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July 5, 2013

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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

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<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

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