

ACTEC

MODEL LLC OPERATING AGREEMENT

Updated through January 2008

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January 2008

The undersigned parties have caused this limited liability company Operating Agreement of _____, LLC (the "Company") to be organized as a limited liability company under the laws of the State of Delaware effective as of the date hereof, and they wish to enter into this Operating Agreement to set forth the terms and conditions on which the management, business and financial affairs of the Company shall be conducted.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises, covenants and conditions herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby covenant and agree as follows:

ARTICLE I – Definitions

(a) "Accounting Period" shall mean the period beginning on the day following any Adjustment Date (or, in the case of the first Accounting Period, beginning on the day of formation of the Company) and ending on the next succeeding Adjustment Date.

(b) "Act" shall mean the Delaware Limited Liability Company Act and its default provisions, 6 Del. C. § 18-101 et. seq. (as amended from time to time).¹

(c) "Adjustment Date" shall mean (i) the last day of each Fiscal Year, (ii) the date of any adjustment pursuant to clause (i) or (ii) of the definition of Book Value, and (iii) any other date determined by the Managers as appropriate for a closing of the Company's books.

(d) "Authorized Person" means any person authorized to act on behalf of the Company pursuant to Section 4.4.

(e) "Available Cash" shall mean all cash funds of the Company on hand from time to time (other than cash funds obtained as Capital Contributions, Capital Event Proceeds and cash funds obtained from loans to the Company) after (i) payment of all operating expenses of the Company as of such time, (ii) reasonable provisions for payment of all obligations of the Company as of such time, and (iii) reasonable provisions for a working capital and other reserves for identified future needs.²

1 If the laws of any other jurisdiction are used, its default provisions should be examined to determine whether they are appropriate.

2 It is anticipated that the Managers would exercise reasonable business judgment in determining the amount to be set aside as a reserve. Business judgment may be a significant issue if creditor protection is a major reason for the formation of the Limited Liability Company. See Article VII regarding the standards applicable to distributions of Available Cash.

(f) “Book Value” shall mean, with respect to any Company asset, the asset’s adjusted basis for U.S. federal income tax purposes, except as follows:

(i) the initial Book Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset;

(ii) the Book Values of all of the Company’s assets shall be adjusted by the Company to equal their respective gross fair market values as of the following times: (a) the admission of a Person (other than a transferee) as a new Member of the Company; (b) the distribution by the Company of money or property to a Member in consideration of the retirement of all or a portion of such Member’s Interest; and (c) any time that either one or more Members, but fewer than all Members, or all Members but not in proportion to their Percentage Interests, make a Capital Contribution to the Company;³

(iii) the Book Value of any or all of the Company’s assets shall be adjusted to the gross fair market value thereof if the Managers determine that such adjustment is necessary in order to ensure that the allocations of Net Profits and Net Losses provided for under this Agreement comply with the Treasury Regulations issued under section 704(b) of the Code; and

(iv) if the Book Value of any asset has been adjusted pursuant to clause (i), (ii) or (iii) hereof, such Book Value shall thereafter be adjusted by any Depreciation taken into account with respect to such asset.

(g) “Capital Account” shall have the meaning set forth in Section 5.3.

(h) “Capital Contributions” shall mean, with respect to any Member, the amount of cash or the gross fair market value of any property contributed by such Member to the Company pursuant to Article V and the other provisions of this Agreement.

(i) “Capital Event Proceeds” shall consist of the net amount of cash received by the Company from the sale, exchange, refinancing, condemnation, casualty loss or other disposition by the Company of its assets outside of the ordinary course of business, less (i) the portion thereof disbursed by the Managers for the payment of the Company’s

3 Under section 1.704-1(b)(2)(iv)(f) of the Treasury Regulations, a partnership agreement may provide that the partners’ capital accounts will be adjusted to reflect the revaluation of partnership property to its gross fair market value, if the adjustment is made principally for a substantial non-tax business purpose in connection with one of the events described in clause (ii).

debts and expenses and (ii) such other reserves as the Managers in their business judgment may see fit to establish.

(j) “Certificate” shall mean Certificate of Formation of the Company as filed with the Delaware Secretary of State.⁴

(k) “Code” shall mean the Internal Revenue Code of 1986, as amended from time to time, and any successor act thereto.

(l) “Depreciation” shall mean, for any Accounting Period and with respect to any asset, an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to such asset for such period for U.S. federal income tax purposes, provided that if the Book Value of an asset differs from its adjusted basis for U.S. federal income tax purposes at the beginning of any such period, Depreciation shall be an amount that bears the same relationship to the Book Value of such asset as the depreciation, amortization, or other cost recovery deduction computed for tax purposes with respect to such asset for the applicable period bears to the adjusted tax basis of such asset at the beginning of such period, or if such asset has a zero adjusted tax basis, Depreciation shall be an amount determined under any reasonable method selected by the Managers.

(m) “Dissolution Event” shall have the meaning set forth in Section 11.1.

(n) “Fiscal Year” shall mean the Company’s fiscal year which shall end on December 31 in each year and which shall be the same for income tax and financial and accounting purposes.

(o) “Indemnified Person” means any person entitled to indemnification pursuant to the terms set forth in Article VIII.

(p) “Interest” of a Member shall mean the “limited liability company interest” (as defined in the Act) of a Member of the Company and such Member’s rights and obligations with respect to the Company pursuant to this Agreement and applicable law.

(q) “Majority” or “Majority-In-Interest” shall mean more than fifty percent of all membership interests in the Company.

(r) “Manager” shall mean a Manager of the Company, whose rights, powers and duties are specified in Article IV hereof.

⁴ “Certificate of Formation” is terminology specific to Delaware. If the Company is organized in another state, this should be revised accordingly.

(s) “Member” shall mean each person that is identified as an initial Member in Schedule A hereto or is admitted as a Member as provided in Article IX hereof. A Person shall cease to be a Member at such time as such Person no longer owns an Interest as a Member.

(t) “Net Profits” and “Net Losses”⁵ shall mean, with respect to any Accounting Period, the net income or net loss of the Company for such Accounting Period, determined in accordance with section 703(a) of the Code, including any items that are separately stated for purposes of section 702(a) of the Code, as determined in accordance with U.S. federal income tax accounting principles with the following adjustments:

(i) any income of the Company that is exempt from U.S. federal income tax shall be included as income;⁶

(ii) any expenditures of the Company described in section 705(a)(2)(B) of the Code or treated as section 705(a)(2)(B) of the Code expenditures pursuant to section 1.704-1(b)(2)(iv)(i) of the Treasury Regulations⁷ shall be treated as current expenses;

(iii) any items of income, gain, loss or deduction specially allocated pursuant to this Agreement shall be excluded from the determination of Net Profits and Net Losses;

(iv) without giving effect to any adjustments made pursuant to sections 734 or 743 of the Code;⁸

(v) treating as an item of gain (loss) the excess (deficit), if any, of the gross fair market value of property distributed in such Accounting Period over

5 See note 28.

6 Tax-exempt income is treated as income for purposes of maintaining capital accounts. Treas. Reg. § 1.704-1(b)(2)(iv)(b).

7 Expenditures in this category include organization costs that the Company has not elected to amortize under section 709(b) of the Code and losses from the sale or exchange of property in a transaction involving a controlled partnership, which are not deductible under section 707(b) of the Code.

8 Capital accounts generally do not reflect adjustments made under section 743 of the Code (which allows a partnership to elect to adjust the basis of its assets upon the transfer of a partnership interest) or section 734 of the Code (which permits a special basis adjustment in connection with a distribution by a partnership that has made a section 754 election). See Treas. Reg. §§ 1.704-1(b)(2)(iv)(m)(2) and (4).

(under) such property's Book Value;⁹

(vi) treating as an item of gain (or loss) the amount of any adjustment to the Book Value of any asset pursuant to clause (ii) or (iii) of the definition of Book Value;¹⁰ and

(vii) in lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such net income or loss, there shall be taken into account Depreciation for such Accounting Period.

(u) "Percentage Interest" shall mean with respect to any Member, (i) for the initial Percentage Interest, the percentage set forth opposite such Member's name on column 2 of Schedule A hereto, and (ii) upon the occurrence of any event described in clause (ii) of the definition of Book Value herein, the percentage obtained by dividing the Capital Account of such Member by the aggregate Capital Accounts of all of the Members.

(v) "Permitted Transferee" shall mean a person or entity entitled to receive a transfer of an interest without the consent of the Managers pursuant to Section 9.4.

(w) "Person" shall mean any natural person or entity, and the heirs, executors, administrators, legal representatives, successors, and assigns of such person where the context so admits.

(x) "Treasury Regulations" shall mean the U.S. federal income tax regulations promulgated under the Code, as they may be amended from time to time.

(y) "Unreturned Capital" consists of so much of a Member's Capital Contributions that have not been returned to such Member by way of distributions under section 7.1(b).

ARTICLE II – Purpose, Principal Office, Etc.

2.1 Purpose. The Company is formed to engage in any lawful activity for which limited liability companies may be formed under the Act,¹¹ and to engage in any

⁹ See Treas. Reg. § 1.704-1(b)(2)(iv)(e)(1).

¹⁰ See Treas. Reg. § 1.704-1(b)(2)(iv)(f).

¹¹ Alternatively, the purposes of the Company can be expanded to include providing a means for the family to become more knowledgeable concerning family assets and the management and preservation of family assets. A list of such "family purposes" is set forth below. Of course, the extent to which such purposes are appropriate in a particular case will depend upon the facts of the

and all activities necessary or incidental to the foregoing, including, without limitation, acquiring, operating, managing, holding and disposing of real estate (and interests

particular case, and, with respect to subsection (e) below, consider *In re Ehmann*, 319 BR 200 (Bankr. D. Ariz., 1/13/05) discussed in footnote 12.

- (a) Control. Maintain control of family assets;
- (b) Fractional Interests. Consolidate fractional interests in family assets;
- (c) Wealth. Increase family wealth;
- (d) Family Ownership. Continue the ownership of family assets and limit the right of non-family to acquire interests in family assets;
- (e) Protection. Provide protection to family assets from future claims against members of the family;
- (f) Divorce of Family Member. Prevent the transfer of a family member's interest in the Company as a result of a failed marriage;
- (g) Flexibility. Provide flexibility in business planning not available through trusts, corporations or other business entities;
- (h) Reduce Cost of Probate of Estate. Facilitate the administration and reduce the cost associated with the disability or probate of the estate of a member of the family;
- (i) Dispute Resolution. Provide a mechanism to resolve disputes that may arise within the family in order to preserve family harmony, and to avoid a trial by jury and the expense and adverse publicity associated with litigation;
- (j) Family Knowledge. Promote the family's knowledge of and communication about family assets;
- (k) Diversification. Diversify family assets in investments of all kinds (subject to Code §721(b) considerations) or, as in the Schutt case (T.C. Memo 2005-16), an LLC can be used to avoid mandatory diversification applicable to trusts under the Prudent Person Rule; and
- (l) Capital Growth. Manage investments primarily to achieve capital growth through any combination of capital appreciation and reinvestment of income and, secondarily, to receive income to the extent that such receipt is consistent with the achievement of capital growth.

therein), stocks, bonds, notes, debentures, limited liability company interests, limited partner interests and other securities and assets of any kind.¹²

12 In connection with footnote 11(e) see *In re Ehmann*, 319 BR 200 (Bankr. D. Ariz., 1/13/05) in which the Bankruptcy Court held that an operating agreement was not “executory” and that restrictions of the rights of “assignees” were inapplicable to the Bankruptcy Trustee. If the operating agreement was executory, then Bankruptcy Code section 365 would apply and the conditions and restrictions relating to “assignees” would be applicable. If the operating agreement was not executory, Bankruptcy Code section 541 would apply and those conditions and restrictions on the rights of “assignees” would be ignored. The court decided that while the LLC owed a number of obligations to the Members, the individual Members owed no duties to the LLC or to the other Members. Consequently, the operating agreement was determined not to be executory, and Bankruptcy Code section 365 was inapplicable. Then the court determined that:

Code § 541(c)(1) expressly provides that an interest of the debtor becomes property of the estate notwithstanding any agreement of applicable law that would otherwise restrict or condition transfer of such interest of the debtor. All of the limitations in the Operating Agreement, and all of the provisions of Arizona law upon which Fiesta relies, constitute conditions and restrictions on the Member's transfer of his interest. Code § 541(c)(1) renders those restrictions inapplicable. This necessarily implies the Trustee has all the rights and powers with respect to Fiesta that the Debtor held as of the commencement of the case.

The Bankruptcy Court's emphasis on the non-executory nature of the Operating Agreement suggests that if an Operating Agreement can be structured as an “executory” contract, then Bankruptcy Code Section 365 would apply and the conditions and restrictions relating to “assignees” would also be applicable. In order to make an Operating Agreement an “executory” contract, the Operating Agreement should include provisions requiring the use of a Finance Committee of all of the Members and further providing that if a Member fails to participate in the Finance Committee, then the Member will be treated as a “Unadmitted Assignee.” In addition to mandatory participation in the Finance Committee, the Operating Agreement should include provisions for mandatory capital contributions as requested by the Manager with penalties for the failure to make contributions. These two provisions should cause the Operating Agreement to be treated as an “executory” contract.

Language requiring additional capital contributions is found in Footnote 27.

Language dealing with the Finance Committee is set forth below:

4.12 Finance Committee.

(a) Finance Committee. There shall be established a Finance Committee of the Company consisting of all of the Members of the Company (the “Finance Committee”). The Finance Committee may make recommendations to or otherwise advise and consult with the Manager regarding the business and affairs of the Company; however, the Finance Committee is not authorized to take any action on behalf of the Company or to compel the Manager to take any action. The Finance Committee shall make periodic reports to the Manager. If any Member fails to attend two scheduled meetings of the Finance Committee without reasonable cause, then such Member shall be treated as an “Unadmitted Assignee” subject to the provisions of Section 9.2(c) herein.

2.2 Principal Office. The principal office of the Company shall be located at _____ . The location of the Company's principal place of business may be changed by the Managers from time to time in accordance with the then applicable provisions of the Act and any other applicable laws.

2.3 Registered Office and Registered Agent. The Managers shall designate a registered office and a registered agent for service of process in accordance with the Act. The Managers may from time to time in accordance with the Act change the Company's registered office or registered agent or both. The Managers shall select and designate a registered office and registered agent for the Company in each other state in which the Company is required to maintain or appoint one.¹³

2.4 Term. The term of the Company shall begin upon the acceptance of the Certificate of Formation by the Office of the Secretary of State of the State of Delaware and shall continue in existence until terminated pursuant to Section 11.1 hereof.

2.5 Limited Liability.¹⁴ Except as otherwise provided by Act or herein, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and neither the Managers nor the Members shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member of the Company.¹⁵

2.6 Other Business. The Managers, Members and any Person affiliated with any of the Managers or Members may engage in or possess an interest in other business ventures of every kind and description, independently or with others. Neither the Company nor other Members shall have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement.¹⁶

(b) Meetings. The Manager may call a meeting of the Members of the Finance Committee to review and discuss the financial condition of the Company from time to time. Each Member shall have at least seventy two (72) hours notice of any meeting. At any meeting, a quorum shall exist only if a majority of Members are in attendance, either in person or by phone or by written proxy (including a facsimile transmitted or emailed proxy) given to a Member in attendance.

13 In Delaware, the limited liability company's registered agent and registered office are identified in the Company's Certificate of Formation.

14 A Member's liability to a third party is specifically limited by 6 Del. C §18-303(a), but a Member or Managing Member may assume Company obligations. See 6 Del. C. §§18-303(b) and 18-215(c).

15 Cf. 6 Del. C. §18-215(c) providing for assumption of Company obligations and liabilities.

¹⁶ Following is an alternative version of this provision:

2.7 Transaction of Business. With the consent of the Managers, any Member shall have the authority to lend money to, borrow money from, act as surety, guarantor or endorser for, guarantee or assume one (1) or more obligations of, provide collateral for, and transact other business with the Company.¹⁷ Any Member transacting business with the Company shall have the same rights and obligations with respect to such matter as person who is not a Member or Manager.

2.8 Filings. The Managers and any Authorized Person (as hereinafter defined) are hereby designated as authorized persons, within the meaning of the Act, and shall be authorized to execute and file (or direct the execution and filing of) a Certificate of

The Members, the Managers, and any affiliates of any of them may engage in and possess, directly or indirectly, interests in real property, business ventures and investment opportunities of every kind and description, independently or with others, including serving as managers, Members, general partners and/or limited partners of other limited liability companies and partnerships with purposes similar to those of the LLC. Neither the LLC nor any other Member or Manager have any rights in or to such ventures or opportunities or the income or profits therefrom.

This provision relates very similarly to provisions regarding conflicts of interest. Following is a provision regarding conflicts of interest for consideration as an insert:

Conflicts of Interest. Each of the Members recognizes and agrees that the other Member and its Members, partners, shareholders, officers, directors, employees, agents, representatives, and affiliates:

- (a) have, nor may have, other business interests, activities and investments, some of which may be in conflict or competition with the business of the Company; and
- (b) are entitled to carry on such other business interests, activities and investments. Notwithstanding any duty otherwise existing, each of the Members may engage in, or possess an interest in, any other business or venture of any kind, independently or with others (including, but not limited to, owning, financing, acquiring, leasing, promoting, developing, improving, operating, managing and servicing real property on its own behalf or on behalf of other entities with which any of the Members is affiliated or otherwise), and each of the Members may engage in any such activities (whether or not competitive with the Company) without any obligation to offer any interest in such activities to the Company or to the other Members. Notwithstanding any duty otherwise existing, neither the Company nor the other Members shall have any right, by virtue of this Agreement, in or to such activities, or the income or profits derived therefrom, and the pursuit of such activities, even if competitive with the business of the Company, shall not be deemed wrongful or improper, subject, however, to the provisions of Section ____.

Use of Company Information. Notwithstanding anything to the contrary contained in Section ____, in the event that any Member acquires an ownership interest in a business, such Member and its affiliates shall not use any Company information, or otherwise act in violation of any fiduciary duties to the other Members that it may have hereunder, to solicit or induce existing or prospective business interest of the Company.

¹⁷ The Delaware Limited Liability Company Act specifically provides for this provision. See 6 Del. C. § 18-107.

Formation with the Office of the Secretary of State of the State of Delaware. The Managers are hereby authorized to execute, file and record all such other certificates and documents, including amendments to the Certificate, and to do such other acts as may be appropriate to comply with all requirements for the formation, continuation and operation of a limited liability company, the ownership of property and the conduct of business under the laws of the State of Delaware and any other jurisdiction in which the Company may own property or conduct business.

ARTICLE III – Voting Powers, Meetings, Etc. of Members

3.1 **In General.** The Members shall not be entitled to participate in the day-to-day affairs and management of the Company, but instead, the Members' right to vote or otherwise participate with respect to matters relating to the Company shall be limited to those matters as to which the express terms of the Act, the Certificate or this Agreement vest in the Members the right to so vote or otherwise participate.

3.2 **Actions Requiring Approval of Members.**

(a) Notwithstanding any other provision of this Operating Agreement, the approval of the Members shall be required in order for any of the following actions to be taken on behalf of the Company:

(i) Amending the Articles in any manner that materially alters the preferences, privileges or relative rights of the Members.

(ii) Electing the Managers as provided in Article IV hereof.

(iii) Taking any action that would make it impossible to carry on the ordinary business of the Company.

(iv) Confessing a judgment against the Company in excess of \$5,000.

(v) Filing or consenting to filing a petition for or against the Company under any federal or state bankruptcy, insolvency or reorganization act.

(vi) Loaning Company funds in excess of \$25,000 or for a term in excess of one year to any Member.

(b) Unless the express terms of this Operating Agreement specifically provide otherwise, the affirmative vote of a Majority-In-Interest of the Members shall be necessary and sufficient in order to approve or consent to any of the matters set forth in

Section 3.2(a) above or any other matters that require the approval or consent of the Members.¹⁸

3.3 Action by Members. In exercising their rights as provided above, the Members shall act collectively through meetings or written consents as provided in this Article.

3.4 Special Meetings. Special meetings of the Members, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the Managers, and shall be called by the Managers at the request of any two Members, or such lesser number of Members as are Members of the Company.

3.5 Place of Meeting. The place of any meeting of the Members shall be the principal office of the Company, unless another place is designated by the Managers.

3.6 Notice of Meetings. Written notice stating the place, day and hour of any meeting of the Members and the purpose or purposes for which the meeting is called shall be delivered not less than 10 nor more than 60 days before the date of the meeting, either personally or by mail, by or at the direction of the Managers, to each Member, unless the Act or the Certificate requires different notice.

3.7 Conduct of Meetings. All meetings of the Members shall be presided over by a chairperson of the meeting, who shall be the Managers, or a Member designated by the Managers. The chairperson of any meeting of the Members shall determine the order of business and the procedure at the meeting, including regulation of the manner of voting and the conduct of discussion, and shall appoint a secretary of such meeting to take minutes thereof.

3.8 Participation by Telephone or Similar Communications. Members may participate and hold a meeting by means of conference telephone or similar communications equipment by means of which all Members participating can hear and be heard, and such participation shall constitute attendance and presence in person at such meeting.

3.9 Waiver of Notice. When any notice of a meeting of the Members is required to be given, a waiver thereof in writing signed by a Member entitled to such notice, whether given before, at, or after the time of the meeting as stated in such notice, shall be equivalent to the proper giving of such notice.

18 Consider the impact on valuation of the ability of a Majority-in-Interest of the Members to act as specified in this provision. In some circumstances (e.g., a transfer of less than a majority during the client's life) this may not matter as much as in others (e.g., valuation of a majority retained interest at death, or lifetime transfer of a majority block).

3.10 Action by Written Consent. Any action required or permitted to be taken at a meeting of Members may be taken without a meeting if one or more written consents to such action are signed by the Members who are entitled to vote on the matter set forth in the consents and who constitute the requisite number or percentage of such Members necessary for adoption or approval of such matter on behalf of the Company. By way of example and not limitation, a Majority-In-Interest of the Members may take action as to any matter specified in Section 3.2(a) hereof by signing one or more written consents approving such action, without obtaining signed written consents from any other Members. Such consent or consents shall be filed with the minutes of the meetings of the Members. Action taken under this Section shall be effective when the requisite Members have signed the consent or consents, unless the consent or consents specify a different effective date.

ARTICLE IV – Management of the Company

4.1 Management and Control. Except as otherwise expressly provided in the Act, the Certificate or this Operating Agreement, the Managers are authorized and empowered on behalf of and in the name of the Company to carry out any and all of the purposes of the Company and to perform all acts and enter into and perform all contracts and other undertakings that they may, in their sole discretion, deem necessary, advisable or incidental thereto. Notwithstanding the foregoing and Section 18-402 of the Act, no member other than a Manager shall have authority to manage or specifically bind the Company except as specifically provided in this Operating Agreement.

4.2 Election, Etc. of Managers.

(a) _____ and _____ shall serve as the initial Managers of the Company until their respective successors shall be duly elected and qualified.

(b) If any Person resigns or otherwise vacates the office of Manager, the Members shall elect a replacement Manager to serve the remaining term of such office, unless one or more other Persons then serve as Managers and the Members determine not to fill such vacancy. A Person may be removed as a Manager by the Members with or without cause at any time. A Manager may, but shall not be required to, be elected from among the Members. A Manager may be a natural person or an Entity.¹⁹

¹⁹ If the donor is going to retain an interest as a Member, his or her ability to participate in the selection of managers may give rise to arguments that the powers of the managers should be attributed to the members and, because of the managers' powers regarding distributions and dissolution, that the LLC should be included in the gross estate under 2036(a)(2) (or otherwise). In addition, whether or not the donor retains an interest as a Member there may be a need to ascertain the fair market value of the interest of the other Members (for example, if the founder

4.3 Powers. Except as otherwise expressly provided in the Act, the Certificate or this Operating Agreement, the Managers shall have full, exclusive and complete discretion, power and authority to manage, control, administer and operate the business and affairs of the Company for the purposes herein stated, and to make all decisions affecting such business and affairs, including without limitation, for Company purposes, the power to:

(a) acquire by purchase, lease or otherwise, any real or personal property, tangible or intangible;

(b) construct, operate, maintain, finance and improve and to own, sell, convey, assign, mortgage or lease any property owned or held by the Company;

(c) enter into agreements and contracts in connection with the Company's business;

(d) borrow money for and on behalf of the Company and execute any guaranty on behalf of a third party and pledge Company property to secure any such obligation;

(e) execute or modify agreements or contracts with respect to any part or all of the property owned or held by the Company;

(f) repay, in whole or in part, refinance, amend, modify or extend any mortgages or deeds of trust that may affect any property owned or held by the Company

decides to give or sell a Member interest to a family member or trust), and the ability of each Member to participate in the selection of Managers may have an impact on the value. Note the interplay with section 3.2 above; obviously the greater the vote of the Member interest being valued, the more likely the attribution of managerial control via the ability to remove and replace. On the other hand consider whether this is analogous to the ability of a settlor to remove and replace trustees and perhaps as a result there should be no attribution of the Manager's powers to the Members just as there is not attribution of the trustee's powers to the settlor (*Estate of Wall v. Comm'r*, 101 T.C. 300 (1993)), at least as long as the replacement has fiduciary constraints (id.) and is not "related or subordinate" (see Rev. Rul. 95-58). If relying on the Wall approach, the drafter should modify section 4.2(b) by requiring that any replacement for a Manager who is removed by a Member's vote must not be "related or subordinate" within the meaning of Code section 672(c), to conform to the IRS view articulated in Rev. Rul. 95-58 (even though there are good arguments that this requirement has no basis in the Code).

More specifically with regard to the donor as a Member, consider disqualifying the donor from participating in the process of dismissing or selecting managers. This may be accomplished either by singling the donor out by name, or by creating two otherwise identical classes of Member interest, one of which is disqualified from participating in this decision (and in the decision to dissolve set forth in Section 11.1 below). The simpler version would simply add a sentence at the end of Section 4.2(b), to read as follows: "For purposes of this subsection 4.2(b), [NAME] shall be deemed not to be a Member and shall not be able to participate in any decision to elect or remove any manger, and [NAME] shall not be eligible to be elected to be a manger." Creating a separate class of Member would be more complex.

and, in connection therewith, to execute for and on behalf of the Company any extensions, renewals or modifications of such mortgages or deeds of trust;

(g) execute any and all other instruments and documents that may be necessary, or in the reasonable opinion of the Managers, desirable to carry out the intent and purpose of this Agreement;

(h) make any and all expenditures that the Managers, in their sole discretion, deem necessary or appropriate in connection with the management of the affairs of the Company and the carrying out of its obligations and responsibilities under this Agreement, including, without limitation, all operating, capital, legal, accounting, investment advisory and other related expenses incurred in connection with the organization, financing and operation of the Company or in connection with its property;

(i) enter into any kind of activity necessary for, in connection with, or incidental to, the accomplishment of the purposes of the Company;

(j) open bank accounts, and invest and reinvest Company monies in short term instruments or money market funds or any securities or other investments, whether or not publicly traded or readily marketable;

(k) loan money on behalf of the Company;

(l) carry out the Company purposes through other limited liability companies, joint ventures, partnerships, corporations, trusts or other entities;

(m) purchase liability and other insurance to protect the Company's property and business, including policies of life insurance which insure the life of any Member;

(n) pay all Company debts, obligations and expenses;

(o) employ accountants, attorneys, appraisers or other professionals to perform services for or on behalf of the Company and to compensate them from Company funds; and

(p) perform any and all other acts as the Managers may deem necessary or appropriate to the conduct of the Company's business.²⁰

²⁰ The Managers are specifically not empowered to unilaterally dissolve the LLC or unilaterally in a non-fiduciary capacity make or withhold periodic distributions. See Article VII pertaining to distributions.

4.4 Authorized Persons. The Managers may (a) authorize by written action any person to enter into and perform any agreement on behalf of the Company, and (b) appoint individuals (including one or more Managers), with such titles as they may select, as officers, employees or agents of the Company to act on behalf of the Company, for such reasonable compensation as the Managers shall determine, and with such power and authority as the Managers may delegate from time to time to any such person.²¹ Any such persons, individuals, officers, employees and agents (each “Authorized Person”) may be removed by the Managers at any time and from time to time, with or without cause.

4.5 Authority. The Managers and any Authorized Person shall have the right to act for and bind the Company and may execute documents, instruments and contracts in the name of and on behalf of the Company. Any person or entity dealing with the Company, the Members, the Managers or any Authorized Person may rely upon a certificate signed by the Managers as to the identity of the Members, the Managers or such Authorized Person and as to the authority of the Managers or such Authorized Person to execute and deliver any agreement or other instrument or document on behalf of the Company. No person dealing with the Managers need inquire into the validity or propriety of any agreement, instrument or document executed in the name of the Company by the Managers, or as to the authority of the Managers executing the same.

4.6 Decisions by Managers. During any period in which more than two persons are serving as the Managers, and except as otherwise provided herein, all decisions which under this Agreement are to be made by the Managers shall be made by the majority of such Managers, with each Manager having one vote. If only two persons are serving as the Managers, all decisions shall be made by a unanimous vote of such Managers unless otherwise agreed by them. Moreover, if an even number of persons are serving as the Managers and such Managers are unable to take action or make a decision because of a disagreement or dispute, such decision shall be made by a vote of all of the Members of the Company.²² If only one person is serving as the Manager all decisions to be made by the Managers shall be made by such person serving as the sole Manager.

In exercising their powers and authority under, and otherwise carrying out the provisions of, this Agreement, the Managers shall act solely in the best interests of, and shall have a fiduciary duty (including the duty of loyalty, the duty of good faith and fair

21 6 Del. C. §18-407 permits Managers to delegate the right and power to manage and control the business and affairs of the LLC.

22 The inclusion of this sentence may result in the Members having powers over matters generally outside their purview under this Agreement.

dealing, the duty of care, and the duty to disclose material information) with respect to, the Company and the Members.²³

4.7 Execution of Documents by Managers. When more than one person is serving as a Manager, the signature of one Manager on a contract or other document on behalf of the Company shall be legally binding as to the Company and its Members even though such Manager did not have the authority to do so under the provisions of this Agreement.

4.8 IRC Section 754 Elections. The Managers shall have the power, in their sole discretion, to (a) cause an election under section 754 of the Code to be made with respect to the Company, (b) determine the method (or methods) adopted by the Company for making any income tax allocations required by section 704(c) of the Code or the Treasury Regulations issued thereunder, (c) make such allocations for Federal, state and local income tax purposes as may be necessary to maintain substantial economic effect, or to ensure that such allocations are in accordance with the Interests of the Members in the Company, within the meaning of the Code and the Treasury Regulations, and (d) determine all other tax matters relating to the Company, including accounting procedures, not expressly provided for by the terms of this Agreement.

4.9 Reliance by Authorized Persons. An Authorized Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any person or entity as to matters the Authorized Person reasonably believes are within such person's or entity's professional or expert competence.

4.10 Incapacity of Individual Manager. For purposes of this Agreement, an individual who is a Manager shall be treated as being incapacitated if he or she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the management of the Company assets by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other similar cause. The existence of a Manager's incapacity shall be conclusively established by (i) a determination of a court having jurisdiction of such matters, (ii) the written opinion of the Manager's regularly attending physician or (iii) the written opinion of two other physicians licensed to practice medicine in the state in which the Manager resides. If a Manager is treated as being incapacitated, he or she shall be deemed to have irrevocably resigned as a Manager. If the effect of the incapacity results

23 With regard to the importance of the applicability of fiduciary duties to the Managers' conduct, see Mezzullo, Recent Cases Affecting Family Limited Partnerships and LLCs, October 12, 2005.

in no remaining Manager, the remaining Members by the vote of a Majority-In-Interest shall designate a new Manager.²⁴

4.11 Reimbursement. Each Manager shall be entitled to reasonable compensation for services rendered to the Company in that capacity as well as to be reimbursed for all expenses reasonably incurred by such manager in connection with the business and purposes of the Company.

ARTICLE V - Contributions and Capital Accounts

5.1 Initial Capital Contributions. On or prior to the date hereof,²⁵ each of the Members shall make an initial Capital Contribution of all or a portion of such Member's right, title and interest in and to the property set forth opposite such Member's name in column 1 of Schedule A hereto, in exchange for the respective Percentage Interests set forth in column 2 thereon. The parties to this Agreement agree that the fair market value of the foregoing contributions is set forth in column 1 of Schedule A hereto.²⁶

5.2 Additional Contributions. No Member shall be required to make any Capital Contribution in addition to his initial Capital Contribution, and the Members may make additional Capital Contributions to the Company only if such additional Capital Contributions are made pro rata by all the Members or all the Members consent in writing to any non-pro rata contribution. The fair market value of any property other than cash or publicly traded securities to be contributed as an additional Capital Contribution shall be (a) agreed upon by the contributing Member and a Majority-in-Interest of the Members before the contribution, or (b) determined by a disinterested appraiser selected by the Managers.²⁷

24 There is an issue of how to obtain medical opinions in light of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the rules and regulations promulgated thereunder. See Graham and Blattmachr, Planning for the HIPAA Privacy Rule, ACTEC Journal (Spring 2004); House and Price, How to Be Hip with HIPAA – Why HIPAA Keeps Us Hoppin', presented at the 2004 ACTEC Meeting.

25 Property can be contributed before the date of the agreement if the LLC's certificate of formation is filed on a prior date.

26 Property is valued for this purpose as of the date of its contribution. Depending on the nature of the asset, this may require a formal appraisal.

27 Alternatively, the agreement could require additional contributions and such provision could have favorable valuation considerations and in the bankruptcy context: 5.2 Additional Contributions: The Members shall from time to time make additional Capital Contributions to the Company as may be required, in the discretion of the Managers, to fund additional activities of the Company or for any other purpose. Any such required additional Capital Contributions shall be allocated among and made

5.3 Capital Accounts. For each Member, there shall be established a separate Capital Account to which such Member's initial Capital Contribution shall be credited. As of the end of each Accounting Period, the balance in each Member's Capital Account shall be adjusted by (a) increasing such balance by such Member's (i) allocable share of Net Profits²⁸ for such Accounting Period (allocated in accordance with Article 6.1) and (ii) Capital Contributions, if any, made during such Accounting Period and (b) decreasing

by the Members pro rata in accordance with their relative Percentage Interests within thirty (30) days from the date of written notice to the Members regarding such contributions from the Members. The Company shall be entitled to enforce the obligations of each Member to make the contributions specified in this Section 5.2, and the Company, acting at the direction of the Managers, shall have all remedies available at law or in equity in the event any such contribution is not so made. The Company shall be entitled to recover reasonable attorneys' fees and other costs of enforcing a Member's obligations under this Section 5.2 and shall also be entitled to recover interest on any unpaid contributions, from the due date of such Capital Contribution, at 375 basis points over the prime rate of interest as published from time to time in The Wall Street Journal or similar publication if The Wall Street Journal is not available. The Company shall be entitled to offset against any amounts which may be or become due to a Member from the Company any obligations, fees, expenses or other amounts which may be payable to the Company by such Member.

Consider the following in lieu of or in partial modification of the foregoing: (a) General. If any Member fails to make, in a timely manner, all or any portion of any Capital Contribution or other payment or return of distributions required to be made by such Member under this Agreement and such failure continues for [five] Business Days after receipt of written notice thereof from the Managers (a "Default"), then the Managers may designate such Member as in default under this Agreement (a "Defaulting Member"). [The Managers may, in their sole discretion, choose not to designate any Member as a Defaulting Member and may agree to waive or permit the cure of any Default, subject to such conditions as the Managers and such Member may agree upon.] (b) Funding of Defaulted Amount. With respect to any amount that is in Default, the Managers may require additional Capital Contributions from the Members in proportion to their Percentage Interests to the extent necessary to fund the amount that is in Default. (c) Forfeiture and Application of Forfeited Amounts. The Managers may reduce amounts otherwise distributable to such Defaulting Member pursuant to Section 7.1 by 50% as of the date of such Default (the amount of such reduction being deemed forfeited by such Defaulting Member) and withhold all remaining distributions that otherwise would be payable to such Defaulting Member pursuant to Section 7.1 until the dissolution of the Company. Amounts forfeited shall be distributed to the other Members in proportion to their Percentage Interests.

- 28 The definitions of "Net Profits" and "Net Losses" incorporate some of the more important rules under section 704(b) of the Code regarding the determination of partnership income and loss for purposes of maintaining capital accounts. Instead of referring to these defined terms, some models simply refer to "each item of the Company's income and gain" and "each item of the Company's loss and deduction." While the definitions are somewhat complex, they do provide greater clarity and guidance. This is of course, like many of the following notes, not pertinent so long as the LLC is a disregarded entity (e.g., if the Members are all grantor trusts as to the same person, who may also be a Member, although even in that case these definitions and allocations may have a real economic impact among different entities deemed to be the same tax person e.g., grantor trusts with different beneficiaries).

such balance by (i) the amount of cash and the fair market value of property distributed to such Member during such Accounting Period and (ii) such Member's allocable share of Net Losses for such Accounting Period (allocated in accordance with Section 6.1). The Capital Accounts shall also be adjusted to reflect any special allocations made pursuant to this Agreement²⁹ and any Member indebtedness transferred to the Company and any Company indebtedness transferred to a Member.³⁰

5.4 Negative Capital Accounts. No Member shall be required to make up a negative balance in his, her or its Capital Account.³¹

5.5 [No Withdrawal of Capital. No Member shall have the right to withdraw his or her capital from the Company or to receive any distribution of or return on such Member's Capital Contributions, except as otherwise provided in Section ___ of this Agreement.]³²

29 For example, allocations made in accordance with section 704(c) or section 737 of the Code pursuant to Section 6.2 of the agreement. See note 41.

30 For capital account purposes, the amount of any partnership liability assumed by a partner (other than a liability assumed in connection with a distribution of encumbered property) is treated as a contribution to the partnership, and the amount of any partner liability assumed by the partnership (other than a liability assumed in connection with a contribution of encumbered property) is treated as a distribution to the partner. Treas. Reg. § 1.704-1(b)(2)(iv)(c).

31 The absence of an obligation to restore a capital account deficit is consistent with the limited liability of the Members of an LLC. One consequence of this provision is that allocations will not have substantial economic effect under the primary test set forth in the section 704(b) regulations. This safe harbor rule requires that (i) capital accounts be maintained in accordance with certain tax accounting rules (this requirement is satisfied by Section 5.3), (ii) liquidating distributions be made in accordance with the partners' positive capital account balances (this requirement is satisfied by Section 7.5 and Section 11.4) and (iii) partners be unconditionally obligated to restore negative capital account balances upon liquidation of their partnership interests. Treas. Reg. § 1.704-1(b)(2). In the absence of a deficit makeup obligation, an alternate safe harbor requires that the agreement contain certain "qualified income offset" provisions designed to allocate partnership income so as to eliminate any unexpected negative capital account balances. In this model, there is no need to include the complex offset provisions in order to qualify for the safe harbor because allocations and distributions are made in accordance with the Members' capital interests. However, inclusion of a "qualified income offset" should be considered where profits and losses will be shared in different proportions. (Note that in many cases the latter structure would run afoul of section 2701 of the Code.)

32 Neither New York nor Delaware law gives Members the right to withdraw capital contributions from an LLC, and therefore this provision is not necessary (and will not add to any valuation discount) in agreements governed by the laws of those states. In states where Members do have such a right, there is a risk that this provision might be disregarded under section 2703(a) or section 2704(b) of the Code. The cross-reference is intended to refer to a section of the agreement providing that a Member is entitled to payment of his or her capital account balance upon a permitted withdrawal from the Company.

5.6 Loan. No loan or promissory note made to the Company by any Member (whether or not evidenced by a promissory note) shall constitute a Capital Contribution to the Company for any purpose.

ARTICLE VI - Allocations and Tax Matters

6.1 Allocations to Capital Accounts. Net Profits or Net Losses³³ with respect to any Accounting Period shall be allocated among the Capital Accounts of the Members in proportion to their Percentage Interests in effect during such Accounting Period.³⁴

6.2 Tax Allocations and Other Tax Matters. Except as otherwise provided in the following sentence, each item of income, gain, loss and deduction recognized by the Company shall be allocated among the Members, for U.S. federal, state and local income tax purposes, to the extent permitted under the Code and the Treasury Regulations, in the same manner that each such item is allocated to the Members' Capital Accounts, provided that the Managers may adjust such allocations as long as such adjusted allocations have substantial economic effect or are in accordance with the interests of the Members in the Company, within the meaning of the Code and the Treasury Regulations.³⁵ Each item of income, gain, loss and deduction with respect to property contributed to the Company shall be allocated in accordance with the principles of

33 If Net Profits and Net Losses are not defined elsewhere in the Agreement, one can refer instead to "Each item of income, gain, loss or deduction of the Company (determined in accordance with U.S. tax principles as applied to the maintenance of capital accounts)." See note 28.

34 Profits and losses are shared in proportion to the Members' capital interests in the Company, as measured by their Percentage Interests—i.e., based initially on relative capital contributions and later on relative capital account balances. This model assumes that distributions will be made in the same proportions. Although it is possible to structure partnerships and LLCs so that profits and losses are shared in a different ratio (and to have such allocations respected for federal income tax purposes—see notes 25 and 27), straight pro-rata sharing is preferable in order to avoid potential income and transfer tax issues in the estate planning context. For example, the allocation of income in proportion to capital interests ensures that allocations satisfy the family partnership rules under section 704(e)(2) of the Code (requiring that partnership income be allocated in proportion to the partners' capital interests, after allowance for reasonable compensation to a donor [or a donee] partner for services rendered to the partnership). In addition, pro-rata allocations of income and distributions of profits avoid application of the special valuation rules of section 2701 of the Code to the transfer of an interest in the entity by ensuring that the interest transferred will be of the same class of equity as any interest retained. See Code § 2701(a)(2)(B) and (C), Treas. Reg. § 25.2701-1(c)(3).

35 The Managers generally must allocate individual items of profits and losses for income tax purposes in the same proportion as they are allocated to the Members' capital accounts—i.e., in accordance with Percentage Interests—but may allocate items in a different ratio if the allocation will be respected under section 704(b) of the Code. See notes 31 and 32 above.

section 704(c) and section 737 of the Code and the Treasury Regulations thereunder.³⁶ Tax credits and tax recapture shall be allocated in accordance with the Members' interests in the Company as provided in Treasury Regulations section 1.704-1(b)(4)(ii).³⁷ The Managers shall have the power, in their sole discretion, to (a) cause an election under section 754 of the Code to be made with respect to the Company,³⁸ (b) determine the method (or methods) adopted by the Company for making any income tax allocations required by section 704(c) of the Code or the Treasury Regulations thereunder,³⁹ and (c) determine all other tax matters relating to the Company, including accounting procedures, not expressly provided for by the terms of this Agreement.

6.3 Allocation of Income and Loss in Respect of Interests Transferred or Reduced. If a Member shall Transfer an Interest pursuant to Section 9.3 of this Agreement⁴⁰ (or a Member shall be admitted to the Company) other than on the first day of the Company's taxable year, the Company books shall not be closed but instead the Net Profits and Net Losses allocable in respect of such Interest (or all Interests) for such taxable year shall be apportioned between the transferor and the transferee (or between the Persons who were Members immediately before such admission and the persons who are Members immediately after such admission) based on the portion of the taxable year that has elapsed prior to such transfer (or admission), as provided in section 1.706-1(c)(2)(ii) of the Treasury Regulations, unless the Manager shall otherwise elect⁴¹ or as

36 Section 704(c) of the Code requires, among other things, that built-in gain or loss with respect to contributed property be allocated to the contributing partner upon a sale of the property or its distribution to another partner. Under section 737, a partner who contributes appreciated property to a partnership must recognize precontribution gain if other property is distributed to the partner within seven years of the contribution.

37 The allocation of tax credits and credit recapture for income tax purposes is addressed separately because unlike items of income, gain, loss and deduction, they are not reflected in the Members' capital accounts. Section 1.704-1(b)(4)(ii) of the Treasury Regulations provides that such allocations must be made in accordance with the partners' respective interests in the entity, i.e., based on capital interests, even if profits and losses are being shared in a different ratio.

38 A partnership may make an election under section 754 of the Code to step up the basis of its assets when an interest in the entity has been sold and the purchase price exceeds the transferor's basis in the interest or when a partner dies. Once made, the election is irrevocable without IRS consent.

39 A partnership may make section 704(c) allocations using any reasonable method or one of three methods specified in the section 1.704-3 of the Treasury Regulations.

40 The cross-reference is to the provisions in the agreement setting forth transfer restrictions, which will define which transactions constitute a "Transfer."

41 Section 706(d) of the Code provides that if there is a change in any partner's interest during the taxable year, each partner's distributive share of partnership income and loss is to be determined by the use of any method prescribed by regulation which takes into account the varying interests of the partners in the partnership during the taxable year. Section 1.706-1(c)(2)(ii) of the Treasury

may otherwise be required by section 1.706-1(c)(5) of the Treasury Regulations in the case of a Transfer by gift.⁴²

6.4 [Taxation as Partnership or as Disregarded Entity.]⁴³

6.5 [Tax Classification. The Company shall not elect to be treated as an association taxable as a corporation for U.S. federal, state or local income tax purposes

Regulations provides that in the case of a transfer of a partner's entire interest, a partnership may use either of two methods to apportion income and losses between the transferor and transferee: it may (i) close its books and apportion income and losses based on whether they were realized before or after the transfer, or (ii) apportion a pro rata share of the partnership's total income and losses for the year based on the relative length of the periods before and after the transfer. The proration method is simpler because there is no need to determine the exact date when partnership items were paid or accrued, but under the regulation it may be used only if the partners agree. Section 6.3 evidences the Members' agreement to use the proration method unless the Manager decide otherwise (there may be situations where an interim closing of the books is preferable because it is advantageous for either the transferor or the transferee to recognize a particular item of income or loss). The section 706 regulations do not describe how income and losses are to be apportioned in the case of a reduction in a partner's interest or the admission of a new partner. However, the Tax Court has approved the use of the interim closing of the books method, the proration method or "any other reasonable method" in this context as well. Richardson v. Com'r, 76 T.C. 512 (1981), aff'd, 83-1 USTC ¶9109 (5th Cir.).

42 Section 1.706-1(c)(5) of the Treasury Regulations provides that in the case of a transfer by gift during the taxable year, income up to the date of the gift is allocated to the donor under section 704(e)(2) of the Code.

43 Under the default classification rules of the "check the box" regulations, an LLC with a single owner is disregarded for federal income tax purposes and an LLC with more than one owner is treated as a partnership. Treas. Reg. § 301.7701-3. (For these purposes, we believe that an LLC owned by grantor trusts will be treated as owned by the grantor.) Some models include language directing that the Company be treated as either a disregarded entity or a partnership depending on the number of Members, but we do not recommend such a provision for a number of reasons. First, as noted above an entity with multiple Members for local law purposes can still have only one "owner" for and be disregarded for income tax purposes if, for example, all of the Members are grantor trusts with respect to the same grantor. Second, the tax status of an entity can change over time. For example, a disregarded entity whose Members are grantor trusts would become taxable as a partnership when the grantor dies or one or more of the trusts is de-grantorized. Finally, the classification of a partnership or LLC owned entirely by two spouses as community property depends on how the owners choose to treat the entity for federal income tax purposes. See Rev. Proc. 2002-69.

Because the Company may be treated as a partnership from inception under the 7701 default classification rules, or if it is initially treated as a disregarded entity and subsequently becomes a partnership under the tax rules, the agreement should include certain partnership-tax provisions, such as the designation of a Tax Matters Partner.

under Treasury Regulations section 301.7701-3(a) or under any corresponding provision of state or local law.]⁴⁴

ARTICLE VII – Distributions

7.1 Distributions of Cash Flow.⁴⁵

(a) Distribution of Available Cash. Available Cash shall be distributed to the Members according to their Percentage Interests in such amounts and at such times as the Managers shall determine consistent with the Managers' fiduciary duty to the Company and the Members of the Company.⁴⁶

44 An LLC treated as a disregarded entity or a partnership under the default classification rules may elect to be treated as an association taxable as a corporation. Id. A provision prohibiting such an election may be included in the agreement, or it can be omitted on the theory that taxation as a corporation might conceivably be beneficial as part of some future income or transfer tax planning technique.

45 The Delaware Limited Liability Company Act provides as follows with regard to distributions:

§ 18-601. Interim distributions. Except as provided in this subchapter, to the extent and at the times or upon the happening of the events specified in a limited liability company agreement, a Member is entitled to receive from a limited liability company distributions before the Member's resignation from the limited liability company and before the dissolution and winding up thereof.

46 The reference to fiduciary duty attempts to address the Section 2036(a)(2) "control" issue raised in Strangi Est. v. Com'r., T.C. Memo 2003-145, aff'd No. 03 60 992 (5th Cir. July 15, 2005)(Strangi II). However, the "control" issue is best addressed by having the client resign as Manager at least three years prior to death. Business judgment may be a significant issue if creditor protection is a major reason for the formation of the Limited Liability Company. Unless a donee of an interest in the Company has a withdrawal power, then the distribution provision may cause the donor to be denied an annual exclusion for a gift of a Member interest under Hackl v. Com'r., 118 T.C. 279 (2002), aff'd, 335 F.3d 664 (7th Cir. 2003). See response to Hackl in footnote 65. Additionally, if there is more than one Manager, then one might consider delegating the investment authority to one Manager and the distribution authority to the other Manager. Alternatively, the agreement could mandate distribution of Available Cash, thereby removing an element of "control" from the Managers, although such a provision could reduce discounts and increase value for gift and estate tax purposes. Another approach would be to mandate distribution of Available Cash at least to the extent required to satisfy Members' income taxes attributable to the Company: Available Cash, if any, shall be distributed to the Members according to their Percentage Interests during the course of and immediately following the end of each Fiscal Year in amounts sufficient for the Members (or their equity owners) to pay their federal, state and local income taxes attributable to the Company, if any, determined based on the highest marginal income tax rates and also to allow the Members (or their equity owners) to make estimated tax payments on a quarterly basis without incurring any penalty. Such distributions shall be made no later than the due date of the Members' (or the equity owners') income tax returns and estimated tax payments. The highest marginal income tax rates shall be based upon the sum of the highest federal, state and local income tax rates in effect for such Fiscal Year applicable to the Member or the equity owner of any disregarded or pass through entity who, in the Managers' judgment, has the highest combined federal, state and local income tax rates. Distributions pursuant to this Section shall not be in addition to other distributions during and immediately after the

(b) Distribution of Capital Event Proceeds. Capital Event Proceeds shall be distributed to the Members in such amounts and at such times as the Managers shall determine in their discretion but always in the following rank and order:

- (i) Among the Members in proportion to, and to the extent of, their Unreturned Capital.
- (ii) The remainder, if any, among the Members according to their Percentage Interests.

7.2 Member Tax Liability. The amount of tax which is required to be paid or withheld by the Company with respect to any Member's allocable share of the income of the Company shall be assessed to such Member, who shall pay the same to the Company or the taxing authority forthwith upon demand of the Managers. The Managers may in their discretion set off any such tax against any amounts otherwise distributable to a Member under this Agreement. Each Member hereby indemnifies the Company and every other Member and agrees to hold them harmless from any liability or loss they might incur by virtue of any such tax with respect to such Member's allocable share of the income of the Company.

7.3 Restrictions on Distributions. Notwithstanding the distributions contemplated by this Section, if the Company has creditors, no distribution may be made if, after giving effect to such distribution, either (i) the Company would be unable to pay its debts as they become due in the usual course of business or (ii) the net assets of the Company would be less than zero.⁴⁷

end of the Fiscal Year, but instead other distributions during and immediately after the end of the Fiscal Year shall be deemed to satisfy the requirement that distributions for income tax purposes be made to the extent of such other distributions. Additional Available Cash, if any, shall be distributed to the Members according to their Percentage Interests in such amounts and at such times as the Managers shall determine consistent with the Managers' fiduciary duty to the Company and the Members of the Company.

47 The Delaware Limited Liability Company Act provides the following limitation on distributions:

§ 18-607. Limitations on distribution.

(a) A limited liability company shall not make a distribution to a Member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to Members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability. For purposes of this subsection (a), the term "distribution" shall not include

7.4 Liquidating Distributions. Distributions of proceeds resulting from a termination and dissolution of the Company shall be distributed by the Managers in the manner set forth in Section 11.4 hereof.

ARTICLE VIII - Exculpation, Indemnification, and Insurance⁴⁸

8.1 Exculpation. So long as a Manager acts in good faith with respect to the conduct of the business and affairs of the Company, no Manager shall be liable or accountable to the Company or to any of the other Managers and Members, in damages or otherwise, for any error of judgment, for any mistake of fact or of law, for any other act or thing that the Manager may do or refrain from doing in connection with the business and affairs of the Company or for any act or omission performed or omitted by a Manager or Authorized Person, except for willful misconduct or gross negligence or breach of fiduciary duty, and further except for breaches of contractual obligations or agreements between the Manager and the Company. Whenever in this Agreement a Manager is permitted or required to make decisions in good faith, the Manager shall act under such standard imposed by this Agreement or any relevant provisions of law or in equity or otherwise. A Manager shall not be relieved of any breach of the Manager's fiduciary obligation to the Company or its Members.⁴⁹

8.2 Reliance. A Manager shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any of the Members, officers, employees or committees, or by any other person as to matters the Manager reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company (including, without limitation, information, opinions, reports or statements as to the value and the amount of the assets, liabilities, profits or losses of the Company or any other facts pertinent to the existence and amount of assets from which distributions to Members might properly be paid). In addition, the Manager may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisors selected by him or

amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

48 Many of the members of the subcommittee insert the following provisions under management (Article IV) and do not have separate articles for exculpation and indemnification in their forms.

49 Cf. [Hackl v. Commissioner](#), 118 T.C. 279 (2002), [Schauerhamer](#), T.C. Memo. 1997-242; [Reichardt](#) 114 T.C. 166 (2000); [Estate of Morton B. Harper v. Commissioner](#), T.C. Memo. 2002-121; and [Thompson v. Commissioner](#), T.C. Memo. 2002-246.

her, and any opinion of any such person as to matters which the Manager reasonably believes to be within such person's professional or expert competence shall be a full and complete authorization and shall provide full and complete protection in respect of any action taken or suffered or omitted by the Manager hereunder in good faith and in accordance with such opinion.

8.3 Indemnification.⁵⁰ In addition to any other powers provided by law:⁵¹

50 The Delaware Limited Liability Company Act provides for broad indemnification of Members and Managers. See 6 Del. C. § 18-108 below:

§ 18-108. Indemnification

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any Member or manager or other person from and against any and all claims and demands whatsoever.

Most Members of the subcommittee use a very simple indemnification provision such as the one that follows, but depending on whether the Company will be used as an operating entity for an active business the provisions set forth in this sample form may be more appropriate.

Indemnification. The Company shall indemnify each Manager, whether serving the Company or, at its request, any other Entity, to the full extent permitted by the Act. The foregoing rights of indemnification shall not be exclusive of any other rights to which the Manager may be entitled. The Manager may, upon the approval of the Members, take such action as is necessary to carry out these indemnification provisions and may adopt, approve and amend from time to time such resolutions or contracts implementing such provisions or such further indemnification arrangements as may be permitted by law.

51 The following form of Indemnification provision provides very broad indemnification of Members, Managers, and certain affiliates. This form can, of course, be scaled back, based on negotiations and circumstances, but is intended to provide as broad an indemnification as could be reasonably requested.

The following provision is from a limited liability company used in an operating business and is very broad but does not extend to breaches of fiduciary duty:

8.3 Indemnification.

(a) The Company shall, to the fullest extent permitted by applicable law and public policy, indemnify, defend (using counsel reasonably satisfactory to the Company) and hold harmless each Indemnitee from and against any claims, demands, liabilities, costs, expenses, penalties, damages and losses (collectively, a "Claim") to which such Indemnitee may become subject due to the Indemnitee's affiliation with the Company or in connection with the defense, settlement or adjudication (actually and reasonably paid) of any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal arising out of, or in connection with, this Agreement or the Company's business or affairs, irrespective of the nature of the legal or equitable theory upon which a Claim is made, including, without limitation, negligence, breach of duty, mismanagement, waste, breach of

(a) The Company has power to indemnify any person (an “Indemnified Person”) who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Company) by reason of the fact that the Indemnified Person is or was a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Manager, Member, officer, director, Authorized Person, employee or agent of another Company, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if the Indemnified Person acted in good faith and in a manner the Indemnified Person reasonably believed to

contract, breach of warranty, strict liability, violation of federal or state securities law, violation of the Employee Retirement Income Security Act of 1974, as amended, or violation of any other state or federal law, except for any Claim to the extent attributable to the Indemnitee’s fraud, bad faith, willful misconduct or arising out of an act or omission the Indemnitee did not believe to be in the best interests of the Company or lawful. The termination of any action, suit, or proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Indemnitee did not act in good faith and in a manner believed to be in the best interests of the Company, and with respect to any criminal action or proceeding, believed that his or its conduct was unlawful.

(b) If any Indemnitee becomes involved in any capacity in any Claim, then the Company shall reimburse such Indemnitee for his, her, or its reasonable legal and other reasonable out-of-pocket expenses (including, but not limited to, the cost of any investigation and preparation and establishing a right to indemnification under this Section 8.3; “Defense Costs”) as they are incurred in connection therewith; provided that such Indemnitee shall have executed an agreement satisfactory to the Company promptly to repay to the Company the amount of any such reimbursed expenses paid to it if it shall ultimately be determined that such Indemnitee was not entitled to be indemnified by the Company in connection with such action, proceeding, or investigation. If such conditions are not satisfied, then reimbursement of Defense Costs shall be made after successful defense of the Claim by the Indemnitee.

(c) The provisions of this Section 8.3 shall survive for a period of four (4) years from the date of winding up and termination of the Company, provided that:

i) if, at the end of such period, there are any actions, proceedings, or investigations then pending, and the Indemnitee notifies any Member thereof at such time, which notice shall include a brief description of each such action, proceeding or investigation and the liabilities asserted therein, then the provisions of this Section 8.3 shall survive with respect to each such action, proceeding, or investigation set forth in such notice (or related action, proceeding, or investigation based upon the same or similar claim) until such date that such action, proceeding, or investigation is finally resolved; and

(ii) the obligations of the Company under this Section 8.3 shall be satisfied solely out of Company assets.

be not opposed to the best interests of the Company (measured by the same fiduciary duty standards applicable to Managers in Section 4.6), and, with respect to any criminal action or proceeding, had no reasonable cause to believe the Indemnified Person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Indemnified Person did not act in good faith and in a manner which the Indemnified Person reasonably believed to be or not opposed to the best interests of the Company (measured as aforesaid), and, with respect to any criminal action or proceeding, had reasonable cause to believe that the Indemnified Person's conduct was unlawful.

(b) The Company has the power to indemnify any Indemnified Person who was or is a party or is threatened to be made a party to any threatened, pending or contemplated action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that the Indemnified Person was or is a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Member, Manager, Authorized Person, director, officer, employee or agent of another Company, partnership, joint venture, trust or other enterprise at the request of the Company against expenses (including attorneys' fees) actually and reasonably incurred by the Indemnified Person in connection with the defense or settlement of such action or suit if the Indemnified Person acted in good faith and in a manner the Indemnified Person reasonably believed to be in or not opposed to the best interests of the Company (measured as aforesaid) and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of the Indemnified Person's duty to the Company unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(c) To the extent that a Manager, Member, Authorized Person, director, employee or agent of a Company has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subparagraphs (a) or (b), or in defense of any claim, issue or matter therein, the Indemnified Person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subparagraphs (a) or (b) (unless ordered by a court) shall be made by the Company only as authorized in the specific case upon a determination that indemnification of the Manager, Member, Authorized Person, employee or agent is proper in the circumstances because such person has met the applicable standard of conduct set forth in subparagraphs (a) or (b). Such determination

shall be made by the Managers (but excluding any Manager who was a party to such action, suit or proceeding) if any such Managers were not parties to such action, suit or proceeding supported by independent legal counsel in a written opinion. If all of the Managers were parties to such action, suit, or proceeding, then such determination shall be made by a Majority-In-Interest of the Members provided such Members were not parties to such action, suit, or proceeding supported by independent legal counsel in a written opinion.

(e) The indemnification provided by this Section 8.3 shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any law, agreement, or otherwise, both as to action in the Indemnified Person's official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Manager, Member, Authorized Person, employee or agent and shall inure to the benefit of the heirs and personal representatives of such person.

8.4 Insurance. The Company shall have the power to purchase and maintain insurance on behalf of any person who is or was a Manager, Member, Authorized Person, employee or agent of the Company, or is or was serving at the request of the Company as a Manager, Member, Authorized Person, director, officer, employee or agent of another Company, partnership, joint venture, trust or other enterprise against any liability asserted against the Indemnified Person and incurred by the Indemnified Person in any such capacity or arising out of the Indemnified Person's status as such, whether or not the Company would have the power to indemnify the Indemnified Person against such liability under the provisions of this section.⁵²

8.5 Expenses. To the fullest extent permitted by applicable law, expenses (including, without limitation, attorneys' fees and disbursements) incurred by an Indemnified Person in defending any claim, demand, action (a civil or criminal), suit or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding, subject to recapture by the Company following a later determination that such Indemnified Person was not entitled to be indemnified hereunder.

ARTICLE IX - Resignation; Admission of Members

Voluntary Transfers of Interests; Involuntary Transfers of Interests

52 This is an alternative provision.

Insurance. The Company may purchase and maintain insurance or other similar protection for its benefit, the benefit of any Indemnified Person, or both, against any Claims, whether or not the Company would have the obligation to indemnify such Indemnitee against such liability.

9.1 Resignation.

(a) Resignation by Manager. A Manager may resign at any time by giving written notice to the other Manager of the Company, or if none, to the Members of the Company. The resignation of a Manager shall take effect upon delivery of notice thereof or at such later time as shall be specified in such notice; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Such resignation may be revoked at any time before its effective date by delivery of a notice of revocation to the other Manager, or if none, to the Members. The resignation of a Manager shall not affect such Manager's rights and liabilities as a Member.

(b) Resignation by Member. In accordance with the Act, no Member shall have the right to resign from the Company, except as a result of a transfer of his, her or its Interest pursuant to Section 9.4 hereof.⁵³

9.2 Admission of Members.

(a) Admission of New Members. No person shall be admitted to the Company as a Member without the unanimous consent of the Members.⁵⁴ Upon the admission of one or more new Members, the Managers are authorized to adjust the Percentage Interests of the Members to reflect the dilution, if any, required to admit such

53 Under Delaware law, unless otherwise provided in the operating agreement, a Member may not resign (withdraw) prior to dissolution and winding up of the limited liability company. See 6 Del. C. §18-603.

Section 2703(a) of the Internal Revenue Code (the "Code") provides that any restrictions in an agreement on the right to sell or use property will be ignored for purposes of valuing such property (unless Code §2703(b) exceptions apply). One can argue that by tying the resignation provision to the Act, there are no restrictions in the Agreement, and therefore Code §2703 should not apply. This provision should not run afoul of Code §2703(a) because Code §2703 was "intended to deal with below-market buy-sell agreements and options that artificially depress the fair market value of the property subject to tax, and are not inherent components of the property interest itself." Church v. U.S., 35 AFTR 2d 2000-804, aff'd by 268 F.3d 1063 (5th Cir. 2001); see also Strangi I, 115 T.C. 478 (2000); Lappo v. Commissioner, T.C. Memo. 2003-258 (2003).

Furthermore, Code §2704(b) should not apply to disregard this provision as an "applicable restriction" for purposes of valuing a transfer of such interest between family Members because one can argue that by tying the resignation provision to the Act, there are no restrictions in the Agreement that are more restrictive than state law. See Kerr v. Commissioner, 113 T.C. 149 (1999), aff'd by 292 F.3d 490 (5th Cir. 2002).

54 Alternatively, the general rule, set forth in Section 3.2(b), requiring only Majority-In-Interest approval could be made applicable to the admission of Members.

new Members. Any such dilution shall be in proportion to the Members' Percentage Interests in the Company, unless otherwise agreed by each such Member whose Percentage Interest may be diluted in excess of that proportion. The Percentage Interest to be granted to a new Member shall take due account of the value of the new Member's capital contribution and capital commitment in relation to the value of the Company upon admission.⁵⁵ Each new Member shall have all of the rights, duties and obligations of the original Members hereunder and in all respects each new Member's admission shall be subject to all of the terms and provisions of this Agreement.

(b) Admission of Substitute Member. In the event a Member transfers all or any part of his, her or its Interest in accordance with this Agreement, the transferee of such Member shall be admitted to the Company as a Substitute Member provided that:

(i) the transferring Member and his, her or its transferee execute and deliver such instruments as the Managers deem necessary or desirable to effect such substitution;⁵⁶

(ii) such transferring Member furnishes to the Managers such assurances as the Managers may request, including, without limitation, an opinion of counsel, which opinion and which counsel are satisfactory to the Managers, that the transfer of such Member's Interest complies with, or does not require the registration under applicable Federal and state securities laws, and that such transfer shall not require the Company to be registered under the Investment Company Act of 1940, as amended;⁵⁷ and

(iii) except as provided in Section 9.4, 9.5, 9.6 and 9.9,⁵⁸ the Members consent to the substitution of such transferee as a Substitute Member.

Substituted Members shall have all of the rights, duties and obligations of the original Members hereunder, and in all respects their admission shall be subject to all of the terms and provisions of this Agreement.⁵⁹

55 Alternatively, full discretion could be left to the Managers to determine the amount of capital to be contributed by such new Member.

56 Usually these requirements can be included under the Assignment and Assumption agreement.

57 This requirement may be waived or acknowledged in the Assignment and Assumption agreement.

58 Even if a Member is allowed to transfer the Interest to family Members under Section 9.4, the valuation adjustment should not be affected since the transferee is similarly restricted.

59 See 6 Del. C. §§18-704 & 18-301(b)(2).

(c) Unadmitted Assignee.⁶⁰ A person who acquires all or any portion of a Member's Interest but who is not admitted as a Substitute Member pursuant to Section 9.2(b) shall be a mere assignee (herein an "Unadmitted Assignee") under the Act and shall have the right to receive such distributions to which the assignor was entitled to the extent assigned and shall be allocated the share of Net Profits and Net Losses attributable to such Interest transferred to such person and shall otherwise be treated as a Member for Federal and state income tax purposes and for purposes of the distribution of cash or other assets to such person upon dissolution of the Company pursuant to Section 11.1 but shall have no right to participate in the management of the business or affairs of the Company or exercise any rights as a Member under this Agreement,⁶¹ to require any information or account of Company transactions, or to inspect the Company books and records.⁶²

9.3 Voluntary Transfers of Member Interest. Except as provided under Sections 9.4, 9.5, 9.6 and 9.9⁶³ each Member hereby covenants and agrees that he, she or it shall only sell, assign, transfer, mortgage, pledge, encumber, hypothecate or otherwise

60 An assignment of an interest in a limited liability company does not dissolve the company or entitle the assignee to become, or to exercise any rights or powers of, a Member. See 6 Del. C. §18-702.

61 See 6 Del. C. §18-702. Note: Where the operating agreement, assignment agreement and instrument of assignment provided by the Member are ambiguous and do not expressly state whether assignees have voting rights, the agreements must be construed according to the reasonable expectations of investors who purchase additional Member Interests.

62 A mere assignee therefore possesses a lesser interest than a Member Interest. This could have an impact on valuation of the Interest. See Kimbell v. U.S., 244 F. Supp. 2d. 700 (5th Cir. 2004); Nowell v. Comm'r, T.C. Memo. 1999-15 (1999).

63 It should be determined, after consultation with client, whether an absolute restriction on transfers of Member Interests is desired or warranted, or whether, in certain limited circumstances limited transfers to certain family Members should be allowed. On the one hand, the inability of a Member to transfer such Member's Interest might cause a prudent investor to be willing to pay less for the Member's Interest. On the other hand, the inability of a Member to transfer such Interest may affect the availability of the annual gift tax exclusion. See Hackl v. Comm'r, 118 T.C. 279, aff'd by 335 F.3d 664 (7th Cir. 2003) (holding that the annual gift tax exclusion was not available where the transferee had no substantial economic interest in the property transferred and therefore had no present interest in such property). The Tax Court's view in Hackl was that a substantial economic interest was not present where the ability to sell or transfer an interest required the approval of the Manager. The Tax Court in Hackl also stated that the ability to transfer an interest to a mere assignee did not necessarily imply that the transferor had a present property interest in the transferred interest.

Therefore, if annual exclusion gifts of Interests to family Members are desired, Section 9.5, Right of First Refusal and/or Section 9.6, Right of Redemption, should be considered for inclusion in the operating agreement.

dispose of all or any part of his, her or its Interest to any person after first having obtained the unanimous written consent of the Members.

9.4 Permitted Transfers. Notwithstanding any other provision of this Agreement to the contrary, if a Member's Interest is (a) transferred (i) by gift or sale during the lifetime of the Member, (ii) as a bequest or devise upon the death of the Member, (iii) upon distribution to a beneficiary of a trust that is a Member, and or (iv) by a custodian for a minor under the laws of Delaware or any state, to such minor when the minor has attained the age of termination of such custodianship under the applicable law, and (b) the transferee is a Member of the class consisting of SENIOR FAMILY MEMBER, the lineal descendants⁶⁴ of SENIOR FAMILY MEMBER, the spouse of any lineal descendants of SENIOR FAMILY MEMBER, any SENIOR FAMILY MEMBER, or any trust created and existing for the primary benefit of the SENIOR FAMILY MEMBER or his/her lineal descendants ("Permitted Transferee(s)"), the transfer shall be valid and the Permitted Transferee shall be admitted as a Substitute Member on the terms and conditions of Section 9.2(b), but without the requirement of the consent of the Members.⁶⁵

9.5 Right of First Refusal on Transfer of Member Interests.⁶⁶

(a) Company's First Option. If a Member or a Substitute Member desires to sell his, her or its Interest (the "Offeror") and has received a bona fide third party offer in writing (the "Offer") from an individual or entity not described as a Permitted Transferee in Section 9.4, the Offeror shall, within five (5) days of receiving

64 Spouses of lineal descendants as Permitted Transferee is optional and may be deleted in certain family instances.

65 This provision is optional. If the goal is to have any transferee of a Member Interest treated as an Unadmitted Assignee, rather than as a Substitute Member, for valuation and discount purposes, this provision should not be used. Furthermore, if this section is used, it may be appropriate, in certain family situations, to omit spouses of lineal descendants as Substitute Members.

66 Under Hackl, supra, where a Member transfers his, her or its Interest to a transferee who is treated under the agreement as a mere assignee rather than as a Substitute Member the gift tax annual exclusion could be jeopardized. Commentators have questioned the Tax Court's conclusion regarding the value of an assignee interest since an assignee's interest does possess economic value.

This Section grants each Member the right to sell his, her or its Interest, subject to the Company's First Option to purchase such Interest and the other Members' Second Option to purchase such Interest. This section could avoid a Hackl attack based on the reasoning that "transfers subject to the contingency of Manager approval cannot support a present interest characterization, and the possibility of making sales in violation thereof, to a transferee who would then have no right to become a Member or to participate in the business, can hardly be seen as a sufficient source of substantial economic benefit." Hackl, 118 T.C. at 297.

such Offer, give the Company the first option to purchase and redeem the Offeror's Interest on the same terms and conditions as the Offer (the "First Option")⁶⁷ by written notice (the "Offer Notice") to the Managers. The Company may elect, by written notice to the Offeror and to the other Members (the "First Exercise Notice") given within thirty (30) days after receiving the Offer Notice (the "First Response Date"), to purchase the Offeror's Interest. If, on or before the First Response Date, there is a First Exercise Notice, then the Offeror shall be required to sell the Interest to the Company under the same terms and conditions contained in the Offer.

(b) Members' Second Option. If no First Exercise Notice is received by the First Response Date or the Company has notified the Offeror that the First Option will not be exercised, the Offeror shall give the other Members the second option to purchase and redeem the Offeror's Interest on the same terms and conditions as the Offer (the "Second Option") by written notice (the "Second Offer Notice") to the other Members. Each of the other Members shall initially be entitled to purchase that fraction of the Offeror's Interest subject to the Offer equal to each such Member's Percentage Interest divided by the Percentage Interests of all Members other than that of the Offeror. The other Members may elect, by written notice to each Member and Manager (the "Second Exercise Notice") within thirty (30) days of the Second Offer Notice (the "Second Response Date"), to purchase the Offeror's Interest. If, on or before the Second Response Date, there is a Second Exercise Notice, then the Offeror shall be required to sell the Interest to the exercising Member(s) or their designee(s) (the "Purchasing Members"). Unless otherwise agreed between the Purchasing Members, each Purchasing Member shall be entitled to purchase that fraction of the Offeror's Interest subject to the Offer equal to the Purchasing Member's Percentage Interest divided by the Percentage Interests of all Purchasing Members.

(c) Conditions of Purchase by Company. At the closing, which shall take place at the principal place of business of the Company on a date and time mutually agreed upon by the Managers and the Offeror, the Offeror shall deliver to the Company (i) a duly executed and acknowledged instrument of assignment transferring the Interest of the Offeror to the Company and (ii) evidence of the absence of any liens, security interests and encumbrances as the Managers, shall reasonably request; and the Offeror shall pay all transfer or similar taxes due in connection with the conveyance of the Interest. The Company shall (i) pay the purchase price to the Offeror in accordance with the Offer, the cash portion thereof by wire transfer, or certified or bank cashier's check payable to the order of the Offeror, and (ii) deliver to the Offeror a duly executed

⁶⁷ Some agreements reduce the right of first refusal price of an interest to a formula price based on appraisal or other method. However, in light of recent case law, the conservative approach is that the right of first refusal price should be based on the purchase price offered by the third party. The issue is whether a lower price would provide the Internal Revenue Service with a Code § 2703 argument, as in the case of a buy-sell agreement. See S. Smith III v. U.S., 94 AFTR 2d 2004-5283 (D.C. Pa. 2004).

agreement indemnifying the Offeror against claims arising from or in connection with the Company except obligations of the Company which the Offeror may have incurred prior to the date of such closing. The Members shall execute all amendments to the Certificate and/or this Agreement as may be required to reflect the transfer of the offered Offeror's interest.

(d) Conditions of Purchase by Members. At the closing, which shall take place at the principal place of business of the Company on a date and time mutually agreed upon by the Purchasing Members and the Offeror, the Offeror shall deliver to each Purchasing Member (i) duly executed and acknowledged instruments of assignment transferring that portion of the Offeror's Interest being purchased to such Purchasing Member and (ii) evidence of the absence of any liens, security interests and encumbrances as the Purchasing Member, or the Purchasing Member's designee(s) shall reasonably request; and the Offeror shall pay all transfer or similar taxes due in connection with the conveyance of the Interest. Each Purchasing Member shall (i) pay the purchase price for that portion of the Offeror's Interest being purchased, in accordance with the Offer, the cash portion thereof by wire transfer, or certified or bank cashier's check payable to the order of the Offeror, and (ii) deliver to the Offeror a duly executed agreement indemnifying the Offeror against claims arising from or in connection with the Company except obligations of the Company which the Offeror may have incurred prior to the date of such closing. The Members shall execute all amendments to the Certificate and/or this Agreement as may be required to reflect the transfer of the Offeror's Interest.

(e) Sale to Third Party Purchaser. If no Second Exercise Notice is received by the Second Response Date, the Offeror shall have the right to sell the Offeror's Interest to a third party purchaser on the same terms and conditions contained in the Offer for a period of sixty (60) days following the expiration of the Second Response Date. In the event that a binding contract to sell such Interest is not entered into between the Offeror and a third party purchaser within such sixty (60) day period, any sale thereafter shall be subject to the provisions of this Section 9.5. In the event of a completed sale of the Offeror's Interest to the third party purchaser, such third party purchaser shall have the rights, duties and obligations of a Substitute Member pursuant to Section 9.2(b) subject to compliance with the requirements hereof.⁶⁸

9.6 Right of Redemption. Each Member who has acquired a Member Interest through gift shall have the right and power, during the thirty (30) day period commencing with such Member's acquisition of such Interest during such taxable year, to have the

⁶⁸ If annual exclusion gifts are anticipated, then a third-party purchaser should not be a mere Unadmitted Assignee according to Hackl, infra. However, if annual exclusion gifts are not anticipated or warranted, a third-party purchaser could be an Unadmitted Assignee.

Company purchase and redeem a portion of such Member's Member Percentage Interest having a fair market value equal to the annual Federal gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended (the "Code"), available to the transferor (or available to the transferor and the transferor's spouse if an election is made under Code Section 2513(a) to split gifts during such calendar year for Federal gift tax purposes) which value shall be determined without giving effect to this Section 9.6 Right of Redemption.⁶⁹ The Member shall exercise the right of redemption under this Section 9.6 by written notice to the Company within said thirty (30) day period.

9.7 Additional Transfer Restriction. Notwithstanding any other provision contained herein, without the consent of the Members, a Member or an Unadmitted Assignee may not transfer his, her or its Interest in the Company if such transfer, when aggregated with any prior transfers of Interests in the Company results in a sale or exchange within a 12 month period of 50% or more of the Interests of the Company within the meaning of Code Section 708(b).

9.8 Involuntary Transfer of Interest. In the event the Interest of a Member or Unadmitted Assignee is taken or encumbered by levy, foreclosure, charging order, execution, assignment for the benefit of creditors or other similar involuntary proceeding (an "Involuntary Transfer") or in the event a Member or Unadmitted Assignee voluntarily files or is involuntarily subject to a bankruptcy proceeding (the "debtor Member"), the statutory or other involuntary assignee (the "Involuntary Assignee") of such Interest or the debtor Member, as the case may be, shall have the rights, duties and obligations of an Unadmitted Assignee in accordance with Section 9.2(c) hereof, unless such Involuntary Transferee or debtor Member is admitted to the Company as a Substitute Member in accordance with the provisions of this Agreement. If the Involuntary Transferee has a right to dispose of the Interest in which it has a security interest or a Bankruptcy Court or its representative has a right to do so (the "Seizing Creditor"), the Seizing Creditor may complete a public or private sale to itself or third party only after the Seizing Creditor has offered such Interest by private sale to the Company and other Members pursuant to the procedures in Section 9.5. In connection therewith such Seizing Creditor shall obtain a bona fide written offer from a third-party purchaser or make an offer itself. If the Company or other Members elect to purchase the Interest of the Seizing Creditor, debtor Member or Unadmitted Assignee pursuant to this Section 9.8 and the procedures set forth in Section 9.5, or if they do not elect to do so and the Seizing Creditor completes the purchase, the proceeds from such sale shall be first remitted to any creditors of the debtor

69 This optional section is designed to ensure that a donor of an Interest will be eligible for the gift tax annual exclusion with respect to such acquired Interest by giving each donee Member a present interest by virtue of a "put right" of the donee's acquired Interest back to the Company. This section should avoid a Hackl "lack of substantial economic benefit" argument. Limiting the redemption right to the value of the Interest without giving effect to the redemption right itself, should allow the taxpayer to arguably retain the benefit of any valuation discounts.

Member or Unadmitted Assignee which have a security interest in the Interest superior to the Seizing Creditor to satisfy all of the debtor Member's or Unadmitted Assignee's indebtedness to such superior creditors, if any, then to the Seizing Creditor to satisfy all indebtedness of the debtor Member or Unadmitted Assignee to the Seizing Creditor, with the balance, if any, to be remitted to other creditors of the debtor Member or Unadmitted Assignee which have a security interest in the Interest inferior to the Seizing Creditor to satisfy all indebtedness of the debtor Member or Unadmitted Assignee to such inferior creditors, if any, with the balance, if any, to be remitted to the debtor Member or Unadmitted Assignee or as specified by a Bankruptcy Court.

9.9 Death, Incompetency or Termination of a Member. On the death or incompetency of a Member (who is a natural person), any personal representative, guardian, trustee or other successor in interest of such deceased or incompetent Member shall have the rights, duties and obligations of [a Substitute Member as defined in Section 9.2(b) hereof] [an Unadmitted Assignee as defined in Section 9.2(c) hereof, unless such person is admitted to the Company as a Substitute Member in accordance with the provisions of this Agreement.] If the Member is an Entity and is dissolved or terminated, the Member's legal representatives or successors in interest shall have the same rights duties and obligations as [a Substitute Member as provided in Section 9.2(b) hereof] [an Unadmitted Assignee as provided in Section 9.2(c), unless such person is admitted to the Company as a Substitute Member in accordance with the provisions of this Agreement.]⁷⁰

ARTICLE X - Books and Records; Bank Accounts; Tax Matters Partner

10.1 Books and Records. The Managers shall keep or cause to be kept complete and accurate books and records of the Company, using the same methods of accounting which are used in preparing the required tax returns of the Company to the extent applicable and otherwise in accordance with generally accepted accounting principles consistently applied.⁷¹ Such books and records shall be maintained and be available, in addition to any documents and information required to be kept under the Act, at its principal office, for examination and copying by any Member, or his or her duly authorized representative, at his or her reasonable request and at his or her expense during ordinary business hours. A current list of the full name and last known address of

70 See 6 Del. C. § 18-705.

71 It will save the Company some money to keep its books and records using the same methods of accounting which are used in preparing the federal income tax returns of the Company, as is provided here. If a lender or regulatory body or other person requires the books and records to be kept according to generally accepted accounting principles ("GAAP"), or if the LLC is expected to be disregarded for income tax purposes and therefore not to file entry-level tax returns, then the previous sentence should be revised accordingly.

each Member, a copy of this Agreement, any amendments thereto and the Certificate, executed copies of all powers of attorney, if any, pursuant to which this Agreement or the Certificate or any amendment has been executed, copies of the Company's financial statements and required tax returns and reports, if any, for the three most recent years, shall also be maintained at such office.⁷²

10.2 Bank Accounts. Bank accounts and/or other accounts of the Company shall be maintained in such banking and/or other financial institution(s) as shall be selected by the Managers, and withdrawals shall be made and other activity conducted on such signature or signatures as shall be designated by the Managers.

10.3 Filing Returns and Other Writings; Tax Matters Partner. (a) The Managers shall cause the preparation and timely filing of all required Company tax returns and shall, on behalf of the Company, timely file all other writings required by any governmental authority having jurisdiction to require such filing. On or before the date which is 15 days before the due date (including extensions) of any required federal income tax return of the Company for each year, each Member shall be furnished with a copy of his or her Form K-1 with respect to the Company's federal income tax return for the year.

(b) The "Tax Matters Partner," as defined in Section 6231(a)(7) of the Code, shall be [].⁷³

(c) Promptly following the written request of the Tax Matters Partner, the Company shall, to the fullest extent permitted by law, reimburse and indemnify the Tax Matters Partner for all reasonable expenses, including reasonable legal and accounting fees, claims, liabilities, losses and damages incurred by the Tax Matters Partner in connection with any administrative or judicial proceeding with respect to the federal income taxation of the Company and/or the Members.

(d) The provisions of this Section 10.3 shall survive the termination of the Company or the termination of any Member's Interest and shall remain binding on the Members for as long a period of time as is necessary to resolve with the Internal Revenue

72 6 Del. C. §18-305 governs record keeping and access to and confidentiality of information. If this Section of the Agreement is to be revised, or if the Company is organized in a state other than Delaware, the applicable rules should be reviewed.

73 The rules about who can be the Tax Matters Partner ("TMP") for a limited liability company are in Regulations 301.6231(a)(7)-1 and 301.6231(a)(7)-2 under the Internal Revenue Code. In general, the TMP must be a person who owns a profits interest in the Company as a Member and is a Manager. If the TMP is not properly designated by the parties, the IRS will pick one.

Service any and all matters regarding the federal income taxation of the Company and/or the Members.

ARTICLE XI - Dissolution and Winding Up

11.1 Dissolution Events. The Company shall be dissolved and its affairs shall be wound up upon the first to occur of the following (each a "Dissolution Event"):

- (a) The unanimous consent of the Managers and the Members⁷⁴;
- (b) The entry of a decree of judicial dissolution; or
- (c) At any time there are no Members, unless the Company is continued as permitted under the Act.⁷⁵

11.2 Deemed Distribution and Reconstitution. Notwithstanding any other provisions of this Article, in the event the Company is liquidated within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g), but no Dissolution Event has occurred, the assets of the Company shall not be sold or distributed, the Company's debts and other liabilities shall not be paid or otherwise provided for and the Company's affairs shall not be wound up. Instead, solely for federal income tax purposes, the Company shall be deemed to have distributed its assets in-kind to the Members, who shall be deemed to have taken subject to all debts of the Company and other liabilities all in accordance with

74 If the donor is a continuing Member, consider excluding the donor from the decision to dissolve. This can be accomplished either by naming the donor or by using a second class of Member interest that is not qualified to participate in the decision. The former approach can be accomplished by the following language to be inserted at the very end of 11.1(a): “. . .other than [NAME], who shall not be entitled to participate in any decision regarding dissolution.”

The used of two classes of Member interest, one of which is not permitted to participate in this decision or the decision to elect managers under 4.2 (which is necessary to give meaning to the exclusion here) is the second possibility.

A different approach would be to strike the words “and the Members” from 11.1(a), so that the managers would be the only ones able to participate in dissolution (presumably this would need to be combined with some of the changes to the selection of managers identified above in Section 4.2, in the case where the donor is a Member). This last approach might strike some as surgery that is too radical.

75 6 Del. C. §18-801 governs dissolution. Under the default provisions of the Act, an LLC has perpetual existence. If there are no Members, a Dissolution Event occurs unless the personal representative of the last remaining Member or his or her designee agrees to continue the LLC and become a Member, which the limited liability company agreement can require that he or she do, or another Member is admitted in accordance with the Agreement.

their respective Capital Accounts. Immediately thereafter, the Members shall be deemed to have recontributed the assets in-kind to the Company, which shall be deemed to have taken subject to all such liabilities.⁷⁶

11.3 Winding Up.

(a) Upon the occurrence of a Dissolution Event, the Managers⁷⁷ shall wind up the Company's affairs.

(b) The Managers shall sell such assets as the Managers deem proper to pay or provide for the Company's debts or liabilities and to generate cash for distribution to the Members.⁷⁸

(c) Any cash or other assets, based on their fair market values, remaining, after paying or providing for payment of the debts and liabilities of the Company, in any order of priority required by the Act, shall be distributed to the Members as provided in Section 11.4, provided that no Member shall be required to accept more than such Member's pro rata share of any asset.⁷⁹

11.4 Tax Law Requirements; Deficit Capital Accounts. In the event the Company is "liquidated" within the meaning of Treasury Regulations Section 704-1(b)(2)(ii)(g) following a Dissolution Event, distributions shall be made to the Members who have positive Capital Accounts (after giving effect to all contributions, distributions and allocations for all tax years, including the tax year during which such liquidation occurs) in compliance with Regulations Section 1.704-1(b)(2)(ii)(b)(2). If any Member has a deficit balance in his Capital Account after giving effect to all such contributions, distributions and allocations, such Member shall have no obligation to make any contributions to the capital of the Company with respect to such deficit, and such deficit

76 If there is a technical termination of the LLC under Code §708(b)(1)(B) because of a sale or exchange of 50% or more of the Member interests in a trailing 12 month period, this provision assures that there is no actual dissolution and winding up. Although such a provision is frequently included in Agreements, some question whether it is needed because no "Dissolution Event" has occurred as a result of a technical termination.

77 6 Del. C. §18-803(a) provides that upon application, the court, upon cause shown, may wind up the LLC and may appoint a liquidating trustee.

78 6 Del. C. §18-804 governs the order of distribution of assets and provides for appropriate reserves for contingencies.

79 6 Del. C. §18-804 specifies the order of distribution of assets to creditors, others and Members and requires that provision be made for unliquidated claims. Some Agreements restate these in the Agreement itself or modify them to the extent permitted by the Act.

shall not be considered a debt owned to the Company or to an other person or entity for any purpose whatsoever.⁸⁰

11.5 State Law Compliance.

(a) The Managers may utilize any provisions of the Act designed to limit liability of the Members after distribution of the Company's assets.⁸¹

(b) The Managers shall take all steps which are required by the Act to complete the dissolution of the Company of record.⁸²

ARTICLE XII – Miscellaneous

12.1 Binding Effect, Not for Benefit of Creditors. Subject to the restrictions on transfers set forth herein, the terms of this Agreement shall be binding upon and shall inure to the benefit of the Members, their respective successors, successors-in-title, heirs, legal representatives and assigns; and each and every successor-in-interest to any Member, whether such successor acquires his, her or its interest by way of inheritance, gift, purchase, foreclosure or any other method, and each Member shall hold his, her or its interest subject to all of the terms and provisions of this Agreement. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company or of any Member (including any Member acting in his or her capacity as a creditor of the Company).

12.2. Amendment. No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and duly adopted by all Members. Any amendment made pursuant to this Section 12.2 may be made effective as of the date of this Agreement⁸³.

80 In an LLC, no Member is obligated for his deficit capital account, and all deductions in excess of Members' capital are nonrecourse deductions which can be allocated to Members. See Section 5.4 above. It is contemplated this is a prorata LLC. Accordingly, if any Member's Capital Account is negative, the Capital Accounts of all Members should be negative. However, this language is necessary because the situation could change. For example, some but not all Members with negative Capital Accounts could make capital contributions resulting in some positive and some negative Capital Accounts.

81 6 Del. C. §18-803(b) provides that if an LLC is dissolved and wound up in accordance with the Act, the limited liability of Members and Manager is not adversely affected.

82 6 Del. C. §18-203 provides for the filing of a certificate of cancellation once the LLC has been wound up.

83 If a donor is also a Member, and if the optional changes to the power to elect Managers and the power to dissolve described above (Sections 4.2 and 11.1) are adopted, in order to safeguard those changes it may be appropriate to preclude the donor/Member from participating in any amendment that could

12.3. Additional Documents and Acts. Each Member agrees to execute and deliver such additional documents and instruments and to perform such additional acts as may be necessary or appropriate to effectuate, carry out and perform all of the terms, provisions, and conditions of this Agreement and the transactions contemplated hereby.

12.4. Severability of Provisions. Each provision of this Agreement shall be considered severable and, if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement which are valid, enforceable and legal.

12.5. Waiver of Partition. Each Member agrees that irreparable damage would be done to the Company if any Member brought an action in court to dissolve the Company. Accordingly, except as may be otherwise expressly authorized in this Agreement, each Member agrees that he, she or it shall not, either directly or indirectly, take any action to require partition or appraisal of the Company or of any of the assets or properties of the Company, and notwithstanding any provisions of this Agreement to the contrary, each Member (and his, her or its successors and assigns) accepts the provisions of this Agreement as his, her or its sole entitlement on termination, dissolution or liquidation of the Company and hereby irrevocably waives any and all right to maintain any action for partition or to compel any sale or other liquidation with respect to his, her or its Interest, in or with respect to, any assets or properties of the Company; and each Member agrees that he, she or it will not petition a court for the dissolution, termination or liquidation of the Company.

12.6. Personal Jurisdiction. Subject to the provisions of Section 12.8, the Company, the Managers and the Members hereby irrevocably consent to the jurisdiction of the [appropriate court] for purposes of any litigation among or between the Company, any Manager and/or any Member concerning the Company or this Agreement. In any such proceeding, the Company and each Member shall be deemed to have waived his, her or its right to a trial by jury. The parties hereto hereby individually agree that they shall not assert any claim that they are not subject to the jurisdiction of such court, that the venue is improper, that the forum is inconvenient or any similar objection, claim or arguments. Service of process on any of the parties hereto with regard to any such action may be made by mailing the process to such person by regular or certified mail to the address of such person set forth herein or to any subsequent address to which notices shall be sent.

undo those exclusions. Thus, consider adding the following proviso at the end of the first sentence of Section 12.2: “;provided, however, that [NAME] may not participate in any decision to change, modify or amend Section 4.2 or Section 11.1(a).” Alternatively, if there is a separate class of Member created designed to accomplish the same exclusion, then there would actually be three votes in which that Member (i.e., the donor) could not participate: the selection of managers; dissolution; and any amendment of either of the first two provisions.

12.7. Title to Assets. Title to the assets and to any other property, real or personal, owned by or leased to the Company shall be held in the name of the Company unless, in the opinion of counsel to the Company or if the Managers so determine, it is advisable to hold record title in a nominee or in a limited liability company or other entity wholly owned, directly or indirectly, by the Company.

12.8. Resolution of Controversies.

(a) Intent. It is the intention of the parties to bring all disputes between or among any of them to an early, efficient and final resolution. Therefore, it is hereby agreed that all disputes, claims and/or otherwise, including without limitation management, contract, quasi contract, equitable claims, tort claims, statutory claims or any other kind of controversy, claim or dispute shall be resolved by mediation and arbitration as provided herein. Nothing herein shall preclude any party from applying to a court of competent jurisdiction for preliminary injunctive relief or a temporary restraining order or other preliminary relief as may be required.⁸⁴

(b) Mediation. All disputes arising among the Members with respect to Company matters shall be resolved by mediation in the following manner. Mediation shall be initiated by any Member by written request to Members for selection of a mediator which request (the “Mediation Request”) shall identify the matters to be mediated. Such mediation shall occur in the city in the metropolitan area of which a Majority-In-Interest of the Members reside. If a Majority-In-Interest of the Members do not reside in the metropolitan area of the same city, or a Majority-In-Interest of the Members cannot agree on a location for the mediation, the mediation shall take place in the City of []. The mediator shall be an individual selected by the Members. Costs and expenses of mediator shall be borne by the party that initiates the mediation.

(c) Arbitration. In the event that the Members cannot agree to mediation within sixty (60) days of the date of the Mediation Request, or in the event that the Members are unable to reach agreement through mediation, then such dispute arising among the Members shall be resolved by arbitration in the following manner. Such arbitration shall occur in accordance with the rules of the American Arbitration Association then in effect, in the city in the metropolitan area of which a Majority in Interest of the Members reside. If a Majority in Interest of the Members do not reside in the metropolitan area of the same city, or a Majority in Interest of the Members cannot agree on a location for the arbitration, the

84 This section 12.8 reflects a decision that a useful way to resolve controversies among Members would be first to structure mediation, and if mediation does not resolve the dispute, to require arbitration. Alternatives would include (i) providing only for mediation, (ii) providing only for arbitration, or (iii) making no provision for resolution of disputes, leaving Members to resolve their differences by other means, including litigation.

arbitration shall take place in the City of []. The arbitration panel shall consist of one (1) individual selected by a Majority in Interest of the Members. The determination of the arbitrator shall be binding upon all parties in accordance with the procedures of the American Arbitration Association. The prevailing party shall be entitled to attorney's fees and costs including the expense of arbitration.⁸⁵

12.9. Applicable Law. This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted and enforced in accordance with the laws of the State of Delaware, notwithstanding any choice of law rules to the contrary.

12.10. Entire Agreement. This Agreement, including the Certificate, which is hereby incorporated herein, embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to such subject matter.

12.11. Non-Waiver. The failure of any Member to insist upon strict performance of a covenant hereunder or of any obligation hereunder, irrespective of the length of time for which such failure continues, shall not be a waiver of such Member's right to demand strict compliance in the future. No consent or waiver, expressed or implied, to or of any breach or default in the performance of any obligation hereunder, shall constitute a consent or waiver to or of any other breach or default in the performance of the same or any other obligation hereunder.

12.12. Notices. Any and all notices provided under this Agreement shall be treated as having been received (i) on the fourth business day after being sent by registered or certified mail, return receipt requested, postage prepaid, or (ii) on the first business day after being sent by commercial expedited delivery service providing a receipt for delivery or by telecopy or e-mail by a machine providing automatic, printed confirmation of successful transmission (if the telecopy number or e-mail address, as the case may be, of the person to whom the notice is addressed is set forth as part of such person's address for purposes of this Agreement) or by United States Postal Service express mail. All such notices in order to be effective shall be addressed, if to a Manager or the Company at the principal office of the Company, if to a Member at the last address of record on the Company's books, and copies of such notices shall also be sent to the last address for the recipient which is known to the sender, if different from the address so specified.

12.13. Titles, etc. Article and paragraph titles are for descriptive purposes only and shall not control or alter the meaning of the Agreement as set forth in the text. As used

⁸⁵ An alternative would be to provide that each party shall bear his, her or its own fees and costs, as has been provided above with respect to mediation.

herein, the singular shall include the plural and the masculine gender shall include the feminine and neuter, and vice versa, unless the context otherwise requires.

12.14. Counterparts. This Agreement may be executed in any number of counterparts, all of which together shall for all purposes constitute one Agreement, binding on all parties notwithstanding that all parties have not signed the same counterpart.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date shown above.

_____:

By:

_____:

By:

_____:

By:

SCHEDULE A

<u>Member's Name</u>	COLUMN 1 <u>Agreed Value of Initial Capital Contribution</u>	COLUMN 2 <u>Percentage Interest</u>	<u>Address</u>
<Name 1>	N/A	N/A	<StreetAddress>, <CityStateZip>
<u>Member</u> <Name 1>		100%	<StreetAddress>, <CityStateZip>