Vermont Bar Association

Seminar Materials

Business Divorce Law:
How to Remedy and Avoid Freeze-Outs
& Other Oppressive Conduct

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11A V.S.A. 1.01 et seq.
Chapter 13 Dissenters’ Rights
Chapter 20 Close Corporations
Section 7.32 Shareholder Agreements
Limited Liability Companies Act and Partnership Act

11 V.S.A. Section 3001 et seq.
Chapter 11 V.S.A. Section 3201 et seq.
A court, by statute will allow for dissolution of a corporation if it finds that those in control have acted, are acting, or will act in a manner that is oppressive.

11A VSA § 14.30
Purpose of Oppression Doctrine

• Nature of Small Business
  – # of Shareholders
  – Absence of market
  – Expectation to participate in management
  – Expectation of employment

• Limit mob rule

• Need for market substitute

• Balanced against legitimate business purposes
Procedure for Judicial Dissolution – Generally

• Dissolution of Vermont Business Corporation governed by Title 11A, Chapter 14
• Action brought in county of principal place of business
• No need to name shareholders
• Court can take control of corporation during course of lawsuit to preserve assets and carry on its business
• Decree of dissolution and liquidation

11A VSA §§ 14.31, 14.33
Procedure for Judicial Dissolution - Close Corporations

Close corporation must be specially organized as such and have fewer than 35 shareholders.

Designation provides certain statutory flexibility and shareholder protection.

Basis for dissolution is governed by the general business corporation provisions, i.e. a finding of oppression.
Added feature of a buy-out election:

- Majority can avoid dissolution
- Written election in proceeding to purchase at fair value
- Electing shareholders to provide a bond
- Stay proceeding to make FV determination, as of day petition for dissolution filed
- Court to direct terms of buy-out
- Shares surrendered upon full payment of purchase price

11A VSA § 20.15
“The statute encourages electing shareholders to calculate whether it is in their interests to buy out the petitioner or risk entry of a dissolution order.”

Vermont recognizes that shareholders in a closely held corporation owe each other utmost fiduciary duty of good faith and fair dealing.

A close corporation bears a resemblance to a partnership and the shareholders owe one another a fiduciary duty.

Oppression and breach of fiduciary duty are linked.

What is Oppression?

- Termination
- Removal from management
- Salary increases to majority
- Reduction of dividends
- Siphoning corporate earnings/corporate waste
- Restricting access to financials
- Low ball offer for shares
Business Judgment Rule

- The expectations of minority shareholder, which must be reasonable, are balanced against the business purpose for the challenged action.
- Did the action have a legitimate business purpose as opposed to driven by self-interest
- Could the action have been achieved by less drastic measures
- Is there a shareholder agreement or employment contract that governs the parties’ conduct?
Remedies

- Dissolution
- Buy-out; fair value
- Reinstatement
- Lost wages
- Dividend declaration
- Money damages
- Receivership
- Punitive Damages
Structure and Operations of LLC

**Term or At-Will:**
- A term company - members have agreed to remain members until the expiration of a specified term.
- An at-will company – no specified term.

**Management:**
- Manager-Managed: allows a non-member to manage the company
- Member-Managed: a member must manage the company
- Section 3054 further outlines the management provisions.

**Operating agreement:**
- “Any form of description of membership rights and obligations.
- Not required, but recommended.
- “To the extent the operating agreement does not otherwise provide, this chapter regulates the affairs of the company, the conduct of its business, and governs relations among the members, among the managers, and among members, managers and the limited liability company.”

11 V.S.A. § 3001
Member-Managed Company:

- Member owes a duty of loyalty and duty of care
- Duty of loyalty is limited to:
  - Account to the company for property, profit or benefit
  - Refrain from dealing with the company as or on behalf of a party having an adverse interest
  - Refrain from competing with the company.
- Duty of care “shall be to act in good faith, with the care of an ordinary prudent person in a like position would exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the limited liability company.”
- “A member shall discharge the duties . . . and exercise any rights consistently with the obligation of good faith and fair dealing.”
- A member does not violate a duty or obligation “merely because the member’s conduct furthers the member’s interest.”

11 V.S.A. § 3059
Manager-Managed Company:

- A member who is not a manager owes no duties solely by reason of being a member.
- A manager is held to the same standards of conduct as a member of a member-managed company.
- A member who, pursuant to the operating agreement exercises some of the rights of a manager in the management of the company is held to the same standards as a member of a member-managed company.

11 V.S.A. § 3059
Dissociation

Section 3081 sets forth the events and circumstances, which result in a member’s dissociation from the company.

“A member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will”.

A dissociation is wrongful under certain circumstances set forth in Section 3082.

A member who wrongfully dissociates is liable for any damages caused.

11 V.S.A. §§ 3081, 3082
Forced Dissociation

The Company or a Member may seek another member's expulsion by judicial determination by showing the member:

- engaged in wrongful conduct that adversely and materially affected the company's business;

- willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under section 3059 of this title; or

- engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member.

11 V.S.A. § 3081(5)
Effect of Dissociation

Dissolution and winding up of the company if:

✓ it is a member-manager who dissociates, or if there is no member-manager;
✓ it is a member of an at-will company; or
✓ it is a member of a term company and the reasons for dissociation is one provided for in Section 3081(6)-(10).

Winding up can be avoided if:

✓ “within 90 days after the dissociation, a majority in interest of the remaining members agree to continue the business of the company; or”
✓ “the business of the company is continued under a right to continue stated in the operating agreement”.

11 V.S.A. § 3083
If dissociation results in dissolution and winding up, subchapter 8 applies:

- LLC continues only for the purposes of winding up the business.
- A member who has not wrongfully dissociated is entitled to participate in the winding up of the company.
- Upon application of a member, for good cause shown, the superior court may order judicial supervision.
- After expenses and obligations, each member is entitled to “a return of all contributions which have not previously been returned and a distribution of any remainder in equal shares.”
Effect of Dissociation (cont.)

If dissociation does not result in dissolution and winding up, and it is an at-will company, The company must cause “the dissociated member’s distributional interest to be purchased under subchapter 7 of the chapter.”

If it is a term company, and the company dissolves and winds up before the expiration of the term, subchapter 8 applies to determine member’s rights to distributional shares.

If it is a term company which continues, subchapter 7 applies and the dissociated member’s interest must be purchased upon the expiration of the term.
Forced Dissolution

A member may apply for a judicial decree to dissolve the LLC if it can be established that:

- The economic purpose of the company is likely to be unreasonably frustrated.
- A member has engaged in conduct relating to the LLC’s business that makes it impractical to carry on the business with that member.
- It is not practical to carry on the business in conformity with the articles of organization and the operating agreement.
- The company has failed to cause a dissociated member’s interest to be purchased.
- Managers or members have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial to the petitioning member.

11 V.S.A. § 3101(5)
A limited liability company shall cause a member’s distributional interest to be purchased if dissociation does not result in a dissolution and winding up of the company.

- If an at-will company, “for its fair value determined as of the date of the member’s dissociation.”
- If a term company, “for its fair value determined as of the date of the expiration of the specified term.”

The company must deliver a purchase offer to the dissociated member no later than 30 days after the date of dissociation or expiration of the term. The offer must include:

- A statement of the company’s assets and liabilities;
- The latest available balance sheet and income statement, if any; and
- An explanation of how the estimated amount of the payment was calculated.

11 V.S.A. § 3091
If no agreement within 120 days of offer, the dissociated member may, “within another 120 days” bring an action to enforce the purchase.

The Court “shall determine fair value of the distributional interest” and “order the limited liability company to purchase or cause the purchase of the interest.”

To determine fair value, the court must consider “among other relevant evidence”:

- The going concern value of the company
- Any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any purpose
- The recommendations of any appraiser appointed by the court and any legal constraints on the company’s ability to purchase the interest.”

“If the court finds that a party to the proceeding acted arbitrarily, vexatiously or not in good faith” it may award reasonable expenses, including attorney’s fees and the expenses of appraisers or other experts, incurred in the proceeding.

11 V.S.A. § 3091, 3092
Purpose of Stockholder Protection

• Why do Stockholders Need Contractual Protection?

• Why might Majority Stockholders Resist Protection?

• Advantages and Scope of Stockholder Protection

  ✓ Control of Management

  ✓ Prevent Dilution

  ✓ Gain Liquidity
Factors Impacting the Scope of Stockholder Protections

- Ownership interest
- Nature of the company and the stockholder's participation
- Negotiating leverage
Protections Relating to Voting

Substantive Protections

- Board Representation
- Voting Rights
- Recusal of Certain Stockholders
- Statutory Voting Rights
- Matters Requiring the Consent of the Stockholders
Typical Matters Requiring the Consent of the Stockholders

- Amending the charter documents, like bylaws or articles.
- Issuing to, or redeeming from, any person the company's equity securities
- Amending the company's business purpose or entering into a new line of business
- Adopting or amending the company's business plans and budgets
- Making a capital call or request for additional contributions to the company
- Entering into any fundamental transaction such as a consolidation, reorganization, merger or sale of substantially all of the assets of the company
- Commencing an IPO
- Creating a subsidiary
- Borrowing, guaranteeing or refinancing any indebtedness
- Creating a security interest in any material asset of the company other than a security interest incurred or created in the ordinary course of business
- Selling, licensing, leasing or otherwise disposing of any material asset of the company
- Purchasing, licensing, leasing, exchanging or otherwise acquiring the assets or equity interests of any person
- Entering into any transaction or agreement with affiliate
- Appointing or removing the company's chief executive officer and any other officer
- Dissolving, winding up or liquidating the company or filing any petition in bankruptcy
- Initiating or settling any litigation or arbitration proceeding against any party
- Appointing or removing the company's auditors
- Entering into any other transaction outside the ordinary of course of business
Procedural Protections Relating to Voting

Other Procedural Protections

- Quorum Requirements
- Observer Rights
Protections Relating to Stock Ownership

- Transfer Restrictions—when how can shareholder sell shares
- Pre-emptive Rights—the right to buy a pro rata share of new stock issuances
- Put and Call Rights—also known as buy/sell rights for the mandatory purchase and sale of stockholders interest
- Rights of First Refusal—stockholder can’t sell without offering to other stockholders first
- Drag-along and Tag-along Rights
  - Drag-along benefits majority stockholder allows the forced sale of minority shares
  - Tag-along (also called co-sale) allows minority stockholders to sell pro-rata portion of interests to any third party buying majority stockholder’s interest
Sample Language

- Sample Transfer Restriction—Stockholders Agreement
- Sample Preemptive Rights—Operating Agreement
- Sample Put/Call Rights
- Sample Rights of First Refusal—Stockholders Agreement
- Sample Drag Along—Operating Agreement
- Sample Tag Along—Stockholders Agreement
- Sample Deadlock/Mediation Provision
Protections Relating to the Company's Business

- Access to Financial Statements
- Inspection Rights
- Non-Compete
- Corporate Opportunities
General Restrictions on Transfer.

(a) Except as permitted pursuant to Section 3.01(b) or in accordance with the procedures described in Section 2.03, each Stockholder agrees that such Stockholder will not, directly or indirectly, voluntarily or involuntarily Transfer any of its Common Stock. In the event that the Minority Stockholder dies, becomes disabled (as defined in the Employment Agreement between the Minority Stockholder and the Company) or is terminated [without cause] pursuant to the Employment Agreement between the Minority Stockholder and the Company, the Majority Stockholder shall repurchase the shares of Common Stock owned by the Minority Stockholder in accordance with the procedures described in Section 2.03.

(b) The provisions of Section 3.01(a) shall not apply to any of the following Transfers by any Stockholder of any of its Common Stock:

(i) to a Permitted Transferee; or

(ii) pursuant to a merger, consolidation or other business combination of the Company with a Third Party Purchaser that has been approved in compliance with Section 2.02(i).

(c) In addition to any legends required by Applicable Law, each certificate representing the Common Stock of the Company shall bear a legend substantially in the following form:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO A STOCKHOLDERS AGREEMENT (A COPY OF WHICH IS ON FILE WITH THE SECRETARY OF THE COMPANY). NO TRANSFER, SALE, ASSIGNMENT, PLEDGE, HYPOTHECATION OR OTHER DISPOSITION OF THE SECURITIES REPRESENTED BY THIS CERTIFICATE MAY BE MADE EXCEPT IN ACCORDANCE WITH THE PROVISIONS OF SUCH STOCKHOLDERS AGREEMENT AND (A) PURSUANT TO A REGISTRATION STATEMENT EFFECTIVE UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR (B) PURSUANT TO AN EXEMPTION FROM REGISTRATION THEREUNDER. THE HOLDER OF THIS CERTIFICATE, BY ACCEPTANCE OF THIS CERTIFICATE, AGREES TO BE BOUND BY ALL OF THE PROVISIONS OF SUCH STOCKHOLDERS AGREEMENT."

(d) Prior notice shall be given to the Company by the transferor of any Transfer (whether or not to a Permitted Transferee) of any Common Stock. Prior to consummation of any Transfer by any Stockholder of any of its Common Stock, such party shall cause the transferee thereof to execute and deliver to the Company an Agreement agreeing to be bound by the terms and conditions of this Agreement. Upon any Transfer by any Stockholder of any of its Common Stock, in accordance with the terms of this Agreement, the transferee thereof shall be substituted for, and shall assume all the rights and obligations under this Agreement of, the transferor thereof.
(e) Notwithstanding any other provision of this Agreement, each Stockholder agrees that it will not, directly or indirectly, Transfer any of its Common Stock (i) except as permitted under the Securities Act and other applicable federal or state securities laws, and then, if requested by the Company, only upon delivery to the Company of an opinion of counsel in form and substance satisfactory to the Company to the effect that such Transfer may be effected without registration under the Securities Act, (ii) if it would cause the Company or any of its Subsidiaries to be required to register as an investment company under the Investment Company Act of 1940, as amended, or (iii) if it would cause the assets of the Company or any of its Subsidiaries to be deemed plan assets as defined under the Employee Retirement Income Security Act of 1974 or its accompanying regulations or result in any "prohibited transaction" thereunder involving the Company. In any event, the Board may refuse the Transfer to any Person if such Transfer would have a material adverse effect on the Company as a result of any regulatory or other restrictions imposed by any Governmental Authority.

(f) Any Transfer or attempted Transfer of any Common Stock in violation of this Agreement shall be null and void, no such Transfer shall be recorded on the Company's books and the purported transferee in any such Transfer shall not be treated (and the purported transferor shall continue be treated) as the owner of such Common Stock for all purposes of this Agreement.
Pre-Emptive Right Provision

(a) Issuance of Additional Equity Securities. The Company hereby grants to each Member (each, a "Pre-emptive Member") the right to purchase its Pro Rata Portion of any new Equity Securities (other than any Excluded Securities) (the "New Units") that the Company may from time to time propose to issue or sell to any party.

(b) Additional Issuance Notices. The Company shall give written notice (an "Issuance Notice") of any proposed issuance or sale described in subsection (a) above to the Pre-emptive Members within [five] [Business Days/days] following any meeting of the Managers at which any such issuance or sale is approved. The Issuance Notice shall, if applicable, be accompanied by a written offer from any prospective purchaser seeking to purchase New Units and shall set forth the material terms and conditions of the proposed issuance, including:

(i) the number and description of the New Units proposed to be issued and the percentage of the Company's outstanding Equity Securities such issuance would represent;
(ii) the proposed issuance date, which shall be at least [20] [Business Days/days] from the date of the Issuance Notice; and
(iii) the proposed purchase price per unit.

(c) Exercise of Pre-emptive Rights. Each Pre-emptive Member shall for a period of [15] [Business Days/days] following the receipt of an Issuance Notice (the "Exercise Period") have the right to elect irrevocably to purchase its Pro Rata Portion of the New Units at the purchase price set forth in the Issuance Notice by delivering a written notice to the Company. The closing of any purchase by any Pre-emptive Member shall be consummated concurrently with the consummation of the issuance or sale described in the Issuance Notice; provided, however, that the closing of any purchase by any Pre-emptive Member may be extended beyond the closing of the transaction in the Issuance Notice to the extent necessary to [(i)] obtain required Government Approvals [and other required third party approvals or consents] (and the Company and the Members shall use their respective [commercially] reasonable efforts to obtain such approvals) [and (ii) permit the Pre-emptive Members to complete their internal capital call process following the Exercise Period; provided, that the extension pursuant to this clause (ii) shall not exceed [60] days.]
Section 2.01 Put Right.

(a) Right to Sell. In the event that a Management Stockholder's employment with the Company [or its Subsidiaries] is terminated (i) as a result of such Management Stockholder's death or Disability, [or] (ii) as a result of such Management Stockholder's resignation other than prior to the age of [THE COMPANY’S MANDATORY RETIREMENT AGE, IF ANY]] or (iii) by the Company for any reason other than for Cause, and the Company has not delivered a notice pursuant to Section [CALL RIGHT SECTION] within [15/30] days/Business Days after such termination, then, subject to the other provisions of this Section [2.01], such Management Stockholder and/or his Management Permitted Transferees, as applicable (the "Offering Management Stockholder"), may elect to sell to the Company all or any percentage of the Management Stock held by such Person at a price equal to the Fair Market Value of such Management Stock as of the date of termination (the "Put Purchase Price").

(b) Procedures.

(i) If such Offering Management Stockholder desires to sell Management Stock pursuant to this Section [2.01], such Offering Management Stockholder shall deliver to the Company, not more than [45/60] days/Business Days after the date of termination of the applicable Management Stockholder's employment, a written notice (the "Management Stock Sale Notice") specifying the number of shares of Management Stock to be sold (the "Offered Management Stock") by such Offering Management Stockholder.

(ii) By delivering the Management Stock Sale Notice, the Offering Management Stockholder represents and warrants to the Company and each other Stockholder that (x) the Offering Management Stockholder has full right, title and interest in and to the Offered Management Stock, (y) the Offering Management Stockholder has all the necessary power and authority and has taken all necessary action to sell such Offered Management Stock as contemplated by this Section [2.01], and (z) the Offered Management Stock are free and clear of any and all Liens other than those arising as a result of or under the terms of this Agreement.

(iii) Subject to subsection (c) below, the closing of any sale of Offered Management Stock pursuant to this Section [2.01] shall take place no later than [60/90/180] days/Business Days following receipt by the Company of the Management Stock Sale Notice. The Company shall give such Offering Management Stockholder at least [10] days/Business Days' written notice of the date of closing (the "Put Right Closing Date").

(c) Consummation of Sale.

(i) Subject to the existence of any Delay Condition, the Company shall use [commercially] reasonable efforts to pay the Put Purchase Price for the Offered Management Stock by certified
or official bank check or by wire transfer of immediately available funds on the Put Right Closing Date.

(ii) If a Delay Condition exists, the Company shall notify the Offering Management Stockholder in writing as soon as practicable of such Delay Condition (the "Delay Condition Notice"), and shall permit the Offering Management Stockholder, within [10] days of the date of the Delay Condition Notice, to rescind the Management Stock Sale Notice.

(iii) If the Offering Management Stockholder does not rescind the Management Stock Sale Notice as provided in the preceding clause (ii), the Management Stock Sale Notice shall remain outstanding and the Company may (x) defer the closing and pay the Put Purchase Price at the earliest practicable date on which no Delay Condition exists, in which case, the Put Purchase Price shall accrue interest at a rate per annum of [INTEREST RATE]% (the "Applicable Interest Rate") from the latest date that the closing could have taken place pursuant to subsection (b)(iii) above (the "Latest Closing Date") to the date the Put Purchase Price is actually paid or (y) pay the Put Purchase Price with a subordinated note (fully subordinated in right of payment and exercise of remedies to the lenders' rights under any Financing Document) bearing interest at the Applicable Interest Rate from the Latest Closing Date until paid in full. [Notwithstanding anything to the contrary herein, the closing shall occur no later than the [fifth] anniversary of the Latest Closing Date.]

(d) Cooperation. The Offering Management Stockholder shall take all actions as may be reasonably necessary to consummate the sale contemplated by this Section [2.01], including, without limitation, entering into agreements and delivering certificates and instruments and consents as may be deemed necessary or appropriate.

(e) Closing. At the closing of any sale and purchase pursuant to this Section [2.01], the Offering Management Stockholder shall deliver to the Company a certificate or certificates representing the Offered Management Stock to be sold (if any), accompanied by stock powers and all necessary stock transfer taxes paid and stamps affixed, if necessary, against receipt of the Put Purchase Price.
Sample Right of First Refusal

a) Right of First Refusal. [At any time/At any time prior to the consummation of [an Initial Public Offering/a Qualified Public Offering]], and subject to the terms and conditions specified in this Section [2.01], each Stockholder shall have a right of first refusal if any other Stockholder (the "Offering Stockholder") receives an offer from an Independent Third Party that the Offering Stockholder desires to accept to purchase all or any portion of the Equity Securities owned by the Offering Stockholder (the "Offered Shares"). Each time the Offering Stockholder receives an offer for any of its Equity Securities, the Offering Stockholder shall first make an offering of the Offered Shares to the other Stockholders in accordance with the following provisions of this Section [2.01] prior to Transferring such Offered Shares to the Independent Third Party (other than Transfers that are permitted by Section [PERMITTED-TRANSFERS SECTION] [or Transfers made pursuant to Section [DRAG-ALONG RIGHTS SECTION]]).

(b) Offer Notice.

(i) The Offering Stockholder shall, within [five] [Business Days/days] of receipt of the offer from the Independent Third Party, give written notice (the "Offering Stockholder Notice") to the Company and the other Stockholders stating that it has received a bona fide offer from an Independent Third Party and specifying: (w) the number of Offered Shares to be sold by the Offering Stockholder; (x) the name of the person or entity who has offered to purchase such Offered Shares; (y) the per share purchase price and the other material terms and conditions of the Transfer, including a description of any non-cash consideration in sufficient detail to permit the valuation thereof; and (z) the proposed date, time and location of the closing of the Transfer, which shall not be less than [60] [Business Days/days] from the date of the Offering Stockholder Notice.

(ii) The Offering Stockholder Notice shall constitute the Offering Stockholder's offer to Transfer the Offered Shares to the other Stockholders, which offer shall be irrevocable until the end of the ROFR Notice Period.

(iii) By delivering the Offering Stockholder Notice, the Offering Stockholder represents and warrants to the Company and each other Stockholder that: (x) the Offering Stockholder has full right, title and interest in and to the Offered Shares; (y) the Offering Stockholder has all the necessary power and authority and has taken all necessary action to sell such Offered Shares as contemplated by this Section [2.01]; and (z) the Offered Shares are free and clear of any and all Liens other than those arising as a result of or under the terms of this Agreement.

(c) Exercise of Right of First Refusal.

(i) Upon receipt of the Offering Stockholder Notice, each Stockholder shall have [10] [Business Days/days] (the "ROFR Notice Period") to elect to purchase all (but not less than all) of the Offered Shares by delivering a written notice (a "ROFR Offer Notice") to the Offering
Stockholder and the Company stating that it offers to purchase such Offered Shares on the terms specified in the Offering Stockholder Notice. Any ROFR Offer Notice shall be binding upon delivery and irrevocable by the applicable Stockholder. If more than one Stockholder delivers a ROFR Offer Notice, each such Stockholder (the "Purchasing Stockholder") shall be allocated its Pro Rata Portion of the Offered Shares, unless otherwise agreed by such Stockholders.

(ii) Each Stockholder that does not deliver a ROFR Offer Notice during the ROFR Notice Period shall be deemed to have waived all of such Stockholder's rights to purchase the Offered Shares under this Section [2.01], and the Offering Stockholder shall thereafter, subject to the rights of any Purchasing Stockholder, be free to sell the Offered Shares to the Independent Third Party specified in the Offer Notice without any further obligation to such Stockholder pursuant to this Section [2.01].

(iii) Each Stockholder who delivers a ROFR Offer Notice shall be deemed to have waived any rights that such Stockholder may have pursuant to Section [TAG-ALONG RIGHTS SECTION].

(d) Consummation of Sale. If no Stockholder delivers a ROFR Notice in accordance with Section [2.01](c), the Offering Stockholder may, during the [60] [Business Day/day] period immediately following the expiration of the ROFR Notice Period (which period may be extended for a reasonable time not to exceed [90] [Business Days/days] to the extent reasonably necessary to obtain any Government Approvals) (the "Waived ROFR Transfer Period"), and subject to the provisions of Section [TAG-ALONG RIGHTS SECTION] with respect to those Stockholders who have not delivered ROFR Offer Notices, Transfer all of the Offered Shares to the Independent Third Party on terms and conditions no more favorable to the Independent Third Party than those set forth in the Offering Stockholder Notice. If the Offering Stockholder does not Transfer the Offered Shares within such period or, if such Transfer is not consummated within the Waived ROFR Transfer Period, the rights provided hereunder shall be deemed to be revived and the Offered Shares shall not be Transferred to the Independent Third Party unless the Offering Stockholder sends a new Offering Stockholder Notice in accordance with, and otherwise complies with, this Section [2.01].
Sample Drag Along

(a) Participation. If [at any time/at any time prior to the consummation of [an Initial Public Offering/a Qualified Public Offering]], [a Member (together with its Affiliates)/two or more Members (together with their respective Affiliates)] who hold[s] more than [50]% of the Units of the Company (the "Selling Member"), receives a bona fide offer from an Independent Third Party to consummate, in one transaction or a series of related transactions, a Change of Control (a "Drag-along Sale"), the Selling Member shall have the right to require that each other Member (each, a "Drag-along Member") participates in such sale in the manner set forth in this Section [2.01]; provided, however, that no Drag-along Member shall be required to transfer or sell any of its Units if the consideration for the Drag-along Sale is other than cash [or registered securities listed on an established U.S. [or foreign] securities exchange or traded on the NASDAQ National Market [or foreign established over-the-counter trading system]]. [Notwithstanding anything to the contrary in this Agreement (including Section [VOTING RIGHTS SECTION]), each Drag-along Member shall vote in favor of the transaction and take all actions to waive any dissenters, appraisal or other similar rights.]

(b) Sale Notice. The Selling Member shall exercise its rights pursuant to this Section [2.01] by delivering a written notice (the "Drag-along Notice") to the Company and each Drag-along Member no more than [10] [Business Days][days] after the execution and delivery by all of the parties thereto of the definitive agreement entered into with respect to the Drag-along Sale and, in any event, no later than [20] [Business Days][days] prior to the closing date of such Drag-along Sale. The Drag-along Notice shall make reference to the Selling Member's rights and obligations hereunder and shall describe in reasonable detail:

(i) the name of the person or entity to whom such Units are proposed to be sold;

(ii) the proposed date, time and location of the closing of the sale;

(iii) the number of Units to be sold by the Selling Member, the per Unit purchase price and the other material terms and conditions of the Drag-along Sale, including a description of any non-cash consideration in sufficient detail to permit the valuation thereof; and

(iv) a copy of any form of agreement proposed to be executed in connection therewith.

(c) Units to be Sold. Subject to paragraph (d), each Drag-along Member shall sell in the Drag-along Sale the number of Units equal to the product obtained by multiplying (i) the number of Units held by such Drag-along Member by (ii) a fraction (x) the numerator of which is equal to the number of Units the Selling Member proposes to sell or transfer in the Drag-along Sale and (y) the denominator of which is equal to the number of Units held by the Selling Member at such
time. [Each Member holding equity interests other than Units shall convert such equity interest into Units immediately prior to such sale.]

(d) Conditions of Sale. The consideration to be received by a Drag-along Member shall be the same form and amount of consideration per Unit to be received by the Selling Member (or, if the Selling Member is given an option as to the form and amount of consideration to be received, the same option shall be given) and the terms and conditions of such sale shall, except as otherwise provided in the immediately succeeding sentence, be the same as those upon which the Dragging Member sells its Units. Each Drag-along Member shall make or provide the same representations, warranties, covenants, indemnities and agreements as the Selling Member makes or provides in connection with the Drag-along Sale (except that in the case of representations, warranties, covenants, indemnities and agreements pertaining specifically to the Selling Member, the Drag-along Member shall make the comparable representations, warranties, covenants, indemnities and agreements pertaining specifically to itself); provided, that all representations, warranties, covenants and indemnities shall be made by the Selling Member and each Drag-along Member severally and not jointly and any indemnification obligation shall be pro rata based on the consideration received by the Selling Member and each Drag-along Member, in each case in an amount not to exceed the aggregate proceeds received by the Selling Member and each such Drag-along Member in connection with the Drag-along Sale[; and provided, further, that a Drag-along Member shall not be required to agree to a non-competition covenant].

(e) Expenses. The fees and expenses of the Selling Member incurred in connection with a Drag-along Sale and for the benefit of all Members (it being understood that costs incurred by or on behalf of a Selling Member for its sole benefit will not be considered to be for the benefit of all Members), to the extent not paid or reimbursed by the Company or the Independent Third Party, shall be shared by all the Members on a pro rata basis, based on the consideration received by each Member; provided, that no Member shall be obligated to make any out-of-pocket expenditure prior to the consummation of the Drag-along Sale.

(f) Cooperation. Each Member shall take all actions as may be reasonably necessary to consummate the Drag-along Sale, including, without limitation, entering into agreements and delivering certificates and instruments, in each case, consistent with the agreements being entered into and the certificates being delivered by the Selling Member.
(g) Consummation of The Sale. The Selling Member shall have [90] [Business Days][days] following the date of the Drag-along Notice in which to consummate the Drag-along Sale, on the terms set forth in the Drag-along Notice (which such [90] [Business Day][day] period may be extended for a reasonable time not to exceed [120] [Business Days][days] to the extent reasonably necessary to obtain any regulatory approvals). If at the end of such period the Selling Member has not completed the Drag-along Sale, the Selling Member may not then effect a transaction subject to this Section [2.01] without again fully complying with the provisions of this Section [2.01].
Sample Tag Along

(a) Participation. If [at any time/at any time prior to the consummation of [an Initial Public Offering/a Qualified Public Offering]], a Stockholder who (together with its Affiliates) holds no less than [51]% of the outstanding Common Stock of the Company (the "Selling Stockholder") proposes to sell any shares of its Common Stock to an Independent Third Party (the "Proposed Transferee") and the Selling Stockholder cannot or has not elected to exercise its drag-along rights set forth in Section [DRAG-ALONG RIGHTS SECTION], each other Stockholder (each, a "Tag-along Stockholder") shall be permitted to participate in such sale (a "Tag-along Sale") on the terms and conditions set forth in this Section [2.01].

(b) Sale Notice. Prior to the consummation of the sale described in Section [2.01(a)], the Selling Stockholder shall deliver to the Company and each other Stockholder a written notice (a "Sale Notice") of the proposed sale subject to this Section [2.01] no more than [10] [Business Days/days] after the execution and delivery by all the parties thereto of the definitive agreement entered into with respect to the Tag-along Sale and, in any event, no later than [20] [Business Days/days] prior to the closing date of the Tag-along Sale. The Tag-along Notice shall make reference to the Tag-along Stockholders' rights hereunder and shall describe in reasonable detail:

(i) the number of shares of Common Stock to be sold by the Selling Stockholder;

(ii) the name of the Proposed Transferee;

(iii) the per share purchase price and the other material terms and conditions of the sale, including a description of any non-cash consideration in sufficient detail to permit the valuation thereof;

(iv) the proposed date, time and location of the closing of the sale; and

(v) a copy of any form of agreement proposed to be executed in connection therewith.

(c) Shares to be Sold.

(i) Each Tag-along Stockholder shall exercise its right to participate in a sale of Common Stock by the Selling Stockholder subject to this Section [2.01] by delivering to the Selling Stockholder a written notice (a "Tag-along Notice") stating its election to do so and specifying the number of shares of Common Stock to be sold by it no later than [five] [Business Days/days] after receipt of the Sale Notice (the "Tag-along Period"). The offer of each Tag-along Stockholder set forth in a Tag-along Notice shall be irrevocable, and, to the extent such offer is accepted, such Tag-along Stockholder shall be bound and obligated to sell in the proposed sale on the terms and conditions set forth in this Section [2.01]. Each Tag-along Stockholder shall have the right to sell in a sale subject to this Section [2.01] the number of shares of Common Stock equal to the product
obtained by multiplying (x) the number of shares of Common Stock held by the Tag-along Stockholder by (y) a fraction (A) the numerator of which is equal to the number of shares of Common Stock the Selling Stockholder proposes to sell or transfer to the Proposed Transferee and (B) denominator of which is equal to the number of shares of Common Stock then owned by such Selling Stockholder.

(ii) The Selling Stockholder shall use its [commercially] reasonable efforts to include in the proposed sale to the Proposed Transferee all of the shares of Common Stock that the Tag-along Stockholders have requested to have included pursuant to the applicable Tag-along Notices, it being understood that the Proposed Transferee shall not be required to purchase shares of Common Stock in excess of the number set forth in the Sale Notice. In the event the Proposed Transferee elects to purchase less than all of the shares of Common Stock sought to be sold by the Tag-along Stockholders, the number of shares to be sold to the Proposed Transferee by the Selling Stockholder and each Tag-along Stockholder shall be reduced so that each such Stockholder is entitled to sell its Pro Rata Portion of the number of shares of Common Stock the Proposed Transferee elects to purchase (which in no event may be less than the number of shares of Common Stock set forth in the Sale Notice).

(iii) Each Tag-along Stockholder who does not deliver a Tag-along Notice in compliance with clause (i) above shall be deemed to have waived all of such Tag-along Stockholder's rights to participate in such sale, and the Selling Stockholder shall (subject to the rights of any participating Tag-along Stockholder) thereafter be free to sell to the Proposed Transferee its shares of Common Stock at a per share price that is no greater than the per share price set forth in the Sale Notice and on other same terms and conditions which are not materially more favorable to the Selling Stockholder than those set forth in the Sale Notice, without any further obligation to the non-accepting Tag-along Stockholders.

(d) Consideration. Each Stockholder participating in a sale pursuant to this Section [2.01] shall receive the same consideration per share after deduction of such Stockholder's proportionate share of the related expenses in accordance with subsection (f) below.

(e) Conditions of Sale. Each Tag-along Stockholder shall make or provide the same representations, warranties, covenants, indemnities and agreements as the Selling Stockholder makes or provides in connection with the Tag-along Sale (except that in the case of representations, warranties, covenants, indemnities and agreements pertaining specifically to the Selling Stockholder, the Tag-along Stockholder shall make the comparable representations, warranties, covenants, indemnities and agreements pertaining specifically to itself); provided, that all representations, warranties, covenants and indemnities shall be made by the Selling Stockholder and each other Tag-along Stockholder severally and not jointly and any
indemnification obligation in respect of breaches of representations and warranties that do not relate to such Tag-along Stockholder shall be in an amount not to exceed the aggregate proceeds received by such Tag-along Stockholder in connection with any sale consummated pursuant to this Section [2.01].

(f) Expenses. The fees and expenses of the Selling Stockholder incurred in connection with a sale under this Section [2.01] and for the benefit of all Stockholders (it being understood that costs incurred by or on behalf of the Selling Stockholder for its sole benefit will not be considered to be for the benefit of all Stockholders), to the extent not paid or reimbursed by the Company or the Proposed Transferee, shall be shared by all the Stockholders on a pro rata basis, based on the consideration received by each Stockholder; provided, that no Stockholder shall be obligated to make any out-of-pocket expenditure prior to the consummation of the transaction consummated pursuant to this Section [2.01].

(g) Cooperation. Each Stockholder shall take all actions as may be reasonably necessary to consummate the Tag-along Sale, including, without limitation, entering into agreements and delivering certificates and instruments, in each case, consistent with the agreements being entered into and the certificates being delivered by the Selling Stockholder.

(h) Deadline for Completion of Sale. The Selling Stockholder shall have [90] [Business Days/days] following the expiration of the Tag-along Period in which to sell the shares of Common Stock described in the Sale Notice, on terms not more favorable to the Selling Stockholder than those set forth in the Sale Notice (which such [90] [Business Day/day] period may be extended for a reasonable time not to exceed [120] [Business Days/days] to the extent reasonably necessary to obtain any regulatory approvals). If at the end of such period the Selling Stockholder has not completed such sale, the Selling Stockholder may not then effect a sale of Common Stock subject to this Section [2.01] without again fully complying with the provisions of this Section [2.01].

(i) Sales in Violation of the Tag-along Right. If the Selling Stockholder sells or otherwise transfers to the Proposed Transferee any of its shares of Common Stock in breach of this Section [2.01], then each Tag-along Stockholder shall have the right to sell to the Selling Stockholder, and the Selling Stockholder undertakes to purchase from each Tag-along Stockholder, the number of shares of Common Stock that such Tag-along Stockholder would have had the right to sell to the Proposed Transferee pursuant to this Section [2.01], for a per share amount and form
of consideration and upon the term and conditions on which the Proposed Transferee bought such Common Stock from the Selling Stockholder, but without indemnity being granted by any Tag-along Stockholder to the Selling Stockholder; provided, that nothing contained in this Section [2.01] shall preclude any Stockholder from seeking alternative remedies against such Selling Stockholder as a result of its breach of this Section [2.01]. The Selling Stockholder shall also reimburse each Tag-along Stockholder for any and all reasonable and documented out-of-pocket fees and expenses, including reasonable legal fees and expenses, incurred pursuant to the exercise or the attempted exercise of the Tag-along Stockholder's rights under this subsection (i).

(j) Excepted Sales. This Section [2.01] shall not apply to:

(i) sales to any employee of the Company; or

(ii) sales in a distribution to the public (whether pursuant to a registered public offering, Rule 144 or otherwise).
DEADLOCK RESOLUTION PROCEDURES

Section 2.01 Deadlock.

(a) If at [two] successive meetings of the Board, the Directors are unable to reach a decision by the required vote regarding a Fundamental Issue submitted for consideration by the Board at such meetings (a "Deadlock"), the Board shall refer the matter subject to the Deadlock to the Members, who shall attempt to resolve such matter within [20] [Business Days/days] after referral to them of the Deadlocked issue (or, if mutually agreed by the Members, a longer period of time). Any resolution agreed to by the Members shall be final and binding on the Company and the Members.

(b) During the continuation of any Deadlock, the Company shall continue to operate in a manner consistent with its prior practices and this Agreement until such time as such Deadlock is resolved. If the Deadlock is with respect to the approval of the Company's annual business plan or budget, the Company shall operate its business in accordance with the business plan or budget then in effect[; provided, that all monetary line items set forth therein shall be increased by [5%]].

Section 2.02 Mediation. If the Members are unable reach agreement as to the Fundamental Issue within the time period set forth in Section [2.01] (including any agreed extensions), the Deadlock shall be mediated (the "Mediation") within 15 [Business Days/days] from the date a written request for mediation is made by any Member. The Mediation shall take place in [LOCATION] and shall be in [English]. The Mediation shall be conducted before a single mediator to be agreed upon by the Members. If the Members cannot agree on the mediator, each Member shall select a mediator and such mediators shall together unanimously select a neutral mediator who will conduct the mediation. Each Member shall bear the fees and expenses of its mediator and all the Members shall equally bear the fees and expenses of the final mediator. The decision of the mediator shall be final and binding on the Members.