

## **SAMPLE AGREEMENT**

### **OPERATING AGREEMENT**

**OF**

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**(a Delaware limited liability company)**

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**, 2014**

**THE MEMBERSHIP INTERESTS OF THE COMPANY HAVE NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT") OR ANY STATE SECURITIES LAWS OR THE LAWS OF ANY OTHER NATION OR JURISDICTION AND ARE BEING OFFERED AND SOLD IN RELIANCE ON EXEMPTIONS FROM THE REGISTRATION REQUIREMENTS THEREOF. NEITHER THE MEMBERSHIP INTERESTS NOR ANY INTEREST THEREIN MAY BE OFFERED, SOLD, TRANSFERRED, ASSIGNED, PLEDGED, HYPOTHECATED OR OTHERWISE TRANSFERRED OR DISPOSED OF UNLESS THE SAME HAVE BEEN INCLUDED IN AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT AND ANY APPLICABLE STATE SECURITIES LAWS OR AN OPINION OF COUNSEL SATISFACTORY TO THE MANAGERS OF THE COMPANY HAS BEEN RENDERED TO THE COMPANY THAT AN EXEMPTION FROM REGISTRATION UNDER APPLICABLE SECURITIES LAWS IS AVAILABLE. IN ADDITION, TRANSFER OR OTHER DISPOSITION OF THE MEMBERSHIP INTERESTS ARE RESTRICTED AS PROVIDED IN ARTICLE XI OF THIS OPERATING AGREEMENT.**

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**OF**

(a Delaware Limited Liability Company)

This OPERATING AGREEMENT OF \_\_\_\_\_, LLC, effective as of \_\_\_\_\_, 2014 (the “Effective Date”), is entered into by and between the Members listed on Schedule A attached hereto, each of whom intend to be legally bound hereby. This Operating Agreement, as it may be amended from time to time, shall be binding on any Person who at the time is a Member (as defined below) regardless of whether or not the Person has executed this Operating Agreement or any amendment hereto; and

WHEREAS, the Company was organized as a limited liability company by the filing of a Certificate of Formation on \_\_\_\_\_, 2014 with the Secretary of State of the State of Delaware under and pursuant to the Act.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, and intending to be legally bound, the parties hereby agree as follows:

ARTICLE I  
DEFINITIONS

1.01 Definitions. The following terms used in this Operating Agreement shall have the following meanings:

“Act” shall mean the Delaware Limited Liability Company Act, 6 Del.C. § 8, *et. seq.*, as amended from time to time.

“Affiliate” shall mean, with respect to any Person, any other Person which directly or indirectly controls or is controlled by or is under common control with such Person, or any Person that is an employee of or an officer of or partner in or serves in a similar capacity or relationship with respect to such Person, or any Person of which such Person is an employee of or an officer of or partner in or serves in a similar capacity or relationship with respect to such Person.

“Big Co.” shall mean Big Company, Inc., a Pennsylvania corporation.

“Big Co. Interest” shall mean the Membership Interest held by Big Company, Inc.

“Big Co. Working Capital Loan” shall have the meaning set forth in Section 8.02 of this Operating Agreement.

“Board” shall mean the Board of Managers appointed pursuant to Section 5.02 hereunder.

“Business Venture Agreement” shall mean that certain Business Venture and Contribution Agreement entered into by and between Small Company, LLC and Big Company, Inc. of even date herewith.

“Capital Account” as of any given date shall mean the aggregate Capital Contribution to the Company by a Member as adjusted up to such date pursuant to Article VIII.

“Capital Contribution” shall mean any contribution to the capital of the Company in cash or property by a Member whenever made.

“Cash Flow” for a given period (or portion thereof) means all gross revenues or business receipts for such period (or portion thereof), from any source whatsoever of the Company (determined on a cash basis), less Permitted Expenses for such period (or portion thereof).

“Certificate of Formation” shall mean the Certificate of Formation of the Company as filed with the Secretary of State of the State of Delaware, as same may be amended from time to time.

“Change in Control” shall mean the occurrence of any of the following: (a) any consolidation or merger of a party with or into any third party, or any other corporate reorganization involving a third party, in which those persons or entities that are stockholders or members of such party immediately prior to such consolidation, merger or reorganization own less than fifty percent (50%) of the surviving entity’s voting power immediately after such consolidation, merger or reorganization; (b) a change in the legal or beneficial ownership of fifty percent (50%) or more of the voting securities of any party (whether in a single transaction or series of related transactions) where, immediately after giving effect to such change, the legal or beneficial owner of more than fifty percent (50%) of the voting securities of such party is a third party; or (c) the sale, transfer, lease, license or other disposition to a third party of all or substantially all of a party’s assets in one or a series of related transactions. Notwithstanding the foregoing, “Change in Control” shall under no circumstances include any internal restructuring or reorganization between and among Big Co. and any Affiliate of Big Co. provided that the affected Entity was an Affiliate of Big Co. before and remains an Affiliate of Big Co. after such Change in Control.

“Code” shall mean the Internal Revenue Code of 1986, as amended from time to time, or corresponding provisions of superseding federal revenue laws.

“Company” shall refer to \_\_\_\_\_, a Delaware limited liability company.

“Company Property” means all real and personal property acquired by or contributed to the Company and any improvements thereto, and shall include both tangible and intangible property.

“Core Business” shall mean the design, manufacture, sale and development of digital widgets.

“Covered Loss” shall mean any liability, loss, damage, penalty, action, claim, judgment, settlement, cost, and/or expense of any kind or nature whatsoever, including, without limitation, reasonable attorneys’ fees, costs and expenses of defense, appeal, and settlement of any proceedings instituted or threatened to be instituted against such Covered Person, and all other costs incurred in connection therewith, arising out of or in connection with any act, omission, alleged act or omission, or mistake of fact or judgment arising out of such Covered Person’s activities on behalf of the Company or in furtherance of the interests of the Company.

“Covered Person” shall mean each of the Managers and any officer of the Company.

“Cure Period” shall mean, with respect to any breach by a Member that is of such a nature that it can be cured, the period of time specified herein by which such Member shall have a right to cure such breach from the date the non-breaching Member gives notice of such breach to such Member or, if no such time period is specified, the period that is sixty (60) days from the date the non-breaching Member gives notice of such breach to such Party.

“Entity” shall mean any general partnership, limited partnership, limited liability partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, foreign trust, foreign business organization or other business entity.

“Fiscal Year” shall mean the period terminating on December 31<sup>st</sup> of each year during the term hereof or on such earlier date in any year in which the Company shall be dissolved as provided herein.

“Formula for Calculation of Projected Working Capital Needs” shall mean the formula set forth on Schedule B of this Operating Agreement for determining Working Capital Needs of the Company.

“GAAP” shall mean generally accepted accounting principles in effect in the United States at the time of application thereof, applied on a consistent basis.

“Initial Capital Contribution” shall mean the initial contribution to the capital of the Company pursuant to Section 8.01 of this Operating Agreement.

“Losses” shall mean the net losses of the Company for federal income tax purposes, as determined separately, and not cumulatively, for each Fiscal Year of the Company, after appropriate adjustment for items otherwise allocated, if any, pursuant to this Operating Agreement.

“Major Decision” shall have the meaning set forth in Section 5.04 hereof.

“Majority in Interest” of Members shall mean one or more Members whose combined Percentage Interests exceed fifty percent (50%) of all Percentage Interests owned by all Members.

“Manager(s)” shall mean any member of the Board.

“Material Breach” shall mean the material breach of the following provisions, which material breach is not promptly cured (if curable) upon notice thereof by the non-breaching party with respect to this Operating Agreement, Sections 5.04, 8.01, 8.02, 8.03, 11.01, 11.02, 11.03, 11.04, and 11.05.

“Member” shall mean each of the parties who executes a counterpart of this Operating Agreement as a Member and each of the parties who may hereafter become a Member.

“Membership Interest” shall mean a Member’s entire ownership interest in the Company and the right to participate in the management of the business and affairs of the Company, including the right to vote on, consent to, or otherwise participate in, any decision or action of or by the Members granted pursuant to this Operating Agreement or the Act.

“Non-Dilution Period” shall mean the period from the date hereof until five (5) years after the date hereof.

“Ordinary Course of Business” means an action consistent in nature, scope and magnitude with the normal day-to-day operations of similarly situated companies engaged in the supply of parts, services and equipment to the electric power transmission and distribution industry.

“Percentage Interests” shall mean with respect to each Member, the Percentage Interest stated for such Member on Schedule A, attached hereto and made a part hereof.

“Permitted Expenses” means all costs (capital, operating, and otherwise) of the Company during any period or portion thereof, determined on the basis of sound accounting practices applied on a consistent basis (specifically excluding depreciation, amortization and any other non-cash deductions of the Company for income tax purposes.)

“Person” shall mean any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such “Person,” where the context so permits.

“Profits” shall mean the net profits of the Company for federal income tax purposes, as determined separately, and not cumulatively, for each Fiscal Year of the Company, after appropriate adjustment for items otherwise allocated, if any, pursuant to this Operating Agreement.

“Projected Working Capital Needs” shall mean the Working Capital Needs for the Company, as determined using the Formula for Calculation of Projected Working Capital Needs for any given period.

“Qualifying Significant Sale Transaction” shall mean a Significant Sale transaction or series of related transactions, in which the aggregate net cash proceeds to be received by the holder of the Small Co. Interest would be not less than [\$10,000,000].

“Required Cash Distribution” shall mean for each Fiscal Year or other measuring period, [ten percent (10%)] of Cash Flow for such Fiscal Year or measuring period.

“Significant Sale” shall have the meaning set forth in Section \_\_\_\_\_ of this Operating Agreement.

“Small Co.” shall mean Small Company, LLC, a Delaware limited liability company.

“Small Co. Interest” shall mean the Membership Interest held by Small Company, LLC.

“Small Co. Non-Dilution Right” shall have the meaning set forth in Section 8.02(d) hereof.

“Super Majority in Interest” means one or more Members whose combined Percentage Interests exceed seventy-five (75%) percent of all Percentage Interests owned by all Members.

“Third Party Working Capital Loan” shall have the meaning set forth in Section 8.02 of this Operating Agreement.

“Transfer” means any sale, assignment, conveyance, pledge, donation, hypothecation, encumbrance, disposition, transfer (including, without limitation, a transfer by will or intestate distribution), gift or attempt to create or grant a security interest in any security or interest therein or portion thereof, whether voluntary or involuntary, by operation of law or otherwise, and any contract to do any of the foregoing; provided, however, any sale, assignment, conveyance, disposition or other transfer of all or any portion of the Big Co. Interest to one or more of its Affiliates (and any subsequent transfer by a Big Co. Affiliate to another Affiliate of Big Co.) shall not be a “Transfer” for purposes of this Operating Agreement and shall not be subject to the provisions of Article XI, below.

“Treasury Regulations” shall include proposed, temporary and final regulations promulgated under the Code.

“Unanticipated Working Capital Needs” shall mean, for any period, the Company’s actual or anticipated need for additional Working Capital as a result of booked orders, firm customer forecasts, supply agreement obligations, stocking requirements and other written obligations of the Company to stock or provide goods to customers, which would require Working Capital in excess of the Projected Working Capital Needs.

“Working Capital” shall mean, for any period, the working capital of the Company, as such term is generally applied under GAAP.

“Working Capital Needs” shall mean, for any period, the capital required to meet the Company’s day-to-day operations.

## ARTICLE II FORMATION OF COMPANY

2.01 Formation. The Company has been organized as a Delaware limited liability company by executing and delivering a Certificate of Formation to the Delaware Secretary of State in accordance with and pursuant to the Act. The Company filed a qualification to do business as a foreign limited liability company with the Pennsylvania Secretary of State on \_\_\_\_\_.

2.02 Name. The name of the Company is \_\_\_\_\_, LLC.

2.03 Registered Office, Principal Place of Business, and Other Offices. The Company’s registered office and principal place of business shall be 100 Main Street, Pittsburgh, Pennsylvania 12345 and the Company may maintain such other offices as the Board determines to be necessary or desirable for the conduct of the Company’s business.

2.04 Term. The Company’s existence commenced on the date the Certificate of Formation was filed with the Delaware Secretary of State pursuant to the Act and shall continue in existence indefinitely, unless the Company is earlier dissolved in accordance with either the provisions of this Operating Agreement or the Act.

2.05 Title to Property. All Company Property shall be owned by the Company as an entity and no Member shall have any ownership interest in such property in his, her or its individual name or right solely by reason of being a Member, and except as otherwise provided in this Operating Agreement, each Member’s interest in the Company shall be personal property for all purposes. The Company shall hold all Company Property in the name of the Company and not in the name of any Member.

## ARTICLE III BUSINESS OF COMPANY

3.01 Purpose. The business of the Company (the “Business”) shall be to conduct the Core Business and any other lawful business activities related to the supply of parts, services and equipment to the digital widget industry.

## ARTICLE IV NAMES AND ADDRESSES OF MEMBERS

4.01 Names and Addresses of Members. The names and addresses of the Members are as set forth on Schedule A, attached hereto and made a part hereof.

4.02 Withdrawal or Disassociation. No Member shall have the right to voluntarily withdraw or dissociate himself, herself or itself from the Company as a Member without the prior unanimous consent of all the remaining Members. A Member who withdraws or dissociates from the Company shall not have any right under of the Act to be paid the fair value of the Membership Interest of such Member as a result of the withdrawal or dissociation.

## ARTICLE V

### MANAGEMENT; RIGHTS AND DUTIES OF BOARD; ELECTIONS AND REPORTS

5.01 Management. Subject to the provisions of Section 5.04 of this Operating Agreement, the business and affairs of the Company will be managed by the Board. The Board, subject to the provisions of Section 5.04 of this Operating Agreement, is authorized and directed to manage and control the business of the Company. Except for situations in which the approval of the Members (or any one or more of the Members) is expressly required by Section 5.04 of this Operating Agreement, the Board has full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business.

#### **5.02 Number and Term of Office of the Board.**

(a) There shall be five (5) managers of the Company, three (3) of whom shall be appointed by the holder of the Big Co. Interest (the "Big Co. Interest Managers") and two (2) of whom shall be appointed by the holder of the Small Co. Interest (the "Small Co. Interest Managers"). The holder of the Big Co. Interest may, from time to time, remove (with or without cause) any Big Co. Interest Manager and name a successor to serve as a Big Co. Interest Manager. The holder of the Small Co. Interest may, from time to time, remove (with or without cause) any Small Co. Interest Manager and name a successor to serve as a Small Co. Interest Manager. A Manager need not be a resident of the State of Delaware or the United States of America.

(b) Notwithstanding Section 5.02(a), no Member shall be entitled to appoint more than one (1) manager if that Member's Percentage Interest is less than twenty-five (25%) percent of all Percentage Interests. If a Member's Percentage Interest is reduced to an amount that is less than twenty-five (25%) percent of all Percentage Interests (a "Reduction Event"), then all but one of the Managers appointed by such Member shall, effective as of the date of the Reduction Event, resign, and the Member or Members whose Percentage Interests exceed seventy-five (75%) percent shall contemporaneously appoint the Manager or Managers to replace those having so resigned.

5.03 Specific Rights and Powers of the Board. Without limiting the generality of Section 5.01, and subject to situations in which the approval of the Members (or any one or more of the Members) is expressly required by Section 5.04 of this Operating Agreement, the Board shall have the power and authority on behalf of the Company to do the following:

(a) Execute any and all documents or instruments of any kind which the Board deems necessary or appropriate to achieve the purposes of the Company, including, without limitation, contracts, agreements, leases, subleases, easements, deeds, notes, mortgages and other documents or instruments of any kind or character or amendments of any such documents or instruments;

(b) Borrow money from individuals, banks and other lending institutions on the general credit of the Company for use in the Business, all upon such terms and containing such features as the Board shall reasonably determine to be necessary or desirable in its absolute discretion;

(c) To confess judgment against the Company and to execute any document granting to any Person the right to confess judgment against the Company in the event of the Company's default in the performance of its obligations under any loan agreement, note, or other agreement or instrument;

(d) Incur, secure, renew, replace, refinance, modify, extend, repay or otherwise discharge any indebtedness of the Company;

(e) Sell, exchange, lease, mortgage, pledge, assign, or otherwise transfer, dispose of or encumber in the Ordinary Course of Business, Company Property or any interest therein;

(f) Procure and maintain, at the expense of the Company and with responsible companies, such insurance as may be available in such amounts and covering such risks as are appropriate in the reasonable judgment of the Board, including insurance policies insuring the Managers against liability arising as a result of any action they may take or fail to take in their capacity as Managers of the Company;

(g) Employ (including establishing criteria for and review of compensation levels, benefit plans and bonus/incentive plans) and dismiss from employment all senior managers or department heads of the Company and otherwise set the terms of employment for any and all Company employees, agents, independent contractors, attorneys and accountants;

(h) Establish, maintain, revise and cause the Company to make distributions to, an employee compensation plan, an employee benefit plan or employee bonus/incentive plan upon such terms, in such amounts and covering such employees as the Board shall reasonably determine in its sole discretion and to terminate or discontinue any such plan as the Board may elect and as may be permitted by applicable law;

(i) Supervise the preparation and filing of all Company tax returns;

(j) Open, maintain and close bank and investment accounts and arrangements, draw checks and other orders for the payment of money, and designate

individuals with authority to sign or give instructions with respect to those accounts and arrangements;

(k) As provided for in Section 5.20 below, appoint one or more officers of the Company and delegate any or all of the administrative and managerial powers conferred upon the Board to officers, employees or agents of the Company, as selected by the Board;

(l) Bring, defend or settle actions at law or equity; and

(m) Retain and compensate on behalf of the Company such accountants, attorneys, realtors, tax specialists, management companies, consultants or other professionals as the Board shall deem necessary or desirable in the Boards' absolute discretion in order to carry out the purposes and business of the Company.

Unless authorized to do so by this Operating Agreement or by the Board, no attorney-in-fact, employee or other agent of the Company shall have any power or authority to bind the Company in any way, to pledge its credit, or to render it liable for any purpose. No Member shall have any power or authority to bind the Company unless the Member has been authorized by the Board to act as an agent of the Company in accordance with the preceding sentence. Any Member who takes any action or binds the Company in violation of this Section 5.03 shall be solely responsible for any loss and expense incurred by the Company as a result of the unauthorized action and shall indemnify, defend and hold the Company harmless with respect to such loss or expense.

5.04 Major Decisions. Notwithstanding anything contained in this Operating Agreement (including Section 5.03) to the contrary, certain significant actions and decisions of the Company (hereinafter referred to as "Major Decisions") shall, in addition to approval by the Board, require in each instance the approval of a Super Majority in Interest. The Major Decisions are limited to the following:

(a) Filing of a voluntary petition in bankruptcy (or consenting to an involuntary petition in bankruptcy) or filing a petition or answer on behalf of the Company under any statute, law or rule seeking any reorganization, arrangement, composition, readjustment, liquidation, or similar relief;

(b) Amending the Company's Operating Agreement or Certificate of Formation (other than for purposes of changing the Company's registered office);

(c) Any action that would cause the Company to not be treated as a Partnership for income tax purposes (including, without limitation, the making of an election to have the Company treated as an association taxable as a corporation for income tax purposes).

(d) Other than as set forth in Section 12.01 below, to dissolve and/or liquidate the Company;

(e) Other than as set forth in, and in accordance with Article XI of this Operating Agreement, committing to or effecting any Change in Control of the Company;

(f) Forming any subsidiaries of the Company where the initial capitalization for such subsidiary would be in excess of \$[1,000,000];

(g) Subject to Section 8.02(a), doing anything that would cause any Member or require any Member to guaranty or to otherwise become personally liable for indebtedness of the Company;

(h) Creating, incurring, assuming or entering into any contract relating to any indebtedness not otherwise necessary to satisfy the Projected Working Capital Needs;

(i) Except in the Ordinary Course of Business, guaranteeing in the name of or on behalf of the Company the payment of money or the performance of any contract or other obligation of any person other than the Company;

(j) Except for customary liens arising in the Ordinary Course of Business, including liens in connection with equipment leases, or liens in connection with indebtedness necessary to satisfy the Projected Working Capital Needs mortgaging, pledging, assigning in trust or otherwise encumbering any property or assets of the Company, or assigning the right to receive any monies owed or to be owed to the Company;

(k) Issuing or repurchasing any equity securities of the Company;

(l) Subject to Section 11.04, admitting any Person other than Big Co. (or an affiliate of Big Co.) or Small Co. as a Member, or authorizing a new class or series of securities or membership interests of the Company;

(m) Exclusive of Company Property that is sold, leased, disposed of or abandoned in the Ordinary Course of Business, selling, leasing, disposing of, or abandoning any materials, supplies, equipment or other items of personal property of the Company (for the avoidance of doubt, this subsection (m) shall not apply to the sale, transfer, lease, license or other disposition to a third party of all or substantially all of a party's assets in one or a series of related transactions, which shall be governed by subsection (e) hereof);

(n) Making any loans or advancing payment of compensation or other consideration to any officer or employee of the Company (other than for the payment of salaries and for reimbursement of reasonable business expenses of employees incurred in the Ordinary Course of Business);

**(o) To require any additional Capital Contributions, except in the event of an Unanticipated Working Capital Need and then, only in accordance with the provisions of Section 8.02(b) of this Operating Agreement;**

**(p) To make any changes to the Formula for Calculation of Projected Working Capital Needs;**

(q) The pledge, hypothecation, or granting of any lien or security interest by any Member in its Membership Interest; and

(r) Agreeing with or committing to any third party to do any of the foregoing.

5.05 Books of Account and Records. At the expense of the Company, the Board shall maintain (or shall cause to be maintained) proper and complete records and books of account and the operations and expenditures of the Company, in which shall be entered fully and accurately all transactions relating to the Company's business in such detail and completeness as is customary and usual for businesses of the type engaged in by the Company. The books and records shall at all times be maintained at the principal place of business of the Company and/or such other place as the Managers may designate within the United States.

5.06 Returns and Other Elections. The Board shall cause the preparation and timely filing of all tax returns required to be filed by the Company pursuant to the Code and all other tax returns deemed necessary and required in each jurisdiction in which the Company does business. Copies of such returns, or pertinent information therefrom, will be furnished to the Members within a reasonable time after the end of the calendar year as required by law or upon a Member's written request. Within ninety (90) days after the end of each calendar year, the Company shall send to each Person who was a Member at any time during such calendar year such tax information, including, without limitation, Federal Tax Schedule K-1, as shall be reasonably necessary for the preparation of such Member's federal income tax return. All elections permitted to be made by the Company under federal or state laws will be made by the Board in its sole discretion.

5.07 Tax Matters Member. The Board shall designate a "Tax Matters Member" (as defined in Code Section 6231) who shall be authorized and required to represent the Company (at the Company's expense) in connection with all examinations of the Company's affairs by tax authorities, including, without limitation, administrative and judicial proceedings, and to expend Company funds for professional services and costs associated therewith. The Members agree to cooperate with each other and to do, or refrain from doing, any and all things reasonably required to conduct such proceedings. The initial Tax Matters Member shall be Big Co..

5.08 Liability for Certain Acts. Each Manager shall perform his duties as a Manager in good faith, in a manner he reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. No Manager shall be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of fraud, deceit, gross negligence or willful misconduct by such Manager.

5.09 Conflicts of Interest. The Managers shall devote such time as they, in their discretion, deem necessary to manage the Company's affairs in an efficient manner or as otherwise obligated pursuant to any separate agreement with the Company. Subject to the other express provisions of this Operating Agreement and

except as may be provided to the contrary pursuant to the terms of any separate agreement with the Company, each Manager, Member, officer and agent of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, specifically excluding any ventures in competition, either directly or indirectly with the Core Business, with no obligation to offer to the Company or any other Member, Manager or agent the right to participate therein. Except as otherwise provided in this Operating Agreement, the Company may transact business with any Manager, Member, agent or Affiliate thereof provided the terms of those transactions are fully disclosed to the Members and no Member has any reasonable objection thereto. For the avoidance of doubt, for so long as Small Co. and Big Co. shall be Members of the Company, Small Co. and Big Co. hereby agree and acknowledge that until the termination of this Operating Agreement, or until the sale, liquidation or dissolution of the Company, the Company shall remain the sole and exclusive entity through which they will conduct the Core Business.

5.10 Regular Meetings. Regular meetings of the Board shall be held at such times and places as shall be designated from time to time by resolution of the Board.

5.11 Special Meetings. Special meetings of the Board may be called by or at the request of not less than two (2) Managers. The persons authorized to call the special meeting of the Board may fix either Pittsburgh, Pennsylvania or any place within five hundred (500) miles of the Company's principal place of business as the place for holding the special meeting of the Board.

5.12 Notice. Notice of any special meeting of the Board shall be given no fewer than five (5) business days and no more than sixty (60) days prior to the date of the meeting. Notices shall be delivered in the manner set forth in Section 13.01. The attendance of a Manager at any meeting shall constitute a waiver of notice of such meeting, except where a Manager attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Unless otherwise provided in this Operating Agreement, neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board need be specified in the notice or waiver of notice of such meeting.

5.13 Quorum. [No business may be conducted at any regular or special meeting of the Board unless a quorum is present. Provided that two (2) Big Co. Interest Managers and one (1) Small Co. Interest Manager participate, a majority of the number of Managers shall constitute a quorum for transaction of business at any regular or special meeting of the Board.] If less than the required number of Managers are present at a duly noticed meeting, a majority of the Managers present at said meeting may adjourn the meeting to a time not less than forty-eight (48) hours after the time for which the adjourned meeting was called at which reconvened meeting, a quorum shall be deemed to be a majority of the number of Managers; provided, however, that no business may be conducted at such reconvened meeting unless at least forty-eight (48) hours' notice of the reconvened meeting has been given to each Member and to any Manager who was absent from the adjourned meeting.

5.14 Manner of Acting. The affirmative vote of the majority of the Managers present at a meeting at which a quorum is present shall be the act of the Board, unless the vote of a greater number is required by this Operating Agreement, the Certificate of Formation, or the Act.

5.15 Vacancies. Any vacancy occurring on the Board shall be filled by an appointment of a Manager pursuant to Section 5.02 hereof so that the holder of the Big Co. Interest will appoint the replacement for any Big Co. Interest Manager who dies, becomes disabled, resigns or is removed from the Board, and the holder of the Small Co. Interest will appoint the replacement for any Small Co. Interest Manager who dies, becomes disabled, resigns or is removed from the Board.

5.16 Action Without Meeting. Any action required to be taken at a meeting of the Board, or any other action which may be taken at a meeting of the Board, or of any committee thereof, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the Managers, or by all the members of such committee, as the case may be. Any such consent signed by all the Managers or all the members of the committee shall have the same effect as a unanimous vote, and may be stated as such in any document filed with the Secretary of State or with any other Person.

5.17 Resignation of Managers. A Manager may resign at any time upon written notice to the other Managers (or, if none, to the Members), and shall take effect at the time specified therein, or if no time be specified, at the time of its receipt by the other Managers (or Members, as the case may be). The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. A Person shall cease to be a Manager upon such Manager's resignation or removal or such Manager's death or disability.

5.18 Telephonic Meetings. The Board or any committee of the Board shall afford each Manager the opportunity to participate in and act at any meeting of the Board or any such committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating, so long as such attendance is confirmed in writing by the counter-signature by the telephonic-connected Members of the minutes of such meeting.

5.19 Compensation; Expenses.

(a) No Manager shall be entitled to receive compensation for services on the Board.

(b) Managers shall be entitled to be promptly reimbursed for budgeted reasonable out-of-pocket costs and expenses incurred in the course of the Managers' services hereunder.

5.20 Officers. The initial officers of the Company shall be the individuals identified in Section 5.23, all of whom shall serve as such officers until the first to

occur of the expiration of their terms as specified in Section 5.23 or their death, resignation or removal for cause by the Board (the “Initial Named Executive Officers”). In addition to the Initial Named Executive Officers, the Board may from time to time elect one or more additional officers of the Company, and such additional officers shall have such titles, powers, duties and tenure as the Board shall from time to time determine. Vacancies may be filled or new offices created and filled by resolution of the Board. Any additional officer or agent elected or appointed by the Board may be removed by the Board whenever in their judgment the best interests of the Company would be served; provided, however, such removal shall be without prejudice to the contract rights, if any, of the person so removed.

5.21 Reports. The Company shall provide the following reports to the Members: (i) not later than 90 days after the end of each Fiscal Year, an annual financial statement (ii) not later than 30 days after the end of each quarter, quarterly financial statements for the first three quarters of each Fiscal Year, which may be unaudited and internally prepared, (iii) quarterly reports setting forth, in reasonable detail, any transactions between the Company and any Member or any Affiliate of any Member during the immediately preceding Fiscal Year quarter, and (iv) such other reports as shall be appropriate to advise the Members as to the operations financial results, prospects and properties of the Company.

5.22 Liability; Expenses; Indemnity:

(a) Except as provided in Paragraph (c) below, no Covered Person shall be liable to the Company or to any Member for any Covered Loss suffered by the Company or any Member.

(b) Except as provided in Paragraph (c) below, to the fullest extent permitted by law, the Company shall indemnify, defend, and hold harmless each Covered Person from and against any Covered Loss suffered by the Covered Person arising out of or in connection with any act or omission pursuant to the authority granted by this Operating Agreement.

(c) The liability of a Covered Person shall not be eliminated pursuant to Paragraph (a) above, and the Company shall not be required to indemnify a Covered Person under Paragraph (b) above: (i) with respect to any Covered Loss attributable to that Covered Person’s gross negligence, willful misconduct, or fraud, and/or (ii) if the acts or omissions of the Covered Person were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action.

(d) Each Covered Person shall be entitled to rely on the advice of the Company’s legal counsel, accountants, and/or other experts or professional advisers and any act or omission of such Covered Person acting in reliance upon such advice shall in no event subject it to liability to the Company or any Member. Notwithstanding the foregoing, no Covered Person will be entitled to indemnification or exculpation for liabilities arising out of violations of the United States securities laws.

(e) To the fullest extent permitted by law, expenses incurred by a Covered Person in defending any claim, demand, action, suit, or proceeding arising out

of or in connection with any action taken or omitted by it pursuant to the authority granted by this Operating Agreement shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined by a final, non-appealable order from a court of competent jurisdiction that the Covered Person is not entitled to be indemnified as authorized in this Section. The Company may purchase and maintain insurance, to the extent and in such amounts as the Board shall determine, on behalf of such Covered Persons and such other persons as the Board shall determine, against any and all liabilities that may be asserted against or expenses that may be incurred by such person in connection with activities of the Company or such person, regardless of whether the Company would have the power to indemnify such person against such liabilities under the provisions of this Operating Agreement. A Covered Person shall not be denied indemnification in whole or in part because the Covered Person had an interest in the transaction with respect to which indemnification applies if the transaction is not otherwise prohibited by the terms of this Operating Agreement.

(f) To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating to the Company or to any Member, such Covered Person acting under this Operating Agreement shall not be liable to the Company or to any Member for his, her, or its reliance on the provisions of this Operating Agreement, and the provisions of this Operating Agreement, to the extent that they restrict the duties and liabilities of the any Covered Person otherwise existing at law or in equity, shall replace such other duties and liabilities of such Covered Person.

5.23 Initial Managers and Initial Named Executive Officers. The initial Managers and Initial Named Executive Officers are as follows:

<b>Big Co. Interest Managers</b>	<b>Title</b>
	Manager, Chairman of the Board
<b>Small Co. Interest Managers</b>	<b>Title</b>
<b>Officers</b>	<b>Title</b>
	Chief Executive Officer
	Chief Operating Officer
	Chief Technology Officer

The Chief Executive of the Company shall be appointed by the Big Co. Interest Managers, subject to Section 5.23(d). The Chief Operating Officer of the Company shall be Bill Smith for the six (6) month period following the Effective Date. Thereafter, the Chief Operating Officer shall be appointed by the Small Co. Interest Managers in accordance with Section 5.23(b), subject to Section 5.23(d). The Chief Technology Officer of the Company shall be [Key Employee] for the eighteen (18) month or such longer period following the Effective Date as may be determined by the Board. Any successor Chief Technology Officer shall be appointed by the Board.

(a) Chief Executive Officer. The chief executive officer of the Company (the “CEO”) shall be the principal executive officer of the Company and shall have the responsibilities, duties, powers, authority and obligations provided to him in this Operating Agreement or as delegated to him by the Board. The CEO shall report directly to the Board. If the CEO is an employee of Big Co. or any of its Affiliates, upon the termination of such employment for any reason whatsoever (other than due to a transition of employment to the Company), he shall similarly be deemed to have concurrently resigned as the CEO of the Company. Unless otherwise provided by a resolution adopted by the Board, the CEO: (a) shall have general and active management of the day-to-day business of the Company and shall have such other responsibilities, authority and duties as are customary for the chief executive officer of a similarly situated business; (b) shall be present at all meetings of the Board; (c) shall see that all orders and resolutions of the Board are carried into effect; (d) shall sign and deliver in the name of the Company any deeds, leases, mortgages, bonds, contracts or other instruments pertaining to the business of the Company, except in cases in which the authority to sign and deliver is required by applicable law to be exercised by another Person or is expressly delegated by this Operating Agreement or the Board; and (e) shall perform such other duties as may from time to time be prescribed by the Board.

(b) Chief Operating Officer. The Chief Operating Officer (“COO”) of the Company shall have the responsibilities, duties, powers, authority and obligations delegated to him by the CEO. The COO shall report to the CEO. The Small Co. Interest Managers shall have the right to select the COO in their sole discretion; *provided, however*, that the holder of the Small Co. Interest agrees to consult with the holder of the Big Co. Interest in advance of such selection; *provided further*, that should the employment of the COO terminate with Small Co. or any of its Affiliates for any reason (other than due to a transition of employment to the Company), he shall similarly be deemed to have concurrently resigned as the COO of the Company.

(c) Authority and Duties. Unless prohibited by the Board, an officer may delegate some or all of the duties and powers of his position to other Persons. An officer who delegates the duties or powers of his office remains subject to the standard of conduct for an officer with respect to the discharge of all duties and powers so delegated. In all cases, the officers of the Company shall report to, and be supervised by, the CEO, or, with the approval of the CEO, the COO; *provided, however*, that the CEO and the COO each ultimately reports to the Board. The appointment of any Person as an officer or agent of the Company shall not, in and of itself, create any contractual rights between such Person and the Company. The officers of the Company, acting in their capacities as such, shall be agents acting on behalf of the

Company as principal to the extent, but only to the extent, of the authority granted to each officer.

*(d) Limits on Appointment.* Notwithstanding the foregoing: (i) in the event the Small Co. Interest is less than twenty-five (25%) percent of all Percentage Interests, then the Small Co. Interest Managers shall not be entitled to appoint the COO, in which event the COO shall be appointed by the Board; and (ii) in the event the Big Co. Interest is less than twenty-five (25%) percent of all Percentage Interests, then the Big Co. Interest Managers shall not be entitled to appoint the CEO, in which event the CEO shall be appointed by the Board.

## ARTICLE VI RIGHTS AND OBLIGATIONS OF MEMBERS

6.01 Limitation of Liability. Each Member's liability shall be limited as set forth in this Operating Agreement, the Act and other applicable law.

6.02 Company Debt Liability. A Member will not be personally liable for any debts or losses of the Company beyond such Member's Capital Contribution except as otherwise required by law.

6.03 List of Members. Upon the written request of any Member, the Board shall provide a list showing the names, addresses and Membership Interests of all Members.

6.04 Priority and Return of Capital. Except as may be expressly provided in this Operating Agreement, no Member shall have priority over any other Member, either as to the return of Capital Contributions or as to Profits, Losses or distributions; provided that this Section 6.04 shall not apply to loans which a Member has made to the Company.

6.05 No Company Certificates. The Membership Interests of the Members in the Company shall not be certificated.

6.06 Access to Books and Records. Without limiting the rights of a Member under the Act, the Company will promptly afford each Member and their agents access, at reasonable times during normal business hours, to the Company's properties, books and records (including any relevant work papers), employees and auditors, and the right to make copies of such books and records, to the extent necessary to permit the Member to determine any matter relating to the rights and obligations of the Members hereunder.

6.07 Non-Solicitation. Except with the approval of a Super Majority in Interest, the Members shall not at any time during which they are Members of the Company and for a two (2) year period thereafter, directly or indirectly, solicit, contact or recruit any employee, agent, contractor, consultant, affiliate or customer of the Company for the purpose of becoming an employee, agent, contractor, consultant, affiliate or customer of any business which is competitive with the Business. As used hereunder, "customer of the Company", shall mean any Person that has at any time during or prior to such Member's affiliation with the Company, (i) had a business,

customer or vendor relationship with the Company or (ii) been the subject of any proposal by the Company for a business, customer or relationship with the Company.

ARTICLE VII  
MEETINGS OF MEMBERS

7.01 Meetings. Subject to compliance with the terms of Section 7.02 below, meetings of the Members may be called by or at the request of (i) not less than three (3) Managers, at least one of whom must be a Small Co. Interest Manager or (ii) at the request of any Member. The meeting shall be held either at the principal place of business of the Company or Houston, Texas, or at such other place within five hundred (500) miles of the principal place of business of the Company as may be designated in the notice or waiver of notice of the meeting.

7.02 Notice. Notice of any meeting of the Members shall be given to all Members no fewer than five (5) days and no more than sixty (60) days prior to the date of the meeting. Notices shall be delivered in the manner set forth in Section 13.01 and shall specify the purpose or purposes for which the meeting is called. The attendance of a Member at any meeting shall constitute a waiver of notice of such meeting, except where a Member attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

7.03 Quorum. All Members must be present for there to be a quorum for transaction of business at any meeting of the Members, provided that if all Members are not present at a duly noticed meeting, the Members present may adjourn the meeting to a time not less than forty-eight (48) hours after the time for which the adjourned meeting was called at which meeting the Members then present may transact any business; provided, however, that no business be conducted at such reconvened meeting unless at least forty-eight (48) hours' notice of the reconvened meeting has been given to any Member who was absent from the adjourned meeting.

7.04 Manner of Acting. All questions or matters contained in this Operating Agreement that require the vote, consent or approval of the Members shall require the affirmative vote, consent or approval of a Majority in Interest of the Members, unless the question or matter is one upon which, by express provision of applicable law or of the Certificate of Formation or this Operating Agreement (including Section 5.04), a different vote is required in which case such express provision shall govern and control the decision of such question or matter.

7.05 Action Without Meeting. Any action required to be taken at a meeting of the Members or any other action which may be taken at a meeting of the Members, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by the holder or holders of not less than the minimum Percentage Interests that would be necessary to take such action at a meeting at which the holders of all Percentage Interests entitled to vote on the action were present and voted.

7.06 Telephonic Meetings. The Company shall afford each Member the opportunity to participate in and act at any meeting of Members through the use of a

conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating, so long as such attendance is confirmed in writing by the counter-signature by the telephonic-connected Members of the minutes of such meeting.

7.07 Voting Rights. Notwithstanding any other provision in this Operating Agreement, each Member, in the capacity as a Member, shall have the number of votes equal to such Member's then existing Percentage Interest.

## ARTICLE VIII CONTRIBUTIONS TO THE COMPANY AND CAPITAL ACCOUNTS

8.01 Capital Contributions; Additional Capital Contributions. Concurrently with the execution and delivery of this Operating Agreement, the Members shall make or shall be deemed to have made the Initial Capital Contributions as set forth in Schedule A, attached hereto and made a part hereof. The Capital Account balances of each of the Members shall be reflected in the books and records of the Company. All Capital Contributions required to be made by the Members as of the date hereof have been made and are in the books and records of the Company. Each Member admitted after the date hereof in accordance with the terms of this Operating Agreement shall make Capital Contributions in such form and amount as is determined by the Board subject to the Supermajority in Interest provisions of Section 5.04 of this Operating Agreement.

### 8.02 Capital Needs.

(a) The Projected Working Capital Needs of the Company, for any period, shall be determined according to the Formula for Calculation of Projected Working Capital Needs and shall, in the first instance, be met from the Company's then-available Working Capital. If the Projected Working Capital Needs of the Company, for any period, exceed the Company's then-available Working Capital, such deficit or any portion thereof (a "Projected Working Capital Deficit") may, upon a determination of the Board, be met by: (i) additional Capital Contributions (subject to Section 5.04(o), above); (ii) a loan or loans by Big Co. or any Affiliate of Big Co. ("Big Co. Working Capital Loan"); or (iii) a loan or loans by a third party ("Third Party Working Capital Loan"). Any Big Co. Working Capital Loan shall be upon terms which are competitive with those which would be extended to the Company, under the circumstances, by a non-affiliated third party. The Members shall each guarantee any Third Party Working Capital Loan if required to do so under the terms of such loan.

(b) Unanticipated Working Capital Needs during any period, shall be met by the Company, upon a determination of the Board, from additional Capital Contributions contributed by the Members in proportion to and in accordance with their respective Percentage Interests ("Mandatory Capital Contributions"); provided, however, in no event shall the total amount of Mandatory Capital Contributions in any single calendar year exceed \$\_\_\_\_\_.

(c) If any Member (the “Non-Contributing Member”) fails to make such Member’s required Mandatory Capital Contribution (the “Unfunded Capital Contribution”) within thirty (30) days after notice thereof of a Mandatory Capital Contribution, then any other Member (the “Contributing Member”) shall have the right, but not the obligation, to advance directly to the Company all or a part of the amount of the Unfunded Capital Contribution of the Non-Contributing Member as a loan from the Contributing Member to the Company, which loan shall be upon terms which are competitive with those which would be extended to the Company, under the circumstances, by a non-affiliated third party (a “Contributing Member Loan”). Each Contributing Member Loan shall be evidenced by a written promissory note or finance agreement executed by the Company for the benefit of and for delivery to the Contributing Member. A Contributing Member Loan shall be an obligation of the Company and shall be repaid either from the Non-Contributing Member’s available cash from unrelated sources or, if not sooner paid, from Distributions from the Company to which the Non-Contributing Member is otherwise entitled up to a maximum of [OPEN] of each Distribution, until the Contributing Member Loan is paid in full.

(d) Non-dilution Rights of Small Co..

(i) During the Non-Dilution Period, and irrespective of the form of financing of any Projected Working Capital Deficit or Unanticipated Working Capital Need, whether funded as debt or as an additional Capital Contribution, the Small Co. Interest shall never equate to less than a forty-nine percent (49%) Percentage Interest in the Company (the “Small Co. Non-Dilution Right”) and the timing and priority of payment of any distributions shall be on a *pari passu* basis with the holder of the Big Co. Interest, provided that a portion of such distributions may be paid directly to a Contributing Member in connection with a Contributing Member Loan in accordance with Section 8.02(c); and

(ii) After the Non-Dilution Period, if an Unfunded Capital Contribution results from a Non-Contributing Member’s failure to make such Member’s required Mandatory Capital Contribution, then the Non-Contributing Member’s Membership Interest shall be reduced so that, when compared to all other Member’s Capital Contributions, it is equal to a fraction, the numerator of which is the sum of the value of all of the Non-Contributing Member’s Capital Contributions to the Company and the denominator of which is the value of all Capital Contributions to the Company made by all Members. The Small Co. Non-Dilution Right shall not be applicable and shall be of no force or effect from and after the last day of the Non-Dilution Period. For the avoidance of doubt, this provision shall not be applicable after the Non-Dilution Period if the applicable Unfunded Capital Contribution has been financed by a Contributing Member Loan that is not in default.

8.03 Loans by Members. With the consent and approval of the Board, one or more Members may, but shall not be obligated to, loan to the Company additional amounts from time to time as required to enable the Company to meet operating expenses and other cash needs. Each such loan shall be at an interest rate and upon such other terms and conditions that are competitive with those which would be extended to the Company under the circumstances, by a non-affiliated third-party.

Each loan shall be evidenced by a written promissory note or finance agreement executed by the Company and delivered to the Member making the.

8.04 Limitation on Members' Liability and Return of Capital. The personal liability of each of the Members (in the capacity as a Member) arising out of or in any manner relating to the Company shall be limited to and shall not exceed payment of such Member's Capital Contribution as provided herein. Except for payment of such amounts, none of the Members (in the capacity as a Member) shall have any personal liability for liabilities or obligations of the Company or shall be required (or, except to the extent and in the manner expressly provided in this Operating Agreement, permitted) to make any further or additional contributions to the capital of the Company or to lend or advance funds to the Company for any purpose. None of the Members shall be liable for the obligations of the other Members. Except as and when expressly provided in this Operating Agreement, none of the Members shall be entitled to a return of capital at any fixed time or upon demand, to receive interest on capital or to receive any distribution from the Company.

8.05 Return of Contributions. Except as may be expressly provided in this Operating Agreement, (i) a Member is not entitled to the return of any part of such Member's Capital Contributions or to be paid interest in respect of either the Capital Account or Capital Contributions of such Member, (ii) an unrepaid Capital Contribution is not a liability of the Company or of any Member, and (iii) a Member is not required to contribute or to lend any cash or property to the Company to enable the Company to return any Member's Capital Contributions.

8.06 Capital Accounts. The Company shall maintain a separate Capital Account for each Member. The Capital Account of each Member shall be an amount equal to such Member's Capital Contributions as and when paid, increased by such Member's share of Profits and reduced by such Member's share of Losses and the amount of any distributions to such Member. Each Member's Capital Account will be maintained and adjusted in accordance with the Code and the Treasury Regulations thereunder, including the adjustments to capital accounts permitted by Section 704(b) of the Code and the Treasury Regulations thereunder in the case of a Member who receives the benefit or detriment of any basis adjustment under Sections 734, 743 and 754 of the Code. It is intended that appropriate adjustments will thereby be made to Capital Accounts to give effect to any income, gain, loss or deduction (or items thereof) that is allocated pursuant to this Operating Agreement and any adjustments to the allocation of any such item subsequently made upon audit by the Internal Revenue Service or otherwise. A Member who has more than one Membership Interest shall have a single Capital Account that reflects all of such Member's Membership Interests, regardless of the class of Membership Interests owned by that Member and regardless of the time or manner in which those Membership Interests were acquired. Each Member's Capital Account will include the Capital Account, as so adjusted, of any predecessor holders of the interest of such Member in the Company.

8.07 Capital Deficits. None of the Members shall be obligated to repay to the Company or any other Member any deficit in such Member's Capital Account arising at any time during the term of the Company or upon dissolution and liquidation of the Company. The Managers shall not be liable for the return of the capital of the

Members and it is expressly understood that any such return shall be made solely from the Company's assets.

ARTICLE IX  
ALLOCATION OF PROFITS AND LOSSES

9.01 Allocation of Profits and Losses. Except as otherwise expressly provided in this Operating Agreement, all Profits or Losses of the Company for each year (including each item of income, gain, loss, deduction or credit entering into the computation thereof), other than Profits and Loss arising out of a sale of all or substantially all of the assets of the Company or otherwise in connection with a liquidation of the Company, shall be allocated among the Members as follows:

(a) Profits for each Fiscal Year shall be allocated among the Members in the following manner and order of priority:

(i) First, to the Members, pro rata, in the proportions that aggregate cash distributions to each Member pursuant to Article X during or with respect to such Fiscal Year bear to the aggregate distributions to all Members pursuant to Article X during or with respect to such Fiscal Year, until aggregate allocations of Profits pursuant to this Section 9.01(a)(i) equal the aggregate distributions to all Members pursuant to Article X during or with respect to such Fiscal Year; and

(ii) Second, to the Members in accordance with their respective Percentage Interests.

(b) Losses for each Fiscal Year shall be allocated among the Members in the following manner and order of priority:

(i) First, if one or more Members have Capital Accounts with positive balances, to those Members, pro rata, in the proportions that the positive balances of their respective Capital Accounts bear to the aggregate positive balances of all such Capital Accounts, until (after giving effect to such allocation of Losses) no Member has a Capital Account with a positive balance; and

(ii) Second, to the Members in accordance with their respective Percentage Interests.

Provided, however, that notwithstanding the foregoing, (i) if one or more Members shall have positive balances in their Capital Accounts, Profits shall be allocated to those Members, if any, having deficit balances in their Capital Accounts to the extent of and in proportion to such deficit balances, and (ii) if one or more Members shall have deficit balances in their Capital Accounts, Losses shall be allocated to those Members, if any, having positive balances in their Capital Accounts to the extent of and in proportion to such positive balances.

9.02 Allocation of Profits and Losses Arising out of a Change in Control of the Company or Otherwise in Connection with a Liquidation of the Company. Except as otherwise expressly provided in this Operating Agreement, Profits or Losses of the

Company arising out of a Change in Control of the Company or otherwise in connection with a liquidation of the Company, shall be allocated among the Members in such a manner that will result in each of the Members having a final balance in such Member's Capital Account equal to the (i) such Member's Percentage Interest, *multiplied by* (ii) the aggregate final balances of the Capital Accounts of all Members. In furtherance of the foregoing the Board shall allocate specific items of Profits and/or Loss (including items of gross income, gain, loss, and/or deduction) with respect to Income and Loss arising out of a Change in Control of the Company or otherwise in connection with a liquidation of the Company. Furthermore, in effecting any such allocation, the Board shall use their best efforts to prevent any undesirable changes in the character of any items of Profits and or expense allocated to a Member (i.e., changes in character regarding classification of items as capital gain, ordinary income, etc.).

9.03 Compliance with the Code. The allocation provisions herein are intended to comply with applicable provisions of the Code, including regulations promulgated under Section 704 of the Code, and successor statutes and regulations thereof, and shall be interpreted and applied in a manner consistent with such statutory and regulatory provisions.

9.04 Allocation of Profits and Losses Upon Transfer or Change in Membership Interests. It is agreed that if all or a portion of a Member's Membership Interest is transferred or adjusted as permitted herein, Profits and Losses for the Fiscal Year of the transfer shall be allocated between the transferor and the transferee based upon the number of days in said Fiscal Year each owned such Membership Interest, without regard to the dates upon which income was received or expenses were incurred during said Fiscal Year, except as otherwise required by the provisions of Code Section 706 and Treasury Regulations thereunder.

9.05 Regulatory Allocations. The requirements of a "qualified income offset" under Treasury Regulations §1.704-1(b)(2)(ii)(d), the provisions for a "minimum gain charge back" as that term is defined in Treasury Regulations §1.704-2(f), and the requirements of Treasury Regulations §1.704-1(b)(4)(iv), relating to allocations of Losses attributable to nonrecourse debt, are expressly incorporated herein and made a part hereof by reference (the "Regulatory Allocations"). The Regulatory Allocations are intended to comply with certain requirements of applicable Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other Profits or Loss and/or items thereof. Accordingly, the Regulatory Allocations shall be taken into account in making subsequent allocations so that, to the extent possible, the net amount of Profits and Loss allocated to each Member shall be equal to the net amount that would have been allocated to each such Member if this Section 9.05 were not part of this Operating Agreement.

9.06 Contributed Property. Notwithstanding anything contained herein to the contrary, if a Member contributes property to the Company having a fair market value that differs from its adjusted basis at the time of contribution, then items of income, gain, loss and deduction with respect to such property shall be shared among the Members so as to take account of the variation between the adjusted tax basis of the

property to the Company and its fair market value at the time of contribution, in the manner prescribed in Code Section 704(c) and the Treasury Regulations thereunder. Any Section 704(c) allocations shall be made using the so-called traditional method as described in Treasury Regulation section 1.704-3(b), unless the affected Member agrees in writing to the use of a different method.

## ARTICLE X DISTRIBUTIONS

### 10.01 Distributions of Cash.

(a) The Company shall distribute to each Member, in cash, an amount equal to the aggregate state and federal income tax liability such Member would have incurred as a result of such Member's ownership of a Membership Interest calculated as if such Member were (1) an individual resident of the State of Delaware, and (2) taxable at the maximum statutory rates for the applicable calendar year under applicable federal and state income tax laws as determined from time-to-time (such distributions referred to herein as "Tax Distributions"). Tax Distributions shall be made in accordance with a schedule which will facilitate the payment of estimated income taxes by the Members. Tax Distributions shall be based on the allocation of taxable income (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income); provided, however, that any Member's "special basis" for properties adjusted under Code Section 743 shall not be taken into account. In the event that, as result of any action or position by the Internal Revenue Service and/or any state or local tax authority, the taxable income allocated to a Member is increased, the Tax Distribution shall be adjusted accordingly and such adjustment shall be distributed promptly after any such adjustment has become final (together with any interest payable to the Internal Revenue Service and/or any state or local tax authority).

(b) Subject to Section 10.02, the Company shall distribute the Required Cash Distribution, if any, for any Fiscal Year, to the Members no later than one hundred twenty (120) days after the end of such Fiscal Year; provided that any amount in excess of the amount reflected in the Company Statement (as hereinafter defined) shall be paid as specified in Section 10.01(d) hereof. The Required Cash Distribution shall be allocated among the Members, in proportion to and in accordance with their respective Percentage Interests.

(c) Any additional distributions shall be allocated among the Members, in proportion to and in accordance with their respective Percentage Interests.

(d) Not later than ninety (90) days after the end of any Fiscal Year, the Company shall prepare and deliver to the Members a written statement (the "Company Statement") of the Company's calculation of the Required Cash Distribution for such Fiscal Year. In the event that there is a dispute regarding the non-payment or calculation of a Required Cash Distribution, upon written notice of a Member setting forth the basis of the dispute, all of the Members shall meet at a mutually agreed upon time and location to negotiate, in person by principals capable of binding each of them,

and in good faith, a timely resolution of the dispute. Payment of any amount in excess of the amount set forth in the Company Statement shall be paid within thirty (30) days after resolution of any question or dispute regarding the Company Statement.

10.02 Limitation upon Distributions. No distribution (including a Required Cash Distribution) or return of Capital Contributions may be made and paid if, after the distribution or return of a Capital Contribution, the Board has determined in good faith that (i) the net assets of the Company would be less than zero, (ii) the Company would be insolvent or (iii) the Company would be unable to meet Working Capital Needs. The Managers may base a determination that a distribution or return of a Capital Contribution may be made hereunder in good faith reliance upon a balance sheet and profit and loss statement of the Company represented to be correct by the person having charge of its books of account or certified by an independent public or certified public accountant or firm of accountants to fairly reflect the financial condition of the Company.

10.03 Amounts Withheld. Amounts withheld pursuant to the Code or any provision of any state, local or foreign tax law with respect to any payment, distribution or allocation to the Members shall be treated as amounts paid or distributed, as the case may be, to the Members with respect to which such amount was withheld pursuant to this Section 10.05 for all purposes under this Operating Agreement. The Company is authorized to withhold from payments and distributions, or with respect to allocations, to the Members, and to pay over to any federal, state, local or foreign government any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state, local or foreign law, and shall allocate any such amounts to the Members with respect to which such amount was withheld.

## ARTICLE XI DISPOSITION OF MEMBERSHIP INTERESTS

11.01 Restrictions on Sale or Other Disposition. Except as expressly set forth in this Article XI, and, in such case then only after complying with the provisions of this Article XI, each Member agrees not to Transfer all or any portion of such Member's Membership Interest now owned or hereafter acquired by such Member unless such Member shall have obtained the approval of a Super Majority in Interest. Any successor or additional Member must agree to be bound by the terms of this Operating Agreement by signing a counterpart of this Operating Agreement.

### 11.02 Right of First Refusal.

(a) If any Member (the "Selling Member") receives a bona fide written offer from a prospective purchaser that is unaffiliated with any Member to purchase any of such Member's Membership Interests ("Offer") which the Selling Member desires to accept, it must first offer to sell such Membership Interests to the Company and to the other Member ("Non-Selling Member") in accordance with Subparagraphs (b) and (c) of this Section, by giving written notice of the Offer ("Selling Member Offer Notice") to the Company and the Non-Selling Member. The Company and the Non-Selling Member shall have the right, successively, to purchase all (but not less than all) of the Membership Interests proposed to be sold or exchanged by the Selling Member, upon and subject to the terms and conditions set forth in this Section 11.02.

(b) The Company shall have the exclusive right during the period of thirty (30) days following the delivery of the Selling Member Offer Notice to elect to purchase all or any portion of the Selling Member's Membership Interests, subject to the terms and conditions contained in the Offer, such election to be exercised by the delivery of written notice thereof within such thirty (30) day period to the Selling Member and the Non-Selling Member.

(c) If the Company has not elected to purchase all of the Membership Interests proposed to be sold or exchanged, then the Non-Selling Member shall have an additional thirty (30) day period following the thirty (30) day period referred to in Section 11.02(b) to elect to purchase the balance of the Membership Interests proposed to be sold or exchanged, subject to the terms and conditions contained in the Offer. In order to exercise its right of first refusal, the Non-Selling Member who elects to purchase any portion of the Membership Interests proposed to be sold or exchanged shall deliver to the Selling Member and the Company written notice of such election within the applicable time period provided in this Section 11.02(c).

(d) Unless otherwise agreed to by the Selling Member, all and not less than all of the Selling Member's Membership Interests must be purchased pursuant to Subparagraphs 11.03(b) and (c) of this Section by the Company and/or the Non-Selling Member in order that there shall be a purchase of said Selling Member's Membership Interests within the intent, scope and terms of this Section.

(e) If the Company and/or the Non-Selling Member do not purchase all of the Selling Member's Membership Interests in accordance with Subparagraphs (b) and (c) of this Section, the Selling Member may, for a period of one hundred twenty (120) days following the last day permitted for exercise pursuant to Subparagraph (c) of this Section, sell the Selling Member's Membership Interests to the third party at the price and under the terms and conditions set forth in the Offer, provided that the Transferee agrees in writing to be bound by all the terms and conditions of this Operating Agreement. If such Transfer does not occur within the one hundred twenty (120) day period, the Selling Member shall again be obligated to make new offers and re-offers to the Company and the Non-Selling Member in accordance with the terms of Subparagraphs (b) and (c) of this Section before selling all or any portion of his or its' Membership Interests to any third party.

11.03 Tag-Along Rights. If Big Co. desires to Transfer all or any portion of the Big Co. Interests to an unrelated Person that is neither an Affiliate of Big Co. nor Affiliate of Toshiba Corporation, whether by sale, merger, consolidation, exchange or otherwise (a "Significant Sale"), and neither the Company nor the other Member exercises its rights under Section 11.02, then at least thirty (30) days prior to the closing of such Significant Sale, Big Co. shall make an offer (the "Participation Offer") to the other Member (the "Remaining Member") to include in the proposed Significant Sale a portion of the Remaining Member's Percentage Interest that represents the same percentage of such Remaining Member's Membership Interest as the percentage of the Big Co. Interest being transferred by Big Co. is to the entirety of the Big Co. Interest. All Membership Interests transferred by a Remaining Member pursuant to

this Section 11.03 must be Transferred at the same price and terms as the Membership Interests being Transferred by Big Co..

#### 11.04 Drag-Along Rights

(a) In connection with any Significant Sale and provided that (i) neither the Company nor the other Member exercises its rights under Section 11.02 and (ii) that the transaction is a Qualifying Significant Sale Transaction, Big Co. has the right to require the holder of the Small Co. Interest to Transfer all of such Small Co. Interest in connection with such Qualifying Significant Sale Transaction. All Small Co. Interest transferred pursuant to this Section 11.04 must be transferred at the same price and terms as the Membership Interest being transferred by Big Co..

(b) Big Co. shall give the holder of the Small Co. Interest at least sixty (60) days' prior written notice of any proposed Transfer as to which Big Co. intends to exercise its rights under Section 11.04(a) (the "Drag-Along Notice").

11.05 Drag-Along Sale Requirements. If Big Co. elects to exercise its rights under Section 11.04(a) in connection with a Qualifying Significant Sale Transaction, the holder of the Small Co. Interest shall (a) take such actions as may be reasonably requested by Big Co. in connection with consummating such Qualifying Significant Sale Transaction, (b) vote in favor of, consent to and raise no objections against such Qualifying Significant Sale Transaction, or the process pursuant to which each such transaction was arranged, (c) waive any dissenter's, appraisal or other similar rights in connection therewith, (d) if such Qualifying Significant Sale Transaction is structured as a sale of Membership Interest, agree to sell such Small Co. Interest at the price and on the same terms and conditions of such transaction, (e) execute and deliver such documents as may be reasonably requested by Big Co. in connection with such Qualifying Significant Sale Transaction, including, without limitation, written consents of Members, letters of transmittal, purchase agreements and the like and (f) (i) bear their proportionate share of any escrows, holdbacks or adjustments in purchase price as the same may be negotiated by Big Co. in connection with such Qualifying Significant Sale Transaction and (ii) make such representations, warranties, covenants and indemnities (based on their proportionate share of the proceeds resulting from such Qualifying Significant Sale Transaction) as are customary for transactions of the nature of such transactions, but only to the extent as made by Big Co.. At the closing of such Qualifying Significant Sale Transaction that is structured as a sale of Membership Interest, the holder of the Small Co. Interest shall deliver assignments for all Small Co. Interest, duly endorsed for Transfer, to the purchaser against delivery of the appropriate purchase price. Notwithstanding anything to the contrary contained in this Operating Agreement, (A) no Remaining Member will be obligated in connection with any such Qualifying Significant Sale Transaction to indemnify the prospective transferee or its Affiliates with respect to any amount in excess of the net cash proceeds paid to such Remaining Member in connection with such Qualifying Significant Sale Transaction and (B) a Remaining Member's indemnification obligations in connection with such Qualifying Significant Sale Transaction shall be joint and several but will only be several based upon its pro rata share of the aggregate consideration received in connection with such Qualifying Significant Sale Transaction.

11.06 Cost of Sale Price. In connection with any transaction contemplated by Sections 11.03 and 11.04, Big Co. may, or may cause the Company to hire legal counsel and other professional advisors as it deems necessary or desirable to effectuate the contemplated transaction on behalf of the Company and all Members. The holders of the Big Co. and the Small Co. Interest shall bear their pro rata share (based upon the percentage Membership Interest sold or to be sold) of the reasonable costs of such transaction to the extent such costs are not otherwise paid by the Company or the acquiring Person. Costs incurred by the holder of the Big Co. Interest or the holder of the Small Co. Interest on their own behalf (other than the costs of the professional advisors hired by Big Co. pursuant to the first sentence of this Section 11.06) shall not be considered costs of such a transaction and must be paid solely by the holder of the Big Co. Interest or the holder of the Small Co. Interest, respectively.

11.07 Prohibited Transfer. Notwithstanding anything herein to the contrary, no Transfer of any Membership Interest shall be made to any Person who is engaged in any business competing with the Core Business, directly or indirectly, whether as principal, agent, owner, employee, stockholder, partner, member, manager, independent contractor, consultant or in any other capacity.

11.08 Conditions to Transfer.

(a) As a condition to the effectiveness of any Transfer permitted hereunder, and the admission of a Transferee as a new Member, each transferor and proposed Transferee shall execute and deliver to the Company, at the transferor's (and/or the Transferees') expense, a joinder agreement to this Operating Agreement, and such instruments of transfer, assignment, and assumption and such other certificates, representations, and documents, and shall perform all other acts necessary or desirable, in the opinion of counsel to the Company, to:

- (i) constitute each such Transferee a Member, if applicable;
- (ii) confirm that each person desiring to acquire Membership Interest, or to be admitted as a Member, has accepted, assumed, and agreed to be bound by, all of the terms, obligations, and conditions of this Operating Agreement, as in effect at the time of the Transfer;
- (iii) preserve the Company after such Transfer under the laws of each jurisdiction in which the Company is qualified, organized, or does business;
- (iv) maintain the status of the Company as a partnership for federal tax purposes;
- (v) assure compliance with all applicable state and federal laws, including, without limitation, securities laws; and
- (vi) constitute the Company a third party beneficiary of the rights of the transferor and the obligations of the Transferees under any arrangements or agreements to Transfer Membership Interests hereunder, with full power to enforce such rights and obligations directly against the Transferees.

(b) No Transfer of Membership Interest may be made if such Transfer, when considered with any other Transfer within the prior twelve-consecutive-month period, would, in the opinion of counsel to the Company, result in the termination of the Company pursuant to § 708 of the Code unless such Transfer is approved by a Super Majority in Interest or such Transfer is of all the Membership Interest in the Company.

(c) Without the approval of a Super Majority in Interest, no Transfer of Membership Interests may be made if, as a result of such Transfer the holder of any indebtedness of the Company would be entitled to accelerate the maturity of such indebtedness.

11.09 Other Transfers Void. Any purported Transfer by any Member or assignee of Membership Interest not in accordance with the provisions of this Article XI (including, without limitation, by operation of law) shall be void and ineffectual and shall not operate to Transfer any interest or title to the purported Transferee. The Managers shall not be charged with actual or constructive notice of any such purported Transfer and are expressly prohibited from making allocations and distributions hereunder in accordance with any such purported Transfer. The Company shall not cause or permit any Transfer by any Member of any Membership Interest to be registered on its books unless such Transfer is made in accordance with the terms of this Article XI. In no event shall a party to whom Membership Interests have been Transferred in violation of the terms and conditions of this Operating Agreement be permitted to vote such Membership Interest on any matter which is presented to the Members for vote. The Company shall be protected in relying on the record of Members maintained by it or on its behalf for all purposes, notwithstanding any notice of any purported Transfer to the contrary.

11.10 Specific Performance. The Members agree that they will be irreparably damaged in the event that the provisions of this Article XI are not performed, and that it will be impossible to measure in money the amount of such damage. Accordingly, if any Member hereto shall institute any action or proceeding to enforce the provisions of this Article XI, any Member hereto against whom such action or proceeding is brought hereby waives any claim or defense that such Member has or may have an adequate remedy at law, and such Member shall not argue in any such action or proceeding such claim or defense. Should any dispute arise concerning the provisions of this Operating Agreement, the Members agree that an injunction may be issued restraining or compelling, as the case may be, any action prohibited or required by this Operating Agreement, as permanent relief, as well as pending the determination of such controversy. Such remedy shall be cumulative and not exclusive.

ARTICLE XII  
DISSOLUTION AND TERMINATION

12.01 Dissolution.

(a) The Company shall be dissolved only upon the occurrence of any of the following events:

(i) the accumulated losses of the Company exceed [ ] of the total capital contributed to the Company by the Members;;

(ii) the Company suffers or permits the appointment of a receiver for its business or assets or becomes subject to involuntary proceedings under any bankruptcy or insolvency law (which proceedings remain undismissed for thirty (30) days);

(iii) at the option of the other Member, upon a Change in Control of a Member;

(iv) at the option of the other Member, if a Member suffers or permits the appointment of a receiver for its business or assets or becomes subject to involuntary proceedings under any bankruptcy or insolvency law (which proceedings remain undismissed for thirty (30) days);

(v) at the option of the non-breaching Member, in the event of a Material Breach of this Operating Agreement; *provided, however*, that the right of dissolution may not be exercised under this Section 12.01(a)(v) unless such breach remains uncured upon the expiration of any applicable Cure Period;

(vi) by mutual agreement of the Members;

(vii) upon the sale or other disposition of all or substantially all of the assets of the Company; or

(viii) otherwise by operation of law.

(b) The Company shall not be dissolved upon the expulsion, dissolution or Bankruptcy of a Member, unless such an event occurs at a time when the Company has only one other Member and, within ninety (90) days after such event, the remaining Member determines that it does not want to continue the business of the Company.

(c) If the “other Member” referenced in Sections 12.01(a)(iii) and (iv), above (the “Other Member”), elects not to dissolve the Company, then the Other Member shall have the additional option and right to buy, and the Member subject to a Change of Control or the appointment of a receiver or an involuntary bankruptcy proceeding (the “Exiting Member”) shall be obligated to sell to the Other Member the Exiting Member’s Membership Interest on the following terms and conditions:

(i) The entire Membership Interest owned by the Exiting Member shall be subject to the terms and conditions and restrictions set forth herein, regardless of the date and manner in which Exiting Member’s Membership Interest was acquired.

(ii) The Other Member's option and right to acquire the Exiting Member's Membership Interest shall be exercised by written notice thereof, delivered to the Exiting Member on or before that date which is ten (10) business days after the occurrence of an event (the "Triggering Event") described in either Sections 12.01(a)(iii) or (iv) above giving rise to the Other Member's option and right to purchase.

(iii) The purchase price for the Exiting Member's Membership Interest shall be equal to the then positive value, if any, of the Exiting Member's Capital Account determined from the Company's books of account as of the date of the Triggering Event (the "Valuation Date"). Said value shall include all credits and charges for Profits, Losses, distributions and contributions as of the Valuation Date, but shall not include any allowance for goodwill, trade name or other intangible assets, except for costs incurred by the Company in the acquisition of such intangible assets as are reflected on the Company's books of account. For the purpose of this Operating Agreement, the Company's books of account shall be conclusive on both the Other Member and the Exiting Member.

(iv) A closing shall be held no later than sixty (60) days after the date of the Triggering Event. At the closing, the Exiting Member shall deliver to the Other Member a duly executed instrument assigning the Exiting Member's Percentage Interest to the Other Member, and the Other Member shall pay the purchase price to the Exiting Member by wire transfer of immediately available funds.

#### 12.02 Winding Up, Liquidation and Distribution of Assets.

(a) Upon dissolution, an accounting shall be made by the Company's independent accountants of the accounts of the Company and of the Company's assets, liabilities and operations, from the date of the last previous accounting until the date of dissolution. The Managers shall promptly proceed to wind up the affairs of the Company.

(b) If the Company is dissolved and its affairs are to be wound up, the Managers are directed to:

(i) sell or otherwise liquidate such of the Company's assets as may be required to discharge all liabilities of the Company, including liabilities to Members who are creditors, to the extent otherwise permitted by law, other than liabilities to Members for distributions, and establish such reserves as may be reasonably necessary to provide for contingent liabilities of the Company (for purposes of determining the Capital Accounts of the Members, the amounts of such reserves shall be deemed to be an expense of the Company);

(ii) allocate any profit or loss resulting from such sales to the Capital Accounts in accordance with Article IX hereof; and

(iii) distribute the remaining assets in the following order of priority:

(1) to the Members having positive balances in their Capital Accounts to the extent of and in proportion to such positive balances; and

(2) the balance among the Members in accordance with each Member's respective Percentage Interest, such distributions to be made either in cash or in kind, as determined by the Managers, with any assets distributed in kind being valued for this purpose at their fair market value as determined by the Managers.

(c) Any distributions pursuant to Section 12.02(b)(iii)(2) made in respect of Capital Accounts must be made in accordance with the time requirements set forth in Treasury Regulations §1.704-1(b)(2)(ii)(b)(2). The Company may offset damages for breach of this Operating Agreement by a Member whose interest is liquidated (either upon the withdrawal of the Member or the liquidation of the Company) against the amount otherwise distributable to such Member.

(d) Notwithstanding anything to the contrary in this Operating Agreement, upon a liquidation within the meaning of Treasury Regulations §1.704-1(b)(2)(ii)(g), if any Member has a deficit Capital Account (after giving effect to all contributions, distributions, allocations and other Capital Account adjustments for all taxable years, including the year during which such liquidation occurs), such Member shall have no obligation to make any Capital Contribution, and the negative balance of such Member's Capital Account shall not be considered a debt owed by such Member to the Company or to any other Person for any purpose whatsoever.

(e) Upon completion of the winding up, liquidation and distribution of the assets, the Company shall be deemed terminated.

(f) The Managers shall comply with all requirements of applicable law pertaining to the winding up of the affairs of the Company and the final distribution of its assets.

12.03 Certificate of Dissolution. When all debts, liabilities and obligations of the Company have been paid and discharged or adequate provisions have been made therefor and all of the remaining property and assets of the Company have been distributed, a certificate of dissolution, as required by the Act, shall be executed and filed with the Connecticut Secretary of State.

12.04 Effect of Filing of Certificate of Dissolution. Upon the filing of the certificate of dissolution with the Delaware Secretary of State, the existence of the Company shall cease, except for the purpose of suits, other proceedings and appropriate action as provided in the Act. The Managers shall have authority to distribute any Company Property discovered after dissolution, convey real estate and take such other action as may be necessary on behalf of and in the name of the Company.

12.05 Return of Contribution Nonrecourse to Other Members. Except as provided by law or as expressly provided in this Operating Agreement, upon dissolution, each Member shall look solely to the assets of the Company for the return of such Member's Capital Contribution. If the Company Property remaining after the payment or discharge of the debts and liabilities of the Company is insufficient to return the Capital

Contribution of one or more Members, such Member or Members shall have no recourse against any other Member.

ARTICLE XIII  
DISPUTE RESOLUTION

13.01 Negotiation. In the event of any controversy or claim arising out of, relating to or in connection with the Business, any provision of this Operating Agreement, or the rights or obligations of the Members hereunder, the Members shall try to settle their differences amicably between themselves. Either Member may initiate such informal dispute resolution by sending written notice of the dispute to the other Member, and within ten (10) days after such notice appropriate representatives of the Members shall meet for attempted resolution by good faith negotiations. If such representatives are unable to resolve promptly such disputed matter, it shall be referred to the Chief Executive Officer of Small Co. and to the Chief Executive Officer of Big Co., for discussion and resolution. If such personnel are unable to resolve such dispute within thirty (30) days of initiating such negotiations, unless otherwise agreed by the Members, such dispute shall proceed to mediation as provided under Section 13.02.

13.02 Mediation.

(a) If a dispute arises out of or relates to this Operating Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, then the Members agree before resorting to resolution under Section 13.03, to first try in good faith to settle the dispute by non-binding mediation with a neutral mediator; *provided, however*, that (a) no such mediation shall be required for any disagreement regarding the failure by a Member to fully pay any sum due hereunder, and (b) if such mediation has not occurred within sixty (60) days after a written request for mediation by either Member, then either Member may commence a proceeding pursuant to Section 13.03.

(b) Each Member agrees not to use the period or pendency of the mediation to disadvantage the other Member procedurally or otherwise. No statements made by either side during the mediation may be used by the other or referred to during any subsequent proceedings.

(c) Each Member has the right to pursue provisional relief from any court, such as attachment, preliminary injunction, replevin, etc. to avoid irreparable harm, maintain the status quo, or preserve the subject matter of the dispute, even though mediation has not been commenced or completed.

13.03 Forum. Any dispute arising out of or in connection with this Agreement that is not settled by negotiation pursuant to Section 13.01 or mediation pursuant to Section 13.02, shall be brought in the Allegheny County, Pennsylvania Court of Common Pleas, and the parties agree to cooperate in a request to such Court that any such proceeding be assigned to the Commerce and Complex Litigation Center of said Court of Common Pleas. Each of the parties irrevocably submits to the exclusive jurisdiction of said Court of Common Pleas in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of such proceeding shall be heard and determined only in

said Court of Common Pleas, and agrees not to bring any proceeding arising out of or relating to this Agreement in any other court. Each party acknowledges and agrees that this Section 13.03 constitutes a voluntary and bargained-for agreement between the parties. Process in any proceeding referred to in the first sentence of this Section may be served on any party anywhere in the world, including by sending or delivering a copy of the process to the party to be served at the address and in the manner provided for the giving of notices in Section 14.01. Nothing in this Section 13.03 will affect the right of any party to serve legal process in any other manner permitted by law or at equity. EACH PARTY, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY, WAIVES ITS RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY CONTEMPLATED TRANSACTION, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE.

#### ARTICLE XIV MISCELLANEOUS PROVISIONS

14.01 Notices. Except as otherwise expressly provided in this Operating Agreement, all notices, demands, or communication required or permitted to be given by any provision of this Operating Agreement, shall be effective only if given in writing and sent by (i) United States certified or registered mail, postage prepaid, (ii) a nationally recognized overnight courier service, or (iii) personal delivery, and addressed to the Member at the address described in Section 4.01 of this Operating Agreement (or such other address as such Member may designate by notice to all other Members). Any such notice shall be deemed given (i) if by certified or registered mail, upon receipt (or refusal to receive) as evidenced by the return receipt (or the refusal to accept delivery), (ii) if by an overnight courier, upon receipt (or refusal to receive) as evidenced by the receipt of the courier service (or evidence of the refusal to accept delivery), or (iii) if by personal delivery, upon receipt or refusal to receive.

14.02 Waiver of Action for Partition. No Member or permitted assignee shall have the right to require a partition of all or a portion of the Company Property, and by signing this Operating Agreement or a joinder hereto or counterpart hereof, each Member or permitted assignee irrevocably waives any right to maintain an action for partition of the Company Property.

14.03 Further Assurances. Each of the Members shall hereafter execute and deliver such further instruments and do such further acts and things consistent with the provisions of this Operating Agreement as may be required or useful to carry out the full intent and purpose of this Operating Agreement or as may be necessary to comply with any laws, rules or regulations.

14.04 Waivers. No Member's undertakings or agreements contained in this Operating Agreement shall be deemed to have been waived unless such waiver is made by an instrument in writing signed by an authorized representative of such Member. Failure of a Member to insist on strict compliance with the provisions of this Operating Agreement shall not constitute waiver of that Member's right to demand later compliance with the same or other provisions of this Operating Agreement. A waiver of a breach of this Operating Agreement will not constitute a waiver of the provision itself or of any subsequent breach, or of any other provision of this Operating Agreement.

14.05 Rights and Remedies Cumulative; Creditors. The rights and remedies provided by this Operating Agreement are cumulative, and the use of any one right or remedy by any Member shall not preclude or waive the right to use any other remedy. Said rights and remedies are given in addition to any other legal rights the Members may have. None of the provisions of this Operating Agreement shall be for the benefit of or enforceable by any creditors of the Company or of the Members.

14.06 Construction. The headings in this Operating Agreement are inserted solely for convenience of reference and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Operating Agreement or any provision hereof. References in this Operating Agreement to numbered paragraphs, sections, schedules or other provisions are references to this Operating Agreement unless otherwise specified. When the context in which words are used in this Operating Agreement indicates that such is the intent, singular words shall include the plural and vice versa and masculine words shall include the feminine and the neuter genders and vice versa.

14.07 Entire Agreement; Amendment. This Operating Agreement and the agreements referred to herein set forth the entire understanding of the Members with respect to the subject matter hereof and supersede any prior understandings or agreements among the Members, whether written or oral, to the extent related to the subject matter hereof. This Operating Agreement is not intended to limit the rights, obligations or remedies of the Members set forth in the Business Venture Agreement. In the event of any conflict or inconsistency between the terms hereof and the Business Venture Agreement, the terms of the Business Venture Agreement shall govern. This Operating Agreement may not be amended, modified, or supplemented in whole or in part except by a subsequent written instrument executed by all of the Members.

14.08 Severability. If any provision of this Operating Agreement or the application thereof to any Person or circumstance shall be invalid, illegal or unenforceable to any extent, the remainder of this Operating Agreement and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law.

14.09 Successors and Assigns. Each and all of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the Members and, to the extent permitted by this Operating Agreement, their respective successors and assigns.

14.10 Counterparts. This Operating Agreement may be executed in one or more counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute but one and the same instrument.

14.11 Effectiveness. This Operating Agreement will not be effective unless and until executed and delivered by each of the Members, but shall be effective as of the Effective Date without regard to the date on which it was actually executed or delivered by either Member.

14.12. Controlling Law; Venue. This Operating Agreement shall be governed and construed in accordance with the laws of the State of Delaware.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

**[SIGNATURE PAGE FOLLOWS]**

SAMPLE

IN WITNESS WHEREOF, the Members have executed this Operating Agreement as of the date first written above.

**COMPANY:**

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**MEMBERS:**

BIG COMPANY, INC., a Pennsylvania corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SMALL COMPANY, LLC, a Delaware limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **SAMPLE AGREEMENT**

### **SCHEDULE A** **MEMBERS**

<b><u>Name/Address</u></b>	<b><u>Initial Capital Contribution</u></b>	<b><u>Percentage Interest</u></b>
Big Company, Inc. 200 Main Street Philadelphia, PA 67890 EIN# _____	\$7,140,000.00 (cash)	51%
Small Company, LLC 100 Main Street Pittsburgh, PA 67890 EIN# _____	\$6,860,000.00 Contributed Assets per the Business Venture Agreement	49%