

# **AMENDED AND RESTATED OPERATING AGREEMENT**

*for*

**Hawthorne Income Fund, LLC**  
*A Delaware Limited Liability Company.*

Effective Date:  
**April 9, 2025**

NEITHER THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION NOR ANY STATE REGULATORY AUTHORITY HAS APPROVED OR DISAPPROVED THE LIMITED LIABILITY COMPANY INTERESTS PROVIDED FOR HEREIN. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

THE SECURITIES REPRESENTED BY THIS AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR REGISTERED OR QUALIFIED UNDER ANY STATE SECURITIES LAWS. SUCH SECURITIES MAY NOT BE OFFERED FOR SALE, SOLD, TRANSFERRED, PLEDGED, OR HYPOTHECATED UNLESS REGISTERED AND QUALIFIED UNDER APPLICABLE FEDERAL AND STATE SECURITIES LAWS OR UNLESS, IN THE OPINION OF COUNSEL SATISFACTORY TO THE COMPANY, SUCH REGISTRATION AND QUALIFICATION IS NOT REQUIRED. ANY TRANSFER OF THE SECURITIES REPRESENTED BY THIS AGREEMENT IS FURTHER SUBJECT TO OTHER RESTRICTIONS, THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH IN THIS AGREEMENT AND ARE BINDING ON BOTH TRANSFEROR AND TRANSFEREE.

PURCHASERS OF SECURITIES REPRESENTED BY THIS AGREEMENT SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THEIR INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

# AMENDED AND RESTATED OPERATING AGREEMENT

*for*

Hawthorne Income Fund, LLC  
*A Delaware Limited Liability Company*

This Amended and Restated Operating Agreement (this “**Agreement**”) of Hawthorne Income Fund, LLC, a Delaware limited liability company (the “**Company**”), is dated effective as of April 9, 2025 (the “**Effective Date**”) by and among the Company, the Members, the Manager (defined herein), and each other Person who after the date hereof becomes a Member of the Company. This Agreement expressly amends, restates, and supersedes all Operating Agreements (or Company Agreements) of prior dates.

## RECITALS

*Whereas*, the Company was formed under the laws of the State of Delaware by the filing of a Certificate of Formation with the Secretary of State of the State of Delaware on or about March 16, 2021 (the “**Certificate of Formation**”) for the purposes set forth in Section 2.05 of this Agreement;

*Whereas*, the Company and the Members entered into that certain original Operating Agreement dated effective on or about March 16, 2021 (the “**Original Agreement**”), and a First Amended and Restated Agreement on or about April 21, 2023 (the “**1AR Agreement**”); and

*Whereas*, the Manager and all of the Members desire to amend, restate, and supersede the Original Agreement and the 1AR Agreement and enter into this Agreement, setting forth the terms and conditions governing the operation and management of the Company henceforth;

**Now, Therefore**, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all Parties, the Parties hereto agree as follows:

## ARTICLE I DEFINITIONS

**Section 1.01 Definitions.** Capitalized terms used herein and not otherwise defined shall have the meanings set forth in this Section 1.01:

“**Adjusted Capital Account Deficit**” means, with respect to any Member, the deficit balance, if any, in such Member’s Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

- (a) crediting to such Capital Account any amount that such Member is obligated to restore or is deemed to be obligated to restore pursuant to Treasury Regulations Sections 1.704-1(b)(2)(ii)(c), 1.704-2(g)(1) and 1.704-2(i); and
- (b) debiting to such Capital Account the items described in Treasury Regulations Section 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

“**Adjusted Taxable Income**” of a Member for a Fiscal Year (or portion thereof) with respect to the Membership Interest held by such Member means the federal taxable income allocated by the Company to the Member with respect to its Membership Interest (as adjusted by any final determination in connection

with any tax audit or other proceeding) for such Fiscal Year (or portion thereof); provided, that such taxable income shall be computed (i) minus any excess taxable loss or excess taxable credits of the Company for any prior period allocable to such Member with respect to its Membership Interest that were not previously taken into account for purposes of determining such Member's Adjusted Taxable Income in a prior Fiscal Year to the extent such loss or credit would be available under the Code to offset income of the Member (or, as appropriate, the direct or indirect owners of the Member) determined as if the income, loss, and credits from the Company were the only income, loss, and credits of the Member (or, as appropriate, the direct or indirect owners of the Member) in such Fiscal Year and all prior Fiscal Years, and (ii) taking into account any special basis adjustment with respect to such Member resulting from an election by the Company under Code Section 754.

**"Affiliate"** means, with respect to any Person, any other Person who, directly or indirectly (including through one or more intermediaries), controls, is controlled by, or is under common control with, such Person. For purposes of this definition, "control," when used with respect to any specified Person, shall mean the power, direct or indirect, to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities or partnership or other ownership interests, by contract or otherwise; and the terms "controlling" and "controlled" shall have correlative meanings.

**"Applicable Law"** means all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations, or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority.

**"Book Depreciation"** means, with respect to any Company asset for each Fiscal Year, the Company's depreciation, amortization, or other cost recovery deductions determined for federal income tax purposes, except that if the Book Value of an asset differs from its adjusted tax basis at the beginning of such Fiscal Year, Book Depreciation shall be an amount which bears the same ratio to such beginning Book Value as the federal income tax depreciation, amortization, or other cost recovery deduction for such Fiscal Year bears to such beginning adjusted tax basis; provided, that if the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero and the Book Value of the asset is positive, Book Depreciation shall be determined with reference to such beginning Book Value using any permitted method selected by the Manager in accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3).

**"Book Value"** means, with respect to any Company asset, the adjusted basis of such asset for federal income tax purposes, except as follows:

- (a) the initial Book Value of any Company asset contributed by a Member to the Company shall be the gross Fair Market Value of such Company asset as of the date of such contribution;

- (b) immediately before the distribution by the Company of any Company asset to a Member, the Book Value of such asset shall be adjusted to its gross Fair Market Value as of the date of such distribution;

- (c) the Book Value of all Company assets may, in the sole discretion of the Manager, be adjusted to equal their respective gross Fair Market Values, as reasonably determined by the Manager, as of the following times:

- (i) the acquisition of an additional Membership Interest in the Company by a new or existing Member in consideration for more than a *de minimis* Capital Contribution;

(ii) the distribution by the Company to a Member of more than a *de minimis* amount of property (other than cash) as consideration for all or a part of such Member's Membership Interest in the Company; and

(iii) the liquidation of the Company within the meaning of Treasury Regulations Section 1.704-1(b)(2)(ii)(g);

(d) the Book Value of each Company asset shall be increased or decreased, as the case may be, to reflect any adjustments to the adjusted tax basis of such Company asset pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Account balances pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m); provided, that Book Values shall not be adjusted pursuant to this paragraph (d) to the extent that an adjustment pursuant to paragraph (c) above is made in conjunction with a transaction that would otherwise result in an adjustment pursuant to this paragraph (d); and

(e) if the Book Value of a Company asset has been determined pursuant to paragraph (a) or adjusted pursuant to paragraphs (c) or (d) above, such Book Value shall thereafter be adjusted to reflect the Book Depreciation taken into account with respect to such Company asset for purposes of computing Net Income and Net Losses.

**"Borrower"** means any Person that is a recipient of capital loans provided by the Fund from time to time pursuant to the Master Credit Agreement between the Fund and the Borrower. At present, there shall be only two Borrowers of the Fund: a certain *Hawthorne Land, LLC*, a Texas limited liability company, and a certain *Hawthorne Interests, LLC*, a Texas limited liability company. Both present Borrowers are affiliates of the Manager and owned by the some of the same principal individuals therein. The Manager, however, has the sole discretion to lend to other Borrowers from time to time.

**"Business Day"** means a day other than a Saturday, Sunday or other day on which commercial banks in the State of Delaware are authorized or required to close.

**"Capital Contribution"** means, for any Member, the total amount of cash and cash equivalents and the Book Value of any property or services actually contributed to the Company by such Member. As used in this Agreement, **"Unrecovered Capital Contributions"** shall mean the total Capital Contributions provided by a Member, reduced by distributions made to such Member pursuant to Article 6 of this Agreement (expressly not including the Preferred Return), and **"Recovered Capital Contributions"** shall mean such total amounts of distributions made to a Member (not including the Preferred Return), counted against their total Capital Contributions provided.

**"Cause"** means a final, non-appealable determination by either a) a court of competent jurisdiction; b) an independent arbitrator under the American Arbitration Association; or c) a government body with appropriate jurisdiction, that a Person has committed an act that constitutes a felony criminal act or wrongdoing, breach of fiduciary duties as outlined in Article 9 of this Agreement (if applicable to such Person), bad faith, gross negligence, fraud, or willful misconduct involving moral turpitude against the Company or one of its Members or Managers, or if an Affiliate Borrower of the Manager is in default under the Master Credit Agreement.

**"Certificate of Termination"** means a certificate to be filed upon completion of the winding up and liquidation of the Company as set forth in Section 11.04, which certificate shall be in the form required by the DLLCA.

**“Change of Control”** mean the occurrence of any of the following events: (i) a sale or other disposition (whether by death, divorce, bankruptcy, or otherwise) of all or substantially all of a Person’s ownership interests or transfer of the governing rights of a Member or the Manager by/to another Person by means of any transaction or series of related transactions (including, without limitation, any reorganization, merger or consolidation but excluding any merger effected exclusively for the purpose of changing the domicile of the Member or the Manager), or (ii) a sale of all or substantially all of the assets of the Member or the Manager (both i and ii collectively for purposes of this definition, a *“Change”*), such that in either case (i or ii) the Member’s or the Manager’s equity holders of record immediately prior to such Change will, immediately after such Change, hold less than a controlling influence and/or less than 50% of the interests of the surviving or acquiring Member or Manager.

**“Code”** means the Internal Revenue Code of 1986.

**“Company Minimum Gain”** means “partnership minimum gain” as defined in Treasury Regulations Section 1.704-2(b)(2), substituting the term “Company” for the term “partnership” as the context requires.

**“DLLCA”** means the Delaware Limited Liability Company Act, and any successor statute thereof.

**“Divorce”** means any legal proceeding to terminate or dissolve, or separate the Marital Relationship of a Member, and includes an action for annulment, legal separation, or similar proceeding that involves a judicial division of joint or marital property of the Member and his or her Spouse.

**“Electronic Transmission”** means any form of communication, not directly involving the physical transmission of paper, that creates an electronic record that may be retained, retrieved, and reviewed by a recipient thereof and that may be directly reproduced by such a recipient, electronically. Electronic Transmission includes e-mail and other forms of electronic communication and delivery.

**“Equity Securities”** means any and all Membership Interests of the Company and any securities of the Company convertible into, exchangeable for, or exercisable for, such Membership Interests, and warrants or other rights to acquire such Membership Interests.

**“Estimated Tax Amount”** of a Member for a Fiscal Year means the Member’s Tax Amount for such Fiscal Year as estimated in good faith from time to time by the Manager. In making such estimate, the Manager shall take into account amounts shown on Internal Revenue Service Form 1065 filed by the Company and similar state or local forms filed by the Company for the preceding taxable year and such other adjustments as the Manager reasonably determines are necessary or appropriate to reflect the estimated operations of the Company for the Fiscal Year.

**“Excluded Securities”** means Equity Securities issued in connection with:

- (a) a grant to any existing or prospective consultants, employees, or officers pursuant to any profits interest plan or similar equity-based plans or other compensation agreement;
- (b) the conversion or exchange of any securities of the Company into Membership Interests, or the exercise of any warrants or other rights to acquire Membership Interests;
- (c) any acquisition by the Company of any equity interests, assets, properties, or business of any Person;
- (d) any merger, consolidation, or other business combination involving the Company;

(e) the commencement of any initial public offering/qualified public offering or any transaction or series of related transactions involving a Change of Control;

(f) an equity split, payment of distributions, or any similar recapitalization; and

(g) any private placement of warrants to purchase Membership Interests to lenders or other institutional investors (excluding the Members) in any arm's length transaction providing debt financing to the Company (the "**Financing Warrants**") where such Financing Warrants, together with all the then outstanding Financing Warrants, are not equal to and not convertible into an aggregate of more than 5% of the outstanding Equity Securities on a fully diluted basis at the time of the issuance of such Financing Warrants, in each case, approved in accordance with the terms of this Agreement.

**"Fair Market Value"** of any asset as of any date means the purchase price that a willing buyer having all relevant knowledge would pay a willing seller for such asset in an arm's length transaction as determined by the Manager in its good faith and within its commercially reasonable judgement.

**"Fiscal Year"** means the calendar year, unless the Company is required to have a taxable year other than the calendar year, in which case Fiscal Year shall be the period that conforms to its taxable year.

**"Fund"** means the Company.

**"GAAP"** means United States generally accepted accounting principles in effect from time to time.

**"Governmental Authority"** means any federal, state, local, or foreign government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision, or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations, or orders of such organization or authority have the force of law), or any arbitrator, court, or tribunal of competent jurisdiction.

**"Initial Members"** means all the Members admitted to the company resulting from the Initial Offering.

**"Independent Third Party"** means, with respect to any Member, any Person who is not an Affiliate or other Permitted Transferee of such Member.

**"Initial Offering"** means the initial offering of Membership Interests offered pursuant to a certain Private Placement Memorandum dated effective on or about April 23, 2021, and which concluded on or about March 3, 2023.

**"Last Tranche"** means the Tranche on the last row of the Tranche Schedule that has the latest Tranche Completion Date.

**"Lien"** means any mortgage, pledge, security interest, option, right of first offer, encumbrance, or other restriction or limitation of any nature whatsoever.

**"Majority"** means one or more Members having among them more than fifty percent (50%) of the issued and outstanding Membership Interests.

**“Manager”** means **Hawthorne Income Fund Manager, LLC**, a Texas limited liability company, or such other Person as may be designated or become the Manager pursuant to the terms of this Agreement. The Manager shall constitute a “manager” (as that term is defined in the DLLCA) of the Company.

**“Manager Designate”** means either a) an Independent Third Party designated by the Manager and kept in the written records of the Company on file with Company Counsel or b) in the absence of the former, Company Counsel itself. The Manager has the authority to change the Manager Representative at any time within its discretion, provided that such change is immediately provided for in the written records of the Company as stated above.

**“Marital Relationship”** means a civil union, domestic partnership, marriage, or any other similar relationship that is legally recognized in any jurisdiction.

**“Master Credit Agreement”** means the certain revolving credit/loan agreement between the Fund and each Affiliate Borrower of the Manager, governing the terms of all Project Loans from the Fund to such Affiliate Borrower, as may be amended from time to time.

**“Member”** means each Person who has executed this Agreement or a counterpart thereof and who is hereafter admitted as a Member in accordance with the terms of this Agreement and the DLLCA (each, a **“Member”**), in each case so long as such Person is shown on the Company’s books and records as the owner of Membership Interests. The Members shall constitute “members” (as that term is defined in the DLLCA) of the Company.

**“Member Nonrecourse Debt”** means “partner nonrecourse debt” as defined in Treasury Regulations Section 1.704-2(b)(4), substituting the term “Company” for the term “partnership” and the term “Member” for the term “partner” as the context requires.

**“Member Nonrecourse Debt Minimum Gain”** means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if the Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Treasury Regulations Section 1.704-2(i)(3).

**“Member Nonrecourse Deduction”** means “partner nonrecourse deduction” as defined in Treasury Regulations Section 1.704-2(i), substituting the term “Member” for the term “partner” as the context requires.

**“Membership Interest”** or **“Member Interest”** means an interest in the Company owned by a Member, which may be expressed as a **“Membership Unit(s)”** or as a **“Membership Interest Percentage”**, including such Member’s right (a) to its distributive share of Net Income, Net Losses, and other items of income, gain, loss, and deduction of the Company; (b) to its distributive share of the assets of the Company; (c) to vote on, consent to, or otherwise participate in any decision of the Members as provided in this Agreement; and (d) to any and all other benefits to which such Member may be entitled as provided in this Agreement or the DLLCA. The Membership Interest of each Member may be expressed as a percentage interest and is likely to be the same proportion of such Member’s total Capital Contribution, though may not necessarily be so. The sum of the Members’ Membership Interests as a percentage shall, at all times, be one hundred percent (100%).

**“Membership Class”** or **“Member Class”** or **“Class”** means the class designation of Membership Interests each Member holds, with each Class representing different rights and entitlements as stated in this Agreement. At present, the Classes are as follows:

- **Class A8**, whose Members will be entitled to a “**Preferred Return Rate**” equal to **8.00%**, subject to the distribution mechanism outlined below.
- **Class A10**, whose Members will be entitled to a “**Preferred Return Rate**” equal to **10.00%**, subject to the distribution mechanism outlined below.

“**Net Income**” and “**Net Loss**” mean, for each Fiscal Year or other period specified in this Agreement, an amount equal to the Company’s taxable income or taxable loss, or particular items thereof, determined in accordance with Code Section 703(a) (where, for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or taxable loss), but with the following adjustments:

(a) any income realized by the Company that is exempt from federal income taxation, as described in Code Section 705(a)(1)(B), shall be added to such taxable income or taxable loss, notwithstanding that such income is not includable in gross income;

(b) any expenditures of the Company described in Code Section 705(a)(2)(B), including any items treated under Treasury Regulations Section 1.704-1(b)(2)(iv)(I) as items described in Code Section 705(a)(2)(B), shall be subtracted from such taxable income or taxable loss, notwithstanding that such expenditures are not deductible for federal income tax purposes;

(c) any gain or loss resulting from any disposition of Company property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Book Value of the property so disposed, notwithstanding that the adjusted tax basis of such property differs from its Book Value;

(d) any items of depreciation, amortization, and other cost recovery deductions with respect to Company property having a Book Value that differs from its adjusted tax basis shall be computed by reference to the property’s Book Value (as adjusted for Book Depreciation) in accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(g);

(e) if the Book Value of any Company property is adjusted as provided in the definition of Book Value, then the amount of such adjustment shall be treated as an item of gain or loss and included in the computation of such taxable income or taxable loss; and

(f) to the extent an adjustment to the adjusted tax basis of any Company property pursuant to Code Sections 732(d), 734(b) or 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis).

“**Nonrecourse Deductions**” has the meaning set forth in Treasury Regulations Section 1.704-2(b).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Notice of Withdrawal**” means a written request delivered to the Manager requesting a withdrawal of funds by a Withdrawing Member.

“**Notice of Withdrawal Date**” means the date on which the Manager actually receives the Notice of Withdrawal from a Withdrawing Member.



**“Operating Expenses”** means, without limitation, all expenses of the Company with respect to (a) the management, maintenance, upkeep, and ongoing operations of the Company, including legal, accounting, and organizational and administrative fees, (b) all expenses related to the Project, (c) if applicable, all fees payable to the Manager and its affiliates, and (d) all fees payable to any placement agents or broker-dealers in connection with any Offering (Initial or Subsequent).

**“Outstanding Unreturned Tranches”** means Tranches that have yet to be fully returned to a Withdrawing Member.

**“Permitted Transfer”** means a Transfer of Membership Interests carried out pursuant this Agreement.

**“Permitted Transferee”** means a recipient of a Permitted Transfer.

**“Person”** means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association, or other entity or organization.

**“Preferred Return”** means, with respect to each Member and their respective Membership Class, an amount calculated like interest on each Member’s Unrecovered Capital Contributions at a rate equal to the set rate established for each separate Class (per annum) as follows (the **“Preferred Return Rate”** for each Class):

Class A10: 10.00%

Class A8: 8.00%

The Preferred Return for each Class shall be cumulative (annual) and non-compounded. For financial and income tax reporting purposes, neither accrual nor payment of the Preferred Return shall be treated as a guaranteed payment under Section 707(c) of the Code.

**“Project”** means the lending of capital as business loan financing capital concerning real estate assets to certain Borrowers upon agreed terms resulting in interest revenue for the Fund, pursuant to the Master Credit Agreement (each such loan a **“Project Loan”**).

**“Related Party Agreement”** means any agreement, arrangement, or understanding between the Company and any Manager, Member, Officer (or other employee) of the Company or any Affiliate of a Manager, Member, Officer (or other employee) of the Company; in each case, as such agreement may be amended, modified, supplemented, or restated in accordance with the terms of this Agreement.

**“Representative”** means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants, and other agents of such Person.

**“Securities Act”** means the Securities Act of 1933 and the rules and regulations thereunder, which shall be in effect at the time.

**“Spouse”** means a spouse or spousal equivalent, a party to a civil union, a domestic partner, a same-sex spouse or partner, or any person in a Marital Relationship with a Member who is an individual.

**“Subscription Agreement”** means a certain agreement in connection with the Initial Offering (or a Subsequent Offering, as applicable) between the Company and each Member by which the Member subscribes to, and becomes of Member of, the Company.

**“Subsequent Offering(s)”** means an offering of Membership Interests at any time after the closing of the Initial Offering.

**“Subsidiary”** means, with respect to any Person, any other Person of which a majority of the outstanding shares or other equity interests having the power to vote for directors or comparable managers are owned, directly or indirectly, by the first Person.

**“Super Majority”** means one or more Members having among them at least sixty-six point six seven percent (66.67 %) of the Membership Interests of all Members.

**“Tax Amount”** of a Member for a Fiscal Year means the product of (a) the Tax Rate for such Fiscal Year and (b) the Adjusted Taxable Income of the Member for such Fiscal Year with respect to its Membership Interest.

**“Tax Rate”** of a Member, for any period, means the highest effective marginal combined federal, state, and local tax rate applicable to an individual residing in Houston, Texas (or, if higher, a corporation doing business in Houston, Texas), taking into account (a) the character (for example, long-term or short-term capital gain, ordinary, or exempt) of the applicable income and (b) if applicable, the deduction under IRC Section 199A.

**“Tranche”** means a portion of a Withdrawal Amount that is to be returned pursuant to the terms of this Agreement.

**“Tranche Completion Date”** means the date at which a Tranche must be returned before fees must begin being paid to Withdrawing Member.

**“Tranche Request Date”** means the date that funds pertaining to a Tranche are requested via a duly noticed Notice of Withdrawal on a Notice of Withdrawal Date.

**“Tranche Schedule”** means a listing of Tranches to be returned to a Withdrawing Member, with each row displaying a Tranche, Tranche Request Date, and Tranche Completion Date, sorted by Tranche Completion Date from earliest to latest.

**“Transfer”** means to, directly or indirectly, sell, transfer, assign, gift, pledge, encumber, hypothecate, or similarly dispose of, either voluntarily or involuntarily, by operation of law or otherwise, or to enter into any contract, option, or other arrangement or understanding with respect to the sale, transfer, assignment, gift, pledge, encumbrance, hypothecation, or similar disposition of, any Membership Interests owned by a Person or any interest (including a beneficial interest) in any Membership Interests owned by a Person. **“Transfer”** when used as a noun shall have a correlative meaning. **“Transferor”** and **“Transferee”** mean a Person who makes or receives a Transfer, respectively.

**“Treasury Regulations”** means the final or temporary regulations issued by the United States Department of Treasury pursuant to its authority under the Code, and any successor regulations.

**“Unallocated Withdrawal Amount”** means the Withdrawal Amount that has yet to be placed in a Tranche on the Tranche Schedule.

**“Withdrawal Amount”** means an amount, not to exceed Unrecovered Capital Contributions by a Withdrawing Member, being requested to be returned by a Withdrawing Member pursuant to a duly noticed Notice of Withdrawal.

**“Withdrawing Member”** means a Member who is requesting a withdrawal of Capital Contributions per the terms of this Agreement.

**Section 1.02 Interpretation.** For purposes of this Agreement: (a) the words “include,” “includes,” and “including” shall be deemed to be followed by the words “without limitation”; (b) the word “or” is not exclusive; and (c) unless otherwise expressly stated, the words “herein,” “hereof,” “hereby,” “hereto,” and “hereunder” refer to this Agreement as a whole.

The definitions given for any defined terms in this Agreement shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine, and neuter forms.

Unless the context otherwise requires, references herein: (x) to Articles, Sections, Exhibits, and Schedules mean the Articles and Sections of, and Exhibits and Schedules attached to, this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder.

This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted.

The Exhibits and Schedules referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Any terms expressly defined elsewhere in this Agreement shall be as defined therein.

## **ARTICLE II ORGANIZATION**

### **Section 2.01 Formation.**

(a) The Company was formed on or about March 16, 2021, pursuant to the provisions of the DLLCA, upon the filing of the Certificate of Formation with the Secretary of State of the State of Delaware.

(b) This Agreement, as revised, shall constitute the “Operating Agreement” (as that term is used in the DLLCA) of the Company. The rights, powers, duties, obligations, and liabilities of the Members and the Manager shall be determined pursuant to the DLLCA and this Agreement. To the extent that the rights, powers, duties, obligations, and liabilities of any Member or the Manager are different by reason of any provision of this Agreement than they would be under the DLLCA in the absence of such provision, this Agreement shall, to the extent permitted by the DLLCA, control.

**Section 2.02 Name.** The name of the Company is “*Hawthorne Income Fund, LLC*” or such other name or names as may be designated by the Manager; provided, that the name shall always contain the words “Limited Liability Company” or “Limited Company” or an abbreviation of one of those phrases. Amendments to the Certificate of Formation or this Agreement to reflect any such name change may be made by the Manager without the consent of the Members. The Manager shall give prompt notice to the Members of any change to the name of the Company and any related amendment to the Certificate of

Formation or this Agreement. The Company may conduct business under any assumed or fictitious name required by Applicable Law or otherwise deemed desirable by the Manager.

**Section 2.03 Principal Office.** The principal office of the Company is as stated in the Certificate of Formation, or such other place as may from time to time be determined by the Manager. The Manager shall give prompt notice of any such change to each of the Members.

**Section 2.04 Registered Office; Registered Agent.**

(a) The registered office of the Company shall be the office of the initial registered agent named in the Certificate of Formation or such other office (which need not be a place of business of the Company) as the Manager may designate from time to time in the manner provided by the DLLCA and Applicable Law.

(b) The registered agent for service of process on the Company in the State of Delaware shall be the initial registered agent named in the Certificate of Formation or such other Person or Persons as the Manager may designate from time to time in the manner provided by the DLLCA and Applicable Law.

**Section 2.05 Purpose; Powers.**

(a) The sole purpose of the Company is to undertake the Project, and to engage in any lawful acts or activities necessary or incidental thereto. Pursuant to this Agreement, the Company shall have all the powers necessary or convenient to carry out the purposes for which it is formed, including the powers granted by the DLLCA.

(b) The Manager shall have the right to enter into side-letter agreements with one or more Members upon terms agreed to by the Manager in its sole and absolute discretion, and such side-letter agreement may provide additional rights, economic incentives, or other terms to such Members. The Manager is not required to disclose the existence or terms of any such side-letter agreements with any other Member. No Member shall have a right to participate in, or be the beneficiary of, any side-letter agreement to which it is not expressly a party to. The terms of this Section 2.05(b) shall be permissible to the maximum extent permitted under Applicable Law.

(c) The Manager shall also have the right, within its sole and absolute but reasonable discretion, to deploy reserve capital that is not otherwise currently required for the Project (or that may simply be held in reserve) into certain stable savings or investment holdings, such as savings accounts, certificates of deposit, bonds, money market funds, and other low-risk opportunities, provided, however, that such actions do not result in a loss of securities exemptions currently relied upon by the Company, and provided further, that these deployments do not constitute the Company's primary investments.

**Section 2.06 Term.** The term of the Company commenced on the date the Certificate of Formation was filed with the Secretary of State of the State of Delaware and shall continue in existence perpetually until the Company is terminated in accordance with the provisions of this Agreement.

### **ARTICLE III CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS; LOANS**

**Section 3.01 Capital Contributions by Membership Class.** With the execution of this Agreement by each Member, each Member has made (or will make) a Capital Contribution in the amounts

so in their Subscription Agreement and is deemed to own Membership Interests belonging to such Membership Class therein designated, with all rights, duties, obligations, and interests therein belonging as outlined in this Agreement. The Manager shall maintain, keep in confidence, and update the Members Schedule (Schedule I) upon the issuance or Transfer of any Membership Interests to any new or existing Member in accordance with this Agreement, or with respect to the changing of Membership Classes. THE MANAGER EXPRESSLY RESEVES THE RIGHT TO INCREASE OR DECREASE THE TOTAL NUMBER OF UNITS AVAILABLE FOR PURCHASE AT ITS SOLE DISCRETION. The Members (other than the Manager, if such Manager is or ever becomes a Member) shall not be entitled to see the Membership Interest Percentages or Membership Classes of any of the other Members.

**Section 3.02 Additional Capital Contributions.** No Member shall be obligated to contribute additional Capital Contributions but may do so voluntarily with the express consent of the Manager.

**Section 3.03 Maintenance of Capital Accounts.** The Company shall establish and maintain for each Member a separate capital account (a “**Capital Account**”) on its books and records in accordance with this Section 3.03. Each Capital Account shall be established and maintained in accordance with the following provisions:

- (a) Each Member’s Capital Account shall be increased by the amount of:
  - (i) such Member’s Capital Contributions, including such Member’s initial Capital Contribution and any additional Capital Contributions; and
  - (ii) any Net Income or other item of income or gain allocated to such Member pursuant to ARTICLE V.
- (b) Each Member’s Capital Account shall be decreased by:
  - (i) the cash amount or Book Value of any property distributed to such Member pursuant to ARTICLE VI and Section 11.03(d);
  - (ii) the amount of any Net Loss or other item of loss or deduction allocated to such Member pursuant to ARTICLE V; and
  - (iii) the amount of any liabilities of such Member assumed by the Company or that are secured by any property contributed by such Member to the Company.

**Section 3.04 Succession Upon Transfer.** In the event that any Membership Interests are Transferred in accordance with the terms of this Agreement, the Transferee shall succeed to the Capital Account of the Transferor to the extent it relates to the Transferred Membership Interests and, subject to Section 5.07, shall receive allocations and distributions pursuant to ARTICLE V, ARTICLE VI, and ARTICLE XI in respect of such Membership Interests.

**Section 3.05 Withdrawals From Capital Accounts.**

- (a) No Member shall be entitled to withdraw any part of its Capital Account or to receive any distribution from the Company, except as otherwise provided in this Section. No Member shall receive any interest, salary, or drawing with respect to its Capital Contributions or its Capital Account, except as otherwise provided in this Agreement. The Capital Accounts are maintained for the sole purpose of allocating items of income, gain, loss, and deduction among the

Members and shall have no effect on the amount of any distributions to any Members, in liquidation or otherwise.

(b) **Permissible Withdrawal from Fund.** A Withdrawing Member must provide a Notice of Withdrawal that includes a Withdrawal Amount. To the extent not already completed pursuant to distributions, the Withdrawing Member shall be entitled to receive distributions equaling its Withdrawal Amount, whereupon if, after completion of the same the Member has zero Unrecovered Capital Contributions it shall cease to be a Member of the Company, provided, however, that until such time, it shall continue to receive its Preferred Return commensurate with its Membership Class on all Unrecovered Capital Contributions.

(c) **Mechanics of Withdrawal.** The Fund will provide the Withdrawing Member its Withdrawal Amount pursuant to the preceding paragraph in Tranches. Each Tranche shall be the lesser of \$100,000 or Unallocated Withdrawal Amount, and the sum of all Tranches for a particular Notice of Withdrawal shall not exceed the Withdrawal Amount for that Notice of Withdrawal. Each Tranche shall have a Tranche Request Date and a Tranche Completion Date to be listed on a Tranche Schedule for the Withdrawing Member. Capital shall be returned to the Withdrawing Member in the order of Tranche Completion Date for the respective Withdrawing Member, from earliest to latest. The Tranche Completion Date for each Tranche shall be as follows:

(i) If there are no Outstanding Unreturned Tranches, the Tranche Completion Date shall be set to 120 days from the Tranche Request Date.

(ii) If there are Outstanding Unreturned Tranches, the Tranche Completion Date shall be set to 120 days from the Tranche Request Date or 60 days from the Tranche Completion Date for Last Tranche, whichever is later.

(d) **Penalty Fees.** Should the Manager be unable to return a particular Tranche by the Tranche Completion Date therein specified, the Withdrawing Member shall be entitled to a fee equal to 0.10%/month calculated on the amount actually due within such Tranche by the expiration of such Tranche Completion Date, or \$100/month, whichever is less, until such Tranche is complete and paid out to the Withdrawing Member. There shall be no prorating of fees. The fee due shall be based on the amount due for a particular Tranche on the date a fee is assessed.

(e) **Separate Notices; Cancellation.** If a Member desires to cancel a request of withdrawal, it must inform the Manager immediately in writing, and cancellation will apply to Tranches from the earliest Tranche Request Date to the latest.

(f) **Continuing Failure.** If at any time any Member has been accruing fees pursuant to its withdrawal Tranches for a consecutive period of 24 months or more, fees will stop being assessed and the Fund shall no longer be permitted to make any additional Project Loans and all excess capital not utilized must be utilized to provide distributions to all Members on a pro rata basis in accordance with their Capital Contributions.

(g) **Change of Control of the Manager.** Notwithstanding anything to the contrary elsewhere in this Agreement, if the Manager undergoes a Change of Control, the Members shall have a right to submit a Notice of Withdrawal to the replacement Manager pursuant to the terms and procedures outlined in this Section 3.05, and Section 7.03 below. A Change of Control of the Manager shall not constitute a “Cause” event by the Manager.

**Section 3.06 Modifications.** The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulations Section 1.704-1(b) and shall be interpreted and applied in a manner consistent with such Treasury Regulations. If the Manager determines that it is prudent to modify the manner in which the Capital Accounts, or any increases or decreases to the Capital Accounts, are computed in order to comply with such Treasury Regulations, the Manager may authorize such modifications without the consent of any Member.

## **ARTICLE IV MEMBERS**

### **Section 4.01 Membership Classes; Voting and Participation.**

(a) **Membership Classes Established.** The Company hereby establishes the Membership Classes. Membership Interests of each Class will be entitled to all rights as stated in this Agreement, *except, however*, that the Preferred Return for each Class shall be different as stated in the definition of “Preferred Return”.

(b) **Transfer of Classes by Manager.** The Manager is permitted, at its sole discretion and without the consent of any Member, to re-classify any Member’s Membership Interests to a different Class, *provided, however*, that in doing so it must: 1) notify such Member at least thirty (30) days prior to, and 2) offering such Member the option to withdraw, without refusal, from the Fund instead pursuant to the terms of Section 4.04 below.

(c) **Management Reserved to Manager.** Except as provided elsewhere in this Agreement, no Member that is not a Manager, regardless of its Membership Class, shall take part in the control of any aspect of the Company’s business, including the Project, or to transact any business in the Company’s name, or have the power to sign documents for or otherwise bind or act on behalf of the Company in any way, to pledge credit, to execute any instrument on the Company’s behalf or to render it liable for any purpose. No Member, acting solely in the capacity of a Member, is an agent of the Company. *For the avoidance of any doubt, it is expressly the Members’ intention to give the Manager broad discretion in the operations, governance, and management of the Company and of the Project.*

(d) **Voting Mechanism of Members.** Subject to 4.01(c) above, each Member, regardless of Membership Class, shall be entitled to vote with equal participation of every other Member wherever such Member participation is required. Notwithstanding the above of Section 4.01(a) and without contradicting the same, in the event that the Members are required under this Agreement or by applicable law to participate by approving any action or measure of the Company, such action or measure shall be approved if the holders of a Majority of Membership Interests, regardless of Membership Class, so approve. Meetings of the Members may be called by (i) the Manager or (ii) a Member or group of Members holding at least a Majority of the Membership Interests. Such a meeting must be called, in writing, with not less than THREE (3) business days’ notice to all the Members entitled to participate. Any matter that is to be voted on, consented to, or approved by Members may be taken without a meeting, without prior notice, and without a vote if consented to, in writing or by Electronic Transmission, by a Member or Members holding not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which each Member entitled to vote on the action is present and votes. A record shall be maintained by the Managers of each such action taken by written consent of a Member or Members. Other than as stated herein or as expressly required elsewhere in this Agreement, no

meetings of the Members shall be required or held, it being understood that, pursuant to 4.01(c) above, the Manager retains exclusive discretion in operating the Company.

**Section 4.02 Admission of New Members.** The Manager is hereby permitted to admit new Members to the Company in accordance with the terms of any Subsequent Offerings conducted by the Company, having already done the same pursuant to the Initial Offering. Accordingly, additional new Members may be admitted from time to time at the sole discretion of the Manager, including the terms of such admission. The Manager may conduct Subsequent Offerings at any time upon such terms as it determines appropriate in its sole discretion (an accompanying close of that offering a “**Subsequent Closing**”) and admit additional Members pursuant to the same (each an “**Additional Member**”). In order for any Person not already a Member of the Company to be admitted as a Member, whether pursuant to an issuance or Transfer (including a Permitted Transfer) of Membership Interests, such Person shall have executed and delivered to the Company a written undertaking substantially in the form of a Subscription Agreement or any other document(s) that the Manager may deem necessary or appropriate. Upon the amendment of the Members Schedule by the Manager and the satisfaction of any other applicable conditions, including the receipt by the Company of payment for the issuance of Membership Interests, such Person may be admitted as a Member and deemed listed as such on the books and records of the Company. The Manager shall also adjust the Capital Accounts of the Members as necessary in accordance with Section 3.03. This section shall not affect a Member’s right to transfer or for the transferee therein to be admitted as a Member pursuant to the terms of this Agreement as outlined in Article 13 of this Agreement.

**Section 4.03 No Personal Liability.** Except as otherwise provided in the DLLCA, by Applicable Law, or expressly in this Agreement, no Member or Manager will be liable or obligated personally for any debt, obligation, or liability of the Company or of the other Members, whether arising in contract, tort, or otherwise, including a debt, obligation, or liability under a judgment, decree, or order of a court, solely by reason of being a Member or Manager.

**Section 4.04 No Interest in Company Property.** No real or personal property of the Company, including the Project Loans, shall be deemed to be owned by any Member individually, but shall be owned by, and title shall be vested solely in, the Company or its established subsidiaries and special purpose vehicles. Without limiting the foregoing, each Member hereby irrevocably waives during the term of the Company any right that such Member may have to maintain any action for partition with respect to the property of the Company.

**Section 4.05 Certification of Membership Interests.** The Manager shall not be required to issue certificates to the Members representing the Membership Interests held by such Member. Membership Interests shall be evidenced this Agreement. In the event that the Manager elects to issue certificates representing Membership Interests in accordance with this Section, then the Manager shall ensure such certificates include all required legends under Applicable Law, including, without limitation, legends that articulates rules and restrictions applicable to the Membership Interests as restricted securities under Applicable Law.

**Section 4.06 Similar or Competitive Activities; Business Opportunities.** Nothing contained in this Agreement shall prevent any Member or Manager or any of their Affiliates from engaging in any other activities or businesses, regardless of whether those activities or businesses are similar to or competitive with the Company. None of the Members or Managers nor any of their Affiliates shall be obligated to account to the Company or to the other Members for any profits or income earned or derived from such other activities or businesses. None of the Members nor any of their Affiliates shall be obligated to inform the Company or the other Member of a business opportunity of any type or description.



**Section 4.07 Member Representations and Warranties.** Each Member represents and warrants to, and covenants with, the Company that:

(a) The Member understands that the Membership Interests have not been registered under the Securities Act of 1933, as amended, or any under any other applicable securities laws, nor has any governmental or regulatory authority passed an opinion regarding the Membership Interests;

(b) The Member warrants, certifies, and represents that it is subscribing to the Membership Interests with a view to investments for its own account, and not with a view to resell the same;

(c) The Member understands that the Company is not currently required to register and will not register as an Investment Company under the Investment Company Act of 1940 by way of exemption therefrom;

(d) The Member has all requisite authority (and in the case of an individual, the capacity) to purchase the Membership Interests, enter into this Agreement, and to perform all the obligations required to be performed by the Member hereunder, and such purchase will not contravene any law, rule, or regulation binding on the Member or any investment guideline or restriction applicable to the Member;

(e) The Member understands and accepts that the purchase of the Membership Interests involves various risks, including the risks that there may be no open market for the Membership Interests. The Member represents that it is able to bear any loss associated with an investment in the Membership Interests;

(f) The Member is, at minimum, an “**Accredited Investor**” as defined under the Securities Act and has such knowledge, skill and experience in business, financial and investment matters that the Member is capable of evaluating the merits and risks of this specific investment in the Membership Interests. With the assistance of the Member's own professional advisors, to the extent that the Member has deemed appropriate, the Member has made its own legal, tax, accounting, and financial evaluation of the merits and risks of an investment in the Membership Interests and the consequences of this Agreement. The Member has considered the suitability of the Membership Interests as an investment in light of its own circumstances and financial condition and the Member is able to bear the risks associated with an investment in the Membership Interests and its authority to invest in the Membership Interests; and

(g) The Member agrees to furnish any additional information requested by the Company or any of its affiliates to assure compliance with applicable U.S. federal and state securities laws in connection with the purchase and sale of the Membership Interests. Any information that has been furnished or that will be furnished by the Member to evidence its status as an accredited investor is accurate and complete and does not contain any misrepresentation or material omission.

## **ARTICLE V ALLOCATIONS**

**Section 5.01 Allocation of Net Income and Net Loss.** Except as otherwise provided in this Agreement, Net Income and Net Loss (including individual items of profit, income, gain, loss, credit,

deduction and expense (including Operating Expenses)) of the Company will be allocated among the Members in a manner such that the Capital Account balance of each Member, immediately after making that allocation, is, as nearly as possible, equal (proportionately) to the Distributions that would be made to that Member pursuant to Article VI if the Company were dissolved, its affairs wound up and its assets sold for cash, all Fund liabilities were satisfied (limited with respect to each nonrecourse liability to the Fair Market Value of the assets securing that liability), and the net assets of the Company were distributed in accordance with Article VI to the Members immediately after making that allocation, adjusted for applicable special allocations, computed immediately prior to the hypothetical sale of assets.

**Section 5.02 Allocation Rules.** In the event that Members are issued Interests on different dates, the Net Income or Net Loss allocated to the Members for each Fiscal Year during which Members receive Membership Interests will be allocated among the Members in accordance with Section 706 of the Internal Revenue Code, using any convention permitted by law and selected by the Manager. For purposes of determining the Net Income, Net Loss and individual items of income, gain, loss credit, deduction and expense allocable to any period, Net Income, Net Loss and any other items will be determined on a daily, monthly or other basis, as determined by the Manager using any method that is permissible under Section 706 of the Code and the Treasury Regulations. Except as otherwise provided in this Agreement, all individual items of Fund income, gain, loss and deduction will be divided among the Members in the same proportions as they share Net Incomes and Net Loss for the Fiscal Year or other period in question.

**Section 5.03 Limitation on Allocation of Net Losses.** There will be no allocation of Net Losses to any Member to the extent that the allocation would create a negative balance in the Capital Account of that Member (or increase the amount by which that Member's Capital Account balance is negative).

**Section 5.04 General Tax Allocations.** Except as otherwise provided in this Section 5.4, the taxable income or loss of the Company will be allocated pro rata among the Members in the same manner as the corresponding items of Net Income, Net Loss and separate items of income, gain, loss, credit, deduction and expense (excluding items for which there are no related tax items) are allocated among the Member for Capital Account purposes.

**Section 5.05 Regulatory and Special Allocations.** Notwithstanding the provisions of Section 5.04:

(a) *Minimum Gain Chargeback.* In the event there is a net decrease in the Company Minimum Gain during any Fiscal Year, the minimum gain chargeback provisions described in Sections 1.704-2(f) and (g) of the Treasury Regulations will apply.

(b) *Member Minimum Gain Chargeback.* In the event there is a net decrease in Member Minimum Gain during any Fiscal Year, the partner minimum gain chargeback provisions described in Section 1.704-2(i) of the Treasury Regulations will apply.

(c) *Qualified Income Offset.* In the event a Member unexpectedly receives an adjustment, allocation or Distribution described in of Section 1.704-1(b)(2)(ii)(d)(4), (5) or (6) of the Treasury Regulations, which adjustment, allocation or Distribution creates or increases a deficit balance in that Member's Capital Account, the "qualified income offset" provisions described in Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations will apply.

(i) *Nonrecourse Deductions.* Nonrecourse Deductions will be allocated in accordance with and as required in the Treasury Regulations.

(ii) *Member Nonrecourse Deductions.* Member Nonrecourse Deductions will be allocated to the Members as required in Section 1.704-2(i)(1) of the Treasury Regulation.

(iii) *Intention.* The special allocations in this Section 5.05 are intended to comply with certain requirements of the Treasury Regulations and will be interpreted consistently. It is the intent of the Members that any special allocation pursuant to this Section will be offset with other special allocations pursuant to this Section. Accordingly, special allocations of Company income, gain, loss or deduction will be made in such manner so that, in the reasonable determination of the Manager, taking into account likely future allocations under this Section, after those allocations are made, each Member's Capital Account is, to the extent possible, equal to the Capital Account it would have been were this Section not part of this Agreement.

(d) *Recapture Items.* In the event that the Fund has taxable income in any Fiscal Year that is characterized as ordinary income under the recapture provisions of the Code, each Member's distributive share of taxable gain or loss from the sale of Company assets (to the extent possible) will include a proportionate share of this recapture income equal to that Member's share of prior cumulative depreciation deductions with respect to the assets which gave rise to the recapture income.

(e) *Tax Credits and Similar Items.* Allocations of tax credits, tax credit recapture, and any items related thereto will be allocated in those items as determined by the Manager considering the principles of Treasury Regulation Section 1.704-1(b)(4)(ii).

(f) *Consistent Treatment.* All items of income, gain, loss, deduction and credit of the Fund will be allocated among the Members for federal income tax purposes in a manner consistent with the allocation under this Section. Each Member is aware of the income tax consequences of the allocations made by this Agreement and hereby agrees to be bound by the provisions of this Agreement in reporting its share of Company income and loss for income tax purposes. No Member will report on its tax return any transaction by the Company, any amount allocated or distributed from the Company or contributed to the Company inconsistently with the treatment reported (or to be reported) by the Company on its tax return nor take a position for tax purposes that is inconsistent with the position taken by the Company.

(g) *Modifications to Preserve Underlying Economic Objectives.* If, in the opinion of counsel or other advisor to the Company, there is a change in the Federal income tax law (including the Code as well as the Treasury Regulations, rulings, and administrative practices thereunder) which makes modifying the allocation provisions of this Section necessary or prudent to preserve the underlying economic objectives of the Members as reflected in this Agreement, the Manager will make the minimum modification necessary to achieve that purpose.

**Section 5.06 Allocation of Excess Nonrecourse Liabilities.** "Excess nonrecourse liabilities" of the Company as used in Section 1.752-3(a)(3) of the Treasury Regulations will first be allocated among the Member pursuant to the "additional method" described in that section and then in accordance with the manner in which the Manager expects the nonrecourse deductions allocable to those liabilities will be allocated.

**Section 5.07 Allocations in Respect of Transferred Membership Interests.** In the event of a Transfer of Membership Interests during any Fiscal Year made in compliance with the provisions of ARTICLE VIII, Net Income, Net Losses, and other items of income, gain, loss, and deduction of the

Company attributable to such Membership Interests for such Fiscal Year shall be determined using the interim closing of the books method.

## ARTICLE VI DISTRIBUTIONS

**Section 6.01 General Reserve for Operations.** Generally, the Company will first use available assets and cash to repay outstanding debts, obligations, and Operating Expenses of the Project prior to making any distributions. The Company shall also maintain a sufficient reserve for anticipated and projected expenses, such sufficiency to be determined by the Manager in its sole discretion.

**Section 6.02 Preferred Return.** Pursuant to the distribution order outlined in Section 6.03 below, the Company shall provide the Preferred Return at a rate equal to the Preferred Return Rate for each Class, respectively, on each Member's Unrecovered Capital as a distribution, understanding that the Preferred Return is calculated at a different rate for each Membership Class. The Preferred Return shall be cumulative, non-compounded, and shall begin to accrue for each Member's Capital Contributions on the date such Member provides such Capital Contributions. The distribution/payment of the Preferred Return shall not be considered Recovered Capital Contributions. Each Member may, at its election and notice to the Company, receive the Preferred Distribution (when available) directly or, with the Manager's express consent, elect to have it paid to a reserve account in its name in the books of the Company, which in turn shall be utilized and applied as additional Capital Contributions for such Member (a "re-investment").

**Section 6.03 Distributions.** From time to time, the Manager shall determine in its sole but reasonable judgement to what extent the Company's cash on hand exceeds its current and anticipated needs, including, without limitation, items outlined in Section 6.01 above. If such an excess exists ("**Distributable Cash**"), when it makes a distribution, the Manager shall do so in the following order:

(a) **First**, 100% to all Members on a pro-rata basis in accordance with their Unrecovered Capital Contributions (pari passu) up to an amount equal to their accrued and unpaid Preferred Return; then

(b) **Second**, and upon duly received Withdrawal Notices, 100% to all the Withdrawing Members (if any) on a pro rata basis (pari passu) in accordance with the Capital Contributions of the Members until all Withdrawing Members have received distributions equaling their total Withdrawal Amounts; then

(c) **Third and finally**, all remaining cash (or cash equivalent), if any (though none anticipated), shall be distributed to the Manager, in full.

**Section 6.04 Distribution Rules.** Notwithstanding the foregoing of Section 6.03, distributions required to be made to Withdrawing Members, if any as may occur from time to time, may be made **outside** of the distribution priority mandated in Section 6.03 above, at the discretion of the Manager. In other words, and for the avoidance of any doubt, distributions made pursuant to Section 4.04 of this Agreement (withdrawals), may be made by the Manager *without* regard to the distribution priority provided for above, and *without* the Manager being in violation or breach of the same. Distributions under this Section 6.04 will take priority over all other distributions provided above in Section 6.03, and further, the above of Section 6.03 shall be superseded by the requirements of Section 3.05

**Section 6.05 No Obligation.** Nothing in this Agreement shall obligate the Manager to cause a distribution to any Member, though the distributions herein are currently anticipated. Notwithstanding any

provision to the contrary contained in this Agreement, the Company shall not make any distribution to the Members if such distribution would violate the DLLCA or other Applicable Law. The Manager may pay out Distributable Cash to Members in chronological order of their subscription date; that is, distributions may be paid to Members in order of the date they became a Member.

**Section 6.06 Tax Withholding; Withholding Advances.** The Company shall not withhold or advance tax payments to the Members, except if required by law (usually in the case of a Non-U.S. Member); each Member shall be solely responsible for its own tax liabilities arising out of or accrued in connection with this Agreement or its Membership Interest in Company.

**Section 6.07 No Creditor Status.** A Member will not have the status of, and is not entitled to the remedies available to, a creditor of the Company with regard to Distributions that a Member may be entitled to receive pursuant to this Agreement, DLLCA, or the Uniform Commercial Code, as amended and in effect in any given state.

## **ARTICLE VII MANAGEMENT**

**Section 7.01 Management of the Company; No Member Participation.** The business and affairs of the Company shall be managed, operated, and controlled by and under the sole direction of the Manager, who shall be permitted to act alone on behalf of the Company. The Manager shall have, and is hereby granted, sole, full, and complete power, authority, and discretion for, on behalf of, and in the name of the Company, to take such actions as it may deem necessary or advisable to carry out any and all of the objectives and purposes of the Company, including with respect to the Project, to the full extent permissible under the law. Except as expressly provided otherwise in this Agreement or by operation of law, the Members shall have no rights or powers to take part in the management and control of the Company and its business and affairs and shall have no power or authority to act for or on behalf of the Company, or bind the Company under agreements or arrangements with third parties. For the avoidance of any doubt, the Members shall have the right to vote only on matters explicitly set forth on this Agreement. *For the avoidance of any doubt, it is expressly the intention of the Members to be “silent” investors into the Company and to take no material part in the management of the Company, the Project, or the Project Loans, unless expressly provided for in this Agreement.* The acquisition or disposition of assets from or to an Affiliate of the Manager or its principals shall not, by itself, constitute the basis for an impermissible conflict or breach of fiduciary duties by the Manager and shall not void the transaction from or to such Affiliate nor the terms of such transaction.

**Section 7.02 Number and Term of Managers.**

- (a) The Company shall be managed by one Manager, who is defined in Article 1.
- (b) Each Manager, including the initial Manager named in this Agreement, shall serve until a successor has been elected and qualified per the terms herein or until the Manager’s earlier death, resignation, or removal.

**Section 7.03 Removal; Resignation, Vacancies.**

- (a) The Manager may not be removed except by a) its own voluntary resignation hereunder or b) for Cause but only upon the affirmative vote of the holders of at least a Super Majority of Membership Interests following such Cause event (each a “**Manager Removal Event**”). The Manager may resign as Manager at any time by giving ten (10) days’ written notice

to the Company. Any such resignation shall be effective upon receipt thereof unless it is specified to be effective at some other time or upon the occurrence of some other event. The Company's acceptance of a resignation shall not be necessary to make it effective.

(b) Upon the occurrence of a Manager Removal Event, the Manager Designate shall access Schedule I and shall call for a meeting of all the Members pursuant to Section 4.01 of this Agreement for the purpose of voting to remove the Manager for Cause, and thereafter (including upon the Manager's resignation), to nominate and elect a replacement Manager. The Manager Designate shall have no authority to vote for, speak on behalf of, or otherwise participate as, the Manager, *except* to chair the meeting of the Members consistent with the terms of this Agreement, to carry out the approved actions of the Members at such meeting, and to perform secretarial functions and to record the minutes of such meeting for the Company's record books. The Manager Designate shall not be liable for any actions of any Member or Manager, or for the debts, obligations, liabilities, or other matters of the Company, it being understood that in this capacity the Manager Designate is, and shall always be, purely a procedural functionary.

(c) If the Manager resigns or is removed for any reason, the holders of at least a Super Majority of Membership Interests shall elect a successor Manager.

**Section 7.04 Fees and Reimbursement of Manager and its Principals/Affiliates.** The Manager will **not** receive any fees, whether management, advisory, or otherwise, in connection with its service as a manager of the Company.

**Section 7.05 Officers.** The Manager may appoint individuals as officers of the Company (the "Officers") as it deems necessary or desirable to carry on the business of the Company and the Manager may delegate to the Officers such power and authority as the Manager deems advisable. No Officer need be a Member of the Company. Any individual may hold two or more offices of the Company. Each Officer shall hold office until his successor is designated by the Manager or until his earlier death, resignation, or removal. Any Officer may resign at any time upon written notice to the Manager. Any Officer may be removed by the Manager, with or without cause, at any time. A vacancy in any office occurring because of death, resignation, removal, or otherwise, may, but need not, be filled by the Manager.

**Section 7.06 No Personal Liability; Conflicts; Borrower and Project Loan Affiliation to Manager.**

(a) Except as otherwise provided in the DLLCA, by Applicable Law, or expressly in this Agreement, the Manager will not be obligated personally for any debt, obligation, or liability of the Company, whether arising in contract, tort, or otherwise, including a debt, obligation, or liability under a judgment, decree, or order of a court, solely by reason of being or acting as a Manager.

(b) The Manager shall also not be obligated to devote all of its time or business efforts to the affairs of the Company, provided, however, that the Manager shall devote such time, effort, and skill as it determines in its sole discretion may be necessary or appropriate for the proper operation of the Company. The Manager, its Affiliates, and its principals may have other business interests and may engage in other activities in addition to those related to the Company, and the Manager and their Affiliates and principals may engage in or possess any interest in other business ventures of any kind, nature, or description, independently or with others, whether such ventures are competitive with the Company or otherwise, including the Borrowers, and neither the Company nor any Member shall have the right to share or participate in such other investments or activities or to the income delivered therefrom, solely by virtue of this Agreement.

(c) It is expressly understood and acknowledged by each Member that the Borrowers, in almost every case, are affiliate entities with the Manager, in that the principal of the Manager is also a principal and majority owner/operator of the Borrower(s), and thereby, the principal of the Manager will always directly benefit from the making of the Project Loans to the Borrowers. Acknowledging this conflict, all Members expressly agree that such affiliation, and the making of such Project Loans shall not, by itself, be construed as, or operate as, an impermissible conflict, and that the making of such Project Loans shall not be voidable solely on this basis. All Members hereby expressly and affirmatively waive claims against the Manager and its principals with respect to any damages or injuries arising out of this conflict as outlined in this Section 7.07(c) and irrevocably consent to the making of such Project Loans on such basis. Other than the terms contained in the Master Credit Agreement (including any revisions or amendments thereof) and any Project Loan documents in connection therewith, the principal of the Manager shall have no obligation to share or otherwise waive any benefit it receives thereof.

## **ARTICLE VIII TRANSFER**

### **Section 8.01 General Restrictions on Transfer.**

(a) Except as otherwise expressly provided in this Article, no Member may Transfer all or any portion of its Membership Interests without (i) providing the Manager with a written opinion of counsel regarding the compliance of the proposed Transfer with all applicable securities laws and (ii) obtaining prior written approval of the Manager, which approval may be withheld, conditioned, or delayed in the Manager's sole and absolute discretion. Any attempted Transfer in violation of this Article will be null and void *ab initio*, and will not bind the Company.

(b) Notwithstanding the foregoing, the Manager may Transfer its Membership Interests to an Affiliate, *provided* that the principals of the Manager or Organizer, as applicable, continue to control the Interests.

**Section 8.02 Further Restrictions on Transfers.** Notwithstanding anything in this Agreement to the contrary, in addition to any other restrictions on a Transfer of a Membership Interest, no Membership Interest may be Transferred (a) without compliance with the Securities Act and any other applicable securities or "blue sky" laws, (b) if, in the determination of the Manager, the Transfer could result in the Company not being classified as a partnership for federal income tax purposes, (c) if, in the determination of the Manager, the Transfer could cause the Company to become subject to the Investment Company Act of 1940, as amended (the "**Investment Company Act**"), (d) if, in the determination of the Manager, the Transfer would cause a termination of the Company under any applicable law, or (e) the transferee is a minor or incompetent.

**Section 8.03 Permitted Transfers.** Except for the requirement to receive approval from the Manager, all other restrictions upon Transfer specified in Section 8.1 will not apply to any Transfer (a) by a Member who is an individual to (i) that Member's spouse, ex-spouse or domestic partner; (ii) that Member's or Member's spouse's lineal descendants; (iii) any family limited partnership or other entity controlled (which for this purpose shall require that the Member own more than 50% of the equity securities of that entity) by that Member, (iv) a trust established solely for the benefit of that Member, Member's spouse or lineal descendants without regard to age, and (v) from any trust to the beneficiaries of that trust; or (b) by a Member to another Member (each transferee, a "**Permitted Transferee**"); *provided, however*, that the Permitted Transferee (other than a Person who is already a Member) pursuant to the foregoing clauses (a)

and (b) agrees in writing to become a party to this Agreement and to be subject to the terms and conditions of this Agreement. Notwithstanding the foregoing in this Section 8.3, any permitted Transfer must be approved by the Manager, which approval will not be unreasonably withheld.

**Section 8.04 Admission of Transferee as a Member.** A Transfer permitted by the Manager will only transfer the rights of an assignee as set forth in Section 8.6 unless the transferee is a Member or is admitted as a Member.

**Section 8.05 Involuntary Transfer of Interests.** In the event of any involuntary transfer of Membership Interests to a Person, that Person will have only the rights of an assignee set forth in Section 8.6 with respect to those Membership Interests.

**Section 8.06 Rights of an Assignee.** An assignee has no right to vote, receive information concerning the business and affairs of the Company and is entitled only to receive Distributions and allocations attributable to the Membership Interest held by the assignee as determined by the Manager and in accordance with this Agreement.

**Section 8.07 Enforcement.** The restrictions on Transfer contained in this Agreement are an essential element in the ownership of a Membership Interest. Upon application to any court of competent jurisdiction, a Manager will be entitled to a decree against any Person violating or about to violate those restrictions, requiring their specific performance, including those prohibiting a Transfer of all or a portion of its Interests.

**Section 8.08 Death or Disability of a Member.** Upon the Disability or death of a Member, that Member will cease to be a member of the Company and that disabled Member or the legal representative of that deceased Member's estate (or the trustee of a living trust established by that deceased Member if that Member's Membership Interests have been transferred to a trust) will have the rights only of an assignee.

**Section 8.09 Compulsory Redemption.** The Manager may, by notice to any Member, force the sale of all or a portion of that Member's Membership Interest on terms as the Manager determines to be fair and reasonable, or take other action as it determines to be fair and reasonable in the event that the Manager determines or has reason to believe that: (i) that Member has attempted to effect a Transfer of, or a Transfer has occurred with respect to, any portion of that Member's Membership Interest in violation of this Agreement; (ii) continued ownership of that Membership Interest by that Member is reasonably likely to cause the Fund to be in violation of securities laws of the United States or any other relevant jurisdiction or the rules of any self-regulatory organization applicable to the Manager, Organizer or its Affiliates; (iii) continued ownership of that Membership Interest by that Member may be harmful to the business or reputation of the Company or the Manager or the Organizer, or may subject the Fund or any Members to a risk of adverse tax or other fiscal consequence, including adverse consequences under ERISA; (iv) any of the representations or warranties made by that Member under this agreement or under any Subscription Agreement signed by that Member in connection with the acquisition of an Interest was not true when made or has ceased to be true; (v) any portion of that Member's Interest has vested in any other Person by reason of the bankruptcy, dissolution, incompetency or death of that Member; or (vi) it would not be in the best interests of the Company, as determined by the Manager, for that Member to continue ownership of its Membership Interest. The Company shall indemnify Managers for any costs and expenses related to the violations of such Act by Member.

## ARTICLE IX EXCULPATION AND INDEMNIFICATION



### **Section 9.01    Exculpation of Covered Persons.**

(a)     **Covered Persons.** As used herein, the term “**Covered Person**” shall mean (i) each Member (ii) each manager, officer, director, principal, shareholder, partner, Affiliate, employee, agent, or Representative of each Member, and each of their Affiliates; and (iii) each Manager (including such Manager’s principals, agents, officers, members, and managers), Officer, employee, agent, or Representative of the Company.

(b)     **Standard of Care.** No Covered Person shall be liable to the Company or any other Covered Person for any loss, damage, or claim incurred by reason of any action taken or omitted to be taken by such Covered Person in good faith reliance on the provisions of this Agreement, *so long as* such action or omission does not constitute Cause by such Covered Person.

(c)     **Good Faith Reliance.** A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports, or statements (including financial statements and information, opinions, reports, or statements as to the value or amount of the assets, liabilities, Net Income, or Net Losses of the Company or any facts pertinent to the existence and amount of assets from which distributions might properly be paid) of the following Persons or groups: (i) another Member; (ii) one or more Officers or employees of the Company; (iii) any attorney, independent accountant, appraiser, or other expert or professional employed or engaged by or on behalf of the Company; or (iv) any other Person selected in good faith by or on behalf of the Company, in each case as to matters that such relying Person reasonably believes to be within such other Person’s professional or expert competence. The preceding sentence shall in no way limit any Person’s right to rely on information to the extent provided in the DLLCA.

### **Section 9.02    Liabilities and Duties of Covered Persons.**

(a)     **Limitation of Liability.** This Agreement is not intended to, and does not, create or impose any fiduciary duty on any Covered Person *except* common law fiduciary duties of care and loyalty on the Manager as they are enforceable against the Manager under Applicable Law. Furthermore, and except as expressly outlined in the preceding sentence, each of the Members and the Company hereby waives any and all other fiduciary duties that, absent such waiver, may be implied or statutorily created by Applicable Law, and in doing so, acknowledges and agrees that the duties and obligations of each Covered Person to each other and to the Company are only as expressly set forth in this Agreement. The provisions of this Agreement, to the extent that they restrict the duties and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of such Covered Person.

(b)     **Duties.** Whenever in this Agreement a Covered Person is permitted or required to make a decision (including a decision that is in such Covered Person’s “discretion” or under a grant of similar authority or latitude), the Covered Person shall be entitled to consider all factors as such Covered Person desires or considers relevant and in keeping with 9.02(a) above. Whenever in this Agreement a Covered Person is permitted or required to make a decision in such Covered Person’s “good faith,” the Covered Person shall act under such express standard and shall not be subject to any other or different standard imposed by this Agreement or any other Applicable Law.

### **Section 9.03    Indemnification.**

(a) **Indemnification.** To the fullest extent permitted by the DLLCA, as the same now exists or may hereafter be amended, substituted or replaced (but, in the case of any such amendment, substitution, or replacement, only to the extent that such amendment, substitution, or replacement permits the Company to provide broader indemnification rights than the DLLCA permitted the Company to provide prior to such amendment, substitution, or replacement), the Company shall indemnify, hold harmless, defend, pay, and reimburse any Covered Person against any and all losses, claims, damages, judgments, fines, or liabilities, including reasonable legal fees or other expenses incurred in investigating or defending against such losses, claims, damages, judgments, fines, or liabilities, and any amounts expended in settlement of any claims (collectively, “**Losses**”) to which such Covered Person may become subject by reason of:

(i) any act or omission or alleged act or omission performed or omitted to be performed on behalf of the Company, any Member, or any direct or indirect Subsidiary of the foregoing in connection with the business of the Company; or

(ii) such Covered Person being or acting in connection with the business of the Company as a member, shareholder, Affiliate, manager, director, officer, employee, or agent of the Company, any Member, or any of their respective Affiliates, or that such Covered Person is or was serving at the request of the Company as a member, manager, director, officer, employee, or agent of any Person including the Company;

provided, that (x) such Covered Person acted in good faith and in a manner believed by such Covered Person to be in, or not opposed to, the best interests of the Company and, with respect to any criminal proceeding, had no reasonable cause to believe his conduct was unlawful, and (y) such Covered Person’s conduct did not constitute fraud or willful misconduct, in either case as determined by a final, nonappealable order of a court of competent jurisdiction. In connection with the foregoing, the termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Covered Person did not act in good faith or, with respect to any criminal proceeding, had reasonable cause to believe that such Covered Person’s conduct was unlawful, or that the Covered Person’s conduct constituted fraud or willful misconduct.

(b) **Control of Defense.** Upon a Covered Person’s discovery of any claim, lawsuit, or other proceeding relating to any Losses for which such Covered Person may be indemnified pursuant to this Section 9.03, the Covered Person shall give prompt written notice to the Company of such claim, lawsuit, or proceeding, provided, that the failure of the Covered Person to provide such notice shall not relieve the Company of any indemnification obligation under this Section 9.03, unless the Company shall have been materially prejudiced thereby. Subject to the approval of the disinterested Members, the Company shall be entitled to participate in or assume the defense of any such claim, lawsuit, or proceeding at its own expense. After notice from the Company to the Covered Person of its election to assume the defense of any such claim, lawsuit, or proceeding, the Company shall not be liable to the Covered Person under this Agreement or otherwise for any legal or other expenses subsequently incurred by the Covered Person in connection with investigating, preparing to defend, or defending any such claim, lawsuit, or other proceeding. If the Company does not elect (or fails to elect) to assume the defense of any such claim, lawsuit, or proceeding, the Covered Person shall have the right to assume the defense of such claim, lawsuit, or proceeding as it deems appropriate, but it shall not settle any such claim, lawsuit, or proceeding without the consent of the Company (which consent shall not be unreasonably withheld, conditioned, or delayed).

(c) **Reimbursement.** The Company may promptly reimburse (and/or advance to the extent reasonably required) each Covered Person for reasonable legal or other expenses (as incurred) of such Covered Person in connection with investigating, preparing to defend, or defending any claim, lawsuit, or other proceeding relating to any Losses for which such Covered Person may be indemnified pursuant to this Section 9.03; provided, that if it is finally judicially determined that such Covered Person is not entitled to the indemnification provided by this Section 9.03, then such Covered Person shall promptly reimburse the Company for any reimbursed or advanced expenses.

(d) **Entitlement to Indemnity.** The indemnification provided by this Section 9.03 shall not be deemed exclusive of any other rights to indemnification to which those seeking indemnification may be entitled under any agreement or otherwise. The provisions of this Section 9.03 shall continue to afford protection to each Covered Person regardless of whether such Covered Person remains in the position or capacity pursuant to which such Covered Person became entitled to indemnification under this Section 9.03 and shall inure to the benefit of the executors, administrators, legatees, and distributees of such Covered Person.

(e) **Insurance.** To the extent available on commercially reasonable terms, the Company may purchase, at its expense, insurance to cover Losses covered by the foregoing indemnification provisions and to otherwise cover Losses for any breach or alleged breach by any Covered Person of such Covered Person's duties in such amount and with such deductibles as the Manager may reasonably determine; provided, that the failure to obtain such insurance shall not affect the right to indemnification of any Covered Person under the indemnification provisions contained herein, including the right to be reimbursed or advanced expenses or otherwise indemnified for Losses hereunder. If any Covered Person recovers any amounts in respect of any Losses from any insurance coverage, then such Covered Person shall, to the extent that such recovery is duplicative, reimburse the Company for any amounts previously paid to such Covered Person by the Company in respect of such Losses.

(f) **Funding of Indemnification Obligation.** Notwithstanding anything contained herein to the contrary, any indemnity by the Company relating to the matters covered in this Section 9.03 shall be provided out of and to the extent of Company assets only, and no Member (unless such Member otherwise agrees in writing) shall have personal liability on account thereof or shall be required to make additional Capital Contributions to help satisfy such indemnity by the Company.

(g) **Savings Clause.** If this Section 9.03 or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Company shall nevertheless indemnify and hold harmless each Covered Person pursuant to this Section 9.03 to the fullest extent permitted by any applicable portion of this Section 9.03 that shall not have been invalidated and to the fullest extent permitted by Applicable Law.

(h) **Amendment.** The provisions of this Section 9.03 shall be a contract between the Company, on the one hand, and each Covered Person who served in such capacity at any time while this Section 9.03 is in effect, on the other hand, pursuant to which the Company and each such Covered Person intend to be legally bound. No amendment, modification, or repeal of this Section 9.03 that adversely affects the rights of a Covered Person to indemnification for Losses incurred or relating to a state of facts existing prior to such amendment, modification or repeal shall apply in such a way as to eliminate or reduce such Covered Person's entitlement to indemnification for such Losses without the Covered Person's prior written consent.

**Section 9.04 Survival.** The provisions of this Article shall survive the dissolution, liquidation, winding up, and termination of the Company.

## **ARTICLE X ACCOUNTING; TAX MATTERS**

**Section 10.01 Financial Statements and Reports.** The Company shall provide quarterly updates to each Member regarding each Member's Capital Account status, such quarterly reports to be prepared and distributed as soon as reasonably practical following the end of each fiscal quarter.

**Section 10.02 Inspection Rights.** Upon reasonable notice from a Member, and subject to the restrictive covenants and terms of Section 12.03, the Company shall afford each Member and its Representatives, once per fiscal year, access during normal business hours to the corporate, financial, and similar records, reports, and documents of the Company, including all books and records, minutes of proceedings, reports of operations, reports of adverse developments, and to permit each Member and its Representatives to examine such documents and make copies thereof, provided, however, that a) internal communications between the Manager and another Member and details and confidential information regarding another Member may not inspected and b) the cost associated with an inspection shall be borne by the Member making the request.

**Section 10.03 Income Tax Status.** It is the intent of the Company and the Members that the Company shall be treated as a partnership for U.S., federal, state, and local income tax purposes. Neither the Company nor any Member shall make an election for the Company to be classified as other than a partnership pursuant to Treasury Regulations Section 301.7701-3.

### **Section 10.04 Tax Matters Representative.**

(a) **Appointment.** The Members hereby appoint the Manager as "partnership representative" as provided in Code Section 6223(a) (the "**Tax Matters Representative**"). The Tax Matters Representative may not be removed, but may voluntarily resign, and shall resign if it is no longer a Member. In the event of the resignation of the Tax Matters Representative, Members holding Super Majority of the Membership Interests shall select a replacement Tax Matters Representative.

(b) **Tax Examinations and Audits.** The Tax Matters Representative is authorized and required to represent the Company (at the Company's expense) in connection with all examinations of the Company's affairs by Taxing Authorities, including resulting administrative and judicial proceedings, and to expend Company funds for professional services and costs associated therewith. The Tax Matters Representative shall have sole authority to act on behalf of the Company in any such examinations and any resulting administrative or judicial proceedings, and shall have sole discretion to determine whether the Company (either on its own behalf or on behalf of the Members) will contest or continue to contest any tax deficiencies assessed or proposed to be assessed by any Taxing Authority.

(c) **US Federal Tax Proceedings.** Unless otherwise approved by the Members, the Tax Matters Representative will cause the Company to annually elect out of the partnership audit procedures set forth in Subchapter C of Chapter 63 of the Code (the "**Revised Partnership Audit Rules**") to the extent permitted by applicable law and regulations. For any year in which applicable law and regulations do not permit the Company to elect out of the Revised Partnership Audit Rules, then within forty-five (45) days of any notice of final partnership adjustment, the Tax Matters Representative will cause the Company to elect the alternative procedure under Code Section 6226,

and furnish to the Internal Revenue Service and each Member during the year or years to which the notice of final partnership adjustment relates a statement of the Member's share of any adjustment set forth in the notice of final partnership adjustment.

(d) **Tax Deficiencies.** Each Member agrees that such Member shall not treat any Company item inconsistently on such Member's federal, state, foreign or other income tax return with the treatment of the item on the Company's return. Any deficiency for taxes imposed on any Member (including penalties, additions to tax or interest imposed with respect to such taxes and taxes imposed pursuant to Code Section 6226) shall be paid by such Member and if required to be paid (and actually paid) by the Company, will be recoverable from such Member as provided in this Agreement.

(e) **Section 754 Election.** The Tax Matters Representative may make an election under Code Section 754, if requested in writing by another Member.

(f) **Indemnification.** The Company shall defend, indemnify, and hold harmless the Tax Matters Representative against any and all liabilities sustained as a result of any act or decision concerning Company tax matters and within the scope of such Member's responsibilities as Tax Matters Representative, so long as such act or decision was done or made in good faith and does not constitute gross negligence or willful misconduct.

#### **Section 10.05 Tax Returns.**

(a) At the expense of the Manager, the Manager (or any Officer that it may designate) shall cause the preparation and timely filing (including extensions) of all tax returns required to be filed by the Company pursuant to the Code as well as all other required tax returns in each jurisdiction in which the Company owns property or does business. As soon as reasonably possible after the end of each Fiscal Year but in no case later than the last day of March of each Fiscal Year, the Manager or designated Officer will cause to be delivered to each Person who was a Member at any time during such Fiscal Year, IRS Schedule K-1 to Form 1065 and such other information with respect to the Company as may be necessary for the preparation of such Person's federal, state, and local income tax returns for such Fiscal Year, provided, however, that the Manager may elect to file an extension of such tax returns, in which case Schedule K-1's will be delayed to each Member beyond the last day of March.

(b) The Member understands that the Company and the Manager expect to deliver all tax return information, including Schedule K-1s (each, a "**K-1**") to the Members by either electronic mail or some other form of electronic delivery, and accordingly, each Member hereby expressly understands, consents to, and acknowledges such electronic delivery of tax returns and related information as the only method of transmission, unless the Member expressly, in writing, informs the Manager of its request for paper copies of the same.

**Section 10.06 Company Funds.** The Manager shall cause the Company to open and maintain a bank account at an FDIC insured banking institution in the United States. However, all Members acknowledge, understand, and agree that the Manager cannot and will not guarantee the safe deposit and keeping of all funds outside of reasonably due care, which generally entails ensuring correct receipts and deposits into the account(s) of the Company. The Manager and the Company are not responsible for the actions (or omissions) or events that occur with the banking institutions in which the Company's funds are deposited.

## ARTICLE XI DISSOLUTION; WINDING UP AND TERMINATION

**Section 11.01 Events Requiring Dissolution Winding Up.** The Company shall begin to wind up its business and affairs only upon the occurrence of any of the following events:

- (a) If determined by the Manager;
- (b) The occurrence of a nonwaivable event under the terms of the DLLCA which requires the Company to be terminated; or
- (c) The entry of a final, non-appealable judicial decree ordering winding up and termination under the applicable provisions of the DLLCA.

**Section 11.02 Effectiveness of Termination.** The Company shall begin to wind up its business and affairs as soon as reasonably practicable upon the occurrence of an event described in Section 11.01 (if such event has not been revoked or cancelled), but the Company shall not terminate until the winding up of the Company has been completed, the assets of the Company have been distributed as provided in Section 11.03, and the Certificate of Termination shall have been filed as provided in Section 11.04.

**Section 11.03 Liquidation.** If the Company is to be terminated pursuant to Section 11.01, the Company shall be liquidated and its business and affairs wound up in accordance with the DLLCA and the following provisions:

- (a) **Liquidator.** The Manager or other Person designated by the Manager shall act as liquidator to wind up the Company (the “**Liquidator**”). The Liquidator shall have full power and authority to sell, assign, and encumber any or all of the Company’s assets and to wind up and liquidate the affairs of the Company in an orderly and business-like manner.
- (b) **Accounting.** As promptly as possible after the event requiring winding up and again after final liquidation, the Liquidator shall cause a proper accounting to be made by a recognized firm of certified public accountants of the Company’s assets, liabilities, and operations through the last day of the calendar month in which such event occurs or the final liquidation is completed, as applicable.
- (c) **Notice.** The Liquidator shall deliver to each known claimant of the Company the notice required by the DLLCA.
- (d) **Distribution of Proceeds.** The Liquidator shall liquidate the assets of the Company and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of Applicable Law:
  - (i) First, to the payment of all of the Company’s debts and liabilities to its creditors (including Members, if applicable) and the expenses of liquidation (including sales commissions incident to any sales of assets of the Company);
  - (ii) Second, to the establishment of and additions to reserves that are determined by the Manager to be reasonably necessary for any contingent unforeseen liabilities or obligations of the Company; and

(iii) Third, in accordance with the distribution mechanism outlined in Section 6.03 of this Agreement, treating all Members as “Withdrawing Members”.

(e) **Discretion of Liquidator.** Notwithstanding the provisions of Section 11.03(d) that require the liquidation of the assets of the Company, but subject to the order of priorities set forth in Section 11.03(d), if upon winding up of the Company the Liquidator reasonably determines that an immediate sale of part or all of the Company’s assets would be impractical or could cause undue loss to the Members, the Liquidator may defer the liquidation of any assets except those necessary to satisfy Company liabilities and reserves, and may distribute to the Members, in lieu of cash, as tenants in common and in accordance with the provisions of Section 11.03(d), undivided interests in such Company assets as the Liquidator deems not suitable for liquidation. Any such distribution in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any agreements governing the operating of such properties at such time. For purposes of any such distribution, any property to be distributed will be valued at its Fair Market Value.

**Section 11.04 Certificate of Termination.** Upon completion of the distribution of the assets of the Company as provided in Section 11.03(d) hereof, the Manager shall execute and cause to be filed a Certificate of Termination in the State of Delaware and shall cause the cancellation of all qualifications and registrations of the Company as a foreign limited liability company in jurisdictions other than the State of Delaware and shall take such other actions as may be necessary to terminate the Company. Upon acceptance of the Certificate of Termination by the Delaware Secretary of State, the Company shall be terminated.

**Section 11.05 Survival of Rights, Duties, and Obligations.** Dissolution, liquidation, winding up, or termination of the Company for any reason shall not release any party from any Loss that at the time of such dissolution, liquidation, winding up, or termination already had accrued to any other party or thereafter may accrue in respect of any act or omission prior to such dissolution, liquidation, winding up, or termination. For the avoidance of doubt, none of the foregoing shall replace, diminish, or otherwise adversely affect any Member’s right to indemnification pursuant to Section 9.03.

**Section 11.06 Recourse for Claims.** Each Member shall look solely to the assets of the Company for all distributions with respect to the Company, such Member’s Capital Account, and such Member’s share of Net Income, Net Loss, and other items of income, gain, loss, and deduction, and shall have no recourse therefor (upon termination or otherwise) against the Liquidator, the Manager, or any other Member.

## **ARTICLE XII MISCELLANEOUS**

**Section 12.01 Expenses.** Except as otherwise expressly provided herein, all costs and expenses, including fees and disbursements of counsel, financial advisors, and accountants, incurred in connection with the preparation and execution of this Agreement by the Company, or any amendment or waiver hereof, and the transactions contemplated hereby shall be paid by the party incurring such costs and expenses. All expenses of the Fund, including Operating Expenses, shall be paid by the Manager.

**Section 12.02 Further Assurances.** In connection with this Agreement and the transactions contemplated hereby, the Company and each Member hereby agrees, at the request of the Company or any other Member, to execute and deliver such additional documents, instruments, conveyances, and assurances and to take such further actions as may be required to carry out the provisions hereof and give effect to the transactions contemplated hereby.

### **Section 12.03 Confidentiality.**

(a) Each Member acknowledges that during the term of this Agreement, it will have access to and become acquainted with trade secrets, proprietary information, and confidential information belonging to the Company and its Affiliates that are not generally known to the public, including, but not limited to, information concerning business plans, financial statements, and other information provided pursuant to this Agreement, operating practices and methods, expansion plans, strategic plans, marketing plans, contracts, customer lists, or other business documents that the Company treats as confidential, in any format whatsoever (including oral, written, electronic, or any other form or medium) (collectively, “**Confidential Information**”). In addition, each Member acknowledges that: (i) the Company has invested, and continues to invest, substantial time, expense, and specialized knowledge in developing its Confidential Information; (ii) the Confidential Information provides the Company with a competitive advantage over others in the marketplace; and (iii) the Company would be irreparably harmed if the Confidential Information were disclosed to competitors or made available to the public. Without limiting the applicability of any other agreement to which any Member is subject, no Member shall, directly or indirectly, disclose or use (other than solely for the purposes of such Member monitoring and analyzing its investment in the Company) at any time, including, without limitation, use for personal, commercial, or proprietary advantage or profit, any Confidential Information of which such Member is or becomes aware. Each Member in possession of Confidential Information shall take all appropriate steps to safeguard such information and to protect it against disclosure, misuse, espionage, loss, and theft.

(b) Notwithstanding the above of Section 12.03(a), if the Manager, in its sole but reasonable judgement, determines in the best interests of the Company and/or the Project that some Confidential Information should not be disclosed even to the Members, then the Manager may withhold such particular Confidential Information and elect not to disclose, make available, or otherwise share or distribute such Confidential Information to any of the Members, including pursuant to a Member’s rights of inspection.

(c) Nothing contained in Section 12.03(a) shall prevent any Member from disclosing Confidential Information: (i) upon the order of any court or administrative agency; (ii) upon the request or demand of any regulatory agency or authority having jurisdiction over such Member; (iii) to the extent compelled by legal process or required or requested pursuant to subpoena, interrogatories, or other discovery requests; (iv) to the extent necessary in connection with the exercise of any remedy hereunder; (v) to the other Members; (vi) to such Member’s Representatives who, in the reasonable judgment of such Member, need to know such Confidential Information and agree to be bound by the provisions of this Section 12.03 as if a Member; or (vii) to any potential Permitted Transferee in connection with a proposed Transfer of Membership Interests from such Member, as long as such potential Permitted Transferee agrees in writing to be bound by the provisions of this Section 12.03 as if a Member before receiving such Confidential Information; provided, that in the case of clause (i), (ii), or (iii), such Member shall notify the Company and other Members of the proposed disclosure as far in advance of such disclosure as practicable (but in no event make any such disclosure before notifying the Company and other Members) and use reasonable efforts to ensure that any Confidential Information so disclosed is accorded confidential treatment satisfactory to the Company, when and if available.

(d) The restrictions of Section 12.03(a) shall not apply to Confidential Information that: (i) is or becomes generally available to the public other than as a result of a disclosure by a Member in violation of this Agreement; (ii) is or has been independently developed or conceived by such Member without use of Confidential Information; or (iii) becomes available to such



Member or any of its Representatives on a non-confidential basis from a source other than the Company, the other Members, or any of their respective Representatives, provided, that such source is not known by the receiving Member to be bound by a confidentiality agreement regarding the Company.

(e) The obligations of each Member under this Section 12.03 shall survive (i) the termination, dissolution, liquidation, and winding up of the Company; (ii) the withdrawal of such Member from the Company; and (iii) such Member's Transfer of its Membership Interests.

**Section 12.04 Notices.** All notices, requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given:

- (a) when delivered by hand (with written confirmation of receipt);
- (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested);
- (c) when delivered by Electronic Transmission to a confirmed e-mail address to such Member, upon confirmation of delivery; or
- (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid.

Such communications must be sent to the respective parties at the following addresses (or at such other address for a party as shall be specified in a notice given in accordance with this Section 12.04):

**If to the Company:** 1210 W Clay St, Suite 8  
Houston, TX 77019  
Email: operations@hawthornecapital.com  
Attention: Hawthorne Income Fund Manager, LLC, the Manager

with a copy to: **M&W Law, PLLC**  
5001 LBJ Fwy, Suite 830  
Dallas, TX 75244  
Email: adnan@mwfirm.com  
Attention: Adnan Merchant

**If to the Manager:** **Hawthorne Income Fund Manager, LLC**  
1210 W Clay St, Suite 8  
Houston, TX 77019  
Email: operations@hawthornecapital.com  
Attention: Douglas Lee Smith

with a copy to: **M&W Law, PLLC**  
5001 LBJ Fwy, Suite 830  
Dallas, TX 75244  
Email: adnan@mwfirm.com  
Attention: Adnan Merchant

**If to a Member:**

To the Member's respective mailing address as set forth on the Member's Signature Page.

**Section 12.05 Headings.** The headings in this Agreement are inserted for convenience or reference only and are in no way intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision of this Agreement.

**Section 12.06 Severability.** If any term or provision of this Agreement is held to be invalid, illegal, or unenforceable under Applicable Law in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Except as provided in Section 9.03(g), upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

**Section 12.07 Entire Agreement.** This Agreement, together with the Certificate of Formation and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter.

**Section 12.08 Successors and Assigns.** Subject to the restrictions on Transfers set forth herein, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

**Section 12.09 No Third-Party Beneficiaries.** Except as provided in this Agreement which shall be for the benefit of and enforceable by Covered Persons as described therein, this Agreement is for the sole benefit of the parties hereto (and their respective heirs, executors, administrators, successors, and assigns) and nothing herein, express or implied, is intended to or shall confer upon any other Person, including any creditor of the Company, any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

**Section 12.10 Amendment.** The Certificate of Formation and this Agreement may be amended, supplemented, or restated by the Manager, in its sole discretion, provided, however, that no amendment may be made to Sections 5.01 or 6.03 that adversely impacts the economic rights of any Member hereunder without the consent of the holders of at least a Majority of Membership Interests. Any amendment validly made pursuant to this Section, whether by the Manager alone or as required upon the consent of the Members, shall be binding upon the Company and all Members.

**Section 12.11 Power of Attorney.**

(a) **Function of Power of Attorney.** Each Member, by its execution of this Agreement, hereby irrevocably makes, constitutes and appoints the Manager (referred to as the "**Attorney-in-Fact**"), as its true and lawful agent and attorney-in-fact, with full power of substitution and full power and authority in its name, place and stead, to make, execute, sign, acknowledge, swear to, record and file (i) this Agreement and any amendment to this Agreement that has been adopted as provided in this Agreement; (ii) the original Certificate of Formation and all amendments required or permitted by law or the provisions of this Agreement; (iii) all instruments or documents required to effect a transfer of Membership Interest; (iv) all certificates and other instruments deemed advisable by the Manager to carry out the provisions of this

Agreement, and applicable law or to permit the Fund to become or to continue as a limited liability company wherein the Members have limited liability in each jurisdiction where the Fund may be doing business; (v) all instruments that the Manager deems appropriate to reflect a change, modification or termination of this Agreement or the Fund in accordance with this Agreement including, the admission of additional Members or substituted members pursuant to the provisions of this Agreement, as applicable; (vi) all fictitious or assumed name certificates required or permitted to be filed on behalf of the Fund; (vii) all conveyances and other instruments or papers deemed advisable by the Manager including, those to effect the dissolution and termination of the Fund (including a Certificate of Cancellation ); (viii) all other agreements and instruments necessary or advisable to consummate any purchase or sale of the any Project Loans or the Project/Company as a whole; and (ix) all other instruments or papers that may be required or permitted by law to be filed on behalf of the Fund.

(b) **Additional Functions.** The foregoing power of attorney:

(i) is coupled with an interest, is irrevocable and will survive the subsequent death, disability or Incapacity of any Member or any subsequent power of attorney executed by a Member;

(ii) may be exercised by the Attorney, either by signing separately as attorney-in-fact for each Member or by a single signature of the Attorney, acting as attorney-in-fact for all of them;

(iii) will survive the delivery of an assignment by a Member of all or any portion of its Membership Interest; except that, where the assignee of all of that Member's Interest has been approved by the Manager for admission to the Fund, as a Substituted Member, the power of attorney of the assignor will survive the delivery of that assignment for the sole purpose of enabling the Attorney to execute, swear to, acknowledge and file any instrument necessary or appropriate to effect that substitution; and

(iv) is in addition to any power of attorney that may be delivered by a Member in accordance with its Subscription Agreement entered into in connection with its acquisition of Membership Interests.

(c) **Delivery of Power of Attorney.** Each Member must execute and deliver to the Manager within 5 days after receipt of the Manager's request, any further designations, powers-of-attorney and other instruments as the Manager reasonably deems necessary to carry out the terms of this Agreement.

**Section 12.12 Waiver.** No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach, or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

**Section 12.13 Governing Law.** All issues and questions concerning the application, construction, validity, interpretation, and enforcement of this Agreement shall be governed by and construed in accordance with the internal laws of the State of Delaware, without giving effect to any choice

or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the State of Delaware.

**Section 12.14 Submission to Jurisdiction.** The parties hereby agree that any suit, action, or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort, or otherwise, shall be brought in the federal courts of the United States of America or the courts of the State of Texas, in each case located in the City of Houston and County of Harris. Each of the parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action, or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action, or proceeding in any such court or that any such suit, action, or proceeding that is brought in any such court has been brought in an inconvenient forum. Service of process, summons, notice, or other document by registered mail to the address set forth in Section 12.04 shall be effective service of process for any suit, action, or other proceeding brought in any such court.

**Section 12.15 Waiver of Jury Trial; Dispute Resolution**

(a) **EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

(b) Any dispute, claim, or controversy arising out of or relating to this Agreement, including the negotiation, breach, validity or performance of the Agreement, the rights and obligations contemplated by the Agreement, any claims of fraud or fraud in the inducement, fiduciary duties imposed on the Manager, and any claims related to the scope or applicability of this agreement to arbitrate, shall be resolved at the request of any party to this Agreement through a two-step dispute resolution process administered by either JAMS or the American Arbitration Association at a location of the Manager's choosing, first as mediation, then followed if necessary, by final and binding arbitration administered by a panel of three (3) arbitrators (the "**Arbitrator**"). The fees and expenses of the Arbitrator shall be borne by the parties bringing the dispute advanced by them from time to time as required; provided that 1) the responding party shall escrow the same amount of fees pro rata, and 2) at the conclusion of the arbitration, the Arbitrator shall award costs and expenses (including the costs of the arbitration previously advanced and the reasonable fees and expenses of attorneys, accountants and other experts) to the prevailing party. No pre-arbitration discovery shall be permitted, except that the Arbitrator shall have the power in his sole discretion, on application by any party, to order pre-arbitration examination solely of those witnesses and documents that any other party intends to introduce in its case-in-chief at the arbitration hearing. The parties shall instruct the Arbitrator to render such arbitrator's award within thirty (30) calendar days following the conclusion of the arbitration hearing. The Arbitrator shall not be empowered to award to any party any damages of the type not permitted to be recovered under this Agreement in connection with any dispute between or among the parties arising out of or relating in any way to this Agreement or the transactions arising hereunder, and each party hereby irrevocably waives any right to recover such damages. If any claims are brought against the Manager asserting a breach of fiduciary duties, then, beginning immediately upon the filing of such arbitration matter and continuing until the resolution of such claims, the Manager shall be temporarily suspended in its role as Manager. In this regard, and upon notice of a filing, it shall convene a meeting of the

Members within thirty (30) days to elect a temporary Manager, and prior to the meeting, shall circulate contact information for each Member to the Members at-large. If the Manager is the prevailing party, it shall immediately and automatically resume its role as Manager, and if the Manager is not the prevailing party, the Members shall elect a replacement Manager forthwith.

**Section 12.16 Equitable Remedies.** Each party hereto acknowledges that a breach (and in some cases, a threatened breach) by such party of any of its obligations under this Agreement would give rise to irreparable harm to the other parties, for which monetary damages may not be an adequate remedy, and hereby agrees that in the event of a breach or a threatened breach by such party of any such obligations, each of the other parties hereto shall, in addition to any and all other rights and remedies that may be available to them in respect of such breach, be entitled to equitable relief, including a temporary restraining order, an injunction, specific performance, and any other relief that may be available from a court of competent jurisdiction (without any requirement to post bond).

**Section 12.17 Attorney's Fees.** In the event that any party hereto institutes any legal suit, action, or proceeding, including arbitration, against another party in respect of a matter arising out of or relating to this Agreement, the prevailing party in the suit, action, or proceeding shall be entitled to receive, in addition to all other damages to which it may be entitled, the costs incurred by such party in conducting the suit, action, or proceeding, including reasonable attorneys' fees and expenses and court costs.

**Section 12.18 Attorney Disclaimer.** All Members and Managers acknowledge that M&W Law, PLLC and its attorneys ("Company Counsel") have been engaged on behalf of the Company to draft this Agreement and other documents pertaining to the Company. Each Member individually understands that it has a right to its own independent legal counsel in connection with this Agreement and other documents drafted by Company Counsel. Each Member consents to the engagement of Company Counsel on behalf of the Company hereunder, *recognizing* that Company Counsel is also the counsel for the Sponsor and the Manager, but expressly not the Borrowers. All Members and Managers acknowledge that Company Counsel has not provided any opinions – legal, financial, investment or otherwise – with respect to the Project and the business terms of the Company.

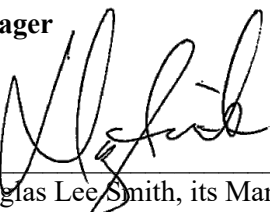
**Section 12.19 Remedies Cumulative.** The rights and remedies under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise, except to the extent expressly provided in Section 9.02 to the contrary.

**Section 12.20 Counterparts; Omnibus Signature; Electronic Signatures.** This Agreement is intended to be executed by omnibus signature, containing an execution to multiple documents simultaneously one of which is this Agreement, and which omnibus signature page, when executed, shall be as if attached to this Agreement as a validly binding execution of this Agreement by its signatory. In view thereof, this Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of the omnibus signature executing this Agreement delivered by facsimile, email, or other means of Electronic Transmission (including electronic signature and delivery methods such as DocuSign, Adobe Sign, etc.) shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. All Members and Managers hereby consent to execution of this Agreement via such methods and utilizing such instruments.

*This space intentionally left blank. Signature Page follow.*

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

**By: Hawthorne Income Fund Manager, LLC,  
the Manager**

By:   
\_\_\_\_\_  
Douglas Lee Smith, its Manager  
and Authorized Representative

**Member Joinder Signature Page**  
*for*  
**Hawthorne Income Fund, LLC**  
*A Delaware Limited Liability Company*

*This page acts as a placeholder only;  
Class A Member Joinder executed by Omnibus Signature  
incorporated by reference herein upon valid execution.*

## **Schedule I**

### **Schedule of Members**

*This Schedule is kept in confidence by the Manager.*