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Re: *AM General Holdings LLC v. The Renco Group, Inc.*  
C.A. No. 7639-VCN  
*The Renco Group, Inc. v. MacAndrews AMG Holdings LLC*  
C.A. No. 7668-VCN  
Date Submitted: January 22, 2016

Dear Counsel:

Plaintiff Renco sought a preliminary injunction against Defendant M&F to secure its informational rights under the Holdco Agreement. The Court denied the motion because it concluded that there was not a sufficient showing of risk of irreparable harm in the absence of interim injunction relief.<sup>1</sup> Renco acknowledges that it must satisfy the irreparable harm standard in order to obtain a preliminary injunction.

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<sup>1</sup> *Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2015 WL 9487922, at \*2–4 (Del. Ch. Dec. 29, 2015) (the “Letter Opinion”). Westlaw shows the caption as “*AM Gen. Hldgs. LLC v. Renco Gp., Inc.*” Unless otherwise noted, capitalized terms used here have the same meaning as ascribed in the Letter Opinion.

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Renco has moved for reargument under Court of Chancery Rule 59(f).<sup>2</sup> In order to prevail on a motion for reargument, Renco must demonstrate “either that the Court overlooked a controlling decision or principle of law that would have a controlling effect, or the Court misapprehended the facts or the law such that the outcome of the decision would be different.”<sup>3</sup>

Renco asserts that the Court misapplied or misapprehended the law and the facts in two ways. First, it contends that a contractual stipulation that a breach of the governing agreement would amount to irreparable harm establishes the irreparable harm element. Second, it maintains that M&F is judicially estopped from seeking to avoid the contractual stipulation because it has relied on a similar provision in this long-running litigation saga. In a sense, Renco is also arguing that if the Court relied upon the contractual stipulation in granting M&F’s interim

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<sup>2</sup> Renco’s motion also invokes Court of Chancery Rule 59(e), but there is no judgment in this action to alter or amend.

<sup>3</sup> *Carlyle Inv. Mgmt., LLC v. Moonmouth Co., S.A.*, 2014 WL 4104702, at \*2 (Del. Ch. Aug. 21, 2014) (citation omitted).

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injunction relief, it is bad form not to treat the contractual stipulation in the same way when it is Renco that seeks interim injunctive relief.<sup>4</sup>

First, according to Renco, under Section 10.1(a) of the Holdco Agreement, it has rights to inspect Holdco's and AM General's books of account and to receive monthly reporting relating to the AM General business. By Section 15.14 of the Holdco Agreement, the parties agreed that "any party by whom this Agreement is enforceable shall be entitled to specific performance in addition to any other appropriate relief or remedy. Such party may . . . apply to a court of competent jurisdiction for . . . injunctive or such other relief as such court may deem just and proper in order to enforce this agreement or prevent any violation hereof." This contractual provision, according to Renco, is the end of any irreparable injury debate.

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<sup>4</sup> Renco suggests that the Court's decision would change if it came to a different conclusion with respect to the presence of irreparable harm. The Court did not resolve the question of whether Renco had demonstrated a reasonable probability of success on the merits of its claim. Thus, in order to understand whether revising the irreparable harm conclusion would yield a different outcome, the Court would need to address another prong of the preliminary injunction standard.

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Renco is correct that “contractual stipulations as to irreparable harm alone suffice to establish that element for the purpose of issuing . . . injunctive relief.”<sup>5</sup> Such a provision can be used by the Court to meet the irreparable harm standard, but such a provision does not deprive the Court of its discretion with respect to one of the critical forms of equitable relief.<sup>6</sup> When a moving party who has the benefit of a similar provision seeks interim injunctive relief, its burden to show irreparable injury will be reduced. If there is a close debate about irreparable harm, such a party will prevail. Here, the Court considered Renco’s claims in conjunction with the contractual stipulation and concluded that its discretion should be exercised to

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<sup>5</sup> *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1226 (Del. 2012) (quoting *Cirrus Hldg. Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001)).

<sup>6</sup> Indeed, in *Martin Marietta*, the Court did not limit its inquiry upon reading the contractual provision regarding irreparable harm. Instead, the Court concluded that “*Martin*’s assertions also fail factually, because the Chancellor did make a finding of ‘actual’—and irreparable—injury.” *Id.* at 1227. It then referenced the “record evidence [that] solidly support[ed] the Court of Chancery’s finding of ‘actual’ irreparable injury.” *Id.*

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deny interim injunctive relief.<sup>7</sup> As this Court recognized in *Kansas City Southern v. Grupo TMM, S.A.*:

Although a contractual stipulation as to the irreparable nature of the harm that would result from a breach cannot limit this Court's discretion to decline to order injunctive relief, such a stipulation does allow the Court to make a finding of irreparable harm provided the agreement containing the stipulation is otherwise enforceable. If the facts plainly do not warrant a finding of irreparable harm, this Court is not required to ignore those facts, especially since the parties cannot confer subject matter jurisdiction upon a court.<sup>8</sup>

Renco does not seek relief to maintain the *status quo*; instead, it seeks affirmative relief—inspection rights. Not only is the relief affirmative or mandatory in nature, but it also approaches final relief. If the relief involves inspection rights, once the inspection is ordered, it is difficult to see what is left (other than prospective inspection). In essence, Renco asks the Court to accept the contractual stipulation regarding irreparable harm and then to award Renco essentially final relief on nothing more than a showing of a reasonable probability

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<sup>7</sup> Letter Opinion, 2015 WL 9487922, at \*3–4.

<sup>8</sup> 2003 WL 22659332, at \*5 (Del. Ch. Nov. 4, 2003) (citation and internal quotation marks omitted).

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of success. Moreover, parties to a contract simply cannot manipulate in the future the Court's discretion to award interim injunctive relief.

Second, Renco's efforts to invoke the law of the case doctrine fail. In a related action<sup>9</sup> and in this action,<sup>10</sup> the Court looked to the contractual stipulation and used it in conjunction with its review of the facts. Indeed, its analysis in both cases involving these parties proceeded in similar fashion. The Court both considered the irreparable harm stipulation provision and assessed the factual circumstances. Because the Court did not in either case merely adhere to the contractual stipulation, the law of the case doctrine does not control because of the factual differences. In the December 2012 Opinion, actual irreparable harm was present because of fundamental problems with the complex corporate governance structure which the parties had agreed upon; in the June 2013 Opinion, the showing of irreparable harm was barely sufficient when the identified risk of harm

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<sup>9</sup> *AM Gen. Hldgs. LLC v. Renco Gp., Inc.*, 2012 WL 6681994, at \*4–5 (Del. Ch. Dec. 21, 2012) (“December 2012 Opinion”).

<sup>10</sup> *Renco Gp. Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 3369318, at \*11–13 (Del. Ch. June 25, 2013) (“June 2013 Opinion”).

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was bolstered by the contractual stipulation. The Court considered both the factual showing of the potential for irreparable harm and the contractual stipulation. Thus, the law of the case doctrine does not require that the Court automatically adhere to the parties' agreement regarding irreparable harm during the course of their business relationship.<sup>11</sup>

In sum, Renco has not demonstrated that the Court's decision regarding irreparable harm was the product of a misapprehension of the facts or a misapplication of the law. Thus, its motion for reargument or reconsideration is denied.<sup>12</sup>

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<sup>11</sup> The December 2012 Opinion which awarded a preliminary injunction was issued in a different case and, thus, there is reasonable debate about whether the holding there would apply here under the law of the case doctrine. The Court does not rely upon this distinction, in large part because these two cases involve substantially the same parties debating their rights with respect to investments which were made at the same time.

<sup>12</sup> In light of this conclusion, MacAndrews AMG Holdings LLC's Motion to Strike The Renco Group, Inc.'s Reply Brief in Support of Its Motion for Reconsideration is denied as moot.

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**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: Register in Chancery-K