

1 **MODEL COMPANY FOR CLOSELY HELD LLCs**

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Appendix A

Model Company Agreement for Manager-Managed, Multi-Member Limited Liability Company

Commented [DT1]: An LLC can also be “member-managed.”
And it can be single-member.

This Model Agreement is Appendix A to an article by Cliff Ernst and Elizabeth S. Miller entitled *Model Company Agreements for Closely Held LLCs* (the “Accompanying Article”). This Model Agreement should not be considered a form to be completed by filling in the blanks. Drafters should be certain that any agreement used by them is appropriate for the particular transaction. This Model Agreement should be read together with the Accompanying Article, including the various references to the Accompanying Article throughout this Model Agreement.

Commented [DT2]: See [the article](#).

**COMPANY AGREEMENT OF
_____, LLC,
a Texas limited liability company**

Commented [DT3]: In other jurisdictions, this would be titled "Operating Agreement" (which makes more sense to me)

This Company Agreement (this “Agreement”), dated effective the _____ day of _____, 20____, is executed and agreed to, for good and valuable consideration, by the initial Members listed on Exhibit “A”.

Commented [DT4]: I'd put ALL the fill-in-the-blank provisions into a table or "Schedule 1" at the beginning of the document.

Commented [DT5]: I'd put the effective date in the “Schedule 1” (see above).

Article 1

Formation

1.1 Formation. _____, LLC (the “Company”) was formed as a limited liability company under and pursuant to the Texas Business Organizations Code (the “BOC”) and other relevant laws of the State of Texas by the filing of a certificate of formation with the Secretary of State of the State of Texas on _____, 20____.

Commented [DT6]: D.R.Y.!!!

1.2 Name. The name of the Company shall be _____, LLC.

Commented [DT7]: If you're going to fill in a date here, I'd say "on or about" a stated date (and put that in “Schedule 1”). But it's not at all clear to me that a date is even needed here.

Commented [DT8]: To Schedule 1.

The Company shall conduct business under that name or such other names complying with applicable law as the Managers may determine from time to time.

Commented [DT9]: Name changes are sometimes considered a big deal, so would it be desirable to leave that in the hands of the manager(s)?

1.3 Duration. The Company shall exist until terminated in accordance with this Agreement.

Commented [DT10]: Schedule 1?

43 1.4 **Purpose.** The purpose of the Company shall be to engage in the business of (insert
44 description of business) and to engage in any other lawful business or activity necessary or
45 convenient in pursuit of the foregoing purposes.

Commented [DT11]: Schedule 1

46 1.5 **Principal Office.** The Company’s principal office shall be _____ or
47 such other place as the Managers may determine from time to time.

Commented [DT12]: Schedule 1. (I’m going to stop saying that; move all blank spaces into Schedule 1.)

48 1.6 **Registered Office and Registered Agent.** The initial address of the registered office
49 of the Company in the State of Texas shall be _____,

Commented [DT13]: QUESTION: Why is a registered agent needed?

50 and the name of the Company’s initial registered agent at that address shall be
51 _____.

52 The Managers may change the registered office and the registered agent of the Company
53 from time to time.

54 The Managers may cause the Company to qualify to do business as a limited liability
55 company (or other entity in which the Members have limited liability) in any other jurisdiction and
56 to designate any registered office or registered agent in any such jurisdiction.

57 1.7 **Definitions.** Certain terms used in this instrument are capitalized. Such terms shall have
58 the meaning set forth in the text or in Section 11.8.

59 **Article 2**

60 **Members and Membership Interests**

61 2.1 **Initial Members.** In connection with the formation of the Company, the Persons
62 executing this Agreement as initial Members are admitted to the Company as Members effective
63 as of the date of formation of the Company.

Commented [DT14]: QUESTION: Is there any requirement that the initial Members make any specified Capital Contributions?

64 The Percentage held by each of the Members is set forth next to such Member’s name on
65 **Exhibit “A”**.

Commented [DT15]: Put the initial members in Schedule 1 as well.

66 2.2 **Issuance of Membership Interests After Formation of Company.** The Company,
67 after the formation of the Company, may issue membership interests in the Company to any Person
68 with the affirmative vote or Written consent of all of the Members of the Company.

Commented [DT16]: Note the high threshold for admitting new members.

69 Any such affirmative vote or Written consent of the Members shall specify the Capital
70 Contribution, if any, required in connection with the new membership interest, the Percentage
71 represented by the newly issued membership interest and all changes in the Percentages
72 represented by the membership interests outstanding prior to the issuance of the new membership
73 interest.

74 **2.3 Nature of Membership Interest.** A membership interest in the Company is personal
75 property.

76 A Member of the Company or an assignee of a membership interest in the Company **does**
77 **not have an interest in any specific property of the Company.**

78 **A membership interest includes** a Member's or assignee's share of profits and losses or
79 similar items and the right to receive distributions as provided in this Agreement, but **does not**
80 **include** a Member's right to participate in management.

81 **2.4 Withdrawal or Expulsion of Member Prohibited.** A Member of the Company may
82 not withdraw or be expelled from the Company except as provided by this Agreement.

83 A Member ceases to be a Member upon the Member's death, **upon the Member's**
84 **Bankruptcy**, or as provided by Section 2.9.

85 **2.5 Assignment of Membership Interest.** Subject to the requirements of Article 8, a
86 membership interest in the Company may be wholly or partly assigned.

87 An assignment of a membership interest in the Company **is not an event requiring the**
88 **winding up of the Company** and does not entitle an assignee who is not already a Member of the
89 Company to participate in the management and affairs of the Company, become a Member of the
90 Company or exercise any rights of a Member of the Company.

91 If a membership interest in the Company is held in a trust **that is not an entity** under the
92 law of the jurisdiction governing the creation of **the trust, the addition,** termination, or substitution
93 of a trustee of the trust shall constitute an assignment of the membership interest for purposes of
94 this Agreement, and the former trustee shall cease to be a Member to the extent that the trustee was
95 a Member in the capacity as trustee.

Commented [DT17]: No interest in Company property — why do you think?

Commented [DT18]: This part allows a Member to use his/her membership interest as collateral, e.g., for a loan — if, that is, anyone is willing to accept the interest as collateral

Commented [DT19]: QUESTION: Why do you think this is stated? (Hint: What happens if a Member dies?)

Commented [DT20]: QUESTION: Would this fall afoul of the Bankruptcy Code's prohibition of *ipso facto* clauses? (I'd say no, but I'm no expert here.)

Commented [DT21]: Under old-style partnership law, the death of a partner could require winding up of the business.

Commented [DT22]: "Not an entity": In some jurisdictions, a trust might not have the legal power to sue (or be sued).

Commented [DT23]: A "then" would be in order here — as in: "... the creation of the trust, **then** the addition, termination

96 A transfer that occurs by virtue of the addition, termination, or substitution of a trustee of
97 a trust that holds a membership interest shall be treated as an Affiliate Transfer under Section 8.1
98 of this Agreement.

99 **2.6 Admission of New Members.** Any Member of the Company who is issued a new
100 membership interest as provided in Section 2.2 or who acquires a membership interest by
101 assignment (including by reason of death or divorce) shall become a Member of the Company with
102 respect to the new or assigned membership interest immediately upon the issuance or assignment
103 of the membership interest.

104 Approval by the Members pursuant to Section 2.2 of the issuance of a new membership
105 interest in the Company to a Person who is not already a Member shall be deemed approval of the
106 admission of such Person as a Member.

107 An assignee of a membership interest in the Company who is not already a Member of the
108 Company is entitled to become a Member of the Company on the affirmative vote or Written
109 consent of all of the Company's Members.

110 Any Person who desires to become a Member after the formation of the Company shall,
111 as a condition to becoming a Member and in addition to any other conditions set forth herein or
112 established by the Members or Managers, execute and deliver an agreement to be bound by the
113 terms and provisions of the Agreement. Such agreement shall also state an address for the Member
114 for notice hereunder.

115 **2.7 Rights and Duties of Assignee of Membership Interest Before Membership.**

116 (a) A Person who is assigned a membership interest in the Company is entitled to:

117 (i) receive any allocation of income, gain, loss, deduction, credit, or a
118 similar item that the assignor is entitled to receive to the extent the allocation of the item is
119 assigned;

120 (ii) receive any distribution the assignor is entitled to receive to the extent
121 the distribution is assigned; and

Commented [DT24]: Note again the distinction between succeeding to "Member" status versus (the lesser) acquiring a Member's membership interest.

Commented [DT25]: Section 2.2 requires unanimous consent of all existing Members. So this section likely recognizes that sometimes the Member approval won't be sufficiently explicit, and therefore "fills the gap."

Commented [DT26]: "As a condition": I'm increasingly a fan of saying "As a prerequisite" or "As a prerequisite condition" to be more understandable by non-lawyers.

Commented [DT27]: Allocations: In this regard, LLCs share some characteristics with partnerships, in that different Members can be allocated different shares of the listed items. That's normally **not** the case for corporations, where shareholders in the same "class" are treated equally.

122 (iii) subject to Article 7, make, for any proper purpose, reasonable
123 inspections of the books and records of the Company.

Commented [DT28]: If the Company wanted to challenge a Member's demand for an inspection, then the Company could dispute whether the demanded inspection was for a "proper purpose" and/or "reasonable."

124 (b) An assignee of a membership interest in the Company is not liable as a Member of
125 the Company until the assignee becomes a Member of the Company.

Commented [DT29]: QUESTION: What kinds of Member liability are we talking about here, given the nature of an LLC?

(Hint: See § 2.8(a)(iii) [lines 133-34] and § 2.8(b) below.)

126 2.8 **Rights and Liabilities of Assignee of Membership Interest After Becoming Member.**

127 (a) An assignee of a membership interest in the Company, after becoming a Member
128 of the Company, is:

129 (i) entitled to the same rights and powers granted or provided to a Member of
130 the Company by this Agreement; and

131 (ii) subject to the same restrictions and liabilities placed or imposed on a
132 Member of the Company by this Agreement; and

133 (iii) except as provided by subsection (b) of this Section 2.8, liable for the
134 assignor's obligation to make contributions to the Company.

135 (b) An assignee of a membership interest in the Company, after becoming a Member
136 of the Company, is not obligated for a liability of the assignor that:

137 (i) the assignee did not have knowledge of on the date the assignee
138 became a Member of the Company; and

139 (ii) could not be ascertained from this Agreement.

140 2.9 **Rights and Duties of Assignor of Membership Interest.** An assignor of a
141 membership interest in the Company continues to be a Member of the Company and is entitled to
142 exercise any rights or powers of the Member not vested in the assignee by virtue of the assignment
143 (including the right to vote on or consent to any matters requiring approval or consent of the
144 Members under this Agreement) until the assignee becomes a Member of the Company.

145 Upon assignment of a membership interest to another Member or admission of an assignee
146 as a Member, the assignor shall cease to be a Member with respect to the membership
147 interest assigned.

148 In the event that a Member's membership interest is purchased by the Company, the
149 Member shall cease to be a Member with respect to the membership interest purchased.

150 2.10 **Certificates.** Membership interests in the Company shall be uncertificated.

151 *[DRAFTING NOTE: Section III.C. of the Accompanying Article includes model provisions regarding*
152 *certificated membership interests.]*

153 2.11 **Representations and Warranties.** Each Member hereby represents and warrants
154 to the Company and each other Member that (a) the Member has duly executed and delivered this
155 Agreement; and (b) the Member's authorization, execution, delivery, and performance of this
156 Agreement do not conflict with any other agreement or arrangement to which that Member is a
157 party or by which that Member is bound.

158 Article 3

159 Management of the Company, Meetings and Voting

160 3.1 **Managers and Management Generally.** The Managers shall have the authority to manage
161 the business and affairs of the Company and make all decisions with respect thereto, except for those matters
162 expressly reserved to the Members.

163 The foregoing shall not restrict the authority of the officers of the Company as described in
164 Section 3.6 below.

Commented [DT30]: Officers of the Company? What's that? (See 3.6.)

165 By the unanimous vote of all of the Managers, the authority of the Managers to act may be delegated
166 to a committee of less than all of the Managers.

Commented [DT31]: Could a "committee" be a single Manager? (IRC, that's possible with committees of boards of directors of corporations.)

167 Each Manager is an agent of the Company for the purpose of carrying out the Company's business
168 in accordance with the authority granted by action of the Managers.

Commented [DT32]: QUESTION: In general, what's the significance of someone being an "agent" of the Company?

169 No Member of the Company in the Member's capacity as such shall be an agent of the Company
170 or have any authority or right to act for or bind the Company.

Commented [DT33]: This is similar to how, in general, no member of a corporation's board of directors **as such** is considered an agent with authority to bind the corporation. (Many "inside" corporate board members are also officers of the corporation and **do** have such authority when wearing that hat.)

171 3.2 **Number and Qualifications of Managers.**

172 (a) The Managers of the Company may consist of one or more Persons. Except as
173 provided by subsection (b) of this Section 3.2, the number of Managers of the Company consists of the
174 number of initial Managers listed in the Company's certificate of formation.

Commented [DT34]: Just one Manager, eh?

175 (b) The number of Managers of the Company may be increased or decreased by
176 amendment to this Agreement.

177 (c) A Manager of the Company is not required to be a resident of Texas or Member of the Company.

178 3.3 **Terms for Managers.** Unless a term is specified upon selection of a Manager, as
179 provided herein, each Manager shall serve until the resignation, removal, or death of the Manager.

180 If a term is specified by the Members upon the selection of a Manager, the Manager shall
181 serve for the specified term and until the Manager's successor is selected by the affirmative
182 vote of Members owning a majority of all Members' Percentages in the Company, or until
183 the earlier resignation, removal or death of the Manager.

Commented [DT35]: So if the Manager's term expires, the Manager continues to serve until replaced.
(This recognizes the reality that sometimes companies don't keep up with their calendars or expiration dates.)

184 3.4 **Resignation and Removal of Managers.** A Manager may resign at any time by
185 giving Written notice to the Company. Such resignation shall take effect at the time specified
186 therein, and unless otherwise specified therein, the acceptance of such resignation shall not be
187 necessary to make it effective.

188 A Manager may be removed, with or without cause, by the affirmative vote of Members
189 owning a majority of all Members' Percentages in the Company.

Commented [DT36]: Note how this doesn't require unanimity, either per-capita or percentage-based.

190 4
191 *Manager-Managed, Multi-Member*

192 3.5 **Manager Vacancy.** A vacancy in the position of a Manager may be filled by the
193 affirmative vote of all of the remaining managers, regardless of whether the remaining managers
194 constitute a quorum, or the affirmative vote of Members owning a majority of all Members'
195 Percentages in the Company.

Commented [DT37]: Note the two ways of filling a Manager vacancy.

196 *[DRAFTING NOTE: Section III.D. of the Accompanying Article includes model provisions regarding*
197 *the right of certain Members to designate Managers.]*

198 3.6 **Officers and Other Agents.** The Managers may appoint such officers or other
199 agents of the Company as the Managers may deem appropriate and may remove any such officer
200 or agent at any time with or without cause.

Commented [DT38]: Officers: So an LLC could have a CEO, a CFO, etc.

201 The Managers may delegate to the Company’s officers such authority as the Managers may
202 deem appropriate and subsequently revoke or modify that authority.

203 The Managers also may delegate authority to other Persons and revoke that delegation as
204 the Managers may deem appropriate including the power to delegate authority.

205 3.7 **Meetings of Members.** The Managers or any Member may call a meeting of the
206 Members.

Commented [DT39]: “The Managers ... may call a meeting” — does that require unanimity? (No: See § 3.14, line 264 et seq.)

207 Meetings of the Members of the Company may be held at the principal office of the
208 Company or, if remote attendance is allowed and provided in accordance with Section 3.9,
209 at another place in or outside Texas designated by the Person or Persons calling the meeting.

210 Members of the Company owning a majority of all Members’ Percentages in the Company
211 constitute a quorum for the purpose of transacting business at a meeting of the Members.

212 3.8 **Meetings of Managers or Committees of Managers.** Any Manager may call a
213 meeting of the Managers or a committee of the Managers.

Commented [DT40]: Note the difference here: “Any Manager ...”

214 The Managers of the Company or a committee of the Managers may hold meetings at the
215 principal office of the Company or, if remote attendance is allowed and provided in
216 accordance with Section 3.9, at another place in or outside Texas designated by the
217 Manager calling the meeting.

218 A majority of all the Managers or members of a committee of the Managers constitutes a
219 quorum for the purpose of transacting business at a meeting of the Managers or committee
220 of the Managers.

221 3.9 **Alternative Forms of Meetings.**

222 (a) The Members, the Managers, or a committee of the Managers may hold meetings

223 and allow attendance at meetings by using a conference telephone or similar communications equipment,
224 or another suitable electronic communications system, including videoconferencing technology or the
225 Internet, or any combination, if the telephone or other equipment or system permits each individual
226 participating in the meeting to communicate with all other individuals participating in the meeting.

227 (b) If voting is to take place at the meeting, the Company must implement reasonable
228 measures to verify that every Person voting at the meeting by means of remote communications is
229 sufficiently identified, and if a proxy for a Person is voting at the meeting, to verify that the proxy
230 requirements set forth in Section 3.15 are satisfied.

231 **3.10 Participation Constitutes Presence.** A Person participating in a meeting is
232 considered present at the meeting unless the participation is for the express purpose of objecting to
233 the transaction of business at the meeting on the ground that the meeting has not been lawfully
234 called or convened.

235 **3.11 Notice of Meetings.** Notice of a meeting of the Members, the Managers, or a
236 committee of the Managers, must be given in a manner described in Section 11.1 and state the date
237 and time of the meeting and the location of the meeting or, if the meeting is held or attendance is
238 allowed by using a conference telephone or other communications system authorized by
239 Section 3.9, the form of communication used for the meeting.

240 Notice of a meeting of the Members shall state the purpose of the meeting and shall be
241 given not later than the tenth (10th) day or earlier than the sixtieth (60th) day before the
242 date of the meeting.

243 Notice of a meeting of the Managers or a committee of Managers must be given not later
244 than the third (3rd) day before the date of the meeting.

245 Notice of a meeting is not required to be given to a Member, Manager or committee
246 member entitled to notice under this Agreement if the Person entitled to notice signs a
247 **Written waiver of notice of the meeting**, regardless of whether the waiver is signed before
248 or after the time of the meeting.

Commented [DT41]: Waivers of notice are not uncommon.

249 If a Person entitled to notice of a meeting participates in the meeting, the Person's
250 **participation constitutes a waiver of notice of the meeting** unless the Person participates in

Commented [DT42]: This is like a "special appearance to contest personal jurisdiction" in a lawsuit.

251 the meeting solely to object to the transaction of business at the meeting on the ground that
252 the meeting was not lawfully called or convened.

253 3.12 **Acts of Members Generally.** Except as otherwise provided in this Agreement,
254 the affirmative vote of Members owning a majority of all Members' Percentages in the Company
255 constitutes an act of the Members.

Commented [DT43]: The majority rule — but by percentage, not per capita.

256 3.13 **Votes Required to Approve Certain Actions.** A Fundamental Business
257 Transaction of the Company, an action by the Company that would make it impossible for the
258 Company to carry out the ordinary business of the Company, or the filing by the Company of a
259 petition for relief under the United States bankruptcy laws (Title 11, United States Code) must be
260 approved by the affirmative vote of all of the Members.

Commented [DT44]: Note the special unanimity requirement for “Fundamental Business Transactions” (defined at the top of the next page).

261 For purposes of this Agreement, the term “**Fundamental Business Transaction**” shall
262 mean a merger, interest exchange, conversion, or sale of all or substantially all of the
263 Company’s assets.

264 3.14 **Acts of Managers or Committees.** The affirmative vote of a majority of all
265 Managers or a majority of all members of a committee of the Managers constitutes an act of the
266 Managers or committee of the Managers, as appropriate.

267 3.15 **Manner of Voting.** A Member of the Company may vote at a meeting in person
268 or by a proxy executed in Writing by the Member to another Member.

269 A Manager or member of a committee of the Managers may vote at a meeting in person or
270 by a proxy executed in Writing by the Manager to another Manager, or a committee
271 member to another committee member, as the case may be.

272 Except as provided in this Section, Members, Managers and committee members may not
273 vote by proxy.

274 3.16 **Action by Written Consent.** An action may be taken without holding a meeting,
275 without providing notice, or without taking a vote if a Written consent or consents stating the action
276 to be taken is obtained from the number of Members, Managers, or committee members, as
277 appropriate, necessary to have at least the minimum number of votes that would be necessary to

Commented [DT45]: Voting by written consent in lieu of a meeting is quite common in smaller companies.

278 take the action at a meeting at which each Member, Manager, or committee member, as appropriate,
279 entitled to vote on the action is present and votes.

280 Any of the following shall satisfy the requirement for a Written consent: an originally
281 signed document; a photographic, photostatic, facsimile or similarly reliable reproduction
282 of an originally signed document; or an electronic message if the transmission contains or
283 is accompanied by information allowing a determination (i) that the message was
284 transmitted by the consenting Member, Manager or committee member and (ii) of the date
285 of the transmission.

Commented [DT46]: Consent by text message!

286 Unless otherwise dated, a consent given by electronic message is considered given on the
287 date transmitted.

288 3.17 **Explicit Vote or Consent Required.** The exclusive methods by which Members
289 or Managers or committee members may take action with respect to the Company are voting
290 affirmatively at a meeting or giving Written consent as provided in this Article 3.

291 A Member or Manager or committee member shall not be deemed to have voted in favor
292 of, or consented to, an action unless such Person has voted affirmatively at a meeting or
293 given explicit consent as provided in this Article 3.

Commented [DT47]: An abstention doesn't count for this purpose.

294 3.18 **Compensation.** No Member, Manager, or officer or agent of the Company shall
295 receive any compensation for services to the Company or reimbursement for expenses incurred on
296 behalf of the Company except compensation that is approved by the Managers for services or
297 expenses that are, in the reasonable judgment of the Managers, necessary or desirable for the
298 Company.

Commented [DT48]: QUESTION: How much "Monday-morning quarterbacking" would this allow?

299 **Article 4**

300 **Capital Contributions**

301 4.1 **Agreed Capital Contributions.** Each initial Member shall contribute to the capital of the
302 Company the contribution set forth opposite such Member's name on the attached **Exhibit "A"**.

Commented [DT49]: Put this in Schedule 1?

303 Any Person issued a membership interest in the Company after the formation of the Company shall
304 contribute to the capital of the Company the contribution, if any, approved as provided in Section 2.2.

Commented [DT50]: QUESTION: What would happen if the Company issued a membership interest after the formation of the Company but the "issue-ee" didn't make the capital contribution? QUESTION: Could that situation be provided for in the issuance document itself?

305 A Person's obligation to contribute to the capital of the Company may be released or settled only
306 by the affirmative vote or Written consent of all Members.

307 4.2 **Additional Capital Contributions.** The Managers may request, but may not require, that
308 the Members make additional contributions to the capital of the Company.

309 4.3 **Capital Accounts.** A capital account ("**Capital Account**") shall be established for each
310 Member and shall be maintained in such a manner as to correspond with the rules set forth in the Treasury
311 Regulations (the "**Allocation Regulations**") promulgated under Section 704(b) of the Code.

312 Except as otherwise required by the Allocation Regulations or the Code, a Member's Capital
313 Account shall be increased by (i) the amount of any contribution of capital to the Company (based on the
314 fair market value of the cash or other assets contributed) and (ii) allocations of income or gain (for Company
315 book purposes) to the Member pursuant to this Agreement.

316 and shall be reduced by (i) the amount of money distributed to the Member by the Company, (ii) the
317 fair market value of any property distributed to the Member by the Company, and (iii) allocations of
318 deduction or loss (for Company book purposes) to the Member by the Company pursuant to this Agreement.

319 The Capital Accounts of the Members shall not bear interest.

320 If any additional membership interests in the Company are to be issued in consideration for a
321 contribution of property or cash or if any Company property is to be distributed in liquidation of the
322 Company or an interest in the Company, the Capital Accounts of the Members (and the amounts at which
323 all Company properties are carried on its books and records other than for income tax purposes) shall,
324 immediately prior to such issuance or distribution, as the case may be, be adjusted (consistent with the
325 provisions of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized
326 loss attributable to all Company properties (as if such unrealized gain or unrealized loss had been recognized
327 upon actual sale of the properties upon a liquidation of the Company immediately prior to issuance or
328 distribution).

329 Except as otherwise required by the Allocation Regulations, in the event any membership interest
330 in the Company is transferred in accordance with the terms of this Agreement, the transferee shall succeed
331 to the Capital Account of the transferor to the extent it relates to the transferred interest.

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Article 5

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Taxation and Allocations

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5.1 **General.** Unless otherwise required by the Allocation Regulations or the Code, all items of income, gain, loss, deduction and credit of the Company shall be allocated to the Members for accounting and tax purposes **pro rata according to their Percentages.**

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5.2 **Regulatory Allocations.** To the extent the Allocation Regulations or the Code require allocations for tax purposes that differ from the foregoing allocations, the Managers may determine the manner in which such tax allocations shall be made so as to fully comply with the Allocation Regulations, the Code, other applicable law and, at the same time to the extent reasonably possible, preserve the economic relationships among the Members as set forth in this Agreement.

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5.3 **Reporting.** **The Members are aware of the income tax consequences of the allocations made by this Article 5 and hereby agree to be bound by the provisions of this Article 5 in reporting their shares of Company items for income tax purposes.**

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Article 6

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Distributions

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6.1 **Distributions.** **Available Cash** shall be distributed at least annually to all of the Members pro rata according to their Percentages.

Commented [DT51]: "Available Cash" is a defined term.

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6.2 **Required Annual Tax Distribution.** Within sixty (60) days following the end of each fiscal year, the Company shall make an additional distribution to each Member in an amount equal to

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(i) the income tax liability of the Member attributable to the taxable income allocable to the Member for such fiscal year with respect to such Member's membership interest, computed as set forth in Article 5, **less**

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(ii) the aggregate amount of distributions to such Member by the Company during such fiscal year, if the amount per clause (i) is greater than the amount per clause (ii);

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provided, however, that the Company shall only be obligated to make distributions pursuant to this Section 6.2 to the extent that it has cash available in the ordinary course of its business

358 and this Section 6.2 shall not require the Company to liquidate noncash assets, to borrow funds or
359 to require additional capital contributions for the purpose of making such distributions.

360 A Member's income tax liability for purposes of this Section 6.2 shall be computed by multiplying
361 the taxable income allocable to the Member by thirty-seven percent (37%).

Commented [DT52]: QUESTION: Why 37%? (Hint: What's the top marginal rate for "ordinary income"?)

362 Article 7

363 Bank Accounts, Books of Account, Reports and Fiscal Year

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365 7.1 **Bank Account; Investments.** The Company shall establish one or more bank or other financial
366 institution accounts into which all Company funds shall be deposited. Funds deposited by the Company
367 into such accounts may be withdrawn only in furtherance of the business of the Company or for distribution
368 to the Members pursuant to this Agreement. Pending withdrawal for such purposes, Company funds may
369 be invested in such manner as the Managers may determine.

370 7.2 Books and Records.

371 (a) The Company shall keep or cause to be kept books and records of the Company
372 using a method consistent with that described in Treasury Regulation Section 1.704-1(b).

373 Income, gain, loss and deduction of the Company (including income and gain exempt from tax and
374 expenditures not deductible in computing the Company's taxable income) shall be computed based upon
375 the book value of the Company's property using the same methods (e.g., cash or accrual accounting, or
376 straight line or accelerated depreciation) as are used in computing the Company's taxable income.

377 The books of the Company, for both tax and financial reporting purposes, shall be kept using the
378 method of accounting selected by the Managers.

379 (b) The books and records of the Company shall be maintained, or made available as
380 required by this Section, at the Company's principal office.

381 (c) The Company shall provide a Member, an assignee of a membership interest, or a
382 former Member access to the Company's books and records to the extent and as provided by this Section.

383 A Member, an assignee of a membership interest, or a former Member who desires to examine or
384 copy any of the Company's books and records (the "**Requester**") shall give Written notice to the Company
385 specifying the books and records that the Requester desires to examine or copy and stating a proper purpose
386 for examining or copying the requested books and records.

Commented [DT53]: QUESTION: Does this allow a Member to designate, say, an accountant to come and examine the books? Or must it be the Member him- or herself?

Commented [DT54]: See also § 2.7(a)(iii) about inspections — does that violate D.R.Y.?

387 The books and records specified by a Requester who is a former Member must pertain to the period
388 during which the former Member was a Member.

389 Subject to this subsection and subsection (d) of this Section, within five days after the Requester
390 submits such a Written notice, the Company will make available at its principal office the requested books
391 and records if the requested books and records are required to be maintained by the Company under the
392 BOC.

393 Subject to this subsection and subsection (d) of this Section, a Requester, on Written demand stating
394 a proper purpose, is entitled to examine and copy at a reasonable time at the Company's principal office or
395 another location approved by the Company and the Requester, any records of the Company, whether in
396 Written or other tangible form, which are reasonably related to and appropriate to examine and copy for
397 that proper purpose.

398 The requested records will be made available during regular business hours, and the examination
399 and copying shall be at the expense of the Requester.

400 The Company may deny a Requester's request for access to the Company's books and records and
401 information if the Requester: (i) has improperly used information obtained through a prior examination of
402 the books and records of the Company or of any other entity; or (ii) was not acting in good faith or for a
403 proper purpose in making the Requester's request for information.

404 (d) The Company may keep confidential from a Requester, for such period of time as
405 the Managers deem reasonable, any information that the Managers reasonably believe to be in the nature of
406 trade secrets or other information the disclosure of which the Managers in good faith believe is not in the
407 best interest of the Company or could damage the Company or its business or which the Company is
408 required by law or by agreement with a third party to keep confidential.

409 **7.3 Financial Information.** As soon as is reasonably practicable after the end of each
410 Company fiscal year, the Managers shall cause to be prepared and furnished to each Member, at
411 Company expense, a balance sheet of the Company (dated as of the end of the fiscal year then
412 ended), and a related statement of income, loss and change in financial position for the Company
413 (for the same year).

414 Such financial information shall reflect the beginning balance in each Member's Capital
415 Account as of the first day of such year, all distributions of cash made to each Member
416 during the year, and the ending balance in each Member's Capital Account as of the last
417 day of the year and is not required to be audited.

418 **7.4 Tax Returns and Information; Governing Documents.**

419 (a) The Members intend for the Company to be treated as a partnership for tax
420 purposes.

421 The Managers shall prepare or cause to be prepared all federal, state and local income and other
422 tax returns which the Company is required to file

423 and shall furnish each Member both a copy of such Member's Schedule K-1 and the Company's
424 tax return as soon as is reasonably practicable after the end of each Company fiscal year.

425 On Written request to the Company, the Company shall provide to a Member or an assignee of a
426 membership interest a free copy of (i) the Company's certificate of formation, including any amendments
427 to or restatements of the certificate of formation; (ii) this Agreement, including any amendments to or
428 restatements of this Agreement; and (iii) any federal, state and local tax returns of the Company for each
429 of the preceding six years.

430 (b) The "tax representative" of the Company (initially, [redacted]) shall be the
431 Company's designated representative within the meaning of Code Section 6223, with sole authority to act
432 on behalf of the Company for purposes of subchapter C of Chapter 63 of the Code and any comparable
433 provisions of state or local income tax laws.

434 (Any person who is designated as the "tax representative" is referred to herein as the
435 "**Tax Representative**".)

436 For purposes of this Section 7.4(b), unless otherwise specified, all references to
437 provisions of the Code shall be to such provisions as enacted by the Bipartisan Budget
438 Act of 2015.

439 If the Company qualifies to elect pursuant to Code Section 6221(b) (or successor
440 provision) to have federal income tax audits and other proceedings undertaken by each Member rather than
441 by the Company, the Tax Representative shall cause the Company to make such election.

442 (c) Notwithstanding other provisions of this Agreement to the contrary, if any
443 "partnership adjustment" (as defined in Code Section 6241(a)(2)) is determined with respect to the
444 Company, the Tax Representative, in its discretion, may cause the Company to elect pursuant to Code
445 Section 6226 to have such adjustments passed through to the Members for the year to which the
446 adjustment relates (i.e., the "reviewed year" within the meaning of Code Section 6225(d)(1)).

447 In the event that the Tax Representative has not caused the Company to so elect pursuant
448 to Code Section 6226,

449 then any "imputed underpayment" (as determined in accordance with Code Section 6225)
450 or "partnership adjustment" that does not give rise to an "imputed underpayment" shall

Commented [DT55]: LLCs can elect to be taxed as a corporation under Subchapter C of the Internal Revenue Code — or (IIRC) even as an "S-corporation" under Subchapter S, which would have the same effect as being taxed as a partnership.

Commented [DT56R55]: QUESTION: What's the main thrust of partnership income taxation?

Commented [DT57]: Put this in Schedule I.

Commented [DT58]: Could we just say "**If** the Tax Representative has not caused the Company"

451 be apportioned among the Members of the Company for the taxable year in which the
452 adjustment is finalized in such manner as may be necessary (as determined by the Tax
453 Representative in good faith)

454 so that, to the maximum extent possible, the tax and economic consequences of the
455 partnership adjustment and any associated interest and penalties are borne by the
456 Members based upon their interests in the Company for the reviewed year.

457 (d) Each Member agrees that, upon request of the Tax Representative, such Member
458 shall take such reasonable actions as may be necessary or desirable (as determined by the Tax
459 Representative) to (1) allow the Company to comply with the provisions of Code Section 6226 so that any
460 “partnership adjustments” are taken into account by the Members rather than the Company or (2) file
461 amended tax returns with respect to any “reviewed year” (within the meaning of Code Section 6225(d)(1))
462 to reduce the amount of any “partnership adjustment” otherwise required to be taken into account by the
463 Company.

464
465 *[DRAFTING NOTE: See Section III.H. of the Accompanying Article for model language that provides*
466 *for past members to bear the imputed underpayment of taxes.]*
467

468 7.5 **Fiscal Year.** The Company fiscal year shall be the calendar year.

469 7.6 **Corporate Transparency Act.**

Commented [DT59]: NOTE: This is potentially a biggie
— but right now it doesn't apply to domestic companies.

470 (a) The Members intend for the Company to comply with its obligations under the
471 Corporate Transparency Act of 2020 (as amended, the “**CTA**”) and with the regulations (the “**CTA**
472 **Regulations**”) promulgated by the Financial Crimes Enforcement Network (“**FinCEN**”) thereunder.

473 The Managers shall designate one of the Managers or another Person to serve as the
474 “**Compliance Officer**” with respect to the Company’s duties under the CTA.

475 The Compliance Officer may take any steps reasonably necessary or convenient to cause
476 the Company to perform its obligations under the CTA and the CTA Regulations, including,
477 without limitation, by causing the Company to file any beneficial ownership report that
478 may be required thereunder. The Compliance Officer will collect CTA Data from each
479 “company applicant” with respect to the Company, as such term is defined in the CTA
480 Regulations.

481 (b) Each Member agrees to provide to the Compliance Officer upon request by the
482 Compliance Officer such Member's:

- 483 (i) full legal name;
- 484 (ii) date of birth;
- 485 (iii) residential street address;
- 486 (iv) business street address; and
- 487 (v) a unique identifying number from one of the following
488 documents:

- 489 (1) a non-expired passport issued by the United States Government;
- 490 (2) a non-expired identification document issued to the individual by
491 a state, local government, or Indian tribe for the purpose of
492 identifying the individual;
- 493 (3) a non-expired driver's license issued to the individual by a state,
494 or
- 495 (4) a non-expired passport issued by a foreign government to the
496 individual, if the individual does not possess any of the documents
497 described in Section 7.6(b)(v)(1), 7.6(b)(v)(2) or 7.6(b)(v)(3)
498 above; and
- 499 (vi) an image of the document from which the unique
500 identifying number in Section 7.6(b)(v) above was obtained which includes
501 both the unique identifying number and photograph of the individual in
502 sufficient quality to be legible or recognizable.

503 Each Member also agrees to provide to the Compliance Officer any other information that the Compliance
504 Officer determines is required to comply with the CTA and the CTA Regulations.

505 The information described in this Section 7.6(b) is hereinafter referred to as a Member's "CTA Data".

506 (c) With respect to any Member that is not a natural person (as applicable, a
507 "NonNatural Person Member"), the Member shall provide CTA Data for each natural person (as
508 applicable, an "Indirect Owner") who owns, indirectly or beneficially, any economic interest in the
509 Company through such Member.

510 (d) The Compliance Officer will safeguard the CTA Data collected from Members

511 and any other persons in accordance with this Section through such methods and systems as the Compliance
512 Officer may determine.

513 (e) Each Member will promptly notify in writing the Compliance Officer of any
514 change in CTA Data previously provided by such Member to the Compliance Officer after such change
515 occurs (but in any event no more than five calendar days after such change occurs).

516 (f) Each Member will indemnify and defend the Company against any third-party
517 claim, loss or expense incurred by the Company as a result of (i) any inaccuracy in any CTA Data or of
518 other information provided by such Member, or (ii) any failure of such Member to provide amended CTA
519 Data to the Compliance Officer within the time period required by Section 7.6(e) above.

520 Article 8

521 Transfer Restrictions and Push-Pull Buyout

522
523 *[DRAFTING NOTE: See Section III.I of the Accompanying Article for a discussion of drafting issues*
524 *that should be considered with drafting transfer restriction and buy-sell provisions.]*
525

526 8.1 **Right of First Refusal.** Any Member who desires to sell, dispose of or otherwise transfer or
527 assign all or any part of such Member's membership interest in any transaction other than an Affiliate
528 Transfer shall first offer to sell to the Company all of the membership interest which such Member desires
529 to transfer.

530 The Company shall have an option, for a period of thirty (30) days after the Company and all of the
531 Members have been given Written notice of the Member's desire to sell, dispose of or otherwise transfer
532 and assign such membership interest, to elect to purchase such membership interest at the price and terms
533 specified in the notice.

534 If the Company does not so elect to purchase such membership interest, the selling Member shall
535 offer the right to purchase such membership interest to the other Members,

536 who shall have an option, for a period of thirty (30) days following the expiration of the
537 Company's thirty (30) day option period, to elect to purchase such membership interest at the price and
538 terms specified in the notice.

539 If all or any portion of the purchase price specified in the notice pursuant to this Section 8.1 is not
540 cash, the price shall be deemed cash equal to the fair market value of the noncash consideration

541 and if the parties are unable to reach agreement as to such fair market value, then the fair market
542 value shall be determined by appraisal using the same methodology for determination of Purchase Value set
543 forth in Section 8.4(b).

544 Any purchase by the Company or the Members pursuant to this Section 8.1 shall be closed in the
545 manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option period or
546 (ii) determination of the fair market value of the noncash consideration, if later.

547 If more than one Member elect to purchase the offered membership interest pursuant to the option
548 granted to them pursuant to this Section 8.1, they shall, absent a different agreement at the time, acquire the
549 offered membership interest pro-rata in accordance with their respective Percentages prior to their purchase
550 pursuant to such option.

551 If neither the Company nor the Members elect to purchase the offered membership interest pursuant
552 to the options granted to them pursuant to this Section 8.1, then the offering Member shall have sixty (60)
553 days after expiration of the options of the Company and the other Members in which to sell the offered
554 membership interest at the price and terms identified in the notice to the purchaser(s) identified in the notice;
555 provided that such purchaser(s) shall be assignee(s) only of such membership interest unless and until such
556 purchaser(s) are admitted as Member(s) of the Company in accordance with Article 2 of this Agreement.

557 In no event shall the offering Member be compelled to sell less than all of the membership interest
558 offered by such Member.

559 An assignee of a membership interest who desires to sell, dispose of or otherwise transfer or assign
560 all or any part of such assignee's membership interest shall be subject to this Section 8.1 in the same manner
561 as a Member.

562 **8.2 Death or Divorce of Member or Spouse; Bankruptcy of a Member.**

563 (a) A Member ceases to be a Member upon the Member's death, and subject to
564 subsection (d) of this Section 8.2, the executor, administrator or personal representative (as applicable, the
565 "**Personal Representative**") of the Deceased Member shall be treated as an assignee. The membership
566 interest of such Personal Representative shall be subject to all the terms and provisions of this Agreement.

567 (b) Subject to subsection (e) of this Section 8.2, a Member's spouse shall become an
568 assignee of the membership interest in the Company that the spouse succeeds to or obtains as the result of
569 the termination of the marital relationship of the spouse and such Member.

570 (c) Subject to subsection (h) of this Section 8.2, upon the Bankruptcy of a Member
571 (the "**Bankrupt Member**"), the Bankrupt Member shall thereafter be treated as an assignee. The
572 membership interest of the Bankrupt Member shall remain subject to all the terms and provisions of this
573 Agreement.

574 (d) Upon the death of a Member (the "**Deceased Member**"), the Personal
575 Representative of the Deceased Member shall have ninety (90) days after the Deceased Member's date of
576 death to cause the Company to purchase the Deceased Member's membership interest for the Purchase
577 Value (determined as set forth in Section 8.4(b)) (the "**Put Option**").

Commented [DT60]: NOTE what a "put option" is: It's an option to compel someone else to buy what you want to sell.

578 The purchase by the Company pursuant to the Put Option shall be closed in the manner
579 specified in Section 8.5 within thirty (30) days after (i) the exercise of the Put Option or (ii) determination
580 of the Purchase Value, if later.

581 If the Personal Representative of the Deceased Member does not exercise its Put Option
582 by notice to the Company within such ninety (90) day period or if a Personal Representative is not appointed
583 within such ninety (90) day period, then the Company shall have the option within one hundred and twenty
584 (120) days from the Deceased Member's date of death to elect to purchase the Deceased Member's
585 membership interest for the Purchase Value (determined as set forth in Section 8.4(b)).

Commented [DT61]: An option to purchase is often known as a "call option."

586 If the Company does not elect to purchase all of the Deceased Member's membership
587 interest, the remaining Member(s) shall have the option, for a period of thirty (30) days following the
588 expiration of the Company's option period, to elect to purchase the Deceased Member's membership
589 interest not purchased by the Company for the Purchase Value (determined as set forth in Section 8.4(b)).

590 Any purchase by the Company or the Members pursuant to this Section 8.2(d) shall be
591 closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option
592 period or (ii) determination of the Purchase Value, if later.

593 If more than one Member elect to purchase the Deceased Member's membership interest
594 pursuant to the option granted to them pursuant to this Section 8.2(d), they shall, absent a different

595 agreement at the time, acquire the Deceased Member's membership interest pro-rata in accordance with
596 their respective Percentages prior to their purchase pursuant to such option.

597 (e) In the event a Member (the "**Divorced Member**") becomes divorced and such
598 divorced spouse becomes the owner of or becomes entitled to any membership interest, the Divorced
599 Member shall have an option, for a period beginning when the divorce decree becomes final and ending
600 sixty (60) days after the Company and the remaining Member(s) of the Company have been notified of the
601 final divorce decree, to elect to purchase the membership interest of such divorced spouse for its Purchase
602 Value (determined as set forth in Section 8.4(b)).

603 Any purchase by the Divorced Member pursuant to this Section 8.2(e) shall be closed in
604 the manner specified in Section 8.5 within thirty (30) days after (i) the end of the option period or
605 (ii) determination of the Purchase Value, if later.

606 If the Divorced Member does not elect to purchase all of the membership interest of the
607 divorced spouse, then the Company shall have an option, for a period of thirty (30) days following the
608 expiration of the Divorced Member's sixty (60) day option period, to elect to purchase such membership
609 interest for its Purchase Value (determined as set forth in Section 8.4(b)).

610 If neither the Divorced Member nor the Company elects to purchase all of the membership
611 interest of the divorced spouse, the remaining Member(s) shall have an option, for a period of thirty (30)
612 days following the expiration of the Company's thirty (30) day option period, to elect to purchase such
613 membership interest for its Purchase Value (determined as set forth in Section 8.4(b)).

614 Any purchase by the Company or the Members pursuant to this Section 8.2(e) shall be
615 closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of the applicable option
616 period or (ii) determination of the Purchase Value, if later.

617 If more than one Member elect to purchase the membership interest of the divorced spouse
618 pursuant to the option granted to them pursuant to this Section 8.2(e), they shall, absent a different
619 agreement at the time, acquire the membership interest pro-rata in accordance with their respective
620 Percentages prior to their purchase pursuant to such option.

621 If neither the Divorced Member nor the Company nor the remaining Member(s) elect to
622 purchase the membership interest of the divorced spouse, then such membership interest may be retained
623 by the divorced spouse, subject to the obligations of this Agreement as an assignee.

624 In no event shall the divorced spouse be compelled to sell less than all of such divorced
625 spouse's membership interest.

626 (f) In the event of the death of a Member's spouse and such Member (the
627 "Surviving Member") does not acquire by will or by operation of law all of the membership interest
628 owned by the deceased spouse,

629 the Surviving Member shall have an option, for a period beginning with the date of death
630 and ending sixty (60) days after the Company and the remaining Member(s) have been
631 notified of the death of the Surviving Member's spouse and the name and address of the
632 duly qualified and acting Personal Representative of the deceased spouse, to elect to
633 purchase the membership interest of the deceased spouse for its Purchase Value
634 (determined as set forth in Section 8.4(b)).

635 If the Surviving Member does not elect to purchase the membership interest of the
636 deceased spouse, then the Company shall have an option, for a period of thirty (30) days
637 following the expiration of the Surviving Member's sixty (60) day option period, to elect
638 to purchase such membership interest for its Purchase Value (determined as set forth in
639 Section 8.4(b)).

640 If neither the Surviving Member nor the Company elects to purchase all of the
641 membership interest owned by the deceased spouse, then the remaining Member(s) shall
642 have an option, for a period of thirty (30) days following the expiration of the Company's
643 thirty (30) day option period, to elect to purchase such membership interest for its
644 Purchase Value (determined as set forth in Section 8.4(b)).

645 Any purchase by the Company or the Members pursuant to this Section 8.2(f) shall be
646 closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of
647 the applicable option period or (ii) determination of the Purchase Value, if later.

648 If more than one Member elect to purchase the membership interest owned by the
649 deceased spouse pursuant to the option granted to them pursuant to this Section 8.2(f),
650 they shall, absent a different agreement at the time, acquire the membership interest pro-
651 rata in accordance with their respective Percentages prior to their purchase pursuant to
652 such option.

653 If neither the Surviving Member nor the Company nor the remaining Member(s) exercise
654 their option to purchase the membership interest owned by the deceased spouse, then
655 such membership interest may be retained by each devisee or heir subject to the
656 obligations of this Agreement as an assignee.

657 In no event shall the Personal Representative or estate of the Surviving Member's
658 deceased spouse be compelled to sell less than all of the membership interest owned by
659 the deceased spouse.

660 (g) By executing this Agreement, the spouses of the Members, in addition to any
661 other purposes for which they are executing this Agreement, agree to be bound by the terms of this
662 Agreement with respect to any membership interests now owned or hereafter acquired in the Company.

663 The execution of this Agreement by such spouses is not intended to alter, nor shall it be
664 construed as altering, the existing status and characterization of the membership interests in the Company
665 as the separate or community property of the Members.

666 (h) Upon the Bankruptcy of a Member, the Company shall have the option within
667 one hundred and twenty (120) days from the Bankruptcy of the Bankrupt Member to elect to purchase the
668 Bankrupt Member's membership interest for the Purchase Value (determined as set forth in Section
669 8.4(b)).

670 If the Company does not elect to purchase all of the Bankrupt Member's membership
671 interest, the remaining Member(s) shall have the option, for a period of thirty (30) days
672 following the expiration of the Company's option period, to elect to purchase the
673 Bankrupt Member's membership interest not purchased by the Company for the Purchase
674 Value (determined as set forth in Section 8.4(b)).

675 Any purchase by the Company or the Members pursuant to this Section 8.2(h) shall be
676 closed in the manner specified in Section 8.5 within thirty (30) days after (i) the end of
677 the applicable option period or (ii) determination of the Purchase Value, if later.

678 If more than one Member elect to purchase the Bankrupt Member's membership interest
679 pursuant to the option granted to them pursuant to this Section 8.2(h), they shall, absent a
680 different agreement at the time, acquire the Bankrupt Member's membership interest pro-
681 rata in accordance with their respective Percentages prior to their purchase pursuant to
682 such option.

683 8.3 **Push-Pull Buyout.**

684 (a) Each Member (the “**Offering Member**”) may at any time give notice to all, but
685 not less than all, of the other Members of the Offering Member’s desire to either (a) sell all of the Offering
686 Member’s membership interest in the Company to the other Members or (b) buy all of the other Members’
687 membership interests in the Company, specifying therein the price per Percentage and the other terms and
688 conditions upon which the Offering Member will buy or sell. To institute the push-pull buyout under this
689 Section, the Offering Member must both offer to be a buyer and offer to be a seller, depending upon the
690 response of the other Member or Members. An offer to be a buyer only or a seller only will not be effective
691 to institute the push-pull buyout under this Section. The other Members shall have an option, for a period
692 of sixty (60) days after receiving such notice, to elect to purchase the membership interest of the Offering
693 Member at the same price per Percentage and upon the same terms and conditions that the Offering Member
694 is offering to sell the Offering Member’s membership interest, the transaction to be closed in the manner
695 specified in Section 8.5 within thirty (30) days after the end of such sixty (60) day period. If no Member
696 exercises such option to purchase within the aforementioned period of sixty (60) days, then the Offering
697 Member shall be obligated to purchase the membership interests of the other Members at the price per
698 Percentage and upon the terms and conditions specified in the aforementioned notice, and the Members
699 receiving the notice shall be obligated to sell their membership interests to the Offering Member upon such
700 terms and conditions, the transaction to be closed in the manner specified in Section 8.5 within thirty (30)
701 days after the end of such sixty (60) day period.

702 (b) If more than one Member elect to purchase the Offering Member’s membership
703 interest pursuant to the option granted to them hereunder, they shall, absent a different agreement at the
704 time, acquire the Offering Member’s membership interest pro-rata in accordance with their respective
705 Percentages prior to their purchase pursuant to such option. If some Members exercise their option to sell
706 and others exercise their option to purchase, then those Members exercising the option to purchase the
707 Offering Member’s membership interest may purchase all of the membership interests of Members opting
708 to sell at the offered price, or, at their election, may purchase only the membership interest originally offered
709 by the Offering Member.

710 (c) Any two or more Members may, if they so elect, institute the push-pull buyout
711 under this Section as a block of membership interests by jointly commencing the offer to purchase or sell
712 their membership interests to the other Member(s) as a block and conditioning the purchase and sale of the
713 membership interests to the block of membership interests offered. In such event, the recipient Member(s)

714 shall treat the membership interests as a block for purposes of exercising the offer to purchase or sell under
715 this section.

716 8.4 **Determination of Purchase Value.**

717 (a) **“Purchase Value”** shall mean the amount of cash and fair market value of property
718 which would be received by the holder of the membership interest to be sold hereunder if the Company sold
719 its business and assets for cash at a purchase price equal to their fair market value as of the date of
720 determination of the Purchase Value, and all remaining assets of the Company were distributed to the
721 Members in accordance with this Agreement.

722 Purchase Value shall be determined as of a date as near as reasonably practicable to the date of the
723 occurrence of the event which results in the sale of the membership interest hereunder.

724 The party whose membership interest is to be sold hereunder is hereafter referred to as the **“Selling**
725 **Party”** and the party or parties acquiring that interest are hereafter referred to, individually or collectively,
726 as the case may be, as the **“Acquiring Party.”**

727 In exercising the right to purchase the membership interests of any party, the Acquiring Party shall
728 develop a purchase price which it reasonably believes to be the Purchase Value for the membership interest
729 and state the purchase price in its notice.

730 If more than one Person is acquiring an interest, the decision of the holders of a majority of the
731 Percentages held by all such parties shall be deemed the decision of the Acquiring Party.

732 The Selling Party shall have thirty (30) days to notify the Acquiring Party in Writing of any
733 objection to such purchase price.

734 If the Selling Party fails to timely object to the purchase price, then the proposed purchase price
735 shall be the purchase price of the membership interests.

736 (b) If the Selling Party does timely object, the Selling Party shall have the right to
737 engage an independent certified public accountant or certified appraiser to perform a determination of the
738 Purchase Value of the membership interest subject to the terms hereof.

739 Such determination shall be completed within twenty (20) days after the Selling Party has
740 delivered notice of objection to the Acquiring Party.

741 The determination so rendered shall be the purchase price of the membership interests
742 unless the Acquiring Party notifies the Selling Party in Writing of any objection to such purchase
743 price within ten (10) days after the Selling Party has delivered notice of the determination to the
744 Acquiring Party on behalf of the Company.

745 If the Acquiring Party so objects to the purchase price, the Acquiring Party shall have the
746 right to engage an independent certified public accountant or certified appraiser to perform another
747 determination of the Purchase Value of the membership interests.

748 Such determination shall be completed within twenty (20) days after the Acquiring Party
749 has delivered notice of objection to the Selling Party.

750 If the second determination differs from the first, the two firms shall meet and attempt to
751 render a joint determination within five (5) days after delivery of the second determination.

752 If for any reason such firms fail to agree on a joint determination during such five-day
753 period, they shall mutually agree upon and appoint a third independent certified public accountant
754 or certified appraiser within the next five (5) days who shall perform a determination of the
755 Purchase Value of the membership interests within twenty (20) days of appointment, which
756 determination shall be and constitute the purchase price of the membership interests.

757 The determination of the purchase price pursuant to this Section shall be conclusive and
758 binding upon the parties.

759 Each party will bear any and all expenses incurred as the result of their objections to the
760 purchase price and the employment of a suitable firm to render a determination pursuant thereto
761 and the Selling Party and the Acquiring Party shall bear equally the costs of any third firm required
762 to determine the Purchase Value of the membership interests.

763 If the Acquiring Party consists of multiple Persons, such Persons shall bear such costs,
764 absent a different agreement at the time, pro-rata in accordance with their respective Percentages.

765 8.5 **Closing of Sale; Payment of Purchase Price.** At the closing of any sale of a
766 membership interest pursuant to Section 8.1, 8.2 or 8.3, the Selling Party shall assign and deliver
767 the membership interest to the Acquiring Party free and clear of all security interests, liens or other
768 encumbrances.

769 If the sale is pursuant to an option under Section 8.1, payment of the purchase price shall
770 be as specified in the notice thereunder unless agreed by the parties.

771 If the sale is being made pursuant to a Put Option of a Personal Representative pursuant to
772 Section 8.2(d), unless otherwise agreed by the parties, the purchase price shall be payable
773 ten percent (10%) in cash at the time of closing

774 and the balance evidenced by a five-year promissory note executed by the
775 Company, payable in annual amortized installments, including principal and interest,

776 the first such installment being due one year following the closing, and bearing
777 interest at the “Prime Rate” quoted in the “Money Rate” section of the *Wall Street Journal*
778 on the last business day prior to the date of the note

779 (or in the event that such prime rate quotation is not available, the prime rate quoted
780 in another nationally distributed newspaper or periodical designated by the Selling Party),

781 and secured by the membership interest being purchased.

782 If the sale is pursuant to any other option, payment of the purchase price shall be in cash at
783 the time of the closing unless agreed by the parties. ***[DRAFTING NOTE: See Section***
784 ***III.I. of the Accompanying Article. The drafter should give careful consideration to what***
785 ***payment terms are appropriate in a specific transaction or relationship.]***

786 Any transfer or similar taxes involved in such sale shall be paid by the Selling Party,

787 and the Selling Party shall provide the Acquiring Party with such evidence of the Selling
788 Party’s authority to sell hereunder and such additional instruments as the Acquiring Party
789 may reasonably request.

816 The Members, in their capacity as Members, owe no fiduciary duty to the Company, the
817 Managers, or the other Members.

818 (b) The fiduciary duties of the Managers that are owed by reason of their capacity as
819 Managers are owed to the Company, and the Managers shall owe **no fiduciary duty to any individual**
820 **Member or Manager.**

Commented [DT64]: A roadblock provision.

821 The fiduciary duty to the Company of a Manager or officer, and the fiduciary duty to the
822 Company, if any, of a Control Person of a Manager, shall be **limited to refraining from** acts
823 or omissions constituting gross negligence, bad faith or willful misconduct. *[DRAFTING*
824 *NOTE: See Section III.J. of the Accompanying Article for a discussion of considerations*
825 *related to articulating the duty of a Covered Person. The drafter should give careful*
826 *consideration to what duty, if any, is appropriate in a specific transaction or*
827 *relationship.]*

828 *[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions specifically*
829 *authorizing reliance on experts.]*

830 *[DRAFTING NOTE: Section III.J. of the Accompanying Article includes model provisions regarding*
831 *limiting the duty of loyalty by permitting competition.]*

832 9.3 **Indemnification.** The Company shall indemnify a Covered Person for any loss or
833 damage incurred by the Covered Person in a Proceeding brought against the Covered Person by
834 reason of the fact that the Covered Person is or was a Covered Person (including any loss, damage
835 or claim arising out of the Covered Person's negligence),

836 except that no Covered Person shall be entitled to be indemnified in respect of any loss or
837 damage incurred by that Covered Person by reason of that Covered Person's gross
838 negligence, bad faith, willful misconduct or breach of this Agreement.

839 Any indemnity under this Section 9.3 shall be **provided out of and to the extent of Company**
840 **assets only**, and no Member shall have any personal liability on account thereof.

841 9.4 **Expenses.** Reasonable expenses (including legal fees) incurred by a Covered
842 Person in defending any Proceeding brought against the Covered Person by reason of the fact that
843 the Covered Person is or was a Covered Person shall, from time to time, be **advanced by the**
844 **Company before the final disposition** of the Proceeding **upon receipt by the Company of a Written**

845 **undertaking** by or on behalf of the Covered Person to repay that amount if it shall be determined
846 that the Covered Person is not entitled to be indemnified under Section 9.3.

847 Notwithstanding the foregoing, the Company shall not be required to make any advances
848 with respect to a Proceeding **brought against a Covered Person by the Company or a**
849 **Member.**

850 The Company may enter into indemnity contracts with any Covered Person,

851 and the Managers may adopt Written procedures pursuant to which arrangements are made
852 for the advancement of expenses and the funding of obligations under this Section 9.4 and
853 containing other procedures regarding indemnification as are appropriate.

854 9.5 **Insurance.** The Company may purchase and maintain insurance, to the extent and
855 in amounts the Managers deem reasonable, on behalf of Covered Persons and other Persons as the
856 Managers shall determine,

857 against any liability that may be asserted against or expenses that may be incurred by that
858 Person in connection with the activities of the Company,

859 regardless of whether the Company would have the power to indemnify that Person against
860 the liability under this Agreement.

861 The Company shall have no obligation to fund indemnification of any Person to the extent
862 the liability is covered by insurance.

863 The Company's obligation to fund indemnification of any Person shall commence only
864 after all available insurance has been exhausted.

865 9.6 **Duration of Protection.** All provisions of this Article 9 shall apply to any former
866 Member or Manager or Control Person thereof for all actions or omissions taken while such
867 Member or Manager was a Member or Manager, as applicable, to the same extent as if that Person
868 were still a Member or Manager, as applicable.

869

Article 10

870

Winding Up

871

872 **10.1 Events Requiring Winding Up.** The Company shall be wound up **only** on the first to occur
873 of any one or more of the following:

874 (a) the affirmative vote or Written consent of all of the Members;

875 (b) the occurrence of any event that terminates the continued membership of the last
876 remaining Member in the Company unless the legal representative or successor of the Member agrees to
877 continue the Company and appoints a successor Member in accordance with the BOC;

878 (c) entry of a judicial order to wind up the Company; or

879 (d) the involuntary termination of the Company under the BOC or Texas Tax Code,
880 unless the Company is reinstated as provided by law.

881 **10.2 Revocation or Reinstatement.** A vote or consent to wind up as provided in
882 Section 10.1(a) may only be revoked upon the affirmative vote or Written consent of all of the
883 Members.

884 In the event of a termination of the Company under the BOC, the Company may only be
885 reinstated upon the affirmative vote or Written consent of all of the Members.

886 **10.3 Winding Up Affairs and Distribution of Assets.**

887 (a) If an event requiring the winding up of the Company occurs and is not revoked,
888 the Managers or if there are no remaining Managers a Person designated for this purpose by the Members
889 (the remaining Manager or Managers or the Person so designated being called the “**Liquidating Agent**”),
890 as soon as practicable shall wind up the affairs of the Company and sell and/or distribute the assets of the
891 Company.

892 The Liquidating Agent is expressly authorized and empowered to execute any and all documents necessary
893 or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets.

894 The Liquidating Agent shall apply and distribute the proceeds of the sale or liquidation of the assets and
895 property of the Company in the following order of priority, unless otherwise required by nonwaivable
896 provisions of applicable law:

897 (i) to pay (or to make provision for the payment of) all creditors of
898 the Company (including Members who are creditors of the Company), in the order of
899 priority provided by law or otherwise, in satisfaction of all debts, liabilities or
900 obligations of the Company due its creditors;

901 (ii) after the payment (or the provision for payment) of all
902 debts, liabilities and obligations of the Company in accordance with clause (i) above,
903 any balance remaining shall be distributed to the Members having positive Capital
904 Accounts in relative proportion to those Capital Accounts.

905 (b) The Liquidating Agent shall have sole discretion to determine whether to liquidate
906 all or any portion of the assets and property of the Company and the consideration to be received for that
907 property.

908 (c) If the Company's property is not sufficient to discharge all of the Company's
909 liabilities and obligations, the Liquidating Agent shall apply its property, or make adequate provision for
910 the application of its property, to the extent possible, to the just and equitable discharge of its liabilities and
911 obligations, including liabilities and obligations owed to the Members other than for distributions.

912 (d) Except as required by nonwaivable provisions of the BOC, no Member shall have
913 any obligation at any time to contribute any funds to replenish any negative balance in the Member's Capital
914 Account.

915 10.4 **Termination.** On compliance with the distribution plan described in Section 10.3, the
916 Liquidating Agent shall execute, acknowledge and cause to be filed a certificate of termination.

917 Except as otherwise provided by the BOC, the Company shall cease to exist upon the filing of the
918 certificate of termination with the Secretary of State of Texas.

919 **Article 11**

920 **Miscellaneous Provisions and Definitions**

921

922 11.1 **Notices.** Any notice to be given under this Agreement must be in Writing and mailed,
923 transmitted by facsimile or by electronic message, or delivered personally

924 (a) if to the Company, to the registered agent of the Company at the registered address of
925 the Company,

926 (b) if to any initial Member, to such Member at an address therefor set forth on **Exhibit**
927 **“A”** or,

928 (c) if to any Member subsequently admitted, to an address set forth in the document in
929 which such Member agreed to be bound by this Agreement,

930 or in each case at such other address as any Person entitled to notice hereunder may
931 designate by notice to the Company and all of the Members.

932 Notice of a meeting that is mailed is considered to be delivered on the date notice is deposited in
933 the United States mail.

Commented [DT65]: Hmm

934 Notice of a meeting that is transmitted by facsimile or electronic message is considered to be
935 delivered when the facsimile or electronic message is successfully transmitted.

936 Notice of a meeting that is personally delivered to the Person is considered to be delivered when
937 received by the Person.

Commented [DT66]: QUESTION: What if there's a dispute about whether and when notice was delivered?

938 11.2 **Entire Agreement.** This Agreement supersedes all prior agreements and understandings
939 among the Members with respect to the Company.

940 11.3 **Amendments.** The affirmative vote or Written consent of all of the Members is required to
941 amend the certificate of formation of the Company or this Agreement;

942 provided that upon the admission of any new Member as authorized by this Agreement, amendment
943 of **Exhibit “A”** of this Agreement to reflect the admission of the new Member shall be deemed approved
944 by the Members.

945 11.4 **Governing Law.** This Agreement shall be governed by and construed in accordance with the
946 law of Texas.

Commented [DT67]: NOTE: This would not preclude other Agreement-related disputes from being governed by the laws of other jurisdictions.

947 **11.5 Power of Attorney.** Each Member constitutes and appoints the Managers, and each of them,
948 the true and lawful attorney of such Member with full power of substitution to make, execute, sign,
949 acknowledge and file (a) all certificates and instruments necessary to form or qualify, or continue the
950 existence or qualification of, the Company in any jurisdiction or before any governmental authority and
951 (b) any amendments to **Exhibit “A”** to this Agreement to reflect the admission of any new Member if the
952 same is authorized by this Agreement.

953 This grant of a power of attorney is **coupled with an interest** and shall survive a Member’s disability,
954 incompetence, death or assignment by such Member of the membership interest pursuant to this Agreement.

Commented [DT68]: QUESTION: What does it mean for a power of attorney to be “coupled with an interest”?

955 **11.6 Binding Effect; No Third-Party Beneficiaries.** This Agreement shall be binding upon, and,
956 to the extent provided herein, inure to the benefit of, the signatories of this Agreement and any Members
957 subsequently admitted, their spouses, heirs, devisees, executors, legal representatives, successors, and
958 assigns.

Commented [DT69]: I’d generally have this be a separate paragraph.

959 Article 9 of this Agreement shall also inure to the benefit of Covered Persons as defined therein.

960 The Members acknowledge and agree that this Agreement is intended to be binding upon and to
961 inure to the benefit of the Company and that the provisions of this Agreement shall be enforceable by and
962 against the Company.

963 The obligations of the Company pursuant to this Agreement are the obligations of the Company
964 only, and absent additional Written agreement, **the Members have no personal liability** for the obligations
965 of the Company, including any obligations pursuant to Article 8 and Article 9 of this Agreement.

Commented [DT70]: D.R.Y. violation? (Or maybe it makes more sense to have this provision here, so that the earlier provisions are D.R.Y. violations?)

966 No creditor of the Company or of a Member is entitled to or is intended to have third-party
967 beneficiary status to enforce any obligation of any party under this Agreement.

968 **11.7 Counterparts.** This Agreement may be executed in any number of counterparts or with
969 counterpart signature pages, each of which shall be deemed an original, but all of which shall constitute one
970 and the same instrument.

971 **11.8 Certain Definitions and Construction.**

972 (a) As used in this Agreement, the following terms have the following meanings:

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(i) “**Affiliate Transfer**” means, if the transferor is an individual, a gift or contribution by the transferor prior to the transferor’s death to a member of the transferor’s immediate family (i.e. parents, descendants, siblings or spouse) or to a trust, partnership or other entity controlled by or for the benefit of such transferor or such transferor’s immediate family.

If the transferor is an entity, “**Affiliate Transfer**” means the transfer or contribution of the membership interest to another entity so long as the Person or Persons with the power, whether through ownership of voting securities, by contract or otherwise, to **direct or cause the direction** of the management and policies of the transferor entity have the power to direct or cause direction of the management and policies of the transferee entity.

(ii) “**Agreement**” means this Company Agreement as it may be amended from time to time as provided herein.

(iii) “**Available Cash**” means cash on hand held by the Company that the Managers determine is not required by operations or as a reasonable reserve for capital replacements.

(iv) “**Bankruptcy**” means, as to any Member, the Member’s taking, or acquiescing in the taking of, any action seeking relief in respect of such Member under, or advantage of, any applicable debtor relief, liquidation, receivership, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization or similar law affecting the rights or remedies of creditors generally, as in effect from time to time, including, without limitation, any chapter of the United States Bankruptcy Code. For the purpose of this definition, the term “**acquiescing**” shall mean (i) the failure to file, within twenty (20) days after its entry, a petition, answer or motion to vacate or to discharge any order, judgment or decree providing for any relief under any such law, (ii) the failure to obtain dismissal of any such involuntary action filed against the Member within sixty (60) days of its filing, or (iii) the filing of any pleading in any such involuntary proceeding admitting any of the material allegations of such bankruptcy or other such filing or petition. ***[DRAFTING NOTE: See Section III.I of the Accompanying Article. The drafter should give careful consideration to whether bankruptcy or a similar proceeding should trigger the consequences set forth herein and whether the breadth of***

Commented [DT71]: LLC members sometimes want to transfer their economic rights to family members.

1006 *this definition is appropriate, including the time periods for acquiescing to a*
1007 *third party proceeding.]*

1008 (v) “**Capital Account**” means the capital account of a
1009 Member in the Company pursuant to Section 4.3.

1010 (vi) “**Code**” means the Internal Revenue Code of 1986.

1011 (vii) “**Managers**” means the Person or Persons listed in the
1012 Company’s Certificate of Formation and any successor Manager or Managers
1013 pursuant to Article 3.

1014 (viii) “**Member**” means any Person admitted to the Company
1015 as a Member
1016 as provided in this Agreement but excludes any such Person that has ceased to be a Member as
1017 provided in this Agreement or the BOC.

1018 (ix) “**Percentage**” for any Member means the membership
1019 interest of the Member expressed as a percentage. The Percentages of the
1020 initial Members as of the formation of the Company are set forth in **Exhibit**
1021 **“A”**.

1022 **Exhibit “A”** shall be amended as necessary to reflect any
1023 changes in Percentages as provided herein.

1024 The total Percentages of membership interests owned by all
1025 Members and assignees at any point in time shall equal 100%.

1026 Upon the purchase by the Company of a membership interest,
1027 the Percentage of the purchased membership interest shall no
1028 longer be included in the total Percentages, and the
1029 Percentages of membership interests owned by Members and
1030 assignees shall be adjusted accordingly.

1031 Upon the issuance of an additional membership interest, the
1032 Percentages of Members and assignees who have not been
1033 issued an additional interest shall be decreased accordingly.

1034 For purposes of Sections 3.3, 3.4, 3.5, 3.7 and 3.12, the
1035 Percentage representing all or any portion of a membership
1036 interest assigned by a Member shall be attributed to the
1037 assignor Member if the assignor Member has not ceased to be
1038 a Member.

1039 If the assignor Member has ceased to be a Member and the
1040 Member's assignee has not been admitted as a Member, the
1041 Percentage of the assignee shall not be included for purposes
1042 of Sections 3.3, 3.4, 3.5, 3.7 and 3.12, and the determination of
1043 a "majority" of the Percentages referenced in those Sections
1044 shall be made on the basis of Percentages held or attributed to
1045 Persons who are at the time Members.

1046 (x) "**Person**" means any individual, corporation,
1047 partnership, limited liability company, business trust or other entity, series of an
1048 entity, or government or governmental agency or instrumentality. In the case of
1049 a trust that is not an entity under the law of the jurisdiction governing its
1050 creation, a trustee of the trust is a Person for the purposes of this Agreement,
1051 but the trust is not.

1052 (xi) "**Proceeding**" means: (1) a threatened, pending, or
1053 completed action or other proceeding, whether civil, criminal, administrative,
1054 arbitral, or investigative; (2) an appeal of an action or proceeding described
1055 by clause (1); and (3) an inquiry or investigation that could lead to an action or
1056 proceeding described by clause (1).

1057 (xii) "**Writing**" or "**Written**" means an expression of words,
1058 letters, characters, numbers, symbols, figures or other textual information that
1059 is inscribed on a tangible medium or that is stored in an electronic or other
1060 medium that is retrievable in a perceivable form. Unless the context requires
1061 otherwise, the term: (1) includes stored or transmitted electronic data,

1062 electronic transmissions, and reproductions of Writings; and (2) does not
1063 include sound or video recordings of speech other than transcriptions that are
1064 otherwise “Writings.”

1065 (b) In this Agreement:

1066 (i) Terms defined in the singular have the corresponding
1067 meaning in the plural and vice versa.

1068 (ii) All pronouns and any variations thereof contained herein
1069 shall be deemed to refer to the masculine, feminine, neuter, singular or plural,
1070 as the identity of the Person or Persons may require.

1071 (iii) The word “include” and its derivatives means “include
1072 without limitation.”

1073 (iv) References to Articles, Sections and Exhibits are to the
1074 specified Articles and Sections of, and Exhibits to, this Agreement unless the
1075 context otherwise requires. Each Exhibit to this Agreement is made a part of
1076 this Agreement for all purposes.

1077 (v) References to statutes or regulations are to those statutes
1078 or regulations

1079 as currently amended and to the corresponding provisions as they may be amended or
1080 superseded in the future.

1081 *[Signature page follows]*

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Commented [DT72]: I'd be inclined to have the signatures up front, for reasons we've discussed in the past.

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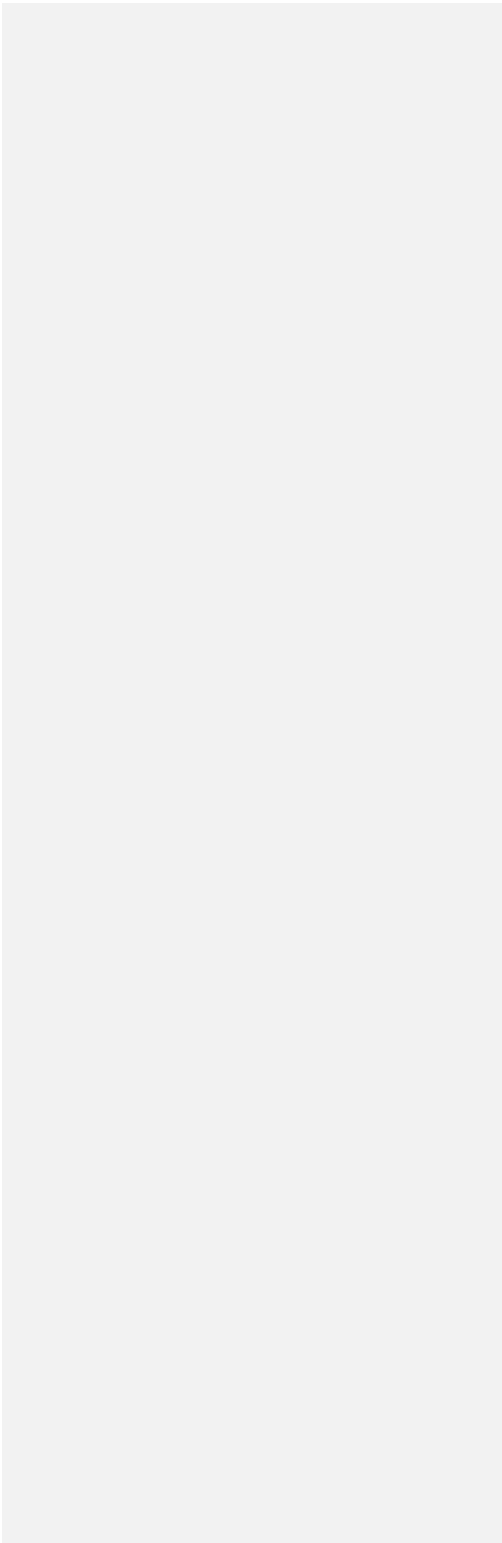
IN WITNESS WHEREOF, the undersigned Members have duly executed this Agreement as of the day and year first above written.

MEMBERS:

ACKNOWLEDGMENT AND CONSENT OF SPOUSES

The undersigned are the spouses of the Members and are executing this Agreement in connection with the execution of this Agreement by the Members. Each of the undersigned acknowledges and represents as follows: I have been provided a copy of the Agreement and have had the opportunity to read and review the Agreement. I approve of all of the provisions of the Agreement and agree to be bound by and accept the terms of the Agreement, but I understand that I am not a Member of the Company. My execution of this Agreement does not alter the legal status, characterization or rights of management of any membership interests now or hereafter acquired by my spouse, and my spouse's membership interests are subject to my spouse's sole management, control and disposition. I understand that the Company and the Members will rely on this acknowledgment and consent in conducting the Company's activities and operations.

SPOUSES OF MEMBERS:



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EXHIBIT A

**NAMES, ADDRESSES, PERCENTAGES AND CAPITAL
CONTRIBUTIONS OF INITIAL MEMBERS**

| <u>Name and Address (Postal; E-mail; Cell phone text) for Notice</u> | <u>Percentage</u> | <u>Capital Contribution</u> |
|--|-------------------|-----------------------------|
| _____ | _____ % | \$ _____ |
| _____ | | [or description of |
| _____ | | contributed asset(s)] |
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