

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

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In re: )  
 ) Case No. 08-12606 (BLS)  
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VERASUN ENERGY CORPORATION, et al., ) *Chapter 11*  
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Debtors.<sup>1</sup> ) Joint Administration Pending  
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**MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 105 AND 503(b),  
(I) CONFIRMING GRANT OF ADMINISTRATIVE EXPENSE  
STATUS TO OBLIGATIONS ARISING FROM PREPETITION DELIVERY  
OF GOODS RECEIVED WITHIN 20 DAYS OF THE COMMENCEMENT  
DATE OF THESE CHAPTER 11 CASES, (II) CONFIRMING GRANT OF  
ADMINISTRATIVE EXPENSE STATUS TO OBLIGATIONS ARISING  
FROM POSTPETITION DELIVERY OF GOODS AND SERVICES, AND  
(III) AUTHORIZING, BUT NOT DIRECTING, THE DEBTORS TO PAY  
SUCH OBLIGATIONS IN THE ORDINARY COURSE OF BUSINESS**

The debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors") hereby move for entry of an order<sup>2</sup> under 11 U.S.C. §§ 105 and 503(b) (the "Bankruptcy Code"), (i) confirming grant of administrative expense status to obligations arising from prepetition delivery of goods received within 20 days of the commencement date of these chapter 11 cases, (ii)

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<sup>1</sup> The Debtors consist of: VeraSun Energy Corporation (EIN: 20-3430241); ASA Albion, LLC (EIN: 55-0907221); ASA Bloomingburg, LLC (EIN: 55-0907224); ASA Linden, LLC (EIN: 55-0907228); ASA OpCo Holdings, LLC (EIN: 68-0609122); US Bio Marion, LLC (EIN: 20-34377343); US BioEnergy Corporation (EIN: 20-1811472); VeraSun Albert City, LLC (EIN: (20-2264707); VeraSun Aurora Corporation (EIN: 40-0462174); VeraSun BioDiesel, LLC (EIN: 20-3790860); VeraSun Central City, LLC (EIN: (55-0816855); VeraSun Charles City, LLC (EIN: 20-3735184); VeraSun Dyersville, LLC (20-5765890); VeraSun Fort Dodge, LLC (EIN: 42-1630527); VeraSun Granite City, LLC (EIN: 20-5909621); VeraSun Hankinson, LLC (90-0287129); VeraSun Hartley, LLC (EIN: 20-5381200); VeraSun Janesville, LLC (EIN: 20-4420290); VeraSun Litchfield, LLC (EIN: 20-8621370); VeraSun Marketing, LLC (EIN: 20-3693800); VeraSun Ord, LLC (75-3204878); VeraSun Reynolds, LLC (EIN: 20-5914827); VeraSun Tilton, LLC (EIN: 26-1539139); VeraSun Welcome, LLC (EIN: 20-4115888); VeraSun Woodbury, LLC (20-0647425).

<sup>2</sup> Given the exigent circumstances, the Debtors are also seeking entry of a separate emergency order to pay on November 3 and 4, 2008 any charges for 20-Day Goods that the Debtors have reasonably determined such payment is required to preserve, maintain, and continue their businesses and manufacturing operations.

confirming grant of administrative expense status to obligations arising from postpetition delivery of goods and services, and (ii) authorizing, but not directing, the debtors to pay such obligations in the ordinary course of business (the "Motion"). In support of the Motion, the Debtors rely upon and incorporate by reference the Declaration of Danny Herron, President and Chief Financial Officer of VeraSun Energy Corporation, in Support of Chapter 11 Petitions and First Day Pleadings, filed with the Court concurrently herewith (the "Herron Declaration"). In further support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

### **JURISDICTION**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105 and 503(b)(9).

### **BACKGROUND**

2. On October 31, 2008 (the "Petition Date"), VeraSun Energy Corporation ("VeraSun") and 24 of its subsidiaries and affiliates (together with VeraSun, the "Company" or the "Debtors") each commenced a case by filing a petition for relief under chapter 11 of the title 11 of the United States Code, 11 U.S.C. §§ 101 et seq., as amended (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors have requested that these chapter 11 cases (the "Chapter 11 Cases") be jointly administered.

3. No creditors' committee has been appointed in these Chapter 11 Cases by the United States Trustee. No trustee or examiner has been appointed in any of the Debtors' Chapter 11 Cases.

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

5. Founded in 2001, VeraSun is headquartered in Sioux Falls, South Dakota and, together with the other Debtors, is a leading producer and marketer of ethanol. Ethanol is a type of alcohol produced principally from corn that is used as a blend component in the U.S. gasoline fuel market to increase octane and reduce tailpipe emissions. Ethanol is mandated to go into the fuel stream by the federal government through the Renewable Fuel Standard (the "RFS"). The RFS calls for escalating volumes of ethanol to be purchased and blended into gasoline. By 2015, the RFS standards will require 15 billion gallons of ethanol a year. The Company also markets E85, a branded fuel blend consisting of 85 percent ethanol and 15 percent gasoline for use in "Flexible Fuel Vehicles."

6. As of the Petition Date, the Company's total consolidated funded debt obligations were approximately \$1.5 billion and consisted of, among other things, revolving credit, institutional term loans, secured and unsecured notes payable and secured construction/project financing. The Debtors are party to certain credit agreements, term loan agreements, and notes payable for the various loans, notes and project financings with UBS AG, UBS Loan Finance LLC, WestLB AG, New York Branch, AgStar Financial Services, PCA, Dougherty Funding LLC, and First Bank & Trust (collectively, the "Prepetition Lenders"). The Debtors are also a party to certain indenture agreements with Wells Fargo Bank, N.A. (the "Indenture Trustee") in connection with the Debtors' \$210 million senior secured notes and \$450 million senior unsecured notes.

7. The Company's liquidity is materially affected by uncertain commodity prices for corn, natural gas and ethanol. Corn and ethanol prices have been highly volatile during

2008 and are impacted by a number of factors beyond the Company's control. In addition, the Company has expanded production capacity substantially over the last year through the acquisitions of ASA Opco Holdings (the "ASA Acquisition") and US BioEnergy Corporation (the "US BioEnergy Acquisition"). Ultimately, sizeable fluctuations in the price of corn, natural gas and ethanol, coupled with obligations to service the Company's debt in the face of continued lack of liquidity in the credit markets and the inability to raise additional investment capital from depressed equity markets, have precipitated these Chapter 11 Cases.

### **RELIEF REQUESTED**

8. By this Motion, the Debtors seek, pursuant to sections 105 and 503(b) of the Bankruptcy Code, an order (i) confirming grant of administrative expense status to obligations arising from prepetition delivery of goods received within 20 days of the commencement date of these chapter 11 cases, (ii) confirming grant of administrative expense status to obligations arising from postpetition delivery of goods, supplies, products and materials, and (iii) authorizing, but not directing, the debtors to pay such obligations in the ordinary course of business.

### **BASIS FOR RELIEF**

9. In the ordinary operation of the Debtors businesses, the Debtors require certain goods, such as corn or other high-starch grains, chemical substances, denaturants (e.g. unleaded gasoline or liquid natural gas), natural gas, among other things (collectively, the "Goods"), to produce ethanol and are provided with services (the "Services") from assorted subcontractors, suppliers, and vendors, including farmers and local grain elevators, chemical suppliers, gasoline suppliers, and natural gas suppliers (the "Vendors"). Prior to the commencement of these chapter 11 cases, the Debtors placed orders with certain Vendors for Goods. Certain of these Vendors delivered their respective Goods to the Debtors within 20 days of the filing date of these cases (the

"20-Day Goods"). The Debtors estimate that approximately \$30.7 million in respect of such 20-Day Goods will become due and payable during the next sixty (60) days.

**A. Goods Delivered Within 20 Days Of The Filing Date Are Administrative Expense Claims**

10. As of the Petition Date, certain of the Vendors have not been paid for the 20-Day Goods. Because the Debtors rely so heavily on perishable inventory, timely delivery is critical to the Debtors' production of ethanol and distiller grains. Many Vendors may not be sophisticated in the complexities of Chapter 11 Cases and may require additional confirmation that payment for Goods and Services provided will occur in a timely manner. Should one of these Vendors decide not to deliver Goods during the course of these chapter 11 cases out of fear that it will not be paid, it would be difficult to replace such Vendors in the short term and consequently the Debtors may have to shut down, or reduce production at one or more of their manufacturing plants. This, in turn, could cause a disruption of shipments to customers, resulting in irreparable harm to the Debtors and their estates. If the Debtors do not timely pay the Vendors and maintain the goodwill, the Debtors' relationship with the Vendors could be damaged and its business relationships could be undermined, thus, jeopardizing a successful reorganization.

11. The Vendors' claims relating to the 20-Day Goods are administrative expenses. The Debtors ordered the Goods prepetition, and the Vendors delivered the Goods to the Debtors within 20 days of the commencement date of these cases. The Debtors have not paid for the 20-Day Goods as of the Petition Date. The Debtors believe that they must pay the claims of the Vendors with respect to the Goods, or the Vendors may refuse to continue to do business with the Debtors.

12. The Debtors are not seeking to change the amounts owed to the Vendors or the priority in which creditors are paid in these cases. Rather, the Debtors are only seeking to

process payments, in their discretion, to the Vendors' claims because those claims, as they related to the 20-Day Goods, are afforded administrative expense status by the Bankruptcy Code.

13. In return for receiving prompt payment on account of obligations arising with respect to any 20-Day Goods, the Vendors, through the endorsement of any check for payment in respect of such 20-Day Goods, shall be deemed to have agreed to continue supplying Goods to the Debtors at prevailing market prices in accordance with the terms and conditions (including payment terms) pursuant to historical practices in effect between such Vendor and the Debtors in the twelve months prior to the Petition Date, or such other terms and conditions as are agreed to by the Debtors and the applicable Vendor.

**B. Obligations Arising From Postpetition Delivery Of Goods And Services Are Administrative Expense Claims**

14. Under the provisions of section 503(b)(1)(A) of the Bankruptcy Code, all obligations that arise in connection with the postpetition delivery of Goods (the "Postpetition Goods") and Services (the "Postpetition Services") to the Debtors are, by definition, administrative expenses. Therefore, the Debtors believe that they have the authority to make payment for the Postpetition Goods and Postpetition Services received regardless of the time when the orders for such Goods or Services were placed. Moreover, the Debtors believe that they have authority to make progress payments, in their discretion, to ensure such delivery of Postpetition Goods and Services.

15. The continued supply of Postpetition Goods and Postpetition Services is crucial to the Debtors' business. Without a continuous supply of Postpetition Goods and Postpetition Services, the Debtors' ethanol production, marketing, and distribution operations cannot continue to operate. Any interruption or disruption in the relationship between the Debtors

and Vendors would be harmful and detrimental to the Debtors' business and could fundamentally undermine the Debtors' reorganization efforts.

16. The Debtors' relationships with their Vendors are so essential and their need for Goods to be shipped and Services provided on a timely basis is so acute that the Debtors believe it is crucial to reassure their Vendors that their valid claims will be paid by the Debtors in the ordinary course of business. The Debtors believe that payment of claims for 20-Day Goods and Postpetition Goods and Services are essential to enabling the Debtors to continue its business and for the Debtors to successfully reorganize. Therefore, the Debtors seek to pay these administrative expenses in the ordinary course of business.

#### APPLICABLE AUTHORITY

**A. Payment For Goods Delivered Within 20 Days Of The Filing Date Is Necessary And Appropriate.**

17. Pursuant to section 503(b)(9) of the Bankruptcy Code , the Vendors' claims relating to the 20-Day Goods will be administrative expenses at the end of these cases. Section 503(b)(9) provides that:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -

\* \* \*

(9) the value of goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9); see also In re Rio Valley Motors Co., LLC, Case No. 11-06-11866-SS, 2008 WL 824271 (Bankr. D. N.M. Mar. 24, 2008) (court held that section 503(b)(9) of the Bankruptcy

Code gave administrative priority to prepetition claim of automobile insurance company for value of vehicle delivered to debtor car dealership within 20 days of date of chapter 11 bankruptcy filing).

18. Additionally, bankruptcy courts have held that the timing of the payment of administrative expenses allowed under section 503(b)(9) is within the discretion of the court. See In re Tubular Technologies, LLC, 372 B.R. 820, 824, n. 4 (Bankr. D.S.C. 2007) (court held that timing of payment of administrative expense allowed under section 503(b)(9) is within discretion of bankruptcy court); In re Bookbinders' Restaurant, Inc., No. 06-12302, 2006 WL 3858020, at \*3-4 (Bankr. E.D. Pa. Dec. 28, 2006) (quoting In re Garden Ridge Corporation, 323 B.R. 136, 143 (Bankr. D.N.J. 2005) (court held that timing of payment of administrative expense allowed under section 503(b)(9) is within discretion of bankruptcy court and that before compelling chapter 11 debtor to pay allowed administrative expense judge may consider potential "prejudice to the debtor, hardship to the claimant, and ... detriment to other creditors.")).

**B. Payment For Goods Delivered And Services Provided After The Filing Date Is Necessary And Appropriate.**

19. Section 503(b)(1)(A) of the Bankruptcy Code governs the allowance of administrative expenses, including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). Administrative expense priority status is granted when "the debt both (1) 'arise[s] from a transaction with the debtor-in-possession' and (2) is 'beneficial to the debtor-in-possession in the operation of the business.'" In re Jartran, Inc., 732 F.2d 584, 587 (7th Cir. 1984) (quoting In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976)); see also In re Moltech Power Sys., Inc., 273 B.R. 268, 271 (Bankr. N.D. Fla. 2002); In re CP III Ltd. P'ship., 224 B.R. 206, 208 (Bankr. M.D. Fla. 1998).



20. The postpetition receipt and acceptance of the Postpetition Goods and Services satisfies the first element of the foregoing test. With respect to the second element, not only are the Postpetition Goods and Services beneficial to the Debtors, they are absolutely critical for the uninterrupted operation of the Debtors' production facilities. Without such Postpetition Goods and Services, the Debtors cannot manufacture and deliver ethanol and other related product to their customers. Accordingly, the Debtors' receipt of Postpetition Goods and Services gives rise to postpetition claims in favor of the Vendors, claims that are entitled to administrative expense priority status under section 503(b) of the Bankruptcy Code.

21. Accordingly, for all of the foregoing reasons, the relief requested herein should be granted.

#### **NOTICE**

22. Notice of this Motion will be given to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Securities and Exchange Commission; (c) the Internal Revenue Service; (d) the United States Attorney Office for District of Delaware; (e) counsel to the Prepetition Lenders; (f) counsel to any proposed provider of debtor-in-possession financing, (g) counsel to the Indenture Trustee; (h) the parties included on the Debtors' list of thirty (30) largest unsecured creditors; (i) and the financial institutions at which the Debtor's maintain any bank accounts (collectively, the "Notice Parties"). The Debtors submit that, under the circumstances, no other or further notice is required.

23. No previous request for the relief sought herein has been made to this Court or any other court.

## CONCLUSION

WHEREFORE, based upon the foregoing, the Debtors respectfully request that the Court enter an order substantially in the form annexed hereto (a) granting the relief requested herein and (b) granting such other relief as may be deemed just and proper.

Dated:           Wilmington, Delaware  
                  October 31, 2008

*/s/ Mark S. Chehi*

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