

**LIMITED LIABILITY COMPANY OPERATING AGREEMENT  
OF  
RIVEROAK REALTY FUND II, LLC**

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**LIMITED LIABILITY COMPANY OPERATING AGREEMENT  
OF  
RIVEROAK REALTY FUND II, LLC**

LIMITED LIABILITY COMPANY OPERATING AGREEMENT (this "Agreement") dated as of August \_\_\_, 2001 by and among RiverOak Investment Corp., LLC, as Managing Member, and those Persons listed from time to time as Nonmanaging Members on Schedule A attached hereto.

**ARTICLE I**

**CERTAIN DEFINITIONS AND REFERENCES**

For the purposes of this Agreement:

"Act" shall mean the Delaware Limited Liability Company Act, *6 Del. C. § 18-101 et seq.*, as amended.

"**Adjusted Capital Account Balance**" of a Member as of any date means the balance in such Member's Capital Account as of such date (i) increased by any amount such Member is deemed obligated to contribute to the Fund pursuant to Treasury Regulation section 1.704-1(b)(2)(ii)(c), 1.704-2(g)(1) or 1.704-2(i)(5) and (ii) reduced by any allocations or distributions to such Member described in Treasury Regulation section 1.704-1(b)(2)(ii)(d)(4), (5) or (6).

"**Adjusted Capital Contributions**" of a Member as of any date means the amount of such Member's Capital Contributions reduced by the aggregate amount of cash and the Fair Market Value of any assets previously distributed to such Member pursuant to Sections 5.1(b)(i), 5.1(b)(iii) (other than distributions of Allocable Preferred Returns) and 5.2(a).

"**Advisory Board**" means a board appointed in accordance with Section 6.5.

"**Affiliate**" of, or a Person "**affiliated**" with, a specified Person means a Person that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with the Person specified. For the purposes of this definition, the term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of securities, by contract or otherwise.

"**Agreement**" means this Limited Liability Company Operating Agreement, as it may be subsequently amended.

"**Allocable Capital Contribution**" of a Member with respect to an Investment means the cost basis to the Fund of such Investment multiplied by a fraction, the numerator of which is that Member's Adjusted Capital Contributions at the time the Fund acquires such

Investment and the denominator of which is the aggregate Adjusted Capital Contributions of all Members at such time.

**"Allocable Preferred Return"** of a Member with respect to an Investment means the Preferred Return calculated with respect to that Member's Allocable Capital Contribution with respect to that Investment.

**"Assignee"** means a Person who has become the owner of all or a portion of a Nonmanaging Member's Interest but who has not become a Substituted Nonmanaging Member.

**"Bankruptcy"** means, with respect to any Person, the occurrence of any of the following events: (i) the making by such Person of an assignment for the benefit of creditors; (ii) the filing by such Person of a voluntary petition in bankruptcy; (iii) adjudication of such Person as bankrupt or insolvent or the issuance of a decree of bankruptcy or insolvency against such Person; (iv) the filing by such Person of a petition or answer seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief; (v) the filing by such Person of an answer or other pleading admitting or failing to contest material allegations of a petition filed in any proceeding of the type described in this definition; or (vi) the seeking, consent to or acquiescence in, by such Person, the appointment of a trustee, receiver or liquidator of such Person or of all or any substantial part of his properties.

**"Capital Account"** means the capital account maintained for each Member pursuant to Section 4.1.

**"Capital Contributions"** of a Member means the amount of cash and the Fair Market Value of property, if any, contributed by such Member to the Fund (or by the former Member in respect of the Interest of such Member).

**"Capital Event"** means the sale, exchange or other disposition of all or substantially all (*i.e.*, 95% or more, based on capital invested) of the Fund's Investments.

**"Closing Date"** means, with respect to the admission of each Nonmanaging Member to the Fund, the date on which such Nonmanaging Member is admitted to the Fund in accordance with Section 3.3.

**"Code"** means the Internal Revenue Code of 1986, as amended.

**"Commitment Period"** means the period beginning on the initial Closing Date and ending on the earlier of (i) December 31, 2002 or (ii) the date on which Total Capitalization has been realized by the Fund, subject to extension or earlier termination at the sole discretion of the Managing Member; provided, however, that such extension shall not exceed two (2) six month periods.

**"Consent"** means the consent of a Person given as provided in Section 11.1 to do the act or thing for which the consent is solicited, or the act of granting such consent, as the context may require. Reference to the Consent of a majority (or specified percentage) in Interest of the Members or the Nonmanaging Members means the Consent of Members or Nonmanaging Members, as the case may be, whose aggregate Adjusted Capital Contributions represent more

than 50% (or not less than the specified percentage) of the aggregate Adjusted Capital Contributions of all of the Members or the Nonmanaging Members, as the case may be, at the time such Consent is solicited.

"**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended.

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended.

"**Expanded Investment Territory**" means the Boston, Massachusetts - Washington, D.C. corridor.

"**Fiscal Year**" means the calendar year or, in the case of the first "**Fiscal Year**," the period commencing on the date hereof and ending on December 31, 2001 and, in the case of the last "**Fiscal Year**," the period commencing on the January 1 of the calendar year which includes the date on which the liquidation of the Fund is completed and ending on the date on which such liquidation is completed.

"**Fund**" shall mean RiverOak Realty Fund II, LLC, a Delaware limited liability company formed pursuant to this Agreement.

"**Fund Expenses**" shall mean the expenses of the Fund described in Article VI.

"**Incapacity**" or "**Incapacitated**" means (i) with respect to any individual, the entry of a court order declaring such individual legally incompetent or incapable of handling his affairs, the appointment by court order of a guardian or conservator for such individual upon an adjudication of such individual's incompetence or his death or (ii) with respect to any other Person, the dissolution or termination of such Person (other than by merger or consolidation).

"**Interest**" means the entire membership interest of a Member in the Fund at any particular time, including the right of such Member to any and all benefits to which a Member may be entitled as provided herein, together with the obligations of such Member to comply with all the terms and provisions hereof. "**Nonmanaging Membership Interests**" shall mean the Interests of a Nonmanaging Member in its capacity as such and "**Managing Membership Interest**" shall mean the Interests of the Managing Member in its capacity as such.

"**Investment**" means any real property acquired by the Fund in furtherance of the purposes of the Fund as set forth in Section 3.2 hereof.

"**Investment Advisers Act**" means the Investment Advisers Act of 1940, as amended.

"**Investment Company Act**" means the Investment Company Act of 1940, as amended.

"**Investment Period**" means the period beginning on the initial Closing Date and ending on the earlier of (i) the date on which at least 75% of the Total Capitalization has been invested by the Fund; or (ii) the date of dissolution of the Fund under Section 9.1.

**"Investment Proceeds"** with respect to any Investment or Short-Term Investment means (a) any cash constituting income on or in respect of that Investment or Short-Term Investment and (b) any proceeds (whether cash or in-kind) from the sale, refinancing or other disposition of that Investment or Short-Term Investment (determined by treating a distribution of an Investment in-kind as a distribution of cash equal to the Fair Market Value of such Investment as of the date of such distribution).

**"Investment Territory"** means the area comprising Connecticut, New Jersey, New York and Eastern Pennsylvania.

**"Liquidating Trustee"** means a Person selected by a majority in Interest of the Nonmanaging Members to act as a liquidating trustee as provided in Section 9.2.

**"Management"** means the President and Chief Executive Officer, and the Chief Marketing Officer of the Fund, as designated from time to time by the Managing Member.

**"Managing Member"** means RiverOak Investment Corp., LLC or its designees, or any other Person that becomes a Managing Member of the Fund as provided herein, in all cases in such Person's capacity as a Managing Member of the Fund.

**"Members"** shall mean the Managing Member and the Nonmanaging Members, collectively, unless otherwise indicated.

**"Memorandum"** means the Confidential Offering Memorandum of the Fund dated August 1, 2001 pertaining to the sale of the Membership Interests.

**"Minimum Gain"** means, with respect to each Nonrecourse Liability of the Fund, the amount of gain the Fund would realize if the property subject to such Nonrecourse Liability were disposed of for no consideration other than full satisfaction of the Nonrecourse Liability, determined in accordance with the rules set forth in Treasury Regulation sections 1.704-2(b)(2) and 1.704-2(d).

**"Net Capital Event Proceeds"** means the amount by which the gross cash proceeds from the occurrence of a Capital Event (treating the distribution of an Investment in-kind as generating cash proceeds equal to the Fair Market Value of such Investment as of the date of distribution) exceed the sum of (a) the amount required to be paid by the Fund in reduction of prior loans or liens upon Fund property, (b) costs incurred by the Fund in connection with such Capital Event and (c) such reserves as the Managing Member shall deem necessary or appropriate.

**"Net Income"** and **"Net Loss"** for each Fiscal Year or part thereof means the income and loss of the Fund for that period, as determined for federal income tax purposes, including all distributive items under Code section 702, adjusted to take into account any tax-exempt income of the Fund and any expenses of the Fund that are described in Code sections 705 or 709 as not deductible or chargeable to capital account, and further adjusted as follows:

(a) Upon adjustment of the book value of Fund property pursuant to Section 4.1(b) or (c), the amount of such adjustment shall be taken into account as gain or loss from the disposition of such property;

(b) Items of depreciation, amortization and other cost recovery with respect to Fund property having a book value that differs from its adjusted basis for tax purposes shall be computed by reference to such property's book value in accordance with Treasury Regulation section 1.704-1(b)(2)(iv)(g);

(c) Items of income, gain, loss or deduction attributable to the disposition of Fund property having a book value that differs from its adjusted basis for tax purposes shall be computed by reference to such property's book value in accordance with Treasury Regulation section 1.704-1(b)(2)(iv)(g); and

(d) Items of income, gain, loss or deduction that are specially allocated pursuant to Sections 4.4 through 4.8 shall not be taken into account in calculating Net Income and Net Loss.

**"Net Investment Proceeds"** with respect to any Investment or Short-Term Investment means the Investment Proceeds from that Investment or Short-Term Investment that the Managing Member determines to be available for distribution to the Members following (i) the retention of such amounts for reinvestment as determined by the Managing Member in accordance with Section 3.6, (ii) the payment of all Fund Expenses attributable to such Investment (including an allocable share of Fund Expenses that are not attributable to any particular Investment), as determined by the Managing Member, (iii) the distribution to the Members of their respective Tax Distributions, if any, pursuant to Section 5.1(a), and (iv) the establishment or replenishment of such reserves as the Managing Member shall deem necessary for taxes, debt service, and other expenses and other working capital requirements of the Fund or for contingent or unforeseen liabilities of the Fund

**"Nonmanaging Members"** means the Nonmanaging Members listed on Schedule A attached hereto and any other Person which shall be admitted to the Fund as a Nonmanaging Member pursuant to Section 3.3 or as a Substituted Nonmanaging Member pursuant to Section 8.3 until such Person shall withdraw as a Nonmanaging Member pursuant to Section 3.11 or a Substituted Nonmanaging Member or Substituted Nonmanaging Members are admitted with respect to such Person's entire NonManaging Membership Interest, in all cases in such Person's capacity as a Nonmanaging Member of the Fund.

**"Nonrecourse Deductions"** means the excess, if any, of the net increase, if any, in the amount of Minimum Gain during a Fiscal Year over the aggregate amount of distributions during that Fiscal Year of proceeds of a Nonrecourse Liability, as defined in Treasury Regulation sections 1.704-2(b)(i) and 1.704-2(c).

**"Nonrecourse Liability"** means a nonrecourse liability of the Fund as defined in Treasury Regulation section 1.704-2(b)(3).

**"Percentage Interest"** means with respect to each Nonmanaging Member, the percentage set forth opposite such Nonmanaging Member's name on Schedule A attached hereto, as amended from time to time, as calculated in accordance with Section 3.7.

**"Person"** means an individual, partnership, corporation, limited liability company, association, joint stock company, trust, joint venture, unincorporated organization or governmental authority or any department, agency or political subdivision thereof.

**"Preferred Return"** of a Nonmanaging Member as of any date means a cumulative return of 8% per annum compounded annually of such Member's average Adjusted Capital Contributions for each Fiscal Year calculated from the Closing Date with respect to that Member.

**"Securities Act"** means the Securities Act of 1933, as amended.

**"Short-Term Investment"** means short-term, liquid securities selected by the Managing Member, in its discretion, for temporary investment of the Fund's funds, including, but not limited to, short-term obligations of, or guaranteed by, the United States or any agency or instrumentality thereof; time deposits, bankers' acceptances and certificates of deposit, and money market or other accounts with, commercial banks or savings institutions; and corporate commercial paper.

**"Substituted Nonmanaging Member"** means a Person admitted pursuant to Section 8.3 as the successor to all of the rights of a Nonmanaging Member with respect to any part or all of such Nonmanaging Member's Interest.

**"Targeted Capital Account Balance"** has the meaning set forth in Section 4.4.

**"Tax Distribution"** with respect to any Member for any taxable year of the Fund means an amount of cash equal to the product of (a) the Net Income and items of income and gain (reduced by any items of loss and deduction) allocated to such Member for such taxable year pursuant to Article IV and (b) the combined highest marginal effective federal and state income tax rates applicable to an individual resident of New York (taking into account the category of income subject to tax and the deductibility of state taxes for federal income tax purposes) in effect from time to time during such taxable year.

**"Total Capitalization"** means \$10,000,000, or such lesser amount as determined by the Managing Member in its sole discretion on or before December 31, 2002; provided, however, that such amount shall be no less than \$2,500,000.

**"Transfer"** means sale, exchange, gift, encumbrance, assignment, pledge, mortgage or other hypothecation or disposition, whether voluntary or involuntary.

**"Unaffiliated Nonmanaging Member"** means a Nonmanaging Member who is not a member or other Affiliate of the Managing Member.

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**ARTICLE II**  
**ORGANIZATION**

2.1 **Name.** The name of the Fund is "RiverOak Realty Fund II, LLC".

2.2 **Offices.** The principal office of the Fund shall be at 400 Atlantic Street, Stamford, Connecticut, 06901, but the Managing Member, at its sole discretion, may select other or additional places of business from time to time.

2.3 **Purposes.** The purposes of the Fund are (i) investing in, acquiring, holding and selling multi-family residential, office and retail real estate assets and real estate related operating or service companies located or based primarily in the Investment Territory and (ii) the carrying on of any other activity which, in the opinion of the Managing Member, may be necessary or appropriate in connection therewith or incidental thereto.

2.4 **Compliance with Applicable Laws and Rules.** No business or activities authorized by Section 2.3 shall be conducted that are forbidden by or contrary to any applicable law or to the rules or regulations lawfully promulgated thereunder. If any of the terms, conditions or other provisions of this Agreement shall be in conflict with any of the foregoing, such terms, conditions or other provisions shall be deemed modified so as to conform therewith. Each Member agrees to comply with all such laws, rules and regulations.

2.5 **Formations; Term .**

(a) The Fund was formed upon the filing of the certificate of formation (the "Certificate") with the Secretary of State of the State of Delaware. Unless sooner terminated pursuant to Article IX hereof or as otherwise provided in this Agreement, the term of the Fund shall continue in full force and effect until the earlier of (i) December 31, 2002 [?] or (ii) the determination by the Managing Member at any time on or after the expiration of the Commitment Period, that the minimum Total Capitalization has not been realized (in which case subscriptions, which shall have been deposited and held in an interest bearing escrow account, will be refunded with all accrued interest thereon).

(b) The Managing Member is hereby designated as an authorized Person, within the meaning of the Act, and shall be authorized to execute, file and record (or direct the execution, filing and recording of) all such certificates and documents, including amendments to the Certificate, and to do such other acts as may be appropriate to comply with all requirements for the formation, continuation and operation of a Limited Liability Company, the ownership of property, and the conduct of business under the laws of the State of Delaware and any other jurisdiction in which the Fund may own property or conduct business. The Members hereby ratify the execution, filing and recording by Robert Rossi, Esq. of Windels Marx Lane & Mittendorf, LLP of the Certificate with the Secretary of State of the State of Delaware.

2.6 **Ownership of Fund Property; Partition.** All property acquired by the Fund, real or personal, tangible or intangible, shall be owned by the Fund as an entity, and no Member, individually, shall have any ownership interest therein. Each Member hereby expressly waives the right to require partition of any Fund property or any part thereof.

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## ARTICLE III

### MEMBERS; CAPITAL; PERCENTAGE INTERESTS

3.1 **Managing Member.** The Managing Member of the Fund is RiverOak Investment Corp., LLC, a [Delaware] limited liability company. The Managing Member represents that its address is 400 Atlantic Street, Stamford, CT 06901. The Managing Member shall promptly give written notice of any change in its address to the Nonmanaging Members.

3.2 **Managing Member's Contributions.** The Capital Contribution of the Managing Member shall be set forth on Schedule A attached hereto. The Managing Member shall not be required to lend any funds or to make any other additional Capital Contribution to the Fund. Any additional Capital Contribution by the Managing Member relating to its Managing Membership Interest shall be made in the same manner as provided in Section 3.3 for Capital Contributions by Nonmanaging Members, relating to additional Nonmanaging Membership Interests.

3.3 **Nonmanaging Members' Sale of Interests.** (a) The Fund shall sell Nonmanaging Membership Interests only to Persons who are, or who the Managing Member reasonably believes are, at the time of sale, "accredited investors," as such term is defined in Regulation D promulgated under the Securities Act. On or before the termination of the Commitment Period, the Managing Member may, at its sole discretion, accept, on behalf of the Fund, subscriptions for Nonmanaging Membership Interests or additional Nonmanaging Membership Interests. On the initial Closing Date, each of the Persons set forth on Schedule A attached hereto shall become a Nonmanaging Member and shall be shown as such on the books and records of the Fund.

(b) The Managing Member may in its discretion cause the Fund to admit additional Nonmanaging Members or allow any Nonmanaging Member to increase its Capital Contribution at any time after the initial Closing Date until expiration of the Commitment Period. Upon the execution and delivery of a counterpart of this Agreement, each such additional Nonmanaging Member shall become a Nonmanaging Member of the Fund and shall be shown as such on the books and records of the Fund. Neither the admission of any additional Nonmanaging Member to the Fund nor the increase in the Capital Contribution of any existing Nonmanaging Member pursuant to this Section 3.3 shall require the approval of any Nonmanaging Member. Notwithstanding the foregoing, no additional Nonmanaging Member shall be admitted to the Fund, and no existing Nonmanaging Member shall be allowed to increase its Capital Contribution, if the admission of such Nonmanaging Member or the increase by such Nonmanaging Member of its Capital Contribution would, in the judgment of the Managing Member, cause a dissolution of the Fund under the Act, cause the Fund's assets to be deemed to be "plan assets" for purposes of ERISA, cause the Fund to be deemed to be an "investment company" for purposes of the Investment Company Act, cause the Managing Member to be in violation of the Investment Advisers Act or violate, or cause the Fund to violate, any applicable law or regulation, including any applicable Federal or state securities laws.

**3.4 Nonmanaging Members' Capital and Interest Thereon.** Each Nonmanaging Member shall contribute the amount paid to the Fund for its Nonmanaging Membership Interests as such Nonmanaging Member's Capital Contribution upon admission of such Nonmanaging Member to the Fund. The minimum initial contribution required from each Nonmanaging Member is \$250,000, unless the Managing Member, at its sole discretion, waives such requirement. Except as provided in Section 2.5, no Member shall be paid interest by the Fund or by the Managing Member on or in respect of any Capital Contribution or Capital Account. No Member shall have any right to demand the return of his Capital Contribution other than upon dissolution of the Fund pursuant to Article IX or as provided in Section 3.11. The Managing Member shall have no personal liability to the Nonmanaging Members for the return of Capital Contributions or for distributions from the Fund, except to the extent of any obligation of the Managing Member to the Fund under Section 3.2.

**3.5 Additional Capital Contributions.**

(a) Upon the termination of the Commitment Period, the Nonmanaging Members shall have no further obligation to make capital contributions to the Fund.

(b) Notwithstanding anything to the contrary contained herein, the Managing Member may from time to time determine that additional capital is necessary or desirable to make Investments or cover Fund Expenses. Upon such determination, the Managing Member shall notify each Nonmanaging Member in writing ("Capital Call Notice") of its intention to make a capital call (a "Capital Call"). Each Capital Call Notice shall specify:

(i) the aggregate amount of capital contributions to be made by the Members (the "Call Amount");

(ii) the purpose(s) for which such Capital Call is being made and a description of the material terms of the proposed Investment or Fund Expense;

(iii) the pro rata capital contribution to be made by such Nonmanaging Member determined in accordance with such Nonmanaging Member's Capital Contributions;

(iv) the date on which such capital contribution is due (which shall be at least ninety (90) business days from and including the date of delivery of the Capital Call Notice) (the "Contribution Date"); and

(v) the account to which such capital contribution shall be paid.

(c) Each Nonmanaging Member shall have the right, but not the obligation, to participate in any Capital Call. Each Nonmanaging Member that chooses to contribute pursuant to a Capital Call Notice (a "Participating Nonmanaging Member") shall, with fifteen (15) business days of receipt of the Capital Call Notice, notify the Managing Member in writing ("Participation Notice") of such intention to participate. Each Participation Notice shall specify:

(i) the name of such Nonmanaging Member; and

(ii) the amount of such capital contribution.

(d) Notwithstanding anything to the contrary contained herein, the Managing Member may, in its sole discretion, accept capital contributions from any Participating Nonmanaging Member in excess of (or less than) the amounts specified in such Nonmanaging Member's Capital Call Notice as provided in Section 3.5(b)(iii).

(e) In the event that less than all of the Nonmanaging Members elect to participate:

(i) the Managing Member may increase each Participating Nonmanaging Member's pro rata share of the capital contribution by notice to such Participating Nonmanaging Members at least sixty (60) days prior to the Contribution Date and may extend the Contribution Date by notice to the Participating Nonmanaging Members at least thirty (30) days prior to any Contribution Date, provided that in no event shall such date be extended beyond thirty (30) days following the date initially designated in the Capital Call Notice; or

(ii) the Managing Member may elect to make a capital contribution to the Fund. If the Managing Member makes a capital contribution pursuant to this Section 3.5(e)(ii), its Percentage Interest and Capital Account shall each be increased to reflect such capital contribution.

(f) (i) If in connection with the making of any Investment or the payment of any Fund Expense in respect of which a Capital Call Notice has been delivered, the Managing Member shall determine that it is necessary or desirable to increase the capital contributions to be made by the Nonmanaging Members in connection therewith, the Managing Member shall deliver an additional Capital Call Notice to each Participating Nonmanaging Member, amending the original Capital Call Notice and specifying:

(1) the amount of any increase in the Call Amount,

(2) the amount of the increase in the capital contribution to be made by such Nonmanaging Member,

(3) the date of contribution with respect to the amount of the increase in the capital contribution if different from the date specified in the original Call Notice, and

(4) the reason for such increase.

(ii) If the amount of the increase in the capital contribution of any Nonmanaging Member is equal to or less than 25% of the capital contribution specified in the original Call Notice, the date with respect to such incremental amount shall be no earlier than the later of (x) the date specified in the original Call Notice and (y) five Business Days from and including the date of delivery of the additional Call Notice. If the amount of such increase is greater than 25% of the capital contribution specified in the original Call Notice, the date with respect to such incremental amount shall be no earlier than the later of (x) the date specified in the original Call Notice and (y) 15 Business Days from and including the date of delivery of the additional Call Notice.

(iii) Any increase in the capital contribution of each Nonmanaging Member due to an increase in the Call Amount specified in the original Call Notice shall be calculated in accordance with Section 3.5(b) with respect to the amount of the increase in the Call Amount.

**3.6 Reinvestment of Certain Proceeds.** On or prior to the third anniversary of the termination of the Commitment Period, the Managing Member may at its sole discretion reinvest or commit to reinvestment all or a portion of any Investment Proceeds in other Investments made or committed to in accordance with the provisions of this Agreement. Beginning after the third anniversary of the termination of the Commitment Period, and until each Nonmanaging Member has received distributions pursuant to Section 5.1(b)(i) and 5.2(a) equal to its Capital Contributions, the Managing Member may retain no more than twenty percent (20%) of such Investment Proceeds for reinvestment purposes pursuant to this Section 3.6. Beginning in year six, 100% of net proceeds will be distributed until all assets of the Fund have been liquidated.

**3.7 Percentage Interests.** The Percentage Interest of each Nonmanaging Member shall be determined by multiplying 100% by a fraction, the numerator of which is the Capital Contribution of that Nonmanaging Member and the denominator of which is the aggregate Capital Contributions of all Nonmanaging Members.

**3.8 Members.** No Person other than a Member shall be considered, be dealt with as or have any rights as a Member of the Fund (notwithstanding an assignment or Transfer of an Interest to such Person by operation of law, as a result of an assignment, by reason of the Incapacity of a Member or for any other reason). Any distribution by the Fund to the Person shown on the records of the Fund as a Member or to such Person's legal representatives shall acquit the Fund and the Managing Member of all liability to any other Person who may be interested in such distribution for any reason.

**3.9 Control.** No Nonmanaging Member acting in its capacity as a Nonmanaging Member shall participate or take part in the control of the business of the Fund or shall have any right or authority to act for or bind the Fund.

**3.10 Liability of Nonmanaging Members.** Except as specifically set forth herein or as provided in the Act, no Nonmanaging Member acting in its capacity as a Nonmanaging Member shall have any personal liability, whether to the Fund, to any of the Members or to the creditors of the Fund, for the debts, liabilities, contracts or any other obligations of the Fund or for any losses of the Fund.

**3.11 Mandatory Redemption.**

(a) The Managing Member may require, at its sole discretion, the redemption, in whole or in part, of the Interest of any Nonmanaging Member if the Managing Member believes, in good faith, that the continued participation of such Nonmanaging Member in the Fund might cause the Fund or any Member to violate any law or might be adverse to the interests of the Fund or any Member. Such redemption shall become effective on such date as shall be specified by the Managing Member. The Managing Member shall give written notice to such Nonmanaging Member of such required redemption at least five days prior to the effective date

of such redemption. The redemption price of such Interest shall equal the amount that would have been distributed to that Member pursuant to Section 9.2(b)(iv) had all assets of the Fund been sold for Fair Market Value and the Fund liquidated on the effective date of the redemption.

(b) In lieu of any redemption pursuant to Section 3.11(a), the Managing Member may permit one or more existing Nonmanaging Members (or if existing Nonmanaging Members do not acquire all of the redeemed Member's Interest, one or more new Nonmanaging Members) to acquire such redeemed Member's Interest, by (i) paying to the redeemed Member an aggregate amount not less than the redemption price of such Interest as determined pursuant to Section 3.11(a) and (ii) if not an existing Nonmanaging Member, otherwise complying with Section 3.3(b). Upon such occurrence and subject to Section 8.2, any such new Nonmanaging Member shall become an additional Nonmanaging Member and be shown as such on the books and records of the Fund.

(c) Once a Nonmanaging Member's Interest has been redeemed, such Nonmanaging Member shall be deemed to have withdrawn from the Fund and shall have no further rights in respect of the Fund. The redemption of a Member's Interest shall not dissolve the Fund, except as expressly provided in the Act.

## **ARTICLE IV**

### **CAPITAL ACCOUNTS; ALLOCATIONS**

#### **4.1 Capital Accounts.**

(a) A separate Capital Account shall be established for each Member and maintained in accordance with the provisions of Treasury Regulation section 1.704-1(b)(2)(iv). Each Member's Capital Account shall be (i) increased by such Member's Capital Contributions and by such Member's allocable share of Net Income and items of Fund income and gain, (ii) decreased by such Member's allocable share of Net Loss and items of Fund loss and deduction and by the amount of cash and the net Fair Market Value of property distributed by the Fund to such Member, and (iii) otherwise adjusted in the manner provided in this Agreement.

(b) Immediately prior to any distribution of Fund assets in kind, each Member's Capital Account shall be adjusted to reflect the manner in which the unrealized income, gain, loss or deduction inherent in the assets to be distributed (and not already reflected in the Members' Capital Accounts) would be allocated among the Members pursuant to Article IV if such assets were sold for Fair Market Value on the date of distribution.

(c) Immediately prior to (i) any contribution of money or other property to the Fund by a new or existing Member as consideration for an Interest in the Fund or (ii) the liquidation of the Fund pursuant to Article 9, each Member's Capital Account shall be adjusted to reflect the manner in which the unrealized income, gain, loss or deduction inherent in all Fund assets (and not already reflected in the Members' Capital Accounts) would be allocated among the Members pursuant to Article IV if such assets were sold for Fair Market Value on the date of such contribution or liquidation.

4.2 **Allocations of Net Income.** After all allocations have been made pursuant to Sections 4.4 through 4.8, Net Income for any period shall be allocated as follows:

(a) First, to the Managing Member to the extent of and in proportion to the cumulative Net Loss, if any, previously allocated to the Managing Member pursuant to Section 4.3(e)(ii), reduced by any prior allocations of Net Income to the Managing Member pursuant to this Section 4.2(a);

(b) second, to the Members to the extent of and in proportion to the Cumulative Net Loss, if any, previously allocated to such Members pursuant to Section 4.3(e)(i), reduced by any prior allocations of Net Income to such Members pursuant to this Section 4.2(b);

(c) third, to the Members to the extent of and in proportion to the Cumulative Net Loss, if any, previously allocated to such Members pursuant to Section 4.3(d), reduced by any prior allocations of Net Income pursuant to this Section 4.2(c);

(d) fourth, to the Nonmanaging Members in proportion to their relative Capital Contributions, until the cumulative amount of Net Income allocated to each Nonmanaging Member pursuant to this Section 4.2(d), reduced by the cumulative amount of Net Loss, if any, allocated to such Nonmanaging Member pursuant to Section 4.3(b), equals such Nonmanaging Member's Preferred Return; and

(e) thereafter, 70% to the Nonmanaging Members, to be shared among them in accordance with their relative Percentage Interests, and 30% to the Managing Member.

4.3 **Allocations of Net Loss.** After all allocations have been made pursuant to Sections 4.4 through 4.8, Net Loss for any period shall be allocated as follows:

(a) first, to the Members to the extent of and in proportion to the cumulative Net Income, if any, previously allocated to such Members pursuant to Section 4.2(e), reduced by any prior allocations of Net Loss to such Members pursuant to this Section 4.3(a);

(b) second, to the Nonmanaging Members to the extent of and in proportion to the cumulative Net Income, if any, previously allocated to such Nonmanaging Members pursuant to Section 4.2(d), reduced by any prior allocations of Net Loss to such Nonmanaging Members pursuant to this Section 4.3(b);

(c) third, to the Members to the extent of and in proportion to the cumulative Net Income, if any, previously allocated to such Members pursuant to Section 4.2(c), reduced by any prior allocations of Net Loss pursuant to this Section 4.3(c); and

(d) thereafter, to the Members in accordance with their respective Capital Contributions.

(e) Notwithstanding any other provision of this Section 4.3, Net Loss shall not be allocated to a Member to the extent such allocation would create or increase a deficit in such Member's Adjusted Capital Account Balance, but shall instead be allocated as follows:

(i) first, to those Members, if any, with positive Adjusted Capital Account Balances, to the extent of and in proportion to such positive balances, until the Adjusted Capital Account Balance of each Member has been reduced to zero; and

(ii) thereafter, to the Managing Member.

**4.4 Allocations on Capital Event or Liquidation.** Notwithstanding any other provision of this Article IV to the contrary, upon the occurrence of a Capital Event or the liquidation of the Fund, all items of Fund income, gain, loss and deduction shall be allocated among the Members so as to bring their respective Capital Account balances to the amounts and proportions necessary to make the distributions specified in Section 5.2 ("Targeted Capital Account Balances"). If the Fund has insufficient items of income, gain, loss and deduction to bring each Member's Capital Account balance to its Targeted Capital Account Balance, the available amounts shall be allocated as follows:

(a) first, so as to bring the Nonmanaging Members' Capital Account balances to the amounts required to make the distribution specified in Section 5.2(a);

(b) second, so as to bring the Nonmanaging Members' Capital Account balances to the amounts required to make the distribution specified in Section 5.2(b);

(c) third, so as to bring the Managing Member's Capital Account balance to the amount required to make the distribution specified in Section 5.2(c); and

(d) thereafter, so as to bring the Members' relative Capital Account balances into the same proportion as their Targeted Capital Account Balances (with both such Capital Account balances and Targeted Capital Account Balances reduced by the amounts of the distributions referred to in paragraphs (a) through (c) of this Section 4.4 as if such distributions had been made).

**4.5 Minimum Gain Chargeback.** Notwithstanding any other provision of this Article IV except Section 4.4, if there is a net decrease in Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Fund income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Minimum Gain, determined in accordance with Treasury Regulation section 1.704-2(g). Allocations pursuant to this Section 4.5 shall be made in proportion to the respective amounts required to be allocated to each Member pursuant hereto. The items to be allocated pursuant to this Section 4.5 shall be determined in accordance with Treasury Regulation sections 1.704-2(f)(6) and 1.704-2(j)(2). This Section 4.5 is intended to comply with the minimum gain chargeback requirement in Treasury Regulation section 1.704-2(f) and shall be interpreted consistently therewith.

**4.6 Qualified Income Offset.** Notwithstanding any other provision of this Article IV except Sections 4.4 and 4.5, if a Member unexpectedly receives an adjustment, allocation or distribution described in Treasury Regulation section 1.704-1(b)(2)(ii)(d)(4), (5) or (6) that creates or increases a deficit in such Member's Adjusted Capital Account Balance, items of Fund income and gain shall be allocated to such Member in the amount and proportion necessary to eliminate such deficit Adjusted Capital Account Balance as quickly as possible.

4.7 **Nonrecourse Deductions.** Notwithstanding any other provision of this Article IV except Sections 4.4, 4.5 and 4.6, Nonrecourse Deductions for any period shall be allocated to the Members in proportion to their respective Capital Contributions.

4.8 **Offsetting Allocations.** In the event items of Fund income, gain, loss or deduction are allocated pursuant to Sections 4.5 through 4.7, offsetting allocations of items of Fund income, gain, loss or deduction shall subsequently be made to the Members in such manner as the Managing Member deems appropriate so as to achieve as nearly as possible the results that would have been achieved had Sections 4.5 through 4.7 not been included in this Agreement and all items of Fund income, gain, loss and deduction had been allocated pursuant to Sections 4.2 through 4.4 (except that no allocation shall be made that would contravene Treasury Regulation section 1.704-1(b)(2)(ii)(d)).

4.9 **Tax Allocations.**

(a) Except as provided below in Section 4.9(b), Fund income, gain, loss, deduction and credit, as calculated for tax purposes, shall be allocated among the Members, to the extent possible, in accordance with the allocations of the corresponding Net Income, Net Loss or items of income, gain, loss or deduction among the Members pursuant to Sections 4.2 through 4.8.

(b) Income, gain, loss, deduction and credit, as calculated for tax purposes, with respect to (i) property contributed to the Fund by a Member and (ii) Fund property that has been revalued pursuant to Section 4.1(c) shall be allocated among the Members in accordance with the principles of Code section 704(c), using such method as shall be selected by the Managing Member, so as to take account of the variation, at the time of contribution or revaluation, between the property's tax basis and book value, as required pursuant to Treasury Regulation sections 1.704-1(b)(4)(i) and 1.704-3.

4.10 **Excess Nonrecourse Liabilities.** For purposes of determining the Members' shares of excess nonrecourse liabilities under Treasury Regulation section 1.752-3(a)(3), each Member's share of profits shall be deemed to be the same as such Member's share of Net Income pursuant to Section 4.2(e).

4.11 **Changes in Interest.** Upon the admission of an Additional Member or the Assignment of an Interest, or at such other time as it is necessary to determine the Net Income, Net Loss or other items allocable to a particular period, the Managing Member shall determine the proper allocation of Net Income, Net Loss and items of income, gain, loss, deduction and credit to the periods before and after such admission or Transfer, or to the period in question, using any method permitted under Code section 706 and the Treasury Regulations thereunder.

**ARTICLE V**  
**DISTRIBUTIONS**

**5.1 Distributions Other Than Net Capital Event Proceeds and Liquidation Proceeds.**

(a) Tax Distribution. Within one hundred eighty (180) days after the close of each taxable year of the Fund, the Managing Member shall cause the Fund to distribute to each Member an amount of cash equal to such Member's Tax Distribution with respect to such taxable year, provided, however, that no such distribution shall be made should the Managing Member determine, in its discretion, that such distribution would adversely affect the Fund or its business.

(b) Net Investment Proceeds. The Managing Member shall cause the Fund to distribute Net Investment Proceeds, if any, attributable to each Investment of the Fund within six months after the Fund receives such Net Investment Proceeds, as follows:

(i) first, to the Nonmanaging Members until each Nonmanaging Member shall have received, pursuant to this Section 5.1(b)(i), an aggregate amount with respect to such Investment equal to its Allocable Capital Contribution with respect to such Investment;

(ii) second, to the Nonmanaging Members until each Nonmanaging Member shall have received, pursuant to this Section 5.1(b)(ii), an aggregate amount with respect to such Investment equal to its Allocable Preferred Return with respect to such Investment;

(iii) third, to the extent the amounts distributed to the Nonmanaging Members pursuant to Sections 5.1(b)(i) and (ii) with respect to Investments that the Fund previously disposed of were less than the Nonmanaging Members' Allocable Capital Contributions and Allocable Preferred Returns with respect to such Investments, an amount equal to such aggregate shortfall shall be distributed to the Nonmanaging Members until each Nonmanaging Member shall have received the amount of its shortfall;

(iv) fourth, to the Managing Member until it shall have received, pursuant to this Section 5.1(b)(iv), an aggregate amount (x) with respect to such Investment and (y) with respect to all Investments previously disposed of by the Fund equal to its aggregate Allocable Capital Contributions with respect to such Investments; and

(v) thereafter, 70% to the Nonmanaging Members, to be shared among them in accordance with their relative Percentage Interests, and 30% to the Managing Member.

(c) Notwithstanding paragraph (b) hereof, no distribution shall be made to a Nonmanaging Member to the extent such distribution would create or increase a deficit in such Nonmanaging Member's Adjusted Capital Account Balance, calculated following all allocations pursuant to Article IV for the periods prior to such distribution.

**5.2 Distribution of Net Capital Event Proceeds.** The Managing Member shall cause the Fund to distribute Net Capital Event Proceeds (less any reserves for outstanding payables, taxes, fees, etc.) within sixty (60) days after the Fund's receipt thereof in the following order of priority:

(a) first, to the Nonmanaging Members until each Nonmanaging Member shall have received an amount equal to its Adjusted Capital Contributions determined immediately prior to such distribution;

(b) second, to the Nonmanaging Members until each Nonmanaging Member shall have received, pursuant to Sections 5.1(b)(ii), 5.1(b)(iii) (other than amounts attributable to Allocable Capital Contributions) and this Section 5.2(b), an amount equal to its Preferred Return;

(c) third, to the Managing Member until it shall have received an amount equal to its Adjusted Capital Contributions determined immediately prior to such distribution; and

(d) thereafter, 70% to the Nonmanaging Members, to be shared among them in accordance with their relative Percentage Interests, and 30% to the Managing Member.

**5.3 Distributions in Kind.** In any distribution of property in kind, the Managing Member shall not discriminate among Members and shall (a) distribute to each applicable Member a proportional interest in any particular property in accordance with Article V and (b) if cash and property in kind are to be distributed simultaneously in respect of any Investment, distribute cash and property in kind in the same proportion to each applicable Member.

**5.4 Withheld Taxes.** Any amount that the Fund is required to withhold and deposit with any governmental authority with respect to any federal, state or local tax liability of a Member, including any withholding pursuant to Code section 1441, 1442, 1445 or 1446, shall be treated as an amount distributed to such Member and shall reduce, dollar for dollar, any distribution that would otherwise be made to such Member pursuant to Sections 5.1 and 5.2 for that or any subsequent period. Should the amount withheld for any period exceed the amount that would have been distributed to that Member pursuant to Sections 5.1 and 5.2 for that period, the excess will be treated as a recourse loan from the Fund to that Member bearing interest at an annual rate equal to the "prime rate", as announced from time to time in the Wall Street Journal on the date such deposit for tax liability was made until the date of repayment thereof. That loan and interest thereon will be paid by reduction of any subsequent distributions to that Member pursuant to Sections 5.1 and 5.2.

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## ARTICLE VI

### RIGHTS AND DUTIES OF THE MANAGING MEMBER

6.1 **Management and Administration.** Except as otherwise expressly provided herein, in the Memorandum or by law, (i) the Managing Member is hereby vested with the full, exclusive and complete right, power and discretion to operate, manage and control the affairs of the Fund and to make all decisions affecting Fund affairs, as deemed proper, necessary, expedient or advisable by the Managing Member to carry on the business of the Fund as described in Section 2.3, (ii) the Managing Member is hereby authorized to appoint Management to perform the duties of Managing Member as provided herein, (iii) the Managing Member shall have all of the rights, powers and obligations of a Managing Member of a limited liability company under the Act and otherwise as provided by law and (iv) without limiting the generality of the foregoing, all of the Members hereby specifically agree that the Managing Member may, on behalf of the Fund, at any time and without further notice to or Consent from any other Member, do any or all of the following:

(a) take any and all actions which it deems necessary or advisable in connection with the business of the Fund as described in the Memorandum, including, without limitation, entering into any contract, agreement, undertaking or transaction with any Member, Affiliate of a Member or other Person having any business, financial or other relationship with any Member;

(b) pay any and all fees and make any and all expenditures which it deems necessary or appropriate in connection with the management of the affairs of the Fund and the carrying out of its obligations and responsibilities under this Agreement;

(c) register or qualify the Fund under any applicable federal or state laws, or obtain exemptions under such laws, if such registration, qualification or exemption is deemed necessary by the Managing Member;

(d) sell all or any part of any Fund assets, whether for cash or other consideration, on such reasonable terms as the Managing Member shall determine to be appropriate;

(e) incur all expenditures permitted by this Agreement and pay all expenses, debts and obligations of the Fund;

(f) engage, compensate and discharge any agent, attorney, employee, accountant, consultant, investment manager or other Person, including any one who may be a Member or an Affiliate of a Member, at such compensation and upon such terms and conditions as the Managing Member may deem appropriate;

(g) maintain such bank accounts on behalf of the Fund and make such signature arrangements with respect thereto as the Managing Member shall determine to be appropriate;

(h) enter into agreements with any and all Persons with respect to financing and operating of the Fund's business upon such terms as the Managing Member deems appropriate;

(i) compromise, submit to arbitration, sue on and defend all claims in favor of or against the Fund;

(j) do all acts it deems necessary or appropriate to further the Fund's business or for the protection and preservation of the Fund's assets;

(k) offer, sell, redeem and resell Nonmanaging Membership Interests as contemplated by the Memorandum and this Agreement;

(l) cause the Fund to enter into transactions in which the Managing Member or its Affiliates have an interest, including, but not limited to, transactions which involve the purchase or sale of any property to or from the Fund and transactions in which services will be rendered for or by the Fund;

(m) enter into, execute, amend, supplement, acknowledge and deliver any and all contracts, agreements and other instruments as the Managing Member shall determine to be appropriate in furtherance of the purposes of the Fund; and

(n) cause the Fund to purchase insurance against liabilities covered by the indemnification provisions of Section 6.9.

**6.2 Authority.** Third parties dealing with the Fund may rely conclusively upon any certificate of the Managing Member to the effect that it is acting on behalf of the Fund. The signature of the Managing Member shall be sufficient to bind the Fund to any agreement or on any document, including, but not limited to, documents drawn, or agreements made, in connection with the acquisition of any investment or property or the disposition of any Fund assets in furtherance of the purposes of the Fund.

**6.3 Restrictions on the Authority of the Managing Member.** The Managing Member shall have no authority to (i) do any act in contravention of the Act or (ii) without prior written consent of all of the Nonmanaging Members, do any act in contravention of this Agreement, (iii) admit a Person as a Managing Member of the Fund, except as provided in Article VII, or (iv) dissolve the Fund, except as provided in Article IX.

**6.4 Duties and Obligations of the Managing Member.**

(a) The Managing Member shall take all action which may be necessary or appropriate for the continuation of the Fund's valid existence as a Limited Liability Company under the laws of the State of Delaware and of each other jurisdiction in which such existence is necessary to protect the limited liability of the Nonmanaging Members or to enable the Fund to conduct the business in which it is engaged.

(b) The Managing Member shall use all reasonable efforts at all times to conduct its affairs and the affairs of the Fund in such a manner that no Nonmanaging Member acting in its capacity as a Nonmanaging Member shall have any personal liability with respect to any Fund liability or obligation, except as expressly assumed by any Nonmanaging Member as otherwise provided herein or in the Act.

(c) The Managing Member shall prepare or cause to be prepared an annual business plan and budget for the Fund.

#### 6.5 **Advisory Board.**

(a) Establishment and Functions. The Fund shall maintain an Advisory Board that shall be authorized, but not obligated, to review and consult with the Managing Member with respect to Fund matters, including: (i) the semi-annual review of the Fund's business plan; (ii) the annual review of the Fund's audited financial statements; (iii) semi-annual consultation with Management on budgetary matters; (iv) action for which the Advisory Board's approval is required under Section 6.5(f); or (v) any other matter as to which the Managing Member determines to consult with the Advisory Board. Notwithstanding anything in this Agreement to the contrary, the Advisory Board shall not have any right, power, or authority to act for or on behalf of or to bind the Fund.

(b) Number and Appointment. The Advisory Board shall initially consist of the members of Management, Mr. Peter Hearst and the two Nonmanaging Members with the two largest Percentage Interests on the initial Closing Date or their designees (the "Nonmanaging Member Board Members"). Notwithstanding anything to the contrary contained herein, the Managing Member shall have the right to appoint to the Advisory Board up to two (2) additional members. Such additional members need not be Nonmanaging Members.

(c) Term of Service. Each member of the Advisory Board shall serve until the termination of the Fund or until such member's earlier removal, disqualification, resignation, death, or Incapacity. Except as provided below, any member (and any alternate) of the Advisory Board may be removed at any time (with or without cause) by the Managing Member, but may be reinstated by affirmative vote of a majority of the members of the Advisory Board taken within thirty (30) days after the Managing Member notifies the Advisory Board members of the removal; provided, however, that a Nonmanaging Member Board Member may only be removed for cause by the Managing Member upon the affirmative vote of a majority of the Advisory Board Members (excluding such Nonmanaging Member Board Member). Any vacancies arising from removal, disqualification, resignation, death, Incapacity, or other cause shall be filled at the discretion and in the manner determined by the Managing Member. Notwithstanding the foregoing, any Nonmanaging Member Board Member removed in accordance with the immediately preceding sentence shall be replaced with the Nonmanaging Member with the next largest Percentage Interest or its designee.

(d) Meetings, Rules, and Expenses. The Advisory Board shall meet at the call of the Managing Member or any member of such board on not less than three business days' prior notice. The Advisory Board shall adopt rules and procedures that shall be consistent with the terms of this Agreement and shall govern the conduct of the board's meetings and affairs. The presence of members representing a majority of all members of the Advisory Board then serving shall constitute a quorum for any meeting. Notice of any meeting may be waived by any

member in writing (before or after such meeting), and any member who attends any meeting of the Advisory Board and does not (at the commencement of such meeting) object to the calling and convening of such meeting shall be deemed to have waived notice of such meeting. Members of the Advisory Board may participate in a meeting by telephone conference permitting all participants in the meeting to hear and speak with one another. All actions of the Advisory Board shall be taken by the concurrence of a majority of the members thereof participating in the meeting of the Advisory Board, unless a greater percentage is expressly required by this Agreement. Any action or vote of the Advisory Board may be taken by written consent, with or without a meeting, of members constituting the requisite number of members authorized to take such action or vote under this Agreement. Any member may, upon prior notice given to the Managing Member and the other members of the Advisory Board, appoint one or more individuals to act as such appointing member's alternate from time to time for purposes of attending or acting at any and all meetings or by written consent of the Advisory Board. Members of the Advisory Board shall receive no compensation from the Fund for services rendered in their capacity as members of the Advisory Board, but shall be entitled to reimbursement from the Fund for any reasonable expenses incurred in connection with such attendance; provided, however, that no Advisory Board member or alternate shall be reimbursed for expenses incurred in attending in person more than one meeting (outside the metropolitan area in which such member resides or conducts business) in any annual period commencing with the initial Closing Date.

(e) Standard of Care. The members of the Advisory Board shall exercise their good faith business judgment in carrying out their functions under this Agreement. Notwithstanding anything in this Agreement or applicable law to the contrary, no Advisory Board member acting in its capacity as an Advisory Board member shall be regarded as serving in any fiduciary capacity with respect to the Fund, and no such member shall be liable to the Fund (by virtue of such member's committee Fund) or any other Person for actions taken in good faith. The Advisory Board may, but shall not be obligated to, engage and consult with legal counsel, accountants, or other professionals in connection with the performance of the board's duties under this Agreement, and the fees and expenses of any such professional shall be borne by the Fund. Each Advisory Board member shall be fully protected and justified with respect to any action or omission taken or suffered in reliance upon and in accordance with the opinion or advice of legal counsel (as to matters of law), accountants (as to accounting matters), and other professionals (as to matters within their expertise) respectively engaged by the Advisory Board, the Fund, or the Managing Member.

(f) Fund Action Requiring the Approval of the Advisory Board. The affirmative vote of the Advisory Board shall be necessary to approve the following:

- (i) the Fund's annual budget;
- (ii) any proposed Investments outside of the Expanded Investment Territory;
- (iii) any transaction involving a potential conflict of interest between the Fund and the Managing Member or any of its Affiliates; and
- (iv) any compensation payable from time to time to Management.

**6.6 Other Business of Members.**

(a) Until the expiration of the Investment Period, the Managing Member shall authorize Management to devote to the Fund its full time efforts as necessary to conduct the Fund's business and affairs in an appropriate manner. Thereafter, the Managing Member shall authorize Management to devote to the Fund such time as the Managing Member determines to be necessary to conduct the Fund's business and affairs in an appropriate manner. Any Member and any of its Affiliates may engage in or possess any interest in other investment or investment advisory activities or business ventures of any kind, nature or description, independently or with others, regardless of whether such ventures are competitive with the Fund, and neither the Fund nor any Member shall have any rights or interest by virtue of this Agreement or the Fund or investment advisory relation created hereby or thereby in or to any such independent activities or ventures or in or to the fees, compensation, income or profits derived therefrom. Notwithstanding the foregoing, other than real estate investments made prior to the formation of the Fund and their personal residences, the members of Management shall not engage in or possess any interest in any competitive investment.

(b) The Managing Member, Management and their Affiliates may offer to any Member, its Affiliates or any other Person, in any capacity, the opportunity to invest in, or make loans to, any Person in which the Fund acquires or holds an investment, and neither the Fund nor any other Member shall have any right to participate, or any interest, therein by virtue of this Agreement or the Fund or investment advisory relation created hereby or thereby.

**6.7 Organization of New Funds.** Until the expiration of the Investment Period, the Managing Member shall not organize, or accept subscriptions for, any new fund with the primary purpose of engaging in activities that are competitive with the Fund's activities as set forth in Section 2.3; provided, however, that nothing in this Agreement shall restrict the Managing Member or its Affiliates from soliciting subscriptions for any such competitive fund if the Investment Period has expired. During the period from the expiration of the Investment Period until Full Capitalization of the Fund has been achieved, the Nonmanaging Members shall have the right but not the obligation to invest in any such new fund.

**6.8 Allocation of Expenses.**

(a) The Fund shall bear, and reimburse the Managing Member for, all expenses incurred in connection with the Fund, including but not limited to the following:

(i) expenses incurred in connection with (A) forming the Fund and offering the Interests, including, without limitation, the legal and accounting fees incurred in connection with preparing this Agreement and the Memorandum, (B) operating the day-to-day business of the Fund, including expenses of administration, salaries paid to employees and the cost of maintaining books and records, (C) communicating with Nonmanaging Members and (D) all accounting fees and expenses incurred in connection with the preparation of the annual financial statements and any tax returns required to be filed by the Fund;

(ii) compensation to be paid to Management as determined from time to time by the Advisory Board in connection with the services provided by Management to the Fund hereunder;

(iii) all taxes payable in respect of the holding of, or dealing with, the investments of the Fund;

(iv) all costs and expenses incurred as a result of termination of the Fund and the realization of Fund assets;

(v) all taxes or governmental charges, brokerage fees, commissions and other duties, charges or fees arising in connection with the purchase and sale of real estate for the Fund;

(vi) any costs and expenses of any litigation involving the Fund and the amount of any judgment or settlement paid in connection therewith, excluding, however, the costs and expenses of any litigation, judgment or settlement in which the conduct of the Managing Member or any member of Management is found to have violated the standard of conduct set forth in Section 6.9;

(vii) all costs and expenses incurred in connection with the redemption of a Nonmanaging Member's Interest and such Nonmanaging Member's withdrawal from the Fund which are not borne by such Nonmanaging Member; and

(viii) all other extraordinary expenses which may be incurred by the Fund ((i) through (viii), the "Fund Expenses").

(b) The Managing Member shall bear no Fund Expenses.

**6.9 Exculpation and Indemnification.** Neither the Managing Member or Management nor any of their Affiliates shall be liable, responsible or accountable in damages or otherwise to the Fund or any Nonmanaging Member for any loss, damage or liability (including tax liabilities) incurred by reason of any error in judgment or any act or failure to act arising out of the activities of any of them on behalf or in respect of the Fund or in furtherance of the interests of the Fund, including, without limitation, (i) the failure to perform any acts they are not expressly obligated to perform under this Agreement or the Act (ii) any acts or failures to act made on the advice of legal counsel, accountants or other consultants to the Fund or the Managing Member, (iii) the negligence, dishonesty or bad faith of any consultant, employee or agent of the Fund through whom the Fund and/or the Managing Member in good faith conducts its business and (iv) any other matter beyond the control of the Managing Member; provided, that such error, act or failure to act did not amount to fraud, willful misconduct or other breach of fiduciary duties imposed upon the Managing Member by the Act. The Fund shall indemnify and hold harmless, to the fullest extent permitted by law, the Managing Member, each member of Management and their Affiliates who are or were a party or threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (including any action by or in the right of the Fund), by reason of any error in judgment, act or failure to act or any alleged error in judgment, act or failure to act arising out of their activities on behalf or in respect of the Fund or in furtherance of the interests of the Fund, against losses, damages and expenses for which they have not otherwise been reimbursed (including attorneys' fees, judgments, fines and amounts paid in settlement) and which were actually incurred by them in connection with such action, suit or proceeding, so long

as such error, act or failure to act did not amount to fraud, willful misconduct or other breach of fiduciary duties imposed upon the Managing Member by the Act. No Member shall have any personal liability on account of any obligation under this Section 6.9.

**6.10 Elections.** Except as otherwise expressly provided herein, all elections required or permitted to be made by the Fund under the Code or other applicable tax law including, but not limited to, the election under Code section 754, and all decisions with respect to the calculation of its taxable income or tax loss under the Code or other applicable tax law, shall be made in such manner as may be reasonably determined by the Managing Member, provided, however, that the Managing Member shall not make or permit an election under Code section 7701 and the Treasury Regulations thereunder to treat the Fund as an association taxable as a corporation.

**6.11 Tax Matters Member.** The Managing Member shall act as the "Tax Matters Member" of the Fund within the meaning of Code section 6231(a)(7) and in any similar capacity under applicable state or local tax law. All expenses incurred by the Managing Member while acting in such capacity shall be paid or reimbursed by the Fund. A Nonmanaging Member shall promptly notify the Managing Member of any intention to (i) file a notice of inconsistent treatment under Code section 6222(b); (ii) file a request for administrative adjustment of Fund items; (iii) file a petition with respect to any Fund item or other tax matters involving the Fund; or (iv) enter into a settlement agreement with the Secretary of the Treasury with respect to any Fund items.

## ARTICLE VII

### TRANSFER OF THE MANAGING MEMBER'S INTEREST

**7.1 Substitution of the Managing Member.** The Managing Member shall have the right to Transfer its interest to any Person that is (i) a Person that succeeds to the Managing Member's business substantially as an entity, or which, directly or indirectly, owns all of the outstanding limited liability company interests of the Managing Member or (ii) an Affiliate of the Managing Member. As a condition of any such Transfer, the Managing Member must obtain an opinion of counsel to the effect that such Transfer will not cause the Fund to be classified as an association taxable as a corporation. The Fund shall not be dissolved by any assignment of all or any part of the Managing Fund Membership Interest in the Fund.

**7.2 Withdrawal of the Managing Member.** Except in connection with an assignment permitted by Section 7.1, the Managing Member shall not withdraw from the Fund unless the Managing Member gives the Nonmanaging Members ninety (90) days written notice in advance of such withdrawal.

**7.3 Continuation of the Fund.** In the event of the withdrawal, Bankruptcy or Incapacity of the Managing Member, the Fund shall be dissolved, unless the Nonmanaging Members, excluding such Nonmanaging Members who are Affiliates of the Managing Member, shall, within ninety (90) days after the occurrence of such withdrawal, Bankruptcy or Incapacity, unanimously Consent to continue the Fund and unanimously Consent to the election of a new Managing Member. Such election shall be deemed to have occurred immediately prior to the occurrence of an event described in the first sentence of this Section 7.3.

7.4 **Liability of a Withdrawn Managing Member.** A Managing Member which shall withdraw from the Fund or otherwise cease to be a Managing Member shall remain liable for obligations and liabilities incurred by the Fund prior to the time of such withdrawal or cessation, but it shall be free of any obligation or liability incurred by the Fund from and after the time of such withdrawal or cessation unless such obligation or liability is a direct result of the Managing Member's withdrawal or cessation.

## ARTICLE VIII

### TRANSFERS OF NONMANAGING MEMBER INTERESTS

#### 8.1 **Restrictions on Transfer of Interests.**

(a) Subject to Section 8.1(b), no Transfer of all or any fraction of a Nonmanaging Member's Interest may be made without (i) the prior written consent of the Managing Member, which consent may be withheld for any reason at the Managing Member's sole discretion, (ii) the receipt by the Managing Member of such documents and instruments of Transfer as the Managing Member may reasonably require and (iii) if required by the Managing Member, the receipt by the Managing Member, not less than ten (10) days prior to the date of any proposed Transfer of a written opinion of counsel (who may be counsel for the Fund), satisfactory in form and substance to the Managing Member, to the effect that such Transfer would not result in any adverse legal or regulatory consequences to the Fund or any Member under the Investment Company Act, the Investment Advisers Act or otherwise, including, but not limited to, that such Transfer would not:

(i) result in a violation of the Securities Act, the Exchange Act or any securities laws of any other jurisdiction applicable to the Fund or the Interest to be transferred;

(ii) cause the Fund to become a "publicly traded limited liability company" for federal income tax purposes;

(iii) constitute a "public offering" within the meaning of Section 7(d) of the Investment Company Act; or

(iv) result in the termination of the Fund or loss by the Fund of its status as a Fund for tax purposes.

(b) Section 8.1(a) shall not apply to a Transfer by a Nonmanaging Member to a Person that acquires such Nonmanaging Membership Interest by reason of the death of such Nonmanaging Member. Each Nonmanaging Member hereby agrees that it will not Transfer all or any fraction of its Nonmanaging Membership Interest, except as permitted by this Agreement.

(c) In no event shall all or any part of an Interest be transferred to a minor or a person who is Incapacitated, except in trust or by will or intestate succession.

(d) The transferring Nonmanaging Member agrees that it will pay all reasonable expenses, including attorneys' fees, incurred by the Fund in connection with a Transfer of its Nonmanaging Membership Interest.

## 8.2 Assignees.

(a) The Fund shall not recognize for any purpose any purported Transfer of all or any part of the Interest of a Nonmanaging Member, unless the provisions of Section 8.1 shall have been complied with and there shall have been filed with the Fund a dated notice of such Transfer, in form satisfactory to the Managing Member, executed and acknowledged by both the transferor or such transferor's legal representative and the transferee, and such notice (i) contains the acceptance by the transferee of all the terms and provisions of this Agreement and such transferee's agreement to be bound hereby and (ii) represents that such Transfer was made in accordance with all applicable laws, rules and regulations.

(b) Unless and until an Assignee becomes a Substitute Nonmanaging Member, such Assignee shall have no rights with respect to such Interest other than those rights with respect to allocations and distributions.

(c) Any Nonmanaging Member which shall Transfer all of its Interest shall cease to be a Nonmanaging Member upon, but only upon, the admission of a Substitute Nonmanaging Member in such Nonmanaging Member's stead.

(d) Notwithstanding anything to the contrary contained in this Agreement, both the Fund and the Managing Member shall be entitled to treat a Nonmanaging Member transferring all or any part of its Interest as the absolute owner thereof in all respects, and shall incur no liability for distributions made in good faith to such Nonmanaging Member, until such time as a Substitute Nonmanaging Member is admitted in such Nonmanaging Member's stead in respect thereof.

## 8.3 Substitute Nonmanaging Members.

(a) No Nonmanaging Member shall have the right to substitute a transferee of all or any part of such Nonmanaging Member's Interest in its place, except as provided in Section 8.1(b). Any such transferee of an Interest (whether pursuant to a voluntary or involuntary Transfer) shall be admitted to the Fund as a Substitute Nonmanaging Member only (i) with the Consent of the Managing Member granted at its sole discretion, (ii) by satisfying the requirements of Sections 8.1 and 8.2(a) and (iii) upon the receipt of all necessary consents of governmental and regulatory authorities. Persons who become Substitute Nonmanaging Members pursuant to Section 8.1(b) need not comply with clause (i) of the preceding sentence.

(b) Each transferee of all or part of a Nonmanaging Membership Interest, as a condition to its admission as a Substitute Nonmanaging Member, shall execute and acknowledge such instruments, in form and substance satisfactory to the Managing Member, as the Managing Member reasonably deems necessary or desirable to effectuate such admission and to confirm the agreement of such Person to be bound by all the terms and provisions of this Agreement with respect to the Nonmanaging Membership Interest acquired. All reasonable expenses, including attorneys' fees, incurred by the Fund in this connection shall be borne by such Person.

8.4 **Bankruptcy or Incapacity of a Nonmanaging Member.** In the event of the Bankruptcy or Incapacity of a Nonmanaging Member, the Fund shall not be dissolved, and the Nonmanaging Member's trustee in bankruptcy or other legal representative shall have only the rights of a transferee of the right to receive Fund distributions applicable to the Interest of such Bankrupt or Incapacitated Nonmanaging Member as provided herein. Any Transfer to or from such trustee in bankruptcy or legal representative shall be subject to the provisions of this Agreement.

## ARTICLE IX

### DISSOLUTION, LIQUIDATION AND WINDING UP OF THE FUND

9.1 **Dissolution.** The Fund shall be dissolved upon the first to occur of any of the following events:

- (a) the expiration of the term of the Fund;
- (b) the failure of the Nonmanaging Members to elect to continue the Fund as provided in Section 7.3 in the event of the withdrawal, Bankruptcy or Incapacity of the Managing Member;
- (c) the Consent of the Managing Member and a majority in interest of the Nonmanaging Members to dissolve the Fund;
- (d) the termination required by operation of law; or
- (e) the sale, disposition or distribution of all of the Fund's assets.

Dissolution of the Fund shall be effective on the day on which the event occurs giving rise to the dissolution, but the Fund shall not terminate until the Certificate of Nonmanaging Fund of the Fund has been cancelled and the assets of the Fund have been liquidated and distributed as provided in Section 9.2.

9.2 **Liquidation.**

(a) Upon dissolution of the Fund, the Managing Member or, if there is none, a Person selected by a majority in interest of the Nonmanaging Members shall act as a liquidating trustee (the "Liquidating Trustee") to wind up the affairs of the Fund and proceed within a reasonable period of time to sell or otherwise liquidate the assets of the Fund and, after paying or making appropriate provision by setting up reserves for all liabilities to the creditors of the Fund, to distribute such assets among the Members in accordance with this Agreement. If the Liquidating Trustee shall, in its absolute discretion, determine that a sale or other disposition of part or all of the Fund's investments would cause undue loss to the Members or otherwise be impractical, the Liquidating Trustee may either defer liquidation of, and withhold from distribution for a reasonable time, any investments or distribute part or all of such investments to the Members in kind as provided in Sections 9.2(b) and 4.2. The Liquidating Trustee shall have all of the rights, powers and duties of the Managing Member in connection with carrying out the purposes of this Section 9.2.

(b) Upon the dissolution and winding up of the Fund, all allocations for the final period of the Fund shall be made in accordance with Section 4.4. Thereafter, all of the assets of the Fund, or the proceeds therefrom, shall be distributed or used as follows and in the following order of priority:

- (i) for the payment of the debts and liabilities of the Fund, including, without limitation, any amounts due to the Managing Member, and the expenses of liquidation;
  - (ii) for the setting up of any reserves which the Liquidating Trustee may deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the Fund;
  - (iii) for the repayment of any loans from Members or their Affiliates;
- and
- (iv) to the Members in accordance with the provisions of Section 5.2.

## ARTICLE X

### AMENDMENTS

10.1 **Amendments Requiring Consent.** Except as otherwise provided herein, this Agreement is subject to amendment only with the written Consent of the Managing Member and a majority in Interest of the Nonmanaging Members; provided, however, that no amendment to this Agreement may:

(a) without the Consent of each affected Member, increase the Capital Contributions required to be made by such Member, convert a Nonmanaging Member's Interest into a Managing Member's Interest or modify the limited liability of a Nonmanaging Member;

(b) alter the Interest of any Member in respect of Fund income, gains and losses or amend or modify any portion of Article IV or Article V without the Consent of each Member adversely affected by such amendment or modification; provided, however, that the admission, withdrawal or substitution of Members in accordance with this Agreement shall not constitute such an alteration, amendment or modification;

(c) amend or modify any provision of Article VIII in a manner that would further restrict the transferability of a Nonmanaging Member's Interest without the Consent of all of the Nonmanaging Members;

(d) amend any provision hereof which requires the Consent, action or approval of a specified percentage in Interest of the Nonmanaging Members without the Consent of such specified percentage in Interest of the Nonmanaging Members; or

(e) amend this Section 10.1 without the Consent of all of the Nonmanaging Members.

10.2 **Amendments Not Requiring Consent.** In addition to any amendments otherwise authorized hereby, this Agreement may be amended from time to time by the Managing Member: (i) to add to the representations, duties or obligations of the Managing Member or surrender any right or power granted to the Managing Member; (ii) to cure any ambiguity or correct or supplement any provisions hereof which may be inconsistent with any

other provision hereof or correct any printing, stenographic or clerical errors or omissions; (iii) to provide for the admission, withdrawal or substitution of Members in accordance with this Agreement; (iv) to amend Schedule A attached hereto to provide any necessary information regarding any Nonmanaging Member and to add and delete Nonmanaging Members or Substitute Nonmanaging Members; (v) to delete or add any provisions of this Agreement required to be so deleted or added by a state securities law commissioner or similar such official or in order to qualify for a private placement exemption; and (vi) to reflect any change in the amount of the Capital Contribution of any Member in accordance with this Agreement; provided, however, that no amendment shall be adopted pursuant to this Section 10.2 if (a) such amendment would adversely alter the interest of a Member in income, gains or losses or distributions of the Fund or (b) such amendment would, in the opinion of counsel for the Fund, alter, or result in the alteration of, the limited liability of the Nonmanaging Members or the status of the Fund as a Fund for federal income tax purposes. The power of attorney granted pursuant to Section 12.1 may be used by the Managing Member to execute on behalf of a Nonmanaging Member any document evidencing or effecting an amendment adopted in accordance with this Section 10.2.

## ARTICLE XI

### CONSENTS AND VOTING

11.1 **Submissions to Nonmanaging Members.** The Managing Member shall give all of the Nonmanaging Members notice of any proposal or other matter required by any provision of this Agreement or by law to be submitted for the consideration and approval of the Nonmanaging Members. Such notice shall include any information required by the relevant provisions of this Agreement or by law.

11.2 **Bound by a Majority.** Unless otherwise specifically provided herein or otherwise required by the Act, all Nonmanaging Members agree to be bound by the Consent of a majority in interest of the Nonmanaging Members.

11.3 **Record Dates.** The Managing Member may set in advance a date for determining the Nonmanaging Members entitled to Consent. No record date shall be more than sixty (60) days prior to the doing of the act or thing to which such record date relates.

## ARTICLE XII

### POWER OF ATTORNEY

12.1 **Grant of Power.** Each Member, by his execution hereof, hereby irrevocably makes, constitutes and appoints the Managing Member, its individual officers and its and their successors as such Member's true and lawful agent and attorney-in-fact, with full power of substitution and full power and authority in such Member's name, place and stead, to make, execute, sign, acknowledge, swear to, record, publish and file in such Member's or such Member's transferee's name, place and stead: (i) any and all counterparts of this Agreement and any and all amendments hereto; (ii) the Certificate and all amendments thereto required or permitted by law or the provisions of this Agreement; (iii) all certificates and other instruments

deemed advisable by the Managing Member to carry out the provisions of this Agreement and any applicable law or to permit the Fund to become or to continue as a limited liability company; (iv) all instruments that the Managing Member deems appropriate to reflect a change or modification of this Agreement, including, without limitation, the admission of additional Nonmanaging Members, Substituted Nonmanaging Members or substituted Managing Members, and the redemption of Interests and withdrawal of Members; (v) all conveyances and other instruments or documents deemed advisable by the Managing Member, including, without limitation, those to effect the dissolution and winding up of the Fund; (vi) all fictitious or assumed name certificates required or permitted to be filed on behalf of the Fund; (vii) any changes in this Agreement as are required or are desirable in the judgment of the Managing Member in order to comply with the laws of Delaware, the Code or other applicable law; (viii) all insertions and/or corrections to any documents executed by such Member in connection with such Member's admission as a Nonmanaging Member of the Fund, including, without limitation, filling in blank addresses and dollar amounts in the Subscription Agreement executed by such Member; and (ix) all other instruments which may be required or permitted by law to be filed, recorded or published on behalf of the Fund. Any Person dealing with the Fund may presume conclusively and rely upon the fact that any instrument referred to above is authorized, regular and binding, without further inquiry. This power of attorney:

(a) is coupled with an interest, shall be irrevocable and shall survive the incapacity of the Member in respect of which such power of attorney may be exercised;

(b) may be exercised by such attorneys-in-fact individually or collectively;  
and

(c) shall survive a Transfer by a Member of the whole or any fraction of his Interest; except that, where the transferee of the whole of such Member's Interest has been approved by the Managing Member for admission to the Fund as a Substituted Nonmanaging Member, the power of attorney of the transferor shall survive the Transfer for the sole purpose of enabling such attorneys-in-fact to effect such Transfer and substitution.

**12.2 Additional Documents.** Each Member shall execute and deliver to the Managing Member within fifteen (15) days after receipt of the Managing Member's request therefor such further designations, powers-of-attorney and other instruments as the Managing Member reasonably deems necessary to carry out the terms of this Agreement.

## **ARTICLE XIII**

### **RECORDS AND ACCOUNTING; REPORTS**

#### **13.1 Books and Records.**

(a) The Managing Member shall keep or cause to be kept complete and accurate books of account with respect to the operations of the Fund. Such books shall be maintained at the address of the Managing Member. The Managing Member shall also maintain or cause to be maintained at such address the following records: (i) a current list of the full name

and last known business address of each Member set forth in alphabetical order; (ii) a copy of the Certificate of Limited Liability Company and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed; (iii) copies of the Fund's federal, state and local income tax returns and reports, if any, for the three most recent years; and (iv) copies of any then effective Fund agreements and of any financial statements of the Fund for the three most recent years.

(b) The books and records of the Fund shall be kept in accordance with the accrual basis method of accounting and in such a way as shall permit the preparation of the financial statements described in Section 13.2. The accrual basis method of accounting shall be followed by the Fund for tax purposes, and the taxable year of the Fund shall be its Fiscal Year.

**13.2 Audits and Reports.** The books and records of the Fund shall be audited as of the end of each Fiscal Year by a firm of independent certified public accountants selected by the Managing Member (the "Accountants"). The Managing Member shall furnish or cause to be furnished to each Member, within ninety (90) days after the close of each Fiscal Year, a written statement containing (i) a report of the Accountants setting forth a balance sheet of the Fund and the Net Income or Net Loss for such Fiscal Year and (ii) a statement prepared by the Managing Member setting forth each Member's distributive share of Net Income or Net Loss and specially allocated items of income, gain, loss or deduction for such Fiscal Year, in sufficient detail to enable such Member to file its federal income tax return and any required state and local income tax returns. In addition, the Managing Member shall furnish or cause to be furnished such other information as any Member may from time to time reasonably request in order to enable such Member to file estimated tax returns and such other information and reports as may be described in the Memorandum.

**13.3 Tax Information.** Within ninety (90) days after the end of each Fiscal Year, the Managing Member will deliver or cause to be delivered to each Person who was a Member at any time during such Fiscal Year a Form K-1 and such other information, if any, with respect to the Fund as a Member reasonably requests as necessary for the preparation of such Member's income tax returns.

**13.4 Elections.** The determinations of the Managing Member with respect to the treatment of any item or its allocation for federal, state or local tax purposes shall be binding upon all of the Members so long as such determination shall not be inconsistent with any express term hereof.

## ARTICLE XIV

### FAIR MARKET VALUE

**14.1 Fair Market Value.** For purposes of this Article XIV, "Fair Market Value" means, as to any non-cash property of the Fund, the fair market value thereof as determined by the Managing Member. The Managing Member shall provide the Advisory Board with written notice of each determination of Fair Market Value. Each such determination shall

be final and conclusive unless the Advisory Board, within twenty (20) days after such notice from the Managing Member, delivers to the Managing Member a written objection to such determination. If the Advisory Board timely objects to any determination of Fair Market Value and if the Managing Member and the Advisory Board do not agree on the Fair Market Value of any property within the applicable period specified in this Article XIV, the Fair Market Value of such property shall be determined by appraisal in accordance with this Article XIV. In determining the Fair Market Value of any non-cash property of the Fund, all factors, which the Managing Member determines might reasonably affect such value, shall be taken into account without regard to any discounts for illiquidity or non-transferability.

#### 14.2 Appraisal Procedures.

(a) If the Managing Member and the Advisory Board are unable to agree upon the Fair Market Value of any non-cash property of the Fund within thirty (30) days after the Managing Member receives written notice that the Advisory Board objects to the Managing Member's determination, or if the Managing Member determines at any time (whether before or after the expiration of such thirty (30) days) that the Managing Member and the Advisory Board are unlikely to reach agreement on the Fair Market Value, then such Fair Market Value shall be determined as follows:

(b) Upon the expiration of such 30-day period or such shorter period determined by the Managing Member, either the Managing Member or the Advisory Board may request an appraisal of the applicable property by sending written notice thereof to the other. Within five days after receipt of the written notice by the party to whom such notice is sent, the Managing Member and the Advisory Board shall, by mutual agreement, appoint an independent appraiser (which may be an investment bank, accounting firm, asset appraiser, or other valuation professional). If the Managing Member and the Advisory Board cannot agree on a single independent appraiser within such five day period, the Managing Member and the Advisory Board shall each have the right to select an independent appraiser experienced in such matters and shall give written notice to the other of the appraiser so selected. The first party to receive such a notice shall have five days after receipt thereof to give the other written notice of its selection. If either the Managing Member or the Advisory Board properly gives a first notice and the other does not properly give the second notice within the requisite time or if a single appraiser is selected, the one independent appraiser so selected shall be the sole appraiser in making the determination required hereunder, which written determination shall be final and binding and shall be delivered to the Managing Member and the Advisory Board no more than thirty (30) days after the delivery of the first notice.

(c) If the second notice is properly given within the requisite time, the independent appraisers so selected shall promptly make the determination required hereunder and deliver a written summary of such determination to the Managing Member and the Advisory Board within thirty (30) days after the delivery of the first notice. If such two appraisers reach the same determination, their determination shall be final and binding. If the two appraisers reach determinations that are different but the lower determination is no less than 90% of the higher determination, an average of the two shall be final and binding. In all other events, the two appraisers shall promptly select a third independent appraiser who shall promptly select the determination of one of the two appraisers which it believes is more accurate and deliver a written summary of such determination to the Managing Member and the Advisory Board no more than sixty (60) days after the delivery of the first notice, and such determination shall be

final and binding on both parties. All fees and expenses of each such independent appraiser shall be borne by the Fund.

## ARTICLE XV

### MISCELLANEOUS

15.1 **Notices.** All notices, payments and demands under this Agreement shall be deemed to have been delivered for all purposes (a) if delivered by hand to the party to whom addressed or to an officer of such party or (b) whether or not actually received, if sent by telex, facsimile or telegram confirmed in writing, or by registered or certified mail, return receipt requested, postage and charges prepaid, addressed to the party at the address set forth herein or in such party's Subscription Agreement or to such other address as a party may designate by written notice received by the Fund. Notice shall be deemed to have been given as of the date delivered or sent, if delivered by hand or sent by telex, facsimile or telegram, and, if mailed as of five business days after the date mailed.

15.2 **Governing Law; Separability of Provisions.** The laws of Delaware and, in particular, the provisions of the Act shall govern the validity of this Agreement, the construction if its terms and the interpretation of the rights and duties of the Members. If any provision of this Agreement shall be held to be invalid, the remainder of this Agreement shall not be affected thereby.

15.3 **Entire Agreement.** This Agreement and the Memorandum together constitute the entire agreement among the Members and supersede any prior agreement or understandings among them, oral or written, relating to the subject matter hereof. There are no other representations, agreements, arrangements or understandings, oral or written, between or among the parties relating only to the subject matter hereof. If any provision of this Agreement shall conflict with any provision in the Memorandum, this Agreement shall govern.

15.4 **Headings.** The headings in this Agreement are inserted for convenience of reference only and shall not affect the interpretation of this Agreement. Wherever from the context it appears appropriate, each term stated in either the singular or the plural shall include the singular and the plural, and pronouns stated in either the masculine or the neuter gender shall include the masculine, the feminine and the neuter.

15.5 **Pronouns.** All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the Person or entity may require.

15.6 **No Third Party Beneficiaries.** The provisions of this Agreement are intended to bind each Member and are not intended to create and do not create any rights in any other Person. No Person shall be or be deemed to be a third party beneficiary of this Agreement.

15.7 **Binding Provisions.** The covenants and agreements contained herein shall be binding upon and inure to the benefit of the heirs, executors, administrators, personal or legal representatives, successors and assigns of the respective parties.

15.8 **Additional Documents.** Each party agrees to execute, with acknowledgment or affidavit, if required by the Managing Member, any and all documents which may be necessary or expedient in connection with the creation of the Fund and the achievement of its purposes.

15.9 **Confidentiality.** Each Nonmanaging Member will maintain the confidentiality of nonpublic information regarding the Fund and the Managing Member received by such Nonmanaging Member pursuant to this Agreement.

15.10 **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Nonmanaging Liability Company Operating Agreement as of the date first above written.

MANAGING MEMBER:  
RIVEROAK INVESTMENT CORP., LLC  
By: \_\_\_\_\_  
Its: Managing Member

NONMANAGING MEMBER:  
By: \_\_\_\_\_  
As Attorney-in-Fact

By: \_\_\_\_\_

SCHEDULE A  
MEMBERS

<u>Name</u>	<u>Address</u>	<u>Capital Contribution</u>	<u>Percentage Interest</u>
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The date of this Schedule A is \_\_\_\_\_, \_\_\_\_\_.

