

RESPONSE OF THE OFFICE OF
PUBLIC UTILITY REGULATION

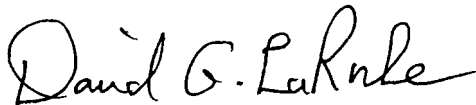
Our Ref. No. 03-4-OPUR
k1 Ventures, Et Al.

DIVISION OF INVESTMENT MANAGEMENT

File No. 132-3

Based on the facts and representations in your letter of July 22, 2003, and without necessarily agreeing with your legal analysis, we would not recommend any enforcement action to the Commission under sections 2(a)(7) and 2(a)(11)(A) of the Public Utility Holding Company Act of 1935 against k1 Ventures or the Non-Managing Member merely because they participate in the Proposed Transaction under the circumstances described in your letter.

You should note that facts or conditions different from those presented in your letter might require a different conclusion. Further, this response expresses only the Division's position on enforcement action. It does not purport to express any legal conclusion on the questions presented.



David G. LaRoche
Special Counsel

July 28, 2003



OFFICE OF
PUBLIC UTILITY REGULATION

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 28, 2003

Joanne C. Rutkowski, Esquire
Baker Botts LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: k1 Ventures, et al.
File No. 132-3

Dear Ms. Rutkowski:

Enclosed is our response to your letter of July 22, 2003. By incorporating our answer in the enclosed copy of your letter, we avoid having to recite or summarize the facts involved.

Very truly yours,

A handwritten signature in cursive script that reads "David G. LaRoche".

David G. LaRoche
Special Counsel

Enclosure

July 22, 2003

DAVID B. SMITH
ASSOCIATE DIRECTOR
DIVISION OF INVESTMENT MANAGEMENT
SECURITIES AND EXCHANGE COMMISSION
450 FIFTH STREET, N.W.
WASHINGTON, D.C. 20549

Dear Mr. Smith:

We are writing on behalf of k1 Ventures Limited, a Singapore public company ("k1 Ventures"), and K-1 HGC Investment, L.L.C., a Hawaii limited liability company (the "Non-Managing Member"), an entity that will become a wholly-owned subsidiary of k1 Ventures, in connection with the proposed transaction described below (the "Proposed Transaction"), to request your written confirmation that, as a result of the Proposed Transaction, the Division of Investment Management (the "Division" or the "Staff") will not recommend that the Securities and Exchange Commission (the "Commission") institute enforcement action under the Public Utility Holding Company Act of 1935, as amended (the "Act") to deem either k1 Ventures or the Non-Managing Member to be a "holding company" or an "affiliate" of a "public utility company" within the meaning of the Act.

I. Factual Background

A. Structure of the Proposed Transaction

The Proposed Transaction will consist of the acquisition of the operating assets and certain related liabilities of The Gas Company division of Citizens Communications Company (the "Gas Company") by The Gas Company L.L.C. ("TGC"), a Hawaii limited liability company formed in February of 2003 for the specific purpose of completing the Proposed Transaction. Upon completion of the Proposed Transaction, TGC will be a "gas-utility company" and a "public-utility company" for purposes of the Act. A chart of the ownership structure of TGC is attached hereto as Exhibit A.

The sole member of TGC is HGC Holdings, L.L.C., a Hawaii limited liability company ("HGC Holdings"), that, upon completion of the Proposed Transaction, will be a "holding company" within the meaning of the Act. HGC Holdings intends to claim, upon completion of the Proposed Transaction, exemption from registration under the Act pursuant to Rule 2 under Section 3(a)(1) of the Act.

At the time of the closing of the Proposed Transaction, HGC Holdings will have one managing member and one non-managing member as provided below.

i) The Managing Member

The managing member of HGC Holdings will be HGC Managing Member, L.L.C., a single-member Hawaii limited liability company (the "Managing Member") that was formed for the specific purpose of acquiring and holding the managing membership interest in HGC Holdings. The Managing Member will hold all of the voting membership interests in HGC Holdings.

Roy A. Pickren, Jr. is the sole member of the Managing Member. Mr. Pickren is the President and Principal of Crescent Technology, Inc. ("CTI"), an independent entity that provides experienced professional consulting in all phases of engineering and technical services. Mr. Pickren has no investment in, nor is he an employee, affiliate or director of, k1 Ventures. Mr. Pickren's resume is attached hereto as Exhibit B.

As the holder of the voting interests in HGC Holdings, the Managing Member will control HGC Holdings and have the power and authority to take such actions from time to time as the Managing Member may deem to be necessary, appropriate or convenient in connection with the management and conduct of the business and affairs of HGC Holdings. The Managing Member shall also have the authority to take all actions on behalf of HGC Holdings acting in its capacity as the sole member of TGC.

ii) The Non-Managing Member

The non-managing member of HGC Holdings will be K-1 HGC Investment L.L.C., a Hawaii limited liability company (the "Non-Managing Member").

At the time of the closing of the Proposed Transaction, k1 Ventures and/or a wholly-owned subsidiary of k1 Ventures will be the only member(s) of the Non-Managing Member. k1 Ventures, which was known by another name prior to 2000, is a Singapore company that is publicly traded on the SGX-ST. k1 Ventures will maintain a significant economic interest in HGC Holdings and thereby TGC, but will have no control over the day-to-day operations of HGC Holdings or TGC. Neither k1 Ventures nor any of its affiliates will provide any goods or services to HGC Holdings or TGC; provided that k1 Ventures and its affiliates may be reimbursed for costs and expenses, including an allocable portion of overhead, incurred in the connection with the performance of its duties and exercise of its rights under the LLC Agreement governing the management of HGC Holdings and the relationship between the Managing Member and the Non-Managing Member (the "LLC Agreement").¹

¹ Passive investors (such as preferred shareholders, for example) are customarily reimbursed for expenses in connection with monitoring their investment. Any payments to k1 Ventures or its affiliates will be subject to examination by the Hawaii Public Utilities

The Non-Managing Member, as the holder of the non-voting membership interests of HGC Holdings, will have no power to manage and administer the business of HGC Holdings. Pursuant to the terms of the LLC Agreement, the Non-Managing Member will have consent rights with respect to various matters which are fundamental to maintaining the nature of the Non-Managing Member's economic investment, and which conform with the precedent for such consent rights established in prior no-action letters issued by the Commission. *See, e.g., General Electric Capital Corporation* (April 25, 2002); *SW Acquisition, L.P.* (April 12, 2000). The following paragraphs set forth the various matters that will require the prior consent of the Non-Managing Member and provide a brief explanation of why they are important:²

(a) Fundamental Ownership Issues: The Non-Managing Member, as a passive investor, must have assurance that its economic interest in HGC Holdings will not be diluted or otherwise impaired. The ability of the Managing Member to issue any form of equity would greatly endanger the Non-Managing Member's ownership interest.³ Similarly, the ability to incur excessive debt has the potential (certainly upon liquidation) to transfer the value of HGC Holdings from its equity holders to its debt holders. Accordingly, the following consent rights are necessary:

- (1) (x) any offering or issuance of equity securities or interests, or any instrument convertible into any equity security or interest, of or in HGC Holdings or TGC, or (y) any offering or issuance of debt securities or other voluntary incurrence of indebtedness in excess of \$300,000 in the aggregate, other than the Acquisition Loan or the Credit Facility or other than in accordance with the Annual Business Plan and Operating Budget of HGC Holdings or TGC;
- (2) any creation of a new class of equity of HGC Holdings or TGC;
- (3) adopting (other than as specifically required by the Asset Purchase Agreement) or amending any employee stock option plan or other material employee benefit plan for either HGC Holdings or TGC;

Commission ("Hawaii Commission"), and k1 Ventures has undertaken to make the books and records of itself and its affiliates available to the Hawaii Commission in this regard.

² The consent rights are also listed (in the order they appear in the LLC Agreement) on Exhibit C attached hereto.

³ For this reason, the prior written consent of the Managing Member and the Non-Managing Member is required for the admission of additional Non-Managing Members.

(4) any reduction of the capital of HGC Holdings or TGC or any variation of the rights attached any equity securities or interests in HGC Holdings or TGC.

(b) Fundamental Organizational Issues: Again, as a passive investor, the Non-Managing Member must have assurances that the nature of its investment will not be changed unilaterally by the Managing Member. The Non-Managing Member's investment in HGC Holdings is predicated upon a certain set of assumptions as to the organization of and business to be conducted by HGC Holdings. The following consent rights are intended to maintain the assumptions underlying the Non-Managing Member's investment:

- (1) any modification of the name of HGC Holdings or TGC;
- (2) changes in HGC Holdings's or TGC's principal line of business;
- (3) any amendments to the organizational documents of HGC Holdings or TGC, including, without limitation, any amendment that would adversely affect the rights, powers and privileges of the Non-Managing Member;
- (4) any merger, joint venture, partnership or similar transaction by or with, or liquidation, winding-up or dissolution of, HGC Holdings or TGC;
- (5) any disposition by HGC Holdings or TGC of any of their respective businesses or assets or any acquisition of any stock or assets of another entity (other than in the ordinary course of business and provided that such disposal or acquisition is not significant in nature) or any entering into any new line of business by HGC Holdings or TGC;
- (6) the commencement of any bankruptcy or receivership proceeding, or voluntary dissolution of HGC Holdings or TGC; and
- (7) any assignment, sale, transfer, exchange, pledge or other conveyance or encumbrance of the Managing Member's interest.

(c) Major Operational Issues: Certain transactions or events undertaken or occurring in the operation of HGC Holdings, due to their nature, size, or timing, have the potential to materially effect the economic interest of the passive investor. While the Managing Member will have day to day control of the business and operations of HGC Holdings, the Non-Managing Member must be able to protect its investment in the event that the Managing Member seeks to engage in transactions of an extraordinary nature such as those addressed by the following consent rights:

- (1) any entry by HGC Holdings or TGC into contracts for goods and services, individually or in a series or related transactions in excess of \$300,000, other than in accordance with the Annual Business Plan and Operating Budget of HGC Holdings or TGC;

- (2) any capital expenditures, or capital expenditures commitment, by HGC Holdings or TGC that vary from those provided for in their respective Operating Budgets by \$750,000 per event or series of related events but otherwise not cumulatively;
- (3) any material change in the accounting practices of HGC Holdings or TGC or any change HGC Holdings's or TGC's accountant, any change in the fiscal year of HGC Holdings or TGC, or any material decisions of the Managing Member as the Tax Matters Partner under Section 6231(a)(7) of the Internal Revenue Code (including any tax re-allocations);
- (4) the initiation or settlement of any litigation, arbitration, actions or suits in excess of \$500,000;
- (5) the approval of or changes to the Annual Business Plan and the approval of the Operating Budget of HGC Holdings or TGC or changes thereto of 15% or more in the aggregate;
- (6) the entry by HGC Holdings or TGC into any agreement or arrangement which is not in the ordinary course of its business other than as expressly permitted by (x) the Annual Business Plan or Operating Budget, or (y) Sections (a)(1) or (c)(1), (2), (4) or (7) hereof (Section references are to the subparagraphs of this Section I (A)(ii));
- (7) the provision by HGC Holdings or TGC of any guarantee or indemnity in excess of \$300,000 in the aggregate or as expressly permitted by the Annual Business Plan or Operating Budget;
- (8) the making by HGC Holdings or TGC of any loan or advance to any person, firm, body corporate or other entity or business other than normal trade credit or otherwise in the normal course of business and on an arm's length basis.

(d) Interested Party Transactions: Certain events or transactions present a higher potential for self-dealing. Given that the Managing Member will have day to day control of the HGC Holdings, there exists the possibility that the Managing Member could direct the business of HGC Holdings so as to enrich himself or his affiliates by entering into transactions not on an arm's length basis and not in the best interest of HGC Holdings, thereby necessitating the following consent rights:

- (1) any transactions between HGC Holdings and the Managing Member or any Affiliate of the Managing Member, or any transaction between TGC and the Managing Member or an Affiliate of the Managing Member;⁴

⁴ The term "Affiliate" is defined in the Limited Liability Company Agreement to mean:

(2) any distributions to the Managing Member or the Non-Managing Member (or to any other member who may be admitted to the LLC in accordance with the terms of the LLC Agreement).

(e) Public Utility Holding Company Act of 1935. Finally, the Non-Managing Member does not intend to become subject to regulation pursuant to the Public Utility Holding Company Act of 1935. Accordingly, it is reasonable to restrict the Managing Member from taking or failing to take any action that would:

(1) cause HGC Holdings or TGC to become subject to regulation as a registered holding company under the Act or as a subsidiary company or an affiliate of a registered holding company as defined in the Act; or

(2) cause any Member or its Affiliate to become subject to regulation as a registered holding company under the Act or as a subsidiary company or an affiliate of a registered holding company as defined in the Act.

iii) Removal of the Managing Member

Also in accordance with the precedent established in prior no-action letters, the LLC Agreement will provide that the Non-Managing Member will have certain rights to remove the Managing Member in the event that the Non-Managing Member's fundamental economic interest is endangered by the Managing Member's failure to manage HGC Holdings effectively. More specifically, the Managing Member may be removed upon the death or incapacity of the individual sole member of the Managing Member, or for "cause," which is defined to include

when used with reference to a specified Person, (a) any Person who directly or indirectly Controls, is Controlled by or is under common Control with the specified Person, (b) any Person who is an officer, partner, member or trustee of, or serves in a similar capacity with respect to, the specified Person, or for which the specified Person is an officer, partner, member or trustee or serves in a similar capacity, (c) any Person who, directly or indirectly, is the beneficial owner of ten percent (10%) or more of any class of equity securities of the specified Person, or of which the specified Person, directly or indirectly, is the beneficial owner of ten percent (10%) or more of any class of equity securities of the specified Person, or of which the specified Person, directly or indirectly, is the owner of ten percent (10%) or more of any class of equity securities, and (d) any spouse, sibling, child or parent of the specified Person.

The lower-case term "affiliate" refers to an affiliate within the meaning of Section 2(a)(11) of the Act.

specified acts of malfeasance or nonfeasance as well as any “*controllable management decision*” by the Managing Member that in the reasonable judgment of the Non-Managing Member has resulted in or will result in, a *material failure* to achieve the results contemplated by the Annual Business Plan and Operating Budget.”⁵

Upon removal of the Managing Member, the Non-Managing Member shall be entitled to elect or appoint a new Managing Member.⁶ In so doing, the Non-Managing Member must take into account 1935 Act concerns and so, the Non-Managing Member would not replace the Managing Member in an attempt to influence control of HGC Holdings or TGC because any replacement Managing Member that is dominated or controlled by the Non-Managing Member would jeopardize the status of the Non-Managing Member (and k1 Ventures) under Section 2(a)(7) of the Act.

The rights of the Non-Managing Member to remove the Managing Member and the provisions regarding the appointment of a new Managing Member are set forth in detail in Exhibit D attached hereto.

iv) *Public Offering of Securities*

The LLC Agreement will also provide that “After five (5) years from the date of [the LLC Agreement], the Non-Managing Member shall have the right to require the Managing Member to conduct a public offering of securities of HGC Holdings or TGC.” This right comports with precedent and of course can only be exercised in accordance with applicable law and regulation.

B. *Management Structure of TGC*

Central to an effective transition of the business of The Gas Company from Citizens Communications Company to TGC is the retention of The Gas Company’s existing

⁵ The term “controllable management decision” is defined to mean the taking or omission of action by the Managing Member or any person acting under the direct or indirect management or control of the Managing Member but excludes (i) the effects on financial results due to changes in law; and (ii) actions of regulators applicable to the Managing Member, TGC Holdings and/or TGC, provided that the Managing Member shall not have failed to manage TGC's relations with regulators in accordance with good utility practices.

The term “material failure” means the actual or projected failure to achieve the cumulative earnings before income taxes, depreciation and amortization contemplated in the Annual Business Plan and Operating Budget by 2% or more as of the end of an annual period.

⁶ k1 Ventures is seeking relief only with respect to the current parties. The parties will seek such additional relief or authority as may be required for any replacement Managing Member in the future.

management team. Under the parties' agreement, TGC is required to make offers of employment to all of The Gas Company's current employees, and it is expected that The Gas Company's current operational management team will continue to serve in its present capacity after the Proposed Transaction since the offers of employment to such management team have been accepted.

In addition to the operational management team, TGC will have a board of directors. The members of such board will be nominated and elected by HGC Holdings and will report to HGC Holdings. The board will be comprised of individuals who collectively possess (i) the level of management experience that is required to effectively oversee the operations of TGC and make prudent business decisions, (ii) the technical experience necessary to assure the successful operation of a gas manufacturing, distributing, and marketing company, and (iii) first hand knowledge of the current and potential needs and concerns of the gas consumers in the State of Hawaii. These collective qualification requirements will ensure that the board will be comprised of individuals who can best serve the needs of the company and its customers

The board of TGC will initially be comprised of Roy A. Pickren, Jr., Jim R. Yates (the representative from The Gas Company's existing management team that is currently in charge the Gas Company division), and Timothy E. Johns (a Hawaii businessman who is not an officer, director or employee of TGC or any of its affiliates). The qualifications of the entire management board will be considered when choosing a board member to fill any vacancy so that the board as a whole will at all times possess the necessary qualifications. Any replacement board member would be elected by HGC Holdings. The Non-Managing Member will not be entitled to appoint any representative of the management board of TGC but will be entitled to attend and observe board meetings, provided that the Non-Managing Member will not be counted for quorum purposes or be entitled to vote on any matter submitted for consideration.

II. Issues Arising under the Act

As a result of the Proposed Transaction, HGC Holdings will own all of the limited liability company interests in TGC and thus will be a "holding company" as defined in Section 2(a)(7) of the Act. As a holding company, HGC Holdings will qualify for an exemption from registration pursuant to Section 3(a)(1) of the Act because HGC Holdings and TGC will be predominantly intrastate in character and will carry on their business solely within Hawaii, the state in which both HGC Holdings and TGC are organized. In addition, as the managing member of HGC Holdings, the Managing Member also will become a "holding company" and will qualify for an exemption under Section 3(a)(1) of the Act.⁷

⁷ In order to qualify for exemption under Section 3(a)(1) of the Act, TGC Holdings and the Managing Member will file reports with the Commission on Form U-3A-2 confirming that each such holding company, and every utility subsidiary from which such holding company derives a material part of its income, will be predominantly intrastate in character and will carry on their business substantially in Hawaii.

For the reasons described below, it is our opinion that the Non-Managing Member should not be deemed to be a "holding company" or an "affiliate" (as such terms are defined in Sections 2(a)(7) and 2(a)(11)(A) of the Act, respectively) of the Managing Member, HGC Holdings or TGC because the Non-Managing Member will not (A) directly or indirectly, own, control or hold with the power to vote "'voting securities" of a public utility company or of a holding company, as the term "voting securities" is defined in Section 2(a)(17) of the Act, or (B) exercise "a controlling influence over the management or policies" of a public utility or of a holding company such that regulation is required under the Act.

A. *The Membership Interest of the Non-Managing Member Is Not a Voting Security*

A "voting security" is defined in Section 2(a)(17) of the Act as "any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." The Commission has issued a number of no-action letters supporting our conclusion that the consent rights associated with the Non-Managing Member's interest in HGC Holdings do not cause that interest to be considered a "voting security" under the Act. *See, e.g., General Electric Capital Corporation; SW Acquisition, L.P.; Berkshire Hathaway, Inc.* (March 10, 2000); *Torchmark Corp.* (January 19, 1996); *Commonwealth Atlantic L.P.* (November 30, 1991); *Nevada Sun-Peak L.P.* (May 14, 1991); and *John Hancock Mutual Life Ins. Company* (July 23, 1986). In this series of no-action letters, the Staff has identified numerous types of consent rights that do not cause the holder of such rights to have a vote in the direction or management of the underlying holding company or utility. Instead, the Staff has recognized that these consent rights are intended to protect the investment of the limited partners or preferred shareholders, similar to the rights granted to debt holders by means of negative covenants in debt instruments. The consent rights granted to the Non-Managing Member fall squarely within the boundaries outlined in prior no-action letter requests.⁸

For instance, in *Torchmark Corp.*, the Staff confirmed the position taken by the applicant that a limited partner with 47.5% of the total equity of the partnership would not be deemed to hold voting securities in the partnership (and thus would not be deemed a holding company or an affiliate of the natural gas distribution company that was owned by such partnership), despite the considerable consent rights granted to its limited partners. In that case, the limited partners were granted consent rights concerning: (i) any sale, exchange, lease, mortgage, or other disposition of 25% or more of the fair market value of the partnership's business or assets, (ii) any merger, takeover, consolidation or similar business reorganization, (iii) the issuance or prepayment of debt (including guarantees) other than in the ordinary course of business or in excess of \$1,000,000, (iv) settling a dispute or litigation other than in the ordinary course of business or in an amount in excess of \$1,000,000, (v) admitting any additional limited or general partner, (vi) dissolution, winding up or liquidation, (vii) commencement of (or

⁸ These rights are also consistent with the types of consent rights granted to preferred stockholders under the Commission's former "Statement of Policy Concerning Preferred Stock."

acquiescence in) a bankruptcy petition, (viii) entering into or amending any material provision of any material contracts, (xi) any capital expenditure in excess of \$500,000, (x) amending any material governmental permit or filing or seeking governmental action other than in the ordinary course of business, and (xi) adopting or modifying the partnership's budget to result in an increase of 15% for any category or expense. This list of consent rights expanded upon the consent rights described in prior no-action letter requests and provided the limited partners with significant protections from adverse actions by the partnership with respect to financial matters, extraordinary corporation transactions and events, as well as potential conflicts with the general partner.

More recently, in *SW Acquisition, L.P.*, the Staff concurred with the opinion that the limited partnership interests described in that request did not constitute "voting securities" based on factual circumstances similar to those set forth in this letter. In *SW Acquisition, L.P.*, the limited partners held 99.9% of the equity of the partnership, with the largest limited partner owning a 24.38% interest, and the limited partners were granted consent rights concerning a wide variety of events.⁹ The consent rights to be granted to the Non-Managing Member in this matter closely match the consent rights held by the limited partners in *SW Acquisition, L.P.*

Also recently, in *General Electric Capital Corporation*, the Staff concurred with the opinion that the limited partnership interests described in that request did not constitute "voting securities" based on factual circumstances again similar to those set forth in this letter. In *General Electric Capital Corporation*, the single limited partner held 99.82% of the equity of the partnership, and the limited partner was granted consent rights with respect to a broad array of events.¹⁰ The consent rights to be held by the Non-Managing Member in this matter also

⁹ In particular, the limited partners in *SW Acquisition, L.P.* held consent rights concerning the approval of: (i) distributions under the partnership agreement, (ii) a public offering of the securities of the partnership or its subsidiaries, (iii) changes in the aggregate of greater than 15% to the business plan and annual operating budget, (iv) contracts for goods and services, or the incurrence of indebtedness, in excess of \$1 million, except in accordance with the current business plan and annual budget, (v) mergers, joint ventures, partnerships and similar transactions, (vi) capital expenditures that vary from the current budget by \$5 million or more, (vii) material changes in accounting practices or a change of the partnership's accountant, (xiii) initiating actions or suits in excess of \$1 million, and (ix) adopting material employee benefits plans or employment agreements.

¹⁰ In particular, the Limited Partner in *General Electric Capital Corporation* held consent rights with respect to each of the following events: (i) any reorganization, merger, consolidation, liquidation, dissolution or similar transaction (provided that the foregoing could be accomplished by the general partner so long as a threshold return on investment was achieved for the limited partner, such transaction being a "Qualified Event"), (ii) any distribution by a subsidiary of the Partnership, (iii) the sale, issuance or redemption of equity securities that might affect the Limited Partner's interest in the Partnership, except upon the occurrence of a Qualified Event, (iv) the voluntary incurrence of indebtedness in excess of \$10,000,000, or the prepayment or

closely match the consent rights granted to the limited partner in *General Electric Capital Corporation*.

Furthermore, on several occasions the Staff has issued no-action letters in response to requests by limited partners with significant consent rights, irrespective of the fact that the consent of a single limited partner (as opposed to a group of unrelated partners) was necessary to approve the applicable events covered by such consent rights. *See, e.g., General Electric Capital Corporation* (consent of single limited partner required for the extensive list of items set forth in footnote 5 of this letter); *Nevada-Sun Peak L.P.* (consent of single limited partner required for extensive list of "major business decisions"); *Dominion Resources, Inc.* (Jan. 21, 1988) (consent of single limited partner required for specified "major events"); *accord, Berkshire Hathaway, Inc.* (consent of corporation holding preferred shares required for specified actions).

waiver of any indebtedness, (v) any agreement for goods or services in excess of \$2,000,000 other than in accordance with any then current annual operating or capital budget and business plan, (vi) capital expenditures greater than \$2,000,000 per event or series of related events (but not otherwise cumulatively) more than the amount contemplated by the then current annual operating or capital budget, (vii) the purchase, lease or other acquisition of any securities or assets, except in the ordinary course of business or pursuant to the then current annual operating or capital budget and business plan, (viii) the disposition of 25% or more of the fair market value of the [holding company's or operating company's] assets or businesses, (ix) the entering into of any joint venture, partnership or other material operating alliance with any other person, (x) the making of any material change in accounting practices, (xi) the commencement of any bankruptcy proceeding, (xii) any employment contract with an executive officer or any employee stock option plan or any other material employee benefit plan, (xiii) the changing of the principal line of business of the [holding company or operating company], (xiv) the adoption of any change in an annual operating or capital budget of more than 15% or the adoption of any annual operating or capital budget that is inconsistent with the business plan, (xv) the exercising of its right to vote the equity interests of any subsidiary of the Partnership in extraordinary circumstances, (xvi) the effectuation of a public offering or private sale or other change of control, (xvii) any transaction involving conflicts of interest between the Partnership and the General Partner, (xviii) the amendment of the Partnership's or the General Partner's organizational documents adversely affecting the Limited Partner, (xix) actions regarding material governmental permit or approval rate proceeding, (xx) the settlement or compromise of any action that would materially adversely affect the Partnership or require the payment of more than \$2,000,000, (xxi) any action (or failure to act) resulting in the Limited Partner being subject to regulation as a "holding company" or a "subsidiary company" or an "affiliate" of a "holding company" or a "public-utility company" under the 1935 Act, (xxii) the entering into of any contract, agreement, arrangement or commitment to do or engage in any of the foregoing.

For these reasons, it is our view that the consent rights to be held by the Non-Managing Member should not cause the interests it will hold directly or indirectly in HGC Holdings or TGC to be deemed to be "voting securities."

B. The Non-Managing Member Will Not Exercise Such a Controlling Influence Over HGC Holdings or TGC Such That Regulation Would Be Required Under the Act

Under Section 2(a)(7) of the Act, the owner of 10% or more of the voting securities of a holding company or a public-utility company is presumed to control such holding company or public utility company and thus such owner is presumed to be a holding company. Alternatively, the owner of less than 10% of the voting securities of a holding company or a public-utility company is not presumed to control such holding company or public-utility company unless the Commission determines, after notice and opportunity for hearing, that such owner exercises such a controlling influence over the holding company or public-utility company in question that the Commission finds it necessary or appropriate to regulate the owner as a holding company under the Act.

We believe that the structure and terms of the Non-Managing Member's investment in this matter evidence the fact that the Non-Managing Member will not have such a controlling influence over the management or policies of the Managing Member, HGC Holdings or TGC that regulation under the Act is required. Our opinion is bolstered by the facts and arguments relied upon in prior no-action letter requests granted by the Staff.

The determination of whether a party has a "controlling influence" is a judgment to be made by the Commission based on the facts of a particular case. In the past, the Commission has relied on the following facts and circumstances in making its determination: "(i) the terms and provisions of the securities that create the relationship, (ii) whether there are agreements between those with voting control and others who have invested in the company, (iii) any past or present business relationship between the entities with voting control and the company and (iv) the nature of the parties involved, including whether there is capable, independent and financially interested management to operate the public utility and holding company." (*Berkshire Hathaway, Inc.*)

As shown above, the consent rights to be granted to the Non-Managing Member are consistent with the rights granted to other similar investors that have received no-action letter assurances. In addition, there are no agreements with respect to the exercise of those rights among the Non-Managing Member, and the Managing Member, HGC Holdings or TGC. Nor are there any past or present business relationships between Mr. Pickren and k1 Ventures or the Non-Managing Member, other than the retention by k1 Ventures of CTI on an arm's-length, negotiated basis for certain discrete consulting projects.¹¹ Furthermore, as discussed below, an

¹¹ The fees for these projects total less than \$100,000.

independent individual with significant qualifications and experience will be in control of the management of the Managing Member, HGC Holdings and TGC.

The Non-Managing Member has no ability to control the management or day-to-day operations of HGC Holdings or TGC. The Managing Member has the exclusive right to control the business of HGC Holdings subject only to the limited approval rights, consistent with Commission precedent, that are intended to enable the Non-Managing Member as a passive investor to protect its economic interest in HGC Holdings and TGC. The Non-Managing Member has no rights under the operative agreements, and will not otherwise attempt, to control the daily operations of HGC Holdings or TGC.

The Managing Member will be owned and controlled by an individual independent of the Non-Managing Member. Under the operative agreements, the Non-Managing Member will have no right to appoint or otherwise nominate any members of management of HGC Holdings or TGC. The Non-Managing Member will have the right to send a non-voting observer to meetings of HGC's management board. In contrast, in prior no-action letters, the Staff has given assurances to passive investors that were granted the right to appoint one or more voting members to the Board of Directors of a holding company or a public-utility company. The ability to have such representation has been supported in no-action letter requests as necessary to permit the passive investor to monitor the activities of the entity in which it has invested, without giving the investor the right to veto or otherwise manage or control the operations of such entity. *See Western Resources, Inc.* (Nov. 24, 1997) (granting owner of common and preferred stock representing approximately 45% of utility's equity the right to appoint two of the utility's fifteen directors); *Ocean State Power 2* (Feb. 16, 1988) (granting each of the six partners a representative to the partnership's management committee). As stated in *Torchmark Corp.*, the Non-Managing Member is not required to be "a stranger to the organization" of the utility as long as its involvement is limited to protecting its investment.

In addition, in the recent no-action letter involving *Berkshire Hathaway, Inc.*, the Staff indicated that it would not recommend that the Commission find that Berkshire Hathaway would have a "controlling influence" over the holding company acquired in that transaction despite the fact that Berkshire Hathaway would own approximately 81% of the holding company's total equity, including approximately 9.7% of its voting stock and the remainder in convertible preferred stock (which entitled it to appoint two of the holding company's ten directors and to exercise consent rights with respect to certain extraordinary actions). While it is recognized that the rights of the Non-Managing Member in HGC Holdings (like Berkshire Hathaway's consent rights as a preferred shareholder) may be used to withhold consent as to any transaction or event within their scope, any leveraging of those rights to obtain more expansive agreements or understandings relative to the direction of the management of HGC Holdings or

TGC could, without further assurances from the Staff, subject the Non-Managing Member (and, potentially, k1 Ventures) to regulation as a holding company or an affiliate under the Act.¹²

Consistent with the precedent, the Non-Managing Member will have a limited right to remove the Managing Member in certain defined circumstances. However, as stated in *SW Acquisition, L.P.*, the ability to replace the Managing Member will not give the Non-Managing Member any right to control the management of HGC Holdings or TGC because any replacement Managing Member would need to retain control over management of HGC Holdings and remain independent of the Non-Managing Member in order to protect the Non-Managing Member's status as neither a holding company nor an affiliate of a holding company or public-utility company under the Act.

Finally, the terms and structure of the Proposed Transaction help to protect against any abuses under the Act and thus the Commission would have no basis to conclude that regulation of the Non-Managing Member under the Act is necessary or appropriate in the public interest or for the protection of investors or consumers.¹³ The proposed acquisition of The Gas Company's public utility business and assets is subject to approval by the Hawaii Commission under Chapter 269.¹⁴ Under the applicable standard of review, the Hawaii Commission cannot approve an acquisition unless it finds that (1) the purchaser is financially fit, willing and able to perform the service currently offered by the utility to be acquired, and (2) the acquisition is reasonable and in the public interest.

¹² As was stated in *Berkshire Hathaway, Inc.*, the Non-Managing Partner is aware that if it were to exert a material influence over the Managing Member, HGC Holdings or TGC through the use of the consent rights or through a threat or suggestion involving the failure to use such consent rights, that action could constitute an "understanding" between the parties and, depending on the nature of the understanding, could result in the parties being outside the scope of this no-action letter request.

¹³ The central factors that the Commission considers in determining whether regulation is necessary or appropriate to prevent the abuses that the Act is intended to remedy are: "(1) the size of the electric utility company, (2) the nature and extent of intercompany relationships, (3) the ownership and distribution of the electric utility company's securities, and (4) the opportunity for excessive charges between the two companies for financing, service and construction contracts." *Nevada Sun-Peak L.P.* (citing *Detroit Edison Co. v. SEC*, 119 F.2d 730, at 739-40 (6th Cir.), cert. denied 314 U.S. 618 (1941)).

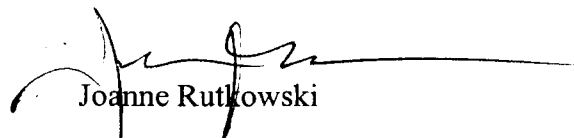
¹⁴ Under Chapter 269, Hawaii Revised Statutes, which provides for the jurisdiction and powers of the Hawaii Commission, the term "public utility" is defined in relevant part to include "every person who may own, control, operate, or manage ... any plant or equipment, or any part thereof ... for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil." This applicability of this definition does not turn on the status of the utility or its operator under the 1935 Act .

On an ongoing basis, the operation of TGC will be subject to the continuing jurisdiction of the Hawaii Commission under Chapter 269. Among other things, TGC will be required to file financial statements and other reports with the Hawaii Commission, and will be required to obtain the Hawaii Commission's approval of utility rate increases, major capital expenditures and long term financings. The Hawaii Commission has broad supervisory and investigative powers over public utilities, including the power "to examine into the condition of each public utility, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours, and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relationships with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions or its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

Conclusion

For the foregoing reasons, we respectfully request that the Staff provide written confirmation that, as a result of the Proposed Transaction, it will not recommend that the Commission institute enforcement action under the Act to deem k1 Ventures or the Non-Managing Member to be a "holding company" or an "affiliate" (as such terms are defined in Sections 2(a)(7) and 2(a)(11)(A) of the Act, respectively) of the Managing Member, HGC Holdings or TGC. If you have any questions, please call me at (202) 639-7785.

Very truly yours,



Joanne Rutkowski

BAKER BOTTS L.L.P.
The Warner, 1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

EXHIBIT A: Organizational Chart of TGC

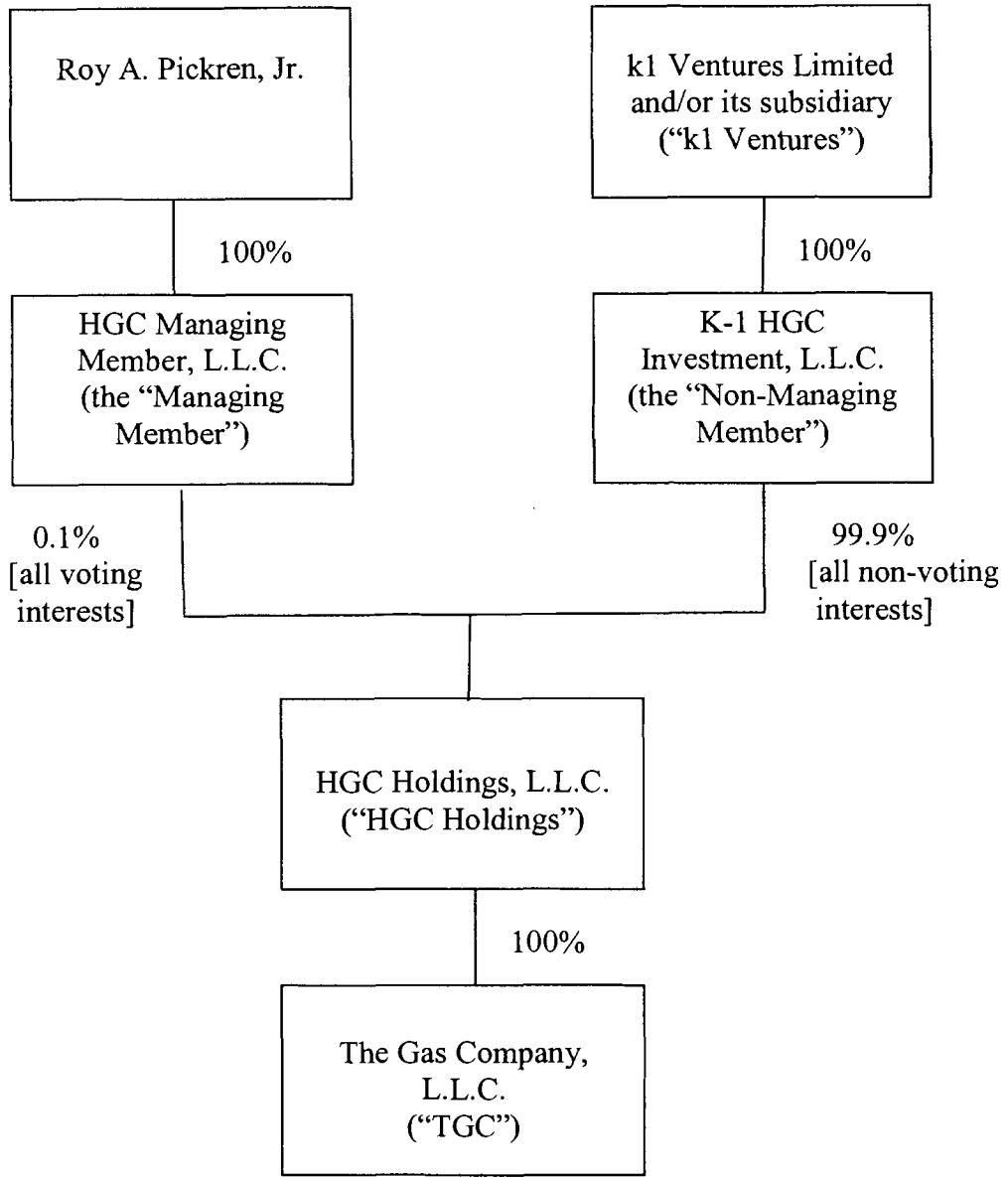


EXHIBIT B: Executive Summary Resume of Roy A. Pickren, Jr.

- Served more than 20 years in executive positions with Crescent Technology and Freeport McMoRan units.
- Directed projects throughout the world. Handled all phases of management. Negotiated numerous contracts. Directed activities pertaining to legislation, litigation, permitting and acquisitions.
- Handled marketing and purchasing and served as Company representative in export organizations for fertilizer and sulphur export. Actively represented Company with the Sulphur Institute, the Fertilizer Institute and the Potash and Phosphate Institute.
- Have served on numerous boards and participated in community and state volunteer activities.

Crescent Technology Inc.

1993 to present – President and Principal

- Organized and staffed Crescent Technology, which provides experienced professional consulting in all phases of engineering and technical services. Crescent personnel include senior managers and core engineers and scientists formerly with major mining and processing companies. Have provided consulting services for over 100 companies. Have provided project management for major projects totaling capital investment of over \$5 billion.

Freeport-McMoRan Inc.

1959 to 1993

- Held a position of President of various Freeport operating units for over 10 years.
- Numerous responsibilities in production, technical management, general management and business development. Extensive experience in power plant and co-generation operations involving coal, fuel oil and gas and geothermal. Extensive experience in production of sulfuric and phosphoric acids and in recovery of byproduct uranium. Responsible for environmental permitting activities with local, state and federal agencies. Led successful development on new technology for recovery of uranium from phosphoric acid.
- Management responsibility for acquisitions in Spanish fertilizer and mining industries. Provided oversight to other projects in Indonesia, Egypt, Sri Lanka and Russia.
- Directed all corporate engineering activities for 7 years. Responsible for all research and for development of new technology. Led in acquisition of Agrico Chemical Co. with Due Diligence responsibilities for Human Relations, Accounting and Safety. Constructed co-generation plants and geothermal power plants.

Education

- B.S. Chemical Engineering, 1957
Georgia Institute of Technology
- Graduate Business Studies, 1957-1958
Louisiana State University
- University of Virginia, 1972, Executive Program

CTI Representative Client List	
<ul style="list-style-type: none"> • ADM Company • AlliedSignal • Amerada Hess • Apache • Avondale • Atlantic Copper S.A. • Barrick Gold Corporation • BFI • Borden Chemical • Cargill • Chevron • Coastal Aruba • Coca-Cola • Colonial Sugar • Conagra • Conoco • Cri-Met • Cyprus AMAX • Domino Sugar • Dupont • Elmers Candy • Entergy • ExxonMobil • Folgers Coffee • Freeport McMoRan Copper & Gold, Inc. • MCMoRan Exploration • MOXY • Freeport Sulphur Company • Freeport-McMoRan Inc. • Genescan, USA • Hecla Mining • Homestake Gold 	<ul style="list-style-type: none"> • IMC-Agrico • IMC-Global Inc. • IMTT • INCO • Inspectorate Griffith • J. W. Allen • Kemper National Insurance • Kennecott • Louisiana State Penitentiary • McMoRan Oil & Gas Co. • Melamine Chemicals • Minerals Escondida • MINPROC • Mississippi Chemical • Mitsubishi • Mobil • Newmont Gold Company • Outback Steakhouse • Pennzoil • Rio Tinto Mines • Rio Tinto Zinc • Russell Marine International • Shell • Texaco • Town of Vinton • US Customs • US Dept. of Interior • US Dept. of Treasury • US FDA • Walk, Haydel and Associates • Winn Dixie • World Bank

EXHIBIT C: Consent Rights of the Non-Managing Member.

Section 8.3 of the Limited Liability Agreement of HGC Holdings, L.L.C. (the "Agreement") provides that:

(a) The prior written consent of the Non-Managing Member shall be required for HGC Holdings or TGC to take, or enter into any agreement for the HGC Holdings or TGC to take, or cause or permit TGC to take, or enter into any agreement to take any of the following actions:

(i) any transactions between HGC Holdings and the Managing Member or any Affiliate of the Managing Member, or any transaction between TGC and the Managing Member or an Affiliate of the Managing Member;

(ii) any distributions to the Managing Member or the Non-Managing Member (or to any other member who may be admitted to the LLC in accordance with the terms of the LLC Agreement);

(iii) (x) any offering or issuance of equity securities or interests, or any instrument convertible into any equity security or interest, of or in HGC Holdings or TGC, or (y) any offering or issuance of debt securities or other voluntary incurrence of indebtedness in excess of \$300,000 in the aggregate, other than the Acquisition Loan or the Credit Facility or other than in accordance with the Annual Business Plan and Operating Budget of HGC Holdings or TGC;

(iv) any modification of the name of HGC Holdings or TGC;

(v) changes in HGC Holdings's or TGC's principal line of business;

(vi) any amendments to the organizational documents of HGC Holdings or TGC, including, without limitation, any amendment that would adversely affect the rights, powers and privileges of the Non-Managing Member;

(vii) any entry by HGC Holdings or TGC into contracts for goods and services, individually or in a series or related transactions in excess of \$300,000, other than in accordance with the Annual Business Plan and Operating Budget of HGC Holdings or TGC;

(viii) any capital expenditures, or capital expenditures commitment, by HGC Holdings or TGC that vary from those provided for in their respective Operating Budgets by \$750,000 per event or series of related events but otherwise not cumulatively;

(ix) any merger, joint venture, partnership or similar transaction by or with, or liquidation, winding-up or dissolution of, HGC Holdings or TGC;

- (x) any disposition by HGC Holdings or TGC of any of their respective businesses or assets or any acquisition of any stock or assets of another entity (other than in the ordinary course of business and provided that such disposal or acquisition is not significant in nature) or any entering into any new line of business by HGC Holdings or TGC;
 - (xi) any creation of a new class of equity of HGC Holdings or TGC;
 - (xii) any material change in the accounting practices of HGC Holdings or TGC or any change HGC Holdings's or TGC's accountant;
 - (xiii) the commencement of any bankruptcy or receivership proceeding;
 - (xiv) the initiation or settlement of any litigation, arbitration, actions or suits in excess of \$500,000;
 - (xv) adopting (other than as specifically required by the Asset Purchase Agreement) or amending any employee stock option plan or other material employee benefit plan for either HGC Holdings or TGC;
 - (xvi) the approval of or changes to the Annual Business Plan and the approval of the Operating Budget of HGC Holdings or TGC or changes thereto of 15% or more in the aggregate;
 - (xvii) any reduction of the capital of HGC Holdings or TGC or any variation of the rights attached any shares of HGC Holdings or TGC;
 - (xviii) the entry by HGC Holdings or TGC into any agreement or arrangement which is not in the ordinary course of its business other than as expressly permitted by (x) the Annual Business Plan or Operating Budget, or (y) Sections (iii), (vii), (viii) or (xiv) hereof;
 - (xix) the provision by HGC Holdings or TGC of any guarantee or indemnity in excess of \$300,000 in the aggregate or as expressly permitted by the Annual Business Plan or Operating Budget; and
 - (xx) the making by HGC Holdings or TGC of any loan or advance to any person, firm, body corporate or other entity or business other than normal trade credit or otherwise in the normal course of business and on an arm's length basis.
- (b) Without the prior written consent of the Non-Managing Member, the Managing Member shall not take any action, or allow any action to be taken, that would:
- (i) cause HGC Holdings or TGC to become subject to regulation as a registered holding company under PUHCA or as a subsidiary company or an affiliate of a registered holding company as defined in PUHCA; or

(ii) cause any Member or its Affiliate to become subject to regulation as a registered holding company under PUHCA or as a subsidiary company or an affiliate of a registered holding company as defined in PUHCA.

The consent of the Managing Member is also required for certain other actions as highlighted in the attached request for no-action relief. See Section 3.5 of the Agreement (admission of new Member), Section 5.1 (approval of tax re-allocations), Section 7.1 (change in Fiscal Year), Section 7.13 (material decisions by Managing Member as "Tax Matters Partner"), Section 9.1 (transfer of Managing Member's interest), Section 10.2 (dissociation of the Managing Member) and Section 13.2 (voluntary dissolution).

EXHIBIT D: Removal of the Managing Member

(a) The Managing Member may be removed by the Non-Managing Member (i) upon the death or legal incapacity of the individual holding, directly or indirectly, any interest in the Managing Member (including, without limitation, the death or legal incapacity of Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member), (ii) upon the bankruptcy, liquidation or insolvency of Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member, (iii) if the Managing Member makes any "controllable management decision" that in the reasonable judgment of the Non-Managing Member has resulted in or will result in a "material failure" to achieve the results contemplated by the Annual Business Plan and Operating Budget, or (iv) if the Non-Managing Member determines in good faith that an event constituting Cause has occurred under Section 6.4(b). For purposes of the LLC Agreement, (A) the term "controllable management decision" shall mean the taking or omission of action by the Managing Member or any Person acting under the direct or indirect management or control of the Managing Member but excludes (1) the effects on financial results due to changes in law, and (2) actions of regulators applicable to the Managing Member, HGC Holdings or TGC, provided that the Managing Member shall not have failed to manage the relations of the Managing Member, HGC Holdings and/or TGC with any such regulators in accordance with good utility practices, and (B) the term "material failure" shall mean the actual or projected failure to achieve the cumulative earnings before income taxes, depreciation and amortization contemplated in the Annual Business Plan and Operating Budget by 2% or more as of the end of an annual period. Any removal shall be deemed to occur as of the first business day following the date the Non-Managing Member gives notice of removal to the Managing Member.

(b) For purposes of this Agreement, "Cause" means any of the following:

- (i) the commission of any felony by the Managing Member or any Affiliate thereof;
- (ii) willful material misconduct committed by the Managing Member or Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member;
- (iii) the breach of any fiduciary duty by the Managing Member or Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member;
- (iv) self dealing by the Managing Member or Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member (in contravention of this Agreement);
- (v) fraud committed by the Managing Member or any Affiliate thereof;

(vi) intentional misappropriation by the Managing Member or any Affiliate thereof of Company funds or other Company property;

(vii) gross negligence of the Managing Member or Roy A. Pickren, Jr. at any time that HGC Managing Member, L.L.C. is serving as the Managing Member resulting in loss or damage to HGC Holdings that is not cured within 30 days after the Managing Member receives written notice thereof from a Member;

(viii) a material breach of this Agreement by the Managing Member that results in a material adverse effect on HGC Holdings or TGC and that is not cured within thirty (30) days after the Managing Member has been notified of same (which notice shall state that the failure of the Managing Member to cure such breach will result in the removal of the Managing Member);

(ix) the bankruptcy, liquidation or insolvency of the Managing Member; and

(x) the Transfer of any direct or indirect legal or beneficial interests in the Managing Member (whether occurring voluntary or by operation of law, excluding however any Transfer occurring by reason of death or legal incapacity) without the prior written consent of the Non-Managing Member.

(c) Upon the removal of the Managing Member in accordance with the provisions of this Section 6.4, a new Managing Member may be elected or admitted by the Non-Managing Member pursuant to the provisions of Section 3.3. Pending the election of a new Managing Member by the Non-Managing Member, any business required to be transacted, or actions required to be taken, on behalf of HGC Holdings or TGC shall be carried out by a Person designated by the Non-Managing Member, provided such Person is then a member of the Board of Directors of TGC and not affiliated with, or employed by, the Non-Managing Member. If the Managing Member is removed in accordance with the provisions of this Section 6.4, then the Managing Member agrees to transfer its Interest in HGC Holdings to such Person as the Non-Managing Member elects or approves as the new Managing Member, in receipt for which the Managing Member so removed shall be paid an amount equal to its Capital Contributions less any portion of such capital that has theretofore been returned to the Managing Member through distributions made by HGC Holdings.