



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

JOHN W. NOBLE  
VICE CHANCELLOR

417 SOUTH STATE STREET  
DOVER, DELAWARE 19901  
TELEPHONE: (302) 739-4397  
FACSIMILE: (302) 739-6179

April 7, 2011

C. Barr Flinn, Esquire  
Nicholas J. Rohrer, Esquire  
Young Conaway Stargatt & Taylor, LLP  
1000 West Street, 17th Floor  
Wilmington, DE 19801

Brock E. Czeschin, Esquire  
Robert L. Burns, Esquire  
Richards, Layton & Finger, P.A.  
920 North King Street  
Wilmington, DE 19801

Re: Glickenhau & Co. v. Lehman Brothers Real Estate Associates II, L.P.  
C.A. No. 5978-VCN  
Date Submitted: February 8, 2011

Dear Counsel:

Plaintiff Glickenhau & Co. (the "Plaintiff") is a limited partner of Defendant Lehman Brothers Real Estate Fund II, L.P. (the "Partnership"), a Delaware limited partnership. The Plaintiff brings this action under Section 17-305 of the Delaware Revised Uniform Limited Partnership Act<sup>1</sup> and Section 8.1 of the Partnership's limited partnership agreement against both the Partnership and its General Partner, Lehman Brothers Real Estate Associates II, L.P., (collectively, the "Defendants") to

---

<sup>1</sup> 6 *Del. C.* § 17-305.

inspect certain books and records of the Partnership. The Defendants have moved to dismiss this action.

First, they argue that this action is an attempt at an “end run” around the stay under the Private Securities Litigation Reform Act (“PSLRA”)<sup>2</sup> because of a federal securities action filed by the Plaintiff in the Southern District of New York against a partnership related to the Defendants. That action has now been dismissed.<sup>3</sup> Thus, this argument for dismissal is now moot.<sup>4</sup>

Second, the Defendants challenge the purposes set forth by Plaintiff for its inspection. Because this is a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court must accept the well-pled allegations of the Complaint as they are.<sup>5</sup> The Complaint alleges that the Plaintiff seeks inspection in order to value its interest in the Partnership.<sup>6</sup> That is a proper purpose for inspection.<sup>7</sup> The

---

<sup>2</sup> 15 U.S.C. § 78u-4(b)(3).

<sup>3</sup> *Fried v. Lehman Brothers Real Estate Associates III, L.P.*, No. 1:09-CV-09100-BSJ-KNF, slip op. (S.D.N.Y. Mar. 21, 2011).

<sup>4</sup> *Marhart, Inc. v. CalMat Co.*, 1992 WL 82365 (Del. Ch. Aug. 20, 1992) (denying a motion to dismiss where two arguments for dismissal were moot and the defendants failed to show dismissal was warranted on other grounds).

<sup>5</sup> *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).

<sup>6</sup> Verified Complaint to Compel Inspection of Books and Records (“Compl.”) at ¶ 5.

<sup>7</sup> *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

*Glickenhause & Co. v. Lehman Brothers Real Estate Associates II, L.P.*  
C.A. No. 5978-VCN  
April 7, 2011  
Page 3

Defendants may be skeptical of that purpose and may be correct that the Plaintiff has ulterior motives, but that does not form a basis for dismissal under Rule 12(b)(6).<sup>8</sup>

The Plaintiff also has alleged that its inspection is necessary to assess whether wrongdoing has occurred. It acknowledges that it is obligated to present a “credible basis” from which the Court may infer wrongdoing.<sup>9</sup> That analysis, given the sufficiency of the Plaintiff’s allegations,<sup>10</sup> and, especially, since this action will move forward on the Plaintiff’s valuation purpose, is best performed in fact-finding mode when the drawing of inferences can be done more efficiently.

Accordingly, the Defendants’ motion to dismiss is denied.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

---

<sup>8</sup> *Helmsman Mgmt. Serv., Inc. v. A.S. Consultants, Inc.*, 525 A.2d 160, 161 (Del. Ch. 1987) (“Once it is determined that a shareholder has a proper purpose that is primary, any secondary purpose or ulterior motive that the stockholder might have is irrelevant.”).

<sup>9</sup> *Seinfeld v. Verizon Comm., Inc.*, 909 A.2d 117, 118 (Del. 2006).

<sup>10</sup> Compl. ¶¶ 1-6.