## COURT OF CHANCERY OF THE STATE OF DELAWARE

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July 5, 2013

Elizabeth M. McGeever, Esquire Prickett, Jones & Elliott, P.A. 1310 N. King Street Wilmington, DE 19801 John M. Seaman, Esquire Abrams & Bayliss LLP 20 Montchanin Road, Suite 200 Wilmington, DE 19807

Re: Red Oak Fund, L.P. v. Digirad Corporation, et al.

C.A. No. 8559-VCN

Date Submitted: July 3, 2013

## Dear Counsel:

Plaintiff Red Oak Fund, L.P. ("Red Oak") has moved for leave to file a Sur-Reply Brief in Opposition to Defendants' Motion to Dismiss. Red Oak's apparent purpose is to place before the Court certain documents obtained from Defendants during discovery in this summary proceeding under 8 *Del. C.* § 225.

Motions to dismiss, of course, are tested on the well-pleaded allegations of the Complaint.<sup>1</sup> Red Oak has not amended (and is not seeking to amend) its complaint. The Court could consider the proffered documents, but that would

<sup>&</sup>lt;sup>1</sup> See Ct. Ch. R. 12(b)(6); Fisk Ventures LLC v. Segal, 2008 WL 1961156, at \*1 (Del. Ch. May 7, 2008).

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involve matters outside the pleadings and would, in effect, convert the motion to

dismiss into one for summary judgment<sup>2</sup>—a development that would result in

delay.

Based on the Court's assumption that Red Oak does not want to delay this

matter, its motion for leave is denied. If the Court misapprehends Red Oak's

scheduling objectives, it will entertain a timely application to treat the submission

of additional materials as converting Defendants' motion into one for summary

judgment. By accepting the Defendants' opposition to Red Oak's motion, the

Court notes that the Defendants have reminded it that, for purposes of considering

a motion to dismiss, it must accept the truth of the well-pleaded allegations of Red

Oak's Complaint.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc:

Register in Chancery-K

<sup>2</sup> See, e.g., In re Santa Fe S'holders Litig., 669 A.2d 59, 69 (Del. 1995).