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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARION #2-SEAPORT TRUST U/A/D JUNE 21, 2002, Defendant Below-Appellant, v. TERRAMAR RETAIL CENTERS, LLC, Plaintiff Below-Appellee.	No. 433, 2017 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 12875-VCL

CORRECTED APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 8

STATEMENT OF FACTS 10

I. THE PARTIES. 10

II. EVENTS PRECEDING THE COMPANY'S FORMATION. 11

III. TERRAMAR ACQUIRES A CONTROLLING INTEREST IN THE COMPANY 12

IV. TERRAMAR ATTEMPTS TO SELL THE COMPANY FOR ITS SOLE BENEFIT AND PRE-EMPTIVELY FILES THIS ACTION TO SECURE A FAVORABLE FORUM. 14

ARGUMENT 17

I. THE TRUST IS NOT SUBJECT TO PERSONAL JURISDICTION IN DELAWARE WITH RESPECT TO THIS ACTION. 17

A. Questions Presented. 17

B. Scope Of Review. 18

C. Merits Of Argument. 18

1. Section 3104 Provides No Statutory Authority For Personal Jurisdiction Over The Trust. 18

a) The Trust Did Not "Form" The Company Or Otherwise "Transact Business" In Delaware. 20

(1) The Trust Had No Ability To Dictate Terms Of The Taubman-Terramar Sale. 21

(2) The Trust Had No Equity Interest In Seaport Village. 22

(3) The Trial Court's Inferences Are Not Reasonably Drawn From The Record. 23

b) Terramar's Declaratory Judgment Claim Does Not "Arise From" The Company's Formation Under Delaware Law. 26

(1) The Company's Formation Is Not Alleged To Have Been Wrongful. 27

(2) There Is No Reasonable "Nexus" Between An LLC's Formation And Future Claims Relating To The Members' Contractual Relations. 29

2. Subjecting The Trust To Personal Jurisdiction Under Section 3104 In This Action Violates Constitutional Due Process Rights. 33

a) Litigating In Delaware Threatens The Trust With Substantial Burdens. 33

b) The Trust's Membership Interest In The Company Does Not Establish "Minimum Contacts" With Delaware. 35

II. THE TRIAL COURT INCORRECTLY ALLOWED JUDICIALLY NOTICED FACTS TO INFLUENCE ITS RULING 38

A. Questions Presented. 38

B. Scope of Review. 38

C. Merits of Argument. 38

CONCLUSION 43

<u>EXHIBITS:</u>

Terramar Retail Centers, LLC v. Marion#2 -Seaport Trust U/A/D June 21, 2011, C.A. No. 12875-VCL, Memorandum Opinion (Del. Ch. July 18, 2017) ....A

Terramar Retail Centers, LLC v. Marion#2 -Seaport Trust U/A/D June 21, 2011,
C.A. No. 12875-VCL, Order Denying Defendant's Motion for Reargument
(Del. Ch. July 18, 2017) .... B

TABLE OF CITATIONS

Cases

AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.,
871 A.2d 428 (Del. 2005) 18, 35

Air Prods. & Chems., Inc. v. Lummus Co.,
252 A.2d 545 (Del. Ch. 1968) 34

Barks v. Herzberg,
206 A.2d 507 (Del. 1965) 39

Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.,
137 S. Ct. 1773 (2017) 34

BW Piezo Holdings LLC v. Phillips,
2017 WL 1399746 (Del. Super. Apr. 18, 2017) 37

Cairns v. Gelmon,
1998 WL 276226 (Del. Ch. May 21, 1998) 27

City of Wilmington v. Fraternal Order of Police Lodge 1,
2016 WL 4059237 (Del. Ch. July 29, 2016) 39

Communist Party of U.S. of Am. v. Peek,
127 P.2d 889 (Cal. 1942) 42

Computer People, Inc. v. Best Int'l Grp., Inc.,
1999 WL 288119 (Del. Ch. Apr. 27, 1999) 33

Connecticut Gen. Life Ins. Co. v. Pinkas,
2011 WL 5222796 (Del. Ch. Oct. 28, 2011) 27, 30

E.B.R. Corp. v. PSL Air Lease Corp.,
313 A.2d 893 (Del. 1973) 41

EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.,
2008 WL 4057745 (Del. Ch. Sept. 2, 2008) 25, 26

Fawcett v. State,
697 A.2d 385 (Del. 1997) 42

Fisk Ventures, LLC v. Segal,
2008 WL 1961156 (Del. Ch. May 7, 2008)....... 31, 32

Haisfield v. Cruver,
1994 WL 497868 (Del. Ch. Aug. 25, 1994)....... 30

Hamilton Partners, L.P. v. Englard,
11 A.3d 1180 (Del. Ch. 2010)....... 27

In Matter of Dissolution of Arctic Ease, LLC,
2016 WL 7174668 (Del. Ch. Dec. 9, 2016)....... 18

In re Mobilactive Media, LLC,
2013 WL 297950 (Del. Ch. Jan. 25, 2013)....... 26

Kahuku Holdings, LLC v. MNA Kahuku, LLC,
2014 WL 4699618 (Del. Ch. Sept. 15, 2014)....... 35

LaNuova D&B, S.p.A. v. Bowe Co., Inc.,
513 A.2d 764 (Del. 1986)....... 18, 19, 26

LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC,
2017 WL 3912632 (Del. Ch. Sept. 7, 2017)....... 32

Microsoft Corp. v. Vadem Ltd.,
2012 WL 1564155 (Del. Ch. Apr. 27, 2012)....... 29, 30

Montgomery Cellular Holding Co., Inc. v. Dobler,
880 A.2d 206 (Del. 2005)....... 38

OneScreen, Inc. v. Hudgens,
2010 WL 1223937 (Del. Ch. Mar. 30, 2010)....... 33, 36

Papendick v. Bosch,
410 A.2d 148 (Del. 1979)....... 6, 28, 34, 35

Playtex, Inc. v. Columbia Cas. Co.,
1989 WL 40913 (Del. Super. Apr. 25, 1989)....... 34

Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.,
1991 WL 129174 (Del. Ch. July 10, 1991)....... 26

RWI Acquisition LLC v. Todd,
2012 WL 1955279 (Del. Ch. May 30, 2012)..37

Seaport Village Ltd. v. Terramar Retail Centers, LLC,
2016 WL 541930 (Del. Ch. Feb. 10, 2016)..3

Shaffer v. Heitner,
433 U.S. 186 (1977)..33

Shamrock Holdings of California, Inc. v. Arenson,
421 F. Supp.2d 800 (D. Del. 2006)..31

Steinman v. Levine,
2002 WL 31761252 (Del. Ch. Nov. 27, 2002)
aff'd, 822 A.2d 397 (Del. 2003)..36

Sternberg v. O'Neil,
550 A.2d 1105 (Del. 1988)..35

Tribbitt v. Tribbitt,
963 A.2d 1128 (Del. 2008)..39

Statutes and Other Authorities

6 *Del. C.* § 18-109..19

10 *Del. C.* § 3104.. *passim*

D.R.E. 201..39

NATURE OF PROCEEDINGS

This appeal arises from an attempt by the managing member of a Delaware limited liability company to force another member – a family trust with a passive, minority ownership stake in the entity – to litigate in this State, across the country from the jurisdiction where all parties reside, where the entity conducts its business and where the entity's sole real estate asset is located. The managing member has done so after engaging in years of predatory conduct against the minority members, such as collecting an estimated $90 million of cash flow, including more than $45 million in distributions to itself, and imposing $3.6 million of "phantom income" to its co-members while distributing no cash to the other members. Now, the managing member is attempting to sell the LLC's assets to generate an additional estimated $50 million for itself without sharing any of the proceeds with the minority members.

The managing member's objectives in bringing suit in Delaware are transparent: (1) to impose upon the minority member the significant burdens of cross-country litigation, which the minority member is far less capable of absorbing than the managing member, a billion-dollar investment firm; (2) to deprive the minority member of its ability and right, as the natural plaintiff in this dispute, to seek relief in California; and (3) to bring its dispute with the minority member in the same forum, and before the same Vice Chancellor, as a previous action that resulted in a positive outcome for the managing member – but which related to facts

predating the current dispute and to which the minority member, a defendant here, was not a party. These tactical goals led the managing member to file a pre-emptive declaratory judgment claim, prematurely before any dispute had ripened between the parties, in a jurisdiction where the defendant has no possible contacts beyond its passive, non-controlling ownership interest in an entity formed under Delaware law.

The entity in question is Seaport Village Operating Company LLC (the "Company"), a Delaware LLC formed in 2002 to hold valuable ground leasehold interests in Seaport Village, a commercial property located in San Diego, California ("Seaport Village"). Plaintiff Terramar Retail Centers, LLC ("Terramar") purchased from Anne Taubman and her affiliated entities (the "Taubman Parties") a 50% interest in the Company and promised to manage Seaport Village for the best interests of all members, including defendant Marion #2-Seaport Trust U/A/D June 21, 2002 (the "Trust").[1]

Over the intervening years, however, Terramar failed to live up to this promise, leading to several disputes between it and the Company's other members. All but one of these disputes were litigated in California, with the sole exception being *Seaport Village Ltd. v. Terramar Retail Centers, LLC*, C.A. No. 8841-VCL (the "Prior Action"). The Prior Action was filed in the Court of Chancery in August

[1] At the time of the sale, the entity now known as Terramar was named GMS Realty, LLC. For ease of reference, this brief will refer to the entity uniformly as "Terramar."

2013 by a third member, San Diego Seaport Village, Ltd. ("Limited"), after a California state court ruled that it lacked authority to compel a statutory dissolution under the Delaware Limited Liability Company Act (the "LLC Act"). The Trust was not a party to the Prior Action. Before the current dispute arose, Vice Chancellor Laster rejected Limited's claims in the Prior Action, entered judgment in favor of Terramar and the Company, and ordered Limited to reimburse $2.3 million in attorneys' fees. *See Seaport Village Ltd. v. Terramar Retail Centers, LLC*, 2016 WL 541930 (Del. Ch. Feb. 10, 2016) (ORDER), *aff'd*, 148 A.3d 1170 (Del. 2016) (TABLE).

On November 4, 2016, undoubtedly hoping to capitalize on its success in the Court of Chancery against Limited, Terramar initiated this proceeding against Limited and the Trust. (Predictably, the matter was assigned to Vice Chancellor Laster after Terramar identified the Prior Action as a "related case." A38.) In its complaint, Terramar alleged a single claim for declaratory judgment, asking the court to approve Terramar's plan to sell Seaport Village without its co-members' consent and to allow Terramar, the 50% member under the Company's Operating Agreement, dated September 1, 2002 (the "Operating Agreement"), to collect 100% of the sale proceeds, estimated at over $50 million.

Terramar purported to serve process upon the Trust pursuant to Delaware's general long-arm statute, 10 *Del. C.* § 3104 ("Section 3104"). In response, the Trust

– domiciled in California, without any ties to Delaware other than its passive, minority membership interest in the Company – moved to dismiss Terramar's declaratory judgment claim on the independent grounds that (1) Section 3104 does not subject the Trust to personal jurisdiction in Delaware, and (2) the Verified Complaint did not allege a ripe dispute for adjudication.

Shortly after the Trust moved to dismiss, Terramar settled its claims with Limited, purporting to acquire Limited's 25% membership interest in the Company in exchange for consideration including: (1) cash; (2) dismissing the claim against Limited in this action; (3) dismissing pending claims by the Company and Terramar against the Taubman Parties in California; and (4) waiving judgments entered in Terramar's and the Company's favor in the Prior Action. A133-135. Terramar then filed an Amended and Supplemental Verified Complaint re-asserting a declaratory judgment claim against the Trust and asking the court to determine that Terramar is entitled "to unilaterally sell all of [the Company's] property and assets to a third party in connection with [the Company's] dissolution." A146. The Trust renewed its motion to dismiss on personal jurisdiction and ripeness grounds. A168.

While its motion to dismiss was pending, the Trust became aware that Terramar had begun taking steps to unilaterally sell Seaport Village. Therefore, on July 17, 2017, and in the interest of asserting and protecting its rights as a member of the Company, the Trust filed a complaint against Terramar in the Superior Court

of California. A976-1055. In its complaint, the Trust alleges several causes of action arising from Terramar's breaches of its fiduciary and contractual duties, both directly and derivatively on the Company's behalf, including claims challenging Terramar's purported right to sell the Company's assets and Terramar's purported purchase of Limited's interest using Company assets. *See id.*

On August 18, 2017, the Court of Chancery issued a Memorandum Opinion (Ex. A, cited as "Mem. Op.") denying the Trust's motion to dismiss and holding that the Trust is subject to personal jurisdiction under Section 3104(c)(1), which authorizes service upon a non-resident who "[t]ransacts any business … in the State" with respect to a cause of action "arising from" that conduct. 10 *Del. C.* § 3104(c)(1). Specifically, the trial court determined that Michael Cohen – the trustee of the Trust and the principal of M.A. Cohen & Co., a separate California-licensed brokerage company that assisted the Taubman Parties in selling a 50% interest in Seaport Village to Terramar – "negotiated the terms of the underlying business deal that was implemented through the formation of the Company" and "negotiated the terms of the Company's operating agreement." Mem. Op. at 1.

Vice Chancellor Laster imputed M.A. Cohen & Co.'s brokerage services to the Trust and inferred from those brokerage services "that the Trust, through Cohen, played a meaningful role in forming the Company and negotiating the Operating Agreement." *Id.* at 17. Despite the absence of any evidence that Mr. Cohen was

involved in the decision to form the Company under Delaware law or the act of filing a Certificate of Formation, the Court of Chancery found that "[t]hrough Cohen, the Trust consciously chose to incorporate the Company as a Delaware entity and to embody core deal terms in the Company's governing documents." *Id.* at 24. The trial court thus attributed to the Trust, for purposes of applying Section 3104, the "single act" of transacting business in Delaware when the Company's Certificate of Formation was filed in 2002. *See id.* at 11-12, 17.

Notwithstanding the fact that Terramar alleged no wrongdoing in connection with the Company's formation in 2002, the trial court held that Section 3104(c)(1) established specific jurisdiction over the Trust by finding a causal connection between the Company's formation and Terramar's claim for declaratory relief, which relates to events which took place thirteen years after the Company was formed. *See* Mem. Op. at 12-17. The court's analysis relied principally upon *Papendick v. Bosch*, 410 A.2d 148 (Del. 1979), to hold that "a nexus exists between the formation of the Company and Terramar's claims … that is sufficient to permit this court to exercise specific jurisdiction over the Trust." Mem. Op. at 16. Vice Chancellor Laster opined that, because "[t]he business deal … was embodied in the Operating Agreement and implemented through the creation of the Company," the Company's formation "set in motion a series of events which form the basis for the cause of action before the court." *Id.* at 16-17.

The Memorandum Opinion also disclosed that the trial court took judicial notice of the Prior Action – a proceeding to which the Trust was not a party – in connection with deciding the Trust's motion to dismiss. *See* Mem. Op. at 2. The court did so, however, without first notifying the parties, as required by Delaware Rule of Evidence 201, or allowing the Trust to assert any objections.

The Trust moved for reargument on August 25, 2017, asking the Court of Chancery to reconsider (1) the factual inferences it drew to find that the Trust participated meaningfully in forming the Company, and (2) its use of judicial notice to consider the Prior Action. A1114-1221. The trial court denied the Trust's Motion for Reargument by Order dated September 19, 2017. *See* Ex. B.

The Trust then applied for (and the Court of Chancery granted) certification of an interlocutory appeal from the August 18, 2017 Memorandum Opinion and the September 19, 2017 Order. A1235-1466; A1482-1491. This Court accepted the Trust's interlocutory appeal by Order dated October 23, 2017. The Trust now respectfully seeks reversal of the trial court's orders, and dismissal of this action, to prevent Terramar from unfairly subjecting the Trust to litigating in a foreign jurisdiction and depriving the Trust of its right to seek relief for Terramar's misconduct in California.

SUMMARY OF ARGUMENT

1. The trial court erred, both as a matter of fact and a matter of law, in ruling that Section 3104 subjects the Trust to personal jurisdiction in Delaware with respect to Terramar's declaratory judgment action:

a. First, there is no evidentiary support for the trial court's factual inference that the Trust "played a meaningful role" in the Company's formation under Delaware law, a determination that was critical to the court's holding that the Trust "transacted business in the State" as required by Section 3104(c)(1).

b. Second, even if the Trust "played a meaningful role" in forming the Company (which it did not), the trial court's finding of a "nexus" between the Company's formation and Terramar's declaratory judgment claim to support specific jurisdiction over the Trust is incorrect because (i) there is no allegation of wrongful conduct by any party, including the Trust, M.A. Cohen & Co. or Mr. Cohen, in connection with forming the Company, and (ii) Terramar's claim arises from facts occurring thirteen years after the Company was formed.

c. Finally, subjecting the Trust to personal jurisdiction under the trial court's application of Section 3104 violates constitutional guarantees of due process and rewards Terramar's forum-shopping by filing a pre-emptive declaratory judgment action, in what Terramar perceives as a favorable forum, to deprive the Trust of its right to seek relief in California.

2. The trial court abused its discretion by allowing the Prior Action, through the *sua sponte* use of judicial notice, to affect the factual inferences drawn by the court to deny the Trust's motion to dismiss. The Trust was not a party to the Prior Action and, therefore, had no role in presenting evidence or influencing the court's understanding of the facts – knowledge upon which the Vice Chancellor undoubtedly drew in reaching his conclusions. As required by the Delaware Rules of Evidence, the Trust should have been given an opportunity to consider and object before the trial court took judicial notice of reasonably disputable facts that influenced the court's analysis.

STATEMENT OF FACTS

I. THE PARTIES.

On September 19, 2002, the Company was formed as a Delaware LLC when an attorney for Terramar filed a Certificate of Formation with the Delaware Secretary of State. A945. When the Operating Agreement was executed, the Company had three members, all of whom reside in California – Terramar owned 50% of the Company's membership interests, while Limited and the Trust each owned 25% of the Company's membership interests. A261. According to the Operating Agreement, the Company was formed to own, operate and manage Seaport Village. A216 (§ 2.3). The Operating Agreement further specifies that the Company's principal office is located in California (*id.* (§ 2.4)) and identifies California as the principal place of business for all three members (A244-245 (§ 12.3)).

Pursuant to the Operating Agreement, Terramar serves as the Company's Manager with complete authority to manage the Company's affairs. *See* A226-227 (§ 5.1(a), (e)). The Operating Agreement also makes clear that no member other than Terramar "shall be an agent of the Company or have any right, power or authority to transact any business in the name of the Company, take part in the day-to-day management or the operation or control of the business and affairs of the Company, or act for on behalf of or to bind the Company." A227 (§ 5.2).

The Trust was created in June 2002 and is domiciled in California. A263. Michael Cohen is a California resident, serves as the trustee of the Trust and is the principal of M.A. Cohen & Co., a licensed California broker and advisory firm. *Id.* Other than its membership interest in the Company, the Trust has no contacts (and has never had any contacts) with the State of Delaware. A263-264.

II. EVENTS PRECEDING THE COMPANY'S FORMATION.

In or around 1998, M.A. Cohen & Co. entered into a series of agreements by which it provided advisory services to the Taubman Parties, including Limited, an entity that owned the leasehold at Seaport Village. A981. Among other things, M.A. Cohen & Co. assisted Limited with refinancing $40 million of debt with Yasuda Bank and ground rent negotiations with the Port of San Diego (the "Port"). A697. Ultimately, a new entity formed and controlled by the Taubman Parties, San Diego Seaport Lending Co., LLC ("Lending"), purchased the Yasuda Bank debt for $25 million through financing arranged by M.A. Cohen & Co.. *Id.*

In March 2000, Ms. Taubman and M.A. Cohen & Co. agreed that, in consideration for M.A. Cohen & Co.'s waiving payment of significant sums owed to it, M.A. Cohen & Co. would receive a 50% share of Limited's and Lending's net cash flow and sales proceeds after certain priorities were paid. A887-894. This was memorialized in a Consulting Agreement and Agreement to Terminate Prior Agreements, dated March 1, 2000 (the "Consulting Agreement") that was governed

by California law and stated explicitly that M.A. Cohen & Co. was a third party vendor, with no interest in Limited or Lending, and would receive compensation as consideration of services rendered between 1998 and 2000. A895-896.

III. TERRAMAR ACQUIRES A CONTROLLING INTEREST IN THE COMPANY.

The original Seaport Village property ("Phase I") was subject to a ground lease with the Port scheduled to terminate in 2018. A981. For many years, the Port stated that a key element in obtaining a valuable ground lease extension for Phase I was redevelopment by Limited (on its own or with a partner) of a vacated police station property adjacent to Phase I ("Phase II"). *Id.* After years of trying unsuccessfully to find a party with development expertise and capital to develop Phase II and potentially redevelop Phase I in partnership with Limited, M.A. Cohen & Co. succeeded in brokering the sale of a 50% interest in Seaport Village from the Taubman Parties to Terramar, a well-capitalized developer. *Id.*

In 2003, after lengthy negotiations, the Taubman Parties and Terramar closed a series of transactions through which Terramar acquired a 50% interest in Seaport Village from the Taubman Parties and the Company was formed (the "Taubman-Terramar Sale"). A981. As consideration for payment of $7 million from Terramar to the Taubman Parties and the refinancing of $25 million in debt, Terramar acquired a 50% *pari passu* ownership interest in Seaport Village from the Taubman Parties. A981-982. The Taubman Parties sold Terramar a 50% interest in Lending (which

held the refinanced Yasuda debt) and a 50% managing membership interest in the Company, which was formed to capture the economic benefits generated by Limited's leasehold on Seaport Village in excess of the debt held by Lending. *Id*.

Terramar paid nothing to M.A. Cohen & Co., the Trust or the Company to acquire an interest in Seaport Village; rather, all of the $7 million payment from Terramar was paid to the Taubman Parties. A1179. Before, during and after the closing, M.A. Cohen & Co. was owed substantial sums by the Taubman Parties pursuant to the Consulting Agreement, significant amounts of which were never paid. A1196.

When the Company was formed in September 2002, it was nominally capitalized with a mere $10,000 – $5,000 from Terramar, $2,500 from Limited and $2,500 from the Trust. A217. Terramar owned 50% of the Company, while Limited and the Trust, which had been created in June 2002, each owned 25% of the Company. A261. Upon closing of the Taubman-Terramar Sale, Terramar and the Taubman Parties each owned 50% of Lending, the entity that held $40 million of debt, subject to $25 million of third party debt. A140; A983. Thus, the Trust's interest was deeply subordinate to the interests in Lending held by Terramar and the Taubman Parties. From and after closing, the first approximately $15 million of equity (after payment of $25 million in debt), and the first approximately $2.4 million of annual cash flow, were payable to Lending, an entity owned exclusively

by Terramar and the Taubman Parties. The Trust received no such payments or entitlements; instead, *M.A. Cohen & Co.* was to be paid fees on those amounts pursuant to the Consulting Agreement (a contract governed by California law). A895.[2]

IV. TERRAMAR ATTEMPTS TO SELL THE COMPANY FOR ITS SOLE BENEFIT AND PRE-EMPTIVELY FILES THIS ACTION TO SECURE A FAVORABLE FORUM.

Not satisfied with distributing approximately more than $45 million in cash flow to itself since 2005 – without making any distributions to its co-members – Terramar has most recently pursued a scheme under which the preferences in the Operating Agreement intended to save Terramar from a worst case scenario would,

[2] The Consulting Agreement is just one piece of evidence demonstrating that all parties reasonably expected to resolve disputes that might arise between them in California courts. In January 2004, Terramar caused Lending to file an interpleader complaint in California relating to funds in which M.A. Cohen & Co. and Anne Taubman claimed interests. A1166-1170. In June 2005, Terramar caused the Company to file its own interpleader complaint seeking a California court's order with respect to M.A. Cohen & Co.'s claimed contractual right to consulting fees. A1172-1175. Ultimately, on or about September 15, 2008, Terramar, the Trust, the Company, Lending and other parties entered into a settlement agreement (governed exclusively by California law) to resolve the interpleader actions and other related litigation. A947-962. The settlement reflected in that agreement was presented to and approved by the Probate Division of the California Superior Court, and incorporates a Consent Agreement which, among other things, addressed the "waterfall" distributions pursuant to Section 4.1 of the Operating Agreement – the same "waterfall" for which Terramar is now seeking an advisory opinion from the Court of Chancery. A950-951. As the interpleader actions demonstrate, Terramar consistently sought to enforce its rights in California, where the parties and Seaport Village are located, rather than Delaware.

instead, be manipulated by Terramar to collect 100% of the proceeds from a proposed sale of Seaport Village. Terramar is attempting to secure all of the property's value for itself, while leaving the Trust with nothing, through a two-part strategy: (1) by purporting to use a "put" option under the Operating Agreement and forcing a unilateral liquidation of the Company without the Trust's consent; and (2) pre-emptively filing this action to avoid defending imminent litigation in California challenging Terramar's actions.

In a letter dated December 18, 2015, Terramar purported to activate the "put" provision contained in Section 9.5 of the Operating Agreement and demanded that Limited and the Trust purchase Terramar's 50% interest. A141. On June 9, 2016, Terramar sent a letter to Limited and the Trust stating that, pursuant to the "put," Terramar intended to sell its 50% interest in the Company at a price approximating 100% of the value of the entire Seaport Village project. A990. After Terramar frustrated efforts by the Trust to purchase Terramar's interest, Terramar pre-emptively commenced this action. Terramar seeks from the same Vice Chancellor who rejected Limited's claims in the Prior Action an advisory opinion that would approve, in advance, a future sale of Seaport Village on the terms demanded by Terramar. In doing so, Terramar brought a declaratory judgment claim before it was ripe for adjudication and sued a party – the Trust – that lacks the minimum contacts

with Delaware that are required before it may be forced to defend itself in the courts of this State.

ARGUMENT

I. THE TRUST IS NOT SUBJECT TO PERSONAL JURISDICTION IN DELAWARE WITH RESPECT TO THIS ACTION.

A. QUESTIONS PRESENTED.

Did the Court of Chancery err by subjecting the Trust, a California-domiciled entity without any contacts to Delaware other than its minority membership interest in the Company, to personal jurisdiction under Section 3104(c)(1) and by holding that (1) the Trust "transacted business" in Delaware through the filing of the Company's Certificate of Formation in 2002, even though neither the Trust nor its trustee participated in forming the Company, and (2) Terramar's pre-emptive declaratory judgment claim, which relates to conduct occurring no earlier than 2015, "arose from" the Company's formation in 2002, even though the formation itself is not alleged to have been wrongful or caused harm? A193-198; A914-929.

Did the Court of Chancery further err by holding that the assertion of personal jurisdiction over the Trust, a passive minority member in the Company without any other contacts in Delaware, against whom a billion-dollar investment firm filed a pre-emptive declaratory judgment action, comports with the Trust's Constitutional guarantees of due process? A198-199; A929-931.

B. Scope Of Review.

This Court reviews a trial court's denial of a motion to dismiss for lack of personal jurisdiction under a *de novo* standard of review. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).

C. Merits Of Argument.

As the plaintiff, Terramar bears the burden of establishing that a Delaware court properly may exercise personal jurisdiction over the Trust, a non-resident, to adjudicate Terramar's claim for declaratory judgment. *See id.* To satisfy this burden, Terramar must prove that: (1) service of process upon the Trust is authorized by statute; and (2) subjecting the Trust to jurisdiction in Delaware comports with the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *LaNuova D&B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986). In denying the Trust's motion to dismiss, the Court of Chancery incorrectly found that Terramar met these two criteria.

1. Section 3104 Provides No Statutory Authority For Personal Jurisdiction Over The Trust.

The only conceivable contact the Trust has with Delaware is its ownership of a minority membership interest in the Company. No statute, however, permits Delaware courts to adjudicate claims against non-residents solely by reason of their equity ownership in a Delaware business entity. *See In Matter of Dissolution of Arctic Ease, LLC*, 2016 WL 7174668, at *3 (Del. Ch. Dec. 9, 2016) ("A party's

ownership of interests in a Delaware entity alone does not constitute sufficient minimum contacts for Delaware courts to exercise personal jurisdiction.”).

When Terramar filed its complaint for declaratory judgment in this action, it purported to serve the Trust with process pursuant to Section 3104.[3] As a “single act” statute, Section 3104 subjects non-residents to personal jurisdiction in Delaware with respect to causes of action “arising from” enumerated acts within the State. *See* 10 *Del. C.* § 3104(c); *LaNuova D & B, S.p.A.*, 513 A.2d at 767. Here, Terramar’s attempt to subject the Trust to personal jurisdiction was based solely upon Section 3104(c)(1), which states in relevant part:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent … [t]ransacts any business or performs any character of work or service in the State.

10 *Del. C.* § 3104(c)(1).

The Court of Chancery’s holding that the Trust is subject to specific jurisdiction under this statute is flawed in two respects: *First*, there is no evidence that the Trust had any role in the Company’s formation as a Delaware LLC fourteen

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[3] If the Trust had any responsibility for managing the Company, it would be deemed to have consented to service of process in Delaware pursuant to the LLC Act. *See* 6 *Del. C.* § 18-109(a). However, since the Operating Agreement expressly *excludes* the Trust from all management duties, Terramar had no option but to assert long-arm jurisdiction based on the Trust’s membership interest.

years before Terramar filed this action, the sole "transaction in Delaware" on which jurisdiction over the Trust was alleged. *Second*, even if the Trust had participated in the decision to form the Company under Delaware law (which it did not), Terramar's request for a judicial declaration about its efforts to sell the Company's primary asset today does not "arise from" the filing of a Certificate of Formation in 2002.

a) *The Trust Did Not "Form" The Company Or Otherwise "Transact Business" In Delaware.*

The Court of Chancery's holding incorrectly disregards the distinction between *M.A. Cohen & Co.'s* limited participation (through its principal, Mr. Cohen) in brokering the Taubman-Terramar Sale and *the Trust's* receipt of a membership interest in the Company as one part of that broader transaction. While M.A. Cohen & Co. is a brokerage and advisory business with its own Federal tax identification number, its own employees and a completely separate existence from the Trust, the Memorandum Opinion repeatedly refers to Mr. Cohen without distinguishing the capacity in which, or the entity on whose behalf, he was acting. By doing so, the trial court erroneously relied upon Mr. Cohen's role in the Taubman-Terramar Sale as a broker for *M.A. Cohen & Co.* to attribute to *the Trust* the purposeful creation of the Company as a Delaware LLC, and thus the "transaction of business" in Delaware sufficient to support personal jurisdiction under Section 3104(c)(1). Despite the absence of any evidence that Mr. Cohen, M.A. Cohen & Co. or the Trust participated in forming the Company, the trial court found that "Cohen negotiated the terms of

the underlying business deal that was implemented through the formation of the Company. He also negotiated the terms of the Company's operating agreement." Mem. Op. at 1.

(1) ***The Trust Had No Ability To Dictate Terms Of The Taubman-Terramar Sale.***

The linchpin of the trial court's holding was its inference that "the Trust, *through Cohen*, played a meaningful role in forming the Company and negotiating the Operating Agreement." *Id.* at 17 (emphasis added). However, neither Mr. Cohen, M.A. Cohen & Co. nor the Trust was a buyer or seller in the Taubman-Terramar Sale – instead, the fact record presented to the trial court shows that the Taubman Parties were the sellers, Terramar was the buyer, and M.A. Cohen & Co. brokered the sale. A386; A556-557; A697. As evidenced by the final escrow statement prepared for closing, neither the Trust nor M.A. Cohen & Co. received *any* proceeds paid by Terramar in the sale; rather, the closing statement reflects that all sale proceeds were distributed to the Taubman Parties. A1177-1181. Since neither the Trust, M.A. Cohen & Co. nor Mr. Cohen was a buyer or seller, none of them had any power or authority over, or any basis on which to dictate or influence, the material terms being negotiated by the Taubman Parties and Terramar – including the choice of Delaware as the Company's legal domicile.

(2) *The Trust Had No Equity Interest In Seaport Village.*

Prior to the Taubman-Terramar Sale, neither Mr. Cohen, M.A. Cohen & Co. nor the Trust had any ownership interest in Limited, Lending or Seaport Village. Instead, M.A. Cohen & Co. was entitled contractually to fees calculated as a share of Limited's and Lending's profits – which Ms. Taubman agreed to provide M.A. Cohen & Co. primarily as consideration for M.A. Cohen & Co. waiving significant amounts due for past consulting services rendered in connection with the Taubman Parties' purchase of the Yasuda loan. A888. In its Memorandum Opinion, the Court of Chancery equated M.A. Cohen & Co.'s right to these fees under the Consulting Agreement with a *de facto* equity interest in Seaport Village. *See* Mem. Op. at 3 ("The [consulting] agreement is complex, but in substance it gave Cohen the right to receive cash flows from Limited and Lending that mimicked a 50% interest in those entities."). The trial court then cited M.A. Cohen & Co.'s contractual fee right as a piece of evidence from which it inferred that the Trust, through Mr. Cohen, "played a meaningful role" in the Company's formation. *See id.* at 17-18.

This inference, however, either fails to consider or contradicts material facts. For example, the Consulting Agreement was executed *after* Lending's formation and stated explicitly that M.A. Cohen & Co. (1) had no "control of or interest in" Limited or Lending, and (2) "shall have no rights with respect to the governance or internal affairs of either of them." A896. The Consulting Agreement also clearly defined

M.A. Cohen & Co.'s status and obligations, stating that the Taubman Parties engaged M.A. Cohen & Co. "as an independent contractor to assist in the negotiation of the current review of rent under the Ground Lease" and that M.A. Cohen & Co.'s services would be complete "[u]pon completion of the rental review process" (a process that was completed more than two years before the Taubman-Terramar Sale). A889. Additionally, M.A. Cohen & Co.'s right to payment of consulting fees was subordinate to the return of capital contributions made to Limited or Lending by Ms. Taubman and her affiliates. A897. The trial court did not account for these terms, which show that at no time did M.A. Cohen & Co. (or the Trust) have any of the critical voting or control rights that are essential to true equity ownership – and, accordingly, that neither Mr. Cohen nor the Trust had authority to dictate the material terms of the Terramar-Limited Transaction negotiated two years later, including the formation of the Company as a Delaware entity. In summary, *M.A. Cohen & Co.'s* performance of brokerage services in connection with the Taubman-Terramar Sale cannot reasonably support an inference that *the Trust* "consciously chose to incorporate the Company as a Delaware entity." Mem. Op. at 24.

(3) *The Trial Court's Inferences Are Not Reasonably Drawn From The Record.*

Other facts cited by the Court of Chancery fail to support the inferences it drew to support its holding. For example:

- Relying on Section 5.4(b) of the Operating Agreement, the court inferred that the Trust played a "substantial role" in the Taubman-Terramar Sale because Mr. Cohen "bargained for a unique economic benefit in the form of an exclusive right to broker future financings for Seaport Village." Mem. Op. at 18. However, the Operating Agreement provides that the Company will engage *M.A. Cohen & Co.* as its financing broker and neither contemplates nor promises any compensation to *the Trust*. A227-228 (§ 5.4(b)).

- This purportedly "unique benefit," which was important to the *Taubman Parties* to avoid forgiveness of debt tax liability with respect to potential debt refinancing, only obligated the Company to pay *below-market fees* to M.A. Cohen & Co. (with limited exceptions, which never occurred). *Id.* Moreover, it is ironic that the court referenced the "exclusive mortgage broker" opportunity for M.A. Cohen & Co. given the fact that Terramar breached its obligation to engage M.A. Cohen & Co. for a refinancing transaction in 2010 so that Terramar could refinance inexpensive third party debt with its own capital at exorbitant rates. A984-985.

- The trial court's analysis did not consider evidence from the Prior Action demonstrating that M.A. Cohen & Co. acted solely as the broker in the Taubman-Terramar Sale, while Ms. Taubman and her entities engaged their own counsel (Michael Freeman) and tax advisor (Brian Shapiro). *See, e.g.*, A480-481; A537; A561-563; A727. Instead, the court cited testimony from Ms. Taubman that Mr. Cohen "was the one that was negotiating the deal" (Mem. Op. at 18) without considering that, in the same deposition, Ms. Taubman confirmed that Mr. Freeman represented her as counsel in connection with the transaction. A492.

- The court accepted at face value prior deposition testimony offered misleadingly by Terramar in an effort to portray Mr. Cohen as having greater influence in

> negotiations than he actually did. The court cited (Mem. Op. at 18) the recollection of Terramar's deal attorney, Kevin Stipanov, that "[m]ost of the conversations about deal terms and the transaction structure and such were had with Mr. Cohen." A538. In the same deposition, however, Mr. Stipanov testified that Mr. Freeman and Mr. Shapiro acted as Ms. Taubman's counsel and tax advisor, respectively (A537); thus, Mr. Stipanov's testimony concerning Mr. Cohen's involvement is entirely consistent with M.A. Cohen & Co.'s role as a broker.

Terramar had access to the full discovery record in the Prior Action, including documents produced by M.A. Cohen & Co. and the Trust and Mr. Cohen's deposition testimony. Nonetheless, Terramar could put forward nothing more than isolated, mischaracterized quotations from depositions and a single e-mail in arguing that the Trust participated in forming the Company. This scant evidence does not support – but, rather, contradicts – the trial court's inference that the Trust "played a meaningful role" in deciding to form the Company as a Delaware LLC. Without proof that the Trust "transacted business" in Delaware through the Company's formation, there is no statutory authority under Section 3104 for subjecting the Trust to the personal jurisdiction of the State's courts. *See EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *7 (Del. Ch. Sept. 2, 2008) (rejecting personal jurisdiction over "a minority member of a limited liability company … in the absence of any facts suggesting [defendant] participated in selecting Delaware as the state of [the LLC's] formation, or otherwise actively

participated in its formation, beyond taking an indirect interest in a minority membership").

b) *Terramar's Declaratory Judgment Claim Does Not "Arise From" The Company's Formation Under Delaware Law.*

Section 3104(c) is clear – it authorizes personal jurisdiction over a non-resident defendant only for causes of action "*arising from*" the acts enumerated therein, including the transaction of business "*in the State*." 10 *Del. C.* § 3104(c)(1) (emphasis added). Delaware courts "have been careful not to construe the statute so broadly as to 'break[] the necessary connection between statutory words and common usage of the English language.'" *EBG Holdings LLC*, 2008 WL 4057745, at *5 (quoting *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *2 (Del. Ch. July 10, 1991)). Therefore, Section 3104(c)(1) "only allows jurisdiction over causes of action that are *closely intertwined with the jurisdictional contact*." *In re Mobilactive Media, LLC*, 2013 WL 297950, at *28 (Del. Ch. Jan. 25, 2013) (emphasis added). *See also LaNuova D & B, S.p.A.*, 513 A.2d at 768 (the "single act" provisions of Section 3104 "supply the jurisdictional basis for suit *only with respect to claims which have a nexus to the designated conduct*") (emphasis added).

Even if the Trust participated meaningfully in forming the Company as a Delaware LLC in 2002 (which, as explained above, it did not), that purported

jurisdictional act has no logical or causal connection with Terramar' declaratory judgment claim. Terramar seeks a declaration concerning acts that took place no earlier than *December 2015*, when Terramar purported to activate the "put" – *more than thirteen years after the Company was formed*. *See* A141.

(1) *The Company's Formation Is Not Alleged To Have Been Wrongful.*

In cases where Delaware courts have found that the formation of Delaware business entities was a "transaction of business" in the State under Section 3104(c)(1), the act of creating the entity through a filing with the Secretary of State was taken by a non-resident defendant for the purpose of *effectuating or facilitating* wrongful conduct giving rise to the plaintiff's cause of action. *See Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1196 (Del. Ch. 2010) ("Forming a Delaware entity *for the purpose of engaging in a [challenged] transaction* constitutes the 'transaction of business' within the State of Delaware sufficient to confer specific jurisdiction over the party forming the entity under Section 3104(c)(1).") (emphasis added); *Connecticut Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011) ("[A] single act of incorporation, *if done as part of a wrongful scheme*, will suffice to confer personal jurisdiction under § 3104(c)(1).") (emphasis in original); *Cairns v. Gelmon*, 1998 WL 276226, at *3 (Del. Ch. May 21, 1998) (holding that, where defendants' formation of a Delaware corporation to effectuate a challenged license transaction was "*central to [plaintiffs']*

claims of wrongdoing, … that single act suffices to constitute the 'transaction of business' in Delaware under 10 *Del. C.* § 3104(c)(1)") (emphasis added).

While the trial court's "nexus" analysis relied heavily on this Court's holding in *Papendick*, that opinion reaffirms the principle that a non-resident defendant may not be subject to personal jurisdiction in Delaware unless the defendant's act of creating a Delaware entity is itself challenged as conduct giving rise to the plaintiff's cause of action. Specifically, the *Papendick* Court upheld personal jurisdiction over a foreign defendant because the defendant's creation of a Delaware subsidiary was an "integral component" of the scheme through which the defendant ("RB") was alleged to have wronged the plaintiff:

> RB came into the State of Delaware to create, under the Delaware Corporation Law, a subsidiary corporation for the purpose of implementing its contract with B-W and accomplishing its acquisition of B-W stock. RB utilized the benefits and advantages of Delaware's Corporation Law for the creation of RBNA to be the vehicle for channeling to B-W the purchase money for the B-W stock and for becoming the recipient of the B-W stock. … We conclude that RB's ownership of RBNA stock was the result of RB's purposeful activity in Delaware as an *integral component of its total transaction with B-W to which the plaintiff's instant cause of action relates.*

410 A.2d at 152 (emphasis added).

Terramar did not allege – and the Court of Chancery did not hold – that the Company's formation itself was wrongful or that the Company was created as part of an unlawful scheme. In fact, Terramar's complaint does not allege that the Trust

has committed *any* wrongful acts; rather, it merely seeks a declaratory judgment concerning *Terramar's* desired rights under the Operating Agreement. Section 3104 may not be used to force a foreign defendant to defend declaratory judgment claims that neither arise from the defendant's own conduct nor allege that the defendant formed an entity under Delaware law for unlawful purposes.

(2) *There Is No Reasonable "Nexus" Between An LLC's Formation And Future Claims Relating To The Members' Contractual Relations.*

The Court of Chancery acknowledged that Section 3104(c)(1) requires a "nexus between the formation of the Delaware entity and the cause of action asserted in the lawsuit." Mem. Op. at 12. However, the trial court's finding of a causal connection between the Company's formation and Terramar's declaratory judgment claim, relating to events occurring thirteen years after the Company was formed, expands the "nexus" requirement beyond any reasonable bounds set by this Court.

The Court of Chancery found a causal link between the Company's formation as a Delaware LLC and Terramar's claim filed fourteen years later because "formation of the Company … 'set in motion a series of events which form the basis for the cause of action before the court.'" Mem. Op. at 17 (quoting *Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155, at *7 (Del. Ch. Apr. 27, 2012), *aff'd*, 62 A.3d 1224 (Del. 2013)). Under this reasoning, however, *any* minority member of a Delaware LLC would be subject to personal jurisdiction in Delaware, under Section

3104(c)(1), for *any* claim relating to the LLC or its members – based on nothing more than the LLC's existence under Delaware law, since the entity's formation necessarily would have "set in motion a series of events" leading to the claim.[4]

This expansive view of specific jurisdiction runs contrary to prior Court of Chancery precedent. In *Connecticut General Life*, a Delaware limited partnership asserted a third-party claim for breach of fiduciary duties against a non-resident limited partner and alleged that the third-party defendant, by participating in the limited partnership's formation, "transacted business" in Delaware for the purposes of establishing personal jurisdiction under Section 3104(c)(1). *See* 2011 WL 5222796, at *1-2. In analyzing the third-party plaintiff's jurisdictional argument, the Court of Chancery noted that "merely participating in the formation of a Delaware entity, without more, does not create a basis for jurisdiction in Delaware.

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[4] The *Microsoft* opinion cited by the trial court quoted language from *Haisfield v. Cruver*, 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994) ("The 'arising from' language [in Section 3104(c)] requires the defendant's act set 'in motion a series of events which form the basis for the cause of action before the court."). Neither opinion, however, applied Section 3104(c) beyond the rational bounds set by this Court's precedent; in fact, both cases recognized that creation and use of Delaware entities to further a non-resident defendant's *wrongful conduct* is essential to exercising personal jurisdiction under the long-arm statute. *See Haisfield*, 1994 WL 497868, at *4 (asserting personal jurisdiction over non-resident defendants who were alleged to have usurped corporate opportunities by selling products to customers located in Delaware); *Microsoft*, 2012 WL 1564155, at *8 (authorizing personal jurisdiction over non-resident defendant where "[t]he challenged asset transfers were accomplished, in part, by [defendant's] incorporation of four operating companies, including [Delaware corporations], which served as counterparties to the asset transfers").

Instead, the formation must be 'an integral component of the total transaction to which plaintiff's cause of action relates.'" *Id.* at *2 (quoting *Shamrock Holdings of California, Inc. v. Arenson*, 421 F. Supp.2d 800, 804 (D. Del. 2006)). Applying this principle, the court held there was no basis for jurisdiction under Section 3104(c)(1), as the Delaware entity "at the time of its inception, was not part of any untoward activity" and "the bases of the claims asserted against [the third-party defendant] do not relate to the formation of the [entity] in any direct way." *Id.* Rather, the Court of Chancery found, the claims "only relate to [the entity's] formation in *the most attenuated way possible* – that [the entity] *must have existed* in order for [the third-party defendant] to have damaged it in the way alleged." *Id.* (emphasis added). This, however, is precisely the causal argument advanced by Terramar and adopted by the court below – *i.e.*, that the parties' alleged dispute relating to conduct occurring in 2015 never would have arisen had the Company not been created thirteen years earlier.

The trial court here declined to follow *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156 (Del. Ch. May 7, 2008), even though its holding squarely supports dismissal. In *Fisk Ventures*, a member of a Delaware LLC alleged a claim for breach of an LLC agreement against a non-resident individual co-member of the LLC. *See id.* at *6. The Court of Chancery, however, held that the individual member was not subject to personal jurisdiction in Delaware, even though he "caused [the entity] to

become a Delaware LLC and demanded that its governing contracts utilize Delaware law" (*id.* at *7) – far more than the Trust's alleged "participation" in forming the Company. Specifically, the *Fisk Ventures* court ruled that the individual's decision to create an LLC under Delaware law did not support personal jurisdiction under Section 3104(c) because the claims alleged against him "have nothing to do with the formation of the Company." *Id.* The Court of Chancery should have reached the same holding with respect to Terramar's claim against the Trust in this action.

After the Memorandum Opinion in this action was issued, another Vice Chancellor applied a narrower view of the "nexus" requirement to hold that Section 3104(c)(1) does not support personal jurisdiction over a non-resident managing member of a Delaware LLC who allegedly participated in a merger between two Delaware LLCs and filed corporate documents in Delaware. *See LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2017 WL 3912632, at *5-6 (Del. Ch. Sept. 7, 2017). This and the other cases cited above – where the Court of Chancery rejected personal jurisdiction over parties with far more involvement than the Trust in forming entities under Delaware law – confirm that the "nexus" analysis under Section 3104(c)(1) is far narrower than that employed here. If not reversed, the trial court's holding will establish precedent under which *any* non-resident, initial member of a Delaware LLC, no matter how minimal its equity interest or management responsibility, can be forced to incur the burdens of litigating in a

foreign jurisdiction whenever a dispute arises with the manager (who, as here, often has greater resources than the member to fund litigation efforts) over the manager's rights and obligations.

2. Subjecting The Trust To Personal Jurisdiction Under Section 3104 In This Action Violates Constitutional Due Process Rights.

It is well established that, under the U.S. Supreme Court's holding in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the mere ownership of equity in a Delaware business entity is not a sufficient "minimum contact" with the State to allow a Delaware court, consistent with Constitutional due process, to exercise personal jurisdiction over a non-resident defendant. *See, e.g.*, *Computer People, Inc. v. Best Int'l Grp., Inc.*, 1999 WL 288119, at *9 (Del. Ch. Apr. 27, 1999); *OneScreen, Inc. v. Hudgens*, 2010 WL 1223937, at *4 (Del. Ch. Mar. 30, 2010). The trial court's holding here, however, forces a non-resident member of a Delaware LLC, with a passive interest and no management authority, to defend in Delaware any claim relating to its relationship with other members at any time during the LLC's existence – based on nothing more than the fact of the LLC's creation. This is directly contrary to *Shaffer* and existing Delaware law.

a) ***Litigating In Delaware Threatens The Trust With Substantial Burdens.***

The U.S. Supreme Court recently recognized that the "primary concern" in evaluating the constitutionality of specific jurisdiction is "the burden on the

defendant." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017). This is consistent with *Papendick*, where this Court evaluated the relative burdens – as are present here – between a well-funded, large commercial enterprise and an individual contractual counter-party. *See* 410 A.2d at 153.

There can be no dispute that subjecting the Trust to personal jurisdiction in this action will unduly and unnecessarily expose it to substantial burdens. The fact that Terramar filed a pre-emptive declaratory judgment action for the express purposes of forum-shopping, imposing these burdens upon the Trust and depriving the Trust of its right to pursue relief in California for Terramar's breaches of its fiduciary and contractual duties, only further supports dismissal. *See Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *4 (Del. Super. Apr. 25, 1989) ("The use of a declaratory judgment action to anticipate and soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a prior filed action.") (citing *Air Prods. & Chems., Inc. v. Lummus Co.*, 252 A.2d 545 (Del. Ch. 1968), *rev'd on other grounds*, 252 A.2d 543 (Del. 1969)).[5]

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[5] After the Memorandum Opinion was issued, Terramar moved to strike the Trust's claim in California challenging Terramar's right to sell the Company's assets on the grounds that no possible interpretation of the Operating Agreement supports the Trust's position. A1450-1463. The motion to strike filed in California demonstrates

b) ***The Trust's Membership Interest In The Company Does Not Establish "Minimum Contacts" With Delaware.***

This case is readily distinguished from precedent where a foreign defendant's creation of a wholly owned subsidiary under Delaware law was found to satisfy a "minimum contacts" inquiry. *Cf. Papendick*, 410 A.2d at 152; *AeroGlobal Capital Management, LLC*, 871 A.2d at 440-41. As this Court has explained, "[t]he decision of the foreign parent corporation to maintain a direct and continuing connection between Delaware and itself, *as the owner of a Delaware subsidiary*, was found to be a 'minimum contact' of paramount importance" in *Papendick* and its progeny. *Sternberg v. O'Neil*, 550 A.2d 1105, 1120 (Del. 1988) (emphasis added). Choosing to pursue business through a 100% owned Delaware subsidiary is a far cry from the situation here, where the Trust obtained a non-controlling minority interest in an entity that others opted to form under Delaware law.

Instead, this case is analogous to those opinions where Delaware courts rejected personal jurisdiction over non-resident equity holders who had no contacts with the State other than their minority holdings in a Delaware entity, even where the defendants "helped co-found a Delaware LLC as well as negotiated and executed" an LLC agreement. *Kahuku Holdings, LLC v. MNA Kahuku, LLC*, 2014

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that Terramar initiated this action in Delaware not because it believed there was a legitimate dispute over the Operating Agreement's terms, but in an effort to force the Trust to litigate in a foreign jurisdiction.

WL 4699618, at *6 (Del. Ch. Sept. 15, 2014). *See also OneScreen, Inc.*, 2010 WL 1223937, at *6 (finding non-resident defendants' ownership of Delaware corporation's shares did not establish minimum contacts with the State where "this action challenges transactions that only incidentally involve stock in a Delaware corporation"); *Steinman v. Levine*, 2002 WL 31761252, at *10 (Del. Ch. Nov. 27, 2002) (holding that non-resident defendants' controlling ownership stake in a Delaware corporation did not satisfy minimum contacts analysis where "[e]ssentially every transaction in this lawsuit occurred in California"), *aff'd*, 822 A.2d 397 (Del. 2003). As this precedent demonstrates, even if the Trust had participated in the Company's formation (which it did not), that participation would not constitutionally require it to defend claims in a foreign jurisdiction that have no causal connection to that act.

In upholding long-arm jurisdiction over the Trust, the Court of Chancery opined that the Trust "should have reasonably anticipated" defending claims concerning the Company in Delaware. Mem. Op. at 26. To the contrary, the record shows that when M.A. Cohen & Co. or the Trust negotiated and contracted directly with Terramar, the parties never availed themselves of Delaware law but consistently chose the law of California to govern their affairs. For example, the only document Mr. Cohen signed individually at closing, an Indemnification and Security Agreement, is governed by California law. A393. The same is true with respect to

the two prior settlement agreements executed by Terramar and the Trust in 2008 and 2015. A954. The second of these settlement agreements also states unambiguously that any action related to its enforcement or interpretation must be brought in the Superior Court of California. A920. In fact, Terramar relies upon the 2015 settlement agreement to contend that the Trust may not challenge Terramar's proposed distribution of liquidation proceeds (A141); however, the scope and effect of the settlement agreement *must* be decided by a California court. *See RWI Acquisition LLC v. Todd*, 2012 WL 1955279, at *7-10 (Del. Ch. May 30, 2012); *BW Piezo Holdings LLC v. Phillips*, 2017 WL 1399746, at *4-5 (Del. Super. Apr. 18, 2017) (same).

II. THE TRIAL COURT INCORRECTLY ALLOWED JUDICIALLY NOTICED FACTS TO INFLUENCE ITS RULING.

A. QUESTIONS PRESENTED.

Did the Court of Chancery comply with Delaware Rule of Evidence 201, and the Trust's due process rights, when it took judicial notice of the Prior Action, even though the Trust was not a party to the Prior Action and had no opportunity to offer or rebut evidence at trial in that proceeding? A1122-1124.

B. SCOPE OF REVIEW.

A trial court's decision to take judicial notice of facts pursuant to Rule of Evidence 201 is reviewed for an abuse of discretion. *See Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 226 (Del. 2005).

C. MERITS OF ARGUMENT.

The Court of Chancery wrote that, in conducting its analysis, it took "judicial notice of prior proceedings in a related action between Terramar and a third member of the Company" (Ex. A at 2) – *i.e.*, the Prior Action. The Trust was not a party to the Prior Action, and by the time it was litigated the litigants (Terramar and the Taubman Parties) had already engaged in various proceedings in which they advocated positions adverse to Mr. Cohen, M.A. Cohen & Co. and the Trust. Neither Terramar nor the Trust requested that the trial court take judicial notice of any facts, and the court gave no notice before issuing the Memorandum Opinion of its decision to do so.

The Delaware Rules of Evidence require that a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b). The Court of Chancery, however, relied upon facts and inferences adduced from evidence presented in the Prior Action without providing notice to the Trust, as required by Rule 201(e). *See* D.R.E. 201(e) ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."). This Court has admonished such *sua sponte* use of judicial notice by trial courts. *See Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008) ("[W]hile a judge may take judicial notice of a fact outside the record, that fact must not be subject to reasonable dispute and the parties must be given prior notice and an opportunity to challenge judicial notice of that fact."); *Barks v. Herzberg*, 206 A.2d 507, 509 (Del. 1965) ("[A] trial judge should rarely, if even, inquire into facts outside of the record on his own motion. If it is to be done, it should be done only with full notice to counsel and the opportunity to them to explain or rebut the matters ascertained."). When a tribunal bases a decision on information or evidence outside the record without complying with Rule 201, as here, it "constitutes a due process violation." *City of Wilmington v. Fraternal Order of Police Lodge 1*, 2016 WL 4059237, at *6 (Del. Ch. July 29, 2016).

In denying reargument, the trial court identified the matters of which it took judicial notice. *See* Ex. B, ¶ 4. Beyond these, however, the Memorandum Opinion contains several statements that were not drawn from the record in this action but suggest that they were influenced by evidence the trial court heard, and impressions the Vice Chancellor made, in the Prior Action. For example:

- In comparing this action to *Papendick*, the trial court described Terramar's claim as one for "*breach of contract*." Mem. Op. at 18 (emphasis added). Nowhere in its complaint, however, does Terramar allege that the Trust breached the Operating Agreement or engaged in any wrongdoing. This suggests, therefore, that the trial court incorrectly inferred from its views developed during the Prior Action that the Trust acted wrongfully in its dealings with Terramar.

- Without citation to the record, the trial court wrote that Ms. Taubman formed Lending as a Delaware LLC "[w]ith Cohen's assistance." Mem. Op. at 3. There is no evidence supporting this statement, and Terramar never offered any. In any event, since Lending was formed by the Taubman Parties in 2000, two years before the Trust was created, Lending's formation cannot possibly be attributed to the Trust.

- The trial court wrote: "In August 2013, the California court held that any claim for dissolution must be brought in Delaware." *Id.* Before filing the Prior Action, Limited's *statutory* claim for dissolution of the Company under the LLC Act was dismissed by the California court. The California court's ruling did not address the parties' rights under the Operating Agreement.

- The trial court stated that, at the time of the Taubman-Terramar Sale, Mr. Cohen "had an existing and ongoing professional relationship with Taubman and Limited." *Id.*

> at 17. As explained above, *M.A. Cohen & Co.* (not the Trust) had a specifically defined contractual engagement with the Taubman Parties as a consultant. Moreover, as reflected in the interpleader complaints filed by Terramar in California, neither Mr. Cohen, M.A. Cohen & Co. nor the Trust have had any "professional relationship" with the Taubman Parties since 2003.

Finally, the trial court opined that it would be an efficient forum for adjudicating Terramar's declaratory judgment claim because it "is familiar with the parties and the underlying facts through its adjudication of the [Prior] Action." Mem. Op. at 28. Before this action, however, the Court of Chancery never had any dealings with the Trust, M.A. Cohen & Co. or Mr. Cohen. Any "familiar[ity] with the parties and the underlying facts" was formed by evidence presented by parties adverse to the Trust's interests (Terramar and the Taubman Parties), in a proceeding in which the Trust did not participate. The accuracy of the court's fact findings in the Prior Action necessarily is subject to dispute by the Trust, since the Trust was not a party to that proceeding and had no opportunity to offer its own evidence to the Vice Chancellor or cross-examine witnesses. Instead, the fact record in the Prior Action – which, in any event, relates to conduct predating the facts alleged in Terramar's declaratory judgment action – was developed by parties who have been consistently hostile to Mr. Cohen, M.A. Cohen & Co. and the Trust. The Trust cannot be bound under *res judicata* principles by factual findings made in the prior action, *see E.B.R. Corp. v. PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973), and

the Court of Chancery abused its discretion by taking judicial notice of them in this matter. *See Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) ("Judicial notice is only proper where 'sufficient notoriety attaches to the fact to make it proper to assume its existence without proof …. [I]f there [is] any possibility of dispute the fact cannot be judicially noticed.'") (quoting *Communist Party of U.S. of Am. v. Peek*, 127 P.2d 889, 896 (Cal. 1942)).

CONCLUSION

As explained herein, Section 3104 was not intended to subject minority equity holders in Delaware business entities to personal jurisdiction in Delaware on the grounds that their ownership of equity might be construed as "transacting business" within the State. Terramar attempted to misuse long-arm jurisdiction pre-emptively and to force the Trust to incur unreasonable burdens to defend litigation in a forum across the country from California, where the parties are located, where the underlying facts occurred, and where the parties agreed they would resolve certain disputes arising between them. The Court of Chancery, by denying the Trust's motion to dismiss, extended the jurisdictional reach of Section 3104 beyond the boundaries set by this Court and Constitutional principles of due process. Accordingly, the Trust respectfully requests that the Court reverse the holding of the court below and dismiss this action in its entirety.

*_/s/ Thad J. Bracegirdle_*
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