

## EXECUTION

### ASSET PURCHASE AGREEMENT

**THIS ASSET PURCHASE AGREEMENT** (this “Agreement”) is made and entered into as of this \_\_\_ day of October, 2008 (the “Execution Date”) by and among DOUGHERTY FUNDING LLC, a Delaware limited liability company (“Dougherty” and together with its permitted successors and assigns, “Buyer”), GATEWAY ETHANOL, L.L.C., a Kansas limited liability company (“Gateway” or “Seller”). Except as otherwise provided herein, capitalized terms used herein have the meanings set forth in Exhibit A attached hereto. Dougherty may assign this Agreement in accordance with Section 10.11 hereof at any time prior to the Closing on the Closing Date.

#### RECITALS:

A. Seller owns a facility (the “Project”) for the production of denatured, anhydrous ethanol alcohol, distillers grains, wet or dry, and with or without solubles and certain other products (the “Business”) located on real property described on Schedule A attached hereto (“Premises”) located in Pratt County, Kansas. The Project is not currently operational.

B. On October 5, 2008 (the “Petition Date”), Seller filed a voluntary petition (the “Petition”) for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Sections 101 et seq. (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Kansas (the “Bankruptcy Court”), commencing federal bankruptcy cases in respect of Seller (such cases being referred to herein as the “Bankruptcy Case”).

C. Seller wishes to sell to Buyer all of Seller’s right, title and interest in substantially all of the assets owned by Seller for use in connection with the Business at the price and on the other terms and conditions specified in detail below, and Buyer wishes to so purchase and acquire such assets from Seller (collectively, the “Contemplated Transactions”).

#### AGREEMENT:

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

### ARTICLE I PURCHASED ASSETS

#### 1.1 Purchase and Sale of Purchased Assets.

On the terms and subject to the conditions of this Agreement, Seller agrees to sell, transfer and deliver to Buyer, and Buyer agrees to purchase from Seller, all of the assets, properties, rights and interests of Seller of every kind and character and wherever located related to the Business, except for the Excluded Assets (collectively, the “Purchased Assets”), at the Closing free and clear of all Liens other than Permitted Encumbrances. The Purchased Assets include, without limitation, all of Seller’s right, title and interest in and to the following:

(a) Assumed Contracts.

(i) Category I Assumed Contracts.

All of Seller's right, title and interest in and to the following contracts, agreements and leases (each a "Category I Assumed Contract" and collectively the "Category I Assumed Contracts") :

(A) the construction contracts (each a "Category I Construction Contract" and collectively the "Category I Construction Contracts") that are listed as being Category I Construction Contracts on Schedule 1.1(a)(i)(A);

(B) the operating agreements (each a "Category I Operating Agreement" and collectively the "Category I Operating Agreements") that are listed as being Category I Operating Agreements on Schedule 1.1(a)(i)(B);

(C) the Industry Track Contract dated April 19, 2006 between Union Pacific Railroad Company ("Railroad") and Seller wherein the Railroad granted access to Railroad's Class I Mainline Tracks and agreed to construct through a contractor of its choice the Rail Spur ("Rail Access Agreement");

(D) the Assessment Agreement; and

(E) the TIF Rebate Agreement;

(ii) Category II Assumed Contracts.

All of Seller's right, title and interest in and to the following contracts, agreements and leases (each a "Category II Assumed Contract" and collectively the "Category II Assumed Contracts"):

(A) the construction contracts (each a "Category II Construction Contract" and collectively the "Category II Construction Contracts") that are listed as being Category II Construction Contracts on Schedule 1.1(a)(i)(A); and

(B) the operating agreements (each a "Category II Operating Agreement" and collectively the "Category II Operating Agreements") that are listed as being Category II Operating Agreements on Schedule 1.1(a)(i)(B).

(iii) Category III Assumed Contracts.

All of Seller's right, title and interest in and to the following contracts, agreements and leases (each a "Category III Assumed Contract" and collectively the "Category III Assumed Contracts"):

(A) the construction contracts (each a "Category III Assumed Contract" and collectively the "Category III Construction Contracts") that are listed as being Category III Construction Contracts on Schedule 1.1(a)(i)(A); and

(B) the operating agreements (each a "Category III Assumed Contract" and collectively the "Category III Operating Agreements") that are listed as being Category III Operating Agreements on Schedule 1.1(a)(i)(B).

provided, that Buyer shall have the right to remove any of the foregoing as Assumed Contracts and to add additional Assumed Contracts in accordance with Section 2.1(b) and/or Section 7.3 hereof.

(b) Real Property.

The following real property:

(i) Seller's fee simple ownership interest in the Premises and all Improvements thereon together with all rights appurtenant to the Premises including, without limitation, any rights of Seller in any adjacent street, alley and right of way and Off Site Improvements;

(ii) Seller's interest in that certain Ground Lease by and between Seller as lessor and Power To Go, L.L.C. as lessee ("Ground Lessee"), dated March 30, 2006, whereby Seller has ground leased a portion of the Premises consisting of the real property described on Schedule "B" attached hereto ("Substation Site") on which the Ground Lessee has constructed and equipped an electrical substation for use in the operation of the Project; and

(iii) Seller's interest in that certain Sublease dated March 30, 2006 ("Substation Sublease") pursuant to which the Ground Lessee, as sublessor, has further subleased the Substation Site to Seller, as sublessee, along with the improvements constructed thereon to Seller, as sublessee, for the exclusive use of Seller in operating the Project.

(c) Inventory.

Inventory, including raw materials, work in process and finished goods and all supplies relating to the maintenance of the Plant; provided, that Seller shall retain sufficient Inventory and Accounts Receivable that comprise the Noble Priority Collateral,

and proceeds thereof, to pay the Prepetition LOC Obligations, if any; provided, further, that the insufficiency in amount of the Inventory and Accounts Receivable to satisfy obligations with respect to the Noble Priority Claim and the Prepetition LOC Obligations shall not constitute a default by Seller or provide grounds for Buyer to not close the Contemplated Transactions.

(d) Accounts Receivable.

The Accounts Receivable arising out of or relating to the Business; provided, that Seller shall retain sufficient Inventory and Accounts Receivable that comprise the Noble Priority Collateral, and proceeds thereof, to pay the Prepetition LOC Obligations, if any; provided, further, that the insufficiency in amount of the Inventory and Accounts Receivable to satisfy obligations with respect to the Noble Priority Claim and the Prepetition LOC Obligations shall not constitute a default by Seller or provide grounds for Buyer to not close the Contemplated Transactions.

(e) Fixed Assets.

The machinery, equipment, furniture, computers, office equipment, fixtures, leasehold improvements and related tools, spare parts and equipment used in the Business and other fixed assets owned by Seller.

(f) Prepaid Expenses.

All prepaid expenses, rent and utility deposits and deferred charges owned for use in connection with, or relating to the Business including, without limitation, prepaid insurance premiums and the other items which are listed on Schedule 1.1(f) (but excluding the Retainer).

(g) Permits and Regulatory Approvals.

All Permits and Regulatory Approvals, to the extent transferable or assignable, for the construction, ownership, operation, management and maintenance of the Project and the Purchased Assets, including, without limitation, the Permits and Regulatory Approvals enumerated on Schedule 1.1(g).

(h) Intangible Property.

All general intangibles and intellectual property related to the Business including, without limitation, telephone numbers, domain names, websites, trade names, service marks, copyrights, patents, customer lists, marketing materials, formulas, samples, customer requirements and pricing, customer prototypes, outstanding customer proposals, warranties, indemnities, software, operating systems and similar items, trade secrets, know-how, applications for any of the foregoing, as well as infringement or similar claims related to any of the foregoing.

(i) Books and Records.

All books and records relating to the Business, including, without limitation, the books of account, tax, general, financial, accounting and personnel records, files, invoices, customer (current and prospective) and supplier lists, business plans, marketing studies and other written information.

(j) Claims.

All claims, rights and causes of action related to the Purchased Assets , whether now existing or hereafter arising, whether arising pursuant to contract, at law or in equity, and/or whether assertable in judicial proceedings or arbitration proceedings (collectively, the “*Claims*”) including, without limitation, the Commercial Tort Claims and other Claims asserted or assertable in the litigation proceedings or arbitration proceedings enumerated on Schedule 1.1(j); provided, that Buyer shall have the right to remove any of the foregoing as Claims and to add additional Claims in accordance with Section 2.1(b) and/or Section 7.3 hereof.

(k) Avoidance Powers.

All avoidance powers (the “*Avoidance Powers*”) under the Bankruptcy Code and causes of action pursuant to or incorporated in Sections 502, 510, 541(a)(3) and (4), 544, 545, 547 through 551 and 553 of the Bankruptcy Code.

(l) Insurance.

All proceeds of insurance payable in the event any asset which would have been a Purchased Asset has been damaged or destroyed by fire or other cause prior to the Closing Date or prior to the delivery of any such asset hereunder to Buyer.

(m) Cash and Cash Equivalents.

All cash and cash equivalents, including cash on hand or in the bank accounts, certificates of deposit, commercial paper and securities owned by Seller except for amounts necessary to pay: (i) Approved Budget Expenses (other than the Carve-Out) that remain to be paid on or after the Closing Date; (ii) the Carve-Out but only to the extent not previously paid from an advance on the Postpetition Facility; and (iii) the Retainer; provided, that Seller shall also retain sufficient Inventory and Accounts Receivable that comprise the Noble Priority Collateral, and proceeds thereof, to pay the Prepetition LOC Obligations, if any; provided, further, that the insufficiency in amount of the Inventory and Accounts Receivable to satisfy obligations with respect to the Noble Priority Claim and the Prepetition LOC Obligations shall not constitute a default by Seller or provide grounds for Buyer to not close the Contemplated Transactions.

(n) Other.

All other assets of Seller that relate to or are used or useful in the Business including, without limitation, all Postpetition Facility Collateral other than Excluded Assets.

**1.2 Excluded Assets.**

Notwithstanding anything to the contrary in this Agreement, the Purchased Assets shall not include and the following assets shall not be conveyed hereunder (collectively, the “Excluded Assets”):

(a) Sufficient Inventory and Accounts Receivable that comprise the Noble Priority Collateral, and proceeds thereof, to pay the Prepetition LOC Obligations, if any.

(b) The following contracts, agreements and leases:

(i) Any contract, agreement or lease that is not an Assumed Contract (including, without limitation, any Category II Assumed Contract or Category III Assumed Contract designated by Buyer as an Excluded Asset pursuant to Section 2.1(b) hereof or that Buyer fails to designate as a Purchased Asset in accordance with Section 7.3 hereof ) or is terminated or has expired prior to the Closing Date in accordance with its terms or in the ordinary course of the Business;

(ii) Any contract rejected by Seller in the Bankruptcy Case at the request of Buyer in accordance with Section 7.2 hereof; and

(iii) Any Claim that Buyer fails to designate as a Purchased Asset pursuant to Section 7.3 hereof.

(c) Any asset listed on Schedule 1.2(c).

(d) Seller’s rights under this Agreement and all cash and non-cash consideration payable or deliverable to Seller pursuant to the terms and provisions hereof.

(e) Cash and cash equivalents, including cash on hand or in the bank accounts, certificates of deposit, commercial paper and securities owned by Seller, necessary to pay (i) Approved Budget Expenses (other than the Carve-Out) that remain to be paid on or after the Closing Date; (ii) the Carve-Out but only to the extent not previously paid by an advance on the Postpetition Facility; and (iii) the Retainer; provided, that Seller shall also retain sufficient Inventory and Accounts Receivable that comprise the Noble Priority Collateral, and proceeds thereof, to pay the Prepetition LOC Obligations, if any.

- (f) the Retainer.

### 1.3 **Liabilities.**

- (a) Assumed Liabilities.

At Closing, Buyer shall assume and discharge only the following liabilities of Seller (the “Assumed Liabilities”) and Buyer agrees to indemnify and hold harmless Seller from and against all loss, liability, damages and expense (including attorney’s fees) arising out of, in connection with or related to the Assumed Liabilities and any actions, causes of action or proceedings related thereto:

- (i) the Assumed Contracts provided that, with respect to:

- (A) a Category I Assumed Contract, Buyer’s assumption shall be limited to: (1) all monetary liabilities and obligations of Seller under such Category I Assumed Contract first arising after the Closing Date (to the extent not funded by the Postpetition Facility) and all obligations to cure any pre-petition monetary breaches or defaults with respect to such Category I Assumed Contract shall not exceed the amount set forth on Schedule 1.3(a)(i) for such Category I Assumed Contract; provided, that the amount of such Assumed Liabilities shall be adjusted to correspond to the above amounts after Buyer’s final designation of the Assumed Contracts as permitted by Section 7.3 hereof; and (2) non-monetary obligations that are not personal to Seller; and

- (B) a Category II Assumed Contract and Category III Assumed Contract, Buyer’s Assumed Liabilities shall be the amount that has been: (1) agreed to by Buyer pursuant to an agreement between Buyer and the counterparty to the relevant Category II Assumed Contract or Category III Assumed Contract, or (2) if Buyer and such counterparty have not entered into such an agreement, established by an order of the Bankruptcy Court so long as, after the entry of such order, Buyer has not elected to treat such Category II Assumed Contract or Category III Assumed Contract as an Excluded Asset pursuant to Section 2.1(b) hereof.

- (ii) At Closing, if the DIP Lender has failed to pay the appropriate recipient any amounts owed or accrued under the Approved Budget in accordance with the terms of the Postpetition Facility including, without limitation, the Carve-Out for “Advisory Fees” payable by Seller to William Blair & Company, L.L.C. (“William Blair”) and for “Legal Fees” payable by Seller to Bryan Cave LLP that are set forth in such Approved Budget, then Buyer shall pay such amount; provided, that Buyer shall not have any obligation to pay any such amount if it has been previously paid from an advance on the Postpetition Facility.

(b) Excluded Liabilities Not Assumed.

Other than the Assumed Liabilities, Buyer is not assuming and shall not be liable for any liabilities or obligations of Seller of any kind whatsoever (the “Excluded Liabilities”) including, but not limited to, all of the following:

- (i) accounts payable;
- (ii) accrued expenses;
- (iii) taxes payable;
- (iv) secured and unsecured Indebtedness, including any payment owed to brokers, finders or similar compensation owed to any Person in connection with the Contemplated Transactions;
- (v) capital leases other than with respect to Assumed Contracts;
- (vi) liabilities related to pension assets or Employee Benefit Plans;
- (vii) warranty claims;
- (viii) product returns;
- (ix) any Chapter 11 Expenses or Transaction Expenses of Seller except as set forth in Section 1.3(a) hereof;
- (x) any liability of Seller pursuant to Environmental Laws based upon or arising from events, conditions or circumstances occurring or existing on or prior to the Closing Date;
- (xi) any liabilities of Seller not related to the Business or the Purchased Assets or any liabilities of Seller that are related to the Business but arise on or before the Closing;
- (xii) any liabilities of Seller for broker's commissions, fees or other compensation arising out of this Agreement or the Contemplated Transactions except as set forth in Section 1.3(a) hereof;
- (xiii) any liabilities of Seller relating to the Excluded Assets;
- (xiv) any liabilities of Seller to any of its directors, officers, employees, agents or Affiliates (except as expressly included in Assumed Liabilities); and
- (xv) claims related to products produced by Seller prior to the Closing.



## ARTICLE II CONSIDERATION

### 2.1 Purchase Price.

(a) Initial Purchase Price.

The initial purchase price of the Purchased Assets hereunder (the “*Initial Purchase Price*”) is estimated to be \$59,931,224.36 and shall be equal to the sum of: (a) all Prepetition Senior Obligations owing to Buyer pursuant to the Prepetition Senior Loan Documents as of the Closing Date (including all outstanding principal, accrued but unpaid interest at the applicable rate set forth in the Prepetition Senior Loan Documents, and all fees, costs and charges properly chargeable under the Prepetition Senior Loan Documents, including all attorneys’ fees and legal expenses through (and including) the Closing Date), plus (b) all Postpetition Indebtedness owing to Buyer pursuant to the Postpetition Loan Documents (including all outstanding principal, accrued but unpaid interest at the applicable rate set forth in the Postpetition Loan Documents, and all fees, costs and charges properly chargeable under the Postpetition Loan Documents, including all attorneys’ fees and legal expenses through (and including) the Closing Date).

(b) Adjustment to Initial Purchase Price.

Buyer has established the Initial Purchase Price on the assumptions that, by the Closing Date: (i) Buyer will have been able to enter into an agreement satisfactory to Buyer, in its sole discretion, with the counterparty to each Category II Assumed Contract specifying the terms and conditions upon which such counterparty will consent to Seller’s assumption of such Category II Assumed Contract and assignment thereof to Buyer pursuant to Section 365 of the Bankruptcy Code and to the release and discharge by such counterparty of Buyer from any liabilities or obligations thereon arising after the consummation of a Qualifying Transfer or, if Buyer and such counterparty have not entered into such an agreement, the Bankruptcy Court shall have issued an order permitting Seller to assume and assign such Category II Assumed Contract that is acceptable to Buyer, in its sole discretion; and (ii) Buyer will have been able to enter into agreement satisfactory to Buyer, in its sole discretion, with the counterparty to each Category III Assumed Contract specifying the terms and conditions upon which: (A) all of Seller’s Claims against such counterparty, and such counterparty’s counterclaims against Seller, are settled (subject to Bankruptcy Court approval); (B) such counterparty will consent to Seller’s assumption of such Category III Assumed Contract and assignment thereof to Buyer pursuant to Section 365 of the Bankruptcy Code and to the release and discharge by such counterparty of Buyer from any liabilities or obligations thereon arising after the consummation of a Qualifying Transfer or, if Buyer and such counterparty have not entered into such an agreement, the Bankruptcy Court has issued an order permitting Seller to assume and assign such Category III Assumed Contract that is acceptable to Buyer, in its sole discretion. If, by Closing, Buyer and any counterparty to a Category II Assumed Contract or Category III Assumed Contract have failed to enter into an agreement contemplated by this Section or, absent such agreement, the Bankruptcy Court has not entered an assumption and assignment order for a Category II

Assumed Contract or Category III Assumed Contract that is acceptable to Buyer, in its sole discretion, then, at Closing, Buyer may elect by written notice to Seller to treat the relevant Category II Assumed Contract or Category III Assumed Contract as an Excluded Asset and may reduce the amount of the Initial Purchase Price by the amount of the Prepetition Senior Obligations specified by Buyer in such notice. The specified reduction of the Initial Purchase Price shall be retained by Buyer as Prepetition Senior Obligations; provided that Buyer's claims against Seller's bankruptcy estate shall be limited to the Prepetition Senior Collateral and Buyer shall have no other recourse to Seller for the payment of such retained Prepetition Senior Obligations; provided, however, that Buyer shall retain the rights of a secured creditor under Section 1111(b) of the Bankruptcy Code. Seller agrees that the Sale Order will provide that the automatic stay pursuant to Section 362 of the Bankruptcy Code is vacated as to the Prepetition Senior Lender to permit it to perform in accordance with, and exercise, enjoy and enforce its respective rights, benefits, privileges and remedies pursuant to the Prepetition Senior Loan Documents without further application or motion to, or order from, the Bankruptcy Court, and that neither Section 105 of the Bankruptcy Code nor any other provision of the Bankruptcy Code, or any other law, shall be utilized to prohibit the Prepetition Senior Lender from the exercise, enjoyment and enforcement of any of such rights, benefits, privileges and remedies. The Initial Purchase Price as reduced in accordance with this Section 2.1(b) shall be the Purchase Price (the "Purchase Price").

(c) Buyer Not Prevailing Bidder.

If Buyer is not the Prevailing Bidder and the Prevailing Bidder has elected to reduce the amount of its purchase price to less than the amount of the Initial Purchase Price because it has elected to treat some or all of the Claims, the Category II Assumed Contracts and/or the Category III Assumed Contracts as Excluded Assets, then such reduced amount shall be retained by Buyer as Prepetition Senior Obligations. At the closing of the transaction with the Prevailing Bidder, the Prevailing Bidder shall be required to purchase from Buyer in Good Funds, and Buyer will be obligated to sell to the Prevailing Bidder, the retained Prepetition Senior Obligations (including without limitation, all unpaid principal, interest and all other obligations of Seller to Buyer arising under the Prepetition Senior Loan Documents through such closing) at par, on an "AS IS, WHERE IS, "AND WITH ALL FAULTS BASIS", without recourse to, or warranty by, Buyer except for Buyer's warranty that its title to the Prepetition Senior Loan Documents is free and clear of all Liens and encumbrances of any kind created by Buyer other than rights of third parties set forth in such Prepetition Senior Loan Documents.

(d) Payment of Purchase Price.

The Purchase Price shall be paid Buyer pursuant to a Bankruptcy Code § 363(k) credit bid. If, at the Auction described in Section 7.1(a)(ii) hereof, Buyer bids more than the Purchase Price, the Buyer shall pay such additional amount to Seller in cash if Buyer is the Prevailing Bidder.

## **2.2 Fair Price.**

Seller acknowledges that the Purchase Price is in excess of the amount Seller could reasonably expect to receive upon a forced liquidation of such Purchased Assets.

## **2.3 Tax Allocation.**

Each of the parties hereto agrees that the Purchase Price shall be allocated as reasonably determined by Buyer prior to the Closing in accordance with Section 1060 of the Code; provided that if such allocation is not agreed to by Buyer and Seller within 15 days prior to the anticipated Closing Date, such allocation shall be determined by the Independent Accounting Firm in accordance with Section 1060 of the Code. Each of the parties agrees to report this transaction for all state and federal tax purposes and all accounting purposes in accordance with such allocation.

## **2.4 Sales, Use and Other Taxes.**

Any sales, purchase, transfer, stamp, documentary stamp, use or similar taxes which may be payable by reason of the sale of the Purchased Assets under this Agreement or the transactions contemplated herein shall be paid by Buyer if not determined to be exempt under Section 1146(c) of the Bankruptcy Code.

## **2.5 Due Diligence.**

### **(a) Seller's Due Diligence Materials.**

Within 5 days after the Effective Date, Seller shall deliver to Buyer, complete and accurate copies, including in electronic format wherever available, to the extent in possession of Seller or under the direct or indirect control of Seller (except nothing herein shall obligate Seller to prepare any documentation not currently in existence) of the following (the "Due Diligence Materials"):

- (i) all contracts, agreements, leases, and other agreements that affect the ownership or operation of the Purchased Assets;
- (ii) all warranties and guarantees given to, assigned to or benefiting Seller or the Real Property or any other Purchased Asset regarding the construction, design, use, operation, management or maintenance of such Purchased Asset;
- (iii) all building permits and certificates of occupancy or of substantial completion issued with respect to the construction and ownership of the Real Property;
- (iv) real estate tax statements for real estate taxes and installments of special assessments due and payable in the calendar year of Closing with respect to the Premises and, if received by Seller, the valuation notice issued with respect

to the Premises for the real estate taxes payable in the calendar year following the calendar year of Closing;

(v) all plans and specifications with respect to the Real Property;

(vi) all environmental reports, asbestos reports, soil reports, property condition reports, ADA reports, engineering reports, and traffic reports or studies, relating to the Premises, including all drafts and letters and other documents that order, describe, or limit the scope of such tests, reports, or studies;

(vii) all equipment manuals relating to the Real Property;

(viii) Seller's current title insurance policy;

(ix) the most recent survey of the Real Property;

(x) all other records regarding real estate taxes and assessments, insurance, maintenance, repairs, and/or capital improvements; and

(xi) any other information Buyer reasonably requests with respect to the Purchased Assets.

(b) Buyer's Due Diligence.

Buyer may, at any time before the Closing Date at the sole cost and expense of Buyer, without the need for any advance notice to Seller, make any examinations, studies, inspections, and investigations of the Real Property that Buyer elects in its sole discretion, including but not limited to investigations regarding environmental conditions, geotechnical conditions, roof condition, floor thickness, radon, asbestos, and compliance with the Americans with Disabilities Act (the "ADA") and other applicable laws. Subject to Section 8.1 hereof, at all reasonable times before Closing, Seller shall make available to Buyer, for review and copying, and in electronic format wherever practicable, all books, records, and files in Seller's possession relating to the ownership and operation of the Purchased Assets, including, without limitation, title matters, tenant or subtenant files (if any), service and maintenance agreements, and other contracts, books, records, operating statements, and other information relating to the Purchased Assets. Seller shall in good faith assist and cooperate with Buyer in coming to a thorough understanding of the books, records, and files relating to the Real Property. At Buyer's request, Seller shall, at no cost to Seller, use commercially reasonable efforts to cause the authors of any appraisal, environmental and building inspection reports, and other similar reports, to issue reliance letters addressed to Buyer and Buyer's lender, if any, in form and substance reasonably acceptable to Buyer, at least 15 days before the Closing Date.

Buyer agrees that all materials obtained through due diligence with respect to the Business and Purchased Assets shall be used for evaluating the Contemplated Transactions or in connection with the DIP Lender's and Prepetition Senior Lender's enforcement of their respective rights and remedies pursuant to the Postpetition Loan Documents and the Prepetition Senior Loan Documents, as the case may be, and that such due diligence materials may be delivered to any of Buyer's transferees (or prospective transferees) of the Business and the

Purchased Assets so long as such Person has signed a confidentiality agreement similar to the confidentiality agreement required by William Blair to be signed by a prospective bidder pursuant to the Bidding Procedures Order.

(c) Casualty Loss.

If between the Effective Date and the Closing Date, all or any part of the Real Property is damaged by fire or other casualty, Seller shall immediately give Buyer written notice of the casualty. Except in the case of any emergency, Seller shall not repair or replace any such damage or adjust any loss with any insurer without Buyer's written consent, which consent Buyer shall be entitled to withhold in its sole discretion. Seller shall perform all repairs and replacements of any such casualty damage before Closing that Buyer reasonably requires so long as such repairs and replacements have been approved by the DIP Lender as an Approved Budget Expenses and are funded by an advance on the Postpetition Facility. At Closing Seller shall assign to Buyer all of Seller's interest in any insurance proceeds paid or payable to Seller on account of any casualty damage, less any reasonable costs Seller incurs in repairing any casualty damage with Buyer's written consent and less any cost incurred by Seller in obtaining or seeking to obtain any insurance proceeds if DIP Lender permits Seller to do so under the Postpetition Loan Documents.

### ARTICLE III CLOSING

#### 3.1 Closing.

The Closing of the transactions provided for herein (the "Closing") shall take place at the offices of Seller's counsel or such other location upon which the parties may mutually agree.

#### 3.2 Closing Date.

The Closing shall be held within five days after satisfaction or waiver of the conditions to Closing in Article 4 (other than the conditions to be satisfied at Closing) (the date of such Closing, the "Closing Date") but in no event later than thirty (30) days after the Sale Approval Order (the "Outside Date"), provided, that Buyer may extend the Outside Date to a date which is not later than sixty (60) days after the Sale Approval Order if Buyer is ready, willing and able to close the Contemplated Transactions, but Seller is not so ready, willing or able; provided further, however, that Seller may extend the Outside Date to a date which is not later than sixty (60) days after the Sale Approval Order if all third-party consents set forth on Schedule 4.2 have not been received and Buyer has not waived the requirement to obtain any such consent. If the conditions to Closing have not been satisfied or waived by the Outside Date, then any party who is not in default hereunder may terminate this Agreement. Alternatively, the parties may mutually agree to an extended Closing Date without further approval of the Bankruptcy Court. Until this Agreement is either terminated or the parties have agreed upon an extended Closing Date, the parties shall diligently continue to work to satisfy all conditions to Closing.

### **3.3 Transfer of Purchased Assets and Assumed Liabilities.**

At the Closing, in addition to the payment of the Purchase Price by Buyer to Seller, the parties agree that:

(a) Instruments of Assignment.

Seller shall effect the sale, conveyance, assignment, transfer and delivery of the Purchased Assets to Buyer by delivering to Buyer assignment and assumption agreements, quit claim deeds, bills of sale and other documents of assignment and transfer (collectively, the "*Instruments of Assignment*") as are reasonably necessary to vest in Buyer good and valid title to the Purchased Assets, free and clear of all Liens, except for Permitted Encumbrances, in form and substance reasonably acceptable to the parties.

(b) Instruments of Assumption.

Buyer shall deliver to Seller assignment and assumption agreements, deeds, instruments, documents or agreements in form and substance reasonably acceptable to the parties (collectively, the "*Instruments of Assumption*") as are reasonably necessary to evidence Buyer's assumption of and agreement to pay and discharge the Assumed Liabilities.

(c) Possession.

The right to possession of the Purchased Assets shall transfer to Buyer at 12:01 a.m. on the Closing Date. Seller shall transfer and deliver to Buyer on the Closing Date such keys, lock and safe combinations and other similar items as Buyer shall reasonably require to obtain immediate and full occupation and control of the Purchased Assets, and shall also make available to Buyer at Seller's then existing locations all documents in Seller's possession that are required to be transferred to Buyer by this Agreement. None of the foregoing documents shall increase in any material way the burdens imposed by this Agreement upon Seller or Buyer. Seller shall deliver exclusive legal and actual possession of the Real Property to Buyer on the Closing Date, subject only to the Permitted Encumbrances, in a physical condition that is equal to or better than the physical condition of the Real Property on the Execution Date, subject only to casualty damage, and reasonable wear and tear and broom-clean with substantially all garbage and personal property properly removed from the Real Property other than personal property that constitutes Purchased Assets.

(d) Professional Fees.

Buyer shall pay to Bryan Cave LLP and William Blair at Closing any fees and expenses payable by Buyer pursuant to Section 1.3(a) hereof.

**ARTICLE IV**  
**CONDITIONS PRECEDENT TO CLOSING**

**4.1 Conditions to Seller's Obligations.**

Seller's obligation to make the deliveries required of Seller at the Closing Date shall be subject to the satisfaction or waiver by Seller of each of the following conditions.

(a) Compliance.

All of the representations and warranties of Buyer contained herein shall continue to be true and correct at the Closing in all material respects, all covenants and obligations to be performed or complied with by Buyer prior to the Closing shall have been performed or complied with in all material respects, and Buyer shall have certified the foregoing to Seller in writing.

(b) Purchase Price.

Seller shall have received the Purchase Price.

(c) Instruments of Assumption.

Buyer shall have executed and delivered to Seller the Instruments of Assumption.

(d) Authorization.

Buyer shall have delivered to Seller appropriate evidence of all necessary action by Buyer in connection with the Contemplated Transactions, including, without limitation: (i) certified copies of resolutions duly adopted by Buyer's governing body approving the Contemplated Transactions and authorizing the execution, delivery and performance by Buyer of this Agreement; and (ii) a certificate as to the incumbency of officers or other authorized agents of Buyer executing this Agreement and any instrument or other document delivered in connection with the Contemplated Transactions.

(e) Proceedings.

No action, suit or other proceedings shall be pending before any court, tribunal or Governmental Entity seeking to restrain or prohibit the consummation of the Contemplated Transactions, or seeking to obtain substantial damages in respect thereof, or involving a claim that consummation thereof would result in the violation of any law, decree or regulation of any governmental authority having appropriate jurisdiction.

(f) Bankruptcy Court.

The Bankruptcy Court shall have entered the Bidding Procedures Order as contemplated by Section 7.1(a) in a form acceptable to the Buyer and Seller, and the

Bidding Procedures Order shall not have been appealed or otherwise formally challenged in court, or if appealed or otherwise challenged, not stayed, as of the Closing Date.

(g) Sale Approval Order.

The Bankruptcy Court shall have entered the Sale Approval Order in a form acceptable to the Buyer and Seller and the Sale Approval Order shall not have been appealed or otherwise formally challenged in court, or if appealed or otherwise challenged, not stayed, as of the Closing Date.

**4.2 Conditions to Buyer's Obligations.**

Buyer's obligation to make the deliveries required of Buyer at the Closing shall be subject to the satisfaction or waiver by Buyer of each of the following conditions:

(a) Compliance.

All representations and warranties of Seller contained herein shall be true and correct at the Closing in all material respects, all covenants and obligations to be performed or complied with by Seller prior to or on the Closing shall have been performed or complied with in all material respects and Seller shall have certified the foregoing to Buyer in writing.

(b) Instruments of Assignment.

Seller shall have executed and delivered to Buyer the Instruments of Assignment and a certificate of non-foreign status for such Seller in the form required under Treasury Regulation Section 1.1445-2(b).

(c) Proceedings.

No action, suit or other proceedings shall be pending before any court, tribunal or Governmental Entity seeking or threatening to restrain or prohibit the consummation of the Contemplated Transactions, or seeking to obtain substantial damages in respect thereof, or involving a claim that consummation thereof would result in the violation of any law, decree or regulation of any governmental authority having appropriate jurisdiction.

(d) Material Adverse Effect.

There shall not have occurred and be continuing a Material Adverse Effect.

(e) Notices and Absence of Orders.

All parties entitled to notice including but not limited to all parties claiming a Lien, mortgage, security interest or other interest in any Purchased Asset shall have been sent timely and proper notice. No order shall have been issued restricting, prohibiting or staying the consummation of the Contemplated Transactions.



(f) Bidding Procedures Order.

The Bankruptcy Court shall have entered the Bidding Procedures Order as contemplated by Section 7.1(a) in a form acceptable to the Buyer, no later than October 28, 2008, and the Bidding Procedures Order shall not have been stayed if it has been appealed or otherwise challenged; provided that Buyer, in its sole discretion, may require that Seller proceed with Closing by the Closing Date notwithstanding that the Bankruptcy Court enters the Bidding Procedures Order after such date.

(g) Sale Approval Order.

The Bankruptcy Court shall have entered the Sale Approval Order in a form acceptable to the Buyer no later than December 19, 2008, and the Sale Approval Order shall not have been stayed if it has been appealed or otherwise challenged; provided that Buyer, in its sole discretion, may require that Seller proceed with Closing by the Closing Date notwithstanding that the Bankruptcy Court enters the Sale Approval Order after such date.

(h) Third-Party Consents.

Each of the consents set forth on Schedule 4.2 shall have been received by Buyer and shall be in full force and effect.

(i) Real Estate Deliveries.

Buyer shall have obtained for the Real Property, a commitment for title insurance with respect to the Premises, issued by a title insurance company reasonably acceptable to Buyer (the "Title Insurer") subject only to: (1) real estate taxes not yet due and payable; (2) zoning and building laws or ordinances; (3) utility easements of record, provided the Improvements do not encroach thereon; (4) Buyer's mortgage, trust deed, or other security documents, (5) liens or other matters insured over by the Title Insurer, (6) the Assessment Agreement; (7) acts done or suffered by Buyer; and (8) Permitted Encumbrances. Buyer shall pay all charges with respect thereto, including deed and mortgage recording charges, mortgage title insurance policy, and all costs of escrow, if any.

(j) Ground Lessee Estoppel.

The Ground Lessee shall have executed and delivered to Buyer an Estoppel in form and substance reasonably satisfactory to the Buyer.

## ARTICLE V TERMINATION

### 5.1 Termination.

This Agreement may be terminated, and the Contemplated Transactions may be abandoned:

(a) Mutual Written Agreement.

Any time before the Closing, by mutual written agreement of Seller and Buyer;

(b) Breach; Non-Satisfaction of Conditions Precedent.

Any time before the Closing, by Seller, on the one hand, or Buyer, on the other hand,

(i) in the event of a material breach hereof by any non-terminating party if such non-terminating party fails to cure such breach within five (5) business days following notification thereof by the terminating party; or

(ii) upon notification to the non terminating party by the terminating party that the satisfaction of any condition to the terminating party's obligations set forth in Article 4 of this Agreement becomes impossible or impracticable with the use of commercially reasonable efforts if the failure of such condition to be satisfied is not caused by a breach hereof by the terminating party.

(c) Certain Termination Rights by Buyer.

By Buyer, upon two (2) business days' prior written notice to Seller, if:

(i) Buyer is not determined to be the Prevailing Bidder or Back-Up Bidder (as defined in the Bidding Procedures) upon the conclusion of the Auction, or in any event, upon consummation of a sale if to a party other than to Buyer;

(ii) the Closing has not taken place by the Outside Date other than by reason of a material breach of this Agreement by Buyer; or

(iii) the Bidding Procedures Order or the Sale Approval Order have not been entered and approved by the Court by the date set forth in Section 4.2(f) or (g), as applicable, or either the Bidding Procedures Order or the Sale Approval Order has been materially modified from the forms attached hereto (in a form not reasonably acceptable to Buyer in writing) and entered and approved by the Court, as applicable.

(d) Certain Termination Rights by Seller.

By Seller, upon two (2) business days' prior written notice to Buyer, if:

(i) Buyer is not determined to be the Prevailing Bidder or Back-Up Bidder (as defined in the Bidding Procedures) upon the conclusion of the Auction; or

(ii) the Closing has not taken place by the Outside Date, other than by reason of a material breach of this Agreement by Seller.

## **5.2 Time Periods.**

The time periods for termination of this Agreement set forth in Sections 5.1(c)(ii), 5.1(c)(iii) or 5.1(d)(i) may be extended by mutual written agreement of Seller and Buyer without further order of the Bankruptcy Court.

## **5.3 Effect of Termination.**

### **(a) Ongoing Liabilities.**

If this Agreement is validly terminated pursuant to Section 5.1, there will be no liability or obligation on the part of any party (or any of their respective officers, directors, employees, partners, agents or other representatives or Affiliates), except as provided in Sections 5.3(b), 5.3(c) and 10.9 and which provisions will continue to apply following any such termination.

### **(b) Breach.**

Notwithstanding any other provision in this Agreement to the contrary, upon termination of this Agreement pursuant to Sections 5.1(b), 5.1(c) and 5.1(d), Seller will remain liable to Buyer for any breach of this Agreement by Seller existing at the time of such termination (and Buyer may seek to have (and Seller shall not oppose) any such damages resulting from such breach be treated as an administrative expense in the Bankruptcy Case), and Buyer will remain liable to Seller for any breach of this Agreement by Buyer existing at the time of such termination. Failure of any party to satisfy any of the conditions set forth in Sections 4.1 or 4.2 of this Agreement shall not be deemed a breach of this Agreement by such party except to the extent that such failure also constitutes a breach of a representation, warranty or covenant.

### **(c) Expense Reimbursement.**

Notwithstanding anything to the contrary set forth in this Agreement, in the event of termination of this Agreement pursuant to Section 5.1(b) by Buyer, Section 5.1(c) by Buyer or Section 5.1(d) by Seller, Seller shall pay the Expense Reimbursement (as defined in Section 7.1(a)(iii)) to the Buyer on the later of (i) January 15, 2009 and (ii) the termination of this Agreement; provided that Seller shall pay the Expense Reimbursement upon the consummation of a Competing Transaction if earlier if the Bankruptcy Court has approved payment thereof in the Bidding Procedures Order as contemplated by Section 7.1.

## **ARTICLE VI REPRESENTATIONS AND WARRANTIES**

### **6.1 Seller's Representations and Warranties.**

Seller hereby makes the following representations and warranties to Buyer:

(a) Validity of Agreement.

Upon obtaining the Sale Approval Order, this Agreement and the other agreements contemplated hereby to which it is a party to be delivered at Closing shall constitute the valid and binding obligation of Seller enforceable in accordance with its terms.

(b) Organization, Standing and Power.

Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Kansas. Subject to the applicable provisions of bankruptcy law, Seller has all requisite limited liability company power and authority to own, lease and operate its properties, to carry on its business as now being conducted and, subject to Seller obtaining the Sale Approval Order, to execute, deliver and perform this Agreement and all agreements relating hereto to which it is a party.

(c) No Conflicts or Violations.

Upon obtaining the Sale Approval Order and other than obtaining the consents as set forth on Schedule 4.2, the execution and delivery of this Agreement, the consummation of the transactions herein contemplated, and the performance of, fulfillment of and compliance with the terms and conditions hereof by Seller do not and will not: (i) conflict with or result in a breach of the organizational documents of Seller; (ii) violate, or require any notice or consent under, any statute, law, rule or regulation, or any order, writ, injunction or decree of any court or governmental authority applicable to Seller; or (iii) violate, conflict with, constitute a default under, give any third party the right to terminate or modify, or require any notice or consent, under any agreement, instrument or writing of any nature to which Seller is a party or the Purchased Assets may be bound.

(d) Brokers.

Other than William Blair, Seller has not retained any broker or finder in connection with the Contemplated Transactions and, other than Seller's obligation to pay William Blair, Seller is not obligated and has not agreed to pay any brokerage or finders' commission, fee or similar compensation to any Person in connection with the Contemplated Transactions.

(e) Title to Purchased Assets.

Seller has good and marketable title to the Purchased Assets or a valid right to use all of the Purchased Assets pursuant to an Assumed Contract. At the Closing, Buyer will acquire all of Seller's right, title and interest in and to all the Purchased Assets owned by Seller, free and clear of any Liens other than Permitted Encumbrances, but subject to the Liens created by the Prepetition TIF Loan Documents. Seller does not own or hold the right to acquire any shares of stock or any other security or interest in any other Person.

(f) Tax Matters.

Except as set forth on Schedule 6.1(f): (i) Seller has timely filed all federal, state, local and foreign income, information and other Tax Returns which are required to be filed with respect to the Business, its assets or its activities, properties or employees; (ii) all such Tax Returns are true, complete and accurate in all respects and such filings accurately reflect the Tax liabilities of Seller in all respects; (iii) assessments and other governmental charges imposed upon Seller with respect to the Business, or upon any of the assets, income, compensation to its employees or franchises of Seller relating to the Business, have been timely paid or, if not yet payable, will be timely paid and are adequately accrued on Seller's books and records; and (iv) there are no actual or proposed Tax deficiencies, assessments or adjustments with respect to the Business or any assets or operations of Seller with respect to the Business.

(g) Environmental.

(i) Except as set forth on Schedule 6.1(g), to the Knowledge of Seller (A) Seller is in compliance with all applicable Environmental Laws and has obtained and is in compliance, in all material respects, with all Environmental Permits in connection with the conduct or operation of the Business and the ownership or use of the Purchased Assets and (B) there are no orders, injunctions, investigations, requests, judgments, decrees, rulings, assessments, notices of violation, information requests, or demands pursuant to any Environmental Law or with respect to any environmental matter pending or, to the Knowledge of Seller, threatened against Seller in connection with the conduct or operation of the Business or the ownership or use of the Purchased Assets.

(ii) Except as set forth on Schedule 6.1(g), to the Knowledge of Seller, there has been no spill, discharge, leak, emission, migration or other leak or threatened leak of any Hazardous Materials by Seller, by any of Seller's predecessors in interest or by any other Person or entity for which any of the Seller or Buyer is or may be held responsible, at the Real Property or any property formerly leased or owned by Seller or at any Off-Site Improvement and no Hazardous Materials are present on the Real Property in violation of, or which could give rise to any obligation or Environmental Liability under, Environmental Laws.

(iii) Schedule 6.1(g) sets forth a complete list, to the Knowledge of Seller, of all underground storage tanks that are now present at, or have heretofore been removed by Seller, or to Seller's knowledge, by any other Person, from the Premises or any Leased Real Property.

(h) Real Property.

(i) Seller does not own or hold a leasehold interest in any real property other than the Real Property.

(ii) Seller does not lease any real property for use in the Business other than the Substation Site. With respect to the Substation Site: (A) neither Seller nor, to Seller's knowledge, the Ground Lessee is in breach or default, and no event has occurred which, with notice or lapse of time or both, would constitute such a breach or default or permit termination, modification or acceleration under the Ground Lease or the Substation Sublease; (B) no party to the Ground Lease or the Substation Sublease has repudiated any provision thereof; (C) there are no disputes, oral agreements or forbearance programs in effect as to the Ground Lease or the Substation Sublease; (D) the Ground Lease and the Substation Sublease have not been modified in any respect, except to the extent that such modifications are disclosed by the documents delivered to Buyer; and (E) Seller has not assigned, transferred, conveyed, mortgaged, deeded in trust or encumbered any interest in the Ground Lease or the Substation Sublease except pursuant to the Postpetition Loan Documents in favor of the DIP Lender and to the Prepetition Loan Documents in favor of the Prepetition Senior Lender and Lurgi.

(i) Litigation.

Except as set forth on Schedule 6.1(i), neither Seller nor any of the Purchased Assets are subject to any litigation, action, suit or proceeding by or before any court, arbitrator or federal, state or other governmental agency, commission or board, or by any private party, and to Seller's knowledge, no such litigation, action, suit or proceeding is pending or threatened.

(j) Records.

All accounts, books, ledgers and official or other records of whatever kind included within the Purchased Assets have been fully, properly and accurately kept and completed in all respects and there are no inaccuracies or discrepancies of any kind contained or reflected therein.

(k) WARN ACT; COBRA.

Assuming the DIP Lender has funded all amounts owing by Buyer to Seller under the Approved Budget Expenses relating to employees, Seller has paid (or will pay on or prior to Closing) all liabilities and obligations relating to any employee or any employee benefits including without limitation, liability under COBRA or the WARN Act.

(l) "AS IS" Transaction.

BUYER HEREBY ACKNOWLEDGES AND AGREES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN SECTION 6.1, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO ANY MATTER RELATING TO THE PURCHASED ASSETS OR ASSUMED LIABILITIES. WITHOUT IN ANY WAY LIMITING THE FOREGOING, SELLER HEREBY DISCLAIMS ANY WARRANTY, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE AS TO ANY PORTION OF THE

PURCHASED ASSETS. BUYER FURTHER ACKNOWLEDGES THAT BUYER HAS CONDUCTED AN INDEPENDENT INSPECTION AND INVESTIGATION OF THE PHYSICAL CONDITION OF THE PURCHASED ASSETS AND ALL SUCH OTHER MATTERS RELATING TO OR AFFECTING THE PURCHASED ASSETS AS BUYER DEEMED NECESSARY OR APPROPRIATE AND THAT IN PROCEEDING WITH ITS ACQUISITION OF THE PURCHASED ASSETS, EXCEPT FOR ANY REPRESENTATIONS AND WARRANTIES EXPRESSLY SET FORTH IN SECTION 6.1, BUYER IS DOING SO BASED SOLELY UPON SUCH INDEPENDENT INSPECTIONS AND INVESTIGATIONS. ACCORDINGLY AND EXCEPT AS OTHERWISE SET FORTH HEREIN, BUYER WILL ACCEPT THE PURCHASED ASSETS AT THE CLOSING “AS IS,” “WHERE IS,” AND “WITH ALL FAULTS.”

## **6.2 Buyer’s Representations and Warranties.**

Buyer hereby makes the following representations and warranties to Seller:

(a) Validity of Agreement.

This Agreement and the other agreements contemplated hereby to which it is a party, when executed and delivered by Buyer, shall constitute the valid and binding obligation of Buyer enforceable in accordance with its terms.

(b) Organization, Standing and Power.

Buyer is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Buyer has all requisite power and authority to own, lease and operate its properties, to carry on its business as now being conducted and to execute, deliver and perform this Agreement and all writings relating hereto.

(c) No Conflicts or Violations.

The execution and delivery of this Agreement, the consummation of the transactions herein contemplated, and the performance of, fulfillment of and compliance with the terms and conditions hereof by Buyer do not and will not: (i) conflict with or result in a breach of the organizational documents of Buyer; (ii) violate or require any notice or consent under any statute, law, rule or regulation, or any order, writ, injunction or decree of any court or governmental authority; or (iii) violate or conflict with or constitute a default under any agreement, instrument or writing of any nature to which Buyer is a party or by which Buyer or its assets or properties may be bound.

(d) Brokers.

Buyer has not retained any broker or finder in connection with the Contemplated Transactions and is not obligated and has not agreed to pay an brokerage or finders’ commission, fee or similar compensation to any Person in connection with the Contemplated Transactions.

**ARTICLE VII  
BANKRUPTCY MATTERS**

**7.1 Bankruptcy Court Approvals.**

(a) Bankruptcy Court's Approval of Sale Procedures.

Promptly following the Execution Date (and in no event later than four days thereafter), Seller will file a motion (the "Motion") with the Bankruptcy Court requesting the entry of an order (the "Bidding Procedure Order") substantially in the form attached hereto as Schedule 7.1(a) which, among other items:

(i) fixes the time, date and location of a hearing to approve Seller's consummation of this Agreement;

(ii) fixes the time and date of an auction (the "Auction") to be held at the offices of Seller's counsel or as otherwise designated by Seller at which higher and better offers may be presented to Seller in accordance with the Bidding Procedure Order;

(iii) provides that, if Seller receives from a third party a higher and better offer at the Auction in accordance with the Bidding Procedure Order, and such third-party offer is subsequently approved by the Bankruptcy Court, then Buyer will be entitled to receive from Seller a flat fee payment in Good Funds in the amount of Buyer's Transaction Expenses and any out-of-pocket expenses including, without limitation, reasonable attorney's fees and legal expenses, incurred by the DIP Lender, the Prepetition Senior Lender or the Prepetition TIF Lender in connection with the Bankruptcy Case that have not been paid by Seller as an Approved Budget Expense from an advance on the Postpetition Facility or by the Prevailing Bidder as part of the Prevailing Bid (the "Expense Reimbursement"); provided, that the Expense Reimbursement shall not be greater than \$250,000. The Expense Reimbursement shall be paid to Buyer in accordance with Section 5.3(c) (and shall be paid from the first monies available from the sale proceeds at the time of such closing if not paid earlier). The Expense Reimbursement shall be deemed an administrative expense in the Chapter 11 Bankruptcy Case;

(iv) provides for bidding procedures substantially in accordance with the bidding procedures ("Bidding Procedures") attached as part of Schedule 7.1(a); and

(v) is in all ways in a form satisfactory to Buyer.

(b) Bidding Procedures Order.

Following the filing of the Motion, Seller shall use reasonable efforts to obtain entry of, and cooperate reasonably with Buyer and its representatives in connection with, the Bidding Procedures Order.



(c) Bankruptcy Court's Approval of Sale.

As part of the Motion, Seller shall request entry of an order (the "Sale Approval Order") which, among other items required by Buyer:

(i) approves the sale of the Purchased Assets to Buyer on the terms and conditions set forth in this Agreement and authorizes Seller to proceed with this transaction if Buyer is the Prevailing Bidder (or if Buyer is the Back-up Bidder and the transaction with the Prevailing Bidder is not consummated);

(ii) includes a specific finding that Buyer is a good-faith purchaser of the Purchased Assets purchased from Seller;

(iii) states that the sale of the Purchased Assets from Seller to Buyer shall be free and clear of all Liens whatsoever other than Permitted Encumbrances; and

(iv) approves the assumption and assignment of the Assumed Contracts of Seller pursuant to Section 365 of the United States Bankruptcy Code.

(d) Sale Approval Order.

Following the filing of the Motion, Seller shall use reasonable efforts to obtain entry of, and cooperate reasonably with Buyer and its representatives in connection with, the Sale Approval Order and the bankruptcy proceedings in connection therewith if Buyer is the Prevailing Bidder (or the Back-Up Bidder and the sale to the Prevailing Bidder is not consummated).

**7.2 Rejection of Contracts.**

On or prior to thirty (30) days after the Execution Date, Buyer may notify Seller in writing of any Contracts that Buyer wishes to have Seller reject in the Bankruptcy Case and not be Assumed Contracts (the "Rejected Contracts") and Seller shall reject all such Rejected Contracts promptly after the Closing. Except for such Rejected Contracts, Seller agrees not to reject any other Contracts of Seller without Buyer's prior written consent.

**7.3 Assumption of Contracts; Claims.**

Buyer shall designate in writing, within thirty (30) days after the Execution Date, the executory contracts and unexpired leases to be assumed and assigned to Buyer as Assumed Contracts and the Claims that will comprise part of the Purchased Assets. Such designation is subject to Buyer's right up to the Closing, by written notice to Seller from time to time to exclude from or add to the list of previously designated Assumed Contracts and/or Claims and to change the categorization of any Assumed Contract as a Category I Assumed Contract, a Category II Assumed Contract or a Category III Assumed Contract. Seller shall take all necessary steps to assume and assign to the Buyer all designated Assumed Contracts and shall co-operate with Buyer in Buyer's negotiations with the counterparties to the Category II Assumed Contracts and Category III Assumed Contracts. Subject to the limitations set forth in

Section 1.3(a)(i), Buyer shall cure any and all monetary liabilities and breaches and satisfy any monetary liability or obligation arising from or relating to pre-Closing periods under the Category I Assumed Contracts, so that such Category I Assumed Contracts may be assigned by Seller to Buyer in accordance with the provisions of Section 365 of the Bankruptcy Code and any orders of the Bankruptcy Court effectuating such assumptions and assignments. Except for Category II Assumed Contracts and Category III Assumed Contracts that Buyer has designated as Excluded Assets pursuant to Section 2.1(b) hereof, Buyer shall further cure any and all monetary defaults and breaches and satisfy any monetary liability or obligation arising from or relating to pre-Closing periods under the Category II Assumed Contracts and the Category III Assumed Contracts in accordance with the agreement between Buyer and the counterparty to the relevant Category II Assumed Contract or Category III Assumed Contract or, absent such an agreement, the Bankruptcy Court order pertaining thereto, so that such Category II Assumed Contracts and Category III Assumed Contracts may be assigned by Seller to Buyer in accordance with the provisions of Section 365 of the Bankruptcy Code and any orders of the Bankruptcy Court effectuating such assumptions and assignments

#### **7.4 Environmental Notices Through Sale Approval Order.**

Pursuant to Rule 2002(a)(2) of the Federal Rules of Bankruptcy Procedure, Seller shall use commercially reasonable efforts to mail copies of the Notice of Sale and Bidding Procedures to any and all creditors and equityholders of Seller, including, without limitation, any potential creditors holding claims relating to Environmental Liabilities, and to any other creditors and equityholders reasonably requested by Buyer.

### **ARTICLE VIII PRE-CLOSING COVENANTS**

#### **8.1 Access to Records and Properties of Seller.**

From and after the date of this Agreement until the Closing Date, Seller shall, upon reasonable advance notice, afford to Buyer's officers, independent public accountants, counsel, lenders, consultants and other representatives reasonable access during normal business hours to the Purchased Assets and all records pertaining to the Purchased Assets or the Business. Buyer, however, shall not be entitled to access to any materials containing privileged communications or information about employees, disclosure of which might violate an employee's reasonable expectation of privacy.

#### **8.2 Operation of Seller's Business Pending Closing.**

Unless Buyer otherwise consents, during the period prior to the Closing Date, Seller shall:

- (a) preserve the Project and the Purchased Assets in the condition in which they existed on the Petition Date and in accordance with the Maintenance Requirements;
- (b) keep the Purchased Assets insured in the amounts and with coverage at least as great as the amounts and coverage in effect as of the date hereof (and not to cancel any insurance policies covering the Purchased Assets or take, or fail to take, any action

that would enable the insurers under such policies to avoid liability for claims arising out of any occurrences prior to Closing);

(c) maintain compliance in all material respect, with all laws, rules and regulations of all Governmental Entities that relate to the Business or the Purchased Assets;

(d) not incur any additional Indebtedness, except Postpetition Indebtedness;

(e) not increase the compensation, incentive arrangements or other benefits to any officer or employee outside of the ordinary course of business;

(f) not redeem, purchase or otherwise acquire directly or indirectly any of Seller's issued and outstanding members interest, or any outstanding rights or securities exercisable or exchangeable for or convertible into its members interest;

(g) not enter into any transaction, arrangement or contract with any Person except pursuant to the Bidding Procedures Order or on an arm's-length basis in the ordinary course of business consistent with past custom and practice; or

(h) not purchase, sell, lease or dispose of any Purchased Assets except for immaterial transactions in the ordinary course of business.

### **8.3 Notification of Certain Matters.**

Seller shall give prompt notice to Buyer of:

(a) the occurrence or non-occurrence of any event of which Seller has Knowledge that:

(i) would reasonably be likely to make any representation or warranty of Seller contained in this Agreement to be untrue or inaccurate in any material respect at any time from the date hereof to the Closing, or

(ii) constitutes any Material Adverse Effect;

(b) any material failure of Seller to comply with or satisfy any covenant, condition or agreement to be complied with or satisfied by it hereunder.

Delivery of any notice pursuant to this Section 8.3 shall not limit or affect Buyer's rights and remedies hereunder.

### **8.4 Employees of Seller.**

Buyer shall have the right (but not the obligation) to make offers of employment to any employees of the Business upon terms and conditions determined by Buyer, with such employment commencing on or after the Closing Date (those persons who have accepted offers

of employment are referred to collectively as the “*Transferred Employees*”). Immediately prior to the Closing, Seller shall terminate all of the Transferred Employees.

#### **8.5 Public Announcement.**

Seller shall not issue a press release or otherwise make any public statements with respect to the Contemplated Transactions, except as may be required by Law or with respect to filings to be made with the Bankruptcy Court in connection with this Agreement (in which case Seller shall notify Buyer as promptly as practicable and prior to making such public statement), without the prior consent of Buyer, which consent shall not be unreasonably withheld; provided, that after the filing with the Bankruptcy Court of this Agreement, Seller shall be entitled to provide copies of this Agreement to other potential bidders prior to the auction contemplated by the Bidding Procedures Order.

#### **8.6 Taxes.**

All real property Taxes, personal property Taxes or similar ad valorem obligations levied with respect to the Purchased Assets for the 2008 tax year shall be payable by Seller so long as the payment of such Taxes have been approved by the DIP Lender as an Approved Budget Expenses and are funded by an advance on the Postpetition Facility. If such Taxes are not paid by the Closing Date, the amount of such Taxes shall be deposited into escrow pursuant to an escrow agreement (the “*Escrow Agreement*”) that is satisfactory to Buyer, in its sole discretion. Any excess amount remaining after payment of such Taxes shall be distributed in accordance with the Escrow Agreement.

#### **8.7 Consents.**

Notwithstanding anything in this Agreement to the contrary, this Agreement shall not be deemed to constitute an agreement to transfer or assign any Assumed Contract or Permit if an attempted assignment thereof, without the consent of a third party, would constitute a breach or other contravention under any such Assumed Contract, Permit or Law to which Seller is a party or by which it is bound, or in any way adversely affect the rights of Seller or, upon transfer, Buyer under such Assumed Contract or Permit or any Purchased Asset if, and to the extent that, such breach, contravention or adverse affect survives Seller’s assumption and assignment of the Assumed Contract or Permit to Buyer pursuant to Section 365 of the Bankruptcy Code. Seller shall use its commercially reasonable best efforts to obtain any consents or waivers required to assign to Buyer any Assumed Contract, Permit or Purchased Asset that requires the consent of a third party, without any conditions to such transfer or changes or modifications of terms thereunder. If any such consent is not obtained prior to Closing, Seller and Buyer shall cooperate in any lawful and commercially reasonable manner, as Seller and Buyer shall agree, under which Buyer would obtain the economic claims, rights and benefits under such Assumed Contracts, Permits or Purchased Assets.

#### **8.8 Use of Name.**

From and after the Closing, Seller shall not, and shall cause its Affiliates not to, use or license or grant any third party the right to use any name, slogan, logo, trademark, service mark, trade name or Internet domain name that is likely to cause confusion with the names, slogans,

logos, trademarks, service marks, trade names and Internet domain names which are similar or reasonably likely to cause confusion with, the name "Gateway Ethanol" or any derivation thereof or any word deceptively similar to such word (collectively, the "Seller's Marks"). At the Closing, Seller shall file an amendment to its articles of organization with the Secretary of State of the State of Kansas and each state in which such Seller is qualified to do business, changing its name to a name that is not confusingly similar to, and not including, Seller's Marks.

#### **8.9 Competing Transactions.**

Seller shall use its best efforts to cause the hearing by the Bankruptcy Court relating to the approval of the Bidding Procedures Order to occur as soon as reasonably practicable after the date hereof. Prior to the time the Bankruptcy Court enters the Bidding Procedures Order, Seller will not enter into an agreement with any Person (other than Buyer) in connection with any sale or other disposition related to any or all of the Purchased Assets (a "Competing Transaction").

#### **8.10 Cooperation.**

Prior to the Closing, Buyer and Seller shall use reasonable commercial efforts to satisfy the conditions to Closing set forth in **Article 4**.

#### **8.11 Category III Assumed Contracts.**

At Buyer's request and at Buyer's sole cost and expense, Seller shall commence an adversary proceeding to determine the validity and extent of its Claims under each Category III Assumed Contract.

#### **8.12 Notice of Inquiry.**

Buyer agrees to notify any third party inquiring about a potential transaction involving the Purchased Assets of the Bankruptcy Case and the Bidding Procedures Order.

### **ARTICLE IX POST-CLOSING AGREEMENTS**

#### **9.1 Survival.**

The representations and warranties of Seller set forth in this Agreement and in any certificate delivered at Closing will expire and terminate effective as of the Closing and the Closing Date and no party shall have any liability with respect thereto after the Closing. The representations and warranties of Buyer set forth in this Agreement and in any certificate delivered at Closing will expire and terminate effective as of the Closing and the Closing Date and no party shall have any liability with respect thereto after the Closing.

## **9.2 Indemnifying Parties' Indemnification.**

Seller agrees to indemnify and hold Buyer harmless from and against any and all Damages arising out of or resulting from and will pay to Buyer the amount of Damages suffered thereby, together with any amount which it may pay or become obligated to pay on account of:

- (a) Seller's failure to perform or observe any term, provision, covenant or condition hereunder on Seller's part to be performed; and
- (b) the Excluded Liabilities.

## **9.3 Buyer's Indemnification.**

Buyer agrees to indemnify and hold Seller harmless from and against any and all Damages arising out of or resulting from and will pay to Seller the amount of Damages suffered thereby, together with any amount which it may pay or become obligated to pay on account of:

- (a) Buyer's failure to perform or observe any term, provision, covenant or condition hereunder on Buyer's part to be performed; and
- (b) the Assumed Liabilities.

## **9.4 Access to Records.**

From and after the Closing Date, Buyer shall, upon reasonable advance notice, afford to Seller's officers, independent public accountants, counsel, lenders, consultants and other representatives reasonable access during normal business hours to records pertaining to the Purchased Assets or the Business for purposes of administration of the Bankruptcy Case and/or the winding up of the businesses of Seller or filing of its Tax returns.

## **9.5 Avoidance Powers.**

From and after Closing, Buyer agrees to not assert the Avoidance Powers it acquires hereunder or to bring any employment claims against the Transferred Employees for actions taken in the course of their employment prior to the Closing.

## **9.6 Manner of Payment.**

Any indemnification of Buyer from Seller pursuant to Section 9.2 shall be made by payment of Good Funds from Seller within five business days after the determination thereof. Any indemnification of Seller by Buyer pursuant to Section 9.3 shall be effected by payment of Good Funds from Buyer within five business days after the determination thereof.

## **9.7 Further Assurances.**

Subject to the requirements of the Bankruptcy Code or an order of the Bankruptcy Court after the Closing Date, upon the reasonable request of Buyer, Seller, at Buyer's sole cost and expense, shall execute and deliver any and all further materials, documents and instruments of

conveyance, transfer or assignment as may reasonably be requested by Buyer to effect, record or verify the transfer to, and vesting in Buyer, of Seller's right, title and interest in and to the Purchased Assets in accordance with the terms of this Agreement.

**ARTICLE X  
MISCELLANEOUS**

**10.1 Notices.**

Unless otherwise provided herein, any notice, tender, or delivery to be given hereunder by either party to the other may be effected by personal delivery in writing, sent by facsimile or electronic transmission in PDF format or by registered or certified mail overnight mail, postage prepaid, return receipt requested, and shall be deemed communicated as of the date sent. Mailed notices shall be addressed as set forth below, but each party may change its address by written notice in accordance with this paragraph.

To Seller: Gateway Ethanol, L.L.C.  
c/o Frederick Loomis  
PO Box 8593  
Pratt, Kansas 67124  
Facsimile: (620) 672-1155

With a copy to: Bryan Cave LLP  
One Kansas City Plaza  
1200 Main Street, Suite 3500  
Kansas City, Missouri 64105-2100  
Attention: Larry Frazen  
Facsimile: (816) 374-3300

To Buyer: Dougherty Funding LLC  
Suite 4300  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Attention: Executive Vice President and Chief  
Operating Officer

With a copy to: Fabyanske, Westra, Hart & Thomson, P.A.  
800 LaSalle Avenue, Suite 1900  
Minneapolis, MN 55402  
Attn: Paul L. Ratelle  
Facsimile: 612-359-7602

## **10.2 Entire Agreement.**

This instrument and the documents to be executed pursuant hereto contain the entire agreement between the parties relating to the sale of the Purchased Assets and the other transactions contemplated hereby. Any oral representations or modifications concerning this Agreement or any such other document shall be of no force and effect excepting a subsequent modification in writing, signed by the party to be charged.

## **10.3 Modification.**

This Agreement may be modified, amended or supplemented only by a written instrument duly executed by all the parties hereto.

## **10.4 Closing Date.**

All actions to be taken on the Closing pursuant to this Agreement shall be deemed to have occurred simultaneously, and no act, document or transaction shall be deemed to have been taken, delivered or effected until all such actions, documents and transactions have been taken, delivered or effected; provided that immediately following delivery by Seller of the Purchased Assets, Buyer shall deliver the Purchase Price to Seller.

## **10.5 Severability.**

Should any term, provision or paragraph of this Agreement be determined to be illegal or void or of no force and effect, the balance of the Agreement shall survive.

## **10.6 Captions.**

All captions and headings contained in this Agreement are for convenience of reference only and shall not be construed to limit or extend the terms or conditions of this Agreement.

## **10.7 Further Assurances.**

Each party hereto will execute, acknowledge and deliver any further assurance, documents and instruments reasonably requested by any other party hereto for the purpose of giving effect to the Contemplated Transactions or the intentions of the parties with respect thereto.

## **10.8 Waiver.**

No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

## **10.9 Brokerage Obligations.**

Seller agrees that if any claims for commissions, expenses, fees or other compensation, including, without limitation, the fees and expenses of William Blair and any other brokerage



fees, finder's fees, expenses or commissions, are ever asserted against Buyer in connection with this transaction arising out of any actions taken or commitments made by Seller that exceed the Carve-Out for "Advisory Fees" set forth in the Orders, all such claims shall be handled and paid by Seller and, regardless of Section 9.1, Seller shall indemnify, defend (with counsel reasonably satisfactory to the party entitled to indemnification), protect, and save and hold the other harmless from and against any and all such claims or demands asserted by any Person in connection with the Contemplated Transactions and arising out of any actions taken or commitments made by Seller.

#### **10.10 Payment of Fees and Expenses.**

Except as provided in this Agreement, each party to this Agreement shall be responsible for, and shall pay, all of its own Transaction Expenses, including those of its counsel, incurred in the negotiation, preparation and consummation of the Agreement and the transaction described herein; provided, however, that Buyer's Transaction Expenses, including those of its counsel, shall be deemed to be Postpetition Indebtedness.

#### **10.11 Assignment; Binding Effect.**

Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any of the parties hereto (whether by operation of law or otherwise) without the prior written consent of the other parties, except that Dougherty may assign, in its sole discretion, any or all of its rights, interests and obligations hereunder to any Affiliate or to any direct or indirect wholly owned subsidiary of Buyer or to any purchaser of the Prepetition Senior Obligations and the Postpetition Indebtedness and upon such assignment, Dougherty shall be released and discharged from any liability hereunder. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of and be enforceable by, the parties and their respective successors, heirs and assigns.

#### **10.12 Applicable Law.**

This Agreement shall be governed by and construed in accordance with the laws of Minnesota, without giving effect to choice of law principles.

#### **10.13 Good Faith.**

All parties hereto agree to do all acts and execute all documents required to carry out the terms of this Agreement and to act in good faith with respect to the terms and conditions contained herein before and after Closing.

#### **10.14 Construction.**

In the interpretation and construction of this Agreement, the parties acknowledge that the terms hereof reflect extensive negotiations between the parties and that this Agreement shall not be deemed, for the purpose of construction and interpretation, drafted by either party hereto.

**10.15 Counterparts.**

This Agreement and the other agreements related hereto may be signed in counterparts. The parties further agree that this Agreement and the other agreements related hereto may be executed by the exchange of facsimile or PDF signature pages.

**10.16 Bankruptcy Court Jurisdiction.**

BUYER AND SELLER AGREE THAT THE BANKRUPTCY COURT SHALL HAVE EXCLUSIVE JURISDICTION OVER ALL DISPUTES AND OTHER MATTERS RELATING TO (A) THE INTERPRETATION AND ENFORCEMENT OF THIS AGREEMENT OR ANY ANCILLARY DOCUMENT EXECUTED PURSUANT HERETO, AND/OR (B) THE PURCHASED ASSETS AND/OR ASSUMED LIABILITIES, AND BUYER EXPRESSLY CONSENTS TO AND AGREES NOT TO CONTEST SUCH EXCLUSIVE JURISDICTION.

**10.17 No Third Party Beneficiaries.**

This Agreement is for the sole benefit of the parties hereto and their permitted assigns, and nothing herein expressed or implied (including Section 8.4) shall give or be construed to give any Person (other than the parties hereto and such assigns) any legal or equitable rights hereunder.

**10.18 Waiver of Right to Trial by Jury.**

Each party to this Agreement waives any right to trial by jury in any action, matter, proceeding regarding this Agreement or any provision hereof.

**10.19 Venue.**

If (a) the Bankruptcy Court relinquishes jurisdiction for a matter, or (b) the Bankruptcy Case is closed, the each party to this Agreement submits to the sole jurisdiction of any federal or state court sitting in Minneapolis, Minnesota in any action or proceeding arising out of or relating to this Agreement (including any action or proceeding for the enforcement of any arbitral award made in connection with any arbitration of a dispute hereunder) and agrees not to bring any action or proceeding arising out of or relating to this Agreement in any other court.

**10.20 Business Day.**

If the due date for any action to be taken under this Agreement (including the delivery of notices) is not a business day, then such action shall be considered timely taken if performed on or prior to the next business day following such due date.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, the parties hereto have executed this Asset Purchase Agreement as of the day and year first above written.

**SELLER:**

GATEWAY ETHANOL, L.L.C., a Kansas limited liability company, Debtor and Debtor-in-Possession

By: *Frederick S. Loomis*  
Name: FREDERICK S. LOOMIS  
Its: CHAIRMAN

**BUYER:**

DOUGHERTY FUNDING LLC, a Delaware limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed this Asset Purchase Agreement as of the day and year first above written.

**SELLER:**

GATEWAY ETHANOL, L.L.C., a Kansas  
limited liability company, Debtor and Debtor-in-  
Possession

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**BUYER:**

DOUGHERTY FUNDING LLC, a Delaware  
limited liability company

By: J. A. Tabolich

Name: J. A. TABOLICH

Its: DFP