

California Business Law PRACTITIONER

Volume 25 / Number 4

Fall 2010



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An Annotated Form of Investment Banking Engagement Letter

Louis R. Dienes and Alison M. Pear

A great deal has been written about the legal aspects of mergers and acquisitions, ranging from structure to strategy. Annotated forms of merger and acquisition agreements, including stock purchase agreements, asset purchase agreements, and merger agreements, as well as ancillary agreements, are widely available in legal literature. Surprisingly, one of the first agreements that the principals in a business transaction execute—one that materially affects their respective rights—has been neglected: investment banking engagement letters.

An investment banking engagement letter is ordinarily drafted by the investment banker. The client that retains the investment banker should therefore review the letter carefully with its legal counsel.

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Because engagement letters often follow considerable interaction between the client and the investment banker, and counsel may work closely with the investment banker in the transaction, the negotiation of the engagement letter requires some delicacy on counsel's part. To best serve the client, counsel must understand and communicate both parties' interests. Ideally, the engagement letter will align the interests of the client and its investment banker and create the foundation for a mutually beneficial relationship and a successful transaction.

[E]ngagement letters should be sufficiently clear that both the client and the investment banker understand what services the investment banking firm is expected to perform.

Investment banking engagement letters set the stage for mergers, acquisitions, and debt or equity financing transactions. The investment banker's major objectives will include: (1) defining the type of transaction for which it is being engaged broadly, so that the client's liability for payment of the banker's fee is triggered easily; (2) defining the exclusivity of its services as broadly as possible; (3) limiting the circumstances that allow the client to avoid paying its fee; and (4) limiting indemnification liability.

SCOPE OF SERVICES

Engagement letters begin by identifying the services that the investment banker will be engaged to perform. The engagement letter represents an important opportunity to ensure that all parties understand the services that are expected, the nature of the transaction that is sought, and the types of transactions that will lead to compensation. Typically, the engagement letter will make a general identification of what role the investment banking firm will play, such as "financial advisor," followed by a list of included services, such as reviewing the client's financial condition, soliciting and coordinating potential investors, and identifying and evaluating potential acquisition targets or possible purchasers. The desired services will be directed toward a financing transaction or a purchase or sale transaction, or both.

Because of the advisory nature of investment banking engagements, it may be difficult to define with great specificity the services to be provided, but engagement letters should be sufficiently clear that both the client and the investment banker un-

derstand what services the investment banking firm is expected to perform. In some circumstances, specific services should be identified as within the scope of the engagement—and within the scope of the expected compensation bargained for in the engagement letter. For example, if the client is expecting a fairness opinion from the investment banking firm without paying an additional fee, that fact should be clearly established in the engagement letter. Other services that may be provided by the investment banking firm, which the client may or may not want to be included in the engagement, include services such as the preparation of marketing materials, placement agent services, or underwriting services. In contrast, if the parties believe that additional services may be required, but want any additional services to be subject to a separate agreement or an additional fee, the engagement letter should explicitly state that additional services will be subject to a separate agreement to be negotiated in good faith by the parties. If the client does not want to be bound to enter into an additional agreement, it may prefer to structure the relationship so that the investment banking firm has a right of first refusal to provide additional services, but the client retains the right to use another service provider if it so wishes.

Although the substantial size of investment banking fees may encourage clients to define the scope of services to be performed as broadly as possible, such an approach should be tempered with caution. As discussed below, investment banking engagements are often exclusive, and the broader the service definition, the more onerous the exclusivity limitations may become and the greater the risk that the investment banking firm may become entitled to compensation unintended by the client.

EXCLUSIVITY AND TERM

Investment banking engagements are often exclusive and entitle the investment banking firm to compensation on the occurrence of certain events during the term of the engagement and for a certain length of time after the term.

Because, as discussed below, the investment banking firm's compensation is largely dependent on the occurrence of a transaction and the size of that transaction, exclusivity is important to investment banking firms because it helps assure the firm that its efforts will be rewarded. If an investment banking firm spends 6 months reviewing and analyzing potential targets for a client, it will not want a concurrently engaged competitor to ultimately receive the desired success fee. To that end, exclusive

engagement letters often provide that if the desired transaction is accomplished during the term of the engagement or, as discussed below, within a “tail” period thereafter, whether or not resulting from the investment banking firm’s efforts, the firm is still entitled to its fees under the engagement letter. If the relationship is not exclusive, the engagement letter should clearly delineate how the parties will determine when the investment banking firm may be entitled to compensation versus when another engaged firm may be entitled to such fees.

Often, the exclusive term of an investment bank’s engagement will be for a period of time ranging from 6 months to a year and may or may not automatically renew on an ongoing basis thereafter. The term should be a compromise between how much time the investment banking firm needs to perform the engagement and how long the client wants to be bound to an exclusive relationship with the firm.

The engagement letter also usually provides that if a transaction of the type subject to the engagement is consummated within a certain period after the term of the engagement, the investment bank will still be entitled to its fees as set forth in the engagement letter. This period is sometimes referred to as a “tail.” The purpose of the tail is to ensure that if a transaction is started during the term of the engagement, but completed afterwards, the investment banking firm will still be entitled to compensation for its efforts. The tail thereby precludes the client from terminating the engagement immediately before the consummation of a transaction in order to avoid paying the investment banking firm’s fee. The tail principally serves the investment banking firm’s interests, because consummation of the transaction may occur after the expiration of the exclusive term for any number of reasons. The investment bank does not want to lose a commission if the parties, although introduced by the investment banking firm, do not initiate negotiations, finalize an agreement, or execute a closing during the exclusive term. From the client’s perspective, however, it is advisable to limit such a tail provision to its intended purpose, *e.g.*, by requiring that a transaction completed during the tail be with a party introduced to the client by the investment banking firm during the term. Without such a limitation, the tail becomes merely an extension of the exclusivity period.

The client should consider having the right to terminate the engagement after minimal notice or at the very least for cause, such as a breach of the terms of the engagement letter. If the engagement letter provides for a tail that ensures payment for services already rendered, the investment banking

firm will have little need for advance notice of a termination. The client, however, may need the ability to free itself quickly from any exclusivity constraints and, to the extent permitted, any monthly or other periodic fees that may be associated with the engagement. The client should also consider negotiating a termination of the tail in the event that the engagement is terminated for cause, in order to avoid an obligation to reward an investment banking firm that has committed a breach.

Although the client should have significant freedom to terminate the engagement, the circumstances in which the investment banking firm itself should have power to terminate should be limited, because, as discussed below, the client has likely paid a retainer that would be at significant risk if the investment banking firm had the power to terminate at any time.

FEES

The element of the engagement letter that usually attracts the most attention from the client is the investment banker’s fees. The fees are usually payable on the occurrence of certain events and are based on the consideration received by the client in the transaction. As discussed below, it is crucial to clearly identify what types of transactions will trigger payment of a “success fee” and what consideration received or paid by the counterparty in the transaction will be included in calculation of the fees.

Fee Structure

The total compensation received by an investment bank will usually consist of a retainer fee and a fee payable on completion of the desired transaction; the latter is sometimes referred to as a success fee. The retainer fee is a flat amount, usually paid either at the beginning of the engagement or on a periodic basis over the term of the engagement, for example (and most commonly), a monthly fee. The retainer fee is generally nonrefundable, although sometimes retainer fees are credited against success fees.

The success fee is payable either at the closing of the transaction for which the investment banking firm was engaged or (as discussed below) possibly over time if future or contingent payments are involved.

In addition to retainer fees and success fees, an engagement letter may also provide for payments at other points in the transaction or as a result of other events. For example, an engagement letter may provide for a fee payable on signing of a term sheet or the definitive agreement or on the client’s public

announcement of the transaction. Clients should avoid a letter of intent or other form of term sheet from being the trigger for payment, however, because such documents are often nonbinding and may subject the client to the significant risk of owing a fee to the investment banker at a time when the deal is still not completed. Another type of fee that may be provided for in an engagement letter is a termination fee, which requires the client to pay the investment banking firm a portion of any termination or break-up fee that the client receives in a transaction.

Success Fee Triggers

For purposes of identifying the types of transactions that will trigger a success fee, the investment banking firm will want to define the transactions as broadly as possible, while the client will want to limit the included transactions. Defining the transactions that will trigger a success fee can be more difficult than it initially appears, because at the time of the engagement there may be many unknown variables regarding the ultimate form of the transaction. Issues may arise with respect to certain transactions that are not clearly identifiable as either financing transactions or acquisition/sale transactions, such as an issuance of securities that represent a significant minority interest in the client. There also may be transactions that may technically fall within the transaction category but are clearly not within the intended transactions for which the investment banking firm was engaged. For example, it is unlikely that an investment banking firm will be engaged to obtain a bank loan, but without careful drafting, a bank loan could be considered a “financing transaction” under the engagement letter. Other categories of transactions that may warrant careful drafting to reflect the parties’ intent are licensing agreements or leasing arrangements. Depending on the nature of the client’s business and whether the client enters into such transactions in the ordinary course of its business, licensing or leasing transactions may be appropriately excluded from, or included in, the definition of a transaction that will give rise to a transaction fee.

Amount of Success Fee

The amount of the success fee is also a provision for which careful drafting is critical. The success fee is usually based on a percentage of the total “transaction value” or “transaction consideration,” although the parties may also consider providing for a flat fee to simplify calculation and avoid some of the issues discussed below. Fees based on percentages

often decrease according to the size of the transaction, becoming progressively smaller as the overall amount of the transaction fee increases. In the case of financing transactions, percentage-based fees may vary according to the type of securities sold in the transaction. It is also common for the engagement letter to provide a certain minimum payment amount, although the parties may want to ensure that the size of the transaction warrants a minimum payment.

Fees based on percentages often decrease according to the size of the transaction, becoming progressively smaller as the overall amount of the transaction fee increases.

Defining the “transaction value” presents a number of difficulties, including what to include in determining “value” and what value to assign to non-cash consideration or future payments. As in defining the types of transactions that trigger a payment obligation, the investment banking firm will want to broadly define what is included in the calculation of transaction value, *e.g.*, to include favorable non-competition, employment, consulting, licensing, or supply agreements and assumptions of debt; the client, however, will want to limit the value to the actual consideration paid. Whether such provisions are reasonable largely depends on what type of transaction is expected and the nature of the client’s business.

When “value” includes items other than cash payable at closing, such as noncash consideration or future payments, an issue also arises regarding how to calculate the value of these items. For example, consideration payable in common stock of a private corporation is not easily valued. Similarly, future or contingent consideration, such as payment of an earn-out or the sale of warrants that may or may not be exercised, is difficult to value as of the time of completion of the transaction. This difficulty is compounded by the fact that the parties must determine whether fees based on these forms of consideration should be payable at the time of closing, which is generally preferable to the investment banking firm, or at the time a future or contingent payment is actually paid (if ever), which is generally preferable to the client.

EXPENSES

Usually, the engagement letter will provide that the client will reimburse the investment banking firm for any expenses incurred in the performance of its services. Although a client may wish to argue that expenses should be included in the other fees payable to the investment banking firm, this argument will likely meet with minimal success. A client can, and should, however, require other terms that will protect its interest. It is common to place a cap on the amount of expenses that are reimbursable or to require prior approval of expenses over a certain amount. It is also appropriate to define expenses to include only out-of-pocket payments for services performed by third parties and not for services that the investment banking firm handles internally, such as secretarial work.

INDEMNIFICATION

The indemnification provisions of the engagement letter often present additional points of contention. In general, the standard of conduct that will subject the investment banking firm to liability is either willful misconduct or gross negligence. Counsel will occasionally try to argue for lesser criteria, but this standard is very difficult to modify.

A more difficult question is whether the client should agree to indemnify its investment bankers against claims and damages caused “solely,” “primarily,” or “principally” by the investment bankers’ actions. Investment bankers cannot reasonably argue that the client should be liable for damages arising solely from the investment bankers’ own actions unless the investment bankers were following the client’s instructions. Accordingly, clients generally do not indemnify their investment bankers against liability arising solely from the bankers’ own actions.

It is challenging for a client to exclude from the indemnification provisions damages arising “primarily” or “principally” from its investment bankers’ actions. The client can argue that a determination of “primary” or “principal” culpability supports the notion that its investment bankers should be liable for the resulting damages, because “primary” or “principal” connotes more than half the fault. In response, however, the investment bankers can argue that if the client played a meaningful role in causing the liability at issue (even if the client’s own actions are ultimately determined not to be the “primary” or “principal” cause of the liability), it would not be

fair for the investment bankers to be held solely responsible for the liability. For these reasons, investment banking firms and their counsel resist changes that would exclude from a client’s indemnification obligation claims and damages caused “primarily” or “principally” by the investment bankers.

In addition to provisions for indemnification, investment banking firms often require that engagement letters set forth circumstances in which indemnification is not permitted. Under contribution provisions, the client agrees to contribute toward an amount payable in respect of third-party damages instead of indemnifying its investment bankers. The amount to be contributed by the client is typically proportional to (1) the relative benefit received by, or expected to be received by, the investment banking firm, and (2) the relative fault of the parties. The terms of contribution also sometimes take into account other equitable considerations, and investment banking firms often seek to limit the amount that they might be required to contribute toward third-party damages.

OTHER TERMS AND CONDITIONS

Engagement letters also include a number of other common contract provisions appropriate in transactions, such as terms related to access to information, confidentiality, and publicity. Although these provisions are less specific to an investment banking engagement, they are nonetheless important, as in all agreements, to identify the scope of the relationship and the parties’ mutual obligations.

CONCLUSION

The terms of an engagement letter are business points that go to the heart of the economic relationship between the client and its investment banker. Although investment bankers often propose broad, and perhaps over-reaching, engagement letters initially, the role of the client’s counsel is to bring a professional’s perspective to the process and try to align the interests of the parties in a way that will not alienate the key members of the transaction team. By understanding the interests and concerns of the parties, counsel will be better able to negotiate an engagement letter that will establish a mutually beneficial basis for consummating a transaction.

The following Appendix to this article sets forth a complete sample form of investment banking engagement letter, with comments.

Appendix

**ANNOTATED FORM OF
INVESTMENT BANKING ENGAGEMENT LETTER****CONFIDENTIAL**

__ [Date] __

Ladies and Gentlemen:

This letter confirms the understanding and agreement (the “Agreement”) between __ [name of company] __ (the “Company”) and __ [name of investment bank] __ (“Investment Bank”) as follows:

ENGAGEMENT SERVICES. The Company hereby retains Investment Bank as its exclusive financial advisor in connection with the possible placement of senior secured debt, unsecured or non-senior debt or preferred shares, or equity (each a “Financing Transaction”). Investment Bank agrees to use its best efforts, consistent with customary practice, to effect the Financing Transaction as soon as practicable. The Company acknowledges that consummation of the Financing Transaction is subject, among other factors, to acceptable documentation, market conditions, and satisfaction of the conditions set forth in one or more agreements to be entered into with any financier, lender, investor, or purchaser of securities. It is expressly understood that this engagement does not constitute any commitment, express or implied, on the part of Investment Bank to provide, and does not ensure the successful placement of, any portion of the Financing.

COMMENT: Defining the scope of the engagement is an opportunity to ensure that Investment Bank understands the type of transaction intended by the Company. For example, if the Company is only looking for financing through the sale of equity, that should be clearly stated in the first sentence of the paragraph above. Similarly, if the Company is only interested in placing its securities through a private placement, this should be made clear.

In conjunction with the above Financing Transaction effort, Investment Bank will also pursue realistic offers for a sale transaction involving a merger or exchange offer, leveraged recapitalization, acquisition or sale of assets or equity interests, or similar transaction involving all or a majority of the business, assets, or equity interests of the Company (each a “Sale Transaction”) (a Sale Transaction and a Financing Transaction shall each be referred to in this Agreement as a “Transaction”); provided, however, that a Sale Transaction shall not include the licensing of products or a collaboration agreement to develop products or other similar commercial contracts entered into in the ordinary course of business between the parties to the Transaction.

Investment Bank’s services will include, if appropriate or if reasonably requested by the Company: (a) reviewing the Company’s financial condition, operations, competitive environment, prospects, and related matters for potential investors; (b) preparing the information package or confidential information memorandum; (c) soliciting, coordinating, and evaluating indications of interest and proposals regarding a Transaction; (d) advising the Company as to the structure of a Transaction; and (e) providing such other financial advisory and investment banking services reasonably nec-

essary to accomplish the foregoing. The Company hereby authorizes Investment Bank to send prospective purchasers the information package and other pertinent information and legal agreements concerning the Transaction.

COMMENT: Counsel for the Company should review and revise the scope of services described in clauses (a) through (e) as appropriate to reflect the Company's intent. Further, if the Company is sensitive to the identity of prospective purchasers that Investment Bank contacts, the Company may want to require Investment Bank to obtain Company approval before distributing any materials.

If requested by the Company, Investment Bank will render an opinion ("Opinion") as to whether or not the consideration to be paid in the Transaction is fair, from a financial point of view, to the Company. No separate or additional fees shall be payable in connection with the rendering of such opinion.

The Company agrees that neither it, its equity holders or other affiliates, nor its management will initiate any discussions regarding a Transaction during the term of this Agreement, except through Investment Bank. In the event that the Company, its equity holders or other affiliates, or its management receives any inquiry regarding a Transaction, Investment Bank will be promptly informed of such inquiry so that it can evaluate such party and its interest in any Transaction and assist the Company in any resulting negotiations. In the event that the Company consummates a Transaction with any party during the period covered by this Agreement, Investment Bank shall be paid the full Financing or Sale Transaction Fee and expenses, as described more fully below.

TERM. This Agreement shall have a term of 12 months from the date of this Agreement set forth above. The Company may terminate this Agreement at any time, with or without cause, on written notice to Investment Bank. Investment Bank may terminate this Agreement at any time if the Company is in material breach of this Agreement, on written notice to the Company. Notwithstanding the foregoing, no expiration or termination of this Agreement shall affect: (a) the Company's indemnification, reimbursement, contribution, and other obligations as set forth on Schedule A attached to this Agreement; (b) the confidentiality provisions set forth herein; (c) Investment Bank's right to receive, and the Company's obligation to pay, any fees and expenses due, whether or not any Transaction shall be consummated before or after the effective date of termination, all as more fully set forth in this Agreement; and (d) the agreements of the Company and Investment Bank with respect to choice of law and forum.

In the event of any termination of this Agreement (other than by the Company for material breach by Investment Bank or by Investment Bank for material breach by the Company), Investment Bank shall be entitled to the applicable Financing or Sale Transaction Fee if the Company enters into an agreement prior to the date that is 12 months from the date of termination of this Agreement with an entity first referred to the Company by Investment Bank before the termination of this Agreement, provided that such agreement subsequently results in the consummation of a Transaction. Not more than 10 business days after termination, Investment Bank shall provide to the Company in writing a list of any parties introduced to

the Company by Investment Bank, which list shall be binding unless the Company provides a written objection notice within 10 days after receipt.

FEES—RETAINER FEES. The Company shall pay Investment Bank a *[one-time/monthly]* nonrefundable retainer fee of \$ *[amount]* ; provided, however, that such amount shall be credited against any Financing or Sale Transaction Fee that may be payable as provided below. Upon entry into a definitive agreement with investors in a Financing Transaction or a purchaser in a Sale Transaction, Investment Bank shall receive an initial payment of \$ *[amount]* , which amount shall also be credited against any Financing or Sale Transaction Fee that may be payable as provided below.

[Add one of the following alternatives]

[Alternative 1]

In the event that, after 12 months have elapsed since the date of this Agreement, the Company receives a reasonable offer that fulfills the original criteria for which Investment Bank was engaged, but the Company decides not to accept any offer, the Company shall pay a Financing or Sale Transaction Fee of \$ *[amount]* .

[Alternative 2]

The Company is not obligated or required to accept any offer to enter into a Transaction by any prospective investor or purchaser identified by Investment Bank, and the Company may refuse in its sole discretion to enter into any transaction without any liability to Investment Bank.

COMMENT: Investment Bank may want to protect itself in the event that the Company decides not to go forward with a transaction that Investment Bank was engaged to procure, or if the Company unreasonably turns down offers procured by Investment Bank. The Company should be reluctant to agree to such terms in order to retain maximum discretion over whether or not to enter into a transaction.

FEES—FINANCING TRANSACTION. In addition to the foregoing retainer fee, on the consummation of any Financing Transaction with any party, whether or not resulting from the services of Investment Bank, occurring after the execution of this Agreement but before the end of the term of this Agreement as set forth herein, the Company shall pay Investment Bank a cash fee (“Financing Transaction Fee”) equal to the greater of (a) a minimum fee of \$ *[amount]* or (b) the sum of (i) *[number]* % of the aggregate amount of senior debt raised or committed; (ii) *[number]* % of the aggregate amount of all unsecured, nonsenior, and subordinated debt raised or committed; and (iii) *[number]* % of the aggregate amount of all equity and equity equivalents (including convertible and preferred stock). For greater certainty, the exercise of any warrants or options provided to any financier, lender, investor, or purchaser as part of a Transaction shall, on the exercise thereof, be considered equity for purposes of calculating Investment Bank’s Financing Transaction Fee. The Financing Transaction Fee(s) shall be paid to Investment Bank by withholding the amount due from the proceeds of the Financing Transaction (including the exercise of any warrants) by instructing the financier, lender, investor, or purchaser to wire transfer the Financing Transaction Fee directly to Investment Bank at the closing of each Transaction.

COMMENT: The transaction fee percentages may be varied according to whether the financing is debt or equity, and the characteristics of the financing as senior or junior, secured or unsecured, and preferred or common. Payments in the form of warrants or options or other payments that are conditioned or contingent on future events are often a difficult issue to address. Investment Bank will want payment upfront at closing, but the Company will not want to make a payment unless they are sure that they are receiving a corresponding payment. Depending on the nature of the future payments, the parties may also want to try to value the payments at the time of closing so that the interaction between the Company and Investment Bank are completed

Subject to the foregoing, the Financing Transaction Fee with respect to a Financing Transaction is due and payable to Investment Bank at the closing or funding of such issuance and sale; in the event of more than one closing, a prorata portion of the Financing Transaction Fee shall be due with each such funding or closing.

FEE—SALE TRANSACTION. In the event that Investment Bank's exclusive financial advisory role involves a Sale Transaction, Investment Bank shall receive a cash transaction fee (a "Sale Transaction Fee") equal to the greater of (a) a minimum fee of \$__[amount]__ or (b) the sum of: (i) __[number]__% of the Transaction Value (defined below) for amounts up to and including \$__[amount]__, (ii) __[number]__% of the Transaction Value for amounts in excess of \$__[amount]__ and including \$__[amount]__, and (iii) __[number]__% of the Transaction Value for amounts in excess of \$__[amount]__.

For the purpose of calculating the Sale Transaction Fee, "Transaction Value" shall mean the total value of all cash, securities, or other property paid at the closing of the Sale Transaction to the Company or its shareholders or to be paid in the future to them with respect to the Sale Transaction as provided below (other than payments of interest or dividends) in respect of (a) the assets of the Company, (b) the capital stock of the Company (and any securities convertible into options, warrants, or other rights to acquire such capital stock), or (c) the assumption, directly or indirectly (by operation of law or otherwise), of any indebtedness of the Company for borrowed money, less all cash and cash equivalents held by the Company at closing.

[If applicable, add the following sentence]

Any amounts payable to the Company, any affiliate of the Company, or any shareholder of the Company in connection with a noncompetition agreement or any employment, consulting, licensing, supply, or other agreement, to the extent that such amounts payable are greater than what would customarily be paid on an arm's-length basis to an employee, consultant, licensee, or supplier who had not been acquired, shall be deemed to be part of the "Transaction Value."

[Continue]

In the event a Sale Transaction is consummated in one or more steps, any additional consideration paid or to be paid in any subsequent step in the Sale Transaction, including without limitation, payments in accordance with promissory notes delivered to the Company in connection with a Sale Transaction or any Contingent Payments in respect of the items set forth in

(a)–(c) above, shall be included in the definition of “Transaction Value.” “Contingent Payments” shall mean consideration received or receivable by the Company, its employees, former or current equity holders, or any other parties in the form of deferred performance-based payments, “earn-outs”, indemnity holdbacks, or other contingent payments based on the future performance of the Company or any of its businesses or assets.

For purposes of valuing consideration included in Transaction Value other than cash payable at closing: (a) the assumption of any indebtedness for borrowed money will be valued at the unpaid principal amount of such assumed liability; (b)

[Add one of the following alternatives]

[Alternative 1]

Contingent Payments shall be valued at the present value of such Contingent Payments using a discount rate of __ *[number]* __ %;

[Alternative 2]

Sale Transaction Fees based on Contingent Payments shall be paid to Investment Bank based on the rate applicable to the total Sale Transaction Fee at the same times as the Contingent Payments are received by the Company;

[Continue]

(c) the value of any purchase money or other promissory notes shall be deemed to be the face amount thereof; (d) any securities (other than a promissory note) will be valued at the time of the closing of the Sale Transaction (without regard to any restrictions on transferability) as follows: (i) if such securities are traded on a stock exchange, the securities will be valued at the average last sale or closing price for the 10 trading days immediately prior to the closing of the Sale Transaction; (ii) if such securities are traded primarily in over-the-counter transactions, the securities will be valued at the mean of the closing bid and asked quotations similarly averaged over a 10-trading-day period immediately before the closing of the Sale Transaction; and (iii) if such securities have not been traded before the closing of the Sale Transaction, the value of such securities shall be as mutually agreed in good faith by the Company’s Board of Directors and Investment Bank; and (e) any assets other than cash or the assets described in the foregoing clauses shall be valued as mutually agreed in good faith by the Company’s Board of Directors and Investment Bank.

COMMENT: Contingent payments, as provided in the first sentence of the paragraph above, can either be structured to be paid at the time of closing, usually at a discount, or at the time payment is received by the Company.

EXPENSES. Additionally, and regardless of whether any Transaction is consummated, Investment Bank shall be entitled to reimbursement of its reasonable out-of-pocket expenses incurred from time to time during the term of this Agreement in connection with the services to be provided under this Agreement, promptly after invoicing the Company therefor; provided, however, that unless the Company otherwise consents in writing in advance, such expenses shall not exceed \$ __ *[amount]* __ in the aggregate.

INFORMATION. The Company will furnish Investment Bank with such information regarding the business and financial condition of the Company as is reasonably requested, all of which will be, to the Company's best knowledge, accurate and complete in all material respects at the time furnished. The Company will promptly notify Investment Bank if it learns of any material misstatement in, or material omission from, any information previously delivered to Investment Bank. Investment Bank agrees that all nonpublic information obtained in connection with its engagement will be held by it in strict confidence and will be used by it solely for the purposes of performing its obligations relating to its engagement, provided that nothing herein shall prevent Investment Bank from disclosing any such information (a) in accordance with an order of any court or administrative agency or in any pending legal or administrative proceeding, or (b) to the extent that such information (i) was or becomes publicly available other than by reason of disclosure by Investment Bank in violation of this Agreement or (ii) was or becomes available to Investment Bank or its affiliates from a source that is not known by Investment Bank to be subject to a confidentiality obligation to the Company. This undertaking by Investment Bank shall automatically terminate __[specify time period, e.g., 3 years]__ following the last to occur of the completion of a Transaction or termination of the engagement hereunder. At the request of the Company, Investment Bank will execute a commercially reasonable nondisclosure agreement in connection with the delivery and use of such information. At Company's request, Investment Bank will promptly return to the Company, or destroy, any and all materials containing such confidential information except to the extent that Investment Bank is required to maintain such information in accordance with legal or regulatory requirements.

COMMENT: Investment banks often want a time limit on their confidentiality obligations to limit their potential liability, especially if their institution has various divisions, departments, or groups outside the investment banking group.

Investment Bank may rely, without independent verification, on the accuracy and completeness of all information furnished by the Company or any other potential party to any Transaction. The Company understands that Investment Bank will not be responsible for independently verifying the accuracy of such information, and shall not be liable for any inaccuracies therein. The Company further acknowledges that Investment Bank has not made and will not make any physical inspection or appraisal of the properties or assets of the Company, and that, with respect to any financial forecasts that may be furnished to or discussed with Investment Bank by the Company, Investment Bank will assume that such forecasts have been reasonably prepared and reflect the best then currently available estimates and judgments of the Company's management as to the expected future financial performance of the Company.

Except as may be required by law or court process, any opinions or advice (whether written or oral) rendered by Investment Bank under this Agreement are intended solely for the benefit and use of the Company, and may not be publicly disclosed in any manner or made available to third parties (other than the Company's management, directors, advisors, accountants, and attorneys) without the prior written consent of Investment Bank, which consent shall not be unreasonably withheld.

INDEMNIFICATION AND STANDARD OF CARE. The Company agrees to provide indemnification, contribution, and reimbursement to Investment Bank and certain other parties in accordance with, and further agrees to be bound by, the provisions set forth in Schedule A attached to, incorporated in, and made an integral part of, this Agreement by this reference.

COMMENT: The terms of indemnification are generally provided as an attachment to the main agreement.

CONFLICTS. The Company acknowledges that Investment Bank and its affiliates may have and may continue to have investment banking or other relationships with parties other than the Company, in which Investment Bank may acquire information of interest to the Company. Investment Bank shall have no obligation to disclose such information to the Company or to use such information in connection with this Agreement.

COMMENT: Investment banking firms have many relationships with many entities that are looking to buy, sell, or invest, and often request that the entity engaging them acknowledge such relationships and the potential conflicts that they present.

ATTORNEY FEES. If any party to this Agreement brings an action directly or indirectly based on this Agreement or the matters contemplated hereby against another party, the prevailing party shall be entitled to recover, in addition to any other appropriate amounts, its reasonable costs and expenses in connection with such proceeding, including without limitation, reasonable attorney fees and court costs.

PUBLICITY. Following the announcement of any Transaction by the Company, Investment Bank may, at its own expense, place announcements in financial and other newspapers and periodicals (such as customary "tombstone" advertisements) describing its services in connection therewith. Investment Bank shall provide the Company with a draft of any announcement that it proposes to place and shall make such revisions to the announcement as the Company reasonably may request within 2 business days after the Company's receipt of the draft announcement.

MISCELLANEOUS. This Agreement shall be binding on the parties hereto and their respective successors and permitted assigns. However, nothing in this Agreement, express or implied, is intended to confer or does confer on any person or entity, other than the parties hereto and their respective successors and permitted assigns and, to the extent expressly set forth in Schedule A, the Indemnified Parties, any rights or remedies under or by reason of this Agreement or as a result of the services to be rendered by Investment Bank hereunder.

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

The Company agrees that it will be solely responsible for ensuring that any Transaction complies with applicable law.

This Agreement incorporates the entire understanding of the parties regarding the subject matter hereof and supersedes all previous agreements or understandings regarding the same, whether written or oral.

This Agreement may not be amended, and no portion hereof may be waived, except in a writing duly executed by the parties.

Each party hereby irrevocably (a) agrees that any suit or other legal proceeding arising out of or relating to this Agreement may be brought only in a court of the State of California or in the United States District Court, located in Los Angeles County, California, (b) consents, for itself and in respect of its property, to the jurisdiction of each such court in any such suit or proceeding, and (c) waives any objection that it may have to the laying of venue of any such suit or proceeding in any of such courts and any claim that any such suit or proceeding has been brought in an inconvenient forum.

This Agreement shall be governed by the laws of the state of __[California/New York]__, without regard to such state's rules concerning conflicts of laws. EACH OF INVESTMENT BANK AND THE COMPANY (ON ITS OWN BEHALF AND, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ON BEHALF OF ITS EQUITY HOLDERS) WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT, OR OTHERWISE) RELATED TO OR ARISING OUT OF THE ENGAGEMENT OF INVESTMENT BANK UNDER, OR THE PERFORMANCE BY INVESTMENT BANK OF THE SERVICES CONTEMPLATED BY, THIS AGREEMENT.

COMMENT: Because of the extensive case law in New York regarding investment banks, New York law is commonly chosen as the governing law. Concerning enforceability of jury trial waivers in California, see *Grafton Partners L.P. v Superior Court* (2005) 36 C4th 944, 32 CR3d 5.

We look forward to working with you on this assignment. Please confirm that the foregoing terms are in accordance with your understanding by signing and returning the enclosed copy of this Agreement, together with the initial retainer payment in the amount of \$ __[amount]__.

Very truly yours,

INVESTMENT BANK

Signature: _____
 Printed Name: _____
 Title: _____

Accepted and agreed effective as of the date of this Agreement.

COMPANY

Signature: _____
 Printed Name: _____
 Title: _____

SCHEDULE A

This Schedule A is attached to, and constitutes a material part of, that certain agreement dated __[date]__, addressed to __[name of company]__ by Investment Bank (the "Agreement"). Unless otherwise noted, all capitalized terms used herein shall have the meaning set forth in the Agreement.

As a material part of the consideration for the agreement of Investment Bank to furnish its services under the Agreement, the Company agrees to indemnify and hold harmless Investment Bank and its affiliates, and their respective past, present, and future directors, officers, shareholders, employees, agents, and controlling persons within the meaning of either Section 15 of the Securities Act of 1933, as amended (15 USC §77o), or Section 20 of the Securities Exchange Act of 1934, as amended (15 USC §78t) (collectively, the "Indemnified Parties"), to the fullest extent lawful, from and against any and all losses, claims, damages, or liabilities (or actions in respect thereof), joint or several, arising out of or related to the Agreement, any actions taken or omitted to be taken by an Indemnified Party (including acts or omissions constituting ordinary negligence) in connection with the Agreement, or any Transaction (or proposed Transaction) contemplated thereby. In addition, the Company agrees to reimburse the Indemnified Parties for any legal or other expenses reasonably incurred by them in respect thereof at the time such expenses are incurred; provided, however, that the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage, or liability that is finally judicially determined to have resulted primarily from the willful misconduct or gross negligence of any Indemnified Party.

COMMENT: Usually, only conduct that rises to the level of "willful misconduct or gross negligence" will be outside the scope of Investment Bank's indemnification obligation.

The Indemnified Parties will give prompt written notice to the Company of any claim for which they seek indemnification hereunder, but the omission to so notify the Company will not relieve the Company from any liability that it may otherwise have hereunder except to the extent that the Company is damaged or prejudiced by such omission. The Company shall have the right to assume the defense of any action for which the Indemnified Parties seek indemnification hereunder, subject to the following provisions, with counsel reasonably satisfactory to the Indemnified Parties. After notice from the Company to the Indemnified Parties of its election to assume the defense thereof, and so long as the Company performs its obligations in accordance with such election, the Company will not be liable to the Indemnified Parties for any legal or other expenses subsequently incurred by the Indemnified Parties in connection with the defense thereof other than reasonable costs of investigation. The Indemnified Parties shall have the right to employ separate counsel in any such action and to participate in the defense thereof at their own expense.

If for any reason the foregoing indemnification is unavailable to any Indemnified Party or is insufficient to hold it harmless, the Company shall contribute to the amount paid or payable by the Indemnified Party as a result of such losses, claims, damages, liabilities, or expenses in such proportion as is appropriate to reflect the relative benefits received (or anticipated to be received) by the Company, on the one hand, and Investment

Bank, on the other hand, in connection with the actual or potential Transaction and the services rendered by Investment Bank. If, however, the allocation provided by the immediately preceding sentence is not permitted by applicable law or otherwise, then the Company shall contribute to such amount paid or payable by any Indemnified Party in such proportion as is appropriate to reflect not only such relative benefits, but also the relative fault of the Company, on the one hand, and Investment Bank, on the other hand, in connection therewith, as well as any other relevant equitable considerations. Notwithstanding the foregoing, the aggregate contribution of all Indemnified Parties to any such losses, claims, damages, liabilities, and expenses shall not exceed the amount of fees actually received by Investment Bank under the Agreement.

The Company shall not effect any settlement or release from liability in connection with any matter for which an Indemnified Party would be entitled to indemnification from the Company, unless such settlement or release contains a release of the Indemnified Parties reasonably satisfactory in form and substance to Investment Bank and does not include any admission of fault on the part of any Indemnified Person. The Company shall not be required to indemnify any Indemnified Party for any amount paid or payable by such party in the settlement or compromise of any claim or action without the Company's prior written consent.

The Company further agrees that neither Investment Bank nor any other Indemnified Party shall have any liability, regardless of the legal theory advanced, to the Company or any other person or entity (including the Company's equity holders and creditors) related to or arising out of Investment Bank's engagement, except for any liability for losses, claims, damages, liabilities, or expenses incurred by the Company that are finally judicially determined to have resulted primarily from the willful misconduct or gross negligence of any Indemnified Party.

Each Indemnified Person shall make reasonable efforts to mitigate its losses and liabilities. The indemnity, reimbursement, contribution, and other obligations and agreements of the Company set forth herein shall apply to any modifications of the Agreement, shall be in addition to any liability that the Company may otherwise have, and shall be binding on and inure to the benefit of any successors, assigns, heirs, and personal representatives of the Company and each Indemnified Party. The foregoing provisions shall survive the consummation of any Transaction and any termination of the relationship established by the Agreement.

[Add if applicable]

Before entering into any agreement or arrangement with respect to, or effecting, any merger, statutory exchange or other business combination or proposed sale or exchange, dividend or other distribution, or liquidation of all or a significant portion of its assets in one or a series of transactions or any significant recapitalization or reclassification of its outstanding securities that does not directly or indirectly provide for the assumption of the obligations of the Company set forth herein, the Company will notify Investment Bank and, if requested by Investment Bank, shall arrange in connection therewith alternative means of providing for the obligations of the Company set forth herein on terms and conditions satisfactory to Investment Bank.

COMMENT: If Investment Bank is engaged for a transaction that, when consummated, will cause the Company to no longer exist or not to have any assets, it may want to ensure that it has a source of indemnification after the transaction is consummated.

To the extent that officers or employees of Investment Bank appear as witnesses, are deposed, or otherwise are involved in or assist with any action, hearing, or proceeding related to or arising from any transaction or proposed transaction contemplated by this Agreement or Investment Bank's engagement hereunder, or in a situation where such appearance, involvement, or assistance results from Investment Bank's engagement hereunder, the Company will pay Investment Bank, in addition to the fees set forth above, Investment Bank's reasonable and customary per diem charges. In addition, if any Indemnified Person appears as a witness, is deposed, or otherwise is involved in any action relating to or arising from any transaction or proposed transaction contemplated by this Agreement or Investment Bank's engagement hereunder, or in a situation where such appearance, involvement, or assistance results from Investment Bank's engagement hereunder, the Company will reimburse such Indemnified Person for all reasonable out-of-pocket expenses (including fees and expenses of counsel) incurred by it by reason of it or any of its personnel being involved in any such action.