

# FORCED BUY-SELL AGREEMENTS

DO YOUR CLIENTS REALLY WANT TO PLAY RUSSIAN ROULETTE WITH THEIR MEMBERSHIP INTERESTS

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# ELEMENTS OF FORCED BUY-SELL PROVISIONS

- Triggering events
  - Nature of the provision
  - Designation of the purchaser
  - Valuation method
  - Payment terms
  - Closing
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# WHEN ARE FORCED BUY-SELL PROVISIONS USEFUL?

- Death or incapacity of a member
  - Change in control of a member
  - Involuntary membership transfer events
  - Termination of a joint venture
  - Member defaults
  - Deadlock resolution
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# TRIGGERING EVENTS EXAMPLE 1

If at any time during the term (as defined in Section 1.5), (a) a Member fails to comply with any provision of this Agreement other than a failure to satisfy a capital call pursuant to Section 2.5 with respect to a Senior Equity Capital Commitment (the redemption pursuant to the event described in clause (a) is referred to as a “Breach Redemption”), (b) a Member fails to comply with a capital call pursuant to Section 2.5 with respect to a Senior Equity Capital Commitment (the redemption pursuant to the event described in clause (b) is referred to as a “Senior Capital Call Breach Redemption”, (c)(i) the ownership of any Interest by any transferee of a Member, or owner or Affiliate of a transferee of a Member, poses a material risk of a potential adverse gaming regulatory consequence to the Company, an Affiliate, the Joint Venture, Caesars or its Affiliates, a Member or any direct or indirect owner of any Member (the redemption pursuant to the event described in clause (c)(i), a “Transferee Regulatory Redemption”), or (ii) LAKES OHIO DEVELOPMENT LLC or any other Person admitted as a member of LAKES OHIO DEVELOPMENT LLC or their owners, including as a transferee, poses a material risk of a potential adverse gaming regulatory consequence to the Company, an Affiliate, the Joint Venture, Caesars or its Affiliates, a Member or any direct or indirect owner of any Member (the redemptions pursuant to the events described in clause (c), including the Transferee Regulatory Redemption, are referred to as a “Regulatory Redemption”, and collectively the events described in clauses (a), (b) and (c) are referred to as the “Buy-Sell Events,” and the Interests of the Member or transferee causing the Buy-Sell Event are referred to as the “Buy-Sell Interest”) ...

## **TRIGGERING EVENTS EXAMPLE 1**

then, at any time following the expiration of the Cure Period (as defined below) with respect to such occurrence, the Company shall have the right (and in connection with a Transferee Regulatory Redemption, an obligation) to purchase all, but not less than all, of the Buy-Sell Interest that is subject to the Buy-Sell Event on the terms and conditions, and subject to the provisions, set forth in this Section 9.4. A Senior Capital Call Breach Redemption, in the absence of any other Breach Redemption, shall allow the Company the right to purchase only the Senior Equity Interests of such Member. Once given, a Demand Notice may be revoked or withdrawn at any time prior to the closing of such sale in the sole and absolute discretion of the Manager.

## TRIGGERING EVENTS EXAMPLE 2

For purposes of this Article 7, the following shall constitute “Default Buy-Sell Events”:

- (a) Prohibited Withdrawal or Retirement. The withdrawal, retirement, or other cessation to serve as a Member of the Company by any Member in violation of the terms of this Agreement;
- (b) Default by the Operating Member. The fraud, willful misconduct, gross negligence and/or Material Breach (which shall include the notice and cure provisions to the extent provided in the definition of Material Breach) by the Operating Member (or its representatives) in performing or failing to perform the Operating Member’s duties and obligations under this Agreement;
- (c) Prohibited Transfer or Encumbrance. Any Transfer or encumbrance or attempted Transfer or encumbrance by any Member of such Member’s Interest contrary to the provisions of Article 6;
- (d) Breach of Agreement. Any Material Breach (which shall include the notice and cure provisions to the extent provided in the definition of Material Breach) by any Member (except for the failure of any Member to make a Shortfall Contribution required hereunder);

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## TRIGGERING EVENTS EXAMPLE 2

(e) Breach of Loan Documents by Operating Member. Any act or omission by the Operating Member that results in a breach of or default that exists beyond any applicable notice and cure period under any document or instrument evidencing or securing the \$11,400,000 mortgage loan from MIREF Governor Finance, LLC to the Project Owner and secured by the Project.

(f) Breach of Master Lease. Any default of the tenant under, or failure of the tenant to perform its obligations under, the Master Lease that is not cured within applicable notice and cure periods provided for therein.

(g) Bankruptcy or Insolvency. The rendering, by a court with appropriate jurisdiction, of a decree or order (i) adjudging a Member bankrupt or insolvent; or (ii) approving as properly filed a petition seeking reorganization, readjustment, arrangement, composition, or similar relief for a Member under the federal bankruptcy laws or any other similar applicable law or practice, and if such decree or order referred to in this Section 7.01(e) shall have continued undischarged and unstayed for a period of sixty (60) days;

## TRIGGERING EVENTS EXAMPLE 2

(h) Appointment of Receiver. The rendering, by a court with appropriate jurisdiction, of a decree or order (i) for the appointment of a receiver, a liquidator, or a trustee or assignee in bankruptcy or insolvency of a Member, or for the winding up and liquidation of a Member's affairs, provided that such decree or order shall have remained in force undischarged and unstayed for a period of sixty (60) days, or (ii) for the sequestration or attachment of any property of a Member without its return to the possession of such Member or its release from such sequestration or attachment within sixty (60) days thereafter; and

(i) Bankruptcy Proceedings. A Member (i) institutes proceedings to be adjudicated a voluntary bankrupt or an insolvent, (ii) consents to the filing of a bankruptcy proceeding against such Member, (iii) is unable to or admits in writing such Member's inability to pay such Member's debts generally as they become due, or (iv) files a petition or answer or consent seeking reorganization, readjustment, arrangement, composition, or similar relief for such Member under the federal bankruptcy laws or any other similar applicable law or practice, (iv) consents to the filing of any such petition, or to the appointment of a receiver, a liquidator, or a trustee or assignee in bankruptcy or insolvency for such Member or a substantial part of such Member's property, (v) makes an assignment for the benefit of such Member's creditors, or (vi) takes any action in furtherance of any of the aforesaid purposes.



# TRIGGERING EVENTS – DEADLOCK EXAMPLE

Section 7.01. A “Deadlock” shall be deemed to exist if:

(i) An action of the Company requiring the unanimous consent of the Board is submitted for consideration at a meeting of the Board, which proposed action is substantially identical to a proposal advanced at the meeting immediately preceding such meeting, provided that both such meetings were or are held (or scheduled to be held) at least thirty days apart;

(ii) Prior to the meeting at which the action is submitted for consideration for the second time, a Member notifies the other Member that it considers the specified action to be essential to the continuance of such Member’s investment in the Company, specifying the reasons therefor;

(iii) The action specified by such Member is not taken at that meeting (as a result of either a rejection thereof or a failure to consider it) or the meeting is canceled by reason of the failure to attend by the other Member; and

(iv) Any Member notifies the other Member of its demand that the Deadlock be preferred for resolution to the Executive Officers as defined in and pursuant to Section 7.02.

# TRIGGERING EVENTS – DEADLOCK EXAMPLE

## Section 7.02. Deadlock Resolution.

(a) Referral to Executive Officers. Upon receipt of a notice pursuant to Section 7.01(iv), the Chair shall forthwith forward a copy of such notice (the “Deadlock Submission Notice”) to Niel C. Ellerbrook, Chief Executive Officer of Indiana Energy, Inc. and Donald B. Ingle, President of Power Technology and Infrastructure Services at Cinergy Corp. or their successors as designated by the Members (collectively, the “Executive Officers”), who shall attempt to resolve such matter by unanimous agreement. If the Executive Officers do not resolve the Deadlock within thirty (30) days after the date of the Deadlock Submission Notice or such other period of time as the Executive Officers may unanimously agree (the “Resolution Period”), any Member shall have the right by written notice to the other Member, to invoke the provisions of Section 7.02(b) below; provided, however, that the provisions of Section 7.02(b) shall not apply to a Deadlock arising prior to the first anniversary of the formation of the Company, unless a failure to act by the Company with respect to the subject matter of such Deadlock would result in a breach by the Company of any material agreement to which it is a party or would violate any applicable legal or regulatory requirement; and provided, further, that any matter with respect to which a Deadlock arises prior to the first anniversary of the Company’s formation may become the subject of a Deadlock after such first anniversary, in which event the provisions of Section 7.02(b) shall apply to such Deadlock.

# THREE GENERAL TYPES OF PROVISIONS

- Mandatory obligations to sell and to purchase
- Non-mandatory options to purchase
- What amounts to essentially a put option that allows a member to force a buy-out.

# MANDATORY PROVISION EXAMPLE

(c)(i) the ownership of any Interest by any transferee of a Member, or owner or Affiliate of a transferee of a Member, poses a material risk of a potential adverse gaming regulatory consequence to the Company, an Affiliate, the Joint Venture, Caesars or its Affiliates, a Member or any direct or indirect owner of any Member (the redemption pursuant to the event described in clause (c)(i), a “Transferee Regulatory Redemption”)

...

then, at any time following the expiration of the Cure Period (as defined below) with respect to such occurrence, the Company shall have the right (**and in connection with a Transferee Regulatory Redemption, an obligation**) to purchase all, but not less than all, of the Buy-Sell Interest that is subject to the Buy-Sell Event on the terms and conditions, and subject to the provisions, set forth in this Section 9.4.

## NON-MANDATORY PROVISION EXAMPLE

At any time following the occurrence of a Default Buy-Sell Event, the Non-Defaulting **Member shall have the right, but not the obligation**, to either (i) cause the sale of the Company or its assets to any unaffiliated third party for a purchase price based upon the sole and absolute judgment of the Non-Defaulting Member (“Third-Party Purchase Price” as further set forth in Section 7.03(c)), and such other terms and conditions as are determined in the sole discretion of the Non-Defaulting Member, (ii) purchase the Interest of the Defaulting Member in accordance with the terms and conditions set forth in this Article 7, in either case, by delivering written notice (“Default Notice”) thereof to the Defaulting Member, or (iii) exercise any other rights or remedies available to the Non-Defaulting Member under this Agreement or at law or in equity as a result of such Default Buy-Sell Event; provided, however, that the failure of the Non-Defaulting Member to exercise any of the foregoing rights shall not be deemed to constitute a waiver of any Default Buy-Sell Event or any rights and remedies (and the provisions of Section 7.09 shall apply to the Defaulting Member).

# TYPES OF FORCED BUY-SELL PROVISIONS

- Adjusted Fair Market Value
    - An expert or auditor determines the "fair market value" of the price per unit. Once determined, the member triggering the buy-sell provision will either buy the other member's units at a set premium (e.g., 20%) or sell their units to the other member or members at an equivalent discount.
  - Russian Roulette
    - One member serves notice to the other member stating the notifying member's perceived value per unit of the LLC. The member receiving the notice must then either sell all of their units to the other member at that price per unit or purchase all of the other member's units at that price.
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# TYPES OF FORCED BUY-SELL PROVISIONS

- Texas Shoot-Out
  - Each member submits a sealed bid containing their perceived value per unit of the LLC. The member with the higher bid buys the other member out.
- Dutch Auction
  - Each member submits a sealed bid containing the lowest price per unit at which they would sell all of their units. The member with the higher price buys the other member's units at the lower price submitted.

# DESIGNATION OF THE PURCHASER MATTERS

- There may be tax consequences or advantages to the buyer and the seller depending whether the other members or the LLC is the purchaser.
  - If life insurance will be used to fund a purchase, there will likely be a simpler process if the LLC be the purchaser, particularly if there are multiple members.
  - Members may prefer not be personally liable in mandatory purchase situations.
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# VALUATION METHODS AND CONSIDERATIONS

Common valuation methods include:

- Using a formula to determine a valuation
- Valuation determined by appraisal

Common considerations include:

- Whether the valuation is discounted based on the triggering event
  - Whether the valuation is used as is or whether valuation is used to determine what distribution the “selling” member would receive
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## COMMON VALUATION METHODS

a) Member Buyout. Within thirty (30) days after the determination of the Buyout Purchase Price or, in the absence thereof, the determination of the Appraised Value of the Company pursuant to Section 7.03(b), the accountants regularly employed by the Company shall determine the amount of cash which would be distributed to each Member pursuant to Section 5.02 if (i) the Company (including all of its assets) were sold (as applicable) for the Buyout Purchase Price or Appraised Value thereof (as applicable) as of the Effective Date of the Default Notice (after deducting therefrom an amount equal to reasonable and customary closing costs); (ii) the remaining liabilities of the Company were liquidated pursuant to Section 8.02(a); (iii) reasonable reserves were established for any contingent, conditional or unmatured liabilities or obligations of the Company pursuant to Section 8.02(b); and (iv) the Company distributed any remaining amounts to the Members in accordance with the provisions of Section 5.02. Upon such determination, the accountants regularly employed by the Company shall give each Member a notice thereof (the "Price Determination Notice"). The determination by the accountants of such amounts, including all components thereof, shall be deemed conclusive absent any material computational error. If the Non-Defaulting Member purchases the Interest of the Defaulting Member, ninety percent (90%) of the amount that would be distributed to the Defaulting Member pursuant to clause (v) above shall be deemed to be the "Default Purchase Price" for purposes of this Article 7; provided, however, that if the Buy-Sell Event applicable to the Defaulting Member is not one of the Buy-Sell Events referenced in Sections 7.01(a), (b), (c) or (d), then one hundred percent (100%) of the amount that would be distributed to the Defaulting Partner pursuant to clause (v) above shall be deemed to be the "Default Purchase Price" for purposes of this Article 7.

# COMMON VALUATION METHODS

(b) Determination of Appraised Value. For purposes of this Article 7, the appraised value (“Appraised Value”) of the assets of the Company shall be determined by one (1) or more independent Qualified Appraisers. The Non-Defaulting Member shall select one (1) Qualified Appraiser and shall include such selection in the Default Notice. Within fifteen (15) days following the Effective Date of the Default Notice, the Defaulting Member shall either agree to the Qualified Appraiser selected by the Non-Defaulting Member or select a second (2nd) Qualified Appraiser and give written notice to the Non-Defaulting Member of the person so selected. If either the Non-Defaulting Member or the Defaulting Member fails to appoint a Qualified Appraiser within the time period specified and after the expiration of five (5) days following the Effective Date of written demand that a Qualified Appraiser be appointed, the Qualified Appraiser duly appointed by the Member making such demand to appoint such Qualified Appraiser shall proceed to make the appraisal as herein set forth, and the determination thereof shall be conclusive on all the Members.

The Qualified Appraiser or the two (2) Qualified Appraisers, as the case may be, shall promptly fix a time for the completion of the appraisal, which shall not be later than thirty (30) days from the Effective Date of the appointment of the last Qualified Appraiser.

The Qualified Appraiser(s) shall determine the Appraised Value by determining the fair market value of the assets of the Company, such being the fairest price estimated in the terms of money which the Company could obtain if the assets of the Company were sold, for all cash, in the open market allowing a reasonable time to find a purchaser.

Upon submission of the appraisals setting forth the opinions as to the Appraised Value of the assets of the Company, the average of the two (2) appraisals shall constitute the Appraised Value of the assets of the Company for purposes of this Article 7.

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# PAYMENT TERM CONSIDERATIONS

- Does the LLC or the members have the ability to make a lump sum payment for all or a portion of the purchase?
  - How long of a period will payments be made?
  - Is a fixed interest rate appropriate or should it be based on a benchmark rate?
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# CLOSING CONSIDERATIONS

- Does the buy-sell provision allow for adjustments to the purchase price based on material changes to value of the LLC?
  - Does the operating agreement address whether distributions or capital contributions will occur during the while the purchase is pending?
  - Does the buy-sell provision address the failure to make a required purchase at closing?
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Questions / Comments

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