

# LIMITED LIABILITY COMPANY AGREEMENT

OF

[\_\_\_\_\_,] LLC

This LIMITED LIABILITY COMPANY AGREEMENT (this “Agreement”) of [\_\_\_\_\_,] LLC (the “Company”) is made and entered into effective as of this \_\_\_ day of [\_\_\_\_], 20[\_\_\_], by and between [Founder Name(s)] (“Founder[s]”).

WHEREAS, the Company was formed by the filing of the certificate of formation of the Company (the “Certificate”) with the office of the Secretary of State of the State of Delaware on [\_\_\_\_\_] [\_\_\_], 20[\_\_\_];

WHEREAS, the Members, as defined below, desire to enter into a written agreement pursuant to the Act governing the affairs of the Company and the organization and conduct of its business.

NOW, THEREFORE, in consideration of the agreements and obligations set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Members hereby agree as follows:

## 1. DEFINED TERMS

“Act” means the Delaware Limited Liability Company Act, 6 Del. C. §18-101, et seq., as amended from time to time.

“Capital Contribution” means the amount of any cash or the Fair Market Value of any property contributed to the capital of the Company by a Member.

“Code” means the Internal Revenue Code of 1986, as amended.

“Dissolution Event” means (i) a material breach by Founder[s] of the Company Formation Agreement if such material breach is not cured within 15 days of the receipt of written notice of such material breach, (ii) a material violation by Founder[s] of any law or regulation governing the conduct of a recipient of, or applicant for, an SBIR Grant.

“Fair Market Value” means the fair market value of the Units or other property as determined by the MRC in good faith in its sole discretion; *provided, however*, that for purposes of the transfer by a Member of such Member’s Units, Fair Market Value means the fair market value of such Units as agreed to by the MRC and the transferring Member, or if such agreement is not reached, then Fair Market Value means the fair market value of such Units as determined by an independent financial analyst selected by the MRC.

“Investor” means a Person other than Founder[s] that in exchange for a cash investment in the Company, receives Units.

“Member” means any Person who at the time is a member and Unit holder of the Company. (See Annex A for a table of the initial Unit holders.)

“Member Representative” shall have meaning ascribed to such term in Section 4.1 of this Agreement.

“Member Representative Committee or MRC” shall have meaning ascribed to such term in Section 4.1 of this Agreement.

“Percentage Interest” means the percentage computed from the fraction where the numerator is the number of Units then held by a Member and the denominator is the aggregate number of Units then held by all Members.

“Person” means a natural person, corporation, general or limited partnership, limited liability company, joint venture, trust, estate, association, or other legal entity or organization.

“Profits” and “Losses” means, for each taxable year or other period, an amount equal to the Company’s taxable income or loss for that year or period, determined in accordance with Code Section 703(a), with the following adjustments: (1) any income of the Company that is exempt from Federal income tax and not otherwise taken into account in computing Profits and Losses pursuant to the foregoing shall be added to such taxable income or loss; (2) any expenditures of the Company described, or treated as described, in Code Section 705(a)(2)(B) and not otherwise taken into account in computing Profits and Losses pursuant to the foregoing shall be subtracted from such taxable income or loss; and (3) any gain or loss from the disposition of an asset shall be taken into account after adjusting the value of an asset as required under the Code and Treasury Regulations. Notwithstanding the above, any items that are specially allocated to certain Members shall not be taken into account in computing Profits and Losses.

“Unit” means units of ownership interest in the Company held by a Member.

## **2. ORGANIZATION**

2.1 Organization. The Members have authorized the organization of the Company as a limited liability company under and pursuant to the provisions of the Act and agree that the rights, duties, and liabilities of the Members shall be as provided in the Act, except as otherwise provided in this Agreement. To the extent the default provisions of the Act and this Agreement are inconsistent with respect to any matter, this Agreement shall, to the extent permitted by the Act, control.

2.2 Term. The term of the Company commenced on the date the Certificate was filed in the office of the Secretary of State of the State of Delaware and shall continue until the Company is dissolved and wound up in accordance with the provisions of Article 5 of this Agreement and the Certificate is cancelled in accordance with the Act.

2.3 Registered Agent and Office. The Company's registered agent and office in Delaware shall be \_\_\_\_\_ At any time, the MRC may designate another registered agent and/or registered office.

2.4 Principal Place of Business. The principal place of business of the Company shall be at [REDACTED], or at such other location as determined by the MRC. At any time, the MRC may change the location of the Company's principal place of business.

2.4 Qualifications in Other Jurisdictions. Any Officer, in his or her capacity as such, is authorized to file any certificates (and any amendments and/or restatements thereof) necessary for the Company to qualify to do business in a jurisdiction in which the Company may wish to conduct business.

2.4 Title to Company Property. All real and personal property shall be acquired in the name of the Company and title to any property so acquired shall vest in the Company itself rather than in the Members.

2.6 Purpose. The Company is formed for the object and purpose of engaging in any lawful act or activity for which limited liability companies may be formed under the Act.

### **3. MEMBERS AND MEMBERSHIP INTERESTS**

3.1 Lack of Authority. No Member, in his, her, or its capacity as such, shall have the authority or power to act for or on behalf of the Company, to do any act that would be binding on the Company, or to incur any expenditures on behalf of the Company.

3.2 Reimbursements. The Company shall reimburse any Member for all reasonable, ordinary, and necessary out-of-pocket expenses incurred by such Member on behalf of the Company, provided that any such expense is approved in writing by the MRC. Such expenses may include expenses for Company travel, fees for consulting services provided to the Company, Company's accounting fees, fees for legal services provided to the Company.

3.3 Voting Rights of Members. Each Unit shall entitle the holder to one vote on all matters submitted to a vote of the Members. Unless otherwise provided in this Agreement, any action permitted or required to be taken by the Act or this Agreement to be taken at a meeting of the Members may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed by the Member and/or Members holding more than 50% (fifty percent) of the Percentage Interest of the Company.

3.4 Certification of Units. The Company may, in its sole discretion, issue certificates to the Members representing the Units held by the Members.

3.5 Distributions. Distributions shall be made to the Members (in cash or in kind) at the times and in the amounts determined by the MRC and as permitted by applicable law.

3.6 Transferability of Units. No Member may, at any time, sell, convey, assign, transfer, pledge, hypothecate or otherwise encumber or dispose of all or any portion of, or right in or to, its Units without the prior written consent of all of the other Members.

3.7 Admission of Additional Members. Additional members of the Company may be admitted to the Company if approved by the Members pursuant to Section 4.3. In the event that any additional members are added, this Agreement shall be construed to apply to the additional members, and the additional members shall be required to either: (i) enter into, ratify and approve this Agreement; or (ii) execute a new operating agreement after the Members have terminated this Agreement.

3.8 Liability of Member. No Member shall have any liability for any debt, obligation or liability of the Company or for the acts or omissions of any other Member, Member Representative, Officer, agent or employee of the Company except to the extent expressly required by the Act. The failure of a Member to observe any formalities or requirements relating to the exercise of the powers of the Members or the management of the business and affairs of the Company under this Agreement or the Act shall not, by itself, be grounds for imposing personal liability on such Member for the liabilities of the Company.

#### 4. MANAGEMENT

4.1 Member's Representatives Committee. The business and affairs of the Company shall be managed by and under the direction of a Member's representative committee of the Company (the "MRC") consisting of natural persons designated as "Member Representatives" of the Company as provided below. The MRC shall have, to the fullest extent permitted by the Act, full and complete authority, power and discretion to direct, manage and control the business, affairs and properties of the Company, to make all decisions regarding such matters and to perform any and all acts and to engage in any and all activities necessary, customary or incident to the management of the business, affairs and properties of the Company. The MRC shall have authority to execute, or to have executed, on behalf of the Company, all contracts, deeds, mortgages, bonds, leases and all other documents, agreements, and instruments. Except as specifically provided in this Agreement, the Members, as such, shall not take part in, or interfere in any manner with, the management, conduct or control of the business and affairs of the Company. Only those Member Representatives who are specifically authorized from time to time by the affirmative vote by, or written consent of, a majority of the unit holders shall have the right and authority to act for or bind the Company.

4.2 Number and Voting of Member Representatives. The number of Member Representatives initially shall be two (2), [\_\_\_\_\_] and [\_\_\_\_\_]. Thereafter, the number of Member Representatives shall be determined in accordance with Section 4.3 following.

#### 4.3 Company Actions.

(a) Except as otherwise required by the Act or as set forth herein, all actions taken, or matters approved, by the MRC must be approved by a vote or written consent of a majority of the MRC, and all such actions shall be conclusive and binding as the authorized action or approval of the Unit holders.

(b) The Company will not, without the written consent of the Unit holders of at least 67% of the Units, either directly or by amendment, merger, consolidation, or otherwise perform any of the following actions or matters:

- (i) engage in a merger or consolidation with or into any corporation, partnership, limited liability company or any other entity, whether or not the Company shall be the surviving entity of such merger or consolidation;
- (ii) sell all or substantially all of its assets to any Person;
- (iii) engage in any business transaction similar to those enumerated in paragraphs (i) and (ii) above;
- (iv) change the Percentage Interests of any Member or make any distribution other than in accordance with Percentage Interests;
- (v) amend, modify, or terminate this Agreement, or waive any provision hereof;
- (vi) increase or decrease the number of Member Representatives on the MRC;
- (vii) admit a new Member to the Company;
- (viii) increase the compensation payable to any Officer in excess of the amounts approved by a majority of the MRC from time to time;
- (ix) enter into any agreement, transaction, or arrangement outside the ordinary course of business or that requires an expenditure (individually or in the aggregate) greater than \$5,000 or incur any lien or liability, borrowing, or debt (individually or in the aggregate), in excess of \$5,000; and
- (x) initiate litigation as a plaintiff, or assert counter claims in a litigation brought against it.

4.4 Officers. The MRC may designate a “Business Officer” and such other officers of the Company with such titles and duties as the MRC shall determine (collectively, the “Officers”). The Officers shall not have the power, authority, and duties of a “Manager” as that term is defined in the Act. Unless the MRC determines otherwise and except as otherwise provided in this Agreement, if the title given to an Officer is one commonly used for Officers of a business corporation formed under the Delaware General Corporation Law, the assignment of such title shall constitute the delegation to such Officer of the authority and duties that are normally associated with that office. Any number of company management positions may be held by the same person. The salaries of each Officer shall be fixed by or in the manner prescribed by the MRC. The Officers shall hold office until their successors are chosen and qualified. Any Officer may be removed at any time by the unanimous vote of the MRC. Any

vacancy occurring in any office of the Company may be filled by the MRC, in its sole discretion. MRC may delegate its authority, by written resolution of a majority of the MRC, to an Officer, including the authority to execute on behalf of the Company all contracts, deeds, bonds, leases and other documents and agreements.

4.5 Bank Accounts. The Founder[s] or the Business Officer, acting alone in his or her capacity as such, is hereby authorized to open one or more separate bank and investment accounts with such financial institutions and firms as he or she shall determine.

## 5. DISSOLUTION

The Company shall dissolve, and its affairs shall be wound up, upon the first to occur of the following: (i) the unanimous consent of the Members or (ii) the entry of a decree of judicial dissolution under Section 18-802 of the Act. The death, dissolution, retirement, resignation, expulsion or bankruptcy of a Member or the occurrence of any other event that terminates the continued membership of a Member shall not, by itself, cause a dissolution of the Company.

Upon dissolution, the Company shall cease carrying on any and all activities other than the winding up of its business, but the Company is not terminated and shall continue until the winding up of the affairs of the Company is completed and a certificate of cancellation has been filed pursuant to the Act. Upon the winding up of the Company, the assets of the Company shall be distributed: (i) first to creditors (including each Member that is a creditor) in satisfaction of the liabilities of the Company, whether by payment or the making of reasonable provision for payment thereof; and (ii) then to the Members according to his, her, or its Percentage Interest. Such distributions shall be in cash or property or partly in both, as determined by the MRC.

## 6. FINANCIAL AND TAX MATTERS

6.1 Capital Contributions. The Company shall keep a record of the Capital Contributions made by the Members. A Member shall not be required to make any Capital Contribution not specifically agreed to in writing between the Member and the Company, or be obligated or required under any circumstances to restore any negative balance in his Capital Account. No Member shall be entitled to the return of any part of its Capital Contribution, nor entitled to be paid interest in respect of its Capital Account or Capital Contribution.

6.2 Advances by Members. A Member may agree, with the consent of the MRC, to loan funds to or guarantee obligations of the Company.

6.3 Capital Accounts. A separate Capital Account shall be established and maintained for each Member and shall, with respect to each Member: (1) be increased by Capital Contributions made by the Member and allocations to the Member of Profits and any other Company income and gain (or items thereof); and (2) be decreased by the amount of cash and Fair Market Value of property distributed to the Member and allocations to the Member of Losses and any other Company loss and deduction (or items thereof). The Members' Capital Accounts shall be maintained and adjusted to comply with the requirements of Section 704(b) of

the Code and the Treasury Regulations promulgated thereunder. On the transfer of all or part of the Units of Member, the Capital Account of the transferor that is attributable to the transferred Units or part thereof shall carry over to the transferee Member in accordance with the provisions of the Treasury Regulations.

6.4 Distributions. All distributions of cash or other property shall be made to the Members as determined in the sole discretion of the MRC. Notwithstanding any provision to the contrary contained in this Agreement, the Company shall not make a distribution to any Member on account of his interest in the Company if such distribution would violate the Act or other applicable law or cause a default or event of default under any indebtedness for borrowed money.

6.5 Allocations of Profits and Losses. Profits and Losses of the Company for any taxable year shall be allocated among the Members in accordance with their Percentage Interest.

6.6 Tax Returns. The MRC shall arrange for the preparation of all tax returns required to be filed for the Company. Copies of such tax returns, or information needed by the Members and other Persons who were Members during the applicable taxable year shall be furnished to each such Member and Person after the end of each taxable year of the Company. Each such Member and Person shall report consistently with the partnership information returns of the Company, as filed.

6.7 Tax Elections. To the extent permitted by applicable tax law, the Company, in the discretion of the MRC, may make any tax elections for the Company allowed under the Code or the tax laws of any state or other jurisdiction having taxing jurisdiction over the Company; *provided, however*, neither the Company nor any Member may make an election for the Company to be taxable as a corporation for Federal income tax purposes or to be excluded from the application of the provisions of subchapter K of chapter 1 of subtitle A of the Code or any similar provisions of applicable state law.

6.8 Tax Matters Member. The MRC shall appoint a “tax matters member” of the Company pursuant to the requirements of the Code and shall retain the right to remove and replace the tax matters member at any time.

## 7. MISCELLANEOUS

7.1 Conflicts of Interest. Nothing in this Agreement shall be construed to limit the right of the Members to enter into any transaction that may be considered to be competitive with, or a business opportunity that may be beneficial to, the Company. A Member does not violate a duty or obligation to the Company merely because the conduct of such Member furthers the interests of such Member. Subject to this Agreement, a Member may lend money to and transact other business with the Company. The rights and obligations of such Member upon lending money to or transacting business with the Company are the same as those of a Person who is not a Member, subject to other applicable law. No transaction with the Company shall be void or voidable solely because a Member has a direct or indirect interest in the transaction.

7.2 Indemnification. The Company shall indemnify and hold harmless the Members, Officers, Member Representatives, and such other persons as are identified by the Members by written instrument executed by all of the Members as entitled to be indemnified under this section for all costs, losses, liabilities and damages paid or accrued by the Members, Officers, Member Representatives or any such other Person in connection with the business of the Company, to the fullest extent provided or allowed by the laws of the State of \_\_\_\_\_. In addition, the Company shall advance costs of defense of any proceeding to the Member, Member Representative, Officer or any such other Person upon receipt by the Company of an undertaking by or on behalf of such Person to repay such amount if it shall ultimately be determined that such Person is not entitled to be indemnified by the Company.

7.3 Governing Law. This Agreement shall be governed by, and interpreted and enforced in accordance with, the laws of the State of Delaware, without reference to the conflict of law rules of that or any other jurisdiction.

7.4 Entire Agreement. This Agreement and those agreements and documents expressly referred to herein constitute the entire agreement among the parties hereto and supersede all prior understandings, contracts or agreements by or among the parties, written or oral, relating to the subject matter hereof.

7.5 Amendment. The Certificate and this Agreement may be amended only if the amendment is approved by the unanimous vote or written consent of the Members. An amendment to this Agreement must be in writing and shall take effect when executed by all of the Members.

7.6 Rights of Creditors and Third Parties. This Agreement is entered into by the Members solely to govern the operation of the Company. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under this Agreement or any other agreement with the Members with respect to the subject matter hereof.

7.7 Successors and Assigns. This Agreement shall be binding on and inure to the benefit of the heirs, personal representatives, successors and assigns of the Members.

*[Signature page follows]*



IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

[FOUNDER 1]

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

Name:

Title:

[FOUNDER 2]

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

Name:

Title:

*[Signature Page to Limited Liability Company Agreement of [Name of Company]]*

**ANNEX A**  
**MEMBERS**

<u>Name</u>	<u>Units</u>	<u>Percentage Interest</u>
[Founder 1]		%
[Founder 2]		%
TOTAL	————— 100	————— 100%