Form 19

Confidential Private Placement Memorandum

CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM

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| --- | --- |
| Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Copy No.: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

[Logo]

[Company]

Up to [Aggregate] Shares of Common Stock,

par value $[par value] per share

[Placement Agent]

[Month] \_\_, 20\_

THIS CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM MAY NOT BE SHOWN OR GIVEN TO ANY PERSON OTHER THAN THE PERSON WHOSE NAME APPEARS ABOVE AND MAY NOT BE PRINTED OR REPRODUCED IN ANY MANNER WHATSOEVER. FAILURE TO COMPLY WITH THIS DIRECTIVE CAN RESULT IN A VIOLATION OF THE U.S. SECURITIES ACT OF 1933, AS AMENDED AND/OR THE U.S. SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, INCLUDING REGULATION FD. ANY FURTHER DISTRIBUTION OR REPRODUCTION OF THESE MATERIALS, IN WHOLE OR IN PART, OR THE DIVULGENCE OF ANY OF THE CONTENTS BY AN OFFEREE IS UNAUTHORIZED.

CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM

[Month] \_\_, 20\_

By accepting the information contained within this confidential private placement memorandum, the recipient acknowledges its express oral agreement with [Company] and the placement agent to maintain in confidence such information. [Company] and the placement agent have caused these materials to be delivered to you in reliance upon your agreement to maintain the confidentiality of this information and upon Regulation FD promulgated by the Securities and Exchange Commission (the “Commission”).

[Company]

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

Up to [Aggregate] Shares of Common Stock

PRIVATE PLACEMENT TO SELECTED ACCREDITED INVESTORS

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

We are offering to sell up to [Aggregate] shares of common stock of [Company], $[par value] par value per share. Only selected investors who qualify as “accredited investors,” as that term is defined in this confidential private placement memorandum, are eligible to purchase these shares. [Company] has prepared this confidential private placement memorandum.

This offer is subject to a number of closing conditions, which include:

* execution of purchase agreements in substantially the form accompanying this confidential private placement memorandum; and
* approval of certain legal matters.

Our common stock is traded on the [Stock Exchange] (“[Stock Exchange]”) under the symbol “[SYMBOL].” However, the shares offered under this confidential private placement memorandum have not been registered under the U.S. Securities Act of 1933, as amended (the “Securities Act”). This offer is being made pursuant to the exemption provided by Section 4(a)(2) of the Securities Act and certain rules and regulations promulgated under that section. Accordingly, you may not transfer the offered shares in the absence of an effective registration statement under the Securities Act or evidence acceptable to us and our counsel, which may include an opinion of counsel, that registration is not required.

Neither the Commission nor any state regulatory authority has passed upon the adequacy or accuracy of this confidential private placement memorandum or endorsed the merits of this offering. Any representation to the contrary is a criminal offense.

The purchase of our shares entails a number of very significant risks. See “Risk Factors” beginning on page \_\_ of this confidential private placement memorandum. Because of these risks, you should invest your funds only if you are an accredited investor and are able to bear the full risk, and withstand the total loss, of your entire investment.

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IMPORTANT CONSIDERATIONS

We intend that this offering of our shares be made only to accredited investors purchasing in the ordinary course of their business for their own account for investment and not with a view to, or in connection with any arrangements or understandings regarding, any subsequent distributions. An “accredited investor,” as used in this confidential private placement memorandum, is a person defined as an “accredited investor” in Rule 501(a) under the Securities Act.

We have requested that [Placement Agent], who is acting as the placement agent for this offering, introduce us to qualified accredited investors as determined by us. The agent’s fee for this service and all other services they provide in connection with this offering will be payable by us based on the proceeds received by us.

We have prepared this confidential private placement memorandum solely for the benefit of persons interested in this offering of our shares. The information contained in this confidential private placement memorandum is strictly confidential and has been prepared from our publicly available documents. You agree to use this information for the sole purpose of evaluating a possible investment in our shares and for no other purpose. You are prohibited from reproducing or distributing this confidential private placement memorandum, in whole or in part, or divulging any of its contents, without our prior written consent. Further, the existence and nature of all conversations regarding this offering and us must be kept strictly confidential. You should be aware that the federal securities laws impose restrictions on trading based on information regarding this offering. In addition, unauthorized disclosure of this information may cause us to violate Regulation FD.

By acceptance of this confidential private placement memorandum, you agree to promptly return to the placement agent or to us this confidential private placement memorandum and the purchase agreement and any other documents or information furnished by or on behalf of the placement agent or us if you elect not to purchase the shares.

The delivery of this confidential private placement memorandum constitutes an offer only to the offeree whose name appears on the front cover. We may withdraw, cancel or modify this offering of our shares at any time and without prior notice.

This confidential private placement memorandum does not purport to be all-inclusive or to contain all the information that you may desire in investigating us. You should conduct and rely on your own evaluation of us and the terms of this offering, including the merits and risks involved, in making an investment decision with respect to our shares.

You should not construe the contents of this confidential private placement memorandum as investment, tax or legal advice. You, your investment, tax or other advisors and your accountants and legal counsel should review this confidential private placement memorandum, as well as the nature of the investment in the shares. Please note that when we refer to “this confidential private placement memorandum,” we also are referencing all attached exhibits and their appendices.

This confidential private placement memorandum does not constitute an offer to sell or a solicitation of an offer to buy any of our shares in any state or other jurisdiction or to any person if such an offer or solicitation is unlawful or unauthorized. Offers to sell or solicitations of an offer to buy any of these shares will be made only after prospective investors have had an opportunity to perform their own due diligence investigations.

This confidential private placement memorandum includes the form of purchase agreement for the offered shares, the draft resale registration statement and certain other documents concerning us. You are encouraged to read these documents before purchasing the shares offered by this confidential private placement memorandum.

We and our placement agent reserve the right to reject any prospective investment, in whole or in part, or to allot to any prospective investor less than the number of shares that an investor desires to purchase.

Neither the delivery of this confidential private placement memorandum nor any sales made under it shall, under any circumstances, create any implication that there has been no change in our affairs from that disclosed herein since the date of this confidential private placement memorandum, or that the information contained in it is correct as of any time subsequent to the date of this confidential private placement memorandum.

In recognition of the fact that investors, even though purchasing these shares for investment, may wish to be legally permitted to sell their shares when they deem appropriate, we have agreed that, as promptly as reasonably practicable, we will prepare and file with the Commission a registration statement with respect to the resale of those shares from time to time through [Exchange] or in privately-negotiated transactions and prepare and file such amendments and supplements to the resale registration statement as may be necessary to keep it effective until the date on which the shares become eligible for resale by non-affiliates by reason of Rule 144(k) under the Securities Act or any other rule of similar effect.

A draft version of the resale registration statement is included in this confidential private placement memorandum. We have agreed to use our reasonable efforts, subject to receipt of necessary information from all investors, to cause the resale registration statement to become effective [upon filing pursuant to Rule 462 under the Securities Act][[2]](#footnote-2) [within 30 days after the date it is filed by us with the Commission].[[3]](#footnote-3) Investors will not be able to publicly sell shares acquired through this offering until this registration statement has been declared effective by the Commission. Thereafter, you may not be able to sell shares acquired through this offering during certain periods until we have amended the resale registration statement or supplemented the prospectus included therein and delivered to you an amended prospectus or prospectus supplement. By executing the purchase agreement, you are also agreeing to indemnify us against certain liabilities.

The completion of the purchase and sale of the offered shares hereunder will be at a place and time specified by us and of which the investors shall have been notified by facsimile or otherwise.

We have prepared two questionnaires for each investor to complete requesting certain details regarding such investor. The questionnaires are attached hereto as Exhibit [G]. You must complete the questionnaires when you execute the purchase agreement. We will utilize the questionnaires to confirm the accuracy of the statements as to each investor in the prospectus forming a part of the resale registration statement, including the information in the sections to be entitled “Selling Stockholders” and “Plan of Distribution.” You may be deemed an “underwriter” as that term is defined in the Securities Act, if you resell the shares pursuant to the resale registration statement. Underwriters have statutory responsibilities as to the accuracy of any prospectus used by them.

Certificates evidencing the offered shares will be delivered to the investors at the closing of the purchase and sale of the shares with a legend on them stating that the shares have not been registered under the Securities Act and, therefore, cannot be sold unless they are registered under the Securities Act or unless an exemption from registration is available. Each investor undertakes in the purchase agreement that, if the offered shares are resold, they will be resold in accordance with the resale registration statement. Further, each investor acknowledges and agrees in the purchase agreement that the offered shares will not be transferable on our books unless the certificate evidencing those shares, when submitted to the transfer agent, is accompanied by a separate certificate executed by an officer of, or other person duly authorized by, the investor to the effect that the shares have been sold in accordance with the resale registration statement and there has been compliance with the requirement of delivering a current prospectus. The text of this separate certificate is specified in Appendix II to the purchase agreement and is attached hereto as Exhibit [H]. Promptly upon receipt of this certificate, share certificates bearing a restrictive legend may be exchanged by the transfer agent for share certificates not bearing a legend.

You can normally satisfy the prospectus delivery requirement by disclosing to a selling broker the existence of the requirement to sell the shares in accordance with the resale registration statement covering the shares and making arrangements with such broker to deliver a current prospectus in connection with any such sale. Upon receipt of a written request therefor, we have agreed to provide a reasonable number of current prospectuses to each investor and to supply a reasonable number of copies to any other parties requiring such prospectuses.

This confidential private placement memorandum is summary in nature and should be read in conjunction with:

* our Annual Report on Form 10-K for the fiscal year ended [December 31], 20\_;
* Definitive Proxy Statement for Annual Meeting of Stockholders to be held on [Month] \_\_, 20\_;
* our Quarterly Report on Form 10-Q for the fiscal quarter ended [March 31], 20\_;
* our Quarterly Report on Form 10-Q for the fiscal quarter ended [June 30], 20\_;
* our Quarterly Report on Form 10-Q for the fiscal quarter ended [September 30], 20\_;
* our Current Report[s] on Form 8-K filed on [Month] \_\_, 20\_;
* the form of purchase agreement to be entered into by the investors; and
* the proposed form of resale registration statement on Form S-3.

All of these documents are attached to, and are incorporated by reference into and made a part of, this confidential private placement memorandum. However, the exhibits to our Annual Report on Form 10-K and our Quarterly Report on Form 10-Q are not attached.

No person (including the placement agent) has been authorized to give any information other than that contained in this confidential private placement memorandum, or to make any representations in connection with this offering, and, if given or made, such other information or representations must not be relied upon as having been authorized by us or the placement agent. The placement agent and we disclaim any and all liabilities for representations or warranties, express or implied, contained in, or omissions from, this confidential private placement memorandum or any other written or oral communication or transmission made available to the recipient.

With respect to the sale of the shares offered by us, you will be entitled to rely solely on those representations and warranties that may be made to you in any purchase agreement relating to your purchase of the shares offered by this confidential private placement memorandum. However, no representation, warranty or covenant, express or implied, is made to you by the placement agent and no responsibility of any kind as between the investors and the placement agent is accepted by the placement agent, with respect to the completeness or accuracy of any information contained in this confidential private placement memorandum or as to any other matter concerning it or the statements made in it. The accuracy of such information is solely our responsibility.

We reserve the right to increase or decrease the number of shares covered by this offering and whether or not to sell shares, and the number of shares to be sold, in our sole discretion, to any person.

We have agreed to indemnify [Placement Agent] and its controlling persons against certain liabilities arising in connection with this offering, or to contribute to payments they may be required to make in respect thereof.

[STATE REQUIRED LEGENDS]

SUMMARY OF THE OFFERING

|  |  |
| --- | --- |
| Issuer........................................ | [Company] |
| [Stock Exchange] symbol........... | [SYMBOL]. |
| Securities offered..................... | Common stock, par value $[par value] per share. |
| Number of shares offered.......... | Up to [Aggregate]. |
| Offering..................................... | Private placement of common stock offered by us. Resales by investors of shares purchased in this offering are to be covered by the resale registration statement that will be filed by us as soon as reasonably practicable, but in no event later than [five] business days following the closing of this offering. |
| Use of proceeds....................... | We expect to use the net proceeds of this offering for \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Pending such uses, we intend to invest the net proceeds in short-term, interest-bearing, investment grade securities. |
| Placement agent........................ | [Placement Agent] |
| Shares outstanding as of [Month] \_\_, 20\_ (1).............................. | \_\_\_\_\_\_\_\_\_\_ shares of Common Stock. |
| Shares outstanding as of [Month] \_\_, 20\_, as adjusted (1).............................. | \_\_\_\_\_\_\_\_\_\_ shares (assuming [Aggregate] shares are sold by us pursuant to this offering). |
| Placement procedure........................... | Interested investors will be asked to execute purchase agreements with us. The closing for the sale of shares under those purchase agreements will occur within three business days following execution of the purchase agreements, unless otherwise agreed to by you and us. |
| (1) Excludes \_\_\_\_\_\_\_\_\_ shares of common stock issuable upon exercise of stock options outstanding at [Month] \_\_, 20\_, at a weighted average exercise price of $\_\_\_\_ per share. An additional \_\_\_\_\_\_shares of common stock are reserved for issuance under our stock option plans. | |

CAUTIONARY NOTE REGARDING FORWARD-LOOKING STATEMENTS

This confidential private placement memorandum contains forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995 and Section 27A of the Securities Act. Statements in this confidential private placement memorandum that are not historical facts are identified as “forward-looking statements” for the purpose of the safe harbor provided by Section 21E of the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”) and Section 27A of the Securities Act. Any statements about our expectations, beliefs, plans, objectives, assumptions or future events or performance are not historical facts and may be forward-looking. These statements are often, but not always, made through the use of words or phrases such as “anticipate,” “estimate,” “plans,” “projects,” “continuing,” “ongoing,” “expects,” “management believes,” “we believe,” “we intend” and similar words or phrases. Accordingly, these statements involve estimates, assumptions and uncertainties that could cause actual results to differ materially from those expressed in them. Our actual results could differ materially from those anticipated in such forward-looking statements as a result of several factors more fully described under the caption “Risk Factors” and elsewhere in this confidential private placement memorandum, including the exhibits hereto. All forward-looking statements are necessarily only estimates of future results and there can be no assurance that actual results will not differ materially from expectations, and, therefore, you are cautioned not to place undue reliance on such statements. Any forward-looking statements are qualified in their entirety by reference to the factors discussed throughout this confidential private placement memorandum. Furthermore, any forward-looking statement speaks only as of the date on which it is made, and we undertake no obligation to update any forward-looking statement to reflect events or circumstances after the date on which the statement is made or to reflect the occurrence of unanticipated events, except as required by law.

BUSINESS

[Insert Short Company Description]

We were incorporated in the State of [Delaware], and our principal executive offices are located at [Street Address], [City, State, ZIP], tel: [Tel]. Our website address is www.          .com. The information contained in our website is not a part of this confidential private placement memorandum.

RECENT DEVELOPMENTS

[To be provided by the Company]

RISK FACTORS

You should carefully consider the general discussion of risk factors set forth in the material set forth under the caption “Item 1.A—Risk Factors” in the Form 10-K for the year ended [December 31,] 20\_ and the caption “Management’s Discussion and Analysis of Financial Condition and Results of Operations” in the Form 10-Q for the fiscal quarter ended [Month] \_\_, 20\_ before making your investment decision, as well as those contained in the any filing with the this Securities and Exchange Commission subsequent to the date of this confidential private placement memorandum. Those risks are not the only risks we face. Additional risks that we do not yet know of or that we currently judge to be immaterial may also impair our business operations. If any of the events or circumstances described in the aforementioned risks or other material actually occurs, our business, financial condition, or results of operations could be materially adversely affected. In such case, the trading price of our common stock could decline, and you may lose part or all of your investment.

USE OF PROCEEDS

The gross proceeds to us from the sale of the [Aggregate] shares of common stock offered by us are estimated to be approximately $[Aggregate Price] (at an assumed sale price of $\_.\_\_ per share, the closing price for our common stock on [Stock Exchange] on [Month] \_\_, 20\_), prior to deducting the commissions to the placement agent and the expenses payable by us in connection with this offering.

We expect to use the net proceeds of this offering for \_\_\_\_\_\_\_\_\_\_\_\_\_\_. Pending such uses, we intend to invest the net proceeds in short-term, interest-bearing, investment grade securities.

CAPITALIZATION

The following table sets forth our capitalization as of [Month] \_\_, 20\_ (1) on an actual basis and (2) as adjusted to reflect net proceeds from the sale by us of [Aggregate] shares of common stock, at an assumed sale price of $\_\_\_.\_\_ per share (the closing price on [Stock Exchange] on [Month] \_\_, 20\_), after deducting our estimated offering expenses. You should read this table in conjunction with “Management’s Discussion and Analysis of Financial Condition and Results of Operations” in our Form 10-K and Form 10-Qs and our audited financial statements and related notes for the year ended [December 31], 20\_, included in our Form 10-K.

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

|  |  |  |
| --- | --- | --- |
|  | Actual | As Adjusted |
| (In thousands) | |
| Obligations under capital leases and equipment notes payable, less current portion.............................. |  |  |
| Stockholders’ equity.............................. |  |  |
| [Preferred Stock, \_\_\_\_\_\_\_\_\_\_ shares authorized,  par value $\_\_.00, none issued and outstanding, actual and as adjusted].............. |  |  |
| Common Stock, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ shares authorized,  par value $[par value] per share, \_\_\_\_\_\_\_\_\_\_  issued and outstanding, actual; and \_\_\_\_\_\_\_\_\_\_\_\_  issued and outstanding, as adjusted for the issuance of [Aggregate] shares[[4]](#footnote-4)\*........ |  |  |
| Additional paid-in capital.............................. |  |  |
| Deferred compensation.............................. |  |  |
| Accumulated deficit.............................. |  |  |
| Other comprehensive income.............................. |  |  |
| Total stockholders’ equity.............................. |  |  |
| Total capitalization.............................. |  |  |

1. \* Please rely only on the information contained in this confidential private placement memorandum, including the attached exhibits made a part hereof. The information contained in the exhibits to this confidential private placement memorandum is accurate only as of the date on which such exhibits were filed with the Commission. Our business, financial condition and prospects may have changed since such date. No person has been authorized to provide you with different or additional information. No offer is being made to sell our shares in any jurisdiction where the offer or sale is not permitted.

   [↑](#footnote-ref-1)
2. Use if the issuer is a WKSI.

   [↑](#footnote-ref-2)
3. Use if the issuer is not a WKSI. [↑](#footnote-ref-3)
4. \* Excludes \_\_\_\_\_\_ shares of common stock issuable upon exercise of stock options outstanding at \_\_\_\_\_\_\_\_ \_\_, 20\_, at a weighted average exercise price of $\_.\_\_ per share. An additional \_\_\_\_\_\_\_\_ shares of common stock are reserved for issuance under our stock option plans as of [Month] \_\_, 20\_. [↑](#footnote-ref-4)