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,	)	C.A. No. 306, 2019 Court below: Court of Chancery of the State of Delaware C.A. No. 12875-VCL

APPELLEE TERRAMAR RETAIL CENTERS, LLC'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

As the trial court's post-trial Memorandum Opinion ("Opinion") properly found, "[t]his case concerns the dissolution of Seaport Village Operating Company, LLC (the "Company"), a privately held, manager-managed Delaware limited liability company." Op. 1.[1] Initially, the Company had three members: Terramar Retail Centers, LLC ("Terramar"), which was the Manager and held a 50% interest; Marion #2-Seaport Trust u/a/d June 21, 2012 (the "Trust"), which held a 25% interest; and Seaport Village Limited ("Limited"), which held a 25% interest. During the litigation, Terramar settled with Limited and purchased its interest, so at the time of trial, Terramar and the Trust were the only members of the Company. *Id.* The Company's limited liability company agreement (the "LLC Agreement" or the "Operating Agreement") gave Terramar the right to exit by offering its member interest to the other members and, if they did not purchase Terramar's interest within six months, Terramar could dissolve the Company and cause a sale of its assets. *Id.*

In December 2015, Terramar exercised its exit right. *Id.* The other members failed to purchase Terramar's interest, and Terramar sought to exercise

[1] The trial court's post-trial Opinion is in the record as Exhibit A to the Notice of Appeal, Exhibit B to Defendant-Appellee's opening brief, and at A6197-6246. It will be referred to herein as "Op. ___." Defendant-Appellant's opening brief is referred to as "AOB ___."

its dissolution right. *Id.* However, the other members disputed whether Terramar had validly exercised its exit right and was entitled to the preferences it claimed under the "waterfall" provisions of the LLC Agreement. *Id.* Terramar responded by filing the present action, seeking a declaration that it may dissolve the Company and unilaterally sell its assets to a third party and that it correctly determined the allocation of the sale proceeds under the "waterfall." *Id.*

Terramar filed this action on November 14, 2016. A54. The Trust moved unsuccessfully to dismiss on jurisdictional grounds. *See* A1292, *et seq.* An interlocutory appeal was granted (A1569), and the denial of the motion to dismiss was affirmed. A1582.

Immediately before argument in the trial court on the Trust's jurisdictional motion to dismiss, the Trust filed an action in California against Terramar (the "California Action"). B1258-1339. The California Action alleged that Terramar had mismanaged the Company and therefore was not permitted to exercise its dissolution rights under the LLC Agreement. A1720-46. Significantly, the California Action by its terms asserted only claims arising after October 2015, as the Trust admitted that the Settlement Agreement discussed herein barred claims predating that agreement. A1732, n.1.

Following the Delaware Supreme Court's affirmance of the trial court's jurisdiction over the Trust, the Trust did not file an answer; instead, it sought to delay the Delaware action by moving to stay it in favor of the second-filed (by more than eight months) California Action. A1583. Recognizing the delay tactics, the trial court entered a scheduling order requiring the Trust to file an answer, without prejudice to its pending motion to dismiss or stay. A2496. The Trust filed that answer on June 28, 2018, asserting, *inter alia*, that "as described in the California Action, Terramar frustrated the intent of Section 9.5 of the Operating Agreement (providing for Terramar's liquidation right) in various ways and "manipulated the terms of the Operating Agreement, in breach of its obligations of good faith and fair dealing and its fiduciary duties, in an effort to collect all proceeds from the proposed liquidation of Operating for itself." A2619-20, ¶ 24; A2627-29 (Affirmative Defense Nos. 3-4).

By Order entered on August 23, 2018, the Court denied the Trust's motion to dismiss or stay. A3275. A subsequent motion for reargument was also denied. A3563.

Following discovery and full pre-trial briefing, the case was tried on January 23-24, 2019. A4. The Court heard live testimony from four fact witnesses and two expert witnesses. Following full post-trial briefing and post-trial argument (A6091), the Court issued its post-trial Opinion. A6197.

In its 49-page Opinion, the trial court carefully considered each of Terramar's claims and each of the Trust's affirmative defenses. After making numerous, critical findings of fact in favor of Terramar, based upon the documentary evidence as well as the trial testimony, the trial court found that Terramar had properly invoked Section 9.5 of the LLC Agreement and was entitled to dissolve the LLC, and that Terramar had properly computed the amount to which it was entitled under the waterfall. A6247-50.

The Trust appeals and asserts a fusillade of claims, ranging from the trial court's alleged abuse of discretion in permitting this action to proceed at all, to claims that the trial court applied incorrect legal standards in finding certain claims to be time-barred or released, and that the Court "held incorrectly that Terramar complied with Section 9.5 of the Operating Agreement." AOB 34. Throughout its Opening Brief, the Trust makes factual assertions directly contrary to the facts found by the trial court after trial, and does not pay so much as lip service to the many precedents holding that those findings are entitled to substantial deference on appeal. As shown here, none of the Trust's claimed bases for reversal has merit.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly exercised its discretion not to stay this action in favor of the California Action, which was filed eight months after this action.

2. Denied. Terramar's claim was not brought to enforce the Settlement Agreement. The Court of Chancery properly applied the terms of the Settlement Agreement to bar claims that were released by that agreement. Indeed, the Trust itself recognized that claims predating the Settlement Agreement were barred by that agreement, and therefore expressly alleged in the California Action that it was asserting claims only "for Terramar's acts and omissions after the effective date of [the settlement] agreement." A1732, n.1.

3. Denied. The Court of Chancery properly applied existing precedent to hold that the three-year statute of limitations precluded assertion of claims predating June 28, 2015 (three years prior to the Trust's assertion of its answer and affirmative defenses in this case on June 28, 2018). Op. 40.

4. Denied. The Court of Chancery found, as a matter of fact, that Terramar (i) satisfied all conditions in Section 9.5 of the Operating Agreement (*Id.* 36); (ii) disclosed its true opinion of Company Fair Market Value (*id.* 23); (iii) demanded a purchase price that was calculated accurately (*id.* 29-30); and (iv) negotiated in good faith, and if any party failed to negotiate in good faith, it

was the Trust (*id.* 30-36). The Trust improperly asserts that these were conclusions of law entitled to *de novo* review, and therefore does not even attempt to apply the appropriate standard of review. The Trust also asserts that the trial court improperly ruled, as a matter of law, that the Operating Agreement imposed a joint purchase requirement. That was a legal ruling, but a correct one.

STATEMENT OF FACTS

As is appropriate in a post-trial Opinion, the trial court engaged in extensive fact finding and carefully cited to the record evidence supporting those factual findings. The Trust generally ignores these factual findings, even though they are entitled to deference on appeal. This brief will generally cite to those factual findings, as well as the record evidence supporting them.

A. Seaport Village, Limited and Cohen.

Seaport Village is a tourist attraction and specialty shopping center in San Diego, California. Op. 3, A5473, ¶ 9. The Port of San Diego (the "Port") owns the ground lease where Seaport Village sits, and in 1978, Limited leased the ground from the Port for a period of 40 years (the "Seaport Lease"). Op. 3; A5473, ¶ 8. Prior to the formation of the Company, Michael Cohen ("Cohen") had a 50% interest in the net cash flows from the Seaport Village property and Limited had the right to the other 50%. Op. 3, A2610-11, ¶ 11.

B. The Formation of the Company and Terms of the LLC Agreement.

In 2002, Seaport Village needed refinancing, which Cohen was engaged to find. Op. 3; A2611-12, ¶ 13. Cohen and Limited approached Terramar, a commercial real estate firm then known as GMS Realty. *Id.*[2] In

[2] For ease of reference, "Terramar" is used herein to refer to GMS as well as the current Terramar.

exchange for a cash contribution of $7 million and guarantee of certain indebtedness, Terramar obtained a 50% interest in the Seaport Village project. Op. 4; A5473, ¶ 6; A2611-12, ¶ 13. The parties' agreement was effectuated through the formation of the Company, with Terramar acting as managing member and 50% owner, and Cohen and Limited each owning a 25% interest. Op. 4; A5473, ¶¶ 6-7.

The LLC Agreement gave Terramar "full, exclusive and complete discretion to manage and control the business affairs of the Company." Op. 4; A76, § 5.1(a). In this capacity, Terramar committed to seek to renew the Seaport Lease and to seek a lease for an adjacent property called Old Police Headquarters (the "Headquarters Lease"), which the parties planned to develop into a shopping center. Op. 4; A66, ¶ 2.3. The LLC Agreement referred to the extension of the Seaport Village lease as "Phase One" and to the redevelopment of Old Police Headquarters as "Phase Two." Op. 4; A63, ¶¶ 1.46, 1.47.

The LLC Agreement entitled Terramar to receive a priority return of 11.5% per year on its initial capital contribution of $7 million (the "Terramar Priority Return") if the Port failed, within 30 months, to approve an extension of the Seaport Village lease of 25 years or more (defined in the Operating Agreement as the "Cut-Off Condition"). Op. 4; A71-72, § 4.1(c). If the Terramar Priority

Return was triggered, the Company could not make any *pro rata* distributions to its members until after the Terramar Priority Return was paid. *Id.*

In the LLC Agreement, Terramar bargained for and obtained the right to require that the other members buy out its member interests at fair market value any time after January 1, 2006 (the "Buy-Out Right"). Op. 5; A87-89, § 9.5. The evidence showed that Terramar was unwilling to participate in the formation of the Company without that exit right. B2.

Pursuant to the Buy-Out Right, if the other members did not purchase Terramar's interests within six months, Terramar could dissolve the Company and receive a payout of the amount determined by the contractual waterfall. Op. 5; A89, § 9.5(d). The parties agreed that, upon Terramar's exercise of its dissolution right, "all of the property and assets of the Company shall be sold on such terms and conditions as shall be determined by [Terramar] in its sole and absolute discretion. . . ." *Id.*

The waterfall provisions of the LLC Agreement governed the priority of cash distributions, both from the operations of the Company and from any sale or dissolution. Generally, the priorities were as follows:

- First, to repay any interest on any Member Loan;
- Second, to repay the principal of any Member Loan;
- Third, to repay any unpaid priority return of 12% per year on additional capital conditions;

- Fourth, to the members in proportion to the members' additional capital contributions, less any repayments;
- Fifth, to Terramar until the satisfaction of the Terramar Priority Return;
- Sixth, pro rata to the members other than Terramar, in an amount equal to the Terramar Priority Return; and
- Seventh, pro rata to the members based on their member interests.

Op. 5; A71-72, ¶ 4.1(c).

C. The 2010 Capital Call.

As part of the Company's formation, the Company obtained a $25 million loan from Wells Fargo. Op. 6; A5654 at 291. Wells Fargo declined to extend the loan beyond 2010, and accordingly, beginning in 2008, the Company sought to refinance the loan. Op. 6; B49-55.

Wells Fargo offered a new loan of $12-$15 million conditioned on receiving a guarantee from Terramar for up to half of the loan amount. Op. 6; B56-59. Other financing sources offered less attractive terms. A265-66. Terramar had no obligation to provide a guarantee and declined to do so. Op. 6. With bank financing unavailable, Terramar made a capital call on the Company's members pursuant to the Operating Agreement, as permitted by the LLC Agreement. *Id.*; A265-66. Even though the Trust had the ability to participate, at least in part, it declined to do so. Op. 6; A5653 at 287-88. As a result, Terramar funded the entire capital call, contributing $20,080,000. Op. 6; AOB 12.

D. Terramar Attempts to Extend the Seaport Village Lease.

Terramar submitted proposals for redevelopment of Seaport Village, and extension of the Seaport Village lease, in 2003, 2007 and 2010. Op. 6-7; B4-35; B36-44; A167-68; B45-48; B60-98; A267-69; B380 (recounting the relevant history, including that in the years following 2003, "the Port did not know what it wanted for Seaport Village"). Ultimately, Terramar funded a "visioning study" by which the Port finally determined its vision for Seaport Village, and Terramar presented a revised plan that the Port ultimately declared to be "consistent with the [Port's] visioning goals" for Seaport Village. Op. 7; A5474, ¶ 13. With the expectation that an extension of the Seaport Village ground lease would be forthcoming, Terramar secured a 40-year headquarters lease and began Phase Two – the development of Old Police Headquarters. Op. 7; A5474, ¶ 14.

E. Limited Files a Lawsuit.

In April 2012, Limited sued Terramar in the Superior Court of the State of California seeking dissolution of the Company (the "Limited Action"). Op. 7. Ultimately, the Limited Action was dismissed in California and refiled in Delaware after the California court ruled that Limited's claim for dissolution had to proceed in Delaware. *Id.* The Limited Action alleged many claims similar to those in the present action. AOB 2. On November 9, 2015, the Court of Chancery entered judgment in Terramar's favor. B886. That ruling was affirmed on appeal.

Seaport Village, Ltd. v. Terramar Retail Ctrs., LLC, 148 A.3d 1170 (Del. 2016) (Table).

F. Financing Efforts Prove Unsuccessful, in Part Because of the Limited Action.

While the Limited Action was pending, Cohen secured a term sheet from Bank of America, N.A. ("Bank of America") for a construction loan for Phase Two in the amount of $33.5 million. Op. 7. Bank of America withdrew its offer in February 2013 after Limited and Terramar failed to resolve the Limited Action through mediation. *Id.*; B99-100; A5620 at 269.

A few months later, Cohen secured a construction loan term sheet, again in the amount of $33.5 million, from BMO Harris Bank, N.A. ("BMO"). Op. 7-8. That term sheet required Terramar to indemnify BMO for "any costs or losses" resulting from the Limited Action. Op. 8; B111; A5564-65 at 332-33. Terramar had no obligation to provide indemnification and declined, causing the BMO loan to fall through. Op. 8.

At this point, there was no third-party financing available to the Company, and Terramar supplied the Company with Member Loans totaling $16.3 million. *Id.*; B1243-44; B133 at n.5. The Company used the Member Loans and cash flows from Seaport Village to redevelop Old Police Headquarters, expending a total of $46.5 million for construction. Op. 8; B115. Old Police Headquarters opened for business in November 2013. Op. 8.

G. The Company Seeks Permanent Financing for Old Police Headquarters.

In March 2014, the Company retained Cohen to help refinance the outstanding Member Loans. *Id.*; A5620 at 269-70. Cohen contacted approximately two dozen lenders. Op. 8; B138-42; B143-54. Most were uninterested, citing some combination of the Limited Action, the expiring Seaport Lease and the Company's request for a non-recourse loan. *Id.* However, in July 2015, Cohen secured a term sheet from NorthStar Realty Finance ("NorthStar") for a loan in the amount of $36.65 million. Op. 8; B185-94. However, NorthStar insisted on modifications to the Headquarters Lease that the Port refused to accept, and the financing ultimately fell apart. Op. 8-9; B934-37; A5691-94 at 437-50; B424-26; B907-28; B929; B930-32.

H. The Port Rescinds Its Approval of Terramar's Plans.

Following approval of Terramar's plan for redevelopment of Seaport Village, Terramar and the Port were unable to agree on rent terms. In June 2015, Terramar completed a long-term project to update its redevelopment plan for Seaport Village and to offer improved rents. Op. 9; A5559-60 at 25-29; B151-84.

The Board of Port Commissions (the "Board") invited Terramar to present its proposal at a hearing on October 6, 2015. Op. 9; B386-403. Four days before the hearing, the Port staff informed Terramar that it would recommend that the Board reject Terramar's proposal and adopt a new vision for the redevelopment of Seaport Village. Op. 9; B376.

Terramar responded with a six-page rebuttal letter, which a Terramar representative read into the record at the hearing. Op. 9; B379-85. The Board nonetheless decided not to extend the Seaport Lease, and instead to formally rescind the visioning goals on which Terramar's proposal had relied. Op. 9; B395-96; B404-06.

I. The Trust Settles with Terramar.

After the Limited Action was refiled in December in 2013, the Trust threatened to assert similar claims against Terramar. Op. 9; B105-06. In June 2014, Cohen offered to settle the Trust's claims for $2 million, but the parties could not agree on terms. Op. 9; B146-48; B149-50.

In August 2015, the Limited Action went to trial in the Court of Chancery. Op. 9. At the conclusion of trial, the Court of Chancery expressed doubt that Limited could prevail on its claims. A5658-59 at 307-310. Immediately thereafter, the Trust and Terramar reached agreement on a settlement, which was finalized in early October, 2015 (the "Settlement Agreement"). Op. 9; B407-17. Pursuant to the Settlement Agreement, in exchange for a payment of $400,000 and a reciprocal release, Cohen released Terramar from all claims relating to the Company that existed on the Settlement Agreement's effective date of October 2,

2015. Op. 9-10; B410-11. The release carved out a claim against Terramar for allocating "phantom income" to the Trust, which had not been tried in the Limited Action. Op. 10; B410-11. By settling, Cohen made a tactical decision to release challenges that seemed likely to fail based on the trial in the Limited Action, while preserving the untried claim. *Id.*

Ultimately, as noted previously, after full briefing and argument, the Court of Chancery entered judgment for Terramar in the Limited Action, and that decision was affirmed on appeal. *See supra* pp. 11-12.

J. <u>Terramar Exercises the Put Right.</u>

By the end of 2015, Company had no prospect of obtaining a Seaport Lease extension, and Terramar felt that owning Old Police Headquarters without Seaport Village was not an attractive investment. Op. 10; A5566-67 at 54-57. Accordingly, Terramar decided to exercise its put right pursuant to Section 9.5 of the LLC Agreement. Op. 10-11; A5566-67 at 54-57.

Pursuant to Section 9.5(a) of the LLC Agreement, Terramar delivered a "Buy-Out Notice" to Limited on December 18, 2015. Op. 11; A290. In compliance with Section 9.5, the Buy-Out Notice stated that the "Company Fair Market Value" was $42,932,927, and the "[Terramar] Purchase Price" equaled $55,445,552. *Id.*

Under Section 9.5(a) of the LLC Agreement, "Company Fair Market Value" was the "fair market value of the Company . . . taking into account the fair market value of the Project" and all other assets and liabilities of the Company and hypothetical sales expenses of 3% of the gross value. Op. 11; A87, § 9.5(a). Under the same section, the "[Terramar] Purchase Price" was:

> [T]he amount that would be distributed to [Terramar] pursuant to [the waterfall] if a hypothetical cash sale of the assets of the Company subject to such liabilities resulted in net proceeds to the Company equal to the Company Fair Market Value, <u>plus</u>
>
> *   *   *
>
> [The amount that] would be paid to [Terramar] or its affiliates upon repayment of any loan to the Company by [Terramar] or its Affiliates.

Id. In other words, "Company Fair Market Value" was the fair market value of the Company's assets and liabilities assuming a 3% hypothetical sales fee, less the amount of any Member Loan. The Terramar Purchase Price was the amount that would be distributed to Terramar under the applicable waterfall if a sale of the Company's assets subject to such liabilities resulted in net proceeds to the Company equal to the Company Fair Market Value; the Terramar Purchase Price included the outstanding balance due to Terramar under any outstanding Member Loan.

K. Appraisals Establish the Value of the Company's Assets to Be Approximately $57.5 Million, as Cohen Refuses to Participate in the Process.

Under 9.5(b) of the LLC Agreement, the Company Fair Market Value as stated in the Terramar Buy-Out Notice would become the purchase price for the Put Right "unless the other parties dispute in writing . . . such amount within ten (10) business days." Op. 12; A88, § 9.5(b). If there was a dispute, the LLC Agreement provided for each party to pick an appraiser, for the two appraisers to pick a third appraiser, and for Company Fair Market Value to be "the average of the two closet appraisers." Op. 12-13; A88, § 9.5(c).

On January 5 and 6, 2016, the Trust and Limited sent notices disputing Terramar's opinion of Company Fair Market Value. Op. 12; A5476, ¶ 24. The Trust also disputed the amount due to Terramar under the waterfall. Op. 12, n.5; B904.

Pursuant to the mechanism set forth in the Operating Agreement (A88, § 9.5(c)), the parties were unable to agree on a "mutually acceptable Company Fair Market Value." *Id.* Indeed, the Trust never offered a view of Company Fair Market Value, even though its expert testified that it had sufficient information to do so. Op. 35; A5715 at 535-36. Ultimately, Terramar and Limited each appointed appraisers, but the Trust never did. Instead, it "went silent," leading Terramar to reasonably conclude that the Trust has stopped participating in the buy-out negotiations. B940-42; B943-44; Op. 14. These appraisers appointed by Terramar and Limited jointly selected a third appraiser. B945.

On June 9, 2016, the appraisers completed their work. Op. 15. The value conclusions of the three appraisers were:

Appraiser	Headquarters Lease	Seaport Lease	Total
Terramar's Appraiser	$43,400,000	$12,950,000	$56,350,000
Limited's Appraiser	$44,300,000	$12,500,000	$56,800,000
Joint Appraiser	$44,000,000	$10,300,000	$54,300,000
Terramar Buy-Out Notice	$42,800,000	$14,000,000	$56,800,000

Op. 27. Under the contractual formula, the appraisal fair market value of the Headquarters and Seaport Village was $56,525,000. B947. Taking into account other assets and liabilities resulted in a Company Fair Market Value of $57,503,287 prior to subtracting the Member Loan. Op. 15; B947. Notwithstanding this number, Terramar agreed that it would sell its interest to the other members at the "[Terramar] Purchase Price" set forth in the Buy-Out Notice, $55,445,552. B948.[3]

[3] The Opinion noted that the appraisals should have deducted a 3% hypothetical sales expense from the asset value and deducted the outstanding Member Loan to arrive at Company Fair Market Value, and then added back the Member Loans to arrive at the Terramar Purchase Price. Op. 16. Had this been done, the GMS Purchase Price would have been $55,778,188, or 97% of the total appraised value of $57,503,287. Because Terramar offered to sell its interests to the other members based on a valuation that was less than this amount, any error in not deducting the hypothetical sales expense was immaterial, as the trial court found. *Id.*

The Trust's last communication before going silent was an email proposing to purchase the Company's assets in conjunction with a third party called Desert Troon. Op. 34; A378-86. As the trial court properly found, the Trust's proposal was to buy the Company's assets – the Seaport Lease and the Headquarters Lease – rather than Terramar's member interest (which was contemplated by Section 9.5(a) of the Operating Agreement). Op. 34; *compare* A378-86.

L. Terramar Markets the Assets, but Cannot Sell Them Due to Ongoing Disputes.

In 2017, Terramar retained C.B. Richard Ellis ("CBRE") to market Seaport Village and the Old Police Headquarters. A5575 at 90-91. CBRE disseminated a marketing memorandum to potential bidders. B951-92. After an extensive marketing effort, six entities made bids. B993-1019; A5575-76 at 92-93. The high bidder for the properties was Ron Allred, who offered $42.5 million for Headquarters and $2.5 million for Seaport Village. B994-95; A5576 at 93-94.[4] Ultimately, however, the Trust's litigation claims prevented the proposed Allred transaction from proceeding. A5576 at 95; B1020-21.

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4 By this time, the Seaport Village lease had less than a year to run, so the value of the Seaport Village lease was lower than the prior appraisals.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION NOT TO STAY THIS ACTION IN FAVOR OF A SECOND FILED CALIFORNIA ACTION.

A. Question Presented.

Did the Court of Chancery err by declining to dismiss or stay this action in favor of the California Action, which arose out of the same facts and circumstances and was filed eight months after the present action? A2526-54; A3443-54.

B. Scope of Review.

As the Trust concedes, "[a] *forum non conveniens* motion is addressed to the trial court's sound discretion." *Martinez v. E.I. DuPont de Nemours & Co., Inc.*, 86 A.3d 1102, 1104 (Del. 2014); *see also* AOB at 24. Thus, this Court shall not reverse where, as here, "the findings and conclusions of the [trial] Court are supported by the record and are the product of an orderly and logical [reasoning] process." *Martinez*, 86 A.3d at 1104 (internal quotations omitted).

C. Merits of the Argument.

The Trust's entire stay argument is based on the demonstrably erroneous proposition that the trial court "impermissibly re-wrote Terramar's narrow declaratory judgment claims and thereby expanded the scope of this action to include issues that already were squarely before the California Court[.]"

AOB 24. The Trust asserts that Terramar's action sought only a declaration that Terramar was "entitled to sell [the Company's] property and assets to a third party in connection with [the Company's] dissolution" (*Id.* 25) and that this entitlement was never truly disputed.

The Trust deliberately ignores that the Verified Amended Complaint (the "Complaint") also sought "[e]ntry of a declaration that Terramar has correctly calculated the Waterfall Distribution" – *i.e.*, the amount to which it would be entitled upon a sale of the Company's assets. A410. This is the exact subject of the California Action – the Trust claims there (and asserts as purported "defenses" here) that Terramar acted improperly following the formation of the Company in 2002 and thereby significantly inflated the preferences to which it is entitled upon sale of the Company's assets. *Compare* A2627-29 *with* A1163, ¶¶ 34-37.

The Trust's deliberate disregard of this request for relief is fatal to its argument. Longstanding principles of Delaware law mandate that "as a general rule, litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its choosing." *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng.'g Co.*, 263 A.2d 281, 283 (Del. 1970). Under *Martinez*, "in deciding *forum non conveniens* motions to dismiss, Delaware trial judges must decide whether the defendants have shown that the *forum non conveniens* factors weigh so overwhelmingly in their favor that dismissal of the Delaware litigation is required to avoid undue hardship and inconvenience to them. *Martinez*, 86 A.3d at 1106.

Here, the trial court carefully weighed each of the hardship factors identified in *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964). Notice of Appeal (Dkt. 1), Ex. H, ¶¶ 8-14. It found, among other things, that the dispute pending before it was governed by Delaware law and that the Delaware action was first filed by eight months – indeed, that the Trust had used the delay in the Delaware action occasioned by its unsuccessful jurisdictional motion to dismiss to try to move forward in California. *Id.* ¶ 11. The Court carefully weighed these and the other *Cryo-Maid* factors to correctly determine that the Delaware action should proceed. There was no abuse of discretion and therefore no basis for reversing this determination.

II. THE TRIAL COURT PROPERLY FOUND THAT CLAIMS PREDATING OCTOBER 2015 WERE RELEASED BY THE SETTLEMENT AGREEMENT.

A. Question Presented.

Did the Court of Chancery err by concluding that claims predating the date of the Settlement Agreement were released by the Settlement Agreement? A5420-24; A5804-16; A6069-71.

B. Scope of Review.

The trial court's interpretation of a contract, such as the Settlement Agreement, raises questions of law that are reviewed *de novo*. *Honeywell Int'l, Inc. v. Air Prods. & Chems., Inc*., 872 A.2d 944, 950 (Del. 2005).

C. Merits of the Argument.

The Trust argues that (i) since the Settlement Agreement provides that actions to enforce its terms are to be brought exclusively in California, the trial court erred in holding that the Settlement Agreement barred pre-October 2012 claims (AOB 28-29), and (ii) in all events, the settlement released only "claims," and not "defenses" of the type asserted by the Trust. *Id.* at 29-31. Neither argument has merit.

First, the present action was *not* brought to enforce the Settlement Agreement. The Complaint sought declaratory relief that Terramar had caused the dissolution of the Company and as a result could sell assets to a third party, and that Terramar had properly calculated the waterfall. The Complaint does not even mention the Settlement Agreement. Accordingly, the forum provision of the Settlement Agreement is inapplicable here.

And, the Trust's purported distinction between "claims" and "defenses" fails here. First, this argument was not timely raised. The Trust's own Answer recognized that claims and defenses pre-dating the October 2015 Settlement Agreement were released by the Settlement Agreement, and therefore asserted as its affirmative defenses that:

> Terramar (i) intentionally deprived Operating of valuable rights by failing to pursue alternatives to secure a Phase One ground lease extension from the Port of San Diego ***following the Port's decision not to approve Operating's proposal in October 2015*** [and] (ii) ***beginning in October 2015***, refused to refinance its purported "funding priorities," estimated at $38 million, at market rates.

A2619-20, ¶ 24; A2627-29 (emphasis added). The Joint Pre-Trial Stipulation and Order similarly states the issues to be tried as:

> Whether or not Terramar frustrated the intent of the Operating Agreement and manipulated the terms of the Operating Agreement by, ***subsequent to the execution of the 2015 Settlement Agreement***,
>
> a. Failing to diligently preserve and pursue Operating's ground lease rights; [and]
>
> b. Refusing to refinance or pay down Terramar's funding priorities.

A5482-83, ¶ IV.B.4 and 5 (emphasis added).

At trial, the Trust belatedly sought to expand its purported defenses to include alleged wrongful acts predating the October 2015 Settlement Agreement. This effort comes too late, as claims not timely raised are barred. *E.g.*, *Cannelongo v. Fidelity Am. Small Bus. Inv. Co.*, 540 A.2d 435, 440 (Del. 1988) ("The failure to timely assert an affirmative defense constitutes waiver of the right to do so."). That rule applies with particular force here, where it is obvious that the pleading failures significantly impacted the proof presented by the opposing party.

Moreover, as the trial court properly found, the distinction that the Trust tried to draw between "claims" and "defenses" is not valid in any event. Op. 38-40. (The trial court also considered these claims on the merits and found them not to be valid – *see infra* Argument IV).

The Trust asserts that Terramar engaged in wrongdoing since 2002 (16 years prior to trial) that inflated Terramar's claims under the waterfall, and that the trial court erred by holding these purported defenses were actually claims that were released by the Settlement Agreement. AOB 1, 29-31.

The Trust's entire theory is that because Terramar took wrongful actions prior to 2015, by incurring fees and predevelopment costs and by obtaining capital through the capital call and Member Loan rather than by lower-cost third party financing, the Company was unable to pay down Terramar's IRR entitlement, and Terramar's priorities were inflated as a result. *See* AOB 11-15; A5712-14 at 524-30.

In other words, the Trust asserted ***claims*** that, in the words of the Trust's pre-trial brief, "Terramar used all of its substantial resources to take advantage of its smaller co-members and extract all of the Company's value for itself," and thereby breached its fiduciary duties, and that the amounts otherwise due to Terramar under the waterfall therefore should be reduced. A5334-35, A5341. These are not mere "defenses" – rather, they are affirmative claims that Terramar breached contractual and fiduciary duties, and therefore is not entitled to payments that otherwise would have been required under the waterfall provisions of the Operating Agreement. These claims are squarely within the definition of those released by the Settlement Agreement – "any and all manner of claims . . . of any nature whatsoever, known or unknown . . . in any way related to Seaport."[5] B410.

California law, which applies to the Settlement Agreement, reinforces this result: it holds that general releases are not to be "shorn of their efficacy by any narrow, technical and close construction. . . . [i]f the parties intended to leave

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5 Cohen incredibly claims that this was an "extraordinarily limited" release. A5608 at 223.

things open and unsettled, their intent to do so should be manifest." *Villacres v. ABM Indus. Inc.*, 117 Cal. Rptr. 3d 398, 420 (Cal. App. 2010) (*quoting United States v. WM. Cramp & Sons, Co.*, 206 U.S. 118, 128 (1907)).

Accordingly, the trial court properly ruled that the release in the Settlement Agreement bars the Trust from asserting its pre-settlement defenses.

III. THE TRIAL COURT PROPERLY FOUND THAT CLAIMS PREDATING JUNE 2015 ARE TIME-BARRED

A. Question Presented.

Did the trial court err when it applied settled Delaware law to hold that the statute of limitations prohibited claims of wrongdoing predating June 28, 2015 (three years before the Trust asserted its affirmative defenses)? A5832; A6061-69.

B. Scope of Review.

A trial court's application of statutes of limitations to fact findings presents a legal issue subject to *de novo* review. *Scharf v. Edgecomb Corp.*, 864 A.2d 909, 916 (Del. 2004).

C. Merits of the Argument.

The Trust asserts that affirmative defenses are not ordinarily subject to the statute of limitations. AOB 32. The Trust's position has been considered and expressly rejected by the Delaware courts.

TIFD III-X, LLC v. Freuhauf Production Co., L.L.C. is directly on point. There, the limited partner of a Delaware entity was entitled to 99% of the partnership's profits during "Phase I" and 75% of the profits during "Phase II." 883 A.2d 854, 857 (Del. Ch. 2004). The parties disputed the amount of the payments remaining to be paid to "flip" to Phase II. *Id.* at 857-58. Similar to the present case, the plaintiff filed a declaratory judgment action seeking construction of the parties' agreement and simultaneously exercised its right under the agreement to cause dissolution of the entity. *Id.* at 858. As in the present case, the defendant asserted an affirmative defense (and a separate counterclaim), the essence of which was an assertion that the plaintiff's past wrongdoing in violation of the partnership agreement had caused losses to the entity of $10 to $20 million, and those losses should be taken into account in calculating the revenues required to "flip" to Phase II.

Then-Vice Chancellor Strine noted that the nature of the alleged defense was that the plaintiff's actions had harmed the partnership, and that the claims were thus derivative in nature. *Id.* at 859-60. Vice Chancellor Strine also noted that the wrong alleged occurred in the late 1990s, and that "any affirmative request for damages based on TIFD's alleged breach of contract would therefore be time-barred, as the three year statute of limitations in 10 *Del. C.* § 8106 has long since expired." *Id.* at 860.

The Court rejected defendant's affirmative defense (styled as a claim for recoupment) because it did not "arise out of the same transaction as the plaintiff's claim" for dissolution. *Id.* at 863. In so holding, the Court squarely rejected defendant's assertion – similar to the assertion of the Trust here – that there was sufficient relationship between the claims because they all arose out of the same contract. *Id.* at 864 ("[T]he fact that a single contract is involved does not suffice to demonstrate that the necessary transactional nexus exists"). As the *TIFD* Court explained:

> Put simply, it makes little sense as a matter of policy to interpret the transactional nexus requirements so broadly as to permit a party to sit on its contractual rights and wait until dissolution to assert its claims. By that time, much of the evidence pertinent to those claims, such as testimony of employees involved in the relevant events who have long-since left the enterprise, might be unavailable or less reliable, and the plaintiff might be able to mount a successful defense. . . . If the parties entering into long-term relationships with one another can never be assured that they can move along in their relationship without remaining exposed to potential liability for events in the distant past, not only will the repose considerations embodied in statutes of limitations and the doctrine of laches be subverted, but the risk created by this uncertainty will make businesspersons less willing to commit capital to profit-generating enterprises such as partnerships for fear that every action or inaction they take during the life of the partnership might come back to haunt them at the relationship's end.

Id. at 865.

Both the holding of *TIFD* and the principles animating it are fully applicable here. Here, upon dissolution of the Company, the Trust is seeking, under the guise of determining the parties' waterfall rights, to litigate claims arising as far back as 2002 (16 years before trial). AOB 1. And, all of the dangers identified in *TIFD* are similarly present here – documents likely no longer exist, and the relevant personnel at Terramar have long since departed. *See* A5555 at 9-10; 5681 at 398; A5684 at 410. As *TIFD* squarely holds, a party in the Trust's position may not assert as "defenses" in a partnership dissolution action claims affecting the distributions due to the partners based on claims arising more than three years prior to their assertion.

This Court followed *TIFD* in *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450 (Del. 2016). That case, like *TIFD*, involved what the Court found to be a recoupment claim. The trial court adopted the rule urged by the Trust here, holding that the "statute of limitations does not apply to these affirmative defenses." *Id.* at 453. However, this Court reversed, holding that it was required to distinguish between set-off (which arises out of an independent transaction) and recoupment (which goes to the reduction of the plaintiff's damages). *Id.* at 454. This Court held that affirmative defenses for set-off (and some affirmative defenses based on recoupment) are subject to statutes of limitations. It held that some claims for recoupment may be considered irrespective of the statute of limitations, but that the Court should be careful to limit such claims to those ***directly related*** to the plaintiff's claim:

> [T]ime-barred claims can be considered for recoupment when they arise out of the same factually-related transaction as the plaintiff's claim. But the Court of Chancery's decision in *TIFD III-X LLC v. Freuhauf Production Co., L.L.C.* explains why great care should be used before allowing a party to assert a stale claim as a basis to reduce its liability for judgment in a suit brought by the party asserting timely claims.

Id. at 453-54 (citations omitted). Accordingly, this Court held that "the transactional nexus requirement under recoupment [should] be tightly constrained" (*id.* at 454) and that defendant's claim that it had been dubiously deprived of management fees under the parties' agreement therefore could not be asserted as a defense to the plaintiff's claim for distribution of the proceeds from the sale of a portfolio company. *Id.*

The same reasoning applies here. The Trust's stale defenses based on conduct occurring as much as 16 years before trial cannot be considered here. As the trial court properly held: "In this case, the Trust cannot resuscitate its time-barred challenges as a recoupment defense because the time-barred challenges do not arise out of the same transaction as the claims that Terramar has asserted under Section 9.5 of the LLC Agreement." Op. 43. This holding is factually and legally correct and should be affirmed.

IV. THE TRIAL COURT HELD CORRECTLY THAT TERRAMAR COMPLIED WITH SECTION 9.5 OF THE OPERATING AGREEMENT AND IS ENTITLED TO DISSOLVE THE COMPANY.

A. Question Presented.

Did the trial court err by concluding, from the record, that Terramar (i) satisfied all conditions in Section 9.5 of the Operating Agreement to entitle it to dissolve the Company; (ii) disclosed its true opinion of Company Fair Market Value; (iii) accurately computed the purchase price; and (iv) sought to negotiate in good faith as the Operating Agreement required? Did the trial court correctly hold that the Operating Agreement imposed a "joint purchase requirement"? A5812-A5832; A6072-87.

B. Scope of Review.

"This Court will uphold the Court of Chancery's factual findings so long as they are not clearly erroneous. The clearly erroneous standard applies to factual determinations based on credibility and the evidence." *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1042 (Del. 2016).

Items (i)-(iv) of the Questions Presented, which relate to factual findings of the trial court, are fully supported by the record. The Trust ignores these factual findings and erroneously treats these as questions of law. The final issue, whether the Operating Agreement imposed a "joint purchase requirement," is a question of law reviewed *de novo* by this Court. As discussed below, the trial court correctly decided this legal issue.

C. Merits of the Argument.

1. The Trial Court Correctly Found That Terramar Complied with All Requirements of Section 9.5.

The Trust argues first that the trial court "misinterpreted the Operating Agreement by questioning whether 'strict compliance with every one of [Section 9.5's requirements] would be required' to permit Terramar to lawfully dissolve the Company." AOB 34 (*quoting* Op. 28, n.13). The trial court made no such ruling; to the contrary, it held that "Terramar complied with Section 9.5 of the LLC Agreement when it exercised the Put Right and the Dissolution Right." Op. 36. The footnote that the Trust cites dealt with a technical issue concerning the appraisal that was not addressed by any party, and that the Court found to be of no moment.

2. The Trial Court Expressly Found That Terramar Disclosed Its True Opinion of Company Fair Market Value.

Section 9.5(a) of the Operating Agreement required Terramar to set forth in its Buy-Out Notice a "statement of [Terramar's] opinion of (i) the fair market value of the Company (the "**Company Fair Market Value**"). . . ." A87. The Trust argues that Terramar failed to disclose its "true opinion of Company Fair Market Value." AOB 36.

The trial court carefully considered and rejected this contention, expressly finding that "the evidence at trial showed that the figures in the Terramar Buy-Out Notice were justified and reflected Terramar's actual belief." Op. 23.

The record fully supports this finding. Tim Pettit, the Company's CFO since April 2017 (Op. 26; A5681 at 398), testified that Terramar valued the Headquarters Lease at $42.8 million by averaging two third-party appraisals – an appraisal dated October 2, 2015 by Cushman & Wakefield Western, Inc. that was provided to the Trust at the time of is completion that valued the Headquarters Lease at $46.8 million as of August 2015, and an appraisal from August 2014 that valued the Headquarters lease at approximately $38.8 million (even after being updated to reflect certain capital expenditures). Op. 24; B198; A5681-82 at 399-401. As the trial court properly noted, if Terramar had wanted to manipulate the Company Fair Market Value upward, it could have simply used the more recent appraisal, significantly increasing that value. Op. at 24.

Mr. Pettit also testified that Terramar valued the Seaport Lease at approximately $14 million by applying a 15% discount rate to the expected net operating income ($6.25 - $6.5 million per year) over the lease's remaining 2.75-year life. Op. at 24-25; A5681 at 400; A5684 at 412. The trial court expressly found that "Pettit testified credibly that the Terramar Buy-Out Notice reflected

Terramar's actual opinion of Company Fair Market Value." Op. 26; A5684-85 at 412-13.

The Trust nonetheless sought to discredit this testimony because Terramar produced a spreadsheet that had, as one of its tabs, a notation labeled "Sell Today" that assigned values to the Headquarters and Seaport Leases of approximately $35 and $9.5 million, respectively. Op. 25. The undisputed testimony at trial was that the spreadsheet was created in 2014 by a former Terramar employee for purposes of settlement and was never used by Mr. Pettit or anyone on his team in the ordinary course of business. Op. 25-26; A5684 at 409-10. Terramar's own audited financial statements reported the asset values reported in the Buy-Out Notice, not those in the "Sell Today" tab of the spreadsheet. Op. 26; A5684-85 at 412-3. And, the Buy-Out Notice numbers were corroborated by substantial contemporaneous evidence: First, the Cushman and Wakefield appraisal valued the Headquarters Lease at over $46 million, not the $10 million lower figure in the "Sell Today" tab. Op. 26-27; B633. Second, when the parties did not agree on the Terramar Purchase Price, three appraisals were commissioned. *See supra* p. 18. All arrived at valuations similar to those in the Buy-Out Notice, even though by the time those appraisals were completed the Seaport Village lease had only approximately two years to run, thus reducing its value by more than $4 million compared to the December 2015 Buy-Out Notice. Op. 27. Finally, the

Company undertook a process in September 2017 to attempt to sell the Company's assets. The high bidder valued the Headquarters Lease at $42.5 million, just $300,000 less than Terramar's valuation in connection with the Buy-Out Notice. Op. 28; B994.

After carefully considering all of this evidence, the trial court concluded: "On balance, the evidence supports Pettit's testimony and shows that Terramar complied with its contractual obligations by including its opinion of Company Fair Market Value in the Terramar Buy-Out Notice. Terramar subjectively believed the value it specified, and that value was reasonable." Op. 28. The trial court's finding was a factual determination based on credibility and the evidence. It was not "clearly erroneous" and therefore should be accepted by this Court.[6]

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[6] There is no merit to the Trust's claim that there was a "gap" in the evidence because Terramar asserted privilege over its initial calculation of the Company Fair Market Value, and that the Court therefore should have drawn inferences adverse to Terramar. AOB 38. Parties may properly assert privilege (D.R.E. 502), and no authority permits a "penalty" of an adverse inference for asserting the right to protect privileged communications. *See* D.R.E. 512(a) ("The claim of a privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom."); *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *39 n.300 (Del. Ch. July 21, 2017), *aff'd,* 184 A.3d 1291 (Del. 2018) (citing D.R.E. 512(a)) ("Sprint withheld relevant materials on grounds of attorney-client privilege. Aurelius requested an adverse inference against Sprint in post-trial briefing, but this is improper.").

3. Terramar Did Not Overstate the Purchase Price by Overstating Its Priorities Under the Waterfall.

The Trust argues that Terramar overstated its priorities under the waterfall through its collection of unspecified fees incurred between 2002 and 2015 and by an allegedly improper capital call in 2010. As noted previously, these claims are barred by both the Settlement Agreement and the statute of limitations. *See supra* pp. 23-32.

Moreover, the claims are without merit. At trial, the Trust did not prove that any fees were inappropriate. Its expert did not know what activities were undertaken to earn the fees that the Trust challenged (A5719 at 549-50) and did not know why those fees exceeded the amount that he considered a "normal" management fee (3%). *Id.* at 551-52. Accordingly, he admitted that he "can't really opine" on the validity of the fees. *Id.* at 552. Similarly, while the Trust complains of $9.5 million of pre-development costs for Old Police Headquarters that were subsequently written down (A5714 at 529-30), its expert admitted that he did not know what costs those relate to (A5719 at 552), he did not know how much (if any) of those costs were paid to Terramar (A5720 at 553), did not know what funds were necessary to address design and environmental issues concerning Old Police Headquarters (*id*. at 555-56) and that he "probably in hindsight should have asked the question or explored the issue further." A5722 at 562 (quoting B1051 at

116). In fact, the Port audited the Company's Old Police Headquarters expenditures and found them to be appropriate except for one $41,436 item. A5685 at 414; A287-89.

The Trust also complains about the 2010 capital call and the 2012-13 Member Loan. Here, too, the record is undisputed: the Company was unable to borrow money in 2010 despite trying to do so, and therefore extended the capital call equally to all members. *See supra* p.10. The Trust declined to participate, asserting falsely that it did not have the funds to do so. *Compare* A5350, *with* A5653 at 287-88. In fact, the Trust simply felt that it was not a good investment opportunity. In such circumstances, a capital call, even if funded solely or predominantly by a controlling stockholder, is not wrongful. *See Watchmark Corp. v. Aero Global Capital LLC*, 2004 WL 2694894, at *5 (Del. Ch. Nov. 4, 2004) (holding where "all preferred stockholders have an equal opportunity to participate" in a financing, there is no "self-dealing").

4. Terramar Sought to Negotiate with the Trust in Good Faith.

The Trust next asserts that Terramar failed to provide it with information and to negotiate with it in good faith. Once again, the Trust's assertions are directly contrary to factual findings that are fully supported by the record.

In fact, as the trial court found, Terramar provided the Trust with extensive information, including current financial statements, the Cushman Wakefield appraisal, rent rolls and leasing reports. Op. 13-14; A5669-70 at 352-53, A293-302; A303-59; A360-61; B905-06; A362-72. The Trust requested as additional information Terramar's "assumptions and calculations." A291-92. As the trial court properly found, Terramar offered to provide the information that the Trust requested, as long as the Trust agreed to a four-page NDA. Op. 35; A5670 at 353. But when Terramar sent Cohen a proposed NDA and asked for comments, Cohen did not respond (Op. 30; A373-77; A5614-15 at 248-49) – which he now admits was an error on his part. *See* A5615 at 249 (admitting "it would have been a good idea" to respond). As the trial court properly found, "[o]nce Cohen gave Terramar the silent treatment, Terramar had no reason to do more." Op. 31. As the Court further noted, the Trust has never explained why the information that was provided to it was not sufficient. *Id.*

The Trust also complains that it was not permitted to share information with its claimed financing source, Desert Troon. AOB 43. As the trial court properly found, "if Cohen had been interested in using Desert Troon to finance a joint purchase of Terramar's member interest with Limited, then he should have engaged with Terramar and marked up the NDA to permit that." Op. 31. After carefully considering all of the facts, the trial court concluded that

"Terramar's NDA proposal did not evidence bad faith." *Id.* Indeed, the Court found as a matter of fact that "[i]f anyone failed to negotiate in good faith, it was Cohen." Op. 36. These factual findings are fully supported by the record and should be afforded deference on appeal.

5. The Trial Court Properly Found Any Repurchase Had to Be Made Jointly by Terramar and Limited.

Finally, the trial court properly found that any repurchase had to be made jointly by Terramar and Limited.

As the trial court properly noted (Op. 32), Section 9.5 of the LLC Agreement states that "[a]t any time after January 1, 2006, [Terramar] shall have the right to give a notice . . . indicating to all other Members and to the Company that [Terramar] desires to have its interest purchased *by the other Members of the Company*." *Id.* (quoting A87). Thus, the plain language of the Buy-Out Right calls for purchase "by the other Members," not by either the Trust or Limited. *Id.* The Trust argued for the first time in post-trial briefing that Section 12.9 of the LLC Agreement states that "[w]henever the context may require . . . the singular form of nouns, pronouns and verbs shall include the plural and vice versa." A96. This argument fails, however, because the context of Section 9.5 does not require the word "Members" to include the singular, but instead requires the opposite. Op. 33. And, it could hardly be otherwise: the Buy-Out Right established a mechanism for the other members to buy out Terramar while retaining their relative positions vis-a-vis each other. If the Buy-Out Right permitted either Limited or the Trust to purchase Terramar's interest, then that member would have a 75% stake and would achieve control. *Id.* Moreover, if both members exercise their alleged Buy-Out Right, there would be no mechanism to specify to which member Terramar would sell. Similarly, the appraisal mechanism required that each party (Terramar, on the one hand, and the other members, on the other) select an appraiser; it did not contemplate Terramar, the Trust and Limited each picking an appraiser. *Id.*; *see* A88, § 9.5(c). Accordingly, the trial court properly ruled that "Terramar had no obligation to accept the unilateral purchase by the Trust that excluded Limited." Op. 34.

CONCLUSION

For the reasons stated herein, the rulings and orders of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, the foregoing documents were caused to be served upon the following counsel of record via File & Serve*Xpress*:

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