

**OPERATING AGREEMENT  
OF  
ELLIOT & 51<sup>ST</sup> STREET MANAGER, LLC**

THIS OPERATING AGREEMENT OF ELLIOT & 51<sup>ST</sup> STREET MANAGER, LLC (this “Agreement”), is entered into to be effective as of the 1st day of October, 2017 by and among Caliber Hospitality LLC, an Arizona limited liability company, as “Manager”, and those persons set forth on Exhibit “A” attached hereto and executing this Agreement as “Members”.

**SECTION 1  
DEFINITIONS**

**1.1 Defined Terms.** Unless otherwise stated, the terms used in this Agreement shall have the usual and customary meanings associated with their use, and shall be interpreted in the context of this Agreement. The following terms when used in this Agreement and capitalized shall have the meanings stated below:

**1.1.1 “Act”** means the Arizona Limited Liability Company Act, as set forth in Arizona Revised Statutes §§ 29-601, et seq., as amended from time to time (or any corresponding provisions of succeeding law).

**1.1.2 “Affiliate”** means, with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person, (ii) any Person owning or controlling greater than fifty percent (50%) of the outstanding voting securities of such Person, (iii) any officer, director or general partner of such Person, or (iv) any Person who is an officer, director, general partner, trustee or holder of ten percent or more of the voting securities of any Person described in clauses (i) through (iii) of this sentence.

**1.1.3 “Articles”** shall mean the Articles of Organization of the Company as adopted and amended from time-to-time by the Manager and filed with the Arizona Corporation Commission.

**1.1.4 “Bankruptcy”** means, with respect to any Person: (A) if such Person (i) makes an assignment for the benefit of creditors, (ii) files a voluntary petition in bankruptcy, (iii) is adjudged a bankrupt or insolvent, or has entered against it an order for relief, in any bankruptcy or insolvency proceedings, (iv) files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation or similar relief under any statute, law or regulation, (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against it in any proceeding of this nature, or (vi) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the Person or of all or any substantial part of its properties; or (B) if (x)120 days after the commencement of any proceeding against the Person seeking reorganization, arrangement, composition, readjustment, liquidation or similar relief under any statute, law or regulation, the proceeding has not been dismissed,

(y) without such Person's consent or acquiescence, within 90 days after the appointment of a trustee, receiver or liquidator of such Person or of all or any substantial part of its properties, the appointment is not vacated or stayed, or (z) within 90 days after the expiration of any such stay, the appointment is not vacated.

**1.1.5** "Capital Account" shall mean the individual accounts established and maintained pursuant to Section 3.2 of this Agreement. The Members acknowledge that a separate Capital Account will be established for each Member. The Capital Account of each Member shall be subject to adjustment as provided elsewhere in this Agreement.

**1.1.6** "Capital Contribution" means, with respect to any Member, the amount of money and the fair market value (as agreed by the Company and the contributing Member) of any property contributed to the Company with respect to the Interest in the Company held by such Member, whether directly or indirectly.

**1.1.7** "Code" means the Internal Revenue Code of 1986, as amended from time to time (or any corresponding provisions of succeeding law).

**1.1.8** "Company" means this limited liability company formed pursuant to this Agreement and the limited liability company continuing the business of this Company in the event of dissolution as herein provided.

**1.1.9** "Company Minimum Gain" has the meaning set forth in Regulations Section 1.704-2(b)(2).

**1.1.10** "Days" shall mean all calendar days exclusive of Saturdays, Sundays, and days which are legal holidays under the laws of the United States or the State of Arizona.

**1.1.11** "Disabled" and "Disability" shall mean, with respect to any Member:

**1.1.14.1** the appointment by a court of competent jurisdiction of a guardian or conservator to act for such party;

**1.1.14.2** a party hereto that:

(i) is "disabled," as such term is defined in the disability income policy maintained by the Company or such party at the time in question, and such disability continues for a consecutive period of 360 calendar days or for shorter periods aggregating three hundred sixty 360 calendar days (including sick leave days) during any 18 month period; or

(ii) if no disability income policy is maintained by the Company or such party, and such party is an employee of the Company, is found to be unable to fully perform substantially all material aspects of such party's duties as an employee of the Company on a regular and consistent basis for a consecutive period of 360 calendar days or for shorter periods aggregating

360 calendar days (including sick leave days), during any 18 month period;  
or

**1.1.14.3** for a period of 6 months or more:

- (i) is unaccountably absent;
- (ii) is being detained under duress; or
- (iii) is incarcerated by a government body.

If such party is a trust, this definition shall apply in the event of the death or Disability of the trustor/settlor of the trust who is involved in the day to day operation of the Company. If such party is an entity, this definition shall relate to death or Disability of the individual who is involved in the day-to-day operation of the Company.

**1.1.12** “Interest” shall mean the entire ownership interest of a Member in the Company at any particular time, including the right of such Member to any and all benefits to which a Member may be entitled as provided in this Agreement, together with the obligations of such Member to comply with all of the terms and provisions of this Agreement.

**1.1.13** “Majority in Interest” means any combination of Members owning more than 66% of the Percentage Interests held by all Members at that time. All references in this Agreement to a specified percentage of the Members shall mean any combination of Members collectively holding such specified percentage of the Percentage Interests then held by all Members at that time.

**1.1.14** “Member” means any Person who (i) executes this Agreement as a Member or who has been admitted as an additional or Substitute Member pursuant to the terms of this Agreement, and (ii) is the owner of an Interest in the Company. “Members” means all such Persons.

**1.1.15** “Net Cash Flow” means, for any fiscal year or part thereof, the excess, if any, of: (a) all proceeds received from any source; less (b) the sum of (i) all cash expenditures of the Company (including capital expenditures and payments with respect to indebtedness and other short and long term obligations), plus (ii) the amount of any funds the Manager, in its reasonable discretion, determines to set aside for contingencies and the establishment of reasonable, prudent reserves.

**1.1.16** “Nonrecourse Deductions” has the meaning set forth in, and shall be determined in accordance with Regulations Section 1.704-2(b)(1) and shall be computed in accordance with Regulations Section 1.704-2(c).

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

**1.1.18** “Percentage Interest” shall mean a Member’s respective distributive share of the Company’s Profits and Losses, and share of distributions by the Company. The initial Percentage Interests of the Members shall be as set forth on Exhibit “A” to this Agreement. The Percentage Interests of the Members shall be subject to adjustment as provided elsewhere in this Agreement.

**1.1.19** “Person” means any individual, corporation, partnership, joint venture, limited liability company, estate, trust, unincorporated association, any federal, state, county or municipal government or any bureau, department or agency thereof and any fiduciary acting in such capacity on behalf of any of the foregoing.

**1.1.20** “Personal Representative” shall mean, with respect to any Member:

**1.1.20.1** the person or persons, including any bank or trust company, who shall be the duly appointed, qualified and acting personal representative, executor or administrator of a such party’s estate;

**1.1.20.2** in the absence of a duly appointed personal representative, executor or administrator, the trustee of the such party’s inter vivos trust which holds title to the Interest; or

**1.1.20.3** in case of such party’s Disability, the duly appointed, qualified and acting conservator or guardian of such party’s estate or the agent of such party acting pursuant to a duly executed durable power of attorney.

**1.1.21** “Profits” and “Losses” means, for each fiscal year or other period, an amount equal to the Company’s taxable income or loss for such year or period, determined in accordance with Code Section 703(a) (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 loss).

**1.1.22** “Property” means all real and personal property, tangible and intangible, acquired by the Company and any improvements thereon.

**1.1.23** “Pro Rata” or “Pro Rata Share” means, with respect to a Member, the proportion that the Percentage Interest of a Member bears to the aggregate Percentage Interests in the Company of all Members. Unless expressly provided otherwise, the term “pro rata” shall be determined by reference to the percentage interests of the Members rather than by reference to the number of Members in the Company.

**1.1.24** “Remaining Member” means the Member(s) other than the Member tendering its Interest under any option or obligation under this Agreement.

**1.1.25** “Regulations” means the Income Tax Regulations, including Temporary Regulations, promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

1.1.26 “Stated Rate of Interest” means such rate as the Manager may determine or successfully negotiate in its reasonable discretion.

1.1.27 “Substitute Member” means, with respect to the transferee of an Interest, any Person admitted to the Company as a “Member” pursuant to Section 9.7 hereof.

## SECTION 2 FORMATION; PURPOSE

2.1 **Organization.** The Company was formed as a limited liability company effective with the filing of the Articles with the Arizona Corporation Commission. The Company has been formed pursuant to the provisions of the Act and upon the terms and conditions set forth in the Articles and in this Agreement.

2.2 **Term.** The term of the Company commenced on the date the Articles were filed as described in Section 2.1 and shall continue until the winding up and liquidation of the Company upon the occurrence of a Liquidating Event as provided in Section 11 of this Agreement.

2.3 **Name.** The business of the Company shall be carried on under the name “ELLIOT & 51<sup>ST</sup> STREET MANAGER, LLC”.

2.4 **Purpose.** The purpose and character of the business of the Company shall be to act as the manager of (i) Elliot & 51<sup>st</sup> Street, LLC, a Delaware limited liability company; and (ii) Elliot 10 Fund, LLC, a Delaware limited liability company, which have been formed for the purpose of acquiring, developing, owning, holding, selling, leasing, mortgaging, transferring, exchanging, managing and operating an existing hotel located at 10831 South 51<sup>st</sup> Street, Phoenix, Arizona and activities relating thereto. The Company shall have the authority to do all things necessary or appropriate to effect the foregoing, and shall have no authority to engage in any other business.

2.5 **Place of Business.** The Company’s principal place of business shall be 16074 North 78th Street, Suite B-104, Scottsdale, Arizona 85260. The Company may have other or additional places of business within or outside of the State of Arizona. The name and address of the agent for service of process is Paul Conant, 16074 North 78th Street, Suite B-104, Scottsdale, Arizona 85260.

2.6 **Nature of Interests.** The Members’ Interests shall be personal property for all purposes. All property owned by the Company, whether real or personal, tangible or intangible, shall be owned by the Company as an entity, and no Member shall have any direct ownership of such property or any right to use such property for any purpose other than a purpose of the Company.

## SECTION 3 CONTRIBUTIONS; CAPITAL ACCOUNTS

### **3.1 Capital Accounts.**

**3.1.1** A separate Capital Account shall be maintained for each Member. The Capital Account of each Member shall be increased by its Capital Contributions to the Company and by such owner's share of gain and Profits of the Company, as allocated under Section 4 hereof, and shall be decreased by any distributions of cash or other property to such Member and by such Member's share of Losses to the Company, as allocated under Section 4 hereof. This Section and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulation Section 1.704-1(b), and shall be interpreted and applied in a manner consistent with such Regulations.

**3.1.2** As of the date of this Agreement, the Members agree that the Capital Account of each Member is as stated on Exhibit "A" of this Agreement, which is incorporated herein by reference.

**3.2 Member Loans.** Subject to the terms of this Agreement, any Member may, with the approval of the Manager, lend or advance money to the Company; provided, however, no Member is obligated to make any loans to the Company. If any Member shall make any loan or loans to the Company or advance money on its behalf, the amount of any such loan or advance shall not be treated as a Capital Contribution to the Company, but shall be an indebtedness of the Company payable to such Member. The amount of any such loan or advance by a lending Member shall be repayable out of the Company's cash and shall bear interest at the Stated Rate of Interest during the period such loan is outstanding.

**3.3 Manager Loans.** Subject to the terms of this Agreement, the Manager may lend or advance money to the Company; provided, however, the Manager is not obligated to make any loans to the Company. If the Manager makes any loan or loans to the Company or advances money on its behalf, the amount of any such loan or advance shall not be treated as a Capital Contribution to the Company, but shall be an indebtedness of the Company payable to the Manager. The amount of any such loan or advance by the Manager shall be repayable out of the Company's cash and shall bear interest at the Stated Rate of Interest.

### **3.4 Other Matters.**

**3.4.1** Except as specifically provided in this Agreement, or as otherwise approved by the Manager, no Member shall receive any interest, salary or draw with respect to its Capital Contributions or its Capital Account. Members may, however, at Manager's discretion, be entitled to receive a salary for services rendered on behalf of the Company or otherwise in their respective capacities as Members.

**3.4.2** Except as otherwise provided by this Agreement or by a separate agreement or with third party creditors or in the Act or otherwise at law, no Member shall be liable for the debts, liabilities, contracts or any other obligations of the Company beyond its respective Capital Contribution.

**3.4.3** None of the provisions of this Agreement, whether in regard to contributions or otherwise, is intended for the benefit of, nor shall such provisions be enforceable by, creditors of the Company beyond the Capital Contributions.

## **SECTION 4 DISTRIBUTIONS; ALLOCATIONS**

### **4.1 Distributions.**

**4.1.1 Distribution of Net Cash Flow.** Except as otherwise provided in Sections 4.1.2 and Section 11 hereof, Net Cash Flow, if any, shall be distributed at such times as the Manager may determine in the following priority:

(i) First, 100% to the Members Pro Rata until they have received a return of their unreturned Capital Contributions;

(ii) Thereafter, 100% to the Members Pro Rata in accordance with their respective Percentage Interests.

**4.1.2 Distributions, Generally.** The Company shall make no distribution to the Members unless the assets of the Company following such distribution will exceed the total liabilities of the Company, excluding liabilities to such parties based on their respective Capital Contributions.

**4.2 Allocation of Profits and Losses.** Subject to the special allocations set forth in Section 4.3, all Profits and any other items of income or gain during each fiscal year of the Company shall be allocated to the Members' Capital Accounts Pro Rata in accordance with Section 4.1.1(i) above, and thereafter to the Members Pro Rata to the extent of distributions in accordance with Section 4.1.1(ii) above.

**4.3 Special Allocations.** The special allocations set forth in this Section 4.3 shall, if necessary, be made in the following order:

**4.3.1 Company Minimum Gain Chargeback.** Notwithstanding any other provision of this Section 4, if there is a net decrease in Company Minimum Gain during any Company fiscal year, each Member shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to the portion of such Person's share of the net decrease in Company Minimum Gain, determined in accordance with Regulations Section 1.704-2(g), that is allocable to the disposition of Property subject to Nonrecourse Liabilities, determined in accordance with Regulations Section 1.704-2(iv)(e). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Section 1.704-2(f) of the Regulations. This Section 4.3.1 is intended to comply with the minimum gain chargeback requirement in such Section of the Regulations and shall be interpreted consistently therewith.

**4.3.2 Member Minimum Gain Chargeback.** Notwithstanding any other provision of this Section 4, except Section 4.3.1, if there is a net decrease in Member Minimum Gain attributable to Member Nonrecourse Debt during any Company fiscal year, each Member who has a share of the Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(5), shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to the portion of such Person's share of the net decrease in Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(5), that is allocable to the disposition of Property subject to such Member Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(4). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Section 1.704-2(i)(4) of the Regulations. This Section 4.3.2 is intended to comply with the minimum gain chargeback requirement in such Section of the Regulations and shall be interpreted consistently therewith.

**4.3.3 Qualified Income Offset.** In the event any Member unexpectedly receives any adjustment, allocation, or distribution described in Sections 1.704-1(b)(2)(ii)(d)(4) through 1.704-1(b)(2)(ii)(d)(6) of the Regulations which causes or increases a deficit in such Member's Capital Account as of the end of the tax year to which the adjustment, allocation or distribution relates, items of Company income and gain shall be specially allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Capital Account deficit of such Member as quickly as possible, provided that an allocation pursuant to this Section 4.3.3 shall be made if and only to the extent that such Member would have a Capital Account deficit after all other allocations provided for in this Section 4 have been tentatively made as if this Section 4.3.3 were not in this Agreement.

**4.3.4 Section 754 Adjustments.** To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to 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) and such gain or loss shall be specially allocated to the Members in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to such Section of the Regulations.

#### **4.4 Other Allocation Rules.**

**4.4.1** For purposes of determining the Profits, Losses, or any other items allocable to any period, Profits, Losses, and any such other items shall be determined on a daily, monthly, or other basis, as determined by the Manager using any permissible method under Code Section 706 and the Regulations thereunder.



**4.4.2** The Members are aware of the income tax consequences of the allocations made by this Section 4 and hereby agree to be bound by the provisions of this Section 4 in reporting their shares of Company income and loss for income tax purposes.

## **SECTION 5 MANAGEMENT**

**5.1 Delegation of Management Powers.** The management and operating responsibilities of the Company shall be delegated to the Manager. The Manager shall have control of and shall be responsible for the management of the Company business, with all rights and powers generally conferred by this Agreement, by law, or as necessary, advisable or consistent with the proper management of Company affairs, subject only to the limitations set forth in Sections 5.2 and 5.3 below. To the extent the Manager is comprised of more than one (1) Person, any decision or vote of the Manager shall require the vote of the majority in number of the Persons comprising the Manager. Without limiting the generality of the foregoing, and subject to Section 5.2 below, the Manager shall have full power and authority to do the following:

**5.1.1** Perform administrative and ministerial functions in connection with the day-to-day operation of the Company;

**5.1.2** Perform sales and accounting management functions for the Company;

**5.1.3** Maintain the Company's books and records;

**5.1.4** Negotiate and enter into any and all contracts by and on behalf of the Company deemed appropriate by the Manager, in its sole discretion, in connection with the operation of the Company's business;

**5.1.5** Borrow money on behalf of the Company, including but not limited to establishing lines of credit in the name of the Company, and, in connection therewith, to execute and deliver for, on behalf of and in the name of the Company, bonds, notes, pledges, security agreements, financing statements, profits interest agreements, assignments and other agreements and documents creating liens on, or granting security interests in or otherwise affecting, the assets and properties of the Company (any of which loan documents may contain confessions of judgment and powers of attorney) including, without limitation, the Property, and extensions, renewals and modifications thereof, and to prepay in whole or in part, refinance, recast, increase, modify or extend any indebtedness of the Company;

**5.1.6** Hold, operate, manage and otherwise deal with the Property of the Company;

**5.1.7** Purchase, sell, convey, assign, lease, rent, exchange and otherwise dispose of in whole or in part the Property of the Company;

**5.1.8** Sell all or substantially all of the assets of the Company in a single transaction or plan;

**5.1.9** Engage, on behalf of the Company, all employees, agents, mortgage loan officers, underwriters, contractors, attorneys, accountants, securities broker-dealers, consultants or any other Persons (including Affiliates of the Manager), as the Manager, in its sole discretion, deems appropriate for the performance of services in connection with the conduct, operation and management of the Company's business and affairs, all on such terms and for such compensation as the Manager, in its sole discretion, deems proper and to replace any such employees, agents, mortgage loan officers, underwriters, contractors, attorneys, accountants, securities broker-dealers, consultants or any other Persons, in the sole discretion of the Manager;

**5.1.10** Establish and maintain working capital reserves for operating expenses, capital expenditures, normal repairs, replacements, contingencies, and other anticipated costs relating to the assets of the Company by retaining a portion of Company proceeds as determined from time to time by the Manager to be reasonable under the then-existing circumstances;

**5.1.11** Determine the amounts of Net Cash Flow available for distribution, and when and in what amounts such funds shall be distributed;

**5.1.12** Pay the expenses of the Company from the funds of the Company; provided that all of the Company's expenses shall, to the extent feasible, be billed directly to and paid by the Company;

**5.1.13** File, on behalf of the Company, all required local, state and federal tax returns relating to the Company or its assets and properties, and to make or determine not to make any and all elections with respect thereto, subject to the provisions of Section 4 of this Agreement;

**5.1.14** Invest and reinvest the funds of the Company and to establish bank, money market and other accounts for the deposit of the Company's funds and permit withdrawals therefrom upon such signatures as the Manager designates;

**5.1.15** Execute and deliver any and all instruments and documents, and to do any and all other things necessary or appropriate, in the Manager's sole discretion, for the accomplishment of the business and purposes of the Company or necessary or incidental to the protection and benefit of the Company.

**5.1.16** Prosecute, defend, settle or compromise, at the Company's expense, any suits, actions or claims at law or in equity to which the Company is a party or by which it is affected as may be necessary or proper in the Manager's sole discretion, to enforce or protect the Company's interests, and to satisfy out of Company funds any judgment, decree or decision of any court, board, agency or authority having jurisdiction or any settlement of any suit, action or claim prior to judgment or final decision thereon;

**5.1.17** Issue additional Interests in the Company and admit additional Members as the Manager may determine in its sole and absolute discretion;

**5.1.18** Amend Exhibit “A” attached hereto to reflect the Members’ respective Percentage Interests of as of that time; and

**5.1.19** Subject to the terms of Section 5.2.1 below, amend this Agreement.

**5.2** **Limitations.** Without the unanimous consent of the Members, the Manager shall not have authority to:

**5.2.1** Subject to the terms of this Agreement, amend this Agreement in a manner which materially and adversely affects the rights of the Members;

**5.2.2** Adopt a plan of merger or consolidation of the Company with or into one or more business entities defined in the Act at Section 29-751, as amended;

**5.2.3** Do any act in contravention of this Agreement;

**5.2.4** Do any act which would make it impossible to carry on the ordinary business of the Company, except as otherwise provided in this Agreement;

**5.2.5** Confess a judgment against the Company; or

**5.2.6** Possess Company Property, or assign rights in specific Company Property, for other than a Company purpose.

**5.3** **Selection of the Manager.** The Manager shall consist of one (1) Person. The initial Manager shall be Caliber Hospitality LLC, an Arizona limited liability company. Any Person comprising Manager can be removed for Cause upon the approval of Members holding 75% of the Percentage Interests in the Company. “Cause” shall mean the determination of a court of competent jurisdiction that one of the following events occurred: (i) the Manager willfully or intentionally violated, or recklessly disregarded, the Manager’s duties to the Company; or (ii) the Manager committed any act involving fraud, bad faith, gross negligence, dishonesty, or moral turpitude in its duties and responsibilities to the Company. The Manager may also resign as Manager by providing written notice to the Members. In either event, a new Manager shall be elected by the approval of a Majority in Interest. The Members hereby specifically authorize Manager to execute documents and sign agreements on behalf of the Company in lieu of requiring execution by the Members, and third parties shall be entitled to rely upon the signature of the Manager as having authority to bind the Company. The Manager hereby specifically authorizes John C. Loeffler II to execute documents and sign agreements on behalf of the Manager, and third parties shall be entitled to rely upon the signature of John C. Loeffler II as having authority to bind the Manager.

**5.4** **Duties and Obligations of the Manager.**

**5.4.1** The Manager shall take all actions which may be necessary or appropriate: (i) for the continuation of the Company’s valid existence as a limited liability company under

the laws of the State of Arizona; and (ii) for the accomplishment of the Company's purposes, including the maintenance, preservation, and operation of the Property in accordance with the provisions of this Agreement and applicable laws and regulations.

**5.4.2** The Manager shall devote to the Company such time as may be necessary for the proper performance of all duties hereunder, but the Manager shall not be required to devote full time to the performance of such duties. Nevertheless, the Company shall pay or reimburse the Manager for all expenses incurred or paid on behalf of the Company prior to or after the formation of the Company. The Manager may also enter into an oral or written employment agreement with the Company.

**5.4.3** The Manager or its Affiliates may also provide additional services to the Company and be compensated therefor so long as the fees paid are no greater than the Company would incur to third parties providing such services in Maricopa County, Arizona at the time such services are provided.

**5.4.4** The Manager is entitled to receive reimbursement from the Company for actual third party expenses incurred in its role as Manager.

## **5.5 Indemnification of the Manager.**

**5.5.1** The Company, its receiver, or its trustee (in the case of its receiver or trustee, to the extent of the Property) shall indemnify, save harmless, and pay all judgments and claims against the Manager relating to any liability or damage incurred by reason of any act performed or omitted to be performed by the Manager solely in connection with the business of the Company, including attorneys' fees incurred in connection with the defense of any action based on any such act or omission, which attorneys' fees may be paid as incurred.

**5.5.2** In the event of any action by a Member against the Manager relating to any liability or damage incurred by reason of any act performed or omitted to be performed by the Manager solely in connection with the business of the Company, including a derivative suit, the Company shall indemnify, save harmless, and pay all expenses of such Member, including attorneys' fees incurred in the defense of such action, if such Member is successful in such action.

**5.5.3** The Manager shall have authority to cause the Company to acquire and maintain the equivalent of directors' and officers' insurance coverage insuring the actions of the Manager in such amounts as it may determine appropriate and customary for a business of the type conducted by the Company.

**5.5.4** Notwithstanding the provisions of Sections 5.5.1 and 5.5.2 above, the Manager shall not be indemnified from any liability for fraud, bad faith, gross negligence, or willful misconduct in its duties and responsibilities to the Company.

**5.5.5** Notwithstanding anything to the contrary above, in the event that any provision in this Section 5.5 is determined to be invalid in whole or in part, the remainder of such Section shall be enforced to the maximum extent permitted by law.

## **SECTION 6 RIGHTS AND OBLIGATIONS OF MEMBERS**

**6.1 Limitation of Liability.** Each Member's liability for the debts and obligations of the Company shall be limited as set forth in the Act in Section 29-651 and other applicable law.

**6.2 Indemnity of Members.** The Members shall be indemnified by the Company to the fullest extent permitted by Arizona law for actions taken in good faith within the scope of this Agreement.

**6.3 No Exclusive Duty to Company.** Except to the extent limited by the terms of any employment agreement by and between the Company and a Member, the Members shall only be required to devote to the Company such time as may be necessary for the proper performance of their duties, if any, hereunder.

**6.4 Priority and Return of Capital – Members.** No Members shall have priority over any other Member(s), either as to the return of Capital Contributions or as to Profits or distributions, except as set forth in Section 4 of this Agreement; provided that this Section shall not apply to loans (as distinguished from Member Capital Contributions) which a Member has made to the Company.

**6.5 Priority and Return of Capital - Members.** No Members shall have priority over any other Member(s), either as to the return of Capital Contributions or as to Profits, Losses or distributions, except as set forth in Section 4 of this Agreement; provided that this Section shall not apply to loans (as distinguished from Capital Contributions) which a Member has made to the Company.

**6.6 Duties of Members.** The Members shall take all actions which may be necessary or appropriate (i) for the continuation of the Company's valid existence as a limited liability company under the laws of the State of Arizona and (ii) for the accomplishment of the Company's purposes, including the maintenance, preservation, and operation of the Property in accordance with the provisions of this Agreement and applicable laws and regulations.

**6.7 Services Provided by Members.** Members and/or their Affiliates may provide services to the Company and be compensated therefor, so long as such compensation arrangements are affirmatively approved by the Manager and the party providing such services, and the fees paid are no greater than the Company would incur to third parties providing such services in Maricopa County, Arizona at the time such services are provided.

**6.8 Representations, Warranties and Acknowledgements of the Members.** Each Member, as a condition to being permitted to become a Member, does hereby represent, warrant and acknowledge to the Company, the Members, and the Manager that such party:

**6.8.1 Authority to Act.** Has full power and authority to execute and agree to this Agreement and to perform its obligation hereunder and all necessary actions and approvals by the board of directors, shareholders, managers, partners or such other Persons necessary for the due authorization, execution, delivery and performance of this Agreement have been taken;

**6.8.2 Review of Documents.** Has carefully read this Agreement and each of the Exhibits attached hereto, as well as all other documents relevant to the investment contemplated hereby; has adequate familiarity with investments and businesses of the type contemplated by the Company to appreciate and understand each of such documents; has been afforded an adequate opportunity to retain legal and/or financial advisors of such party's choice to advise such party with respect to the investment contemplated hereby;

**6.8.3 Risks of Investment.** Understands that the Company is recently organized and has minimal financial or operating history and that there are risks incident to the investment contemplated hereby which are applicable to such party's investment in the Company; and has adequate experience and background in investing in investments of this type such that such party is able to adequately assess the risks of an investment herein;

**6.8.4 Illiquidity.** Understands that such party's investment in the Company will be illiquid; that such party must bear the economic risk of such investment for an indefinite period of time because the Interests and the Interests (as applicable) hereunder are not registered under the Securities Act of 1933 or any applicable state securities laws, to the extent applicable, and therefore cannot be sold unless they are subsequently registered under the Securities Act of 1933 and any applicable state securities laws or an exemption from such registration is available; and that such party's right to assign any Member in the Company is further restricted by the other provisions of this Agreement;

**6.8.5 Independent Analysis.** Has independently conducted such party's due diligence and evaluation with regard to the investment contemplated hereby; has been encouraged by the Company and the Manager to engage such party's own legal, financial and tax advisors and has done so to the extent such party deemed appropriate; and has had access to all information such party considers necessary or appropriate to complete such party's due diligence and evaluation;

**6.8.6 Access to Information.** Has been afforded the opportunity to obtain any additional information such party deems necessary to verify any of the information set forth in this Agreement and the Exhibits attached hereto, and any other information such party deems appropriate concerning the proposed investment; has received answers from the Manager on all inquiries such party has asked of the Manager concerning the Company;

**6.8.7 Reliance by Company and Manager.** Understands that the Company and the Manager are permitting such party to acquire an Interest in reliance upon such party's representations and warranties as set forth in this Section 6.8; and such party is acquiring said interest for such party's own account, as a principal, for investment, and not with a view to the resale or distribution of all or any part of such Interest and not on behalf of any other Person; and

**6.8.8 Representation.** Acknowledges that this Agreement, and certain documents related to the organization of the Company ("Company Documents"), were prepared by Snell & Wilmer ("Law Firm"). With respect to Law Firm's participation (including rendering of advice) in the preparation of the Company Documents, such party agrees with the Company, the Manager, and the Members as follows:

**6.8.8.1** Notwithstanding prior, present and continuing representation by Law Firm of any Person comprising Manager or any Member, or any of their respective affiliates or principals, with respect to other matters, Law Firm is only representing the Company and Caliber Hospitality LLC, and no other Member, or any of their respective principals in connection with the preparation of the Company Documents or thereafter;

**6.8.8.2** Law Firm has expressly recommended to each Member that it obtain appropriate independent legal, tax and other professional consultation and advice with respect to the Company Documents and all aspects of the effect and enforceability thereof, and by executing this Agreement, each respective party to this Agreement confirms said recommendation by Law Firm; and

**6.8.8.3** Law Firm has no obligation to render or provide any advice to any Member (other than Caliber Hospitality LLC) or their respective affiliates or principals, with respect to any of the Company Documents, or the effect or enforceability thereof.

## **SECTION 7 MEETINGS; VOTING**

**7.1 Meetings of the Members.** Meetings of the Members, or a vote of the Members without a meeting, may be called upon the written request of any one or more of the Members holding ten percent (10%) or more of the Percentage Interests in writing. The call shall state the nature of the business to be transacted or, if no meeting is to be held, the matter to be voted on and the day that the votes shall be counted. Notice of any such meeting shall be given to all Members not less than ten (10) business days or more than thirty (30) days prior to the date of such meeting unless waived in writing. Whenever the vote or consent of Members is permitted or required under this Agreement, such vote or consent may be given at a meeting of Members or may be given in accordance with the procedure prescribed in Section 7.3. Except as otherwise expressly provided in this Agreement, the vote of a Majority in Interest of the Members shall control.

**7.2 Record Date.** For the purpose of determining the Members entitled to vote on a matter, or to vote at any meeting of the Members or any adjournment thereof, the Member

requesting such meeting may fix, in advance, a date as the record date for any such determination. Such date shall not be more than thirty (30) days nor less than ten (10) business days before any such meeting.

**7.3 Method of Voting.** Each Member may cast the number of votes equal to such Member's Percentage Interest. A Member may vote in person at a meeting, by written proxy or by a signed writing directing the manner in which such Member desires its vote to be cast, which writing must be received by the other Member(s) prior to the date on which votes are to be counted. The proxy of a Member may authorize any Person or Persons to act for it on all matters in which a Member is entitled to participate, including waiving notice of any meeting, or voting or participating at a meeting. Every proxy must be signed by the Member or its attorney-in-fact. No proxy shall be valid after the expiration of eleven (11) months from the date thereof unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the Member executing it.

**7.4 Meetings.** Each meeting of Members shall be conducted by the Manager.

**7.5 Action Without a Meeting; Telephone Meetings.** Any action required by the Act or this Agreement to be taken at any annual or special meeting of the Members, or any action which may be taken at any annual or special meeting of Members, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the Members holding not less than the minimum Percentage Interests that would be necessary to authorize or take such action at a meeting at which all of the Members were present. Any electronic communication, including but not limited to electronic mail, photographic, photostatic, facsimile or similar reproduction of a writing signed by a Member shall be regarded as signed by such Member for purposes of this Section 7.5. Subject to the provisions of applicable law and this Agreement regarding notice of meetings, Members may participate in and hold a meeting by using conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a telephone meeting pursuant to this Section 7.5 shall constitute presence in person at such meeting, except when a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting was not lawfully called or convened.

## **SECTION 8 BOOKS AND RECORDS**

**8.1 Books and Records.** The Company shall keep adequate books and records at its principal place of business, setting forth a true and accurate account of all business transactions arising out of and in connection with the conduct of the Company. Any Member or its respective designated representative shall have the right, at any reasonable time, to have access to and inspect and copy the contents of such books and records.

**8.2 Tax Information.** Necessary tax information shall be delivered to each Member after the end of each fiscal year of the Company. Such tax information shall include, but shall in no event be limited to, an internally prepared balance sheet and related statements of income, cash flow, Members' capital for the most recently ended fiscal year of the Company. Any and all



statements of income, cash flow, Members' capital shall be prepared in accordance with United States generally accepted accounting principles consistently applied and certified (or reviewed) by independent certified accountants retained by the Manager on behalf of the Company and shall include a statement or certification that such financial statements have been prepared in accordance with generally accepted accounting principles consistently applied. Every effort shall be made to furnish all such tax information within 75 days after the end of each fiscal year. In addition, the Manager is specifically authorized to represent the Members and act as the "Tax Matters Partner", as that term is used under the Code and in any similar capacity under state or local law.

**8.3 Fiscal Year.** The fiscal year for the Company shall begin on January 1st of each year and end on December 31st of each year.

## **SECTION 9 TRANSFER OF INTERESTS**

**9.1 Transfer of an Interest.** Except as otherwise expressly provided in this Section 9, no Member may voluntarily withdraw from the Company and no Interest in the Company may be transferred without the consent of the Manager. As used in this Section, "Transfer" means to transfer, sell, assign, pledge, hypothecate, or otherwise dispose of any Interest in the Company, including any transfer by death, Disability or involuntarily by operation of law.

**9.2 Permitted Transfers.** Notwithstanding any of the other requirements of this Section 9, except subject to the conditions and restrictions set forth in Sections 9.3, 9.4 and 9.7 hereof, a Member may at any time Transfer all or any portion of its Interest in the Company to (i) the other Members; (ii) any Affiliate of the transferor but only so long as the only party with authority to bind such Affiliate is the Member making such Transfer; (iii) to a trust for estate planning purposes, but only so long as the only party with authority to bind such trust is the Member making such Transfer; (iv) its Personal Representative or heirs or beneficiaries upon the Disability or death of a Member; or (v) any Purchaser in accordance with Section 9.4 hereof (any such Transfer referred to in (i) through (v) above shall be referred to in this Agreement as a "Permitted Transfer").

**9.3 Conditions to Permitted Transfers.** A Transfer shall not be treated as a Permitted Transfer under Section 9.2 hereof unless and until the following conditions are satisfied:

**9.3.1** The transferor and transferee shall execute and deliver to the Company such documents and instruments of conveyance as may be necessary or appropriate in the opinion of counsel to the Company to effect such Transfer and to confirm the agreement of the transferee to be bound by the provisions of this Section 9. In any case not described in the preceding sentence, the Transfer shall be confirmed by presentation to the Company of legal evidence of such Transfer, in form and substance satisfactory to counsel to the Company. In all cases, the Company shall be reimbursed by the transferor and/or transferee for all costs and expenses that it reasonably incurs in connection with such Transfer.

**9.3.2** The transferor may be required to furnish the Company an opinion of counsel, which counsel and opinion shall be satisfactory to the Company, that the Transfer will not cause the Company to terminate for federal income tax purposes and will comply with any and all state or federal securities laws.

**9.3.3** The transferor and transferee shall furnish the transferee's taxpayer identification number, sufficient information to determine the transferee's initial tax basis in the Interest transferred, and any other information reasonably necessary to permit the Company to file all required federal and state tax returns and other legally required information statements or returns.

**9.3.4** The Manager and a Majority in Interest shall have consented in writing to such Transfer.

**9.4 Right of First Refusal; Limitations on Transferred Interest.** In addition to the other limitations and restrictions set forth in this Section 9, except as permitted by Sections 9.2 (i), (ii) and (iii) hereof, no Member shall Transfer all or any portion of its Interest in the Company (the "Offered Interest") unless such Member (the "Seller") first offers to sell the Offered Interest pursuant to the terms of this Section 9.4. In the case of a Transfer upon the death or Disability of a Member or an involuntary Transfer by operation of law, a right of first refusal shall be given to all other Members in accordance with Section 9.4.7.

**9.4.1 Purchase Offer.** The Seller must have received a bona fide written and signed offer (the "Purchase Offer") from an unaffiliated third Person (the "Purchaser") to purchase the Offered Interest for a purchase price (the "Offer Price") payable in United States dollars at closing or according to specified terms, with or without interest, which shall be irrevocable through the end of the Offer Period, as hereinafter defined.

**9.4.2 Notice to Members.** Prior to making any Transfer, the Seller shall give written notice to the Company and the other Members (the "Offer Notice") which shall include a copy of the Purchase Offer and an offer (the "First Offer") to sell the Offered Interest to the other Members (each an "Offeree" and collectively, the "Offerees") for the Offer Price, payable according to the same terms as (or more favorable terms than) those contained in the Purchase Offer, provided that the First Offer shall be made without regard to the requirement of any earnest money or similar deposit required of the Purchaser prior to closing, and without regard to any security (other than the Offered Interest) to be provided by the Purchaser for any deferred portion of the Offer Price.

**9.4.3 Offer Period.** The First Offer shall be irrevocable for a period (the "Offer Period") ending at 11:59 P.M., local time at the Company's principal office, on the date which is thirty (30) days following the date of the Offer Notice.

**9.4.4 Acceptance of First Offer.** At any time during the Offer Period, an Offeree or Offerees may accept the First Offer. If one or more Offerees do not accept the First Offer as to all of the Offered Interest during the Offer Period, the First Offer shall be

deemed to be rejected in its entirety. If more than one Offeree elects to accept the First Offer, then such accepting Offerees shall acquire that portion of the Offered Interest represented by a fraction wherein each accepting Offeree's Percentage Interest is the numerator and the sum of all accepting Offerees' Percentage Interests is the denominator.

**9.4.5 Closing of Purchase Pursuant to First Offer.** If the First Offer is accepted, the closing of the sale of the Offered Interest shall take place within thirty (30) days of acceptance or, if later, the date of closing set forth in the Purchase Offer. The Seller and the Offeree or Offerees, as the case may be, shall execute such documents and instruments as may be necessary or appropriate to effect the sale of the Offered Interest pursuant to the terms of the First Offer and this Section 9.

**9.4.6 Sale Pursuant to Purchase Offer If First Offer Rejected.** If the First Offer is not accepted as provided above, the Seller may sell the Offered Interest to the Purchaser at any time within thirty (30) days after the last day of the Offer Period, provided that such sale shall be made on terms no more favorable to the Purchaser than the terms contained in the Purchase Offer and provided further that such sale complies with all other applicable terms, conditions, and restrictions of this Agreement. In the event that the Offered Interest is not sold in accordance with the terms of the preceding sentence, the Offered Interest shall again become subject to all of the conditions and restrictions of this Section 9.4.

**9.4.7 Right of First Refusal in Event of Involuntary Transfer.** In the event of an involuntary Transfer by operation of law (including the transfer to a conservator or trustee for an incompetent or Disabled Member) or a Transfer in the event of a Member's death, the Interest of the involuntary Transferring Member shall be subject to a right of first refusal hereby vested in the Remaining Members. Upon learning of the involuntary Transfer by operation of law or upon learning of the death of a Member (the "Notice Date") the other Members may purchase such Interest in the Company by giving written notice to the appropriate party for the transferee within sixty (60) days of the Notice Date. The purchase price for such Interest shall be the lesser of the Net Equity (as such term is defined in Section 10.3 below) of the Transferring Member's Interest in the Company. The purchase price shall be payable in five (5) equal principal payments (without interest accruing thereon) paid annually. The first payment shall be due no later than ninety (90) days from the Notice Date and the remaining payments shall be paid on the next four (4) consecutive anniversaries of the initial payment. Notwithstanding the foregoing, the purchasing Member may elect, in its sole discretion, to prepay the purchase price for the Interest acquired. The payment of the balance of the purchase price for such Interest shall be secured by a security interest in the Interest. Failure of any Member to timely invoke the terms of this right of first refusal shall allow the transfer of the Interest to the appropriate person in the instance of involuntary Transfer by operation of law to occur.

**9.4.8 Limitation on Transferred Interest.** Notwithstanding anything to the contrary contained in Sections 9.4.1 through 9.4.7 above or elsewhere in this Agreement,

without the written consent of the Manager and the Members, any of the following Transfers shall not include the right to vote as a Member of the Company:

- (i) A Permitted Transfer set forth in Section 9.2(iv);
- (ii) A Transfer to a Purchaser set forth in Section 9.4; and
- (iii) An involuntary Transfer by operation of law set forth in Section 9.4.7.

The Members hereby acknowledge that in such instances they may otherwise Transfer the rights to cash distributions and allocations and such other rights and remedies which comprise an interest in the Company. In the event of any such Transfer, the remaining non-transferring Member(s) shall retain 100% of the voting rights pursuant to Section 7 above. The Members hereby agree and acknowledge that were it not for this restriction they would not otherwise enter into this Agreement and that such restriction does not create a total restriction on the right of alienation of property interests.

## **9.5 Prohibited Transfers.**

**9.5.1 Void.** Any purported Transfer of an Interest that is not a Permitted Transfer shall be null and void and of no effect whatsoever; provided that, if the Company is required by law to recognize a Transfer that is not a Permitted Transfer (or if the Company, in its sole discretion, elects to recognize a Transfer that is not a Permitted Transfer), the Interest transferred shall be strictly limited to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the transferred Interest, which allocations and distributions may be applied (without limiting any other legal or equitable rights of the Company) to satisfy any debts, obligations, or liabilities for damages that the transferor or transferee of such Interest may have to the Company.

**9.5.2 Indemnification.** In the case of a Transfer or attempted Transfer of an Interest that is not a Permitted Transfer, the parties engaging or attempting to engage in such Transfer shall be liable to indemnify and hold harmless the Company, the Manager and the other Members from all cost, liability, and damage that any of such indemnified Persons may incur (including, without limitation, incremental tax liability and attorneys' fees and expenses) as a result of such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.

**9.6 Rights of Unadmitted Assignees.** A Person who acquires an Interest but who is not admitted as a Substitute Member pursuant to Section 9 hereof shall be entitled only to allocations and distributions with respect to such Interest in accordance with this Agreement, but shall have no right to any information or accounting of the affairs of the Company, shall not be entitled to inspect the books or records of the Company, shall not have the voting rights as a Member and shall not have any of the rights of a Member under the Act or this Agreement.

**9.7 Admission of Transferees as Substitute Members.** Subject to the other provisions of this Section 9, a transferee of an Interest may be admitted to the Company as a Substitute Member only if each of the following conditions is satisfied:

**9.7.1** The Remaining Member(s) consents to such admission;

**9.7.2** The Interest with respect to which the transferee is being admitted was acquired by means of a Permitted Transfer;

**9.7.3** The transferee becomes a party to this Agreement and executes such documents and instruments as the Company may reasonably request to confirm such transferee as a Member and such transferee's agreement to be bound by the terms and conditions hereof;

**9.7.4** The transferee pays or reimburses the Company for all reasonable legal, filing, and publication costs that the Company incurs in connection with the admission of the transferee as a Member with respect to the transferred Interest; and

**9.7.5** The transferee executes a statement that it is acquiring such Interest in the Interest for investment and not for resale.

**9.8 Distributions and Allocations in Respect to Transferred Interests.** If any Interest in the Company is transferred during any accounting period in compliance with the provisions of this Section 9, all Profits, Losses, each item thereof, and all other items attributable to the transferred Interest for such period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any convention permitted by law and selected by the Manager. All distributions on or before the date of such Transfer shall be made to the transferor, and all distributions thereafter shall be made to the transferee.

**9.9 Issuance of Additional Interests.** Notwithstanding anything to the contrary contained in this Agreement, the Manager is hereby authorized to cause the Company to issue additional Interests and such other equity ownership interests in the Company as Manager may determine. Additional equity ownership interests in the Company may be on such terms and conditions as the Manager may determine to be in the best interests of the Company in its sole discretion, including, without limitation, providing for priority returns on capital contributed, providing for ownership which is not proportionate to the Percentage Interests of the Members and/or providing for such other terms and conditions as the Manager may determine in its sole discretion, all in accordance with its fiduciary duties as Manager.

## **SECTION 10 WITHDRAWAL OF MEMBER**

**10.1 Covenant Not to Withdraw or Dissolve.** Notwithstanding any provision of the Act, each Member recognizes that the Members have entered into this Agreement based on their mutual expectation that all Members will continue as Members and carry out the duties and

obligations undertaken by them hereunder and that, except as otherwise expressly required or permitted hereby, each Member hereby covenants and agrees not to (a) take any action to file a certificate of dissolution or its equivalent with respect to itself, (b) take any action that would cause a Bankruptcy of such Member, (c) voluntarily withdraw or attempt to withdraw from the Company, (d) exercise any power under the Act to dissolve the Company, (e) petition for judicial dissolution of the Company, or (f) demand a return of such Member's contributions or profits without the unanimous consent of the Members (collectively, (a)-(e) above shall be referred to as "Withdrawal").

**10.2 Consequences of Withdrawal.** If a Member attempts to take any action in breach of Section 10.1 hereof, such Member (the "Breaching Member") shall immediately cease to be a Member and shall have no further power to act for or bind the Company and the Breaching Member shall be liable in damages, without requirement of a prior accounting, to the Company for all costs and liabilities that the Company or any Member may incur as a result of such breach. In addition:

**10.2.1** The Company shall have no obligation to pay to the Breaching Member its contributions, capital, or Profits, but may, by notice to the Breaching Member within thirty (30) days of its Withdrawal, elect to make Breach Payments (as defined below) in complete satisfaction of the Breaching Member's Interest in the Company;

**10.2.2** If the Company does not elect to make Breach Payments, the Company shall treat the Breaching Member as if it were an unadmitted assignee of the Interest of the Breaching Member and shall make distributions to the Breaching Member only of those amounts otherwise payable with respect to such Interest hereunder;

**10.2.3** The Company may apply any distributions otherwise payable with respect to such Interest (including Breach Payments) to satisfy any claims it may have against the Breaching Member;

**10.2.4** The Breaching Member shall continue to be liable to the Company for any unpaid Capital Contributions required hereunder with respect to such Interest; and

**10.2.5** Notwithstanding anything to the contrary hereinabove provided, unless the Company has elected to make Breach Payments to the Breaching Member in satisfaction of its Interest, the Company may offer and sell (on any terms that are not manifestly unreasonable) the Interest of the Breaching Member to any other Members or other Persons on the Breaching Member's behalf, provided that any Person acquiring such Interest becomes a Member with respect to such Interest and agrees to perform the duties and obligations imposed by this Agreement on the Breaching Member.

**10.3 Breach Payments.** For purposes hereof, Breach Payments shall be made in five (5) equal installments, without any interest thereon. Each payment shall be equal to one-fifth of the Breach Amount (as defined below) and shall be paid on the next five (5) consecutive anniversaries of the breach by the Breaching Member. The "Breach Amount" shall be an amount equal to the greater of \$1 or one-half the Net Equity of the Breaching Member's Interest on the day of such breach. The "Net Equity" of a Member's Interest in the Company shall be the amount that would

be distributed to such Member in liquidation if the Company sold all of its assets for their net fair market value. Net Equity shall be determined, without audit or certification, from the books and records of the Company by the accountants regularly employed by the Company. The Net Equity determination of such accountants shall be final and binding in the absence of a showing of gross negligence or willful misconduct. The Company may, at its sole election, prepay all or any portion of the Breach Payments at any time without penalty.

**10.4 No Bonding.** Notwithstanding anything to the contrary in the Act, the Company shall not be obligated to secure the value of the Breaching Member's Interest by bond or otherwise; provided, however, that if a court of competent jurisdiction determines that, in order to continue the business of the Company such value must be so secured, the Company may provide such security. If the Company provides such security, the Breaching Member shall not have any right to participate in Company profits or distributions during the term of the Breach, or to receive any interest on the value of such Interest.

## **SECTION 11 DISSOLUTION OF COMPANY**

**11.1 Liquidating Events.** The Company shall dissolve and commence winding up and liquidating upon the first to occur of any of the following ("Liquidating Events"):

**11.1.1** The written consent of a Majority in Interest to dissolve, wind up, and liquidate the Company;

**11.1.2** The happening of any event that makes it unlawful or impossible to carry on the business of the Company;

**11.1.3** An event of Withdrawal of a Member, unless a Majority in Interest of the remaining Members elect to continue the Company in accordance with the provisions set forth in this Section 11.1, below; or

**11.1.4** The entry of a judgment of dissolution under Section 29-785 of the Act.

The Members hereby agree that, notwithstanding any provision of the Act, the Company shall not dissolve prior to the occurrence of a Liquidating Event. Furthermore, if an event specified in Section 11.1.3 above occurs, then a Majority in Interest of the remaining Members may, within sixty (60) days of the date such event occurs, elect by vote to continue the Company's business, in which case the Company shall not dissolve and shall continue to operate.

**11.2 Notice of Dissolution.** If required by the Arizona Corporation Commission, a written notice of dissolution signed on behalf of the Company shall be filed with the Arizona Corporation Commission giving notice of the dissolution of the Company and the commencement of the winding up of its business affairs as soon as possible following the occurrence of a Liquidating Event.

**11.3 Winding Up.** Upon the occurrence of a Liquidating Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members. No Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's business and affairs. The Manager shall be responsible for overseeing the winding up and dissolution of the Company and shall take full account of the Company's liabilities and Property and the Property shall be liquidated as promptly as is consistent with obtaining the fair value thereof, and the proceeds therefrom, to the extent sufficient therefor, shall be applied and distributed in the following order:

**11.3.1** First, to the payment and discharge of all of the Company's debts and liabilities to creditors other than Members;

**11.3.2** Second, to the payment and discharge of all of the Company's debts and liabilities to Members; then

**11.3.3** The balance, if any, to the Members in accordance with Section 4.1.2 above.

**11.3.4** Notwithstanding anything to the contrary in this Agreement, upon a liquidation within the meaning of Regulations §1.704-1(b)(2)(ii)(g), if any Member has a deficit balance in its Capital Account (after giving effect to all contributions, distributions, allocations and other Capital Account adjustments for all taxable years, including the year during which such liquidation occurs), such Member shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and the negative balance of such Member's Capital Account shall not be considered a debt owed by such Member to the Company or to any other person for any purpose whatsoever.

**11.4 Distributions Held in Trust Reserves.** In the discretion of the Members, a Pro Rata Share of the distributions that would otherwise be made to the Members pursuant to this Section 11 may be:

**11.4.1** Distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company or of the Members arising out of or in connection with the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Manager, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to this Agreement; or

**11.4.2** Withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

**11.5 Deemed Distribution and Recontribution.** Notwithstanding any other provision of this Section 11.5, in the event the Company is liquidated within the meaning of Regulations



Section 1.704-1(b)(2)(ii)(i) but no Liquidating Event has occurred, the Property shall not be liquidated, the Company's liabilities shall not be paid or discharged, and the Company's affairs shall not be wound up. Instead, the Company shall be deemed to have distributed the Property in kind to the Members, who shall be deemed to have assumed and taken subject to all Company liabilities, all in accordance with their respective Capital Accounts. Immediately thereafter, the Members shall be deemed to have recontributed the Property in kind to the Company, which shall be deemed to have assumed and taken subject to all such liabilities.

**11.6 Articles of Termination.** At such time as all of the debts, liabilities and obligations of the Company have been paid, discharged or otherwise provided for, written articles of termination signed on behalf of the Company shall be filed with the Arizona Corporation Commission in accordance with Sections 29-781 and 29-783 of the Act.

**11.7 Return of Contribution Nonrecourse to Other Members.** Except as provided by law, upon dissolution, each Member shall look solely to the assets of the Company for the return of its Capital Contributions and each Member shall look solely to the assets of the Company for the return of its Capital Contributions. If the Property remaining after the payment or discharge of the debts and liabilities of the Company is insufficient to return the Capital Contributions of one or more Members, such party or parties shall have no recourse against any Member, any Member or the Manager.

## **SECTION 12 REMEDIES**

**12.1 Default.** In the event any Member (the "Defaulting Party") fails to timely perform any duty or obligation required under the terms of this Agreement, the Company shall have the right to pursue such legal remedies as are available under the Act and the laws of the State of Arizona in such manner and to such extent deemed to be in the best interest of the Company under the prevailing facts and circumstances, including, but not limited to, the institution of legal proceedings to specifically enforce the obligation of the Defaulting Party in accordance with this Agreement; provided, however, before pursuing such remedies the Defaulting Party shall be given written notice of the default and a period of ten (10) days after such notice is given in which to cure the default.

**12.2 Suspension of Rights.** Without limiting the rights of the Company, the Manager or any Member under this Section, and without being deemed an election of remedies, subsequent to the default by the Defaulting Party and until such time as the default has been cured, the Defaulting Party shall have no right to receive any distribution from the Company nor to vote or otherwise participate in the management of Company affairs or any other rights as a Member, as the case may be, under this Agreement or under the Act.

## **SECTION 13 MISCELLANEOUS**

**13.1 Notices.** Any notice, payment, demand, or communication required or permitted to be given by any provision of this Agreement shall be in writing and shall be deemed delivered and

received by the intended recipient: (i) on the business day that such notice is sent by electronic mail or facsimile or hand delivered to the intended recipient provided that such notice is also sent by United States Mail, by certified mail, return receipt requested and postage paid thereon; (ii) the third business day after the date placed in United States Mail, certified mail, return receipt requested and postage paid thereon; and (iii) the first business day after notice is sent by express mail or other overnight mail service. All notices shall be delivered to the address of the name of such Person on the execution page or to such other address as such Person may from time to time specify by written notice to the Company. If a notice is sent to the Company, it shall be sent to the Company's principal place of business.

**13.2 Severability.** Every provision of this Agreement is intended to be severable. If any portion of this Agreement is determined to be illegal or invalid for any reason, such determination shall not affect the validity or legality of the remainder of this Agreement.

**13.3 Governing Law; Parties in Interest.** This Agreement will be governed by and construed according to the laws of the State of Arizona, and will bind and inure to the benefit of the Members and the Members' heirs, successors, assigns and Personal Representatives.

**13.4 Waiver of Lis Pendens and Partition.** The Members recognize that no such party has any direct right in the Property but only an interest in the Company which is deemed to be personal property. Nevertheless, because the Company may suffer irreparable financial injury if a *lis pendens* or an action for partition were filed with respect to the Property in connection with a Company dispute, each Member hereby waives any such right to file a *lis pendens* against the Property or an action for partition thereof.

**13.5 Execution in Counterpart.** This Agreement may be executed in counterparts, all of which taken together shall be deemed one original.

**13.6 Incorporation by Reference.** Every exhibit, schedule and other appendix attached to this Agreement is deemed incorporated herein by this reference.

**13.7 Computation of Time.** In computing any period of time pursuant to this Agreement, the day of the act, date of notice, event or default from which the designated period of time begins to run will not be included. The last day of the period so computed will be included, unless it is a Saturday, Sunday or legal holiday in the State of Arizona, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or such legal holiday.

**13.8 Titles and Captions.** All article, section or paragraph titles or captions contained in this Agreement are for convenience only and are not deemed part of the context hereof.

**13.9 Pronouns and Plurals.** All pronouns and any variations thereof are deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or Persons may require.

**13.10 Construction.** Every covenant, term and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any Member.

**13.11 Entire Agreement.** This Agreement and the documents referenced herein contain the entire understanding amongst the Company, the Manager and the Members, and supersedes any prior understandings and agreements amongst them representing the subject matter contained herein.

**13.12 Amendment.** Except as otherwise specifically set forth herein, a proposed amendment to this Agreement shall be adopted and effective as an amendment if it receives the affirmative vote of a Majority in Interest.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS WHEREOF, the Persons comprising Manager and the Members have executed this Operating Agreement as of the date first set forth above.

**MANAGER:**

**CALIBER HOSPITALITY LLC**, an Arizona limited liability company

By: Caliber Services, LLC, an Arizona limited liability company, its Member

By: Caliber Companies, LLC, an Arizona limited liability company, its Member

By: CaliberCos Inc. A Nevada Corporation, its manager

By:   
Name: Jennifer Schrader  
Its: Manager

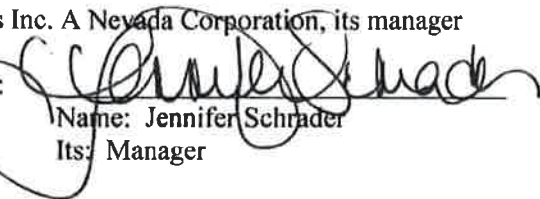
**MEMBER:**

**CALIBER HOSPITALITY LLC**, an Arizona limited liability company

By Caliber Services, LLC, an Arizona limited liability company, its Member

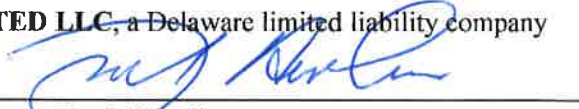
By: Caliber Companies, LLC, an Arizona limited liability its Member

By: CaliberCos Inc. A Nevada Corporation, its manager

By:   
Name: Jennifer Schrader  
Its: Manager

**MEMBER:**

**FND UNITED LLC**, a Delaware limited liability company

By:   
Name: Frank Heavlin  
Its: Manager

**[SIGNATURE PAGE TO OPERATING AGREEMENT  
OF ELLIOT & 51<sup>ST</sup> STREET MANAGER, LLC]**

**EXHIBIT "A"**

**Names and Addresses of Members,  
Percentage Interest and Initial Capital Accounts**

<b>Name and Address of Member</b>	<b>Percentage Interest</b>	<b>Initial Capital Account</b>
Caliber Hospitality LLC 16074 North 78th Street, Suite B-104 Scottsdale, Arizona 85260	80%	\$80.00
FND United LLC 846 West Fairway Drive Chandler, Arizona 85225	20%	\$20.00