

**BEFORE THE SURFACE TRANSPORTATION BOARD**

ENTERED  
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October 14, 2016  
Part of  
Public Record

**THE ATLANTA DEVELOPMENT  
AUTHORITY D/B/A INVEST ATLANTA  
and ATLANTA BELTLINE, INC.**

**FINANCE DOCKET NO. 35991**

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**FIRST SUPPLEMENT TO THE RESPONSE OF INTERESTED PARTIES TO FILE  
NEW EVIDENCE OBTAINED FROM NORFOLK SOUTHERN IN OPPOSITION TO  
VERIFIED PETITION FOR A DECLARATORY ORDER AND REQUEST FOR  
EXPEDITED CONSIDERATION**

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Counsel for Interested Parties under  
5 U.S.C. § 554(c)(1)

Dated: October 14, 2016

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Pursuant to 5 U.S.C. § 554(c)(1), CYNTHIA VICK; GORDON B. RAGAN, JR.; JANE G. POWELL; LORAN M. POWELL; ELIZABETH A. ALBERT; MICHAEL LOVING; DAWN SMITH; RODERICK SMITH; ROBIN TUBBS; JASON GODWIN; STEVEN R. GREEN; STACEY E. CLAY; SANDY FLORES; CHRISTOPHER DRAPER; DENNIS SABO, JR.; LAURA M. SHEPARD; ANGELA FOX; HANNIBAL HEREDIA; PATRICIA S. JONES; JAY JONES; DONNA M. FITZMAURICE; PATRICK J. FITZMAURICE; SAMANTHA C. BONTRAGER; DEWAYNE M. BONTRAGER; MOLLY TAYLOR; JOSH B. TAYLOR; THOMAS R. MARKOVIC; MEGAN COCHARD; MATTHEW R. COCHARD; AMANDA K. SAPRA; NEIL K. SAPRA; MARGARET N. CORBETT; NICOLAS ALBANO; ERIC BYMASTER; FULTON D. LEWIS, III; S. NEIL RHONEY; TOM PHILPOT; ANNA L. LENTZ; KURT LENTZ; (collectively, the “Flagler Owners”) file and submit this first supplemental response, as interested parties, to file new evidence in opposition to the *Verified Petition for a Declaratory Order* (the “Petition”) filed by The Atlanta Development Authority d/b/a Invest Atlanta (the “Authority”) and Atlanta BeltLine, Inc. (“ABI”) on January 8, 2016, respectfully requesting that the Surface Transportation Board (the “Board”) deny the Petition.

As has been well established by the pleadings in the above-style action, the question presented in the Petition for decision by the Board is whether the conveyance of a line of railroad known as the Northeast Quadrant located in Fulton County, Georgia (the “Northeast Quadrant Line”) from rail carrier Norfolk Southern Railway Company (“Norfolk Southern”) to non-rail carriers Ansley North BeltLine, LLC; Ansley South BeltLine, LLC; Piedmont BeltLine, LLC; North Avenue BeltLine, LLC; Corridor Beltline, LLC; and, Corridor Edgewood, LLC (collectively, the “Mason Entities”) was subject to 49 U.S.C. § 10901(a)(4), or was the conveyance exempted from 49 U.S.C. § 10901(a)(4) by virtue of State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991), and its progeny.

### **SUPPLEMENTAL FACTUAL BACKGROUND**

On March 30, 2016, the Authority and ABI initiated an action in the Superior Court of Fulton County, Georgia, styled as The Atlanta Development Authority d/b/a Invest Atlanta and Atlanta BeltLine, Inc. v. Gordon Ragan, et. al.; Civil Action File No. 2016CV273389 (the “Superior Court Action”).

On August 30, 2016, in the Superior Court Action, the Flagler Owners served Norfolk Southern with *Defendants’ First Request for Production of Documents to Non-Party Norfolk Southern Railway Company* (the “Requests”). On September 26, 2016, Norfolk Southern served its responses to the Requests (the “Responses”).

The Responses support the Flagler Owners’ position asserted in their *Response of Interested Parties in Opposition to Verified Petition for a Declaratory Order and Request for Expedited Consideration* (the “Response of Interested Parties”) that the undisputed facts clearly establish that the conveyance of the Northeast Quadrant Line from Norfolk Southern to the Mason

Entities was subject to 49 U.S.C. § 10901(a)(4). As such, the Board should deny the Petition and, instead, issue a declaratory order that the conveyance of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities violated 49 U.S.C. § 10901(a)(4) and is of no effect or force.

### **LAW AND CITATION TO AUTHORITY**

As detailed in the Response of Interested Parties, in determining whether a conveyance to a non-rail carrier is a State of Maine transaction, “the key question is whether the transaction documents give the new owner of the physical railroad assets the ability to prevent the rail carrier that retains the freight operating easement from meeting its common carrier obligations on the [rail line].” New Jersey Transit Corporation, 2013 WL 1247853 at 3. In making this determination, the Board should look to whether the rail carrier “has retained (1) a permanent, irrevocable, and exclusive freight rail operating easement, and (2) sufficient interest and control over the [rail line] to permit it to carry out its common carrier obligation.” Id.

Furthermore, the Board should “examine the relevant agreements to determine whether there are any impediments to the continuation of common carrier freight service by [the rail carrier] on the [rail line] being transferred to [the non-rail carrier].” Id. Most importantly, “[f]or a transaction to fall within this exception . . . the terms of the sale must protect the selling carrier from undue influence by the purchaser or third-party designee in provisioning of common carrier freight rail service.” Central Puget Sound Regional Transit Authority – Acquisition Exemption – Certain Assets of City of Tacoma in Pierce County, Washington, 2015 WL 480409, 2-3 (S.T.B.) (2015).

In the Responses, Norfolk Southern produced a previously unseen document titled, “Supplemental Agreement” dated June 22, 2007 between Norfolk Southern and the Mason

Entities. A true and correct copy of the Supplemental Agreement is attached hereto as “Exhibit A.”

The Supplemental Agreement affirms “that [Norfolk Southern], at the request of the [Mason Entities], shall, at no cost to [Norfolk Southern], seek approval or exemption from the Surface Transportation Board...to abandon or discontinue railroad service over the reserved easement areas, except the easement area over Parcel 1.”<sup>1</sup> Moreover, “[the Mason Entities] may elect to have [Norfolk Southern] seek an exemption from the office of financial assistance (“OFA”) provisions set forth in 49 U.S.C. § 10904 at the time [Norfolk Southern] seeks authority to abandon the Easement Corridor.”<sup>2</sup> Section 1.5 of the Supplemental Agreement adds that “[i]f requested by [the Mason Entities], [Norfolk Southern] shall seek to have its abandonment or discontinuance withdrawn from the STB.”<sup>3</sup>

Finally, and most importantly, Section 1.6 of the Supplemental Agreement states the following:

“[i]n the event [Norfolk Southern] commences an abandonment proceeding and [the Mason Entities] or a designee of [the Mason Entities] files a request with the STB for issuance of a Notice of Interim Trail Use (“NITU”) to negotiate a rail banking arrangement pursuant to the provisions of the National Trail Systems Act, 16 U.S.C. § 1247(d), [Norfolk Southern] agrees to consent to the issuance of a NITU. In the event a NITU is not precluded by the OFA process, [Norfolk Southern] agrees to transfer its remaining real property interests in the Easement

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<sup>1</sup> See, the Supplemental Agreement at Page 2.

<sup>2</sup> See, Id. at Page 2, Section 1.2..

<sup>3</sup> See, Id. at Page 3, Section 1.5.

Corridor, including the right to reactivate rail service, to [the Mason Entities] or [the Mason Entities'] designee..."<sup>4</sup> (Emphasis supplied).

The above-language of the Supplemental Agreement clearly demonstrates that the conveyance of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities failed to meet the conditions set forth by State of Maine and its progeny. See, State of Maine, 8 I.C.C.2d 835.

Specifically, the Supplemental Agreement not only confirms that the Mason Entities had the authority to control when Norfolk Southern was to pursue abandonment or discontinuance of the Northeast Quadrant Line, but states that the Mason Entities could control the specific statutory procedure under which Norfolk Southern was to seek such abandonment or exemption from the same.<sup>5</sup> Moreover, pursuant to the Supplemental Agreement, the Mason Entities had the authority to request that Norfolk Southern withdraw any and all active abandonment or discontinuance proceedings over the Northeast Quadrant Line.<sup>6</sup>

Most importantly, however, during Norfolk Southern's pursuit of abandonment or discontinuance of the Northeast Quadrant Line pursuant to the Supplemental Agreement, the Mason Entities' could force Norfolk Southern to transfer the entirety of its rights as the rail carrier to the Northeast Quadrant Line, including any and all easements over the same, to the Mason Entities at the mere filing of a request for issuance of a Notice of Interim Trail Use with the STB.<sup>7</sup>

The plain language of Supplemental Agreement clearly demonstrates that the Mason Entities "[had] the ability to prevent [Norfolk Southern] from meeting its common carrier obligations on the [rail line]." See, New Jersey Transit Corporation, 2013 WL 1247853 at 3.

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<sup>4</sup> See, the Supplemental Agreement at Pages 3-4.

<sup>5</sup> See, Id. at Pages 2, 4.

<sup>6</sup> See, Id. at Page 3.

<sup>7</sup> See, Id. at Pages 3-4.

Moreover, the terms of the Supplemental Agreement failed to protect Norfolk Southern “from undue influence by the purchaser or third-party designee in provisioning of common carrier freight rail service.” Central Puget Sound Regional Transit Authority – Acquisition Exemption – Certain Assets of City of Tacoma in Pierce County, Washington, 2015 WL 480409, 2-3 (S.T.B.) (2015).

Accordingly, the purported sale of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities completely failed to provide an easement in favor of Norfolk Southern that was in any way “permanent, irrevocable, and exclusive.” New Jersey Transit Corporation, 2013 WL 1247853 at 3.

As such, neither State of Maine, nor its progeny apply to the purported conveyance of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities, and the purported conveyance was subject to 49 U.S.C. § 10901(a)(4). See, State of Maine, 8 I.C.C.2d 835. Accordingly, the Board should deny the Petition and, instead, issue a declaratory order that the conveyance of the Northeast Quadrant Line from Norfolk Southern to the Mason Entities violated 49 U.S.C. § 10901(a)(4) and is of no effect or force.

Finally, as Norfolk Southern produced the Supplemental Agreement pursuant to the Requests served in the Superior Court Action, and as the Supplemental Agreement was a document previously unseen by the Flagler Owners and their counsel, it is clear that discovery in the above-styled action is necessary so that this Board has before it all relevant documentation prior to issuing its decision on the merits.

The Supplemental Agreement is likely not the only document governing the issues presented herein that has yet not been brought before this Board for its consideration. Accordingly, the Flagler Owners respectfully request reconsideration of and request for discovery, including depositions.

## **REQUEST FOR PROCEDURAL SCHEDULE AND THE NEED FOR DISCOVERY**

Unlike the evaluation of agreements contemplated by the State of Maine and reflected in Central Puget Sound Regional Transit Authority, the Petition here does not provide any detail concerning or copies of the actual agreement or contract between Norfolk Southern and the Mason Entities as to specific the terms of the purchase and sale, use, or continuing operating agreements. Instead, the record is incomplete and does not afford a full evaluation of the facts and circumstances of this transaction because the Petition only provides the conveyance deeds<sup>8</sup> and an Offer of Financial Assistance Supplement Agreement<sup>9</sup> executed three (3) years after the transaction. As such, there is no appreciable factual record establishing the contemporaneous agreement or contract between Norfolk Southern and the Mason Entities as to specific the terms of the purchase and sale, use, or continuing operating agreements.

As noted in State of Maine, the question presented here to the Board for determination requires a close examination that is “based upon the specific facts of this particular transaction.” See, State of Maine, 8 I.C.C.2d at 838. The record currently before the Board does not provide a complete picture of the contemporaneous “facts and circumstances” surrounding the conveyance from Norfolk Southern to the Mason Entities. Discovery is therefore necessary in light of the insufficient and incomplete evidence concerning this particular transaction that is currently before the Board.

Accordingly, the Flagler Owners respectfully request that the Board establish a procedural schedule for discovery under 49 U.S.C. § 1114.21(a).

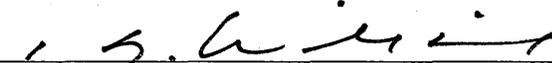
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<sup>8</sup> Petition Exhibits A and B.

<sup>9</sup> Petition, Exhibit C.

This the 14<sup>th</sup> day of October, 2016.

WILLIAMS TEUSINK, LLC

  
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*Counsel for Interested Parties under 5 U.S.C. § 554(c)(1)*

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**CERTIFICATE OF SERVICE**

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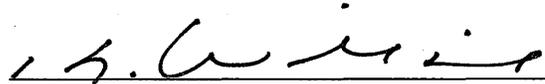
This is to certify that I have this day served counsel in the foregoing matter with a copy of the foregoing by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon, as follows:

Charles A. Spitulnik, Esq.  
Allison I. Fultz, Esq.  
KAPLAN KIRSCH & ROCKWELL LLP  
1001 Connecticut Avenue, NW, Suite 800  
Washington, DC 20036

Maquiling Parkerson  
NORFOLK SOUTHERN RAILWAY COMPANY  
Three Commercial Place  
Norfolk, VA 23510

This the 4<sup>th</sup> day of October, 2016.

WILLIAMS TEUSINK, LLC



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Georgia Bar No. 763910  
Nicolas Bohorquez  
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*Counsel for Interested Parties under 5 U.S.C. § 554(c)(1)*

**EXHIBIT A**

## SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, made and entered into as of this 22 day of June, 2007, by and between **NORFOLK SOUTHERN RAILWAY COMPANY**, a Virginia corporation, successor to the Georgia Air Line Railway Company, the Atlanta and Richmond Air Line Railway Company, Richmond and Danville Railroad Company, the Atlanta and Charlotte Air Line Railway Company and Southern Railway Company ("Seller") and **ANSLEY NORTH BELTLINE, LLC**, a Georgia limited liability company, **ANSLEY SOUTH BELTLINE, LLC**, a Georgia limited liability company, **PIEDMONT BELTLINE, LLC**, a Georgia limited liability company, **NORTH AVENUE BELTLINE, LLC**, a Georgia limited liability company, **CORRIDOR BELTLINE, LLC**, a Georgia limited liability company, and **CORRIDOR EDGEWOOD, LLC**, a Georgia limited liability company ("Purchasers")

### RECITALS:

By Deed dated December 30, 2004 (the "Deed"), and recorded in the Office of the Clerk of Superior Court of Fulton County, Georgia, in Deed Book 39115, page 430, Seller sold and conveyed to Purchasers seven parcels of property identified in Exhibit A to the Deed.

Seller reserved unto itself, among other things, all railroad tracks and railroad facilities on the property and an easement for all passenger and freight railroad purposes as described in Exhibit B to the Deed ("Easement Properties").

Exhibit B to the Deed provides, in relevant part, that Seller, at the request of the Purchasers, shall, at no cost to Seller, seek approval or exemption from the Surface Transportation Board ("STB") to abandon or discontinue railroad service over the reserved easement areas, except the easement area over Parcel 1 ("Easement Corridor").

The parties now desire to supplement the abandonment provisions set forth in Exhibit B to the Deed as set forth in this Supplemental Agreement.

**NOW, THEREFORE,** it is agreed by and between the parties hereto as follows:

**SECTION 1. ABANDONMENT OR DISCONTINUANCE OF RAIL OPERATIONS**

- 1.1** The parties acknowledge that no local or overhead traffic has moved over the Easement Corridor for at least two years prior to the date of this Supplemental Agreement. If no rail freight operations occur in the future, Seller may, unless requested otherwise by Purchasers, utilize the procedures of 49 C.F.R. Part 1152, Subpart F to obtain an exemption to abandon or discontinue railroad service on the Easement Corridor.
- 1.2** Purchasers may elect to have Seller seek an exemption from the offer of financial assistance ("OFA") provisions set forth in 49 U.S.C. § 10904 at the time Seller seeks authority to abandon the Easement Corridor. In that event, Seller shall file a petition pursuant to 49 C.F.R. Part 1152, Subpart G seeking an exemption from the provisions of 49 U.S.C. §§ 10903 and 10904.
- 1.3** In the event a third party submits to Seller either a formal expression of intent to file an OFA or an OFA after the commencement of any abandonment or discontinuance proceeding involving all or part of the Easement Corridor, Seller shall promptly notify Purchasers of such submission. In the event Purchasers or any financially responsible affiliate or designee of Purchasers (collectively "OFA Designee") shall late-file an OFA with the STB, Seller shall support that OFA and request that the STB accept the tendered OFA for filing.
- 1.4** In the event Seller receives more than one OFA from offerors found to be financially responsible, Seller shall select and transact business with the OFA Designee or any other offeror designated by Purchasers. In the event the OFA Designee shall satisfy the requirements of

applicable laws and regulations to acquire all of Seller's rights and interests in the Easement Corridor for continued rail service, Seller shall convey such rights and interests to the OFA Designee for an amount equal to the net liquidation value ("NLV") of the track, track materials and railroad facilities located on the Easement Corridor (the "Track Materials"). In the event the parties are unable to agree on the NLV of the Track Materials, the parties shall select a qualified appraiser to calculate the NLV of the Track Materials and such appraisal shall be binding on the parties ("Appraised Value"). In no event shall Purchasers or their OFA Designee be obligated to consummate any transaction to acquire Seller's rail line operations pursuant to the OFA process.

1.5 Purchasers acknowledge that Seller may be required by Federal law to convey all or part of Seller's rights and interests in the Easement Corridor to a third party for continued rail service. In the event Seller is required to convey its Track Materials and real property interests to a third party, not affiliated with Purchasers, Seller shall assume the burden of defending the value of the Track Materials and the real property interests in the course of any OFA proceeding. Seller agrees to allow Purchasers' consultants and attorneys to participate with Seller in any such OFA proceeding. If requested by Purchasers, Seller shall seek to have its abandonment or discontinuance filing withdrawn from the STB. In the event the STB does not permit the withdrawal of the filing and Seller is required to sell the Track Materials and its real property interest in the Easement Corridor to any third party, not affiliated with Purchasers, Seller will be entitled to the proceeds received for the Track Materials and Seller will transfer to Purchasers the proceeds received for Seller's real property interests in the Easement Corridor.

1.6 In the event Seller commences an abandonment proceeding and Purchasers or a designee of Purchasers files a request with the STB for issuance of a Notice of Interim Trail Use ("NIU") to negotiate a rail banking arrangement pursuant to the provisions of the National

Trails Systems Act, 16 U.S.C. § 1247(d), Seller agrees to consent to the issuance of a NITU. In the event a NITU is not precluded by the OFA process, Seller agrees to transfer its remaining real property interests in the Easement Corridor, including the right to reactivate rail service, to Purchasers or Purchasers' designee for the consideration of ten dollars (\$10.00) pursuant to standard terms and conditions for rail banking under the National Trails Systems Act and a conforming quitclaim deed. Purchasers or Purchasers' designee will have the burden of obtaining approval from the STB for the transfer from Seller to Purchasers or Purchasers' designee of the right to reactive rail service on the Easement Corridor. In no event shall Seller agree to the issuance of a NITU on behalf of a third party without the written consent of Purchasers.

## **SECTION 2: RIGHT OF FIRST REFUSAL**

In the event a third party seeks to acquire all or portions of the Easement Properties from Seller, Seller shall provide Purchasers written notice of such offer ("Seller Notice"). Within forty-five (45) days of the Seller Notice, Purchasers shall have the right of first refusal to acquire the Easement Properties. If, within forty-five (45) days of the Seller Notice, Purchasers elect to acquire the Easement Properties, Seller shall sell to Purchasers the Easement Properties for an amount equal to the NLV of the Track Materials or, if the parties are unable to agree on NLV, the Appraised Value. Closing shall take place within thirty (30) days of date Purchasers elect to acquire the Easement Properties or the date of the Appraisal Value, whichever is later.

## **SECTION 3: FEEDER LINE APPLICATION**

In the event a third party files with the STB an application under 49 U.S.C. § 10907 seeking to acquire the Easement Properties and Purchasers or any financially responsible affiliate or designee of Purchasers (collectively "Feeder Line Designee") files a competing application,

Seller shall select and transact business with the Feeder Line Designee. In the event the Feeder Line Designee shall satisfy the requirements of applicable laws and regulations to acquire all of Seller's rights and interests in the Easement Properties for continued rail service, Seller shall convey such rights and interests to the Feeder Line Designee for an amount equal to the NLV of the Track Materials or, if the parties are unable to agree on NLV, the Appraised Value. In no event shall Purchasers or their Feeder Line Designee be obligated to consummate any transaction to acquire the Easement Properties pursuant to Section 10907.

#### **SECTION 4. EFFECTIVE DATE**

This Supplemental Agreement shall be effective as of the day and year first above written.

#### **SECTION 5. AGREEMENT SUPPLEMENTAL**

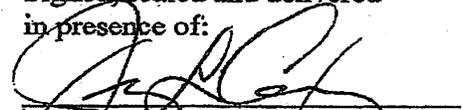
This Agreement is supplemental to the Deed, as herein amended, and nothing herein contained shall be construed as amending or modifying the Deed except as herein specifically provided. This Supplemental Agreement shall not be recorded.

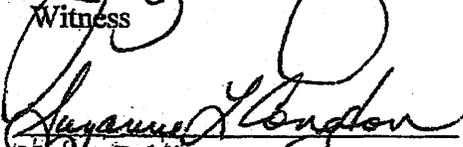
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IN WITNESS WHEREOF, each of the parties hereto have duly signed and sealed this

Agreement

Signed, sealed and delivered  
in presence of:

  
\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Notary Public  
Suzanne L. Congdor.

Notary Public, Cobb County, State of G.

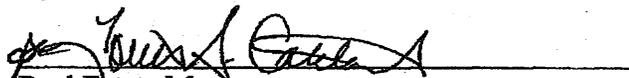
My Commission Expires April 25

Signed, sealed and delivered  
in presence of:

By

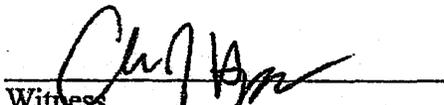
NORFOLK SOUTHERN RAILWAY COMPANY

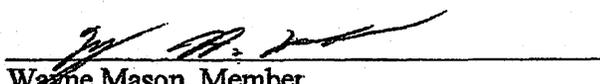
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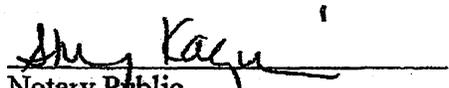
  
\_\_\_\_\_  
Real Estate Manager

ANSLEY NORTH BELTLINE, LLC,  
ANSLEY SOUTH BELTLINE, LLC,  
PIEDMONT BELTLINE, LLC,  
NORTH AVENUE BELTLINE, LLC,  
CORRIDOR BELTLINE, LLC,  
CORRIDOR EDGEWOOD, LLC

By

  
\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Wayne Mason, Member

  
\_\_\_\_\_  
Notary Public

Notary Public, Gwinnett County, Georgia  
My Commission Expires March 6 2011