Form 12

Engagement Letter for PIPE Transaction

[Placement Agent Letterhead]

[Form Trailing Resale/Traditional PIPE]

\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_, 20\_

[Company Name]

[Company Address]

Attention: [Name and Title]

Dear [Mr./Ms./Mrs. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]:

This letter agreement (this “Agreement”) confirms our understanding that [Corporation], a [State of Incorporation] corporation (the “Company”), has retained [Placement Agent] (the “Placement Agent”) to act as the Company’s [exclusive] agent to identify and introduce it to certain investors (the “Investors”) as prospective purchasers of the Company’s [equity or equity-linked securities] (the “Securities”) in connection with a possible private placement, whether in one or a series of offerings (the “Offering”), for a period commencing on the date of this Agreement and terminating [six] months from the date of this Agreement, unless extended by the parties.

As Placement Agent under this agreement, the Placement Agent will use its best efforts to complete the Offering as soon as practicable. The terms of the Offering shall be subject to mutual agreement of the Company and each Investor in the Offering. The Placement Agent will contact potential Investors, advise on timing, assist in the negotiation and the structuring of the Offering, assist in the preparation of a Private Placement Memorandum or other appropriate materials and provide related services to facilitate the successful completion of the Offering. The private placement of the Securities is to be made directly by the Company to the purchasers pursuant to purchase or subscription agreements entered into by such parties. The Placement Agent will conduct all sales and solicitation efforts in a manner consistent with the Company’s intent that the Offering be an exempt transaction pursuant to the U.S. Securities Act of 1933, as amended (the “Act”), and only to “accredited investors” as defined in Rule 501(a) under the Act. The Company shall in any event have sole and final authority to approve the timing, price, Investors and other terms of the Offering, and may at any time elect not to proceed with the Offering.

The Offering will be a private placement in accordance with the applicable laws of the United States and pursuant to the following procedures and terms and conditions:

1.

(a) Prior to the signing of any purchase agreements with Investors, officers of the Company with responsibility for financial affairs have been and will continue to be available to answer inquiries from prospective purchasers approved by the Company. After the purchase agreements and the information referred to therein have been reviewed by Investors approved by the Company, and the Investors have had the opportunity to address inquiries to the Company, separate purchase agreements will be completed with each prospective Investor approved by the Company. The conditions to the closing of the Offering (the “Closing”) shall be set forth in the purchase agreements and mutually agreed to between the Company and the Investors. Pursuant to the terms to be set forth in such purchase agreements, the Company shall file a registration statement (the “Registration Statement”) with respect to the possible resale, from time to time, of the Securities purchased under such purchase agreements. The Company agrees to keep the Registration Statement effective until such time as the Securities become eligible for resale by non-affiliates pursuant to Rule 144 under the Act.

(b) The types, terms, and amount of Securities sold, if any, by the Company and the price at which they will be sold is entirely within the Company’s discretion.

(c) The Company will perform the agreements set forth in the purchase agreements entered into with the Investors.

(d) The Company will:

(i) [Use its best efforts to cause the Company’s independent public accountants to address and deliver to the Company and the Placement Agent a letter or letters (which letters are frequently referred to as “Comfort Letters”) dated as of the date of the Closing;] and

(ii) Use its best efforts to cause the Company’s counsel to address and deliver to the Company and the Placement Agent a letter dated as of the date of the Closing [and as of the effective date of the Registration Statement] containing the statements set forth in Exhibit A hereto and addressing such additional matters as the Placement Agent shall reasonably request. In addition, the Placement Agent shall be entitled to rely on any opinion delivered to the Investors by counsel to the Company in connection with this transaction.

(iii) [Consider whether other deliveries should be required, such as opinions from intellectual property counsel, regulatory counsel, or any foreign counsel.]

(e) The Company will not, directly or indirectly, make any offer or sale of any of the Securities or any securities of the same or a similar class as the Securities, the result of which would cause the offer and sale of the Securities to fail to be entitled to the exemption from registration afforded by Section 4(a)(2) of the Act. The Company represents and warrants to the Placement Agent that it has not, directly or indirectly, made any offers or sales of the Securities or securities of the same or a similar class as the Securities during the six-month period ending on the date of this letter, and has no intention of making an offer or sale of the Securities or securities of the same or a similar class as the Securities for a period of six months after completion of this Offering, except for the offering of the Securities through the Placement Agent pursuant hereto and for offers and sales, the result of which would not cause the offer and sale of the Securities contemplated hereunder to fail to be entitled to the exemption from registration afforded by Section 4(a)(2) of the Act. As used herein, the terms “offer” and “sale” have meanings specified in Section 2(3) of the Act.

(f) The Company will fully cooperate with the Placement Agent in any due diligence investigation, including the production of information reasonably requested by the Placement Agent with respect to the offer and sale of the Securities, and will furnish the Placement Agent with such information, including financial statements, with respect to the business, operations, assets, liabilities, financial condition, and prospects of the Company, as the Placement Agent may reasonably request in order to permit it to assist the Company in preparing, if necessary, a confidential information memorandum, investor presentation or similar document, as appropriate, for use in connection with the offering of the Securities (the [“CIM”) and any general solicitation or general advertising materials (collectively, the “General Solicitation Materials”) and together with the CIM, the][[1]](#footnote-1) “Materials”). The Placement Agent may rely upon the accuracy and completeness of all such information and the Company acknowledges that the Placement Agent has not been retained to independently verify any of such information. The Company will be solely responsible for the contents of the CIM [and any General Solicitation Materials], its offering materials and any and all other written or oral communications provided by or on behalf of the Company to any actual or prospective purchaser of the Securities, and the Company represents and warrants that the CIM [and any General Solicitation Materials], any offering materials (other than with respect to any financial projections contained therein) and any other communications will not, as of the date of the offer or sale of the Securities, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. With respect to the financial projections to be contained in the CIM [and any General Solicitation Materials], if any (the “Projections”), the Company represents and warrants that the Projections will be made by the Company with a reasonable basis and in good faith and that the Projections will represent the Company’s best then available estimate and judgment as to the future financial performance of the Company based on the assumptions to be disclosed therein, which assumptions will be the only assumptions that are material in forecasting the financial results of the Company and that will reflect the Company’s best then available estimate of the events, contingencies, and circumstances described therein. The Company’s filings with the U.S. Securities and Exchange Commission (the “SEC”) will be deemed offering materials. The Company authorizes the Placement Agent to provide the CIM and offering materials to prospective purchasers of the Securities on its behalf.

(g) If at any time prior to the completion of the offer and sale of the Securities an event occurs that would cause the CIM or offering materials [, including any General Solicitation Materials,] (as supplemented or amended) to contain an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, or that would cause a material change in the Company’s view of the likelihood of achievement of the Projections or the reasonableness of the underlying assumptions, then the Company will notify the Placement Agent immediately of such event and the Placement Agent will suspend solicitations of the prospective purchasers of the Securities until such time as the Company shall prepare a supplement or amendment to the CIM or offering materials [or any General Solicitation Materials] that corrects such statement or omission or revises the Projects or such assumptions.

2. The selling price of the Securities to be issued and sold by the Company in the Offering will be specified in writing by the Placement Agent on behalf of the Company (by facsimile, letter, or otherwise) to the prospective Investors prior to the execution of the purchase agreements, subject to the Company’s approval.

3.

(a) The Placement Agent’s aggregate fee for introducing the Investors, preparing the Placement Memorandum (subject to the Company’s review and approval), and all other services provided by the Placement Agent in connection therewith, will be [Fee] % of the proceeds from the sale of the Securities pursuant to the purchase agreements, the (“Placement Fee”).[[2]](#footnote-2) Such Placement Fee shall be payable by the Company at the Closing.

(b) In addition to any Placement Fee that may be payable hereunder, the Company shall reimburse, regardless of the consummation of the sale contemplated hereby, the Placement Agent for all of the reasonable travel, legal, and other out-of-pocket expenses incurred in connection with the engagement hereunder. [Such [legal] expenses will not exceed a total of $\_\_\_\_\_\_\_\_\_\_\_\_\_ without the prior written consent of the Company, which consent shall not be unreasonably withheld; provided, [further,] that such cap on reimbursable expenses shall in no way affect the Company’s indemnity obligations under Exhibit B hereunder.] The Placement Agent shall provide the Company with a reasonably detailed description of such expenses.

(c) If within [six] [twelve] months after the termination of this agreement, [any Securities are sold by the Company,] [Securities are sold by the Company through a placement to investors previously identified and/or contacted by the Placement Agent in its capacity as placement agent hereunder,] then for each such sale the Company shall pay the Placement Agent, at the time of each such sale, an amount equal to the full fee set forth in Section 3(a) above.

(d) [All amounts payable to the Placement Agent hereunder shall be paid free and clear of all deductions or withholdings, unless the deduction or withholding is required by law, in which event the Company shall pay such additional amounts as shall be necessary to ensure that the net amount received by the Placement Agent will equal the full amount that would otherwise have been received by the Placement Agent had no such deduction or withholding been made.][[3]](#footnote-3)

Nothing in this Section 2 shall affect or abridge the rights Placement Agent may have under paragraph 8 and Exhibit B hereto.

4. The Placement Agent hereby represents and warrants to the Company that it has not had and will not have [(except for arrangements, if any, to share the fee provided herein)] any discussions with any person on the basis of which such person would be able to assert a claim for a finder’s fee or similar fee in connection with the sale by the Company of the Securities covered by this Agreement to prospects in the United States of America or overseas.[[4]](#footnote-4)

5. The Company hereby represents and warrants to the Placement Agent that during the term of this engagement, the Company will not (i) offer any securities for sale to, or solicit any offers to buy from, any person or persons, whether directly or indirectly, other than through the Placement Agent, or (ii) engage in any discussions with any person other than representatives of the Placement Agent for the purpose of engaging, or considering the engagement of, such person as a finder or broker in connection with the sale by the Company of the Securities covered by this Agreement to prospects in the United States of America or overseas.

6. For a period beginning on the date of this Agreement and continuing until a date that is [ninety] days from [the date of the Private Placement Memorandum] [the effective date of the Registration Statement,] [the filing date of the Registration Statement,] the Company will not, without the Placement Agent’s prior written consent, which consent shall not be unreasonably withheld, (a) offer for sale, sell, contract to sell, pledge, borrow, or otherwise dispose of (or enter into any transaction or device which is designed to, or could be expected to, result in the disposition by such person at any time in the future of) or issue any shares of common stock of the Company (“Common Stock”), [debt securities,] or securities convertible into or exchangeable for Common Stock, or grant, purchase, or sell any options, rights, or warrants with respect to any shares of Common Stock or securities convertible into or exchangeable for Common Stock, or (b) otherwise enter into any swap, derivative or other transaction or arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of any securities of the Company, except (i) securities issued pursuant to contractual obligations of the Company in effect as of the date of this Agreement and disclosed to the Placement Agent or its counsel prior to [the date of the Private Placement Memorandum] [the filing date of the Registration Statement]; (ii) securities issued on a pro rata basis to all holders of a class of outstanding equity securities of the Company; and (iii) equity securities issued pursuant to employee benefit or purchase plans in effect as of the date of this Agreement. In addition, the Company will cause each of its officers and directors to furnish to the Placement Agent, prior to the pricing of the sale of the Securities, a letter or letters, in form and substance satisfactory to counsel for the Placement Agent, pursuant to which each person shall agree not to, directly or indirectly, (1) offer for sale, sell, contract to sell, pledge, borrow, or otherwise dispose of (or enter into any transaction or device that is designed to, or could be expected to, result in the disposition by such person at any time in the future of) any shares of Common Stock, debt securities, or securities convertible into or exchangeable for Common Stock, or (2) otherwise enter into any swap, derivative, or other transaction or arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of any securities of the Company [for the period specified above] [for a period [specify other period]] without the prior written consent of the Placement Agent, and the Company will use its best efforts to cause such of its stockholders as may be designated by the Placement Agent to become subject to a lock-up arrangement reasonably acceptable to the Placement Agent prohibiting the disposition of any equity securities of the Company for [the period specified above] [a period [specify other period]] without the prior written consent of the Placement Agent.

7. The Company hereby agrees to indemnify the Placement Agent in accordance with the provisions set forth in Exhibit B hereto.

8. From the date of this Agreement and for so long as a Registration Statement is effective covering the resale of Securities sold to a purchaser, the Company will furnish to the Placement Agent:

(a) as soon as practicable (but in the case of the annual report of the Company to its stockholders, within 150 days after the end of each fiscal year of the Company), one copy of: (i) its annual report to its stockholders (which annual report shall contain financial statements audited in accordance with generally accepted accounting principles in the United States of America by a firm of certified public accountants of recognized standing), (ii) if not included in substance in its annual report to stockholders, its annual report on Form 10-K, (iii) each of its quarterly reports to its stockholders and, if not included in substance in its quarterly report to stockholders, its quarterly report on Form 10-Q, and (iv) a copy of the full Registration Statement (the foregoing, in each case, excluding exhibits); and

(b) upon reasonable request, all exhibits excluded by the parenthetical to the last clause of the immediately preceding paragraph and all other information that is generally available to the public.

Consider:

9. [The Placement Agent will not have any obligations in connection with the proposed offering contemplated by this Agreement other than those expressly provided herein. In no event shall the Placement Agent be obligated to purchase any Securities for its own account or for the accounts of its customers. Notwithstanding the foregoing, the Placement Agent will have the right, but not the obligation, (i) to determine the allocation of the Securities among potential purchasers, provided that such allocation is reasonably acceptable to the Company, and (ii) in any event, to allocate up to 20% of the Securities to individual customers of the Placement Agent (which may include employees of the Placement Agent, directly or through an investment vehicle), provided that such customers are reasonably acceptable to the Company. The Company hereby acknowledges that, except as expressly set forth herein, the Company (and not Placement Agent) is ultimately responsible for the completion of any Offering and the sale of any Securities.]

Consider:

10. [The Placement Agent’s financial arrangements, proposals and guidance are intended solely for the benefit and use of the Board of Directors of the Company (acting in its capacity as such) in connection with the Offering, are not on behalf of, and shall not confer rights or remedies upon, any securityholder or creditor of the Company or any other person, and may not be used or relied upon for any other purpose. Except as otherwise required by applicable law or governmental or stock exchange regulation, the Company will treat the Placement Agent’s arrangements, proposals and guidance and the terms of this Agreement as confidential and will not disclose them to any third party (other than, on a confidential basis, to its counsel and other advisors in connection with the Offering subject always to the terms of the preceding sentence, it being understood that the Company will be responsible for any breach by such counsel or advisors of the provisions of this sentence) in any manner without the Placement Agent’s prior written approval.]

Consider:

11. [Either the Company or the Placement Agent may terminate the Placement Agent’s engagement hereunder at any time upon at least [twenty] [ten] days’ prior written notice to the other party, including, without limitation, if the Placement Agent, in its sole discretion, is not satisfied with the results of its due diligence investigation of the Company and its business, operations, assets, liabilities, financial condition and prospects. Notwithstanding any such expiration or termination, the Company shall remain responsible for the reimbursement of the Placement Agent’s expenses under paragraph [3] of this Agreement, and the reimbursement, indemnification and contribution obligations of the Company under Exhibit B and paragraphs [7] and [17] of this Agreement shall survive. Such obligations also shall survive the offer and sale of the Securities.]

Consider:

12. [If, during the term of the Placement Agent’s engagement hereunder or during the period of [6 months] following expiration or termination of the Placement Agent’s engagement hereunder, there occurs a change in control (as defined below) of the Company, the Company will pay to the Placement Agent a one-time break-up fee in cash upon the closing of such change in control equal to the greater of (i) $[1,000,000] or (ii) the Placement Agent’s customary advisory fees for such a transaction [less the amount of any fees actually paid to the Placement Agent under paragraph [3] hereof]. For purposes of the foregoing, a “change in control” shall mean the signing of a definitive agreement for (I) a merger, consolidation, sale, or exchange of capital stock or other transaction that results in the shareholders of the Company immediately prior to such transaction owning less than 50% of the Company’s (or surviving company’s) voting stock immediately after such transaction, or (II) the sale or all or substantially all of the Company’s assets.]

[13.] For a period of [18] months from the date hereof, the Company grants the Placement Agent the right (provided the financing contemplated in this Agreement is completed)[, but not the obligation,] to provide investment banking services to the Company on an exclusive basis in all matters for which investment banking services are sought by the Company (such right, the “Right of First Refusal”), [which right is exercisable in the Placement Agent’s sole discretion]. For these purposes, investment banking services shall include, without limitation, (i) acting as lead manager for any underwritten public offering; (ii) acting as exclusive placement agent or financial advisor in connection with any private offering of securities of the Company; and (iii) acting as financial advisor in connection with any sale or other transfer by the Company, directly or indirectly, of a majority or controlling portion of its capital stock or assets to another entity, any purchase or other transfer by another entity, directly or indirectly, of a majority or controlling portion of the capital stock or assets of the Company, and any merger or consolidation of the Company with another entity. The Placement Agent shall notify the Company of its intention to exercise the Right of First Refusal within 15 business days following notice in writing by the Company. Any decision by the Placement Agent to act in any such capacity shall be contained in separate agreements, which agreements would contain, among other matters, provisions for customary fees for transactions of similar size and nature, as may be mutually agreed upon, and indemnification of the Placement Agent and its affiliates, and shall be subject to general market conditions. If the Placement Agent declines to exercise the Right of First Refusal, the Company shall have the right to retain any other person or persons to provide such services on terms and conditions that are not materially more favorable to such other person or persons than the terms declined by the Placement Agent.

[14.] The Company agrees that any press release it may issue announcing the Offering will, subject to the Placement Agent’s review and approval, contain a reference to the Placement Agent’s role as placement agent to the Company in connection with the Offering. Further, the Company understands and agrees that, without the Placement Agent’s prior written consent, the Placement Agent may not be quoted or referred to in any document, release, or communication prepared, issued, or transmitted by the Company, including any entity controlled by, or under common control with, the Company and any director, officer, employee, or agent thereof.

Consider:

[Include the following paragraph if the Securities will be offered pursuant to Rule 506(c).]

The Company shall not use the Placement Agent’s name in any General Solicitation Materials without the prior written consent of the Placement Agent. The Company and the Placement Agent agree that any General Solicitation Materials must be reasonably satisfactory to the Placement Agent and the Placement Agent shall not use any General Solicitation Materials without the prior written consent of the Company. The Company agrees that following the consummation of the sale of the securities contemplated hereby, the Placement Agent shall have the right to place usual and customary advertisements in financial and other newspapers and journals at its own expense describing its services to the Company.

Consider:

[15.] [Include the following paragraph if the Securities will not be offered pursuant to Rule 506(c).][[5]](#footnote-5)

Each of the Company and the Placement Agent will have a reasonable belief at the time of any sale of the Securities as pursuant hereto that each purchaser of the Securities is an “accredited investor” as defined in Rule 501 of Regulation D under the Act and satisfies any private placement requirements applicable in any non-U.S. jurisdiction where the Securities may be offered (“Applicable Non-U.S. Laws”). None of the Company, any person acting on its behalf nor the Placement Agent will offer or sell the Securities by any form of general solicitation or general advertising, including the methods described in Rule 502(c) of Regulation D or by any means inconsistent with Applicable Non-U.S. Laws. The Company will file in a timely manner with the U.S. Securities and Exchange Commission (the “SEC”) any notices with respect to the Securities required by Rule 503 of Regulation D and will furnish to the Placement Agent promptly thereafter a signed copy of each such notice. The Company and the Placement Agent shall have the right to reject any proposed purchaser of Securities.

[Include the following paragraph if the Securities will be offered pursuant to Rule 506(c).]

The Company represents, warrants, and agrees that all sales of Securities intended to qualify under Rule 506(c) of Regulation D under the Act shall be made only to “accredited investors” as defined in Rule 501 of Regulation D under the Act, and that it will take reasonable steps to verify that such purchasers are accredited investors, which reasonable steps may include, but are not limited to, the methods identified in Rule 506(c). The Company will not make any filings with the U.S. Securities and Exchange Commission (the “SEC”) with respect to the offer and sale of the Securities without the Placement Agent’s prior consent. The Company will file in a timely manner with the SEC any notices with respect to the Securities required by Rule 503 of Regulation D and will furnish to the Placement Agent promptly thereafter a signed copy of each such notice. The Company and the Placement Agent shall have the right to reject any proposed purchaser of Securities.

[16.] Nothing in this Agreement, express or implied, is intended to confer or does confer on any person or entity other than the parties hereto or their respective successors and assigns, and to the extent expressly set forth herein, the Indemnified Persons (as defined in Exhibit B hereto), any rights or remedies under or by reason of this Agreement or as a result of the services to be rendered by the Placement Agent hereunder. The parties acknowledge that the Placement Agent is not acting in a fiduciary capacity with respect to the Company, and that the Placement Agent is not assuming any duties or obligations other than those expressly set forth in this Agreement. The Company further agrees that neither the Placement Agent nor any of its controlling persons, affiliates, directors, officers, employees, or consultants shall have any liability to the Company or any person asserting claims on behalf of or in right of the Company for any losses, claims, damages, liabilities, or expenses arising out of or relating to this Agreement or the services to be rendered by the Placement Agent hereunder, unless it is judicially determined that such losses, claims, damages, liabilities, or expenses resulted directly from the gross negligence or willful misconduct of the Placement Agent in performing its services hereunder.

17. The benefits of this Agreement shall inure to respective successors and assigns of the parties hereto and of the indemnified parties, and the obligations and liabilities assumed in this agreement by the parties hereto shall be binding upon their respective successors and assigns.

18. This agreement shall be governed by the laws of the state of [New York] governing contracts made and to be performed in such state without giving effect to principles of conflicts of law. The Company and the Placement Agent hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York and of the United States District Courts located in the City of New York for any lawsuits, actions, or other proceedings arising out of or relating to this Agreement. The Company further agrees that service of any process, summons, notice, or document by mail to the Company’s address set forth above shall be effective service of process for any lawsuit, action, or other proceeding brought against the Company in any such court. The Company and the Placement Agent hereby irrevocably and unconditionally waive any objection to the laying of venue of any lawsuit, action, or other proceeding arising out of or relating to this Agreement in the courts of the State of New York or the United States District Courts located in the City of New York, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such lawsuit, action, or other proceeding brought in any such court has been brought in an inconvenient forum.

19. ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LAWSUIT, CLAIM, OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES TO BE RENDERED BY THE PLACEMENT AGENT HEREUNDER IS EXPRESSLY AND IRREVOCABLY WAIVED.

20. The Company and the Placement Agent represent and warrant that each has all requisite power and authority to enter into and carry out the terms and provisions of this Agreement and the execution, delivery, and performance of this Agreement does not breach or conflict with any agreement, document, or instrument to which it is a party or bound.

21. The Company acknowledges that the Placement Agent may have and may continue to have investment banking and other relationships with parties other than the Company pursuant to which the Placement Agent may acquire information of interest to the Company. The Placement Agent shall have no obligation to disclose such information to the Company or to use such information in connection with any contemplated transaction.

22. [The Company acknowledges that the Placement Agent is a full service securities firm and in the ordinary course of its business, for its own account or the accounts of its customers, holds long or short positions in securities or derivative securities (including options), which may include securities or derivative securities relating to the Company or other entities that may be involved in the engagement contemplated hereby. Nothing in this Agreement shall be deemed to prohibit the Placement Agent from providing any services permitted by applicable law to any third party or from engaging in any lawfully permitted activity on its own behalf.]

23. In accordance with the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)), the Placement Agent is required to obtain, verify and record information that identifies its clients, including the Company, which information may include the name and address of its clients, as well as other information that will allow the Placement Agent to properly identify its clients.

Consider:

[24.] The Company agrees that it will not directly or indirectly use the proceeds of the Offering hereunder, or lend, contribute or otherwise make available such proceeds to a subsidiary, joint venture partner or other person or entity, (i) to fund or facilitate any activities of or business with any person that, at the time of such funding or facilitation, is the subject of or target of any sanctions administered or enforced by the U.S. government (including, without limitation, the Office of Foreign Assets Control of the U.S. Department of the Treasury) or other relevant sanctions authority (collectively, “Sanctions”), (ii) to fund or facilitate any activities of or business in any country or territory that is the subject or target of Sanctions, including, without limitation, Cuba, Iran, North Korea, Syria and Crimea or (iii) in any other manner that will result in a violation by any person (including any person participating in the Offering, whether as placement agent, underwriter, advisor, investor or otherwise) of Sanctions.

24. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

25. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be the same agreement.

26. This Agreement constitutes the entire understanding and agreement between the Company and the Placement Agent with respect to the subject matter hereof, and supersedes all prior understanding or agreements between the parties with respect thereto, whether oral or written, express or implied. This Agreement may not be amended or modified except in writing signed by each of the parties hereto. It is understood and agreed that the Placement Agent’s services hereunder will not include providing any tax, accounting, legal or regulatory advice, or developing any tax strategies for the Company.

If the foregoing is in accordance with your understanding of our agreement, please sign in the space provided below and return a signed copy of this Agreement to the Placement Agent.

|  |  |  |
| --- | --- | --- |
|  | Sincerely, | |
|  | [PLACEMENT AGENT] | |
|  | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |
|  |  | Name: | |
|  |  | Title: | |
|  | Accepted by: | |
|  | [COMPANY] | |
|  | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |
|  |  | Name: | |
|  |  | Title: | |

Exhibit A

[Insert text of opinion request.]

Opinion rendered at the time of effectiveness of the Registration Statement shall include, among other things, a statement to the following effect:

The opinion of counsel to the Company shall be to the effect that the Registration Statement of the Company (the “Registration Statement”) and the Prospectus of the Company (the “Prospectus”) as amended and supplemented to date (other than the financial statements and related schedules, and other financial and statistical data therein, as to which it need express no opinion)[, including documents incorporated by reference,] comply as to form in all material respects with the requirements of the U.S. Securities Act of 1933, as amended, and the rules and regulations of the Securities and Exchange Commission thereunder (the “Securities Act”); and nothing came to its attention that caused it to believe that (i) the Registration Statement, as of its effective time, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, (ii) (a) the Prospectus, as of its date, the time of sale of the Securities, or the date of such opinion, and (b) the most recent preliminary prospectus and any “free writing prospectuses” (as defined in Rule 405 of the Securities Act) set forth on a schedule to such opinion, each as of its issue date or at the time of sale of the securities, each as so amended and supplemented, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading (it being understood that it need express no opinion with respect to the financial statements, related schedules, and other financial and statistical data therein).[[6]](#footnote-6)

Exhibit B

The Company shall indemnify the Placement Agent and hold it harmless against any and all losses, claims, damages or liabilities to which the Placement Agent may become subject (i) arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in the CIM, Private Placement Memorandum, registration statement (including documents, incorporated by reference) (the “Registration Statement”), any preliminary prospectus or prospectus forming a part thereto, or in any other written or oral communication provided by or on behalf of the Company to any actual or prospective purchaser of the Securities [and any General Solicitation Materials][[7]](#footnote-7) (including any free writing prospectus) or arising out of or based upon the omission or alleged omission to state therein a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, or (ii) arising in any manner out of or in connection with the services or matters that are the subject of this agreement (including, without limitation, the offer and sale of the Securities), and shall reimburse the Placement Agent promptly for any legal or other expenses reasonably incurred by it in connection with investigating, preparing to defend or defending, or providing evidence in or preparing to serve or serving as a witness with respect to, any lawsuits, investigations, claims, or other proceedings arising in any manner out of or in connection with the services or matters that are the subject of this agreement (including, without limitation, in connection with the enforcement of this agreement and the indemnification obligations set forth herein); provided, however, that the Company shall not be liable under clause (ii) of this paragraph in respect of any loss, claim, damage, liability, or expense to the extent that it is finally judicially determined that such loss, claim, damage, liability, or expense resulted directly from the gross negligence or willful misconduct of the Placement Agent in the performance of its services hereunder.

The Company agrees that the indemnification and reimbursement commitments set forth herein shall apply whether or not the Placement Agent is a formal party to any such lawsuits, claims, or other proceedings, and that such commitments shall extend upon the terms set forth herein to any controlling person, affiliate, director, officer, employee, or agent of the Placement Agent (each, with the Placement Agent, an “Indemnified Person”). The Company further agrees that, without the Placement Agent’s prior written consent, which consent will not be unreasonably withheld, it will not enter into any settlement of a lawsuit, claim, or other proceeding arising out of the transactions contemplated by this agreement unless such settlement includes an explicit and unconditional release from the party bringing such lawsuit, claim, or other proceeding of all Indemnified Persons.

If any action shall be brought against any Indemnified Party in respect of which indemnity may be sought pursuant to this Agreement, such Indemnified Party shall promptly notify the Company in writing, and the Company shall have the right to assume the defense thereof with counsel of its own choosing. Any Indemnified Party shall have the right to employ separate counsel in any such action and participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party except to the extent that (i) the employment thereof has been specifically authorized by the Company in writing, (ii) the Company has failed after a reasonable period of time to assume such defense and to employ counsel, or (iii) in such action there is, in the reasonable opinion of such separate counsel, a material conflict on any material issue between the position of the Company and the position of such Indemnified Party.

The Company and the Placement Agent agree that if any indemnification or reimbursement sought hereunder is judicially determined to be unavailable for a reason other than the gross negligence or willful misconduct of the Placement Agent in performing its services hereunder, then, whether or not the Placement Agent is the Indemnified Person, the Company and the Placement Agent shall contribute to the losses, claims, damages, liabilities, and expenses for which such indemnification or reimbursement is held unavailable (i) in such proportion as is appropriate to reflect the relative benefits to the Company on the one hand, and the Placement Agent on the other hand, in connection with the transactions to which such indemnification or reimbursement relates, or (ii) if the allocation provided by clause (i) above is judicially determined not to be permitted, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) but also the relative faults of the Company on the one hand, and the Placement Agent on the other hand, as well as any other equitable considerations; provided, however, that in no event shall the amount to be contributed by the Placement Agent hereunder exceed the amount of the fees actually received by the Placement Agent hereunder.

The Company also agrees that no Indemnified Person shall have any liability whatsoever to the Company or any of its affiliates, including securityholders or creditors, for or in connection with this Agreement, the Offering or the Placement Agent’s role or services in connection therewith, except to the extent that any such liabilities or expenses incurred by the Company are finally judicially determined to have resulted primarily from the applicable Placement Agent’s gross negligence or willful misconduct in performing its services hereunder. In no event shall any Indemnified Person be responsible for any special, indirect or consequential damages incurred by the Company.

1. Include the bracketed language in clauses (b) and (c) if the Securities will be offered pursuant to Rule 506(c).

   [↑](#footnote-ref-1)
2. If a time-based tolling fee is preferred, replace with: “a [monthly/quarterly cash retainer fee of $[\_\_], payable in advance upon the signing of this Agreement and thereafter upon each [monthly/quarterly] anniversary of the date hereof during the term of the Placement Agent’s agreement hereunder.”

   [↑](#footnote-ref-2)
3. Insert this paragraph if cross-border payments are expected.

   [↑](#footnote-ref-3)
4. If there is another advisor or other entity entitled to a fee pursuant to the Private Placement, insert: [, other than [ ], whose fees shall be the sole responsibility of the Company.]

   [↑](#footnote-ref-4)
5. Only one of the paragraphs should be included in the final version.

   [↑](#footnote-ref-5)
6. If the registration statement is not filed on the Closing Date, then the opinion of counsel to the Company will refer to the offering materials, including the information included in the purchase agreements, used in connection with the private placement.

   [↑](#footnote-ref-6)
7. Include the bracketed language if the Securities will be offered pursuant to Rule 506(c). [↑](#footnote-ref-7)