UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

In re:	**)**	**In Proceedings Under Chapter 11**
	)	
GATEWAY ETHANOL, L.L.C.,	**)**	**Case No. 08-22579-DLS**
	)	
Debtor.	**)**	

MOTION FOR ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363 AND 365 (1) APPROVING AUCTION AND BID PROCEDURES; (2) APPROVING REIMBURSEMENT EXPENSE; (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

Gateway Ethanol, L.L.C., debtor and debtor in possession, by and through its undersigned attorneys, for its Motion for Order Pursuant to 11 U.S.C. §§ 105(a), 363 and 365 (1) Approving Auction and Bid Procedures; (2) Approving Reimbursement Expense; (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 "Motion"), respectfully represents as follows:

Jurisdiction and Venue

1. On October 5, 2008 (the "Petition Date"), Gateway Ethanol, L.L.C. ("Gateway" or "Debtor") filed a voluntary petition under Chapter 11 of Title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101–1532, as amended (the "Bankruptcy Code"). Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

2. No trustee or examiner has been appointed in this case. An official committee of unsecured creditors (the "Creditors' Committee") has not yet been appointed in this proceeding.

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The predicates for relief sought herein include 11 U.S.C. §§ 105(a), 363 and 365, and Rules 2002, 6004, 6006 and 9006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Background

4. Gateway is a Kansas limited liability company with its headquarters in Pratt, Kansas. Gateway was formed in March 2006 to construct, manage, and operate a premier dry-mill ethanol plant.

5. On March 30, 2006, Gateway entered into a Restated Engineering, Procurement, and Construction Agreement ("EPC Agreement") with Lurgi PSI, Inc. ("Lurgi") for the design and construction of a fully integrated and functional dry-mill ethanol plant located near Pratt, Kansas capable of processing approximately 20 million bushels of local corn and milo to produce approximately 55 million gallons per year, or about 150,000 gallons per day, of fuel-grade ethanol, in addition to about 183 thousand tons of distiller grains and approximately 160 thousand tons of carbon dioxide per year as co-products ("Pratt Ethanol Facility").

6. The Pratt Ethanol Facility was expected to be operational by August of 2007. Construction was delayed due to Lurgi's failure to achieve "Interim Completion" of the Pratt Ethanol Facility, as defined under the EPC Agreement.

7. Since August of 2007, Gateway has attempted to complete the construction of the Pratt Ethanol Facility and start commercial operations. Gateway's efforts to

start-up the plant were thwarted by Lurgi's failure to deliver the completed Pratt Ethanol Facility. Further, Gateway became involved in disputes with its senior lender, Dougherty Funding LLC ("Dougherty").

8. Gateway continued in its efforts to operate the plant until early March 2008, when it was required to shut down the plant due to Lurgi's continued construction delays. The Pratt Ethanol Facility is currently not operating, but remains lightly staffed pending a contemplated sale of the plant.

9. As of August 31, 2008, Gateway reported assets of approximately $95.7 million. Also as of August 31, 2008, Gateway reported liabilities of approximately $95.4 million, comprised of (a) approximately $71.3 million in secured credit facilities; (b) unsecured debt owed to Cargill in the amount of about $7 million; (c) unsecured debt owed to Noble in the approximate amount of $4 million, including funds borrowed under an unsecured letter of credit in the amount of about $3.25 million; (d) trade debt of approximately $2.6 million; and (e) other liabilities of approximately $10.5 million, which includes mechanic's liens filed against Debtor's premises, obligations under equipment and railcar leases, and a note payable to the City of Pratt for a water line.

10. Gateway has three primary secured credit facilities.[1/] On March 30, 2006, Gateway entered into a Loan and Security Agreement with Dougherty, which provides for advances up to $54.3 million towards the construction of the Pratt Ethanol Facility ("Dougherty

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1/ The discussion in this Motion regarding Gateway's secured debt is meant as a summary only. Gateway's secured indebtedness is described in further detail in Gateway's Emergency Motion to Approve Stipulated Order Granting Expedited Relief and Interim Order (I) Authorizing Debtor (A) to Obtain Secured Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 363, and 364(c) and (d); and (B) to Grant Security Interests, Superpriority Claims and Adequate Protection; and (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(c) (the "DIP Motion") filed on October 6, 2008. Parties should refer to the DIP Motion for complete details with respect to Gateway's secured indebtedness.

Loan Agreement"), and which is secured by substantially all of Gateway's assets. As of the Petition Date, the balance due Dougherty under the Dougherty Loan Agreement is approximately $53 million.

11. On March 30, 2006, Gateway entered into a Tax Increment Secured Promissory Note with Dougherty in the principal amount of $11.34 million to provide additional funding for the Pratt Ethanol Facility ("TIF Promissory Note"). Dougherty agreed to advance Gateway $11.34 million secured against, among other assets of Gateway, future revenues from a Property Tax Increment Rebate Agreement between Gateway and Pratt County, Kansas dated February 1, 2006. As of the Petition Date, the balance due Dougherty under the TIF Promissory Note is approximately $9.6 million.

12. Also on March 30, 2006, Gateway entered into a Subordinated Loan Agreement with Lurgi for advances up to $7 million plus capitalized interest for construction costs for the Pratt Ethanol Facility ("Lurgi Loan Agreement"), which is secured by a second mortgage on the Pratt Ethanol Facility. As of the Petition Date, the balance due Lurgi under the Lurgi Loan Agreement is approximately $8.7 million.

13. The Pratt Ethanol Facility was scheduled to be operational in August of 2007. Now, more than a year after the plant was supposed to be completed, Lurgi still has not met its obligations under the EPC Agreement. Gateway has initiated an arbitration proceeding against Lurgi to recover damages arising from the delayed construction of the plant, in addition to damages resulting from construction defects and tortious interference in Gateway's relationship with Dougherty.

14. In March 2008, Dougherty asserted that Gateway defaulted under its loan obligations, and in early April 2008, Dougherty accelerated the indebtedness. Gateway attempted to negotiate a resolution with Dougherty, however, on May 6, 2008, Dougherty filed a

complaint against Gateway seeking judicial foreclosure in the United States District Court for the District of Kansas ("Foreclosure Action"). Dougherty also filed an action in the United States District Court for the District of Kansas regarding the TIF Promissory Note ("Note Action"). Over the summer, Gateway continued to negotiate a workout with Dougherty. Gateway's efforts proved unsuccessful, and Dougherty notified Gateway that it would aggressively move forward with the Foreclosure Action and Note Action.

15. In April 2008, Indeck Power Systems ("IPS"), filed suit against Gateway in Illinois alleging breach of an equipment lease for a thermal oxidizer/boiler system. This equipment is vital to operation of the Pratt Ethanol Facility. Gateway's efforts to resolve the situation with IPS have also been unsuccessful.

16. Following the exploration of numerous alternatives, Gateway determined that its only reasonable course of action was a Chapter 11 filing. Gateway has focused efforts on selling the Pratt Ethanol Facility and liquidating its other assets in an orderly manner.

17. Prior to the Petition Date, Gateway engaged William Blair & Company, LLC ("William Blair") as its investment banker and financial advisor to provide various services including assisting Gateway in marketing the Pratt Ethanol Facility. William Blair's marketing efforts have generated several entities that appear to be interested in exploring a purchase of Debtor's assets.

18. Dougherty as DIP Lender has agreed to provide debtor in possession financing to Gateway in the principal amount of up to approximately $5.2 million to see Gateway through the contemplated Section 363 sale process (the "DIP Facility"). The terms of the DIP Facility are described in the DIP Motion and in the Debtor-In-Possession Loan and Security Agreement, a copy of which is attached to the DIP Motion. On October 8, 2008, the Court entered a Stipulated Order Granting Expedited Relief and Interim Order: (I) Authorizing

Debtor (A) to Obtain Secured Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, and 364(c) and (d); and (B) to Grant Security Interests, Superpriority Claims and Adequate Protection; and (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(c) (the "Interim DIP Order") [docket no. 54]. The final hearing on the DIP Motion is scheduled for October 28, 2008.

19. On October 23, 2008, Debtor signed an Asset Purchase Agreement (the "Purchase Agreement") with Dougherty ("Purchaser"). Pursuant to the Purchase Agreement Purchaser agrees to buy substantially all of Debtor's assets, the consideration for which is a credit bid pursuant to 11 U.S.C. § 363(k). The Purchase Agreement, including schedules prepared to date, is attached hereto as **Exhibit A**.

20. Debtor is filing this motion seeking court approval of certain auction, bid and sale procedures ("Procedures"), and sale of all of Debtor's right, title and interest in substantially all of the assets owned by Debtor (the "Assets")[2/] to Purchaser pursuant to the terms of the Purchase Agreement, subject to higher and better offers pursuant to the Procedures. Debtor believes that the sale of the Assets pursuant to the Purchase Agreement and the Procedures is in the best interest of Debtor's estate and creditors.

21. Debtor is seeking court approval of sale procedures that would provide for the submission of competing bids, an auction, a final sale hearing, and entry of a Court order approving the sale by no later than December 18, 2008.

22. Debtor believes this Motion, the Purchase Agreement and the transactions contemplated thereby are in the best interests of the estate, creditors, and all other interested

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[2/] Parties should refer directly to the Asset Purchase Agreement for complete details with respect to the assets being purchased by Purchaser.

parties in this Chapter 11 case. An orderly sale of Debtor's Assets is essential. Finally, an orderly sale process should aid in minimizing the administrative expenses of Debtor's estate.

Relief Requested

23. As stated above, Debtor believes that an orderly sale of the Assets is the best way to maximize the value of those assets for the benefit of creditors and all parties in interest. Accordingly, Debtor requests that a hearing be held expeditiously for the Court to enter an order (the "Bidding Procedures Order") (i) approving the Auction and Bid Procedures (as defined below); (ii) approving the Expense Reimbursement (as defined below); and (iii) approving the form and manner of notice (the "Sale Notice") of the proposed Auction and Bid Procedures and of the Contract Notice (defined below). Copies of the proposed Bidding Procedures Order, Auction and Bid Procedures, Sale Notice and Contract Notice are attached hereto as **Exhibits B, C, D and E**, respectively.

24. The Interim DIP Order contains tight timelines for the contemplated Section 363 sale process. This Motion is being filed under exigent circumstances. Debtor requests that the Court approve the Auction and Bid Procedures, Sale Notice and Contract Notice on October 28, 2008 (the "First Hearing").

25. After approval by the Court of the Auction and Bid Procedures, Sale Notice and Contract Notice at the First Hearing, Debtor will send such notice to all potential purchasers of its assets known to Debtor, and if Competing Bids are received, an Auction (as defined in the Auction and Bid Procedures) shall be held.

26. Debtor further requests that the Court, at a second hearing (the "Sale Hearing"), to be held on December 18, 2008, enter an order (the "Sale Order") approving the sale of the Assets to Purchaser (or to such other party or parties that make the highest or best bid(s) at the Auction), free and clear of any and all interests, liens, claims and encumbrances,

provided that Debtor reserves the right to contest the validity, extent or priority of any liens that encumber the assets; approving the assumption and assignment of certain executory contracts and unexpired leases to Purchaser (or to such other party or parties that make the highest or best bid(s) at the Auction), in connection with such sale; and resolving any potential disputes concerning the Cure Amounts (defined below) under the assumed contracts and unexpired leases.

Auction and Bid Procedures

27. To ensure that Debtor has maximized the value of the Assets, Purchaser has agreed that the sale of the Assets must be subject to the proposed bidding and auction procedures (the "Auction and Bid Procedures"), described in detail in **Exhibit C** attached hereto and incorporated by reference herein.

28. Section 363 of the Bankruptcy Code governs a Debtor's ability to sell property of the estate outside of the ordinary course of business. Although this section does not set forth a standard for determining when it is appropriate to authorize such a sale, courts have uniformly held that such a sale should be approved when it is justified by a sound business purpose. *See* In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986); In re Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991); *accord* Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); In re Schipper, 933 F.2d 513, 515 (7th Cir. 1991); In re Continental Air Lines, Inc., 780 F.2d 1223 (5th Cir. 1986); In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983). The burden of establishing a rational business justification lies with the debtor. Lionel, 722 F.2d at 1070-71. However, once the debtor makes such a showing, a presumption will attach that the decision was made on an informed basis, in good faith and in the honest belief that the action was in the best interest of the company. *See*, *e.g.*, In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993).

29. Applying Section 363, courts accord debtors substantial deference in formulating procedures for selling assets. *See, e.g.*, Integrated Resources, 147 B.R. at 656-57 (noting that overbid procedures and breakup fee arrangements that have been negotiated by a debtor-in-possession are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid"); In re 995 Fifth Ave. Associates, L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same). Indeed, courts recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and are appropriate in the context of bankruptcy sales. *See, e.g.*, Integrated Resources, 147 B.R. at 659 (such procedures should "encourage bidding and . . . maximize the value of the Debtor's assets"); In re Financial News Network, Inc., 126 B.R. 152, 156 (S.D.N.Y. 1991) ("court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and ... provide for a fair and efficient resolution of bankrupt estates").

30. Here, the Auction and Bid Procedures are supported by ample business justification and are reasonable and appropriate under the circumstances of this case. The proposed Auction and Bid Procedures are designed to foster an open, competitive and fair sale process, while maximizing the value the estate hopes to obtain for the Assets. Debtor requests that the Court approve the Auction and Bid Procedures as fair and reasonable under the circumstances and authorize and direct Debtor to proceed in accordance with them.

Purchaser Protections

31. In order to induce Purchaser to enter into the Purchase Agreement, and as a part of extensive negotiations between Purchaser and Debtor, Purchaser required (and Debtor agreed to grant), an expense reimbursement in an amount not to exceed $250,000 (the "Expense Reimbursement") as provided in and subject to the terms and conditions set forth in the Purchase

Agreement. The Reimbursement Expense shall survive termination of the Purchase Agreement and shall constitute an administrative expense (which shall be a superpriority administrative expense claim senior to all other administrative expense claims and payable out of Debtor's cash or other collateral securing Debtor's obligations to its senior secured lender, prior to recovery by such lender) of Debtor under Section 364(c)(1) of the Bankruptcy Code, and the Final DIP Order shall be deemed to so provide.

32. In the context of bankruptcy cases, it is appropriate to grant buyer protections to prospective purchasers. Buyer protections (including expense reimbursements and breakup fees) are designed to compensate a prospective purchaser for the costs and risk involved in preparing and proposing a bid that will establish a minimum standard for competing bids. *See* Integrated Resources, 147 B.R. at 658 (breakup fees are "important tools to encourage bidding and to maximize the value of the Debtor's assets"); In re APP Plus, Inc., 223 B.R. 870, 874 (Bankr. E.D.N.Y. 1998) (breakup fees compensate a prospective purchaser "for the time, efforts, resources, lost opportunity costs and risks incurred").

33. In Integrated Resources, the court identified the following factors in determining whether to approve a breakup fee or expense reimbursement: (1) whether the negotiations of the breakup fee or expense reimbursement are tainted by self-dealing or manipulation; (2) whether the existence of the breakup fee or expense reimbursement hampers rather than encourages other bidding; and (3) whether the amount of the breakup fee or expense reimbursement is reasonable relative to the proposed purchase price. Integrated Resources, 147 B.R. at 662. *See also* APP Plus, 223 B.R. at 875.

34. In the present case, the Expense Reimbursement is the result of arm's-length negotiations between Debtor and Purchaser.

35. With respect to the second Integrated Resources factor, the Purchase Agreement will enhance the bidding for the assets by generating increased interest among other potential bidders and providing a baseline by which Debtor can evaluate competing bids, including the minimum acceptable terms on which the proposed transaction can proceed. *Id.* Therefore, rather than "chilling" the bidding process, Debtor believes that the Expense Reimbursement supports the bidding process, will encourage the bidding process, and should be approved by the Court. *See* In re Wintz Companies, 230 B.R. 840, 846 (8th Cir. B.A.P. 1999) (noting that courts have permitted breakup fees when they encourage rather than discourage bidding).

36. The maximum amount of the Expense Reimbursement is not unreasonable in comparison to the size of the proposed transaction. The maximum amount of the Expense Reimbursement is less than .5% (one-half percent) of the Purchase Price. *See, e.g.*, Integrated Resources, 147 B.R. at 662 (breakup fee of up to 3.2%, plus reimbursement of expenses, found to be reasonable; expert testimony acknowledged that average breakup fee is 3.3%); In re Mid-American Waste Systems, Inc., Case No. 97-00104 (PJW) (Bankr. D. Del., January, 1997) (approving breakup fee of approximately 3.3%, plus up to $1 million in expense reimbursement); In re Maritime Group, Ltd., Case No. 95-08153 (ERG) (Bankr. S.D. Miss., December 20, 1995) (approving breakup fee of approximately 2.9%); In re Smith Corona Corp., Case No. 95-788 (HSB) (Bankr. D. Del., November 6, 1995) (approving breakup fee of approximately 3.9%); *cf.* In re Twenver, Inc., 149 B.R. 954 (Bankr. D. Colo. 1992) (rejecting breakup fee, in part, because it exceeded 10% of total proposed transaction price).

37. In light of the risks, expense and complications associated with the proposed transaction, Purchaser would not enter into the Purchase Agreement without the protection of the Expense Reimbursement. Therefore, absent the Expense Reimbursement,

Purchaser would not have negotiated or entered into the Purchase Agreement, which Purchase Agreement will confer value upon Debtor's estate by, among other things, (i) initiating the bidding process for the assets, (ii) establishing a bid standard or minimum for other bidders early in the bidding process, (iii) placing the assets in a sales configuration mode to attract other bidders, and (iv) serving, by Purchaser's name and expressed interest, as a catalyst for other potential bids. Therefore, the Expense Reimbursement is clearly in the best interests of Debtor's estate and creditors.

The Proposed Transaction Satisfies All Applicable Legal Standards

38. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." *See also* Fed. R. Bankr. Proc. 6004(f)(1) ("All sales not in the ordinary course of business may be by private sale or by public auction"). This section generally permits a debtor to sell property of the estate outside of the ordinary course of its business where the proposed sale is a sound exercise of the debtor's business judgment and when such sale is proposed in good faith. *See* Stephens Industries, Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) ("[A] bankruptcy court can authorize a sale of all of a Chapter 11 Debtor's assets under § 363(b)(1) when a sound business purpose dictates such action"); In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983); In re Channel One Comm., Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990).

39. In the present case, the proposed sale of the Assets pursuant to the Purchase Agreement constitutes a sound exercise of Debtor's business judgment and has been proposed in good faith. An expedited sale of the Assets, as required under the Interim DIP Order, should aid in minimizing the administrative expenses of Debtor's estate. Further, the sale

represents the best opportunity for Debtor to maximize the value of the Assets for the estate and creditors.

40. Debtor believes this Motion, the Purchase Agreement and the transactions contemplated thereby are in the best interests of the bankruptcy estate and in the best interests of all other interested parties in this Chapter 11 case.

41. Debtor submits that the factors described above, which require an expedited sale of the Assets to maximize value for Debtor's estate, are consistent with the traditional rationale for authorizing a sale outside of a Chapter 11 plan. *See* Lionel, 722 F.2d at 1070; Channel One, 117 B.R. at 496.

Sale Free and Clear of Liens

42. Section 363(f) of the Bankruptcy Code authorizes a debtor to use, sell or lease property of the estate outside of the ordinary course of business, free and clear of any interest in such property. Debtor requests authority to sell the Assets free and clear of all interests, liens, claims and encumbrances. Any such interests, liens, claims and encumbrances would attach to the proceeds of the sale of the assets (the "Sale Proceeds") ultimately attributable to the property against or in which such interest, lien, claim or encumbrance is asserted.

43. Under Section 363(f)(2) of the Bankruptcy Code, a sale free and clear of all interests, liens, claims and encumbrances is permissible if all parties asserting liens on or other interests in the assets to be sold consent. Debtor is providing proper notice of this transaction and the Sale Hearing to secured creditors, thereby giving them the opportunity to object to this transaction. Provided that no secured creditors object to this transaction, Section 363(f)(2) will be satisfied. *See, e.g.*, Veltman v. Whetzal, 93 F.3d 517, 521 n.5 (8th Cir. 1996) (in a Chapter 7 case, stating that "some courts have found implied consent, however, when a party with an interest in the bankruptcy estate fails to object after receiving notice of the sale

under subsection 363(f)(2)") (*citing* In re Tabone, Inc., 175 B.R. 855, 858 (Bankr.D.N.J.1994); In re Elliot, 94 B.R. 343, 345 (E.D.Pa.1988)).

44. Under Section 363(f)(4) of the Bankruptcy Code, a sale free and clear of all interests, liens, claims and encumbrances is permissible if the interest of any entity is in *bona fide* dispute. Under Section 363(f)(5) of the Bankruptcy Code, a sale free and clear of all interests, liens, claims and encumbrances is permissible if any party asserting an interest in the assets could be compelled to accept money satisfaction of such interest in a legal equitable proceeding. Debtor submits that to the extent certain mechanic's lien claimants who have filed mechanic's liens against Debtor's ethanol plant may not consent under Section 363(f)(2), a sale free and clear of their interests will still be permissible because Lurgi's claim or interest, or the amount of Lurgi's claim or interest, is the subject of a *bona fide* dispute under Section 363(f)(4), and as to all such other mechanic's lien claimants, they could be compelled to accept a money satisfaction of their respective interests in a legal or equitable proceeding under Section 363(f)(5).

45. Approval of the sale free and clear of all interests, liens, claims and encumbrances is in the best interests of the estate and creditors. Any Sale Proceeds shall be applied in accordance with the Final DIP Order and the Debtor-In-Possession Loan and Security Agreement, as applicable, or further order of this Court.

Purchase Agreement Was Negotiated at Arm's Length and in Good Faith

46. The Purchase Agreement and the transactions related thereto were negotiated and have been and are undertaken by Debtor and Purchaser at arm's length, without collusion and in good faith within the meaning of Section 363(m) of the Bankruptcy Code, and Debtor accordingly requests that the Court determine that the entire sale process was conducted in good faith within the meaning of Section 363(m) of the Bankruptcy Code and that Debtor and

Purchaser are entitled to the protections of Section 363(m) of the Bankruptcy Code. See In re Apex Oil Co., 92 B.R. 847, 874 (Bankr. E.D. Mo. 1988).

47. In Debtor's view, the Purchase Agreement represents substantial value to Debtor's estate inasmuch as it provides favorable terms for the disposition of the Assets at a price that represents fair and reasonable consideration having a certain value. *See id.* at 869. *See also* Mellon Bank, N.A., v. Metro Communications, Inc., 945 F.2d 635 (3d. Cir. 1991) (reasonably equivalent value under the Bankruptcy Code). At the conclusion of the bid process and auction opportunity, Debtor will have the highest and best offer to submit to this Court for approval.

Assumption and Assignment of Certain Executory Contracts and Unexpired Leases

48. The assumption by Debtor and assignment to Purchaser of certain executory contracts and unexpired leases will be an integral part of the proposed sale and should be approved by the Court. Section 365(a) of the Bankruptcy Code authorizes a debtor in possession to assume any executory contract or unexpired lease subject to the bankruptcy court's approval. Section 365(b) of the Bankruptcy Code requires such debtor in possession to satisfy certain requirements at the time of assumption if a default exists under the contract or lease to be assumed.

49. A bankruptcy debtor's decision to assume or reject an executory contract or unexpired lease is governed by the "business judgment" test. *See* In re Food Barn Stores, Inc., 107 F.3d 558, 567 n.16 (8th Cir. 1996); In re Chi-Feng Huang, 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982). *See also* Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309 (5th Cir. 1985); In re Pesce Baking Co., Inc., 43 B.R. 949, 956 (Bankr. N.D. Ohio 1984). Under the business judgment test, a court should approve a debtor's proposed assumption or rejection if it will benefit the estate. *Id.* A debtor's decision to assume or reject an executory contract should

be accepted unless evidence is presented that the decision was "clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code." Richmond Leasing, 762 F.2d at 1309.

50. Debtor presently intends to seek approval of the assumption and assignment to Purchaser (or to such other successful bidder(s) ultimately selected by Debtor pursuant to the Auction and Bid Procedures) of all executory contracts and unexpired leases related to the Assets (all such executory contracts and unexpired leases being collectively referred to as the "Contracts"), except for those executory contracts and unexpired leases rejected by Debtor pursuant to Court order or not designated by Purchaser or such other successful bidder(s) for assumption and assignment. Prior to the deadline for the submission of competing bids, Debtor will serve the counterparties (the "Counterparties") to the Contracts with a notice (the "Contract Notice") that contains the following information: (a) notice of Debtor's intent to assume and assign certain of the Contracts to Purchaser (or to such other successful bidder(s) ultimately selected by Debtor pursuant to the Auction and Bid Procedures), effective as of the date of the closing of the transaction with such parties ("Closing"); (b) a list of the Contracts and the monetary defaults (if any) related to each Contract that are required to be cured pursuant to Section 365 of the Bankruptcy Code (the "Cure Amounts"); and (c) the procedures for filing any objections to the assumption and assignment of the Contracts, including any objections to the proposed Cure Amounts. The form of the Contract Notice, attached as **Exhibit E** hereto is subject to prior Court approval pursuant to this Motion.

51. Under the Auction and Bid Procedures, Debtor shall designate prior to the deadline for the submission of competing bids, the Contracts to be assumed and assigned to Purchaser (or to such other successful bidder(s) ultimately selected by Debtor pursuant to the Auction and Bid Procedures) at Closing pursuant to the Sale Order (the "Assumed Contracts").

At a hearing to be held on December 18, 2008 (the "Assumed Contracts Hearing"), any potential disputes concerning the Cure Amounts under the Assumed Contracts shall be resolved. The Court's findings at the Assumed Contracts Hearing as to the Cure Amounts, if any, arising from the Assumed Contracts pursuant to Section 365(b) of the Bankruptcy Code, shall be final and binding on the parties to all Assumed Contracts, and shall not be subject to further dispute or audit based on performance prior to the time of assumption and assignment (to the extent any Assumed Contracts contain an audit clause).

52. Based on the foregoing, Debtor respectfully requests that the Court approve the assumption and assignment of the Assumed Contracts. Debtor's decision to assume and assign those Contracts relating to the Assets in connection with the proposed sale transaction stems from the sound exercise of the Debtor's best business judgment as they are necessary to maximize the value of the Assets to the Purchaser and therefore to the estate. Debtor's decision to assume and assign the Contracts is in the best interests of the estate and creditors.

Reduction or Elimination of 10-Day Stay Under Bankruptcy Rules 6004(h) and 6006(d)

53. Time is of the essence in approving and closing the Sale, and any unnecessary delay in closing the Sale could result in the collapse of the Sale. Accordingly, this Court should waive the ten (10)-day period staying any order to sell or assign property of the estate imposed by Bankruptcy Rules 6004(h) and 6006(d).

WHEREFORE, Debtor respectfully request that the Court hear this Motion on October 28, 2008, and enter an Order: (a) approving the Auction and Bid Procedures, Reimbursement Expense, Sale Notice and Contract Notice; and (b) at a hearing to be held on December 18, 2008 (i) authorize the sale of the Assets free and clear of all interests, liens, claims and encumbrances; (ii) approve the assumption and assignment of certain executory contracts and unexpired leases in connection with such sale; (iii) resolve any potential disputes concerning

the Cure Amounts under the Assumed Contracts; (iv) find that the Sale be effective immediately and that the stay provisions of Bankruptcy Rules 6004(h) and 6006(d) do not apply; and (v) provide such other relief as is just and proper.

Respectfully submitted,

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GATEWAY ETHANOL, L.L.C.,	**)**	**Case No. 08-22579-DLS**
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SUMMARY OF EXHIBITS

The following exhibits in reference to Debtor'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, are available upon request:

Exhibit A:	Purchase Agreement
Exhibit B:	Form of Bidding Procedures Order
Exhibit C:	Auction and Bid Procedures
Exhibit D:	Sale Notice
Exhibit E:	Contract Notice

Respectfully submitted,

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By: /s/ Laurence M. Frazen

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