

# Operating Agreement--Short Form for Multiple Members

## OPERATING AGREEMENT

### OF

## XYZ TECHNOLOGY, LLC

THIS OPERATING AGREEMENT ("Agreement," as may be amended from time to time as provided below) is adopted as of \_\_\_\_\_, 20\_\_ , by and among the Initial Members (as defined below).

### ARTICLE I

#### THE COMPANY GENERALLY

Section 1.1 Formation. XYZ Technology, LLC was formed as a limited liability company (the "Company") under and pursuant to the Limited Liability Company Act ("LLCA") and other relevant laws of the State of \_\_\_\_\_ by the filing of articles of organization with the Secretary of State of \_\_\_\_\_ on \_\_\_\_\_, 20\_\_ .

Section 1.2 Name. The name of the Company shall be XYZ Technology, LLC. The Company shall conduct business under that name or such other names complying with applicable law as the Managing Member may determine from time to time.

Section 1.3 Duration. The Company commenced on the first proper filing of articles of organization for the Company as provided in LLCA and shall continue until it is dissolved and its business and affairs are wound up as provided in Article VII.

Section 1.4 Purpose. The purpose of the Company shall be to engage in the business of \_\_\_\_\_ (the "Business"), and to engage in any other lawful business or activity necessary or convenient in pursuit of the foregoing purposes.

Section 1.5 Principal Place of Business. The Company's principal place of business shall be at such place or places as the Managing Member may determine from time to time.

Section 1.6 Registered Office and Registered Agent. The initial address of the registered office of the Company in the State of \_\_\_\_\_ shall be \_\_\_\_\_, \_\_\_\_\_, and the name of the Company's initial registered agent at that address shall be \_\_\_\_\_. The Managing Member may change the registered office and the registered agent of the Company from time to time. The Managing Member may cause the Company to qualify to do business as a limited liability company (or other entity in which the Members have limited liability) in any other jurisdiction and to designate any registered office or registered agent in any such jurisdiction.

Section 1.7 Company Property. All real and personal property owned by the Company shall be deemed owned by the Company as an entity and held in its name. No Member shall have any ownership interest in any such property.

Section 1.8 Merger and Conversion. The Company may merge with, or convert into, another entity only in accordance with a plan of merger or conversion approved by the Required Members.

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### Section 1.9 Definitions and Construction.

As used in this Agreement, the following terms have the following meanings:

- . *"Additional Interests"* has the meaning specified in Section 2.2.
- . *"Business"* has the meaning specified in Section 1.4.
- . *"Capital Account"* has the meaning specified in Section 3.2.
- . *"Claim"* has the meaning specified in Section 4.4.
- . *"Company"* has the meaning specified in Section 1.1.
- . *"Covered Person"* has the meaning specified in Section 4.4.
- . *"Initial Members"* means \_\_\_\_\_ and \_\_\_\_\_ .
- . *"Interest"* means, with respect to any Member at any time, that Member's entire beneficial ownership interest in the Company at such time, including that Member's Capital Account, voting rights, and right to share in profits, losses, cash distributions and all other benefits of the Company as specified in this Agreement, together with that Member's obligations to comply with all of the terms of this Agreement.
- . *"IRC"* means the Internal Revenue Code of 1986.
- . *"Issuance Notice"* has the meaning specified in Section 2.2.
- . *"Liquidating Agent"* has the meaning specified in Section 7.2(a).
- . *"LLCA"* means the \_\_\_\_\_ Limited Liability Company Act.
- . *"Managing Member"* means \_\_\_\_\_ or such other Member appointed as Managing Member as provided in this Agreement but excludes any such Person that has ceased to be the Managing Member or a Member as provided in this Agreement or the LLCA. The Managing Member also shall be the President of the Company.
- . *"Member"* means any Person admitted to the Company as a member as provided in this Agreement but excludes any such Person that has ceased to be a member as provided in this Agreement or the LLCA.
- . *"Percentage"* for any Member means the Percentage established for that Member in accordance with this Agreement.
- . *"Person"* means any individual, corporation, partnership, limited liability company, business trust or other entity, government or governmental agency or instrumentality.
- . *"Regulations"* has the meaning specified in the introduction to this Agreement.
- . *"Required Members"* means Members, which must include each Managing Member, owning at least two-thirds of the Percentages of all Members.

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### ARTICLE II

#### MEMBERS AND INTERESTS

Section 2.1 Initial Members. \_\_\_\_\_ was admitted to the Company as a member effective as of the commencement of the Company as provided in Section 1.3. \_\_\_\_\_ is admitted to the Company as of the date of this Agreement. The Percentage of each Initial Member as of the date of this Agreement is set forth next to that Initial Member's name on Exhibit A.

Section 2.2 Admission of Additional Limited Members; Additional Interests.

(a) Subject to compliance with Section 2.2(b) below, the Managing Member may cause the Company to issue additional Interests and may admit additional Persons to the Company as members on such terms as the Required Members shall determine, if but only if each such new Member agrees in writing to be bound by the provisions of this Agreement as a Member and notifies the other Members of its address for notices under this Agreement. Unless otherwise approved by all of the Members, the Company shall not issue any Interests for consideration other than cash.

(b) The Company shall not issue or sell (or agree to issue or sell) any Interests (or any securities or instruments convertible into or exchangeable or exercisable for any Interests) after the date hereof ("Additional Interests"), unless the Company shall first offer to each Member the right to purchase its proportionate share of the Additional Interests, on the same terms and conditions as the Company proposes to sell the Additional Interests. The Company shall deliver a notice to each Member of its intention to issue Additional Interests and the price and other terms thereof (an "Issuance Notice"). Any Initial Member who desires to purchase its proportionate share of any Additional Interest shall notify the Company no later than ten days after the receipt of such Initial Member of the Issuance Notice from the Company. If the Company does not receive notice from an Initial Member of its desire to purchase Additional Interests within such ten-day period, the Company may sell the securities described in such notice, on the terms described therein, free of any restriction imposed by this Section, during a period not to exceed 90 days after the receipt by the Initial Members of the Issuance Notice. Thereafter, any issuance by the Company must again be preceded by an offer to the Initial Members hereunder.

Section 2.3 Business to be Conducted Solely Through the Company. The Managing Member hereby agrees that he will not, directly or indirectly, engage or participate in, as employee, consultant, investor or otherwise, in the Business in the State of \_\_\_\_\_, otherwise than (i) through the Company or (ii) as a passive investor in any publicly-held entity.

### ARTICLE III

#### FINANCE

Section 3.1 Capital Contributions.

(a) On the commencement of the Company, \_\_\_\_\_ made a contribution to the Company of his existing \_\_\_\_\_ business.

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(b) As of the date of this Agreement, \_\_\_\_\_ made a cash contribution to the Company in the amount set forth next to his name on Exhibit A.

(c) Except as provided in Section 2.2 or 3.1(a), no Member shall have any obligations to make any contribution to the Company.

Section 3.2 Capital Accounts. Each Member shall have a single capital account (its "Capital Account"), which shall be (a) increased by the amount of cash and the fair market value of any property (net of liabilities assumed by the Company and liabilities to which the property is subject) that Member contributes to the Company, plus all items of income and gain of the Company allocated to that Member, (b) decreased by the amount of distributions the Company makes to that Member of cash or other property (net of liabilities assumed by that Member and liabilities to which the property is subject), plus all items of loss and deduction of the Company allocated to that Member. The provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulation §1.704-1(b), and shall be interpreted and applied in a manner consistent with those Treasury Regulations.

Section 3.3 Allocations. All items of income, gain, loss, deduction and credit of the Company shall be allocated to the Members for accounting and tax purposes pro rata according to their Percentages; provided, however, that any allocations pursuant to this Agreement shall comply with the qualified income offset requirements of Treasury Regulation §1.704-1(b)(2)(ii)(d) and the nonrecourse deduction or minimum gain chargeback requirements of Treasury Regulation §1.704-2.

### Section 3.4 Tax Matters.

(a) The Members intend that the Company be treated as a partnership for federal income tax purposes and any similar provisions of state or local law.

(b) The Managing Member shall be the "tax matters partner" for purposes of IRC §6231(a)(7). The tax matters partner shall cause to be prepared and shall sign all returns of the Company, make any election which is available to the Company, and monitor any governmental tax authority in any audit that the authority may conduct of the Company's books and records or other documents. Each Member shall take all actions required to cause the Managing Member to be (and continue as) the tax matters partner and, if requested by the tax matters partner, to otherwise authorize and appoint the tax matters partner as that party with the sole authority to handle all tax matters of the Company. Each Member agrees to execute, certify, deliver, file and record at appropriate public offices or deliver to the tax matters partner such documents as may be requested by the tax matters partner to facilitate the handling of any tax matter as the tax matters partner deems necessary.

(c) After the end of each fiscal year of the Company, the Managing Member shall cause to be prepared and transmitted to each Member, as promptly as possible, and in any event by the end of the third month following the close of the fiscal year, a federal income tax Form K-1 and any required similar state and local income tax form for each Member.

Section 3.5 Mandatory Tax Distribution. The Managing Member shall cause the Company to distribute to the Members cash, proportionally in accordance with their Percentages, in an amount equal to (i) the net federal taxable income allocated to the Members for the fiscal year, less any allocations of net federal taxable income allocated to

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the Members under Section 3.3, above, multiplied by (ii) a reasonable marginal combined federal and state tax rate determined by the Managing Member.

Section 3.6 Distributions. The Managing Member, in its sole discretion, may cause the Company to distribute to the Members cash available after servicing all Company debts, liabilities and obligations then payable and provision of reasonable reserves for expenses and contingencies, which distributions shall be made to the Members pro rata according to their Percentages.

### ARTICLE IV

#### CONDUCT OF COMPANY AFFAIRS

##### Section 4.1 Managing Member.

(a) Subject to the other provisions of this Agreement, the Managing Member shall have the right to, and shall be fully responsible for, the management and control over the business of the Company. The Managing Member shall make all decisions affecting the business of the Company, except to the extent that this Agreement or nonwaivable provisions of the LLCA require the consent or approval of some or all other Members. The Managing Member shall have all rights, powers and authority generally conferred by the LLCA on a member of a limited liability company managed by its members or as otherwise provided by law or necessary, advisable or consistent with accomplishing the purposes of the Company.

(b) Without limiting the other provisions of Section 4.1, the Managing Member has the power:

(i) to protect and preserve the title to and the interest of the Company in all of its property and assets, real, personal and mixed;

(ii) to borrow money on behalf of the Company and to encumber the Company assets or place title in the name of a nominee for purposes of obtaining financing;

(iii) to employ from time to time, at the expense of the Company, consultants, accountants and attorneys;

(iv) to pay all expenses incurred in the operation of the Company and all taxes, assessments, rents and other impositions applicable to the Company or any part thereof;

(v) to sign deeds, notes, contracts and other instruments in the name and on behalf of the Company;

(vi) to make all filings with governmental authorities, including tax returns; and

(vii) to assume any and all overall duties imposed on a member of a limited liability company managed by its members by the LLCA.

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(c) Notwithstanding any other provision of this Agreement to the contrary, the Managing Member may do any of the following only with the prior written consent of all other Members:

(i) do any act in contravention of this Agreement;

(ii) knowingly do any act that would subject any Member to liability for the obligations of the Company in any jurisdiction;

(iii) knowingly do any act that would cause the Company to be treated as an association taxable as, or otherwise taxed as, a corporation for federal income tax purposes unless at the time it already is so taxed; or

(iv) permit or obligate the Company to pay to the Managing Member (or to any person or group of Persons affiliated with or related to the Managing Member), (x) compensation (whether salary or fees) in an amount exceeding \$ \_\_\_\_\_ in any calendar year or (y) other cash and non-cash benefits (such as medical and other insurance, lease or use of a vehicle) exceeding \$ \_\_\_\_\_ in any year.

(d) The Managing Member may appoint such officers of the Company as it may deem appropriate and may remove any such officer at any time with or without cause. The Managing Member may delegate to the Company's officers such powers and duties as it may deem appropriate and subsequently revoke or modify those powers and duties, and except to the extent that the Managing Member determines otherwise, each officer will have the powers and duties normally associated with an officer having a similar title with a \_\_\_\_\_ corporation. The Managing Member also may delegate authority to other Persons and revoke that delegation as it may deem appropriate include the power to delegate authority.

Section 4.2 Members Generally. The Members (other than the Managing Member) shall have no authority to take part in the control, conduct or operation of the Company and shall have no right or authority to act for or bind the Company, including during the winding up of the Company. Other than as specifically provided in this Agreement or nonwaivable provisions of the LLCA, no such Member shall have the right to vote upon any matter concerning the business and affairs of the Company.

Section 4.3 Good Faith Actions. No Member, or any of its officers, directors, shareholders, officers, constituent partners, managers, members, trustees, representatives, agents or employees, shall be liable to the Company or to any of the other Members for any action taken (or any failure to act) by it in good faith on behalf of the Company and reasonably believed by it to be authorized or within the scope of its authority, unless that action (or failure to act) constitutes fraud, gross negligence, bad faith or willful misconduct, and then only to the extent otherwise provided by law.

Section 4.4 Indemnification. To the fullest extent permitted by law, the Company shall indemnify and hold harmless each Member and its respective officers, directors, shareholders, managers, members, employees, agents, subsidiaries and assigns (each, a "Covered Person") from and against any and all losses, claims, demands, liabilities, expenses, judgments, fines, settlements and other amounts arising from any and all claims, demands, actions, suits or proceedings, civil, criminal, administrative or investigative (each a "Claim"), in which the Covered Person may be involved, or threatened to be involved, as a party or otherwise, which relates to or arises out of the Company or its property, business or affairs; provided, however, that a Covered Person shall not be entitled to indemnification

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under this Section 4.5 with respect to (a) any Claim with respect to which the Covered Person has engaged in fraud, willful misconduct, bad faith or gross negligence or (b) any Claim initiated by a Covered Person unless that Claim (or part thereof) was brought to enforce that Covered Person's rights to indemnification under this Section 4.5. The Company shall pay in advance of the final disposition of any such Claim expenses incurred by a Covered Person in defending that Claim if, but only if, that Covered Person so requests and delivers to the Company of an undertaking by or on behalf of that Covered Person to repay amounts so advanced if it ultimately is determined that the Covered Person is not entitled indemnification under this Section 4.5.

Section 4.5 Meetings of Members. The Managing Member may call meetings of Members at such times and places as the Managing Member may determine in its sole discretion; provided that written notice of any meeting shall be provided to each Member at least five business days prior to the meeting date, and each notice shall set forth the time plus any purpose of the meeting and shall be accompanied by a description of the items of business to be addressed at the meeting, to the extent reasonably known.

Section 4.6 Limitations. No Member shall have the right or power to:

(a) (a) withdraw any part of its contributions to the Company or its Capital Account except as a result of the dissolution and winding up of the Company as provided in Article VII or as otherwise provided by nonwaivable provisions of law;

(b) bring an action for partition of Company property;

(c) cause the dissolution and winding up of the Company, except as set forth in this Agreement;

(d) demand or receive (i) interest on its contributions to the Company or its Capital Account or (ii) any property from the Company other than cash except as provided in Section 3.5; or

(e) have priority over any other Member either as to the return of contributions to the Company or as to items of Company income, gain, loss, deduction and credit, or distributions.

## ARTICLE V

### BOOKS AND RECORDS

Section 5.1 Books and Records. The Managing Member shall keep appropriate records and books of account of all transactions and other matters related to the Company's business. Except as otherwise expressly provided by this Agreement, such books and records shall be maintained in accordance with generally accepted accounting principles, consistently applied, and shall reflect the allocations provided in Section 3.3.

Section 5.2 Access by Limited Members. Subject to Section 5.3, all books and records of the Company shall be made available at the principal office of the Company and shall be open to the reasonable inspection and examination of the Members or their duly authorized representatives during normal business hours, and each Member has the right to inspect, and copy during normal business hours, those records, and to obtain from the Managing Member,

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promptly after becoming available, a copy of the Company's federal, state and local income tax or information returns for each year.

Section 5.3 Confidential Information. Notwithstanding the provisions of Section 5.2, the Managing Member may withhold and keep confidential from any Member trade secrets, personnel records and other information if the Managing Member determines in good faith that making that information available to that Member would not be in the best interest of the Company or the Members generally in their capacities as such. Each Member agrees that the restrictions in this Section 5.3 are just and reasonable.

### ARTICLE VI

#### TRANSFERS OF INTERESTS

Section 6.1 Transfers Generally. A Member may sell, transfer, assign, hypothecate, pledge or otherwise dispose of or encumber all or any part of its Interest.

Section 6.2 Rights of Transferee. A Person to which all or any part of a Member's Interest is transferred as permitted by Section 6. 1, or that succeeds to all or part of the Interest of a Member due to the death, divorce or incapacity of a Member who is an individual or the liquidation of a Member that is an entity, or on the bankruptcy of a Member, (a) is entitled to share in the Company's profits and losses, and to receive distributions and allocations of Company income, gain, loss or credit, to the same extent as the predecessor Member to the extent of the Interest and (b) if but only if the Managing Member consents in writing in its sole discretion (or if the Managing Member's Interest is affected, the Required Members consent in writing in their sole discretion) and the Person receiving the Interest agrees in writing to be bound by the provisions of this Agreement as a Member and notifies the other Members of its address for notices under this Agreement, shall be admitted to the Company as a member.

Section 6.3 Void Assignments. Any purported sale, transfer, assignment, hypothecation, pledge or other disposition or encumbrance by a Member of all or any part of any Interest not made strictly in accordance with the provisions of this Article VI or otherwise permitted by this Agreement shall be entirely null and void, and of no force or effect.

### ARTICLE VII

#### DISSOLUTION AND WINDING UP

Section 7.1 Dissolution. The Company shall be dissolved only on the first to occur of any one or more of the following:

- (a) written consent of the Required Members;
- (b) at such time as there is no Member remaining;
- (c) entry of a judicial order dissolving the Company; or

(d) on notice from any Member to the other Members on or after the 90th day following the Managing Member's ceasing to be a Member, unless a new Managing Member has been appointed as provided in Section 4.1(f).



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### Section 7.2 Winding Up Affairs and Distribution of Assets.

(a) On dissolution of the Company, the Managing Member or, if there is no Managing Member, a Person designated for this purpose by written consent of Members owning more than 50% of the outstanding Percentages owned by Members (the Managing Member or the Person so designated being called the "Liquidating Agent"), as soon as practicable shall wind up the affairs of the Company and sell and/or distribute the assets of the Company. The Liquidating Agent shall have all of the rights and powers with respect to the assets and liabilities of the Company in connection with the liquidation and termination of the Company that the Managing Member would have with respect to the assets and liabilities of the Company during the term of the Company, and the Liquidating Agent is expressly authorized and empowered to execute any and all documents necessary or desirable to effectuate the liquidation and termination of the Company and the transfer of any assets. The Liquidating Agent shall apply and distribute the proceeds of the sale or liquidation of the assets and property of the Company in the following order of priority, unless otherwise required by nonwaivable provisions of applicable law:

(i) to pay (or to make provision for the payment of) all creditors of the Company (including Members who are creditors of the Company), in the order of priority provided by law or otherwise, in satisfaction of all debts, liabilities or obligations of the Company due its creditors;

(ii) after the payment (or the provision for payment) of all debts, liabilities and obligations of the Company in accordance with clause (i) above, any balance remaining shall be distributed to the Members having positive Capital Accounts in relative proportion to those Capital Accounts.

(b) The Liquidating Agent shall have sole discretion to determine whether to liquidate all or any portion of the assets and property of the Company and the consideration to be received for that property.

(c) Except as required by nonwaivable provisions of the LLCA, no Member shall have any obligation at any time to contribute any funds to replenish any negative balance in its Capital Account.

Section 7.3 Termination. On compliance with the distribution plan described in Section 7.2(a), the Liquidating Agent shall execute, acknowledge and cause to be filed articles of dissolution, at which time the Company shall cease to exist as a limited liability company.

## ARTICLE VIII

### MISCELLANEOUS

Section 8.1 Notices. Any notice to be given under this Agreement must be in writing and delivered personally (including by courier), electronically, by facsimile transmission, or by express, certified or registered mail (a) if to the Company, to the Managing Member, and (b) if to a Member, at its address set forth on Exhibit A, in the case of a Member subsequently admitted, in the instrument in which it agreed to be bound by this Agreement, or in either case at such other address as that Member may designate by notice to the other Members. A notice is deemed given on receipt at the address so provided.

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Section 8.2 Entire Agreement. This Agreement supersedes all prior agreements and understandings among the Members with respect to the Company.

Section 8.3 Amendments. This Agreement may be modified only on the written consent of the Required Members; provided, however, that an amendment adversely affecting a Member's distributions, allocations, obligation to make contributions to the Company or rights to consent or approve is effective against that Member only if that Member agrees in writing.

Section 8.4 Waivers. A waiver of any breach of any of the terms of this Agreement shall be effective only if in writing and signed by the Member against whom such waiver or breach is claimed. No waiver of any breach shall be deemed a waiver of any other subsequent breach.

Section 8.5 Severability. If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired, unless that provision was fundamental to the objectives of this Agreement.

Section 8.6 Interpretation. In this Agreement, (i) terms defined in the singular have the corresponding meaning in the plural and vice versa; (ii) reference to one gender includes the others; (iii) the word "*include*" and its derivatives means "include without limitation;" (iv) references to Articles, Sections and Exhibits are to the specified Articles and Sections of, and Exhibits to, this Agreement unless the context otherwise requires. Each Exhibit to this Agreement is made a part of this Agreement for all purposes; and (v) references to statutes or regulations are to those statutes or regulations as currently amended and to the corresponding provisions as they may be amended or superseded in the future.

Section 8.7 Further Assurances. Each Member shall execute such deeds, assignments, endorsements and other instruments and documents and shall give such further assurances as shall be reasonably necessary to perform its obligations under this Agreement.

Section 8.8 Governing Law. This Agreement shall be governed by and construed in accordance with the law of \_\_\_\_\_ .

Section 8.9 Power of Attorney. Each Member constitutes and appoints the Managing Member its true and lawful attorney with full power of substitution to make, execute, sign, acknowledge and file all certificates and instruments necessary to form or qualify, or continue the existence or qualification of, the Company in any jurisdiction or before any governmental authority. This grant of a power of attorney is coupled with an interest and shall survive a Member's disability, incompetence, death or assignment by such Member of its Interest pursuant to this Agreement.

Section 8.10 Successors and Assigns. Except as expressly provided to the contrary in this Agreement, this Agreement shall be binding on and inure to the benefit of the Members and their respective successors and permitted assigns.

Section 8.11 Counterparts. This Agreement may be executed in any number of counterparts or with counterpart signature pages, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned Members have duly executed this Agreement as of the day and year first above written.

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<b>MEMBERS:</b>	

**EXHIBIT A**

**NAMES, ADDRESSES, PERCENTAGES, CAPITAL CONTRIBUTIONS AND CAPITAL ACCOUNT BALANCES OF INITIAL MEMBERS**

<u>Name and Address</u>	<u>Percentage</u>	<u>Capital Contribution</u>	<u>Capital Account Balance</u>
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