


Prepared by and return to:  
L. Don Campbell, Jr., Esq.  
Krivcher Magids PLC  
51000 Poplar Avenue, Suite 2902  
Memphis, TN 38137-2902

  
20040212000073160 Pg 1/6 26.00  
Shelby Cnty Judge of Probate, AL  
02/12/2004 11:21:00 FILED/CERTIFIED

**FIFTH AMENDMENT TO FIRST AMENDED AND RESTATED  
CERTIFICATE OF FORMATION AND LIMITED PARTNERSHIP AGREEMENT  
OF FPI BIRMINGHAM, LTD.**

THIS FIFTH AMENDMENT TO FIRST AMENDED AND RESTATED CERTIFICATE OF FORMATION AND LIMITED PARTNERSHIP AGREEMENT OF FPI BIRMINGHAM, LTD. ("Agreement") is executed and shall be effective as of January 1, 2004, by and among FOGELMAN REALTY GROUP, LLC, a Tennessee limited liability company ("FRG"), ABF INVESTMENTS I, L.P., a Tennessee limited partnership (the "Withdrawing Partner"), AVRON B. FOGELMAN ("ABF") and FOGELMAN REALTY MEMBER TWO, LLC, a Delaware limited liability company ("FRMT"). All capitalized terms used but not defined in this Agreement shall have the meanings ascribed thereto in that certain First Amended and Restated Certificate of Formation and Limited Partnership Agreement of FPI Birmingham, Ltd. dated December 5, 1985 (as amended, the "Partnership Agreement"), which governs the business and affairs of FPI Birmingham, Ltd., an Alabama limited partnership (the "Partnership").

**RECITALS:**

WHEREAS, the Partnership was formed by its partners, by executing and filing the Certificate of Formation and Limited Partnership Agreement of the Partnership (the "Initial Partnership Agreement") in the office of the Judge of Probate of Shelby County, Alabama on September 12, 1985;

WHEREAS, the Initial Partnership Agreement was amended and restated by the Partnership Agreement, which has been amended by: (i) that certain Amendment of the Partnership Agreement dated August 1, 1985, and filed with the office of the Probate Judge of Shelby County, Alabama on December 31, 1985; (ii) that certain Second Amendment of the Partnership Agreement dated August 1, 1985, and filed with the office of the Probate Judge of Shelby County, Alabama on June 23, 1988; (iii) that certain Third Amendment of the Partnership Agreement dated January 1, 1999, and filed with the office of the Probate Judge of Shelby County, Alabama on February 23, 1999; and (iv) that certain Fourth Amendment of the Partnership Agreement dated December 23, 1999, and filed with the office of the Probate Judge of Shelby County, Alabama on December 30, 2003;

WHEREAS, the Withdrawing Partner owns a limited partnership interest in the Partnership comprised of 25.5 Limited Partnership Units (the "Transferred Partnership Interest");

WHEREAS, pursuant to an Assignment of Limited Partnership Interest dated January 1, 2004, the Withdrawing Partner has assigned and transferred to FRMT all of his right, title and interest in and to the Transferred Partnership Interest; and

WHEREAS, the parties hereto have determined that the Partnership Agreement should be amended to reflect: (i) the transfer of the Transferred Partnership Interests to FRMT; and (ii) the admission of FRMT as a substituted Limited Partner.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. The Withdrawing Partner hereby acknowledges and agrees that the Transferred Partnership Interest has been assigned and transferred to FRMT.

2. The Withdrawing Partner (a) hereby withdraws from the Partnership, (b) shall have no further interest in the Partnership, and (c) shall have no further obligation or liability to the Partnership or any of its Partners.

3. FRMT is hereby admitted to the Partnership as a substituted Limited Partner in the name, place and stead of the Withdrawing Partner.

4. FRMT agrees to be bound by each of the terms, conditions and provisions of the Partnership Agreement and assumes and agrees to perform and discharge all of the obligations of the Withdrawing Partner thereunder.

5. Schedule A to the Partnership Agreement is deleted in its entirety, and Schedule A attached hereto is simultaneously substituted in lieu thereof.

6. Each of the parties hereto: (a) consents to the transfer and assignment to FRMT of the Transferred Partnership Interest; (b) consents to the admission of FRMT as a substituted Limited Partner in the name, place and stead of the Withdrawing Partner; and (c) waives any and all requirements or conditions to such transfer, assignment and/or admission contained in the Partnership Agreement.

7. All other terms, provisions and conditions set forth in the Partnership Agreement remain unaffected hereby and except as specifically herein set forth, all such terms, provisions and conditions are hereby ratified and affirmed.

8. Every term, covenant and provision of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legatees, legal representatives, successors, transferees and assigns.

9. This Agreement shall be governed by and construed under and in accordance with the laws of the State of Alabama without regard to principles of conflicts of law.

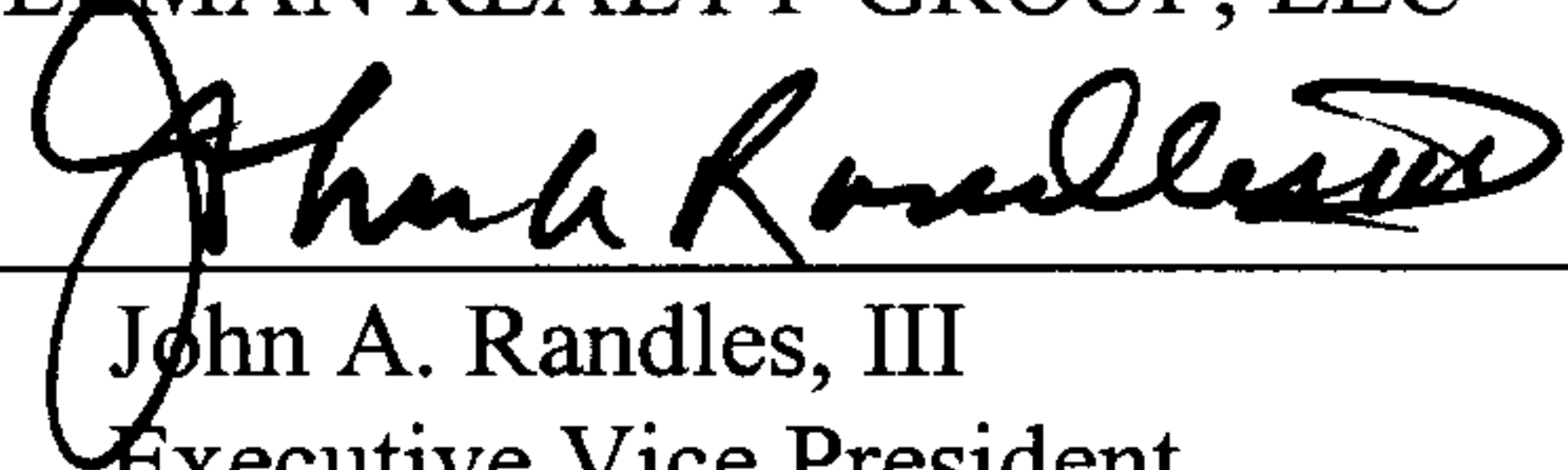
[signatures on the following page(s)]

[Signature Page to Fifth Amendment]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement or caused this Agreement to be executed by their duly authorized representatives and having first been duly sworn, do hereby state and affirm that the same is true, accurate and complete to the best of their knowledge, information and belief, all as of the date first above written.

**GENERAL PARTNER:**

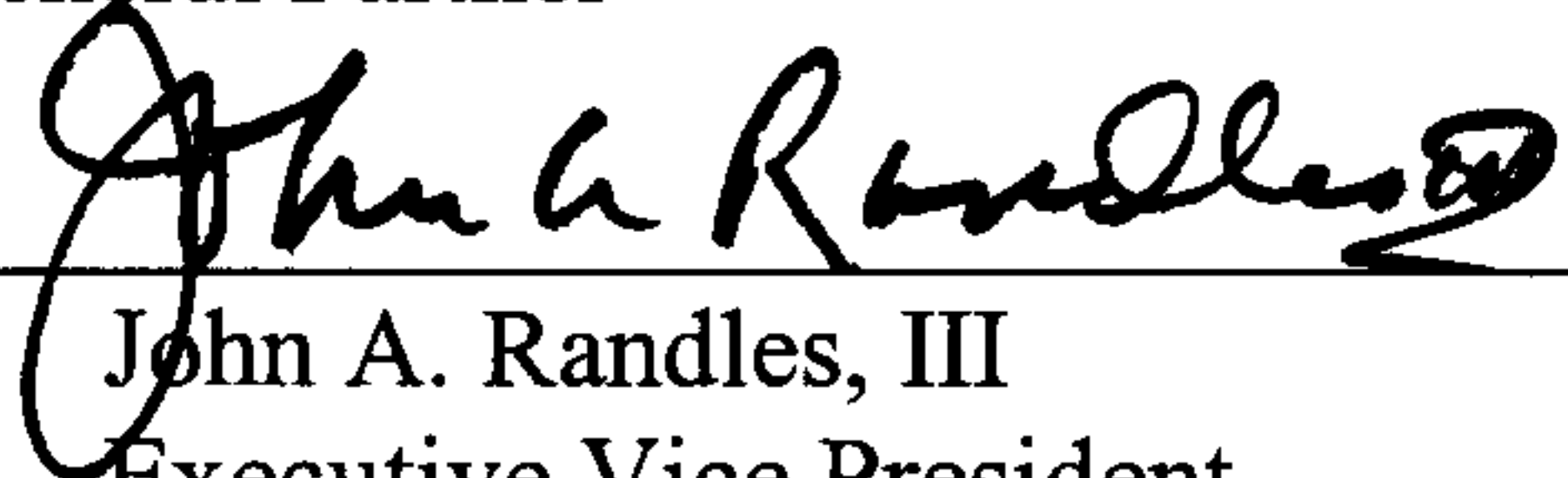
FOGELMAN REALTY GROUP, LLC

By:   
John A. Randles, III  
Executive Vice President

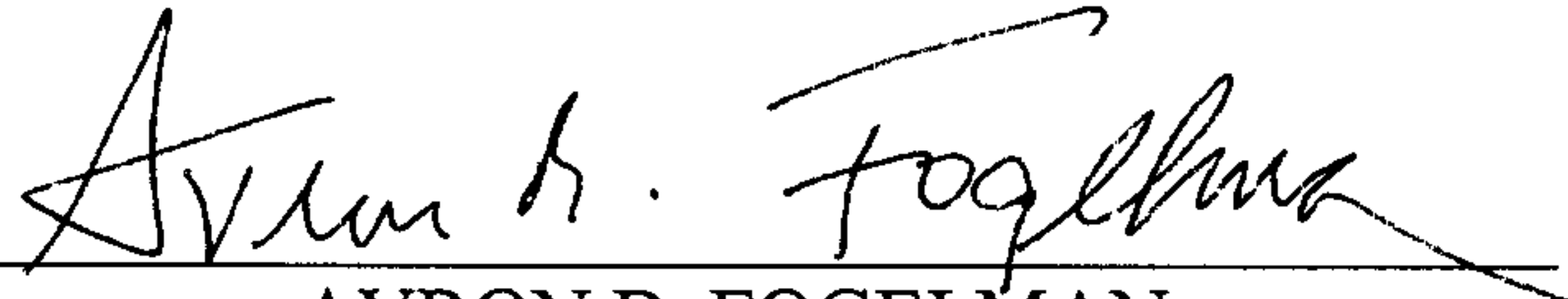
**WITHDRAWING LIMITED PARTNER:**

ABF INVESTMENTS I, L.P.

By: Fogelman Realty Group, LLC  
Its General Partner

By:   
John A. Randles, III  
Executive Vice President

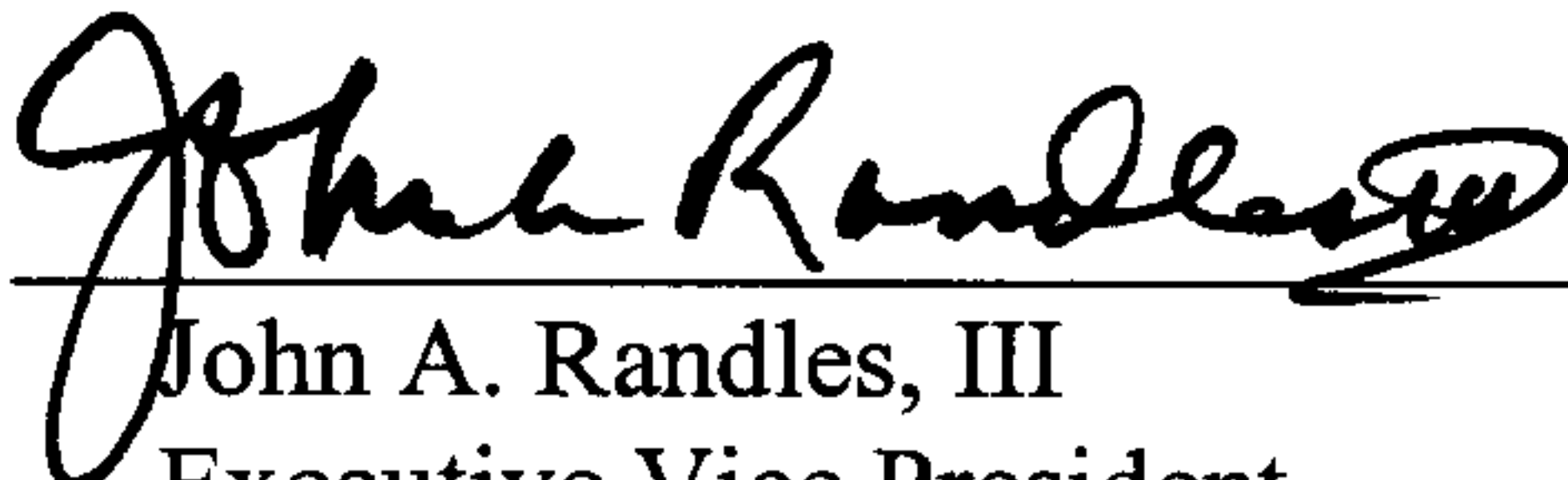
**ABF:**

  
AVRON B. FOGELMAN

**FRMT:**

FOGELMAN REALTY MEMBER TWO, LLC

By: Fogelman Realty Group, LLC  
Its Sole Member

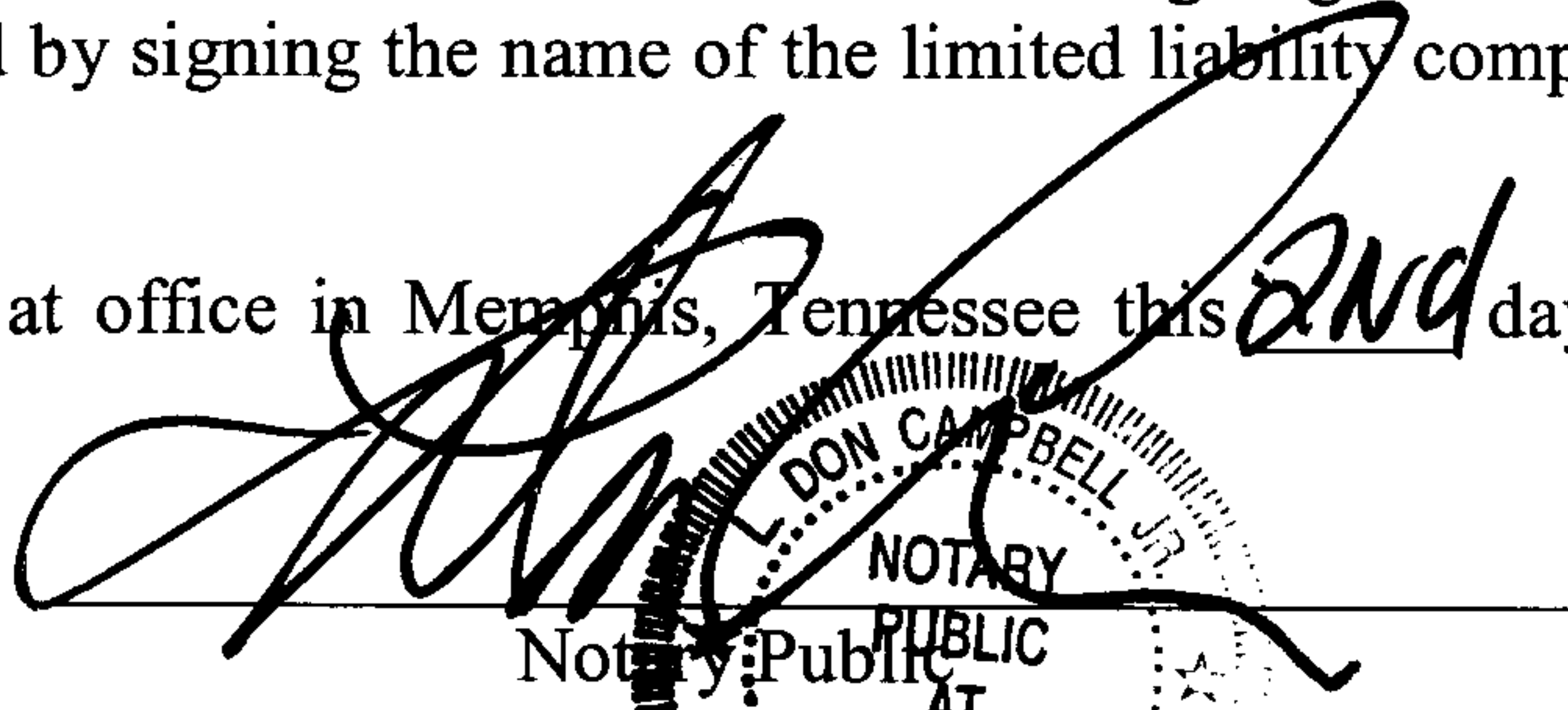
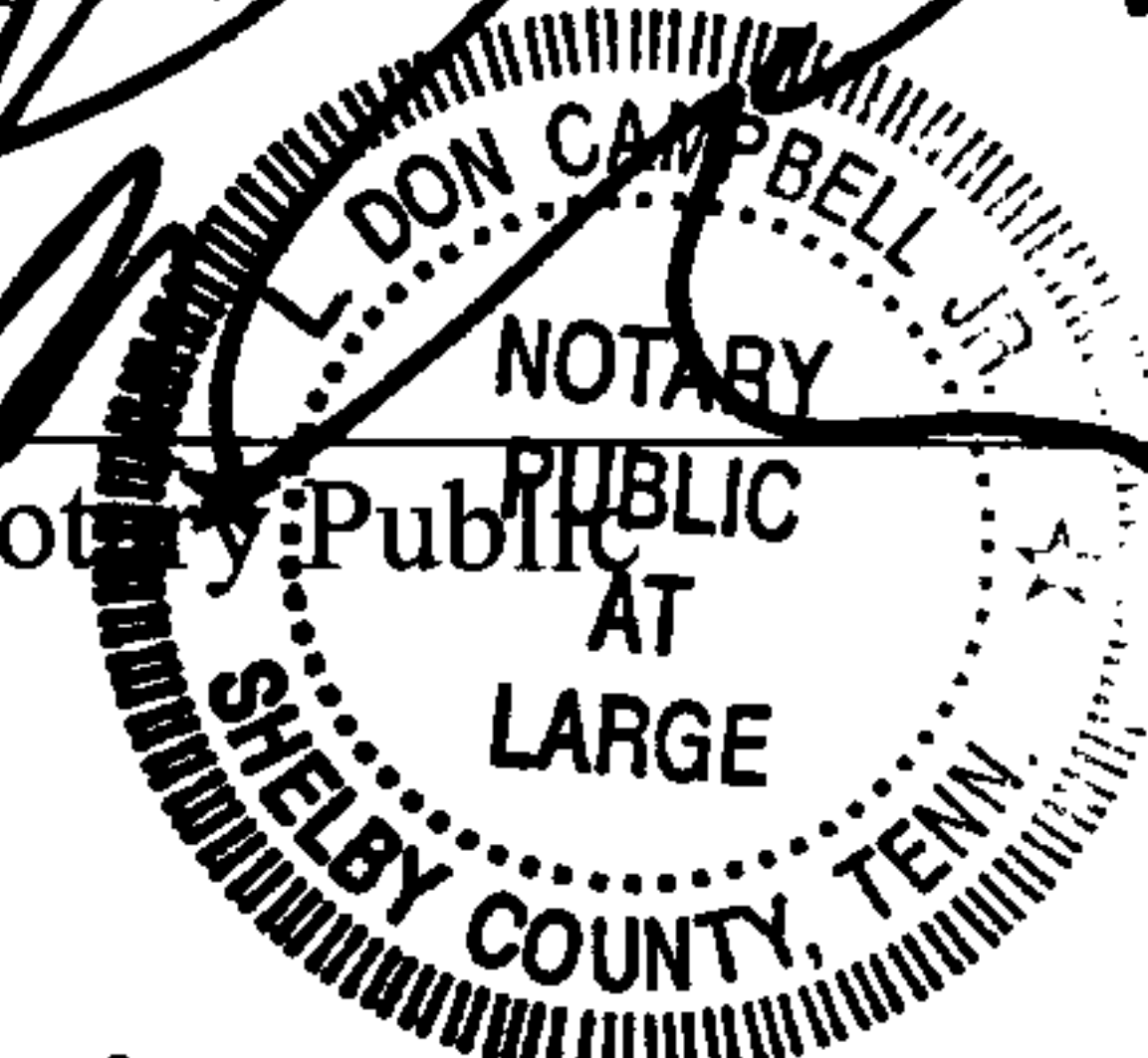
By:   
John A. Randles, III  
Executive Vice President



STATE OF TENNESSEE  
COUNTY OF SHELBY

Before me, the undersigned Notary Public of the state and county aforesaid, personally appeared John A. Randles, III, with whom I am personally acquainted and who upon oath acknowledged himself to be the Executive Vice President of Fogelman Realty Group, LLC and that he, as such manager being authorized to do so, executed the within and foregoing instrument for the uses and purposes therein contained by signing the name of the limited liability company by himself as such manager.

Witness my hand and notary seal at office in Memphis, Tennessee this 2nd day of January, 2004.

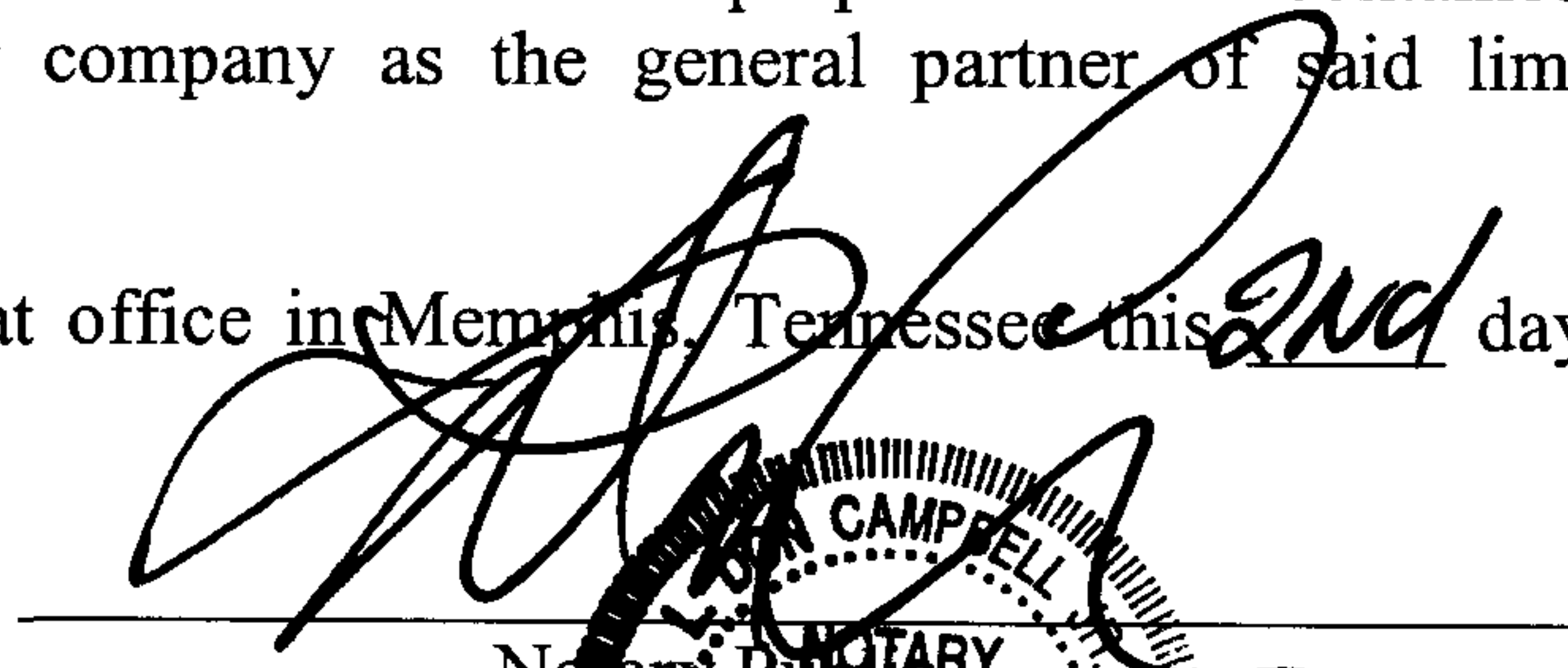
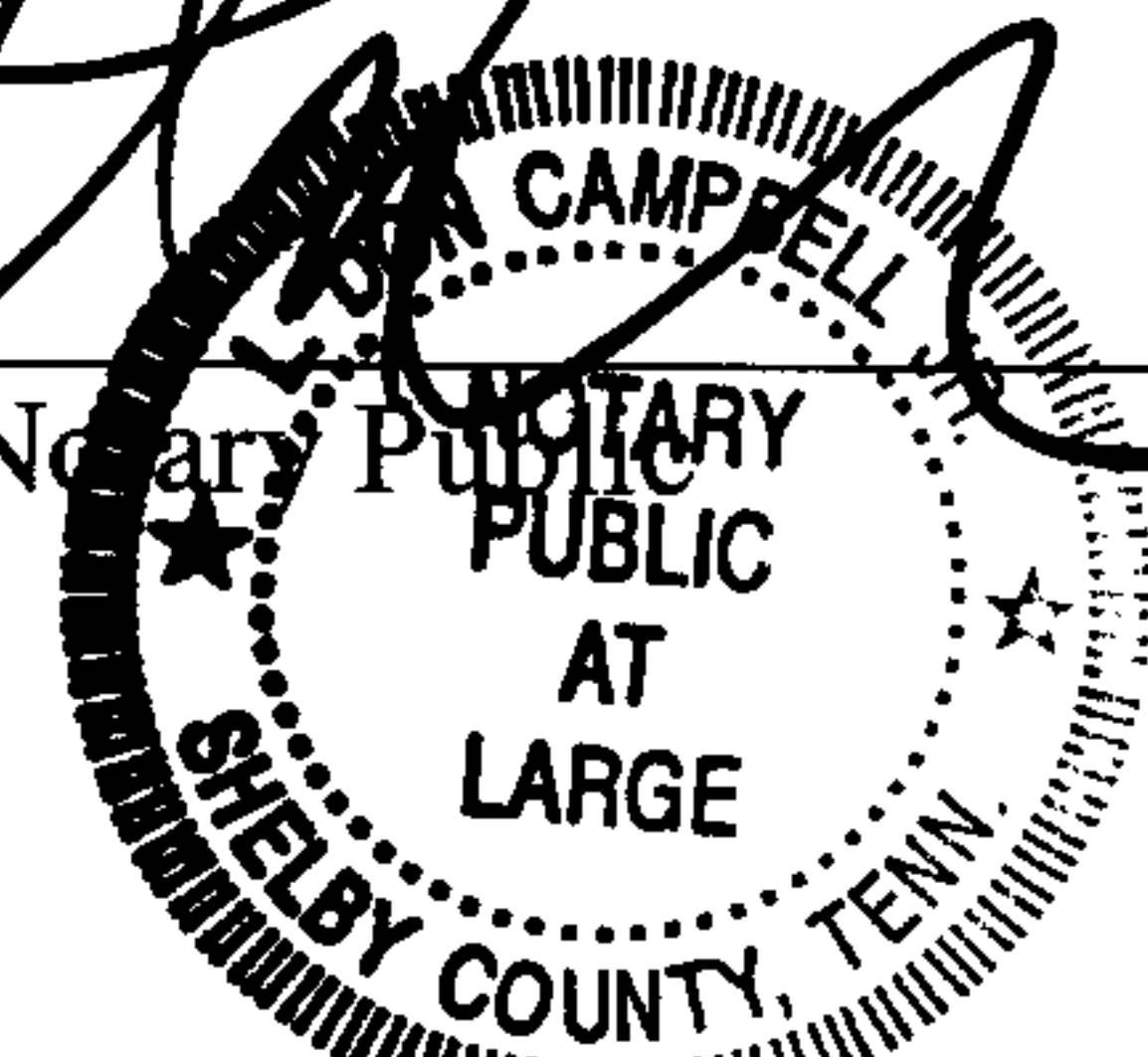
  
\_\_\_\_\_  
Notary Public  
  
My Commission Expires  
December 29, 2004

My Commission Expires: \_\_\_\_\_

STATE OF TENNESSEE  
COUNTY OF SHELBY

Before me, the undersigned Notary Public of the state and county aforesaid, personally appeared John A. Randles, III, with whom I am personally acquainted and who upon oath acknowledged himself to be the Executive Vice President of Fogelman Realty Group, LLC, the general partner of ABF Investments I, L.P., and that he, as such manager being authorized to do so, executed the within and foregoing instrument for the uses and purposes therein contained by signing the name of the limited liability company as the general partner of said limited partnership by himself as such manager.

Witness my hand and notary seal at office in Memphis, Tennessee this 2nd day of January, 2004.

  
\_\_\_\_\_  
Notary Public  
  
My Commission Expires  
December 29, 2004

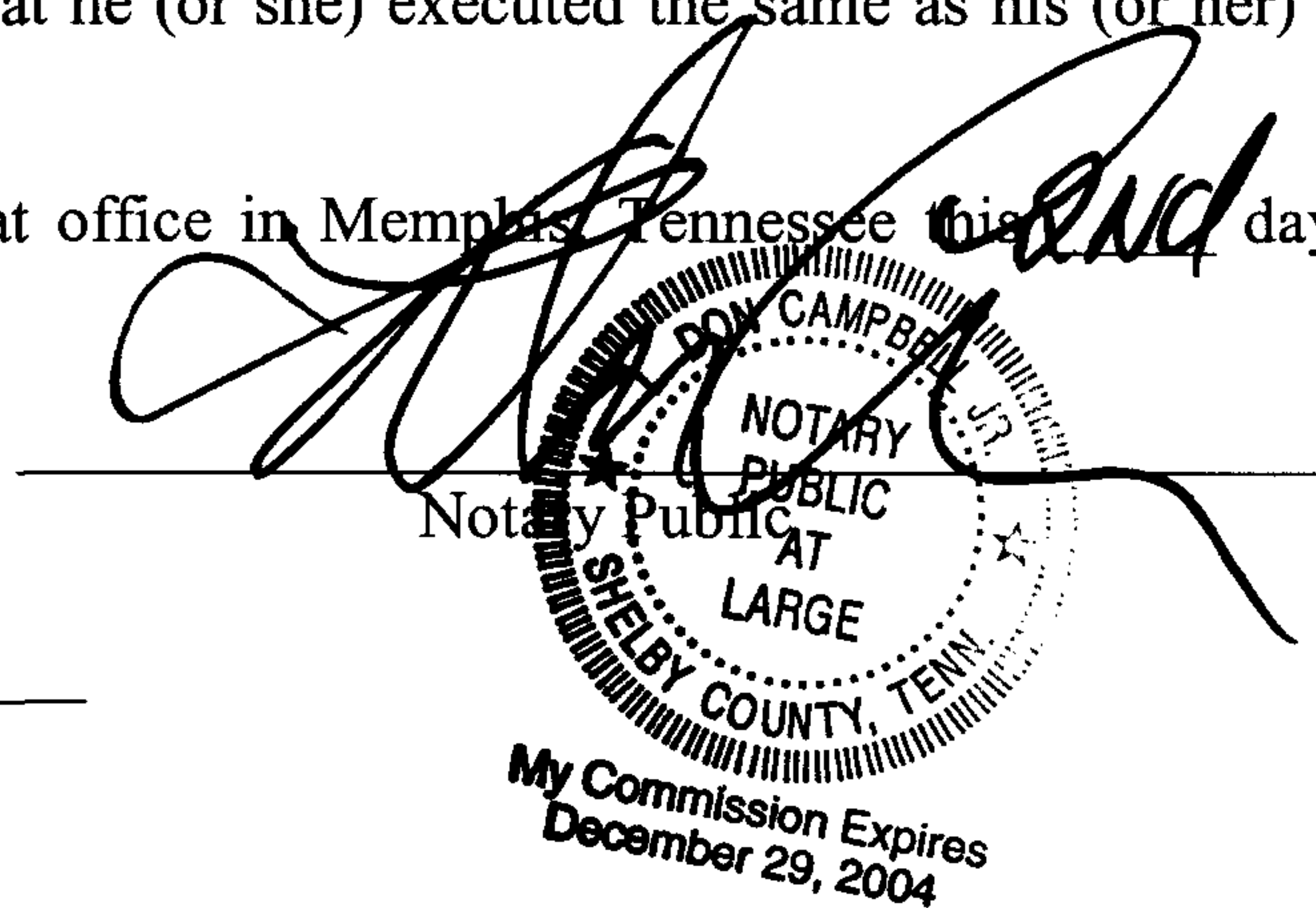
My Commission Expires: \_\_\_\_\_

STATE OF TENNESSEE  
COUNTY OF SHELBY

Before me, the undersigned Notary Public of the state and county aforesaid, personally appeared Avron B. Fogelman, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he (or she) executed the same as his (or her) free act and deed.

Witness my hand and notary seal at office in Memphis, Tennessee this 29th day of January, 2004.

My Commission Expires: \_\_\_\_\_

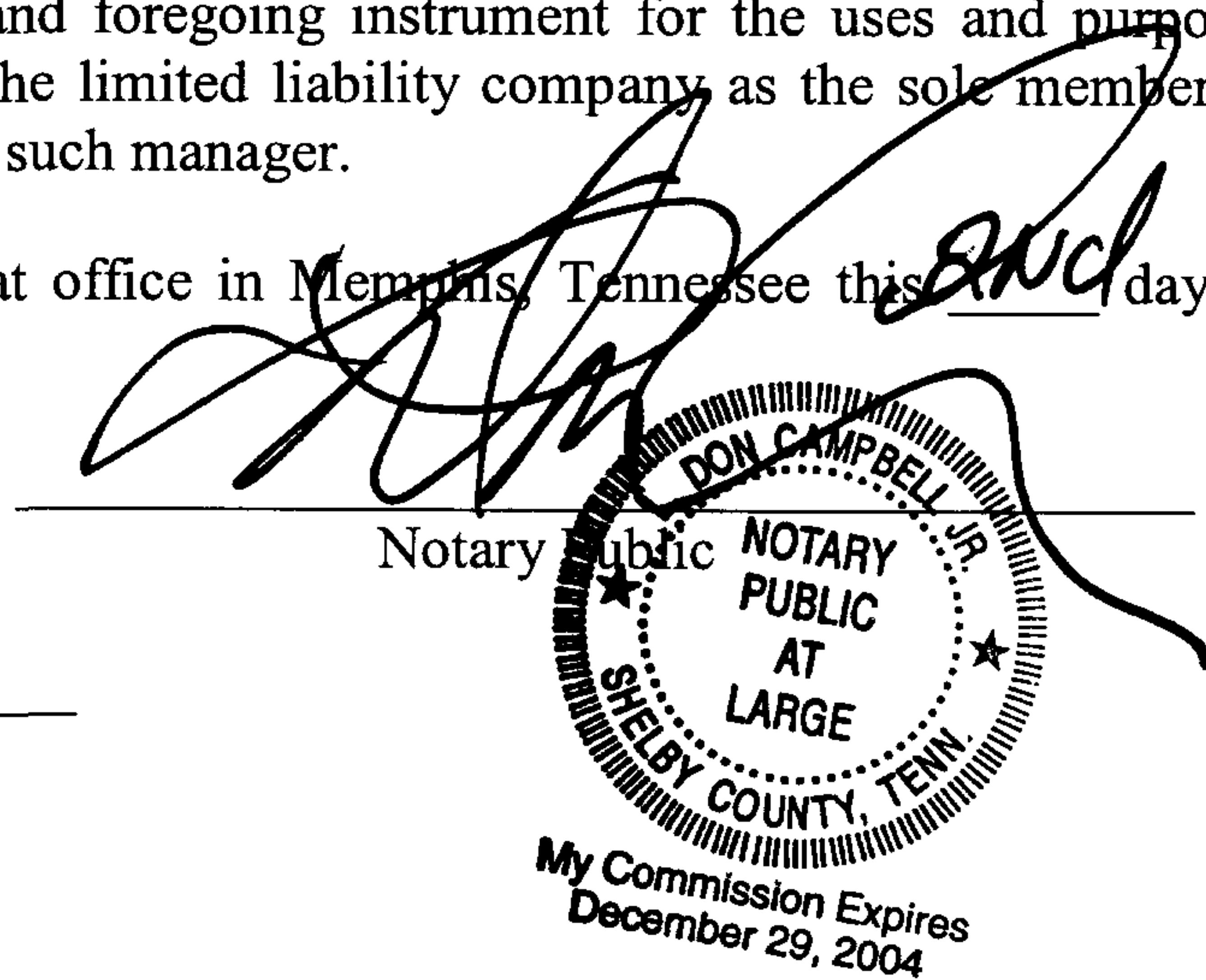


STATE OF TENNESSEE  
COUNTY OF SHELBY

Before me, the undersigned Notary Public of the state and county aforesaid, personally appeared John A. Randles, III, with whom I am personally acquainted and who upon oath acknowledged himself to be the Executive Vice President of Fogelman Realty Group, LLC, the sole member of Fogelman Realty Member Two, LLC, and that he, as such manager being authorized to do so, executed the within and foregoing instrument for the uses and purposes therein contained by signing the name of the limited liability company as the sole member of said limited liability company by himself as such manager.

Witness my hand and notary seal at office in Memphis, Tennessee this 29th day of January, 2004.

My Commission Expires: \_\_\_\_\_



**SCHEDULE A  
TO  
FIFTH AMENDMENT TO FIRST AMENDED AND RESTATED  
CERTIFICATE OF FORMATION AND LIMITED PARTNERSHIP AGREEMENT  
OF FPI BIRMINGHAM, LTD.**

The name, address, capital contribution and the number of Units held by each Partner is as follows:

<b>Name and Address</b>	<b>Capital Contribution</b>	<b>General Partnership Units</b>	<b>Limited Partnership Units</b>
Fogelman Realty Group, LLC 5400 Poplar Avenue Memphis, TN 38119	\$ 110.00	11.00	0.00
Avron B. Fogelman 5400 Poplar Avenue Memphis, TN 38119	630.00	0.00	63.00
Fogelman Realty Member Two, LLC 5400 Poplar Avenue Memphis, TN 38119	255.00	0.00	25.50
<b>Totals</b>	<b>\$995.00</b>	<b>11.00</b>	<b>88.50</b>