

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

In re:	)	Chapter 11 Cases
VERASUN ENERGY CORPORATION, et al., <sup>1</sup>	)	<i>Jointly Administered</i>
Reorganized Debtors.	)	Case No. 08-12606 (BLS)
	)	Obj. Date: April 4, 2011 at 4:00 p.m.
	)	Hearing Date: April 11, 2011 at 11:00 a.m.

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**MOTION OF THE NORTH DAKOTA PUBLIC SERVICE COMMISSION FOR AN  
ORDER MODIFYING STIPULATION AND AGREED ORDER TO ALLOW FURTHER  
ACTION ON STATE COURT PROCEEDING, OR ALTERNATIVELY, FOR RELIEF  
FROM THE AUTOMATIC STAY**

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**COMES NOW**, the North Dakota Public Service Commission (the "Commission") by and through its undersigned counsel, pursuant to 11 U.S.C. § 362(d)(2), Rule 4001(a) of the Federal Rules of Bankruptcy Procedure, and Local Rule 4001-1, and hereby submits this Motion seeking Modification of that certain Stipulation and Agreed Order Modifying the Automatic Stay to Allow North Dakota Public Service Commission to Commence State Proceeding (the "Commission Stay Relief Order") (Docket Entry No. 1810) or, to the extent it applies, for relief from the automatic stay imposed by 11 U.S.C. § 362. By this Motion, the Commission seeks a modification of the Commission Stay Relief Order to allow it to pursue to conclusion the State Court proceeding filed following this Court's entry of the Commission Stay Relief Order. Alternatively, and to

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<sup>1</sup> The Reorganized 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).

the extent applicable, the Commission seeks further relief from the automatic stay imposed by 11 U.S.C. § 362 for this purpose. As grounds, the Commission would state the following:

## **I. JURISDICTION**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

## **II. BACKGROUND**

2. On October 31, 2008, 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").

3. On March 12, 2009, the Commission received a claim against VeraSun Hankinson, LLC ("VeraSun Hankinson"), one of the Debtors herein, in which the claimant alleged he had not been paid in full for grain purchased by VeraSun Hankinson and in which the claimant asked the Commission to take appropriate action in seeking recovery of the alleged unpaid amount under grain elevator warehouse bond number 674012345 issued by Liberty Mutual Insurance Company ("Liberty") naming VeraSun Hankinson as principal and in the amount of \$380,000 (the "Bond").

4. On March 27, 2009, the Commission filed a Motion for Relief from Stay (the "Commission Motion") in which it sought an order lifting the automatic stay to allow the Commission to commence an action in North Dakota District Court, Southeast Judicial District against VeraSun Hankinson to secure the Commission's appointment as

trustee under applicable North Dakota law, and to maintain an action against Liberty under the Bond in accordance with applicable North Dakota law.

5. On August 27, 2009, Liberty filed an Objection to the Commission Motion (the "Liberty Objection") asserting that (i) Federal bankruptcy law preempts (procedurally) the state insolvency proceeding contemplated by the Commission's Motion, (ii) that this Court could determine the relative rights and interests of Liberty, the Commission, the Debtors and others under North Dakota law, and (iii) that the interests of judicial economy would not be served by allowing a parallel proceeding to move forward in North Dakota state court.

6. On September 11, 2009, an executed Stipulation and Agreed Order Modifying the Automatic Stay to Allow North Dakota Public Service Commission to Commence State Proceeding was filed in the United States Bankruptcy Court District of Delaware (Docket Entry No. 1805).

7. On September 14, 2009, this Court entered the Commission Stay Relief Order. Under the Commission Stay Relief Order, the automatic stay imposed by 11 U.S.C. § 362 was modified for the limited purpose of allowing the Commission to take such action as may be required to secure its appointment as trustee under Chapter 60-04 of the North Dakota Century Code, take possession of relevant books and records of the warehouseman, issue and publish a notice of appointment and notice to file claims with the Commission, and to enable the Commission to evaluate claims presented to it within the statutory period prescribed by applicable North Dakota law.

8. The Commission secured its appointment as trustee under Chapter 60-04 of the North Dakota Century Code by filing an action styled *Public Service Commission*

*vs. VeraSun Hankinson, LLC*, Civil No. 39-9-C-462-1, in the Richland County District Court for the Southeast Judicial District of North Dakota (the "State Court Proceeding").

9. Under the Commission Stay Relief Order, the Commission is required to seek further stay relief to the extent it seeks to take any further action in the State Court Proceeding, including the filing of the required Report and Recommendation in the State Court Proceeding, the joinder of Liberty as a party thereto, the deposit of bond proceeds deemed necessary, and any litigation that ensues based upon the Report and Recommendation.

10. In accordance with the Commission Stay Relief Order, the Commission has provided the Debtors and Liberty with a draft copy of the Report and Recommendation that it will file in the State Court Proceeding containing the Commission's recommendation as to the amount and validity of each claim and the proposed distribution of the trust fund assets, including expenses incurred by the Commission in the administration of the insolvency that is the subject of the State Court Proceeding.

11. The Commission will seek the joinder of Liberty as a Defendant in the State Court Proceeding. The Commission will request that the Court therein order Liberty to deposit bond proceeds in trust to fund items the State Court determines are recoverable from the bond proceeds under North Dakota law. These items include, but may not be limited to, all amounts necessary to fund distributions to growers whose claims the Commission determines are cash claims under North Dakota law, plus interest, from the date of insolvency, and to cover expenses, including attorneys' fees, of the Commission. In the event that the Commission and Liberty cannot reach

agreement on the amount of bond funds to be deposited, the Commission may seek the deposit of funds up to, but not in excess of, the Bond's \$380,000 penal limit.

### III. RELIEF REQUESTED; ARGUMENT

12. By this Motion, the Commission requests that this Court modify the Commission Stay Relief Order to allow the Commission to file its Report and Recommendation and to pursue to conclusion the State Court Proceeding. To the extent it applies, and in accordance with the Commission Stay Relief Order, the Commission requests that the Court grant it further relief from the automatic stay imposed by § 362 of the Code for this purpose.

13. Bankruptcy Code section 362(d)(1) provides that upon request of a party in interest and after hearing, a bankruptcy court *shall* grant relief from the automatic stay of Bankruptcy Code section 362(a) "for cause."

14. As set forth in its original Motion for Relief from Stay, (Docket Entry No. 924), the Commission is statutorily authorized to commence an action to seek recovery of the proceeds of the Liberty Bond for the benefit of those who qualify, under applicable law, as proper claimants thereunder.

15. First, the Commission received the claims which will be the basis for the Commission claim against Liberty in the State Court Proceeding almost two (2) years ago: one in March of 2009 and one in August of 2009.

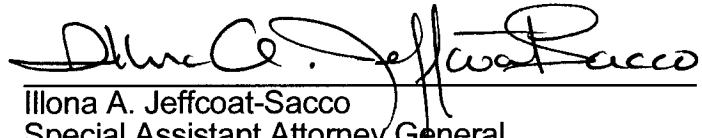
16. Second, the Debtors' estates are currently being liquidated pursuant to a Plan of Liquidation (the "Plan"). The proceeds of the Liberty Bond are not property of the Debtors, and therefore, are not necessary for the liquidation of the Debtors' assets under the Plan. See, e.g., *In the Matter of Lockard*, 884 F.2d 1171, 1178 (9th Cir.

1989); *In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108, 1115 (6th Cir. 1981) (recognizing that a bond posted in favor of a state agency to guarantee payment of workers' compensation claims was not property of the estate); *In re Buna Painting & Drywall Co., Inc.*, 503 F.2d 618, 619 (9th Cir. 1974) (denying trustee's request to compel payment of the penal sums of a bond into the estate); *In re McLean Trucking*, 74 B.R. 820, 826-28 (Bankr. W.D.N.C. 1987) (recognizing that a bond posted in favor of a state agency to guarantee payment of workers' compensation claims was not property of the estate); *In re Capitol-York Construction Corp.*, 43 B.R. 52, 56 (Bankr. S.D.N.Y. 1984); *In re Jay Forni, Inc.*, 33 B.R. 538, 541 (Bankr. N.D. Cal. 1983); see also *In re Wegner Farms Company*, 49 B.R. 440, 443 (Bankr. N.D. Iowa 1985) (citing *In re Apache Construction, Inc.* 34 B.R. 415, 417 (Bankr. Or. 1983), *In re Jay Forni, Inc.*, 33 B.R. 538 (Bankr. N.D. Cal. 1983), *In re Fintel*, 10 B.R. 50, 51 (Bankr. Or. 1982)).

17. Accordingly, the prosecution of the State Court Proceeding for this purpose will not delay, hinder, or otherwise affect this proceeding except to the extent of Liberty's claim against the Debtors arising under the Liberty Bond, by contract, or under applicable law.

**WHEREFORE, PREMISES CONSIDERED,** the Commission respectfully requests that this Court modify the Commission Stay Relief Order to allow the Commission to pursue to conclusion the State Court Proceeding, or, to the extent the automatic stay applies, (i) grant the Commission relief from the automatic stay for said purpose, and (ii) grant the Commission such other further relief as may be appropriate.

Dated this 3<sup>rd</sup> day of March, 2011.

A handwritten signature in black ink, appearing to read "Illona A. Jeffcoat-Sacco", written over a horizontal line.

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Attorney for the North Dakota Public Service  
Commission.

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

In re:	)	Chapter 11 Cases
	)	<i>Jointly Administered</i>
VERASUN ENERGY CORPORATION, et al., <sup>1</sup>	)	
	)	
Reorganized Debtors.	)	Case No. 08-12606 (BLS)
	)	
	)	Obj. Date: April 4, 2011 at 4:00 p.m.
	)	Hearing Date: April 11, 2011 at 11:00 a.m.

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**NOTICE OF MOTION OF THE NORTH DAKOTA PUBLIC SERVICE COMMISSION  
FOR AN ORDER MODIFYING STIPULATION AND AGREED ORDER TO ALLOW  
FURTHER ACTION ON STATE COURT PROCEEDING, OR ALTERNATIVELY, FOR  
RELIEF FROM THE AUTOMATIC STAY**

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<sup>1</sup> The Reorganized 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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All parties who filed request for service  
of notice

Notice of Electronic Filing to registered  
CM/ECF registered filers

**PLEASE TAKE NOTICE** the North Dakota Public Service Commission has filed a Motion of the North Dakota Public Service Commission for an Order Modifying Stipulation and Agreed Order to Allow Further Action on State Court Proceeding, or Alternatively, for Relief from the Automatic Stay. The North Dakota Public Service Commission requests the Court modify the September 11, 2009, Stipulation and Agreed Order Modifying the Automatic Stay to Allow North Dakota Public Service Commission to Commence State Proceeding (Docket Entry No. 1805), or alternatively, for relief from the automatic stay to allow the Commission to pursue to conclusion the State Court Proceeding referenced in the Motion.

**PLEASE TAKE NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON  
APRIL 11, 2011, AT 11:00 A.M., BEFORE THE HONORABLE BRENDAN L.**

SHANNON AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 6<sup>TH</sup> FLOOR, COURTROOM 1, WILMINGTON, DELAWARE 19801.

**PLEASE TAKE FURTHER NOTICE** that a response to the Motion, if any, is required to be filed on or before **April 4, 2011 at 4:00 p.m.** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 3rd Floor, 824 Market Street, Wilmington, Delaware 19801. At the same time, you must serve a copy of the response upon the undersigned counsel for the North Dakota Public Service Commission so as to be received on or before the Objection Deadline as follows:

Illona A. Jeffcoat-Sacco  
Special Assistant Attorney General  
State Bar ID No. 03315  
North Dakota Public Service Commission  
600 East Boulevard Ave – Dept 408  
Bismarck, ND 58505-0480

The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the Motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as may be applicable, value of the property, and the extent and validity of any security instrument.

**PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT FURTHER NOTICE OR HEARING.**

Dated this 3<sup>rd</sup> day of March, 2011.



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Attorney for the North Dakota Public Service Commission.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: )  
VERASUN ENERGY CORPORATION, et al.,<sup>1</sup> ) Chapter 11 Cases  
 ) *Jointly Administered*  
 )  
Reorganized Debtors. ) Case No. 08-12606 (BLS)  
 )  
 ) Related to Docket No. \_\_\_\_\_

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**ORDER GRANTING MOTION OF NORTH DAKOTA PUBLIC SERVICE  
COMMISSION FOR AN ORDER MODIFYING STIPULATION AND AGREED ORDER  
TO ALLOW FURTHER ACTION ON STATE COURT PROCEEDING, OR  
ALTERNATIVELY, FOR RELIEF FROM THE AUTOMATIC STAY**

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Upon consideration of the Motion of the North Dakota Public Service Commission for an Order Modifying Stipulation and Agreed Order to Allow Further Action on State Court Proceeding, or Alternatively, for Relief from the Automatic Stay, the Court having determined that granting the relief requested in the Motion is warranted and it appearing that proper and adequate notice of the Motion has been given under the circumstances and that no other or further notice is necessary;

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED that the Motion is granted and the North Dakota Public Service Commission is granted further relief under the September 11, 2009, Stipulation and Agreed Order Modifying the Automatic Stay to Allow North Dakota Public Service Commission to Commence State Proceeding (Docket Entry No. 1805), to pursue to conclusion the North Dakota state district court

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<sup>1</sup> The Reorganized 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).

action styled *Public Service Commission vs. VeraSun Hankinson, LLC*, Richland County  
Civil No. 39-9-C-462-1 (Southeast Judicial District filed Oct. 7, 2009).

Dated this \_\_\_\_\_ day of April, 2011.

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Honorable Brendan L. Shannon  
United States Bankruptcy Judge

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

In re:	)	Chapter 11 Cases
VERASUN ENERGY CORPORATION, et al., <sup>1</sup>	)	<i>Jointly Administered</i>
Reorganized Debtors.	)	Case No. 08-12606 (BLS)
	)	Obj. Date: April 4, 2011 at 4:00 p.m.
	)	Hearing Date: April 11, 2011 at 11:00 a.m.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on March 3, 2011, the following documents were filed electronically with the Clerk of Court through ECF:

1. Motion of the North Dakota Public Service Commission for an Order Modifying Stipulation and Agreed Order to Allow Further Action on State Court Proceeding, or Alternatively, for Relief from the Automatic Stay;
2. Notice of Motion of the North Dakota Public Service Commission for an Order Modifying Stipulation and Agreed Order to Allow Further Action on State Court Proceeding, or Alternatively, for Relief from the Automatic Stay; and
3. proposed Order Granting Motion of the North Dakota Public Service Commission for an Order Modifying Stipulation and Agreed Order to Allow Further Action on State Court Proceeding, or Alternatively, for Relief from the Automatic Stay.

and that ECF will send a Notice of Electronic Filing to registered CM/ECF registered filers, including those entities required to be served by Del. Bankr. L.R. 2002-1(b) and 4001-1(a),

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<sup>1</sup> The Reorganized 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).

and who have filed requests for service/notice through CM/ECF.

I certify that copies of the documents will be mailed by first-class mail, postage paid,  
to the following:

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Dated this 3<sup>rd</sup> day of March, 2011.



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