



Monday, October 1, 2012

9:00 AM - 10:30 AM

300 – Drafting and Enforcing Restrictive Covenants around the World

Susan Barnard

Partner

Sullivan & Worcester LLP

Diane Carman

Chief Corporate Counsel & Compliance Officer

Gamesa Technology Corporation, Inc.

Kathleen Lundy

General Counsel

Monitor Company Group Limited Partnership

Laura Steinberg

Partner

Sullivan & Worcester LLP

Faculty Biographies

Susan Barnard

Susan M. Barnard is co-director of Sullivan & Worcester's corporate department and a member of the firm's management committee. Ms. Barnard represents public and private companies with respect to matters involving securities law, mergers and acquisitions and general corporate law. Ms. Barnard also represents sponsors and institutional investors in the formation of and investment in private investment funds for commercial timberland, commercial farmland and commercial real estate.

Ms. Barnard received a JD, cum laude, from Boston College Law School and a BA, magna cum laude and phi beta kappa, from Wheaton College.

Diane Carman

Diane Carman is chief corporate counsel and compliance officer for Gamesa Technology Corporation, Inc., a publicly traded company in the business of wind turbine manufacturing and wind farm development, with over 8,000 employees worldwide. In her role with Gamesa, she manages the corporate, labor, employment and immigration law, and compliance departments for North America, providing legal counsel, managing litigation, negotiating agreements, and ensuring Company regulatory and legal compliance.

Prior to joining Gamesa, Ms. Carman served as attorney for labor relations and talent negotiations for NBC/Universal in New York, and worked as in-house counsel for such companies as Lutron Electronics, NTERA, and QVC. She began her career as an associate with the international law firm of O'Melveny & Myers in its L&E group in NY.

Ms. Carman is on the ACC's Delaware Valley Chapter (DELVACCA) board of directors, and has served as co-chair of its Employment and Labor Committee for the last three years. In addition, she has served on the board of directors of, and as chapter counsel for, the National Television Academy (Mid-Atlantic Chapter), since 2002. She is a frequent lecturer on various employment, litigation, privacy and commercial law topics.

Ms. Carman received both her JD and BA (honors liberal arts and theatre) from Villanova University, and completed post graduate work in opera performance at the Esther Boyer College of Music at Temple University.

Kathleen Lundy

Kathleen P. Lundy is general counsel of Monitor Company Group Limited Partnership, a global management consulting firm based in Cambridge, MA. Ms. Lundy is responsible

for overseeing all legal matters globally, leading the internal legal team and working closely with outside counsel. Her principal areas of focus are international compliance, partnership and employment matters, intellectual property and general corporate matters.

Prior to joining Monitor, Ms. Lundy was senior vice president, general counsel and secretary of LoJack Corporation, a global provider of stolen vehicle recovery technology, based in Canton, MA. Prior to LoJack, Ms. Lundy was the legal counsel for Dunkin' Brands, Inc. and was a corporate associate at Sullivan & Worcester, LLP.

Ms. Lundy received her AB in political science from the College of the Holy Cross and her JD from Notre Dame Law School.

Laura Steinberg

Laura Steinberg is a partner in the litigation department of Sullivan & Worcester LLP in the Boston office, and heads the firm's international dispute resolution group. Her practice consists of federal and state civil (commercial) litigation and arbitrations throughout the United States, with an emphasis on complex regulatory and fiduciary issues. She has extensive experience in disputes involving shareholder and investor rights and relationships; application of the business judgment rule; and fiduciary disclosures, compliance and enforcement issues (often in a securities law setting). She also counsels clients on how to minimize or avoid litigation exposure both contractually and through proactive conduct, and she frequently conducts internal investigations for non-management directors. Where litigation is necessary or unavoidable, she works with clients to identify and attain the desired objectives in light of any applicable budgetary constraints. Ms. Steinberg has arbitrated in many different forums, including the American Arbitration Association, the National Association of Securities Dealers, the New York Stock Exchange and specially tailored entities. She has extensive international arbitration experience and has arbitrated under the auspices of the International Chamber of Commerce, the Vienna Arbitration Centre, the London Court of International Arbitration, and the International Centre for Settlement of Investment Disputes.

Ms. Steinberg has been a board member for the Boston Chapter of the Lawyers Committee for Civil Rights under Law since 1999.

She is a magna cum laude graduate of Bryn Mawr College, was a special career Fellow at the University of California at Berkeley, and received her JD, cum laude, from Harvard Law School.

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Drafting and Enforcing Restrictive Covenants Around the World

Susan Barnard, Corporate Partner, Sullivan & Worcester LLP

Diane Carman, Chief Corporate Counsel & Compliance Officer,
Gamesa Technology Corporation, Inc.

Kathleen Lundy, General Counsel, Monitor Company Group Limited Partnership

Laura Steinberg, Litigation Partner, Sullivan & Worcester LLP

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Part I:

Key Considerations in Drafting a Restrictive Agreement

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- What is the “Company” and where does it do business? Should there be more than one “company” party?
 - Parent
 - Subsidiary
 - Employer-local in country
- Who is the “Employee” and what is his role in the Company?
 - Senior management
 - Key person-sales/technology/customer interface
 - Division head/in country president/managing director

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Where is the employee domiciled? Where does he work?
 - Does his work regularly cross borders?
 - Does he have a principal work base?
- What is the consideration/circumstance for entering the restrictive covenants?
 - Employment
 - Promotion
 - Bonus
 - Grant of equity
 - Sale of division or business

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- What type of interest is being protected?
 - Trade secrets
 - Proprietary intellectual property
 - Confidential business information

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- How are interests in play treated/protected/proven in the relevant jurisdictions? For example:
 - In many European countries, duty of confidentiality exists only during employment; to obtain post-employment protection, must have contractual agreement so specifying.
 - **Chile, India, Mexico, Vietnam:** Non-compete agreements binding employee post-employment are generally void, unless tied to sale of business.
 - **Russia:** Non-compete agreements binding employee post-employment are generally void, unless tied to sale of business. Non-solicitation agreements binding employee post-employment are void.

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- How are interests in play treated/protected/proven in the relevant jurisdictions? For example: (continued)
 - **Austria, Czech Republic, England:** Non-compete cannot exceed one year after employment.
 - **China, Germany, Portugal, Saudi Arabia, Spain, Sweden:** Non-compete cannot exceed two years after employment, and in Germany, Spain and France statutory mandated payment is required for post termination non-compete.
 - **California:** absent statutory exceptions, non-competes are generally not enforceable.

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- How does the organization treat/protect/deal with the property interests that it seeks to protect?
 - Does it have a “standard” practice?
 - Need to have a coherent framework
- Uniform and consistent application across organization, with appropriate training, monitoring, and enforcement, is critical

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- What is the practice within the relevant industry?
 - Consulting industry: full package of restrictive agreements
 - Financial services: short-term non-competition, non-solicitation agreements
 - Software houses: non-competition and non-solicitation agreements are common
 - Sales/marketing: non-solicitation of customers
- Must be able to articulate a reasonable basis for any deviation from common practice in particular industry

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Nature and type of agreements which may apply and must be consistent with each other:
 - Employment agreement
 - Offer letter/terms of employment
 - Restrictive agreement
 - Nondisclosure and assignment of inventions
 - Equity grant agreement

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- What types of restrictive covenants are applicable to the employee in question?
 - Noncompetition
 - using a narrowly drawn competitive business description
 - only if employee's position means that he carries company goodwill with him
 - Nonsolicitation of customers/vendors/suppliers
 - Nonsolicitation/no hire of employees and independent contractors

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- What types of restrictive covenants are applicable to the employee in question? (continued)
 - Length of post termination obligation for noncompetition and for nonsolicitation (might not be the same); length of time of “look back” for nonsolicitation of customers
 - Nondisclosure/assignment of inventions (no time limit)

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Advice must be obtained from local counsel in relevant jurisdictions
 - Are restrictive agreements permissible? If so, is separate consideration necessary? Are there specific geographic and/or time limitations? Will overly broad restriction be cut back or invalidated?
 - Is there a particular national format for employment related agreements? Is there a national language requirement? (Example: French law requires all communications with employees to be rendered in and executed in the national language.)

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Advice must be obtained from local counsel in relevant jurisdictions (continued)
 - Are there any specific execution requirements (*e.g.*, need for both parties to sign, signatures witnessed; notarization)?
 - Are there any enforcement requirements (arbitration required or not allowed)? Are injunctions available? Are liquidated damages permissible?

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Other provisions to consider:
 - Title to company property, return of company property
 - Assurance as to absence of restrictions on disclosure and competition on account of former employment (important protection for Company)
 - Agreement to comply with customer/client confidentiality obligations (again, important protection for Company)
 - Notice (including for change of notice address) and transition
 - Reasonableness of covenants

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting a Restrictive Agreement

- Other provisions to consider: (continued)
 - Survival post termination of employment
 - Assignment (including in an assets sale or to other subsidiary if moves around in organization)
 - Severability; acknowledgment of “blue penciling”; confirm that the applicable jurisdiction will “blue pencil”

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Part II:

Key Considerations in Drafting the Enforcement Provisions

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

- Range of possible remedies has to be available in the relevant jurisdictions
 - Provisional (interim) remedies
 - Specific performance of contract
 - Forfeiture of equity
 - Injunctive relief (may conflict with privacy laws)
 - Money damages; liquidated damages
 - Prevailing party fees and costs

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

- Choice of law; venue/jurisdictional considerations
- Choice of law is substantive; identifying “seat” of an arbitration will establish procedural governing law
 - Seat should be signatory to New York Convention
- Desire for uniformity *versus* need to accommodate to local law issues
- Utility of agreed service procedures for giving notice and initiating proceedings

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Enforcement options: Arbitration

- EU Regulation 44/2001, requiring employer to litigate claims related to individual employment contracts only in courts in country where the employee lives, may trump arbitration agreement
- Arbitration can be expensive: forum fees and arbitrator fees are even more expensive if employee defaults or fails to pay his share
 - Importance of contract provision addressing default
 - Need to ensure that procedural order does not override any contract provision
- Pros and cons of one *versus* three arbitrators

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Enforcement options: Arbitration (continued)

- Claim splitting problem:
 - Every party to an arbitration has to be signatory to an arbitration agreement
 - If employee bound by restrictive covenant goes to work for new employer, no arbitration against that employer
- Pros and cons of institutional *versus* ad hoc arbitration; assisted arbitration as compromise (but need to know local law; for example, ad hoc arbitration not permissible in China)
- Importance of picking the right rule set to meet confidentiality, discovery, and hearing needs

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Administered arbitration rules:

- 2012 ICC Rules of Arbitration; available at <http://iccwbo.org/court/arbitration>
(do not contemplate a hearing)
- LCIA Arbitration Rules; available at <http://lcia.org>
- 2011 JAMS International Arbitration Rules (one arbitrator unless parties specify three); available at www.jamsadr.com
- 2009 International Arbitration Rules of the American Arbitration Association (one arbitrator unless otherwise specified or administrator determines three are warranted); available at www.icdr.org

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Self-administered arbitration rules:

- 2010 UNCITRAL Rules (three arbitrators unless specify one); available at www.uncitral.org
- UK Arbitration Act 1996 (one arbitrator unless specify three); available at <http://www.nadr.co.uk/articles/published/arbitration/ArbitrationAct1996.pdf>
- 2005 CPR Rules for Non-Administered Arbitration of International Disputes; available at <http://cpradr.org>

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Assisted arbitration rules:

- 2005 CPR Rules for Non-Administered Arbitration of International Disputes; available at <http://cpradr.org>

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Enforcement options: Court proceeding

- Jurisdictional considerations: must again consider import of EU Regulation 44/2001
- Local court may be hostile to foreign employer
- Language issues
- Need for local advocate
- Duration of covenant *versus* likely length of proceeding
 - Possibility of appellate review *versus* desire for immediate binding effect

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Defenses to be anticipated and addressed:

- Lack of confidentiality
- Waiver/estoppel: lack of consistent enforcement within Company
- Failure to prove monetary damages or other harm

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

Damages issues:

- Proper measure of damages? May vary depending on substantive law
- Proving actual damages may require providing information about Company's costs and profit margins
- Liquidated damages? Actual damages must be difficult to quantify; liquidated damages must be reasonable proxy
 - If Employee goes out on his own or becomes head of a new business or competitive business unit, information about lost revenues may be available
 - If Employee joins existing competitor, Company may be unlikely to gain access to damages information

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Drafting the Enforcement Provisions

- Fee shifting provisions for deterrent effect? Need to be specific about trumping any contrary law or arbitration rules
- Settlement considerations
 - Confidentiality provision may be contrary to desire for prophylactic effect
 - Effect of privacy laws
- Need for consultation with local counsel, both in US (*e.g.*, California) and abroad

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Part III:

Key Considerations in Practice – Living with the Program

ACC'S
ANNUAL MEETING
2012 ORLANDO
SEPT 30-OCT 3
WHERE IN-HOUSE COUNSEL CONNECT



#ACCAM12



AM.ACC.COM

ACC Association of
Corporate Counsel

Key Considerations in Practice – Living with the Program

- Monitoring, training, internal enforcement, uniform practices, protecting good will
 - Cultural barriers
 - Implementing an existing program
 - New hires
 - Amendments/modifications/waivers on separation
 - Exit interviews
 - Implementing a policy change
- Internal communications as to enforcement efforts

[_____]

**[NONCOMPETITION,] NONSOLICITATION, NONDISCLOSURE AND
INVENTIONS AGREEMENT**

This Agreement is made as of _____, 20__ between [_____], a [_____] (“Company”)¹, and [_____] (“Employee”)².

[Company wishes to employ and Employee wishes to accept such employment with Company.] [Employee is presently an employee of Company and a member of key management personnel of Company and Company has offered Employee a promotion to _____/ a significant bonus and compensation increase/the opportunity to receive [equity] in Company and to become a [stockholder/partner/member] of Company.] [Employee wishes to accept the promotion/change in status/ additional compensation/receive [equity] and to become a [stockholder/partner/member] of Company.]

As a condition of Employee’s [employment by] [receipt of [promotion/consideration/equity from] Company [and his becoming a [stockholder/partner/member] of Company, Company and Employee agree that it is in their mutual best interest that Employee become subject to the restrictive covenants set forth herein.³

For good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, Employee hereby acknowledges and agrees as follows:

1. **Reasons for Agreement.** As a result of his relationship with Company, and because of the nature of his responsibilities with Company, Employee [has acquired and] as a result of his anticipated relationship and responsibilities with Company hereafter will acquire valuable trade secrets, proprietary data, and/or confidential information with respect to Company and its business. In view of the foregoing, [and as a condition of Company’s employment of Employee/granting to Employee the promotion/title and responsibilities of _____/additional compensation/sale of equity to Employee], Employee acknowledges that it is reasonable and essential for the global protection of the goodwill, trade secrets, proprietary data and confidential information of Company that he undertake the obligations contained in this Agreement. Employee acknowledges that Company operates globally and that Employee may provide services on behalf of Company to customers/clients on a worldwide basis, regardless of the jurisdiction in which Employee resides from time to time. The intent of this Agreement is to provide protection to Company for its goodwill, trade secrets, proprietary data, and confidential information and to protect Company’s relationships with clients and employees to the greatest

¹ Consider which entity within the organization should be a party.

² Consider Employee’s role with the organization. Is he an executive? Does he interact with customers? Does he have access to confidential information?

³ Identify the consideration/circumstance for entering the restrictive agreement.

extent permitted by law, throughout the countries and jurisdictions in which Company does business.⁴

2. **Provision of Services; Noncompetition.**⁵ During the period of Employee's [employment by/provision of services to] Company, Employee will devote his full time efforts to promote the interests and business of Company; and during such period and during the [one (1)/two (2)] year[s] following the date of his [termination of employment by/cessation of the provision of services to, for or on behalf of] Company (the "Separation Date"), will not; directly or indirectly (either for his own account or as a stockholder, partner, member, manager, officer, director, employee, consultant, joint venturer, lender or in any other capacity whatsoever), engage in or have any interest whatsoever in [any other business that relates, is similar to, or competes or conflicts with the business of Company, "Business"]; provided, however, that the foregoing shall not preclude Employee from acquiring or owning solely for investment purposes up to two (2%) percent of the combined voting power of the outstanding capital stock of a publicly held company.]

3. **Nonsolicitation.**⁶ Employee shall not, at any time during the period commencing on [the date of this Agreement/the date Employee commences [employment by/the provision of services to] Company (including any of Company's current and future subsidiaries and affiliates, all of which shall be deemed to be included within the definition of "Company") and ending [one (1)/two (2) year[s] following the Separation Date:

(a) directly or indirectly (except on behalf of Company), solicit or attempt to solicit, accept business from, divert or attempt to divert, handle or attempt to handle or service or attempt to service, the account or business of any customer/client which as of the Separation Date or during the [one (1) year/six month] period prior thereto (i) was a customer/client of Company with which Employee had dealt or (ii) had been directly solicited by Company with Employee's involvement with a view toward establishing a customer/client relationship, or assist any other person in doing any of the foregoing; or

(b) directly or indirectly recruit, solicit or hire any employee [or member, partner, stockholder, director, manager, officer] or independent contractor of Company, or induce or attempt to induce any such person to terminate his employment, or otherwise to limit

⁴ The type of interests at stake (*i.e.*, trade secrets, proprietary IP, confidential business information) needs to be considered and assessed in light of the places where Company and Employee do business. How Company protects these interests internally (through policies, training, monitoring, and enforcement) must be consistent with protection of the relevant interests under local law.

⁵ Consider whether a noncompetition covenant is appropriate for Employee. The relevant jurisdiction may preclude or limit protection of certain interests, scope (narrow definition of competitive business), length of time and may prescribe compensation during any noncompete period.

⁶ Consider whether a nonsolicitation agreement is appropriate for Employee. If so, both the look-back and the nonsolicitation periods must be reasonable in light of Employee's role and functions, and the geographic reach must also be reasonable. The relevant jurisdiction may preclude or limit such agreements and/or their duration and geographic reach.

or to cease his relationship, with Company, or assist any other person in doing any of the foregoing; or

(c) directly or indirectly interfere or attempt to interfere in any way with Company's relationships with any of its customer, clients, sales representatives, or suppliers, including, without limitation, inducing or attempting to induce any customers, clients, sales representative, supplier, key advisor or consultant to terminate or change the terms of its dealings with Company, or assist any other person in doing any of the foregoing.

4. **Nondisclosure.**⁷ Employee will not, at any time prior to the Separation Date or thereafter, without the express written consent of Company, directly or indirectly, communicate, disclose or divulge to, or use for the benefit of himself or of any person, firm, entity, association or corporation, any of Company's trade secrets, proprietary data, or confidential information, which trade secrets, proprietary data and confidential information were communicated to or otherwise learned of or acquired by Employee in the course of his relationship with Company. Employee agrees that such trade secrets, proprietary data and confidential information include but are not limited to the following which are not generally publicly available: Company's existing and contemplated products and projects, joint ventures, research and development programs, work product, business, accounting, consulting, engineering and financial information and data, research data, testing methods, plant layout and tooling, technical data, marketing plans, pricing, methods and processes involved in manufacturing, selling, rendering advice and marketing products; lists and/or identities of Company's customers, clients and vendors and prospective customers, clients and vendors; information, specifications and data relating to Company's products and work product; information relating to Inventions (defined below); Company's licensing arrangements and the identity of any persons or entities associated with or engaged by Company as employees, officers, consultants, advisers, agents, distributors or sales representatives. Information that is proprietary or confidential, or constitutes a trade secret, shall remain so notwithstanding its availability to other partners, employees, personnel or agents of Company.

Notwithstanding the foregoing, Employee may disclose such trade secrets, proprietary data and confidential information only to the extent that disclosure thereof is required (a) in the course of his performing services for or on behalf of Company, or (b) by a court, arbitral body, or governmental agency of competent jurisdiction, provided Employee promptly notifies Company and cooperates fully with Company in obtaining any available protective order or the equivalent prior to the disclosure of such information. This provision does not apply to any information which legally is or becomes generally known to the public from authorized sources other than Employee.

5. **Title to Certain Property.** All tangible and intangible materials, in whatever form, including, but not in any way limited to, project work product, printouts, specifications, models, books, records, computer disks and storage devices, manuals, marketing literature, training materials, client/customer files, computer programs, correspondence, documents, contracts, orders, memoranda, notes, agreements, invoices and receipts (and all copies and reproductions

⁷ Check whether this is covered in another agreement. Note that this obligation should not be time limited.

thereof), in the possession or control of Employee which in any way relate or pertain to Company's Business or to the business of any affiliate of Company, whether furnished to Employee by Company or prepared, compiled or acquired by Employee, shall be the sole property of Company. Employee agrees to surrender and return to Company all such materials and copies thereof, at any time, upon Company's request. Upon the Separation Date, Employee shall immediately return to Company all such materials and copies thereof and, if so requested by Company, shall certify to the fulfillment of such return obligation.

6. **Inventions: Disclosure, Assignment and Further Assurances.**⁸ If at any time(s) prior to the Separation Date, Employee shall (either alone or with others) make, conceive, discover, reduce to practice or become possessed of any invention, modification, discovery, design, development, improvement, enhancement, framework, methodology, computer program, work of authorship, process, formula, data, technique, know-how, trade secret or other intellectual property right whatsoever or any interest therein (whether or not patentable or registrable under copyright or similar statutes or subject to analogous protection) that relates to the Business of Company, or any of the products or services being developed, manufactured or sold by Company, or results from tasks assigned Employee by Company or results from the use of premises or equipment owned, leased or contracted for by Company (herein called "Inventions"), such Inventions and the benefits thereof shall immediately become the sole and absolute property of Company and its assigns, and Employee shall promptly disclose to Company (or any persons designated by it) each such Invention and hereby assigns without compensation to Company and its assigns any rights Employee may have or acquire in the Invention and benefits and/or rights resulting therefrom and shall communicate to Company, without cost or delay, and without publishing the same, all available information relating thereto with all necessary plans and models; provided, however, that to the extent such assignment is not permitted by applicable law, Company shall at all times have the right to receive and Employee hereby grants to Company an exclusive, worldwide, perpetual license to use in any manner it deems appropriate the Inventions on a royalty free basis.

Employee shall keep records of and promptly disclose to Company, and Company hereby agrees to receive all such disclosures in confidence, any other invention, modification, discovery, design, framework, methodology, development, improvement, process, formula, data, technique, know-how, secret or intellectual property right whatsoever or any interest therein (whether or not patentable or registrable under copyright or similar statutes or subject to analogous protection) made, conceived, discovered, reduced to practice or possessed by Employee (either alone or with others) at any time or times prior to the Separation Date for the purpose of determining whether each constitutes an "Invention" as defined herein.

Upon disclosure of each Invention to Company, Employee shall, at the request and expense of Company, sign, execute, make and do all such deeds, documents, acts and things as Company and its duly authorized agents may reasonably require:

⁸ Check jurisdiction to determine whether Company must compensate Employee for Inventions. If so, "without compensation" language must be deleted.

(a) to apply for, obtain and vest in the name of Company alone (unless Company otherwise directs) letters patent, copyrights or other analogous protection in any country throughout the world and when so obtained or vested to renew and restore the same; and

(b) to defend any opposition proceedings in respect of such applications and any opposition proceedings or petitions or applications for revocation of such letters patent, copyright or other analogous protection.

If Company is unable, after reasonable effort and for any reason whatsoever, to secure Employee's signature on any application for, assignment of, or other document relating to any letters patent, copyright or other analogous protection relating to an Invention, Employee hereby irrevocably designates and appoints Company and its duly authorized officers and agents as Employee's agent and attorney-in-fact, to act for, in, and on Employee's behalf and stead to execute and file any such document(s) and to do all other lawfully permitted acts to further the prosecution and issuance of letters patent, copyright or other analogous protection thereon with the same legal force and effect as if executed by Employee.⁹

7. **Notice of Change of Residence; Assist in Transition.**¹⁰ Employee shall give Company prompt written notice of his change of residence or domicile prior to the Separation Date if such change is to a state or country other than that which appears on the signature page to this Agreement. Employee further agrees that, prior to his resignation from employment or performing services for Company, he will give Company the greater of at least [four weeks notice], such notice period required pursuant to any existing agreement between Company and Employee or notice pursuant to applicable law¹¹. Employee will assist and facilitate the orderly transition of his assignments and customers/clients upon his departure from Company.

8. **Absence of Restrictions Upon Disclosure and Competition.** Employee represents and warrants that his performance of all of the terms of this Agreement and of services on behalf of Company does not and will not breach any agreement to keep in confidence proprietary information or trade secrets acquired by him in confidence or in trust prior to his becoming associated with Company or to refrain from competing, directly or indirectly, with the business of any previous employer or other party. Employee has returned all documents and materials belonging to any of his former employers. Employee will not disclose to Company or induce any of Company's employees to use proprietary information or trade secrets of any of their former employers. Employee has not entered into, and hereby agrees that he will not enter into, any written or oral agreement in conflict herewith. In addition, Employee covenants that he will not violate any agreement of which he has knowledge between Company and a client/customer.

9. **Compliance with Company Nondisclosure Obligations.** Employee hereby acknowledges that Company may hereafter be subject to non-disclosure or confidentiality agreements with third parties pursuant to which Company must protect or refrain from use of

⁹ Check jurisdiction as to enforceability of this provision.

¹⁰ Consider need to amend Agreement if Employee changes his state or country of residence.

¹¹ Consider jurisdictional notice requirements for employment related agreements.

proprietary and/or confidential information which is the property of such third party or other party. Employee hereby agrees upon the direction of Company to be bound by the terms of such agreements in the event Employee has access in the course of his relationship with Company to the proprietary and/or confidential information protected thereunder to the same extent as if Employee were an original individual signatory thereto.

10. **Certain Remedies.** [In the event of any breach of the provisions of this Agreement, pursuant to the terms of Company's [charter documents/shareholders' agreement/other agreement] ("Equity Agreement") Company, by written notice to such Employee, may redeem all or any part of such Employee's (and such transferee's) [equity], at the lesser of: (i) the Call Price (as defined in the Equity Agreement); or (ii) the holder's original purchase price.] In addition, Company shall be entitled, in addition to any other legal rights or remedies which it may have, to initiate a proceeding and maintain an action or arbitration for preliminary and permanent injunctive relief, it being agreed by the parties hereto that the substantial and irreparable harm which Company would sustain upon any such breach is impossible to ascertain in advance and shall be presumed to exist and that the award of monetary damages therefor would be wholly inadequate. In the event of any action by either party to enforce the provisions of this Agreement, the non-prevailing party shall be responsible for paying all reasonable costs and expenses (including, without limitation, court or arbitration costs and attorneys' and expert fees) incurred by the prevailing party in connection with such action; provided, however, that if there is no clear prevailing party in such action, the court or arbitrator, as applicable, hearing such action will make the determination as each party's responsibility for paying such costs and expenses. In the event that Employee fails timely to pay his required share of any arbitration fees or costs while a proceeding is underway, Company shall be entitled to treat such nonpayment as a default and to seek appropriate remedies in view of such default.

11. **Reasonable Covenants.** Employee acknowledges and agrees that due to the [global] nature of Company's business, the restrictive covenants contained herein (a) are essential for the reasonable, proper, and adequate protection of the [global] goodwill of Company and its trade secrets, proprietary data and confidential information, irrespective of whether such goodwill and assets may be protectable in the jurisdiction of Employee's country of domicile, (b) are reasonable with respect to length of time, scope and geographic area and (c) will not prohibit Employee from engaging in other businesses or employment for the purpose of earning a livelihood following the termination of his relationship with Company.

12. **Survival.** Employee acknowledges and agrees that the provisions of this Agreement shall survive the termination of Employee's relationship with Company, regardless of the circumstances of such termination.

13. **Severability.** Each provision of this Agreement shall be treated as a separate and independent clause, and the unenforceability of any one clause shall in no way impair the enforceability of any of the other clauses herein. If the invalidity or unenforceability of any provision hereof is due to unreasonableness of the time or scope or geographic extent of any covenant or restriction, said covenant or restriction nevertheless shall be effective for such period of time or within such scope or geographical area as may be determined to be reasonable by a court of competent jurisdiction. The parties agree that any court of law or arbitrator, as

applicable, has the authority to “blue pencil” the provisions of this Agreement to carry out the intent of the parties hereto.

14. **Assignment and Benefit**.¹² This Agreement shall be binding upon Employee’s heirs, executors, and administrators. Company shall have the right to assign this Agreement to its successors and assigns, including any subsidiary or affiliate and further including without limitation a purchaser of all or substantially all of the assets of Company and in connection with the sale of all or substantially all of the equity or assets of a subsidiary or affiliate (which right shall include the right to require Employee to execute and deliver to Company in connection with any such sale of a subsidiary or affiliate a separate restrictive agreement with such subsidiary or affiliate on terms similar to those contained herein), and all covenants and agreements hereunder shall inure to the benefit of and be enforceable by said successors and assigns.

15. **Waiver**.¹³ No delay or omission by Company in exercising any right under this Agreement shall operate as a waiver of that or any other right. No waiver of any right under this Agreement shall be effective unless in writing and signed by Company. A waiver or consent given by Company on any one occasion shall be effective only in that instance and shall not be construed as a bar to or waiver of any right on any other occasion.

16. **Entire Agreement; Amendment; Headings**.¹⁴ Employee acknowledges receipt of this Agreement, and agrees that with respect to the subject matter hereof it is the entire agreement with Company, superseding any previous oral or written communication, representation, understanding or agreement with Company or any representative thereof, and that this Agreement supersedes any prior agreement of the parties with respect to this subject matter. No modification of or amendment to this Agreement shall be effective unless in writing and signed by both parties hereto. The headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

17. **Notice**. All notices, requests, demands and any other communications hereunder shall be made in writing and shall be deemed to have been duly given if delivered in person or sent by registered or certified mail, postage prepaid, if to Company addressed to the [_____] of Company at Company’s principal executive office, and if to Employee at the address appearing beneath his signature to this Agreement. Any party may change its or his address for notice hereunder by giving notice of change of address in the manner herein provided. If Employee moves or changes his residence or notice address without duly informing Company thereof in writing, Company may deliver notice pursuant to this Section 17 at such address as Company

¹² This provision permits Company to assign the Agreement to a purchaser of assets or of a division or to a subsidiary without having to seek Employee’s consent.

¹³ Notwithstanding this provision, Company’s uniform and consistent treatment of breaches or alleged breaches of the Agreement across similarly situated employees and with respect to similar behavior will be key to enforcement.

¹⁴ If they exist, this provision must be revised to refer to other relevant agreements (employment agreements, offer letters, separate agreements with covenants).

may reasonably determine, after reasonable investigation, is an appropriate notice address for Employee.

18. **Governing Law.**¹⁵ This Agreement shall be governed by and construed in accordance with the laws of [_____], without regard to its conflicts of law principles. [Employee hereby submits to the personal jurisdiction within [state/country] in respect to the interpretation and enforcement of the provisions of this Agreement and all transactions contemplated hereby.] Employee acknowledges and agrees that the enforceability of this Agreement is essential to protect the global goodwill and assets of Company and that this Agreement shall therefore be enforceable in the courts located in [state/country], irrespective of whether or not this Agreement is or may be enforceable in the jurisdiction of Employee's country of domicile.

(b) **Arbitration.** Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by a/an [confidential] arbitration proceeding (the "Arbitration") conducted in accordance with [arbitration rule set].¹⁶ The seat of the Arbitration shall be [state/country].¹⁷ Any Arbitration shall be conducted in [city/state or country] in English.¹⁸ The Arbitration shall be conducted before [one arbitrator/panel of three arbitrators] (the "Tribunal") selected [identify arbitrator selection mechanism and institution to break impasse].¹⁹ Judgment on the award issued in any such Arbitration shall be final and binding and may be entered in any court having jurisdiction thereof. The Tribunal shall have the power to grant all the remedies, including preliminary and permanent injunctive relief, as set forth in Section 9 hereof. [No punitive or multiple damages shall be awardable in any such Arbitration.]

EMPLOYEE ACKNOWLEDGES THAT HE HAS READ THE FOREGOING [NON-COMPETITION,] NONSOLICITATION, NONDISCLOSURE AND INVENTIONS AGREEMENT AND UNDERSTANDS AND AGREES TO EACH AND EVERY PROVISION. EMPLOYEE FURTHER ACKNOWLEDGES THAT THIS AGREEMENT WAS DRAFTED BY COUNSEL TO COMPANY, THAT HE HAS BEEN GIVEN THE OPPORTUNITY TO CONSULT COUNSEL OF HIS OWN CHOOSING AND HAS EITHER DONE SO OR VOLUNTARILY CHOSEN NOT TO DO SO PRIOR TO HIS EXECUTION HEREOF, AND THAT FAILURE TO CONSULT WITH COUNSEL MAY HAVE ADVERSE CONSEQUENCES TO EMPLOYEE.

¹⁵ Carefully consider choice of substantive law: law of Company organization or headquarters; law of Employee domicile ; law of place of employment. Local law may dictate choice.

¹⁶ Consider whether institutional, ad hoc, or assisted arbitration is preferable. Local law may affect choice.

¹⁷ This provision determines what procedural law applies.

¹⁸ Place of Arbitration differs from Arbitration "seat." Local law may override language choice.

¹⁹ Choice of Arbitration rule set may determine Tribunal make-up and mechanism for breaking appointment impasse.

The parties hereto have freely executed this Agreement under seal as of the date first written above.²⁰

COMPANY

[-----]

By:

Its:

EMPLOYEE

Address:

²⁰ Local law may require witnesses and/or notarization.

SAMPLE ARBITRATION STATEMENT OF CLAIM

IN THE MATTER OF AN AD HOC ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES

BETWEEN:

COMPANY,
Claimant,

and

EXECUTIVE,
Respondent.

STATEMENT OF CLAIM

Pursuant to Article 18 of the UNCITRAL Arbitration Rules, Claimant submits the following Statement of Claim.

Description of the Parties

1. Claimant Company is a Delaware corporation with a principal place of business in New York, New York, United States of America. Through various offices, Company conducts business throughout the United States. Company is the parent company of various subsidiaries and affiliates. Activities under the "Company" brand outside of the United States are conducted through the various Company subsidiaries and/or affiliates.

2. Respondent Executive is a former senior executive and employee of Company. On information and belief, Executive currently resides at [address].

Statement of Facts

3. Company is a strategy consulting company serving commercial business enterprises around the world. It is generally regarded as in the top tier of business strategy consulting firms. Company's particular focus is on organizational design and revenue and

business line growth. As a professional services firm, Company's key assets are its intellectual property, its professional personnel, and the goodwill of its clients. Company has invested substantial effort and expense in developing a body of confidential and proprietary intellectual property that is used in the provision of client services. Company is constantly adding to and enhancing that body of concepts and materials. Company likewise invests considerable effort and expense in hiring and training professional personnel to deliver the high quality professional strategy consulting services for which the firm has developed a formidable worldwide reputation. Company has historically focused on developing long-term relationships with its clients and derives a significant portion of its revenues from repeat business. Company employees are encouraged and assisted in the development of close working relationships with client personnel, with a view towards fostering the development and maintenance of long-term client relationships.

Executive's Possession of Company's Confidential and Proprietary Information

4. Executive became employed by Company in or around [date] and worked continuously for Company until [date]. Executive was hired as a Junior Consultant and ultimately became a Senior Consultant in charge of a team of over 100 Company employees. As a Senior Consultant, Executive was held out to and interacted with senior representatives of Company clients and client prospects as the Company employee overseeing the work that Company was performing or wished to undertake for them.

5. Consulting firms differentiate themselves from one another through the development and use of their own proprietary intellectual property. Like all similar firms, Company goes to great effort to develop and protect proprietary intellectual property. One important way in which Company secures that protection is by entering into and enforcing confidentiality and licensing agreements with its clients. Clients are given access to Company's

proprietary methodologies and content solely for purposes of making use of Company's work product. Clients cannot disclose Company's proprietary methodologies to third parties, including Company competitors. All of Company's client contracts have such confidentiality provisions in them.

6. Through detailed confidentiality training, Company employees are trained to protect both Company's proprietary intellectual property and the confidential information that they receive from and develop for clients. All of Company's senior professional employees are required annually to reconfirm their understanding of and their adherence to Company's key policies, including, *inter alia*, Company's contracting, confidentiality, and intellectual property policies. Executive annually certified to his understanding of and adherence to these policies.

The Restrictive Agreement

7. At the same time that he was promoted to Senior Consultant, Executive was offered the opportunity to become an equity holder in Company. Executive was not coerced into accepting this offer; other Senior Consultants have chosen not to receive equity. Executive chose to become an equity holder. Executive signed a Phantom Stock Agreement and today owns 100 shares of Company Phantom Stock.

8. As a condition to Executive's promotion to Senior Consultant and to his becoming an equity holder, on or about [date], Company and Executive entered into a Restrictive Agreement, a copy of which is attached hereto. All individuals who become Company Phantom Stock holders are required to sign a virtually identical restrictive agreement, with a few country-specific modifications. Executive received a copy of the Restrictive Agreement well in advance of signing it and had ample time to review it with counsel of his choice. The Restrictive Agreement provides that it is governed by New York substantive law and that any disputes thereunder are to be settled by binding arbitration.

9. Section 1 of the Restrictive Agreement explicitly recites the need for entry into the Restrictive Agreement to protect Company's and its subsidiaries' and affiliates' goodwill, trade secrets, proprietary data, and confidential information. Section 3 defines such trade secrets, proprietary data, and confidential information as including

Company's existing and contemplated projects; joint ventures; research and development programs; work product, business, accounting, consulting, engineering and financial information and data; marketing plans; pricing, methods, processes, and know-how involved in rendering advice to clients; analytic frameworks; lists and/or identities of Company's actual and prospective clients; information relating to Inventions (defined below); information, specifications and data relating to Company's projects and work product; and the identity of any persons or entities associated with or engaged by Company as partners, employees, advisers, or agents.

10. Pursuant to Section 2, from the time that Executive entered into the Restrictive Agreement through two years following his departure from Company, Executive cannot:

(a) directly or indirectly ... solicit, accept business from, or assist any other person to solicit or accept business from Company to which the Senior Consultant on behalf of Company was providing services or seeking to provide services during the two (2) years immediately prior to his severance date;

(b) directly or indirectly recruit, solicit or hire or assist any other person to recruit, solicit, or hire any Company employee or contractor, or encourage any of them or any supplier or client of Company to terminate their relationship with Company; or

(c) directly or indirectly interfere or attempt to interfere in any way with Company's relationships with any of its clients, employees, contractors, or suppliers, including, without limitation, inducing or attempting to induce any clients, employees, contractors, or suppliers to terminate or change the terms of his, her or its dealings with Company.

11. Pursuant to Section 3 of the Restrictive Agreement, Executive is obliged never to directly or indirectly, communicate, disclose, or divulge to, any person or entity, nor use for his own benefit or the benefit of any other person or entity, any of Company's trade secrets, proprietary data or confidential information, which trade secrets, proprietary data and confidential information were communicated to or otherwise learned of or acquired by Senior Consultant in the course of his employment by Company.

12. Section 4 of the Restrictive Agreement makes clear that Company, not Executive, owns all tangible materials in any way related to Company's business and that Executive must return all such materials to Company upon his departure from the firm.

13. Section 6 of the Restrictive Agreement required Executive to provide at least four weeks' notice of his resignation from Company and to "assist and facilitate the orderly transition of his assignments and clients upon his departure from Company."

14. In Section 10 of the Restrictive Agreement, Executive agreed that these restrictions

(a) are necessary for the reasonable and proper protection of Company's goodwill and trade secrets, proprietary data and confidential information, (b) are reasonable with respect to length of time, scope and geographic area and (c) will not prohibit Senior Consultant from engaging in other businesses or employment for the purpose of earning a livelihood following the termination of his Company employment.

15. The Restrictive Agreement further provides in its Section 9 that

In the event of any breach of the provisions of this Agreement, Company shall have the right to redeem any and all equity interests owned by Executive, by written notice to Senior Consultant, at the lesser of the cost of the equity interests or the price determined pursuant to the Valuation Formula applicable at the time of such redemption.

Company's Use of Executive to Develop Company Goodwill

16. Company provided Executive with a large expense account and encouraged Executive to utilize Company funds and resources to develop close personal and professional ties with client personnel. Company showcased Executive as an important thought leader at industry seminars, in industry publications, and on Company's website. Company provided research personnel to research and write articles published with Executive listed as the lead author. Company provided executive coaching to Executive to hone his business development skills.

Executive's Access to Company Confidential and Proprietary Information

17. As a Senior Consultant and a Phantom Stock holder, Executive was regularly given access to highly confidential Company financial information, including Company cost and revenue information on a region-by-region basis, broken down by client and by project; profitability data; project pipeline information; and client prospects data. Executive also received complete compensation information for all Company employees on his team.

Executive's Violation of the Restrictive Agreement

18. On or around [date], Executive began a systematic process, both alone and with other Company personnel whom he recruited to be his collaborators, of planning for and undertaking the intentional misappropriation for his own use and benefit, and to the detriment of the Company enterprise, of Company's goodwill, proprietary data, and confidential information. Executive began that misappropriation process while he was still with Company and has continued it since his departure from Company on [date]. It is unclear exactly when Executive first formulated his plan to misappropriate Company's goodwill and confidential and proprietary data and information.

19. Executive first sought to join a major, direct Company competitor ("Competitor A") and to take with him to Competitor A his entire Company team and the clients of that team. To that end, Executive met with Competitor A's Chief Executive Officer repeatedly while still employed by Company. In the course of those discussions, Executive prepared and provided to Competitor A a comprehensive business plan that contained detailed confidential and proprietary information and data as to Company. Executive solicited key members of his Company team to join him at his meetings with Competitor A. Executive disclosed Company's confidential and proprietary information and data to those Company employees as well as to Competitor A.

Neither the other Company employees nor Competitor A would otherwise have had access to such confidential and proprietary Company information and data.

20. Executive resigned from Company on [date]. At approximately the same time, many members of the Company team that Executive had headed also resigned from Company. When they resigned from Company, Executive and his former Company colleagues did not end up joining Competitor A. Instead, for approximately six months, until they joined Competitor B, they worked through a company (“Garden Leave Company”) that one or more of them founded after leaving Company en masse on [date]. Executive was President of Garden Leave Company.

21. Through Garden Leave Company, Executive submitted a number of proposals to substantial Company clients for which he had performed or overseen work during the two years before his departure from Company. In each instance, Executive caused the proposal to be submitted and presented by a former Company employee who had not been party to a restrictive agreement. Executive attended one or more of Garden Leave Company’s formal proposal presentations ostensibly as an observer.

22. On or around [date], Executive and the group of former Company employees who had been with him at Garden Leave Company all joined Competitor B. Through Competitor B, Executive began to bid aggressively for more work from his former Company clients. In the proposals to those clients, Executive permitted or caused Competitor B to highlight the Company credentials of himself and several other former Company employees. Competitor B was successful in obtaining the work as to several of those proposals, even though Competitor B had never previously done work for the clients in question.

Redemption of Executive's Phantom Stock

23. Executive has remained an equity holder in Company. The Phantom Stock Agreement contains a provision, entitled "Redemption by Company upon Breach of Certain Agreements," which provides that

If any Person at any time violates any Restrictive Agreement, the Company may redeem any or all equity interests held by such Person.

The redemption price to be paid for Executive's Phantom Stock in such circumstances is set out in the Phantom Stock Agreement.

Points at Issue

24. Executive cannot seriously contest the validity of his Restrictive Agreement or its coverage of his activities. It is settled law that a covenant not to compete contained in a personal services agreement that is subject to New York law will be enforced, provided that the covenant protects a legitimate business interest of the employer, is reasonably limited temporally and geographically so that it does not impose undue hardship on the employee, and is consistent with the public interest. BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-89 (1999). The same precepts govern the enforceability of non-solicitation agreements that are subject to New York law. All three of the requisite conditions to enforceability are met here.

25. Company anticipates that Executive may also advance the notion that he has not solicited Company's clients, that they have freely sought him out. Any such defense would not be viable. Section 2(a) of the Restrictive Agreement precludes Executive's acceptance of his former clients' and of client prospects' work until [date], no matter whether he behaved admirably or improperly in connection with the solicitation of that work. New York courts honor such agreements. See, e.g., The Estee Lauder Cos. v. Batra, 430 F.Supp.2d 158, 182 (S.D.N.Y. 2006).

Protection of Company's Legitimate Business Interests

26. New York case law makes clear that it is reasonable for an employer to protect its legitimate business interests through a non-competition covenant, and that such legitimate business interests may include confidential information and the goodwill that an employer has acquired through customer relationships. The same principles are regularly applied to non-solicitation agreements. Invoking well-known precedents, New York courts routinely enjoin violations of non-solicitation agreements.

27. The recent decision in *National Economic Research Associates, Inc. v. Evans*, Suffolk Cty., MA Superior Court Civil Action No. 04-2618-BLS1, 24 Mass. L. Rptr. 436 (Sept. 10, 2008), Law Doc. C-107, is particularly instructive.¹ NERA is a well-known economic consulting powerhouse. The economic consulting industry is quite similar to the management consulting industry in that there are many firms but only a small percentage of them (dozens, perhaps) achieve NERA's preeminence. From 1988 until 2004, Evans was a NERA employee. He rose through the ranks at NERA to become a Senior Vice President and Director. Over a ten year period that ended with his departure from NERA, Evans served as the NERA group leader directing at least 40 highly lucrative projects for Microsoft (which had been a NERA client before Evans joined the firm). As Evans' influence within NERA increased, he was granted various stock options. In order to exercise those options, which he did on four occasions, Evans was required to execute a non-solicitation agreement. Summarized simplistically, that agreement precluded Evans from soliciting or accepting business of the type offered by NERA for or from NERA clients or prospects that Evans had solicited or serviced during his time at NERA. The agreement also prohibited Evans from soliciting for different employment, to compete with

¹ New York law was applied in the *NERA* case.

NERA, any NERA employee who directly or indirectly reported to him. In 2004, Evans moved from NERA to LECG, another economic consulting firm of equal repute. Most of his NERA clients and most of the large group of employees who had worked with him at NERA moved to LECG with Evans. NERA filed suit.

28. The Superior Court determined that Evans had violated the portion of his restrictive agreement that barred him from accepting business on behalf of LECG from clients that he or his subordinates had serviced at NERA. 24 Mass. L. Rptr. at 440. The NERA case stands out because it too involves a consulting company and a restrictive agreement that was entered into during, rather than at the start of, employment and as part of an equity investment program.

Reasonable Temporal and Geographic Limitations

29. Two year restrictive periods are regularly upheld as reasonable. Nothing in this matter provides any basis for regarding two years as unreasonable. This is not a situation in which the restriction precludes Executive from earning a livelihood in his chosen field during the period for which he is restricted. He is free to work at the management consulting company of his choice. He is free to engage in direct competition with Company. With respect to his non-solicitation obligations, the only activities that Executive is not free to undertake for a two year period are (a) to approach or to perform work for Company clients that he served or the prospects that he was trying to serve in the two years leading up to his departure, or to assist anyone else in doing those things, and (b) to recruit, solicit, or hire any of Company personnel, or to assist anyone else in doing so. These are not cumbersome restrictions.

Consistency with the Public Interest

30. The Restrictive Agreement protects what New York law deems to be an employer's legitimate business interests and does not overstep as to time or space. It could be

found to be contrary to the public interest only if such restrictions are shown to be invalid in the country where Executive now resides (“Country”). There is no reason to believe that that is the case. Company has learned of no prohibition on such agreements in Country and believes that a Country court would give effect to an award enforcing the Restrictive Agreement, provided that such an award had been issued in accordance with due process. Country has been a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, for many years. If Executive believes that Country law would nonetheless preclude enforcement of an award enforcing the Restrictive Agreement, it is incumbent upon him to provide credible expertise to that effect.

Entitlement to an Accounting and to Damages

31. New York case law recognizes two measures of damages in business tort cases of this sort. Company can show either the profits that it lost by reason of the misconduct at issue or the profits that the wrongdoer gained through its misbehavior.

Relief or Remedy Sought

32. Company seeks issuance of an injunction (a) prohibiting Executive from further violations of the Restrictive Agreement; (b) requiring an accounting for, identification of, and return of all misappropriated materials and all copies thereof; (c) requiring Executive to provide an enumeration of all Company clients and prospects which Executive served or sought to serve in the two years directly preceding his departure and which Executive has solicited for work; and (d) requiring Executive to provide an enumeration of all Company clients and prospects which Executive served or sought to serve in the two years directly preceding his departure and for which Executive has directly or indirectly performed any work since his departure from Company, along with an accounting and disgorgement of all profits received from such work performed in violation of the Restrictive Agreement. In addition, and as outlined in ¶23 above,

pursuant to Section 9 of the Restrictive Agreement, Company is entitled to redeem Executive's Phantom Stock in accordance with the provisions of the Phantom Stock Agreement.

33. Pursuant to Section 9 of the Restrictive Agreement, Company is also entitled to recover, should it prevail herein, "all reasonable costs and expenses (including, without limitation, court or arbitration costs and attorneys' and expert fees) incurred ... in connection with such proceeding." Company accordingly seeks recovery of its reasonable legal fees and costs and will present an affidavit at the close of this proceeding enumerating such fees and costs.

[Date]

COMPANY

[LAWYER SIGNATURE BLOCK]