.133 Basic Cross–Purchase Buy–Sell Agreement Among Stockholders (With Optional and Alternative Provisions)

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[*Name*]

CROSS–PURCHASE BUY–SELL AGREEMENT

This Agreement made this ____ day of ____, 20__, by and between [*names*] (hereinafter referred to as the "Stockholders").

Witnesseth

Whereas, the total shares of stock of [*name of corporation*], (hereinafter referred to as the "Corporation") issued and outstanding, consists of [*number*] shares, all of which are currently owned as follows:

Names Number of Shares

Whereas, the parties hereto believe it to be in the best interests of the Stockholders and the Corporation to insure continuity of harmonious management by restricting the transfer of the stock of the Corporation during the lives of the Stockholders, and to insure that at a Triggering Event (which shall, for the purpose of this Agreement, be defined as any event requiring a Stockholder to offer or sell stock) said stock shall not pass into the control of persons whose interest might be incompatible with the interest of the Corporation and the remaining Stockholder(s):

Now, for mutual covenants exchanged and other valuable consideration, it is agreed:

Required in Order to Accomplish Objective

Article I RESTRICTION ON SALE

Sec. 1.1 Transfers

(a) General Prohibition. The Stockholders shall not sell, assign, pledge or otherwise transfer or encumber in any manner or by any means whatever, any interest in all or any part of the stock of the Corporation now owned or hereafter acquired by them without having first obtained the consent of or offer it to the other Stockholder(s) in accordance with the terms and conditions of this Agreement.

Article II INSTANCES WHEN STOCKHOLDER MUST OFFER STOCK—BONA FIDE OFFER

Sec. 2.1 Stockholder Has Offer

(a) Bona Fide Offer. In the event that any Stockholder is in receipt of a bona fide offer to purchase his stock, and if he shall desire to sell, assign, transfer or otherwise dispose of his stock without the prior written consent of the other Stockholder(s): he shall serve notice to such effect upon the other Stockholder(s) by registered or certified mail, return receipt requested, and said notice shall indicate the name and address of the person desiring to purchase the same and the price and terms of payment upon which said sale is proposed. Said notice shall also imply an offer to sell such stock to the other Stockholder(s) upon the same price and terms as the proposed sale, or upon the following price and terms, at Purchaser's option.

(b) Price. Purchase price paid for each share of stock shall be as set forth in Article VIII.

(c) Terms. The stock shall be paid for as set forth in Article IX.

(d) Mechanics. Upon such event, the other stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article III STOCKHOLDER DESIRES TO SELL

Sec. 3.1 Notice of Desire to Sell

(a) Notice. In the event that any Stockholder, not in receipt of a bona fide offer, shall desire to transfer his/her stock, he/she shall, at least ____ (____) days prior to the date he desires to transfer his stock, serve notice upon the other Stockholder(s) by registered or certified mail, return receipt requested, said notice containing an offer to sell such stock to the other Stockholder(s) upon the following price and terms.

(b) Price. The purchase price paid for each share of stock shall be as set forth in Article VIII.

(c) Terms. The stock shall be paid for as set forth in Article IX.

(d) Mechanics. Upon such event, the other Stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article IV STOCKHOLDER IS DISABLED

Sec. 4.1 Disability

(a) Disability. If any Stockholder is, by reason of illness, injury or disability, unable to carry on his normal duties in the conduct of the Corporation business then such inactive Stockholder shall be deemed permanently disabled and shall be deemed to have offered his Capital interest as follows. Such inability shall be deemed to have occurred upon the following event:

Alternative A–1

The Stockholder receives disability benefits under the terms of any disability income policy held on his health.

Alternative A–2

The Stockholder is unable to effectively carry on his normal duties during any [*number*] months during any [*number*] consecutive month period.

Alternative A–3

The Stockholder receives Social Security benefits as a result of his disability.

(b) Price. The purchase price paid for each share of stock shall be as set forth in Article VIII.

(c) Terms. The stock shall be paid for as set forth in Article IX.

(d) Mechanics. Upon such event, the other Stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article V DEATH OF A STOCKHOLDER

Sec. 5.1 Death

(a) Death. Upon the death of any Stockholder, the entire interest of such deceased Stockholder and the estate of the decedent in the Corporation shall be offered for sale as follows.

Option 1 (Value Depends on Specific Objectives)

(1) Stockholder Insurance. Each Stockholder has taken out insurance on the life of the other Stockholder(s) in the amounts set forth in Schedule "B" attached. Each Stockholder shall name himself as the direct beneficiary under the policies for which he is the applicant, and he shall be the sole owner of the policies taken out by him.

Each Stockholder shall pay all premiums due on the policies taken out by him on the life of the other Stockholder(s) and shall exhibit proof of payment to the other Stockholder(s) within _____ (_____) days after the due date of each premium. If any Stockholder fails to pay a premium within ____ (____) days after the premium due date, the other Stockholder(s) may pay the premium due. Such payment shall be considered a loan to the Stockholder in default, and the Stockholder(s) making the payment shall be entitled to recover such amount with interest from the date of payment at ____ percent per annum.

No Stockholder shall, during the term of this Agreement, revoke or change the beneficiary designation or modify or impair any of the rights or values under the policies which he is the owner of.
End of Option 1

It is understood that said policies shall represent a source of funds necessary to cover, in the event of death, the purchase price of the stock respectively owned by each Stockholder, as provided in this Article. The Owner shall pay all premiums due on the policies and shall be the sole owner thereof. Any party shall have the right to insure at any time the life of a Stockholder, or anyone who may hereafter become, or be deemed to be, a party to this Agreement, for an amount or amounts in excess of the amount or amounts needed to fully purchase his respective stock.

Option 2 (Preferred as a Matter of Practical Experience)

(2) Modification of Insurance. The owner shall only modify or impair the rights or values under such policies with the mutual consent of the parties hereto.

End of Option 2

Option 3

(2) Applicable Insurance. Only insurance policies listed in this Agreement, or written amendments or written supplements to this Agreement, shall be included as insurance held pursuant to this Agreement.

End of Option 3

(b) Price. The purchase price paid for each share of stock shall be as set forth in Article VIII modified as follows:

Alternative B–1 (Not Preferred as a Matter of Practical Experience)

(1) Excess Insurance Proceeds. In addition, upon the death of a Stockholder, such purchase price shall take into account _____ (_____) of the excess of the insurance proceeds (if any) paid pursuant to this Agreement and received as a result of the death of the Stockholder to the remaining Stockholder(s) over the proceeds necessary to cover the purchase price as calculated herein.

This clause reflects the fact that the insurance can be thought of as a windfall which the deceased Stockholder should share in.

End of Alternative B–1

Alternative B–2 (Preferred as a Matter of Practical Experience)

(1) Excess Insurance Proceeds. Provided, that the purchase price shall be the higher of the above calculation or the insurance face value paid to the Stockholder(s) pursuant to this Agreement and received as a result of the death of the Stockholder.

End of Alternative B–2

(c) Terms. The stock shall be paid for as set forth in Article IX.

(d) Mechanics. Upon such event, the other Stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article VI RETIREMENT OR WITHDRAWAL BEFORE NORMAL RETIREMENT

Sec. 6.1 Termination

(a) Termination. If any Stockholder's employment voluntarily or involuntarily is terminated before age [*number*] then such event shall constitute an implied offer under the following price and terms.

(b) Price. The purchase price paid for each share of stock shall be as set forth in Article VIII.

(c) Terms. The stock shall be paid for as set forth in Article IX.

(d) Mechanics. Upon such event, the Stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article VII RETIREMENT OR WITHDRAWAL AFTER NORMAL RETIREMENT

Sec. 7.1 Retirement or Withdrawal After Normal Retirement

(a) Termination. If any Stockholder employment is voluntarily or involuntarily terminated after age [*number*] such event shall constitute an implied offer to sell his capital interest under the following price and terms.

(b) Price. The redemption or purchase price paid for each share of stock shall be as set forth in Article VIII.

(c) Terms. The redemption or purchase price for each share of stock shall be paid as set forth in Article IX.

(d) Mechanics. Upon such event, the Stockholders shall have the [*option/obligation*] to purchase the relevant Stockholder(s) stock and shall follow the procedures in making such purchase as are set forth in Article X.

Article VIII PRICE
Alternative A–1 (Value Depends Upon Specific Objectives)

Sec. 8.1 Price

The purchase price paid for each share of stock pursuant to the terms of this Agreement shall be the value as computed in the following manner (if not otherwise determined) divided by the number of issued and outstanding shares:

Alternative A–1(A)

(a) Book Value. The book value of the Corporation shall be computed in accordance with generally accepted accounting practices as consistently used by the Corporation in preparation of its financial statements, as of the close of business on the _____ day of the month preceding the month in which the Triggering Event occurs to reflect the fair market value of all assets of the Corporation, accounts receivable and current liabilities not reflected on the books of the Corporation, other than goodwill, if any.

Option 4 (Value Depends Upon Specific Objectives)

The then parties to this Agreement shall agree on such fair market values. In the absence of agreement, such fair market values shall be determined by an appraiser selected pursuant to the rules of the American Arbitration Association.

End of Alternative A–1(A) and Option 4

Alternative A–1(B)

(a) Fixed Value. The value of the Corporation pursuant to the terms of this Agreement is fixed at $[*dollars*] until changed as follows: at any time the worth of the Corporation as a going concern may be reappraised and fixed by ____ (____) or more Stockholder(s) who own at least (____%) percent of the then issued and outstanding stock, and shall be endorsed on Schedule "A" attached to the counterpart of this Agreement delivered to and held by the Corporation, on which each value so fixed shall be verified by the signatures of said Stockholders who own at least (____%) percent of the issued and outstanding stock. If the parties fail to redetermine a value at any time, the last previously stipulated value shall control.

End of Alternative A–1(B)

Alternative A–1(C) (Value Depends on Specific Objectives)

(a) Capitalization of Earnings. The average net earnings of the Corporation for the years ending prior to the Triggering Event shall be multiplied by a factor of ____ and this result shall be the value of the entire Corporation. Each Stockholder's interest shall be divided by his or her then share of the Corporation value. Said earnings shall be determined by the Corporation's accountant pursuant to the methods already being applied regarding the Corporation.
End of Alternative A–1(C)

Alternative A–1(D) (Value Depends on Specific Objectives)

(a) Appraisal. The value of the Corporation (and each Stockholder's interest) shall be determined by an appraisal made pursuant to the rules of the American Arbitration Association, one Arbitrator.

End of Alternative A–1(D)

Alternative A–1(E) (Value Depends on Specific Objectives)

(a) Appraisal. The value of the Corporation shall be determined by the surviving Stockholders by majority vote appointing one arbitrator and selling Stockholder appointing one arbitrator. The two arbitrators so appointed shall appoint a third arbitrator. The decision of the three arbitrators shall be by majority vote and binding upon all parties to this Agreement. [*Provision should also be made for the appointment of an arbitrator in the event of a disagreement among the living Stockholders or if no appraiser is appointed within a specified time. Such provision may be by court appointment.*]

End of Alternative A–1(E)

Alternative A–1(F) (Value Depends on Specific Objectives)

(a) Valuation by Formula. The value of the Corporation shall be equal to:

(1) Take the fair market value of the Corporations tangible and intangible property (as determined by an appraisal pursuant to the rules of the American Arbitration Association, one arbitrator) and multiply this value by ___% . This result is the expected return on tangible assets.

(2) Take the net after tax earnings of the Corporation and subtract the result from (1). This is the excess earnings (or return from goodwill).

(3) Multiply the difference from (2) by ____. This is the value of goodwill.

(4) Add the fair market value of all property to the value of goodwill. This is the value of the Corporation.

(5) Each Stockholder's share shall be his or her share of the Corporation capital times the value of the Corporation.

End of Alternative A–1(F)

Option 5 (Value Depends Upon Specific Objectives)

(b) Tax Reserve. The above sum shall be reduced by a reserve equal in amount to ____ (%) percent of the Corporation's accountant's reasonable estimate of the Federal and State Income Taxes which will be payable by the Purchaser as a result of the fact that the Purchaser will not receive a deduction for the purchase of the selling Stockholder's stock.

End of Option 5

Option 6 (Preferred as a Matter of Practical Experience)

(c) Loan Payment. In addition to such purchase price, there shall be a repayment by the Corporation of the then outstanding balance of any sum then loaned to the Corporation by the withdrawing Stockholder (plus accrued interest, if any) whether or not said sums shall be then due and owing.

End of Option 6

Option 7 (Preferred as a Matter of Practical Experience if Corporation Is a Cash Basis Taxpayer)

(d) Unbooked Work. In addition, such purchase price shall also include the Stockholder's pro rata share of profit to be derived from unbilled and unbooked work, whether or not in process.

End of Option 7

Article IX TERMS

Sec. 9.1 Terms

The purchase price of the capital stock of a Stockholder shall be paid in the following manner:

Alternative A–1(A) (Value Depends Upon Specific Objectives)

(a) Years Certain. In the event of a purchase of the stock of a Stockholder a down payment shall be made at closing in the amount of [*percent*] of the purchase price. The balance of the purchase price shall be paid starting _____ month(s) thereafter in [*number*] equal monthly payments [*including/plus*] interest on the unpaid balance over [*number*] of years. Interest shall commence ____ (____) days after the Corporation or the remaining Stockholders are required to buy the stock of the selling Stockholder.

Alternative A–1(B) (Value Depends Upon Specific Objectives)

(a) Payment Amount Certain. In the event of a purchase of the stock of a Stockholder a down payment shall be made at closing in the amount of [*percent*] of the purchase price. The balance of the purchase price shall be paid starting _____ month(s) thereafter in equal monthly installments of $[*dollars*] per month, [*including/plus*] interest on the unpaid balance at the rate of [*percent*] per annum. Interest shall commence _____ (_____) days after the Corporation or the remaining Stockholder(s) are required to buy the stock of the selling Stockholder.

End of Alternative A–1(B)

Article X MECHANICS

Sec. 10.1 Mechanics—Mandatory Purchase

Offers made to the Stockholder(s) shall be subject to the following mechanics: the selling Stockholder or his representative shall give notice of such event, and within a period of (____) days after the mailing of such notice, the other Stockholder(s) shall purchase all (and not part) of the stock so offered in proportion to their respective stockholdings, unless they otherwise agree to a different percentage.

In all cases, the closing shall take place within ____ (____) days of the date on which the Corporation and/or the other Stockholder(s) become obligated to purchase the stock of the selling Stockholder.

Sec. 10.2 Mechanics—Optional Purchase

Offers made to the Stockholder(s) shall be subject to the following mechanics: the selling Stockholder or his representative shall give notice of such event and for a period of ____ ( ) days after the mailing of such notice, the other Stockholder(s) shall have the option to purchase all (but not part) of the stock so offered in proportion to their respective stockholdings, unless they refuse to exercise their option or otherwise agree to a different percentage. In the event that none of the other Stockholder(s) shall exercise the option to purchase as provided herein,

Alternative C–3(A) (Value Depends Upon Specific Objectives) the Corporation shall be liquidated.

Alternative C–3(B) (Value Depends Upon Specific Objectives) the offering Stockholder shall be free to dispose of his interest subject to the following restrictions:

Alternative D–1 (Value Depends Upon Specific Objectives)

(1) Effect on Transferor. The Transferor shall continue to be completely bound by the terms and provisions of this Agreement to the extent to which Triggering Events which relate to the Transferor shall trigger the offer or sale of said stock.

End of Alternative D–1

Alternative D–2 (Value Depends Upon Specific Objectives)

(1) Effect on Transferor. The Transferor shall no longer be bound by the terms and provisions of this Agreement.

End of Alternative D–2

Alternative E–1 (Value Depends Upon Specific Objectives)

(2) Effect on Transferee. The Transferee shall be bound by the terms and provisions of this Agreement to the extent to which Triggering Events which relate to the Transferee shall trigger the offer or sale of said stock. For purposes of determining who shall be entitled to purchase or is bound to purchase stock offered or to be sold, the Transferee shall be so entitled or bound.

End of Alternative E–1

Alternative E–2 (Value Depends Upon Specific Objectives)

(2) Effect on Transferee. The Transferee shall not be bound by the terms and provisions of this Agreement to the extent to which Triggering Events which relate to the Transferee might otherwise trigger the offer or sale of said stock. For purposes of determining who shall be entitled to purchase or is bound to purchase stock offered or to be sold, the Transferee shall be so entitled or bound.

End of Alternative E–2

In all cases, the closing shall take place within ____ (____) days of the date on which the other Stockholder(s) become obligated to purchase the stock of the selling Stockholder.

Article XI LIQUIDATION

Sec. 11.1 Liquidation

If the remaining Stockholder(s) have the option or are required to but do not purchase the interest of the Stockholder subject to said option or requirement, the potential selling Stockholder shall have the option of requiring that the Corporation shall proceed with reasonable diligence and prudence to liquidate or of demanding specific performance of this Agreement. In such liquidation, the Corporation assets, including the corporate name and any good will of the business, trade names, and other intangible assets shall be sold for such price as may reasonably be obtained for the same. The Stockholders shall be entitled to the profits and losses of the business during the period of liquidation, and the proceeds realized from such liquidation, shall be divided according to stock ownership.

Article XII MISCELLANEOUS—SUBSTANTIVE PROVISIONS

Sec. 12.1 Endorsement on Stock Certificates

(a) Upon the execution of this Agreement or within a reasonable time thereafter, the Stockholders shall cause their certificates of capital stock of the Corporation to be endorsed as follows:

> "The sale, assignment, transfer, pledge or other disposition of the shares of capital stock represented by this certificate are subject to a certain restrictive agreement dated _____, a copy of which Agreement is on file in the office of the Corporation."

(b) The parties hereto agree that all stock of the Corporation issued or transferred to them hereafter shall be subject to this Agreement and shall have endorsed thereon the notice hereinbefore set forth.

Sec. 12.2 Changes in Stock Ownership

It is recognized by all parties to this Agreement that the number of shares owned by any one Stockholder may vary from time to time. The fact that such changes occur shall have no effect upon the operation of this Agreement.

Sec. 12.3 Termination of Agreement

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

(a) The purchase of the stock of a party to this Agreement so as to leave only one Stockholder-party to this Agreement still owning stock in the Corporation; but such purchase will still subject the parties hereto or the estate of a deceased Stockholder to fulfilling the obligations of this Agreement.

(b) The termination of the Corporation for any cause.

(c) Mutual agreement of the parties.

(d) Bankruptcy or insolvency of any of the parties hereto, or the appointment of a receiver of the assets of any of the parties hereto, if said appointment is not vacated within ____ ( ) days after same became effective.

Option 8

Sec. 12.4 Subchapter S Status

The Stockholders agree that they will cause the Corporation to elect to be taxed under Subchapter S of the Internal Revenue Code and that they will not transfer the stock of the Corporation if such transfer will cause the Corporation to lose its election to be taxed under Subchapter S of the Internal Revenue Code.

Article XIII MISCELLANEOUS—MECHANICS

Sec. 13.1 Notices

All notices under this Agreement shall at the option of the sender be either served personally upon the party or parties to whom such notice is directed, or shall be mailed certified mail, postage paid, to the party to whom it is directed at the residence address of the party to whom directed of which the sender is reasonably aware of or should be aware of and such mailing shall constitute full and adequate notice on the date of such mailing of the matter so mailed.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

Attest Stockholders

____

____

Corporation

By

Its President

By

Its Secretary

[*Corporate Seal*]

Schedule A

Fixed Price

Date	Price Fixed Per Share of Stock	Stockholders' Signatures
____	____	
____	____	
____	____	
____	____	

The preceding agreement is a basic cross-purchase buy-sell stock purchase agreement giving the other Stockholders the option or requirement to purchase the stock of the Stockholder to whom a Triggering Event relates.

This type of agreement provides that upon one Stockholder's death (or otherwise) the estate will sell his shares to the other Stockholders personally, such other Stockholders being obligated to purchase the shares, usually on a pro rata basis. The surviving Stockholders use their own funds to buy in the shares, and again the variations are many. Ordinarily if there are three Stockholders (A, B and C), A and B would buy out C's interest if C predeceased.

If a cross-purchase is used, it almost certainly will turn out that it is best for each Stockholder to apply for, own, be the beneficiary of and pay (unless a split dollar arrangement is feasible—see the Employee Benefit Plan Volume) the premiums on the insurance on the lives of the other Stockholders who are parties to the agreement. Thus, where there are three Stockholders, A would hold a policy on the lives of both B and C, B on both A and C, and C on both A and B. There is the possibility of using a trustee in this sort of arrangement to own the insurance and distribute its proceeds. Also, in this cross-purchase arrangement, as in the stock-retirement plan, some type of valuation should be established, as will be seen later.

One of the clear advantages of a cross-purchase agreement funded by life insurance is that since each Stockholder owns policies of insurance on the lives of his fellow Stockholders, then in the event of the Corporation's insolvency, creditors of the Corporation cannot reach the cash values in such policies. It would be undesirable if the law were otherwise since then a primary advantage of a Corporation, i.e., limited liability of the Stockholders, would be lost.

In addition, proponents of cross-purchase plans occasionally argue that the tax problems are less complex than they are under all but the most conservatively drawn stock-redemption agreements. This would be true not only with respect to premium payments but to death proceeds as well. Further, with ownership of the policies in the Stockholders themselves, there could be no possible creation or aggravation of an IRC Section 531 problem—the unreasonable accumulation of surplus.

Perhaps the most obvious disadvantage of a cross-purchase agreement is in evidence where there are more than just a very few Stockholders. If, for example, there are 25 Stockholders and they all enter into a cross-purchase agreement, then, since each one of them would need to buy a policy on the life of every other Stockholder, 600 individual policies of life insurance would be required or an insurance trust used. If the same 25 were to use a stock-retirement agreement, then only 25 policies would be required. This disadvantage, however, is greatly reduced in the ordinary situation where there are only three or four Stockholders. Assuming that there are three Stockholders, if a stock-retirement plan is initiated, then only three policies are needed, while if a cross-purchase plan is used, then six policies must be written or an insurance trust used. Although there is no theoretical limit on the number of Stockholders utilizing a cross-purchase agreement, it has been suggested that any cross-purchase agreement with more than five parties would be extremely cumbersome and should probably be avoided unless there are compelling reasons to the contrary.

Another possible drawback of the cross-purchase type of stock-purchase agreement lies in the practical problem of each Stockholder's ability to pay the premiums required on his policies from year to year. It may be that the Corporation should increase dividends to enable the Stockholders to meet the premium payments, although it would seem from the Corporation's point of view wiser to increase their salaries if the Stockholders are also employees (assuming salary increases can be justified) and thereby be able to deduct such increases as a business expense. However, either additional dividends or increased salaries increase the income tax liability of the Stockholder. If the premium is felt to be too burdensome and if other factors indicate its desirability, then perhaps a solution might lie in forms of permanent insurance the premium rates for which lie between ordinary life and term insurance or the Stockholders themselves might partially finance the insurance.

Further, assume that there are three Stockholders, A, B and C, and that after the death of A, B would like to buy the policy A owned on C's life and C would like to buy the policy A owned on B's life in order to continue to have funds available to meet increased obligations under a new cross-purchase agreement. That there would be an increased burden is easy to see; B bought one-half of A's shares and C the other half when A died, and should either B or C now die, the survivor would have just that much more stock to buy. B and C could, however, buy the respective policies from A's executor.