THE UNIVERSITY OF TENNESSEE SYSTEM

OFFICE OF THE GENERAL COUNSEL

T. HAROLD PINKLEY
Associate General Counsel

May 21, 2024

VIA HAND-DELIVERY

Knox County Chancery Court
J. Scott Griswold, Clerk & Master
400 W. Main Street, Suite 125
Knoxville, TN 37902-2423

Re: John Becker v. The University of Tennessee
Knox County Chancery Court, Case No. 208439-1

Dear Mr. Griswold:

Please find enclosed for filing, Respondent, University of Tennessee's Memorandum in Response to the Memorandum of Law in Support of Becker's Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access in the above matter. Also, enclosed is an extra copy of the first page of the pleading which I would request that you date stamp as "Filed" and return to me.

We appreciate your assistance in this matter.

Yours very truly,

/s/ T. Harold Pinkley

T. Harold Pinkley
Associate General Counsel

THP/dg

Enclosures

cc: Paul R. McAdoo, Esq. (w/encl. via e-mail)

IN THE CHANCERY COURT OF KNOX COUNTY, TENNESSEE
FOR THE SIXTH JUDICIAL DISTRICT AT KNOXVILLE

JOHN BECKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 208439-1**
	)	
THE UNIVERSITY OF TENNESSEE	)	
	)	
Respondent.	)	

RESPONDENT'S MEMORANDUM IN RESPONSE TO THE MEMORANDUM OF LAW IN SUPPORT OF BECKER'S PETITION FOR ACCESS TO PUBLIC RECORDS AND TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS

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INTRODUCTION AND SUMMARY

The Petitioner is seeking a copy of the Operating Agreement for UT-Battelle, a limited liability company of which UT is a member and which operates Oak Ridge National Laboratory. Respondent UT provided the Petitioner with the Agreement (both the original version and the amended and restated version) in redacted form, withholding portions that UT contends are trade secrets. The Petitioner has graciously agreed not to contest some of the redactions (Petitioner's Memorandum, p. 16 n.7), and UT thanks the Petitioner for that simplification of the issues. As to the remainder of the redactions, the Court should uphold all such redactions, because (1) legally, the Tennessee Uniform Trade Secrets Act, Tenn. Code Ann. §§ 47-25-1701 *et seq.*, is an exemption to the Tennessee Public Records Act; and (2) factually, the redacted material constitutes a trade secret under Tennessee law.

That is all this case is about. UT respectfully requests the Court not to reach and address any of the other issues raised by the Petitioner, because he withdrew the Public Records Act requests to which they relate. If the Court does reach those issues, UT respectfully requests the Court to uphold UT's actions.

STANDARD OF REVIEW

"The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence." Tenn. Code Ann. § 10-7-505(c).

STATEMENT OF FACTS

A. Oak Ridge National Laboratory, the University of Tennessee, UT-Battelle.

Federal law authorizes the Secretary of the Department of Energy to acquire and operate laboratories and research and testing sites and facilities. 42 U.S.C. § 7457. Oak Ridge National Laboratory ("ORNL") is one of seventeen national laboratories owned by the Department of Energy. 42 U.S.C. § 15801(3)(K). ORNL is part of the Oak Ridge Reservation, established by the federal government in 1942 as part of the Manhattan Project. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 718 (6th Cir. 2004).

The University of Tennessee is a public institution of higher education, Tenn. Code Ann. § 49-9-101 *et seq.*, whose mission is to serve all Tennesseans and beyond through education, discovery, and outreach that enables strong economic, social, and environmental well-being.

In 1999 Battelle Memorial Institute and UT agreed to organize and operate UT-Battelle, LLC, a Tennessee nonprofit limited liability company ("LLC"), to submit a proposal to the United States Department of Energy (DOE) to manage and operate ORNL. Exhibit 1, Smith Declaration, ¶ 3. UT-Battelle "is responsible for the day-to-day operations at ORNL. ... [T]he employees at ORNL are hired and managed solely by UT-Battelle. *Reich v. U.S. Dept. of Energy*, 784 F. Supp. 2d 15, 20 (D. Mass. 2011). That is, "ORNL is funded entirely by the United States Department of Energy but managed by a private contractor." *U.S. v. Hall*, 549 F.3d 1033, 1035 (6th Cir. 2008).

B. The Petitioner's Public Records Act Request and UT's Response.

On November 8, 2022, WBIR reporter and Petitioner John Becker submitted the following Public Records Act Request to the University of Tennessee:

Becker, John

From:	Becker, John
Sent:	Tuesday, November 8, 2022 3:11 PM
To:	charles.primm@tennessee.edu
Cc:	North, John
Subject:	WBIR-TV public records request

Dear Mr. Primm-

I wanted to follow-up on my prior public records request. I've narrowed my first request to the following - WBIR-TV and I would like to inspect all records received by University of Tennessee President Randy Boyd from Oak Ridge National Laboratory or UT Battelle LLC from January 1, 2022 to present. In addition to President Boyd we would like the same records from the following people:

Person 1: David L. Miller, Senior Vice President & Chief Financial Officer

Person 2: Jeff W. Smith, Interim Vice President for Research

Person 3: Brian Dickens, Chief Human Resources Officer

Person 4: Luke Lybrand, Treasurer

Person 5: Jamie Blessinger, Assistant to Randy Boyd

Person 6: Dr. Stacy Patterson (before her departure from the University)

I also want to re-up our prior request and clarify that I seek to inspect all operating agreements, partnership agreements, or other agreements regarding the formation and operation of UT Battelle LLC between and including UT and Battelle Memorial Institute.

Finally, please cite the state law basis for any denial, including redactions, of these requests.

Respectfully,

John Becker

John Becker
Anchor
WBIR-TV | TEGNA | 1513 Bill Williams Avenue – Knoxville, Tennessee 37917
Cell: 503.720.0317 | **Email** jbecker@wbir.com www.ServiceandSacrifice.com

Petition, ¶ 12; Exhibit A to Petition, Attachment 1.

On March 15, 2023, The University denied the request in part, and also informed the Petitioner that some records responsive to his request were available for inspection. Petition,

¶ 19. Those records did not include the requested UT-Battelle Operating Agreement, which UT made clear was being withheld on the grounds that it contains trade secrets.[1]

The Petitioner did not immediately inspect the records UT agreed to make available, but a month later, on April 19, 2023, sent his colleague John North to inspect the public records that were made available by UT. Petition, ¶ 19. UT provided 966 printed pages of records. Primm Dec., ¶ 5. Mr. North spent approximately one hour reviewing the nearly thousand pages of records and tabbed 128 pages of records that he wished to have copies of. Primm Dec., ¶ 5. UT provided those copies on May 1, 2023. Primm Dec., ¶ 5.

C. UT's Provision of Additional Documents.

Two months after Mr. North's review of the records provided by UT, Petitioner's counsel sent UT a letter dated June 15, 2023, objecting to UT's response. Petition, ¶ 25. UT's counsel responded with a detailed letter dated July 14, 2023. Petition, ¶ 31. That letter included, among other things, an eight-page, single-spaced, detailed analysis of why trade secrets are exempt from disclosure under the Tennessee Public Records Act that cited and analyzed court decisions from throughout the United States that have addressed that issue. *See* Exhibit A to Attachment 4 to Exhibit C (McAdoo Declaration) to the Petition.

As a result of the appearance of a lawyer into a situation normally handled between UT's Communications professionals and their media counterparts, Melissa Tindell, the Assistant Vice President of Communications at the University of Tennessee System, contacted WBIR's John

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[1] UT's Public Records Coordinator, Charles Primm, had previously spoken on the phone with Mr. Becker's WBIR colleague John North on September 27, 2022, and explained to him that the document is protected from disclosure under Tennessee law, specifically citing trade secret law. Exh. 2, Primm Decl., ¶ 4. And again, when the Operating Agreement was later provided in redacted form (as noted below), Mr. Primm cited the Tennessee trade secret statute and explained that the redactions "have to do with trade secrets being protected information." Attachment 1 to Exhibit B (North Declaration) to the Petition.

North by phone in an attempt to assist him in his request for information by better understanding what he wanted. Exhibit 3, Tindell Dec., ¶ 4. During that phone conversation, Mr. North expressed he was looking for only two things: Top 50 salaries of UT-Battelle employees and the original Operating Agreement between UT and Battelle. *Id.* Ms. Tindell told him that she would look into this and get back to him. *Id* Primm Dec. ¶¶ 6 & 7; Petition, ¶¶ 37-39 & Exhibit B (North Declaration) Attachments 2-4.

When Mr. Primm provided Mr. North with the original 1999 Operating Agreement on August 22, 2023, he told Mr. North by e-mail: "feel free to let us know if you have any questions." Petition, Exh. B. (North Declaration) Attachment 3. Neither Mr. North nor the Petitioner Mr. Becker ever contacted UT further about their records request. Tindell Dec., ¶ 5; Instead, they waited seven months, and then filed this lawsuit in March, 2024.

ARGUMENT

I. UT PROPERLY REDACTED TRADE-SECRET INFORMATION FROM THE UT-BATTELLE OPERATING AGREEMENT, AND THAT REQUIRES A RULING IN UT'S FAVOR IN THIS CASE BECAUSE THAT IS THE ONLY ISSUE IN THIS CASE.

A. The Only Matter at Issue in this Case Is the Propriety of UT's Redacting what It Contends Is Trade-Secret Information from the UT-Battelle Operating Agreement, Because the Petitioner Has Withdrawn the Rest of His Request.

The initial Public Records Act request – asking for all records received from ORNL or UT-Battelle by seven different UT officials during a nearly one-year period – was not a proper Public Records Act request in the first place. Rather than identifying specific records being sought as required by Tenn. Code Ann. § 10-7-503(a)(4), it was a proverbial "fishing expedition" request to rifle through a year's worth of documents. But "[a] Public Records Act request is not a discovery request pursuant to litigation." *Hickman v. Tennessee Bd. of Probation and Parole,* No. M2001-02346-COA-R3-CV, 2003 WL 724474 (March 4, 2003). And even in litigation

discovery, Tennessee courts have declined to allow "fishing expeditions." *See, e.g., First Community Bank., N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 406 (Tenn. 2015). Indeed, such an overbroad request puts a public agency in an untenable position: It must devote many hours to the burdensome task of reviewing thousands of pages of records to assure that it does not violate Tennessee law by inadvertently providing a record – and in some cases, part of a record – that the Tennessee General Assembly has ordered it by statute not to produce by enacting an exemption to the Tennessee Public Records Act.

Fortunately, this overbreadth issue was addressed and cured when UT's Melissa Tindell spoke with the Petitioner's colleague John North – who was taking the lead on the request for WBIR – and he told her that only two things WBIR wanted were the top 50 salaries of UT-Battelle employees and the original Operating Agreement between UT and Battelle.

Accordingly, the Petitioner, through his agent, narrowed his Public Records Act request, and quite properly so, by withdrawing all of it except for the request for the UT-Battelle Operating Agreement.[2] Having narrowed his request to just the Operating Agreement,[3] and never having informed UT otherwise during the seven months between doing so and filing this lawsuit, the overbroad portion (seeking a year's worth of records for seven UT officials) should be deemed by the Court to have been abandoned and withdrawn, and the request before the Court should be limited to the portion not withdrawn, which is as follows: "[A]ll operating

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[2] The request for information about the salaries of UT-Battelle employees was not part of the Public Records Act request, which is reproduced in full on page 3 above and contains no request for such information. Further, neither the Petition nor the Petitioner's Memorandum says anything about the salaries of UT-Battelle employees. Accordingly, nothing about such salary information is at issue in this lawsuit.

[3] In an effort to resolve this matter, Respondent has revised the redaction so as to redact less from the Operating Agreement. The re-redacted version is attached as Exhibit 4.

agreements, partnership agreements, or other agreements regarding the formation and operation of UT Battelle LLC and including UT and Battelle Memorial Institute."[4]

B. The UT-Battelle Operating Agreement Was Properly Redacted Under the Trade Secrets Exemption to the Tennessee Public Records Act.

1. The Tennessee Uniform Trade Secrets Protection Act Is and Exemption to the Tennessee Public Records Act.

It is unclear whether the Petitioner is contending that there is no trade secrets exemption to the Public Records Act, but if he is, he is incorrect as a matter of law.

Tennessee has adopted the Uniform Trade Secrets Act ("UTSA"), Tenn. Code Ann. §§ 47-25-1701–1709, a statute that has been adopted by many American states. The UTSA is not specifically and expressly identified as being an exemption to the Tennessee Public Records Act ("TPRA"), but that is not necessary for the creation of an exemption. Under the TPRA, records custodians are instructed to permit inspection of records by citizens "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). The Tennessee Supreme Court has called this statute the "general exception," and explained that "'[s]tate law' includes ***statutes***, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations." *Tennessean v. Metropolitan Government of Nashville*, 485 S.W.3d 857, 865-66 (Tenn. 2016) (emphasis added). Thus, as a state statute, the UTSA can operate as a TPRA exemption under this general exception.

While no Tennessee authorities address whether the UTSA constitutes a TPRA exemption under this general exception, every single time a court elsewhere has considered

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[4] As the Petitioner pointed out, UT has withdrawn its argument that the request was not a proper request. Petitioner's Memorandum, p. 2 n.2. That is because, once the Petitioner cured the improper nature of the request by withdrawing all of it except for the request for the Operating Agreement, there was no longer any need to rely on the fact that the initial request was not a proper Public Records Act request.

whether its UTSA constitutes an exemption to its public records statute, the court has ruled that the trade secrets statute ***does*** qualify as an exemption. *See, e.g.*, 37A Am. Jur. 2d *Freedom of Information Acts* § 132 (November 2020 Update) ("Many states . . . have freedom of information or similar public access laws that . . . have been interpreted to include[ ] exemptions for trade secrets and commercial information designed primarily to protect the interests of persons who submit data to government agencies.")

Progressive Animal Welfare Society v. University of Washington, 125 Wash.2d 243, 884 P.2d 592 (Wash. 1994) ("*PAWS*"), which involved information sought from a public university, appears to be the first such decision to address the question. PAWS, an animal rights organization, sought records relating to an unfunded NIH grant proposal relating to research on rhesus monkeys. The court acknowledged the policies underlying Washington's Public Records Act—similar to the policies underlying the TPRA—by explaining that its purpose is "nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions"; that the statute "stands for the proposition that[ ] ***full access*** to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society"; and that "its exemptions [must be] narrowly construed." 125 Wash.2d at 251, 884. P.2d. at 597 (emphasis in original). Nevertheless, the court held that Washington's UTSA constituted an exemption to its Public Records Act. Emphasizing that ***"[t]he Public Records Act is simply an improper means to acquire knowledge of a trade secret,"*** the court ruled that its UTSA constituted an "other statute" creating an exemption, by way of the Washington Public Records Act's provision (similar to Tenn. Code Ann. § 10-7-503(a)(2)(A)) that required disclosure "unless the record

falls within the specific exemptions . . . of this section or ***other statute*** which exempts or prohibits disclosure of specific information or records." *Id.*, 125 Wash.2d at 261-62 and n.9, 884 P.2d. at 602-03 and n.9 (emphases added).

Since *PAWS*, Washington courts have repeatedly reaffirmed that the State's UTSA creates an exemption to its Public Records Act. *Lyft, Inc. v. City of Seattle*, 190 Wash.2d 769, 418 P.3d 102 (Wash. 2018) (addressed further below); *Belo Management Services, Inc. v. ClickA Network*, 184 Wash. App. 649, 656, 343 P.3d 370, 375 (Wash. App. 2014) (holding that ""[t]he Uniform Trade Secret Act (UTSA) qualifies as an 'other statute' exempting disclosure," but ruling that the party had failed to establish that the records at issue qualified as a trade secret) (footnote omitted); *Robbins, Geller, Rudman & Dowd, LLP v. State of Washington*, 179 Wash. App. 711, 721, 328 P.2d 905, 911 (Wash. App. 2014) (same); *Spokane Research & Defense Fund v. City of Spokane*, 96 Wash. App. 568, 577-78, 983 P.2d 676, 682-83 (Wash. App. 1999) (same)); *see also SEIU 775 v. State Dept. of Social and Health Svcs.*, 198 Wash. App. 745, 756 n.4, 396 P.3d 369, 375 n.4 (Wash. App. 2017) ("Like the attorney-client privilege . . . , the UTSA clearly focuses on the confidentiality of certain records."). And in *Versaterm, Inc. v. City of Seattle*, No. C16-1217JLR, 2016 WL 4793239 (W.D. Wash. Sept. 13, 2016), a Washington federal court issued a preliminary injunction preventing the City of Seattle from disclosing the plaintiff's proprietary information under the Public Records Act, because "Washington's Uniform Trade Secrets Act ('UTSA') is an 'other statute' that exempts trade secrets from disclosure under the PRA." *Id.* at *6.

After Washington, the next state to address this issue was Ohio, in *State ex rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 721 N.E.2d 1044 (Ohio 2000), another case in which a requester sought information from a university. Applying the Ohio statute's exemption for

"[r]ecords the release of which is prohibited by state or federal law," the Ohio Supreme Court held that the Ohio UTSA rendered trade secrets exempt from disclosure under the "state or federal law" exemption. *Besser*, 87 Ohio St. 3d at 540, 721 N.E.2d at 1049. The court specifically cited "the manifest purpose behind" the Ohio UTSA in support of its decision. *Id.* As the court noted, "[a] contrary holding would afford no protection for an entity's trade secrets that are created or come into the possession of an Ohio public office." *Id.*, 87 Ohio St. 3d at 540, 721 N.E. at 1048.

Since deciding *Besser*, the Ohio Supreme Court has routinely applied the UTSA to exempt trade secrets from disclosure under its public records act. *See Salemi v. Cleveland Metroparks*, 145 Ohio St. 3d 408, 49 N.E.3d 1296 (Ohio 2016) (a golf course's customer list was a trade secret and thus exempt from disclosure); *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St. 3d 416, 988 N.E.2d 546 (Ohio 2012) (refusing to compel disclosure of license agreements because they were trade secrets exempt from disclosure); *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St. 3d 410, 916 N.E.2d 1049 (Ohio 2009) (semester examinations given to ninth grade students were trade secrets exempt from disclosure); *State ex rel. Carr v. Akron*, 112 Ohio St. 3d 351, 358, 859 N.E.2d 948, 955 (2006) (records relating to firefighter promotion examination were "exempt from disclosure as trade secrets"); *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St. 3d 166, 724 N.E.2d 411 (Ohio 2000) (records of landfill operator's tests of samples were trade secrets exempt from public disclosure).

In 2005, the Missouri Court of Appeals upheld a trade secrets exemption to that state's public records act in *American Family Mutual Insurance Company v. Missouri Department of Insurance*, 169 S.W.3d 905 (Mo. App. S.D. 2015). Citing to a Missouri statute (*id.* at n. 3) which

states that "***[e]xcept as otherwise provided by law***, all . . . records . . . shall at all reasonable times be open for personal inspection by any citizen of Missouri," the court held that information that is a trade secret under the Missouri UTSA is exempt from disclosure under the state's Public Records Act. *Id.* at 909 (emphasis added). Applying this exemption, the court refused to require the disclosure of certain statistical information (such as the amount of premiums collected during the reporting year) that had been provided to the state by a number of insurance companies that did business with the state.

An Oregon court reached a similar conclusion in 2012 in *Pfizer, Inc. v. Oregon Dept. of Justice ex rel. Kroger*, 254 Or. App. 144, 294 P.3d 496 (Ct. App. Or. 2012). *Pfizer* was a case arising out of an investigation of Pfizer's marketing practices for certain medications, during which Pfizer submitted documents to the Oregon Department of Justice under a confidentiality agreement, and those documents were later requested under Oregon's Public Records Law by a party who was in litigation with Pfizer. In upholding the denial of disclosure, the court ruled that Oregon's UTSA constituted an exemption to its Public Records Law because of a statutory provision exempting from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." 254 Or. App. at 160. The court ruled that a number of the documents at issue did qualify as trade secrets, and therefore were exempt from disclosure.

In 2015, the New Hampshire Supreme Court followed suit in *CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services*, 167 N.H. 583, 116 A.3d 1054 (N.H. 2015). Applying the New Hampshire Right-to-Know Law's provision (similar to Tenn. Code Ann. § 10-7-503(a)(2)(A)) stating that "[e]very citizen . . . has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies,

. . . except as ***otherwise prohibited by statute***," 116 A.3d at 1056 (emphasis added), the Court held that the New Hampshire UTSA made trade secrets exempt. Accordingly, the court upheld the lower court's refusal to require disclosure to Caremark's competitors of confidential information Caremark had submitted as part of a response to a state Request for Proposal.

Accordingly, the five states that have addressed the question—Washington, Ohio, Missouri, Oregon, and New Hampshire—have all ruled that a state's Uniform Trade Secrets Act constitutes an exemption to its public records act under a statute similar to Tennessee's "general exception," *Tennessean*, 485 S.W.3d at 865, contained in Tenn. Code Ann. § 10-7-503(a)(2)(A) ("unless otherwise provided by state law"). The states that have addressed the issue repeatedly—Washington and Ohio—have adhered to their ruling in multiple cases.

Thus, the unanimous position of American courts that have addressed the issue that a state's UTSA constitutes an exemption to its public records act under statutory language similar to Tenn. Code Ann. § 10-7-503(a)(2)(A). This consistent application of the UTSA by other states is particularly important for applying the Tennessee UTSA because the General Assembly has made clear that the Tennessee UTSA "shall be applied and construed to effectuate its general purpose to make consistent the law with respect to the subject of this act among states enacting it." Tenn. Code Ann. § 47-25-1709.

Accordingly, the statute and case law interpreting similar language in other states compels the conclusion that the Tennessee Uniform Trade Secrets Act is an "otherwise provided by state law" exemption to the Tennessee Public Records Act.[5]

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[5] There is also a federal trade secrets statute, 18 U.S.C. § 1831 *et seq.*, but UT is not relying on that statute in this case because the Tennessee trade secrets statute so clearly creates an exemption from the Tennessee Public Records Act for trade secrets, making the analogous federal statute redundant.

2. The Redacted Portions of the Operating Agreement Constitute Trade Secrets.

a. The Information on Allocation of Profits and Losses Was Properly Redacted from Both Agreements.

The Petitioner "does not contest" the redaction from the Operating Agreement of information on allocation of profits and losses from the 2007 Amended and Restated Operating Agreement, Petitioner's Memorandum, p. 16, n.7, but does contest the same redaction from the original 1999 Operating Agreement. *Id.*, p. 20. The Court should rule that the Petitioner's concession covers both agreements because the redacted language in Sections 6.3 and 6.4 of the 2007 Amended and Restated Operating Agreement is exactly the same as the redacted language in the original 1999 Operating Agreement, and they both constitute trade secrets for the same reason. *See also* Petition ¶ 42 (noting that UT made the "same redactions" to both versions of the Operating Agreement). Further, as explained below, the Court should determine that they are trade secrets even apart from the Petitioner's concession.

b. The Information Redacted from the Operating Agreements Constitute Trade Secrets.

As set out in some detail in the Declaration of Jeff Smith, the University's Vice President for National Labs, the information redacted from the produced versions of the operating agreements is trade secret. Tennessee has adopted the Uniform Trade Secrets Act. Tenn. Code Ann. §§ 47-25-1701 to 47-25-1709. As set out in section 1702(4),

> "Trade secret" means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:
>
> (A) Derives independent economic value, actual or potential, from

not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. The redacted information in the two operating agreements is information that fits the definition in the first paragraph of section 1702(4). It is information that could reveal the particulars of how UT-Battelle does business that would be useful to a potential competitor, for example, who might be interested in competing for the contract to run ORNL the next time the U. S. Department of Energy puts the management and operations contract out for bid. This is set out in ¶ 5___ of the Declaration of Jeff Smith attached as Exhibit 1.

The information is also the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6] The operating agreements have been kept secure and are provided only to persons within the organization who need to use them in order to perform their assigned duties. Smith Decl. ¶ 9. The agreements have never been released outside of the organization. This is sufficient to satisfy the requirements of section 47-25-1702(4)(B). The redacted information is trade secret and is, therefore, not subject to disclosure under the TPRA.

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[6] Under the Tennessee Limited Liability Company Act, the documents required to be filed to form an LLC do not include an operating agreement. Tenn. Code Ann. § 48-249-202(a). An operating agreement "may" be filed but need not be. Tenn. Code Ann. § 48-249-202(b). The agreements at issue were were not filed with the Secretary of State. Smith Dec. ¶ 7.

II. IF THE COURT REACHES ANY OTHER ISSUES, THE COURT SHOULD UPHOLD THE UNIVERSITY'S WITHHOLDING CERTAIN RECORDS AS EXEMPT FROM DISCLOSURE UNDER THE TENNESSEE PUBLIC RECORDS ACT.

UT respectfully submits that the Court should not address any other issue raised by the Petition, as explained above, because the Petitioner withdrew all of his request except for the request for the UT-Battelle Operating Agreement. If the Court does so, the Court should uphold the University's actions.

A. Documents in Draft Are Not Public Records Subject to Production.

The TPRA does not require that documents in draft form be produced. The Act defines "public record" as "all documents ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity." Tenn. Code Ann. § 10-7-503(a)(1)(A). A document in draft—in other words, a document in process—has not been "made" for purposes of the Act. As defined by the Shorter Oxford English Dictionary, a draft is "A preliminary version or rough form of something to be written or printed, esp[ecially] an official document." A document in draft is subject to being, and is likely to be, changed before it is ready for the purpose it was being created. The conclusion is buttressed by the treatment of "temporary records" in the TPRA. Section 10-7-301(13) says such records "can be disposed of in a short period of time as being without value in documenting the functions of an agency." And under the Tennessee Department of State's Records Disposition Authorization No. SW16 (RDA), the term "temporary records" includes drafts. The RDA goes on to provide there is no minimum retention requirement; thus, temporary documents can be destroyed. Because drafts have no value in documenting the functions of an agency and can lawfully be immediately destroyed, they are not "public records" for purposes of the TPRA. *Cf. Tire Shredders, Inc. v.*

ERM-North Central, Inc., 15 S.W.3d 849, 861-63 (Tenn. Ct. App. 1999) (holding that an unsigned draft contract was not a "public record" for purposes of Tennessee Rule of Evidence 803(8)).

The University also cited the deliberative process privilege as further support for withholding draft documents but is not relying on that doctrine in this case. The deliberative process privilege is clearly a recognized privilege under Tennessee law, having been recognized by the Court of Appeals of our State for decades. *Davidson v. Bredesen*, No. M2012-023740COA-R3-CV, 2013 WL 5872286 at *3-*5 (Tenn. Ct. App. Oct. 29, 2013); *Swift v. Campbell*, 159 S.W.3d 565, 578-79 (Tenn. Ct. App. 2005). And the doctrine could be applied to draft documents because it covers "pre-decisional" information, *see e.g. Worldnetdaily.com, Inc. v . U.S. Department of Justice*, 215 F. Supp. 3d 81 (D.C. Cir. 2016), and by its nature a draft document that has not been completed is still in a pre-decisional stage. Accordingly, it was appropriate for UT to cite this doctrine to avoid a contention of waiver, but the University is currently relying only on the statutory argument outlined above regarding the draft documents it has withheld, not on the deliberative process privilege.

B. Federal Law Confidentiality Requirements Are an Exemption Under the Tennessee Public Records Act and Create an Exemption for Documents that Are Confidential under the Federal Procurement Integrity Act.

1. Information that Is Made Confidential by Federal Law Is Exempt from Disclosure under the Tennessee Public Records Act.

There is an exemption in Tennessee law, enacted as Public Chapter 665 in 2006, for "[i]nformation received by the state that is required by federal law or regulation to be kept confidential," and such information "shall be exempt from public disclosure and shall not be open for inspection by members of the public." Tenn. Code Ann. § 10-7-504(a)(9)(C). Despite the plain language of this statute, the Petitioner asserts the extreme legal position that records

containing information made confidential by federal law are nonetheless subject to disclosure under the Tennessee Public Records Act – apparently, some concept of reverse-preemption, with Tennessee law overriding federal law. The Petitioner is wrong as a matter of law.

a. The U.S. Constitution's Supremacy Clause Exempts Federally-Confidential Records from Disclosure under the Tennessee Public Records Act.

First, as has long been clear, no statutory exemption is even needed for federally-confidential records to be exempt from the Tennessee Public Records Act, due to the Supremacy Clause of the United States Constitution. In 1995, without any specific Tennessee statutory authorization such as now exists, the Tennessee Court of Appeals ruled that information made confidential by a federal statute was exempt from disclosure, holding that the federal statute "effectively supersedes" the Tennessee Public Records Act. *Seaton v. Johnson*, 898 S.W. 2d 232, 236-37 (Tenn. Ct. App. 1995). *See also Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297, 304 (Tenn. 1998) (characterizing *Seaton* as holding that "a federal statute . . . preempted the Tennessee Public Records Act"); *Swift v. Campbell*, 159 S.W.3d 565, 577 (Tenn. Ct. App. 2004) (discussing *Seaton*).

Similarly, in 1999, still before Tenn. Code Ann. § 10-7-504(a)(9)(C) was enacted, the Tennessee Attorney General explained that a federal statute, the Family Education Rights and Privacy Act ("FERPA"), is an exemption to the Tennessee Public Records Act, and that "release of any information from [university student disciplinary records] must be limited in accordance with the provisions of FERPA." Tenn. Op. Atty. Gen. No. 99-106, 1999 WL 321801 (Tenn. A.G. May 10, 1999).

Accordingly, if federal law makes information confidential, Tennessee law does not make it subject to disclosure even without a specific statutory exemption, such that there is no

need for the Court to reach the question of whether Tenn. Code Ann. § 10-7-504(a)(9)(C) applies here.

b. Tennessee Code Annotated Section 10-7-504(a)(9)(C) Exempts Federally-Confidential Records from Disclosure under the Tennessee Public Records Act.

About a decade after *Seaton*, the Tennessee legislature enacted Tenn. Code Ann. § 10-7-504(a)(9)(C) in 2006 Public Chapter 665 (H.B. 3982), which effectively codifies *Seaton*. It was added to a pre-existing code section (which already contained present (A)), and that section now reads in full as follows:

> (A) Official health certificates, collected and maintained by the state veterinarian pursuant to rule chapter 0080-2-1 of the department of agriculture, shall be treated as confidential and shall not be open for inspection by members of the public.
>
> (B) Any data or records provided to or collected by the department of agriculture pursuant to the implementation and operation of premise identification or animal tracking programs shall be considered confidential and shall not be open for inspection by members of the public. Likewise, all contingency plans prepared concerning the department's response to agriculture-related homeland security events shall be considered confidential and shall not be open for inspection by members of the public. The department may disclose data or contingency plans to aid the law enforcement process or to protect human or animal health.
>
> (C) Information received by the state that is required by federal law or regulation to be kept confidential shall be exempt from public disclosure and shall not be open for inspection by members of the public.

Tenn Code Ann. § 10-7-504(a)(9).

Petitioner, citing to Tenn. Code Ann. § 10-7-503(a)(2)(A), first argues that federal confidentiality rules cannot create exemptions under the Tennessee Public Records Act because the TPRA requires disclosure "unless otherwise required by ***state*** law." Petitioner's May 14 Memorandum, p. 12 (emphasis in original). Petitioner is wrong to cite that statute as if it completely takes federal law off the table as a potential ground for an exemption, because the exemption cited by the University ***is*** a "state law." Statutorily, federal laws like the Federal

Procurement Integrity Act are exemptions to the Tennessee Public Records Act because a ***state*** law, Tenn. Code Ann. § 10-7-504(a)(9)(C), says so.

Next, in claiming that subsection (C) applies only to records of the state veterinarian or department of agriculture that are covered by subsections (A) and (B), Petitioner ignores the fact that subsection (C) uses different language than subsections (A) and (B) use. In doing so, the Petitioner violates the plain meaning rule, and departs from settled law that requires giving meaning to the specific statutory words chosen by the legislature.

"If a statute is clear and unambiguous on its face," a court "'must apply its plain meaning in its normal and accepted use.'" *State v. Gevedon*, 671 S.W.3d 537, 541 (Tenn. 2023) (quoting *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009)). In looking at the particular wording of a statute's text, a court must "interpret each word so that no part will be inoperative, superfluous, void or insignificant." *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (cleaned up). Regarding the word choices in a statutory text, a court "must keep in mind that the legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose." *State v. Cavin*, 671 S.W.3d 520, 525 (Tenn. 2023) (cleaned up). *See, e.g., State v. Robinson*, 676 S.W.3d 580, 588 (Tenn. 2023) (when the General Assembly words a statute a certain way – in that case, by omitting the word "full" – "we must assume that this was not an oversight").

Here, the Tennessee General Assembly chose to enact an exemption applicable to "the state veterinarian" in subsection (A), an exemption applicable to "the department of agriculture" in subsection (B), and an exemption applicable to "the state" in subsection (C). When the General Assembly chose a different word in subsection (C), as a matter of law it did so deliberately and not by oversight. Since the General Assembly clearly knew how to limit an

exemption to the state veterinarian or the department of agriculture, as it did in subsections (A) and (B), there is no principled basis to contend that the General Assembly forgot how to do that when it reached subsection (C) and intended only an exemption limited to the state veterinarian or department of agriculture when it used the broader word "state."

While there appear to be no court decisions applying Tenn. Code Ann. § 10-7-504(a)(9)(C), several post-enactment administrative decisions have consistently recognized exemptions for federally-confidential information that is unrelated to the state veterinarian or department of agriculture. While not binding on the Court, the University respectfully submits that this administrative expertise is valuable information for the Court to consider. *See* Tenn. Code Ann. § 10-7-505(g).

For example, in a 2007 Attorney General Opinion addressing health information privacy, a situation having nothing to do with either the state veterinarian or the department of agriculture, the Attorney General explained that Tenn. Code Ann. § 10-7-504(a)(9)(C) "incorporate[s] the confidentiality restrictions contained in the federal Medicaid regulations." Tenn. Op. Atty. Gen. No. 07-165, 2007 WL 4800784 at *2 (Tenn. AG. Dec. 14, 2007).

Similarly, in a 2011 Advisory Opinion addressed to the very same television station involved in this lawsuit, WBIR, the State Open Records Counsel explained that the federal FERPA statute (discussed above) shielded certain higher education student information contained in public records related to alleged NCAA violations (again, a context far removed from the state veterinarian or department of agriculture). The State Open Records Counsel then opined that, under the Tennessee Public Records Act, such information "is required to be

redacted pursuant to FERPA [a federal law] prior to the records being made accessible to the public." State Open Records Counsel Op. No. 11-05 at p. 6.[7]

And in a 2009 Advisory Opinion, the State Open Records Counsel noted that "[t]he courts have recognized that the specific exceptions [to the Tennessee Public Records Act] are not only found within statute, but are also found within the common law, Tennessee Constitution, administrative rules and regulations, rules of court, and ***federal law***." State Open Records Counsel Op. No. 09-04 at p. 2 (emphasis added).[8] Then the State Open Records Counsel advised, in another context that had nothing to do with the state veterinarian or department of agriculture, that "federal copyright law creates an exception to the TPRA." *Id.* at p. 5.

Accordingly, the plain meaning of Tenn. Code Ann. § 10-7-504(a)(9)(C), in line with precedent issued before its enactment and consistent with administrative actions after its enactment, is that federally-confidential records are not subject to disclosure under the Tennessee Public Records Act, no matter which state agency holds the records (that is, the exemption is not limited to the state veterinarian and department of agriculture).

The Petitioner seeks to override the plain meaning of the statute by pointing to discussions in the legislative history (Petitioner's May 14 Memorandum, pp. 13-14), but resort to the legislative history is not warranted here because the statute is not ambiguous. The law is that "when the language of a statute is clear and unambiguous, [a Court] need look no further than the plain and ordinary meaning of the statutory language." *Davis ex rel. Davis v. Ibach*, 465 S.W.3d 570, 573 (Tenn. 2015). In the letter Petitioner's counsel's June 15, 2023 letter, he readily

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7 Available at https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/advisory-opinions/11-05TheInterplayBetweenFERPAandTPRA.pdf.

8 Available at https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/advisory-opinions/09-04_CityofKnoxville.pdf.

conceded that "Tenn. Code Ann. § 10-7-504(a)(9)(C) . . . which on its face appears to sweep up federal law generally as an exception to the TPRA." Attachment 2 to Exhibit C (McAdoo Declaration) to the Petition. He is correct, and the face of the statute is what counts – it creates an exemption (necessitated by our constitutional structure as elaborated in *Seaton*) for federally-confidential information. *See, e.g., State v. Welch*, 595 S.W.3d 615, 619 (Tenn. 2020) (when a "statute is clear and unambiguous on its face, we need not review the legislative history to ascertain its meaning").

2. The Federal Procurement Integrity Act Is an Exemption to the Tennessee Public Records Act.

a. The Petitioner Has Not Raised the Alleged Inapplicability of the Federal Procurement Integrity Act.

Factually, the Petitioner has not properly challenged (and, by not challenging, has conceded) UT's position that the records in question do in fact contain information made confidential by the Federal Procurement Integrity Act (FPIA). 41 U.S.C. §§ 2101–2107. In the Petition, the Petitioner clearly took the position that the Federal Procurement Integrity Act is simply not an exemption to the Tennessee Public Records Act (Petition, ¶ 51 (asserting that the Federal Procurement Integrity Act is "inapplicable" and "not the proper basis for withholding public records under the TPRA")). But the Petitioner did ***not*** assert that any of the withheld documents are in fact not covered by that federal statute. *Compare* Petition, ¶ 53 (making the factual allegation that the redacted portions of the Operating Agreements are not trade secrets). That is, in his Petition, the Petitioner put all his eggs into the basket of his legal argument and did not raise the factual issue of the actual applicability of the federal statute to the information at issue. In his Memorandum, however, the Petitioner argues that the Federal Procurement Integrity Act does not cover the withheld records even if it is legally applicable. Since he did not

raise this question in his Petition, the Court may choose to rule on the basis of the legal issue alone.

b. The Federal Procurement Integrity Act Applies Here.

The Procurement Integrity Act, 41 U.S.C. § 423, prohibits the disclosure of procurement information by a person, which includes source selection information, before the award of a Federal agency procurement contract to which the information relates.

Detailed contractor performance information, which includes annual contractor performance evaluation reports, is used by the federal Government when deciding whether to compete, extend, or award contracts. The federal Government has a web-based system used to manage contractor performance known as the Contractor Performance Assessment Reporting System (CPARS). Performance information, such as the annual UT-Battelle performance assessment reports are used to evaluate UT-Battelle's performance and form the basis of the information the Government enters into CPARS with respect to UT-Battelle. The federal Government's web-based training for CPARS clearly demonstrates the Government's expectation that this type of performance information is confidential procurement information that is not releasable under the Freedom of Information Act (FOIA). 5 U.S.C. § 552:

> Evaluations are source selection information, and they must be treated in accordance with FAR 2.101, 3.104, and 42.1503. CPARS Evaluations are pre-decisional in nature because they are used to support source selections on an ongoing basis. The only people that can view ratings, narratives, etc. for a specific contract are personnel with a need to know and the contractor who is the subject of the evaluation. In addition, evaluations are not releasable under the Freedom of Information Act, or FOIA. *See*, https://www.cpars.gov/ documents/ training/Overview-Section1-Introduction-to-CPARS.docx#:~:text= The%20only%20people%20that%20can,of%20Information%20Act%2C% 20or%20FOIA.

Release of UT-Battelle's detailed performance evaluation reports would be contrary to federal Government policy based upon the principles of the Procurement Integrity Act and the Federal Acquisition Regulation. Moreover, individuals who improperly release source selection material beyond the disclosures authorized by federal law are subject to prosecution, and the penalties of any such prosecution could include fines, penalties, loss of business, and exclusion from federal Government contracting.

The unintended consequence of using a state law to circumvent well-established principles of federal government contracting thwarts federal law and is inconsistent with the Supremacy Clause of the U.S. Constitution. The drafters of Tennessee's Public Records Act did not intend for it avoid federal law.

3. UT Is Relying on the Federal Freedom of Information Act in this Lawsuit Only Insofar as it is Relevant to Information Protected under the Procurement Integrity Act.

At this point, the only federal statute UT is relying on to withhold documents is the Federal Procurement Integrity Act. The Federal Freedom of Information Act is relevant only because FOIA protects some information made confidential by the PIA.

Regarding the Federal Freedom of Information Act, or FOIA, UT agrees with the Petitioner that it is distinct from the Tennessee Public Records Act, and that its provisions are not directly transported into Tennessee law. UT never contended that it was directly applicable here, and explained that clearly to the Petitioner nearly a year ago:

> Regarding the federal Freedom of Information Act ("FOIA"), it is not the University's position that it is incorporated wholesale into Tennessee law as an exemption to the Tennessee Public Records Act. Instead, our position is that federal documents, such as documents prepared by the United States Department of Energy, that would be exempt from disclosure by DOE if DOE received a FOIA request for them, are also exempt from disclosure under Tennessee law, and do not become public records simply because DOE provided them to its federal contractor UT-Battelle.

Attachment 4 to Exhibit C (McAdoo Declaration) to the Petition (copy of UT's July 14, 2023 Letter).

Regarding ORNL, "DOE owns over 99% of the physical property at the ORNL site, directs and approves all major projects at ORNL and provides funding for carrying out all operations." *Reich v. U.S. Dept. of Energy*, 784 F. Supp. 2d 15, 20 (D. Mass. 2011). Indeed, "ORNL is funded entirely by the United States Department of Energy but managed by a private contractor." *U.S. v. Hall*, 549 F.3d 1033, 1035 (6th Cir. 2008). Clearly, the Federal Freedom of Information Act can be applicable to ORNL's records, and the Petitioner has not explained any rationale why the Tennessee Public Records Act should be a back door to gain access to Federal Government records that are declared by a federal statute, FOIA, to be confidential.

In any event, no ruling on this issue is necessary, as UT is not relying on any aspect of FOIA in this case at this point.

C. The Court Should Uphold UT's Decision Not To Produce Records relating to Job Applicants.

UT withheld (1) documents identifying applicants or potential applicants for jobs, in particular for Governor's Chair faculty positions, and (2) documents relating to a search for the ORNL Lab Director position that was ongoing at the time of the request. UT requests the Court to uphold that action to protect the privacy interests of the applicants and the integrity of UT-Battelle's job search process.

There is a fundamental right to privacy protected by the Fourteenth Amendment to the United States Constitution which protects, among other things, an "individual's interest in avoiding divulgence of highly personal information." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998). For instance, the First and Fourteenth Amendments provide protection for "privacy in one's associations," particularly where exposure of the association

may subject an individual to such consequences as "loss of employment." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). An individual's federal constitutional rights regarding information supersede any disclosure obligation of that information by the University under the Tennessee Public Records Act. *See, e.g., Kallstrom, supra* (ruling that police officers' personal information could not be disclosed under Ohio Public Records Act due to federal privacy rights under the Fourteenth Amendment); *Deja Vu Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 395 (6th Cir. 2001) (*Deja Vu I*) (exemption to Tennessee Public Records Act required to prevent undue burden on federal First Amendment rights); *Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 794 (6th Cir. 2005) (en banc) (same under Ohio law, following *Deja Vu I*).

In the employment context, knowledge by an employer that one of its employees is seeking another employment position could cause the employee to lose his or her current job. Disclosing the names of individuals who applied for or were subject to recruiting efforts for positions with the University could jeopardize their employment and thus could violate their federal privacy and associational rights. Accordingly, such information should be treated as exempt from disclosure under the Tennessee Public Records Act.

Further, the records relating to the UT-Battelle Laboratory Director search contained information such as interview questions to be asked of applicants. Allowing public access to such information before the search concludes could affect the integrity of the search process, as applicants could be given advance notice of the questions they would be asked.

D. The Attorney-Client Privilege and the Joint Interest Privilege Are Clearly Exemptions to the Tennessee Public Records Act, But Likely Do Not Need To Be Addressed in this Case.

There is no question that the attorney-client privilege is an exception to the Tennessee Public Records Act. *See, e.g., The Tennesseean v. Tennessee Dept. of Personnel*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337 (Tenn. Ct. App. April 27, 2007). And there is no question that the joint-interest privilege (also called the common-interest privilege) is a form of the attorney-client privilege. *See, e.g., Moore Freight Services, Inc. v. Mize*, No. E2021-00590-COA-R9-CV, 2022 WL 325595 at *9 (Tenn. Ct. App. Feb. 3, 2022).

In terms of applicability to this case, there are few, if any, documents that UT is withholding on the basis of the attorney-client privilege or the joint-interest privilege that are not also covered by some other exemption, and the assertion of these privileges has been largely to avoid waiver. If the Court does not uphold UT's position on the substantive merits of other exemptions claimed, UT respectfully requests the opportunity to conduct an additional privilege review and provide a privilege log.

E. Records Received by UT-Battelle Board Members in their Capacity as UT-Battelle Board Members Do Not Become Public Records Simply Because Those Board Members Are Also UT Employees.

In contesting the University's position that some of the records are not considered to be public records because the recipient received them in their capacity other than UT employment (see Petitioner's Memorandum, pp. 6-9), it appears that the Petitioner is attempting to obtain a ruling that conflates UT and UT-Battelle that is contrary to multiple sources of law.

First, Tennessee law is clear that not every record that resides in a public agency is a public record simply because of where it is located. In particular, the courts have rejected the idea that a record is a public record just because it was created by a government employee during

work hours and/or by virtue of the fact that it was created and/or stored on government-owned computer equipment, and expressly rejected the argument that "any citizen of Tennessee may gain access to any and all records created during work hours on computers owned and operated by governmental entities." *Brennan v. Giles County Bd. of Educ.*, No. M2004-00998-COA-R3-CV, 2005 WL 1996625 (Tenn. Ct. App. Aug. 18, 2005). Clearly, then, not every record that is "under the roof" of UT is a public record simply because it is there.

Second, UT-Battelle, LLC is a limited liability company. *See generally* Tenn. Code Ann. § 48-249-101 *et seq.* (Tennessee Revised Limited Liability Company Act). It is owned by its members, one of which is UT, and is akin to a corporation that is owned by its shareholders. As made clear in one of the most succinct statutes in the Tennessee Code: "An LLC is a legal entity distinct from its members." Tenn. Code Ann. § 48-249-116. That is, "a limited liability company exists separate and apart from its members." *Johnson v. Tanner-Peck*, No. W2009-02454-COA-R3-CV, 2011 WL 1330777 at *13 (Tenn. Ct. App. Apr. 8, 2011). This separateness is confirmed by another statute that makes clear that "[a] member has no interest in specific LLC property. All property transferred to or acquired by an LLC is property of the LLC." Tenn. Code Ann. § 48-249-502(a). For that reason, the property of an LLC cannot be reached through its members. *See, e.g., Sexton v. Sexton*, No. E2023-00136-COA-R3-CV, 2024 WL 333954 at *11 (Tenn. Ct. App. Jan. 30, 2024) (trial court erred by awarding Wife property that was owned by LLC, of which Husband was sole member). Conflating UT and UT-Battelle and using UT as a vehicle to obtain the records of the separate entity UT-Battelle, would run counter to these clear principles of Tennessee business organization law.

Third, the Petitioner cites to *Memphis Publishing Co. v. Cherokee Children & Family Services*, 87 S.W.3d 67 (Tenn. 2002) and mentions the term "functional equivalent," but does not

provide any analysis that would support a contention that UT-Battelle is the functional equivalent of UT. The Court should reject out of hand any such assertion by the Petitioner on the basis of the record and briefing here. *See also Memphis Publishing Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 WL 317652 (Tenn. Ct. App. July 26, 2017) (rejecting assertion that a separate non-profit entity was the "functional equivalent" of the City of Memphis).[9]

Fourth, and finally, the Petitioner speculates that "[b]oth of the redacted UT-Battelle operating agreements will likely confirm that UT employees serve on the UT-Battelle board because of their employment at UT." Petitioner's Memorandum, p. 7. From there, the Petitioner argues – without citing any authority that says so – that this turns any documents UT employees receive as part of their UT-Battelle board service into public records. As the evidence shows (**Exhibit 1**, Smith Dec. ¶ 16 and 17), and as the Court will see by *in camera* review of the Operating Agreement, the Petitioner is incorrect, and his speculation about how the Board is constituted – the whole premise to his legally unsupported argument – is simply wrong.

Here, there is no basis for Petitioner's accusation that UT is employing an "evasive device" to avoid disclosure of public records (Petitioner's Memorandum, p. 8). Instead, all that UT has done is properly point out that some records in its possession are actually the records of a separate, private, non-profit entity, not UT's own public records, and the mere fact that a UT employee happens to possess them does not render them public records.

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[9] Further, UT respectfully submits that the Court should not permit the Petitioner to make any argument regarding the "functional equivalent" issue in a reply brief that Petitioner did not make in its initial brief, as it would be unfair to allow Petitioner to make its case for the first time in the reply brief.

F. The Court Should Deny the Petitioner's Request for Attorney's Fees.

The Court should deny the Petitioner's request for attorney's fees. First, if the Court rules in favor of UT, there will of course be no basis to award attorney's fees in favor of the Petitioner. Second, even if the Petitioner were to prevail in this action, attorney's fees may be awarded, at the Court's discretion, only if the Court finds that UT, in "refusing to disclose a record, knew that such record was public and willfully refused to disclose it." Tenn. Code Ann. § 10-7-505(g). This standard requires a showing of bad faith. *Arnold V. City of Chattanooga*, 19 S.W. 3d 779, 789 (Tenn. Ct. App. 1999). Here, UT respectfully submits that the foregoing legal and factual explanation of its position, and the circumstances that include the Petitioner informing UT that he was withdrawing most of his request, negate any contention that UT acted in bad faith or willfully refused to disclose a record that it knew was a public record.

CONCLUSION

The Respondent respectfully requests the Court to deny the Petition.

Respectfully submitted this 21st day of May, 2024.

/s/ T. Harold Pinkley
T. Harold Pinkley (BPR # 009830)
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Attorney for Respondent, the
University of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing has been hand-delivered to **J. Scott Griswold**, Clerk & Master, Knox County Chancery Court Clerk's Office, 400 W. Main Street, Suite 125, Knoxville, Tennessee 37902, with copy via e-mail to Petitioner's attorney, **Paul R. McAdoo, Esq.**, Reporters Committee for Freedom of the Press, 6688 Nolensville Road, Suite 108-20, Brentwood, Tennessee 37027 (pmcadoo@rcfp.org); postage prepaid. A hard copy will be provided upon request.

This 21st day of May, 2024.

/s/ T. Harold Pinkley
T. Harold Pinkley

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
FOR THE SIXTH JUDICIAL DISTRICT AT KNOXVILLE

JOHN BECKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 208439-1
	)	
THE UNIVERSITY OF TENNESSEE,	)	
	)	
Respondent.	)	

DECLARATION OF JEFF W. SMITH

1. I am Jeff W. Smith and am over the age of 18 years and competent to make this declaration. Everything I state in this declaration is personally known to me.

2. I currently serve as Vice President for National Labs at the University of Tennessee (UT or the University). From 2002–2023 I served UT-Battelle as Deputy Director for Operations at Oak Ridge National Laboratory (ORNL) and was a board member and president of UT-Battelle Development Corporation during the same years. In 2023 I was asked to serve as Interim Director of ORNL, and I agreed to do so until a new permanent director was hired.

3. In 1999, Battelle Memorial Institute (BMI) and UT agreed to organize and operate UT-Battelle, LLC, a Tennessee nonprofit limited liability company, to submit a proposal to the United States Department of Energy (DOE) to manage and operate ORNL.

4. BMI had substantial experience in successfully operating other federally funded research and development centers (FFRDC), including FFRDCs owned by DOE.

5. As a result of this experience, BMI has developed a unique approach to forming teams to compete for contracts to manage and operate FFRDCs, including teaming arrangements with academic institutions. The operating model that has resulted from this unique approach, including not only the composition of team members but also the governance model for the LLC, gives BMI a competitive advantage in responding to requests for proposals for contracts to manage and operate DOE national laboratories.

6. This teaming and operating model has been used by BMI in competing for DOE contracts since 2000, including the contract to manage and operate ORNL along with the University.

7. The governance structure of UT-Battelle, LLC is set forth in a Limited Liability Company Operating Agreement, originally executed in 1999 and amended and restated in 2007. The operating agreements were not required to be filed with the Tennessee Secretary of State and were not filed.

8. I have reviewed the operating agreements, both the unredacted and redacted versions (the one previously provided to Petitioner in this case) and can offer the following summary of the redacted sections:

a. Section 4.1(b) defines how many board members may be appointed by

UT and BMI; how many board members may be appointed by other members of the UT-Battelle team; and which board members have voting rights. This section does not identify UT-Battelle board members by positions held at UT but sets out the ability of UT to appoint persons to the board. The individuals appointed by UT may be employees or nonemployees of UT.

b. Section 4.3(a) sets out matters that are reserved to the Executive Group. This section is a critically important component of the governance structure, because it identifies the types of issues that are reserved to the UT and Battelle-appointed members of the board, and those that may be decided by the full board. This division of authority is a key component of the BMI governance model for national laboratories.

c. Sections 4.3(b) and (c) set out the powers and authority of board committees, including out such committees may affect matters reserved to the Executive Group.

d. Section 4's formula for filling board seats and the respective rights of the board members appointed by different members of the UT-Battelle team would be valuable to potential competitors of BMI as these competitors form teams to compete against BMI in a future competition for the ORNL contract or any similar contract to manage and operate a FFRDC.

e. Section 5.1 of the operating agreement describes the capital accounts of the members of the LLC (UT and BMI). This is also a key component of the governance model.

9. UT-Battelle does not publicly disclose the identities of its board members, nor does it disclose to ORNL employees the governance model outlined in Section 4 and 5.1. The operating agreement is maintained by the Secretary of UT-Battelle and is accessible only to the officers of the LLC. During the onboarding process for board members, a high-level overview of the governance structure is provided, but the specific details of the structure set out in Section 4 is not included.

10. The mechanism for appointing board members and the respective rights and authority of board members appointed by different entities on the UT-Battelle team is a business method that has commercial value to UT-Battelle.

11. The information contained in the redacted sections is not readily available to anyone other than the officers of UT-Battelle.

12. UT, BMI, and UT-Battelle all derive economic value from keeping this information from public disclosure.

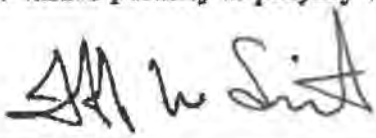
13. BMI has prepared bids on 10 Requests for Proposals to manage and operate national laboratories for DOE. The average cost to prepare a single bid is approximately $2,000,000. If BMI's unique governance model were to be disclosed, BMI would suffer significant financial harm.

14. Sections 6.3 and 6.4 set out the financial distribution of net profits and net losses to the members. Disclosure of this information could have a negative effect on its ability to attract desirable teaming partners in future proposals to manage and operate national laboratories for DOE.

15. The operating agreement does not require that board members appointed by UT hold specific positions with or be employed by UT. The original 1999 operating agreement, before it was amended, did, however, require that the President of UT serve as board chair for the first two years of the LLC's existence (1999–2000).

16. UT has appointed non-employees to the UT-Battelle board. The operating agreement does not require UT-appointed board members to resign from the board if they cease being UT employees.

17. I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.



Jeff W. Smith

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
FOR THE SIXTH JUDICIAL DISTRICT AT KNOXVILLE

JOHN BECKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 208439-1
	)	
THE UNIVERSITY OF TENNESSEE,	)	
	)	
Respondent.	)	

DECLARATION OF CHARLES PRIMM

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1. My name is Charles Primm, and I am the Public Records Coordinator in the Office of Communications and Marketing of the University of Tennessee System (UT or the University). I am over the age of 18 years and am competent to make this declaration. I have personal knowledge of the facts state herein.

2. My job requires me to receive, manage, and respond to all requests for public records made to the University. In that role, on August 29, 2022, I received a records request from John Becker, who works at WBIR, a Knoxville, Tennessee, television station.

3. The request asked for documents received by UT from Oak Ridge National Laboratory (ORNL) or UT-Battelle from January 1, 2022, to August 29, 2022, and to inspect the operating agreement and partnership agreement for UT-Battelle, LLC.

4. On September 16, 2022, I asked Mr. Becker to contact me to discuss the request. He replied that he was going out of town, but we could contact his

EXHIBIT 2

colleague John North. I asked Mr. North on September 22, 2022, to contact me to discuss the request. We spoke on September 27, 2022, and I told Mr. North that the request was quite broad. He said he would work with Mr. Becker to narrow the scope of the first part of the request. Regarding the operating agreement, I told him that the document is protected from disclosure under Tennessee law, specifically citing trade secret law. On November 8, 2022, Mr. Becker narrowed the request to cover the period January 1, 2022, to November 8, 2022, and to include only Randy Boyd, David Miller, Jeff Smith, Brian Dickens, Luke Lybrand, Jamie Blessinger, and Stacy Patterson.

5. On March 15, 2023, I told Mr. Becker that the documents were ready for inspection. On April 18, 2023, Mr. North spent approximately one hour inspecting the 966-page file of records. He asked for copies of 112 pages, which were provided on May 1, 2023.

6. On August 11, 2023, I provided a redacted copy of the 2007 Amended and Restated Operating Agreement of UT-Battelle and provided citations to the Tennessee Code as the basis for the redactions.

7. On August 22, 2023, I provided a redacted copy of the 1999 Operating Agreement and again provided citations to the Tennessee Code as the basis for the redactions.

8. Neither Mr. Becker nor Mr. North contacted me further about Mr. Becker's public records act request after my August 22, 2023, email.

9. I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Charles Primm

Charles Primm

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
FOR THE SIXTH JUDICIAL DISTRICT AT KNOXVILLE

JOHN BECKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 208439-1
	)	
THE UNIVERSITY OF TENNESSEE,	)	
	)	
Respondent.	)	

DECLARATION OF MELISSA TINDELL

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1. My name is Melissa Tindell. I am Assistant Vice President of Communications at the University of Tennessee System. I have held this job since 2018. I am over the age of 18 and am competent to make this declaration. I have personal knowledge of the matters stated herein.

2. The Public Records Coordinator, Charles Primm, reports to me.

3. Mr. Primm generally manages all public records requests, including the request from WBIR on which this lawsuit is based, in partnership with UT General Counsel's office. In July 2023, however, he sustained a significant injury while on vacation that required a medical leave from work for a period of approximately four weeks. During that time, I was the main point of contact for public records requests.

4. On June 15, 2023, our General Counsel's office received a letter from attorney Paul McAdoo regarding WBIR's request to obtain the UT-Battelle partnership agreement. General Counsel responded on July 14, 2023. In an effort

EXHIBIT 3

to best help WBIR and to also maintain a good working relationship with the media outlet, I contacted John North by phone on July 24, 2023, to discuss the request further since he originally inspected the records. Personnel in our office routinely work with media representatives to try to provide them with information they need, and so I was attempting to assist Mr. North by better understanding what he wanted. During that phone conversation, John North expressed he was looking for only two things: Top 50 salaries of UT-Battelle employees and the original operating agreement between UT and Battelle. I told him that I would look into this and get back to him. Later we let him know that UT did not have the UT-Battelle, LLC salary information, and we provided him with redacted copies of the operating agreements. My contemporaneous notes from my conversation with Mr. North are attached hereto as Exhibit 3-A.

5. After our conversation during the summer of 2023, I don't recall that either Mr. Becker nor Mr. North contacted me further about Mr. Becker's public records act request.

6. I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Melissa Tindell

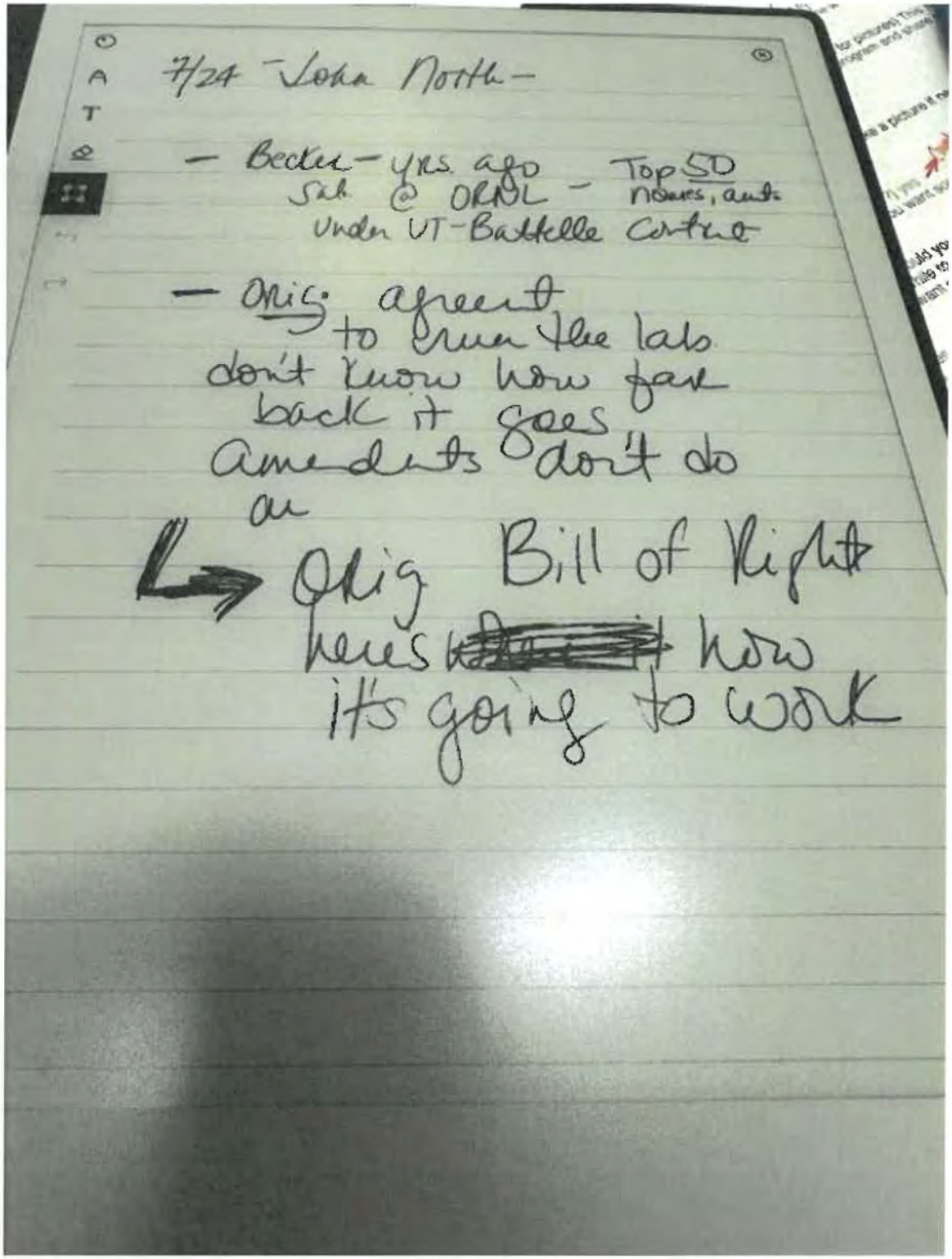
DATE
7/24 - John North -
- Becker - yrs. ago Top SD
Sab @ ORNL - names, and
Under UT-Battelle Contract
- Orig. agreement
to run the labs
don't know how far
back it goes
Amendments don't do
a
Orig Bill of Rights
[redacted] how
it's going to work

EXHIBIT 3-A

LIMITED LIABILITY COMPANY OPERATING AGREEMENT
OF
UT-BATTELLE, LLC
A Tennessee Limited Liability Company

THIS LIMITED LIABILITY COMPANY OPERATING AGREEMENT of UT-Battelle, LLC (the "Company"), dated and effective as of July 13, 1999 is adopted, executed and agreed to, for good and valuable consideration, by and between THE UNIVERSITY OF TENNESSEE ("UT"), a corporate agency of the State of Tennessee and state university chartered under the laws of the State of Tennessee, and BATTELLE MEMORIAL INSTITUTE, an Ohio nonprofit corporation ("Battelle").

WHEREAS, UT is a corporate agency of the State of Tennessee and state university chartered under the laws of the State of Tennessee for the purposes of higher education and graduate instruction, scientific and other research, and public service programs; and

WHEREAS, Battelle is a nonprofit charitable trust incorporated under the nonprofit corporation laws of the State of Ohio for the purposes of scientific research, development and education;

WHEREAS, in connection with the issuance by the United States Department of Energy ("DOE") of RFP No. DE-RP05-99OR22725 ("RFP") for the management and operation of Oak Ridge National Laboratory ("ORNL"), the Members have agreed to organize and operate the Company as a not-for-profit equally-owned limited liability company for the purpose of submitting a proposal to DOE in response to the RFP and, if successful, entering into and conducting business in connection with a management and operation contract with DOE for the management and operation of ORNL (the "ORNL M&O Contract");

WHEREAS, Battelle and UT have agreed that membership in the Company will be limited to qualifying nonprofit organizations in accordance with DOE requirements as provided in the RFP; and

WHEREAS, the purposes for which the Company is being organized by the Members are intended by the Members to be in furtherance of, and have a substantial relationship to, the purposes of UT and Battelle, respectively, as hereinabove described;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein made and intending to be legally bound, the Members hereby agree as follows:

EXHIBIT 4

ARTICLE I

DEFINITIONS

1.1 Certain Definitions. Capitalized terms used but not defined herein shall have the respective meanings assigned to them in Appendix I.

1.2 Certain Conventions. Unless the context of this Agreement otherwise requires, (a) words of any gender include each other gender and (b) words using the singular or plural number also include the plural or singular number, respectively. The terms "hereof," "herein," "hereby" and "hereunder," and words of similar import, refer to this Agreement as a whole and not to any particular Section or provision. The words "include," "includes" and "including" shall be deemed to be followed by the phrase "without limitation."

ARTICLE II

ORGANIZATION

2.1 Formation. By execution of this Agreement and upon the filing of the Articles of Organization of the Company ("Articles") with the Secretary of State of the State of Tennessee, the Members hereby form the Company pursuant to the Act, for the purposes hereinafter set forth. Promptly following the execution hereof, the Members or their designees shall execute or cause to be executed all necessary articles, certificates, and documents, and shall make all such filings and recordings, and shall do all other acts as may be necessary or appropriate from time to time to comply with all requirements for the formation, continued existence and operation of a limited liability company in the State of Tennessee.

2.2 Company Name. The name of the Company shall be "UT-Battelle, LLC" and all Company business shall be conducted in that name or in such other names that comply with applicable law as the Board of Governors may select from time to time. Prior to the termination of the Company, the Company shall have the full and exclusive ownership of and right to use the name "UT-Battelle, LLC." At no time during the existence of the Company, as among the Members or for the purpose of determining the Capital Account of any Member, shall any value be placed upon the Company's name, the right to its use or any goodwill associated with the Company. The Members agree that this name shall remain in effect so long as The University of Tennessee and Battelle Memorial Institute each retain a Membership Interest.

2.3 Registered Office; Registered Agent; Principal Office; Other Offices. The registered office of the Company required by the Act to be maintained in the State of Tennessee shall be the office of the registered agent named in the Articles or such other office (which need not be a place of business of the Company) as the Board of Governors may designate from time to time in the manner provided by law. The registered agent of the Company in the State of Tennessee shall be the General Counsel or such other Person or Persons as the Board of Governors may designate from time

to time in the manner provided by law. The principal office of the Company shall be in Tennessee or at such place as the Board of Governors may designate from time to time, and the Company shall maintain records there. The Company may have such other offices as the Board of Governors may designate from time to time.

2.4 **Purposes.** The primary purpose of the Company is to enter into and perform the ORNL M&O Contract. The Company is also to engage in scientific research, technology development, and educational activities and any other related purposes under the Act for which a not-for-profit limited liability company may be organized and which are in furtherance of scientific research and educational activities. The Company shall possess and may exercise all the powers and privileges granted by the Act or by any other law, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the purposes of the Company.

2.5 **Partition.** No Member, nor any successor-in-interest to any Member, shall have the right, while this Agreement remains in effect, to have the property of the Company partitioned, or to file a complaint or institute any proceeding at law or in equity to have the property of the Company partitioned, and each of the Members, on behalf of itself and its successors, representatives and assigns, hereby irrevocably waives any such right.

2.6 **Term.** The term of the Company shall be from the date of filing of the Certificate to December 31, 2020 or until sooner terminated in accordance with the provisions of this Agreement. The term of the Company may be extended for successive five-year periods by unanimous consent of the Members no later than one year prior to the end of the initial term or any succeeding term.

2.7 **Title to Company Property.** All property owned by the Company, whether real or personal, tangible or intangible, shall be held in the name of the Company, and no Member individually shall have any interest in such property.

2.8 **No State-Law Partnership.** The Members intend that the Company shall not be a partnership (including, without limitation, a limited partnership), and that no Member, Governor or officer shall be a partner of any other Member, Governor or officer, for any purposes other than federal, and if applicable, state tax purposes, and this Agreement shall not be construed to the contrary. The Members intend that the Company shall be treated as a partnership for federal and, if applicable, state income tax purposes, and each Member and the Company shall file all necessary Tax returns and shall otherwise take all Tax and financial reporting positions in a manner consistent with such treatment. The Members shall not make any election under Treasury Regulation Section 301.7701-3, or any comparable provisions of state or local law, to treat the Company as an entity other than a partnership for federal, state or local income tax purposes.

2.9 **Dissolution Events and Transfers of Governance Rights.** Dissolution events may be determined only by the Executive Group of Governors who are appointed by the Members and

transfers of governance rights may be permitted only by consent of the Executive Group of Governors appointed by the Members.

ARTICLE III

MEMBERSHIP; CAPITAL CONTRIBUTIONS

3.1 Members.

(a) Names, etc. The names, business or mailing addresses, Capital Contributions and the Membership Interests of the Members are set forth on Schedule A, as amended from time to time in accordance with the terms of this Agreement. Any reference in this Agreement to Schedule A shall be deemed to be a reference to Schedule A as amended and in effect from time to time.

(b) Loans by Members. No Member, as such, shall be required to lend any funds to the Company, except as otherwise required by applicable law or by this Agreement. Any loan by a Member to the Company shall not be considered to be a Capital Contribution, shall be reflected in a written loan document executed by such Member and the Company, and shall be reflected as a liability on the books of the Company.

(c) Representations and Warranties of Members. Each Member hereby represents and warrants to and acknowledges with the Company that: (i) the execution, delivery and performance of this Agreement have been duly authorized by such Member and do not require such Member to obtain any consent or approval that has not been obtained and do not contravene or result in a default under any provision of any law or regulation applicable to such Member or other governing documents or any agreement or instrument to which such Member is a party, or by which such Member is bound, which would likely have a material, adverse impact on the party's ability to perform its obligation under this Agreement; (ii) this Agreement is valid, binding and enforceable against such Member in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium or other similar laws relating to the enforcement of creditors' rights generally and by general principles of equity; and (iii) such Member is a nonprofit organization as contemplated by the terms of the RFP.

(d) Meetings of Members. A meeting of the Members shall be held at least annually on the second Friday of October of each year, or as soon thereafter as the Members shall agree, for the appointment of Governors and for the transaction of such other business as may properly come before the meeting. Membership meetings shall be held at the principal office of the Company or at such other place and by such other means as the Members may determine.

3.2 No Liability of Members.

(a) No Liability. Except as otherwise required by applicable law, as expressly set forth in this Agreement or as otherwise expressly agreed upon by the Members in writing, no Member shall

amounts previously distributed to such Member.

3.3 **Initial Capital Contribution.** The Initial Capital Contributions to be made by the Members shall be contributed in cash or as a credit for expenses incurred by such Member for the benefit of the Company. The Initial Capital Contribution of each Member is set forth on Schedule A. No Member shall be obligated to make any Capital Contributions to the Company in excess of its Initial Capital Contribution, except as may be determined by the Members from time to time.

3.4 **Issuance of Additional Interests; Additional Members.**

(a) Additional Interests. The Members shall have the right to cause the Company to issue or sell to any Person (including Members and Affiliates of Members) any of the following (which for purposes of this Agreement shall be "Additional Interests"): (i) Additional Membership Interests in the Company; (ii) obligations, evidences of indebtedness or other securities or interests convertible into or exchangeable for Membership Interests; and (iii) warrants, options or other rights to purchase or otherwise acquire Membership Interests. The Members shall determine the terms and conditions governing the issuance of such Additional Interests, including the number and designation of such Additional Interests, the preference (with respect to distributions, in liquidation or otherwise) over any other Membership Interests and any required contributions in connection therewith. If an Additional Interest is issued to an existing Member in accordance with the terms of this Agreement, the Secretary of the Company shall amend Schedule A without the further vote, act or consent of any other Person to reflect the issuance of such Additional Interest.

(b) Additional Members. In order for a Person, other than an existing Member, to be admitted as a Member of the Company with respect to an Additional Interest: (i) such Additional Interest shall have been issued in accordance with the terms of this Agreement; (ii) such Person shall have delivered to the Company a written undertaking to be bound by the terms and conditions of this Agreement and shall have delivered such documents and instruments as the Members determine to be necessary or appropriate in connection with the issuance of such Additional Interest to such Person or to effect such Person's admission as a Member; and (iii) the Secretary of the Company shall amend Schedule A without the further vote, act or consent of any other Person to reflect such new Person as a Member. Upon the amendment of Schedule A, such Person shall be admitted as a Member and deemed listed as such on the books and records of the Company. No Person shall be admitted as an Additional Member other than a qualifying nonprofit organization meeting DOE criteria as specified in the RFP or elsewhere.

4.1 The Board of Governors.

(a) Members and Board of Governors. All actions specifically excluded from the authority of the Board of Governors and reserved to the Members by this Agreement shall require the unanimous vote or consent of all Members. The Members may take action by vote of the Members at a meeting, by proxy or by unanimous written consent without a meeting. Meetings of the Members shall be at such place and time as shall be determined by unanimous agreement of the Members. The Members, acting through the Board of Governors established pursuant to Section 4.1 (b), shall manage and control the business and affairs of the Company and shall possess all rights and powers as provided in the Act and otherwise by law. Except as otherwise expressly provided for herein, the Members hereby consent to the exercise by the Board of Governors and Executive Group of all such powers and rights conferred on the Board of Governors by the Act with respect to the management and control of the Company. If a vote, consent or approval of the Members is required by the Act or other applicable law with respect to any act to be taken by the Company or matter considered by the Executive Group, the Members agree that they shall be deemed to have consented to or approved such act or voted on such matter in accordance with a vote of the Executive Group on such act or matter. No Member, in its capacity as a Member, shall have any power to act for, sign for or do any act that would bind the Company.

(b) Governors. There shall be established a Board of Governors of the Company composed of [redacted] Governors which, in turn, shall be comprised of [redacted] classes. [redacted] Governors shall be appointed by the Members as follows: [redacted] of the Governors shall be appointed by the UT Member (collectively, the "UT Member Governors"); and [redacted] of the Governors shall be appointed by the Battelle Member (collectively, the "Battelle Member Governors"). Collectively, these [redacted] Governors shall comprise a class of Governors referred to as the "Executive Group." [redacted] additional Governors shall be the Presidents or their respective designees (collectively, the "Core University Governors") of Oak Ridge Associated Universities, Duke University, Florida State University, Georgia Institute of Technology, North Carolina State University, Vanderbilt University, The University of Virginia, and Virginia Polytechnic Institute and State University, respectively (collectively, the "Core Universities") through whom the Core Universities shall bring relevant scientific, educational, and research experience and resources to bear for the benefit of the Company. The Core University Governors shall comprise a separate class of Governors referred to as the "Core University Group." All Governors shall serve two-year terms and except as otherwise provided herein, shall be entitled to vote or consent on matters affecting the general business and policy determinations of the Board of Governors. UT shall have the right to appoint the UT Member Governors for an unlimited number of successive terms, Battelle shall have the right to appoint the Battelle Member Governors for an unlimited number of successive terms and the Core Universities shall have the right to appoint Core University Governors for an unlimited number of successive terms. There shall also be a third class of [redacted] Governors," [redacted], comprised of [redacted] representative, designated by BWX Technologies, and such [redacted] shall continue for so long as [redacted] and shall otherwise terminate automatically.

4.2 Board of Governors Meetings.

(a) Quorum A majority of the total number of Governors shall constitute a quorum for the transaction of business of the Board of Governors except as otherwise provided in this Agreement; provided however, that no quorum shall be considered duly convened without the presence of at least three UT Member Governors and three Battelle Member Governors. At any meeting of the Board of Governors at which a duly convened quorum is present, the act of a majority of the Governors of the Board of Governors then present shall be the act of the Board of Governors.

(b) Place and Waiver of Notice. Meetings of the Board of Governors may be held at such place or places as shall be determined from time to time by the Board of Governors. At all meetings of the Board of Governors, business shall be transacted in such order as shall from time to time be determined by the Board of Governors. Attendance of a Governor at a meeting shall constitute a waiver of notice of such meeting, except where a Governor attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

(c) Regular Meetings. Regular meetings of the Board of Governors shall be held at such times and places as shall be designated from time to time by the Board of Governors.

(d) Special Meetings. Special meetings of the Board of Governors may be called on at least seven days' notice to each Governor by any two Governors thereon. Such notice shall state the purpose or purposes of, and the business to be transacted at such meeting.

(e) Notice. Notice of any meeting of the Board of Governors, including the agenda of such meeting and any materials relevant, may be given by mail, facsimile, electronic mail, courier or other reasonably appropriate means and shall be provided no less than seven (7) business days prior to any meeting of the Board of Governors.

(f) Death, Resignation or Removal of Governors. Any UT Member Governor may be removed at any time only by UT; any Battelle Member Governor may be removed at any time only by Battelle; any Core University Governor may be removed at any time only by the Core University having appointed such Governor. Each Governor shall remain in office until his or her death, resignation, expiration of term without reappointment or removal. In the event of death, resignation or removal of a Governor, the vacancy created thereby shall be filled in accordance with Section 4.1(b).

(g) Rules and Procedures. The Board of Governors shall have the authority to adopt rules and procedures, not inconsistent with this Agreement, relating to the conduct of its affairs.

(h) No Individual Authority No Governor shall have the authority or power to act for or on behalf of the Company, to do any act that would be binding on the Company or to make any expenditures or incur any obligations on behalf of the Company or authorize any of the foregoing,

other than acts that are authorized by the Board of Governors acting in accordance with this Agreement and the Act. Except as otherwise determined by the Members, the Governors shall not receive any fees or other consideration from the Company for serving in such capacity, except that the Company shall reimburse each Governor for all reasonable travel and other out-of-pocket expenses incurred by him or her in connection with his or her service on the Board of Governors.

(i) Attendance by Counsel. Each Member shall be entitled to be represented by legal counsel at all meetings of the Board of Governors, including any executive sessions of the Board of Governors and committee meetings.

4.3 Matters Reserved to the Executive Group; Committees and Subcommittees; Delegation of Authority.

(a) Executive Group. The Executive Group shall have sole authority, exclusive of the Core University Group, to make decisions on behalf of the Company with respect to [redacted] and, [redacted] shall function as the Risk Management Committee of the Board of Governors. The Executive Group shall also have sole authority [redacted] UT Member Governors and [redacted] Battelle Member Governors shall constitute a quorum for the transaction of business of the Executive Group. At any meeting of the Executive Group at which a duly convened quorum is present, the act of a majority of each of the UT Member Governors and Battelle Member Governors shall be the act of the Executive Group except as otherwise provided in this Agreement. The Executive Group shall also have sole authority [redacted] The approval of [redacted] of the UT Member Governors and [redacted] the Battelle Member Governors, given in writing or by vote at a meeting, consenting or voting in the affirmative, shall be necessary for the Executive Group to effect or validate the following [redacted]

(i) any termination or extension of the term of the ORNL M&O Contract;

(ii) [redacted]

(iii) [redacted]

(iv) Reserved;

(v) [redacted]

(vi) any material tax election (including, without limitation, the making of an election under Section 754 of the Code), the adoption or modification of financial accounting methods or principles (except those required by changes in accounting industry standards or approved as consistent with GAAP as applied by the Company's accounting firm), any decision not to audit the financial statements of the Company;

(vii) (A) [redacted]

(viii) any change in the business of the Company unrelated to the operation and management of ORNL;

(ix) [redacted]

(x) [redacted]

(xi) extension of the term of the Company pursuant to Section 2.6;

(xii) [redacted]

(xiii) the submission of any application for the entry of a decree of judicial dissolution of the Company under T.C.A. § 48-245-902 of the Act;

(xiv) [redacted]

(xv) [redacted]

(b) Committees and Subcommittees: Delegation by Board of Governors. The Board of Governors shall have the power and authority to delegate to one or more Persons, including committees and subcommittees of the Board of Governors, the Board of Governors' rights and powers to manage and control the business and affairs of the Company, other than those matters over which the Executive Group has sole authority under subsection (a) above, including to delegate to agents and employees of the Company (including officers), and, consistent with the ORNL M&O Contract, to delegate by a management agreement or another agreement with, or otherwise to, any Persons. Each committee and subcommittee of the Board of Governors shall have such powers as may be specified herein or, absent any provision herein, in the resolution of the Board of Governors establishing such committee or subcommittee. Except as provided herein or in the adopting resolution for such committee or subcommittee, the rules applicable to meetings of the Board of Governors (including with respect to notice and quorum) shall be applicable to meetings of each such committee or subcommittee.

(c) Science and Technology Committee. The Science and Technology Committee shall be comprised of [redacted]. The Science & Technology Committee shall advise the Board of Governors on matters relating to the scientific mission of ORNL.

4.4 Chair; Vice-Chair. For the first two years of the Company's existence, the Board of Governors shall designate a UT Member Governor to serve as the chair and a Battelle Member Governor to serve as the vice-chair of the Board of Governors. The Battelle Member Governor previously serving as vice-chair shall be designated to serve as chair for the next two years, and the UT Member Governor previously serving as chair shall be designated to serve as vice-chair for the next two years. Thereafter, the positions of chair and vice-chair shall rotate between a UT Member Governor and Battelle Member Governor every two years. The chair shall preside at all meetings of the Board of Governors. If the chair is absent at any meeting of the Board of Governors, the vice-chair shall preside at that meeting. If the chair and vice-chair are both absent at any meeting of the Board of Governors, a majority of the Governors present shall designate another Governor to serve as interim chair for that meeting. The chair and vice-chair shall have no authority or power to act for or on behalf of the Company, to do any act that would be binding on the Company or to make any expenditure or incur any obligations on behalf of the Company or authorize any of the foregoing. During the initial two-years of the Company's existence, the chair shall be The University of Tennessee, President, and the vice-chair shall be Chief Executive Officer and President, Battelle. In the event either is unable to serve as chair or vice-chair, respectively, at any time during the initial two years, UT shall have the right to designate a substitute chair for the duration of such term and Battelle shall have the right to designate a substitute vice-chair for the duration of such term.

4.5 Action by Written Consent or Telephone Conference. Any action permitted or required by the Act, the Certificate or this Agreement to be taken at a meeting of the Board of Governors, the Executive Group or any committee or subcommittee established by the Board of Governors may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed by a majority of the Governors of the Board or Governors, by the required number of the Executive Group as required by Article 4.3(a), or of the members of such committee or subcommittee then holding office, as the case may be. Such consent shall have the same force and

4.5 **Action by Written Consent or Telephone Conference.** Any action permitted or required by the Act, the Certificate or this Agreement to be taken at a meeting of the Board of Governors, the Executive Group or any committee or subcommittee established by the Board of Governors may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed by a majority of the Governors of the Board or Governors, by the required number of the Executive Group as required by Article 4.3(a), or of the members of such committee or subcommittee then holding office, as the case may be. Such consent shall have the same force and effect as a vote at a meeting and may be stated as such in any document or instrument filed with the Secretary of State of Tennessee, and the execution of such consent shall constitute attendance or presence in person at such meeting. Subject to the requirements of this Agreement for notice of meetings, the Governors on the Board of Governors and members of the Executive Group and members of any committee or subcommittee established by the Board of Governors, may participate in and hold a meeting by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in such meeting shall constitute attendance and presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

4.6 **Officers.**

(a) Designation and Appointment. The officers of the Company shall be those designated in this Section and shall be appointed by the Executive Group to conduct the Company's business subject to the supervision and control of the Board of Governors, the Executive Group and relevant committees and subcommittees established by the Board of Governors and the Executive Group. The Executive Group may, from time to time, employ and retain additional Persons as may be necessary or appropriate for the conduct of the Company's business (subject to the supervision and control of the Board of Governors, the Executive Group and relevant committees or subcommittees established by the Board of Governors), including employees, agents and other Persons (any of whom may be a Member or Governor) who may be designated as officers of the Company. To the extent feasible, equal numbers of officers shall be appointed by the Executive Group from UT and from Battelle; and where not feasible shall be equalized at the next election of officers. Any number of offices may be held by the same person. Officers need not be residents of the State of Tennessee or Members. Any officers so designated shall have such authority and perform such duties as the Board of Governors may, from time to time, delegate to them. The Executive Group may assign titles to particular officers. Each officer shall hold office until his successor shall be duly designated and shall qualify or until his death or until he shall resign or shall have been removed in the manner hereinafter provided. The salaries or other compensation, if any, of the officers of the Company shall be fixed from time to time by the Executive Group.

(b) Resignation/Removal. Any officer may resign as such at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or if no time be specified, at the time of its receipt by the Board of Governors. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer may be

removed as such, either with or without cause at any time by the Board of Governors. Designation of an officer shall not of itself create any contractual or employment rights.

(c) Duties of Officers Generally. The officers, in the performance of their duties as such, shall owe to the Company duties of loyalty and due care of the type owed by the officers of a corporation to such corporation and its stockholders under the laws of the State of Tennessee.

(d) UT-Battelle, LLC Chief Manager/ORNL Laboratory Director. The UT-Battelle, LLC Chief Manager shall be appointed by the Executive Group upon mutual nomination by the Members and also serve as the ORNL Laboratory Director and shall, subject to the powers of the Board of Governors and the Executive Group, be the Chief Executive Officer and have general and active management of the business of the Company; and shall see that all orders and resolutions of the Board of Governors and the Executive Group are carried into effect. The UT-Battelle, LLC Chief Manager/ORNL Laboratory Director shall have such other powers and perform such other duties as may be prescribed by the Executive Group. The UT-Battelle, LLC Chief Manager/ORNL Laboratory Director shall subject to the powers and authority of the Board of Governors and the Executive Group, manage and operate ORNL consistent with the ORNL M&O Contract. Reporting to the Chief Manager/ORNL Laboratory Director shall be the other officers of the Company (including Deputy Laboratory Directors described in subparagraphs (e) and (f) below) as well as such other employees as the UT-Battelle, LLC Chief Manager/ORNL Laboratory Director shall designate from time to time.

(e) UT-Battelle, LLC Deputy Chief Manager/ORNL Deputy Laboratory Director for Science and Technology. The UT-Battelle, LLC Deputy Chief Manager/Deputy Laboratory Director for Science and Technology shall be appointed by the Executive Group upon nomination by UT with the consent of Battelle and of the Chief Manager/ORNL Laboratory Director, and shall also serve as the Chief Science and Technology Officer and, subject to the powers of the Board of Governors, the Executive Group and the Chief Manager/ORNL Laboratory Director, shall have authority and responsibility for all science and technology programs; and shall take the lead and have general and active management in providing the scientific direction (goals, strategy/approach, metrics, experience) for UT-Battelle, LLC and for ORNL, and for the appointment of key personnel to carry out these duties; and shall lead and serve as the liaison to the Core Universities for all of the activities between the Core Universities and the science and technology programs of ORNL.

(f) UT-Battelle, LLC Deputy Chief Manager/ORNL Deputy Laboratory Director for Operations. The UT-Battelle, LLC Deputy Chief Manager/Deputy Laboratory Director for Operations shall be appointed by the Executive Group upon nomination by Battelle, with the consent of UT and of the Chief Manager/ORNL Laboratory Director, and, subject to the powers of the Board of Governors, the Executive Group and the Chief Manager/ORNL Laboratory Director, shall have authority and responsibility for all operational aspects of ORNL and shall take the lead and have general and active management for the operations of ORNL to support the science and technology programs, and for the appointment of key personnel to carry out these duties.

(h) Secretary

(i) The secretary shall be appointed by the Executive Group and shall attend all meetings of the Board of Governors and the Executive Group, and shall record all the proceedings of the meetings in a book to be kept for that purpose, and shall perform like duties for the subcommittees of the Board of Governors and of the Executive Group when required

(ii) The secretary shall keep all documents as may be required under the Act other than those designated to be kept by the CFO. The secretary shall perform such other duties and have such other authority as may be prescribed elsewhere in this Agreement or from time to time by the UT-Battelle, LLC President and Chief Executive Officer/ORNL Laboratory Director or the Executive Group. The secretary shall have the general duties, powers and responsibilities of a secretary of a corporation.

(iii) If the Executive Group chooses to appoint an assistant secretary or assistant secretaries, the assistant secretaries, in the order of their seniority, in the absence, disability or inability to act of the secretary, shall perform the duties and exercise the powers of the secretary, and shall perform such other duties as the UT-Battelle, LLC President and Chief Executive Officer/ORNL Laboratory Director or the Executive Group may from time to time prescribe.

(i) Chief Audit Executive. The chief audit executive shall be appointed by the Executive Group and shall have responsibility for the internal audits and investigations conducted by UT-Battelle in order to monitor and evaluate the adequacy, efficiency, and effectiveness of overall operations within the organization. The chief audit executive shall have the authority to issue audit and investigation reports and shall inform the Executive Group of significant issues related to the organization's risk management, control, and governance processes, including potential improvements to those processes, and provide information concerning such issues through resolution. The chief audit executive shall keep and maintain all records of internal and independent audits and investigations, including audit and investigation findings and recommendations. The chief audit executive shall promote independence in all audit activities and assess the audit function, including the level of independent authority of the internal audit activity. The chief audit executive shall have the general duties, powers and responsibilities of a chief audit officer of a corporation. The chief audit executive shall have such other powers and perform such other duties as may from time to time be prescribed by the UT-Battelle, LLC President and Chief Executive Officer/ORNL Laboratory Director or the Executive Group.

4.7 Insurance. The Company shall maintain such types, levels and limits of insurance coverage with appropriate insurance carriers as are consistent with good business practices.

4.8 Taxes and Charges; Governmental Rules. Each Member shall promptly pay all applicable taxes and other governmental charges attributable to it in its individual capacity, satisfy all Liens attributable to it in its individual capacity, and comply with all governmental rules applicable to it to the extent that a failure to do so would create a Lien on the Company or its assets.

ARTICLE V
CAPITAL
ACCOUNTS

5.1 Capital Accounts. Each Member shall have a capital account (a "Capital Account") which account shall be (1) increased by the amount of (a) [redacted] of [redacted], (b) [redacted], and (c) [redacted], and (2) decreased by the amount of (x) [redacted] (y) the allocation to such Member [redacted] (z) [redacted] The provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulation section 1:704-l(b), and shall be interpreted and applied in a manner consistent with such Regulation.

5.2 Negative Capital Accounts. Except with respect to any deficit or negative balance resulting from a withdrawal of capital or a distribution which is in contravention of this Agreement, no Member shall be required to pay to the Company or any other Member any deficit or negative balance which may exist from time to time in such Member's Capital Account.

5.3 Company Capital. No Member shall be paid interest on any Capital Contribution to the Company or on such Member's Capital Account, and no Member shall have any right to demand the return of such Member's Capital Contribution or any other Distribution from the Company, (whether upon resignation, withdrawal or otherwise), except upon dissolution of the Company pursuant to Article XI hereof.

ARTICLE VI
DISTRIBUTIONS; ALLOCATIONS OF PROFITS AND LOSSES

6.1 Generally. Pursuant to Section 4.3 of this Agreement, and subject to the provisions of Section 6.4 of this Agreement, the Executive Group shall have sole discretion regarding the amounts and timing of Distributions to Members, and in each case subject to the retention and establishment of reserves of, or payment to third parties of, such funds as it deems necessary with respect to the reasonable business needs of the Company which shall include the payment or the making of provision for the payment when due of the Company's obligations.

6.2 Percentage Interests. The Percentage Interests of the Members are as set forth on Schedule A. The Percentage Interests shall be updated by the Board of Governors to reflect any transfers of Membership Interests, set forth on a revised Schedule A and filed with the records of the Company. The sum of the Percentage Interests for all Members shall equal 100 percent.

6.3 Allocation of Net Profits and Net Losses: Book Allocation.

(a) *In General*. [redacted]

(b) *Profits and Losses*. [redacted]

(i) [redacted]

(A) [redacted]

(B) [redacted]

(C) [redacted]

(ii) [redacted]e

(c) *Special Rules*. [redacted]

(i) *Deficit Capital Account and Nonrecourse Debt Rules*.

(A) *Limitation on Loss Allocations*. [redacted]

(B) *Qualified Income Offset*. [redacted]

[redacted]

(C) *Company Minimum Gain Chargeback*. [redacted]

[redacted]

(D) *Member Nonrecourse Debt Minimum Gain Chargeback*. [redacted]

[redacted]

(E) *Member Nonrecourse Deduction*. [redacted]

[redacted]

(F) *Limited Effect and Interpretation*. [redacted]

[redacted]

(G) *Curative Allocations.* [redacted]

(H) *Change in Regulations.* [redacted]

(I) *Change in Members' Interests.* [redacted]

6.4 Allocation of Profits and Losses: Tax Allocations.

(a) *In General.* [redacted]

(b) *Special Rules.*

(i) *Elimination of Book/Tax Disparities.* [redacted]

[redacted]

(ii) *Allocation of Items Among Members.* [redacted]

(iii) *Tax Credits.* [redacted]

(c) *Conformity of Reporting.* [redacted]

6.5 Distributions to Pay Taxes (or in lieu of such distributions).

(a) Within 90 days of the end of each Fiscal Year, the Company shall (unless the Executive Group shall decide to the contrary) make a distribution of cash to each Member in an amount equal to the excess of each such Member's allocable share of all items of Profit and income over all items of Loss and deduction as determined under Section 6.3 and 6.4 multiplied by the sum of the highest corporate federal income tax rate as provided under Section 11 of the Code plus 4% as a surrogate state and local income tax rate.

(b) If a distribution of cash is made pursuant to Section 6.5(a) and the distribution is not in proportion to the Member's Percentage Interest, then the Executive Group shall adjust subsequent distributions at such time as there is no Distributable Amount so that the cumulative distributions pursuant to Section 6.5(a) and this Section 6.5(b) are in proportion to the Members' Percentage Interests.