

**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.)	

**APPLICATION UNDER 11 U.S.C. §§ 327(a) AND 328(a) FOR RETENTION OF
WILLIAM BLAIR & COMPANY, L.L.C. AS INVESTMENT BANKER AND
FINANCIAL ADVISOR FOR DEBTOR AND DEBTOR IN POSSESSION**

COMES NOW Gateway Ethanol, L.L.C., Debtor and Debtor in Possession (“Gateway” or “Debtor”), and for its Application under 11 U.S.C. §§ 327(a) and 328(a) for Retention of William Blair & Company, L.L.C. as Investment Banker and Financial Advisor for Debtor and Debtor in Possession (the “Application”), pursuant to the terms of the engagement letter dated September 18, 2008 (the “William Blair Agreement”), a copy of which is attached hereto as **Exhibit A**, and states as follows:

1. On even date with the filing of this Application (the “Petition Date”), Debtor filed a voluntary petition in this Court for reorganization relief under Chapter 11 of Title 11 of the United States Code, §§ 101-1532, as amended (the “Bankruptcy Code”). Debtor continues to operate its business and manage its properties as debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been established in this case.

2. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this case and motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. Debtor seeks to employ William Blair & Company, L.L.C. (“William Blair”) as its investment banker and financial advisor pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014 in connection with various matters, as described in more detail below, retroactive to the Petition Date. Pursuant to Section 327(a) of the Bankruptcy Code, Debtor requests that the Court approve the employment of William Blair as its investment banker and financial advisor during this Chapter 11 case. Pursuant to Section 328(a) of the Bankruptcy Code, Debtor requests that the Court approve the fees and expenses (the “Fee Structure”) and indemnification provisions (the “Indemnification Agreement”) as set forth in the William Blair Agreement.

4. Debtor believes that the services William Blair will perform are critical to the success of Debtor’s Chapter 11 case. William Blair has the necessary background to deal effectively and efficiently with many of the potential financial issues and problems that may arise in the context of this Chapter 11 case. Debtor believes that William Blair is both well-qualified and uniquely able to assist it in this Chapter 11 case in a most efficient and timely manner.

5. William Blair is uniquely qualified to advise Debtor in connection with its strategic alternatives and possible restructuring transactions in this Chapter 11 case, and William Blair’s professionals have extensive experience in matters involving complex financial restructurings. William Blair is a global investment and advisory firm with expertise in mergers and acquisitions, capital raising, restructurings and other strategic advisory services. William Blair has considerable expertise in the ethanol and bio-fuels industries, having recently advised on more than a dozen bio-fuels transactions. Among its disclosable and notable clients in these industries, William Blair has advised US BioEnergy and FC Stone in an advisory capacity on

different engagements. Additionally, William Blair and/or its bankers have been involved as investment bankers and advisors to a diverse group of debtors, creditors, and bondholders in the Chapter 11 cases of many companies, including, among numerous others, Ameriserve Food Distribution, Inc., Calpine Corporation, CoServ, Diamond Brands, Diamond Glass Companies, Harnischfeger Industries, Stations Holding Company, Inc. and UAL Corporation.

6. Geoffrey A. Richards, Co-Head of William Blair's Special Situations and Restructuring Group, will lead all of the day-to-day aspects of this assignment. Mr. Richards has extensive complex transaction experience in a comprehensive range of restructuring and distressed mergers and acquisition engagements, both in and outside Chapter 11. Mr. Richards has advised public and private companies, private equity sponsors, hedge funds, purchasers of distressed assets and businesses, key secured and unsecured creditors, DIP lenders, and creditors' committees. Mr. Richards was previously a managing director at Giuliani Capital Advisors LLC and, before that, a partner in the Kirkland & Ellis LLP restructuring practice. Since 2001, Mr. Richards has taught corporate restructuring as an adjunct professor at Northwestern University School of Law.

7. The parties have entered into the William Blair Agreement, which governs the relationship between William Blair and Debtor. William Blair will provide such financial advisory and investment banking services as William Blair and Debtor shall deem appropriate and feasible in order to advise Debtor in the course of this Chapter 11 case, including, but not limited to, the following:

- a. Advise and assist Debtor in connection with any acquisition of all, or a substantial portion of the capital stock or assets of Debtor in each case in either a single transaction or a series of transactions, whether by tender or exchange offer, purchase, acquisition, business combination, or otherwise (a "M&A Transaction");

- b. Advise and assist Debtor in connection with any financing for any portion of Debtor, whether in the form of secured, unsecured, subordinated or senior debt, equity or equity equivalents, and whether or not such financing is arranged on a public or private basis (a “Financing Transaction”); and
- c. Advise and assist Debtor in connection with any single transaction or series of transactions that effectuates any material modification, amendment to, or change of, or in, the principal balance, accrued or accreted interest, payment term, other debt service requirement, and/or financial or operating covenant; any forbearance for at least six months with respect to any payment obligation; conversion to common or other equity, or any other security or instrument, of any, or all, of Debtor's obligations and/or indebtedness for borrowed money, which are currently outstanding; the implementation of a cash tender offer for any, or all, of such obligations or indebtedness; any other compromise of the existing terms of such obligations and/or indebtedness; or any combination of the foregoing transactions (a “Restructuring Transaction”).

8. A Financing Transaction, an M&A Transaction and a Restructuring Transaction are each referred to herein as a (“Possible Transaction”) and are collectively referred to herein as the (“Possible Transactions”). Depending upon the nature of the Possible Transactions, William Blair’s services will include, if appropriate or if requested by Debtor, the following:

- a. Assist Debtor’s management in (a) developing a strategy for pursuing one or more Possible Transactions, (b) preparing a descriptive memorandum that describes Debtor’s operations and financial condition and includes current financial data and other appropriate information furnished by Debtor (as amended and supplemented from time to time, the “Descriptive Memorandum”) and (c) contacting and eliciting interest from those possible participants expressly approved by Debtor and a list of possible participants in the Possible Transactions (it being understood that such participants may include parties to whom William Blair has rendered or is now rendering investment banking services but, in any case, such services have not and do not in any way relate to Debtor or any Possible Transactions);
- b. Review and analyze the business plans and financial projections prepared by Debtor including, but not limited to, testing assumptions and comparing those assumptions to historical Debtor and industry trends;

- c. Assist Debtor and its other professionals in reviewing and analyzing the terms of any proposed Possible Transaction, in responding thereto and, if directed, in evaluating alternative proposals for a Possible Transaction, whether in connection with a confirmed chapter 11 plan (a “Plan”) or otherwise;
- d. Determine a range of values for Debtor and any securities that Debtor offers or proposes to offer in connection with a Possible Transaction;
- e. Advise Debtor on the risks and benefits of considering a Possible Transaction with respect to Debtor's business prospects and strategic alternatives to maximize the business enterprise value of Debtor, whether pursuant to a Plan or otherwise;
- f. Assist or participate in negotiations with parties in interest, including, without limitation, any current or prospective creditors of, holders of equity in, or claimants against Debtor and/or their respective representatives in connection with a Possible Transaction and/or a Plan;
- g. Advise and attend meetings of Debtor's Board of Directors, creditor groups, official constituencies and other interested parties, as necessary;
- h. To the extent requested by Debtor, assist Debtor in raising capital and/or refinancing or amending any of its existing debt facilities;
- i. In the event Debtor determines to commence one or more cases under chapter 11 of the Bankruptcy Code in order to pursue a Possible Transaction or otherwise, and if requested by Debtor, participate in hearings before the Bankruptcy Court in which such cases are commenced (the “Bankruptcy Court”) and provide relevant testimony with respect to the matters described herein and arising in connection with any Possible Transaction or any proposed Plan; and
- j. Render such other financial advisory and investment banking services as may be agreed upon in writing by William Blair and Debtor in connection with any of the foregoing.

9. It is necessary that Debtor employ investment bankers to render the foregoing professional services. Debtor believes that William Blair is well qualified and able to provide the aforementioned services. William Blair has stated its desire and willingness to act in this case and render the necessary professional services as investment bankers for Debtor.

10. To the best of Debtor’s knowledge, information and belief, other than in connection with this case, William Blair has no connection with, and neither holds nor represents

any interest adverse to, Debtor, its estate, creditors, or any other parties in interest herein or their respective attorneys or accountants, in the matters for which William Blair is proposed to be retained, except that William Blair may have represented (and may represent in the future) certain of Debtor's creditors or other parties in interest herein, or interests adverse to such creditors or parties in interest herein, in matters unrelated to this Chapter 11 case. To the best of Debtor's knowledge, information and belief, neither William Blair nor any of its employees has any financial connection with Debtor or its estate, or has any relationship or connection with the Office of the U.S. Trustee for the District of Kansas or with any United States Bankruptcy Judge in the District. William Blair is not a creditor, an equity shareholder, nor an insider of Debtor. William Blair has not, within the last two years, been a director, officer, or employee of Debtor. Consequently, William Blair is a "disinterested person" as defined in Section 101(14) of the Bankruptcy Code and as required by 11 U.S.C. § 327(a). The Affidavit of Geoffrey A. Richards, executed on behalf of William Blair in accordance with 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014, is attached hereto as **Exhibit B** and incorporated herein by reference. Debtor's knowledge, information and belief regarding the matters set forth in this paragraph are based, and made in reliance upon, said Affidavit.

11. As more fully described in the William Blair Agreement, Debtor has agreed, subject to Court approval, to pay the fees and expenses for the services rendered in these cases as follows:

- a. Monthly Fees. A non-refundable fee in the amount of \$50,000 upon mutual execution of the William Blair Agreement and, thereafter, a monthly fee (the "Monthly Fee") in the amount of \$50,000 payable in advance in full every thirty days after the date of the William Blair Agreement. All Monthly Fees received by William Blair shall be credited once against the Transaction Fees.
- b. M&A Transaction. Upon the consummation of any M&A Transaction, Debtor shall pay William Blair a cash fee (the "M&A Fee") equal to:

For Transaction Value^{1/} up to \$45 million: \$750,000 (the “Minimum Fee”), plus

For Transaction Value from \$45 million to \$65 million: 2.5% of such incremental value, plus

For Transaction Value from and in excess of \$65 million: 4.0% of such incremental value.

- c. Financing Transaction. Upon the consummation of a Financing Transaction, Debtor shall pay William Blair a cash fee (the “Financing Fee”) equal to the greater of (A) the Minimum Fee or (B) the sum of (x) 1.0% of the aggregate principal amount of all secured notes and bank debt raised or committed, (y) 3.0% of the aggregate amount of all unsecured and subordinated debt securities raised or committed, whether structurally or contractually subordinated and whether with the same or different lender(s) or (z) 5.0% of the aggregate amount of all equity and equity equivalents (including convertible securities and preferred stock) placed or committed. For greater certainty, the exercise of any warrants provided to any financier, lender, investor or other purchaser of securities as part of a Financing Transaction shall, upon the exercise thereof, be considered equity for purposes of calculating the Financing Fee. Notwithstanding the foregoing, in the event that the parties on Exhibit C of the William Blair Agreement^{2/} consummate a Financing Transaction, the Debtor shall pay William Blair a fee equal to (i) 60% of the Financing Fee described in the foregoing sentence for the first \$10 million of financing; (ii) 70% of the Financing Fee described in the foregoing sentence for the next \$5 million of financing; and (iii) 75% of the Financing Fee described in the foregoing sentence for the financing in excess of \$15 million.
- d. Restructuring Transaction. Upon the consummation of any Restructuring Transaction, Debtor shall pay to William Blair a cash fee (the “Restructuring Fee”) equal to the Minimum Fee.
- e. Reimbursement of all necessary, reasonable and documented third party out-of-pocket expenses incurred during this engagement, including but not limited to, travel and lodging, direct identifiable data processing, word processing and communication charges, courier services, working meals, and other necessary expenditures, payable upon rendition of invoices setting forth in reasonable detail the nature and amount of such expenses.

12. Subject to the limitations set forth in the William Blair Agreement and the

Indemnification Agreement as included therein, Debtor has agreed to indemnify William Blair

^{1/} Transaction Value is defined in the William Blair Agreement which is attached as Exhibit A.

^{2/} To preserve confidentiality, Exhibit C of the William Blair Agreement attached to the Application has been redacted.

against, and reimburse it for reasonable costs and expenses in relation to, any claim in connection with the engagement.

13. Debtor's major secured lender Dougherty Funding LLC (Dougherty) and William Blair have agreed to the following terms regarding William Blair's compensation, in exchange for which Dougherty has agreed to support William Blair's retention:

a. Dougherty has agreed to a "carve-out" to permit the payment of William Blair's postpetition fees in the amount of \$550,000 and its expenses (provided that such expenses do not exceed the amount of expenses projected with William Blair's monthly fee in the Gateway 4-month Budget that Gateway provided to Dougherty on October 3, 2008).

b. The \$550,000 consists of postpetition monthly fees in the amount of \$50,000, which monthly fees will be credited against the \$550,000 success fee. The success fee will be payable upon and in connection with the consummation of the sale of substantially all of Gateway's assets.

c. In the event that William Blair achieves a purchase price in excess of Dougherty's purchase price under the contemplated Asset Purchase Agreement between Dougherty (or its designee) and Gateway (the "Purchase Price"), Dougherty has agreed to consent to the payment to William Blair of 4% of the purchase price that exceeds the Purchase Price.

14. The William Blair Agreement may be terminated without cause by either Debtor or William Blair upon written notice to the other party. Notwithstanding the foregoing, any such termination shall not affect Debtor's obligations under the Indemnification Agreement. Further, William Blair shall be entitled to any transaction fees for any agreements in principle to

engage in (and which subsequently closes at any time) any Possible Transaction within 18 months after such termination date.

15. In accordance with the terms of the William Blair Agreement, Debtor seeks approval of the Fee Structure and Indemnification Agreement pursuant to Section 328(a) of the Bankruptcy Code. Section 328(a) provides, in relevant part, that a debtor “with the court’s approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.” 11 U.S.C. § 328(a). Section 328(a), therefore, permits the Court to approve the Fee Structure and Indemnification Agreement proposed in the William Blair Agreement in connection with Debtor’s retention of William Blair.

16. Debtor believes that the Fee Structure is fair and reasonable and should be approved under Section 328(a) of the Bankruptcy Code. The Fee Structure appropriately reflects the nature of the services to be provided by William Blair and the fee structures typically utilized by leading investment bankers when billing on a non-hourly basis. In particular, Debtor believes that the Fee Structure creates a proper balance between fixed, monthly fees and contingency fees. Similar fixed and contingency fee arrangements have been approved and implemented in other large Chapter 11 cases. See, e.g., In re Mirant Corp., No. 03-46590 (DML) (Bankr. N.D. Tex. Dec. 8, 2003) (authorizing the retention of The Blackstone Group, L.P. as financial advisors for the debtors, pursuant to Section 328(a) of the Bankruptcy Code); In re Kaiser Aluminum Corporation, No. 02-10429 (JKF) (Bankr. D. Del. Mar. 19, 2002) (authorizing the retention of Lazard Freres & Co. LLC and subjecting compensation to same standard of review); In re Trans World Airlines, Inc., No. 01-0056 (PJW) (Bankr. D. Del. Jan. 26, 2001) (authorizing retention of Rothschild, Inc. as financial advisors for the debtors, pursuant to Sections 327(a) and 328(a) of

the Bankruptcy Code); In re Covad Communications Group, Inc., No. 01-10167 (JJF) (Bankr. D. Del. Nov. 21, 2001) (authorizing retention of Houlihan Lokey with compensation subject to standard of review set forth in Section 328(a)); In re Harnischfeger Industries, No. 99-02171 (PJW) (Bankr. D. Del. Feb. 8, 2000) (authorizing retention of The Blackstone Group L.P. pursuant to Section 328(a)); In re Casual Male Corp., No. 01-41404 (REG) (Bankr. S.D.N.Y. Mar. 18, 2001) (authorizing retention of Robertson Stephens, Inc., subject to Section 328(a) standard of review); In re Edison Bros. Stores, Inc., No. 99-00115 (MFW) (Bankr. D. Del. Mar. 15, 1999) (order approving the retention of Houlihan Lokey as financial advisors and investment bankers for the debtors, pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code).

17. Debtor also believes that the provisions of the Indemnification Agreement are customary and reasonable for investment banker engagements, both out-of-court and in Chapter 11 proceedings. See, e.g., In re United Artists Theatre Company, 315 F.3d 217 (3rd Cir. 2003) (order authorizing the indemnification of Houlihan Lokey by the debtors); In re Comdisco, Inc., No. 02-C-1174 (N.D.IL. Sep. 23, 2002) (affirming order authorizing indemnification of Lazard Freres & Co. LLC and Rothschild, Inc. by debtors and official committee of unsecured creditors); In re Joan & David Halpern, Inc., 248 B.R. 43 (Bankr. S.D.N.Y. 2000), aff'd, 2000 WL 1800690 (S.D.N.Y. Dec. 6, 2000). The Indemnification Agreement is similar to other indemnification agreements that have been approved by other bankruptcy courts. See, e.g., In re CTC Communications Group, Inc., No. 02-12873 (PJW) (Bankr. D. Del. Nov. 15, 2002) (order authorizing retention of Gleacher Partners LLC on similar terms); In re PC Landing Corp., No. 02-12086 (PJW) (Bankr. D. Del. Oct. 10, 2002) (same); In re Metrocall, Inc., No. 02-11579 (RB) (Bankr. D. Del. July 8, 2002) (order authorizing retention of Lazard Freres & Co. LLC under similar terms); In re Kaiser Aluminum Corporation, No. 02-10429 (JKF) (Bankr. D. Del. Mar.

19, 2002) (same); In re W.R. Grace & Co., No. 01-01139 (JJF) (Bankr. D. Del. June 22, 2001) (order authorizing retention of The Blackstone Group L.P. under terms of engagement letter, including, among other things, indemnification Agreement similar to the instant indemnification provisions).

18. Debtor believes that the Fee Structure and Indemnification Agreement set forth in the William Blair Agreement are reasonable terms and conditions of employment and should be approved under section 328(a) of the Bankruptcy Code. The Fee Structure and Indemnification Agreement appropriately reflect (i) the nature of the services to be provided by William Blair, and (ii) the fee structures and indemnification provisions typically utilized by William Blair and other leading investment banking firms. In sum, therefore, Debtor believes that the Fee Structure and Indemnification Agreement are reasonable terms and conditions of employment in light of (a) industry practice, (b) market rates charged for comparable services both in and out of the Chapter 11 context, (c) William Blair's substantial experience with respect to investment banking services, and (d) the nature and scope of work already performed by William Blair prior to the Petition Date and to be performed by William Blair in this Chapter 11 case.

19. Debtor submits that the employment of William Blair on the terms and conditions set forth herein and the William Blair Agreement is in the best interest of the Debtor, its creditors and all parties in interest.

20. If William Blair's retention and employment are not immediately approved by the Court as requested herein, Debtor will suffer immediate and irreparable harm. Due to the tight timelines associated with the contemplated Section 363 sale process much work needs to be done by William Blair on behalf of Debtor within the first 20 days of this case.

Debtor requires the immediate assistance of William Blair to address the myriad of financial issues that will arise in this fast-paced case. William Blair's knowledge and expertise in the ethanol and bio-fuels industries as well as its extensive experience in complex financial transactions are vital to Debtor's ability to meet the contemplated Section 363 sale process timelines, and to preserve and enhance asset value for creditors. Accordingly, Debtor's request to employ William Blair qualifies for immediate relief under Federal Rule of Bankruptcy Procedure 6003.

WHEREFORE, Debtor respectfully requests that the Court enter an Order authorizing Debtor to retain and appoint William Blair & Company, L.L.C. as its investment banker and financial advisor, and grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ Laurence M. Frazen

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