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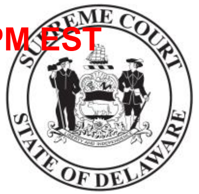

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

**APPELLANT'S REPLY BRIEF**

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Dated: January 23, 2018

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## INTRODUCTION

As the Trust[1] explained in its Opening Brief, this *de novo* appeal will determine whether the managing member of a Delaware LLC may force a minority member, without any management responsibilities or contacts with Delaware other than its passive investment, to defend a pre-emptive claim for declaratory judgment filed in Delaware solely to grab jurisdiction. Terramar's objectives in purporting to assert long-arm jurisdiction over the Trust are transparent: (1) to impose the significant burdens of cross-country litigation upon the Trust, which is far less capable of absorbing such burdens than Terramar, a billion-dollar investment firm; (2) to deny the Trust its ability and right, as the natural plaintiff in this dispute, to seek relief in California; and (3) to secure jurisdiction in the same forum, and before the same Vice Chancellor, as the Prior Action which resulted in a positive outcome for Terramar (but which related to facts predating the current dispute and to which the Trust was not a party).

This action represents only the latest abusive tactic pursued by Terramar, which has a history of predatory conduct against the Company's minority members, including the Trust. Originally, Terramar was given an opportunity to participate in Seaport Village not merely as a source of financing (as Terramar claims in this

[1] Unless otherwise stated, capitalized terms shall have the meanings ascribed to them in Appellant's Opening Brief (cited herein as "OB"). Appellee's Answering Brief is cited herein as "AB."

action), but as a well-capitalized and experienced developer who promised to manage the property for the benefit of all members and secure a valuable Phase I ground lease extension. In exchange for this commitment, Terramar acquired a controlling position in Seaport Village, consisting of 50% of Lending, an entity holding debt secured by Seaport Village and worth $14 million, and 50% of the economic benefits flowing from the Seaport Village leasehold through the Company. Terramar, however, never lived up to its promises – Terramar never obtained a Phase I ground lease extension, choosing instead to breach its fiduciary and contractual duties by, among other things, collecting an estimated $90 million of cash flow from Seaport Village, including more than $45 million in distributions to itself while making no distributions to its co-members.

The full scope of Terramar's misconduct is detailed in the Trust's complaint filed in California. A976-999. Ultimately, the present dispute arises from Terramar's actions and omissions beginning in 2015, when Terramar purported to activate a "put" right in the Operating Agreement and frustrated the Trust's efforts to execute the "put." Terramar did so in an effort to dissolve the Company without its co-members' consent and sell Seaport Village to generate an additional estimated $50 million for itself without sharing any of the proceeds.

Terramar filed this action in furtherance of that scheme. Now, however, Terramar claims that it sued the Trust in Delaware simply to protect its rights under

the Company's Operating Agreement, going so far as to blatantly mischaracterize its declaratory judgment claim as one for *breach of contract* against the Trust. AB at 45. Terramar alleges no such claim in this action, and does not allege that the Trust engaged in any actionable conduct. Contrary to Terramar's assertions, the Trust cannot "thwart" Terramar's efforts to dissolve the Company other than to pursue relief for the harm Terramar has caused. If Terramar truly wanted to "exit" the Company, it would have simply dissolved the Company. Instead, anticipating that the Trust would challenge these actions (among others) through litigation in California, Terramar pre-emptively filed a declaratory judgment action in Delaware in a classic example of forum-shopping.

This Court should not permit Terramar to use Delaware's long-arm statute, 10 *Del. C.* § 3104, to force the Trust to litigate here. There is no logical connection, as Section 3104 requires, between the Company's formation in 2002 and Terramar's actions, beginning in 2015, giving rise to the parties' dispute. Therefore, Terramar's Answering Brief is largely devoted to arguing that the Trust "transacted business" in Delaware, namely by (1) trying to impute M.A. Cohen & Co.'s brokerage activities to the Trust, and (2) falsely describing events involving M.A. Cohen & Co. at or prior to the Company's creation. However, those assertions relating to events in 2002 and 2003 (even if true, which they are not) have no relevance to Terramar's

declaratory judgment claim arising from events beginning in 2015 and cannot establish the requisite "nexus" with the act of forming the Company.

Terramar relies upon a false narrative surrounding the Taubman-Terramar Sale in an attempt to attribute formation of the Company to the Trust. Terramar's Answering Brief is (1) replete with false statements that have no evidentiary support, and (2) contradicted by the documents executed by the parties and cited in the Trust's Opening Brief. The record before the Court – rather than Terramar's falsehoods and distortions of the record – proves that the Trust played no role, let alone a "meaningful" one, in selecting Delaware as the Company's corporate domicile. Accordingly, there is no basis under Section 3104 to subject the Trust to personal jurisdiction and the ruling below should be reversed.

## ARGUMENT

### I. TERRAMAR CANNOT SATISFY ITS BURDEN TO ESTABLISH PERSONAL JURISDICTION OVER THE TRUST.

As the plaintiff, Terramar bears the burden "to make a specific showing that the Delaware court has jurisdiction under the long-arm statute." *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984). This requires Terramar to 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). Although the Court of Chancery has held that a *prima facie* showing of personal jurisdiction will suffice, *see Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007), this does not relieve a plaintiff of its obligation to establish, through evidence, a basis for personal jurisdiction over a non-resident defendant. *See Fahey-Hosey v. Capano*, 1999 WL 33117229, at *1 n.3 (Del. Super. Nov. 1, 1999) (defining "*prima facie* case" as "the plaintiff's burden of producing enough evidence to permit the fact-trier to infer the fact at issue"). When a non-resident defendant moves to dismiss under Rule 12(b)(2), "the burden that the pleader is said to bear does not refer to a pleading burden, but rather to the evidentiary burden of proof on the issue of defendant's amenability to suit." *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 538 (Del. Ch. 1991).

Terramar cannot meet this burden. Terramar attempts to blur the well-founded legal distinctions between Mr. Cohen, M.A. Cohen & Co. and the Trust by falsely imputing to the Trust actions purportedly taken by Mr. Cohen on behalf of M.A. Cohen & Co. and thus arguing that the Trust somehow "purposely availed" itself of Delaware law in a manner that equates to "transacting business" in the State as required by Section 3104. In the absence of any evidence that the Trust actually formed the Company, Terramar tries to equate the Trust's passive, minority investment in a Delaware LLC with a conscious participation in that entity's "formation" – the only act with any connection to Delaware upon which Terramar's personal jurisdiction argument relies. There is no factual support for Terramar's allegations and, notably, Terramar has never offered any testimony or affidavits from any principals at Terramar concerning events at the time of the relevant transactions. Instead, Terramar cherry-picks a handful of deposition quotes and a single e-mail from discovery in the Prior Action and distorts them to overstate Mr. Cohen's role in the complex Taubman-Terramar Sale. Terramar then attributes Mr. Cohen's actions as a broker, and as an agent of M.A. Cohen & Co., to the Trust even though there is no record evidence that Mr. Cohen, M.A. Cohen & Co. or the Trust took *any* action to form the Company under Delaware law or choose Delaware as the Company's corporate domicile.

There also is no basis for long-arm jurisdiction over the Trust because Terramar's declaratory judgment claim does not "arise from" the Company's formation. Terramar does not allege that the Trust participated in forming the Company for any wrongful purposes (or that the Trust in any way acted unlawfully), as Delaware law requires. There also is no logical "nexus" between the Company's formation in 2002 and the claim Terramar filed fourteen years later. If the trial court's holding is not reversed, then *any* minority member of a Delaware LLC will be subject to long-arm jurisdiction under Section 3104 for *any* declaratory judgment claim relating to the LLC solely because, but for the Company's formation, the members' relationship with each other would not exist. No prior Delaware opinion has subjected a non-resident, minority LLC member to personal jurisdiction under this scenario, and Terramar offers no such authority.

### A. SECTION 3104 PROVIDES NO STATUTORY BASIS FOR PERSONAL JURISDICTION OVER THE TRUST.

Section 3104(c)(1) authorizes suit against a non-resident who "[t]ransacts any business or performs any character of work or service in the State." 10 *Del. C.* § 3104(c)(1). Personal jurisdiction is proper, however, only "[a]s to a cause of action … *arising from*" the transaction of business in Delaware. *Id.* (emphasis added). Nothing in Terramar's Answering Brief satisfies this plain statutory language.

### 1. The Record Shows That The Trust Did Not "Transact Business" In Delaware.

Terramar contends that Delaware courts "routinely recognize that forming a Delaware entity constitutes the transaction of business within Delaware in a manner that is sufficient to establish specific personal jurisdiction under [Section] 3104(c)(1)." AB at 20. Applying the long-arm statute based on "forming a Delaware entity," however, is not nearly as straightforward as Terramar suggests. Specific jurisdiction must still relate to the "transaction of business" within Delaware – namely, the act of creating an entity under Delaware law. *See Sample v. Morgan*, 935 A.2d 1046, 1057 (Del. Ch. 2007). Thus, when a foreign defendant creates a wholly-owned Delaware subsidiary to effectuate an unlawful transaction, Delaware courts have relied on Section 3104(c)(1) to subject that party to personal jurisdiction. *See*, *e.g.*, *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439-40 (Del. 2005); *see also Dow Chem. Co. v. Organik Kimya Holding A.S.*, 2017 WL 4711931, at *10 (Del. Ch. Oct. 19, 2017) (holding that creating a wholly-owned Delaware subsidiary "suffices to show" that the non-resident parent "participated in the formation" of the entity for purposes of establishing personal jurisdiction).

When a Delaware entity was not formed as a wholly-owned subsidiary of a foreign defendant, however, determining whether the defendant "transacted business" in the State requires a more fact-intensive inquiry considering, *inter alia*,

whether the defendant affirmatively selected Delaware as a corporate domicile. *See Dow Chem. Co.*, 2017 WL 4711931, at *10 (rejecting jurisdiction where plaintiffs "failed to offer any record evidence suggesting that the other Foreign Defendants played any role whatsoever in the decision to create" a Delaware entity); *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *7 (Del. Ch. Sept. 2, 2008) (rejecting personal jurisdiction "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").

The Trust's Opening Brief described the Taubman-Terramar Sale in detail, through record facts and supporting documentation, to prove that the Trust had no role in "forming" the Company or any other "transaction of business" in Delaware. In response, Terramar's Answering Brief is filled with unsubstantiated misstatements and distortions of the record and falsely attempts to portray the Trust – through the brokerage services performed by Mr. Cohen on behalf of M.A. Cohen & Co., a separate entity – as a "meaningful participant" in forming the Company as a Delaware LLC.

**a) *Terramar falsely claims that Mr. Cohen (and, by extension, the Trust) dictated material terms of the Taubman-Terramar Sale (AB at 2-3, 7, 12, 23).***

The record shows that neither Mr. Cohen, M.A. Cohen & Co. nor the Trust had any ownership interest in Seaport Village. Prior to the Taubman-Terramar Sale, the Taubman Parties owned 100% of both the leasehold (through Limited) and the refinanced Yasuda Bank debt (through Lending), and possessed 100% decision-making control over both entities. M.A. Cohen & Co. had nothing more than a consulting and advisory relationship with the Taubman Parties, who executed the Consulting Agreement in 2000 when M.A. Cohen & Co. agreed to accept a future 50% interest in net cash flow from Limited and Lending (after paying certain priorities) as consideration for waiving payment of significant fees owed for past professional services. A887-894.[2] The Consulting Agreement (which is expressly governed by California law, A895) made clear that M.A. Cohen & Co. was engaged by the Taubman Parties "as an independent contractor" with no "control or interest in" Limited or Lending and "no rights with respect to the governance or internal affairs of either of them." A889, A896.

[2] M.A. Cohen & Co.'s right to payment of a fee calculated as a share of future profits was in no way "equal" or "identical" to the Taubman Parties' valuable interests in Seaport Village. As evidenced by the final terms of the Taubman-Terramar Sale, the Taubman Parties sold a 50% interest in Lending, an entity holding debt secured by Seaport Village that was valued at $14 million. In exchange, Terramar paid $7 million to the Taubman Parties (and the Taubman Parties alone). A981.

Terramar also inaccurately suggests that M.A. Cohen & Co. was not merely acting as a broker, but as an authorized agent for the Taubman Parties and "the chief negotiator for the Trust/Limited side" of the transaction. AB at 10. Mr. Cohen did not, as Terramar claims, "admit[] under oath that he was involved in almost all aspects of the negotiations." *Id.* Rather, in the deposition Terramar cites, Mr. Cohen testified that his role was "*trying to broker the deal*," and explained how negotiating responsibilities for the Taubman Parties were delegated between Ms. Taubman, her attorney (Michael Freeman) and her tax advisor (Brian Shapiro). A728-729.

Terramar misleadingly claims that *Mr. Cohen* received a substantial sum "[w]hen the transaction was successfully completed." AB at 12. This is untrue, as the Consulting Agreement obligated the Taubman Parties to pay certain sums to *M.A. Cohen & Co.* – not the Trust. M.A. Cohen & Co. earned this sum as consideration for past services rendered to the Taubman Parties prior to 2001. A1196. Although certain sums were paid prior to the Taubman-Terramar Sale, and certain additional sums were paid well after closing, the Taubman Parties never paid M.A. Cohen & Co. all amounts owed. The closing statement for the Taubman-Terramar Sale confirms that neither Mr. Cohen, M.A. Cohen & Co. nor the Trust received a single cent at closing. A1177-1181. Instead, the Trust received a 25% membership interest in the Company, subordinate to the $14 million equity position held by Lending (an entity owned exclusively by Terramar and the Taubman

Parties). A981-983; A1157. The Company itself had only nominal value, as reflected by its total capitalization of $10,000. A217. In fact, had Seaport Village been sold the day after the Taubman-Terramar Sale closed, the Trust would have received nothing.[3]

Terramar's assertions also are contradicted by its own prior statements. For example, when Terramar caused Lending to file an interpleader action in California against M.A. Cohen & Co. in 2004, its complaint alleged that, "in a series of complex and interrelated transactions," Terramar "acquired a controlling interest in the ownership of the commercial enterprises known as Seaport Village … *from San Diego Seaport Village, Ltd., and from Anne Taubman in her various representative and individual capacities*." A1168 (emphasis added). Nowhere did Terramar allege, as it does now, that M.A. Cohen & Co. or the Trust was a "seller" on equal footing with the Taubman Parties. While Terramar now asserts with purported certainty what it believes were the respective interests of the Taubman Parties, M.A. Cohen & Co., the Trust and Mr. Cohen, in 2004 it alleged in the interpleader action that Lending "is unable and unwilling to determine the validity of the conflicting demands" between those parties. A1169.

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[3] Upon a sale of Seaport Village, the Taubman Parties would have been obligated under the Consulting Agreement to pay a fee to *M.A. Cohen & Co.*, not the Trust. A889.

In 2005, Terramar caused the Company to file a second interpleader action in California against the Trust and M.A. Cohen & Co., and again alleged in its complaint that it was "unable and unwilling to determine the validity" of the parties' respective claims. A1173-1174. In the second interpleader, Terramar also admitted that M.A. Cohen & Co. claimed an interest in the Company's proceeds pursuant to the Consulting Agreement, but did not assert – as it does now – that Mr. Cohen, M.A. Cohen & Co. or the Trust had any claim to distributions on par with the Taubman Parties. A1174. When the parties resolved the interpleaders (along with other disputes) in 2008, the settlement agreement they executed stated expressly that Terramar acquired an interest in Seaport Village through a series of transactions with *the Taubman Parties*, as evidenced by no fewer than six separate contracts. A947. In the 2008 settlement agreement, Terramar did not represent that it acquired any interest in Seaport Village from Mr. Cohen, M.A. Cohen & Co. or the Trust; rather, the agreement states that "*[t]he Cohen Parties assisted in facilitating*" the Taubman-Terramar Sale. A948.[4]

[4] The 2008 settlement agreement also provided expressly that "[t]o the fullest extent possible, this Agreement shall be construed under and in accordance with the laws of the State of California … and all obligations of the Parties created hereunder are performable in Los Angeles or San Diego County, California." A954.

**b) *Terramar incorrectly claims that the Trust participated in forming the Company because it "does not exist separately" from Mr. Cohen, its trustee (AB at 22).***

Terramar suggests that, under California law, *any and every* act taken by Mr. Cohen, simply because he is a trustee, is a *de facto* act by the Trust – *even if Mr. Cohen acts on behalf of M.A. Cohen & Co*. Not surprisingly, California law does *not* impute to a trust all actions by its trustee. While the Trust here is an *irrevocable* trust, the opinion Terramar cites considered only whether a *revocable* trust was required to sell its interests in a partnership, under buy-sell provisions of the partnership agreement, when its trustee died. *See Presta v. Tepper*, 102 Cal. Rptr. 3d 12, 14 (Ct. App. 2009).

Terramar's argument also fails to acknowledge that the Trust was formed in June 2002, *after* acts which Terramar cites as evidence that the Trust "meaningfully participated" in negotiations. For example, Terramar touts as a key factual event a single e-mail by which Terramar's deal counsel forwarded to Mr. Cohen (in his capacity as a broker and an agent of M.A. Cohen & Co.) a copy of an earlier e-mail explaining various negotiating positions to counsel for the Taubman Parties. AB at 13. This forwarded e-mail, sent to M.A. Cohen & Co. on February 11, 2002 (A882) – months *before* the Trust even existed – cannot possibly establish that the Trust "meaningfully participated" in forming the Company under Delaware law.

**c) *Terramar mischaracterizes its acquisition of an interest in Seaport Village as a simple transaction, effectuated entirely through the Company's formation (AB at 7-8, 22).***

Terramar falsely suggests that the Company was the only vehicle through which it acquired a 50% interest in Seaport Village, attempting to imbue the Company's formation as a Delaware LLC with greater significance than it merits. Terramar ignores completely the facts set forth in the Trust's Opening Brief showing that Terramar obtained its rights and interest in Seaport Village through a complex series of transactions and contracts, only one component of which implicated the Company (and, thus, the Trust). The Index of Closing Documents prepared for the Taubman-Terramar Sale identifies no fewer than 90 separate documents, including the Company's Operating Agreement. A1157-1164. Nowhere in its Answering Brief does Terramar acknowledge that it acquired a 50% interest in Lending, a separate entity holding refinanced debt worth $14 million and in which neither Mr. Cohen, M.A. Cohen & Co. nor the Trust held any ownership.

Besides the Operating Agreement, the only other document executed by the Trust out of the 90 delivered at closing was an Indemnification and Security Agreement and Certificate of Representations and Warranties. A386-394. While Terramar argues that delivery of this document was "a material part of its consideration to enter into" the Taubman-Terramar Sale (AB at 10), the contract only provided standard representations and warranties from Mr. Cohen and the Trust

that Terramar has never claimed were breached (A388-389). Notably, the indemnity agreement (and every other contract exclusively between Terramar and Mr. Cohen, M.A. Cohen & Co. or the Trust) is governed expressly by California law. A393.

### 2. This Pre-Emptive Declaratory Judgment Action Does Not "Arise From" A Business Transaction In Delaware.

Section 3104's plain language permits 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). Terramar, however, stretches this requirement beyond its logical breaking point. Affirming the trial court's ruling will threaten all passive, minority members of Delaware LLCs with defending a pre-emptive declaratory judgment action filed by the managing member in Delaware, even if the minority members have no other contacts with the State and are not alleged to have taken any acts to the detriment of the managing member or the LLC. None of Terramar's arguments suggest otherwise.

Section 3104 requires a causal connection between a foreign defendant's use of Delaware law to form an entity and the plaintiff's theory of liability. This is reflected in the case law cited by the Trust where personal jurisdiction under Section 3104(c)(1) was predicated on the plaintiff's allegation that the non-resident defendant formed a Delaware entity with the intent of facilitating a broader, wrongful course of conduct. *See* OB at 27-28; *see also Dow Chem. Co.*, 2017 WL

4711931, at *10. While Terramar claims that the Trust's argument is "unsupported by Delaware law" (AB at 28), it offers no contrary authority. Terramar also cites no case law upholding personal jurisdiction under Section 3104(c)(1) where, as here, the formation of a Delaware entity was not alleged to have been wrongful.

Impliedly conceding that it must allege wrongful conduct to establish long-arm jurisdiction, Terramar strives mightily in its Answering Brief to re-cast its declaratory judgment claim – which alleges no actionable conduct by the Trust, seeks no damages against the Trust, and asks the trial court to opine on *Terramar's* desired rights under the Operating Agreement – as one relating to misconduct by *the Trust*. Remarkably, Terramar claims for the first time that "the *gravamen* of [its] complaint is for *breach of contract*" (*id.* at 45), despite the fact that ***Terramar has never pursued a breach of contract claim against the Trust or alleged that the Trust engaged in any actionable conduct***. This blatant mischaracterization demonstrates how far Terramar will go to obscure its own inequitable intentions. Unable to allege any wrongful actions by the Trust, Terramar commenced this action in Delaware not to seek any damages but to pre-empt the Trust's right to challenge Terramar's abusive conduct in another jurisdiction and to secure what Terramar perceives to be a sympathetic venue.

Terramar also cannot establish a temporal "nexus" between the Trust's alleged participation in forming the Company – which relies entirely on facts that

transpired in 2002 and 2003 – and the present dispute, which relates to Terramar's efforts, over a decade later, to misappropriate all value in Seaport Village for itself. The Trust's Opening Brief explained how, under the trial court's holding, *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 will *always* "set in motion a series of events" leading to the claim. OB at 28-29.

There is no causal connection between the Trust's execution of the Operating Agreement in 2003 and Terramar's request, in 2016, for judicial approval of Terramar's efforts to unilaterally sell Seaport Village without sharing proceeds with its co-members – other than the mere fact that, had the parties not entered into the Operating Agreement, the present dispute would not have arisen between them many years later. This, without more, cannot support personal jurisdiction under Section 3014 and compel non-resident members of a Delaware LLC, like the Trust, to litigate issues relating to the Operating Agreement in a foreign jurisdiction. *See Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *10 n.32 (Del. Ch. Mar. 31, 2003) (questioning whether "any claim for a later breach of terms of the governing instrument of an entity [should] be deemed to have the required nexus to

the original transaction in Delaware that gave legal life to that instrument as a legally viable contract").

### B. USING SECTION 3104 TO SUBJECT THE TRUST TO THE BURDENS OF LITIGATING IN A FOREIGN JURISDICTION VIOLATES CONSTITUTIONAL GUARANTEES OF DUE PROCESS.

Terramar never disputes that the Trust will be unfairly subjected to substantial burdens if it is compelled to defend Terramar's claim in Delaware.[5] Instead, Terramar attempts to distinguish controlling U.S. Supreme Court authority and argues that the burdens imposed upon the Trust are irrelevant to the Trust's due process rights. AB at 37-39. Terramar's arguments are unavailing, since the U.S. Supreme Court has stated unequivocally:

> In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." … *But the "primary concern" is "the burden on the defendant."*

*Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017) (emphasis added, citations omitted). Delaware courts are in accord. *See EBP Lifestyle Brands Holdings, Inc. v. Boulbain*, 2017 WL 3328363,

[5] Terramar's contention that the Trust did not identify these burdens in the proceeding below, and its argument that they are not properly before this Court on appeal (AB at 36), are unfounded. The Trust consistently urged the trial court to stop Terramar's abusive litigation tactics and its efforts to impose excessive burdens upon the Trust. A188-189; A205; A267-276; A910-913; A935-936.

at *7 (Del. Ch. Aug. 4, 2017) (noting, in analyzing due process implications under Section 3104, that "our law is clear that the primary focus of the analysis when considering competing interests is on the burden that litigating in plaintiff's chosen forum would impose on the defendant") (citing *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).[6]

Since the Trust's only conceivable contact with Delaware is its minority membership interest in the Company, this is not a case where the Trust "should 'reasonably anticipate' being required to defend itself" here. *AeroGlobal Capital Mgmt., LLC*, 871 A.2d at 440. Rather, the present dispute between Terramar and the Trust should be adjudicated in California for many reasons, including:

- California is the jurisdiction where the parties are located, where the Company conducts its business and where Seaport Village is located.
- California is the jurisdiction where all of the facts underlying the parties' dispute occurred.
- California is the jurisdiction whose law the parties overwhelmingly chose to govern their relationship, through contracts such as the Consulting Agreement and the Indemnity Agreement.
- California is the jurisdiction whose law governs a 2008 settlement agreement executed by Terramar and the Trust

[6] Contrary to Terramar's argument, *World-Wide Volkswagen* is entirely consistent with this analysis. In fact, the language from *World-Wide Volkswagen* quoted by Terramar makes clear that "the burden on the defendant" is "*always a primary concern*." 444 U.S. at 292 (emphasis added).

which incorporates a "Consent Agreement" addressing distribution priorities among the parties (A958-962).

- California is the jurisdiction where Terramar and the Trust expressly agreed they would litigate disputes arising under another settlement agreement they executed in 2015.

- California is the jurisdiction where Terramar previously commenced interpleader actions against the Trust and M.A. Cohen & Co. when it sought a judicial declaration concerning the parties' (and the Company's and Lending's) rights.

- California is the jurisdiction where the Trust currently is pursuing its own action against Terramar arising from Terramar's mismanagement of the Company, which is broader than and encompasses Terramar's pre-emptive declaratory judgment claim filed in Delaware.[7]

Notably, Terramar never claims that litigation in California would subject it to any burden – nor could it, since its principal place of business is and always has been there.

Instead, Terramar attempts to justify its forum-shopping by deceptively suggesting that its *only* recourse is seeking a declaration of its rights from the Court of Chancery. AB at 39. While Terramar contends that "any claim to dissolve [the Company] must be brought in Delaware" (*id.*; AB at 47), ***Terramar has not asserted***

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[7] Terramar has moved to stay the Trust's California action pending final resolution of this proceeding, rather than seek dismissal. A1434-1448. Therefore, it is inevitable that the Trust's claims against Terramar ultimately will be heard in California. There is no reason to waste Delaware's judicial resources to address Terramar's claim when the California court will be adjudicating the parties' dispute.

***in this action a claim to compel the Company's dissolution and winding up; rather, Terramar has only alleged a claim for declaratory judgment***. Terramar also states incorrectly that the California Superior Court, in dismissing Limited's earlier claim to dissolve the Company, ruled that *all* claims for relief which would result in the Company's dissolution *must* be adjudicated in Delaware. The California court's ruling does no such thing, holding instead that the court lacked subject matter jurisdiction over Limited's *statutory claim* for judicial dissolution pursuant to 6 *Del. C.* § 18-801. *See Seaport Village Ltd. v. Seaport Village Operating Co.*, 2013 WL 12144700 (Cal. Super. Aug. 2, 2013) (Trial Order) (attached as Ex. A). The California court's decision concerning a statutory cause of action plainly does *not* apply to Terramar's declaratory judgment claim, which could (and should) be resolved in California. Forcing the Trust to litigate its dispute with Terramar in Delaware will violate the Trust's Constitutional due process rights and reward Terramar's abusive litigation tactics.

## II. TERRAMAR CANNOT JUSTIFY MISUSE OF JUDICIAL NOTICE TO SUBJECT THE TRUST TO PERSONAL JURISDICTION IN DELAWARE.

Terramar parses the text of D.R.E. 201(e) to argue that the trial court correctly took judicial notice of the Prior Action between Terramar and Limited without first notifying the parties or allowing them to offer contrary evidence. AB at 43. This Court's opinions, however, make clear that "while 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*." *Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008) (emphasis added). *See also Barks v. Herzberg*, 206 A.2d 507, 509 (Del. 1965) ("[A] trial judge should rarely, if ever, 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*.") (emphasis added). While Terramar attempts to distinguish these cases on their specific facts, the Court's directive is unequivocal – trial courts must give parties a fair opportunity to consider and rebut facts to be judicially noticed.[8] The trial court did not do so here, even after

[8] While the Trust cited these opinions in seeking reargument of the trial court's ruling (A1122-23), Terramar never claimed they were distinguishable, or otherwise argued that D.R.E. 201(e) does not require prior notice, in opposing the Trust's motion (A1230).

the Trust moved for reargument on the issue. This failure to comply with D.R.E. 201(e) was a reversible abuse of discretion.

## CONCLUSION

The Court should not permit Terramar to use Section 3104 to subject the Trust to the burdens of litigating in Delaware, a forum across the country from California, where the parties are located, where the underlying facts occurred, where the parties agreed they would resolve certain disputes arising between them, and where the parties currently are in litigation. The Trust respectfully requests that the Court reverse the holding of the court below and dismiss this action in its entirety, which will (1) protect the Trust's Constitutional due process rights, (2) be consistent with Delaware case law construing and applying Section 3104, (3) subject Terramar to no burdens, and (4) prevent precedent under which passive, minority members of Delaware LLCs could routinely be forced to defend litigation in a foreign jurisdiction, even when they are not alleged to have engaged in any wrongdoing.

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