

21 “Available Cash” of the Company means all cash funds of the Company on hand from time to
22 time (other than [NOTE THE CARVE-OUT HERE] cash funds obtained as contributions to the
23 capital of the Company by the Members and cash funds obtained from loans to the Company) af-
24 ter: [THE “AFTER” LANGUAGE HELPS TO ENSURE THAT INAPPROPRIATE CASH
25 DISTRIBUTIONS TO MEMBERS AREN’T MADE]

26 (i) payment of all operating expenses of the Company as of that time;³⁵

27 (ii) provision for payment of all outstanding and unpaid current obligations of the Company
28 as of that time;³⁵ and

29 (iii) provision for a working capital reserve in accordance with Section 5.2.

30 “Capital Account” means the individual accounts established and maintained pursuant to Sec-
31 tion 3.4.

32 “Capital Contribution” means the total value of cash and agreed fair market value of property
33 contributed and agreed to be contributed to the Company by each Member as shown in Exhib-
34 it A. [CAUTION: CHECK THE POSSIBLE ADVERSE TAX IMPLICATIONS OF A MEM-
35 BER’S CONTRIBUTING PROPERTY, VICE CASH, TO PAY FOR THE MEMBER’S IN-
36 TEREST IN AN LLC, VICE TO PAY FOR SHARES IN A CORPORATION]

37 “Certificate” means the certificate of formation of the Company filed with the Texas Secretary of
38 State pursuant to the TBOC as shown in Exhibit B. [CERTIFICATES OF FORMATION ARE
39 FILED ELECTRONICALLY VIA THE TEXAS SECRETARY OF STATE WEB SITE]

40 “Company” has the meaning set forth in the Preamble. [NOTE THE CROSS-REFERENCE]

41 “Effective Date” has the meaning set forth in the Preamble.

42 | “Entity” [I PREFER “ORGANIZATION”] means any association, corporation, general partner-
43 | ship, limited partnership, limited liability partnership, limited liability company, joint stock asso-
44 | ciation, joint venture, firm, trust, business trust, cooperative, and foreign associations of like
45 | structure.

46 | “Incompetency” occurs when a disability of a Member causes that Member to lack the ability,
47 | knowledge, fitness or legal qualification to discharge his or her duties as a Member. [AS DE-
48 | TERMINED BY WHOM, AFTER WHAT “DUE PROCESS”? THIS IS OFTEN NEGOTIAT-
49 | ED IN EXECUTIVE EMPLOYMENT AGREEMENTS]

50 | “Interest” in the Company means the entire ownership interest of a Member in the Company at
51 | any particular time, including without limitation:

52 | (i) the right of the Member to any and all benefits to which a Member may be entitled as pro-
53 | vided in this Agreement and under the TBOC, together with

54 | (ii) the obligations of the Member to comply with all of the terms and provisions of this
55 | Agreement.

56 | “Member” means (i) any Person executing this Agreement as of the date of this Agreement as
57 | a ~~Member~~ or and (ii) any Person hereafter [HOW COULD “HEREAFTER” BE REPLACED?]
58 | admitted to the Company as a Member as provided in this Agreement. The term ,but does not
59 | include any Person who has ceased to be a Member of the Company.

60 | “Percentage Interest” of a Member means a Member’s then-current proportionate holding of
61 | units in the Company expressed as a fraction of 100; each initial Member’s initial Percentage In-
62 | terest is ,and set forth opposite the name of the Member under the column “Percentage Interest”
63 | in Exhibit A, to this Agreement, which may be adjusted from time to time.

64 “Person” ~~refers to includes~~ an individual or Organization, whether acting on its own behalf or ,
65 ~~partnership, limited partnership, limited liability partnership, limited liability company, foreign~~
66 ~~limited liability company, trust, estate, corporation, custodian, trustee, executor, administrator,~~
67 ~~nominee, or Entity~~ [THE DELETED THINGS VIOLATE D.R.Y.] in a representative capacity.

68 “Principal Office” means the office of the Agent as shown in the Certificate or any other address
69 as may be established pursuant to Section 2.4.

70 “Section” refers to a section of this Agreement unless otherwise clear from the context.

71 “TBOC” means the Texas Business Organizations Code including any successor statute as
72 amended from time to time.

73 **ARTICLE 2: ORGANIZATION**

74 **2.1 Formation.** The Company is organized as a Texas member-managed limited liability com-
75 pany by the filing and issuance of the Certificate. [QUESTION: IS THIS PARAGRAPH NEC-
76 ESSARY?]

77 **2.2 Purpose.** The purpose of the Company is to engage in any lawful act or activity for which a
78 limited liability company may be formed within the State of Texas.

79 **2.3 Name.** The Company’s name is XXX L.L.C. [QUESTION: IS THIS SENTENCE NECES-
80 SARY?] All Company business must be conducted in the Company’s name or in any other name
81 a majority of the Members may select [HOW?] that complies with applicable law.

82 **2.4 Principal Office.** The Company’s principal office is currently located at XXX. The Compa-
83 ny may have other offices and places of business within or without Texas.

84 **2.5 Registered Agent & Office.** The Company’s egistered agent for the service of process is
85 XXX; the Company’s registered office is at XXX.

86 A majority of the Members may appoint a different registered agent, select a different registered
87 office, or both.

88 The Company’s registered office need not be a place of business of the Company.

89 **2.6 Term.** The Company will continue in existence perpetually or until terminated pursuant to
90 Section 9.1 of this Agreement or as provided by the TBOC.

91 **2.7 No State-Law Partnership.** The Members intend that the Company not be a partnership (in-
92 cluding a limited partnership) or joint venture and that no Member be a partner or joint venture
93 of any other Member for any purposes other than applicable tax laws.

94 **ARTICLE 3: MEMBERS**

95 **3.1 Names, Addresses, and Initial Capital Contributions of Members.** Members, their respec-
96 tive addresses, their initial Capital Contributions to the Company, and their respective Percentage
97 Interest in the Company are set forth on Exhibit A, which is attached and made part of this
98 Agreement.

99 Each Member agrees to make the initial Capital Contribution set out in Exhibit A.

100 **3.2 Future Contributions.** No Member is required to make additional Capital Contributions to
101 the Company after his or her initial Capital Contribution without the Member’s prior express
102 consent.

103 | Additional Capital Contributions must be made by-if so agreed by unanimous written consent of
104 | the Members. [IF AN LLC WILL HAVE INVESTORS, THERE WILL USUALLY BE

105 ELABORATE PROVISIONS SPELLING OUT THE CIRCUMSTANCES UNDER WHICH
106 ADDITIONAL CAPITAL CONTRIBUTIONS MUST BE MADE, AND WHAT HAPPENS IF
107 A MEMBER FAILS TO MAKE A REQUIRED ADDITIONAL CONTRIBUTION]

108 **3.3 Loans or Other Funds.** Loans or other funds provided by a Member to the Company are not
109 to be treated as Capital Contributions. [THIS WOULD MAKE IT IMPORTANT TO BE VERY
110 CAREFUL IN DOCUMENTING LOANS SO THAT THEY'RE DISTINCT FROM CAPITAL
111 CONTRIBUTIONS] [QUESTION: WHY MIGHT A MEMBER MAKE A LOAN, AS OP-
112 POSED TO CONTRIBUTING MORE CAPITAL?]

113 **3.4 Capital and Capital Accounts.** The initial Capital Contribution of each Member is as set
114 forth in Exhibit A.

115 The Company is to establish and maintain an individual Capital Account on behalf of each
116 Member. [CAPITAL ACCOUNTS ARE IMPORTANT FOR LLCs – THEY CAN HAVE SIG-
117 NIFICANT TAX IMPLICATIONS. THEY'RE NOT “A THING” FOR CORPORATIONS]

118 No interest may be paid on any Capital Contribution.

119 No Member has any liability or obligation to restore a negative or deficit balance in that Mem-
120 ber's Capital Account except as is provided in the TBOC. [FYI, THIS CAN HAVE TAX CON-
121 SEQUENCES DOWN THE ROAD]

122 No Member may withdraw his or her Capital Contribution or demand and receive property of the
123 Company or a distribution in return for his or her Capital Contribution except as provided in this
124 Agreement or as required by law. [THIS HELPS FORESTALL A MEMBER WANTING TO
125 “TAKE MY BAT AND BALL AND GO HOME,” WHICH COULD BE FINANCIALLY
126 DEVASTATING TO THE COMPANY]

127 **3.5 Additional Members.** The Members may admit Additional Members to the Company sub-
128 ject to Jane Doe’s approval. [IT’S UNUSUAL TO GIVE ONE MEMBER SUCH CONTROL,
129 BUT LLC LAW IS LARGELY “ANYTHING GOES” IF IT’S IN THE OPERATING
130 AGREEMENT A.K.A. COMPANY AGREEMENT]
131 An Additional Members ~~must~~ will not have any rights as a Member unless and until the Addi-
132 tional Member adopts the terms of and ~~execute~~ signs this Agreement.

133 **ARTICLE 4: MANAGEMENT AND CONTROL OF BUSINESS**

134 **4.1 Overall Management Authority.** Except as expressly provided otherwise in this Agree-
135 ment, management of the Company shall be vested in Jane Doe or any Person she designates as a
136 Manager. [THIS IS ANOTHER UNUSUAL PROVISION]

137 Except as otherwise required by law, Jane Doe is authorized on behalf of the Company to make
138 all decisions with respect to the Company’s business, and to take all actions necessary to carry
139 out such decisions.

140 The selling or encumbering of all or substantially all of the assets of the Company other than in
141 the ordinary course of business shall require the unanimous vote of all Members. [THERE’S A
142 STATUTORY PROVISION RELEVANT TO THIS CONCEPT]

143 **4.2 Member Meetings.** Meetings of the Members will be called and conducted as determined by
144 the Members. [UNANIMOUSLY? MAJORITY VOTE?]

145 A Member ~~must~~ will preferably be selected at each meeting to record the minutes, which will be
146 kept at the Company’s Principal Office. [QUESTION: ARE MINUTES NECESSARY BY

147 LAW? IF NOT, DOES IT MAKE SENSE TO SET THE BAR HIGHER THAN NECES-
148 SARY?]

149 **4.3 Managing Member Compensation.** Jane Doe is to be compensated shall be entitled to re-
150 ceive compensation for services provided in the management of the Company. The level of com-
151 pensation will is to be approved by a unanimous vote by the Members.

152 **4.4 Reimbursement.** Jane Doe shall is to be reimbursed by the Company for any reasonable out-
153 of-pocket costs incurred on behalf of the Company.

154 **ARTICLE 5: ALLOCATIONS AND DISTRIBUTIONS**

155 **5.1 Allocation of Profits and Losses.** For financial accounting and tax purposes, the Company's
156 net gains or net losses will are to be determined at the end of each fiscal year and will are to be
157 allocated among the Members in accordance with their Percentage Interest. [LLC LAW AND
158 TAX LAW PERMIT THIS TO BE HANDLED OTHERWISE, BUT IT CAN COMPLICATE
159 MATTERS. CORPORATIONS DON'T HAVE NEARLY SO MUCH FLEXIBILITY]

160 **5.2 Distributions.** From time to time, the Members shall may determine, in their reasonable
161 judgment, to what extent (if any) the Company's cash on hand after the tax distribution in 5.1
162 above, exceeds its current and anticipated needs, including, without limitation, for operating ex-
163 penses, debt service, acquisitions, and a reasonable contingency reserve. If such an excess exists,
164 the Members may cause the Company to distribute to the Members an amount in cash equal not
165 greater than to that excess in proportion to their Interests. [UNLESS THE LLC ELECTS TO BE
166 TAXED AS A CORPORATION, THIS COULD BE IMPORTANT TO PROVIDE CASH TO
167 PAY THE MEMBERS' PERSONAL INCOME THAT'S IMPUTED TO THEM FROM THE
168 LLC'S NET INCOME]

169 **5.3 No Right to Demand Return of Capital.** No Member has any right to return of capital or
170 other distribution except as expressly provided in this Agreement. No member has any drawing
171 account in the Company. [ANOTHER "BAT AND BALL" CLAUSE]

172 **ARTICLE 6: CHANGES IN MEMBERS**

173 **6.1 Death.** If Jane Doe predeceases John Doe as a Member, then, her Interest ~~shall~~will automat-
174 ically vest in [NOTE TO CLIENT: FILL IN THIS BLANK], who
175 ~~shall~~will, at that time, be ~~deemed~~automatically admitted as a Member with respect to such Inter-
176 est. If John Doe predeceases Jane Doe as a Member, then, his Interest ~~shall~~will automatically
177 vest in Jane Doe.

178 **6.2 Divorce.** Upon the divorce of Jane Doe and John Doe, John Doe ~~shall~~will be automatically
179 divested of his Interest, ~~which will and such Interest shall~~ vest in Jane Doe.

180 **6.3 Incompetency.** Upon the judicial determination of Incompetency of Jane Doe as a Member,
181 her Interest shall vest in [NOTE TO CLIENT: FILL IN THIS BLANK]. Upon
182 the judicial determination of Incompetency of John Doe as a Member, his Interest shall vest in
183 Jane Doe, or [NOTE TO CLIENT: FILL IN THIS BLANK] if Jane Doe is
184 dead or incompetent.

185 **6.4 Transfer and Assignment of Member's Interest.** Unless otherwise expressly provided in
186 this Agreement, no Member may assign, convey, sell, encumber, or in any way alienate all or
187 any part of his or her Interest in the Company as a Member without the prior written unanimous
188 consent of the other Members. ~~Such, which~~ consent may be given or withheld, conditioned or
189 delayed (as allowed by this Agreement or the TBOC) by each of, as the remaining Members in
190 his or her ~~may determine in their~~ sole and unfettered discretion. [THIS PROBABLY WORKS]

191 FOR A HUSBAND-AND-WIFE ARRANGEMENT, BUT IT COULD BE DANGEROUS TO
192 A MINORITY MEMBER]

193 **6.5 Withdrawal.** A Member does not have the right or power to withdraw, resign or retire from
194 the Company as a Member. [LET'S DISCUSS THIS]

195 **ARTICLE 7: INDEMNIFICATION**

196 **7.1 General Rule.** The Company shall indemnify and hold harmless the Members from and
197 against all losses, claims, demands, costs, damages, liabilities, judgments, fines, settlements, and
198 other amounts arising from any and all claims, demands, or proceedings in which a Member may
199 be involved, or threatened to be involved, as a party or otherwise, arising out of the business of
200 the Company, unless [NOTE THE BURDEN OF PROOF HERE] [LET'S DISCUSS WHO THE
201 CLIENT IS] the Company demonstrates, by clear and convincing evidence, that:

202 (a) the Member's actions were not in good faith; or

203 (b) the Member's actions were not in a manner that the Member reasonably believed to be in
204 the interest of the Company; or

205 (c) in the case of a criminal proceeding, the Member did not have had reasonable cause to be-
206 lieve his or her conduct was unlawful; and-or

207 (d) the Member is adjudged in any such the relevant proceeding, in a final judgment from
208 which no further appeal is taken or possible, to be liable for negligence or misconduct in the
209 performance of duty.

210 The termination of a proceeding by judgment, order, settlement, conviction, or on a plea of nolo
211 contendere or its equivalent is not determinative that the individual did not meet the standard of
212 conduct described in this Section.

213 [NEW PARAGRAPH HERE] Any indemnification of this Agreement must be satisfied solely
214 out of the assets of the Company (or from insurance permitted to be obtained by the Company),
215 and no Member will be subject to any personal liability because of these indemnification provi-
216 sions.

217 **7.2 Exception.** The Company shall not indemnify any Person, against whom the Company has
218 brought or has threatened to bring action, in respect of that action. [QUESTION: IS THIS DE-
219 SIRABLE?]

220 **7.3 Insurance.** The Company may maintain for the protection of the Company and the Members
221 such insurance as Jane Doe, in her sole discretion, deems necessary for the operations being con-
222 ducted. [ANOTHER UNUSUAL CLAUSE]

223 **ARTICLE 8: ACCOUNTING AND RECORDS**

224 **8.1 Accounting and Records.** The books and records of the Company ~~must~~ are to be kept, and
225 the financial position and the results of its operations recorded, in accordance with the account-
226 ing methods elected to be followed by the Company for federal and state tax purposes.

227 The fiscal year of the Company for financial reporting and for federal income tax purposes is the
228 calendar year.

229 All books and records of the Company ~~will~~ are to be kept at the Company's Principal Office.

230 **8.2 Tax Elections.** By unanimous written consent, the Members may make any tax elections for
231 the Company [MEMBERS MIGHT WANT TO MAKE THEIR OWN PERSONAL ELEC-
232 TIONS, E.G., “83(b)” ELECTIONS] allowed under ~~the Internal Revenue Code of 1986, as~~
233 ~~amended from time to time, or~~ the tax laws of any ~~state or other~~ jurisdictions having taxing au-
234 thority over the Company. ~~that they may deem appropriate and in the best interests of the Com-~~
235 ~~pany and the Members.~~

236 **ARTICLE 9: DISSOLUTION AND WINDING UP**

237 **9.1 Dissolution.** The Company ~~will~~ is to be dissolved, and its affairs ~~will be~~ wound up, upon the
238 occurrence of one or more ~~by any~~ of the following: [THIS IS COVERED BY THE STATUTE
239 TOO]

- 240 (a) sale, transfer, or other disposition of all or substantially all of the property of the
- 241 Company;
- 242 (b) voluntary decision by unanimous written consent of the Members; or
- 243 (c) judicial decree.

244 **9.2 Winding Up.** In settling accounts of the Company, the liabilities of the Company ~~must~~ are to
245 be paid in the following order: [THIS IS A FAIRLY-STANDARD PRIORITY SCHEME]

- 246 (a) liabilities to creditors, in the order of priority as provided by law, except those to
- 247 Members of the Company on account of their contributions to capital;
- 248 (b) liabilities to Members of the Company in respect of their share of the profits and other
- 249 compensation by way of income on their contributions to capital; and
- 250 (c) liabilities to Members of the Company in respect of their contribution to capital.

251 **ARTICLE 10: MISCELLANEOUS**

252 **10.1 Governing Law.** This Agreement; ~~[NOTE THE SEMI-COLON FOR THE LIST] and~~ the
253 rights of the parties under this Agreement; and any dispute arising out of or relating to this
254 Agreement; # are to be governed by, interpreted by, and enforced in accordance with the laws of
255 the State of Texas (without regard to principles of conflicts of law).

256 **10.2 Amendments.** Any Member may propose amendments to this Agreement. A proposed
257 amendment will be adopted and become effective as an amendment only on the unanimous writ-
258 ten approval of the Members.

259 **10.3 Entire Agreement.** This Agreement constitutes the entire understanding and agreement be-
260 tween the Members with respect to the subject matter of this Agreement. No agreements, under-
261 standings, restrictions, representations, or warranties exist between or among the Members other
262 than those referred to or provided for in this Agreement. ~~No modification or amendment of any~~
263 ~~provision of this Agreement will be binding on any Member unless by unanimous written con-~~
264 ~~sent of the Members. [D.R.Y.] [IF “INVESTORS” ARE JOINING AS MEMBERS, THE~~
265 ~~AGREEMENT USUALLY WILL CONTAIN REPS AND WARRANTIES FROM EACH IN-~~
266 ~~VESTOR THAT THE INVESTOR IS, E.G., AN “ACCREDITED INVESTOR”]~~

267 **10.4 Severability.** If any term or provision of this Agreement is held to be void or unenforcea-
268 ble, then that term or provision will be severed from this Agreement, the balance of the Agree-
269 ment will survive, and the balance of this Agreement will be reasonably construed to carry out
270 the intent of the parties as evidenced by the terms of this Agreement.

271 **10.5 Conflicts of Interest.** Any Members may engage in and possess interests in other business
272 ventures of any type and description, independently or with others, including ones in competition

273 with the Company, with no obligation to offer to the Company the right to participate.

274 [A MANAGER, ON THE OTHER HAND, LIKELY WILL HAVE HEIGHTENED, FIDUCI-
275 ARY-LIKE DUTIES UNDER LLC LAW]

276 [SEPARATE PARAGRAPH HERE] The Company may transact business with a Members if the
277 contract or transaction is fair to the Company as of the time it is authorized by the Member in
278 questions. [LLC LAW ALSO ADDRESSES THIS]

279 **10.6 Notices.** All notices required to be given by this Agreement will be in writing and will be
280 effective when actually delivered to the Members' addresses attached in Exhibit A or to such
281 other address as a Member may specify by notice given in conformance with these provisions to
282 the other Members.

283 **10.7 Attorney's Fees.** In the event of any suit or action to enforce or interpret any provision of
284 this Agreement, the prevailing party is entitled to recover, in addition to other costs, reasonable
285 attorney's fees in connection with the suit or action.

286 The determination of who is the prevailing party and the amount of reasonable attorney's fees to
287 be paid to the prevailing party is to be decided by the court or courts, including any appellate
288 courts, in which the matter is tried, heard, or decided. [THAT IS, NO JURY]

289 CONSIDER A JURY-TRIAL WAIVER OR AN ARBITRATION CLAUSE (FOR CONFI-
290 DENTIALITY)

291 | Executed by the Members on the dates written below, to be effective as of the Effective Date.

292 | [NEED TO FIX THE SIGNATURE BLOCKS TO INCLUDE DATES]

293

294 | _____

295 | Jane Doe, MEMBER

296 | _____

297 | John Doe, MEMBER

298

299

EXHIBIT A

300

<u>Member</u>	<u>Capital Contribution</u>	<u>Percentage Interest</u>
Jane Doe XXX XXX St. Houston, TX 7700X	\$ _____	51%
John Doe XXX XXX St. Houston, TX 7700X	\$ _____	49%

301

302

303

EXHIBIT B

304

[INSERT COPY OF CERTIFICATE OF FORMATION]

305

306