Form 41

Engagement Letter for Registered Direct Offering

[Month] \_\_\_, 20\_

[Company]

[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 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 registered direct financing (the “Transaction”), 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 Transaction as soon as practicable. The Placement Agent will contact potential Investors, assist in the negotiation and the structuring of the Transaction, assist in the preparation of a prospectus supplement or other appropriate materials and provide related services to facilitate the successful completion of the Transaction.

The Transaction will be a registered direct financing in accordance with the applicable laws of the United States and pursuant to the following procedures and terms and conditions:

1. The Company will:

(a) 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 pricing date and a bring-down letter dated the date of the consummation of the sale of the Securities (the “Closing Date”), both of which letters will at all times be in form and substance reasonably satisfactory to the Company and the Placement Agent. The Company, in consultation with the Placement Agent, will determine the actual timing of the distribution;

(b) 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 Closing Date containing the statements set forth in Exhibit A hereto and addressing such additional matters as the Placement Agent shall reasonably request; [and]

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

(d) Immediately prior to the offering of the Securities, enter into a placement agency agreement with the Placement Agent in such form and substance as are customary for registered direct financings, which upon execution, will supersede this Agreement. Upon the occurrence of such event, this Agreement shall be null and void and of no further legal consequence. The obligation of the Placement Agent to enter into a placement agency agreement pursuant to the first sentence of this paragraph is subject to the satisfactory completion of a due diligence investigation of the Company by the Placement Agent and its agents.

2. The Placement Agent’s aggregate fee for introducing the prospective Investors and all other services provided by the Placement Agent in connection therewith will be [ ] % of the proceeds from the sale of the Securities. Such fee shall be payable by the Company on the Closing Date. In addition, 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 [cumulative] total of $\_\_\_\_\_\_\_\_\_\_\_\_ without the prior written consent of the Company, which consent shall not be unreasonably withheld.] [Upon request, the Placement Agent agrees to provide the Company with a detailed description of such expenses.] The Company also shall be responsible for its own expenses, including, but not limited to, the reasonable fees and disbursements of the Placement Agent’s counsel in connection with any Financial Industry Regulatory Authority, Inc. (“FINRA”) filings and “Blue Sky” filings.

If within [six] months after the termination of this Agreement, the 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 the Company shall pay the Placement Agent, at the time of each such sale, an amount equal to the full fee set forth above from each such sale.

3. 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. The Company hereby represents and warrants to the Placement Agent that during the term of this engagement, the Company agrees that it 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.

5. For a period beginning on the date of this Agreement and continuing until a date that is [90] days from [the Closing Date,] the Company will not, without your prior written consent, which consent shall not be unreasonably withheld, (a) sell, contract to sell, grant any call option or purchase any put option with respect to, pledge, borrow or otherwise dispose of or issue any securities of the Company 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 Closing Date; (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, prior to the Closing Date, not to dispose of any equity 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 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] [for a period [specify other period]] without the prior written consent of the Placement Agent.

6. The Company hereby agrees to indemnify the Placement Agent in accordance with the indemnification provisions set forth as Exhibit B hereto and to the other provisions set forth in Exhibit B hereto.

Consider:

[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.]

[Either the Company or the Placement Agent may terminate the Placement Agent’s engagement hereunder at any time upon at least [20] days’ prior written notice to the other party, including, without limitation, if the Placement Agent, in its sole judgment, 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 [2] of this Agreement and the reimbursement, indemnification and contribution obligations of the Company under paragraph [6] and [11] of this Agreement shall survive. Such obligations also shall survive the offer and sale of the Securities.]

[7.] [Note: FINRA considers a right of first refusal as an item of compensation. In the event the overall compensation to the Placement Agent exceeds the limits prescribed by the FINRA, the Placement Agent may be required to waive the right of first refusal.] 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) 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”). 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 (the “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.

[8.] This Agreement may be terminated with respect to the Securities in the sole discretion of the Placement Agent by notice to the Company given prior to the Closing Date, in the event that the Company shall have failed, refused or been unable to perform all obligations and satisfy all conditions on its part to be performed or satisfied hereunder at or prior thereto or, if at or prior to the Closing Date, the Placement Agent determines in its sole discretion (which determination shall be conclusive absent manifest error) that:

(a) trading in the Company’s common stock or securities generally shall have been suspended by the Securities and Exchange Commission or the [Stock Exchange,] or minimum or maximum prices shall have been established for the Common Stock or securities generally on such market;

(b) a banking moratorium shall have been declared by New York or United States authorities; or

(c) there shall have been (i) an outbreak or escalation of hostilities between the United States and any foreign power, (ii) an outbreak or escalation of any other insurrection or armed conflict involving the United States or (iii) any other calamity or crisis having an effect on the financial markets that makes it impracticable or inadvisable to proceed with the placement contemplated hereby or the delivery of the Securities as contemplated hereby.

Any such termination shall not affect the compensation, reimbursement, Right of First Refusal or indemnification provisions set forth herein, all of which will remain in full force and effect.

[9.] 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: 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 which 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.]

[10.] The Company agrees that following consummation of the sale of the Securities as 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.

[11.] 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.

[12.] 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.

[If the Company is a foreign entity, include the following: 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.]

[13.] 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.

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 letter to the Placement Agent.

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

Exhibit A

[Insert text of opinion request.]

Opinion rendered on the Closing Date shall include, among other things, a statement to the following effect:

The opinion of [Counsel] to [Company] (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) 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; and nothing came to its attention that caused it to believe that either the Registration Statement or the Prospectus, 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 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).

EXHIBIT B

The Company shall indemnify and hold harmless [Placement Agent] as placement agent (the “Placement Agent”), together with its respective officers, directors, shareholders, employees and agents, and each person, if any, who controls the Placement Agent and any of its affiliates within the meaning of the U.S. Securities Act of 1933, as amended or the U.S. Securities Exchange Act of 1934 (all of the foregoing are referred to collectively as “Indemnified Parties” and individually as an “Indemnified Party”), from any and all losses, suits, actions, judgments, penalties, fines, costs, damages, liabilities or claims of any kind or nature, whether joint or several, (including, without limitation, any legal or other expenses as they are incurred by an Indemnified Party in connection with the investigation of, preparation for or defense of any action, claim or proceeding, whether or not resulting in any liability) (all of the foregoing being collectively defined as the “Indemnified Claims”) to which such Indemnified Party may become subject or liable or which may be incurred by or assessed against any Indemnified Party under any statute, common law, contract or otherwise, relating to or arising out of any of: (a) any actions or omissions of the Company or anyone acting on the Company’s behalf, including its employees, officers, advisors, directors and agents; (b) this Agreement or the services to be performed pursuant to this Agreement; (c) any securities, tax, corporate or other filings of the Company; or (d) any transactions referred to in this Agreement or any transactions arising out of the transactions contemplated by this Agreement; provided, however, that the Company shall not be liable to an Indemnified Party in any such case solely to the extent that any such Indemnified Claim is found, in a final, unappealable judgment by a court of competent jurisdiction, to have resulted [solely and exclusively and as a direct and proximate cause] from said Indemnified Party’s willful misconduct or gross negligence in the performance of its duties on behalf of the Placement Agent. The Company also agrees that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company or its securityholders or creditors related to or arising out of the appointment of the Placement Agent pursuant to, or the performance of the Placement Agent of the services contemplated by, this Agreement, except to the extent any loss, claim, damage or liability resulted [solely and exclusively and as a direct and proximate cause] from said Indemnified Party’s willful misconduct or gross negligence in the performance of its duties on behalf of the Placement Agent.

Promptly after receipt by an Indemnified Party of notice of the occurrence of an Indemnified Claim, or any claim or the commencement of any action or proceeding in respect of which indemnity may be sought against the Company, such Indemnified Party will notify the Company in writing of the commencement of such Indemnified Claim or other such claim, action or proceeding, as the case may be; provided, however, that any failure by an Indemnified Party to so notify the Company will not relieve the Company from its obligations hereunder. The Company shall immediately assume the full defense of such Indemnified Claim or such other claim, action or proceeding (including the employment of counsel satisfactory to the Indemnified Party and the payment of the fees and expenses of such counsel). Notwithstanding the preceding sentence, the Indemnified Party will be entitled to employ its own counsel in any circumstances in which the Indemnified Party is advised in a written opinion of counsel 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) a conflict of interest exists which makes representation by counsel chosen by the Company not advisable. In any such event, the Company will pay the reasonable fees and disbursements of such separate counsel.

If for any reason (other than as specifically provided herein) the foregoing indemnity for an Indemnified Claim is unavailable to an Indemnified Party or insufficient to fully hold any Indemnified Party harmless, then the Company shall contribute to the amount paid or payable by such Indemnified Party as a result of such Indemnified Claim or such other claim, action or proceeding (i) in such proportion as is appropriate to reflect the relative benefits (or anticipated benefits) to the Company and its affiliates, on the one hand, and to the Indemnified Party, on the other hand, from the possible relevant transaction, or (ii) if such allocation in the preceding clause (i) is not permitted by applicable law, then in such proportion as is appropriate to reflect not only the relative benefits received by the Company and its affiliates, on the one hand, the Indemnified Party, on the other hand, but also the relative fault of the Company and its affiliates, on the one hand, and the Placement Agent and the relevant Indemnified Parties, on the other hand, as well as any other relevant equitable considerations. Notwithstanding any provisions herein to the contrary, the aggregate contribution of all of the Indemnified Parties shall not exceed the amount of fees actually received by the Placement Agent pursuant to this Agreement.

It is hereby further agreed that the relative fault of the Company on the one hand and an Indemnified Party on the other hand with respect to the transactions shall be determined by reference to, among other things, whether any untrue or alleged untrue statement of a material fact or incorrect opinion or conclusion or the omission or alleged omission to state a material fact related to information supplied by the Company on the one hand or by the Indemnified Party on the other hand, as well as the parties’ relative intent, knowledge, access to information and opportunity to correct or prevent such statement, opinion, conclusion or omission. No Indemnified Party shall have any liability to the Company or any other person in connection with the services rendered pursuant to this Agreement except for any liability for losses, claims, damages or liabilities finally judicially determined to have resulted [solely and exclusively] from actions taken or omitted to be taken as a direct result of such Indemnified Party’s gross negligence or willful misconduct.

The indemnity, contribution and expense reimbursement agreements and obligations set forth herein shall be in addition to any other rights, remedies or indemnification which any Indemnified Party may have or be entitled to at common law or otherwise, and shall remain operative and in full force and effect regardless of any investigation made by or on behalf of any Indemnified Party. In addition, the Company shall offer such indemnification and expense advance and reimbursement as it may be permitted to offer or extend pursuant to its bylaws, charter, certificate or articles of incorporation, and other governing documents, or insurance. The Company further agrees that the indemnification and expense advance and reimbursement obligations set forth herein, shall apply whether or not the Placement Agent or any other Indemnified Party is a formal party in any such Indemnified Claim. The Company will not be permitted to settle any Indemnified Claim without the prior consent of the Placement Agent or any Indemnified Party involved therein if any admission of wrong doing, negligence or improper activity of any kind of the Placement Agent or such Indemnified Party is a part of such settlement. The Company shall not, without the prior written consent of an Indemnified Party, effect any settlement of any pending or threatened action, suit or proceeding in respect of which an Indemnified Party is or could have been a party and indemnity could have been sought hereunder by such Indemnified Party, unless such settlement includes an unconditional release of such Indemnified Party from all liability on claims that are the subject matter of such action, suit or proceeding.