

*ACTEC*

**SHAREHOLDERS AGREEMENTS  
FOR CLOSELY-HELD CORPORATIONS**

**SAMPLE FORM**

Updated through 1/1/06  
Supplemented 4/20/06

*See Companion Document “Outline”*

**Co-Authors:**

Nancy Schmidt Roush, Richard S. Scolaro and Steven B. Gorin.

**Sub-Committee Members of the ACTEC Business Planning Committee Who  
Contributed:**

Nancy Schmidt Roush (chair), James L. Boring, C. Fred Daniels, Clarence J. Ferrari, Jr., Steven B. Gorin, Robert S. Marquis, Randy S. Nelson, Richard S. Scolaro, and David C. Sojourner, Jr.

**Disclaimer:** The Sample Form is intended as a resource for attorneys, but is not a substitute for the attorney's judgment and application of the relevant law to a client's circumstances.

**IRS Circular 230 Disclosure:** Pursuant to Internal Revenue Service rules of practice, any tax advice set forth in this form is not intended or written to be used, and cannot be used, for the purpose of (a) avoiding penalties that may be imposed under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any tax-related matter addressed herein.

© 2006 The American College of Trust and Estate Counsel – All Rights Reserved

## Table of Contents

|   |    |
|---|----|
| ARTICLE 1 DEFINITIONS .....   | 2  |
| Section 1.1 Bona Fide Offer .....                                   | 2  |
| Section 1.2 Board .....   | 2  |
| Section 1.3 Corporation .....                                       | 2  |
| Section 1.4 Effective Date of Purchase .....                        | 3  |
| Section 1.5 Family Member .....                                     | 3  |
| Section 1.6 IRC .....   | 3  |
| Section 1.7 Living Trust .....                                      | 3  |
| Section 1.8 Permitted Transferee .....                              | 4  |
| Section 1.9 Shareholder .....                                       | 4  |
| Section 1.10 Shares .....   | 4  |
| Section 1.11 Total and Permanent Disability .....                   | 4  |
| Section 1.12 Transfer .....   | 5  |
| ARTICLE 2 ISSUANCE OF SHARES .....                                  | 6  |
| Section 2.1 Conditions to Issuing Shares .....                      | 6  |
| Section 2.2 Legend on Certificates .....                            | 6  |
| Section 2.3 Spousal Consent [ <i>Optional</i> ] .....               | 7  |
| Section 2.4 Pre-Emptive Rights .....                                | 7  |
| ARTICLE 3 BUY-SELL PROVISIONS .....                                 | 7  |
| Section 3.1 Restrictions on Transfers .....                         | 7  |
| Section 3.2 Options to Purchase .....                               | 8  |
| Section 3.3 Mandatory Purchases .....                               | 10 |
| ARTICLE 4 CALLS, PUTS, & OTHER PURCHASE RIGHTS .....                | 11 |
| Section 4.1 Corporation Call .....                                  | 11 |
| Section 4.2 Shareholder Put .....                                   | 11 |
| Section 4.3 Tag-Along & Drag-Along Rights .....                     | 12 |
| ARTICLE 5 PURCHASE PRICE .....                                      | 12 |
| Section 5.1 Price for Shares .....                                  | 12 |
| Section 5.2 Adjusting Price Based on Estate Tax Liability .....     | 15 |
| Section 5.3 Adjustment Upon Subsequent Sale of Corporation .....    | 15 |
| Section 5.4 Insufficient Surplus .....                              | 16 |
| Section 5.5 Life Insurance Held in Escrow [ <i>optional</i> ] ..... | 16 |
| ARTICLE 6 CLOSING & TERMS .....                                     | 17 |
| Section 6.1 Closing & Effective Date .....                          | 17 |
| Section 6.2 Payment of Purchase Price .....                         | 17 |
| Section 6.3 Allocation of Book Income From Insurance .....          | 18 |
| Section 6.4 Representations & Warranties .....                      | 18 |
| Section 6.5 Remedy for Failure of Seller to Convey Shares .....     | 19 |

|  |    |
|--|----|
| ARTICLE 7 VOTING & GOVERNANCE .....                        | 19 |
| Section 7.1 Supermajority Voting Rights .....              | 19 |
| Section 7.2 Irrevocable Proxy [ <i>Optional</i> ] .....    | 20 |
| Section 7.3 Deadlock .....                                 | 20 |
| Section 7.4 Retention of Control [ <i>Optional</i> ] ..... | 22 |
| Section 7.5 Founders Rights .....                          | 23 |
| Section 7.6 Multiple Classes of Stock .....                | 23 |
| ARTICLE 8 NON-COMPETE & CONFIDENTIALITY .....              | 23 |
| Section 8.1 Covenants.....                                 | 23 |
| Section 8.2 Remedies.....                                  | 24 |
| Section 8.3 Continuing Employment [ <i>Optional</i> ]..... | 25 |
| ARTICLE 9 S STATUS .....                                   | 26 |
| Section 9.1 Maintaining S Corporation Status.....          | 26 |
| Section 9.2 Permissible Shareholders .....                 | 26 |
| Section 9.3 Income Allocation for Partial Year.....        | 27 |
| Section 9.4 Tax Dividends .....                            | 28 |
| Section 9.5 Tax Matters Shareholder.....                   | 29 |
| Section 9.6 Tax after Purchase.....                        | 29 |
| Section 9.7 Power of Attorney.....                         | 29 |
| ARTICLE 10 REMEDIES & ARBITRATION .....                    | 29 |
| Section 10.1 Specific Performance .....                    | 29 |
| Section 10.2 Expenses of Litigation .....                  | 30 |
| Section 10.3 Arbitration.....                              | 30 |
| Section 10.4 Governing Law .....                           | 30 |
| Section 10.5 Severability .....                            | 30 |
| ARTICLE 11 MISCELLANEOUS .....                             | 31 |
| Section 11.1 Termination & Amendment.....                  | 31 |
| Section 11.2 Rights to Use Shareholder's Name .....        | 31 |
| Section 11.3 Spouses' Interest .....                       | 32 |
| Section 11.4 Waiver of Conflict of Interest .....          | 32 |
| Section 11.5 Notice .....                                  | 32 |
| Section 11.6 Waiver.....                                   | 33 |
| Section 11.7 Binding Effect.....                           | 33 |
| Section 11.8 Documentary Stamps [ <i>Optional</i> ].....   | 33 |
| Section 11.9 Entire Agreement .....                        | 33 |
| Section 11.10 Assignment .....                             | 33 |
| Section 11.11 Agreement is Not an Employment Contract..... | 34 |
| Section 11.12 Setoff.....                                  | 34 |
| Section 11.13 Construction.....                            | 34 |
| Section 11.14 Performance of Necessary Acts .....          | 34 |
| Section 11.15 Counterparts and Date of Execution .....     | 34 |

|   |    |
|---|----|
| EXHIBIT CONSENT OF SPOUSE .....                               | 36 |
| EXHIBIT CERTIFICATE OF DESIGNATIONS.....                      | 37 |
| EXHIBIT CERTIFICATE OF VALUE .....                            | 38 |
| EXHIBIT ADDENDUM TO SHAREHOLDERS AGREEMENT.....               | 39 |
| EXHIBIT PROMISSORY NOTE AND SECURITY AGREEMENT .....          | 40 |
| EXHIBIT PERSONAL GUARANTY .....                               | 45 |
| EXHIBIT ESCROW AGREEMENT FOR PLEDGE OF STOCK.....             | 50 |
| EXHIBIT ESCROW AGREEMENT FOR INSURANCE POLICIES & PLEDGE..... | 56 |
| ATTACHMENT CLASSES OF STOCK CLAUSE FOR ARTICLES .....         | 62 |
| ATTACHMENT TAG-ALONG RIGHTS CLAUSE FOR ARTICLES.....          | 63 |
| ATTACHMENT SAVINGS CLAUSE FOR TRUST OWNING S STOCK.....       | 64 |
| ATTACHMENT SECTION 303 REDEMPTION AGREEMENT.....              | 65 |

**SHAREHOLDERS AGREEMENTS  
FOR CLOSELY-HELD CORPORATIONS**

**SAMPLE FORM INTRODUCTION**

Often referred to as “buy-sell” agreements, shareholders agreements contain contractual rights and obligations between shareholders and the corporation to buy and sell stock, as well as other provisions dealing with matters like governance and tax issues. This Sample Agreement is intended to be a form appropriate for corporations (either S or C) with active businesses (but not including provisions unique to professionals) that are owned either by family members or unrelated owners (but not ESOPs). Unique provisions of particular state laws are not addressed, except for certain community property provisions.

The Sample Form should not be used “as is.” There are many alternative provisions included and therefore this form cannot be copied and used as a whole document without considerable editing by the user. The Sample Form is primarily intended to provide sample provisions, and not all provisions are coordinated with all other provisions, and not all advisable provisions are included.

Please see the accompanying Shareholders Agreements for Closely-Held Corporations Outline for a discussion of issues surrounding shareholders agreements in general, and the provisions of this sample agreement in particular.

## **SHAREHOLDERS AGREEMENT**

THIS SHAREHOLDERS AGREEMENT (the “Agreement”), which shall be effective as of \_\_\_\_\_, 20\_\_\_\_, is entered into by and among [Name of Corporation], a [State] corporation, (the “Corporation”) and the individual shareholders who sign the Agreement (referred to individually as “Shareholder” or collectively as “Shareholders”).

WHEREAS, the Shareholders are the owners of [all] of the outstanding capital stock of the Corporation (the “Shares”);

*[WHEREAS, the Corporation has elected with the consent of the Shareholders to be taxed as an S corporation for federal and state income tax purposes and the parties hereto desire to continue such election and to bind each other to take such steps as may be necessary to preserve such election; and]*

WHEREAS, the parties wish to agree to certain rights and obligations regarding ownership of the Shares including restrictions on transfer and buy-sell provisions;

THEREFORE in consideration of the mutual covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

### **ARTICLE 1** **DEFINITIONS**

#### **Section 1.1    Bona Fide Offer**

The term “Bona Fide Offer” shall mean a legally binding written agreement with a third party to purchase all or a portion of the Shares owned by a Shareholder, which written agreement must be contingent upon the options to purchase or participate in a sale as provided herein. At a minimum, such third party must place in escrow as earnest money at least [fifty percent (50%)] of the proposed purchase price to be paid for the selling Shareholder’s Shares and must provide written evidence of such third party’s financial ability to consummate the purchase of such Shares.

#### **Section 1.2    Board**

The term “Board” shall mean the board of directors of the Corporation.

#### **Section 1.3    Corporation**

The term “Corporation” shall mean [name of corporation], a [state of incorporation] corporation, its successor and successors, any surviving entity or entities into which it may be merged, or any entity resulting from a division or separate from the Corporation and/or its consolidation with any other corporation or entities and the successor and successors of any such surviving or consolidated entity, and any entity controlled by or under common control with the Corporation.

## **Section 1.4    Effective Date of Purchase**

The term “Effective Date of Purchase” shall mean:

- (a) If the purchase occurs due to death, the date of death.
- (b) If the purchase occurs due to a Total and Permanent Disability, the first day of the \_\_\_\_\_ month period during which the shareholder was disabled.
- (c) If the purchase occurs on any other triggering event, and the purchase is mandatory, the date of the triggering event.
- (d) If the purchase occurs on any other triggering event and the purchase is optional, the date of the last option to purchase is exercised [*or the date of the triggering event*].
- (e) If the purchase occurs due to a right to call, then the date specified in the call.

## **Section 1.5    Family Member**

The term “Family Member” shall mean any of the following:

- (a) *[name of parents]* and their descendants *[or those descendants active in the business]*, and any trust for the benefit of one of those individuals *[as long as the trustee or a co-trustee is a Family Member]*.
- (b) A trust for the benefit of the Shareholder’s spouse, as long as the trust terms do not allow principal distribution of Shares to the spouse during the term of the trust or on termination of the trust, and on termination of the trust the Shares pass to a Family Member as defined above.

## **Section 1.6    IRC**

The term the “IRC” shall mean the Internal Revenue Code of 1986, as amended.

## **Section 1.7    Living Trust**

The term “Living Trust” shall mean a trust of which the individual Shareholder is a sole grantor and initial trustee or co-trustee, over which the individual Shareholder has the full right of revocation, and which will function during the Shareholder’s life primarily for the benefit of the Shareholder. Provided, however, a subsequent amendment to such a trust that would either: (i) remove the grantor as a trustee even though the grantor is still alive and competent; or (ii) cause the trust to function during the grantor’s life other than primarily for the grantor’s benefit, is a Transfer to someone other than a Permitted Transferee (unless the trust after such changes otherwise would qualify as a Permitted Transferee). For all purposes of this Agreement, the Shares owned by such a Living Trust shall still be considered as owned by the individual grantor of the living trust, and all references to the death of a Shareholder, or any other provision that would apply to an individual and not a trust, shall be considered as applying to individual grantor of the living trust. However, for purposes of

making payments to a Shareholder (such as dividends, liquidating distributions and payments in exchange for the Shares owned by the trust), those payments shall be made to the Living Trust. The trustees, successor trustees, and all present and future beneficiaries of a Living Trust shall be fully bound by the provisions of this Agreement. Any notices required to a Shareholder whose Shares have been transferred to a Living Trust shall be mailed to the individual grantor as trustee of the living trust, or to any successor trustee of whom the Corporation has been notified in writing.

### **Section 1.8    Permitted Transferee**

The term “Permitted Transferee” shall mean the Corporation, a current Shareholder, a Shareholder’s Living Trust [*, or a Family Member*], if such transferee is or becomes a party to this Agreement and holds the Shares subject to the provisions of this Agreement by signing an Addendum in the form attached hereto as Exhibit \_\_\_\_.

*[Add if an S corporation:]* Provided, however, that to be a Permitted Transferee, the transferee must be qualified to be a shareholder in an S corporation and the transfer will not cause the total number of shareholders to exceed the number allowed for S corporations (which is currently 100). Prior to the transfer of any Shares to a trust, a copy of the trust instrument and all documents related hereto shall be submitted to counsel for the Corporation for determination of whether the transfer of the Shares to such trust shall cause or result in an inadvertent termination of the Corporation’s S status.

### **Section 1.9    Shareholder**

The term “Shareholder” includes the original parties to this Agreement, any Permitted Transferee who becomes the owner of the Shares and who is or becomes subject to this Agreement as provided herein, and when applicable includes an agent under a power of attorney if a Shareholder is disabled, and a Shareholder’s successor-in-interest on death.

### **Section 1.10    Shares**

The term “Shares” shall mean the capital stock of the Corporation, issued and outstanding at the applicable time.

### **Section 1.11    Total and Permanent Disability**

The term “Total and Permanent Disability” shall mean, with regard to a Shareholder who is also an employee of the Corporation, a Shareholder’s inability, by reason of accident or illness, to carry on the duties and functions, exercise the responsibilities, and/or discharge the obligations of employment with the Corporation, for a period of *[180 days within a 365 day period, whether or not continuous]* in accordance with his/her previous experience of employment with the Corporation. Such determination shall be made by the mutual agreement of the parties hereto, or in the event such agreement cannot be reached within 30 days of the event resulting in such inability, by the following procedure.

(a) If the Corporation then has a disability income or disability buy-out policy covering the Shareholder, the definition set forth in such policy shall control, provided the

issuing insurance company agrees to commence disability buy-out or income payments as a result of such permanent and total disability.

(b) If the Corporation does not then have a disability income or buy-out policy covering the Shareholder:

(i) Each party shall select an independent physician who shall examine the subject Shareholder. The mutual agreement of the two examining physicians shall control, and their opinion shall be binding on the parties. If the two physicians cannot agree, those physicians shall select a third physician to examine the subject Shareholder. The majority opinion of those three physicians shall control, and their decision shall be binding on the parties.

(ii) If any of the physicians are not able to provide their opinion to the Corporation due to privacy laws or other such obstacles that the Shareholder is not able or willing to remove by giving the appropriate consents, then the Board shall make the determination regarding the subject Shareholder's condition based on the information available to them in their sole discretion, and the Board's determination shall be binding on the parties.

## **Section 1.12 Transfer**

The term "Transfer" means (i) when used as a verb, to gift, sell, exchange, assign, redeem, transfer, pledge, hypothecate, encumber, bequeath, devise or otherwise dispose of, whether voluntary or involuntary or whether arising from a divorce, separation, death, attachment, execution, bankruptcy, foreclosure, judicial order, operation of law or otherwise and (ii) when used as a noun, the nouns corresponding to such verbs.

*[If the Corporation is an S Corporation, add the following:]* A "Transfer" shall also include (a) a failure to make an election that, if made, would qualify such person as an eligible S corporation shareholder as provided in IRC §1361, and (b) any change in circumstances or any event which results in Shares being held by a person who is ineligible to be an S corporation shareholder, or cause the number of shareholders to be in excess of the permitted shareholders, as provided in IRC §1361.

If a corporation or other business entity is the Shareholder, then a Transfer of ownership interest in such entity or any reorganization of such entity which results in the individual(s) who own the controlling interest in the entity no longer owning a controlling interest, or may result in other individuals or entities owning a direct or indirect ownership or beneficial interest in the Corporation, shall be a "Transfer" under this Agreement.

If a trust is the Shareholder, then a change in the terms of the trust or in circumstances which result in the individual(s) who are the primary beneficiary(ies) of the trust no longer being the primary beneficiary(ies) *[and/or the persons currently serving as trustee no longer serving as trustee]* shall be a "Transfer" under this Agreement.

The existence or creation of a spouse's interest in the Shares by virtue of applicable state laws shall not be a Transfer as long as the spouse complies with and continues to comply

with all the terms of and obligations under this Agreement. Provided, however, if a Shareholder's marriage is terminated by divorce or death, and such Shareholder does not succeed to any interest the former spouse or deceased spouse might have in his or her Shares, or if a creditor of a spouse or any other party succeeds to such spouse's interest, or if such spouse is determined to have rights beyond what this Agreement provides, then each of those events constitutes a Transfer.

## **ARTICLE 2** **ISSUANCE OF SHARES**

### **Section 2.1 Conditions to Issuing Shares**

No Shares may be issued by the Board without the approval of Shareholders holding \_\_\_\_ % of the Shares.

Before Shares are issued or reissued to any person, directly, upon exercise of an optional or mandatory purchase under this Agreement, or upon a Transfer permitted as provided herein, such person shall be required to do all of the following:

- (a) Sign and deliver to the Corporation an Addendum to this Agreement in the form set forth in Exhibit \_\_\_, agreeing to be personally bound by this Agreement.
- (b) Endorse in blank the stock certificate(s) representing his or her Shares or execute a stock power or assignment separate from certificate(s).
- (c) For the purpose of carrying out the terms of this Agreement, deposit the endorsed stock certificate(s) and any separate stock power or assignment with the secretary of the Corporation or such person as may be designated for such purpose by the Corporation. *[or with the Escrow Agreement pursuant to the Escrow Agreement attached as Exhibit \_\_\_ hereto].*
- (d) Have signed and deliver to the Corporation a Consent of Spouse, if required as provided below.

Each Shareholder shall have the right to vote his or her Shares and shall receive the dividends paid thereon until such Shares are formally Transferred as provided herein. No Shares can be Transferred except in accordance with the terms hereof, and the person designated by the Corporation to hold the Shares shall hold and deliver the Share certificates only in accordance with the provisions hereof.

### **Section 2.2 Legend on Certificates**

Each stock certificate issued by the Corporation to a Shareholder shall be endorsed conspicuously on the face thereof as follows:

*The sale, assignment, exchange, transfer, devise, bequest or other disposition of, or the pledge, mortgage, hypothecation or encumbrance of, or the creation of any security interest in, the shares represented by this Certificate is*

*restricted by a Shareholders Agreement, dated \_\_\_\_\_, as may be amended, a copy of which is on file in the office of the Secretary of the Corporation and may be reviewed upon request.*

*These securities have not been registered under the Securities Act of 1933, as amended (the “Act”), or any state securities laws, and may not be offered, offered for sale, sold, assigned, transferred or otherwise disposed of in the absence of an effective registration statement under the Act or any state securities laws or an applicable exemption from such requirement.*

### **Section 2.3 Spousal Consent [Optional]**

A Shareholder (if married) shall cause his or her spouse to execute and deliver to the Corporation a Consent of Spouse in the form attached as Exhibit \_\_\_. If a Shareholder marries or remarries subsequent to the date of such Shareholder's execution of this Shareholder's Agreement, such Shareholder shall within 30 days thereafter cause his or her new spouse to execute and deliver to the Corporation such a Consent of Spouse in the form attached as Exhibit \_\_\_ .

### **Section 2.4 Pre-Emptive Rights**

#### **a. Waiver of Pre-emptive Rights Alternative**

With respect to pre-emptive rights to the issuance of further Shares, the Shareholders shall waive such pre-emptive rights in the event that an offer for such shares has been approved by (i) the Board or (ii) by vote of the Shareholders holding at least \_\_\_% of all outstanding Shares.

#### **b. Providing Pre-emptive Rights Alternative**

In the event of an issuance of further Shares, the Shareholders shall have the option to subscribe for and purchase Shares being offered by the Corporation in such proportions as the Shareholders may agree. In the absence of such agreement, those Shareholders wishing to subscribe for and purchase Shares may do so in proportion to their respective holdings of the Corporation's outstanding Shares at that time.

## **ARTICLE 3 BUY-SELL PROVISIONS**

### **Section 3.1 Restrictions on Transfers**

No Shareholder shall Transfer any Shares (or any interest therein), whether now owned or hereafter acquired, except for a Transfer (i) to a Permitted Transferee, (ii) with the [*unanimous*] written consent of the other Shareholders on such terms as they chose to give for their consent, (iii) upon a Bona Fide Offer, subject to the options to purchase as provided below, (iv) upon an involuntary transfer, subject to the options to purchase as provided below, or (v) pursuant to a mandatory purchase as provided below. Provided, however, a

Transfer by Shareholders owning a majority of the Shares is subject to the provisions of the Section Tag-Along & Drag-Along Rights.

**a. Void Ab Initio Alternative**

Any attempt to Transfer any Shares not in accordance with this Agreement shall be null and void *ab initio*, shall not be binding on the Corporation, and the Corporation shall not give any effect to such attempted Transfer on its stock transfer records.

**b. Assignee Alternative**

Upon any Transfer of Shares in violation of this Agreement, the parties hereto agree on their own behalf and on behalf of any such transferee (the “Transferee”), to take any and all actions necessary to convert the Shares transferred to the Transferee into an equal number of non-voting Shares. Such actions may include, without limitation, the authorization and execution of (i) a plan of recapitalization with respect to the exchange of the Shares, (ii) an amendment to the certificate of incorporation of the Corporation, if necessary, to authorize the Corporation’s issuance of non-voting stock and (iii) corporate resolutions approving the plan of recapitalization and the amendment to the certificate of incorporation.

**Section 3.2 Options to Purchase**

**a. Triggering Events**

Upon the occurrence of any of the Triggering Events, all of that Shareholder’s Shares shall be subject to the options to purchase set out below for the purchase price and upon the payment terms provided in this Agreement. For purposes of this Section, “Triggering Events” shall mean any of the following:

- (i) A Shareholder shall desire to sell any portion or all of his or her Shares upon receipt of a Bona Fide Offer.
- (ii) A Shareholder’s Shares are subject to an involuntary Transfer by operation of law (such as, but not limited to, a Transfer to Shareholder’s trustee in bankruptcy or a purchaser at any creditors’ or judicial sale, or to a Shareholder’s spouse pursuant to any property division or pursuant to a divorce or separation decree).
- (iii) Material breach of this Agreement, if such breach remains uncured for a period of \_\_\_ days after written notice of the same is provided to the breaching Shareholder by the Corporation. (This option to purchase shall be in addition to, and not in lieu of, any damages that the Corporation or other Shareholders incur as a result of the breach.)  
*[Consider adding liquidated damages of 25% of the purchase price if the breach is a transfer otherwise prohibited by the Agreement.]*
- (iv) *[Can add any of the other events set out under the Section Mandatory Purchase.]*

The “Transferring Shareholder” is the Shareholder desiring to sell or, in the case of an involuntary Transfer, is the Shareholder whose Shares are subject to an involuntary Transfer and also the potential transferee if that person has provided information to the Corporation and other Shareholders of his/her name, address, and potential claim to the Shares.

**b. Notice**

The Shareholder desiring to sell all or part of his Shares pursuant to a Bona Fide Offer (hereinafter referred to as “Transferring Shareholder”) shall serve notice upon all other parties to this Agreement at their last known address by certified mail, return receipt requested, indicating the number of shares the Transferring Shareholder desires to sell, and the name and address of the third party desiring to purchase the Shares, with a copy of the Bona Fide Offer attached to it (“Notice”).

If the Transfer is an involuntary transfer, “Notice” shall be deemed received on the date any other Shareholder or one or more members of the Board receives actual notice that an involuntary Transfer of Shares has or will take place, and that person shall in turn promptly send notice of such to the other parties to this Agreement.

*[Add notice references for any other triggering events included in this section.]*

**c. Option Periods**

(i) Corporation First Option Alternative

The Corporation shall have an option for a period of 30 days from the Corporation’s receipt of Notice to purchase all, but not less than all, of the Shares proposed to be Transferred. The Corporation shall exercise such option by giving written notice of such exercise to both the Transferring Shareholder and the other Shareholders within such 30 day period. Should the Corporation fail to give written notice within such 30 day period, the Corporation shall be deemed to have waived such option. If the Corporation does not elect to purchase all of the Shares to be transferred, the other Shareholders shall have an option for a period of 60 days from the Corporation’s receipt of such Notice to purchase all, but not less than all, of the remaining Shares proposed to be transferred. The other Shareholders shall exercise this option by sending written notice of such exercise to the Transferring Shareholder and the Corporation within such 60 day period. Should the other Shareholders fail to give written notice within such 60 day period, the other Shareholders shall be deemed to have waived such option. *[Alternatives: (i) the option to purchase can be of part or all of the transferring shares or (ii) the option is for all the shares owned by that shareholder, not just the ones proposed to be transferred.]*

(ii) Shareholder First Option Alternative

The other Shareholders shall have an option for a period of 30 days from their receipt of Notice to purchase any of the Shares proposed to be Transferred. The other Shareholders shall exercise such option by giving written notice of such exercise to both the Transferring Shareholder, the Corporation, and the other Shareholders within such 30-day period. Should the other Shareholders fail to give written notice within such 30-day period, they shall be

deemed to have waived such option. If more than one other Shareholder exercises an option to purchase Shares hereunder, those Shareholders shall purchase the Shares in proportion to their interest in the issued and outstanding Shares, excluding the Shares of the Transferring Shareholder and the Shares of those Shareholders not electing to purchase, or in such proportions as they may mutually agree.

If the other Shareholders do not elect to purchase all of the Shares to be transferred, the Corporation shall have an option for a period of 60 days from the Corporation's receipt of such Notice to purchase all, but not less than all, of the remaining Shares proposed to be Transferred. The Corporation shall exercise this option by sending written notice of such exercise to the Transferring Shareholder and the other Shareholders within such 60-day period. Should the Corporation fail to give written notice within such 60-day period, the Corporation shall be deemed to have waived such option.

**d. Divorce**

Notwithstanding the prior provisions, if in the event of a Shareholder's marital dissolution ("Divorced Shareholder") such Shareholder's Shares are awarded to such Shareholder's spouse, the Divorced Shareholder shall instead have the first option to purchase all or any portion of the Shares awarded to the former spouse, such option to be exercised within 30 days, and the options otherwise given to the other Shareholders and the Corporation above shall apply but as second and third options with 60-day and 90-day periods.

**e. Failure to Exercise Options**

In the event the other Shareholders and the Corporation shall fail to exercise their options to purchase all, but not less than all, of the Shares proposed to be Transferred, the Transferring Shareholder may sell the shares in accordance with the Bona Fide Offer if the closing on that purchase occurs within 60 days of the expiration of the option periods [*or the transferee in an involuntary transfer shall take the Shares free of the terms of this Agreement.*].

*[The transferee takes the Shares subject to the provisions of this Agreement, and must comply with the provisions of the Article Issuance of Shares before the Shares are reissued in the transferee's name.] OR [The transferee takes the Shares free of the terms of this Agreement and the Corporation shall, upon request, remove the legend referencing this Agreement from the certificate representing such shares.]*

**Section 3.3 Mandatory Purchases**

**a. Triggering Events**

Upon the occurrence of any of the Triggering Events, all of the Shares of that Shareholder shall be purchased by the *[Corporation]* or *[other Shareholders]* for the purchase price and upon the payment terms provided in this Agreement. For purposes of this Section, the term "Triggering Events" shall mean any of the following: *[Note all of these are optional, and don't have to be included.]*

- (i) Death of the Shareholder, unless the Shares are transferred to a Permitted Transferee.
- (ii) *[If the Shareholder is also an employee of the Corporation]* Total and Permanent Disability of a Shareholder.
- (iii) *[If the Shareholder is also an employee of the Corporation]* Termination of employment of a Shareholder with the Corporation, whether voluntary or involuntary.
- (iv) On the last day of the year in which a Shareholder reaches age *[65]*.
- (v) If a Shareholder who is not a Family Member becomes divorced from a Family Member.
- (vi) Any transfer that would result in the loss of the S election.

**b. Failure to Purchase**

In the event there is a failure to purchase Shares as required by this Section, then, in addition to any other remedies available at law or in equity, whether arising from breach of this Agreement or otherwise, the Shareholder or Shareholder's personal representative, as the case may be, shall be free to Transfer the Shares owned by Shareholder if the Transfer occurs within 90 days of the Triggering Event. *[Any transferee takes the Shares subject to the provisions of this Agreement, and must comply with the provisions of the Article Issuance of Shares before the Shares are reissued in the transferee's name.] OR [The transferee takes the Shares free of the terms of this Agreement and the Corporation shall, upon request, remove the legend referencing this Agreement from the certificate representing such shares.]*

**ARTICLE 4**  
**CALLS, PUTS, & OTHER PURCHASE RIGHTS**

**Section 4.1 Corporation Call**

The Corporation has the ongoing right to purchase the Shares owned by any Shareholder at any time and from time to time (which right is referred to herein as a "Call"). A Call may be exercised by the Board at any time upon written notice sent to the Shareholder, which notice shall state the Shares to be called and the effective date of the purchase. Upon the exercise of a Call, the Shareholder whose Shares are being called shall sell to the Corporation the number of Shares called as of the effective date determined by the Board and for the purchase price and upon the payment terms provided in this Agreement.

**Section 4.2 Shareholder Put**

Each Shareholder who is an employee of the Corporation or any of its affiliates has the right to Put the Shares owned by the Shareholder to the Corporation upon termination of such employment, provided that this Put may only be exercised as to all Shares the Shareholder owns (directly or upon exercise of a stock option). If the Shareholder is a Living Trust, then

this Put shall be effective upon termination of employment of the individual who is the grantor of such trust. A Put must be exercised within 60 days after the effective date of the termination of employment by written notice sent to the secretary of the Corporation. Upon the exercise of a Put, the Corporation shall purchase the Shares owned by that Shareholder for the purchase price and payment terms provided in this Agreement.

### **Section 4.3 Tag-Along & Drag-Along Rights**

No Shareholder or group of Shareholders (collectively, the “Transfer Group”) shall transfer any Shares, directly or indirectly, in a single transaction or series of related transactions, to any person (the “Offeror”), if as a result of such transfer(s) more than 50% of the outstanding Shares would be owned by the Offeror, unless such Offeror gives the parties to this Agreement who are not included in the Transfer Group (the “Minority Shareholders”) the option to sell to the Offeror, at the same price and on the same terms and conditions as offered to the Transfer Group, all or any portion of the Shares held by the Minority Shareholders.

At the option of the Transfer Group, all Shareholders who have not tendered their Shares pursuant to the prior paragraph shall be required to transfer their Shares to the Offeror at the same price and on the same terms and conditions as offered to the Transfer Group.

*[Note Attachment TAG-ALONG RIGHTS CLAUSE FOR ARTICLES for clause to use in the Corporation’s Articles rather than in a shareholders agreement.]*

## **ARTICLE 5 PURCHASE PRICE**

### **Section 5.1 Price for Shares**

The price for any Shares purchased pursuant to this Agreement shall be determined as follows. *[Note if the valuation approach is to first value the Company, then divided by the number of issued and outstanding shares, and then multiplied by the number of Shares being purchased. This valuation will not take into account minority discounts or majority premiums. One alternative is to add that if Shares being purchased from a single Shareholder are less than 50%, then a discount of \_\_\_\_% will be applied. Another Alternative is to have the valuation in each case be arrived at a per share value, but you would need to specify whether the per share value is for a majority or minority share. Another alternative is to have an appraisal of just the Shares being purchased, which appraisal shall take into account all applicable valuation discounts, in which case the appraiser will determine the discounts. This last option may work best in a family situation if it is unlikely that the Agreement’s value would set the value for estate tax purposes anyway.]*

#### **a. Set By Appraiser Alternative**

The purchase price shall be the fair market value of the Shares being purchased as of the last day of the calendar month preceding *[so that life insurance proceeds will not be included]* the Effective Date of Purchase. In determining the fair market value of the Shares being purchased all appropriate and applicable discounts shall be considered.

(i) Select Appraiser in Advance.

The appraiser shall be the person set out on the most recent and still valid Certificate of Designation of Appraiser. The original Certificate of Designation of Appraiser is attached hereto as Exhibit \_\_\_\_\_. In the event the Certificate of Designation has expired and is therefore invalid: The Shareholders agree to meet (which can be at a regularly scheduled shareholders meeting) for purposes of renegotiating and executing subsequent Certificates of Designation of Appraiser at intervals of not more than 12 months from the execution date of the preceding certificate. The appraiser to be set forth in the subsequent Certificates of Designation of Appraiser shall be determined by unanimous vote of the Shareholders. *[Alternative: The Board shall meet for purposes of determining and executing subsequent Certificate of Designation of Appraiser at intervals of not more than 12 months from the execution date of the preceding certificate.]* A Certificate of Designation of Appraiser shall be valid for no longer than 12 months, and if a subsequent Certificate of Designation of Appraiser has not been executed within 12 months of the prior certificate, then the appraisal shall be done as follows:

(ii) Buyer and Seller Select Appraiser.

The buyer(s) and the seller shall select an independent appraiser to value the Shares, in which case they shall equally share the cost of the appraiser. If within 30 days after the date of the Triggering Event, the buyer(s) and the seller are unable to agree on such an appraiser, then the buyer(s) shall appoint an appraiser and the seller shall appoint an appraiser. The appraisers shall be independent, shall be members of the American Society of Appraisers, and shall be experienced in making appraisals of closely held businesses, shall have the following additional qualifications: *[specify any important to the corporation's business]*. The appointment of the appraisers shall be made in writing and delivered to the other party within 40 days after the date of the Triggering Event. If either party fails to timely appoint a qualified appraiser, that party shall be deemed to have waived that right, and the appraisal shall be conducted by the sole qualified appraiser timely appointed, in which case the buyer(s) and the seller shall equally share the cost of the appraiser. The two appraisers so appointed shall attempt to mutually agree on the fair market value, but if they are unable to do so within 60 days after their appointment, they shall immediately submit in writing to the buyer(s) and the seller their respective appraisals of the fair market value. If each appraisal is within 10% of the numerical average of both appraisals, then the fair market value shall be conclusively determined by taking the numerical average of both appraisals. If each appraisal is not within 10% of the numerical average of both appraisals, then the two appraisers shall mutually select a third appraiser, similarly qualified, within 10 days after the 60-day period and give written notice to the buyer(s) and the seller. Within 20 days after the appointment of the third appraiser, the third appraiser shall submit his or her appraisal in writing to the buyer(s) and the seller. The fair market value of the Shares shall be conclusively determined by taking the numerical average of the two appraisals that are numerically closest in value. However, if one of the appraisals is the numerical average of the three appraisals, the fair market value shall be that numerical average. The fair market value as determined under this Section shall be binding on all parties without recourse.

*[Optional provision]* Within 15 days after the receipt of the final appraisal, the buyer(s) shall have the right to withdraw the election to exercise the option to purchase, in which case the buyer(s) shall pay for the cost of all of the appraisers. In the absence of such a withdrawal and except as provided above, the buyer(s) and the seller shall each pay for the services of the appraiser appointed by each of them, and they shall equally share the cost of the third appraiser, if any.

*[Optional provision for S corporation]* If the Corporation is an S corporation, any required tax or income distributions that have not been made by the valuation date and that relate to the Corporation's net income through the valuation date shall be treated by the appraiser or appraisers as a liability of the Corporation on the valuation date.

In the event of the Transfer of Shares as a result of the death of a Shareholder, in arriving at their determination of fair market value of the Shares the appraiser(s) shall exclude any proceeds received or receivable by the Corporation from any insurance policies on the life of the deceased Shareholder to the extent those proceeds exceed the value of the policies on the day prior to death.

**b. Certificate of Value Alternative**

The purchase price shall be the value of the Shares as set out in the most recent and still valid Certificate of Value. The original Certificate of Value is attached hereto as Exhibit \_\_\_\_\_. The Shareholders agree to meet (which can be at a regularly scheduled shareholders meeting) for purposes of renegotiating and executing subsequent Certificates of Value at intervals of not more than 12 months from the execution date of the preceding certificate *[or within four months after the end of each fiscal year of the Corporation]*. The value to be set forth in the subsequent Certificates of Value shall be determined by unanimous vote of the Shareholders.

*[Alternative: The Board shall meet for purposes of determining and executing subsequent Certificates of Value at intervals of not more than 12 months from the execution date of the preceding certificate.]* A Certificate of Value shall be valid for no longer than 12 months, and if a subsequent Certificate of Value has not been executed within 12 months of the prior certificate, then the purchase price shall be the fair market value of the Shares determined as of the date of the Triggering Event by an appraisal pursuant to the following provisions:

*[insert same language as above under "Buyer and Seller Select Appraiser"]*

**c. Book Value Formula Alternative**

The purchase price shall be the net book value of the Shares. The net book value shall be the value of net assets of the Corporation determined from the Corporation's books at the amounts stated therein adjusted in accordance with generally accepted accounting principles or the principles and methodology utilized by the regular accountants for the Corporation who prepare the Corporation's financial statements, which determination shall be conclusive and binding on all concerned. Except as otherwise provided herein, the net book value shall be determined as of the end of the month immediately preceding the month in which the Effective Date of Purchase occurs.

**d. Terms of Bona Fide Offer Additional Provision**

Notwithstanding the foregoing, in the event of a purchase of Shares as a result of a Bona Fide Offer, the purchasing Shareholders or the Corporation, as the case may be, shall have the option of paying either the price calculated above or the price contained in the Bona Fide Offer and if the price contained in the Bona Fide Offer is used, then the terms contained in the Bona Fide Offer shall be used also in lieu of the provisions in the Article Closing & Terms.

**Section 5.2 Adjusting Price Based on Estate Tax Liability**

**a. Increase for Estate Tax Liability Alternative**

In the event of a purchase of Shares due to the death of a Shareholder, should the Internal Revenue Service determine the value of the Shares to be greater than that determined pursuant to this Agreement and such value results in an increase in federal and state estate tax liability, the purchase price shall be adjusted as follows: The purchase price of the Shares shall be increased by the additional estate tax liability which shall be obtained by multiplying (a) the difference between (i) the value of the deceased Shareholder's Shares as finally determined for federal estate tax purposes and (ii) the purchase price of the Shares, multiplied by (b) the maximum estate tax rate imposed on the deceased Shareholder's estate. Any such increases shall be paid to the deceased Shareholder's duly appointed fiduciary within 30 days of the final determination of the matter by the Internal Revenue Service.

**b. Increase to Final Estate Tax Value Alternative**

Should the value of the Shares as finally determined for federal estate tax purposes be greater than that determined by this Agreement, the purchase price shall equal the value of the deceased Shareholder's Shares as finally determined.

**Section 5.3 Adjustment Upon Subsequent Sale of Corporation**

In the event the occurrence of a Material Transaction following the Closing of a purchase hereunder from a Shareholder (the "Purchased Shareholder"), the purchase price of the Shares paid to the Purchased Shareholder shall be increased by the following amount, if any: the difference between the price per share received by the remaining Shareholders of the Corporation in a Material Transaction and the purchase price per Share previously received by the Purchased Shareholder pursuant to this Agreement shall be multiplied by the number of Shares purchased from the Purchased Shareholder pursuant to this Agreement.

A "Material Transaction" is a voluntary transfer of substantially all of the assets or substantially all of the stock of the Corporation to an independent third party (which shall exclude a Shareholder, whether current or former, or a corporation or other entity owned by a current or prior Shareholder) for value that occurs either (i) within \_\_\_\_\_ months following the Closing or (ii) within \_\_\_\_\_ months following the Closing if any significant negotiations for that transfer occurred during \_\_\_\_\_ months prior to the Closing.

## **Section 5.4    Insufficient Surplus**

In the event the Corporation is the purchaser and the surplus of the Corporation is insufficient (under then existing laws) to permit the Corporation to redeem the Shares as provided in this Agreement, then the parties to this Agreement agree to perform such acts, execute such instruments and vote their shares as necessary to increase such surplus to an amount that is sufficient, including, but not limited to a recapitalization of the Corporation so as to reduce its capital and increase its surplus, and/or a reappraisal of the assets of the Corporation, including goodwill, if any, to reflect the market value of its assets so as to increase its surplus. In the event the surplus cannot be sufficiently increased by these steps, then either the other Shareholders shall purchase the Shares at their option, or if they do not, then the Corporation shall only purchase those Shares for which it has sufficient surplus.

*[Optional]* In the event such surplus shall nevertheless prove to be insufficient to legally allow the Corporation to redeem such shares or to make any deferred payment required hereunder: The Corporation, within 30 days after the Effective Date of Purchase, shall notify the Shareholders of this fact in writing, and the number of shares the Corporation may legally redeem, by certified mail, return receipt requested. The remaining Shareholders shall then purchase all of such Shares which the Corporation cannot legally redeem with each remaining Shareholder to purchase an amount proportionate to his or her allocable interest in the Corporation (excluding the Shares held by the Shareholder whose Shares are being purchased), or in such proportions as to which the other Shareholders shall mutually agree, and the Corporation shall redeem the rest. The purchase price shall be determined and paid by the other Shareholders in the same manner as would otherwise be required of the Corporation in accordance with this Agreement.

## **Section 5.5    Life Insurance Held in Escrow [optional]**

During the term of this Agreement, the Shareholders shall obtain and maintain life insurance policies on the lives of the other Shareholders in amounts not less than \$\_\_\_\_\_ in the aggregate for each Shareholder. The purchasers of the policies shall be the sole owners thereof, and the policies and any proceeds received thereunder shall be held by an escrow agent in trust for the purposes of this Agreement, under the terms and conditions of the escrow agreement attached as Exhibit \_\_\_. Each Shareholder agrees that he/she shall have no right, title or interest in or to any policy purchased on his/her life pursuant to this Section. Each Shareholder agrees to submit to any physical examinations which may be required by the insurer in order to issue any policy purchased pursuant to this Section.

Upon receipt of notification of the Shareholder's death, the party who holds the policies pursuant to the terms hereof, shall make prompt and proper application for payment of the proceeds of the insurance policies, if any. In the event that the net proceeds received from the insurance policies are greater than the purchase price as determined herein, such excess amount shall be disbursed to the deceased Shareholder's successor in interest.

## **ARTICLE 6** **CLOSING & TERMS**

### **Section 6.1    Closing & Effective Date**

The Closing shall occur \_\_\_\_ days after the Effective Date of Purchase, or such other date as mutually agreed to by the parties. *[Provided, however, the Closing shall occur \_\_\_\_ days after the final determination of the purchase price of the Shares, if later.]* If the purchase occurs upon the death of a Shareholder and court action is required to transfer title, then Closing shall be conditioned upon the receipt of any necessary approval of any court having jurisdiction over the deceased Shareholder's estate, which shall be promptly obtained by the deceased Shareholder's personal representative.

Upon receipt by the selling Shareholder of the purchase price in cash and/or promissory note as herein provided, the selling Shareholder shall endorse and deliver the purchased Shares to the purchaser, together with all other documents necessary or required to effect the transfer. The parties shall provide and execute all other documents and items as reasonably required to accomplish the purchase.

The purchase shall be effective as of the Effective Date of Purchase, even though the Closing occurs later.

### **Section 6.2    Payment of Purchase Price**

Payment of the purchase price for the Shares shall be made at Closing. The purchase price, to the extent of any insurance proceeds received by the purchaser, shall be paid in cash. *[If there is insurance that might be payable due to the death or disability of a shareholder that is not intended to be buy-sell insurance (such as key person insurance to help fund operations), then the prior sentence needs to distinguish between those policies.]* If the purchase price exceeds the amount of any insurance proceeds, the purchaser has the option to pay the balance of the purchase price by the delivery of a promissory note in the form attached hereto as Exhibit \_\_\_\_.

The promissory note shall be secured by

- (a) A personal guarantee of the Shareholders *[unless the Shareholders are buying, in which case the Corporation could guarantee].*
- (b) A security interest in the Corporation's assets.
- (c) A pledge of the Shares being purchased *[or a pledge of all of the Shares].*

The new certificate(s) issued to the purchaser(s), the executed note, a separate stock power endorsed in blank, and a properly executed Escrow Agreement in form of attached Exhibit \_\_\_\_, shall be delivered to the escrow agent designated therein ("Escrow Agent"). When the promissory note is paid in full, the selling Shareholder and the Escrow Agent shall, concurrently with the final payment, return the subject stock certificate(s), the stock powers, the cancelled Escrow Agreement, and the cancelled note. During the period from Closing

until the date of payment in full of the purchase price, the purchaser shall exercise all rights as shareholder in relation to the purchased shares, unless and until a default occurs with respect to any payment as defined in the promissory note. In the event of a default in relation to any payment, the selling Shareholder shall be entitled to enforce full legal rights in connection with the shares assigned as collateral, and as set forth in the Escrow Agreement.

### **Section 6.3    Allocation of Book Income From Insurance**

*[Note: For cash basis, interim closing income allocation, S Corporation]* The Corporation shall redeem a deceased Shareholder's stock before applying for proceeds from insurance on the deceased Shareholder's life. The Corporation will issue two promissory notes under Section 6.2: one with principal equal to the proceeds (excluding post-mortem interest and dividends) payable in full (including interest) upon receipt of the life insurance proceeds (as used in this Section, the "first note") and one with principal equal to the remaining amount otherwise due under Section 6.2 (as used in this Section, the "second note"). To the extent possible, the Corporation shall use all of the life insurance proceeds (including post-mortem interest and dividends) to pay the first promissory note's principal and any accrued but unpaid interest and then to prepay the second promissory note. The Corporation and all affected shareholders shall make the election under Section 9.2(a) so that all income realized upon receipt by the Corporation of proceeds from such insurance shall be allocated to the Shareholders owning stock after the Effective Date of Purchase of the deceased Shareholder's stock.

*[You may wish to specifically provide which insurance is used for redemption and which insurance is used to provide funds for business continuity needs, such as any loss of value due to death or loss of value and executive search costs due to death.]*

### **Section 6.4    Representations & Warranties**

#### **a.      Seller's Representations & Warranties**

This Agreement when executed and delivered by a Shareholder shall constitute a valid and legally binding obligation of the Shareholder (and if applicable the Shareholder's spouse, estate or other successor in interest), enforceable in accordance with its terms. The Shares to be purchased and sold pursuant to this Agreement, and delivered in accordance with the terms and consideration expressed herein, shall be fully paid and not assessable, and free and clear of any liens or encumbrances. The Shareholder (and if applicable the Shareholder's spouse, estate or other successor in interest) has not made and will not make any transfer, sale, assignment, pledge or other conveyance of any interest in the Shares which would cause the Shares to be subject to any lien, encumbrance or prior right of others.

#### **b.      Buyer's Representations & Warranties**

This Agreement when executed and delivered by the party acquiring the Shareholder's Shares ("Buyer") will constitute a valid and legally binding obligation of the Buyer, enforceable in accordance with its terms. Buyer understands that the Shares are characterized as restricted securities under the Securities Act of 1933 (the "Act") and that the Shares are being acquired from the Shareholder (or if applicable the Shareholder's spouse,

estate or other successor in interest) pursuant to an exemption from registration under the Act. Buyer also understands that no public market exists and it is unlikely that a public market will ever exist for the Shares which limits resale, without registration under the Act, to certain circumstances.

### **Section 6.5 Remedy for Failure of Seller to Convey Shares**

In the event that a Shareholder is required to sell such Shareholder's Shares pursuant to any provision hereof, and in the further event that such Shareholder is unable to, or for any reason does not, deliver the certificate or certificates evidencing such Shares or otherwise comply with the terms of the purchase in accordance with the applicable provisions of this Agreement, or such Shareholder cannot be identified or located, the purchaser of such Shares may deposit the purchase price for such Shares (by good check, promissory note or both, as the case may be under the applicable provisions of this Agreement) with any bank doing business within 25 miles of the Corporation's principal office, or with the Corporation's certified public accountants, as agent or trustee, or in escrow, for such Shareholder, to be held by such bank or accountant until withdrawn by such Shareholder. Upon such deposit by the purchaser of such Shares and upon notice to the Shareholder who was required to sell, the Shares of such Shareholder to be sold pursuant to the applicable provisions of this Agreement shall at such time be deemed to have been sold to such purchaser, such Shareholder shall have no further rights thereto and the Corporation shall record such transfer in its stock transfer book.

## **ARTICLE 7 VOTING & GOVERNANCE**

### **Section 7.1 Supermajority Voting Rights**

Without regard to anything to the contrary contained in the Corporation's Articles or By-laws, the affirmative vote of the holders of \_\_\_\_% of the outstanding voting Shares shall be required for approval of the following corporate actions:

- (i) Amendment of the articles of incorporation or bylaws.
- (ii) Merger, consolidation, or other reorganization.
- (iii) Sale, lease, transfer, exchange, or other disposition of substantially all of the assets of the Corporation [*other than in the regular course of business*].
- (iv) Election, removal and any change in duties or compensation of the president.
- (v) Borrowings, business transactions or financial commitments in excess of \$\_\_\_\_\_.
- (vi) Declaring dividends or other distributions to Shareholders.

- (vii) Dissolution or voluntary bankruptcy of the Corporation.
- (viii) Any business transactions between an officer or director and the Corporation.
- (ix) *[Termination of employment of a Shareholder.]*

The parties to this Agreement hereby agree that each party will vote his or her Shares, vote as a member of the Board, or take other required corporate action to carry out the prior corporate actions upon the requisite affirmative vote of the Shareholders.

## **Section 7.2 Irrevocable Proxy [Optional]**

The Shareholders irrevocably appoint \_\_\_\_\_ (the “Proxyholder”) as their attorney and proxy with full power of substitution in their names, to vote and otherwise act with respect to all Shares which they now own or may hereafter acquire at any duly called meetings of shareholders of the Corporation (or by written consent in lieu thereof) and at any other time such Shares may be, voted or acted upon. The Shareholders agree that this appointment and proxy granted to the Proxyholder is irrevocable and coupled with an interest and, except as otherwise provided herein, shall not terminate by operation of law, whether because of the death, bankruptcy, or incompetency of the Shareholders or the occurrence of any other event. This Proxy shall terminate only upon the termination of this Agreement.

## **Section 7.3 Deadlock**

### **a. Buy-Out Alternative [*most useful if two 50-50 shareholders*]**

If the Shareholders or the Board are equally divided with respect to the management of the Corporation’s property, business, or affairs, or are equally divided in any question, dispute, or controversy, and this division concerns the proper subject for action by the Shareholders or directors, no Shareholder or director shall have the right to have the Corporation dissolved or shall have any other legal right in a suit because of such deadlock, except as provided in this Article. If such a deadlock exists, the parties agree to use their best good faith efforts to settle the matter by mutual agreement. They may submit the matter to arbitration (the terms of which shall be agreed to at that time), but they are under no obligation to do so. If a dispute resulting in a deadlock continues to exist, any Shareholder may submit to the other Shareholder a statement (“Statement”) that a deadlock exists, stating in detail the nature of the deadlock. The date the Statement is mailed or otherwise delivered is the Statement Date.

If the deadlock is not resolved within 60 days of the Statement Date, each Shareholder shall have the right to make an irrevocable offer to the other Shareholder to sell the offering Shareholder’s Shares or to purchase the other Shareholder’s Shares. The Shareholder making the offer shall be referred to as the Offeror, and the Shareholder receiving the offer shall be referred to as the Offeree. The offer by the Offeror shall be evidenced by a written notice to the Offeree (“Put or Call Notice”) specifying a value per Share (“Deadlock Price”) and offering (i) to sell the Offeror’s Shares at the Deadlock Price or (ii) to purchase the Offeree’s Shares at the Deadlock Price free and clear of all liens and encumbrances. If neither Shareholder gives a timely Put or Call Notice, the right to issue a Put or Call Notice

shall lapse and may only become operative again upon the issuance of a subsequent Statement. If both Shareholders give a timely Put or Call Notice, the Put or Call Notice with the earlier postmark or delivery date, if hand delivered, shall control, and if the notices are postmarked or delivered on the same day, the Put or Call Notice providing the highest Deadlock Price shall control. The Offeree shall, within 45 days after receipt of the Put or Call Notice, give written notice to the Offeror of the Offeree's election to sell or purchase pursuant to the terms of the Put or Call Notice. In the absence of a timely written election by the Offeree, the Offeree shall be deemed to have elected to sell his or her Shares at the Deadlock Price. The purchaser, whether the Offeror or the Offeree, shall pay the entire Deadlock Price by certified or cashier's check at the Closing, which shall take place at a date designated by the purchaser, which date shall not be more than 90 days following the receipt of the Put or Call Notice by the Offeree.

If the purchaser, whether the Offeror or the Offeree, breaches the terms and conditions of this provision and fails to close and/or pay the Deadlock Price as provided for in this Article ("Defaulting Purchaser"), then the non-breaching party shall have the option, exercisable by written notice within 30 days after the original closing date, to purchase the Shares of the Defaulting Purchaser at a price equal to 80% of the Deadlock Price by certified or cashier's check at a closing that shall take place at a date designated by the original seller above, which date shall not be more than 90 days following the date of exercise of the option on default.

Notwithstanding the foregoing, if a Shareholder dies after the Statement Date and before the closing, the procedure and provisions of this article shall be deemed to have lapsed and the provisions of this Agreement for the purchase of a Shareholder's Shares on death shall apply. Upon the issuance of a Put or Call Notice, the provisions of Article III shall no longer apply.

#### **b. Liquidation Alternative**

If the Shareholders or the Board are equally divided with respect to the management of the Corporation's property, business, or affairs, or are equally divided in any question, dispute, or controversy, and this division concerns the proper subject for action by the Shareholders or directors, the parties agree to use their best good faith efforts to settle the matter by mutual agreement. They may submit the matter to arbitration (the terms of which shall be agreed to at that time), but they are under no obligation to do so. If a dispute resulting in a deadlock continues to exist, any Shareholder shall have the option to dissolve the Corporation. If a Shareholder desires to exercise this option, such Shareholder shall do so by giving the other Shareholder(s) written notice of the exercise. The dissolution of the Corporation shall be completed within one year after the date the written notice exercising the option to dissolve is properly given.

#### **c. Advisory Board Alternative**

In the event there is deadlock between the Shareholders on an issue which cannot be resolved after the Shareholders have met on two separate occasions held at least five and not more than ten days apart, the issue shall be determined by a Board of Advisors (as defined below). The Board of Advisors shall have 30 days to make their recommendation to the Shareholders. The Shareholders shall have five days, beginning on their receipt of the

recommendation from the Board of Advisors, to either accept or reject such recommendation. If the Shareholders are still unable to agree to a resolution of the issue within such five-day time period, the recommendation of the Board of Advisors shall be conclusive and binding on the Shareholders. Provided, however, items requiring a supermajority vote as set out in Section \_\_\_\_\_, may not be submitted to the Board of Advisors for determination.

The members of the Board of Advisors shall be set forth and attached hereto as Exhibit \_\_\_\_\_. The Shareholders hereby agree to meet for purposes of determining the members of the Board of Advisors at intervals of not more than 12 months from the date of the preceding determination. In the event the Shareholders have not determined the members of the Board of Advisors within such 12-month interval, the members set forth on the most recent Exhibit \_\_\_\_\_ shall continue to serve on the Board of Advisors.

**d. Arbitration**

In the event of a deadlock between the Shareholders on a Material Issue, as defined below, which issue cannot be resolved after the Shareholders have met on two separate occasions held at least five and not more than ten business days apart, the issue shall be resolved in accordance with the terms set forth herein. For purposes of this paragraph, a Material Issue shall be an issue which materially affects the operation of the business of the Corporation as determined by an independent third party selected by the mutual agreement of the parties or, in the event the parties cannot agree on a third party, as determined by an arbitrator selected by the American Arbitration Association in the county in which the Corporation's principal place of business is located. The parties agree that the determination of the third party or arbitrator shall be conclusive and binding.

If an issue is determined to be a Material Issue and the parties are still unable to resolve the issue within five business days after their receipt of the determination by the third party or arbitrator, the Shareholders agree that they shall determine by a coin toss within five business days after the date on which they received the determination that the issue is a Material Issue, which Shareholder shall make the decision regarding the Material Issue.

In the event an issue is determined to be non-material and the parties are still unable to resolve the issue within five business days after the receipt of the determination by the third party or arbitrator, as the case may be, the matter shall be determined by arbitration in the county in which the Corporation's principal place of business is located, pursuant to the then-current rules of the American Arbitration Association. The expenses associated with any arbitration proceeding required hereunder and the expenses associated with the making of the determination as to whether an issue is material, shall be equally shared by the Shareholders.

**Section 7.4 Retention of Control [Optional]**

Upon the death or incompetency of \_\_\_\_\_, the successor trustee of the \_\_\_\_\_ Trust (or an individual selected by such successor trustee) or agent under a valid durable power of attorney for that individual, shall replace him/her on the Board until all of the Shares owned by such Trust have been purchased by the Corporation and the purchase price has been paid in full. For this purpose, the determination of "incompetency" shall be made

as provided by the terms of such Trust or power of attorney. *[Note - this may prevent qualification as a corporate redemption for tax purposes if severing all ties of the selling Shareholder is required.]*

### **Section 7.5 Founders Rights**

In the event the Corporation is liquidated, \_\_\_\_\_ shall have the right to receive the following items as part of his/her distributive share, to be valued for that purpose at \$1.00: the name of the Corporation, the right to continue to use the Corporation's place of business, equipment, advertising and letterhead, and the right to all other intellectual property and goodwill of the Corporation

### **Section 7.6 Multiple Classes of Stock**

*[Note: Attachment CLASSES OF STOCK CLAUSE FOR ARTICLES for a sample provision to include in the Articles to establish different classes of stock.]*

## **ARTICLE 8 NON-COMPETE & CONFIDENTIALITY**

### **Section 8.1 Covenants**

As a material inducement to the parties hereto to enter into this Agreement, the Shareholders hereby covenant and agree as follows:

#### **a. Confidential Information**

During the period that any Shareholder owns Shares, and at all times after he/she ceases to own Shares, such Shareholder shall not, directly or indirectly, divulge or disclose, for any purpose whatsoever, any confidential information, including without limitation, the Corporation's trade secrets, systems, procedures, manuals, confidential reports, as well as the nature and type of services rendered by the Corporation, the equipment and methods used and preferred by the Corporation, and fees paid by its customers, which has been obtained by or disclosed to him or her as a result of his or her status as a shareholder, officer, director and/or employee of the Corporation; provided, however, such Shareholder shall be permitted to divulge or disclose any financial or other relevant information to the extent reasonably necessary for him to perform his responsibilities and duties as a shareholder, director, employee and/or officer of the Corporation; further, the following information is excluded from the scope of this provision: (i) information that is or becomes a part of the public domain; (ii) information that such Shareholder can reasonably and promptly demonstrate was in the receiving party's possession at the time divulged or disclosed by such Shareholder; (iii) information that is required to be disclosed by law or to comply with a subpoena or court order; (iv) information that is required to be disclosed to the Internal Revenue Service or other taxing authority in connection with an audit; or (v) information necessary to enforce any term or provision of this Agreement.

**b. No Competition**

During the period that any Shareholder owns Shares, and for a period of \_\_\_\_\_ years after he and his Permitted Transferees cease to own Shares, such Shareholder shall not, within the greater \_\_\_\_\_ metropolitan area *[OR \_\_\_\_\_ miles from any then-existing office of the Corporation]*, engage in the business of \_\_\_\_\_ or otherwise compete with the Corporation in any of its business ventures, directly or indirectly and whether as a proprietor, partner, investor, shareholder, director, officer, consultant, independent contractor, co-venturer, employer, employee, principal, agent, manager, representative or in any other capacity.

**c. No Solicitation**

During the period that any Shareholder owns Shares, and for a period of \_\_\_\_\_ years after that Shareholder and any of his/her Permitted Transferees cease to own Shares, with respect to the business described in the immediately preceding paragraph, such Shareholder shall not, directly or indirectly, solicit business from, divert business from, or perform services for or to, any customer of the Corporation, including any potential customer for which a bid has been or is expected to be submitted by the Corporation.

**d. No Hire**

During the period that any Shareholder owns Shares, and for a period of \_\_\_\_\_ years after that Shareholder and any of his/her Permitted Transferees cease to own Shares, such Shareholder shall not, directly or indirectly, solicit for employment or employ any employee of the Corporation, or any individual who was employed by the Corporation within the six-month period preceding purchase of such Shareholder's Shares.

**Section 8.2 Remedies**

**a. Injunctive Relief**

The parties acknowledge that a violation of this non-competition covenant will cause irreparable damage to the Corporation, the exact amount of which may not be subject to reasonable or accurate ascertainment, and therefore the Shareholders hereby consent that in the event of such violation, the Corporation shall as a matter of right be entitled to injunctive relief to restrain them, or any person or entity acting for or on behalf of them, from violating this covenant without the necessity of posting bond. Such remedies, however, shall be cumulative and in addition to any other remedies to which the Corporation may then be entitled.

The Shareholders agree that in the event the Corporation seeks an injunction against them to prevent them from violating these covenants, the time periods will not begin to run until such time as a court or arbitrator grants injunctive relief to the Corporation, and that any time between the date of the inception of the non-compete period and the date injunctive relief is granted will not be credited toward the time period restriction.

The Shareholders represent and acknowledge that their experience and capabilities are such that they can obtain employment in businesses other than a business which competes with the Corporation, and that the enforcement of a remedy by way of injunction will not prevent them from earning a livelihood.

**b. Reasonableness of Restrictions**

It is expressly understood and agreed that although the parties consider the restrictions contained herein reasonable as to protected business, duration and geographic area, in the event any arbitrator or court of competent jurisdiction deems them to be unreasonable, then such restriction shall apply to the broadest business, longest period and largest territory as may be considered reasonable by such arbitrator or court, and this Agreement as so amended shall be enforced.

**c. Accounting for Profits**

If there is any breach of the covenants the Corporation shall be entitled to an accounting and repayment of all profits, compensation, commissions, remunerations or benefits that the breaching Shareholder directly or indirectly has realized and/or may realize as a result of, growing out of or in connection with any such violation. Such remedy shall be in addition to and not in limitation of any injunctive relief or other rights or remedies to which the Corporation is or may be entitled at law or in equity or under this Agreement, including, for this purpose, the right of the Corporation to withhold any payments due to such Shareholder under any promissory note issued pursuant to any of the provisions of this Agreement.

**d. Forfeiture [*Optional*]**

Upon a material breach of any of these covenants, the Corporation may declare forfeited all amounts remaining to be paid to the breaching Shareholder, whether due under this Agreement or otherwise.

**e. Attorneys' Fees**

The Corporation shall be entitled to recover its reasonable attorneys fees incurred in enforcing its rights under these covenants.

**Section 8.3 Continuing Employment [*Optional*]**

In the event that the Corporation's assets or stock are sold, or the Corporation is merged or consolidated, \_\_\_\_\_ hereby agrees to continue in the employ of the purchaser or surviving entity for a period of not less than two years, provided however, the compensation and benefits payable to the him/her are substantially equivalent to the compensation and benefits received by him/her for the 90-day period immediately preceding such sale, merger or consolidation.

## **ARTICLE 9**

### **S STATUS**

If and so long as the Corporation has elected S corporation tax status under IRC §1361 and §1362, the following provisions shall apply:

#### **Section 9.1 Maintaining S Corporation Status**

The Corporation has elected to be taxed under Subchapter S of the IRC, Treasury Regulations promulgated thereunder (“Treas. Reg.”), and applicable State law, and the parties hereby acknowledge their intention to continue such election unless they shall terminate it in accordance with the provisions of this Agreement. Therefore, the parties agree that they will do nothing, directly or indirectly, which will cause an inadvertent or wrongful termination of the Corporation’s S election. Furthermore, the parties agree to take such action as may be required to continue such election and to prevent its termination.

In order to prevent an inadvertent or wrongful termination of the Corporation’s S election, the Corporation shall not file a consolidated tax return with any affiliated C corporation. The Corporation may own 100% of a domestic corporation that qualifies as a Subchapter S corporation which it elects to treat as a Qualified Subchapter S Subsidiary pursuant to IRC §1361(b)(3). In order to prevent the Corporation’s debt instruments from being treated as second class of stock, the form of such debt instrument, if any, shall satisfy the requirements for “straight debt” as that term is defined in IRC §1361(c)(5)(B) and shall be nontransferable during the Shareholder’s life unless the transferee of the debt instrument is a person whose ownership of shares in the Corporation would not result in the termination of the Corporation’s S election.

If any Shareholder causes a termination of the Corporation’s S election, the Corporation may request the IRS to waive the terminating event under IRC §1362(f), if the termination could be considered inadvertent, or request the IRS to permit the Corporation to file a new S election under IRC §1362(g). Each Shareholder agrees to enter into an agreement under IRC §1362(f)(4) to make any adjustments required by the IRS to cure an inadvertent termination of the Corporation’s S election.

Any Shareholder who violates this Agreement and as a result causes a termination of the Corporation’s S election, shall indemnify, defend and hold harmless the other Shareholders with respect to any damages they suffer as a result of the termination.

Notwithstanding anything contained in this Agreement to the contrary, the parties agree that the Corporation’s S election may be revoked upon the affirmative vote of [100%] of the Shares. If the requisite vote is obtained, each Shareholder agrees to execute the necessary forms to implement the revocation.

#### **Section 9.2 Permissible Shareholders**

No Shareholder shall Transfer Shares to a transferee who is not eligible to be a shareholder in an S corporation as defined by IRC §1361, or if the transfer increases the number of shareholders to more than the number of shareholders permitted under IRC §1361, and any

such transfer shall be null and void *ab initio*. If the transfer of Shares is to a trust with respect to which an election must be made for the trust to satisfy the preceding sentence, such transfer shall be permitted only upon approval by the Corporation's counsel as to the election's validity and proof of timely filing of such election.

*[Option if you want to include a list:]*

No Shareholder shall transfer any of his or her Shares to:

- (a) A person who, when added to the other shareholders of the Corporation, would cause the total number of shareholders of the Corporation to exceed the number permitted by IRC §1361(b)(1)(a) (as of the date of this Agreement, that number is 100);
- (b) An individual who is a nonresident alien;
- (c) A trust which fails to satisfy the requirement of IRC §1361(c)(2), (d) or (e) or other requirements for permitted shareholders of an S corporation;
- (d) A personal representative, unless the personal representative is directed by the governing instrument or enters into an agreement not to revoke the Corporation's S election (except for a revocation permitted in accordance with this Agreement); or
- (e) Any person whom the shareholder knows, or has reasonable grounds to believe, will take action which will cause the Corporation's S election to terminate.

Any such transfer shall be null and void *ab initio*.

*[Note: Attachment SAVINGS CLAUSE FOR TRUST OWNING S STOCK for a sample savings clause to use in a trust that might own S stock.]*

### **Section 9.3    Income Allocation for Partial Year**

#### **a.        Close the Books Alternative**

An election will be made pursuant to IRC §1374(a)(2) to treat the shareholders as though the taxable year of the corporation during which a purchase occurs consisted of two taxable years, the first of which ended on the Effective Date of Purchase. Further, an election under IRC §1362 will be made to allocate items of income, deduction or loss upon any termination of the S election of the Corporation between the S short year and the C short year according to the time they were incurred or realized as reflected on the books and records of the Corporation, rather than on a pro rata basis. The corporation and each Shareholder hereby agree to take all actions and execute and file such elections and other documents as may be necessary for such election to be made.

**b. Pro Rata Alternative**

Upon a purchase of Shares, the income, deductions, credits and other tax attributes of an S corporation for the entire tax year shall be allocated on a pro rata basis, based on the portion of the tax year ending on the Effective Date of Purchase.

**Section 9.3 Agreement Concerning AAA**

The parties agree to consent to the election under IRC §1368(e)(3) to treat all distributions during the Corporation's taxable year as being out of the Corporation's accumulated earnings and profits to the extent thereof, rather than from the accumulated adjustments account.

**Section 9.4 Tax Dividends**

*[Option No. 1]*

The corporation shall pay cash dividends during the course of and immediately following the end of each fiscal year in amounts sufficient for the Shareholders to pay their federal and state income taxes attributable to the Corporation determined based on the highest marginal income tax rates and also to allow the Shareholders to make estimated tax payments on a quarterly basis without incurring any penalty. Such dividends shall be paid no later than the due date of the Shareholders' income tax returns and estimated tax payments. Notwithstanding the foregoing, however, dividends shall only be paid out of surplus or other funds to the extent allowed by law. For this purpose, the highest marginal income tax rate shall be based upon the sum of the maximum federal income rate tax under the IRC plus the maximum *[name of state]* income tax rate imposed on individual taxpayers. Dividends paid pursuant to this paragraph shall not be in addition to other dividends paid during and immediately after the end of the fiscal year, but instead other dividends paid during and immediately after the end of the fiscal year shall be deemed to satisfy the requirement that dividends for income tax purposes be made to the extent such other dividends have been paid. The Corporation may also pay dividends in excess of the amounts required by this paragraph.

*[Option No. 2]*

Provided cash flow exists in the opinion of the Board of Directors, the Corporation agrees to distribute cash to each Shareholder, within \_\_\_\_\_ days after the end of the Corporation's tax year in sufficient amounts to pay federal, state and local income taxes on the net distributive share of income, losses, deductions and credits that have passed through to the Shareholders under IRC §1366 as shown on each Shareholder's Schedule K-1 of the Corporation's informational tax return Form 1120-S. For purposes of determining the amount of the distribution to be made pursuant to this paragraph, each Shareholder is assumed to be taxable at the highest marginal federal, state, and local income tax rates applicable to married individuals filing a joint tax return and to fully utilize any losses, deductions, and credits passed through under IRC §1366.

### **Section 9.5 Tax Matters Shareholder**

The parties hereby appoint the president of the Corporation as the “Tax Matters Shareholder” to act on behalf of the Shareholders and the Corporation for federal tax audit purposes.

### **Section 9.6 Tax after Purchase**

The parties agree that upon a purchase of Shares in accordance with this Agreement:

- (a) The selling Shareholder will indemnify and hold harmless the other Shareholders with respect to the selling Shareholder’s pro rata share of the tax liabilities which may have accrued during the time that the selling Shareholder held Shares.
- (b) The Corporation and the other Shareholders will indemnify, defend and hold harmless the selling Shareholder with respect to any tax liabilities or loss of tax benefits such Shareholder may incur as a result of any action taken by the Corporation or other Shareholders after the disposal of the Shares, including by way of example, any action which results in the termination of the Corporation’s S election, or causes a retroactive change or adjustment in the Corporation’s tax returns, method of accounting or status as an S corporation.

### **Section 9.7 Power of Attorney**

Each Shareholder hereby irrevocably appoints the president of the Corporation as his or her attorney-in-fact to enter into the agreements, consents and elections referenced under this Article on behalf of the Shareholder, if the requisite vote is obtained, or in the case of an inadvertent termination without the need for a vote. This power, coupled with an interest, shall constitute an irrevocable proxy to vote stock, shall not expire on the death or incapacity of the appointing Shareholder, and may not be revoked while this Agreement is in effect. The parties agree to execute any further documentation that may be required to enforce the terms of this Section.

## **ARTICLE 10 REMEDIES & ARBITRATION**

### **Section 10.1 Specific Performance**

The parties declare that it is impossible to measure in money the damages that would accrue to a party to this Agreement by reason of a failure to perform any of the obligations under this Agreement. The Shares may not be readily purchased or sold on the open market, and for that reason, among others, the parties will be irreparably damaged if this Agreement is not specifically enforced. Should any dispute arise concerning the sale or disposition of Shares, an injunction may be issued (without the necessity of posting bond) restraining any sale or disposition pending the determination of the controversy. In the event of a controversy concerning the right or obligation to purchase or sell any Shares, the right or obligation shall be enforceable in a court of equity by a decree of specific performance. This remedy shall, however, be cumulative and nonexclusive and shall be in addition to any other remedies that the parties may have.

## **Section 10.2 Expenses of Litigation**

In any arbitration or action at law or in equity to enforce any of the provisions or rights under this Agreement, the unsuccessful party, as determined by the arbitrator or court in a final judgment or decree, shall pay to the successful party or parties all costs, expenses and reasonable attorneys' fees incurred therein by such party or parties, including such costs, expenses and fees as may be incurred on any appeal; and if such successful party or parties shall recover judgment in any such action or proceeding, costs, expenses and attorneys' fees shall be included as a part of such judgment.

## **Section 10.3 Arbitration**

Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement, the transactions contemplated by this Agreement, or breach thereof shall be subject to mediation and, in the event no mediated resolution is reached, then subject to arbitration by a single arbitrator in \_\_\_\_\_ [city and state] in accordance with the Rules of the American Arbitration Association currently in effect. The determination of the arbitrator shall include which party shall pay the cost of the arbitration and shall be final, binding on the parties and non-appealable, and may be entered in any court of competent jurisdiction to enforce it. The parties acknowledge, agree and stipulate that the activities of the corporation and the actions contemplated by this Agreement include the use of interstate mails, materials and commerce and thus involve interstate commerce, as that term is defined in the Federal Arbitration Act, 9 U.S.C. section 1, *et seq.*

## **Section 10.4 Governing Law**

This Agreement shall be governed by and construed in accordance with the domestic laws of the State of \_\_\_\_\_ without giving effect to any choice or conflict of law provision or rule (whether of the State of \_\_\_\_\_ or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of \_\_\_\_\_. Any litigation concerning this Agreement shall be brought only in the \_\_\_\_\_ Court of \_\_\_\_\_ County, \_\_\_\_, which court shall have the exclusive venue for and have exclusive jurisdiction over such litigation. The parties hereby expressly consent to the jurisdiction and venue of said courts and to service of process upon them regardless of where they may be located.

## **Section 10.5 Severability**

If any portion of this Agreement is held to be invalid or unenforceable for any reason, it is agreed that this invalidity or unenforceability shall not affect the other portions of this Agreement, and that the remaining covenants, terms, and conditions or portions thereof shall remain in full force and any arbitrator or court of competent jurisdiction may so modify the objectionable provision as to make it valid, reasonable, and enforceable.

## **ARTICLE 11** **MISCELLANEOUS**

### **Section 11.1 Termination & Amendment**

This Agreement shall terminate on the occurrence of any of the following events:

- (i) Cessation of the Corporation's business;
- (ii) Bankruptcy, receivership, or dissolution of the Corporation;
- (iii) Reduction in the number of Shareholders to one; or
- (iv) The voluntary agreement of *[all of the parties]* or *[Shareholders owning a majority OR two-thirds OR 100% of the outstanding Shares]*.

Upon the termination of this Agreement, each Shareholder shall surrender to the Corporation the certificates representing his stock, and the Corporation shall issue to him in lieu thereof new certificates for an equal number of shares without the endorsement required by this Agreement.

Any Shareholder who disposes of all of his or her Shares in accordance with the terms of this Agreement shall be relieved of all obligations under this Agreement and shall no longer be a party to this Agreement, except for any obligations or liabilities arising prior to such disposition. On termination of this Agreement, the Corporation's secretary shall, on tender of the stock certificates, delete the legend endorsed on them pursuant to this Agreement.

In the event of the death of all of the Shareholders simultaneously or within a period of 30 days, *[the obligations to purchase and sell under this Agreement shall be null and void] OR [the Corporation shall not be obligated to purchase and the Shareholders and their estates shall not be obligated to sell any Shares under this Agreement]*.

This Agreement may be amended or modified only by a written instrument executed by *[all of the parties to this Agreement] OR [Shareholders owning a majority or two-thirds of the outstanding Shares]*.

### **Section 11.2 Rights to Use Shareholder's Name**

The Corporation shall have the right to continue to use the name of \_\_\_\_\_ as part of the Corporation's name, regardless of whether \_\_\_\_\_ dies, ceases to be a shareholder, or otherwise. Provided, however, if the Corporation is liquidated, its assets are assigned for the benefit of creditors, *[or there is a Material Transaction]*, then this right shall not continue to any successor in interest.

### **Section 11.3 Spouses' Interest**

Any community property or other interest that a spouse might have in the Shares is subject to the terms and conditions of this Agreement, and spouse shall have no right to participate in management, including without limitation vote as a shareholder or attend shareholder meetings, and shall have no rights or interest except through the Shareholder. Any right to purchase Shares owned by an Shareholder shall include the right to purchase any interest in any Shares the Shareholder's spouse or former spouse might have. Each Shareholder, by signing this Agreement, represents and warrants to the Corporation that he or she has obtained the valid and legally binding consent of his or her spouse to this Agreement as provided above and that such consent is effective to carry out these provisions, and agrees to indemnify the Corporation from any expenses, damages, losses, claims, liability or adverse affect which may result by reason of a spouse, deceased spouse, or divorced spouse having any rights or interest in the Corporation other than through the Shareholder and in accordance with this Agreement.

### **Section 11.4 Waiver of Conflict of Interest**

The law firm of \_\_\_\_\_ (the "Law Firm") has represented the Corporation in the preparation of this Agreement. Each of the Shareholders acknowledges that he or she: (i) was advised in advance by the Law Firm that a conflict exists among their individual interests, that this Agreement may have tax consequences, and that they are advised to secure separate independent legal counsel in connection with signing and making this Agreement and its effect upon each of them; (ii) has carefully read and understood the provisions of this Agreement; (iii) has had the opportunity to seek the advice of independent legal counsel; (iv) has had the opportunity to request such information and has received such information about the Corporation and the other Shareholders as he or she requested; and (v) is signing and making this Agreement voluntarily.

### **Section 11.5 Notice**

Unless otherwise provided herein, all notices, requests, demands, and other communications under this Agreement shall be in writing. Unless otherwise provided herein, notice shall be deemed to have been duly given (i) on the date of service, if served personally, or by facsimile or other electronic transmission with confirmation of successful transmission, on the party to whom notice is to be given, (ii) within seven calendar days after mailing, if mailed to the party to whom notice is to be given, by registered or certified mail, return receipt requested, postage prepaid, and properly addressed, or (iii) within three calendar days after deposit with a delivery service, if sent to the party to whom notice is to be given by a service guaranteeing overnight delivery, costs prepaid, and properly addressed:

- (i) If to the Corporation, to \_\_\_\_\_, with a copy to \_\_\_\_\_.
- (ii) If to a Shareholder, to such party's last known address as set forth in the records of the Corporation.

or to any other address that any party may designate by written notice to the others.

## **Section 11.6 Waiver**

The failure of any party at any time or times to require performance of any provision of this Agreement shall in no manner affect the right to enforce that provision at a later time. No waiver by any party of any breach of any term contained in this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such breach or a waiver of any other term contained in this Agreement.

## **Section 11.7 Binding Effect**

This Agreement shall be binding upon the Shareholders, and their heirs, executors, administrators or other legal representatives, irrespective of their desire to sell Shares, who shall be bound to carry out the provisions of this Agreement and to sell and transfer the certificates evidencing ownership of such Shares to the Corporation or to the Shareholders in full compliance with the terms and provisions of this Agreement. This Agreement shall inure to the benefit of the heirs, executors, administrators or other legal representatives of the Shareholders and to the successors and assigns of the Corporation.

The Shareholders shall not make any agreement or contract with others that would tend to amend, alter, rescind or abrogate the provisions of this Agreement, nor will they make any will, deed of gift or other testamentary disposition in contravention of this Agreement. In the event any Shareholder violates the terms of this Agreement, the Corporation shall have the right to compel the holder or transferee to deliver such Shares in accordance with the provisions of this Agreement.

## **Section 11.8 Documentary Stamps [Optional]**

Whenever any stock is sold pursuant to this Agreement, the seller shall affix to the certificates representing the stock any necessary state or federal documentary stamps.

## **Section 11.9 Entire Agreement**

This Agreement (including the documents referred to herein) constitutes the entire agreement among the parties hereto, and there are no agreements, understandings, restrictions, warranties, or representations among the parties other than those set forth herein or herein provided for. The foregoing supersedes all prior agreements and understandings, written or oral, to the extent they related in any way to the subject matter hereof. This Agreement shall extend to and cover all Shares presently or subsequently held by any of the Shareholders.

## **Section 11.10 Assignment**

Neither this Agreement nor any right created hereby shall be assignable by Shareholder without the prior written consent of the Corporation. Nothing in this Agreement, expressed or implied, is intended to confer upon any person, other than the parties hereto and their successors, any rights or remedies under or by reason of this Agreement.

### **Section 11.11 Agreement is Not an Employment Contract**

Nothing contained herein shall give any Shareholder the right to be retained in the employ of Corporation or to interfere with the right of Corporation to discharge the Shareholder at any time, nor shall it interfere with the Shareholder's right to terminate his or her employment at any time.

### **Section 11.12 Setoff**

If at any time a Shareholder (in any capacity) is indebted or otherwise obligated to the Corporation or any of its affiliates, the Corporation may setoff against and deduct from any payments or other amounts due the Shareholder under this Agreement, or under any note issued to that Shareholder, the amount of the indebtedness and other obligations due the Corporation and/or any of its affiliates by such Shareholder, and any such setoff shall discharge the Corporation's obligations to the extent of the amount setoff. The existence and amount of any such indebtedness or other obligations of the Shareholder shall be determined by the Board.

### **Section 11.13 Construction**

The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local, or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word "including" shall mean including without limitation. Whenever the masculine gender is used, it shall be deemed to include the feminine or neuter gender as well and the singular shall include plural and vice versa, all as the contents shall require. The headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

### **Section 11.14 Performance of Necessary Acts**

The Shareholders agree to perform any further acts and to execute and deliver any additional documents which may be reasonably necessary to carry out the provisions of this Agreement.

### **Section 11.15 Counterparts and Date of Execution**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument. The date of this Agreement is intended as a date for the convenient identification of this Agreement and is not intended to indicate that this Agreement was executed and delivered on such date.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement by their duly authorized officers and representatives, to be effective as of the first date set forth above.

*[add signature lines for the Corporation and current shareholders]*

**EXHIBIT**

**CONSENT OF SPOUSE**

I acknowledge that I have read the foregoing Shareholders Agreement and that I know its contents. I am aware that by its provisions my spouse or I may be required to sell all of the Shares of stock in the Corporation owned by us, including my community interest therein, upon the occurrence of certain events, including but not limited to my spouse's death, termination of my spouse's employment by the corporation or the dissolution of our marriage. I hereby consent to all required sales of Shares pursuant to the Agreement, approve the provisions of the Agreement, and agree that, if I predecease my spouse, I will not bequeath any of such shares by my will or other instrument to any person other than my spouse. I direct that the residuary clause in my will shall not be deemed to apply to my community interest in such shares.

*[add signature, date lines, and notary]*

## **EXHIBIT**

### **CERTIFICATE OF DESIGNATIONS**

Pursuant to Section \_\_\_\_\_ of the certain Shareholders Agreement (the “Agreement”) by and between \_\_\_\_\_ (the “Corporation”) and its Shareholders, the [Shareholders/Directors] of the Corporation hereby appoint the individual or entity set forth below as the appraiser for any shares of the Corporation which may hereafter become subject to disposal pursuant to the terms of the Agreement for a period of [18/12] months from the date hereof, or until such time as the [Shareholders/Directors] shall mutually agree to remove him/it from such position.

Name of Appraiser: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT**

**CERTIFICATE OF VALUE**

The undersigned do hereby certify that as of the date set forth below, the fair market value of the issued and outstanding capital stock of \_\_\_\_\_ owned by the shareholders is equal to the amount set forth opposite each shareholder's name as follows:

| <u>Shareholder</u> | <u>No. of Shares</u> | <u>Fair Market Value Per Share</u> |
|--------------------|----------------------|------------------------------------|
| Shareholder A      | X                    | \$                                 |
| Shareholder B      | X                    | \$                                 |

Dated:

---

By: \_\_\_\_\_  
, President

---

, Individually

---

, Individually

## **EXHIBIT**

### **ADDENDUM TO SHAREHOLDERS AGREEMENT**

The undersigned hereby acknowledges that he/she has read the Shareholders Agreement, dated \_\_\_\_\_, 20\_\_\_\_, (the “Agreement”) by and among \_\_\_\_\_ (the “Corporation”) and its shareholders attached hereto as Exhibit A. By signing this Addendum, the undersigned hereby agrees to adhere to and be bound by the terms and conditions set forth in the Agreement as if an original signatory.

The parties have executed this Addendum on \_\_\_\_\_, 20\_\_.

*NAME OF CORPORATION*

By:

\_\_\_\_\_, President

**SHAREHOLDER:**

## EXHIBIT

### PROMISSORY NOTE AND SECURITY AGREEMENT

*[The terms of notes and security or pledge agreements can vary considerably under state law; please use this form only as an example since other provision may be necessary for a valid note or agreement under your state law. This form assumes the Corporation is acquiring the Shareholder's Shares.]*

Date: \_\_\_\_\_ \$ \_\_\_\_\_

FOR VALUE RECEIVED, the undersigned \_\_\_\_\_ ("Obligor") whose primary residence is located at \_\_\_\_\_, promises to pay, without demand, deduction, set-off or counterclaim, to the order of \_\_\_\_\_ ("Holder"), the principal sum of \$\_\_\_\_\_.

Interest shall accrue on the outstanding principal balance of this Promissory Note and Security Agreement (the "Note") until paid in full at the rate of interest announced or adopted by \_\_\_\_\_ Bank as its "prime rate" in effect on the first day of the month as to amounts outstanding during that month. Principal and accrued interest thereon is due in \_\_\_ equal monthly installments.

Obligor may prepay this Note in whole or in part at any time without penalty. Any prepayment of principal shall be applied to the principal payments due in the inverse order of their installment maturities.

Obligor hereby grants to Holder a security interest in the Collateral described below to secure the payment and performance of all existing or future obligations of any nature whatsoever of Obligor to Holder, including, without limitation, all amounts owing under this Note. "Collateral" means all of Obligor's right, title and interest in and to the following property, whether such property or Obligor's right, title or interest therein or thereto is now owned or existing or hereafter acquired or arising: \_\_\_\_\_, and all proceeds of each of the foregoing. Obligor authorizes Holder to file one or more Uniform Commercial Code financing statements describing the Collateral in any filing offices in any jurisdictions. The foregoing security interest shall remain in effect until all obligations of Obligor to Holder have been indefeasibly paid in full and Holder has no obligation to extend credit to or for the benefit of Obligor.

Obligor represents and warrants to Holder that Obligor owns the Collateral free and clear of any lien, claim or other encumbrance, except for Holder's rights therein; and Obligor covenants to Holder that Obligor will not sell or otherwise transfer, or grant or permit to exist any security interest or other claim against, all or any part of the Collateral or any interest of Obligor therein, except for rights granted to Holder with respect to the Collateral. Obligor shall fully perform all of Obligor's obligations under the Shareholder's Agreement.

If Obligor fails to pay any principal or interest due Holder, whether under this Note or otherwise, or if Obligor defaults in the payment or performance of any of Obligor's other obligations due Holder and such default is not cured within five days after Holder gives Obligor notice thereof, or if any bankruptcy or other insolvency proceeding is filed by or against Obligor, or if Obligor makes any material misrepresentation to Holder regarding any material fact (each of the foregoing being an "Event of Default"), then at such time or at any time thereafter Holder may, at its option, declare the outstanding principal balance of this Note and all other obligations of Obligor to Holder to be immediately due and payable in full, whereupon the same shall become and be due and payable at once without notice or demand, and Holder may exercise all other rights and remedies available to Holder by contract, at law or in equity, including, without limitation, Holder's right to realize on the Collateral.

Further, if an Event of Default is in effect, interest shall accrue on the unpaid principal balance of this Note at a rate equal to three percent (3%) above the rate that would otherwise apply.

So long as no Event of Default is in effect, Obligor shall be entitled (a) to exercise any and all voting and other consensual rights pertaining to the Collateral or any part thereof for any purpose not inconsistent with the terms of this Note, and (b) to receive and retain, free of any security interest hereunder, all Collateral consisting of distributions (other than distributions payable in stock of Holder or other securities). However, if any Event of Default is in effect, all rights of Obligor to exercise the voting and other consensual rights which Obligor would otherwise be entitled to exercise pursuant to this paragraph, and all rights of Obligor to receive or retain any distributions in respect of the Collateral pursuant to this paragraph, shall in each case cease, and all such rights shall thereupon become vested in Holder who shall thereupon have the sole right to exercise such voting and other consensual rights and to receive and retain such distributions, in Holder's election, as additional security for or to be applied against Obligor's obligations to Holder.

The failure of Holder to exercise any option or any right to which Holder may be entitled shall not constitute a waiver of the right to exercise the option or any right at any time thereafter.

Obligor shall pay to Holder on demand all reasonable costs and expenses incurred by Holder, including, without limitation, reasonable attorneys' fees and expenses, to collect any amounts due Holder under this Note and/or to otherwise protect or enforce Holder's rights under this Note.

Obligor waives presentment for payment, demand, protest and notice of demand, protest and nonpayment, and consents to any and all renewals, extensions or modifications which may be made by Holder as to the time of payment of this Note, from time to time, and further agrees that any security for this Note or any portion of such security may be from time to time modified or released in whole or in part without affecting the liability of any party liable for the payment of this Note. Holder shall at all times have the right to proceed against any obligor of, and any portion of any security for, this Note in any order and in any manner as Holder may choose, and without waiving rights with respect to any other obligor or security,

as the case may be. Obligor also waives any right to direct the application of any payments or collateral proceeds received by Holder.

This Note shall be governed by the laws of the State of \_\_\_\_\_ without regard to any conflict of law principles thereof which give effect to the laws of any other jurisdiction. If any provision of this Note or application hereof to any person or circumstance which, for any reason and to any extent, is invalid or unenforceable, neither the remainder of this Note nor the application of such provision to any other person or circumstance shall be affected by it, but rather the same shall be enforced to the fullest extent permitted by law. Any matters hereunder which may be brought in a court of law shall be brought only in the \_\_\_\_\_ Court of \_\_\_\_\_, and the Holder and Obligor hereto hereby irrevocably consent to personal jurisdiction in \_\_\_\_\_ County, \_\_\_\_\_, and acknowledge the convenience and propriety of the venue.

If the interest rate under this Note exceeds the maximum lawful interest rate at any time, then the interest rate under this Note, for such period of time during which it exceeds the maximum lawful rate, will be reduced to and will equal the maximum lawful rate at such time. If Holder receives any interest payments in excess of the maximum amount permitted by law, such excess will be applied to reduce the outstanding principal balance, whether then due and payable or not, and any other amounts owing under this Note, and the balance remaining, if any, will be returned to Obligor upon Obligor's request. Obligor covenants to Holder that the proceeds of this Note will be used only for business purposes, and that no proceeds will be used for personal, family or household purposes. Obligor agrees that this loan is a "business loan" within the meaning of, and that it is exempt from usury restrictions under state law.

Obligor shall not move Obligor's primary residence as indicated in the first paragraph of this Note without giving Holder at least 30 days' prior written notice of the address of Obligor's new primary residence.

*[Option No. 1]*

Obligor shall have at all times, whether before or after the occurrence of an Event of Default, the right to retain and set-off against Obligor's obligations to Holder any and all amounts due Obligor from Holder by reason of Holder's interest in Obligor, whether for distributions of dividends, profits or otherwise, or for any other reason.

*[Option No. 2]*

This Note is negotiable and may be assigned by Holder; and, in any event, Obligor agrees that Obligor will not assert any deduction, set-off or counterclaim against any subsequent holder or other assignee hereof who is not the original holder. *[You may want the Corporation to be able to raise defenses against a subsequent holder, such as due to damages the Corporation may suffer because the former shareholder breached the agreement or violated a non-compete and so therefore would want to use OPTION 1.]*

The Holder's right to receive payment of principal, interest and any other amounts owing under this note is subordinated to the prior payment in full of any Senior Debt; provided,

however, that the Holder shall be entitled to make, and the Obligor shall be entitled to accept and retain, regularly scheduled payments of principal and interest due under this note until such time as the Holder receives notice that the Obligor has defaulted in the payment or performance of its obligations under the Senior Debt and that, as a result of such default, the holder of the Senior Debt has elected to exercise its subordination rights under this note. If requested to do so by the Obligor, the Holder agrees to execute and deliver such subordination agreements and other documents as the Obligor or the holder of the Senior Debt may request from time to time to further evidence the subordination terms set forth in this Note; it being understood, however, that the subordination terms set forth in this Note are self-operative and that no further consent or documentation shall be required as a condition to the effectiveness of the subordination terms contained in this Note. “Senior Debt” means, at any time, any revolving credit, letter of credit and/or term loan indebtedness of the Obligor to any bank or similar financial institution at such time, including, without limitation, all principal, interest, fees, expenses and other amounts, if any, owing thereunder.

Until this Note with interest is paid in full, the Obligor shall not, without the prior written consent of the Holder, which consent shall not be unreasonably withheld: *[Note-if a shareholder is the Obligor, then these need to be adjusted to provide that that Obligor will not cause the Corporation to do the following or make these events trigger acceleration of the note.]*

- (a) Permit any form of distribution of assets of the Obligor to its shareholders including, but without limitation thereto, the payment of dividends in stock or in cash.
- (b) Increase any employee's/shareholder's compensation more than \_\_\_\_% per annum or pay bonuses to such employees.
- (c) Create, incur, or assume, any indebtedness or mortgage, pledge, grant or security interest, encumbrance, lien, or charge of any kind in excess of \$\_\_\_\_\_ or any other defect in title to or restriction upon the use of any of the Holder's property or assets of any character, whether owned at the date hereof or hereafter acquired.
- (d) Lend or advance money, credit, or property to any person, or invest in (by capital contribution or otherwise), or purchase or repurchase the stock or indebtedness, or all or a substantial part of the assets or properties, of any person, or guarantee, assume, endorse, or otherwise become responsible for (directly or indirectly or by any instrument having the effect of assuring any person's payment or performance) the indebtedness, performance, obligations, stock, or dividends of any person, or agree to do any of the foregoing, or permit or suffer any subsidiary to do so in an amount greater than \$\_\_\_\_\_.
- (e) Make any sale, transfer, assignment, conveyance, mortgage, pledge, encumbrance or lien of the assets of the Obligor or any part thereof, except in the usual and ordinary course of business.
- (f) Amend the Bylaws or Certificate or Articles of Incorporation of the Corporation or issue any additional shares of stock of any class for less than adequate and full consideration.

(g) Merge or consolidate with any other corporation.

(h) The Holder has the right to accelerate the principal balance and all interest accrued to date if there is a change in control in the Obligor.

IN WITNESS WHEREOF, the undersigned has executed and delivered this Note as of the date first above written.

---

Name

## EXHIBIT

### PERSONAL GUARANTY

This Guaranty is given as of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, (the “\_\_\_\_\_”), in favor of \_\_\_\_\_, a \_\_\_\_\_ (the “Lender”).

\_\_\_\_\_, a \_\_\_\_\_ (the “Borrower”), is or may hereafter be indebted to the Lender pursuant to one or more credit facilities or other evidences of indebtedness. The Guarantor has agreed to guarantee in favor of the Lender all existing and future obligations of the Borrower to the Lender.

NOW, THEREFORE, to induce the Lender to extend credit to the Borrower from time to time, and in recognition that the Lender would not extend credit to the Borrower [on the terms and conditions set forth in \_\_\_\_\_] but for, among other things, the Guarantor’s promises hereunder, [and in recognition that the Guarantor reasonably anticipates that the Guarantor will now or hereafter benefit, directly or indirectly, from the Lender’s extension of credit to or for the benefit of the Borrower,] and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Guarantor agrees as follows:

(a) Guaranty. The Guarantor unconditionally guarantees the punctual payment and performance when due, whether at stated maturity, by acceleration or otherwise, of all indebtedness and all other obligations of the Borrower to the Lender, whether such indebtedness or other obligations are monetary, nonmonetary, contractual, noncontractual, direct, indirect, acquired, joint, several, joint and several, existing, future, contingent or otherwise, and whether for principal, interest, fees, expenses, reimbursement obligations or otherwise, and all replacements, renewals, consolidations, amendments and other modifications of each of the foregoing (collectively, the “Obligations”). The Guarantor further agrees to pay all reasonable fees and expenses (including, without limitation, attorneys’ fees and expenses, whether or not litigation is commenced, and, if litigation is commenced, during both the trial and any appellate phases of such litigation) incurred by or on behalf of the Lender to protect or enforce any of the Lender’s rights under this Guaranty.

(b) Guaranty Absolute; Surety Waivers. The Guarantor guarantees that the Obligations will be paid strictly in accordance with the terms of such documents or agreements as may be applicable thereto, regardless of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of the terms or the rights of the Lender with respect thereto. The liability of the Guarantor under this Guaranty shall be absolute and unconditional irrespective of (a) any lack of validity or enforceability of any credit agreement, promissory note, security agreement or other agreement or document evidencing, securing or otherwise relating to any of the Obligations (collectively, the “Transaction Documents”), (b) any change in the time, manner or place of payment of, or in any other term of, all or any of the Obligations, or any other amendment or waiver of or any consent to departure from any Transaction Document, (c) any exchange, release, non-perfection or other impairment of any collateral or other security, any release of any person or entity (including, without limitation, the Borrower and any other guarantor) liable in whole or in part, or any

release or amendment or waiver of or consent to departure from any other guaranty, for all or any of the Obligations, or (d) any other circumstance which constitutes a defense available to, or a discharge of, the Borrower, a surety or a guarantor. This Guaranty shall continue to be effective or be reinstated, as the case may be, if (a) at any time any payment of any of the Obligations is rescinded or must otherwise be returned by the Lender upon the insolvency, bankruptcy or reorganization of the Borrower or otherwise, all as though such payment had not been made, or (b) this Guaranty is released in consideration of a payment of money or transfer of property or grant of a security interest by the Guarantor or any other person or entity and such payment, transfer or grant is rescinded or must otherwise be returned by the Lender upon the insolvency, bankruptcy or reorganization of such person or entity or otherwise, all as though such payment, transfer or grant had not been made.

(c) Waiver. The Guarantor waives promptness, diligence, notice of acceptance and any other notice with respect to any of the Obligations and this Guaranty and any requirement that the Lender protect, secure, perfect or insure any security interest or lien or any property subject thereto or exhaust any right or take any action against the Borrower or any other person or entity (including, without limitation, any other guarantor) or any collateral. The Guarantor waives any right of setoff the Guarantor may now or hereafter have against the Lender as a defense to the payment or performance of the Guarantor's obligations under this Guaranty. If the Guarantor now or hereafter has any claim against the Lender giving rise to any such right of setoff, the Guarantor agrees not to assert such claim as a defense or right of setoff with respect to the Guarantor's obligations under this Guaranty, and to instead assert any such claim, if the Guarantor so elects to assert such claim, in a separate proceeding against the Lender and not as a part of any proceeding, or as a defense to any claim, initiated by the Lender to enforce any of the Lender's rights under this Guaranty. To the fullest extent permitted by applicable law, the Guarantor waives any right the Guarantor may have at any time to terminate or limit the Guarantor's liability under this Guaranty. If, notwithstanding the foregoing waiver, the Guarantor is permitted by applicable law or otherwise to terminate or limit the Guarantor's liability under this Guaranty, then no such termination or limitation shall be effective until the close of business on the business day after the Lender's actual receipt of written notice to such effect delivered by the Guarantor to the Lender; nor shall any such termination or limitation be effective with respect to (a) any Obligations outstanding on the effective date of such termination or limitation (the "Guaranty Termination Date"), or (b) any Obligations arising after the Guaranty Termination Date, to the extent the Lender is obligated to make the credit extensions giving rise to such Obligations. Further, if any such Obligations represent revolving credit indebtedness or the like and all or any portion of such indebtedness is thereafter repaid and re-advanced, then, for purposes of this Guaranty, all such subsequent re-advances shall be deemed outstanding on the Guaranty Termination Date and consequently the Guarantor's liability hereunder shall extend to such subsequent advances.

(d) Subrogation; Subordination. The Guarantor will not exercise any right (whether arising by contract, operation of law or otherwise) which the Guarantor has or may acquire by way of subrogation (or any similar reimbursement right) under or in respect of this Guaranty, by any payment made hereunder or otherwise, until all of the Obligations shall have been paid indefeasibly paid in full and the Lender shall be under no duty to extend credit to or for the benefit of the Borrower. If any amount shall be paid to the Guarantor on

account of such subrogation (or any similar reimbursement) rights at any time when all of the Obligations have not been indefeasibly paid in full or the Lender is under any duty to extend credit to or for the benefit of the Borrower, such amount shall be held in trust for the sole benefit of the Lender and shall forthwith be paid to the Lender to be applied to the Obligations, whether matured or unmatured, in accordance with the terms of the applicable Transaction Documents. Similarly, if and to the extent the Borrower is now or hereafter obligated to pay any other obligations of any nature whatsoever to or for the benefit of the Guarantor, such obligations due the Guarantor shall be subject, junior and subordinate to the Borrower's Obligations to the Lender, and the Guarantor shall not accept any payment in respect thereof or commence or maintain any lawsuit or take any other action to collect or enforce any such obligations due the Guarantor; *provided, however,* that, so long as the Borrower is not in default in the payment, performance or observance of any of the Obligations due the Lender, the Borrower may make, and the Guarantor may receive and retain, regularly scheduled payments on account of such obligations and the Guarantor may commence or maintain any lawsuit or take any other action to collect or enforce such obligations due the Guarantor. Any payments or property received by the Guarantor in violation of this Section shall be held by the Guarantor in trust for the sole benefit of the Lender and shall be paid over to the Lender upon the Lender's demand therefor.

(e) Amendments. No amendment or waiver of any provision of this Guaranty nor consent to any departure by the Guarantor therefrom shall be effective unless the same shall be in writing and signed by the Lender and delivered to the Guarantor, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

(f) No Waiver; Remedies. No failure on the part of the Lender to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law or equity or otherwise.

(g) Right of Setoff. After the occurrence and during the continuance of any default by the Borrower or the Guarantor in the payment, performance or observance of any of their respective obligations to the Lender, the Lender is hereby authorized at any time and from time to time, to the fullest extent permitted by law, without notice to the Guarantor (any such notice being expressly waived by the Guarantor), to setoff and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by the Lender to or for the credit or the account of the Guarantor against any and all of the obligations of the Guarantor now or hereafter existing under this Guaranty, irrespective of whether or not the Lender shall have made any demand under this Guaranty and although such obligations may be contingent and unmatured. The Lender agrees to notify the Guarantor after any such setoff and application, provided that the failure to give such notice shall not affect the validity of such setoff and application. The rights of the Lender under this Section are in addition to other rights and remedies (including, without limitation, other rights of setoff) which the Lender may have. [Delete this Section if the Lender is not a bank or other depository institution.]

(h) Continuing Guaranty; Transfer of Obligations. This Guaranty is a continuing guaranty and shall (a) remain in full force and effect until indefeasible payment in full of the Obligations and all other amounts payable under this Guaranty and the termination of any obligation of the Lender to extend credit to or for the benefit of the Borrower, (b) be binding upon the Guarantor and the Guarantor's personal representative, heirs, successors and assigns, as the case may be, and (c) inure to the benefit of and be enforceable by the Lender and the Lender's personal representative, heirs, successors, assigns and transferees, as the case may be. Without limiting the generality of the foregoing clause (c), the Lender may assign or otherwise transfer any of the Transaction Documents, or any interest of the Lender therein, to any other person or entity, and such other person or entity shall thereupon become vested with all of the rights in respect thereof granted to the Lender herein or otherwise.

(i) Financial Information. So long as any Obligations are outstanding or the Lender has any duty to extend credit to or for the benefit of the Borrower, the Guarantor promises to furnish to the Lender the Guarantor's annual federal income tax return reasonably promptly after the filing thereof, and a signed personal financial statement, on the Lender's standard form therefor or such other form as may be reasonably acceptable to the Lender, within 30 days after the Lender's request therefor.

(j) Limitation. Notwithstanding anything in this Guaranty to the contrary, the right of recovery against the Guarantor under this Guaranty is limited to the extent it is judicially determined with respect to the Guarantor that entering into this Guaranty would violate Section 548 of the United States Bankruptcy Code or any comparable federal, state or other laws relating to fraudulent transfers or the like, in which case the Guarantor shall be liable under this Guaranty only for amounts aggregating up to the largest amount that would not render the Guarantor's obligations under this Guaranty subject to avoidance under Section 548 of the United States Bankruptcy Code or any such comparable laws. [Use if upstream guaranty or similar fraudulent conveyance risk.]

(k) Governing Law. This Guaranty shall be governed by the laws of the State of \_\_\_\_\_ without regard to any choice of law rule thereof which gives effect to the laws of any other jurisdictions.

(l) Consent to Forum. As part of the consideration for new value this day received, the Guarantor consents to the jurisdiction of any state or federal court located within \_\_\_\_\_ County, \_\_\_\_\_, and waives personal service of any and all process upon the Guarantor and consents that all such service of process be made by certified or registered mail directed to the Guarantor at \_\_\_\_\_ [the last known address of the Guarantor as reflected in the Lender's records], and service so made shall be deemed to be completed upon delivery thereto. The Guarantor waives any objection to jurisdiction and venue in any action instituted against the Guarantor as provided herein and agrees not to assert any defense based on lack of jurisdiction or venue. The Guarantor further agrees not to assert against the Lender (except by way of a defense or counterclaim in a proceeding initiated by the Lender) any claim or other assertion of liability with respect to this Guaranty, the Obligations, any of the Transaction Documents, the Lender's actions or inactions in respect of any of the foregoing or otherwise in any jurisdiction other than the foregoing jurisdictions. Nothing in this Section shall affect the right of the Lender to serve legal

process in any other manner permitted by law or affect the right of the Lender to bring any action or proceeding against the Guarantor in the courts of any other jurisdictions or limit the right of the Lender to exercise any non-judicial remedies available to the Lender.

(m) Jury Trial Waiver. To the fullest extent permitted by law, and as separately bargained-for consideration to the Lender, the Guarantor waives any right to trial by jury (which the Lender also waives) in any action, suit, proceeding or counterclaim of any kind arising out of or otherwise relating to this Guaranty.

(n) Miscellaneous. This Guaranty may be validly executed and delivered by fax or other electronic transmission and in one or more counterpart signature pages. This Guaranty shall be construed without presumption for or against the drafter of all or any part hereof. If any provision of this Guaranty is unlawful, then such provision shall be void but the remainder of this Guaranty will remain in effect and be binding on the parties in accordance with its terms. Section headings are for convenience of reference only and shall not limit the scope of any Section. All factual recitals and other matters set forth in the Preliminary Statements to this Guaranty shall constitute a part of this Guaranty.

IN WITNESS WHEREOF, the Guarantor has executed and delivered this Guaranty as of the date first above written.

---

Name of Guarantor

## **EXHIBIT**

### **ESCROW AGREEMENT FOR PLEDGE OF STOCK**

THIS AGREEMENT is made and entered into on \_\_\_\_\_, 20\_\_\_\_, by and among NAME OF CORPORATION, a \_\_\_\_\_ corporation with its principal place of business located in, \_\_\_\_\_ (hereinafter referred to as "Corporation"), \_\_\_\_\_ (hereinafter referred to as "Selling Shareholder"), \_\_\_\_\_ (hereinafter referred to as "Purchasing Shareholder"), and NAME OF ESCROW AGENT, located in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_ (hereinafter referred to as "Escrow Agent").

**a. Purposes.**

- (i) Purchasing Shareholder (or Corporation) is indebted to Selling Shareholder (or Selling Shareholder's estate) in accordance with the terms of a Promissory Note of even date herewith (the "Note"), a copy of which is attached hereto and made a part hereof as Exhibit "A".
- (ii) The Note was executed by Purchasing Shareholder (or Corporation) pursuant to a certain Shareholders Agreement, by and among the Corporation and its shareholders, dated \_\_\_\_\_, 2005 (attached hereto as Exhibit "B").
- (iii) To secure payment of the Note to Selling Shareholder (or Selling Shareholder's estate) and any other obligations of Purchasing Shareholder (or Corporation) to Selling Shareholder (or Shareholder's estate) pursuant to the Agreement, Purchasing Shareholder (or Corporation) has agreed to pledge all of the shares of Corporation owned by Purchasing Shareholder (or Corporation), together with executed assignments.

**b. Escrow Agent.**

The parties hereto hereby appoint and designate NAME OF ESCROW AGENT, as the Escrow Agent under this Agreement, and NAME OF ESCROW AGENT, hereby accepts its designation as Escrow Agent hereunder.

**c. Deposit of Escrow Shares.**

Purchasing Shareholder (or Corporation) hereby pledges and deposits with the Escrow Agent for the benefit of Selling Shareholder or Selling Shareholder's Estate, and the Escrow Agent hereby acknowledges receipt of negotiable stock certificates, endorsed in blank, being \_\_\_\_\_ (\_\_\_\_\_) shares of the capital stock of the Corporation ("Escrow Shares").

**d. Delivery.**

The Escrow Agent will hold the Escrow Shares in its possession until authorized hereunder to deliver same upon the happening of the following events:

- (i) Upon Purchasing Shareholder (or Corporation) making all the payments provided for under the Note executed by Purchasing Shareholder (or Corporation), the Escrow Agent will deliver the Escrow Shares to Purchasing Shareholder (or Corporation), duly endorsed for transfer and free and clear of any security interest of Selling Shareholder or Selling Shareholder's Estate therein. As evidence of such payments, the Escrow Agent may, but shall not be required, to rely conclusively upon either (i) a written notification to such effect by Selling Shareholder or Selling Shareholder's Estate, or (ii) the exhibition by Purchasing Shareholder (or Corporation) of canceled checks or written receipts evidencing full payment of the amounts due. The parties acknowledge that no periodic distribution of the stock to Purchasing Shareholder (or Corporation) is intended.
- (ii) Upon the occurrence of any of the events of default listed below, Selling Shareholder or Selling Shareholder's Estate shall deliver to the Escrow Agent, within ten (10) days after any such default, a written notice indicating the nature of such default ("Default Notice") which shall contain (i) an affidavit, sworn to by such representative, stating that Purchasing Shareholder (or Corporation) has defaulted, with specific reference to the date or dates of default; and (ii) direction to the Escrow Agent to sell all or whatever portion of the Escrow Shares as is necessary and required in order to satisfy the unpaid principal amount, together with accrued interest to the date of payment, if any, due under the Note.
- (iii) Upon receipt by the Escrow Agent of the Default Notice, the Escrow Agent shall forthwith notify Purchasing Shareholder (or Corporation) of such receipt. If Purchasing Shareholder (or Corporation) claims that no such default has occurred and the event of default set forth in the Default Notice is the nonpayment of amounts due under the Note, Purchasing Shareholder (or Corporation) must, within ten (10) days after receipt of such notice from the Escrow Agent, exhibit to the Escrow Agent canceled checks or written receipts evidencing payment of such alleged defaulted payments. If no controverting affidavit or other evidence of payment is received by Escrow Agent from Purchasing Shareholder (or Corporation) within such ten (10) day period and if Selling Shareholder or Selling Shareholder's Estate has complied with all the requirements of \_\_\_\_\_ above, the Escrow Agent shall sell all or whatever portion of Escrow Shares in accordance with and pursuant to the direction given by such legal representative in his Default Notice to Escrow Agent. If the event of

default set forth in the Default Notice is a default other than the nonpayment of amounts due under the Note, Purchasing Shareholder (or Corporation) shall, within the same ten (10) day period set forth above, exhibit to the Escrow Agent evidence or an affidavit controverting the allegation of default.

- (iv) Upon the Escrow Agent being directed by Selling Shareholder or his legal representative to sell all or any portion of the Escrow Shares pursuant to the terms of this Paragraph, Purchasing Shareholder (or Corporation) hereby agrees to execute and deliver any and all documents that the Escrow Agent may request in order to empower it to take possession of and to sell such shares. Upon receiving these documents, the Escrow Agent shall undertake with all due deliberate speed to sell all or a portion of the Escrow Shares at a public or private sale or sales, pursuant to the provisions of the \_\_\_\_\_ Uniform Commercial Code then in effect. After paying the expenses of the sale or sales, the Escrow Agent shall apply the proceeds of the sale or sales to the payment of the unpaid principal balance due under the Note, together with all interest accrued thereon to date of the payment. If such proceeds are sufficient to fully discharge and satisfy the Note, any excess sales proceeds shall be delivered to Purchasing Shareholder (or Corporation). If all of the Escrow Shares have been sold by the Escrow Agent and the proceeds from the sales are insufficient to fully pay the principal amount and the accrued interest due under the Note, Purchasing Shareholder (or Corporation) shall remain liable to Selling Shareholder or Selling Shareholder's Estate for any unpaid sum remaining due under the Note.

**e. Events of Default.**

Upon the occurrence of any of the events listed below, Selling Shareholder or Selling Shareholder's Estate shall be entitled to exercise all of the rights set forth above:

- (i) Purchasing Shareholder's (or Corporation's) failure to make timely payments of any amounts due under the Note.
- (ii) The sale or other transfer of more than fifty percent (50%) of the assets or the capital common stock of the Corporation.
- (iii) The insolvency of Corporation, or the inability of Corporation to pay its debts as they mature, the appointment of a receiver of its assets, or the institution of any voluntary or involuntary proceeding under any bankruptcy or insolvency law relating to debtors for the readjustment or relief of any indebtedness of the Corporation, whether as a reorganization, composition, extension or otherwise.

- (iv) Purchasing Shareholder's (or Corporation's) failure to observe or perform any obligation, covenant, term or provision, required to be observed or performed by Purchasing Shareholder (or Corporation) when, and in the manner required, pursuant to the Note or the Cross Purchase, Redemption and Restrictive Sale Agreement.
- (v) The liquidation, dissolution or merger of the Corporation.

**f. Shareholder Rights.**

During the term of this Agreement, Purchasing Shareholder (or Corporation) shall be the beneficial owner of and exercise and enjoy all rights and incidents of ownership with respect to the respective Escrow Shares, including the right to vote such shares, until the Escrow Agent and Purchasing Shareholder (or Corporation) shall have received a notice of default from Selling Shareholder or Selling Shareholder's Estate directing the Escrow Agent to deliver the Escrow Shares to such legal representative.

**g. Escrow Expenses.**

The Escrow Agent hereby waives all fees for its services under this Escrow Agreement. Purchasing Shareholder (or Corporation) and Selling Shareholder or Selling Shareholder's Estate agrees to reimburse the Escrow Agent for all reasonable expenses, disbursements and advances incurred or made by the Escrow Agent in performance of its duties hereunder (including reasonable fees, expenses and disbursements of its counsel).

**h. Resignation of Escrow Agent.**

The Escrow Agent may resign as such at any time by giving written notice thereof to Purchasing Shareholder (or Corporation) and Selling Shareholder or his legal representative. Upon such notice, a successor Escrow Agent shall be appointed upon unanimous consent of the parties. If the parties are unable to agree upon a successor Escrow Agent within thirty (30) days after such notice, the Escrow Agent shall designate any bank or trust company in \_\_\_\_\_ State as its successor. In the event any such designee fails to accept such appointment, the Escrow Agent shall be entitled to appoint its successor. The Escrow Agent shall continue to serve until its successor accepts the escrow and receives the Escrow Shares. The parties shall have the right at any time upon unanimous consent to substitute a new Escrow Agent by giving written notice thereof to the Escrow Agent then acting.

**i. Liability of Escrow Agent.**

The Escrow Agent shall be obligated only for the performance of such duties as are specifically set forth herein and may rely and shall be protected in acting or refraining from action on any instrument or signature believed by it to be genuine and to have been signed or presented by the proper party or parties duly authorized to do so. The Escrow Agent shall have no responsibility for the contents of any writing contemplated herein and may rely without liability upon the contents thereof. The Escrow Agent shall not be liable for any obligation taken or omitted by it in good faith and believed by it to be authorized hereby, nor for action taken or omitted by it in accordance with advice of counsel, and shall not be liable

for any mistake of fact or error of judgment or for any acts or omissions of any kind unless caused by willful misconduct or gross negligence. Each party agrees to indemnify the Escrow Agent and hold it harmless against any and all liabilities incurred by it hereunder as a consequence of such party's action, and the parties agree jointly to indemnify the Escrow Agent and hold it harmless against any and all liabilities incurred by it hereunder which are not a consequence of any party's action, except in either case for the Escrow Agent's own willful misconduct or gross negligence.

**j. Dispute.**

It is understood and agreed that if any dispute arises with respect to the delivery and/or ownership or right of possession of the Escrow Shares, or the facts upon which such determinations are based, or the duties of the Escrow Agent hereunder, the Escrow Agent, at its sole option, is authorized and directed to elect to either:

- (i) retain in its possession, without liability to anyone, all or any part of the Escrow Shares until such dispute shall have been settled, either by mutual agreement of the parties concerned (evidenced by appropriate instructions in writing to the Escrow Agent, signed by all of the parties) or by binding arbitration, or by a final order, decree, or judgment of a court of competent jurisdiction in the State of \_\_\_\_\_ (the time for appeal having expired and no appeal having been perfected), all costs and expenses of which shall be paid by the parties, but the Escrow Agent shall be under no duty whatsoever to institute or defend any such proceedings; or
- (ii) commence an action in the nature of an interpleader and seek to deposit the Escrow Shares in the Supreme Court, County of \_\_\_\_\_, State of \_\_\_\_\_, or the county in which the Corporation maintains a principal place of business, and the remaining parties hereto shall be thereupon permitted to pursue their remedies and claims, and resolve their disputes, in such court.

**k. Miscellaneous.**

Any notice or other communication required to be given under this Agreement shall be given in writing and delivered personally or by certified or registered mail, return receipt requested, to the last known address of the party to whom it is directed. Notice shall be deemed given if personally served, on the date of its actual receipt, and, if given by certified or registered mail, on the date of its mailing. This Agreement shall be binding upon and shall inure to the benefit of the legal representatives, heirs, assigns and successors of the respective parties. This Agreement may not be altered or modified without the express written consent of the parties. This Agreement shall be governed under the laws of the State of \_\_\_\_\_.

The foregoing is established by the following signatures of the parties.

NAME OF CORPORATION

By \_\_\_\_\_  
\_\_\_\_\_, President

\_\_\_\_\_  
(Selling Shareholder)

\_\_\_\_\_  
(Purchasing Shareholder)

NAME OF ESCROW AGENT

By: \_\_\_\_\_

## EXHIBIT

### **ESCROW AGREEMENT FOR INSURANCE POLICIES & PLEDGE**

THIS AGREEMENT is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and among \_\_\_\_\_, a \_\_\_\_\_ (the “Corporation”), \_\_\_\_\_, \_\_\_\_\_ (each, a “Shareholder” and collectively, the “Shareholders”) and \_\_\_\_\_ (hereinafter referred to as “Escrow Agent”).

#### W I T N E S S E T H :

WHEREAS, the Shareholders are the owners of all of the shares of the Corporation (the “Shares”); and

WHEREAS, the Corporation and the Shareholders have entered into a certain Cross Purchase, Redemption and Restrictive Sale Agreement dated \_\_\_\_\_, 20\_\_\_\_ (the “Agreement”), pursuant to which the Shareholders and the Corporation may purchase and maintain policies of life insurance and disability buy-out insurance on the life of the other Shareholders (the “Policies”); and

WHEREAS, the parties have agreed that the Policies will be placed in escrow and held by the Escrow Agent pursuant to the terms and conditions set forth herein to ensure prompt and orderly payment of the proceeds of the Policies; and

WHEREAS, upon the occurrence of certain events (each, a “Triggering Event”) with respect to a shareholder (the “Selling Shareholder”), certain of the remaining Shareholders (the “Purchasing Shareholders”) may purchase the Shares of the Corporation held by the Selling Shareholder at the time of the Triggering Event (the “Purchased Shares”); and

WHEREAS, if the Purchased Shares are purchased by the Purchasing Shareholders on a deferred basis (a “Pledged Shares Transaction”), the Purchasing Shareholders may be obligated to pledge the Purchased Shares to the Selling Shareholder as security for the satisfaction of the obligations of the Purchasing Shareholders under the Pledged Shares Transaction (the “Deferred Obligations”) pursuant to the terms hereof.

NOW, THEREFORE, the parties hereto agree as follows:

1. Authority. Any Policies obtained pursuant to Paragraph “\_\_\_” of the Agreement shall be set forth on Exhibit “A” attached hereto and made a part hereof. The Policies shall be held by the Escrow Agent as security for performance under the Agreement by the Shareholders. The Escrow Agent shall be a nominee for the Shareholders and named the beneficiary of the Policies. The Escrow Agent shall not, however, have any beneficial or proprietary interest in the Policies or the proceeds thereof. Except as otherwise provided herein, the Escrow Agent is hereby authorized to hold the Policies in escrow in accordance with the terms set forth herein, until the occurrence of a Shareholder’s death or Total and Permanent Disability (as defined in the Agreement).

2. **Death/Disability.** In the event of a Shareholder's death or Total and Permanent Disability, the Escrow Agent shall collect any insurance proceeds as soon as practicable pursuant to Paragraph "\_\_\_\_" of the Agreement. Upon collection of the proceeds, the Escrow Agent shall deliver the proceeds to the disabled Shareholder or the legal representative of the estate of the deceased Shareholder pursuant to Paragraph "\_\_\_\_" of the Agreement up to but not in excess of the Purchase Price under the terms of the Agreement. The Escrow Agent shall deliver to the remaining Shareholders or the Corporation, as the case may be, any remaining proceeds in excess of the Purchase Price. The Escrow Agent shall deliver to the legal representative of the deceased Shareholder the Policy owned by the deceased Shareholder or the Corporation, as the case may be, on the remaining Shareholder, together with duly executed assignments transferring all incidents of ownership in the Policies to the deceased Shareholder's estate.

3. **Termination of Agreement.** If the Agreement is terminated for any reason other than a Shareholder's death or Total and Permanent Disability, this Escrow Agreement shall terminate immediately and the Escrow Agent shall transfer each Policy held in escrow together with duly executed assignments to the owner of the Policy, and shall deliver any unencumbered shares to their owner.

4. **Deposit of Shares.** The Shareholders hereby pledge and deposit all of such Shareholder's shares with the Escrow Agent for the benefit of any Selling Shareholder or Selling Shareholder's Estate in the event of a Pledged Shares Transaction involving such Shareholder. The Escrow Agent hereby acknowledges receipt of negotiable stock certificates, endorsed in blank, being all of the Shares of the Corporation in which each Shareholder has any ownership rights.

5. **Delivery.** The Escrow Agent will hold the Shares in its possession so that the shares can be transferred as appropriate, and held as pledged shares in the event there is a Pledged Share Transaction. In the event that there is a transfer of Shares pursuant to a Pledged Shares Transaction (the "Purchased Shares"), the Selling Shareholder and the Purchasing Shareholders shall jointly notify the Escrow Agent. The Escrow Agent shall cause the Purchased Shares to be re-titled in the name of the Purchasing Shareholders. In the event that the transaction is a Pledged Shares Transaction, the Purchased Shares shall be deemed pledged to the Selling Shareholder or the Selling Shareholder's estate as security for the payment of the Deferred Obligations. The Escrow Agent shall hold the Purchased Shares in Escrow and shall not release the encumbrance of the pledge until the happening of the following events:

(a) Upon Purchasing Shareholders satisfying in full Deferred Obligations. As evidence of such satisfaction, the Escrow Agent may, but shall not be required, to rely conclusively upon either (i) a written notification to such effect by Selling Shareholder or Selling Shareholder's Estate, or (ii) the exhibition by Purchasing Shareholders of canceled checks or written receipts evidencing full payment of the amounts due. The parties acknowledge that no periodic release of the encumbrance of the pledge to Purchasing Shareholders is intended.

(b) Upon the occurrence of any default beyond applicable notice and grace periods under the Deferred Obligations, Selling Shareholder or Selling Shareholder's Estate shall deliver to the Escrow Agent, within ten (10) days after any such default, a written notice indicating the nature of such default ("Default Notice") which shall contain (i) an affidavit, sworn to by such representative, stating that Purchasing Shareholders have defaulted, with specific reference to the date or dates of default; and (ii) direction to the Escrow Agent to sell all or whatever portion of the Pledged Shares as is necessary and required in order to satisfy the unpaid principal amount, together with accrued interest to the date of payment, if any, due pursuant to the Deferred Obligations.

(c) Upon receipt by the Escrow Agent of the Default Notice, the Escrow Agent shall forthwith notify Purchasing Shareholders of such receipt. If Purchasing Shareholders claim that no such default has occurred and the default set forth in the Default Notice is the nonpayment of amounts due, Purchasing Shareholders must, within ten (10) days after receipt of such notice from the Escrow Agent, exhibit to the Escrow Agent canceled checks or written receipts evidencing payment of such alleged defaulted payments. If no controverting affidavit or other evidence of payment is received by Escrow Agent from Purchasing Shareholders within such ten (10) day period and if Selling Shareholder or Selling Shareholder's Estate has complied with all the requirements of subparagraph "(b)" above, the Escrow Agent shall sell all or whatever portion of Purchased Shares in accordance with and pursuant to the Uniform Commercial Code of the State of \_\_\_\_\_. If the event of default set forth in the Default Notice is a default other than the nonpayment of amounts due, Purchasing Shareholders shall, within the same ten (10) day period set forth above, exhibit to the Escrow Agent evidence or an affidavit controverting the allegation of default.

(d) Upon the Escrow Agent being directed by Selling Shareholder or Selling Shareholder's legal representative to sell all or any portion of the Purchased Shares pursuant to the terms of this Paragraph "5", Purchasing Shareholders hereby grant the Escrow Agent the necessary power of attorney to empower it to transfer such shares pursuant to the terms hereof. After paying the expenses of the sale or sales, the Escrow Agent shall apply the proceeds of the sale or sales to the payment of the unpaid principal balance due pursuant to the Deferred Obligations, together with all interest accrued thereon to date of the payment. If such proceeds are sufficient to fully discharge and satisfy the Deferred Obligations, any excess sales proceeds shall be delivered to Purchasing Shareholders.

If all of the Purchased Shares have been sold by the Escrow Agent and the proceeds from the sales are insufficient to fully satisfy the Deferred Obligations, Purchasing Shareholders shall remain liable to Selling Shareholder or Selling Shareholder's Estate for any unpaid amounts due.

6. Shareholder Rights. During the term of this Agreement, the Shareholders shall be the beneficial owners of and exercise and enjoy all rights and incidents of ownership with respect to the respective Shares titled in their names, including the right to vote such shares.

7. Escrow Expenses. The Escrow Agent hereby waives all fees for its services under this Escrow Agreement. All of the Shareholders agree to jointly and severally be responsible to reimburse the Escrow Agent for all reasonable expenses, disbursements and advances incurred or made by the Escrow Agent in performance of its duties hereunder with respect to the Policies (including reasonable fees, expenses and disbursements of its counsel). Purchasing Shareholders and Selling Shareholder or Selling Shareholder's Estate agrees to reimburse the Escrow Agent for all reasonable expenses, disbursements and advances incurred or made by the Escrow Agent in performance of its duties hereunder with respect to any Pledged Shares Transaction (including reasonable fees, expenses and disbursements of its counsel).

8. Resignation of Escrow Agent. The Escrow Agent may resign as such at any time by giving written notice thereof to the Shareholders. Upon such notice, a successor Escrow Agent shall be appointed upon unanimous consent of the parties. If the parties are unable to agree upon a successor Escrow Agent within thirty (30) days after such notice, the Escrow Agent shall designate any bank or trust company in the State of \_\_\_\_\_ as its successor. In the event any such designee fails to accept such appointment, the Escrow Agent shall be entitled to appoint its successor. The parties shall have the right at any time upon unanimous consent to substitute a new Escrow Agent by giving written notice thereof to the Escrow Agent then acting.

9. Disputes. It is understood and agreed that if any dispute arises with respect to the delivery and/or ownership or right of possession of the Policies or the Escrowed Insurance Proceeds or the Shares, or the facts upon which such determinations are based, or the duties of the Escrow Agent hereunder, the Escrow Agent, at its sole option, is authorized and directed to elect to either:

(a) retain in its possession, without liability to anyone, the Policies, all or any part of the Escrowed Insurance Proceeds and/or the Shares until such dispute shall have been settled, either by mutual agreement of the parties concerned (evidenced by appropriate instructions in writing to the Escrow Agent, signed by all of the parties) or by binding arbitration, or by a final order, decree, or judgment of a court of competent jurisdiction in the State of \_\_\_\_\_ (the time for appeal having expired and no appeal having been perfected), all costs and expenses of which shall be paid by the parties, but the Escrow Agent shall be under no duty whatsoever to institute or defend any such proceedings; or

(b) commence an action in the nature of an interpleader and seek to deposit the Policies, the Escrowed Insurance Proceeds and/or the Shares in a court of competent jurisdiction in the State of \_\_\_\_\_, and the parties hereto shall be permitted to pursue their remedies and claims, and resolve their disputes, in such court.

10. Limitation on Liability of Escrow Agent. The Escrow Agent shall be obligated only for the performance of such duties as are specifically set forth herein and may rely upon and shall be protected in acting or refraining from action on any instrument or signature believed by him to be genuine and to have been signed or presented by the proper party or parties duly authorized to do so. The Escrow Agent shall have no responsibility for

the contents of any writing contemplated herein and may rely without liability upon the contents hereof. The Escrow Agent shall not be liable for any obligation taken or omitted by it in good faith and believed by it to be authorized hereby, nor for action taken or omitted by it in accordance with advice of counsel, and shall not be liable for any mistake of fact or error of judgment or for any acts or omissions of any kind unless caused by willful misconduct or gross negligence. Each party agrees to indemnify and hold harmless the Escrow Agent against any and all liabilities incurred by it hereunder as a consequence of such party's action, and the parties agree jointly and severally to indemnify the Escrow Agent and hold him harmless against any and all liabilities incurred by him hereunder, including in either case reasonable attorneys' fees, except in either case for the Escrow Agent's own willful misconduct or gross negligence.

11. Notices. Any notice or other communication required to be given under this Agreement shall be given in writing and delivered personally or by certified or registered mail, return receipt requested, to the last known address of the party to whom it is directed. Notice shall be deemed given if personally served, on the date of its actual receipt, and, if given by certified or registered mail, on the date of its mailing.

12. Benefit. This Agreement shall be binding upon and shall inure to the benefit of the legal representatives, heirs, assigns and successors of the respective parties.

13. Modification. This Agreement may not be altered or modified without the express written consent of the parties.

14. Governing Law. This Agreement shall be governed under the laws of the State of \_\_\_\_\_.

The foregoing is established by the following signatures of the parties.

CORPORATION:

By: \_\_\_\_\_

SHAREHOLDERS:

\_\_\_\_\_  
\_\_\_\_\_

ESCROW AGENT:

By:

---

## **ATTACHMENT**

### **CLASSES OF STOCK CLAUSE FOR ARTICLES**

Different Classes of Stock with Rights to Elect Directors. The Corporation is authorized to issue three classes of common stock, to be known as Class A Common, Class B Common and Class C Common. One Thousand (1000) Shares of stock shall be authorized for each class. The rights, preferences and limitations of each class of common stock shall be identical in all respects except that the holders of the Class A Common shall have the right to elect one director, and the holders of the Class B Common shall have the right to elect two directors and the holders of the Class C Common stock shall have the right to elect two directors.

Different Classes of Stock – Voting and Non-Voting. The Corporation is authorized to issue two classes of common stock, to be known as Class A Voting Common and Class B Non-Voting Common. One Thousand (1000) Shares of stock are authorized for each class. The Class A and Class B shares shall have equal dividend rights and liquidation preferences but, except as otherwise provided by law, only the Class A shares shall be entitled to vote on action required or permitted by law to be approved by shareholders.

## **ATTACHMENT**

### **TAG-ALONG RIGHTS CLAUSE FOR ARTICLES**

If an offer is made for any interest in any shares by or to any person, or by or to any member of a group which acts in concert, and if as a result of such offer the offering person or group would end up with more than 50% ownership of, or more than 50% of the voting rights in, common shares or preferred shares:

Unless and until an offer (i) at not less than the highest consideration paid for any of such shares of the same class; and (ii) upon the best terms and conditions as pertain to the acquisition of any of such shares of the same class, is made by the offering person or group for all the shares (of the class or classes of stock involved) of all Shareholders who are descendants of \_\_\_\_\_ (by bloodline or adoption where the adoptee was less than 14 years old when legally adopted by a bloodline descendant of \_\_\_\_\_) and who are not involved in making or receiving such offer,

The offering person or group shall not be entitled to vote (whether in person or by proxy) for any purpose whatsoever any interest in any shares acquired as a result of such offer, and shall likewise not be entitled to vote for any purpose whatsoever any interest in shares already owned by such offering person or group; and further, such offering person or group shall not be entitled to receive any dividends of any kind.

## ATTACHMENT

### **SAVINGS CLAUSE FOR TRUST OWNING S STOCK**

It is my overriding intent that each trust hereunder be permitted under IRC §1361(c)(2) to be a shareholder of an S Corporation (within the meaning of IRC §1361(a)(1)) if the trust acquires stock in an S Corporation or owns stock in a corporation that desires to make an election to become an S Corporation. Therefore, the following provisions shall apply to such trust unless all of the trust is treated under IRC subpart E of part I of subchapter J of chapter 1 of subtitle A as owned by an individual who is a citizen or resident of the United States (and thus is permitted to be a shareholder of an S Corporation under IRC §1361(c)(2)(A)(i)). A trust described in the preceding sentence as owned by an individual who is a citizen or resident of the United States is referred to herein as a “grantor trust”. These provisions shall apply irrespective of the manner of acquiring the stock, including, but not limited to, acquisition through allocation of stock to the trust, the purchase of stock by the trust, or the election to become an S Corporation by a corporation whose stock is already held by the trust, all of which are described herein as an acquisition.

Qualified Subchapter S Trust. If any trust is entitled to acquire stock in an S Corporation and the trust is not a grantor trust, said stock shall be set aside as a separate and independent share for the beneficiary of the trust to whom current distributions of income may be made. The Trustee shall pay the entire net income from said separate and independent share to or for the benefit of the beneficiary in installments convenient to the beneficiary, but at least annually during the continuation of the trust. All other provisions of the trust shall apply to said separate and independent share. It is my overriding intent that the Trustee adopt, agree to, or acquiesce in such construction as is necessary for such separate and independent share to be eligible for treatment as a Qualified Subchapter S Trust within the meaning of IRC §1361(d)(3).

Electing Small Business Trust. If (i) any trust is entitled to acquire stock in an S Corporation, (ii) the trust is not a grantor trust, and (iii) the income beneficiary of the trust (or the income beneficiary's legal representative) does not properly elect under IRC §1361(d)(2) with respect to the corporation concurrently with the acquisition of the stock, then the Trustee shall elect under IRC §1361(e)(3) to be an electing small business trust concurrently with the acquisition of the stock. Upon making the election to be an electing small business trust, the stock shall cease to be held as a separate and independent share for the beneficiary of the trust.

## ATTACHMENT

### **SECTION 303 REDEMPTION AGREEMENT**

Agreement made by and between \_\_\_\_\_ ("Shareholder") and \_\_\_\_\_, a \_\_\_\_\_ corporation ("Corporation").

WHEREAS, the Shareholder's receipt of the stock in the Corporation ("Stock") was conditioned on the Shareholder's payment of various expenses and taxes, including the death taxes (including any interest on those taxes), funeral expenses, and administration expenses referred to in IRC §303(a)(1) and (2) relating to the estate of \_\_\_\_\_ ("Decedent"); and

WHEREAS, the Shareholder desires to sell and the Corporation desires to purchase a portion of the Stock so received to provide funds to the Shareholder from which the Shareholder will pay the taxes and expenses;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is agreed as follows:

The Corporation agrees to buy for cash any Stock tendered to it upon at least 10 days advance notice by the Shareholder at the price per share of the stock used in computing the federal estate tax payable by the Decedent's estate as finally determined after any audit and any litigation relating to that tax for federal estate tax purposes.

The number of shares of Stock purchased by the Corporation from the Shareholder shall not exceed in the aggregate the following dollar amount: the number of shares multiplied by the price per share of the Stock provided above shall not exceed the sum of (a) the estate, inheritance, legacy, and succession taxes (including any interest collected as a part of those taxes) imposed because of the Decedent's death, and (b) the amount of funeral and administration expenses allowable as deductions to the Decedent's estate under IRC §2053, whether or not such items are deducted for federal estate tax purposes.

The Corporation's obligation to purchase shall continue throughout the period for distribution provided in IRC §303(b)(1).

The Shareholder may request that the Corporation purchase a specified number of shares of Stock before the final determination of the purchase price. In that event, the tentative purchase price shall be \$\_\_\_\_ per share of Stock, which is the value per share of the Stock as reported on the decedent's federal estate tax return. If the final price per share of Stock as determined pursuant to Article II differs from the tentative purchase price per share of Stock, appropriate adjustments shall be made to reflect the final price per share.

It is the parties' intention that the purchase provided for in this Agreement qualify under IRC §303, and they agree to use their best efforts to comply therewith.

The Corporation shall have no obligation under this Agreement to purchase any share of Stock if the purchase would result in a violation of applicable law.

This Agreement may be amended, modified, superseded, or cancelled only by a written instrument executed by all of the parties to this Agreement. This Agreement shall be binding on and be enforceable by the parties to this Agreement, and their respective personal representatives, administrators, heirs, successors and assigns. This Agreement shall be governed by and construed in accordance with the laws of the State of \_\_\_\_\_.

*[date and signature lines]*