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Re: *Barton v. Club Ventures Investments LLC*
C.A. No. 8864-VCN
Date Submitted: November 7, 2013

Dear Counsel:

Plaintiff David Barton ("Barton") is the founder of the eponymous DavidBartonGym, a health club designed to "reflect [his] unique brand of personal health and fitness."[1] In 2004, after DavidBartonGym had existed for more than a decade, Barton and John Howard ("Howard") formed Club Ventures Investments LLC ("CVI" or the "Company"), a Delaware limited liability company, to facilitate

[1] Barton Aff. ¶ 2.

the investment of "additional capital to grow the business."[2] CVI is a holding company that "establishes, operates and manages DavidBartonGym facilities and conducts related activities."[3]

Praesidian Capital Investors, L.P. ("Praesidian") invested in CVI in 2004. Since that investment, Barton, Howard, and various Praesidian affiliates, such as Praesidian Capital Corp., Praesidian II Corp., and Praesidian II-A Corp. (collectively, the "Praesidian Equity Group"), have held member interests in CVI.[4] Barton, Howard, and Jason D. Drattell ("Drattell") are Managers of CVI.[5] Currently, CVI owns six and operates nine DavidBartonGym health clubs in major metropolitan areas across the country.[6]

Barton was the Chief Executive Officer ("CEO") of CVI when, in 2011, it filed for Chapter 11 bankruptcy.[7] Upon CVI's exit from bankruptcy, Barton

[2] *Id.* ¶¶ 3-4.
[3] Verified Am. Compl. ("Compl.") ¶ 23; Def. CVI's Answer to Verified Am. Compl. ("Answer") ¶ 23.
[4] Barton Aff. ¶ 4.
[5] Compl. ¶¶ 12, 19-20; Answer ¶¶ 12, 19-20.
[6] Compl. ¶ 24; Answer ¶ 24.
[7] Barton Aff. ¶ 7.

became President, and Charles H. Grieve II ("Grieve") took over as CEO.[8] Approximately two years later, on September 4, 2013, Barton, claiming he was "constructively discharged" by Howard and Drattell, [9] left CVI.[10] That same day, Barton initiated this lawsuit, alleging that he would like to start a new health club, separate and distinct from DavidBartonGym.[11] But, he claims that prospective investors have been concerned that he may be subject to a covenant restricting his future employment.[12] With this lawsuit, Barton seeks to remove this "cloud of uncertainty."[13]

Barton has asserted eight claims against Defendants CVI, the Praesidian Equity Group, LBN Holdings LLC ("LBN"), Drattell, and Howard. He sought expedited review of Counts I and II against CVI.[14] In Count I, Barton seeks a declaratory judgment that he is not subject to any non-compete agreement with

[8] *Id.* ¶ 10; Zilka Aff. Ex. C. (Debtors' Second Amended Joint Plan of Reorganization Dated September 20, 2011) (the "Plan") § 5.1.
[9] Compl. ¶ 79.
[10] Pl.'s Mot. to Expedite Certain Claims ("Mot. to Expedite") Ex. A (Letter from David Barton to John Howard (Sept. 4, 2013)).
[11] Compl. ¶¶ 89-91.
[12] *Id.* ¶ 92-93.
[13] *Id.* ¶ 94.
[14] Mot. to Expedite ¶ 11.

CVI.[15] In Count II, were the Court to find that he is subject to a non-compete agreement with CVI, Barton requests a declaratory judgment that the terms of any such agreement violate public policy and are therefore unenforceable.[16]

CVI moved to dismiss Counts I and II and certain other claims, and it filed an answer to the remaining claims. The other defendants moved to dismiss all claims. On October 8, 2013, Barton and CVI agreed to submit to the Court, by a motion for partial summary judgment, threshold legal questions related to Counts I and II.[17] Barton presented two issues: first, whether the CVI Amended and Restated Limited Liability Company Agreement (the "LLC Agreement"),[18] which does not include a non-compete provision that CVI intends to enforce,[19] supersedes the Confidentiality, Non-Competition and Intellectual Property Agreement (the "Non-Compete Agreement"),[20] which may include a non-compete provision; and second, whether CVI assumed and retained the Non-Compete Agreement upon its exit from bankruptcy.

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[15] Compl. ¶¶ 96-99.
[16] *Id.* ¶¶ 100-102.
[17] Leavengood Rule 56(f) Aff. ¶ 6 (citing *Barton v. Club Venture Invs. LLC*, C.A. No. 8864-VCN, at 15-16 (Del. Ch. Oct. 8, 2013) (TRANSCRIPT)).
[18] Zilka Aff. Ex. E (LLC Agreement).
[19] Zilka Aff. Ex. I (Letter from Timothy Dudderar to Diane Zilka (Sept. 18, 2013)).
[20] Zilka Aff. Ex. B (Non-Compete Agreement).

Barton moved for partial summary judgment on these legal questions (the "Motion").[21] This opinion is the Court's disposition of the Motion. For the following reasons, the Court concludes that the LLC Agreement does not supersede the Non-Compete Agreement and that CVI retained the Non-Compete Agreement after bankruptcy.

I. BACKGROUND

A. *The Non-Compete Agreement*

CVI and Barton entered into the Non-Compete Agreement in 2005.[22] Barton alleges that the Non-Compete Agreement includes a provision that purports to restrict his ability to work in the industry and geographic area in which CVI operates for eighteen months after the termination of his employment with CVI.[23] Barton executed the Non-Compete Agreement, which he asserts he had no role in

[21] Although CVI did not raise this issue, the Court notes that it does not appear that Barton actually filed the Motion under Rule 56. Ct. Ch. R. 56(c) ("The motion shall be served at least 10 days before the time fixed for the hearing."). The parties nonetheless conducted themselves as if the Motion had been filed, as evidenced by filing their briefs according to the approved scheduling order and by presenting oral arguments. *See* Stipulated Briefing Schedule and Order (Oct. 9, 2013). For these reasons, the Court will overlook this technicality and consider the Motion.
[22] Barton Aff. ¶ 6.
[23] *See, e.g.*, Compl. ¶¶ 83-87.

negotiating or drafting,[24] both individually and on behalf of CVI.[25] The Non-Compete Agreement mandates that "if any party shall institute legal action to enforce or interpret the terms and conditions of this Agreement[,] . . . venue for any such action shall be in New York County, New York" (the "Non-Compete Venue Clause").[26]

B. *CVI Files for Bankruptcy*

In 2011, CVI filed for Chapter 11 bankruptcy in New York.[27] CVI was reorganized pursuant to the court-approved Debtor's Second Amended Joint Plan of Reorganization (the "Plan").[28] Under Section 7.1 of the Plan, when CVI emerged from bankruptcy, it assumed and was vested with all executory contracts

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[24] Barton Aff. ¶ 6.
[25] Compl. ¶ 81; Non-Compete Agreement Signature Page.
[26] *Id.* § 16.

Courts in the United States generally respect a contract's forum selection clause. *See generally M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Delaware courts are no different. *See, e.g.*, *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010) ("[W]e hold that where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause . . . ."). Of course, although a contract may vest another jurisdiction with exclusive authority to hear legal actions requiring an interpretation of the contract, the Court here needs to be able to interpret at least part of the Non-Compete Agreement—namely, the Non-Compete Venue Clause—to give effect to it. The Court limits its reading of the Non-Compete Agreement to be an agreement between, and executed by, Barton and CVI. For the Court to do any more may cross into territory restricted by the Non-Compete Agreement.

[27] Barton Aff. ¶ 7.
[28] *See generally* Plan § 3.1; Zilka Aff. Ex. D.

that were not expressly rejected.[29] The Non-Compete Agreement was not expressly identified as either an assumed or rejected executory contract.[30] Under Sections 5.1 and 9.2 of the Plan, CVI also assumed and was vested with all non-executory contracts.[31] Whether the Non-Compete Agreement was assumed by and revested in CVI under the Plan is in dispute.

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[29] Section 7.1 of the Plan provides:

> Each Executory Contract and Unexpired Lease shall be deemed automatically assumed in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code as of the Effective Date, unless such Executory Contract or Unexpired Lease:
>
> (a) has been previously rejected by the Debtors by Final Order of the Bankruptcy Court;
>
> (b) has been rejected by the Debtors by order of the Bankruptcy Court in effect as of the Confirmation Date (which order may be the Confirmation Order); or
>
> (c) is the subject of a motion to reject filed by the Debtors under section 365 of the Bankruptcy Code pending as of the Confirmation Date.

[30] Zilka Aff. Ex. F (Disclosure Statement for the Joint Plan of Reorganization of the Debtors Under Chapter 11 of the Bankruptcy Code Ex. K-1, K-2) (the "Disclosure Statement").

[31] Section 5.1 of the Plan provides: "In accordance with Article 9.2 hereof, and except as otherwise explicitly provided in this Plan, on the Effective Date, all property comprising each Estate (including Retained Actions) shall revest in the applicable Reorganized Debtor."

Section 9.2 of the Plan provides:

> Except as otherwise explicitly provided in this Plan, on the Effective Date, all property comprising the Estates (including Retained Actions) shall revest in the Reorganized Debtors, free and clear of all Claims, Liens, charges, encumbrances, rights, and Interests of creditors and equity security holders except as otherwise set forth in the Plan.

C. *The LLC Agreement*

As part of the Plan, CVI was reorganized under the LLC Agreement, effective as of November 22, 2011.[32] The LLC Agreement, entered into "by and among" CVI, LBN, the Praesidian Equity Group, Barton, and Grieve,[33] "constitutes the operating agreement and sets forth the agreement of the Members as to their relative rights and obligations as well as the manner in which the Members have agreed to operate the Company."[34] A "Member" is defined, in relevant part, as "any Person executing this Agreement as of the date of this Agreement as a member or hereafter admitted to the Company as a Member as provided in this Agreement."[35] The Praesidian Equity Group, LBN, Barton, and Grieve executed the LLC Agreement on the signature page under the heading "members"; CVI executed the LLC Agreement under the heading "Company."[36]

"Except as may be provided otherwise in a separate agreement, subject to Section 8.3" of the LLC Agreement, the Members are generally permitted to

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[32] Disclosure Statement § III E(3).
[33] LLC Agreement Recitals, Signature Page.
[34] *Id.* § 2.1
[35] *Id.* § 1. A "Person" is defined as "any individual, partnership, corporation, limited liability company, unincorporated organization or association, trust or other entity." *Id.*
[36] *Id.* Signature Page.

"engage in and own interests in other business ventures of any and every type and description."[37] Section 8.3 restricts certain activities:

> The Company and all the Members acknowledge that the Company licenses on an irrevocable, royalty free, perpetual, worldwide exclusive basis the right to use the name "DAVID BARTON GYM" and related intellectual property from Barton and that all the intellectual property rights licensed to or used by the Company and employed within or applied to its products are owned by the Company and not by any Member. By signing below, Barton agrees that he will not, at any time, whether during the term of this Agreement or thereafter, directly or indirectly, except through the Company or any of its subsidiaries, open or operate, or participate in the opening or operation of, any new fitness facility (or otherwise license the name "David Barton Gym" or any variation thereof) without the written consent of LBN and the Praesidian Equity Group.[38]

After Barton initiated this action, CVI conceded that it "will agree not to enforce the provision contained in the last sentence of Section 8.3 of the LLC Agreement to the extent that it may be construed as a non-competition restriction."[39]

The primary legal question before the Court now is the meaning of the LLC Agreement's merger and integration clause (the "Integration Clause"). The Integration Clause provides:

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[37] *Id.* § 3.9.
[38] *Id.* § 8.3.
[39] Letter from Timothy Dudderar to Diane Zilka (Sept. 18, 2013).

> All understandings and agreements heretofore made among the Members, with respect to the subject matter hereof, are merged in this Agreement, which alone fully and completely expresses their agreement with respect to the subject matter hereof. There are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, among the Members, other than as set forth in this Agreement and the Certificate of Formation. All prior agreements among the Members are superseded by this Agreement, which integrates all promises, agreements, conditions, and understandings among the Members with respect to the Company and its property.[40]

In dispute is whether the LLC Agreement, by the Integration Clause, supersedes the Non-Compete Agreement.

II. CONTENTIONS

Barton presents two theories by which he argues he is not subject to a non-compete agreement with CVI. Under his first theory, the LLC Agreement, by the "straightforward and unambiguous" terms of the Integration Clause, "render[s] any prior agreements between its signatories, including Barton and CVI, inoperative and non-binding."[41] The LLC Agreement, according to Barton, would thus permit

[40] LLC Agreement § 11.4.
[41] Opening Br. in Supp. of Pl.'s Mot. for Partial Summ. J. ("Pl.'s Opening Br.") 14.

him to engage in other business ventures subject only to the restrictions in Section 8.3—excluding any non-compete aspect that CVI agreed not to enforce.[42]

CVI, in response to Barton's first theory, contends that the Integration Clause unambiguously does not supersede the Non-Compete Agreement. In particular, CVI argues not only that it did not execute the LLC Agreement as a member, but also that Barton did not execute the Non-Compete Agreement as a Member—either of which would demonstrate that the Non-Compete Agreement is not an agreement "among Members" subject to the Integration Clause.[43] Moreover, it asserts that the Integration Clause does not apply because the Non-Compete Agreement covers a different subject matter than does the LLC Agreement.[44]

Separately, Barton argues that there is enough of a factual record for the Court to apply *contra proferentem* or quasi-estoppel to grant partial summary judgment in his favor. He urges the Court to apply *contra proferentem* to interpret

[42] *Id.* 18-19.
[43] Def. CVI's Answering Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Def.'s Answering Br.") 14.
[44] *Id.* 14-15.

any ambiguous terms against CVI as the party that drafted the LLC Agreement.[45] And, based on quasi-estoppel, he asserts that CVI should be prevented from advancing its argument based on the Non-Compete Agreement because of its failure to produce that agreement when, after CVI exited bankruptcy, Barton requested from CVI his employment agreements.[46]

CVI contends that the Court cannot grant summary judgment to Barton on the basis of either *contra proferentem* or estoppel. First, it argues that the application of *contra proferentem* requires finding an ambiguity, which neither party has asserted.[47] Second, it argues that quasi-estoppel is inappropriate because CVI has not gained any advantage based on the communications cited by Barton. Independent of the merits of these arguments, CVI further argues that it is premature for the Court to apply either of these doctrines because to do so would require the determination of facts that have yet to be discovered in light of the parties' agreement to limit the Motion to legal questions.[48]

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[45] Pl.'s Opening Br. 18.
[46] *Id.* 20-21; Zilka Aff. Ex. G, H.
[47] Def.'s Answering Br. 20-22.
[48] *Id.*

Under Barton's second theory, CVI did not retain the Non-Compete Agreement under the Plan because it was not expressly assumed in the Disclosure Statement.[49] Because of the claimed *res judicata* effect applied to claims not raised in the Plan or in the Disclosure Statement, Barton argues that CVI can no longer enforce the Non-Compete Agreement.[50] Here, CVI maintains that it assumed and was revested with the Non-Compete Agreement pursuant to the Plan, regardless of whether that agreement was an executory or a non-executory contract.[51]

III. ANALYSIS

A. *Standard of Review*

Summary judgment should be granted only where the moving party establishes both that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.[52] The Court should evaluate "all of the evidence in the light most favorable to the non-moving party."[53] Summary

[49] Pl.'s Opening Br. 22.
[50] *Id.* 23-24.
[51] Def.'s Answering Br. 24-28.
[52] *See* Ct. Ch. R. 56(c); *see also United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).
[53] *Id.*

judgment for a contract interpretation "is appropriate only if the contract in question is unambiguous."[54] Indeed, this Court has described "pure[] matters of contractual interpretation" as "readily amenable to summary judgment."[55]

A dispute over a contract term does not, on its own, render that term ambiguous.[56] Rather, the Court should find a term ambiguous only when the term is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[57] Where the disputed contract term is unambiguous, the Court should interpret the term according to its "plain meaning."[58] To interpret a particular term, the Court may need to "construe the agreement as a whole, giving effect to all provisions therein,"[59] to avoid an interpretation that may render other terms "illusory or meaningless."[60]

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[54] *Id.*
[55] *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 1309398, at *3 (Del. Ch. May 1, 2007).
[56] *See City Investing Co. Liquidating Trust v. Continental Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[57] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[58] *Chambers v. Genesee & Wyo. Inc.*, 2005 WL 2000765, at *5 (Del. Ch. Aug. 11, 2005).
[59] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[60] *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).

Thus, for Barton to succeed here on the Motion, he must demonstrate not only that his constructions of the Integration Clause and the Plan are reasonable, but also that his constructions are the *only* reasonable interpretations.[61]

C. *Does the LLC Agreement Supersede the Non-Compete Agreement?*

1. The Integration Clause and the Definition of Member are Unambiguous

The parties do not contend that the Integration Clause of the LLC Agreement is ambiguous; they just sponsor different applications of its unambiguous terms. Barton construes the Non-Compete Agreement as an agreement "among Members"—that is, that CVI is a Member under the LLC Agreement—such that the Non-Compete Agreement is superseded by the Integration Clause.[62] According to Barton, that CVI executed the LLC Agreement means that CVI must be deemed a Member, either because it is bound by the LLC Agreement's terms or by operation of law because CVI is "an entity" that is a "set"

[61] *See United Rentals*, 937 A.2d at 830.
[62] Reply Br. in Further Supp. of Pl.'s Mot. for Partial Summ. J. ("Pl.'s Reply Br.") 8-9.

or "conglomeration" of members.[63] By contrast, CVI claims that it is not a Member because it did not execute the LLC Agreement as a member.[64]

The Integration Clause is unambiguous because it is not reasonably susceptible of two interpretations. The Integration Clause, when it refers to the agreements it supersedes, refers exclusively to agreements among defined Members—not simply members, parties, or signatories. Its plain meaning is that it supersedes only prior agreements among Members. The definition of Member is also unambiguous; its plain meaning requires a person to execute the LLC Agreement as a member to be a Member. CVI signed on the left side of the LLC Agreement's signature page under the heading "Company"; the Praesidian Equity Group, LBN, Barton, and Grieve signed on the right side of the page under the heading "members." Barton has failed to demonstrate that CVI must be viewed as a Member by operation of law. The only possible reading here is that CVI did not execute the LLC Agreement as a member; thus, CVI is not a Member.[65]

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[63] Transcript of Oral Arg. Mot. for Partial Summ. J. ("Oral Arg.") 4-6, 26.
[64] Def.'s Answering Br. 13-14.
[65] Because Barton has not argued or presented any evidence demonstrating that CVI was subsequently admitted as a Member, the Court need not determine whether CVI is a Member under this alternative definition in the LLC Agreement.

Therefore, the Non-Compete Agreement, as an agreement between a Member, Barton, and a non-Member, CVI, is not superseded by the Integration Clause.[66] The Court concludes that this interpretation is consistent with other provisions of the LLC Agreement.[67]

2. The Doctrine of Contra Proferentem

The doctrine of *contra proferentem* is minimally discussed by the parties—likely out of a recognition that it is inapplicable here. The Court may apply *contra proferentem* to construe ambiguous terms in a non-negotiated contract against the contract's drafter.[68] That is, the doctrine is limited to resolve ambiguities. Neither

[66] The Court does not determine now whether the Integration Clause is further limited in scope to supersede only agreements among Members addressing the same subject matter as the LLC Agreement, only agreements among Members executed in their capacity as Members, or both. Accordingly, the Court need not consider CVI's separate arguments on these questions.

In addition, because the Integration Clause is limited to agreements among Members, not merely or necessarily agreements of the same subject matter, Barton's reliance on *Ostroff v. Quality Services Laboratories, Inc.* is unpersuasive. *See* Pl.'s Opening Br. 15-17. In that case, integration was limited to agreements among the "parties" on the same subject matter. *See Ostroff v. Quality Servs. Labs., Inc.*, 2007 WL 121404, at *9 (Del. Ch. Jan. 5, 2007). For obvious reasons, "parties" is different from "Members."

[67] The Court reaches this conclusion despite Barton's contention that, under this interpretation, the LLC Agreement would not supersede prior CVI LLC agreements. Oral Arg. 5-6. That argument is unpersuasive. By its literal terms, the LLC Agreement is *the* amended and restated operating agreement of CVI. LLC Agreement Recitals, § 2.1, Signature Page. That it is an amended and restated agreement rather than a separate agreement means the Integration Clause is inapplicable.

[68] *See, e.g., Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013).

party argues the Integration Clause is ambiguous,[69] and the Court also found the Integration Clause unambiguous. Accordingly, *contra proferentem* is inapplicable.

3. Quasi-Estoppel

Barton advances a more meritorious argument under the doctrine of quasi-estoppel. In April 2013, Barton's counsel in a separate matter requested by email that CVI provide to him "any employment agreements for David."[70] The Company's counsel replied, "I am not aware of any Employment Agreement with David, but you should obviously check with David on that."[71] Barton argues that CVI's failure to produce the Non-Compete Agreement in response to that request prevents it from now asserting that the Non-Compete Agreement governs Barton's employment.[72] Under the doctrine of quasi-estoppel, the Court may "preclude[] a party from asserting, to another's disadvantage, a right inconsistent with a position

[69] *Compare* Pl.'s Opening Br. 14, *with* Def.'s Answering Br. 20-21.
[70] Zilka Aff. Ex. G.
[71] Zilka Aff. Ex. H.
[72] Pl.'s Opening Br. 20.

it has previously taken."[73] A party does not need to show reliance for quasi-estoppel to apply.[74]

Barton argues that CVI "is attempting to assert, to Barton's material disadvantage, the right to enforce . . . [a] non-competition agreement, which is flatly inconsistent with the position taken by the company in April 2013."[75] He stresses that summary judgment is appropriate on this factual ground, despite the parties' agreement to limit the Court's present review to legal questions, because of CVI's failure to produce contradicting evidence or to identify what contradicting evidence it would seek in discovery.[76] In opposition, CVI asserts that the exchange of emails among counsel cannot be interpreted as an acknowledgment that no document other than the LLC Agreement governed Barton's employment with CVI. And, in any event, according to CVI, the application of estoppel here would be based upon facts that have yet to be discovered and, thus, summary judgment is

[73] *Personnel Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009) (TABLE) (quoting *Albertson v. Winner Auto.*, 2004 WL 2435290, at *4 (D. Del. 2004)).
[74] *See Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 2011 WL 3360024, at *8 n.71 (Del. Ch. Aug. 4, 2011) (citations omitted), *rev'd on other grounds*, 65 A.3d 539 (Del. 2013).
[75] Pl.'s Reply Br. 26.
[76] Oral Arg. 12-13.

premature.[77] CVI's counsel submitted a Rule 56(f) affidavit stating that CVI cannot respond to Barton's quasi-estoppel theory "unless and until it has the opportunity to conduct discovery with respect to the facts underlying" that theory.[78]

That the Motion was to be limited to legal questions[79] leads the Court to conclude that it would be premature to grant partial summary judgment to Barton on this ground. Of course, after the parties have an opportunity for at least limited discovery, Barton may ultimately establish that quasi-estoppel should apply to CVI. Whether this theory implicates the Non-Compete Venue Clause is a question that does not need to be addressed now.

C. *Did CVI Assume and Retain the Non-Compete Agreement Under the Plan?*

Barton also seeks summary judgment on the legal question of whether CVI assumed and retained the Non-Compete Agreement pursuant to the Plan when it exited bankruptcy. Barton argues that the Non-Compete Agreement was "carved out by the Plan language from other[] assets and claims revested in and retained

[77] Def.'s Answering Br. 23-24.
[78] Leavengood Rule 56(f) Aff. ¶ 12.
[79] *Barton v. Club Venture Invs. LLC*, C.A. No. 8864-VCN, at 15-16 (Del. Ch. Oct. 8, 2013) (TRANSCRIPT).

by . . . CVI" under the Integration Clause that purportedly "supersedes all prior agreements between the parties."[80] He contends that the Non-Compete Agreement is a non-executory contract that was not capable of assumption because there "was nothing that could have remained unperformed as of . . . CVI's bankruptcy filing."[81]

Alternatively, if the Non-Compete Agreement were an executory contract, then Barton argues it was not assumed and retained because of CVI's failure to list it expressly in the Disclosure Statement.[82] Barton asserts that CVI should be estopped, under the *res judicata* effect afforded to the Plan, from attempting to assert the Non-Compete Agreement now.[83] In response, CVI argues that since it did not expressly reject the Non-Compete Agreement in the Plan, it assumed and retained that agreement following bankruptcy, regardless of whether the Non-Compete Agreement is an executory or a non-executory contract.[84]

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[80] Pl.'s Opening Br. 23.
[81] Pl.'s Reply Br. 19-20.
[82] *Id.* 20.
[83] *Id.* 20-21.
[84] Def.'s Answering Br. 24-28.

The Court determines that CVI assumed and was revested with the Non-Compete Agreement under the unambiguous terms of the Plan. The only reasonable interpretation of Section 7.1 of the Plan is that CVI assumed and was revested with all executory contracts not expressly rejected in the Disclosure Statement. It is undisputed that the Non-Compete Agreement, were it an executory contract, was not expressly rejected in the Disclosure Statement. Similarly, the only reasonable interpretation of Sections 5.1 and 9.2 of the Plan is that CVI assumed and was revested with all non-executory contracts, including, were it a non-executory contract, the Non-Compete Agreement. Thus, without needing to resolve whether the Non-Compete Agreement is an executory or a non-executory contract, the Court finds that CVI assumed and retained it, pursuant to the Plan, when CVI exited bankruptcy.[85]

Separately, Barton argues that CVI cannot enforce the Non-Compete Agreement after its reorganization under the Plan because of several purported terms of the Non-Compete Agreement. For example, Barton suggests that CVI's enforcement rights may have been affected by the bankruptcy filing or when he

[85] In light of this holding, the Court does not consider the *res judicata* effects of court approval of the Plan.

was removed as CEO in November 2011.[86] At oral argument, CVI asserted that the Court should decline to consider these arguments not only because they were not included in Barton's opening brief, but also, and more importantly, because to do so would require an interpretation of the Non-Compete Agreement.[87]

The Court agrees with CVI that Barton waived these arguments, for the purpose of the Motion, by not including them in his opening brief. "It is settled Delaware law that a party waives an argument by not including it in its brief."[88] Barton has not shown why the Court should deviate from this rule. Thus, once again, whether these arguments implicate the Non-Compete Venue Clause does not need to be answered.

IV. CONCLUSION

For the foregoing reasons, Barton's motion for partial summary judgment is denied.

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[86] Pl.'s Reply. Br. 14-18.
[87] Oral Arg. 22-24.
[88] *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (finding an argument waived when it was not included in the party's opening post-trial brief)).

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery -K