# OPERATING AGREEMENT[1]

## OF

## *NAME, LLC,

## A *STATE LIMITED LIABILITY COMPANY

## EFFECTIVE AS OF *DATE

## "NOTICE OF RESTRICTIONS ON TRANSFER

**THE SHARES AND MEMBERSHIP INTERESTS ARE SUBJECT TO A LIMITATION UNDER WHICH THE TRANSFER IN ANY MANNER OF SUCH SHARES OR MEMBERSHIP INTERESTS IS RESTRICTED. SEE ARTICLE IX BELOW.**

**THE SHARES DESCRIBED AND REPRESENTED BY THIS OPERATING AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 (THE "ACT") OR ANY APPLICABLE STATE SECURITIES LAWS ("STATE ACTS") AND MAY BE RESTRICTED SECURITIES AS THAT TERM IS DEFINED IN RULE 144 UNDER THE ACT. THE SHARES MAY NOT BE OFFERED FOR SALE, SOLD, OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT OR QUALIFICATION UNDER THE ACT AND APPLICABLE STATE ACTS OR PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE ACT AND APPLICABLE STATE ACTS, THE AVAILABILITY OF WHICH IS TO BE ESTABLISHED TO THE SATISFACTION OF THE COMPANY.**

[1] This is based on a manager-managed platform because manager-managed LLCs generally limit the decision-making authority and ability to bind of the members in a manner that simulates the that of a corporation. This agreement could be modified to fit a manager-managed LLC and could be modified to eliminate the corporate concept of officers without impairing the LLC's ability to qualify as an S corporation. For a general discussion of LLCs as S corporations see Larry E. Ribstein, Robert R. Keatinge and Thomas Rutledge, Ribstein and Keatinge on Limited Liability Companies ("Ribstein and Keatinge") §19:16.

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# OF
# *NAME, LLC

THIS Amended and Restated Operating Agreement of *name, LLC, a *state Limited Liability Company is made by and between the undersigned Shareholders and entered into effective as the Effective Date.

FOR AND IN CONSIDERATION OF the mutual covenants, rights, obligations and promises contained herein, the benefits to be derived therefrom and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed by each Member, the Members hereby agree as follows:

## Article I
## DEFINITIONS

For purposes of this Operating Agreement unless the context clearly indicates otherwise, the following terms shall have the following meanings:

1.1 "Act" The State Limited Liability Company Act at _____ as amended.

1.2 "Admission" or "Admit" The act by which Person becomes a Member of the Company.

1.3 "Affected Group" The Affected Group as defined in Section 5.3.

1.4 "Agreement" or "Operating Agreement" This operating agreement of the Company, including this Amended and Restated Operating Agreement of *name, LLC, a State Limited Liability Company, as the same may be amended or restated from time to time.

1.5 "Articles" The Articles of Organization of the Company as filed with the Filing Officer pursuant to the Act and as may be amended from time to time.

1.6 "Beneficial Owner" and "Beneficially Own" With respect to any Share, any Person, regardless of whether the person has legal title to the Shares, who directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise is treated as the owner of the Share for Federal or state income tax purposes.[2]

1.7 "Capital Contribution" The cash, cash equivalents or the agreed fair market value of Property which a Shareholder[3] contributes to the Company in exchange for Shares, net of any liabilities secured by such contributed property which the Company is considered to have assumed or taken subject to.[4]

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[2] See, Dunne v. Comm'r, No. 24666–05, 2008 Tax Ct. Memo LEXIS 63 (T.C. Mar. 12, 2008), Bonilla v. U.S., 123 AFTR 2d 2019-1196 See also, Enis, Jay, (2017) TC Memo 2017-222, RIA TC Memo ¶2017-222; Dunne, Joseph D., (2008) TC Memo 2008-63, RIA TC Memo ¶2008-063, 95 CCH TCM 1236; Ragghianti, Arno, (1978) 71 TC 346, affd (1981, CA9) 652 F2d 65. Note that this concept of beneficial owner is different from that applicable to the Corporate Transparency Act.

[3] Contributions as a financial transaction will be made by Shareholders not Members.

[4] Services are not included because services are rendered in exchange for Compensation. In other words, we don't want to say that the Company has service-based capital which needs to be accounted for. This definition is similar to the one used in

1.8 "Cause" With respect to the termination of any Shareholder's employment shall mean the Shareholder's commission of any of the following acts: theft or fraud by the Shareholder that materially harms the Company or any action resulting in the judicial expulsion of the Shareholder as a Member.[5]

1.9 "Code" The Internal Revenue Code of 1986 as amended, references to particular sections of the Code shall apply to the corresponding sections, if any, of the Code as amended.

1.10 "Company" *name, LLC, a State limited liability company.

1.11 "Compensation" Amounts payable to or on behalf an Employee on account of the Employee's performance of services for or on behalf of the Company regardless of whether paid as regular periodic payments or bonus.[6]

1.12 "Consent" Unless this Agreement or the Act require that the consent be in writing (in which case the consent may be given in a written, facsimile, or electronic record in a single document or counterparts), consent given verbally, in writing, or by course of conduct. Consent need not be given at a formal meeting.[7]

1.13 "Damages" Any loss or damage sustained by the Company, the other Shareholders, including interest, costs (including reasonable attorneys' fees). In the case of the taking or failing to take of any action which causes the Corporation to cease to be treated as an S Corporation under Section 5.5.2, failure to supply information to the Corporation under Section 5.6 breach of any warranty under Section 5.9. Damages includes all taxes, penalties and interest for which the Company, the other

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partnership taxation which also excludes services under I.R.C §704(b). Note that this definition also speaks of contributions "in exchange for shares" thereby distinguishing Capital Contributions from loans.

[5] See Treas. Reg. §1.1361-1(l)(2)(iii)(B) (*bona fide* agreements to redeem or purchase stock at the time of death, divorce, disability, or termination of employment are disregarded in determining whether a corporation's shares of stock confer identical rights); Priv. Ltr. Rul. 201918013 (May 3, 2019) (where the IRS determined that there would not be a second class of stock in the case of an employee who has the employee who "has engaged in activity meeting the definition of 'cause' in the Plan, which generally only includes theft or fraud by the employee that materially harms [the Company], the Shareholder's shares may be redeemed for the "'forfeiture repurchase price," which is the lesser of: (i) the fair market value of the shares or (ii) the price paid, if any, to acquire the shares."

[6] This distinction is important to avoid violating the 1 class of stock requirement of I.R.C. §1361(b)(1)(D). Note that there is not a "reasonable" limitation on compensation. Treas. Reg. §1.1361(1)(2)(vi) Example 3 provides that unless the arrangement is used to avoid the single class of stock rule, excessive compensation, while not deductible to the S corporation, will constitute a disqualifying second class of stock. Note that other state and federal tax rules turn on the concept of reasonable compensation. For example, some statutes exclude amounts constituting reasonable compensation from the amount of distributions for purposes of determining wrongful distributions and for federal tax purposes cases and sections like I.R.C. §199A(c)(4)(A) (which excludes "reasonable compensation" from qualified business income) turn on the reasonableness of the compensation. Thus, the exclusion of the term "reasonable" helps with respect to the avoidance of multiple classes of stock but may not be respected for other state and federal tax purposes.
In this regard note Priv. Ltr. Rul. 202141002 (Oct. 15, 2021) (holding that a multi-member LLC having a partnership structure with capital accounts and liquidation distributions based upon capital accounts would violate the single class of stock rule thereby terminating the LLC's S corporation status, but finding that because "the owners of [the LLC] were all individuals who were eligible S Corporation shareholders, all income and expense items were allocated on a per-share basis, all distributions were made on a pro-rata basis based on ownership, and all shareholders were treated equally in corporate matters" and the termination was inadvertent under I.R.C. §1362(f), the LLC's status as an S corporation would not be terminated.). See also, Ribstein and Keatinge §19:16.

[7] This provision is intended to allow for informality in decision-making.

# Title search: Operating Agreement

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