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Re: *Barton v. Club Ventures Investments LLC*  
C.A. No. 8864-VCN  
Date Submitted: December 11, 2013

Dear Counsel:

Court of Chancery Rule 26(c) confers upon the Court the discretion to enter a protective order to stay discovery. In evaluating a motion to stay discovery, the Court “balance[s] the costs and hardship to defendants if discovery were to proceed against plaintiffs’ need for discovery and the risk of injury to plaintiffs if a stay were granted.”<sup>1</sup> The Court will often grant such motions where “some

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<sup>1</sup> *Ford Motor Co. v. Drive Am. Hldgs., Inc.*, 2008 WL 4603579, at \*1 (Del. Ch. Oct. 8, 2008).

practical reason” is established by the moving party, which is often “easily met because avoiding unnecessary discovery is usually sufficient justification for a stay of discovery pending resolution of a potentially dispositive motion.”<sup>2</sup> The justification for such a stay is efficiency: “staying discovery pending resolution of a potentially dispositive motion prevents the unnecessary imposition of burden and expense on the parties in complying with discovery requests and on the Court in resolving discovery disputes.”<sup>3</sup> However, special circumstances may result in the denial of a motion to stay.

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Plaintiff David Barton (“Barton”) seeks a judicial determination that he is not contractually precluded from competing with the fitness club business that he helped to establish.<sup>4</sup>

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<sup>2</sup> *TravelCenters of Am. LLC v. Brog*, 2008 WL 5101619, at \*1 (Del. Ch. Nov. 21, 2008).

<sup>3</sup> *Id.*

<sup>4</sup> A more detailed description of the dispute may be found in the Letter Opinion on Barton’s expedited motion for partial summary judgment. *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249 (Del. Ch. Nov. 19, 2013). Barton wants to engage in the fitness business, as he has for many years, but he and potential investors are worried that the Defendants may seek to prevent any such endeavor because of a restrictive covenant in one of the documents defining Barton’s prior relationship with Defendants. Time is of the essence because all agree that the restrictive covenant has a limited time duration. In brief, the Defendants’ ability to limit

The movants, Defendants, have pending motions to dismiss under Court of Chancery Rules 12(b)(1), 12(b)(2), and 12(b)(6). These are dispositive motions,<sup>5</sup> which, if granted, would result in the dismissal of all of Barton's claims except for a single indemnification and advancement claim against a single Defendant, Club Ventures Investments LLC. The movants have generally shown that much of the burden and expense of unnecessary discovery may be avoided if they prevail on the pending dispositive motions. As noted, one exception is Barton's indemnification claim which will proceed, at some point, because no motion to dismiss that claim has been filed. A motion to stay discovery may be granted, even if "it appears that certain claims will continue regardless of the Court's resolution of the pending dispositive motion."<sup>6</sup>

Nevertheless, certain special circumstances may result in the denial of a stay of discovery pending resolution of a potentially dispositive motion. Among those circumstances, for example, are: "(1) the motion does not offer a 'reasonable

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Barton's competitive activities is akin to a depleting resource. Delay in the litigation allows the Defendants to obtain the benefit of the restrictive covenant, regardless of its merit.

<sup>5</sup> Briefing the motions to dismiss is expected to be relatively prompt. Argument has been scheduled for February 20, 2014.

<sup>6</sup> *Kuroda v. SPJS Hldgs., LLC*, 2009 WL 58910, at \*1 (Del. Ch. Jan. 2, 2009).

expectation’ of avoiding further litigation; (2) the plaintiff has requested interim relief; [or] (3) the plaintiff will be prejudiced because the ‘information may be unavailable later.’”<sup>7</sup>

Barton’s most persuasive argument in favor of denying Defendants’ motion to stay is the same justification which resulted in expedition of his effort to obtain partial summary judgment: namely, the need for prompt resolution of the issues related to the non-competition provision that may bind Barton. These claims are pending in a later-filed action in New York. Count I and Count II of Barton’s complaint sought declaratory judgment to determine whether a provision in Club Ventures Investments LLC’s operating agreement was a non-competition restriction and, if it was, whether it violated public policy. It seems likely that discovery regarding the bulk of the claims will eventually take place, although it may be somewhat more likely that New York will be the forum for resolution of those claims.<sup>8</sup>

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<sup>7</sup> *In re Yahoo! Inc. S’holders Litig.*, 2008 WL 2721800, at \*1 n.4 (Del. Ch. July 11, 2008).

<sup>8</sup> One of the agreements at issue has a forum selection clause providing that the dispute will be litigated in New York. *Zilka Aff. Ex. B* § 16.

The discovery that Barton needs should not impose any substantial burden on the Defendants. The issues to be litigated, even though there are eight separate counts, appear to be narrow. The Defendants may be concerned about the scope of Barton's proposed discovery and whether the effort required to respond to that discovery is unwarranted, but a disagreement about the scope of discovery should be resolved through a debate about its scope and not through a motion to stay discovery in its entirety for some period of time.

Delay in this litigation allows the Defendants to win that which is in dispute—whether Barton is subject to limits on his ability to compete with Defendants. Discovery on that issue would appear to be inevitable, whether it is in Delaware or in New York. The circumstances in this case, thus, are different from those in many cases in which discovery is stayed pending resolution of motions to dismiss. The indemnification claim will go forward, although that, by itself, does not justify denying a motion to stay. More importantly, one can reasonably assume that resolving the challenge to restrictions on competitive activities will be

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necessary, whether here or in another forum. Under these circumstances, there is no reason to deny Barton the opportunity to proceed with discovery now.

For these reasons, the Defendants' Motion to Stay Discovery is denied.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: Register in Chancery-K