# DIFFERENCES IN DRAFTING FOR MAJORITY, MINORITY AND 50/50 OWNERS IN AN LLC AND IMPLICATIONS FOR LLC OPERATING AGREEMENT DRAFTING


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Professor Moll graduated with highest honors from the University of Virginia in 1991 with a Bachelor of Science degree in Commerce. He attended Harvard Law School where he served as the Developments in the Law chairperson on the Harvard Law Review. Professor Moll graduated magna cum laude from Harvard Law School in 1994. After a clerkship with Judge Carolyn King on the United States Fifth Circuit Court of Appeals, Professor Moll spent two years practicing commercial litigation with Fulbright & Jaworski in Houston. He came to the University of Houston Law Center in the fall of 1997 as an Associate Professor of Law.

Professor Moll teaches in the areas of business organizations, business torts, and commercial law. His courses include Business Organizations, Doing Deals, Business Torts, Secured Financing, and Sales and Leasing. He is the co-author of a treatise on closely held corporations, three casebooks on business law (closely held business organizations, business organizations generally, and business torts), and a concise hornbook on business organizations. He has also written numerous law review articles focusing on closely held businesses and related fiduciary duty and oppression doctrines.

In 1998, 1999, 2003, 2011, and 2014, Professor Moll was honored with a Professor of the Year award by the Order of the Barons, and in 2000 he received a Teaching Excellence Award from the University of Houston. He is a past Chair and current Executive Committee Member of the AALS Section on Agency and Unincorporated Business Associations, and in April 2015, he was elected to membership in the American Law Institute.

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# DIFFERENCES IN DRAFTING FOR MAJORITY, MINORITY AND 50/50 OWNERS IN AN LLC AND IMPLICATIONS FOR LLC OPERATING AGREEMENT DRAFTING

When business associates come together to form a business, they are at the "honeymoon stage" of the relationship. Everyone is getting along, everyone has a similar vision for the business, and everyone is extremely confident that the business will be a great success. They instruct their respective attorneys to prepare formation documents for the business entity that are simple, straightforward, and fair to everyone (and, by the way, they need the entity formed right away because they are already signing purchases orders, hiring employees, and leasing a facility). While the business owners are very optimistic about the future success of the business and their ongoing relationship together, the lawyers charged with forming the business entity and documenting the relationship among the owners need to be more circumspect. The honeymoon will not last forever. From time to time the business owners will likely face financial challenges, conflicting views on business strategy and vision, as well as personality clashes. Furthermore, there are other sources of inherent conflict in a business enterprise—the owners may have different ownership percentages in the business, different owners may be contributing to the business in different ways—with one contributing capital and another providing services, or one owner may be the founder and controlling owner of the business and another a key employee of that business. Drafting the organizational documents for a business entity with multiple owners with differing interests is rarely "simple and straightforward". Careful consideration needs to be given to the specific nature of the business arrangement, the ownership level of each owner, and what talents and resources each owner is bringing to the table in order to put together organizational documents that protect the key areas of concern for a client.

This paper discusses certain key points for a lawyer to consider in drafting the Operating Agreement (or Company Agreement) when representing a client who will become a Member of a multi-Member Texas limited liability company ("***LLC***"). Moreover, this paper looks at certain key drafting issues from three (3) different points of view:

(1) What are key points to consider in drafting the Operating Agreement when you represent an owner who will own more than 50% of the LLC (the "***Majority Member***")?

(2) What are key points to consider in drafting the Operating Agreement when you represent a Member who will own less than 50% of the LLC (the "***Minority Member***")?

(3) What are key points to consider in drafting the Operating Agreement when you represent a Member who will own 50% of the LLC with another Member owning 50% ("***50% Member***")?

The key points for the lawyer to consider in drafting the Operating Agreement will differ depending on whether the lawyer is representing the Majority Member, the Minority Member, or a 50% Member. The Texas Business Organizations Code ("***TBOC***") affords great flexibility in drafting the Operating Agreement. In fact, while the TBOC sets forth the default rules governing the LLC and the relationship among the Members, the TBOC also allows the Operating Agreement to override the TBOC's default rules and adopt alternative rules governing the LLC and its Members (subject to certain non-waivable provisions of the TBOC that cannot be modified by the Operating Agreement, as set forth in §101.054 of the TBOC).

At the end of most sections is a sample provision that can be referred to as a guide in drafting on a particular issue for the Operating Agreement. However, each provision must be customized to fit the particular Operating Agreement.

Finally, this paper assumes that the LLC is Manager-managed, but the same concepts would apply to a Member-managed LLC.

## I. REPRESENTING THE MAJORITY MEMBER.

### A. Voting Standards to Approve LLC Action.

When representing the Majority Member, a key point to address in drafting the Operating Agreement is to make sure the Operating Agreement provides the Majority Member with the level of control over the LLC that the Majority Member is expecting. The Majority Member may want to have absolute control over the business and affairs of the LLC (including hiring and firing, establishing the budget, borrowing, issuing additional membership interests, selling the business, or liquidating the business). In drafting the Operating Agreement for the Majority Member, the lawyer needs to make sure that the provisions dealing with management of the LLC by the Managers clearly establish that the Majority Member's membership interest percentage is sufficient to appoint a number of Managers that constitutes a quorum and can approve

action on behalf of the LLC on those matters coming before the Managers. In addition, to the extent the Operating Agreement provides that certain LLC actions will require the approval of the Members, the Operating Agreement should also be drafted such that the Majority Member's membership interest percentage is sufficient to constitute a quorum and approve actions required to be approved by the Members. It is important to note that under the default rules of the TBOC, each Manager and Member has an equal vote regardless of Member's ownership percentage in the LLC (§101.354). Accordingly, 2 Members owning a total of ten percent (10%) of the LLC could "outvote" another Member owning ninety percent (90%) of the LLC on many LLC actions. It is also important to note that under the default rules of the TBOC: (1) certain actions of the LLC require the approval of all of the Members of the LLC, including the issuance of membership interests after the LLC is formed (§101.105), the amendment of the Operating Agreement (§101.053), and the amendment to the certificate of formation of the LLC (§101.355(d)), and (2) certain actions of the LLC require the approval of a majority of the Members of the LLC, *in number not ownership percentage*, including a merger, interest exchange, conversion, and sale of all or substantially all of the assets of the LLC (§101.355(c)) and the winding-up of the LLC (§101.552). Accordingly, if the Operating Agreement is not drafted in a manner that specifically overrides the default rules of the TBOC, not only would the Majority Member be required to obtain the approval of other Members in order to take such actions, but he could potentially be outvoted on many LLC actions including those involving the sale or liquidation of the LLC.

***Sample Provision*:**

> "***Number, Appointment, and Removal of Managers.*** The authorized number of Managers shall be established (and may be re-established from time to time) by a Required Interest, but in no event shall the number of Managers be less than one (1). The individuals to serve as Managers shall be determined by a Required Interest. A Manager may be removed (with or without cause) by a Required Interest. In the event that any Manager ceases to serve as a Manager during his term of office, the resulting vacancy shall be filled by a Person designated by a Required Interest.
>
> ***Quorum and Action of Managers.*** A majority of the total number of Managers fixed by, or in the manner provided in, this Agreement shall constitute a quorum for the transaction of business of the Managers. Except as otherwise specifically provided in this Agreement, the act of a majority of the total number of Managers shall be the act of the Managers. A Manager who is present at a meeting of the Managers at which action on any Company matter is taken shall be presumed to have assented to the action unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as secretary of the meeting before the adjournment thereof or shall deliver such dissent to the Company immediately after the adjournment of the meeting. Such right to dissent shall not apply to a Manager who voted in favor of such action.
>
> ***Quorum and Action of Members.*** A quorum shall be present at a meeting of Members if the holders of a Required Interest are represented at the meeting in person or by proxy. With respect to any matter, other than a matter for which the affirmative vote of the holders of a specified portion of the [Membership Interests / Units] of all Members entitled to vote is required by the non-waivable provisions of the TBOC, the affirmative vote of a Required Interest at a meeting of Members at which a quorum is present shall be the act of the Members.
>
> '***Required Interest***' means Members holding at least ____% of the outstanding [Membership Interests / Units] held by all Members."

**B. Exculpation and Indemnification.**

The Majority Member will have the ability to control the business and affairs of the LLC through the appointment of a majority of the Managers. The Majority Member himself (or principal of the Majority Member if the Majority Member is an entity) will often be one of the Managers appointed along with his other trusted representatives. If the business of the LLC hits hard times or if conflict develops between the Majority Member and the Minority Member(s), the Managers appointed by the Majority Member could be at risk for the assertion of breach of fiduciary duty claim by the Minority Members. To help minimize this risk, the

Majority Member should consider including provisions in the Operating Agreement that restrict the duties and limit the liability of the Managers and also require the LLC to indemnify the Managers from claims so long as the Managers have met a specified standard of conduct.

§101.401 of the TBOC provides that the Operating Agreement of an LLC <u>may expand or restrict</u> any duties, including fiduciary duties, and related liabilities that a Member, Manager, officer, or other person has to the LLC or to a Member or Manager of the LLC. It is important to note that §101.401 permits the Operating Agreement <u>to restrict</u> the duties of Managers, but does not expressly permit the Operating Agreement <u>to eliminate</u> the duties of Managers, so it is unclear under the TBOC just how far one can go in restricting the duties of the Managers to the LLC and its Members. Further, §7.001(d)(3) of the TBOC also authorizes the Certificate of Formation or Operating Agreement of the LLC to limit or eliminate the liability of the Managers or other governing person of the LLC to the extent set forth in §7.001 and to the additional extent permitted under §101.401. In addition, the TBOC provides greater latitude for an LLC to indemnify Managers (and other governing persons) than corporations can for directors. Chapter 8 of the TBOC generally governs indemnification of governing persons of a Texas entity. §8.004 of the TBOC generally provides that indemnification and advancement of expenses to a governing person is valid only to the extent it is consistent with Chapter 8. However, §8.002 of the TBOC states that the governing documents of an LLC (and general partnership) may adopt the provisions of Chapter 8 or <u>may contain other provisions, which will be enforceable</u>, relating to indemnification, advancement of expenses, or insurance. In other words, the TBOC allows even greater liability/indemnification protection for Managers of an LLC as compared to the directors of a corporation.

**Note:** In drafting the Operating Agreement, one should be careful not to "cast too wide a net" as to the types of LLC personnel who will be granted exculpation and mandatory indemnification protections. The Majority Member will want to afford broad protection for the Managers and perhaps executive officers of the LLC as the Majority Member and his representatives will likely hold such positions. However, these protections should not necessarily be extended to all employees and agents of the LLC, otherwise the LLC and its Members could be absolving/indemnifying certain personnel whom they never intended.

***<u>Sample Provision</u>*:**

"**ARTICLE # EXCULPATION AND INDEMNIFICATION**

**Section #.01** <u>Exculpation</u>. Except for such duties as are expressly set forth in this Agreement, a Covered Person shall not have any duties (fiduciary or otherwise) to the Company or any of the Members. No Covered Person shall be liable to the Company or any Member for any loss suffered by the Company or any Member unless such loss is caused by the Covered Person's gross negligence, willful misconduct, or intentional violation of law. A Covered Person shall not be liable for errors in judgment or for any acts or omissions that do not constitute gross negligence, willful misconduct, or intentional violation of law.

**Section #.02** <u>Right to Indemnification</u>. Subject to the limitations and conditions as provided in this **Article #**, each Person who was or is made a party or is threatened to be made a party to or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative (hereinafter a '***Proceeding***'), or any appeal in such a Proceeding or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that he, or a Person of whom he is the legal representative, is or was a Covered Person or while a Covered Person is or was serving at the request of the Company as a manager, director, officer, partner, venturer, proprietor, trustee, employee, agent, or similar functionary of another foreign or domestic limited liability company, corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other enterprise shall be indemnified by the Company against judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements and reasonable expenses (including, without limitation, attorneys' fees) actually incurred by such Person in connection with such Proceeding, and indemnification under this **Section #.02** shall continue as to a Person who has ceased to serve in the capacity which initially entitled such Person to indemnity hereunder. The

rights granted pursuant to this **Section #.02** shall be deemed contract rights, and no amendment, modification, or repeal of this **Section #.02** shall have the effect of limiting or denying any such rights with respect to actions taken or Proceedings arising prior to any amendment, modification or repeal. **IT IS EXPRESSLY ACKNOWLEDGED THAT THE INDEMNIFICATION PROVIDED IN THIS SECTION #.02 SHALL APPLY TO MATTERS ARISING OUT OF THE NEGLIGENCE, STRICT LIABILITY, OR OTHER FAULT OR RESPONSIBILITY OF SUCH PERSON.** Notwithstanding the foregoing, the Company's obligations hereunder to indemnify any Person pursuant to this **Section #.02** shall not be applicable and shall have no force or effect if such Person is found to have engaged in acts or omissions that constitute gross negligence, willful misconduct, or intentional violation of law.

**Section #.03** Advance Payment. The right to indemnification conferred in this **Article #** shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a Person of the type entitled to be indemnified under **Section #.02** who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the Person's ultimate entitlement to indemnification; *provided, however*, that the payment of such expenses incurred by any such Person in advance of the final disposition of a Proceeding, shall be made only upon delivery to the Company of a written affirmation by such Person of such Person's good faith belief that such Person has met the standard of conduct necessary for indemnification under this **Article #** and a written undertaking, by or on behalf of such Person, to repay all amounts so advanced if it shall ultimately be determined that such Person is not entitled to be indemnified under this **Article #** or otherwise.

**Section #.04** Indemnification of Employees and Agents. The Company, by adoption of a resolution of the Managers, may indemnify and advance expenses to an [Officer], employee or agent of the Company to the same extent and subject to the same conditions under which it may indemnify and advance expenses to Persons who are or were Covered Persons.

**Section #.05** Appearance as a Witness. Notwithstanding any other provision of this **Article #**, the Company may pay or reimburse expenses incurred by a Covered Person in connection with his appearance as a witness or other participation in a Proceeding at a time when he is not a named defendant or respondent in the Proceeding.

**Section #.06** Nonexclusivity of Rights. The right to indemnification and the advancement and payment of expenses conferred in this **Article #** shall not be exclusive of any other right which a Covered Person or other Person indemnified pursuant to **Section #.02** or **#.04** may have or hereafter acquire under any law (common or statutory), provision of the Certificate of Formation or this Agreement, agreement, vote of Members or disinterested Managers or otherwise.

**Section #.07** Insurance. As determined by the Managers with the consent of the holders of a majority of the [Membership Interests / Units] issued and outstanding, the Company may purchase and maintain insurance, at its expense, to protect itself and any Person who is or was serving as a Manager, Officer, employee, or agent of the Company or is or was serving at the request of the Company as a manager, director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of another foreign or domestic limited liability company, corporation, partnership, joint venture, sole proprietorship, trust, employee benefit plan or other enterprise against any expense, liability or loss, whether or not the Company would have the power to indemnify such Person against such expense, liability or loss under this **Article #**.

**Section #.08** Savings Clause. If this **Article #** or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Company shall nevertheless indemnify and hold harmless each Person entitled to be indemnified pursuant to this **Article #** as to costs, charges and expenses (including attorneys' fees),

judgments, fines and amounts paid in settlement with respect to any Proceeding to the fullest extent permitted by any applicable portion of this **Article #** that shall not have been invalidated and to the fullest extent permitted by applicable law.

'**Covered Person**' means any Manager [and Officer] of the Company."

**C. Repurchase of Membership Interest of Departed Employee-Member.**

Often, a Minority Member of an LLC will also be an employee of the LLC (or another entity affiliated with the LLC). Consideration needs to be given as to what happens to the Membership Interest of the employee-Minority Member ("***Employee***") on the termination of the employment relationship. Typically, the Majority Member will want the LLC to have the option to purchase the Membership Interest of the Employee on any employment termination event, including death, as the Majority Member does not want the Employee (or his surviving family) to continue having an ownership stake in the LLC once the Employee ceases to work for the LLC. Accordingly, the Operating Agreement should include comprehensive provisions describing the LLC's right to purchase the Employee's Membership Interest upon the termination of the employment relationship for any reason. Specific areas to be addressed for the purchase include the following:

- The time period for the LLC to exercise its option to purchase the Employee's Membership Interest;
- The purchase price for the Membership Interest (or formula or appraisal process for determining the purchase price and whether typical minority interest discounts will apply for lack of control and marketability);
- The payment terms for the purchase (all cash or in installments);
- The interest rate on any installment payment of the purchase price;
- Whether installment payments will be secured or unsecured;
- Whether the Employee will be subject to any non-compete or other restrictive covenants in connection with the purchase (especially if the Employee is voluntarily quitting or being terminated by the LLC for cause);
- Whether the Employee will be required to sign a Release of Claims for the benefit of the LLC and the Majority Member in connection with the purchase; and
- Whether the purchase documents will be agreed to in advance and attached to the Operating Agreement (to minimize the amount of negotiation down the road, especially in a contentious termination) or whether the purchase documents will be in a "customary form" to be agreed to by the parties at the time of purchase.

***Sample Provision*:**

"Call Right.

(a) Upon the occurrence of a Call Event affecting the [Minority Member] (the '***Call Member***'), the Company shall have the right (the '***Call Right***'), but not the obligation, to purchase all (but not less than all) of the [Membership Interest / Units] held by such Call Member and any Permitted Transferee thereof (the '***Call Interest'***). The Company shall exercise the Call Right by delivering to such Call Member, the personal representative thereof, or such Permitted Transferee, as applicable (each, a '***Call Notice Recipient***'), written notice (the '***Call Notice***') of its exercise of the Call Right within [ ] days after the Company receives notice of the occurrence of the Call Event.

(b) Promptly following the delivery of a Call Notice, the Company and the Call Notice Recipient shall negotiate in good faith to agree on the purchase price ('***Call Purchase Price***') to be paid for the Call Interest. If the Company and the Call Notice Recipient are not able to agree on the Call Purchase Price within [ ] days after the date the Call Notice is delivered (the '***Call Purchase Price Negotiating Period***'), the Call Purchase Price shall be the Fair Value of the Call Interest as of the date of the Call Event, as determined by the following procedures:

(i) The Company and the Call Notice Recipient (or, jointly, the Call Notice Recipients) shall each select an Independent Appraiser within [ ] days after the termination of the Call Purchase Price Negotiating Period. The two Independent Appraisers so selected shall each independently determine the Fair Value of the Call Interest and, as long as the difference in the two determinations does not exceed 10% of the lower of the two appraisals, Fair Value of the Call Interest shall be

conclusively deemed to equal the average of the two appraisals and the determination of such Independent Appraisers shall be binding on the parties. Each party shall pay the fees and expenses of its own Independent Appraiser. If either party fails to select an Independent Appraiser within the time required by this **Section [ ]**, the Fair Value of the Call Interest shall be conclusively deemed to equal the determination of the Independent Appraiser timely selected by the other party.

(ii) If the difference between the two appraisals referred to in **Section [ ]** exceeds 10% of the lower of the two appraisals, the two Independent Appraisers shall select a third Independent Appraiser who shall also independently determine the Fair Value of the Call Interest. In such case, the Fair Value of the Call Interest shall be the average of the two closest appraisals. The determination of such Independent Appraisers shall be binding on the parties. The cost of the third appraisal shall be paid as follows: (x) 50% by the Company and (y) 50% by the Call Notice Recipients.

(iii) In determining the Fair Value of the Call Interest, the Independent Appraisers appointed pursuant to this **Section [ ]** shall consider all opinions and relevant evidence submitted to them by the parties or otherwise obtained by such Independent Appraisers and shall set forth their determinations in writing, together with their opinions and the considerations on which their opinions are based, with a signed counterpart to be delivered to each party within [ ] days after commencing the appraisal.

(iv) At any time during the appraisal process, the Company and the Call Notice Recipients may negotiate a mutually agreeable value for the Call Interest and the appraisal process shall terminate.

(c) The Call Purchase Price shall be paid, at the option of the Company, either in cash or by a cash closing payment of no less than [___%] of the Call Purchase Price and the delivery of a promissory note of the Company for the balance, providing for equal [annual] installments payable over a period of [ ] years. The note shall carry interest at a fixed rate equal to [ (___%) or (interest rate index)] on the date of the final determination of the Call Purchase Price, compounded annually. The note shall permit prepayment, without penalty or premium, and shall provide for acceleration of the principal amount thereof, and all accrued but unpaid interest, in the event that the Company fails to discharge its obligations thereunder. The note shall be subordinate in right of payment to the obligations of the Company and its affiliates to any bank or other financial institution providing credit to the Company or any of its affiliates to the extent required by such bank or financial institution.

(d) The closing of the purchase of the Call Interest shall occur at the offices of the Company on a date designated by the Company that is not later than [ ] days following the final determination of the Call Purchase Price, subject to the satisfaction of any Conditions, in which case the purchase of the Call Interest shall be delayed pending the satisfaction of the Conditions. At the closing of such transaction, the parties shall execute and deliver such documentation as is reasonably necessary or appropriate to consummate such transaction. Such purchase shall be effected by the delivery by the Call Notice Recipient to the Company of a certificate or certificates evidencing the Call Interest or assignment document in form satisfactory to the Company, free and clear of any liens and encumbrances (other than those that arise under federal or state securities laws or by virtue of this Agreement), and duly endorsed for transfer to the Company, against payment to the Call Notice Recipient of the Call Purchase Price in accordance with the terms hereof.

(e) Notwithstanding anything in this Agreement to the contrary, the Company may abandon the purchase of the Call Interest after being advised of the Call Purchase Price determined pursuant to **Section [ ]**. If the Company so abandons the purchase of the Call Interest, it shall reimburse the Call Recipient for all fees and expenses of Independent Appraisers incurred by such Call Recipient.

'***Call Event***' means (i) the death or serious mental incapacitation of the [Minority Member] or (ii) the termination of the [Minority Member's] employment with the Company and its affiliates for any reason.

'***Conditions***' means any required material third party or governmental approvals, compliance with applicable laws and the absence of any injunction or similar legal order preventing such transaction.

'***Fair Value***' means an amount equal to the price at which the Call Interest is likely to be sold in an arm's-length transaction between a willing and able buyer and a willing and able seller, and neither of which is under any compulsion to buy or to sell, based on market conditions prevailing at the time, taking into account all attendant circumstances, [but excluding from such determination of Fair Value any reference to lack-of-control and lack-of-marketability discounts].

'***Independent Appraiser***' means an appraiser of nationally or regionally-recognized standing with substantial experience appraising businesses and assets similar to the business and assets of the Company and who has not, within the preceding [ ] years, performed services for the Company or the Person designating such appraiser, or any of their respective affiliates.

'***Permitted Transferee***' means (i) the Call Member's estate or (ii) one or more trusts for the benefit of such Call Member or for the benefit of such Call Member's immediate family."

## II. REPRESENTING THE MINORITY MEMBER.

When representing the Minority Member of an LLC, it is unrealistic for the lawyer to expect that the client will be able to control the business and affairs of the LLC. Nevertheless, in drafting the Operating Agreement, there are certain areas the lawyer for the Minority Member can address in order to protect his client's economic stake in the LLC and have a voice in the decision-making process.

### A. Tax Distributions.

For federal income tax purposes, LLCs are typically taxed as either a "partnership" or an "s-corporation". Under either of these federal tax classifications, the LLC is a flow-through entity for tax purposes, meaning that the LLC itself does not pay federal income tax. Instead, the income and loss of the LLC "flows-through" to the Members and is reported by the Members on their respective individual federal income tax returns. Moreover, this "flow-through" of income and loss occurs <u>even if the LLC does not actually make distributions of cash to fund tax liability arising out of the "flow-through" income</u>. Therefore, if an LLC is profitable but not does make cash distributions to its Members, a Minority Member could be in the unenviable position of paying federal income tax on income resulting from the LLC for which the Minority Member did not receive corresponding distributions of cash to pay the tax. Accordingly, when the LLC is a "flow-through" entity for federal income tax purposes, a provision in the Operating Agreement should be included requiring the LLC to make distributions to the Members at least annually in order to cover Member-level federal income taxes attributable to the flow-through income of the LLC.

***<u>Sample Provision</u>***[1]**:** "Within [ ] days after each Fiscal Year, the Managers shall, to the extent the Company has legally available funds therefor, cause the Company to make cash distributions to each of the Members in an amount not less than the product of (i) the net positive taxable income and gain allocated to such Member pursuant to **Section [ ]** of this Agreement during the applicable prior Fiscal Year, and (ii) the Imputed Tax Rate, as defined below (each a '***Tax Distribution***'). Any Tax Distribution not so made because of a failure of the conditions for making such Tax Distribution as set forth above in this **Section [ ]** shall be made as soon as such conditions are satisfied. The '***Imputed Tax Rate***' means, for any Fiscal Year, the highest effective ordinary federal income tax rate applicable during such year to a natural person taxable at the highest marginal ordinary federal income tax rate.

'***Fiscal Year***' means the taxable year of the Company for federal income tax purposes."

[1] (**Note:** This sample provision only addresses federal incomes taxes and does not take into account any state or other taxes that might apply to LLC flow-through income.)

**B. Future Capital Contribution Requirements.**

The draft Operating Agreement may provide the Managers appointed by the Majority Member with the power to make future capital calls on the Members in order to fund operating and other business needs of the LLC. If so, the Minority Member needs to understand what his obligations are to contribute additional capital to the LLC and the consequences to him of not participating in future capital calls. Key questions to evaluate include:

1. Is the Minority Member required to contribute his pro rata share of any future capital call or is it elective?
2. If there a cap on the total amount of money that the Minority Member can be required to contribute in the future?
3. If a Minority Member can be required to contribute additional capital to the LLC but fails to do so, what are the remedies that may be pursued against him (breach of contract, dilution, etc.)?
4. If a Minority Member cannot be required to contribute additional capital to LLC and he chooses not to participate in future capital calls, then what is the methodology for diluting his ownership interest percentage in the LLC?

If the Minority Member does not have sufficient bargaining power to negotiate a veto right on capital calls (which will probably be the case), then, the Minority Member should try to structure the Operating Agreement such the Minority Member is not required to make future capital contributions to the LLC and the only consequence to the Minority Member for non-participation in a future capital call is the dilution of his Membership Interest in the LLC pursuant to an agreed-upon methodology.

***Sample Provision*****:**

"Future Contributions. Other than the initial Capital Contribution provided for in **Section [ ]** of this Agreement, a Member is not required to make any Capital Contributions to the Company without such Member's written consent."

**C. Preemptive Rights.**

The Operating Agreement will often be drafted by the Majority Member to provide the Majority Member the authority to issue additional membership interests in the LLC in the future. There are many reasons the LLC might issue additional membership interests in the future, including to raise capital, as consideration for a business acquisition, or to incentivize key employees of the LLC through co-ownership. The issuance of additional membership interests in the LLC to others will result in the ownership percentage of the Minority Member being reduced, including his share of the profits (or losses). In order to protect the Minority Member against dilution of his membership interest resulting from the issuance to others of additional membership interests in the LLC, the Minority Member may want to include "preemptive rights" in the Operating Agreement. Generally speaking, preemptive rights afford the Minority Member the opportunity to participate, on a pro basis, in certain types of issuances of membership interests by the LLC occurring in the future. The scope of these preemptive rights varies greatly. For example, the Minority Member will not likely be able to participate in the issuance of membership interests as part of business acquisition transaction or as part of an incentive compensation program with key employees (though the Minority Member may try to cap the amount of membership interests that could be issued to key employees in connection with such incentive program).

***Sample Provision*****:** "Each Member shall have the right to purchase his proportionate share of any New Interests (as defined below) that the Company may, from time to time, propose to issue after the date of this Agreement. For purposes of this **Section [ ]**, each Member's "proportionate share" means the number of New Interests proposed to be issued multiplied by a fraction, the numerator of which is the [Membership Interest / number of Units] held by such Member immediately prior to the issuance of the applicable New Interests, and the denominator of which will be the total [Membership Interests / number of Units] outstanding and held by all Members immediately prior to the issuance of the applicable New Interests. If the Company proposes to issue any New Interests, it shall give each Member written notice (the '***New Interests Notice***') thereof (including notice of the material terms of such issuance) at least [ ] days prior to such issuance, and each Member may purchase his proportionate share of such New Interests for the price and upon the terms specified in such New Interests Notice by delivering written notice to the Company no later than [ ] days after such Member's receipt of the New Interests Notice, identifying the amount of New

Interests to be purchased. If any Member fails to exercise his preemptive rights within such [ ] day period, the Company may proceed to sell the New Interests on the terms set forth in the New Interests Notice as long as such sales are consummated within [ ] days after delivery of the original notice to the Members. '***New Interests***' means any Membership Interest / Units in the Company (and any rights, options or warrants to acquire any such interest, or securities convertible into such interest), other than (i) interests issued pursuant to the acquisition of another Person by the Company by merger, consolidation, purchase of a substantial portion of such other Person's assets or otherwise, (ii) interests issued in connection with any compensatory plan for employees of the Company approved by the Managers {not to exceed in the aggregate [___%] of all outstanding [Membership Interests / Units] as of the date of this Agreement on a fully-diluted basis}, or (iii) interests issued to an unaffiliated, third-party lender in connection with a bona fide financing transaction."

**D. Exit Right.**

Under §101.107 of the TBOC, a Minority Member does not have the right to unilaterally withdraw from the LLC and receive payment for the value of his membership interest in the LLC. In addition, the Operating Agreement will likely contain a similar provision expressly denying withdrawal rights for the Members. This restriction on withdrawal limits the ability of the Minority Member to monetize his investment until the LLC is sold or liquidates. Because the Minority Member does not have the voting power to cause the sale or liquidation of the LLC, the Minority Member's investment could be "locked-up" indefinitely. To give the Minority Member the ability to monetize his investment in the LLC, one should consider including in the Operating Agreement a withdrawal right for the benefit of the Minority Member ("***Put-Right***"). Under the Put Right, after a certain period of time (i.e. 5 years), the Minority Member can require the LLC (or the Majority Member) to purchase the Minority Member's membership interest in the LLC at specified price and upon specified payment terms. In exchange for the Put-Right, the Majority Member may require the Minority Member to take a discount on the purchase price to be paid for his membership interest and/or be paid in installments over a period of time.

***Sample Provision*:**

"(a) Upon the occurrence of a Put Event (as defined herein) affecting the [Minority Member] (the '***Put Member***'), the Put Member shall have the right (the '***Put Right***'), but not the obligation, to sell all (but not less than all) of the [Membership Interest] or [Units] held by such Put Member (the '***Put Interest***') to the Company. Such Put Member shall exercise the Put Right by delivering to the Company a written notice (the '***Put Notice***') of its exercise of the Put Right within [ ] days after the occurrence of the Put Event; provided, that the Put Member may exercise the Put Right only during such period.

(b) Promptly following the delivery of a Put Notice, the Company and the Put Member shall negotiate in good faith to agree on the purchase price ('***Put Purchase Price***') to be paid for the Put Interest. If the Company and the Put Member are not able to agree on the Put Purchase Price within [ ] days after the date the Put Notice is delivered (the '***Put Purchase Price Negotiating Period***'), the Put Purchase Price shall be the Fair Value of the Put Interest as of the date of the Put Event, as determined by the following procedures:

(i) The Company and the Put Member shall each select an Independent Appraiser within [ ] days after the termination of the Put Purchase Price Negotiating Period. The two Independent Appraisers so selected shall each independently determine the Fair Value of the Put Interest and, as long as the difference in the two determinations does not exceed 10% of the lower of the two appraisals, Fair Value of the Put Interest shall be conclusively deemed to equal the average of the two appraisals and the determination of such Independent Appraisers shall be binding on the parties. Each party shall pay the fees and expenses of its own Independent Appraiser. If either party fails to select an Independent Appraiser within the time required by this **Section [ ]**, the Fair Value of the Put Interest shall be conclusively deemed to equal the determination of the

Independent Appraiser timely selected by the other party.

(ii) If the difference between the two appraisals referred to in **Section [ ]** exceeds 10% of the lower of the two appraisals, the two Independent Appraisers shall select a third Independent Appraiser who shall also independently determine the Fair Value of the Put Interest. In such case, the Fair Value of the Put Interest shall be the average of the two closest appraisals. The determination of such Independent Appraisers shall be binding on the parties. The cost of the third appraisal shall be paid as follows: (x) 50% by the Company and (y) 50% by the Put Member.

(iii) In determining the Fair Value of the Put Interest, the Independent Appraisers appointed pursuant to this **Section [ ]** shall consider all opinions and relevant evidence submitted to them by the parties or otherwise obtained by such Independent Appraisers and shall set forth their determinations in writing, together with their opinions and the considerations on which their opinions are based, with a signed counterpart to be delivered to each party within [ ] days after commencing the appraisal.

(iv) At any time during the appraisal process, the Company and the Put Member may negotiate a mutually agreeable value for the Put Interest and the appraisal process shall terminate.

(c) The Put Purchase Price shall be paid, at the option of the Company, either in cash or by a cash closing payment of no less than [___%] of the Put Purchase Price and the delivery of a promissory note of the Company for the balance, providing for equal [annual] installments payable over a period of [ ] years. The note shall carry interest at a fixed rate equal to [(___%) or (interest rate index)] on the date of the final determination of the Put Purchase Price, compounded annually. The note shall permit prepayment, without penalty or premium, and shall provide for acceleration of the principal amount thereof, and all accrued but unpaid interest, in the event that the Company fails to discharge its obligations thereunder. The note shall be subordinate in right of payment to the obligations of the Company and its affiliates to any bank or other financial institution providing credit to the Company or any of its affiliates to the extent required by such bank or financial institution.

(d) The closing of the purchase of the Put Interest shall occur at the offices of the Company on a date designated by the Company that is not later than [ ] days following the final determination of the Put Purchase Price, subject to the satisfaction of any Conditions, in which case the purchase of the Put Shares shall be delayed pending the satisfaction of the Conditions. At the closing of such transaction, the parties shall execute and deliver such documentation as is reasonably necessary or appropriate to consummate such transaction. Such purchase shall be effected by the delivery by the Put Member to the Company of any certificate or certificates evidencing the Put Interest to be purchased or other assignment document in form satisfactory to the Company, free and clear of any liens or encumbrances (other than those that arise under federal or state securities laws or by virtue of this Agreement), and duly endorsed for transfer to the Company, against payment to the Put Member of the Put Purchase Price in accordance with the terms hereof.

'***Conditions***' means any required material third party or governmental approvals, compliance with applicable laws and the absence of any injunction or similar legal order preventing such transaction.

'***Fair Value***' means an amount equal to the price at which the Put Interest is likely to be sold in an arm's-length transaction between a willing and able buyer and a willing and able seller, and neither of which is under any compulsion to buy or to sell, based on market conditions prevailing at the time, taking into account all attendant circumstances, [but excluding from such determination of Fair Value any reference to lack-of-control and lack-of-marketability discounts].

'***Independent Appraiser***' means an appraiser of nationally or regionally-recognized standing with substantial experience appraising businesses and assets similar to the business and assets of the Company and who has not, within the preceding [ ] years,

performed services for the Company or the Person designating such appraiser, or any of their respective affiliates.

'***Put Event***' means the [ ] anniversary of the date of this Agreement."

## E. Appointment of a Manager.

The Majority Member will control the business and affairs of the LLC. The primary way in which the Majority Member will accomplish this control is through the appointment of Managers. While the Minority Member will not control the LLC, the Minority Member may want to ensure that he at least has a seat at the "Managers table" so that he can have input on various business decisions—even if the Minority Member cannot make the final decision. Without special drafting, the Operating Agreement may be drafted in a manner that allows the Majority Member to appoint, remove, and replace all of the Managers. Accordingly, if it is important for the Minority Member to be represented among the Managers, the Operating Agreement should include a provision that gives the Minority Member the right to appoint, remove, and replace a specified number of Managers. If the Majority Member is agreeable to the Minority Member having such Manager appointment rights, the Majority Member may condition such appointment rights on the Minority Member maintaining at least a certain ownership percentage (i.e. 10-20%) in the LLC, and once the Minority Member's ownership drops below that percentage, the appointment rights go away.

***<u>Sample Provision</u>*:**

"A <u>Election, Number, Term of Office</u>. The number of Managers shall be [ ]. The Majority Member shall be entitled to elect two (2) Managers. The initial Managers designated by the Majority Member are [ ] and [ ]. The Minority Member shall be entitled to elect one (1) Manager. The initial Manager designated by the Minority Member is [ ]. Unless a resolution of the Members electing a Manager specifies a limited term for which the Manager is elected, a Manager shall serve until his successor is elected and qualified or, if earlier, the Manager's death, termination of existence, dissolution, legal incapacity, resignation or removal. If a resolution of the Members electing a Manager specifies a limited term for which the Manager is elected, the Manager shall serve until the expiration of such term and until the Manager's successor is elected and qualified, or until the Manager's earlier death, termination of existence, dissolution, legal incapacity, resignation, or removal. Managers need not be Members or residents of the State of Texas.

B. <u>Vacancies</u>. Any vacancy occurring in the number of Managers shall be filled by action of the Member who had a right to elect the Manager whose position is then vacant. The person elected to fill the vacancy shall serve for the unexpired term of his predecessor, if any, or, in the case of a vacancy arising from an increase in the number of Managers, for the term, if any, specified in the resolution of the Members creating the vacancy, and, in each case, until the person's successor has been elected, or until the person's earlier death, termination of existence, dissolution, legal incapacity, resignation or removal.

C. <u>Removal and Resignation</u>. Any Manager may be removed, with or without cause, by the Member entitled by the provisions of this Agreement to elect such Manager. Any Manager may be removed by a vote of the Members if that Manager engages in willful misconduct involving the Company. Any Manager may resign at any time. Such resignation shall be made in writing and shall be effective upon delivery to the Company unless a later time is specified therein."

## F. Action of the Managers Without a Meeting.

To some extent, this topic goes together with the "Appointment of Manager" topic in the previous section. §101.358 of the TBOC permits the Managers to take action that could otherwise be taken at any annual or special meeting of the Managers without notice and without holding an actual meeting of Managers if a written consent is signed by at least the minimum number of Managers that would be required to vote for the action if there was an actual meeting. The purpose of this provision is to give the LLC flexibility to take action promptly without having to go through the formalities of an actual annual or special meeting of Managers so long there is the requisite Manager support for the action. However, from the point of view of the Minority Member who has Manager appointment rights, the ability of the Managers to take action without a meeting by less than all of the Managers could deprive the Minority Member from participating in the decision-making process of the Managers because the Managers appointed by the Majority Member could unilaterally take action through the execution of a written consent

document without the joinder or knowledge of the Manager appointed by the Minority Member. The Operating Agreement could require that any action by the Managers by written consent without a meeting must be signed by all of the Managers (or, alternatively, a requisite number of Managers that must include a Manager appointed by the Minority Member).

> ***Sample Provision #1***: "Action by Written Consent. Any action permitted or required to be taken at a meeting of the Managers may be taken without a meeting, without prior notice, and without a vote, if written consents, setting forth the action so taken, are signed by all of the Managers."

> ***Sample Provision #2***: "Action by Written Consent. Any action permitted or required to be taken at a meeting of the Managers may be taken without a meeting, without prior notice, and without a vote, if written consents, setting forth the action so taken, are signed by the Managers having not fewer than the minimum number of votes that would be necessary to take the action at a meeting at which all Managers, entitled to vote on the matter, were present and voted; provided that, at least one of the Managers signing such written consents must be a Manager appointed by the Minority Member."

### G. Amendments To The Operating Agreement.

Often the Operating Agreement provides that the Operating Agreement can be amended by Members holding a specified percentage (but less than 100%) of the Membership Interests. The last thing the Minority Member wants to happen is to negotiate for certain key points to be included in the Operating Agreement and then leave the door wide-open for the Majority Member to "un-do" these points by subsequently amending the Operating Agreement. One should make sure that the amendment provision for the Operating Agreement sufficiently protects the Minority Member against amendments to the Operating Agreement that unravel the key deal-points that the Minority Member originally bargained for. Ideally, the Minority Member would like the Operating Agreement to provide that the Operating Agreement cannot be amended without the consent of all of the Members (or at least with the consent of the Minority Member). The Majority Member may balk at this, especially if there are numerous Members and Minority Member has a relatively small ownership interest in the LLC because that LLC could be handcuffed from making a much-needed amendment to the Operating Agreement by a rogue, Minority Member. In that case, a compromise position might be that the amendment of certain key provisions would require the approval of the Minority Member (or a high threshold % interest that would require approval of a portion of the minority ownership).

> ***Sample Provision***: "Amendment or Modification. This Agreement may be amended or modified from time to time only by a written instrument adopted by the Manager and executed and agreed to by a Required Interest; *provided*, *however*, that (a) an amendment or modification reducing a Member's [Membership Interests / Units] or interest in Profits or Losses or in distributable cash is effective only with that Member's consent; (b) an amendment or modification that adversely affects the rights or interests of a single Member (and no other Member) is effective only with that Member's prior written consent; (c) an amendment or modification to add to the representations, duties, or obligations of a Member is effective only with that Member's consent; (d) an amendment or modification to surrender any material right or power granted to the Member in this Agreement is effective only with that Member's consent [OR an amendment or modification to §§___, ___, ___, or ___ of this Agreement is effective only with the consent of the (Minority Member)]; (e) an amendment or modification that affects the limited liability of a Member is effective only with that Member's consent; and (f) an amendment or modification reducing the required [Membership Interests / Units] or other measures for any consent or vote in this Agreement is effective only with the consent or vote of Members having the [Membership Interests / Units] or other measures theretofore required; *provided further* that dilution occurring in connection with the issuance of [Membership Interests / Units] properly authorized and issued in accordance with this Agreement shall not be deemed an amendment or modification requiring consent hereunder."

## III. REPRESENTING A 50% MEMBER.

When the LLC is owned by two (2) Members 50%/50%, decisions relating to the LLC will require the approval of both Members. At the "kick-off" of the

LLC, the Members are pretty much in agreement on everything—that is why they entered into business together in the first place. However, what happens down the road if the Members disagree on a significant matter relating to the LLC? The Members are at a stalemate. One of the most important issues to address in this 50/50 ownership arrangement is how to resolve a disagreement between the 50/50 Members on a significant matter relating to the LLC. Examples of such key matters may include: (1) establishing the annual budget, (2) borrowing money, (3) hiring or firing an executive employee, (4) expanding or contracting the business, and (5) selling the business. There are a number of ways to handle the resolution of a deadlock.

### A. Require Unanimity.

One option is that the 50/50 Members must agree on the LLC action in order to take action. This forces the 50/50 Members to try to resolve the deadlock. However, if a resolution cannot be achieved, then hostility can increase and the LLC may languish. At that point, the only option may be to seek a court-ordered winding up of the LLC pursuant to §11.314 of the TBOC.

### B. Appointment of a Mediator.

Another option in resolving a deadlock is for the 50/50 Members to appoint a mutually agreeable mediator to assist them in resolving the deadlock. The mediator would not have any authority to make a binding decision so an unsuccessful meditation would not resolve the deadlock.

### C. Appointment of a Deadlock Person to Cast Deciding Vote.

One method to actually break a deadlock in a 50/50 ownership arrangement is to appoint a third person for the sole purpose of casting the deciding vote to break the deadlock (the "***Deadlock Person***"). The Deadlock Person position is only activated when there is a deadlock between the 50/50 Members. The vote of the Deadlock Person breaks the deadlock and is final and binding on the Members.

The Deadlock Person should be an impartial person trusted by both Members. It is beneficial if the Deadlock Person has experience in the line of business of the LLC or in the types of deadlock decisions that will be encountered. Also, it is preferable if the Members can agree in advance on the person to serve as the Deadlock Person in order to avoid the need to reach an agreement on the Deadlock Person in the heat of a "live" deadlock situation where the Members may become more biased in their selection of a Deadlock Person. It would further be a good idea to confirm with the Deadlock Person candidate that he would be willing to consider serving in that capacity if needed. In casting the deciding vote, typically the Deadlock Person must select one of the options proposed by the deadlocked Managers / Members; the Deadlock Person does not have the discretion to vote for a compromise position or for something different than proposed by the Managers / Members. **Note:** There may be some matters which may be considered too important to commit to a third party Deadlock Person (i.e. issuance of additional equity, or sale or liquidation of the business)—such that the 50/50 Members would need to agree on those extraordinary actions.

> ***Sample Provision*:** "Deadlock in Vote of Managers / Members. If there is a deadlock in the vote of the Managers [Members] on any Major Action (a '***Deadlocked Action***'), and such deadlock continues for a period of fifteen (15) days despite good faith deliberations by the Managers [Members], then such Deadlocked Action shall be resolved by the vote of [Insert Name], or, if such person is unable or unwilling to serve, an individual designated with the consent of all of the Managers [Members] (the '***Deadlock Person***'). The Managers [Members] shall collectively meet with the Deadlock Person within two (2) business days after his appointment regarding the Deadlocked Action and be provided a reasonable opportunity to present their respective views on the Deadlocked Action. Until the Deadlocked Action is resolved, all verbal communications between any Manager [Member] (or his Affiliates) and the Deadlock Person relating to the Deadlocked Action must be in the presence (whether in-person or by telephone conference) of at least one (1) Manager [Member] representing the opposing view, and all written communications must be transmitted via e-mail simultaneously to all of the Managers [Members]. The vote of the Deadlock Person must be identical to a vote proposed by one of the deadlocked Managers [Members] and must be cast within [ ] business days after his appointment. The decision of the Deadlock Person shall be final and binding on the Company, the Managers, and the Members. The Deadlock Person shall have no liability to the Company, the Members, or the Managers other than by reason of his intentional fraud or willful misconduct.

'***Major Actions***' means (1) the approval of the annual budget of the Company, (2) the hiring or firing of any officer of the Company or an employee having annual compensation in excess of $______, (3) borrowing in excess of [$ ], or (4) [ ]."

**D. Push-Pull.**

Another way to resolve a deadlock is through a "Push-Pull" provision in the Operating Agreement whereby there is an opportunity for a complete buy-out of one 50% Member by the other 50% Member if the parties cannot resolve a deadlock after a certain period of deliberations. Under the typical arrangement, after the unsuccessful deliberation period, either 50% Member can activate the "Push-Pull" by offering to either (1) sell his 50% Membership Interest to the other 50% Member at a specified price for cash or (2) purchase the other 50% Member's Membership Interest at the same specified price for cash. The other 50% Member then must elect to either buy or sell at the specified price for cash. If the other 50% Member fails to make a timely election, then he is deemed to have elected to sell his 50% Membership Interest. Because the "Push-Pull" is a drastic method for resolving a deadlock, ideally, it should only be used when there is a bona fide disagreement on major LLC actions such as a significant borrowing or expenditure, business expansion or contraction, issuing equity, or the selling the business. Furthermore, the Push-Pull may not be a viable option if one of the 50% Members is in a significantly stronger financial position than the other 50% Member, as the wealthier Member may be the only party with the resources to effectuate a buy-out. Moreover, the wealthier Member could set the buy-out price at relatively low, bargain price, but still too high for the other Member to afford. This gamesmanship could effectively allow the wealthier Member to steal the LLC away from the other Member.

***Sample Provision*:** "If the Members disagree on any Major Action and such disagreement is not resolved within [ ] days after the commencement of good faith discussions by the Members to resolve the same, then either Member shall have the right to (but shall not be obligated to) exercise the buy-sell rights set forth below by delivering a Buy-Sell Notice (as defined below) to the other Member. If a Member desires to exercise the buy-sell right provided in this **Section [ ]**, such Member (the '***Initiating Member***') shall deliver to the other Member (the '***Responding Member***') written notice (the '***Buy-Sell Notice***') of such election, which Buy-Sell Notice shall set forth (1) a summary of the unresolved Major Action that triggered the buy-sell right, and (2) the purchase price (the '***Purchase Price***'), payable in a lump-sum cash payment at closing, at which the Initiating Member shall either (A) purchase all of the Membership Interests owned by the Responding Member or (B) sell all of its Membership Interests to the Responding Member. Within [ ] days after the Buy-Sell Notice is received by the Responding Member (the '***Response Deadline***'), the Responding Member shall deliver to the Initiating Member a written notice (the '***Response Notice***') stating whether the Responding Member elects to (A) sell all of its Membership Interests to the Initiating Member for the Purchase Price or (B) purchase all of the Membership Interests owned by the Initiating Member for the Purchase Price. If the Responding Member fails to deliver the Response Notice by the Response Deadline, the Responding Member shall be deemed to have elected to sell all of its Membership Interests to the Initiating Member at the Purchase Price. The closing of the purchase and sale of Membership Interests pursuant to this **Section [ ]** shall occur shall within [ ] days after the Response Notice is delivered (or deemed to have been delivered) to the Initiating Member. The Purchase Price shall be paid by purchasing Member (the '***Buyer***') at closing by wire transfer of immediately available funds to an account designated in writing by the selling Member (the '***Seller***'). At such closing, the Seller shall deliver to the Buyer good and marketable title to its Membership Interests, free and clear of all liens and encumbrances (other than those that arise under federal or state securities laws or by virtue of this Agreement). Each Member agrees to take all actions and execute all documents reasonably necessary or appropriate to effectuate the purchase of the Seller's Membership Interest by the Buyer. If the Seller has guaranteed, or is otherwise obligated on, any debts or obligations of the Company, the Buyer and the Company shall use reasonable commercial efforts to obtain the complete release of the Seller from such debts and obligations (but without the Buyer or the Company being required to incur any financial obligation to obtain such release). If the Seller is not completely released from

such debts and obligations, then the Buyer and the Company shall jointly and severally indemnify and reimburse the Seller for any amounts paid by the Seller in respect of such debts and obligations.

'***Major Actions***' means [ ]."