

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: February 15, 2006

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Philip Trainer, Jr., Esquire
Ashby & Geddes
222 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899

David J. Margules, Esquire
Bouchard, Margules & Friedlander
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

***RE: Madison Real Estate Immobilien-Anlagegesellschaft beschränkt
haftende KG v. GENO One Financial Place L.P. and GENO
Auslandsimmobilien GmbH
C.A. No. 1928-N***

Dear Counsel:

Having considered the arguments advanced by the parties in their written submissions and during the teleconference on February 15, 2006, and for the reasons set forth herein, the motion for expedited proceedings will be denied.

I.

Briefly stated, the plaintiff, Madison Real Estate Immobilien-Anlagegesellschaft beschränkt haftende KG, an entity organized under the laws of Germany, is one of two entities making unregulated tender offers for a portion of the limited partnership interests held in defendant GENO One Financial Place L.P., a Delaware limited partnership. GENO's general partner, defendant GENO Auslandsimmobilien GmbH, is a German limited liability company. Madison's tender offer is priced at 80% of the nominal value of the partnership interests. The competing offer, being made by an entity referred to in the moving papers as Meridian 10, is priced at 100% of that nominal value, or 25% higher than the Madison offer. Before the competing offer was made, Madison succeeded in

attracting a number of tenders that were accompanied by forms of assignment and transfer agreements supplied by Madison. Those transfer agreements provide that Madison's admission as a substitute limited partner with respect to the interests will be as of January 1, 2006.

Madison did not submit any of those transfer agreements to the general partner for its consent until after the first of the year. Recognizing that the GENO limited partnership agreement provides that the first available date for admission to the partnership is January 1 of the year following the general partner's consent to admission, Madison asked the general partner to give its consent retroactively, to January 1, 2006, as stated in the transfer agreements. The general partner has taken the position that it does not have the power to consent retroactively and that it will not approve the transfer agreements of those holders who accepted Madison's offer, as the back dated transfer does correspond to the current limited partnership agreement.¹ Thus, Madison is faced with the prospect of having to obtain new transfer agreements from tendering limited partners. Obviously, in the face of the higher competing offer, that prospect is unwelcoming.

The court also notes that the general partner, in considering whether or not to consent to the admission of a substitute limited partner, is required to act so as to preserve the limited partnership's pass-through tax status under the U. S. Internal Revenue Code and to avoid the partnership being treated as a "publicly-traded partnership" taxable as a corporation. Madison alleges that, due to the general partner's "intentional delay" in consenting to the transfer to it, "the General Partner has created the possibility that the transfers to Madison, in conjunction with the Meridian 10 transfers, may raise [tax] issues and ultimately bar the Madison transfers." In other words, Madison wants to enjoin the general partner from approving any transfers to Meridian 10 lest the annual quota for transfer under the tax laws be used up. Madison has therefore moved for expedited consideration of a preliminary injunction preventing the defendants from consenting to transfers of partnership interests to Meridian 10 or any other assignee of an interest in the partnership, and compelling the general partner to consent to the Madison transfers.

¹ Apparently, there is a proposal to amend the partnership agreement to allow for quarterly admissions.

Finally, the court notes that the tender offer materials used by Madison to solicit tenders are not in the record. Madison's counsel was able to state, during the hearing, that Madison's obligation to purchase tendered interests is not complete until it receives the general partner's consent to the transfer. What is not clear is whether Madison has the power, under the agreements it drew, to purchase the tendered partnership interests without having first obtained the consent of the general partner to the transfer. In other words, the terms of Madison's tender offer may treat the general partner's consent merely as a condition to Madison's obligation to purchase that Madison has the power to waive. Alternatively, Madison's right to purchase tendered interests may depend upon the general partner's prior consent to the transfer. Finally, it is possible that the legal effect of the tender offer documents is unclear.

II.

"This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause why that is necessary."² To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.³ In this case, upon reflection, it is clear that the plaintiff is not facing any imminent threat of irreparable injury that would justify the equitable relief it seeks.

Madison is making a tender offer for up to 4.9% of the GENO limited partnership interests and alleges that it has obtained tenders from up to 200 limited partners, representing \$7 million nominal capital value.⁴ Due to the offer's size limitation, among other reasons, the terms of Madison's offer are not subject to the

² *Greenfield v. Caporella*, 1986 Del. Ch. LEXIS 493, at *5 (Del. Ch. Dec. 3, 1986).

³ *Giammargo v. Snapple Beverage Corp.*, 1994 Del. Ch. LEXIS 199 at *6 (Del. Ch. Nov. 15, 1994).

⁴ Compl. ¶ 12.

familiar requirements of federal tender offer regulation.⁵ Thus, Madison was and is, truly, the master of its offer and was free to structure terms of the offer to suit its own purposes. For example, unlike a regulated tender offer, Madison's offer evidently does not afford tendering persons any right to withdraw, even in order to tender to a superior competing offer. Nevertheless, Madison is obliged, according to its attorneys, to pay the consideration offered or return the interests tendered promptly after the termination of its offer.⁶

Madison's problem is that there is now a higher priced competing bid that, presumably, all those who tendered to Madison would prefer to pursue. At the same time, the general partner has advised Madison that Madison needs to obtain revised forms of transfer agreements from those who have tendered to it before the general partner will consider Madison's request that the general partner consent to the transfer of those interests. But Madison's potential quandary is entirely of its own making. If it has the contractual right to buy partnership interests without the general partner's prior consent, it can do so and pursue those consents at a later time without suffering any irreparable injury. If Madison's right to purchase tendered partnership interests is contractually conditioned on the approval of the general partner, Madison's current concern that it might be left out in the cold by the competing Meridian 10 offer is the result of a flawed contract, from Madison's current perspective. In that context, this court's equitable powers would hardly be available to aid Madison in satisfying a self-imposed precondition to its right to buy the partnership interests at a price 25% lower than the Meridian 10 offer.

Further, Madison has not shown a sufficiently colorable claim to justify the public burden of an expedited preliminary injunction hearing. Section 7.1 of the GENO partnership agreement vests in the general partner sole and exclusive authority for the management of the partnership.⁷ Necessarily, this relationship of trust creates fiduciary duties in the general partner that run to the limited partners.

⁵ The court assumes that Madison's offer is subject to the broad anti-fraud provisions of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e), and the rules adopted thereunder, which apply to "any tender offer."

⁶ This duty may flow from Rule 14e-1(c), 17 C.F.R. § 240.14e-1(c), which applies by its terms to "any tender offer."

⁷ Pl.'s Mot. For Expedited Proceedings Ex. A.

In part, the contours of these duties are set out in Section 8.1 of the agreement, which requires the general partner to “manage the affairs of the Partnership in a prudent business-like fashion” In addition, Section 11.1 of the agreement authorizes the general partner to refuse consent to any transfer that would cause the partnership to be characterized as publicly-traded within the meaning of Section 7704 of the Internal Revenue Code, and also references certain limitations on membership in the partnership contained in Section 1.5.⁸ These powers suggest that the general partner has a relatively broad duty to investigate any substituted limited partner before consenting to a transfer of partnership interests and that it would be justified in refusing to make any special accommodation (such as giving retroactive consent) needed to facilitate Madison’s lower priced tender offer.

III.

For the foregoing reasons, Madison’s motion for expedited proceedings is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

⁸*Id.*