

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**WAYNE CLARK,**  
**a natural individual,**

**Plaintiff,**

**v.**

**Civil Action Case No. 2022-C-52**

**CLEAR VISION, LLC,**  
**a West Virginia limited liability company,**

**LOVE 4 GOLF, LLC,**  
**a West Virginia limited liability company,**

**Defendants.**

**TO THE HONORABLE CHIEF JUSTICE JOHN A. HUTCHISON**

The Plaintiff/Counter-Defendant, **WAYNE CLARK**, a natural individual ("Mr. Clark"), and the Defendant/Counter-Plaintiff, **CLEAR VISION, LLC**, a West Virginia limited liability company ("Clear Vision"), by and through their respective counsel jointly request, pursuant to W. Va. Tr. Ct. R. 29.06, that the Honorable Chief Justice refer their complex civil action, which involves the technical application of the West Virginia Limited Liability Act, and the construction and application of a West Virginia limited liability company operating agreement, to the Business Court for adjudication.

In support therefore, the parties state as follows:

James P. Campbell, Esquire (WVSB # 609)  
Matthew L. Clark, Esquire (WVSB # 13946)  
Daniel M. Casto, Esquire (WVSB # 11226)  
**Campbell Flannery, P.C.**  
1602 Village Market Boulevard, Suite 225  
Leesburg, Virginia 20175  
(703) 771-8344/Telephone  
*Counsel for the Plaintiff/Counter-Defendant*

William J. Powell (WVSB# 2961)  
Kenneth J. Barton, Jr. (WVSB# 6044)  
STEPTOE & JOHNSON, PLLC  
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(304) 262-3534/Telephone  
*Counsel for the Defendant/Counter-Plaintiff*

## **A. LEGAL STANDARDS**

W. Va. Tr. Ct. R. 29.04(a) defines "Business Litigation," in pertinent part, as an action pending in a circuit court, in which:

- (1) the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
- (3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. Tr. Ct. R. 29.04(a).

Pursuant to W. Va. Tr. Ct. R. 29.06(a)(1), "[a]ny party . . . may seek a referral of Business Litigation to the Division by filing a Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia." When moving for a referral to the Business Court, "[t]he motion shall identify [1] the nature of the action(s) sought to be referred, [2] the basis for the request, and, [3] if known, whether additional related actions are pending or may be filed in the future. A copy of the complaint, answer, docket sheet and any other documents that support referral under W. Va. Tr. Ct.

R. 29.04(a) shall be attached to the motion." W. Va. Tr. Ct. R. 29.06(a)(1) (numbering added to original). "The motion shall be filed after the time to answer the complaint has expired." W. Va. Tr. Ct. R. 29.06(a)(2).

This case is pending in the Circuit Court of Jefferson County, West Virginia, which is located within Assignment Region G. See W. Va. Tr. Ct. R. 29.04(b).

## **B. REQUEST FOR REFERRAL TO THE BUSINESS COURT**

This case is eligible for a referral to the Business Court because it involves "Business Litigation" as that term is defined under W. Va. Tr. Ct. R. 29.04(a). First, the "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities." W. Va. Tr. Ct. R. 29.04(a)(1). Second, "the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. Va. Tr. Ct. R. 29.04(a)(2). Third and finally, the case does not involve "consumer litigation" or any of the other litigation types described in W. Va. Tr. Ct. R. 29.04(a)(3).

A description of the items under W. Va. Tr. Ct. R. 29.06(a)(1) is set forth below.

### **1. The nature of the action sought to be referred**

This case involves a dispute amongst and between members of Love 4 Golf, LLC, a West Virginia limited liability company ("Love4Golf"), over its operations and governance. *Accord* W. Va. Tr. Ct. R. 29.04(a). This case also involves a claim by Mr. Clark, a member of Love4Golf, for (a) judicial dissociation of Clear Vision from the

Love4Golf pursuant to W. Va. Code § 31B-6-601(6) (Count I), and (b) declaratory judgment to construe and/or apply the meaning of certain terms of the Love4Golf Operating Agreement (Count II). Mr. Clark seeks to dissociate Clear Vision based on his contentions that (1) their conduct constitutes wrongful conduct that adversely and materially affected the Company's business pursuant to W. Va. Code § 31B-6-601(6)(i), (2) that they have committed willful or persistent material breaches of the Operating Agreement and/or of a duty owed by Clear Vision to the Company or Mr. Clark under section 4-409 [§ 31B-4-409] pursuant to W. Va. Code § 31B-6-601(6)(ii), and (3) that to the extent Clear Vision possesses equal voting power as Mr. Clark under the Operating Agreement (an issue to be adjudicated under Count II), the alleged acts of disloyalty and misappropriation of Clear Vision make it not reasonably practicable to carry on the business of the Company with Clear Vision pursuant to W. Va. Code § 31B-6-601(6)(iii). The concept of judicial dissociation has been in existence in the United States since the 1990s. There are few reported cases in West Virginia (and other jurisdictions) that have thoroughly explored the parameters of these principles, and the rules and concepts involving dissociation are not well-understood by the Bench and Bar generally. In addition, dissociation can trigger a duty to purchase the dissociated member's interest, which in turn implicates a court-supervised valuation and buy-out process. *See* W. Va. Code §§ 31B-7-701, 31B-7-702. The Business Court's unique expertise in these matters will foster and enhance the purposes underlying W. R. Tr. Ct. R. 29.



Clear Vision has also filed a counterclaim against Mr. Clark for (x) alleged breach of the Love4Golf operating agreement (Count I of the Counterclaim) and (y) alleged failure to pay expenses (Count II of the Counterclaim).

A copy of the Complaint is attached hereto as "**Exhibit A.**" A copy of the Answer and Counterclaim is attached hereto as "**Exhibit B.**" A copy of the Answer to Counterclaim is attached hereto as "**Exhibit C.**" A copy of the docket sheet is attached hereto as "**Exhibit D.**"

## **2. The basis for the request**

The contested issues raised by the Complaint and Counterclaim involve the technical application of the West Virginia Limited Liability Act, and the construction and application of a West Virginia limited liability company operating agreement. In addition, judicial dissociation is a remedy in which a member of a limited liability company ceases to participate in the governance of a limited liability company, but remains an economic participant. *See* W. Va. Code § 31B-6-603(b). These events can trigger a court-supervised valuation and buy-out of the dissociated member's membership interest in the company.

The operative issues in this case involve corporate governance, control, and the remedies of members of a limited liability company against one another, business interest valuations, and court-supervised buy-outs. These issues are at the core of the definition of "Business Litigation" pursuant to W. Va. Tr. Ct. R. 29.04(a), and are appropriate for adjudication under the specialized expertise of the Business Court. *Accord* W. Va. Code §51-2-15 (establishing the Business Court Divisional System).

**3. Whether additional related actions are pending or may be filed in the future**

No related actions are pending. It is unlikely that any related actions will be filed in the future.

**C. CONCLUSION**

The West Virginia Legislature has recognized that, "due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes between businesses." W. Va. Code § 51-2-15 (Business Court Division). This case involves a dispute over the operations and governance of a business entity, namely Love4Golf, a West Virginia limited liability company. These issues are at the core of what constitutes "Business Litigation" under W. Va. Tr. Ct. R. 29. Business Litigation issues such as these require the application and construction of the esoteric and technical rules of the West Virginia Limited Liability Company Act, and are appropriate for adjudication in the specialized forum of the Business Court.

Respectfully submitted,

**WAYNE CLARK,**  
a natural individual  
By Counsel

**Clear Vision, LLC,**  
a West Virginia limited liability company



Berkeley County Judicial Center  
Business Court Division  
Suite 2100  
380 W. South Street  
Martinsburg, WV 25401

Laura Storm, Clerk  
Jefferson County Circuit Court  
P O Box 1234  
Charles Town WV 25414

The Honorable David Hammer  
Jefferson County Circuit Court  
P O Box 1234  
Charles Town WV 25414

Item Served:

Joint Request for Referral to Business Court

/s/ James P. Campbell

James P. Campbell

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**WAYNE CLARK,**  
**a natural individual,**

**Plaintiff,**

**v.**

**CASE NO.:** \_\_\_\_\_

**CLEAR VISION, LLC,**  
**a West Virginia limited liability company,**

**LOVE 4 GOLF, LLC,**  
**a West Virginia limited liability company,**

**Defendants.**

**SERVE:** Clear Vision, LLC  
By Tim Carrol, Agent for Service of Process  
128 Sunflower Drive  
Kearneysville, West Virginia 25430

Love 4 Golf, LLC  
By Wayne Clark, Agent for Service of Process  
278 St. Andrews Drive  
Charles Town, West Virginia 25414

**COMPLAINT**

**COMES NOW**, the Plaintiff, **WAYNE CLARK**, a natural individual ("Mr. Clark"), by counsel, and for his Complaint against the Defendant, **CLEAR VISION, LLC**, a West Virginia limited liability company ("Clear Vision"), and the nominal Defendant, **LOVE 4 GOLF, LLC**, a West Virginia limited liability company (the "Company"), states as follows:

James P. Campbell, Esquire (WVSB # 609)  
Matthew L. Clark, Esquire (WVSB # 13946)  
Daniel M. Casto, Esquire (WVSB # 11226)  
**CAMPBELL FLANNERY, P.C.**  
1602 Village Market Boulevard, Suite 225  
Leesburg, Virginia 20175  
(703) 771-8344/Telephone  
(703) 777-1485/Facsimile

## **I. SUMMARY**

1. In this Complaint, Mr. Clark seeks the dissociation of Clear Vision from the Company based on its acts of disloyalty, and misappropriation of assets of the Company, as well as the potential impracticality of continuing to carry on the business of the Company with Clear Vision as a Member.

2. In addition, this Complaint seeks a declaratory judgment as to the meaning and import of certain language in the Company's Operating Agreement governing voting rights amongst the members.

3. The relief sought by Mr. Clark will allow for streamlined management of the Company's golf course that will enable management to provide the best service possible to its patrons and customers. Further, it will allow for a stable management that will help ensure a healthy, fiscal future for the golf course and its customers, allowing for important reinvestment into the grounds and services.

## **II. JURISDICTION**

4. Because the amount in controversy exceeds \$7,500.00 and is not confined exclusively by the West Virginia Constitution to some other tribunal, this Court's jurisdiction is proper pursuant to W. Va. Code § 51-2-2.

5. Because the Defendant has its principal office Address in Jefferson County, West Virginia, venue is proper in this Court pursuant to W. Va. Code § 56-1-1.

6. Pursuant to W. Va. Code § 55-13-1 *et seq.*, the Court has jurisdictional "power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

7. This Court has the power to grant injunctive relief pursuant to W. Va. § 53-5-4.

### **III. PARTIES**

8. The Plaintiff, Wayne Clark, is a natural individual who resides in Jefferson County, West Virginia.

9. Mr. Clark holds a 75% membership interest in the Company.

10. Clear Vision is a West Virginia limited liability company with its principal office in Jefferson County, West Virginia.

11. Clear Vision specializes in Golf and Athletic field services, projects, and DryJect services in and around Jefferson County, West Virginia.

12. Clear Vision holds a 25% membership interest in the Company.

13. The Company has its principal office in Jefferson County, West Virginia.

14. Mr. Clark has joined the Company to this action as a nominal defendant, so that it may benefit from, and be bound by, any judgment entered herein.

15. Mr. Clark's 75% membership interest in the Company is an "Interest" in the Company as that term is defined in the Operating Agreement.

16. Clear Vision's 25% membership interest in the Company is an "Interest" in the Company as that term is defined in the Operating Agreement.

17. The Operating Agreement defines "Class A Voting Member," in pertinent part, as "the Person(s) designated as a Class A Voting Member on Schedule A."

18. The Operating Agreement defines "Percentage Interest" as "the Percentage

Interest opposite a Member's name on Schedule A.

19. Schedule A to the Operating Agreement lists Wayne Clark and Clear Vision as the Company's Class A Voting Members.

20. The "Percentage Interest" opposite Mr. Clark's name on Schedule A is 75%, and Mr. Clark has 75% of the Percentage Interests of the Class A Voting Members in the Company.

21. The "Percentage Interest" opposite Clear Vision's name on Schedule A is 25%, and Clear Vision has 25% of the Percentage Interests of the Class A Voting Members in the Company.

22. The Company is an "at-will company" pursuant to W. Va. Code § 31B-1-101(2).

23. Mr. Clark and Clear Vision comprise all members of the Company, and hold all membership interests (Percentage Interests) in the Company.

#### **IV. FACTUAL BACKGROUND**

24. The Company was formed as a limited liability company in the State of West Virginia on May 13, 2010.

25. At the time of its formation, Mr. Clark held 100% of the membership interests in the Company.

26. On or about May 1, 2019, Clear Vision contracted to purchase a 25% membership interest in the Company for the purchase price of \$250,000.00, but did not deliver those funds until August 15, 2019.

27. Thereafter, Mr. Clark and Clear Vision executed an Operating Agreement,



that is dated September 2019, which is attached hereto as "**Exhibit A**" (the "Operating Agreement"). Clear Vision became admitted as a member of the Company as of September 2019.

**28.** The Company is governed by the Operating Agreement.

**29.** Pursuant to Article VI, Section 6.01 of the Operating Agreement, the Company is member-managed.

**30.** Pursuant to the Operating Agreement, most decisions require a "Required Majority of Members," which is defined as "those Class A Members owning more than 66.66% of the Percentage Interests of the Class A Voting Members." Because Mr. Clark holds 75% of the Percentage Interests of the Class A Voting Members in the Company, according to this language, Mr. Clark's votes may provide the "Required Majority of Members."

**31.** Other portions of the Operating Agreement require the "Supermajority Consent of Members." Like the term "Required Majority of Members," this term is also defined as meaning "those Class A Voting Members owning more than 66.66% of the Percentage Interests of the Class A Voting Members." Operating Agreement at p. 4. Again, Because Mr. Clark holds 75% of the Percentage Interests of the Class A Voting Members in the Company, according to this language, Mr. Clark's votes may provide the "Supermajority Consent of Members."

**32.** The Company is principally engaged in the business of owning and managing the Locust Hill Golf Course, Golf Shop, and Driving Range, located at 278 St. Andrews Drive, Charles Town, West Virginia 25414 ("Locust Hill").

**33.** Prior to Clear Vision's admission as a member of the Company, and starting on or about August 28, 2017, Clear Vision provided the Company with golf course superintendent and maintenance services, including maintenance of all equipment, the health and conditions of all turf, appearance of all aesthetics (interior and exterior); and maintenance and upkeep of the golf course.

**34.** Pursuant to a Membership Interest Purchase Agreement, dated May 1, 2019, between Mr. Clark and Clear Vision, following Clear Vision's acquisition of a 25% membership interest in the Company, Clear Vision was permitted to increase its annual service to the Company, at Locust Hill, to \$100,000.00. While dated May 1, 2019, the Membership Interest Purchase Agreement was not actually signed until September of 2019.

**35.** Following Clear Vision's acquisition of a 25% membership interest in the Company, Clear Vision continued to provide maintenance services to Locust Hill.

**36.** For Clear Vision's maintenance services provided in 2019, the Company paid Clear Vision \$75,174.10.

**37.** For Clear Vision's maintenance services provided in 2020, the Company paid Clear Vision \$83,971.48.

**38.** For Clear Vision's maintenance services provided in 2021, the Company paid Clear Vision \$96,350.00.

**39.** Unfortunately, since becoming a member of the Company in 2019, Clear Vision has acted in a disloyal manner by misappropriating assets and employees of the Company when fulfilling its contracts to third parties and without providing compensation to the Company. In addition, Clear Vision has voted its membership interest

to cause deadlock (or at least perceived deadlocks) in the Company's management.

**Acts of Disloyalty and Misappropriation by Clear Vision**

**40.** Since becoming a member of the Company, Clear Vision has consistently and repeatedly utilized the Company's employees and equipment to fulfill Clear Vision's contractual obligations to, and provide work for, third parties without the consent or authorization of Mr. Clark or the Company.

**41.** Examples of such acts of disloyalty and misappropriations by Clear Vision are set forth below.

**42.** On September 18, 2019, Clear Vision utilized the Company's John Deer Turf Sprayer for a third-party project at Spring Mills High School without compensating the Company for the use of that equipment.

**43.** On September 25, 2019, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Musselman High School without compensating the Company for the use of that vehicle.

**44.** On September 26, 2019, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**45.** On October 9, 2019, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Spring Mills High School without compensating the Company for the use of that vehicle.

**46.** On October 28, 2019, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a facility of the federal government without compensating

the Company for the use of that vehicle.

**47.** On November 28, 2019, Clear Vision utilized the Company's John Deere Gator Pro with Top dresser for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**48.** On November 29, 2019, Clear Vision utilized the Company's John Deere Gator Pro with Top dresser for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**49.** On March 17, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a facility of the federal government without compensating the Company for the use of that vehicle.

**50.** On April 2, 2020, Clear Vision utilized the Company's John Deere Bunker Rake for a third-party project in Fort Belvoir, Virginia, without compensating the Company for the use of that vehicle.

**51.** On April 23, 2020, Clear Vision utilized the Company's John Deere Gator Pro with Top dresser for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**52.** On April 30, 2020, Clear Vision utilized the Company's John Deere Gator Pro with Top dresser for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**53.** On June 24, 2020, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Spring Mills High School without compensating the Company for the use of that vehicle.

**54.** On July 1, 2020, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Martinsburg High School, PO Faulkner Field, Martinsburg, West Virginia, without compensating the Company for the use of that vehicle.

**55.** On July 1, 2020, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Musselman High School Football and Softball fields, without compensating the Company for the use of that vehicle.

**56.** On July 6, 2020, Clear Vision utilized the services of the Company's employees, Nick Falso, Noah Cunningham, and Tanner Elliott for third-party projects while those employees were on the clock for the Company without compensating or reimbursing the Company for the labor of those employees.

**57.** On July 7, 2020, Clear Vision utilized the services of the Company's employees, Dalton Dodson, Nick Falso, Noah Cunningham, and Tanner Elliott for third-party projects while those employees were on the clock for the Company without compensating or reimbursing the Company for the labor of those employees.

**58.** On July 8, 2020, Clear Vision utilized the services of the Company's employees, Dalton Dodson, Nick Falso, Noah Cunningham, and Tanner Elliott for third-party projects while those employees were on the clock for the Company without compensating or reimbursing the Company for the labor of those employees.

**59.** On July 9, 2020, Clear Vision utilized the services of the Company's employees, Dalton Dodson, Nick Falso, Noah Cunningham, and Tanner Elliott for third-party projects while those employees were on the clock for the Company without compensating or reimbursing the Company for the labor of those employees.

**60.** On July 10, 2020, Clear Vision utilized the services of the Company's employees, Dalton Dodson, Nick Falso, Noah Cunningham, and Tanner Elliott for third-party projects while those employees were on the clock for the Company without compensating or reimbursing the Company for the labor of those employees.

**61.** On July 11, 2020, Clear Vision utilized the services of the Company's employee, Dalton Dodson for third-party projects while that employee was on the clock for the Company without compensating or reimbursing the Company for the labor of that employee.

**62.** On July 12, 2020, Clear Vision utilized the services of the Company's employee, Nick Falso, while that employee was on the clock for the Company without compensating or reimbursing the Company for the labor of that employee.

**63.** On August 20, 2020, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**64.** On September 24, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Musselman High School Football Field without compensating the Company for the use of that vehicle.

**65.** On October 1, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Jefferson High School JHS Stadium Field without compensating the Company for the use of that vehicle.

**66.** On October 1, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a Berkeley County high school without compensating the

Company for the use of that vehicle.

**67.** On October 7, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Musselman High School without compensating the Company for the use of that vehicle.

**68.** On October 7, 2020, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Spring Mills High School without compensating the Company for the use of that vehicle.

**69.** On November 17, 2020, Clear Vision utilized the Company's silt seeder at Jefferson County High School without compensating the Company for the use of that equipment.

**70.** On November 20, 2020, Clear Vision utilized the Company's John Deere Gator Pro at Jefferson County High School without compensating the Company for the use of that vehicle.

**71.** On March 8, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Hedgesville High School without compensating the Company for the use of that vehicle.

**72.** On April 16, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Martinsburg High School without compensating the Company for the use of that vehicle.

**73.** On May 14, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a Jefferson County high school without compensating the Company for the use of that vehicle.

**74.** On May 25, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a Berkeley County school without compensating the Company for the use of that vehicle.

**75.** On June 18, 2021, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Spring Mills High School without compensating the Company for the use of that vehicle.

**76.** On June 18, 2021, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at another Jefferson County School without compensating the Company for the use of that vehicle.

**77.** On July 8, 2021, Mr. Clark saw Clear Vision hauling away one of the Company's pieces of equipment John Deer Gator Pro for a third-party project without compensating the Company for the use of that equipment.

**78.** On July 11, 2021, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Musselman High School without compensating the Company for the use of that vehicle.

**79.** On July 14, 2021, Steve Ceravalo, an employee of the Company, reported to Mr. Clark that he was ordered by Clear Vision to fix a mower of a friend of Brian Greenfield (a member of Clear Vision), while Mr. Ceravalo was on the clock for the Company, and without compensation the Company for the use of his labor.

**80.** On July 14, 2021, Rick Kidd, an employee of the Company, reported that Clear Vision ordered Noah Cunningham, another employee of the Company, to leave Locust Hill and report to a ball field managed by Clear Vision. While doing work for Clear



Vision, Mr. Cunningham was on the clock for the Company, and he clocked out of work for the Company only upon his return to Locust Hill.

**81.** On July 29, 2021, Clear Vision utilized the Company's John Deere Turf Sprayer for a third-party project at Jefferson High School without compensating the Company for the use of that vehicle.

**82.** On September 30, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at Wildwood Middle School without compensating the Company for the use of that vehicle.

**83.** On October 14, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a Berkeley County school without compensating the Company for the use of that vehicle.

**84.** On October 14, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at another Berkeley County school without compensating the Company for the use of that vehicle.

**85.** On October 14, 2021, Clear Vision utilized the Company's John Deere Gator Pro for a third-party project at a Jefferson County school without compensating the Company for the use of that vehicle.

**86.** On November 11, 2021, Clear Vision utilized the Company's John Deere Gator for a third-party project at Wildwood Middle School without compensating the Company for the use of that vehicle.

**87.** On April 13, 2022, the Company received a large shipment from SiteOne, a third-party vendor. The Company needed only 94 bags, but the order was for 184; the

additional bags, which were paid for by the Company. Mr. Clark suspects the excess bags went to Clear Vision for its third party contracts unrelated to the maintenance of Locust Hill, without compensating the Company for those bags.

**88.** On April 22, 2022, Clear Vision utilized the Company's John Deere Gator for a third-party project at a school in Berkeley County, West Virginia, without compensating the Company for the use of that vehicle.

**89.** On April 22, 2022, Clear Vision utilized the Company's John Deere Gator for a third-party project at a school in Jefferson County, West Virginia, without compensating the Company for the use of that vehicle.

**90.** On April 22, 2022, Clear Vision utilized the Company's John Deere Gator for a third-party project at another school in Jefferson County, West Virginia, without compensating the Company for the use of that vehicle.

**91.** Mr. Clark also understands from various employees of the Company that Clear Vision has consistently and repeatedly utilized gasoline from Locust Hill's gasoline storage facility for Clear Vision equipment, vehicles and projects pursued for its private benefit and not for the benefit of the Company.

**92.** Investigation through the discovery process may uncover further acts of disloyalty and misappropriation by Clear Vision.

### **Deadlocks in Management**

**93.** The Members of Clear Vision have contended that the definitions of "Required Majority of Members" and "Supermajority Consent of Members" entitle them to a veto power over the management of the Company (i.e. that three votes are required by

Mr. Clark, and three votes are required by Clear Vision to approve any decision concerning the Company).

94. As set forth in Count II, Mr. Clark believes that these definitions enable him to provide the "Required Majority of Members" and "Supermajority Consent of Members" as those terms are defined in the Operating Agreement.

95. While uncertainty over the meaning of those terms persists, the Company is deadlocked in the management of the Company.

96. For example, most recently, due to Locust Hill having outdated and inoperable golf carts, the course's loyal patrons had requested upgraded carts.

97. Mr. Clark had negotiated terms with Kawasaki to acquire upgraded golf carts for Locust Hill that would actually save the Company a substantial sum of money on a recurring monthly basis.

98. However, Clear Vision objected to proceeding on the basis that Clear Vision's counsel claimed that Clear Vision would be responsible for the debt incurred in acquiring the upgraded carts (which contention was false).

99. Clear Vision then took the unauthorized action of calling Kawasaki to cancel the order, and Locust Hill remains without upgraded golf carts much to the chagrin of its loyal patrons.

**COUNT I -  
JUDICIAL DISSOCIATION OF CLEAR VISON FROM THE COMPANY**

100. The allegations set forth in Paragraphs 1 through 99 are re-stated and reincorporated as if set forth herein.

**101.** W. Va. Code § 31B-6-601(6) states, in pertinent part, that "[a] member is dissociated from a limited liability company upon the occurrence of any of the following events: . . . "(6) [o]n application by the limited liability company or another member, the member's expulsion by judicial determination because the member:

- (i) Engaged in wrongful conduct that adversely and materially affected the company's business;
- (ii) Willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under section 4-409 [§ 31B-4-409]; or
- (iii) Engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;

**102.** The acts of Clear Vision, described herein, specifically, the misappropriation of equipment, vehicles, and employees of the Company in furtherance of the private interests of Clear Vision, without compensation to the Company, is wrongful conduct that adversely and materially affected the Company's business pursuant to W. Va. Code § 31B-6-601(6)(i).

**103.** As a member of a member-managed company, pursuant to W. Va. Code § 31B-4-409, Clear Vision owed the Company and their fellow member, Mr. Clark, fiduciary duties of loyalty, care, and good faith and fair dealing. *Accord* Operating Agreement at p. 3 (defining "Fiduciary Duty"), p. 9, Section 6.02 (defining the members' Standard of Care).

**104.** The acts of Clear Vision, specifically, the misappropriation of equipment, vehicles, and employees of the Company in furtherance of the private interests of Clear Vision, without compensation to the Company, constituted acts of disloyalty and breaches of its fiduciary duties owed to the Company and to Mr. Clark under the West Virginia Code

and the Operating Agreement, including, but not limited to, their duties of loyalty and care (inasmuch as those acts constituted grossly negligent or reckless conduct, intentional misconduct, or knowing violations of the law), and their duties of good faith and fair dealing. These acts by Clear Vision constituted willful or persistent material breaches of the Operating Agreement and/or of a duty owed by Clear Vision to the Company or Mr. Clark under section 4-409 [§ 31B-4-409] pursuant to W. Va. Code § 31B-6-601(6)(ii)

**105.** Finally, to the extent the Court concludes under Count II that the Operating Agreement's definitions of "Required Majority of Members" and "Supermajority Consent of Members" entitle Clear Vision to a veto power (*i.e.* its three-votes) to satisfy these voting thresholds, then the acts of disloyalty and misappropriation described herein make it not reasonably practicable to carry on the business of the Company with Clear Vision pursuant to W. Va. Code § 31B-6-601(6)(iii).

**WHEREFORE**, pursuant to W. Va. Code § 31B-6-601(6), the Plaintiff, **WAYNE CLARK**, a natural individual, by counsel, seeks:

- (a) the Dissociation of **CLEAR VISION, LLC**, a West Virginia limited liability company from Love 4 Golf, LLC, a West Virginia limited liability company;
- (b) any sums payable to Clear Vision following its dissociation to be offset and reduced by the value of the equipment and labor misappropriated from the Company as described herein, and as determined through further investigation and discovery;
- (c) an injunction prohibiting Clear Vision from committing further and future acts of disloyalty and misappropriation of the Company's resources;
- (d) an award of attorneys' fees and costs in equity; and

(e) such other and further relief the Court deems mete and just.

**COUNT II -  
DECLARATORY JUDGMENT**

**106.** The allegations set forth in Paragraphs 1 through 105 are re-stated and reincorporated as if set forth herein.

**107.** The definitions of "Required Majority of Members" and "Supermajority Consent of Members" in the Operating Agreement are somewhat unclear.

**108.** Mr. Clark takes the position that, because he has a 75% membership interest (Percentage Interest) in the Company, the plain and unambiguous language in the Operating Agreement provides him with the "Required Majority of Members" and/or "Supermajority Consent of Members" with respect to votes involving the Company.

**109.** To the extent Clear Vision contends that their consent is required to satisfy the thresholds of "Required Majority of Members" and "Supermajority Consent of Members," a justiciable controversy exists with respect to this language, which the Court may declare and clarify for the benefit of the parties.

**110.** This Court has the power to declare rights, status and other legal relations between the parties pursuant to the West Virginia Declaratory Judgments Act, W. Va. Code § 55-13-1, *et seq.*

**111.** Pursuant to W. Va. Code § 55-13-2, any person interested in a written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected therefrom, may have any questions of construction or validity determined such to obtain a declaration of rights, status or other legal relations thereunder.

**112.** As a member of the Company, Mr. Clark has a right to seek a declaration of his rights under that contract as requested and stated herein. *See* W. Va. Code § 55-13-2.

**WHEREFORE**, pursuant to W. Va. Code § 55-13-1, *et seq.*, the Plaintiff, **WAYNE CLARK**, a natural individual, by counsel, seeks:

(a) a declaration that his possession of a 75% membership interest (Percentage Interest) in the Company entitles him to exercise the "Required Majority of Members" and/or "Supermajority Consent of Members" under the Operating Agreement with respect to votes involving the Company;

(b) an award of attorneys' fees and costs in equity; and

(c) such other and further relief the Court deems mete and just.

Respectfully submitted,

**WAYNE CLARK**,  
a natural individual  
By Counsel

/s/ James P. Campbell  
James P. Campbell, Esquire (WVSB # 609)  
Matthew L. Clark, Esquire (WVSB # 13946)  
Daniel M. Casto, Esquire (WVSB # 11226)  
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*Counsel for Plaintiff*



THE INTERESTS DESCRIBED HEREIN HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR UNDER THE SECURITIES ACT OF ANY STATE OR JURISDICTION. NO SALE, OFFER TO SELL, OR OTHER TRANSFER OF THESE INTERESTS MAY BE MADE BY A MEMBER UNLESS PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT, OR UNLESS IN THE OPINION OF COUNSEL TO LOVE 4 GOLF, LLC THE PROPOSED DISPOSITION FALLS WITHIN A VALID EXEMPTION FROM THE REGISTRATION PROVISIONS OF THOSE ACTS AND ARE, IN ALL CASES, SUBJECT TO THE PROVISIONS OF THIS AGREEMENT, INCLUDING WITHOUT LIMITATION THE PROVISIONS OF ARTICLE VII OF THIS AGREEMENT.

**OPERATING AGREEMENT  
OF  
LOVE 4 GOLF, LLC**

This **OPERATING AGREEMENT** (hereinafter referred to as "this Agreement") is made and entered into as of the \_\_\_\_ day of September, 2019, by the undersigned.

**EXPLANATORY STATEMENT:**

Love 4 Golf, LLC (the "Company") was organized on July 16, 2019, with an effective date of May 13, 2010, as a limited liability company under and in accordance with the West Virginia Limited Liability Company Act (the "Act"), upon the filing of Articles of Organization of the Company with the State of West Virginia.

NOW, THEREFORE, in consideration of the mutual promises of the parties hereto, each to the others, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

**ARTICLE I**  
**COMPANY NAME, LOCATION, REGISTERED AGENT AND TERM**

Section 1.01. Name. The name of the Company shall be "Love 4 Golf, LLC."

Section 1.02. Registered Agent of Company. The registered agent of the Company shall Wayne Clark, whose mailing address is 278 St. Andrews Drive, Charles Town, West Virginia 25414.

Section 1.03. Principal Office of Company. The registered principal office of the Company in this State shall be 278 St. Andrews Drive, Charles Town, West Virginia 25414. The Company may have such other or additional offices as the Members may determine.

Section 1.04. Term. The Company shall commence on the date its Articles of Organization are filed with the Secretary of State of the State of West Virginia. Unless sooner terminated pursuant to the further provisions of this Agreement, the Company shall have a perpetual existence.



Section 1.05. Ratification of Articles of Organization and Prior Acts of Organizer. The Members, by executing this Agreement, hereby approve, ratify, and confirm, in all respects, the Company's Articles of Organization and all actions previously taken on behalf of the Company and its Members by the Company's organizer(s) identified in the Articles of Organization.

## ARTICLE II DEFINED TERMS

Throughout this Agreement, the word(s) listed below shall have the following meanings:

Act. The word "Act" shall mean the West Virginia Limited Liability Company Act, as codified in West Virginia Code § 31B-1-101 *et seq.* (2018).

Affiliate. The word "Affiliate" shall mean, with respect to any Member, a Person who directly or indirectly through one or more intermediaries controls or is controlled by or is under common control with the Member. The term "control" as used herein (including the terms "controlling," "controlled by," and "under common control with") means the possession, direct or indirect, of the power to: (i) vote five percent (5%) or more of the outstanding voting interests of an entity Member or such Person; or (ii) otherwise direct the management policies of a Member or such Person by contract or otherwise.

Agreement. The word "Agreement" shall mean this Operating Agreement, as amended from time to time.

Bankruptcy. The word "Bankruptcy" shall mean, with respect to any Member:

(i) the commencement of a proceeding in bankruptcy or for reorganization or for the adoption of an arrangement under the United States Bankruptcy Code (as now or in the future amended) or an admission seeking the relief therein provided;

(ii) the making of an assignment for the benefit of creditors;

(iii) consenting to the appointment of a receiver for all or a substantial part of its property;

(iv) being adjudicated bankrupt or insolvent;

(v) the entry of a court order appointing a receiver or trustee for all or a substantial part of its property without its consent; or

(vi) the assumption of custody or sequestration by a court of competent jurisdiction of all or substantially all of its property.

Capital Contribution. The term "Capital Contribution" shall mean the amount of cash and the fair market value of assets (as of the date of this Agreement or, if applicable, any future date



of contribution), net of any liabilities, contributed to the Company by each Member. Any reference in this Agreement to the Capital Contribution of a then Member shall include a Capital Contribution previously made by any prior Member with respect to the Interest of such then Member.

**Cash Flow.** The term "Cash Flow" shall mean, for any fiscal year, all cash receipts of the Company (other than Capital Contributions) plus amounts released from reserves, less the sum of (i) all cash expenditures and (ii) such reasonable reserves as the Members shall determine from time to time. Cash Flow shall be determined for each fiscal year or portion thereof and shall not be cumulative.

**Class A Voting Member.** The term "Class A Voting Member" shall mean the Person(s) designated as a Class A Voting Member on **Schedule A** and any Person(s) who becomes a Class A Voting Member pursuant to this Agreement. It is understood and agreed that the Class A Voting Member shall have the right to vote on any matter to be determined by the Company in accordance herewith.

**Class B Non-Voting Member.** The term "Class B Voting Member" shall mean the Person(s) designated as a Class B Non-Voting Member on **Schedule A** and any Person(s) who becomes a Class B Non-Voting Member pursuant to this Agreement. It is understood and agreed that the Class B Non-Voting Member shall have no right to vote on any matter to be determined by the Company in accordance herewith, except as expressly set forth herein.

**Code.** The word "Code" shall mean the Internal Revenue Code of 1986, as amended, and any successor statute thereto.

**Company.** The word "Company" shall mean Love 4 Golf, LLC, a West Virginia limited liability company.

**Disability.** The word "Disability" shall mean the declaration that a Person is mentally incompetent under the laws of the State, or the receipt of a written opinion from a physician designated by the Company to the effect that such Person has incurred a mental condition that can reasonably be expected to prevent such Person from carrying out his or her material duties under this Agreement for a period of six (6) months or longer from the date of such opinion. Each Member hereby agrees to cooperate with any physician so designated by the Company to determine whether such Member is disabled, provided that any physician so designated shall consult with any physician designated by (or on behalf of) such Member.

**Fiduciary Duty or Fiduciary Obligation.** The terms "Fiduciary Duty" and/or "Fiduciary Obligation" shall mean the standard of care imposed on all Members of the Company in the operation (or dissolution) of the Company, which standards are the same as those set forth in Act and which are hereby adopted for application to this Company.

**Interest.** The word "Interest" shall mean the entire ownership interest of a Member in the Company.



**Involuntary Transfer.** The term "Involuntary Transfer" shall mean any of the following, and constitutes a "Governing Event" under this Agreement: (i) a Member's liquidation, dissolution or Bankruptcy; or (ii) notice of a creditor's sale of the Member's Interest in the Company; or (iii) the entering of a charging order issued by a Court against a Member's Interest in the Company. Any such Person who holds, or did hold such an Interest immediately prior to the Governing Event shall be called a "Withdrawing Member" (even though that Person may also be an Unadmitted Assignee). Any Person who purportedly succeeds to a Withdrawing Member's rights hereunder shall be an "Unadmitted Assignee." Whenever the sale of an Interest of a Withdrawing Member is referred to in Article VIII, it shall include an Unadmitted Assignee if the ownership of the Withdrawing Member's Interest has already been transferred to the Unadmitted Assignee.

**Members.** The word "Members" shall mean any and all Persons designated as Members on **Schedule A**, or any Person who becomes a Member as provided herein, in such Person's capacity as a Member of the Company. Such term shall include and refer to two or more Members if more than one Member shall at any time exist hereunder.

**Percentage Interest.** The term "Percentage Interest" refers to the Percentage Interest opposite a Member's name on **Schedule A**.

**Persons.** The word "Persons" shall mean individuals, partnerships, limited liability companies, corporations, unincorporated associations, trusts and estates.

**Prime Rate.** The term "Prime Rate" shall mean the fluctuating prime rate of interest identified as such and as published by The Wall Street Journal, or in the event that The Wall Street Journal shall cease to publish such information, any other daily or weekly financial publication of substantial national circulation, selected by the Members from time to time.

**Required Majority of Members.** The term "Required Majority of Members" shall mean those Class A Voting Members owning more than 66.66% of the Percentage Interests of the Class A Voting Members. Clear Vision, LLC shall be entitled to three (3) votes, one for each member of Clear Vision. Wayne Clark shall be entitled to (3) votes. In the event of the death, Disability, liquidation, dissolution, or Bankruptcy of a Class A Voting Member, and if there are no other Class A Voting Members remaining, those Class B Non-Voting Members owning more than 66.66% of the Percentage Interests of the Class B Non-Voting Members shall constitute the Required Majority of Members.

**State.** The word "State" refers to the State of West Virginia.

**Supermajority Consent of Members.** The term "Supermajority Consent of Members" shall mean those Class A Voting Members owning more than 66.66% of the Percentage Interests of the Class A Voting Members. Clear Vision, LLC shall be entitled to three (3) votes, one for each member of Clear Vision. Wayne Clark shall be entitled to (3) votes. In the event of the death, Disability, liquidation, dissolution, or Bankruptcy of a Class A Voting Member, and if there are no other Class A Voting Members remaining, those Class B Non-Voting Members owning more than 66.66% of the Percentage Interests of the Class B Non-Voting Members shall constitute the Supermajority Consent of Members.



**Tax Amount.** The term "Tax Amount" shall mean an amount equal to the total taxable income allocated to a Member for the current year, multiplied by forty percent (40%).

**Transfer.** The word "Transfer" shall mean any gift, transfer, pledge, sale, assignment, substitution, or other disposition, whether voluntary or involuntary or with or without consideration, of a Member's Interest.

### **ARTICLE III** **BUSINESS AND PURPOSE OF THE COMPANY**

The purpose for which the Company has been formed shall be to engage in all activities necessary for the provision of mechanical, plumbing, and similar services and the performance of any and all acts or things necessary, proper, or convenient for or incidental to the furtherance or carrying out of the purposes mentioned herein. In connection therewith and in connection with any other purpose or activity which the Members elect to pursue in accordance with the Operating Agreement, the Company may enter into such contracts, agreements, ventures, or arrangements with such other persons as may be deemed necessary or advisable by the Members to accomplish any of the purposes of the Company. In addition to the foregoing enumeration of powers, the Company shall have the right to register to conduct business in any state and/or commonwealth or other foreign jurisdiction and to operate and conduct business in connection therewith. The Company is authorized and empowered to conduct such other businesses and/or undertake such other activities as may be allowed by law for a limited liability company formed in the State of West Virginia, it being understood and agreed that the enumeration of purposes set forth herein is not meant to limit the activities of the Company as determined by the Members in accordance with this Agreement.

### **ARTICLE IV** **CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS**

#### **Section 4.01. Capital Contributions; Loans.**

A. The Members have contributed cash or property as their initial Capital Contribution to the Company in the amount of the "Capital Contributions" set forth on **Schedule A**.

B. No Member shall be required to lend any funds to the Company, nor make any Capital Contributions to the Company other than as set forth on **Schedule A**, nor shall any Member be liable for any debts, liabilities, contracts, or obligations of the Company. Any loan from a Member to the Company shall be on such terms as mutually agreed upon by such Member.

C. (i) The Members may make additional Capital Contributions which are required from time to time for the conduct of the business of the Company. The Capital Contributions hereunder shall be made by the Members, and shall be made within fifteen (15) days of the written determination by the Supermajority Consent of Members that such Capital Contributions are needed, in such amounts as the Supermajority Consent of Members shall determine and shall be made by the Members pro rata in accordance with their Percentage Interests.



(ii) In the event that a Member (the "Defaulting Member") shall default in payment of an additional Capital Contribution required pursuant to call (a "Default"), then the Managing Member, by written notice to the Defaulting Member, shall declare such Member to be in default. If such default continues past the expiration of fifteen (15) days after the date of mailing such written notice of default, then the Manager shall take on behalf of the Company whatever legal action as may be necessary to collect the additional Capital Contribution, including a suit in assumpsit, which shall be available for collection thereof, unless the non-defaulting Members shall elect to make loans on behalf of the defaulting Member in accordance with subsection (iii) below.

(iii) If a Defaulting Member fails to make its portion of the requested Capital Contributions, in such event, the non-defaulting Members (the "Contributing Members"), in proportion to their Percentage Interests, may, in their discretion, advance all or a portion of the funds to which there was a Default to the Company on behalf of the Defaulting Member. Any such advance shall be considered a "Shortfall Loan."

(iv) The Shortfall Loan shall be treated as a debt of the Defaulting Member to the Contributing Member. The Shortfall Loan shall carry interest until repaid at a rate of five percent (5%) [five hundred (500) basis points] over the Prime Rate. Shortfall Loans shall be repaid in full prior to any distributions of Cash Flow or Capital Transaction Proceeds to the Defaulting Member.

(v) In the event any Shortfall Loan remains outstanding for a period of more than twelve (12) months, the Contributing Members shall have the right to acquire the Interest of the Defaulting Member, upon written notice to the Defaulting Member, for a price equal to shall be equal to seventy-five percent (75%) of the amount such Member would receive pursuant to Section 12.04 if the assets of the Company were sold for Fair Market Value (as determined in accordance with Section 9.01) and the Company liquidated in accordance with such section, less appropriate adjustments deemed relevant by the Company accountant.

(vi) This Section 4.01.C is solely for the benefit of the Members and cannot be enforced by any creditor of the Company.

#### Section 4.02. Capital Accounts.

A. An individual capital account shall be maintained for each Member. Each such capital account of a Member shall consist of: (i) the fair market value of property contributed by it to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Section 752 of the Code), (ii) allocations to it of Company profits (or items thereof), and decreased by (iii) the amount of money and fair market value of property distributed to it by the Company (net of liabilities secured by such distributed property that such Member is considered to assume or take subject to under Section 752 of the Code), (iv) all allocations to it of expenditures of the Company described in Section 705(a)(2)(B) of the Code, and (v) allocations of Company loss and deduction (or item thereof), subject to such other adjustments required by Treas. Reg. 1.704-1(b)(4) (or any corresponding successor



provisions). In all events such capital accounts shall be maintained in accordance with the Treasury Regulations promulgated under Section 704(b) of the Code.

- B. No interest shall be paid on any present or future capital account balance.

**ARTICLE V**  
**ALLOCATION OF PROFITS AND LOSSES;**  
**CERTAIN TAX MATTERS; DISTRIBUTIONS**

Section 5.01. Allocation of Profits and Losses. Except as provided in Sections 5.05, 5.06 and 5.07 of this Agreement and Section 704(c) of the Code, the profits and losses of the Company for each fiscal year of the Company shall be allocated among the Members in proportion to their respective Percentage Interests.

Section 5.02. Determination of Profits and Losses. The profits or losses of the Company shall be determined in accordance with the accounting methods followed for federal income tax purposes and otherwise in accordance with sound accounting principles and procedures applied in a consistent manner. An accounting shall be made for each fiscal year by the accountants employed by the Company, as soon as possible after the close of each such fiscal year, to determine the Members' respective shares of profits or losses of the Company, which shall be credited or debited, as the case may be, to the Members' respective capital accounts. For tax purposes, all items of income, gain, loss, deduction, or credit shall be allocated to and among the Members in the same proportion in which they share profits and losses.

Section 5.03. Cash Flow. Cash Flow shall be distributed among the Members with respect to each fiscal year as soon as practicable after the end of such year to the Members as follows:

- A. First, to each Member an amount equal to such Member's Tax Amount;
- B. Second, to each Member in proportion to their respective Percentage Interests.

Section 5.04. Right to Distributions. Except as otherwise provided in this Agreement, no Member shall have the right to receive distributions of property from the Company. No Member shall have the right to receive distributions to a Member which include a return of all or any part of its Capital Contribution, except to the extent of Cash Flow distributions and Company property available for distribution on dissolution of the Company, if any.

Section 5.05. Unrealized Receivables. In the event of a reduction in a Member's Interest (provided such reduction does not result in a complete termination of such Member's Interest), such Member's share of the Company's "unrealized receivables" (within the meaning of Section 751(c) of the Code) shall not be reduced so that the portion of the profit which is taxable as ordinary income for federal income tax purposes shall, to the extent possible without increasing the total gain to the Company or to any Member be allocated among the Members in proportion to the deductions (or basis reductions treated as deductions) giving rise to such recapture. Any questions



as to the aforesaid allocation which cannot be resolved in the manner specified above, shall be resolved by the Managing Member in its reasonably exercised discretion.

**Section 5.06. Special Allocations Regarding Excess Deficits and Minimum Gain.** Notwithstanding anything to the contrary contained in this Article V, the allocations of income or gain described in Treas. Reg. Sections 1.704-1(b)(2)(ii)(d) (last paragraph) and 1.704-2(f) shall be made in the circumstances described in such sections of such Treasury Regulations or any successor provisions thereto. This Section 5.06 is intended to constitute a qualified income offset provision and minimum gain chargeback provision under such sections of such Treasury Regulations and shall be so interpreted for all purposes.

**Section 5.07. Minimum Allocations Required Under Section 704(c)(1)(A) of the Code.** Notwithstanding any other provision of this Agreement to the contrary, to the extent a Member is required to take into account an item of profit or loss under Section 704(c)(1)(A) of the Code (or any provisions contained in the Treasury Regulations under 704(b) of the Code providing for substantially equivalent treatment), such allocation shall override all other allocations contained herein but shall not affect a Member's capital account to the extent the economic value of such profit or loss has already been reflected in such Member's capital account.

## **ARTICLE VI**

### **MANAGEMENT OF BUSINESS;**

### **INDEMNIFICATION OF MEMBERS**

**Section 6.01. Operation by the Members.** The Members of the Company shall be jointly responsible for the general overall supervision of the business and affairs of the Company. The Members of the Company shall preside at all meetings of the Members. All Members must sign, on behalf of the Company, any deeds, mortgages, bonds, contracts, or other instruments which have been appropriately authorized to be executed by the Members except in cases where the signing or execution thereof shall be expressly delegated by the Members or by this Operating Agreement to some other officer or agent of the company. The specific authority and responsibility of the Members shall also include the following:

- A. The Members shall effectuate this Operating Agreement.
- B. The Members direct and supervise the operations of the Company.
- C. The Members, within such parameters as may be set by the Members, shall establish such charges for services and products of the Limited Liability Company as may be necessary to provide adequate income for the efficient operation of the Company.
- D. The Members, within the budget established by the Members, shall set and adjust wages and rates of pay for all personnel of the Company and shall appoint, hire and dismiss all personnel and regulate their hours of work.
- E. The Members shall keep all other Members advised in all matters pertaining to the operation of the Company, services rendered, operating income and expenses, financial



position, and, to this end, shall prepare and submit a report at each regular meeting and at other times as may be directed.

Section 6.02. Standard of Care. The Members will exercise their powers hereunder in good faith and in a manner that it reasonably believes to be in the best interests of the Company. In furtherance thereof, each Member shall have a Fiduciary Duty to the other Members of the Company as is defined in this Agreement.

Section 6.03. Indemnification. The Members shall be indemnified and held harmless by the Company from and against any and all claims, demands, liabilities, costs, damages and causes of action, of any nature whatsoever, arising out of or incidental to the Members' involvement in the Company affairs, except where the claim at issue is based upon (i) the fraud, gross negligence or willful misconduct of such Member; or (ii) the material and adverse breach of such Member of any material provision of this Agreement. The indemnification authorized by this Section 6.03 shall include, without limitation, payment of (i) reasonable attorneys' fees or other expenses incurred in connection with settlement or in any finally-adjudicated legal proceeding; and (ii) the removal of any liens affecting any property of the Member so indemnified. The indemnification rights contained in this Section 6.03 shall be cumulative of, and in addition to, any and all rights, remedies and recourses to which the Members shall be entitled, whether pursuant to the provisions of this Agreement, at law or in equity. Indemnifications shall be made solely and entirely from assets of the Company (excluding, for these purposes, all assets of a Member other than those of, and attributable to such Member's interest in, the Company), and none of the Members shall be personally liable for the indemnity provided in this Section 6.03.

## ARTICLE VII INVOLUNTARY TRANSFERS

Section 7.01. Unadmitted Assignees. No Unadmitted Assignee shall become a Member of the Company unless and until the Required Majority of Members has approved. An Unadmitted Assignee shall have the right to distributions as if a Class B Non-Voting Member but shall have no other rights of a member in a limited liability company under the Act. An Unadmitted Assignee shall have the right to sell its rights as an assignee of a Membership Interest in the Company provided that such sale must be in accordance with the provisions of this Article VII. Finally, an Unadmitted Assignee shall, in all other instances, be bound by this Agreement.

Section 7.02. Option to Purchase, Obligation to Sell. If there should occur a Governing Event, the Company, or not less than all of the Company's remaining Members if so designated by the Company (the "Designee," also the "Purchaser") may elect to purchase, and the Withdrawing Member must sell, the entire Interest of the Withdrawing Member. If the Purchaser elects to purchase the Withdrawing Member's Interest, it shall give notice of such sale to the Withdrawing Member at any time within ninety (90) days after notice of the Governing Event.

Section 7.03. Determination of Purchase Price. Unless the Withdrawing Member and Purchaser shall have agreed as to the value of the Interest within sixty (60) days after such notice is given by the Purchaser to purchase the Interest, the fair market value of the Withdrawing Member's Interest shall be determined by arbitration, as provided in Section 8.01, Paragraphs A



through E below. Notwithstanding the foregoing references to the provisions in Article IX to the contrary, the Purchase Price shall not be prorated as provided for in Section 8.01.E if the Company elects to be the Purchaser instead of designating the Remaining Members as Purchasers. Furthermore, to the extent the provisions of Section 8.01, Paragraphs A through E, are inconsistent with the provisions of this Article VII, this Article VII shall govern.

Section 7.04. Time for Closing. The closing of the purchase shall take place at the office of the Company no later than two hundred (200) days after the Governing Event.

Section 7.05. Payment of Purchase Price. At the option of the Purchaser, the Purchase Price may be paid in any one of the following ways:

- (i) In full, by certified check; or
- (ii) In the manner provided in Section 8.04 below.

Section 7.06. Adjustments to Capital Accounts. Appropriate adjustments shall be made by the accountants between the Company and the Withdrawing Member in the capital accounts and income and expense accounts so that the Withdrawing Member shall have repaid to the Company all sums due for overdraws, advances, share of losses, loans or otherwise, and vice versa.

Section 7.07. Delivery of Documents. The Withdrawing Member shall deliver to the Purchaser such documents or instruments in writing, in a form satisfactory to the Purchaser, which shall assign, transfer, and convey to the Purchaser all of the Withdrawing Member's right, title, and interest, in and to the Member's Interest so purchased, free and clear of all liens and encumbrances or rights of others thereto or therein.

Section 7.08. Class A Voting Membership Interests. Should an Involuntary Transfer under this Article VII involve Class A Voting Membership Interests, Section 8.01 of this Agreement shall govern.

## ARTICLE VIII

### DEATH, DISABILITY OR OTHER VOLUNTARY TRANSFERS

Section 8.01. Voluntary Disposition of Membership Interests. No Member (hereinafter the "Selling Member") with respect to the following activity) shall Transfer, all or any part of its Membership Interest in the Company without (i) first notifying the remaining Members in writing, and (ii) offering the Membership Interest for sale to the other Members at the Transfer Price (as defined in Section 8.01.E below).

A. The Selling Member and the remaining Members shall have a period of thirty (30) days from the date of receipt of such notice within which to agree to the full net cash value of the Company's assets (hereinafter "Fair Market Value"). If the Selling Member and the remaining Members are unable to agree upon the Fair Market Value, then the dispute shall proceed to arbitration. The arbitration procedure shall commence when either party submits the matter to arbitration by sending written notice of such submission to the other party. Not later than ten (10)



days after the arbitration procedure has commenced, the Selling Member shall appoint one (1) arbitrator and the remaining Members shall appoint one (1) arbitrator and each shall notify the other of such appointment by identifying such arbitrator. In the event the Company owns any real property (or any interest therein) at the time such Fair Market Value is determined, then the Selling Member and the remaining Members agree to appoint as their respective appointee a real estate appraiser with an MAI designation who is an individual of substantial experience with respect to real property values in Jefferson County, West Virginia, which person shall be regularly engaged during the previous two (2) years as a real estate appraiser in Jefferson County, West Virginia. In the event more than one (1) appointee is selected hereunder by virtue of the various types of assets than owned by the Company, such appointees shall collectively be referred to as the arbitrator. None of the Members may consult directly or indirectly with any arbitrator regarding the Fair Market Value prior to appointment, or after appointment, outside the presence of the other party. The arbitration hereunder shall be conducted in Jefferson County, West Virginia, under such provisions, rules, and procedures as shall be determined by the arbitrators acting hereunder from time to time.

B. Not later than ten (10) days after each arbitrator is appointed, the Selling Member and the remaining Members shall separately, but simultaneously, submit in a sealed envelope to each arbitrator their separate suggested Fair Market Value and shall provide a copy of such submission to the other party. The two (2) selected arbitrators, after reviewing such submissions, shall determine whether the Selling Member's or the remaining Members' estimate of the Fair Market Value is closer to the actual Fair Market Value. The arbitrators in making such determination shall use normal, acceptable personal property and real estate appraisal practices in determining the Fair Market Value in the same manner as if the arbitrators were performing an appraisal of the Company's assets. If both arbitrators agree that one of said declared estimates is closer to the actual Fair Market Value, they shall declare that estimate to be the Fair Market Value, and their decision shall be final, binding and conclusive upon all parties interested in this Agreement.

C. If the two (2) selected arbitrators are unable to agree on the Fair Market Value within forty-five (45) days after receipt of the Selling Member's and remaining Members' written estimates, then the arbitrators shall inform the parties. Unless the parties shall otherwise then direct, said arbitrators shall select a third (3rd) arbitrator not later than ten (10) days after the expiration of said forty-five (45) day period. If no arbitrator is selected within such ten (10) day period, either party may immediately petition a court with appropriate jurisdiction to appoint such third (3rd) arbitrator. The third arbitrator shall have the qualifications and restrictions set forth in Section 9.01.A above. The third arbitrator's decision shall be final and binding as to which estimate (as between the Selling Member's and remaining Members') of the Fair Market Value is closer to the actual Fair Market Value. Such third arbitrator shall make a decision not later than thirty (30) days after appointment. Such third arbitrator's determination shall be final, binding, and conclusive on all persons interested in this Agreement.

D. The Selling Member and the remaining Members shall be responsible for the costs, charges, and/or fees of their respective appointee, and the Selling Member and the remaining Members shall each pay one-half (1/2) of the costs, charges, and/or fees of the third arbitrator. The decision of the arbitrator(s) may be entered in any court having jurisdiction thereof.



E. Upon receipt of the written determination of the Fair Market Value as set forth above, the Company accountant shall have a period of time not to exceed fifteen (15) days within which to determine the voluntary transfer purchase price. The voluntary transfer purchase price ("Transfer Price") shall be equal to ninety percent (90%) of the amount such Member would receive pursuant to Section 11.04 if the assets of the Company were sold for Fair Market Value (as determined in accordance with this Section 8.01) and the Company liquidated in accordance with such section, less appropriate adjustments deemed relevant by the Company accountant. The Transfer Price so determined shall be binding on all parties hereto. Upon determination of the Transfer Price, the Company accountant shall send written notice thereof to all of the Members, and the remaining Members shall have a period of thirty (30) days from the date notice of the Transfer Price is sent by the Company accountant ("Remaining Member Purchase Period") to elect in writing to purchase their proportionate share of the Membership Interest proposed for Transfer. Each remaining Member's proportionate share shall be the percentage that their respective Percentage Interest bears to the total of the Percentage Interests of the remaining Members desiring to purchase the Membership Interest. In the event that a remaining Member should choose not to elect in writing to purchase his or her proportionate share of the Membership Interest proposed for Transfer, then the remaining Members who have timely elected to purchase their proportionate share of the Membership Interest proposed for Transfer may, for a period of ten (10) days following the expiration of the Remaining Member Purchase Period (the "Default Purchase Period"), elect in writing to purchase their proportionate share (in this instance, also excluding the non-purchasing remaining Member's Percentage Interest in determining proportionate shares) of the portion of the Membership Interest proposed for Transfer that the non-purchasing remaining Member did not timely elect to purchase.

F. In the event that the remaining Members shall fail to timely elect to purchase all of the Membership Interest which the Selling Member proposes for Transfer, then, upon the expiration of the Remaining Member Purchase Period (or, if applicable, the Default Purchase Period), the Selling Member may sell, assign, transfer, or otherwise dispose of that portion or all of the Membership Interest proposed for Transfer to any transferee for a period of one hundred eighty (180) days immediately following the expiration of the Remaining Member Purchase Period or the expiration of the Default Purchase Period, whichever shall be applicable in the circumstances (provided that such Transfer is evidenced by a written agreement which takes into account the rights of the remaining Members as hereinafter set forth); provided, however, in the event that the Selling Member has obtained from a bona fide third-party purchaser a written, executed contract of sale for his or her Membership Interest which is acceptable to the Selling Member, which contract provides for a purchase price for the Selling Member's Membership Interest which is less than the Transfer Price, then the Selling Member shall immediately deliver an executed copy thereof to the remaining Members, and the remaining Members shall have the right, for a period of fifteen (15) days from the date of receipt of a copy of said written contract of sale, to elect in writing to purchase the Membership Interest being sold pursuant to the aforesaid contract of sale at the same price and upon the same terms and conditions as set forth in the aforesaid contract of sale. In the event that more than one of the remaining Members elects to purchase the Selling Member's Membership Interest at the price, terms, and conditions set forth in the aforesaid contract of sale, then the electing remaining Members shall each be entitled, unless otherwise agreed between the electing remaining Members, to purchase their pro-rata share of the



Selling Member's Membership Interest set forth in the aforesaid contract of sale. In the event that no remaining Member elects to purchase the Selling Member's Membership Interest in accordance with the price, terms, and conditions as set forth in the aforesaid contract of sale within the said fifteen (15) day period, then, upon the expiration of said fifteen (15) day period, such Membership Interest may be sold, assigned, transferred, and otherwise disposed of to the prospective purchaser in accordance with such contract of sale, and the prospective purchaser shall, upon completion of such transfer and executing a copy of this Agreement, become a Class B Non-Voting Member of the Company, having all of the rights and obligations set forth herein and as set forth under West Virginia law, it being understood and agreed that the disposition of any Class A Voting Membership Interest hereunder to a third-party purchaser (i.e., other than an existing Member of the Company) shall automatically convert such Membership Interest to a Class B Non-Voting Membership Interest.

**Section 8.02. Purchase on Death.** Subject to the provisions of Section 8.07 below, upon the death of any Member (the "Decedent"), the surviving Members shall have the obligation to purchase their proportionate share (based on the percentage that their respective Percentage Interest bears to the total Percentage Interests of all Members excluding the Decedent), and the Personal Representative of the Decedent's estate shall have the obligation to sell unto the surviving Members, in proportionate shares, the Decedent's Membership Interest at the purchase price, which shall be determined in the same manner as set forth in Section 8.01.A, B and C above, and the date of death shall be deemed the equivalent of the date upon which such Membership Interest is being offered for sale to the surviving Members. The purchase price ("Death Price") shall be equal to the amount such Member would receive pursuant to Section 11.04 if the assets of the Company were sold for Fair Market Value (as determined in accordance with this Section 8.01) and the Company liquidated in accordance with such section, less appropriate adjustments deemed relevant by the Company accountant. The Death Price so determined shall be binding on all persons interested herein. Upon determination of the Death Price, the Company accountant shall send written notice thereof to each surviving Member and the personal representative of the Decedent's estate. The Death Price shall be the price for which the personal representative shall sell the Decedent's entire Membership Interest and the price which shall be paid on the proportionate basis as above set forth by the surviving Members in exchange for their proportionate share of the Decedent's Membership Interest. A settlement shall be held for the sale and purchase of the Decedent's Membership Interest at a time and place mutually agreeable to the surviving Members and the personal representative of the Decedent's estate, but such settlement shall not take place later than one hundred twenty (120) days subsequent to the date of the Decedent's death. All Members acknowledge and agree that due to the unique nature of Membership Interests in the Company and due to the unavailability of a ready market for the same, the Decedent's estate or the legatee of his or her Membership Interest in the Company, whatever the case may be, shall be entitled to the remedy of specific performance in the event any surviving Member should fail to fulfill his or her obligation to purchase as set forth in this Section 8.02.

**Section 8.03. Purchase on Disability.** Subject to the provisions of Section 8.07 below, upon any Member becoming Disabled (the "Disabled Member"), the remaining Members shall have the obligation to purchase their proportionate share (based on the percentage that their respective Percentage Interest bears to the total Percentage Interests of all Members excluding the Disabled Member), and the personal representative or guardian of the Disabled Member shall have



the obligation to sell unto the remaining Members, in proportionate shares, the Disabled Member's Membership Interest at the purchase price, which shall be determined in the same manner as set forth in Section 8.01.A, B and C above, and the date Disability shall be deemed the equivalent of the date upon which such Membership Interest is being offered for sale to the surviving Members. Upon receipt of the determination of the Fair Market Value in accordance with Section 8.01.A, B and C above, the Company accountant shall have a period of time not to exceed fifteen (15) days within which to determine the purchase price. The purchase price ("Disability Price") shall be equal to the amount such Member would receive pursuant to Section 11.04 if the assets of the Company were sold for Fair Market Value (as determined in accordance with this Section 8.01) and the Company liquidated in accordance with such section, less appropriate adjustments deemed relevant by the Company accountant. The Disability Price so determined shall be binding on all persons interested herein. Upon determination of the Disability Price, the Company accountant shall send written notice thereof to each surviving Member and the personal representative or guardian of the Disabled Member's estate. The Disability Price shall be the price for which the personal representative or guardian shall sell the Disabled Member's entire Membership Interest and the price which shall be paid on the proportionate basis as above set forth by the remaining Members in exchange for their proportionate share of the Disabled Member's Membership Interest. A settlement shall be held for the sale and purchase of the Disabled Member's Membership Interest at a time and place mutually agreeable to the remaining Members and the personal representative or guardian of the Disabled Member, but such settlement shall not take place later than one hundred twenty (120) days subsequent to the date of the Disability. All Members acknowledge and agree that due to the unique nature of Membership Interests in the Company and due to the unavailability of a ready market for the same, the Disabled Member shall be entitled to the remedy of specific performance in the event any remaining Member should fail to fulfill his or her obligation to purchase as set forth in this Section 8.03.

Section 8.04. Settlement. Settlement with respect to the purchase by the remaining Members of the Selling Member's Membership Interest shall be held within sixty (60) days after timely notification by the remaining Members of the election to purchase the Membership Interest pursuant to terms of Section 8.01. The purchasing Members agree to pay at settlement their proportionate share (as established pursuant to Section 8.01. above) of the Transfer Price. Twenty-five percent (25%) of the Transfer Price shall be paid in cash at settlement, with the proportionate share of the remaining balance from each purchasing Member to be evidenced by the delivery at closing of a confessed judgment promissory note in a form which is reasonably acceptable to Selling Member's attorney. Each note shall be made payable to the Selling Member, or order, bearing interest on the outstanding principal balance due thereunder from time to time at two (2) percentage points above the Prime Rate on the date of death or Disability. In the event that the Transfer Price is less than One Million and 00/100 Dollars (\$1,000,000.00), principal and interest at the foregoing rate shall be payable in eighteen (18) equal monthly installments beginning on the first (1st) day of the calendar month after the settlement date, and with subsequent installments of principal and interest being due and payable on the same day of the calendar month thereafter until the note is fully paid. In the event that the Transfer Price is equal to or more than One Million and 00/100 Dollars (\$1,000,000.00), principal and interest at the foregoing rate shall be payable in sixty (60) equal monthly installments beginning on the first (1st) day of the calendar month after the settlement date, and with subsequent installments of principal and interest being due and payable on the same day of the calendar month thereafter until the note is fully paid. The notes



may be prepaid, in whole or in part, at any time (including at settlement) in the sole discretion of the purchasing Member. In return for the Transfer Price, the Selling Member shall execute an assignment to each purchasing Member transferring the portion of his or her Membership Interest being purchased by such Member, with such assignment to be in a form acceptable to the purchasing Member's attorney.

Section 8.05. Encumbrance by a Member. No Member shall have the right to pledge mortgage, assign for security purposes, or hypothecate its Membership Interest, except with the prior written unanimous consent of the other Members. Any action in violation of the foregoing provision shall be void at the option of the other Members. If a Member violates this provision, the violating Member shall hold the other Members and the Company harmless from all costs and expenses, including attorneys' fees resulting from such violation. Notwithstanding the foregoing, Members may make loans to each other and secure such debt by the Membership Interest of the borrowing Member.

Section 8.06. Disposition of Class A Voting Membership Interests. Notwithstanding anything in this Article VIII to the contrary, it is the intent of the Members hereunder that the disposition of a Class A Voting Membership Interest in accordance with this Article (whether by voluntary transfer, death or Disability) shall, in the first instance, be offered to and/or purchased by the remaining and/or surviving Class A Voting Members. Therefore, in the event of a proposed Transfer as set forth in Section 8.01 above of a Class A Voting Membership Interest, the remaining Class A Voting Members shall initially have the sole and exclusive right to acquire such Class A Voting Membership Interest in accordance with the provisions thereof. In the event the remaining Class A Voting Members fail or refuse to acquire such Class A Voting Membership Interest in accordance with Section 8.01 above, then such Class A Voting Membership Interest may then be offered to all of the Members of the Company proportionately, but in such event, shall be converted to a Class B Non-Voting Membership Interest. In the event of the death or disability of a Class A Voting Member in accordance with Section 8.02 or 8.03 above, then the remaining Class A Voting Members shall be obligated to acquire such Class A Voting Membership Interest in accordance with the provisions of Section 8.02 or Section 8.03 as applicable. The disposition of a Class B Non-Voting Membership Interest shall be made in accordance with this Article VIII to all of the Members of the Company proportionately. The provisions of this Section shall be applied to Involuntary Transfers made under Article VII.

Section 8.07. Disposition to Family Members.

A. Notwithstanding anything in this Agreement to the contrary, it is understood and agreed that any Class A Voting Member shall have the right to transfer and/or convey by sale, gift and/or other disposition all or a portion of the Class B Non-Voting Membership Interests held or controlled by such Class A Voting Member hereunder to himself or any Immediate Family Member by sending written notice of such transfer and/or conveyance to the remaining Class A Voting Members ("Related Disposition") without the obligation to first offer such Class B Non-Voting Membership Interest to the other Members in accordance with the provisions of this Article IX; provided, however, the Class B Non-Voting Membership Interest which is transferred in a Related Disposition shall, nonetheless, remain subject, in all cases, to the provisions of this Agreement, including, without limitation, the sale obligations set forth in this Article VIII. It is



the intent of the Members that any Class A Voting Member shall have the sole and unilateral right to convert all or a portion of such Class A Voting Membership Interests to a Class B Non-Voting Membership Interest and may thereafter transfer and/or convey all or a portion of the Class B Non-Voting Membership Interest owned by such Class A Voting Member (or a portion of the Class A Voting Membership Interest owned by such Class A Voting Member, which upon the consummation of the Related Disposition, shall automatically be converted to a Class B Non-Voting Membership Interest) to himself or any Immediate Family Member for tax planning purposes, estate planning purposes and/or any other reason without being subject to the restrictions set forth in this Article VIII, provided, that in all cases, such Class B Non-Voting Membership Interest shall remain subject to the requirements of this Article VIII following the Related Disposition. By way of example, in the event a Class A Voting Member transfers and/or conveys all or a portion of the Class B Non-Voting Membership Interest owned by such Class A Voting Member to an Immediate Family Member, such Related Disposition shall not be subject to the provisions of Section 8.01 above; provided, however, any subsequent transfer, conveyance or other disposition of the Membership Interest transferred herein shall be subject to the restrictions, covenants and prohibitions set forth herein unless further transferred, conveyed or disposed by the Immediate Family Member to another Immediate Family Member. In addition to, and in furtherance of, the provisions contained in this Section 8.07 above, if the Class A Voting Member therein described is a trust, or trustee of a trust, the provisions of which include the right to distribute principal to another Member, either Class A Voting Membership Interests or Class B Non-Voting Membership Interests may be so distributed, subject to the provisions contained in this Section.

B. As set forth above, it is understood and agreed that the Membership Interest owned by the Decedent or Disabled Member may be transferred and conveyed unto an Immediate Family Member in accordance with any last will and testament prepared by the Decedent and/or by virtue of intestate succession, or upon assignment by the personal representative or guardian of a Disabled Member, as the case may be. Such Immediate Family Member shall retain ownership of such Membership Interest in the same manner as the Decedent or Disabled Member and the voting rights attributable to such Membership Interest, if any, shall be vested with Immediate Family Member; provided, however, that except in the case of a transfer or conveyance to a spouse of the Decedent or Disabled Member, any Class A Voting Membership Interest so transferred or conveyed shall be automatically converted to a Class B Non-Voting Membership Interest. In the case of a transfer or conveyance of a Class A Voting Membership Interest to a spouse of the Decedent or Disabled Member, such spouse shall become a Class A Voting Member with respect to such Interest; provided, however, that (i) the death or Disability of such spouse; or (ii) in the event such spouse subsequently fails or refuses to execute and deliver any documentation requested by the Managing Member from the Class A Voting Members as a part of the operation and management of the Company (provided that in all cases such Managing Member agrees to execute and deliver such similar documentation), then upon such refusal, the Class A Voting Membership Interest owned by the spouse shall be automatically converted to a Class B Non-Voting Membership. In the event an Immediate Family Member retains ownership of the Membership Interest in accordance herewith and subsequently fails or refuses to execute and deliver any documentation requested by the Managing Member as a part of the operation and management of the Company (provided that in all cases such Managing Member agrees to execute and deliver such similar documentation), then upon such refusal, the Membership Interest owned



by the Immediate Family Member shall be deemed offered for sale to the Remaining Member in the same manner as a voluntary Transfer in accordance with Section 8.01 above. By way of example, in the event an Immediate Family Member acquires the Decedent's Membership Interest and the Managing Member subsequently requests such Immediate Family Member to execute documents in connection with financing for the property (provided such Managing Member is willing to execute similar documents) and the Immediate Family Member fails or refuses to do so without delay, then the Membership Interest owned by such Immediate Family Member shall be offered for sale to the Remaining Member in accordance with Section 8.01 above.

#### ARTICLE IX EXPENSES

All expenses in connection with the acquisition, development and financing of Company property, as well as the annual accounting fees, expenses for preparing and distributing Company financial statements, tax returns, Company progress and other periodic reports, and comprehensive general insurance premiums shall be considered Company expenses. Each Member shall pay its own legal and accounting fees in connection with protecting or enforcing its particular interest in the Company.

#### ARTICLE X MEETINGS AND MINUTES

Section 10.01. Annual Meetings. An annual meeting of the Members of the Company shall be held within five (5) months after the close of the fiscal year of the Company. The date, time and place thereof shall be set by the Managing Member.

Section 10.02. Special Meetings. Special meetings of the Members of the Company may be called at any time by a Required Majority of Members.

Section 10.03. Special Meetings; Notice. Notice of special meetings shall be mailed directly to each Member, addressed to said Member at his or her residence or usual place of business, at least ten (10) days before the day on which the meeting is to be held, or shall be sent to him or her at such place by facsimile or other electronic communication, or orally, in person or by telephone. Said notice shall specify the purpose of the meeting. Notice of any special meeting shall not be required to be given to any Member who shall attend such meeting without protesting prior thereto or at its commencement the lack of notice to him or her, or who submits a signed waiver of notice, whether before or after the meeting. Notice of any adjourned meeting shall not be required to be given.

Section 10.04. Meeting Chair. At all meetings of the Company, the Managing Member shall serve as its Chair.

Section 10.05. Minutes. At all meetings of the Company, the Managing Member shall appoint a person to act as secretary for the Company for the purpose of keeping minutes. All minutes of meetings shall be retained in a Company Minute Book.



ARTICLE XI  
DISSOLUTION OF THE COMPANY

Section 11.01. Events of Dissolution. The Company shall be dissolved upon the happening of any of the following:

- A. The sale or disposition of all or substantially all of the Company assets, and the distribution of the proceeds thereof to the Members;
- B. The vote of the Required Majority of Members;
- C. Upon an event which makes it unlawful for the Company's business to be continued; or
- D. The entry of a decree of judicial dissolution.

Section 11.02. Winding Up. Upon dissolution under Section 11.01, no further business shall be conducted by the Company except for the taking of such action as shall be necessary for the winding up of the affairs of the Company and the distribution of its assets to the Members pursuant to the provisions hereof, and thereupon such Person(s) as the Required Majority of Members shall designate (hereinafter, in either event, referred to as the "Liquidator") shall act as liquidating trustee and immediately proceed to wind up and terminate the business and affairs of the Company.

Section 11.03. Sale of Company Assets. Upon dissolution, the Liquidator shall sell such of the Company assets as it deems necessary or appropriate. In lieu of the sale of any or all of the Company property, the Liquidator may convey and assign all or any part of the Company property to the Members. A full accounting shall be made of the accounts of the Company and each Member thereof and of the Company's assets, liabilities, and income, from the date of the last accounting to the date of such dissolution. The profits and losses of the Company shall be determined to the date of dissolution and transferred, as provided in Article V, to the respective capital accounts of the Members. In accounting for distributions of Company property, such property shall be valued at the fair market value at the date of dissolution as determined by an appraisal secured by the Liquidator, except that no value shall be placed upon the firm name or goodwill of the Company. Any difference between the valuation of the Company property and its book value shall be considered as though it represented profit or loss, and shall be allocated to the capital accounts of the Members as provided in Section 4.02. Any gain or loss on disposition of Company property shall be credited or charged to the capital accounts of the Members in the same manner as the difference between the valuation of Company property and its book value.

Section 11.04. Distribution of Assets. The Liquidator shall apply the remaining Company assets, in the following order of priority:

- A. First, to the payment and discharge of, or reservation for, all of the Company's debts and liabilities and the expenses of dissolution and winding up, in the order or priority as provided by law;



B. Second, to the payment to a reserve fund for contingent liabilities to the extent deemed reasonable by the Liquidator; and

C. Third, to the Members to the extent of and in proportion to their respective Capital Accounts after taking into account the allocations of profit or loss pursuant to Section 5.01 and prior distributions of cash or property pursuant to Section 5.03.

Section 11.05. Return of Capital Contributions. The Members shall look solely to the assets of the Company for the return of their Capital Contributions, and if the Company property remaining after the payment or discharge of the debts, obligations and liabilities of the Company is insufficient to return the Capital Contributions, they shall have no recourse therefor against the Liquidator.

## ARTICLE XII ACCOUNTING PROVISIONS

Section 12.01. Fiscal Year. The fiscal year of the Company shall end on December 31.

Section 12.02. Company Elections. In the case of a distribution of property made in the manner provided in Section 734 of the Code, or in the case of a transfer of an Interest permitted by this Agreement made in the manner provided in Section 743 of the Code, the Managing Member, on behalf of the Company, shall file an election under Section 754 of such Code in accordance with the procedures set forth in the applicable Treasury Regulations.

## ARTICLE XIII REPORTS

Section 13.01. Access to Information. The Members and their authorized representatives shall be permitted access to all records of the Company after adequate notice, at any reasonable time.

Section 13.02. Financial Statements. As soon as practicable after the end of each calendar quarter, the Managing Member shall deliver to each Member an unaudited financial statement of the Company, including balance sheet and statement of revenues and expenses. As soon as practicable after the end of each fiscal year, the Managing Member shall deliver to each Member a review of the financial condition of the Company including balance sheet, statement of revenues and expenses, the Member's capital accounts, changes in financial condition, and all information relating to the Company necessary for the preparation by each Member of its federal income tax return.

Section 13.03. Annual Budget. The Managing Member shall prepare an annual budget for the Company, at least thirty (30) days prior to the end of each calendar year, which shall be reviewed and approved by the Required Majority of Members.



ARTICLE XIV  
INDEPENDENT ACTIVITIES; TRANSACTIONS WITH AFFILIATES

Each of the parties hereto may engage in whatever other activities it chooses. The Members shall not be obligated to contribute their full time and efforts to the Company; however, the Members shall diligently and faithfully devote such of its time to the business of the Company as may be necessary to properly conduct the affairs of the Company. The fact that any Member, a member of his or her family or an Affiliate is directly or indirectly interested in or connected with any Person employed by the Company or from whom the Company may buy merchandise, materials, services or other property shall not prohibit the Company from employing, or from dealing with, such Person.

ARTICLE XV  
AMENDMENTS

This Agreement shall not be amended except with the consent of the affirmative vote of the Required Majority of Members. In the event this Agreement is amended as hereinbefore provided, each Member agrees to promptly execute or cause to be executed one or more amendments to this Agreement and such certificates to reflect the adoption by the Company of any such amendment of this Agreement as may be required by the laws of the jurisdictions in which the Company does business at such time. There shall be no amendment to this Agreement which increases the liability of the Members or affects their capital accounts, without the consent of all Members.

ARTICLE XVI  
MISCELLANEOUS

Section 16.01. Notices. All notices or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given or made if made by facsimile (confirmed on the date the facsimile is sent by one of the other methods of giving notice provided for in this section) or by hand delivery, by FedEx or other similar overnight delivery service, or by certified mail, unrestricted delivery, return receipt requested, postage prepaid, and addressed (i) if to a Member at its address set forth on **Schedule A**, and (ii) if to the Company, at its address set forth in Section 1.02 with copies thereof to each Member. Any notice required or permitted by or in connection with this Agreement shall be in writing and shall be made by Notice shall be considered given as of the date of the facsimile or the hand delivery, one (1) calendar day after delivery to Federal Express or similar overnight delivery service, or three (3) calendar days after the date of mailing, independent of the date of actual delivery or whether delivery is ever in fact made, as the case may be, provided the giver of notice can establish the fact that notice was given as provided herein. If notice is tendered pursuant to the provisions of this section and is refused by the intended recipient thereof, the notice, nevertheless, shall be considered to have been given and shall be effective as of the date herein provided. Any Member may change its address by giving notice in writing stating its new address to the Company, and the Company may change its address for purposes of this Section 18.01 by giving notice thereof to each Member. Commencing on the tenth (10th) day after the giving of such notice, such newly designated address shall be such Member's address or the Company's



address, as the case may be, for the purposes of all notices or other communications required or permitted to be given pursuant to this Agreement.

Section 16.02. Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State.

Section 16.03. Genders and Headings. The use of any gender herein shall be deemed to be or include the other gender and the use of the singular herein shall be deemed to be or include the plural (and vice-versa), wherever appropriate. The headings herein are inserted only as a matter of convenience and reference and in no way define, limit or describe the scope of this Agreement, or the intent of the provisions thereof.

Section 16.04. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective heirs, executors, administrators, personal and legal representatives, successors and permitted assigns, except as otherwise expressly provided herein.

Section 16.05. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be considered an original and all of which taken together shall constitute one and the same instrument.

Section 16.06. Interest Held For Investment. Each Member does hereby represent and warrant by the execution of this Agreement that (i) its Interest was obtained for investment purposes only and not for resale or distribution; (ii) it is qualified by its personal experience to analyze the merits and risks of a contribution to the Company; and (iii) it has not relied on the advice of its counsel in making its decision to contribute to the Company and become a Member herein.

Section 16.07. Securities Laws Restrictions. The Interests described in this Agreement have not been registered under the Securities Act of 1933, as amended (the "Securities Act") or under the securities laws of the State or any other jurisdiction (the "State Acts"). Consequently, these Interests may not be sold, transferred, assigned, pledged, hypothecated or otherwise disposed of, except in accordance with the provisions of the Securities Act, the State Acts and this Agreement.

Section 16.08. Application of Subchapter K. No election shall be made by the Company or any Member for the Company to be excluded from the application of the provisions of Subchapter K of the Code, or from any similar provisions of State and foreign tax laws which relate to the taxation of partnerships.

Section 16.09. Waiver of Partition. Each Member (and its representatives, successors and assigns) hereby irrevocably waives any and all right to maintain any actions for partition or to compel any sale with respect to any assets or properties of the Company.

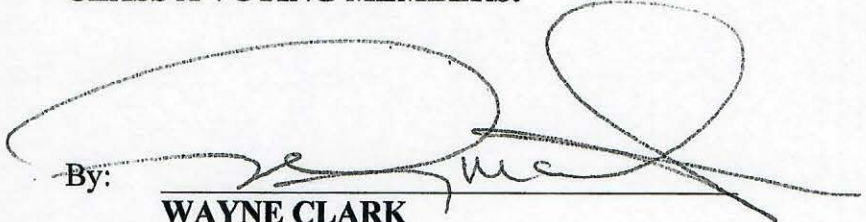
**IN WITNESS WHEREOF**, the Members have executed this Operating Agreement under seal as of the day and year first above written.



WITNESS:

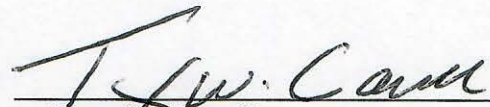
E. B. Hill

CLASS A VOTING MEMBERS:

By:   
WAYNE CLARK

Tim Carroll

By: CLEAR VISION, LLC, a West Virginia  
limited liability company

By:   
Timothy Carroll

**SCHEDULE A****LOVE 4 GOLF, LLC**

<b><u>Names and Addresses</u></b>	<b><u>Capital Contribution</u></b>	<b><u>Percentage Interest</u></b>
<b><u>Class A Voting Members</u></b>		
Wayne Clark	\$ _____	75%
Clear Vision, LLC	\$ _____	25%

# SUMMONS

Case Number:  
CC-19-2022-C-52

IN THE CIRCUIT OF JEFFERSON WEST VIRGINIA  
**Wayne Clark v. Clear Vision, LLC**

Service Type: Defendant - Private Process Server

NOTICE TO: Clear Vision, LLC, c/o Tim Carrol Agent for Service, 128 Sunflower Drive, Kearneysville, WV 25414  
THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY:

James Campbell, 1602 Village Market Blvd Ste 225, Leesburg, VA 20175

THE ANSWER MUST BE MAILED WITHIN 20 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT.

SERVICE:

4/25/2022 4:40:00 PM                      /s/ Laura Storm  
Date    Clerk

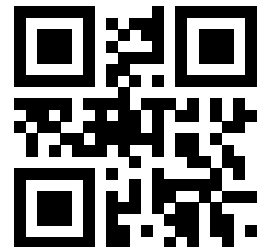
RETURN ON SERVICE:

☐ Return receipt of certified mail received in this office on \_\_\_\_\_  
☐ I certify that I personally delivered a copy of the Summons and Complaint to \_\_\_\_\_

☐ I certify that I personally delivered a copy of the Summons and Complaint to the individual's dwelling place or usual place of abode to \_\_\_\_\_, a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purpose of the summons and complaint.

☐ Not Found in Bailiwick

\_\_\_\_\_  
Date    Server's Signature



**CC-19-2022-C-52**  
**Wayne Clark v. Clear Vision, LLC**

P-001 - Wayne Clark                      v.   D-001 - Clear Vision, LLC  
Plaintiff    Defendant

**SERVICE RETURN**



## West Virginia E-Filing Notice

CC-19-2022-C-52

Judge: David Hammer

**To:** Clear Vision, LLC  
c/o Tim Carrol Agent for Service  
128 Sunflower Drive  
Kearneysville, WV 25414

---

# NOTICE OF FILING

---

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

Wayne Clark v. Clear Vision, LLC

CC-19-2022-C-52

The following complaint was FILED on 4/25/2022 4:40:00 PM

Notice Date: 4/25/2022 4:40:00 PM

Laura Storm  
CLERK OF THE CIRCUIT COURT  
Jefferson County  
PO Box 1234  
CHARLES TOWN, WV 25414

(304) 728-3231  
[circuitclerk@jeffersoncountywv.org](mailto:circuitclerk@jeffersoncountywv.org)



# SUMMONS

E-FILED | 4/25/2022 4:40 PM  
CC-19-2022-C-52  
Jefferson County Circuit Clerk  
Laura Storm

IN THE CIRCUIT OF JEFFERSON WEST VIRGINIA  
**Wayne Clark v. Clear Vision, LLC**

Service Type: Defendant - Private Process Server

NOTICE TO: Clear Vision, LLC, c/o Tim Carrol Agent for Service, 128 Sunflower Drive, Kearneysville, WV 25414

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James Campbell, 1602 Village Market Blvd Ste 225, Leesburg, VA 20175

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SERVICE:

4/25/2022 4:40:00 PM

Date

/s/ Laura Storm

Clerk

RETURN ON SERVICE:

☐ Return receipt of certified mail received in this office on \_\_\_\_\_

☐ I certify that I personally delivered a copy of the Summons and Complaint to \_\_\_\_\_

☐ I certify that I personally delivered a copy of the Summons and Complaint to the individual's dwelling place or usual place of abode to \_\_\_\_\_, a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purpose of the summons and complaint.

☐ Not Found in Bailiwick

\_\_\_\_\_  
Date

\_\_\_\_\_  
Server's Signature



## West Virginia E-Filing Notice

CC-19-2022-C-52

Judge: David Hammer

**To:** James P. Campbell  
spowell@campbellflannery.com

---

### NOTICE OF FILING

---

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

Wayne Clark v. Clear Vision, LLC

CC-19-2022-C-52

The following answer was FILED on 6/1/2022 11:32:55 AM

Notice Date: 6/1/2022 11:32:55 AM

Laura Storm  
CLERK OF THE CIRCUIT COURT  
Jefferson County  
PO Box 1234  
CHARLES TOWN, WV 25414

(304) 728-3231  
circuitclerk@jeffersoncountywv.org

# COVER SHEET

E-FILED | 6/1/2022 11:32 AM  
CC-19-2022-C-52  
Jefferson County Circuit Clerk  
Laura Storm

## GENERAL INFORMATION

IN THE CIRCUIT COURT OF JEFFERSON COUNTY WEST VIRGINIA

**Wayne Clark v. Clear Vision, LLC**

**First Plaintiff:**

☐ Business ☒ Individual  
☐ Government ☐ Other

**First Defendant:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**Judge:**

David Hammer

## COMPLAINT INFORMATION

**Case Type:** Civil

**Complaint Type:** Other

**Origin:** ☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

**Jury Trial Requested:** ☒ Yes ☐ No **Case will be ready for trial by:** 6/11/2023

**Mediation Requested:** ☒ Yes ☐ No

**Substantial Hardship Requested:** ☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: \_\_\_\_\_

☐ I am proceeding without an attorney

☒ I have an attorney: William Powell, 1250 EDWIN MILLER BLVD STE 300, MARTINSBURG, WV 25404

**SERVED PARTIES**

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

WAYNE CLARK,  
a natural individual,

Plaintiff,

v.

Civil Action No: 2022-C-52

CLEAR VISION, LLC  
A West Virginia limited liability Company,  
Defendant and Counter-Plaintiff

LOVE 4 GOLF, LLC,  
A West Virginia limited liability Company,

Defendant.

**DEFENDANT CLEAR VISION, LLC'S ANSWER TO COMPLAINT AND  
COUNTERCLAIM**

**ANSWER TO COMPLAINT**

COMES NOW, Defendant, Clear Vision, LLC ("Clear Vision"), by and through its counsel Steptoe & Johnson, and William J. Powell, and answers the Complaint as follows:

1. Clear Vision is not required to respond to paragraphs 1 through 3 of the Complaint as it is a "summary" of the Complaint and makes no allegations requiring a response. However, to the extent it implies or otherwise suggests improper conduct of any type by Clear Vision, said allegations are denied.
2. Clear Vision admits the allegations in paragraph 4 of the Complaint.
3. Clear Vision admits the allegations in paragraph 5 of the Complaint.
4. With respect to the allegations in paragraph 6 and 7 of the Complaint, Plaintiff provides a legal interpretation of West Virginia statutes. The statutes speak for themselves and require no response.
5. Upon information and belief the allegations of paragraph 8 of the Complaint are admitted.

6. Clear Vision admits Plaintiff has a 75% interest in the Company as alleged in paragraph 9 of the Complaint.
7. Clear Vision admits the allegations in paragraph 10 of the Complaint.
8. With respect to the allegations in paragraph 11 of the Complaint, Clear Vision states that its Company performs multiple types of professional services, including those identified in paragraph 11 of the Complaint.
9. Clear Vision admits it has a 25% interest in the Company as alleged in paragraph 12 of the Complaint.
10. Clear Vision admits the allegation in paragraph 13 of the Complaint.
11. Clear Vision neither admits nor denies the allegations in paragraph 14 of the Complaint as it has no information as to the intent to Plaintiff but admits that the Company is a nominal defendant.
12. With respect to the allegations in paragraphs 15, 16, 17, 18, 20, and 21 of the Complaint, Plaintiff merely restates portions of the attached Operating Agreement which requires no response.
13. Clear Vision admits that Wayne Clark and Clear Vision constitute all members of the Company as alleged in paragraphs 19 and 23 of the Complaint.
14. Clear Vision neither admits nor denies the allegations in paragraph 22 of the Complaint, which provides a legal interpretation of Company Love 4 Golf, LLC's status. The Operating Agreement speaks for itself.
15. Clear Vision admits the allegations in paragraph 24 in the Complaint.
16. Upon information and belief, the allegations in paragraph 25 of the Complaint are true.
17. Clear Vision admits the allegation in paragraph 26 of the Complaint that it became part owner of the Company on or about May 1, 2019.

18. Clear Vision admits with respect to paragraph 27 of the Complaint that an Operating Agreement was executed, that it is dated September 2019, and that a copy is attached to the Complaint.
19. Clear Vision admits the allegation in paragraph 28 of the Complaint that the Company is governed by the Operating Agreement and West Virginia law, and that the Company is member managed as alleged in paragraph 29 of the Complaint.
20. With respect to the allegations in paragraphs 30 and 31 of the Complaint, Clear Vision denies the Plaintiff's interpretations of the cited provisions within the Operating Agreement.
21. Clear Vision admits the allegations in paragraph 32 of the Complaint.
22. Clear Vision admits with respect to the allegations in paragraph 33 of the Complaint, that it provided certain services to the Company prior to becoming part owner of the Company.
23. Clear Vision neither admits nor denies the allegations in paragraph 34 of the Complaint as they constitute an interpretation of an unambiguous Operating Agreement which speaks for itself.
24. Clear Vision admits the allegations in paragraph 35 of the Complaint.
25. Clear Vision admits, with respect to the allegations in paragraphs 36, 37, and 38 of the Complaint, that certain services were paid for by the Company. However, Clear Vision denies the amounts identified in the Complaint are accurate.
26. Clear Vision denies the allegations in paragraphs 39 through 78 of the Complaint because the alleged details are wrong, mischaracterized and/or improperly dated. Clear Vision states that to the extent equipment and personnel were used for off-site work, it was done so in a manner that did not violate any duties owed Plaintiff.
27. Clear Vision denies the allegations in paragraphs 79 through 92 of the Complaint because they are inaccurate, incorrectly stated, and/or mischaracterized.

28. Clear Vision denies the allegations contained in paragraphs 93 through 99 of the Complaint. The “golf cart” allegations reflect Plaintiff’s false belief that he has had unilateral authority to manage and bind the Company to obligations.

29. Clear Vision neither admits nor denies the allegations in paragraphs 101 and 103 of the Complaint as they merely restate portions of statutes or the Operating Agreement which require no response.

30. Clear Vision denies the allegations in paragraphs 102, 104, and 105 of the Complaint.

31. Clear Vision denies that Plaintiff is entitled to the relief sought at the end of Count I of the Complaint, and further deny the allegations against Clear Vision contained therein. However, to the extent Plaintiff seeks a court supervised legal separation with an appropriate allocation of Clear Vision’s distributional interest, Clear Vision would agree to do so, but deny dissociation on the grounds alleged by the Plaintiffs.

32. Clear Vision denies the allegations in paragraph 107 and 109 of the Complaint.

33. Upon information and belief, Clear Vision admits the allegation in paragraph 108 of the Complaint that Plaintiff believes he can operate the Company as if he has authority to do so. Plaintiff is wrong in this belief.

34. Clear Vision neither admits nor denies the allegations in paragraphs 110, 111, 112 of the Complaint as they attempt to state portions of West Virginia law which speak for themselves and do not require additional response. Clear Vision states that Plaintiff is not entitled to any of the relief sought in Count II of the Complaint and denies all alleged damages to Plaintiff.



35. With respect to the “incorporating” paragraphs 100 and 106 of the Complaint, Clear Vision adopts and reincorporates its answers and defenses as if fully set forth in response to Plaintiff’s incorporations.

36. Clear Vision denies each and every allegation contained in the Complaint that is not specifically addressed or admitted herein. Clear Vision further denies that Plaintiff is entitled to any relief whatsoever.

37. Clear Vision asserts and reserves unto itself the affirmative defenses of waiver, estoppel, accord and satisfaction, offset, statute of limitations and such other defenses that become apparent during discovery.

38. Clear Vision moves to dismiss the Complaint for failing to state a claim upon which relief can be granted, and to award all attorney’s fees and costs allowable by law and indemnification pursuant to the terms of the Operating Agreement.

### **COUNTERCLAIM**

Pursuant to Rule 13 of the West Virginia Rules of Civil Procedure, Defendant and Counter-Plaintiff Clear Vision, LLC asserts a counterclaim against Plaintiff Wayne Clark, an individual, and indirectly against nominal defendant, Love 4 Golf, LLC. The grounds for this claim are as follows:

1. Plaintiff is a Member of Love 4 Golf, LLC, (the “Company”) a West Virginia limited liability Company. Clear Vision is the other member of the Company.
2. The Company operates pursuant to an Operating Agreement (attached hereto).
3. Each member of the Company has three (3) shares of Class A stock. The Company is a Member Managed LLC.

4. Clear Vision brings this counterclaim pursuant to W. Va. Code §31B-4-410, which permits the maintaining of an action to enforce members rights under an Operating Agreement.
5. The Operating Agreement for the Company was entered into in September 2019.
6. Clear Vision has a 25% interest and Plaintiff has a 75% interest in the Company.
7. The Members of the Company are jointly responsible for the general overall supervision of the business affairs of the Company and owe a fiduciary duty to each other.
8. Both Clear Vision and the Plaintiff have 3 votes to utilize as they deem appropriate in the operation of the Company.
9. Both the Operating Agreement and West Virginia law provide LLC members with certain rights, including the right to information pursuant to W. Va. Code §31B-4-408.
10. Plaintiff has during the term of the Operating Agreement continually failed to provide Clear Vision requested information regarding the operation of the Company. In fact, Plaintiff, notwithstanding the plain terms of the Operating Agreement, has taken actions as if the Company was a sole proprietorship, without regard for the interests of the Company's other member, Clear Vision.
11. On multiple occasions Plaintiff has made or attempted to make operational and/or financial decisions for the Company which required agreement of Clear Vision. In fact, Plaintiff has exercised control over the Company's financial accounts, managed the Company as if he was a "Managing Member" and had authority to make decisions without input from Clear Vision and has exercised his perceived authority to the detriment of Clear Vision.
12. Plaintiff has failed to ensure and otherwise obstructed Clear Vision from being paid the agreed upon sums of money that were required to be paid.

13. Clear Vision has routinely had to utilize its own non-Company owned equipment, without reimbursement, to perform its functions under the Operating Agreement.

14. Plaintiff has breached his legal and equitable obligations to Clear Vision.

#### **COUNT I – BREACH OF OPERATING AGREEMENT**

15. Clear Vision incorporates by reference the allegations stated above as if fully set forth herein.

16. Plaintiff's material breaches of the Operating Agreement have occurred in several ways since its effective date, to wit: (a) Plaintiff has failed to provide financial and other information at the request of Clear Vision in violation of the Operating Agreement; (b) Plaintiff has "managed" the Company in a manner inconsistent with the Operating Agreement, which required joint management of the Company to the detriment of Clear Vision; (c) Plaintiff has breached his fiduciary duty to Clear Vision during Company operations in violation of the Operating Agreement.

Wherefore, Clear Vision demands full access to all Company financial and other records, and a judgement by the court precluding Plaintiff from managing the Company in a manner contrary to the Operating Agreement and West Virginia law, and indemnification for all fees and expenses incurred by Clear Vision pursuant to the terms of the Operating Agreement.

#### **COUNT II – FAILURE TO PAY EXPENSES INCURRED BY CLEAR VISION**

17. Clear Vision incorporates by reference the allegations made above as if fully set forth herein.

18. Since the inception of the Operating Agreement, the Company was obligated to pay Clear Vision certain agreed upon sums, including reimbursable expenses, but failed to do so.

19. The Company owes Clear Vision \$23,461.45 for 2019; \$20,259.98 for 2020, and \$3846.00 for 2021.

20. The Company further benefitted from Clear Vision's use of its own equipment during the term of the Operating Agreement for the benefit of the Company's operation, and for which no compensation was offered or made. It is inequitable and constitutes unjust enrichment for the Company and Plaintiff to benefit in such a manner without compensating Clear Vision for use of the equipment. Accordingly, Clear Vision demands damages pursuant to quantum meruit.

21. Notwithstanding numerous requests, Plaintiff has refused to reimburse Clear Vision for monies expended on behalf of the Company in violation of the Operating Agreement.

Wherefore, Clear demands all damages incurred, including a sum to be calculated under quantum meruit, plus interest, and for indemnification for all fees and expenses incurred by Clear Vision pursuant to the terms of the Operating Agreement.

**CLEAR VISION, LLC**  
**By Counsel**

*/s/ William J. Powell*

---

William J. Powell (WVSB# 2961)  
Kenneth J. Barton, Jr. (WVSB# 6044)  
STEPTOE & JOHNSON, PLLC  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
(304) 262-3534

**CERTIFICATE OF SERVICE**

I hereby certify this 1st day of June, 2022 I served the foregoing *Defendant Clear Vision, LLC's Answer to Complaint and Counterclaim* with the Clerk of the Court via the West Virginia electronic filing system, which will send notification and effect service upon the following counsel of record:

James P. Campbell, Esquire  
Matthew L. Clark, Esquire  
Daniel M. Casto, Esquire  
Campbell Flannery, P.C.  
1602 Village Market Boulevard, Suite 225  
Leesburg, VA 20175  
[jcampbell@campbellflannery.com](mailto:jcampbell@campbellflannery.com)  
[mclark@campbellflannery.com](mailto:mclark@campbellflannery.com)  
[dcasto@campbellflannery.com](mailto:dcasto@campbellflannery.com)

*/s/ William J. Powell*

---

William J. Powell (WVSB# 2961)  
STEPTOE & JOHNSON, PLLC  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
(304) 262-3534

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

WAYNE CLARK,  
a natural individual,

Plaintiff,

v.

Civil Action No: 2022-C-52

CLEAR VISION, LLC  
A West Virginia limited liability Company,  
Defendant and Counter-Plaintiff

LOVE 4 GOLF, LLC,  
A West Virginia limited liability Company,

Defendant.

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### **COUNTERCLAIM**

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1. Plaintiff is a Member of Love 4 Golf, LLC, (the “Company”) a West Virginia limited liability Company. Clear Vision is the other member of the Company.
2. The Company operates pursuant to an Operating Agreement (attached hereto).
3. Each member of the Company has three (3) shares of Class A stock. The Company is a Member Managed LLC.

4. Clear Vision brings this counterclaim pursuant to W. Va. Code §31B-4-410, which permits the maintaining of an action to enforce members rights under an Operating Agreement.
5. The Operating Agreement for the Company was entered into in September 2019.
6. Clear Vision has a 25% interest and Plaintiff has a 75% interest in the Company.
7. The Members of the Company are jointly responsible for the general overall supervision of the business affairs of the Company and owe a fiduciary duty to each other.
8. Both Clear Vision and the Plaintiff have 3 votes to utilize as they deem appropriate in the operation of the Company.
9. Both the Operating Agreement and West Virginia law provide LLC members with certain rights, including the right to information pursuant to W. Va. Code §31B-4-408.
10. Plaintiff has during the term of the Operating Agreement continually failed to provide Clear Vision requested information regarding the operation of the Company. In fact, Plaintiff, notwithstanding the plain terms of the Operating Agreement, has taken actions as if the Company was a sole proprietorship, without regard for the interests of the Company's other member, Clear Vision.
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#### **COUNT I – BREACH OF OPERATING AGREEMENT**

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Wherefore, Clear Vision demands full access to all Company financial and other records, and a judgement by the court precluding Plaintiff from managing the Company in a manner contrary to the Operating Agreement and West Virginia law, and indemnification for all fees and expenses incurred by Clear Vision pursuant to the terms of the Operating Agreement.

#### **COUNT II – FAILURE TO PAY EXPENSES INCURRED BY CLEAR VISION**

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19. The Company owes Clear Vision \$23,461.45 for 2019; \$20,259.98 for 2020, and \$3846.00 for 2021.

20. The Company further benefitted from Clear Vision's use of its own equipment during the term of the Operating Agreement for the benefit of the Company's operation, and for which no compensation was offered or made. It is inequitable and constitutes unjust enrichment for the Company and Plaintiff to benefit in such a manner without compensating Clear Vision for use of the equipment. Accordingly, Clear Vision demands damages pursuant to quantum meruit.

21. Notwithstanding numerous requests, Plaintiff has refused to reimburse Clear Vision for monies expended on behalf of the Company in violation of the Operating Agreement.

Wherefore, Clear demands all damages incurred, including a sum to be calculated under quantum meruit, plus interest, and for indemnification for all fees and expenses incurred by Clear Vision pursuant to the terms of the Operating Agreement.

**CLEAR VISION, LLC**  
**By Counsel**

*/s/ William J. Powell*

---

William J. Powell (WVSB# 2961)  
Kenneth J. Barton, Jr. (WVSB# 6044)  
STEPTOE & JOHNSON, PLLC  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
(304) 262-3534

**CERTIFICATE OF SERVICE**

I hereby certify this 1st day of June, 2022 I served the foregoing *Defendant Clear Vision, LLC's Answer to Complaint and Counterclaim* with the Clerk of the Court via the West Virginia electronic filing system, which will send notification and effect service upon the following counsel of record:



James P. Campbell, Esquire  
Matthew L. Clark, Esquire  
Daniel M. Casto, Esquire  
Campbell Flannery, P.C.  
1602 Village Market Boulevard, Suite 225  
Leesburg, VA 20175  
[jcampbell@campbellflannery.com](mailto:jcampbell@campbellflannery.com)  
[mclark@campbellflannery.com](mailto:mclark@campbellflannery.com)  
[dcasto@campbellflannery.com](mailto:dcasto@campbellflannery.com)

*/s/ William J. Powell*

---

William J. Powell (WVSB# 2961)  
STEPTOE & JOHNSON, PLLC  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
(304) 262-3534

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**WAYNE CLARK,**  
**a natural individual,**

**Plaintiff,**

**v.**

**Civil Action Case No. 2022-C-52**

**CLEAR VISION, LLC,**  
**a West Virginia limited liability company,**

**LOVE 4 GOLF, LLC,**  
**a West Virginia limited liability company,**

**Defendants.**

**PLAINTIFF'S ANSWER TO COUNTERCLAIM**

**COMES NOW**, the Plaintiff/Counter-Defendant, **WAYNE CLARK**, a natural individual ("Mr. Clark"), by counsel, and for his Answer to the Counterclaim filed by the Defendant/Counter-Plaintiff, **CLEAR VISION, LLC**, a West Virginia limited liability company ("Clear Vision") states as follows:

- 1.** Admitted.
- 2.** Admitted.
- 3.** Denied. The Defendant/Counter-Plaintiff has a 25% Percentage Interest.
- 4.** Paragraph 4 states a legal conclusion to which no response is required. To

the extent a response is required, the statute speaks for itself. Otherwise, denied.

- 5.** Admitted.

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Matthew L. Clark, Esquire (WVSB # 13946)  
Daniel M. Casto, Esquire (WVSB # 11226)  
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6. Admitted.

7. Admitted that the duties, obligations and responsibilities of the members of Love 4 Golf, LLC (the "Company") are set forth in the Operating Agreement attached to the Plaintiff/Counter-Defendant's Complaint, and the applicable provisions of the West Virginia Code and related case law. Otherwise, denied.

8. Denied.

9. Paragraph 9 states a legal conclusion to which no response is required. To the extent a response is required, the statute speaks for itself. Otherwise, denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

**COUNT I - ALLEGED BREACH OF OPERATING AGREEMENT**

15. The Plaintiff/Counter-Defendant hereby reincorporates and restates the foregoing answers to Paragraph 1 through 14 as if fully set forth herein.

16. Denied

**COUNT II - ALLEGED FAILURE TO PAY  
EXPENSES INCURRED BY CLEAR VISION**

17. The Plaintiff/Counter-Defendant hereby reincorporates and restates the foregoing answers to Paragraph 1 through 16 as if fully set forth herein.

18. The Operating Agreement speaks for itself. Otherwise, denied.

19. Denied.

20. Denied.

21. Denied.

### **AFFIRMATIVE DEFENSES**

The Plaintiff/Counter-Defendant does not knowingly or intentionally waive any applicable defense, and reserves the right to assert and rely on such other applicable defenses as may become available or apparent during the course of the proceedings.

The Plaintiff/Counter-Defendant further reserves the right to amend its Answer and/or defenses accordingly, and/or delete defenses that it determines are not applicable, during the course of the proceedings.

Without assuming any burden that it would not otherwise bear, Defendant asserts the following Affirmative Defenses:

#### **FIRST AFFIRMATIVE DEFENSE**

The claims of the Defendant/Counter-Plaintiff in the Counterclaim are barred, in whole or in part, because the Defendant/Counter-Plaintiff's Counterclaim has failed to state a claim upon which relief may be granted as a matter of law. The rights and remedies which the Defendant/Counter-Plaintiff seeks to enforce in its Counterclaim arise from its status as a vendor to the Company, and not as a result of its status as a member of the Company, or as a result of any rights or remedies arising under the Company's Operating Agreement.

#### **SECOND AFFIRMATIVE DEFENSE**

The claims of the Defendant/Counter-Plaintiff in the Counterclaim are properly

brought against the Company, and not against the Plaintiff/Counter-Defendant. The issues raised concern a contractual agreement and relationship between the Defendant/Counter-Plaintiff and the Company, not between the Defendant/Counter-Plaintiff and Mr. Clark. The claims against Mr. Clark, therefore, fail as a matter of law.

### **THIRD AFFIRMATIVE DEFENSE**

To the extent the Counterclaim of the Defendant/Counter-Plaintiff seeks equitable relief, those claims are barred by the doctrine of Unclean Hands as a result of the mis-deeds and inequitable conduct of the Defendant/Counter-Plaintiff described in the Complaint.

### **FOURTH AFFIRMATIVE DEFENSE**

Any claims of the Defendant/Counter-Plaintiff in the Counterclaim must be offset (or setoff) by the amounts owed by the Defendant/Counter-Plaintiff as described in the Complaint.

### **FIFTH AFFIRMATIVE DEFENSE**

To the extent the Defendant/Counter-Plaintiff is raising claims that are not in the nature of claims it is making in its capacity as a vendor to the Company, and are claims that could be raised in its capacity as a member of the Company, those claims are derivative in nature, allege harm or damages to the Company as a whole, and any relief must be returned and restored to the Company, and not to the Defendant/Counter-Plaintiff.

### **SIXTH AFFIRMATIVE DEFENSE**

To the extent that the Defendant/Counter-Plaintiff suffered any damages, which damages are denied, any such damages are barred and/or must be reduced on account of Plaintiff's failure to take reasonable steps to mitigate damages.



### **SEVENTH AFFIRMATIVE DEFENSE**

The Plaintiff/Counter-Defendant at all times acted properly, reasonably and in good faith in performing any obligations under the Operating Agreement and as a Member/Managing Member of the Company.

### **EIGHT AFFIRMATIVE DEFENSE**

The claims of the Defendant/Counter-Plaintiff in the Counterclaim seek to hold the Plaintiff/Counter-Defendant liable for the debts of another (the Company) when no signed written agreement creating that obligation exists, and that claim is thereby barred by the Statute of Frauds, W. Va. Code § 55-1-1.

### **ADDITIONAL DEFENSES**

The Plaintiff/Counter-Defendant reserves the right to assert additional defenses based on information learned or obtained during discovery.

**WHEREFORE**, pursuant to W. Va. Code § 55-13-1, *et seq.*, the Plaintiff/Counter-Defendant, **WAYNE CLARK**, a natural individual, by counsel, seeks:

(a) a declaration that his possession of a 75% membership interest (Percentage Interest) in the Company entitles him to exercise the "Required Majority of Members" and/or "Supermajority Consent of Members" under the Operating Agreement with respect to votes involving the Company;

(b) an award of attorneys' fees and costs in equity;

(c) the denial and dismissal of the Counterclaim of the Defendant/Counter-Plaintiff in its entirety; and

(d) such other and further relief the Court deems mete and just.

Respectfully submitted,

**WAYNE CLARK,**  
a natural individual  
By Counsel

/s/ James P. Campbell

James P. Campbell, Esquire (WVSB # 609)  
Matthew L. Clark, Esquire (WVSB # 13946)  
Daniel M. Casto, Esquire (WVSB # 11226)  
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dcasto@campbellflannery.com  
*Counsel for Plaintiff/Counter-Defendant*

**CERTIFICATE OF SERVICE**

Type of Service:	First Class and Electronic Mail
Date of Service:	June 17, 2022
Persons served and address:	William J. Powell, Esquire Steptoe & Johnson, PLLC 1250 Edwin Miller Boulevard, Suite 300 Martinsburg, West Virginia 25404
Item Served:	Plaintiff/Counter-Defendant's Answer to Counterclaim

/s/ James P. Campbell  
James P. Campbell

# Case Docket Entries

CC-19-2022-C-52

Court: **Circuit** County: **19 - Jefferson** Created Date: **4/25/2022** Security Level: **Public**  
 Judge: **David Hammer** Case Type: **Civil** Case Sub-Type: **Other** Status: **Open**  
 Related Cases:  
 Style: **Wayne Clark v. Clear Vision, LLC**

	<u>Entered Date</u>	<u>Event</u>	<u>Ref. Code</u>	<u>Description</u>
1	4/25/2022 4:40:01 PM	E-Filed		Complaint
	1-1 4/25/2022	Civil Case Information Statement		
	1-2 4/25/2022	Complaint - Complaint		
	1-3 4/25/2022	Transmittal		
	1-4 4/25/2022	Summons		
2	4/25/2022 4:40:01 PM	Judge Assigned	J-2012	David Hammer
3	4/25/2022 4:40:01 PM	Party Added	P-001	Wayne Clark
4	4/25/2022 4:40:01 PM	Party Added	D-001	Clear Vision, LLC
5	4/25/2022 4:40:01 PM	Party Added	D-002	Love 4 Golf
6	4/25/2022 4:40:01 PM	Attorney Listed	P-001	A-609 - James P. Campbell
7	4/25/2022 4:40:01 PM	Service Requested	D-001	Defendant - Private Process Server
8	4/25/2022 4:40:01 PM	Service Requested	D-002	No Service
9	6/1/2022 11:32:56 AM	E-Filed		Answer - Complaint Denied
	9-1 6/1/2022	Civil Case Information Statement		
	9-2 6/1/2022	Answer - Defendant Clear Vision, LLC's Answer to Complaint and Counterclaim		
	9-3 6/1/2022	Counterclaim - Defendant Clear Vision, LLC's Answer to Complaint and Counterclaim		
	9-4 6/1/2022	Transmittal		
10	6/1/2022 11:32:56 AM	Attorney Listed	D-001	A-2961 - William J. Powell
11	6/17/2022 3:49:15 PM	E-Filed		Answer - Answer to Counterclaim
	11-1 6/17/2022	Civil Case Information Statement		
	11-2 6/17/2022	Answer - Answer to Counterclaim		
	11-3 6/17/2022	Transmittal		
12	8/16/2022 2:39:33 PM	E-Filed		Motion - Other
	12-1 8/16/2022	Motion - Defendant Clear Vision, LLC's Motion to Set a Scheduling Conference		
	12-2 8/16/2022	Transmittal		
13	8/18/2022 12:38:48 PM	E-Filed		Order - Motion - Order Setting Scheduling Conference
	13-1 8/18/2022	Order - Order Setting Scheduling Conference		
	13-2 8/18/2022	Transmittal		
14	9/13/2022 5:03:26 PM	E-Filed		Order - Case - Order Staying Action Pending Referral to Business Court Division
	14-1 9/13/2022	Order - Order Staying Action Pending Referral to Business Court Division		
	14-2 9/13/2022	Transmittal		
15	10/19/2022 1:22:22 PM	E-Filed		Letter to Clerk - Letter to Clerk requesting docket sheet
	15-1 10/19/2022	Letter - Letter to Clerk requesting docket sheet		
	15-2 10/19/2022	Transmittal		