Phantom Stock Plan (Private Company)

A Practical Guidance® Annotated Form by Doreen Lilienfeld, Gillian Emmett Moldowan, and Matthew Weston, Shearman & Sterling LLP

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Summary

This form phantom stock plan is primarily designed for use by a privately held company to incentivize employee and other service provider performance by granting awards whose value is determined based on the company's stock value. It includes practical guidance, drafting notes, and optional and alternate clauses.

Phantom stock generally represents a company's unsecured and unfunded promise to make a payment to an employee or other service provider upon certain specified events (e.g., change in control or termination of employment) equal to the value of a specified number of shares of the company. Alternatively, a phantom stock plan can be designed so that the value of the award is based on the appreciation in value of the company's stock, similar to a stock option or stock appreciation right. This form contains alternate clauses so that it can be used for a full-value award plan or an appreciation-value award plan.

For private companies, a key advantage of granting cash-settled phantom stock rather than traditional equity awards that include the transfer of shares, such as options or restricted stock, is that it allows companies to reward and incentivize service providers without using actual, illiquid shares. Another advantage in granting phantom stock is that it allows for the deferral of taxes after vesting, if properly structured to comply with the nonqualified deferred compensation rules of I.R.C. § 409A (Section 409A). Phantom programs may also be attractive to partnerships or limited liability companies (LLCs) given the relatively higher costs to implement and administer traditional equity plans. In addition, for partnerships and LLCs that grant profits interests, such entities can also implement a phantom plan that incorporates both phantom stock and profits interests (see Drafting Note to Section 2.).

For an accompanying form award agreement, see Phantom Unit Award Agreement. For additional related information and resources, see Equity Incentive Plan Resource Kit.

[PLAN NAME]

1. **Establishment; Purpose**.

(a) [company name] (the "***Company***") hereby establishes the [plan name] (the "***Plan***"), effective as of [date] (the "***Effective Date***").

(b) The purpose of the Plan is to provide incentives to selected service providers to the Company [and its subsidiaries and affiliates] relating to the success of the Company through the grant of Phantom Units (as defined below).

Drafting Note to Section 1.(b)

In some circumstances, a company may want to establish an employee vehicle or management company through which the phantom stock plan is administered and under which phantom stock awards are issued. This is often the case for partnerships or LLCs that want to issue key employees an equity interest in the company (profits interest) and issue other employees a right to receive value in the form of cash that mimics the value of a profits interests (i.e., phantom stock). To the extent a company wants to issue employees an instrument whose value is only based on the appreciation of the value of the company (e.g., a profits interest), this form phantom plan and award agreement can be easily modified by including a base participation threshold in the award agreement for the instrument. For appreciation-value awards, see Alternate Section 2.(i), the Drafting Note to Section 4., and, in the accompanying form Phantom Unit Award Agreement, Alternate Section 1(c).

2. **Definitions**.

(a) "***Award Agreement***" means a Phantom Unit Award Agreement in a form authorized by the Board.

(b) "***Board***" means the Board of Directors of the Company.

Drafting Note to Section 2.(b)

If the entity sponsoring the phantom plan is a partnership or LLC, it might be appropriate for the plan to be administered by a manager or general partner.

(c) "***Cause***" means, unless otherwise defined in a Participant's employment agreement, the occurrence of any of the following events: (i) any willful and continued failure or refusal of a Participant to perform the duties assigned to the Participant; (ii) a Participant's indictment, conviction of, or a plea of nolo contendere to, a felony under U.S. law or applicable state law or any similar offense under non-U.S. law, or any misdemeanor or similar offense under non-U.S. law involving moral turpitude; (iii) a Participant's willful commission of an act of fraud, forgery, theft, misappropriation or embezzlement; (iv) any other willful misconduct by a Participant that is materially injurious to the financial condition or business reputation of, or is otherwise materially injurious to, the Company; or (v) any material breach by the Participant of any agreement (including an Award Agreement) to which the Participant and the Company, or any of its subsidiaries and affiliates, are both parties.

Drafting Note to Section 2.(c)

This is a standard definition of cause. There are several variations of the definition of cause, which vary depending on, among other things, the company's business and the group of eligible participants. Some companies prefer to include the definition of cause in award agreements (or simply incorporating the definition from the participants' employment agreement, assuming that all participants are employees with employment agreements). This gives a company more flexibility to tailor the definition to the individual participant based on such participant's level and role in the company. Companies should use caution in defining cause when the group of eligible participants includes consultants or other non-employee service providers as some portions of the typical definition of cause may not apply to that group. For alternative example language, see Executive Employment Agreement (Pro-employer) and Executive Employment Agreement (Pro-executive).

(d) "***Code***" means the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated thereunder.

(e) "***Disability***" means a Participant's inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, as determined in accordance with Section 409A of the Code.

Drafting Note to Section 2.(e)

Section 409A allows the occurrence of a "disability" to be a permissible payment event for deferred compensation subject to Section 409A. See Treas. Reg. § 1.409A-3(i)(4). However, the definition must meet Section 409A's requirements. The definition of Disability used in this form phantom plan complies with Section 409A as the plan is designed so that awards are settled upon a participant suffering a disability.

(f) "***Exit Event***" means: (i) a change in the ownership or control of the Company effected through a transaction or series of related transactions (other than an offering of securities to the general public through a registration statement filed with the Securities and Exchange Commission) whereby any "person" or related "group" of "persons" (as such terms are used in Sections 13(d) and 14(d)(2) of the Exchange Act of 1934, as amended (the "***Exchange Act***")), other than an affiliate, directly or indirectly acquires beneficial ownership (within the meaning of Rule 13d-3 under the Exchange Act) of securities possessing more than fifty percent (50%) of the total combined voting power of the securities outstanding immediately after such acquisition; or (ii) the sale or conveyance of all or substantially all of the assets of the Company to a person who is not an affiliate.

Drafting Note to Section 2.(f)

Section 409A allows the occurrence of a change in control to be a permissible payment event for deferred compensation subject to Section 409A. However, the definition must meet Section 409A's requirements. See Treas. Reg. § 1.409A-3(i)(5)(v) to (vii). The definition of Exit Event used in this form phantom plan complies with Section 409A as the plan is designed so that awards are settled upon an Exit Event or, if earlier, a termination of a participant's employment, which is also a permissible payment event for purposes of Section 409A. For more information, see the Drafting Note to Section 2.(h) and Section 409A Change-in-Control Payment Events.

(g) "***Participant***" means an individual who is granted and accepts a Phantom Unit award under the Plan.

(h) "***Payment Event***" means the earliest of (i) an Exit Event or (ii) a Participant's termination of employment with the Company or any of its subsidiaries or affiliates, including by reason of a Disability.

Drafting Note to Section 2.(h)

Phantom stock is considered deferred compensation and is therefore subject to Section 409A, unless an exemption applies. As such, where an exemption does not apply, the payment triggers must comply with Section 409A. For example, if the phantom stock plan provides for payment upon termination of employment and/or a change in control (defined for purposes of the form phantom plan as an Exit Event), the payment timing must comply with the requirements of Section 409A.

Other events a company may consider including as a payment event are death and disability, each of which are permissible payment events for purposes of Section 409A, provided that, disability must be defined to comply with the definition of disability under Section 409A. Companies should be careful when including initial public offerings (IPOs) as a payment or liquidity event because IPOs are not permissible payment events under Section 409A (however, it is permissible to use an IPO as a payment event where the short-term deferral exemption under Section 409A is used and the IPO is also a vesting event under the plan).

Penalties for violating Section 409A can be harsh. The company will have penalties for failures to report and/or withhold amounts that become taxable as a result of a Section 409A failure. The participant service provider would suffer adverse

consequences that include (1) immediate taxation of all vested deferred compensation of the same type as the phantom stock, (2) a 20% tax on the phantom stock (which is in addition to ordinary income tax), and (3) interests on deferred amounts that vested in a prior taxable year. For more information, see Section 409A Fundamentals.

The specifics regarding vesting and payment are covered in Section 5. of this phantom plan and Section 1 of the form Phantom Unit Award Agreement.

(i) "***Phantom Units***" means awards granted under the Plan giving a Participant the right to receive, subject to the terms and conditions of the Plan and the applicable Award Agreement, an amount in cash for each vested Phantom Unit held upon the occurrence of a Payment Event that is equal to the value of one [share, unit, OR other equity interest denomination] of the Company's [type and class of equity interests to which the phantom units relate], as determined by the Board in its sole discretion in accordance with the terms of the Plan.

Drafting Note to Section 2.(i)

This language is for a plan that provides for full-value phantom awards where the amount payable for each phantom unit is equal to the value of one share of company common stock (or other equity interest of the company). For a phantom plan that provides for awards based on the increase in value of the stock (or other equity interest) relating to the phantom units from the time of grant through the time that a payment event is triggered, use Alternate Section 2.(i).

Alternate Section 2.(i):

(i) "***Phantom Units***" means awards granted under the Plan giving a Participant the right to receive, subject to the terms and conditions of the Plan and the applicable Award Agreement, an amount in cash for each vested Phantom Unit held upon the occurrence of a Payment Event that is equal to (i) the value of one [share, unit, OR other equity interest denomination] of the Company's [type and class of equity interests to which the phantom units relate] minus (ii) the Performance Threshold (as defined in the Award Agreement) for that Phantom Unit, all as determined by the Board in its sole discretion in accordance with the Plan.

Drafting Note to Alternate Section 2.(i)

This language is for a plan that provides for appreciation-value phantom awards where the amount payable is based on the increase in value of the stock (or other equity interest) relating to the phantom units from the time of grant through the time that a payment event is triggered. For language to use in a full-value award plan, see default Section 2.(i).

(j) "***Section 280G***" means Section 280G of the Code and the rules and regulations promulgated thereunder, as they may be amended from time to time.

(k) "***Section 409A***" means Section 409A of the Code and the rules and regulations promulgated thereunder, as they may be amended from time to time.

3. **Administration**.

(a) The Plan shall be interpreted and administered by the Board, provided that the Board may delegate such administrative duties to a compensation committee or any other committee (and all references to the Board in the Plan shall include any authorized delegate of the Board), whose actions shall be final and binding on all persons, including the Participants, and shall be given the maximum deference permitted by law.

(b) The Board (or applicable committee), in its sole discretion, shall have the power, subject to and within the limitations of the express provisions of the Plan, to:

i. Determine from time to time which service providers of the Company [or its subsidiaries and affiliates] shall be designated as Participants entitled to participate in the Plan and the number and terms of the Phantom Units granted;

ii. Make determinations and interpretations required under the Plan, including the amount of any payments to Participants;

iii. Establish rules and regulations it deems necessary or desirable for the administration of the Plan;

iv. Exercise all authority granted to it hereunder; and

v. Correct any defect, supply any omission and/or reconcile any inconsistency in the Plan or any Award Agreement.

(c) No member of the Board (or the applicable committee) shall be personally liable for any action, determination or interpretation made in good faith with respect to the Plan or any payment paid hereunder, and all members of the Board (or the applicable committee) shall be fully indemnified and held harmless by the Company or its successor in respect of any such action, determination or interpretation.

4. **Eligibility; Awards Subject to the Plan.**

(a) Phantom Units may be granted to eligible persons at the discretion of the Board[; provided that no employee with less than [number, e.g., ninety (90)] days of employment with the Company may participate in the Plan].

Drafting Note to Section 4.(a)

Include the bracketed proviso language if the company wants to explicitly limit participation to those employees or other service providers who have completed a minimum period of service with the company. While this may not be strictly necessary as a company has the sole discretion to determine which employees received phantom stock, it could be helpful when negotiating employment terms for newly hired employees as it can be used to demonstrate a well-established policy applicable to all new hires.

(b) The aggregate Phantom Units that shall be eligible for grant pursuant to the Plan shall provide the Participants with the right to receive payments relating to the [value of OR appreciation value on] no more than [percentage] percent of the total aggregate [type and class of equity interests to which phantom units relate] of the Company (not including amounts payable under the Plan) as of the Effective Date. Any Phantom Units granted that are subsequently forfeited or cancelled under the Plan, due to a failure to vest, termination of employment or otherwise, shall again become available for grant under the Plan. In the event of a recapitalization, merger, unit split, unit dividend or similar change in the capital structure of the Company, the Board shall make proportionate adjustments to the number of Phantom Units and other terms as it in its sole discretion deems appropriate and equitable.

Drafting Note to Section 4.(b)

This clause limits the number of phantom units that may be granted under the plan. For the first field, use "value of" for a plan that provides for full-value awards or "appreciation value on" for a plan that provides for payments based on the appreciation in the entity's equity interests from the time of grant through the payment event.

In practice, the maximum number of phantom stock units issuable is generally equivalent of 10 to 15% of the company's outstanding equity. Note that the second sentence of this clause provides that any phantom stock that is forfeited or otherwise cancelled in accordance with the terms of the plan and the award agreement will again be issuable under the plan.

Companies should be careful in administering the phantom plan to avoid dilution-related issues. The issuance of phantom stock does not result in shareholder voting dilution because actual shares are not being issued. However, if the company fails to calculate payments to holders of phantom stock rights on a fully diluted basis, this could result in dilution to the company's capital and ultimately reduced payments to shareholders upon an exit or liquidity event.

5. **Terms and Conditions of the Awards.**

(a) Each Phantom Unit granted under the Plan shall be evidenced by an Award Agreement in a form approved by the Board, specifying the number of Phantom Units granted, vesting conditions, grant date and such other terms

and conditions as specified by the Board consistent with the Plan. Each Award Agreement shall be subject to the applicable terms of the Plan.

(b) Subject to the applicable Award Agreement, upon an Exit Event, each outstanding Phantom Unit shall accelerate vesting in full and be treated in accordance with the Award Agreement with respect to the treatment of vested Phantom Units.

(c) Subject to the applicable Award Agreement, upon a Participant's termination of employment with the Company for any reason (whether by the Company or by the Participant), (i) the vested portion of any Phantom Unit held by such Participant shall be treated in accordance with the Award Agreement with respect to the treatment of vested Phantom Units and (ii) the unvested portion of such Phantom Unit shall be automatically forfeited without consideration.

Drafting Note to Section 5.(c)

As a default, this form plan provides for forfeiture of all unvested phantom stock units upon a participant's termination of employment (subject to the terms of the award agreement). If desired, the plan can provide for the acceleration of unvested units (in full or in part) in the event of a good-leaver termination, as provided in Optional Section 5.(d).

(d) Each Phantom Unit granted under the Plan shall be nontransferable, other than to a Participant's or former Participant's heirs.

Optional Section 5.(d):

(d) Notwithstanding Section 5.(c) and subject to the applicable Award Agreement, upon a Participant's termination of employment by the Company without Cause, the Participant shall become immediately vested in that portion of the Participant's Phantom Units that would have otherwise become vested within the [period, e.g., twelve (12)-month] period immediately following the Participant's termination of employment date had the Participant remained continuously employed by the Company through such period, and such Phantom Units shall be treated in accordance with the Award Agreement with respect to the treatment of vested Phantom Units. Any other remaining unvested portion of such Phantom Units shall be automatically forfeited without consideration.

Drafting Note to Section 5.(d)

As a default term of the plan, subject to the applicable award agreement, this optional clause provides for at least partial accelerated vesting for outstanding phantom units if the participant is terminated by the company without cause by applying accelerated vesting to units that would have vested within a specified period following the participant's termination date.

6. **Amendment or Termination of the Plan.** The Board, at any time, and from time to time, may amend or terminate the Plan in any manner in its sole discretion, provided that termination of the Plan or any amendment thereof shall not materially adversely affect any Phantom Unit previously granted under the Plan without the consent of the holders of a majority of the then issued and outstanding Phantom Units.

Drafting Note to Section 6.

It is somewhat typical, predominately in the private company space, that companies retain discretion to terminate the plan and/or amend the plan without regard to the impact to participants. However, from an employee morale perspective, this may not be well received. Accordingly, the default language for this amendment and termination clause prevents changes that would be adverse to participants' rights in outstanding plan awards without obtaining the consent of participants holding a majority of the then outstanding phantom units. For a provision that gives the company unfettered discretion to amend or terminate the plan, see Alternate Section 6.

Alternate Section 6.:

6. **Amendment or Termination of the Plan.**

The Board, at any time, and from time to time, may amend or terminate the Plan, or any Award Agreement issued under the Plan, in any manner in its sole discretion, without regard to the impact of such amendment or termination on any Phantom Unit previously granted or the rights of any Participant therein, to the maximum extent permissible under applicable law.

Drafting Note to Alternate Section 6.

This language gives the company unfettered discretion to amend or terminate the plan. Often, the amendment and termination clause prohibits changes that would be adverse to participants' rights in outstanding plan awards without obtaining the consent of participants holding a majority of the then outstanding phantom units, as provided in default Section 6..

7. **Securities Compliance.** The Plan is intended to be a written compensatory benefit plan within the meaning of Rule 701 promulgated under the Securities Act of 1933. A Phantom Unit shall not be effective unless such Phantom Unit is in compliance with all applicable federal and state securities laws, rules and regulations of any governmental body, as they are in effect on the date of grant of the Phantom Unit and also on the date of exercise or other issuance. The Company shall be under no obligation to register any securities with respect to the Plan with the Securities and Exchange Commission or to effect compliance with the exemption, registration, qualification or listing requirements of any state securities laws, stock exchange or automated quotation system, and the Company shall have no liability for any inability or failure to do so.

Drafting Note to Section 7.

Offering equity-based awards requires either registration with the Securities and Exchange Commission or an exemption from the registration requirements. To the extent that phantom stock is considered a security, private companies generally rely on the exemption from registration under Rule 701 of the Securities Act of 1933, which allows a company to offer securities to employees under a written compensatory plan if: (1) certain disclosure requirements are met and (2) the aggregate sales price of securities sold in reliance on Rule 701 during any 12-month period does not exceed the greatest of (A) $1,000,000, (B) 15% of the total assets of the company, or (C) 15% of the outstanding securities of the class being offered. For more information, see Employee Incentive Compensation and Rule 701. To the extent the company exceeds any of these limits, there are other exemptions it may rely on to exempt the securities from registration (e.g., private placement exemptions).

8. **No Guarantee of Future Service.** Selection of an individual as a Participant under the Plan shall not provide any guarantee or promise of continued service of the Participant with the Company or any of its subsidiaries and affiliates, and the Company retains the right to terminate the employment of any employee at any time, with or without Cause, for any reason or no reason, except as may be restricted by law or contract.

9. **Withholding.** All payments under the Plan shall be subject to withholding of all applicable taxes under federal, state or other applicable law.

10. **Section 280G.** Notwithstanding anything else contained in the Plan or an Award Agreement to the contrary, in no event shall the vesting of any Phantom Unit be accelerated under Section 5 of the Plan or otherwise under the Plan or the Award Agreement to an extent or in a manner so that such vesting, together with any other compensation and benefits provided to or for the benefit of the Participant, under any other plan or agreement of the Company or any of its subsidiaries and affiliates, would result in the loss of deductions by the Company for federal income tax purposes due to the application of Section 280G or any other similar applicable law, each to the extent applicable. If a holder of a Phantom Unit would be entitled to benefits or payments hereunder (along with payments and benefits under any other plan or program) that would constitute "parachute payments" as defined in Section 280G, then the Company shall reduce or eliminate such parachute payments in the following order so that the Company is not denied federal income tax deductions for any "parachute payments" because of Section 280G: (i) cash severance benefits shall be reduced or eliminated first, (ii) then any accelerated vesting of Phantom Units shall be reduced or eliminated or waived, in reverse order of date of grant, and (iii) finally any

other benefits to which the Participant is or may be entitled shall be reduced or eliminated. Notwithstanding the foregoing, if a Participant is a party to an employment or other agreement with the Company or is a participant in a severance program sponsored by the Company or any of its subsidiaries and affiliates that contains express provisions regarding Section 280G and/or Section 4999 of the Code (or any similar provision), the Section 280G and/or Section 4999 provisions of such employment or other agreement or plan, as applicable, shall control as to the Phantom Units held by that Participant.

Drafting Note to Section 10.

Section 280G of the Internal Revenue Code provides for an excise tax on certain compensation paid to any so-called disqualified individual in connection with a change in control (parachute payments) if the payments are deemed excessive under Section 280G. The tax imposed is 20% of the portion of the parachute payments that is determined to be excessive. In addition, the corporation making the payment may not take a deduction for such excess parachute payments. As a preliminary matter, a private company should first determine whether it is subject to Section 280G since Section 280G does not typically apply to companies that are organized as an LLC, partnership, or an S-corporation, and also does not apply to any C-corporation that is eligible to be treated as an S-corporation. If Section 280G does apply, a privately held company can still make such parachute payments without triggering the Section 280G penalties if the payments are approved by more than 75% of the voting power of all outstanding stock of the company (and the vote is otherwise conducted in accordance with Section 280G and the corresponding treasury regulations).

If the company does not want to go through the shareholder approval process, there are several other ways to address the excise tax under Code Sections 280G and 4999, which includes incorporating into the plan a safe harbor cutback or best net provision. Other alternatives that are less common include full or modified parachute tax gross-ups. The provision in the draft phantom plan provides for a safe harbor cutback, meaning that any parachute payments payable to a disqualified individual will be reduced to the extent necessary to avoid exceeding the applicable threshold and therefore avoid triggering the excise tax. For additional information and resources, see the Section 280G Resource Kit.

11. **Funding.** Nothing in the Plan shall be construed to create a trust or to establish or evidence any Participant's claim of any right other than as an unsecured general creditor with respect to any payment to which he or she may be entitled.

12. **Nonassignability.** Subject to Section 5(e), to the maximum extent permitted by law, a Participant's rights or benefits under the Plan shall not be subject to anticipation, alienation, sale, assignment, pledge, encumbrance or charge, and any attempt to anticipate, alienate, sell, assign, pledge, encumber or charge the same shall be void.

13. **Section 409A.** Any payments with respect to an Award are intended to be exempt from or comply with Section 409A so that none of the payments to be provided hereunder shall be subject to the additional tax imposed under Section 409A. Any ambiguities or ambiguous terms herein shall be interpreted to the extent possible such that any amounts deferred under the Plan shall be exempt from or so comply with the requirements of Section 409A. Notwithstanding anything in the Plan to the contrary, the Company reserves the right, in its sole discretion and without the consent of any Participant, to take such reasonable actions and make any amendments to the Plan as it deems necessary, advisable or desirable to comply with Section 409A or to otherwise avoid income recognition under Section 409A or imposition of any additional tax prior to the actual payment of any amounts under the Plan. Any payments under the Plan that may be excluded from Section 409A either as separation pay due to an involuntary separation from service or as a short-term deferral will be excluded from Section 409A to the maximum extent possible. For purposes of Section 409A, each installment payment provided under the Plan will be treated as a separate payment. Any payments to be made under the Plan upon a termination of employment will be made only upon a "separation from service" under Section 409A. Notwithstanding the foregoing, the Company makes no representations that the payments and benefits provided under the Plan comply with Section 409A, and in no event will the Company be liable for all or any portion of any taxes, penalties, interest or other expenses that may be incurred by the Participant on account of non-compliance with Section 409A.

Drafting Note to Section 13.

A Section 409A savings clause should be included in every deferred compensation plan document to illustrate the intent of the parties to comply with Section 409A. However, it is worth noting that Treasury Regulation Section 1.409A-1(c)(i) states that a general provision indicating that the plan is intended to comply with Section 409A does not save or fix an otherwise non-compliant plan document.

14. **Effective Date; Term of Plan.** The Plan shall become effective on the Effective Date. The Plan shall remain in effect until it is revised or terminated by further action of the Board (or applicable committee).

Drafting Note to Section 14.

Generally speaking, the effective date of an incentive plan is based on the date of approval by the company's board of directors or other governing person, subject to shareholder approval, if necessary. Shareholder approval of the plan may be required by state law, exchange rules (for publicly listed companies) or the governing documents of the company. The company should determine whether shareholder approval is required in connection with the adoption of the plan.

In some cases incentive compensation plans have an expiration or termination date, typically 10 years from the effective date (i.e., the date the board or other governing person approved the plan). An advantage of including an expiration date is that it requires the company to revisit the terms of the plan and to update the plan to align with current market practice or the company's then-current business objectives. Notwithstanding the foregoing, including an expiration date is not strictly necessary and in some cases can lead to a company issuing awards after the plan expires.

15. **Headings.** The headings of sections herein are included solely for convenience and shall not affect the meaning of any of the provisions of the Plan.

16. **Governing Law; Jurisdiction; Waiver of Jury Trial.**

(a) The Plan and any Award Agreement shall be governed by and construed in accordance with the laws of [state] without giving effect to the conflict of laws provisions thereof. As any controversy which may arise under or relate to the Plan or an Award Agreement is likely to involve complicated and difficult issues, the Company agrees and, by accepting an award of Phantom Units under the Plan, each Participant agrees to IRREVOCABLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY JUDICIAL PROCEEDING TO WHICH THEY ARE PARTIES INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER ARISING OUT OF, RELATED TO OR IN CONNECTION WITH THE PLAN OR AN AWARD AGREEMENT AND AGREE THAT THEY SHALL NOT SEEK A TRIAL BY JURY IN ANY SUCH PROCEEDING.

(b) Any dispute under the Plan or any Award Agreement shall be required to be resolved by binding arbitration. If the parties cannot agree on an arbitrator, each party shall select one arbitrator and both arbitrators shall then select a third. The third arbitrator so selected shall arbitrate the dispute. The arbitration shall be governed by the rules of [arbitration body, e.g., the American Arbitration Association] then in force and effect. Determinations of the arbitrator shall be final and binding on the parties, and may be entered for judgment in any court of competent jurisdiction. The language of the arbitration shall be English. The place of arbitration shall be in [location]. Each party shall pay its own expenses of such arbitration and all common expenses of such arbitration shall be borne equally by the Participant and the Company. Notwithstanding the foregoing, the parties may petition a court for specific performance or for emergency or temporary injunction relief pending resolution of any claim relating to the Plan or an Award Agreement, and this Section 16(b) shall not require the arbitration of an application for such specific performance or emergency or temporary injunctive relief by either party pending arbitration; provided, however, that the remainder of any such dispute beyond the specific performance or emergency or temporary injunctive relief shall be subject to arbitration under this Section 16(b).

Drafting Note to Section 16.(b)

This form phantom plan provides for mandatory arbitration to resolve any disputes arising under the plan. If it is desired to resolve disputes via federal or state court, see Alternate Section 16.(b).

Alternate Section 16.(b):

(b) All actions, suits or proceedings arising out of or based upon the Plan or the subject matter hereof shall be brought and maintained exclusively in the federal district court or state court of [state] located in [location].

Drafting Note to Alternate Section 16.(b)

Use this language for dispute resolution in federal or state court. For language requiring binding arbitration, see default Section 16.(b).

(c) Nothing in the Plan or any Award Agreement should be interpreted as restricting or prohibiting Participants from filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, or any other federal, state, or local administrative agency charged with investigating and/or prosecuting complaints under any applicable federal, state or municipal law or regulation (except that each Participant acknowledges that he or she may not recover any monetary benefits in connection with any such claim, charge or proceeding). A federal, state, or local agency would also be entitled to investigate the charge in accordance with applicable law. However, any dispute or claim that is covered by this Section 16 but not resolved through the federal, state, or local agency proceedings must be adjudicated in accordance with Section 16(b).

17. **Notices**.

Any notice, demand, consent, election, offer, approval, request or other communication (collectively a "***notice***") required or permitted under the Plan or the applicable Award Agreement must be in writing and either delivered personally or sent by certified or registered mail, postage prepaid, return receipt requested, facsimile message, email or recognized overnight courier. A notice must be addressed to the Participant at the Participant's last known address on the records of the Company or if sent by facsimile or email, to the fax number or email address of the Participant maintained on the records of the Company. Notices to the Company shall be addressed to:

[company contact information]

All notices shall be deemed to have been given (i) three (3) business days after the same are sent by certified or registered mail, postage prepaid, return receipt requested, (ii) when delivered by hand or transmitted by facsimile or email (with confirmation of transmission received) unless delivered on a day which is not a business day or after 5:00 pm recipient's time on a business day, in which case such notice shall be deemed to have been given on the next succeeding business day, or (iii) one business day after the same are sent by a reliable overnight courier service, with acknowledgment of receipt. Any party may designate, by notice to all of the others, substitute addresses or addressees for notices; and, thereafter, notices are to be directed to those substitute addresses or addressees. Whenever any notice is required to be given by applicable law or the Plan or the applicable Award Agreement, a written waiver thereof signed by the person entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

18. **Successors and Assigns.** The Plan shall be binding upon and shall inure to the benefit of the Company and its successors and assigns.

19. **Clawback.** Notwithstanding anything in the Plan to the contrary, all Phantom Units granted under the Plan and any payments made with respect to such Phantom Units pursuant to the Plan shall be subject to clawback or recoupment as permitted or mandated by applicable law, rules, regulations or Company policy as enacted, adopted or modified from time to time (any of the foregoing, a "***Clawback Policy***"). By accepting an award of Phantom Units under the Plan, each Participant agrees and consents to the Company's application, implementation and enforcement of any Clawback Policy and expressly agrees that the Company may take such actions as are necessary to effectuate the Clawback Policy or applicable law with respect to any Phantom Units without further consent or action being required by the Participant.

Drafting Note to Section 19.

Companies should consider including a clawback or recoupment provision to the extent that they would like to retain the right to recover any amounts paid to an award recipient in connection with his or her phantom stock or cause an award recipient to forfeit his or her phantom stock award, in each case pursuant to applicable company policy or the company's governing documents. Companies generally use clawbacks upon a finding of fraud or misconduct on the part of the award recipient, a breach of a material term of an agreement between the award recipient and the company (e.g., violating a restrictive covenant provision in an employment agreement) or a restatement of the company's financial results that resulted in an overpayment.

Doreen Lilienfeld, Partner, Shearman & Sterling LLP

Doreen Lilienfeld is Global Head of the Governance & Advisory Group and a partner in the Compensation, Governance and ERISA practice.

She focuses on a wide variety of compensation-related matters, including the design and implementation of retention and compensation plans, disclosure and regulatory compliance, and employment negotiations with senior executives. She has advised both U.S. and non-U.S. issuers on corporate governance and regulatory requirements relating to compensation and benefits matters.

Doreen has been a resident in the Frankfurt, London and Bay Area offices of Shearman & Sterling. She is a lecturer in Executive Compensation at the Berkeley School of Law.

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Gillian Emmett Moldowan is a partner in the Compensation, Governance & ERISA practice.

She advises companies, boards of directors, executives and investors on compensation and benefit matters, including equity-based incentives, deferred compensation programs and employment, retention and severance arrangements. Her practice focuses in particular on issues that arise in securities offerings and mergers and acquisitions transactions. She regularly counsels clients on disclosure, corporate governance, trading rules (including Section 16) and the negotiation of executive employment arrangements. Gillian also advises on the applicability of federal securities law, tax law and general employment-related legal issues.