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Re: *Gerber v. EPE Holdings, LLC, et al.*
C.A. No. 3543-VCN
Date Submitted: February 4, 2013

Dear Counsel:

This motion for reargument comes in one case of a growing line of cases involving alternative entities with “creative” approaches to governance and to restricting fiduciary protections that might otherwise be available to investors.¹ The Plaintiff questions the Court’s decision granting Defendants’ Motion to Dismiss his

¹ See, e.g., *Norton v. K-Sea Transp. P’rs L.P.*, 2013 WL 2316550 (Del. May 28, 2013); *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2013 WL 2321598 (Del. May 28, 2013).

Second Amended Complaint.² In order to prevail on a motion for reargument under Court of Chancery Rule 59(f), the movant must demonstrate that the Court “misapprehended the law or the facts so that the outcome of the decision would be different.”³

The Plaintiff raises complicated and debatable questions about what the Court did, but, ultimately, he disagrees with what the Court did and, in substance, he seeks to reprise his arguments which the Court has already addressed.⁴ Although understandable, that is not a proper application of the Court’s rule on reargument. Accordingly, the motion for reargument is denied.

A few brief comments on the motion, nonetheless, may be appropriate. First, the Court did not rely upon the possibility that there might be some “innocent explanation for the difference in price—times were good from 2005 to 2007.”⁵ The Court observed that: “The period at issue—from 2005 until 2007 was one of general prosperity. Maybe this explains all of the price differentials; maybe it does not.”⁶

² *Gerber v. EPE Hldgs., LLC*, 2013 WL 209658 (Del. Ch. Jan. 18, 2013).

³ *Those Certain Underwriters at Lloyd’s, London v. Nat’l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *1 (Del. Ch. May 21, 2008), *aff’d*, 962 A.2d 916 (Del. 2008) (TABLE).

⁴ See *Sutherland v. Sutherland*, 968 A.2d 1027, 1028 (Del. Ch. 2008).

⁵ Mot. for Reargument at ¶ 4.

⁶ *Gerber*, 2013 WL 209658, at *10.

The Court, however, continued, “All that matters is that, given the role of the Conflicts Committee, a simple difference in price over such a period does not alone implicate any of Gerber’s remaining rights under the LPA.”⁷ That ex-complaint explanation was neither adopted by the Court nor used by the Court in reaching its conclusion.

Second, the Plaintiff argues that the failure of the Conflicts Committee to obtain a fairness opinion from a financial advisor supports an inference of a lack of good faith.⁸ In the ordinary course, one would naturally expect the retention of a financial advisor to provide a fairness opinion. The Plaintiff, however, seeks to elevate that expectation to what amounts to a rule of law (or, at least, compel an inference as to the lack of good faith when applying the “reasonable conceivability” standard). Yet, he does so without authority.

Finally, the Plaintiff questions dismissal of this action with prejudice.⁹ The Plaintiff has not provided good cause basis for avoiding the general limitation on repetitive complaints established by Court of Chancery Rule 15(aaa).

⁷ *Id.*

⁸ Mot. for Reargument ¶ 6.

⁹ *Id.* ¶ 9.

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Patricia R. Uhlenbrock, Esquire
Register in Chancery-K