

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

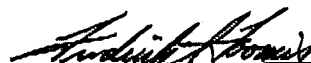
**[SIGNATURE PAGE FOLLOWS]**

Exhibit A

**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: FREDERICK S. LOOMIS  
Its: CHAIRMAN

**BUYER:**

DOUGHERTY FUNDING LLC, a Delaware  
limited liability company

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

SIGNATURE PAGE: ASSET PURCHASE AGREEMENT

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

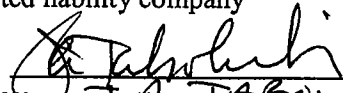
**SELLER:**

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:  \_\_\_\_\_  
Name: J. A. TABOLICH  
Its: DUP



## SCHEDULES TO ASSET PURCHASE AGREEMENT

Pursuant to the Asset Purchase Agreement dated as of October \_\_, 2008 (the “Agreement”), by and among DOUGHERTY FUNDING LLC, a Delaware limited liability company (“*Buyer*”) and GATEWAY ETHANOL, L.L.C., a Kansas limited liability company (“*Gateway*”), these schedules are being delivered by Sellers to Buyer. Each capitalized term used herein shall have the meaning assigned to it in the Agreement unless otherwise defined herein.

<u>Schedule</u>	<u>Title</u>
A	Premises Legal Description
B	Substation Premises Legal Description
C	Permitted Encumbrances
1.1(a)(i)(A)	Assumed Contracts—Construction Contracts
1.1(a)(i)(B)	Assumed Contracts—Operating Agreements
1.1(b)	Off-Site Improvements
1.1(f)	Prepaid Expenses
1.1(g)	Permits and Regulatory Approvals
1.1(j)	Claims
1.2(c)	Other Excluded Assets
1.3(a)(i)	Assumed Contracts Cure Obligations
4.2	Third-Party Consents
6.1(f)	Tax Matters
6.1(g)	Environmental
6.1(i)	Litigation
7.3	Bidding Procedures

**SCHEDULE A**

**Premises Legal Description**

TRACT NO. 1: That part of the Southeast Quarter lying North of the Railroad Right-of-Way in Section 23, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas.

TRACT NO. 2: The Northeast Quarter of Section 23, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas.

TRACT NO. 3: The East Half of the Southwest Quarter of Section 23, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas.

TRACT NO. 4: The Southeast Quarter of the Northwest Quarter of Section 23, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas.

TRACT NO. 5: That portion of the Northwest Quarter lying North of the Railroad Right-of-Way in Section 24, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas.

TRACT NO. 6: The Southwest Quarter of Section 13, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas, except the right of way of the Union Pacific Railroad.

TRACT NO. 7: A non-exclusive Easement for one gas pipeline across the North Half of Section 22, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas, and across the Southwest Quarter of the Northwest Quarter of Section 23, Township 27 South, Range 13 West of the 6th P.M., Pratt County, Kansas, for the benefit of Tract No. 4, recorded in Book 299, Page 457, subject to terms & provisions of said instrument.

TRACT NO. 8: Lots 10 and 11, Block 4, Smith and Brigg's Addition to the City of Pratt, Pratt County, Kansas, described as follows: Commencing at the Southwest corner of said Lot 10; thence South 88 degrees 49' 47" East (basis of bearings is assumed) along the South line of said Lot 10 a distance of 112.60 feet for the point of beginning; thence North 01 degree 08' 35" East parallel with the West line of said Lots 10 and 11 a distance of 88.40 feet; thence South 88 degrees 49' 47" East parallel with the South line of said Lot 10 a distance of 20.00 feet; thence South 01 degree 08' 35" West parallel with the West line of said Lots 10 and 11 a distance of 88.40 feet to the South line of said Lot 10; thence North 88 degrees 49' 47" West along the South line of said Lot 10 a distance of 20.00 feet to the point of beginning; provided, that upon further review of the real estate records, Seller's interest in Tract No. 8 could be limited to all water rights represented by vested water right PR 006 and a right of way easement across Tract 8.

TRACT NO. 9: A non-exclusive Easement for water well(s) and one water pipeline across the Northeast Quarter of Section 22 and Northwest Quarter of the Southwest Quarter and the Southwest Quarter of the Northwest Quarter of Section 23, all in Township 27 South,

Range 13 West of the 6th P.M., Pratt County, Kansas, for the benefit of Tract No. 4, recorded in Book 302, Page 5, subject to terms & provisions of said instrument.

**SCHEDULE B**

**Substation Premises Legal Description**

A portion of the East Half (E/2) of Section Twenty-three (23), Township Twenty-seven (27) South, Range Thirteen (13) West of the 6<sup>th</sup> P.M., Pratt County, Kansas, more particularly described as follows:

Commencing at the Southwest corner of the Northeast Quarter (SW/c NE/4) of Section 23, Township 27 South, Range 13 West of the 6<sup>th</sup> P.M.; thence with an assumed bearing of South 89°05'30" East along the South line of said Northeast Quarter 95.26 feet for the point of beginning; thence North 00°00'00" East 43.67 feet; thence North 90°00'00" East 175.00 feet; thence South 00°00'00" East 182.00 feet; thence North 90°00'00" West 175.00 feet; thence North 00°00'00" 138.33 feet to the point of beginning, containing 31,850.00 square feet subject to any easements and/or rights-of-way of record.

**Schedule C**

**Permitted Encumbrances**

1. Taxes or special assessments payable with respect to the 2009 calendar year
2. An easement for pipeline to Kathol Natural Gas, Inc. as to Tract No. 1 in the document recorded 3-6-69 as Book 116, Page 503 of Official Records; and any and all subsequent Assignments and Mortgages thereof.
3. An easement for pipeline to Kathol Natural Gas, Inc. as to Tract No.2 in the document recorded 1-15-69 as Book 116, Page 209 of Official Records; and any and all subsequent Assignments and Mortgages thereof.
4. An easement for pipeline to Kathol Natural Gas, Inc. as to Tract No.6 in the document recorded 1-15-69 as Book 116, Page 213 of Official Records; and any and all subsequent Assignments and Mortgages thereof.
5. An easement for electric transmission lines and poles to Ninneseah Rural Electric Cooperative Assoc., Inc. as to Tract No. 4 in the document recorded 1-22-79 as Book 146, Page 610 of Official Records.
6. An easement for pipeline to Hinkle Oil Co. as to Tract No. 6 in the document recorded 8-18-83 as Book 181, Page 152 of Official Records.
7. A Right-of-Way Grant for pipeline from Board of County Commissioners of Pratt County, Kansas, to Republic Natural Gas Company as to Tract No. 5 in the document recorded 12-18-95 as Book 238, Page 282 of Official Records.
8. Assignment from Central States Gas Co. to WorldWide Energy filed 6-8-79, in Book 149, Page 283, as to Tract No. 5.
9. Surface Lease dated 11-1-84, from Marie I. Brooks and Bernard L. Brooks to Republic Natural Gas Company, filed 11-8-84, in Book 190, Page 399, as to Tract No. 6, as shown on the Survey by Garber Surveying Service, Job #G2006-51.
10. Deed for Highway Purposes as to N/2 22-27-13 in Tract No. 7 from Anna M. Strothman, a widow, to the State of Kansas, conveying .91 acre tract in NW/4 22-27-13, et al land, filed 8-3-34, in Book 64, Page 631, as shown on the Survey by Garber Surveying Service, Job #G2006-53.
11. Right of Way Easement for Township as to N/2 22-27-13 in Tract No. 7 from Mrs. Anna M. Strothman to Center Township of the State of Kansas granting an easement for public highway wherever its road may be constructed along a strip of land 5 feet wide located in 22-27-13, filed 7-22-37, in Book 15, Page 427.

12. Easement Contract as to N/2 22-27-13 in Tract No. 7 from Frank Udry and Anna Udry to the City of Pratt, Kansas, for electrical energy along and across a strip of land 10 feet wide in 22-27-13, filed 1-22-43, in Book 32, Page 530~
13. An easement for pipeline to The Kansas Power and Light Company as to the N/2 22-27-13 in Tract No. 7 in the document recorded 4-1-43 as Book 33, Page 376 of Official Records.
14. An easement for communication system to Southwestern Bell Telephone Company as to SW/4 NW/4 23-27-13 in Tract No. 7 and NW/4 SW/4 in Tract No. 9 in the document recorded 4-23-75 as Book 131, Page 85 of Official Records.
15. Pratt County District Court Case No. 79 C 22, In the Matter of the Petition of The Ninnescah Rural Electric Cooperative Association, Inc. for the transmission of electrical energy, filed 3-8-79, as to Tracts No. 1, 2, 3, and 4, as shown on the Survey by Garber Surveying Service, Job #G2006-49.
16. Pratt County District Court Case No. 93 C 19, In the Matter of the Condemnation of Land for State Highway Purposes, filed 4-22-93, as to the N/2 22-27-13 in Tract No. 7, and 1.33 acres along the existing highway which is shown on Survey by Garber Surveying Service, Job #G2006-53.
17. Terms and provisions of Approval of Application for Change in Place of Use filed in Book 299, Page 432; Book 299, Page 434; Book 299, Page 436; Book 299, Page 438; Book 299, Page 440 and Book 299, Page 442, as to Tracts No. 1, 2, 3, 4, 7, and 9.
18. Notice of Contents of Order Determining and Establishing Vested Rights to Continue the Beneficial Use of Water by the Division of Water Resources, Kansas State Board of Agriculture, to Western Light and Telephone Co., filed 7-11-78, in Book 143, Page 693, at to Tract No. 8.
19. Water Rights Conservation Program, Water Right File No. PR0006, between Jerry M. Frisbie d/b/a Frisbie Ice Company, and Division of Water Resources, Kansas Department of Agriculture, filed 11-24-97, in Book 245, Page 51, as to Tract No. 8.
20. Water Rights Conservation Program Contract, Water Right File No. PR0006, between Jerry M. Frisbie, and Division of Water Resources, Kansas Department of Agriculture, filed 1-29-01, in Book 252, Page 549, as to Tract No. 8.
21. Encroachment of concrete onto adjacent property as shown in the Survey by Garber Surveying Service, PA, Job #2006-52, as to Tract No. 8.
22. Right-of-Way Agreement dated 12-17-04 from Wildcat Bio-Energy, LLC to Jerry M. Frisbie, Trustee of the Jerry M. Frisbie Revocable Trust No. 1, dated the 27th day of October, 1997, said Right-of-Way being filed 12-30-04, in Book 299, Page 452, as to Tract No. 8.

23. Right-of-Way Agreement dated 3-3-06 from Wildcat Bio-Energy, LLC to The County of Pratt, Kansas, said Right-of-Way being filed 4-10-06, in Book 315, Page 372, as to Tracts No. 2, 5 and 6.
24. Roadway easement over the E 30' of Tr. #1 and Tr. #2; over the N 20' of Tr. #2; over the S 30' of Tr. #1 and Tr. #3; over the W 30' and the N 20' of Tr. #5; over the S 20' and the E 30' of Tr. #6; for section line roads. Also for roadway easements over the W 20' of SW/4 NW/4 and NW/4 SW/4 Sec. 23-27-13 in Tr. #7 and #9, and the E 20' of the NE/4 Sec. 22-27-13 in Tr. #7 and #9; and the N 25' of the N/2 Sec. 22-27-13 in Tr. #7 and #9 for section line roads.
25. Unrecorded Ground Lease from Gateway Ethanol, L.L.C. to Power To Go, L.L.C. and any subsequent Sublease, and the Affidavit of Equitable Interest filed April 10, 2006 in Book 315, Page 434.
26. Assessment Agreement between The Board of County Commissioners of Pratt County, Kansas, and Gateway Ethanol, L.L.C., and the County Appraiser, Pratt County, Kansas, filed 5-14-08, in Book 345, Page 174, as to Tracts 1, 2, 3 and 4.

**THE FOLLOWING ARE SUBJECT TO FURTHER REVIEW BY BUYER AS TO  
WHETHER THEY WILL BE ACCEPTED AS PERMITTED ENCUMBRANCES**

27. Any dispute between the insured and the owner of the land over the precise route of the gas line to be laid under the Right of Way Agreement filed 12-30-04 in Book 299, Page 457, as to Tract No. 7; and subsequent Assignment filed 4-10-06, in Book 315, Page 379.
28. Any dispute between the insured and the owner of the land over the precise route of the water line to be laid under the Right of Way Agreement filed 3-10-05, in Book 302, Page 5, as to Tract No. 9; and subsequent Assignment filed 4-10-06, in Book 315, Page 379.
29. Consent to Right-of-Way as recorded in Book 302, Page 5, by The Peoples Bank, Pratt, Kansas, said Consent filed 4-10-06, in Book 315, Page 368, as to Tracts 4, 7 and 9.
30. Easement for natural gas facilities and pipeline to ONEOK, Inc. filed 12-7-06, in Book 326, Page 136, as to Tract No. 4.
31. Grant of Right of Way for pipeline to ONEOK, Inc., filed 9-29-06, in Book 322, Page 199, as to Tracts 7 and 9.
32. Grant of Right of Way for pipeline to ONEOK, Inc., filed 9-29-06, in Book 322, Page 202, as to Tract 7.
33. Unreleased Oil & Gas Leases filed in Book 325, Page 247; Book 325, Page 250; Book 325, Page 259; Book 325, Page 262.
34. Quit Claim Deed for Highway Right of Way dated 2-10-06 from Paul S. Burkner and Charles M. Burkner to Board of County Commissioners of Pratt County, Kansas, filed 2-14-06, in Book 313, Page 50S, as to Tracts No. 7 and 9.



**Schedule 1.1(a)(i)(A)**

**Assumed Contracts-Construction Contracts**

**A. Category I Construction Contracts**

1. Construction Agreement dated January 31, 2006 between HABCO, Inc., and Gateway Ethanol, L.L.C. (the "Grain Handling Facility Contract").
2. Construction Agreement dated January 31, 2006, between Railworks Track Systems, Inc. and Gateway Ethanol, L.L.C. (the "Loop Tract Contract").
3. Industry Track Contract between Union Pacific Railroad Company and Gateway Ethanol, L.L.C. (the "Rail Access Agreement").
4. Gound Lease dated March 30, 2006 between Power to Go, L.L.C. and Gateway Ethanol, L.L.C. (the "Ground Lease").
5. Sublease Agreement dated March 30, 2006 between Power to Go, L.L.C. and Gateway Ethanol, L.L.C. (the "Substation Contract").
6. Supplemental Agreement for Lease of Ethanol Substation dated November 20, 2006 between Power to Go, L.L.C. and Gateway Ethanol, L.L.C. (the "Substation Supplemental Agreement").
7. Capacitor Sublease Agreement dated July 31, 2006 between Power to Go, L.L.C. and Gateway Ethanol, L.L.C. (extension and addition to the Ground Lease and Substation Contract) (the "Capacitor Sublease Agreement").
8. Substation Erection Contract, Ethanol Substation dated January 17, 2006, and Addendum to Substation Erection Contract dated March 13, 2006, between Re-Con Company (Contractor/ Bidder) and Power To Go, LLC (Owner) (the "Substation Erection Contract").
9. AIA Document A101-1997 Standard Form of Agreement Between Owner and Contractor dated April 17, 2007 between Rafferty Construction, Inc. and Gateway Ethanol, L.L.C. (the "Rafferty Construction Contract").

**B. Category II Construction Contracts**

None

**C. Category III Construction Contracts**

1. Restated Engineering, Procurement and Construction (EPC) Agreement dated March 30, 2006, between Gateway Ethanol, L.L.C. and Lurgi PSI, Inc (the "Lurgi Contract") together with:

- (a) the Seller's right, title and interest in the letter of credit delivered by Lurgi pursuant to the Lurgi Contract; and
- (b) the "Guaranty" (as defined in the Lurgi Contract) made by GEA Group AG in favor of Seller.

**Schedule 1.1(a)(i)(B)**

**Assumed Contracts-Operating Agreements**

**A. Category I Operating Agreements**

1. The permit from Kansas Department of Health and Environment (“KDHE”), Permit #I-AR73-NP02, permitting the discharge of blow down wastewater from the Plant into collection ponds and future use as irrigation (the “Irrigation Agreement”).
2. Operating Leases
  - (a) Sublease Agreement and Ground Lease, each dated April 13, 2007, between Jerry Rafferty and Gateway Ethanol, LLC (Maintenance Building)
3. Agreement for Electric Service dated January 31, 2006 between the Ninnescah Rural Electric Cooperative Association, Inc. and Gateway Ethanol, L.L.C. (the “Electrical Service Agreement”).
4. Discount Rate Agreement for Transportation of Natural Gas dated February 1, 2006 between Kansas Service, a division of Oneok, Inc., and Gateway Ethanol, L.L.C. (the “Natural Gas Agreement”).
5. Potable Water Supply Contract dated February 6, 2006 between the City of Pratt and Gateway Ethanol, L.L.C. (the “Potable Water Agreement”).
6. Incentive Payments
  - (a) Eligibility with the USDA Commodity Credit Corporation, 7 CFR Part 1424, Federal Register, Volume 68, No. 88, May 2, 2003, page 24596-24603 (the “Commodity Credit Corporation Payments”).
  - (b) Eligibility for the Kansas Department of Revenue, Ethanol Production Incentive Payment Program. (the “State of Kansas Producer Incentive Payments”).
7. Prepetition TIF Documents
  - (a) Assessment Agreement dated March 30, 2006, between the Pratt County, KS, the Pratt County Appraiser and Gateway Ethanol, L.L.C (the “Assessment Agreement”).
  - (b) Property Tax Increment Rebate Agreement dated March 30, 2006 between Pratt County, Kansas and Gateway Ethanol, L.L.C. (the “TIF Rebate Agreement”).

8. Service Agreements

(a) Nisly Brothers Trash Service

9. Antenna and Radio Frequency Transmission Agreement dated October 4, 2007 between Crop Circle RTK by Record Harvest Enterprises, Inc. and Gateway Ethanol, L.L.C.
10. Lease of Bin dated November 13, 2006 between Farmers Cooperative Company and Orion Ethanol, LLC (the "Bin Lease"), as assigned to Gateway Ethanol, L.L.C. pursuant to a \_\_\_\_\_ dated \_\_\_\_\_, 2006.

**B. Category II Operating Agreements**

1. Trinity Industries Leasing Company Railroad Car Lease Agreement dated September 11, 2007 between Trinity Industries Leasing Company and Gateway Ethanol, L.L.C. (the "Trinity Railcar Lease").
2. Mitco Purchase Order for Water Treatment Services dated February 2, 2007.

**C. Category III Operating Agreements**

1. Indeck Lease.

**Schedule 1.1(b)**

**Off Site Improvements**

None.

**Schedule 1.1(f)**

**Prepaid Expenses**

1. Kansas Gas Service -- \$30,000 deposit.
2. Ninnescah Electric -- \$36,000 deposit.

**Schedule 1.1(g)**

**Permits and Regulatory Approvals**

1. KDHE Air Emission Source Modified Construction Permit, effective December 2, 2003 (modified March 30, 2007).
2. Kansas Water Pollution Control Permit number I-AR73-NP02, effective May 1, 2007, expires December 31, 2008
3. Industrial Storm Water Permit number G-AR73-0004, issued September 2006.
4. Kansas Historical Society Approval.
5. KDHE Construction Storm Water Discharge Permit No.S-MCST-0110-1.
6. Potable Water Supply Contract dated February 6, 2006 between the City of Pratt and Gateway Ethanol, L.L.C.
7. Alcohol, Tobacco and Firearms Permit.
8. KDHE Tank and Boiler Permits
9. Federal Aviation Administration Permit.



**Schedule 1.1(j)**

**Claims**

All Claims asserted or assertable in the following pending litigation proceedings or arbitration proceeding:

1. Gateway Ethanol, LLC v. Lurgi PSI, Inc. AAA No. 51 110 Y 00272-08 (Demand for arbitration dated February 25, 2008).
2. Gateway Ethanol, LLC v. Lurgi PSI, Inc. and Sherman Schwartz. Case numbers: 2008CV47 (Dist. Court of Pratt County, Kansas); Case No 08-CV-1301-MLB-DWB (US Dist. Court for Kansas).
3. Gateway Ethanol, L.L.C. v. Lurgi, Inc. Case number: 2008 SL 24 (Dist. Court of Pratt County, Kansas).
4. Trinity Industries Leasing Company v. Gateway Ethanol. Cause No: 08-09982 (District Court of Dallas County, Texas).
5. Victory Energy Operations, L.L.C. v. Gateway Ethanol, L.L.C. Case Number: 08-CV-579-GKF-FHM (N.D. Oklahoma).
6. Indeck Power Equipment Company v. Gateway Ethanol, LLC. Case Number: 2008L003637 (Circuit Court of Cook County, Illinois).

**Schedule 1.2(c)**

**Other Excluded Assets**

1. The following items and equipment located on the Premises are not owned by Gateway Ethanol, L.L.C. and are not Purchased Assets.
  - (a) The GPS RTK reference base station on Gateway's silo structure.
  - (b) The crop irrigation system located on the SE1/4 of Section 23, Township 27, Range 13, Pratt County KS.
  - (c) The computer server located in the basement of Gateway's administrative building which is owned by Orion.
2. Buyer reserves the right to designate other assets as Excluded Assets based on its due diligence; provided, that such designation will not reduce the Purchase Price.

**Schedule 1.3(a)(ii)**

**Assumed Contracts Cure Obligations**

SEE ATTACHED SCHEDULE

## Assumed Contract Cure Obligations

### Construction Contracts

	<u>Estimated Maximum Cure Amount</u>
<b>A.     <u>Category I Construction Contracts</u></b>	
1.     Grain Handling Facility Contract	\$0.00
2.     Loop Tract Contract	\$0.00
3.     Rail Spur Contract	\$0.00
4.     Ground Lease	\$0.00
5.     Substation Contract	\$0.00
6.     Substation Supplemental Agreement	\$0.00
7.     Capacitor Sublease Agreement	\$0.00
8.     Substation Erection Contract	\$0.00
9.     Rafferty Construction Contract	\$0.00
 B.     Category II Construction Contracts	
None	
 C. <u>Category III Construction Contracts</u>	
1.     Lurgi Contract	Undetermined

## Operating Agreements

		Estimated Maximum <u>Cure Amount</u>
<b>A.</b>	<b><u>Category I Operating Agreements</u></b>	
1.	Irrigation Agreement	\$0.00
2.	Rail Access Agreement	\$0.00
3.	Operating Leases	
	(a) RC Holdings	
	Maintenance Building	\$15,600.00
4.	Electrical Service Agreement	\$216.21
5.	Natural Gas Agreement	\$1,750.00
6.	Potable Water Agreement	0.00
	(a) Water Appropriate Agreement	\$28,761.78
	(b) Storm Water Discharge Permit	\$60.00
7.	Service Agreements	
	(a) Nisly Brothers Trash Service	\$1,622.51
8.	Bin Lease	\$0.00
<b>B.</b>	<b><u>Category II Operating Agreements</u></b>	
1.	Trinity Railcar Lease	undetermined
2.	Mitco Purchase Orders	undetermined
<b>C.</b>	<b><u>Category III Operating Agreements</u></b>	
1.	Indeck Lease	undetermined

**Schedule 4.2**

**Third-Party Consents**

Without limiting Buyer's rights under Section 2.1(b) of the APA, each counterparty to an Assumed Contract that Buyer identifies as being required by Buyer.

**Schedule 6.1(f)**

**Tax Matters**

\$3,018.15 tax liability to the Internal Revenue Service (Reflection of moving expenses on W-2; not reflected on 941 filing.)



**Schedule 6.1(g)**

**Environmental**

None.

**Schedule 6.1(i)**

**Litigation**

1. Dougherty Funding LLC v. Gateway Ethanol, L.L.C. *et al.* (Civil Case No. 08-CV-2214) (Fed. Dist. of Kansas)
2. Dougherty Funding LLC v. Gateway Ethanol, L.L.C. (Civil Case No. 08-CV-2213) (Fed. Dist. of Kansas)
3. Gateway Ethanol, LLC v. Lurgi PSI, Inc. AAA No. 51 110 Y 00272-08 (Demand for arbitration dated February 25, 2008)
4. Gateway Ethanol, LLC v. Lurgi PSI, Inc. and Sherman Schwartz. Case numbers: 2008CV47 (Dist. Court of Pratt County, Kansas); Case No 08-CV-1301-MLB-DWB (US Dist. Court for Kansas)
5. Gateway Ethanol, L.L.C. v. Lurgi, Inc. Case number: 2008 SL 24 (Dist. Court of Pratt County, Kansas)
6. Trinity Industries Leasing Company v. Gateway Ethanol. Cause No: 08-09982 (District Court of Dallas County, Texas)
7. Victory Energy Operations, L.L.C. v. Gateway Ethanol, L.L.C. Case Number: 08-CV-579-GKF-FHM (N.D. Oklahoma)
8. Indeck Power Equipment Company v. Gateway Ethanol, LLC. Case Number: 2008L003637 (Circuit Court of Cook County, Illinois).

**Schedule 7.1(a)**

**Bidding Procedures**

SEE ATTACHED AUCTION AND BID PROCEDURES

## **AUCTION AND BID PROCEDURES**

The following sets forth the proposed bidding and auction procedures (the “Auction and Bid Procedures”)<sup>1</sup> pursuant to which Gateway Ethanol, L.L.C. (“Gateway” or “Seller” or “Debtor”) will solicit bids and seek authority to sell all of Gateway’s right, title and interest in substantially all of the assets owned by Gateway (collectively, the “Assets”). Gateway’s assets include a dry-mill ethanol plant located near Pratt, Kansas.

Seller has entered into an asset purchase agreement (the “Purchase Agreement”) with Dougherty Funding, LLC (together with its permitted successors and assigns, “Purchaser”) for the sale of the Assets for an estimated purchase price of \$59,931,224.36, being the sum of: a) all Prepetition Senior Obligations owing to Purchaser 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 Purchaser 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), plus c) the assumption of certain specified liabilities (the “Purchase Price”); provided, that, if the Purchaser elects, by the Closing Date, to exclude any Category II Assumed Contract or Category III Assumed Contract, the Purchaser may reduce its Purchase Price by a specified amount of Prepetition Senior

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<sup>1</sup> The Auction and Bid Procedures were approved by the United States Bankruptcy Court for the District of Kansas (“Bankruptcy Court”) by an order dated October \_\_, 2008 (the “Bidding Procedures Order”), pursuant to Seller’s Motion for Order Pursuant to 11 U.S.C. §§ 105(a), 363 and 365 (1) Approving Auction and Bid Procedures; (2) Approving Expense Reimbursement; (3) Approving Form and Manner of Notice; (4) Authorizing Sale of Assets Free and Clear of Liens, Claims and Encumbrances, Subject to Higher or Better Offers; and (5) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases (the “Sale Motion”). Pursuant to the Sale Motion, Seller seeks authority to sell the Assets to Purchaser (as defined below) free and clear of liens, claims and encumbrances, subject to higher or better offers in accordance with the Auction and Bid Procedures set forth herein.

Obligations. Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the Purchase Agreement.

Seller intends to sell the Assets free and clear of all interests, liens, claims and encumbrances, subject to any applicable defenses; provided that Seller reserves the right to contest the validity, extent or priority of any Liens that encumbered the Assets prior to the consummation of the sale.

The sale of the Assets shall be conducted in accordance with Sections 363 and 365 of the Bankruptcy Code, Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure, and the Bidding Procedures Order, including the Seller's Auction and Bid Procedures.

### **Submission of Bids**

1. Seller will accept Competing Bids for the Assets in parcels and Competing Bids for the Assets as one lot. Competing Bids for individual Assets may be aggregated to be considered as a Competing Bid for the Assets as an entirety

2. Any Person seeking Confidential Information regarding Debtor and/or the Assets must identify such Person's shareholders or members owning at least 5% of such Person as well as such Person's affiliates and execute and deliver a confidentiality agreement in a form and in substance acceptable to Debtor in its sole and absolute discretion. Debtor, in its sole and absolute discretion (but after consultation with the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender), may decline to provide Confidential Information or any other non-public information to any Person seeking it hereunder if Debtor concludes, in its sole and absolute discretion, that provision of such information to a particular Person could harm Debtor's estate in any way whatsoever or diminish the value of the Assets or their marketability.

3. Upon written request to Seller by any Person interested in submitting a bid for the Assets, Seller shall, upon execution by such Person of a confidentiality agreement and the confirmed intent to timely consummate a transaction in terms of scope and value that is of interest to Seller, provide such Person with access to relevant business and financial information that will enable such Person to evaluate the

Assets for the purpose of submitting a competing offer for the Assets in one lot or in parcels.

4. The Purchase Agreement and its attached schedules (the “Schedules”) identify certain contracts and/or liabilities (including without limitation, executory contracts, unexpired leases, and other obligations) related to the Assets not previously rejected by Seller pursuant to an order of the Bankruptcy Court (all such contracts and liabilities, the “Contracts”) that Seller may assume and assign to the Purchaser at closing (the “Purchaser Assumed Contracts”). The Purchaser has reserved the right to designate certain Category II Assumed Contracts and Category III Assumed Contracts as Excluded Assets by the Closing and to reduce the Purchase Price by a designated amount of Prepetition Senior Obligations that the Prepetition Senior Lender will retain as a limited recourse secured claim against the Seller’s estate.

5. Any Qualified Bidder (other than Purchaser) interested in purchasing all or a portion of the Assets must submit a bid (a “Competing Bid”) prior to **5:00 p.m. Central Time on December 12, 2008** (the “Competing Bid Deadline”), in compliance with the provisions set forth below in order for such bid to be considered a Competing Bid.

6. Each Competing Bid shall remain open and irrevocable until the later of the fifteenth (15<sup>th</sup>) day following the date of entry of an order approving the sale by the Bankruptcy Court or the twentieth (25<sup>th</sup>) day following the date of the Auction, as defined below (the “Bid Expiration Date”), or the date of the Closing of the last sale of the Assets sold pursuant to the Auction if earlier, or such earlier date as may be determined by Seller, and shall:

a) be made by a Person (i) demonstrating evidence of committed financing and other ability to consummate the proposed transaction by the later of December 31, 2008 (with no financing contingency) or the Bid Expiration Date, and (ii) delivering to Seller an offer that Seller, in its discretion exercised in good faith and upon the advice of its investment banker and financial advisor and after consultation with the Creditors’ Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, believes is reasonably likely to lead to a Prevailing Bid (as defined below) (a “Qualified Bidder”);

b) be submitted in a writing identical to the Purchase Agreement (except that any proposed changes to the Purchase Agreement shall be set forth in the Qualified Bidder's purchase agreement in electronic form marked to reflect such changes) signed by the Qualified Bidder, (i) identifying (i) the bidder and the members of its investor group, as applicable, (ii) the consideration offered for the Assets, (iii) financial information regarding the bidder and its ability to consummate the proposed transaction, and (iv) all terms and conditions of the Competing Bid; provided that the Competing Bid may not include non-cash consideration;

c) if a Competing Bid is submitted for the Assets in one lot, be a higher or better offer for the Assets than the Purchase Price, and such offer shall not be considered a higher or better offer unless if for the Assets in one lot, such Competing Bid (i) provides for aggregate cash consideration to Seller's estate of at least more than the sum of the Purchase Price plus the Expense Reimbursement (the "Alternative Minimum Purchase Price"); (ii) is not (A) subject to conditions, representations or terms that Seller, in its sole and absolute discretion, after consultation with the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, determines to be unacceptable; or (B) subject to the bidder receiving any breakup fee, termination fee, expense reimbursement or similar type of purchaser protection payment; (iii) contains the following agreements (collectively, the "TIF Assumption Agreements") by the bidder (A) an agreement by the bidder to assume the Assessment Agreement dated March \_\_, 2006 (the "Assessment Agreement") among the County of Pratt, Kansas (the "County"), the Seller and the County Appraiser, Pratt County Kansas, and the Property Tax Increment Rebate Agreement dated March 30, 2006 (the "TIF Rebate Agreement") between the County and the Debtor; (B) an agreement by the bidder that the pledge of the "Increments" defined in the TIF Rebate Agreement to the Prepetition TIF Lender pursuant to the Pledge and Security Agreement dated March 30, 2006 (the "TIF Pledge Agreement") constitutes a Permitted Encumbrance on the Real Property defined in the APA; and (C) an agreement that the bidder will grant a first priority



non-recourse mortgage on the Premises to secure the payment of any Taxes on the Premises that are paid by the Prepetition TIF Lenders because of the Premises' owner's failure to timely pay such Taxes and the Prepetition TIF Lender's collection costs (including, without limitation, reasonable attorney's fees and legal expenses) in enforcing such mortgage; and (iv) identifies the Contracts that the bidder desires the Seller to assume and assign to the bidder; provided, however, that the bidder may elect to reduce the purchase price to an amount less than the Alternative Minimum Purchase Price if the bidder elects not to have the Seller assume and assign any Class II Assumed Contract or Class III Assumed Contract specified by the bidder so long as the bidder agrees (the "Minimum Alternative Purchase Price Adjustment Agreement") to purchase the retained Prepetition Senior Obligations described in Section 2.1(c) of the Purchase Agreement on the terms and conditions set forth in Section 2.1(c) of the Purchase Agreement so that, after giving effect to such price, the sum of the purchase price being paid for the Assets and for the retained Prepetition Senior Obligations shall be at least equal to the Alternative Minimum Purchase Price; provided further, however, that Seller, in its sole and absolute discretion, may add or modify these requirements by announcement prior to the Auction (defined below);

d) a Competing Bid may be for less than all of the Assets; provided, however, that the Real Property is required to be sold as a single parcel. In the event Seller receives a Competing Bid for less than all of the Assets, Seller may combine such Competing Bid with other Competing Bids for some of the other Assets to provide for an aggregate purchase price which is an amount equal to or greater than the Alternative Minimum Purchase Price. Such Competing Bids shall not be considered a higher or better offer unless such Competing Bids (i) are not (A) subject to conditions, representations or terms unacceptable to Seller in its sole and absolute discretion; or (B) subject to the bidder receiving any breakup fee, termination fee, expense reimbursement or similar type of purchaser protection payment; (ii) provide that the sales contemplated by such combined Competing Bids are expressly conditioned upon the closing of all other sales contemplated by such combined Competing Bids; (iii) the Competing Bid for the

Real Property is required to contain the TIF Assumption Agreements; and (iv) the Competing Bids may contain the Alternative Minimum Purchase Price Adjustment Agreement; provided, however, that Seller, in its sole and absolute discretion, may add or modify these requirements by announcement prior to the Auction (defined below);

e) if a Competing Bid is submitted for the Assets in one lot, include an earnest money deposit of no less than \$3,000,000 in cash or cash equivalents (the “Bulk Assets Initial Deposit”). If a Competing Bid is submitted for the Assets in parcels, include an earnest money deposit of no less than ten percent (10%) of the Competing Bid in cash or cash equivalent (the “Parcel Assets Initial Deposit”). Seller reserves the right to condition its acceptance of any offer of a Qualified Bidder other than the Purchaser on the provision of an additional deposit of cash or a letter of credit in the amount and in the form acceptable to Seller in Seller’s sole and absolute discretion and to the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, in their respective sole and absolute discretion (the “Additional Deposit”) (each Bulk Assets Initial Deposit, each Parcel Assets Initial Deposit and each Additional Deposit is each sometimes referred to herein as a “Sale Deposit”); and

f) be submitted on or before the Competing Bid Deadline by delivering the complete competing offer(s) together with the Bulk Assets Initial Deposit or Parcel Assets Initial Deposit, as applicable, to Tammee E. McVey at Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 3500, Kansas City, Missouri 64105 with copies to Frederick S. Loomis, Chairman of the Board, Gateway Ethanol, L.L.C., P.O. Box 8593, Pratt, Kansas 67124 and Geoffrey Richards, William Blair & Company, LLC, 222 West Adams Street, Chicago, Illinois 60606. Potential bidders may obtain copies of the Purchase Agreement from Tammee E. McVey at Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 3500, Kansas City, Missouri 64105 (816-374-3220) (temcvey@bryancave.com).

7. Seller shall consult with the Creditors’ Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender regarding

the conduct of the Auction and the selection of the “Prevailing Bidder(s)” and “Back-up Bidder(s)” as respectively defined below. Any Sale pursuant to one or more Competing Bids is subject to the terms of the relevant Order.

8. All bidders, whether a Qualified Bidder or not, their shareholders and/or the members owning at least 5% of such bidders, are deemed to have submitted to the exclusive jurisdiction of the Bankruptcy Court with respect to all matters related to the bids, the Auction, and the sale of the Assets.

### **Bid Protection**

9. Purchaser shall be entitled, as provided in and subject to the terms and conditions set forth in the Purchase Agreement, to the Expense Reimbursement up to the amount of \$250,000.00.

10. Purchaser shall be entitled to the Expense Reimbursement at the time and upon satisfaction of the conditions set forth in the Purchase Agreement.

11. Seller shall pay the Expense Reimbursement by wire transfer of immediately available funds to such account as Purchaser may designate in writing in accordance with the terms of the Bidding Procedures Order.

### **The Auction**

12. If Qualified Bidders have submitted Competing Bids by the Competing Bid Deadline, Seller may receive additional bids from Purchaser and Qualified Bidders for the Assets at an Auction (as defined below), to be held on a business day that is not less than three (3) business days and not more than ten (10) calendar days following the Competing Bid Deadline. A live oral Auction shall be organized and conducted by Seller at the offices of Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 3500, Kansas City, Missouri 64105, on invitation to Purchaser, each Qualified Bidder, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender (the “Auction”). Within two (2) business days after the Competing Bid Deadline or as soon thereafter as is reasonably practical (but in no event later than 5:00 p.m. Central Time, on the second business day preceding the Auction date), Seller shall deliver copies of all Competing Bids (including copies of all documents

described in paragraph 6 herein) to Purchaser, each other Qualified Bidder, the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender. Overbids for the Assets in one lot shall be in an amount of at least \$50,000 in excess of the last highest bid; provided, however, that any overbid by Purchaser shall be in an amount of at least the last highest bid less the Expense Reimbursement plus \$25,000. Overbids for the Assets in parcels shall be in an amount of at least \$25,000 in excess of the last highest bid.

13. The Expense Reimbursement shall be taken into account in determining the amount bid in each round of bidding. The only Persons who will be permitted to bid at the Auction are authorized representatives of Purchaser and each Qualified Bidder. Each bid submitted at the Auction must comply with the procedures set forth herein for Competing Bids and copies of each bid must be provided to Purchaser, each other Qualified Bidder, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender at the Auction. All bids shall be made in the physical presence of Seller, Purchaser, all other Qualified Bidders, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender. To facilitate a deliberate and orderly consideration of the Competing Bids, Seller may adjourn the Auction at any time and from time to time and may conduct multiple rounds of bidding, so long as the Sale Hearing is held within the time constraints set forth in the Purchase Agreement. Notwithstanding the foregoing, Seller, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender shall determine, in their respective sole and absolute discretion, and subject to final determination by the Bankruptcy Court as set forth in paragraph 15 below, considering all of the factors referenced below, among others, whether a bid matches or is higher and better than another bid.

14. Any Qualified Bidder who is physically absent from the Auction for more than 30 minutes may, in the Debtor's sole and absolute discretion, be disqualified from the Auction. Only the Purchaser, the Qualified Bidders, the Creditors' Committee, if applicable, Debtor, the Prepetition Senior Lender, the Prepetition TIF Lender, the DIP Lender, and each of their authorized representatives, may attend and be present at the Auction. Debtor, in its sole discretion, may permit other Persons or Entities to attend the Auction.

15. Seller shall not be deemed to have accepted any offer unless and until such offer and bid and Seller's acceptance thereof have been subsequently authorized by separate order of the Bankruptcy Court.

16. Seller is authorized to conduct the Auction in accordance with such additional procedures and requirements as Seller, with Purchaser's approval and after consultation with the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, shall from time to time announce, consistent with these Auction and Bid Procedures.

17. At the Auction, after the conclusion of bidding, and following consultation with the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, Seller, taking into account any and all relevant factors including, but not limited to, the terms and conditions of the proposed purchase agreement, the scope of the proposed transaction(s), the aggregate value offered for the Assets that the maker of the bid(s) propose to purchase, and the likelihood and timing of closing on such proposed transaction(s), shall select the offer or offers that Seller determines in its sole and absolute discretion to reflect (i) the highest or best offer(s) for the Assets (such offer(s), the "Prevailing Bid(s)"), and (ii) the second highest or best offer(s) for the Assets (such offer(s), the "Back-up Bid(s)").

18. At the Auction, at the conclusion of bidding, Seller shall notify any Person submitting a Prevailing Bid (the "Prevailing Bidder") that such Person's offer has been determined by Seller to be a Prevailing Bid and any Person submitting a Back-up Bid (the "Back-up Bidder") that such Person's offer has been determined by the Seller to be a Back-up Bid. No later than one (1) business day after the Auction, and prior to the Sale Hearing, (a) the Prevailing Bidder, if other than Purchaser, shall deliver any unpaid portion of any Additional Deposit to Seller and (b) the Prevailing Bidder shall complete and sign all agreements and documents deemed by Seller as necessary to bind the Prevailing Bidder to all of the terms and conditions contemplated by the Prevailing Bid. After notification that a Qualified Bidder is a Prevailing Bidder, the Prevailing Bidder's Sale Deposit and Additional Deposit, if any, shall be nonrefundable when paid, and shall be forfeited to Seller, as liquidated damages, if for any reason the Prevailing Bidder fails to consummate the acquisition of the Assets in accordance with the Prevailing Bid and

such failure is the result of a breach by the Prevailing Bidder, except as otherwise set forth in the Prevailing Bidder's purchase agreement as approved by the Bankruptcy Court.

19. Each Sale Deposit received by Seller shall be maintained in an interest-bearing account and be subject to the jurisdiction of the Bankruptcy Court.

20. The Sale Deposit of the Prevailing Bidder or the Back-up Bidder, as the case may be, shall be applied by Seller against the purchase price to be paid by the Prevailing Bidder or the Back-up Bidder, as applicable, at the closing of the relevant transaction(s) approved by the Bankruptcy Court.

21. If for any reason the Prevailing Bidder fails to consummate the acquisition of the Assets in accordance with the Prevailing Bid, the Seller is authorized to effect the sale of the Assets to the Back-up Bidder in accordance with the Back-up Bid without further order of the Bankruptcy Court. If for any reason the Back-up Bidder fails to consummate the acquisition of the Assets in accordance with the Back-up Bid, and such failure is the result of a breach by the Back-up Bidder, the Back-up Bidder's Sale Deposit shall be forfeited to Seller as liquidated damages, except as otherwise set forth in the Back-up Bidder's purchase agreement as approved by the Bankruptcy Court.

22. No later than the Bid Expiration Date, Seller shall return to each Qualified Bidder(s), other than the Prevailing Bidder and the Back-up Bidder, their respective Sale Deposit(s), together with any interest accrued thereon. No later than the second business day after the closing of the sale of the Assets to the Prevailing Bidder, Seller shall return the Back-up Bidder's Sale Deposit to the Back-up Bidder, together with any interest accrued thereon.

23. The Auction and Bid Procedures are solely for the benefit of Seller, and nothing contained in the Bidding Procedures Order shall create any rights in any other Person or bidder other than the rights expressly granted to Purchaser under the Bidding Procedures Order.

24. Except as provided in the Bidding Procedures Order, the Bankruptcy Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of the Bidding Procedures Order.

**Notice of Auction and Bid Procedures, Sale Motion and Sale Hearing**

25. Within two (2) business days after the entry of the Bidding Procedures Order, Seller shall serve via first-class mail a notice (the “Sale Notice”) of the Auction and Bid Procedures, the Bidding Procedures Order, the Sale Motion and the Sale Hearing (defined below), in such form as the Bankruptcy Court shall approve, on the following entities: (i) Purchaser and all Persons that were contacted by Seller or William Blair & Company, LLC in connection with the marketing and sale process for the Assets; (ii) all other prospective offerors and parties-in-interest upon written request to Seller; (iii) all Persons who receive electronic notice in Seller’s bankruptcy proceedings; and (iv) all Persons pursuant to Bankruptcy Rules 6004(a), 6004(c), 6006(c) and 9014. Service pursuant to Bankruptcy Rules 6004(a), 6004(c), 6006(c) and 9014 on those Persons not receiving electronic notice shall be by first-class mail addressed to the business address of such Persons appearing in Seller’s records, notwithstanding Bankruptcy Rule 9014. In addition, Seller shall publish the Sale Notice (in summary form) in *The Wall Street Journal* (National Edition). Pursuant to Bankruptcy Rule 2002, this service of the Sale Notice shall constitute good and sufficient notice of the Auction and Bid Procedures, the Auction, the Bidding Procedures Order, the Sale Motion and the Sale Hearing (and any proceedings to be held thereon) on all known and unknown creditors and parties-in-interest, including all Persons entitled to service pursuant to Bankruptcy Rules 6004(a), 6004(c), 6006(c) and 9014.

26. Objections, if any, to the Sale Motion shall be in writing, shall conform to the Bankruptcy Rules and local rules and orders of the Bankruptcy Court, shall set forth (i) the nature of the objector’s claims against or interests in Seller’s estate, (ii) the basis for the objection, (iii) the specific grounds therefor, and (iv) all evidence in support of said objection, and shall be filed and served so as to be received on or before December 16, 2008, by (a) each Person who receives electronic notice in Seller’s bankruptcy proceedings and (b) counsel for Purchaser. Any Person objecting to the Sale Motion that has not complied with the requirements of this paragraph shall not be heard at the Sale Hearing. If any Qualified Bidder objects to Seller’s determination of a Competing Bid as a higher or better bid for the Assets, the sole and exclusive remedy of such Qualified Bidder shall be to bid under protest at the Auction, state their reasons on

the record at the Auction for their objections and, upon compliance with this paragraph and the other Auction and Bid Procedures, have standing at the Sale Hearing to contest Seller's determination. Purchaser shall be deemed to have standing at the Sale Hearing for all purposes.

27. Except as set forth above, nothing otherwise contained in the Bidding Procedures Order shall be deemed to deprive any interested party of the right to object timely to the Sale Motion, all of which rights are expressly reserved by the Bidding Procedures Order.

### **Sale Hearing**

28. The Sale Hearing to consider the relief requested in the Sale Motion and to consider whether to approve the Prevailing Bid(s) and the Back-up Bid(s) (the "Sale Hearing") shall be held before the Bankruptcy Court within two (2) business days after the Auction, or as soon thereafter as the Court's schedule permits, and if no Auction is held, within five (5) business days after the Competing Bid Deadline, or at such other time as the Court may determine. Debtor shall serve those parties identified in paragraph 21 of these Auction and Bid Procedures with a separate Notice, setting forth the date and time of the Sale Hearing and the deadline for the filing of objections to the Sale Motion.

29. Subject to the time restrictions set forth in the Purchase Agreement, Seller, after consultation with the Creditors' Committee, if applicable, the Prepetition Senior Lender, the Prepetition TIF Lender and the DIP Lender, may extend the deadlines set forth in the Bidding Procedures Order, may recess or adjourn the Auction at any time or from time to time, and/or may seek adjournment of the Sale Hearing, and/or may adopt and/or implement and/or waive such other, additional or existing procedures or requirements consistent with these Auction and Bid Procedures and the Purchase Agreement that in its sole and absolute discretion serves to further an orderly auction and bid process, all without further notice. Seller shall file with the Bankruptcy Court appropriate notices of adjournment with respect to any such extension or adjournment.