INSURANCE COMPANY

Exhibit A - BONDS

Number	Principal	Amount	Obligee
674012323	US BIO Janesville, LLC	$10,000.00	Minnesota Commissioner of Transportation
674012286	Verasun Energy Corporation d/b/a Verasun Welcome LLC, 144 120th St, Welcome, MN 56181 Verasun Energy	$50,000.00	Minnesota Department of Agriculture
674012345	Verasun Hankinson, LLC	$380,000.00	North Dakota Public Service Commission
674013153	Verasun Energy Corporation d/b/a Verasun Aurora Corporation	$300,000.00	South Dakota Public Utilities Commission
674013161	Verasun Energy	$300,000.00	Nebraska Public Service Commission
674011599	ASA Albion, LLC	$200,000.00	Nebraska Department of Revenue
674012287	Verasun Marketing, LLC	$32,000.00	Alabama Department of Revenue
674012320	Verasun Marketing, LLC	$300,000.00	North Carolina Department of Revenue
674012324	ASA Bloomingsburg, LLC	$5,000.00	State of Ohio
674012326	Verasun Marketing, LLC	$2,000.00	State of Nevada Motor Carrier Division
674012342	Verasun Marketing, LLC	$2,500.00	Pennsylvania Department of Revenue
674012343	Verasun Marketing, LLC	$50,000.00	State of Maryland
674012346	VeraSun Marketing, LLC	$5,000	District of Columbia
674012349	Verasun Marketing, LLC	$100,000.00	Connecticut Department of Revenue Services
674013152	VeraSun Marketing, LLC	$5,000	Arizona Department of Transportation
674013157	Verasun Marketing, LLC	$100,000.00	State of Washington
674013187	Verasun Marketing, LLC	$150,000.00	Georgia Department of Revenue
674013192	Verasun Marketing, LLC	$20,000.00	Nebraska Department of Revenue
674008144	ASA Linden LLC	$200,000.00	Department of the Treasury
674008145	ASA Albion, LLC	$200,000.00	Department of the Treasury
674012280	US Bio Marion, LLC	$200,000.00	Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms
674012299	Verasun Hankinson, LLC	$200,000.00	Department of the Treasury
674012317	Verasun Welcome, LLC	$200,000.00	Department of the Treasury
674012318	Verasun Hartley, LLC	$200,000.00	Department of the Treasury
674012319	ASA Bloomingburg, LLC	$200,000.00	Department of the Treasury
674013154	Verasun Dyersville, LLC	$200,000.00	Department of the Treasury
674013155	Verasun Janesville, LLC	$200,000.00	Department of the Treasury
674013172	Verasun Aurora Corporation	$200,000.00	Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau
674013191	Verasun Albert City, LLC	$200,000.00	Department of the Treasury
	Total:	**$4,211,500.00**	