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LLC BUY SELL AGREEMENT

– Sample for the use of legal counsel only –

This is an Agreement between [*Names of Members*] (hereinafter collectively referred to as the “Members” and otherwise referred to as the “Member(s)”) and [*Name of Limited Liability Company*], a limited liability company organized under the laws of [*Name of State*] (the “Company”). The Members (including any persons who later become a party hereto) and the Company are sometimes referred to as the Parties. This Agreement is effective as of the last date on which all of the Parties have signed it.

RECITALS

A. Each Member owns an interest in the Company as set forth below.

<u>Name of Member</u>	<u>Percentage Interest</u>
_____	_____ %
_____	_____ %
_____	_____ %

B. The Company is now engaged in the business of [*Description of Nature of Business*].

C. The management of the Company is vested in its [*Members*] [*managers (whether one or more, hereinafter referred to as the “Managers”*)].

D. The Parties agree that it is in their best interests to restrict the ownership in the Company.

E. The Members believe that it is in their best interests if each Member’s interest is subject to an option to purchase by the other Members of the Company in the event of a Member’s death, disability, or other unpermitted transfer.

This sample document is intended only as guidance for the client’s own legal counsel. The document is general in nature and does not reflect the specific circumstances of any individual or situation. The document does not constitute tax or legal advice and cannot be used to avoid any penalties that may be imposed on a taxpayer. It is intended that the client’s legal counsel will modify the document where necessary to satisfy the client’s objectives and the requirements of any applicable federal, state or local law. Northwestern Mutual does not guarantee the effectiveness of this document and is not responsible for any tax or legal consequences resulting from use.

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NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Disability of a Member.** If an individual Member becomes Totally Disabled (as defined below), the following provisions shall apply to the disposition of his or her interest in the Company.

- (a) A Member shall be conclusively deemed to be Totally Disabled or have a Total Disability if (i) with respect to any policy of disability insurance issued by a commercial insurer insuring such Member, such policy's payee is determined eligible to receive benefits, (ii) a waiver of premium benefit upon total disability forming a part of any policy of life insurance insuring such Member pays such benefit, or (iii) he or she is determined eligible to receive disability benefits from Social Security. In the absence of any such determinations by a commercial carrier or by Social Security, the term Total Disability or Totally Disabled means the inability of a Member to perform substantially all the regular duties of his or her position with the Company due to sickness or injury. If there is a dispute regarding the existence or continuation of a Total Disability, the Member shall submit to an examination by a medical doctor licensed to practice medicine in [Name of State] no more frequently than once in any [Ninety (90)] day period. Any period of Total Disability shall be deemed to be continuing until the disabled person has either died or failed to meet the definition set forth above for a period of [three (3)] consecutive months.

***Comment:** In the case of requiring medical examinations, the drafter should address how the doctor will be selected, any necessary qualifications of such doctor and who will pay the medical fees.*

[OPTION 1 – CROSS PURCHASE]

- (b) **Purchase by Members.** After a Member has been Totally Disabled for a continuous period of eighteen (18) months, (in the case of Total Disability being determined by a commercial insurer or the Social Security Administration, this eighteen month period commences on the date of the disability and not on the expiration of any elimination period), the other Members shall purchase the entire membership interest owned by the disabled Member, upon the price and terms set forth in Sections 3 and 4 hereof. Unless otherwise agreed by the other Members, the portion of the disabled Member's membership interest to be acquired by each of the other Members shall be determined pro rata according to the relative percentage interest in the Company represented by each other Member's membership interest as of the date of the disability.

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[OPTION 2 – ENTITY PURCHASE]

- (b) Purchase by Company. After a Member has been Totally Disabled for a continuous period of eighteen (18) months, (in the case of Total Disability being determined by a commercial insurer or the Social Security Administration, this eighteen month period commences on the date of the disability and not on the expiration of any elimination period), the Company shall purchase the entire membership interest owned by the disabled Member, upon the price and terms set forth in Sections 3 and 4 hereof.

2. Death of a Member.

[OPTION 1 – CROSS PURCHASE]

Purchase by Members. Upon the death of a Member, the other Members shall purchase the entire membership interest owned by the deceased Member, upon the price and terms set forth in Sections 3 and 4 hereof. Unless otherwise agreed by the other Members, the portion of the deceased Member's membership interest to be acquired by each of the other Members shall be determined pro rata according to the relative percentage interest in the Company represented by each other Member's membership interest as of the date of the death.

[OPTION 2 – ENTITY PURCHASE]

Purchase by Company. The Company shall purchase the entire membership interest of a Member upon the Member's death. The closing of such purchase shall take place within ninety (90) days of the death, unless more time is reasonably necessary for the Company to effect such purchase. The purchase price of any membership interests purchased under this section shall be at the price determined under Section 3 hereof. For purposes of determining the valuation date under Section 3 hereof, the death of the Member shall constitute the "option event."

3. Purchase Price. The purchase price determined under this Section for any membership interest purchased shall be equal to

[OPTION 1: APPRAISAL METHOD]

the fair market value of the membership interests determined by an independent appraisal as of the last day of the full calendar month immediately preceding the notice of exercise under Section 11 hereof, or the notice of Transfer under Section 12 hereof, as the case may be (the "option event"). If within [thirty (30)] days after the notice of exercise the parties are unable to agree on such an appraiser, each party shall select an appraisal firm and such two (2) appraisal firms shall select a third independent appraisal firm, which firm shall conduct the actual appraisal. Discounts for lack of marketability and/or minority discounts [shall] [shall not] be

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applied in determining the fair market value. The results of the appraisal shall be deemed conclusive in the absence of fraud, malfeasance or gross negligence.

[OPTION 2: BOOK VALUE FORMULA METHOD]

the net book value of the membership interest as of the end of the most recent taxable year of the Company ended prior to the notice of exercise under Section 11 hereof, or the notice of Transfer under Section 12 hereof, as the case may be (the “option event”) less any distributions paid or payable to the seller and not reflected in said book value. Said book value shall be based upon the balance sheet included in the Company’s federal income tax return for said taxable year and shall be adjusted to reflect the then current fair market value of any real estate and improvements owned by the Company and to put the balance sheet, for this purpose only, on the accrual method. The fair market value of real estate and improvements shall be determined by an appraiser mutually agreed upon by the Company and the Member, or if they are unable to so agree, an appraiser to be chosen by *[Name of Mutually Agreeable Independent Third Party]* upon the request of either party. For purposes of determining the portion of said purchase price payable in exchange for the seller’s interest in Company property other than unrealized receivables, the entire purchase price, less an amount equal to the unrealized receivables reflected in said book value, if any, shall be treated as the amount paid in exchange for seller’s interest in such other property. The Company shall, at its own expense, compute said purchase price within *[thirty (30)]* days of the option event. Said seller may, at his, her, or its own expense, have an independent certified public accountant audit or otherwise examine the books of the Company for the exclusive purpose of independently determining said purchase price, provided that said accountant executes and delivers to the Company a confidentiality agreement in form and substance satisfactory to the Company prohibiting disclosure of any information so obtained other than disclosure to said seller of the price so determined by said accountant and information relating to the difference, if any, between said price and the price determined by the Company.

[OPTION 3: STIPULATED VALUE METHOD]

the product of \$_____ *[Value of Company]* multiplied the percentage interest of the total membership interest in the Company represented by the selling Member’s membership interest as of the date of the notice of exercise under 11 hereof, or the notice of Transfer under Section 12 hereof, as the case may be (the “option event”).

Comment: *In the case of a specific dollar amount, consider requiring a periodic update of that value.*

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4. Terms.

(a) The purchase price for all purchases pursuant to the foregoing Sections of this Agreement shall be payable as set forth below (or, in the event of an option arising under Section 10, at the price specified in the Offer and/or such longer payment term as may be specified in the Offer):

(i) Cash Portion. The purchaser shall deliver to the seller at closing an amount of cash or a certified check equal to the greater of _____ [insert percentage] % of the total purchase price, or the amount of insurance proceeds received by the purchaser on account of the death or disability of a Member (if the purchase and sale is made pursuant to the death or disability of a Member), but not more than the total amount of the purchase price.

(ii) Promissory Note. Any balance of the purchase price not paid in cash at closing shall be paid by the purchaser's delivery of a signed negotiable promissory note (the "Note") in the original principal amount of the balance. The Note shall require payment of the principal amount in _____ [insert number of quarterly installments] equal consecutive quarterly installments together with interest at a rate per annum equal to the lowest Applicable Federal Rate under the Code on said date. The Note shall allow the prepayment of all or any part of the principal amount at any time without penalty. The Note shall be executed by all purchasers as makers, and all purchasers shall be jointly and severally liable for full payment according to its terms. *[As security for the Note, the purchaser shall execute a pledge of the membership interest being purchased and sold in favor of any holder of the Note.]*

Comment: *The above clause requires the Company interest subject to the sale to be pledged as collateral. However, this may not be adequate security. Accordingly, it may be advisable to require the purchaser to pledge personal assets or unencumbered partnership property as collateral.*

Comment: *The above clause provides for a rate of interest necessary to avoid imputation of interest under federal tax provisions relating to below market loans (generally found in I.R.C. § 7872). Of course, the parties are free to provide for a higher interest rate if they so wish.*

(iii) In the event of any bona fide dispute regarding the price, terms, or other rights relating to said purchase, installments due hereunder may be paid into an interest-bearing escrow account designated by the Company pending the final resolution of said dispute.

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- (b) The selling party shall transfer and convey his, her or its interest in the Company to the purchasing party at closing free and clear of all encumbrances except those arising out of this Agreement.
- (c) Unless otherwise agreed by the Company and all of the parties thereto, the closing for all purchases by the Company or Members pursuant to said Sections hereof shall be held at [____ a.m./p.m.] at the principal office of the Company on the [*one hundred twentieth (120th)*] day after the date of the notice of offer under Section 9 hereof or the option event under Section 11 hereof, as the case may be, or if such day is a Saturday, Sunday, or legal holiday, on the next business day thereafter.
- (d) If a living individual Member sells his interest in the Company pursuant to this Agreement, and if such selling Member dies before receiving the entire purchase price, then the purchaser shall pay to the estate of such Member (or other successor in interest) an amount equal to the lesser of: (i) the amount of any life insurance proceeds received by the purchaser on account of the death of such Member, or (ii) the remaining principal amount owed by the purchaser to the Member as a result of the purchase of such interest in the Company. Such payment shall be credited as a principal prepayment of any note given by the purchaser pursuant to this paragraph 5. Any remaining principal balance of such note shall continue in effect according to its terms.

Comment: *The drafter may wish to alter the above clause if this buy-sell arrangement is not funded with life insurance because there may be difficulty in paying the promissory note in full upon the seller's death.*

5. Insurance Policies.

- (a) Purchase of Insurance. The [Company] [Members] shall purchase and maintain policies of disability and life insurance on the life of each [of the other individual] Members to provide for the obligations under this Agreement. The policies shall be the sole property of the owner. Nothing in this Agreement shall be construed as giving an individual Member any incidents of ownership in any such policy insuring his or her life. No individual Member nor any successor, transferee, assignee, or personal representative of any individual Member shall have any interest (collateral or otherwise) in any such policy insuring his own life.

Comment: *In general, the intended purchaser upon death or disability should own insurance on the life of each other Member. In some instances, the parties might arrange different ownership arrangements, such as having the insured own a policy on his or her own life and endorse death benefit to the purchasing/surviving Member(s). In this case, the last two sentences of the above paragraph could be deleted.*

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- (b) Purchase by Insured. If the entire membership interest of any living individual Member is transferred pursuant to this Agreement, and if all the obligations of the purchaser for payment of the purchase price have been fully satisfied, then such living individual Member may purchase any policy of insurance insuring his or her life owned by any other Member, for a price equal to the fair market value of such policy, as determined under Treas. Reg. § 25.2512-6 (or any successor provision). Such living Member may also purchase any disability policy insuring such living individual Member. The fair market value of any disability policy shall be the unearned premium.

***Comment:** Some parties might want to exclude the above paragraph that provides a Member with the right to purchase a policy on his own life, as some legal authorities suggest that an insured's right to do so, even if never exercised, could amount to an incident of ownership. See, e.g., Rev. Ruls. 79-46, 1979-1 C.B. 303 and 75-70, 1975-1 C.B. 301. On the other hand, other legal authorities have found no incident of ownership in similar situations. See, e.g., Smith, 73 T.C. 307 (1979); Morrow, 19 T.C. 1068 (1953); and Infante, T.C. Memo 1970-206 (1970).*

NOTE: OPTION 1 PRESCRIBES THAT EACH REMAINING MEMBER MAY PURCHASE THE POLICIES OWNED BY A TRANSFEROR MEMBER OR A DECEASED MEMBER. OPTION 2 OBLIGATES THE COMPANY TO BUY SUCH POLICIES.

[OPTION 1 – MEMBER OPTION TO PURCHASE]

- (c) Purchase by Members. Upon the transfer of the entire Company interest of any living Member pursuant to this Agreement or upon the death of any Member, each remaining Member shall have the option to purchase a pro rata portion of any policy of life insurance owned by such transferor Member or such deceased Member, as the case may be, insuring the life of any other remaining living Member. Such option to purchase shall be in the same proportion that such Member's right to purchase the Company interest from such insured bears to the rights of all remaining Members to purchase the Company interest from such insured. The price for a policy so purchased shall be the fair market value of such policy, as determined under Treas. Reg. § 1.83-3(e) (or any successor provision), with each purchasing Member paying his pro rata portion of the purchase price. The transferor Member or the estate of any deceased Member, as the case may be, shall be bound to sell any such policies owned by the transferor Member or the deceased Member, pursuant to this paragraph. This paragraph shall also apply similarly to any disability policy owned by such transferor Member or such deceased Member, as the case may be, insuring any other remaining living Member. The fair market value of any disability policy shall be the unearned premium.

***Comment:** The purchase of a life insurance policy by a Member gives rise to the "transfer-for-value" rule; however, an exception to this rule exists if the limited liability*

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company is taxed as a partnership, in which case the parties are partners in a partnership.

[OPTION 2 – COMPANY COMPULSORY PURCHASE]

- (c) **Purchase by Company.** Upon the transfer of the entire Company interest of any living Member pursuant to this Agreement or upon the death of any Member, the Company shall purchase and the transferor Member or the estate of the deceased Member, as the case may be, shall sell any policy of life insurance owned by such transferor Member or such deceased Member insuring the life of any living Member, for a price equal to the fair market value of such policy, as determined under Treas. Reg. § 1.83-3(e) (or any successor provision). The Company shall also purchase and the transferor Member or the estate of the deceased Member, as the case may be, shall sell any disability policy owned by such transferor Member or such deceased Member insuring any living Member for a price equal to the fair market value of any disability policy, which shall be the unearned premium.

***Comment:** If the Parties have a cross-purchase arrangement, operation of paragraph 5(c) will place the funding mechanism in the corporation, and away from the purchasers. In this event, the drafter might want to provide that a portion of this Agreement becomes an entity purchase or the Agreement may be amended at that time to so provide.*

6. **Restrictions.** Except as hereinafter provided, no Member shall Transfer all or any part of such Member's interest without the consent of Members holding at least [*insert percentage*] [__%] of the total membership interests [and the Managers (excluding a Manager whose interest is the subject of such transfer)]. Any Transfer or attempted Transfer in violation of the preceding sentence shall be null and void and of no force and effect whatever.

***Comment:** Where one or more of the Company members is itself an entity, it may be appropriate to restrict indirect assignments of interests in the Company by the transfer of ownership interests in the underlying member itself. This can be addressed by the inclusion of the following clause: "For purposes of this Agreement, the Transfer of an ownership or beneficial interest in any Member (other than an individual Member) shall constitute a Transfer of that Member's interest in the Company."*

7. **Permitted Transfers.** Subject to the provisions of Section 8 below, all or a portion of a Member's interest may be transferred as follows: (i) by the Member to any person with the consent of the Managers as provided in Section 6 above, or (ii) to any person in accordance with Section 9 below (any of such transfers hereinafter referred to as a "permitted transfer"). Anything herein to the contrary notwithstanding, a transferee who has not become a Member shall not have the right to acquire membership interests by the exercise of any of the options to purchase set forth herein.

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Comment: *The law of many states prohibits absolute restrictions on the alienation of property. Accordingly, a common technique for ensuring enforceability is to provide for a “right of first refusal” in the other Members in the event that a Member has a bona fide offer to purchase. Furthermore, depending on the nature of the business and other circumstances, the Members may be prepared to allow additional categories of “permitted transfer” that would not require approval, such as: (i) by a Member to such Member’s issue or a trust for such individuals, (ii) by the Member to another Member, (iii) upon the death of an individual Member, to the personal representative of such Member and pursuant to his or her will and/or the provisions of a revocable trust established by the member or the Member and the Member’s spouse, or by succession or transfer on death designation, or (iv) upon the dissolution of any Member which is not an individual, to the Member’s interest holder.*

8. **Conditions to Permitted Transfers.** A Transfer shall not be treated as a permitted transfer unless and until the following conditions are satisfied:
- (a) **Transfer of Full Interests.** Except as permitted by the Managers, a transfer of a portion of a Member’s interest shall be made only in full interests, and no portion of the rights of a Member represented by an interest may be separately transferred except as provided in the Statutes.
 - (b) **Compliance with Securities Laws.** The Managers are satisfied that the proposed transfer will be exempt from registration requirements imposed by federal and state securities laws and will not violate any other applicable requirements thereof. The Managers may require that the transferor or transferee obtain an opinion of counsel reasonably satisfactory to the Managers to that effect.
 - (c) **Avoidance of Tax Termination.** The Managers are satisfied that the proposed transaction will not cause termination under Section 708(b)(1)(B) of the Code. The Managers may require the proposed transferor to deliver an opinion of counsel reasonably satisfactory to the Managers to that effect.
 - (d) **No Public Trades.** The Managers are satisfied that, within Section 7704(b) of the Code, (i) the proposed transaction does not constitute a trade on an established securities market or pursuant to quotation by a broker, dealer or any person regularly making available to the public bid or offer quotes and standing ready to transact at such quoted prices for itself or others, (ii) at the time of the proposed transaction, the membership interests are not traded on an established securities market or readily tradable on a secondary market or the substantial equivalent thereof, and (iii) the proposed transaction will not cause the Company to be treated as a publicly traded partnership. The Managers may require that

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the transferor or transferee obtain an opinion of counsel reasonably satisfactory to the Managers to that effect.

- (e) **Disclosure of Necessary Information.** The transferor and transferee agree to furnish to the Company the transferee's taxpayer identification number, sufficient information to determine the transferee's initial tax basis for the interest transferred and any other information reasonable necessary to permit the Company to file all required federal and state income tax returns and all other legally required documents.
- (f) **Commitment of Transferee.** The transferee executes and delivers to the Company such documents (which may include a counterpart of this Agreement) as may be reasonably required by the Managers to confirm that the transferee agrees as to the transferred interest to be bound by and subject in all respects to the provisions of this Agreement even if such transferee is not made a Member.

9. Bona Fide Offer to Purchase. Subject to the right of first refusal provided for in Section 10 hereof, a Member (the "assigning Member") may assign all, but not less than all, of his, her, or its membership interests (the "assigned interests") to a disclosed purchaser pursuant to a bona fide written offer to purchase which shall, at a minimum, set forth the name and address of the proposed purchaser, the date on which it is given, the proposed price to be paid in cash at closing and the terms of payment, and shall represent that the proposed purchaser is aware of this Agreement and is willing to purchase the assigned interests in accordance with and subject to the provisions hereof even if not made a Member (the "Offer"). A notice of sale specifying a price to be paid in the form of property other than cash or the purchaser's obligation to pay cash shall not be regarded as in compliance with the provisions hereof. The assigning Member shall give written notice of the Offer (the "notice of offer") to a Manager of the Company (other than himself or herself) as soon as practicable after acceptance thereof, and in no event more than **[five (5)]** days thereafter. The notice of offer shall include a true, correct, and complete copy of the executed Offer.

10. Refusal Rights. The Company shall give copies of the notice of offer to all Members other than the assigning Member (the "non-assigning Members") within **[five (5)]** days of its receipt of said notice of offer. The Company and the non-assigning Members shall have the option to purchase all, but not less than all, of the assigned interests at a price equal to the price specified in the Offer, all as set forth below.

- (a) The Company shall give notice ("notice of exercise") to all of the Members, within **[thirty (30)]** days of the date of the notice of offer, of the portion of the assigned interests, if any, it is willing to purchase pursuant hereto.
- (b) Each of the non-assigning Members shall give notice ("notice of exercise") to the Company and all of the other Members, within **[forty-five (45)]** days of the date of the notice of offer,

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of the portion of the assigned interests, if any, said Member is willing to purchase pursuant hereto.

(c)

- (i) If the sum of the portions specified in the notices of exercise is less than all of the assigned interests, the Company and each of the non-assigning Members may increase the portions so specified by submitting amended notices of exercise to the Company and all of the Members within [sixty (60)] days of the date of the notice of offer.
 - (ii) If the sum of the portions specified in the notices of exercise, as amended pursuant to Section 10(c)(i) hereof, exceeds one hundred percent (100%) of the assigned interests, the Company shall be deemed to have elected to purchase, and shall purchase, the portion specified in its notice of exercise, and each non-assigning Member shall be deemed to have elected to purchase, and shall purchase, the percentage of the remaining portion of the assigned interests (up to the portion specified in said Member's notice of exercise) as the percentage of membership interests held by said Member on the date of the notice of offer bears to the total percentage of membership interest then held by all Members electing to purchase hereunder. Any portion of the assigned interests not so allocated shall be allocated in one (1) or more successive similar allocations among those non-assigning Members designating more than their proportionate portion in their respective notices of exercise and each Member shall be deemed to have elected to purchase, and shall purchase, the percentage of the assigned interests so allocated thereto in such successive allocations.
 - (iii) If the sum of the portions specified in said notices of exercise equals one hundred percent (100%) of the assigned interests, the Company and each of the non-assigning Members shall be deemed to have elected to purchase, and shall purchase, the portion of the assigned interests specified in their respective notices of exercise.
 - (iv) If the sum of the portions specified in said notices of exercise is less than one hundred percent (100%) of the assigned interests, the Company and the non-assigning Members shall be deemed to have refused to exercise their option to purchase hereunder.
- (d) Except as provided in Section 10(c)(i) above, neither the Company nor any of the non-assigning Members may amend their respective notices of exercise without the consent of the Company and all of the non-assigning Members.

All purchases pursuant to this Section shall be on the payment terms and otherwise as provided in Section 4 hereof. If the Company and the non-assigning Members refuse to exercise their option hereunder, then the assigning Member shall assign the assigned interests to the purchaser designated in the notice of offer in accordance with the terms of the Offer.

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- 11. Spouses.** The spouse of a Member may acquire and/or hold a marital or other community property interest in the membership interests held in the name of said Member so long as said Member retains all rights of management and control with respect thereto and said spouse has executed this Agreement or a counterpart thereof. Said spouse may assign all or any portion of any such interest to said Member at any time during said spouse's lifetime or upon death, in which case any intermediate Transfer to said spouse's personal or other representative shall be permissible also. In the event that all or any portion of any such interest would otherwise be transferred other than to said Member, either during said spouse's lifetime or upon his or her death, said spouse, or the personal or other representative thereof, shall give written notice of said Transfer to said Member and to a Manager of the Company (other than said Member) at least [*one hundred twenty (120)*] days prior to when said Transfer is to be effective, and said Member shall have the option to purchase all or any portion of said interest at a price based upon the price determined under Section 3 hereof. Said Member may exercise said option by giving notice (the "notice of exercise") to the Company and the person who did or should have submitted said notice of Transfer, at any time prior to the expiration of [*sixty (60)*] days after the notice of Transfer, of the portion of such interest, if any, said Member shall purchase pursuant hereto. All purchases pursuant to this Section shall be on the terms and otherwise as provided in Section 4 hereof. In the event said Member does not purchase all of such interest pursuant to this Section, Section 7 hereof shall apply to the portion of such interest not so purchased.
- 12. Transfers.** If all or any portion of a Member's membership interests become subject to involuntarily transfer other than specifically as permitted under the foregoing Sections of this Agreement as the result of any event, including, without limitation, the death of said Member or his or her spouse; the commencement of divorce, spousal remedy, or other family proceedings by or against said Member or his or her membership interests; the failure of said Member to exercise an option arising under Section 11 hereof in its entirety; the commencement of partition, assignment, receivership, or other custodial proceedings with respect to said Member or his, her, or its membership interests; the commencement of bankruptcy or other insolvency proceedings with respect to said Member; or the entry of a judgment against said Member, the Company and the Members other than the Member in whose name such membership interests are held (the "non-transferring Members") shall have the option to purchase all or any portion of said membership interests at the price determined under Section 3 hereof. Said Member shall give written notice of said event to a Manager of the Company (other than himself or herself), or to all of the other Members (if there are no other Managers other than himself or herself), as soon as practicable but in no event more than [*five (5)*] days after the occurrence thereof, and may avoid or defer application of the foregoing provision by furnishing the Company with such documents and other proof as the Managers deem necessary, in their sole discretion, to ensure that said interests will not Transfer from said Member as a result of said event. The Company shall give notice of said event to the non-transferring Members when the Managers determine, in their sole discretion,

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that such Transfer is likely or has occurred as a result thereof (the “notice of Transfer”). The procedure for exercising the option arising under this Section shall be as set forth in Section 10 hereof, except that the date of the notice of Transfer (instead of the date of the notice of offer) shall be used for determining the time periods therein and the Company and the non-transferring Members may elect to purchase less than all of said interests. All purchases pursuant to this Section shall be on the terms and otherwise as provided in Section 4 hereof.

- 13. Exercise & Ordering.** Notwithstanding anything to the contrary contained herein, the decision of the Company to exercise (or refrain from exercising) any option to purchase hereunder shall be made solely by those Managers who are not interested in the transaction as assigning Members or transferring Members, or the majority of the disinterested Members if there are no disinterested Managers. In the event that an option arises under any of the foregoing Sections of this Agreement with respect to membership interests as to which other options thereunder are still pending, the Company and/or Members, as the case may be, shall be entitled to exercise said prior options in accordance with their respective terms, and said subsequent options shall be effective only with respect to membership interests not purchased pursuant to said prior options.
- 14. Applicability.** Unless otherwise agreed by all of the Members, all of the provisions of this Agreement shall continue to apply to all of the membership interests, including, without limitation, membership interests transferred with consent pursuant to Section 6 hereof, membership interests transferred pursuant to a permitted transfer under Section 7, membership interests assigned to a purchaser pursuant to Section 9, membership interests in which a marital or other community property interest is acquired or held by the spouse of a Member as permitted in Section 11 hereof, membership interests as to which any of the options hereunder are pending or have lapsed, and membership interests transferred to a trustee in bankruptcy, a debtor in possession, or a personal or other representative of a deceased Member or otherwise by operation of law, whether or not in violation of any of the terms of this Agreement and whether or not held by a Member.
- 15. Default.** Any attempted Transfer of membership interests that does not comply with all of the provisions of this Agreement shall be invalid and void and shall not be recognized by the Company. The failure of any party to properly close the sale of membership interests required to be transferred to the Company or a Member hereunder upon tender of the purchase price therefor at the time scheduled for closing shall not prevent said Transfer from taking place. Thereupon, all rights of the party that is the transferor with respect to said membership interests under this Agreement and as a Member (other than the right to receive the purchase price so tendered, without interest, upon such closing) shall terminate, and the Company and the remaining Members shall thereafter treat said membership interests as being owned by the person or persons entitled thereto hereunder.

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16. Cure. In the event that one (1) or more Members entitled to purchase membership interests hereunder fails to make payment therefor at closing, the Company shall have the right to cure such default by purchasing said membership interests at the same price and on the same terms as said Member at any time prior to the expiration of [thirty (30)] days after the seller thereof notifies the Company of such default or defaults.

17. Damages. Each Member hereby agrees to indemnify and hold the Company and the other Members harmless for and against damages, including reasonable attorneys' fees and other expenses, incurred thereby as the result of any breach of any of the provisions of this Agreement by said Member or his or her spouse. In the event of any such breach, the aggrieved parties shall be entitled to deduct or collect any such damages so suffered or incurred from any amounts otherwise due to said Member or spouse from the Company or the Members, including, without limitation, distributions with respect to said Member's membership interests and the purchase price for said membership interests.

***Comment:** If one or more members own a substantial majority (but less than all) of the membership interests, it may be appropriate to include a provision which will both protect the majority member(s) from the minority member(s) holding a sale of the Company hostage, and protect the minority member(s) from the majority member(s) selling a controlling interest to an unknown third-party, by compelling participation (by all parties) in such a transaction on the same terms. Such provisions are often referred to as "drag along/tag along" or "come along/bring along" provisions.*

18. Drag Along/Tag Along Rights.

(a) **Drag Along.** If a Member or group of Members holding at least [_____ percent (___%)] of all membership interests entitled to vote (the "Majority Sellers") desire to make a transfer of all, but not less than all, of their membership interests (a "Control Transfer of Interests"), such membership interests shall not be subject to the rights of refusal set forth in Section 5, and the Majority Sellers shall have the right, but not the obligation, to require the non-selling Member(s) (the "Minority") to sell all, but not less than all, of their membership interests to the third party for the same price and on the same terms and conditions as those received by the Majority Sellers. The Majority Sellers shall give written notice of intent to exercise their rights under this Section ___ (a) to the Minority at least [thirty (30)] days prior to the closing of the sale to the third-party purchaser. Such notice shall contain the terms and conditions of the sale and the identity of the third-party purchaser.

(b) **Tag Along.** If the Majority Sellers desire to make a Control Transfer of Interests, the Minority shall have the right to sell all, but not less than all, of their membership interests to the third-party purchaser for the same price and on the same terms and conditions as those received by the Majority Sellers. The Minority may exercise their option under this Section ___ (b) by written notice to the Majority Sellers within [twenty (20)] days of

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notification by the Majority Sellers of the Control Transfer of Interests. The Majority Sellers shall not accept any Third-Party Offer which does not comply with the terms of this Section ____ (b).

Comment: *In the event that the Company is owned 50/50 by two Members, it may be appropriate to incorporate a compulsory sale clause in the event of “deadlock.” A common mechanism in this regard is the so-called “Dutch Auction” – which is essentially an “I cut/You choose” way of resolving the valuation, in that a Member’s proposed purchase price could be the price at which they need to sell, thereby incentivizing a certain level of reasonableness.*

19. Dutch Auction. In the event that the Members reach an impasse with respect to a material matter concerning the Company on which they disagree, or in the event one Member desires to sell the Company and the other Member does not agree, either Member (the “Offeror”) may submit an offer (the “Bid”) stating the price upon which he, she or it will, at the option of the Offeree, purchase all, but not less than all, of the membership interests of the Offeree, or in the alternative, sell all, but not less than all, of his, her or its membership interests to the Offeree. Unless otherwise agreed, within [ninety (90)] days of receipt of the Bid, the Offeree shall inform the Offeror of his election to either sell his, her or its membership interests, or purchase the membership interests of the Offeror, at the price stated in the Bid. Failure to respond to the Bid within [ninety (90)] days shall be deemed an election by the Offeree to sell his, her or its membership interests to the Offeror. If the party purchasing membership interests pursuant to a Bid under this section fails to pay the purchase price, in cash or by certified or bank cashier’s check, within [____ (____)] days of the election determining which Member will sell his, her or its membership interests, then the other Member shall have the opportunity, for a period of [thirty (30)] days, to purchase the membership interests of the other at the same price, less ____%. If the purchase and sale pursuant to this section is not consummated in accordance with the terms of the Bid and this Section _____, all membership interests shall again be subject to the terms and conditions of this Agreement and shall not be transferred except pursuant hereto. Notwithstanding the foregoing, or anything to the contrary contained herein, any Bid shall have as one of its conditions that the selling Member (either the Offeree or the Offeror) shall, at or before closing, be removed as a personal guarantor of any debt or other obligation of the Company, at no cost to the selling Member.

Comment: *In the event that one or more of the individual Members is a “service partner” (viz. one whose contribution to the enterprise is services rather than cash or property), it may be appropriate either to compel the repurchase of such Member’s interest, or at least give the other Members the option to purchase such Member’s interest, rather than have this “service partner” continue on in essentially a “investor” role.*

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20. Spouses. The spouses of any Members hereby confirm that the terms of this Agreement bind whatever marital, community or other interest, if any, they may have in the Company, and that the provisions hereof are fair and equitable with respect to them. Said spouses warrant and represent that the parties in whose name the membership interests are held on the Company records shall have the sole and exclusive right to manage and control said membership interests for credit and other purposes, including, without limitation, the right to vote and exercise all other rights incident to the ownership thereof and to exercise option, consent and other rights under this Agreement, and that the Company and the Members may rely on said warranty in conducting their affairs. Each Member agrees to have any subsequent spouse of said Member execute a counterpart of this Agreement.

21. Security Interest. Each Member hereby grants the Company a security interest in such Member's membership interests and other rights in the Company to secure the obligations of such Member to the Company under this Agreement and otherwise. The parties agree that such security interests shall be perfected by the pledge to the Company.

***Comment:** State security laws and/or commercial code may provide that a pledge can only be perfected by possession, which may require the membership interests to be certificated.*

22. Waiver. Each Member hereby irrevocably waives during the entire term of this Agreement any right that he, she, or it might otherwise have to maintain an action for partition with respect to the property of the Company or his, her, or its membership interests, or to otherwise require the Company to pay fair value or otherwise liquidate said membership interests.

23. Miscellaneous.

(a) **Notices.** Each Member and the Company, through its authorized representative, shall give prompt notice to the other Members and the Company, as the case may be, of all offers, acceptances, refusals, and exercise of options made pursuant to this Agreement. All notices, writings, offers, acceptances, refusals, payments, or agreements given or required to be given under this Agreement shall be made in writing and sent by registered or certified mail, return receipt requested, to the principal business office of the Company and to the last known address of each Member appearing on the books of the Company. Any such notice or other writing shall be deemed given and received upon the expiration of **[three (3)]** days following such mailing with proper postage affixed.

(b) **Definitions.** The following terms, when used herein, shall have the meanings indicated and derivatives thereof should be interpreted accordingly:

(i) the Code -- the Internal Revenue Code of 1986 and the provision(s) thereof referred to herein, respectively, as of the date hereof, except as they may be renumbered or

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otherwise amended from time to time hereafter to the extent that reflection of such changes would not defeat the purposes of this Agreement.

- (ii) the Regulations -- the regulations promulgated pursuant to the Internal Revenue Code and the provision(s) thereof referred to herein, respectively, as of the date hereof, except as they may be renumbered or otherwise amended from time to time hereafter to the extent that reflection of such changes would not defeat the purposes of this Agreement. "Reg. §" refers to a particular provision of the Regulations.
- (iii) Transfer -- Sale, assignment, exchange, pledge, gift, encumbrance, or other disposition of any membership interest or any interest therein (including, without limitation, the acquisition of management or control rights by the spouse of a Member), whether voluntarily or by operation of law or otherwise.
- (iv) the Statutes -- the [*Name of State*] Statutes and the provisions thereof referred to herein, respectively, as of the date hereof, except as they may be renumbered or otherwise amended from time to time hereafter to the extent that reflection of such changes would not defeat the purposes of this Agreement.
- (c) Severability. In the event that any provision of this Agreement is ever finally determined to be wholly or partially illegal, invalid or unenforceable, either in all jurisdictions and circumstances or in particular jurisdictions or circumstances, such provision shall be deemed severed herefrom in those jurisdictions and circumstances as to which it is so determined to be wholly illegal, invalid or unenforceable and shall be limited to the extent required in those jurisdictions and circumstances as to which it is so determined to be partially illegal, invalid or unenforceable, and such severance or limitation shall not affect the legality, validity or enforceability of any of the other provisions hereof or of such provision to the extent not so severed or limited.
- (d) Successors. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective heirs, executors, administrators, legal representatives, successors, and assigns, except that Members may not assign any of their rights or obligations under this Agreement other than as specifically provided herein without the prior written consent of the Company.
- (e) Assurance. Each of the parties hereto shall execute and deliver such documents, including, without limitation, consents with respect to marital property interests, and take such other actions as may be reasonably requested by any other party hereto to carry out the provisions or purposes of this Agreement. However, no party shall be required to contribute capital or extend credit to the Company or vote in a manner so as to incur personal liability solely to satisfy said party's obligations under this Section.

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- (f) Interpretation. In interpreting this Agreement, whenever the context so permits, (i) the singular shall include the plural and the plural shall include the singular and (ii) any gender shall include all genders. The headings in this Agreement are intended for convenience only and shall not affect the meaning or interpretation hereof. This Agreement was drafted jointly by all of the parties, and no rule of construction or other presumption shall arise by reason of authorship of any of the provisions hereof.
- (g) Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument, or with multiple signature pages which may be delivered electronically.
- (h) Jurisdiction. This Agreement shall be governed by, and construed and enforced in accordance with, the internal laws of the state of [*Insert State*]. The parties hereby stipulate and agree that any action or other legal proceeding arising under or in connection with this Agreement or otherwise relating to the Company shall be commenced and prosecuted in its entirety in either the federal or state courts having jurisdiction over [*the principal business address of the Company*] [*Insert County/State*] and each of the Members hereby agree that they shall not assert in any such action or proceeding that either of such courts lacks personal jurisdiction or is not a convenient forum, and hereby waive their rights to contest the jurisdiction and/or venue thereof to the fullest extent permitted by law.
- (i) Specific Performance. The parties hereto (and the spouses thereof) recognize that breach of any of the provisions of this Agreement by any Member or transferee (or the spouse thereof) would cause irreparable injury to the Company, which could not be fully measured or compensated by money damages and for which there would be no other adequate remedy at law, and, therefore, hereby agree that, in the event of any such breach, the Company shall be entitled to obtain temporary restraining orders and temporary and permanent injunctions restraining further violations of and/or requiring compliance with this Agreement, in addition to such other legal and/or equitable relief as may be appropriate and hereby waive, to the fullest extent allowed under applicable law, any bond or other security that would otherwise be required in connection with such relief.
- (j) Waiver. No failure to enforce rights under any provision hereof shall be deemed to be a waiver of such rights or said provision in the absence of a written waiver signed by the party alleged to have so waived.
- (k) Amendment. This Agreement may not be amended, except by an instrument in writing signed by all of the parties hereto. Any such amendment shall be effective when so signed, or as of such other effective date as is designated therein.

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- (l) Integration. This Agreement embodies the entire understanding and agreement among the parties concerning the subject matter hereof and supersedes any and all prior written or oral negotiations, understandings, or agreements in regard thereto.
- (m) Authority. Each of the Members hereby warrants to the other Members that such Member has the requisite power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby, and that such execution, delivery and consummation has been duly authorized by all necessary action with respect to such Member and this Agreement is valid, binding and enforceable by and against such Member in accordance with its terms.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the parties have hereunto set their hands and seals, the Company by its duly authorized representatives, on the day and year written opposite the signature.

[NAME OF COMPANY]

By its Manager/Members [*as applicable*]

_____ (SEAL) Date: _____

_____ (SEAL) Date: _____

_____ (SEAL) Date: _____

Attest: _____ Date: _____

Members

Spouse

_____ (SEAL)
Date: _____

_____ (SEAL)
Date: _____

_____ (SEAL)
Date: _____

_____ (SEAL)
Date: _____

_____ (SEAL)
Date: _____

_____ (SEAL)
Date: _____

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