

Illustrative Form of Single-Member Operating Agreement

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OPERATING AGREEMENT

OF

SINGLE-MEMBER NEWCO, LLC

A COLORADO LIMITED LIABILITY COMPANY

_____, 2013

**OPERATING AGREEMENT
OF
SINGLE-MEMBER NEWCO, LLC**

THIS OPERATING AGREEMENT of Single-Member Newco, LLC, a Colorado limited liability company (the “Company”), is made as of _____, 2013 by and between the Company and _____ (the “Member”).

**ARTICLE I.
FORMATION**

On _____, 2013, _____ caused the organization of the Company by filing the Articles of Organization with the Colorado Secretary of State.

**ARTICLE II.
PURPOSES AND POWERS**

2.1 Purposes. The purposes of the Company are to hold, manage, lease, and operate equipment and machinery and to undertake activities related thereto, and to pursue any other lawful purpose for which a limited liability company may be organized under Colorado law.

2.2 Powers. The Company shall have all of the powers of a limited liability company set forth in the Colorado Limited Liability Company Act, as amended (the “Colorado Act”).

2.3 Duration. The Company shall continue until it is dissolved, liquidated and terminated pursuant to Article IX.

**ARTICLE III.
OFFICES**

3.1 Principal Office. The principal office of the Company shall initially be at _____, Denver, Colorado _____, but the Manager, in his discretion, may cause the Company to keep and maintain offices wherever the business of the Company may require.

3.2 Registered Agent and Office. The Company shall continuously maintain in the State of Colorado a registered office and a registered agent whose business office is identical with the registered office. The initial registered office is at _____, Denver, Colorado _____ and the initial registered agent at that address is _____, both as specified in the Articles of Organization.¹ The Company may change its registered office, its registered agent, or both, upon filing a statement with the Colorado Secretary of State.

¹ Why bother making this statement? It is in the articles of organization.

ARTICLE IV. MEMBER

4.1 Sole Member. _____, is the only Member of the Company.

4.2 Capital Contributions. The Member has contributed to the Company the assets as reflected on the books of the Company and has obtained the Membership Interest described on Exhibit “A” hereto. The Member may contribute additional cash or other assets to the Company as the Member and the Company may agree. No person shall have the right to enforce any obligation of the Member to contribute capital to the Company.²

4.3 Limited Liability of Member. The Member’s liability shall be limited to the maximum extent possible as set forth in this Operating Agreement, the Colorado Act and other applicable law.³ A Member or Assignee shall not be personally liable for any debts or losses of the Company beyond his, her or its respective Capital Contributions (defined in Section 5.3 below).⁴ Any Member may, however, voluntarily agree to be liable on a debt or obligation of the Company by entering into a separate written agreement or other undertaking with an obligee or creditor of the Company; *provided, however*, no Member may commit another Member to be liable on a debt or obligation of the Company unless authorized to do so in writing by such other Member.

4.4 Meetings of Member. Meetings of the Member may be held at such place, either within or without the State of Colorado, as may be determined by the Manager or the Member. There need not be annual or other meetings.

4.5 Action of Member without a Meeting. Action required or permitted to be taken at a Member meeting may be taken without a meeting if the action is evidenced by a written consent describing the action taken, signed by the Member. Action so taken shall be effective as of the date of the signature of the Member thereon unless the consent specifies a different effective date in which case the action shall be effective as of the different effective date.

² This is an effort to avoid any third-party beneficiary obligations.

³ This provision should be considered carefully, as it may actually expand the liability of Members. The goal would be to contract liability, as in the following sentence. The operating agreement and law will speak for themselves. Why risk incorporating them to possibly dilute the effect of the following sentence?

⁴ Note, however, the Colorado Act provides for piercing the veil of an LLC as for a corporation (CRS § 7-80-107). There may be other grounds for holding a member or manager of a single member LLC liable for the debts of the LLC. See Lidstone, “Piercing the Veil of an LLC or a Corporation,” 39 *The Colorado Lawyer*, no 8 at 71 (August 2010), updated and available at Lidstone, *Piercing the Corporate and LLC Veil* <http://ssrn.com/abstract=2207735>.

4.6 Transferability of Interest.⁵ The Member's interest in the Company is transferable either voluntarily or by operation of law, provided such transfer is accomplished in accordance with federal and applicable state securities laws. The Member may dispose of all or a portion of the Member's interest by will, the laws of descent and distribution, by a writing that the Member states is incorporated into this Agreement, or as set forth in Section 10.2, below.

(a) Notwithstanding any provision of the Colorado Act to the contrary, upon any disposition of all (but not less than all) of the Member's interest, the transferee shall be admitted as a Member upon completion of the transfer without further action.⁶ By accepting such transfer, the transferee shall be deemed to have accepted the provisions of this Agreement.⁷ Upon the transfer of the Member's entire interest (other than a transfer by way of pledge or security interest) the Member shall cease to be a Member and shall have no further rights or obligations under this Agreement.⁸

(b) Upon the transfer of less than all of the Member's interest, the transferee may be admitted as a new Member only with the approval of the Manager. A new Member shall be required to consent in writing to the provisions of this Agreement, as modified to reflect the admission of the new Member.

⁵ One can question whether this transferability restriction goes far enough to protect the single member LLC against the liabilities of the single member. Asset protection from creditors is difficult to achieve in a single member Colorado LLC. While other states (such as Kansas, Nevada, and Wyoming) provide greater protection to single member LLCs, one can question whether courts of another state will be bound to recognize that protection. *See* Lidstone, *Single Member LLCs and Asset Protection*, 41 The Colo. L., No. 3 at 39 (Mar. 2012). Consider including spendthrift or other provisions in the operating agreement, or have a "springing member" where a charging order is issued or the single member incurs a liability beyond his/her ability to pay.

⁶ A transfer by the sole Member may be voluntary or involuntary. An "involuntary" transfer can occur in a number of ways, including death and inheritance, bankruptcy, or by foreclosure. The Colorado Act contemplates a charging order and the right of a creditor to foreclose against that charging order. CRS § 7-80-703.

⁷ Since the operating agreement is an "agreement of all of the members" (CRS § 7-80-102(11)), the new Member can amend the Operating Agreement. It is questionable whether spendthrift provisions included in the Operating Agreement (*e.g.*, "this Operating Agreement may not be amended to deprive John Doe of his economic interests herein") may prevent the new member from doing so.

⁸ This provision may, or may not, be advisable, depending on a number of circumstances. This provides for immediate succession in the event of death of the Member; on the other hand, this also provides in a transfer to a bankruptcy estate for the Member to lose control over the Company and its assets.

(c) A charging order entered against the Member's interest in the Company does not constitute a transfer. No holder of a charging order may foreclose on or otherwise acquire the Member's interest so charged.⁹

ARTICLE V. TAX MATTERS

Pursuant to the regulations under § 7701 of the Internal Revenue Code of 1986, as amended, but only for the purposes of U.S. federal income and all applicable state and local income tax purposes, the Company shall be disregarded as an entity separate from the Member, such that the income, gain, loss or deduction of the Company shall be taxable to the Member.

ARTICLE VI. DISTRIBUTIONS

A Manager may, from time to time, cause the Company to make distributions to the Member in amounts that the Manager determines are not needed and are not reasonably expected to be needed for normal operating expenses of the Company, for payment of Company obligations, or for establishing reasonable reserves for such expenses and obligations.

ARTICLE VII. MANAGEMENT

7.1 Management by Manager. The management of the business and affairs of the Company shall be vested in one or more Managers.¹⁰ The initial Manager of the Company is _____. Any action required or permitted to be taken by the Managers may be taken by a single Manager, and all references herein to "the Manager" shall refer to any Manager. The Manager does not have to be a Member. If the Member has not appointed a Manager, the Member will be the Manager.

7.2 Duties. A Manager shall carry out his or her duties in good faith,¹¹ in a manner he or she believes to be in the best interests of the Company, and with such care

⁹ This asset protection provision, while enshrined in some state laws (such as Delaware, Nevada, and Wyoming), may not be enforceable.

¹⁰ This permits the ownership and management of the single member LLC to be separated. For the LLC to be a manager-managed LLC, the appropriate election must be made in the articles of organization.

¹¹ For the reasons set forth in the next footnote, should this be better written: "A Manager shall carryout his or her duties in accordance with the contractual obligation of good faith and fair dealing."

as an ordinary prudent person in a like position would use under similar circumstances.¹² A Manager who so performs his or her duties shall not have any liability by reason of being or having been a Manager.

7.3 Term. A Manager shall hold office until he or she resigns, dies, becomes bankrupt or incompetent, or is removed by the Member. Any vacancies occurring in the office of Manager and any position to be filled by an increase in the number of Managers shall be filled by a majority of the Managers then in office or by the Member. A Manager may be removed at any time, with or without cause, by the Member.

7.4 Transactions Between Company and Manager. The Manager may cause the Company to contract and deal with a Manager, or any person or entity affiliated with a Manager, provided such contracts and dealings are on terms comparable to and competitive with those available to the Company from arm's length parties or are approved by the Member in writing.¹³

7.5 Management Fees and Reimbursements. The Manager shall not be entitled to any fee or salary for managing the operations of the Company unless approved by the Member. The Manager shall be reimbursed by the Company for any reasonable out-of-pocket expenses incurred on behalf of the Company.

7.6 Exculpation and Indemnification. Any act or failure to act, if done in good faith to promote the best interests of the Company, shall not subject the Manager to any liability.¹⁴ The Company shall indemnify the Manager for all costs, losses, liabilities and damages paid by the Manager in connection with the Company's business, to the fullest extent provided or allowed by Colorado law, but only out of and to the extent of the assets of the Company. In no event shall the Company or the Member be liable to a third party as a result of any indemnification.

7.7 Elimination of Fiduciary Duties. The Manager shall have no fiduciary duties to the Company or to the Member other than the contractual obligation of good

¹² This duty of Managers to act as an ordinarily prudent person in the best interests of the Company is derived from the business judgment rule concept for directors under the Colorado Business Corporation Act (§7-108-401(1)). Where the Manager is different from the Member, imposing these enhanced duties on a Manager of a single member LLC may be appropriate. This would be an enhancement of the duties owed by the manager which, under the Colorado Act, would be defined by the contractual duty of good faith and fair dealing (CRS § 7-80-108) and the other duties outlined in §§ 7-80-108, 7-80-404 and 7-80-405. This duty may be inconsistent with the "elimination of fiduciary duties" set forth in Section 7.7, below, and should be coordinated with Section 7.6.

¹³ Query whether all transactions between the Manager and the Company should be approved by the Member?

¹⁴ Is this sentence advisable? Is it potentially inconsistent with the clearer "no liability" language in the last sentence in Section 7.2?

faith and fair dealing.¹⁵ The Manager may compete with the business of the Company,¹⁶ is not required to refrain from dealing with the Company in the conduct or winding up of the Company's business as or on behalf of a party having an interest adverse to the Company,¹⁷ and is not obligated to account to the Company and hold as trustee any property, profit, or benefit derived by the Manager in the conduct or winding up of the Company's business or derived from the use by the Manager of property of the Company, including (without limitation) an appropriation of an opportunity of the Company.¹⁸

7.8 Officers. The Manager, or if none, the Member, may appoint such officers as are appropriate or necessary. Officers so appointed shall have the authority delegated to them by the person appointing such person as an officer.¹⁹

ARTICLE VIII. ADMINISTRATION

8.1 Books and Records. The Manager shall keep or cause to be kept (a) true and complete information regarding the status of the business and financial condition of the Company; (b) a copy of this Agreement and the Articles of Organization and all amendments thereto; (c) copies of the Company's tax returns and reports, if any; and (d)

¹⁵ §7-80-108(1.5) provides that the fiduciary duties of a Manager (or member in a member-managed LLC) can be "restricted or eliminated by provisions in the operating agreement as long as any such provision is not manifestly unreasonable," but no provision can eliminate "the obligation of good faith and fair dealing under Section 7-80-404(3); except that the operating agreement may prescribe the standards by which the performance of the obligation is to be measured, if such standards are no unreasonable." §7-80-108(2)(d). Section 7-80-404(3) provides that "each Member and each manager shall discharge the member's or manager's duties to the limited liability company and exercise any rights consistently with the contractual duty of good faith and fair dealing." Arguably this is unnecessary in a single-member LLC, but may have some value where the Manager owing duties to the single Member is a different person. This elimination of fiduciary duties needs to be consistent with the language of Section 7.5 which (as written) is inconsistent with this Section.

¹⁶ This provision may not be appropriate in all contexts. The statute provides that, unless the operating agreement provides otherwise, managers and (in a manager-managed LLC) and members (in a member-managed LLC) must "refrain from competing with the limited liability company in the conduct of the limited liability company business before the dissolution of the limited liability company." §7-80-404(1)(c).

¹⁷ See §7-80-404(1)(b). This is probably not appropriate in most situations.

¹⁸ See §7-80-404(1)(a). This also is probably not appropriate in most situations and is unnecessary in the single-member LLC context except where the Manager and Member are different people.

¹⁹ This is potentially a useful provision, especially in a single-Member LLC context where the Member does not expect to be involved in management. Managers (in a manager-managed LLC) and Members (in a Member-managed LLC) are by statute agents of the LLC. §7-80-405. Where officers are appointed in a Manager-managed LLC, the agency relationship can be established by the appointing resolution, and is not absolute. If there is no Manager in a Manager-managed LLC, there is no person with the full agency granted by the statute.

any other information regarding the affairs of the Company as may be determined to be necessary by the Manager.

8.2 Financial Statements. The Manager shall prepare or cause to be prepared financial statements as may be necessary for the purposes of the Company or the Member.

8.3 Bank Accounts. The Manager shall arrange for the Company to maintain bank accounts in such banks or institutions as the Manager from time to time shall select, and such accounts shall be drawn upon by checks signed by such person or persons, and in such manner, as may be designated by the Manager, subject to any restrictions or conditions established by the Manager or the Member. All monies of the Company shall be deposited in the bank account or accounts of the Company, and shall not be commingled with monies of the Member.

8.4 Fiscal Year. The fiscal year of the Company shall be the calendar year.²⁰

ARTICLE IX. DISSOLUTION, LIQUIDATION AND TERMINATION

9.1 Events of Dissolution. The Company shall be dissolved and its affairs wound up pursuant to this Agreement upon the first to occur of the following events (“Events of Dissolution”):

- a. the written consent of the Member to dissolution;
- b. the sale or other disposition of substantially all of the assets of the Company (excluding a mortgage, pledge or encumbrance of such assets);
- c. the entry of a decree of judicial dissolution under the Colorado Act; or
- d. there being no Members unless, within 91 days after the termination of the membership of the last Member, the Assignees holding at least a Majority Interest in the Company have admitted at least one person as a Member.²¹

²⁰ If the single member is an entity with a different fiscal year, this should be changed appropriately unless the single member LLC elects to be taxed as an association taxable as a corporation.

²¹ The statute requires unanimity of the interest holders, but this can be reduced by the operating agreement. If the interest holders do not admit a Member, the statute provides that the Company will dissolve on “the ninety-first day after the limited liability company ceases to have members unless, prior to that date, a person has been admitted as a member.” §7-80-801(1)(c)(I). Section 7-80-108(d.5) provides that the operating agreement may extend this 91 day period to “not later than the first anniversary of the date of the termination of the membership of the last remaining member.”

No other event shall constitute an Event of Dissolution.

9.2 Liquidation. Upon the occurrence of an Event of Dissolution, the Company's affairs shall be wound up by the Manager, or by such other person or persons required by law to wind up the Company's affairs.

9.2.1 The assets and properties of the Company shall be disposed of, and receivables collected, all in an orderly and businesslike manner.

9.2.2 The assets of the Company, including the proceeds of liquidation, shall be applied and distributed in the following order of priority:

a. to creditors, including the Member if a creditor, in satisfaction of liabilities of the Company (whether by payment or the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to the Member pursuant to this Agreement; and

b. to the Member.

9.3 Provisions for Contingencies. The Company shall make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured claims and obligations, known to the Company and all claims and obligations which are known to the Company but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available. Any liquidating trustee (including the Manager acting as liquidating trustee) winding up the Company's affairs who has complied with this Agreement shall not be personally liable to the claimants of the dissolved Company by reason of such person's actions in winding up the Company.

9.4 Termination. Upon completion of the winding up of the Company, the Manager or such other person or persons required by law to wind up the Company's affairs shall file articles of dissolution with the Colorado Secretary of State and take such other actions as may be necessary to terminate the Company.

ARTICLE X.
DEATH, INCOMPETENCY, OR BANKRUPTCY²² OF THE MEMBER

10.1 No Dissolution. Neither the death, incompetency, or bankruptcy of the Member will cause the dissolution of the Company. If the Company has no Members because of the death, incompetency, bankruptcy, or withdrawal of the sole Member, the legal representative or successor of the Member may exercise all of the powers of an assignee or transferee of a Member,²³ and if there are no Members, may (by vote of a Majority of the outstanding interests) admit one or more Assignees as Members.²⁴

10.2 Death. The Member may dispose of his/her interest in the Company by will or the laws of descent and distribution. The Member's estate shall be immediately substituted as the sole Member of the Company upon the Member's death. The personal representative named by will or appointed by court will have all authority to act on behalf of the Member's estate.

10.3 Member Designation. A Member may transfer his or her Membership Interest by will, by laws of descent and distribution, and *inter vivos*, in each case to the Member's descendants at law (whether naturally-born, adopted or step-children). A Member may designate, in writing, one or more descendants-at-law to receive such Member's interest in the Company upon such Member's death. The written designation shall be fully revocable by the Member and may be changed by subsequent writings from time-to-time, in the sole discretion of the Member. Any person so designated shall be subject to all the terms of this Agreement and shall receive the Member's interest in the Company subject to any purchase option, any buy-sell agreement, or any other agreement potentially affecting such interest. Such person shall be admitted as a

²² A bankruptcy of the single member would transfer the bankrupt's assets to the bankruptcy trustee. This would include the single member LLC interest. While other states (such as Kansas, Nevada, and Wyoming) provide greater protection to single member LLCs, one can question whether courts of another state or a federal bankruptcy court will be bound to recognize that protection. *See* Lidstone, *Single Member LLCs and Asset Protection*, 41 The Colo. L., No. 3 at 39 (Mar. 2012). Consider including spendthrift or other provisions in the operating agreement, or have a "springing member" where a charging order is issued or the single member incurs a liability beyond his/her ability to pay.

²³ See § 7-80-704(2).

²⁴ See § 7-80-701(2). The statute requires unanimity of the interest holders, but this can be reduced by the operating agreement. If the interest holders do not admit a Member, the statute provides that the Company will dissolve on "the ninety-first day after the limited liability company ceases to have members unless, prior to that date, a person has been admitted as a member." § 7-80-801(1)(c)(I). Section 7-80-108(2)(d.5) provides that the operating agreement may extend this 91 day period to "not later than the first anniversary of the date of the termination of the membership of the last remaining member."

Member automatically upon the person accepting this Agreement in writing, without any further action of the Manager.²⁵

10.4 Incompetency. If the Member is adjudged incompetent by any court with jurisdiction over the matter, which judgment is not being appealed, the Member shall retain his/her interest in the Company, but the court-appointed guardian, custodian, or trustee will have all authority to act on behalf of the Member.

10.5 Bankruptcy. If the Member files a petition under the United States Bankruptcy Code, if creditors file a petition against such Member which the Member chooses not to contest in accordance with the Bankruptcy Code (or if contested, the court finds for the creditors), or if a receiver is appointed for the Member's assets, the Member shall retain his/her interest in the Company, but the trustee or receiver appointed by the court will have all authority to act on behalf of the Member.²⁶

ARTICLE XI. AGREEMENT WITH CREDITOR²⁷

11.1 [Insert Bankruptcy Remote—Single Purpose entity provisions]

11.2 [Insert provisions for any control agreement with creditor]²⁸

²⁵ This is a method by which the Member's interest may avoid probate. Whereas it probably is suitable for a single member LLC, it may not be suitable in all cases for a multi-member LLC. This needs to be confirmed through competent estate planning counsel.

²⁶ This provision may not be in the best interests of the owner of a single-member LLC, although it now reflects the current law. Following *In re Ashley Albright* case (291 B.R. 538 (D. Colo. 2003)), Colorado amended the Colorado Act to provide that where the LLC has no members, the non-member assignees may, by the unanimous consent of the assignees, "be admitted as a member." §7-80-701(2) This would include a bankruptcy trustee, a creditor foreclosing on the single member membership interest, or an heir upon death of the single member. See C.R.S. § 7-80-703 which states that a judgment creditor "has only the rights of an assignee or transferee of the membership interest" and contemplates the possibility of foreclosure. The LLC acts of Kansas, Nevada, and Wyoming, have asset protection provisions which (by their terms) limit the rights of creditors to a charging order, expressly disclaiming the right of the creditor to foreclose on a member's interest in even a single member LLC. See Lidstone, "Single Member LLCs and Asset Protection" (*to be published*).

²⁷ An operating agreement may include other parties, such as a creditor, and it may include provisions to protect that other party's rights. Sometimes these are referred to as "bankruptcy remote" vehicles, but whether they truly are bankruptcy remote depends on a number of factors. See *In re General Growth Properties, Inc.*, 409 B.R. 43, No 09-11977 (ALG) (Bankr. S.D.N.Y. 2009) for a case where creditors thought they had bankruptcy protections, but found that the protections were not nearly what was expected.

²⁸ A control agreement is necessary for a creditor to perfect a security interest in the single member's LLC membership interest. C.R.S. § 4-8-106(c). For more information about control agreements, see *Initial Report of the Joint Task Force on Deposit Account Control Agreements* by the Joint Task Force on Deposit Account Control Agreements, ABA Section of Business Law, reprinted in

**ARTICLE XII.
MISCELLANEOUS**

12.1 Notices. Any notice which may be given in connection with the business of the Company or which is provided for in this Agreement shall be given in writing and may be delivered personally or by facsimile transmission or mail.

12.2 Amendment and Waiver. No change, modification, waiver or amendment to this Agreement shall be valid unless the same is in writing and signed by the Member and the Company.

12.3 Admission of Additional Member. If not amended prior thereto by the sole Member, this Agreement shall be automatically amended upon the admission of an additional Member or holder of an economic interest in the Company to conform Article V (Tax Matters) to be consistent with the requirements of subchapter K of the Internal Revenue Code of 1986, as amended.²⁹

12.4 Governing Law. This Agreement shall be governed by the laws of the State of Colorado.

The parties hereto have executed this Operating Agreement as of the date first set forth above.

COMPANY:

Single-Member Newco, LLC, a Colorado limited liability company

By: _____
Its Sole Member

By: _____
Its Manager

CREDITOR SIGNATURE (if necessary)

61 *The Business Lawyer* (ABA) No. 2 at 745 (Feb. 2006); Michael VanNiel and James W. May, "Limited Liability Company Membership Interests: What a Lender Needs to do with LLC Collateral on Default," 2009 *Business Law Today* (ABA) (March-April 2009) at 47; Lynn A. Soukup, "It's a Matter of Collateral: LLCs, partnerships and the UCC," 2005 *Business Law Today* (ABA) (March-April 2005) at 53.

²⁹ This may or may not reflect the parties' business agreement. The best practice is to amend the operating agreement at the time of admission of a new member.

EXHIBIT A
Capital Contributions
As of _____, 200X

This Exhibit shall be amended from time-to-time to reflect the issuance, transfer, or repurchase of Units. Capital contributions will be reflected on the books of the Company.

Member's Name & Address And Social Security Number	Membership Interest (# Units)	Percentage Interest
Member		
	100	100%
Economic Interest Holder who is not a Member		
None		

Signatures: