

# **ISSUES IN BUY-SELL, PUSH-PULL, RUSSIAN ROULETTE, OR TEXAS SHOOTOUT PROVISIONS**

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**ESSENTIALS OF BUSINESS LAW**  
May 10-11, 2012  
Dallas

## **CHAPTER 13**



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# ISSUES IN BUY-SELL, PUSH-PULL, RUSSIAN ROULETTE, OR TEXAS SHOOTOUT PROVISIONS

## INTRODUCTION

Part of the discussions or negotiations between owners of an entity at the inception of their relationship concern how the owners might resolve their future disagreements or terminate their relationship. One of those resolution or termination methods – though usually considered one of the most extreme methods – is the forced buy-sell provision.

The provision, which is known by many names, allows one owner or group of owners (the “initiating owner”) to force the other owner or group of owners (the “non-initiating owner”) to either (1) buy all of the initiating owner’s ownership interest in the entity or (2) sell all of the non-initiating owner’s ownership interest in the entity to the initiating owner. Not infrequently, the provision also contemplates that the initiating owner will name a price at which it will either sell or buy, and the non-initiating owner will decide whether to buy or sell at that price. As indicated below, however, that pricing mechanism is not an essential element of a forced buy-sell provision.

The buy-sell provision may be in a separate agreement, but it is typically part of a more comprehensive agreement governing the owners’ relationship, such as a shareholders’ agreement, a partnership agreement, or an LLC agreement. It most often is considered as much a deadlock-resolution provision as an exit provision and arises in the context of two owners or two groups or sets of owners.

An example of a forced buy-sell provision is Exhibit A to this paper.

This paper describes various issues to be considered regarding forced buy-sell provisions. In general, this paper assumes only two owners.

## NAMES FOR PROVISION

It is interesting to note some of the many names given to the forced buy-sell provision. Many of them are colorful, reflecting the mandatory nature of the provision (once initiated), the uncertainty of whether a party is buying or selling, and the “final separation” of the parties to be effected by the provision. They include:

- Push-pull
- Russian roulette
- Texas shootout
- Shotgun
- Cut-throat
- Texas draw
- Chinese option

- Pie-slice
- Candy-bar.

With the multiplicity of names, a threshold concern is to ensure that the clients or others using any such name intend to refer to a forced buy-sell provision, and not something else or some special variant of it.

## GENERAL BENEFITS AND DETRIMENTS

The forced buy-sell provision is attractive because, at least in theory, it would permit one of the owners to continue to own the entity upon the owners’ separation through a procedure which:

- Does not depend on, or involve the cost of, third parties;
- Results in a price to buyer and seller that is fair; and
- Is relatively simple and quick.

To the extent that this is true, however, the ease of the procedure might also be a detriment. The owners may not desire, or may not be better off with, a relationship that is too quickly or too easily broken or terminated.

The reality of the forced buy-sell provision, however, is that:

- Because of the various issues that the owners and their counsel should consider, the provision will not be so easy to negotiate and draft if the owners intend for the provision to operate as written;
- The procedure may well take a fairly long time to work; and
- It will rarely operate as contemplated or promised, because the circumstances in which it is invoked (often when the owners cannot resolve their differences) will be different than the owners anticipate and may well include litigation or arbitration.

In the experience of the authors (and other experienced lawyers whom the authors have consulted), it is rare for forced buy-sell provisions to operate as written. Indeed, to the extent the provision is relied upon, litigation often results. The one or two circumstances in which the provision operated without litigation were those in which the owners desired to effect the transaction despite the inapplicability or the uncertainties of the provision or the procedure. One or both of the parties ignored, or the parties resolved by agreement, issues that could have led to litigation or arbitration.

In some cases, it appears that the owners really do not intend for the provision to operate as written. The provision’s principal purpose seems to provide

possible leverage for one or both owners to encourage a different consensual arrangement or transaction as necessary.

## PARTIES

The forced buy-sell provision appears to be most suitable in the situation involving two owners that will have relatively equal or similar:

- Cash resources;
- Ownership interests in the entity;
- Information about the entity's business; and
- Involvement in and resources committed to the entity and its business.

Disparities between the owners regarding any of these factors, and certain others, may affect whether an owner desires a forced buy-sell provision or perceives such a provision more as a risk than a benefit.

An owner with greater cash resources is more likely, of course, to be able to take advantage of a forced buy-sell provision. The concern for an owner with limited resources is that the other owner could use the forced buy-sell provision to buy it out for an unfair, or a lower-than-desired, amount. As addressed below, the provision could be drafted to address this issue to an extent.

The greater an owner's relative ownership interest, the less it would cost that owner to purchase the minority owner's interest and, conversely, the more it would cost for the minority owner to purchase the majority owner's interest. Again, to some extent, this disparity could be addressed in the provision.

If there is a disparity in information about the entity's business, the owner with the greater information will be in a better position to determine or evaluate any purchase price for an ownership interest in the entity. The procedure set forth in the forced buy-sell provision probably will not be able to adequately address such a disparity.

One owner may be more involved in operating, managing, or developing the entity's business than the other. One owner – not necessarily the same one – may be providing property, personnel, intellectual property, or other resources to the entity or may be providing continuing financial support to the entity (such as a guaranty or other relationship with creditors of the entity). The more involved an owner is, the less likely it is to be a seller or able to be a seller.

## TIMING OF BUY-SELL RIGHT

A forced buy-sell right may be exercisable immediately, only after a period of time, or upon the occurrence of an event. Often, some time must elapse before it can be exercised. That time period may be set because the owners believe that their commitment to

common ownership of the entity should last for a minimum time, especially if the entity's business plan contemplates some particular development of a product or service, or because a financing source or a critical vendor or supplier to the entity's business will insist.

The right may instead be exercisable only upon certain events, including:

- A deadlock between the owners;
- A default in performance by an owner;
- The failure to achieve a particular milestone (even if there is no default); or
- A change in control of an owner.

A forced buy-sell may be viewed as a remedy if the owners disagree, or continue to disagree, about any of certain major decisions regarding the entity or its business. Those major decisions, which would be stated in one of the entity's governing documents, are ones that the owners have agreed are fundamental to the business or purposes of the entity. They might include a proposal or decision to:

- Raise new equity capital (at all or over a threshold amount);
- Incur new debt for borrowed money (at all or over a threshold amount);
- Set an annual budget, or materially modify a budget;
- Materially change the operation of the entity's business;
- Enter into or modify a material agreement (which may include any agreement with an owner or an owner's affiliate);
- Make a material capital expenditure (that is not within the budget if the owners approve a budget);
- Materially amend the entity's governing documents; or
- Make a material acquisition or disposition of assets.

These sorts of business disagreements between the owners should be distinguished from legal disputes, like the authority of an owner under an entity's governing documents to take certain action. Legal disputes can and should be addressed by mediation, arbitration, or litigation rather than by a forced buy-sell.

In addition to agreeing to and specifying the major decisions that may lead to a deadlock, the owners should consider how to determine whether a "deadlock" exists. Must the disagreement continue for some period? What actions (e.g., good-faith negotiation by high-level representatives or a joint meeting with a business mediator) must be taken by

each owner to resolve the disagreement before a deadlock is deemed to exist? How can it be determined that the required preliminary actions have been taken?

The right to initiate the buy-sell provision may be an owner's remedy for one or more particular events of default by the other owner. In this circumstance, only the non-defaulting owner would have the right, and (as described below) the terms of the purchase or sale may differ from those in a non-default situation. In effect, the provision is basically a put right or call right of the non-defaulting owner.

The owners might agree that the failure to achieve one or more specified milestones related to the entity's business, such as the development of a certain product or service or the achievement of certain financial results, is enough to trigger an owner's right to exercise the forced buy-sell provision.

If the owners agree that the continuation of ownership of one or both of the owners, or the continuation of the control by or the management or personnel of one or both of the owners, is critical to the entity or its business, a change in control of one owner might give the other owner the right to initiate the forced buy-sell provision. Similar to the provision in a default situation, only the owner as to which no change in control has occurred would have the forced buy-sell right. This would require the owners to agree on a definition of "change in control" applicable to one, or both, of the owners.

The owners might also agree that, under certain circumstances, the forced buy-sell provision will not be applicable. For example, an owner may not be permitted to exercise the right to initiate the buy-sell procedure when a third-party sale is pending or when the process of winding-up the business and affairs of the entity has begun.

## PRICE OR VALUE

The forced buy-sell provision must include, or provide a mechanism for determining, the price or value at which the purchase-and-sale is to be effected. The "standard" provision simply provides that one owner will establish the price for an ownership interest (e.g., a share or a 1% membership or partnership interest), however that owner may determine it, and then the price will be adjusted proportionately to reflect the difference in economic ownership interests if they are not equal (i.e., 50/50). That method of establishing price will be appropriate or fair, however, only if the economic ownership interests are simply or strictly proportionate, without any preference, carried interest, promote, or the like.

Alternatively, the provision might contemplate that the initiating owner would specify in its offer a value of the entity's assets, with the price to be paid to the selling owner then calculated in accordance with

the entity's governing documents as though the selling owner were distributed the net proceeds after a sale of the entity's assets for that value. This would be also an appropriate mechanism if the distributions to owners are to be made proportionately, or even disproportionately in light of a preference or promote. In the situation where the distributions are to be made disproportionately (i.e., in accordance with a "waterfall"), however, care should be given to the fact that there may not be a direct relationship between asset value and distributable amounts.

If the provision contemplates that net (asset) value of the entity is to be determined and specified in the offer, the various questions that arise include:

- Is the determination by the initiating owner to be entirely arbitrary, or must it use some independent source (e.g., a third-party appraiser)?
- Must the background information used by the initiating owner for, and its calculations of, value be provided to the non-initiating owner?
- Must the value be a specified minimum amount?
- What assumptions will be made regarding expenses of the sale or liquidation of the entity, and how will those expenses be borne?
- How will any contingent liabilities of the entity be valued or treated?
- To the extent any material assumptions are made regarding the expenses or the liabilities, will there be any adjustment or true-up to reflect actual amounts?

Instead of an approach in which the initiating owner determines and names the price or value, the provision could specify a different method to determine the price or value. One method is to set a formula for determining price or value – e.g., a multiple of EBITDA, discounted projected cash flow, or book value. The advantages of such an approach are that the price or value can be readily calculated and will be known to the owners even before the forced buy-sell procedure is initiated and that an owner with limited resources need not be concerned that the other owner will arbitrarily set an unfair price and force a sale for that price. The disadvantages of such an approach are that the application of the formula (though not arbitrary) may not be appropriate or fair at the time of the procedure; that, no matter how carefully drafted, the formula may include some significant uncertainties, resulting in disagreement or dispute between the owners; and that this approach may be, depending on the application of the formula, a kind of

invitation to one owner or the other to take advantage of the formula.

Another alternative method is for the provision to require the price or value to be set by independent appraisal. There is a variety of approaches to the appraisal method, particularly if more than one appraiser is used (which would be expected). The advantage of such an approach would be comfort with the price or value so determined in comparison with the market; this would address the concern of an owner with limited resources that the other owner might force a sale for an unfair price. The disadvantages of such an approach are that the price or value is not determined until after the buy-sell procedure has been initiated; that the initiating owner might really not be interested in purchasing or selling for the appraised or market value; and that using appraisers would increase the time and the cost of the procedure.

A third alternative method is for the provision to establish the possibility of an auction. The initiating owner begins an appraisal process set forth in the provision; and once the owners are notified of the appraised value, each owner submits to an independent third party whether it wishes to purchase or sell for that price. If one owner wishes to purchase and the other wishes to sell, that transaction will occur. If both owners wish to purchase, then a bidding process will occur. This process might involve just one round of bidding, or could provide for one or more additional rounds of bidding until the highest bid is received. The owner submitting the higher (or highest) bid would be the purchasing owner. If neither owner wishes to purchase, the forced buy-sell procedure will cease (and if it was triggered by a deadlock, the owners will have to address it otherwise). The advantages of such an approach are that it should lead to a fair price and that it would afford the owners more opportunity to deliberate about the purchase-and-sale. The disadvantages of such an approach are that it is only suitable where both owners have sufficient cash resources and information about the entity to engage in bidding; that the purchasing owner might pay a higher price than otherwise; and that the procedure would take longer and may not result in a purchase-and-sale.

It is not unusual for the forced buy-sell procedure to take at least two months after the initiating owner submits its offer. Therefore, regardless of how the price, or the value for establishing the price, is determined, the owners might well consider whether it should be subject to adjustment to reflect changes in the entity or in events or circumstances that occur before closing after the forced buy-sell procedure is initiated. Those changes, events, or circumstances might include:

- Additional contributions to capital of the entity by one or both owners
- Distributions from the entity to the owners
- Payments of interest or principal on indebtedness by the entity
- Payments of significant, and perhaps unusual, expenses by the entity
- Unanticipated or uncontrollable significant changes in value of the entity or its assets.

The forced buy-sell provision could include an increase for any interim capital contributions, because the entity's capital has been increased. This may not be appropriate in certain circumstances, however. If the contribution is one otherwise previously required by an owner or is to pay operating deficits, it may not really increase the value of the entity or its assets. This issue could instead be addressed by including in the provision a prohibition against contributions after the forced buy-sell right is triggered. But such a prohibition may not be fair to the purchasing owner if it determines that the entity requires capital to continue to operate or to protect the entity's assets.

The forced buy-sell provision could include a decrease for any interim distributions from the entity, because the entity's assets have been decreased, resulting in a decrease in the entity's value. This may not be appropriate, however, if the distributions are operating cash-flow distributions or even distributions from a refinancing where there is no change in asset value. This issue could instead be addressed by including in the provision a prohibition against distributions after the forced buy-sell right is triggered. But such a prohibition may not be desirable for either owner and may not particularly be fair to the selling owner unless the selling owner gets credit in the purchase price it receives for the interim distributions it did not receive.

If the forced buy-sell provision is used in the event of a default by an owner, it may include a variation between (1) the price at which the non-defaulting owner would purchase and (2) the price at which the non-defaulting owner would sell. If the non-defaulting owner is purchasing, the purchase price might be a specified discount to the price that would be applicable if the non-defaulting owner were selling. If the non-defaulting owner is selling, the sale price might be determined or at least supported by a third-party appraisal as to fair market value. A typical concern about a discount price, and particularly a discount to fair market value, is that it might be characterized as a penalty, rather than appropriate damages for breach, and would therefore be unenforceable. In light of that concern, if the non-defaulting owner is purchasing, the price might not be discounted significantly or at all, but the non-

defaulting owner may have the right to pay the purchase price in installments over a specified time.

### MECHANICS OF PROCEDURE

The purchase price is typically payable entirely in cash in a lump sum at closing. It is possible for the provision to permit payment in installments; and an owner with limited, or more limited, resources may suggest such an approach. Such an approach is unusual because it is generally inconsistent with the purpose of the procedure, which is to effect a separation of the owners. As described above, however, it may be more typical for payment to be made in installments if the forced buy-sell provision applies as a remedy for an owner's default.

Many forced buy-sell provisions do not require the initiating owner to submit with its offer any letter of credit or other form of payment assurance. Such a requirement would be a reasonable way to address a concern about the financial capacity of an (initiating) owner to complete the procedure. But the difficulty with the requirement is that a letter of credit or other similar form of payment assurance can be expensive. If the requirement were to apply to the offer from the initiating owner, it should apply equally to the non-initiating owner if, in response to the offer, it elects to purchase. The owners might instead rely on the elements of the forced buy-sell provision regarding default in failing to complete the purchase, as described below.

Depending on the type of entity or the owners' arrangements, an owner may have some responsibility for liabilities to third parties incurred by the entity while the forced buy-sell procedure is pending. In that circumstance, because the selling owner will prefer not to be responsible for such liabilities, the provision might require the purchasing owner (once that is determined) to use best efforts, or some variant of that, to obtain for the selling partner a release from such interim liabilities.

The stated time period for the non-initiating owner's response (i.e., its election to sell or purchase) may be relatively short, such as 30 days after receipt of the initiating owner's offer. The provision may, however, provide for a longer period to permit an owner with limited cash resources to arrange for financing. The concerns with a longer response period are that it lengthens the buy-sell procedure and, therefore, the time to resolve a deadlock or other circumstance that makes common ownership not preferable; that it increases the risk of a material change in the entity or its assets or business that could render the proposed price or value unsatisfactory to one or both owners; and that it may increase the cost of a letter of credit or other form of payment assurance until closing, if required.

The forced buy-sell provisions should include a limitation or restriction on the terms of the offer to those permitted in the provision; an owner should not be free to vary the terms of the offer from those stated in the provision (e.g., to propose payment in installments instead of in a lump sum). Of course, the owners may negotiate a transaction different from the provision if they so agree.

### MANAGEMENT DURING PROCEDURE

The owners may wish to address in the provision what will happen to the management of the entity, at least once it has been determined which owner will purchase and which will sell. Should the management continue to be as provided before the forced buy-sell procedure was initiated, or should management rights (and obligations), or some greater control, shift to the purchasing owner? Management rights and the capacity to act for the entity may be particularly important in connection with arrangements to be made for the closing, such as a refinancing, and the selling owner may not want to participate in those matters. A shift in management control to the purchasing owner would strengthen the selling owner's argument that it should be released from third-party liabilities while the procedure is pending.

### ANCILLARY ARRANGEMENTS

In connection with the forced buy-sell provision, the owners might need to, or might be well-advised to, address certain arrangements ancillary to their relationship as owners. Those arrangements may include:

- Loans to the entity from one or both of the owners, or vice versa
- Guaranties or credit enhancements in favor of the entity from one or both of the owners
- Service agreements, like management agreements, between one or both of the owners and the entity
- License or lease agreements between one or both of the owners and the entity.

The owners should address in the forced buy-sell provision whether any of these ancillary arrangements are to be terminated or otherwise resolved or are to be modified as part of the purchase-and-sale. Because the purpose of the provision is to separate the owners, it would make sense for the loans from (or to) the selling owner to be satisfied and, if possible, for the selling owner's guaranties or other credit enhancements in favor of the entity to be released (or, if not released, subject to indemnification from a creditworthy indemnitor).

The same desire to separate may dictate that any service agreement, or license or lease agreement, also be terminated at the closing of the purchase and sale. But one or both of the owners may desire that such an agreement continue after closing, either because it is essential for the continued operation or value of the entity or because it would be advantageous for one or both owners and workable even after their common ownership of the entity is undesirable.

### POST-CLOSING MATTERS

The forced buy-sell provision should address various other issues regarding entity-related liabilities or obligations after the closing of the purchase-and-sale, including:

- What release, if any, is to be provided to the selling owner regarding liabilities or obligations to the entity, the other owner, or third-parties
- What indemnification rights, if any, the selling owner is to have regarding liabilities or obligations of the entity to third parties, and whether the indemnification obligation is from the entity or the other owner
- What confidentiality covenant will (continue to) apply to each owner
- What noncompetition or similar covenant, if any, the selling owner should have in favor of the entity and the purchasing owner, and the duration and scope of the covenant
- If the entity is a tax-flow-through entity, the extent to which the selling owner may have rights or obligations in connection with post-closing tax returns of the entity
- What rights the selling owner will have to access the entity's books and records, and the scope and duration of those rights
- Whether there be any required change in the entity's employees, particularly if any of them were seconded by the selling owner
- What arrangements, if any, are to be made to preserve any critical assets or rights or any regulatory licenses or permits for the on-going business.

### MECHANICS OF CLOSING

The forced buy-sell provision should identify a date of closing or the manner in which that date is to be determined (e.g., a specified number of days after receipt of a necessary governmental approval). If there are any conditions to closing that require action by any person or entity other than the owners, like governmental approvals, the provision should obligate the owners to use best efforts, or some variant of it, to attempt to satisfy the condition.

At the closing, the selling owner would deliver to the purchasing owner or the entity:

- An assignment of the ownership interest in the entity
- A representation and warranty (to survive indefinitely) that all title to (or the equivalent regarding) the assigned ownership interest is being transferred and is free and clear of all liens, claims, and encumbrances
- The resignation of the selling owner or its representatives from all management positions with the entity
- A general release of all claims against the entity and against the purchasing owner relating to the entity, except for claims relating to the purchase-and-sale and ancillary matters, any claims relating to the entity's or the purchasing owner's non-performance of any of its post-closing covenants (such as a confidentiality covenant), and any other claims that the owners have agreed will continue
- If the provision requires, the payment of all borrowed debt owed by the selling owner to the entity (which may just reduce the purchase price)
- If the provision requires, a document containing or confirming applicable post-closing covenants of the selling owner (such as confidentiality or non-competition).

At the closing, the purchasing owner or the entity would deliver to the selling owner:

- From the purchasing owner, the purchase price in cash (or however else the provision provides for payment)
- If the provision requires, from the entity, the payment of borrowed debt owed by the entity to the selling owner
- If the provision requires, from the entity or the purchasing owner (or both), an indemnity in favor of the selling owner against claims arising from the conduct of the entity's business after the closing
- If the provision requires, a document containing or confirming applicable post-closing covenants of the entity (such as granting access to certain records) or the purchasing owner
- If the provision requires, from the entity and the purchasing owner, a general release of all claims against the selling owner relating to the entity, except for claims arising because of unauthorized conduct of the selling owner

not disclosed to the purchasing owner, claims relating to the purchase-and-sale and ancillary matters, any claims relating to the selling owner's non-performance of any of its post-closing covenants (such as a non-competition covenant), and any other claims that the owners have agreed will continue.

The provision might also require the purchasing owner to assume at the closing known or specified liabilities of the selling owner relating to the entity. The provision might provide similarly regarding unknown liabilities, or the owners may determine instead that the purchase price will reflect that uncertainty.

## DEFAULT

The forced buy-sell provision should address the consequences of the purchasing owner's failure to purchase as required. There is more than one possible way to address this situation.

Perhaps the most simple way is to provide that the forced buy-sell procedure that was triggered will cease and the defaulting owner will be responsible for payment or reimbursement of the non-defaulting owner's expenses in connection with the aborted procedure.

A more common approach is to provide that the non-defaulting (former selling) owner will have the right to purchase the defaulting owner's ownership interest at a discount. It will be important not only to state the discount, but also to specify, if the price or value terms include an adjustment, whether the discount applies only to the originally proposed price or value or also applies to the adjusted amount. In this approach, it is not typical to require the non-defaulting owner to put up a letter of credit or other form of payment assurance, though the owners may otherwise agree. In addition, or perhaps instead if there is a concern about the enforceability of a discount, the provision may provide that the purchase price will be payable by the non-defaulting owner in installments over a specified time.

The provision may also permit the non-defaulting owner to exercise greater control, or full control, over the management of the entity. The extent of any shift in control may depend on how the owners have treated management of the entity during the pendency of the original procedure, as mentioned above. If the owners deem it necessary for the purchasing owner to have control over the entity during the buy-sell procedure, then that would suggest that the non-defaulting (now the purchasing) owner should have control.

As if addressing the default in the originally triggered procedure is not difficult enough, the forced buy-sell provision might also address the consequences of a default by the original non-defaulting owner in purchasing the ownership interest of the original

defaulting owner. The provision might simply provide that the triggered procedure is at an end, and the situation should return to that existing before the buy-sell procedure was originally triggered. Therefore, if management control over the entity had shifted, it would have to be restored.

## CONCLUSION

It may well be difficult for owners and their counsel to focus on and resolve many of the issues that arise in connection with forced buy-sell provisions. The issues may make such a provision less attractive than originally supposed. But if the provision is intended to operate as written, it will be better for the owners to address the issues at the beginning of their relationship, while there is some harmony between them.





## EXHIBIT A

## Example of a Forced Buy-Sell Provision

Section [\_\_\_]. Buy-Sell Provision.

(a) At any time after [date] [specified event] [deadlock regarding specified major decision], either Member (the “*Initiating Member*”) may by delivery of a written notice (the “*Buy-Sell Notice*”) to the other Member (the “*Responding Member*”) initiate the buy-sell procedures set forth in this Section [\_\_\_].

(b) The Buy-Sell Notice shall contain the following terms: (i) a statement that the notice is the Buy-Sell Notice referred to in this Section [\_\_\_], (ii) the price per Unit (the “*Unit Price*”) at which the Initiating Member is willing to purchase all, but not less than all, of the Units owned by the Responding Member, (iii) an irrevocable offer of the Initiating Member to the Responding Member to, at the sole election of the Responding Member exercised pursuant to Section [\_\_\_](c), either (1) purchase from the Responding Member all, but not less than all, of the Units owned by the Responding Member for a purchase price per Unit equal to the Unit Price, or (2) sell to the Responding Member all, but not less than all, of the Units owned by the Initiating Member for a purchase price per Unit equal to the Unit Price. **[In no event shall [the Unit Price be less than \$\_\_\_\_\_] [the amount of the Unit Price multiplied by the number of Units owned by the Responding Member be less than \$\_\_\_\_\_] [the value of the capital contributed to the Company by the Responding Member] [, plus an amount equal to [\_\_\_]% per annum from \_\_\_\_\_, 20\_\_].]**

(c) Within [thirty (30)] days after its receipt of the Buy-Sell Notice (the “*Response Period*”), the Responding Member shall by delivery of a written notice to the Initiating Member (the “*Response Notice*”) elect to either (1) sell to the Initiating Member all, but not less than all, of the Units owned by the Responding Member for a purchase price per Unit equal to the Unit Price, or (2) purchase from the Initiating Member all, but not less than all, of the Units owned by the Initiating Member for a purchase price per Unit equal to the Unit Price.

(d) If the Responding Member does not deliver to the Initiating Member the required Response Notice during the Response Period, then, effective as of the first day following expiration of the Response Period, such failure shall be deemed to be an irrevocable acceptance and agreement of the Responding Member to sell to the Initiating Member all of the Units owned by the Responding Member for a purchase price per Unit equal to the Unit Price. Any election or deemed election of the Responding Member with respect to the Buy-Sell Notice shall be irrevocable and shall be binding on both the Responding Member and the Initiating Member.

(e) The closing of the purchase and sale of Units pursuant to this Section [\_\_\_] (the “*Closing*”) shall **[be pursuant to a equity purchase agreement customary for transactions in which the buyer and the seller are familiar with the issuer of the equity interests being purchased and sold and shall]** occur at the offices of the Company or at such other location agreed to by the Responding Member and the Initiating Member at 10:00 a.m. (Central time) on the first business day following the [sixtieth (60th)] day after the expiration of the Response Period.

(f) The Units sold pursuant to this Section [\_\_\_] shall be transferred free and clear of all liens, claims and encumbrances (other than restrictions pursuant to this Agreement or restrictions on transfer imposed by applicable securities laws).

(g) The Company and each Member shall take all actions as may be reasonably necessary to consummate the purchase and sale contemplated by this Section [\_\_\_], including (without limitation) entering into such agreements and delivering such consents as may be necessary, including (without limitation) any written agreements or consents as may be necessary to waive any restrictions on transfer of the Units contained in this Agreement.

(h) At the Closing, the Member having become obligated to transfer its Units pursuant to this Section [ ] (the “**Selling Member**”) shall deliver to the Member having become obligated to purchase the Selling Member’s Units pursuant to this Section [ ] (the “**Buying Member**”) documents or instruments necessary to effect the irrevocable assignment and transfer of all of the Selling Member’s Units [ **, including (without limitation) the certificate or certificates representing the Selling Member’s Units, endorsed as necessary,** ] against receipt of the purchase price therefor.

(i) At the Closing, the aggregate purchase price to be paid for the Selling Member’s Units pursuant to this Section [ ] (the “**Purchase Price**”) shall be paid by the Buying Member in full in immediately available funds[ **, or, if the Buying Member so elects, the Purchase Price may be paid with a combination of immediately available funds and a promissory note executed by the Buying Member and delivered to the Selling Member (the “Note”), with up to [fifty percent (50%)] of the Purchase Price being paid pursuant to the Note, such Note to be payable with interest at a variable per annum rate of interest equal to [two percent (2%)] over the “Prime Rate” as published in *The Wall Street Journal* on the first day of each calendar month, fully amortized over [three (3)] years with equal quarterly payments of principal (plus accrued interest), and secured by the Selling Member’s Units pursuant to a pledge and security agreement in form and substance reasonably satisfactory to the Selling Member.** ]

(j) At the Closing:

- (i) the Buying Member shall either (1) secure the release of the Selling Member, and any affiliate of the Selling Member, from any personal liability associated with any financing of the Company or any of its subsidiaries **[and any obligations under this Agreement]**, or (2) indemnify the Selling Member from any liability in connection with any financing of the Company or any of its subsidiaries **[and any obligations thereafter arising under this Agreement]**;
- (ii) any loans to the Selling Member by the Company shall be repaid by the Selling Member in full in immediately available funds;
- (iii) any loans by the Selling Member to the Company shall be repaid by the Company in full in immediately available funds;
- (iv) the Buying Member shall deliver to the Selling Member:
  - (1) the Purchase Price in accordance with Section [ ](i), and
  - (2) a general release, in form and substance reasonably satisfactory to the Selling Member, for the benefit of the Selling Member and its affiliates, of all claims relating to the Company, except for claims relating to the performance or enforcement of the provisions of this Section [ ] and Sections [ ] and [ ] of this Agreement **[e.g., noncompete, non-solicitation, non-disparagement, confidentiality, etc. covenants]**; and
- (v) the Selling Member shall deliver to the Company and the Buying Member:
  - (1) a written resignation, in form and substance reasonably satisfactory to the Buying Member, executed by the Selling Member providing for the resignation of the Selling Member and any of its affiliates or representatives from all positions the Selling Member or any of its affiliates or representatives holds as a manager, officer, director, employee or other position with the Company or any subsidiary of the Company,
  - (2) a general release, in form and substance reasonably satisfactory to the Buying Member, for the benefit of the Company, the Buying Member and their respective affiliates, of all claims relating to the Company, except for claims

relating to the performance or enforcement of the provisions of this Section [ ],

- (3) a written confirmation of the Selling Member's continuing obligations under Sections [ ] and [ ] of this Agreement [e.g., **noncompete, non-solicitation, non-disparagement, confidentiality, etc. covenants**], and
- (4) any other certificates, documents or instruments required by this Section [ ] to be delivered by the Selling Member at the Closing.

(k) If the Selling Member shall default in its obligation to sell all of its Units in accordance with the terms of this Section [ ], then (i) the Buying Member shall have the right to purchase the Units of the Selling Member for an amount equal to **[eighty percent (80%)]** of the Purchase Price (the "**Buy-Sell Default Price**"), (ii) the Selling Member and any of its affiliates and/or representatives shall be deemed removed from all positions with the Company or any of its subsidiaries without any action needing to be taken by the Company, the Buying Member or any other person or entity, and (iii) notwithstanding any provision of this Agreement to the contrary, all rights of the Selling Member under this Agreement to vote or consent to any matter shall automatically be terminated without any action needing to be taken by the Company, the Buying Member or any other person or entity. If the Selling Member shall continue to default in its obligation to sell all of its Units for a period of **[ten (10)]** days after written notice from the Buying Member to the Selling Member, the Buying Member shall be entitled to initiate legal (or arbitration) proceedings to compel the Selling Member to complete the sale of all of its Units to the Buying Member for the Buy-Sell Default Price, and the Buying Member shall have the right to recover from the Selling Member all attorneys' fees, court costs and other expenses of litigation (or arbitration) incurred by the Buying Member in connection with such proceedings. The Selling Member and the Buying Member agree that in the situation in which the Buy-Sell Default Price applies, the Buying Member will suffer damages because of the Selling Member's default, and that if the Buy-Sell Default Price is less than the fair market value of the Selling Member's Units, the difference will be regarded as liquidated damages and not as a penalty.

(l) If the Buying Member (for this purpose such Buying Member is referred to as the "**Defaulting Member**") shall default in its obligation to purchase all of the Units of the Selling Member in accordance with the terms of this Section [ ] (for this purpose, such Selling Member is referred to as the "**Non-Defaulting Member**"), then (i) the Non-Defaulting Member shall have the right to purchase the Units of the Defaulting Member for an amount equal to **[eighty percent (80%)]** of the Purchase Price which would have been paid to the Defaulting Member had the Non-Defaulting Member elected to purchase all of the Defaulting Member's Units in response to the Buy-Sell Notice in accordance with Section [ ](c) (the "**Reverse Buy-Sell Default Price**"), and the other provisions of this Section [ ] shall also apply as though such election had been made, (ii) if the Non-Defaulting Member desires to exercise such right, it must give written notice of exercise to the Defaulting Member within **[fifteen (15)]** days after the date set for the proposed Closing at which the Defaulting Member was to purchase the Non-Defaulting Member's Units, and if it does not give such notice within such time period, the right shall expire, (iii) the Closing shall be scheduled as though the date of the Non-Defaulting Member's notice of exercise were the expiration of the Response Period under Section [ ](e), and (iv) upon the Non-Defaulting Member's notice of exercise, the Defaulting Member and any of its affiliates and/or representatives shall be deemed removed from all positions with the Company or any of its subsidiaries without any action needing to be taken by the Company, the Non-Defaulting Member or any other person or entity and, notwithstanding any provision of this Agreement to the contrary, all rights of the Defaulting Member under this Agreement to vote or consent to any matter shall automatically be terminated without any action needing to be taken by the Company, the Non-Defaulting Member or any other person or entity. If the Non-Defaulting Member does not timely exercise its right to purchase under this Section [ ](l), it shall be entitled to receive, within **[three (3)]** business days after demand to the Defaulting Member, a payment from the Defaulting Member of cash equal to all **[reasonable]** third-party expenses incurred by the Non-Defaulting Member in connection with the proposed sale of all of its Units to the Defaulting Member; and this Section [ ] shall otherwise no longer apply to the possible transactions resulting from the Defaulting Member's Buy-Sell Notice, which shall be deemed abandoned [; and neither Member may give a Buy-Sell Notice within **[six (6) months]** after the expiration of the Non-Defaulting Member's option period above in this

**Section [ ](I).** If the Non-Defaulting Member exercises its right to purchase under this Section [ ](I) and the Defaulting Member shall thereafter default in its obligation to sell its Units for the Reverse Buy-Sell Default Price for a period of **[ten (10)]** days after written notice from the Non-Defaulting Member to the Defaulting Member, the Non-Defaulting Member shall be entitled to initiate legal (or arbitration) proceedings to compel the Defaulting Member to complete the sale of its Units to the Non-Defaulting Member for the Reverse Buy-Sell Default Price, and the Non-Defaulting Member shall have the right to recover from the Defaulting Member all attorneys' fees, court costs and other expenses of litigation (or arbitration) incurred by the Non-Defaulting Member in connection with such proceedings. The Non-Defaulting Member and the Defaulting Member agree that in the situation in which the Reverse Buy-Sell Default Price applies, the Non-Defaulting Member will suffer damages because of the Defaulting Member's default, and that if the Reverse Buy-Sell Default Price is less than the fair market value of the Defaulting Member's Units, the difference will be regarded as liquidated damages and not as a penalty.

(m) If the Selling Member or the Defaulting Member (as applicable) shall default in its obligation to sell all of its Units in accordance with the terms of this Section [ ], the Buying Member or the Non-Defaulting Member (as applicable) may, at its option, in addition to all other remedies it may have, send to the Selling Member or the Defaulting Member (as applicable) by registered mail, return receipt requested, a certified or cashier's check made payable to the Selling Member or the Defaulting Member (as applicable) in the amount of the purchase price required by this Section [ ], and concurrently therewith give notice of such action to the Company. The Company shall then **[(i)]** transfer on the Company's books and records all Units standing in the name of the Selling Member or the Defaulting Member (as applicable) to the Buying Member or the Non-Defaulting Member (as applicable)[, **and (ii) cancel in its records the certificates representing the Units so transferred, issue in the name of the Buying Member or the Non-Defaulting Member (as applicable) a new certificate representing such Units, if applicable, and deliver such new certificate to the Buying Member or the Non-Defaulting Member (as applicable)].**

(n) If the Non-Defaulting Member exercises its right to purchase under Section [ ](I), but defaults in its obligation to purchase all of the Defaulting Member's Units in accordance with Section [ ](I), then (i) the Defaulting Member shall be entitled to receive, within **[three (3)]** business days after demand, a payment from the Non-Defaulting Member of cash equal to all **[reasonable]** third-party expenses incurred by the Defaulting Member in connection with the proposed sale of its Units to the Non-Defaulting Member, and (ii) this Section [ ] shall otherwise no longer apply to the possible transactions resulting from the Defaulting Member's Buy-Sell Notice, which shall be deemed abandoned.

(o) Upon the transfer of a Member's Units pursuant to this Section [ ], such Member shall cease to be a Member of the Company.

(p) During the period of time commencing on the date of the Buy-Sell Notice and ending on the earlier of: (i) the date of the consummation of the sale and purchase pursuant to this Section [ ], or (ii) the date a Member defaults on its obligations to sell or purchase, as applicable, Units pursuant to this Section [ ], the Company and the Members shall cause the Company to continue to operate in a manner consistent with its prior practices and this Agreement.

(q) No Buy-Sell Notice may be given while (i) the Members have rights and obligations under this Section [ ] regarding a Buy-Sell Notice that has previously been given (i.e., until the possible transactions resulting from a previously given Buy-Sell Notice have been abandoned or deemed abandoned), or (ii) the Company or all of its **[managers or]** Members are parties to a letter of intent or letter of understanding or a binding written agreement that contemplates the merger of the Company or the sale of all or **[fifty percent (50%)]** or more of the outstanding equity interests or the assets of the Company.

(r) The Company and the Members agree that the parties hereto would be irreparably damaged if this Section [ ] is not specifically enforced in the event of a breach or threatened breach hereof. If any controversy concerning the rights or obligations under this Section [ ] arises, or if this Section [ ] is breached or threatened to be breached, the parties hereto agree that remedies at law would be inadequate and that, therefore, such rights and obligations, and this Section [ ], shall be enforceable by specific performance. The remedy of specific performance shall not be an exclusive remedy, but shall be cumulative of all other rights and remedies of the parties hereto at law, in equity or under this Agreement.