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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARION #2-SEAPORT TRUST U/A/D JUNE 21, 2002, Defendant Below, Appellant, v. TERRAMAR RETAIL CENTERS, LLC, Plaintiff Below, Appellee.	)	No. 433, 2017 Court below: Court of Chancery of the State of Delaware C.A. No. 12875-VCL

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TERRAMAR RETAIL CENTERS, LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's denial of Defendant Marion #2–Seaport Trust U/A/D June 21, 2002's (the "Trust" or "Defendant") Motion to Dismiss Plaintiff Terramar Retail Holdings LLC's ("Terramar" or "Plaintiff") Verified Amended and Supplemental Complaint under Court of Chancery Rule 12(b)(2).

Plaintiff brought this case to enforce dissolution and liquidation rights for which Plaintiff specifically negotiated in negotiations with Defendant when the parties formed Seaport Village Operating Company LLC ("Operating"), a Delaware LLC now owned 75% by Plaintiff and 25% by Defendant. The Defendant Trust, whose Trustee and agent is Michael Cohen ("Cohen"), disputes terms of the LLC's operating agreement (the "Operating Agreement") that Cohen substantially negotiated, including Terramar's right to receive a contractually determined return on its initial investment and payout upon exercising its right to exit and dissolve Operating.

Through this appeal, the Trust urges this Court to overturn the Court of Chancery's well-reasoned opinion finding that the exercise of personal jurisdiction over the Trust for the purpose of adjudicating Terramar's claims under

the Operating Agreement comported fully with both the Delaware Long-Arm Statute and the Due Process Clause of the Fourteenth Amendment.

The Trust's arguments are predicated on fundamental misstatements of fact. Because there have been prior proceedings between the parties, there is a significant factual record before the Court; including depositions. *See* A396-880. That record contradicts the Trust's central assertion that there is no "nexus" between the Trust's Delaware-related activities and the claims in issue because Cohen was a mere "broker" and neither the Trust nor Cohen "had any power or authority over, or any basis on which to dictate or influence, the material terms being negotiated by the Taubman Parties[[1]] and Terramar – including the choice of Delaware as the Company's legal domicile." OB 12, 20-21, 24-25.[2] As shown herein, this is wrong and conflicts with the record. Through a Consulting Agreement with Limited, Cohen had rights to 50% of the cash resulting from

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1 The "Taubman Parties" refer to Anne Taubman, and entities she controlled. One of those entities is San Diego Sea Port Village, Ltd. ("Limited"), which owned the leasehold interest in Seaport Village prior to its transfer to Operating in connection with the formation of Operating.

2 As used herein, "OB" refers to the Trust's opening brief on appeal; "Op." refers to the opinion that is the subject of the appeal, *Terramar Retail Ctrs., LLC v. Marion # 2–Seaport Tr. U/A/D/ June 21, 2002*, 2017 WL 3575712 (Del. Ch. Aug. 18, 2017), and attached as Exhibit A to the Trust's opening brief.

Limited's ownership of Seaport Village, including the rights to 50% of the proceeds of any refinancing or sale of the Seaport Village property or of Limited itself. A887-95, ¶ 5. Cohen was thus not a mere "broker" – he was a principal with economic rights identical to those of Anne Taubman and personally negotiated the Operating Agreement as a principal. Consistent with Taubman and Cohen's equal economic rights, Taubman and Cohen each received a 25% interest in Operating. Cohen contributed his interest to the Trust, and the Trust signed the Operating Agreement, as a principal. A70; A111. Thus, the factual inferences drawn by the Court of Chancery in finding that the Trust participated meaningfully in the formation of the entity at issue were reasonable and should be upheld. The Court of Chancery's conclusion that there was a specific nexus between the formation of Operating and Terramar's claims is similarly supported by the record.

The Trust also complains that the Court of Chancery inappropriately took judicial notice of prior proceedings between Terramar and Limited. However, in his thorough opinion denying reargument where the Trust asserted this very same claim, Vice Chancellor Laster aptly explained his use of limited judicial notice in his opinion in accordance with Rule 201. The Trust's attack on Vice Chancellor Laster's use of judicial notice should thus fail.

This Court should affirm the Court of Chancery's opinion in its entirety.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err in ruling that 10 *Del. C.* § 3104 subjects the Trust to personal jurisdiction in Delaware with respect to this action.

a. Denied. The Court of Chancery did not err in finding that Cohen, on behalf of his Trust, played a meaningful role in Operating's formation such that the Trust "transacted business in the State" as required by 10 *Del. C.* § 3104(c)(1).

b. Denied. The Court of Chancery did not err in finding a sufficient nexus between Operating's formation and Terramar's claim.

c. Denied. The Court of Chancery properly held that subjecting the Trust to personal jurisdiction in Delaware with respect to this action does not violate the Trust's constitutional due process rights.

2. Denied. The Court of Chancery judicially noticed facts in accordance with Delaware Rule of Evidence 201.

STATEMENT OF FACTS

A. Seaport Village Needs Recapitalization.

Seaport Village is a tourist attraction and specialty shopping center in San Diego, California that was developed by the Taubman family. A138. The Taubman family's entity, non-party Limited, entered into a 40-year lease in 1978 with the Port of San Diego, the owner of the ground on which Seaport Village operates. A138-139.

Limited borrowed $40 million from Yasuda Bank in Japan to develop Seaport Village ("Yasuda Loan"). A139. As of the maturity date of the Yasuda Loan in 1998, Limited was unable to repay or refinance. *Id*. Anne Taubman ("Taubman"), the principal of Limited, engaged Cohen to refinance the Yasuda Loan. *Id.*; A694.

Ultimately, Taubman formed a Delaware LLC, San Diego Seaport Lending Co., LLC ("Lending"), to borrow $25 million to purchase the Yasuda Loan. A139; A211; A697. In connection with the purchase of the Yasuda Loan, Cohen entered into a Consulting Agreement and Agreement to Terminate Prior Agreements between Taubman, Limited, Lending, and Cohen, dated as of March 1, 2000 ("Consulting Agreement"), pursuant to which Cohen was entitled to receive 50% of the cash flows from the Seaport Village project, including the

proceeds of any refinancing or sale of all or part of the project. A139; A887-94, ¶ 5. By 2002, Lending's obligations were coming due and, again, could not be repaid. A139. Cohen was engaged to find additional capital. *Id.*

B. Defendant Purposely Avails Itself of Delaware Law to Recapitalize and Reorganize Seaport Village Through the Formation of Operating.

Cohen identified Terramar, then known as GMS Realty, as a financing source, and Cohen, Taubman, and Terramar ultimately entered into a transaction (the "Terramar Transaction"). A139. To recapitalize and restructure the nearly-bankrupt Seaport Village project, Cohen, Taubman, and Terramar formed Seaport Village Operating Company LLC (previously defined as "Operating") as a Delaware LLC. A139-40. Taubman and Cohen contributed their interests in the Seaport Village operating lease. Terramar contributed $7 million of new capital and the use of its financial strength to refinance the pre-existing $25 million loan and to guarantee 50% of the new loan's repayment. *Id.*; A336. Operating's membership interests were split between Terramar, Cohen, and Taubman: Terramar received 50% of the member interests; Taubman received 25% which she

held through Limited; and Cohen received the remaining 25%, which he held in the Trust.[3] A124; A136; A138.

The terms of the Terramar Transaction were memorialized in the Operating Agreement. A207-248. The Operating Agreement states that the members—Terramar, Limited, and the Trust—"wish[ed] to form a Delaware limited liability company for the purpose and on the terms and conditions set forth herein." A208. The Operating Agreement specifies that "[t]he Company is formed as a limited liability company pursuant to the provisions of the [Delaware LLC] Act." A215. Section 2.1 of the Operating Agreement mandates that the "rights and obligations of the Members and the affairs of Operating shall be governed: first by those provisions of the [Delaware LLC] Act that cannot be waived; second by Operating's Certificate; third by this Agreement; and fourth by those provisions of the Act that can be waived but have not been waived." *Id.* Thus, in forming Operating as a Delaware LLC, the members (including the Trust) purposefully availed themselves of the protections of Delaware law.

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[3] Cohen refers to the Trust as his entity. In a December 18, 2014 deposition of Cohen he stated, "Because ***my entities*** were party to some parts of this, of the transaction documents, I recall reading documents." A729 (emphasis added).

C. The Parties Meaningfully Participated in the Formation of Operating As a Delaware LLC.

1. Terramar Participated in the Formation of Operating As a Delaware LLC and Received Just Consideration.

From the outset, Terramar was unwilling to participate in the Terramar Transaction without a clear exit strategy, which resulted in the inclusion of Sections 1.29, 4, and 9.5 in the Operating Agreement. A883. Under Section 1.29 of the Operating Agreement, Terramar was promised a minimum 11.5% per annum internal rate of return on its $7 million contribution. A210. Section 4 works in conjunction with Section 1.29 to ensure that Terramar's return on its capital contribution of $7 million is preferential to distributions to other members. A220-26. Finally, Section 9.5, which is at the heart of this dispute, details the procedure by which Terramar is entitled, in certain circumstances, to exit the investment and to dissolve and liquidate Operating. A141-44; A237-39.

Section 9.5 allows Terramar to request that the other members buy out its interest at fair market value at any time after January 1, 2006. A237. Section 9.5 specifies how "fair market value" is to be determined, and further provides that if the remaining members do not agree to purchase, and do not pay for Terramar's interest within a six month period, Terramar may dissolve and liquidate Operating and obtain a contractually determined payout. A237-39.

As a material part of its consideration to enter into the Terramar Transaction, Terramar was also promised indemnification and given other representations and warranties by the Trust, under a separate Indemnification and Security Agreement and Certificate of Representations and Warranties, dated January 5, 2003 (the "Indemnification Agreement"). A386-94.

2. The Trust Participated in the Formation of Operating As a Delaware LLC and Received Just Consideration.

Cohen was the chief negotiator for the Trust/Limited side of the Terramar Transaction and ***the only person*** involved on behalf of the Trust. A126; A138; A248. Cohen admitted under oath that he was involved in almost all aspects of the negotiations for the Terramar Transaction, except "[t]he legal issues [that] were between the lawyers." A728. Cohen also recently boasted of his knowledge of the parties' intentions in drafting the Operating Agreement to Hugh Zwieg, now-Chief Executive Officer of Terramar, stating that he knows what the parties really intended with respect to certain provisions. A378-79.

Taubman's testimony is consistent. She stated under oath that "Michael Cohen was the one that was negotiating the deal." A492.

Kenneth Stipanov, Terramar's transactional attorney, had the same recollection. He testified that "There was a man named Michael Cohen who was

involved in the transaction and was the person with whom we did the primary negotiation on the transaction." A537. When asked to define his use of the phrase "primary negotiation," Stipanov stated, "Most of the conversations about deal terms and the transaction structure and such were had with Mr. Cohen." A538. Cohen never offered any contrary facts, and the facts are therefore undisputed in the record.

In its appeal brief, the Trust contends that Cohen was a mere "broker" in the transaction by which Operating was formed, and that Cohen's company, M.A. Cohen & Co., had "limited participation" "in brokering the Taubman-Terramar Sale." OB 20. The Trust further asserts that "neither the Trust nor M.A. Cohen & Co. received *any* proceeds paid by Terramar in the sale; rather, the closing statement reflects that all sale proceeds were distributed to the Taubman Parties (*id*. 21) and that "[s]ince neither the Trust, M.A. Cohen & Co. nor Mr. Cohen was a buyer or seller, none of them had any power or authority over, or any basis on which to dictate or influence, the material terms being negotiated by the Taubman Parties and Terramar – including the choice of Delaware as the Company's legal domicile." *Id.* Based on these factual assertions, the Trust claims that it did not, directly or through the actions of Mr. Cohen, play a "meaningful role" in the formation of Operating.

But the supposed "facts" proffered by the Trust are not true, and contradict the actual facts in the record. As noted previously, through the contractual rights set forth in the Consulting Agreement, Cohen's economic rights were *identical* to those of Ms. Taubman. Moreover, with Ms. Taubman's concurrence, Mr. Cohen was the principal negotiator of the Operating Agreement. And, he undertook that role ***not*** as a mere broker, but as a principal with economic rights identical to those of Ms. Taubman.

Cohen admitted that he "[n]aturally . . . wanted the [Terramar] transaction to close because under the consulting agreement [he was] entitled to a portion of the seller's net proceeds[.]" A825.[4] When the transaction was successfully completed, Cohen received $2.687 million. A751; A1234. This plainly contradicts Cohen's claim that he had no interest in the proceeds of the Terramar Transaction. Compare OB 21.

Cohen also negotiated Section 5.4(b) of the Operating Agreement to mandate an exclusive brokerage right for himself for certain refinancings for Seaport Village. A227-28. Taubman stated, under oath, "When the [Terramar]

[4] Thus, Cohen and the Trust executed the Indemnification Agreement to induce Terramar to participate in the Terramar Transaction. A378-79.

deal was negotiated, I recall hearing that one of the conditions associated with any refinancing was that Michael would be the mortgage broker." A453. Thus, Taubman (who Cohen claims was the only principal on the other side of the transaction from Terramar) learned of a material term of the transaction benefitting Cohen after the fact, from Cohen. This further contradicts Cohen's claim that he was acting solely as Taubman's "broker" in negotiating the transaction. Compare OB 21, 24.

During the negotiations, Terramar's attorney apprised Cohen personally of the importance to Terramar of one of the provisions of the Operating Agreement that is now in direct dispute in this action – Section 9.5. In a February 11, 2002, email, forwarding drafts of the transaction documents to Cohen "per [Cohen's] request" (A882), Terramar's attorney (Stipanov) highlighted Terramar's need for a "clear exit strategy[,]" which would have to include "the right to force a dissolution and sale of the property on the open market." A883. This is the very provision that evolved into Section 9.5 of the Operating Agreement and that is at the center of the current dispute.

D. Intervening Litigation Over Operating Arises.

The members of Operating have been involved in several actions over the lifetime of Operating. Op. 6. Most pertinent, Limited and Terramar have

disagreed about their dissolution rights before. *Id.* In April 2012, Limited brought suit against Terramar in the Superior Court of California seeking to dissolve Operating. *Id.* The California court held that *any* claim for dissolution must be brought in Delaware. *Id.*

In August 2013, Limited sued Terramar again, this time in the Court of Chancery of the State of Delaware with Vice Chancellor Laster presiding (the "Prior Action"). *Id.* Limited alleged numerous actions on Terramar's part that purportedly breached the Operating Agreement. *Id.* The Court of Chancery ruled against Limited on all claims in its post-trial opinion (Op. 9), and the Delaware Supreme Court affirmed the ruling.

E. Terramar Invokes its Rights Under the Operating Agreement.

On December 18, 2015, in accordance with Section 9.5, Terramar delivered notice to the Trust and Limited that it desired to have its interests purchased by the other members of Operating. A141; A237-38. The parties followed the procedures in Section 9.5 to determine Operating's fair market value, which was ultimately found to be $57,503,287.000. A142-43; A237-38. The parties agreed that the six-month period during which the Trust and Limited could exercise their rights to purchase Terramar's interest in order to avoid dissolution

and liquidation of Operating expired on November 9, 2016.[5] A143. To date, Terramar has not been paid for its interest and now wishes to implement its exit rights. A143-44; A338-39.

F. Terramar's Declaratory Judgment Claim Arises Out of the Operating Agreement Executed in Connection with the Formation of Operating.

The Trust and Terramar disagree with respect to the scope and operation of their rights under the Operating Agreement. A144-45; A337-39. Specifically, the parties are unable to agree as to (a) whether Terramar's right under Section 9.5 of the Operating Agreement allows Terramar to unilaterally sell all of Operating's property and assets to a third party in connection with Operating's dissolution, (b) whether Terramar has an entitlement to an 11.5% internal rate of return on its initial $7 million investment under the waterfall provision amounts set forth in Section 4(c)(v) of the Operating Agreement (the

[5] The Trust does not dispute that Terramar has: (a) properly delivered a "Buy-Out Notice" pursuant to Section 9.5 of the Operating Agreement; (b) included in its Buy-Out Notice its statement of Operating's Fair Market Value and proposed purchase price of Terramar's interest pursuant to Section 9.5; and (c) advised Limited and the Trust of its calculation of the amount that Terramar should be entitled to under the Waterfall Distribution. A337.

"Waterfall Distribution"), and (c) whether Terramar has properly computed the Waterfall Distribution applicable upon liquidation. A144-45; A337.

On November 4, 2016, Terramar filed the underlying action against Limited and the Trust seeking a declaratory judgment confirming its calculations and exit rights under the Operating Agreement. A22-38. After purchasing Limited's interest in Operating in January 2017, Terramar filed an amended complaint that *inter alia* removed Limited as a party on February 10, 2017 (the "Complaint"). A136-67.

The Trust moved to dismiss the Complaint on February 24, 2017 pursuant to Rule 12(b)(2). A168-69. The Court of Chancery ruled in favor of Terramar on August 18, 2017, finding that under Delaware's Long-Arm Statute, the Court of Chancery could exercise specific personal jurisdiction over the Trust for the purposes of adjudicating Terramar's claims under the Operating Agreement (the "Opinion"). Op. 29. The Trust moved for reargument on August 25, 2017, which was denied by the Court of Chancery by Order on October 23, 2017. OB Ex. B. The Trust then filed an application for certification of interlocutory appeal, which was granted by this Court. A1235-248; A1482-491.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE TRUST IS SUBJECT TO PERSONAL JURISDICTION IN DELAWARE WITH RESPECT TO THIS ACTION.

A. Question Presented

1. Whether the Court of Chancery properly held that the Trust transacted business in Delaware as defined under Delaware's Long-Arm Statute by meaningfully participating in the negotiation of the underlying transaction that was effectuated through the formation of Operating as a Delaware entity and embodied in Operating's governing documents, which include provisions reflecting core issues of internal affairs of the Delaware entity at issue in this action. *See* A349-59.

2. Whether the Court of Chancery properly held that its exercise of personal jurisdiction over the Trust under 10 *Del. C.* § 3104(c)(1) comports with constitutional due process given that the Trust was involved in the negotiation of Terramar's right to dissolution under the Operating Agreement, a right that the Trust has refused to honor. *See* A359-63.

B. Scope of Review

The Court of Chancery's denial of the Trust's motion to dismiss based on personal jurisdiction is reviewed by this Court *de novo*. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).

C. Merits of Argument

The Trust does not dispute the legal standard applied by the trial court: to sustain personal jurisdiction over the Trust, Plaintiff "need only make a *prima facie* showing, in the allegations of the complaint, of personal jurisdiction, and the record is construed in the light most favorable to the Plaintiff." Op. 9-10 (quoting *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008)). As shown herein, this standard was clearly met.

To attempt to claim otherwise, the Trust asserts that Cohen did not participate in the formation of Operating. As shown above, that is simply not true and conflicts with the record. The Trust also attacks the reasonable inferences made by the Court of Chancery in imputing Cohen's actions to the Trust and finding that those acts constitute sufficient participation in the formation of a Delaware entity to subject the Trust to personal jurisdiction under the Delaware Long-Arm Statute. The Trust then argues that there are no minimum contacts sufficient to withstand due process because the Trust merely owns a minority

interest in a Delaware entity and has no other contacts with Delaware. The Trust's characterization of the Court of Chancery's conclusions is unsupportable.

Under Delaware law, Terramar was required to demonstrate that the Court of Chancery can exercise personal jurisdiction over the Trust by showing that (1) the Delaware Long-Arm Statute, 10 *Del. C.* § 3104(c) ("Section 3104"), applies, and (2) subjecting the Trust to jurisdiction does not violate the Due Process Clause of the Fourteenth Amendment. *See Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155, at *7 (Del. Ch. Apr. 27, 2012), *aff'd*, 62 A.3d 1224 (Del. 2013). Because no evidentiary hearing was held, Terramar "need only [make] a *prima facie* showing of personal jurisdiction and 'the record is construed in the light most favorable to [Terramar].'" *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (citation omitted). Terramar made this showing to the Court of Chancery, and the record provides the same conclusion on *de novo* review.

1. Section 3104 Provides Statutory Authority For Personal Jurisdiction Over the Trust.

The Court of Chancery correctly held that Terramar demonstrated that Section 3104 permits the exercise of personal jurisdiction over the Trust with respect to Terramar's claim. Section 3104 enables the Court to "exercise personal jurisdiction over any nonresident, or a personal representative, who . . . [t]ransacts

any business or performs any character of work or service in the State [of Delaware]." 10 *Del. C.* § 3104(c)(1). "[A] single transaction is sufficient to confer jurisdiction where the claim is based on that transaction[.]" *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 978 (Del. Ch. 2000) (citation omitted).

The Trust maintains that the only contact it has with Delaware is a mere ownership interest in a Delaware entity. OB 1-2, 18-19. This claim ignores the Court of Chancery's ruling and Terramar's arguments. Terramar has never attempted to subject the Trust to personal jurisdiction based only on the Trust's ownership in Operating and does not dispute that Delaware law rejects subjecting nonresidents to personal jurisdiction on the basis of mere ownership of interests in a Delaware entity ***alone***. Instead, the Trust is properly subject to personal jurisdiction under Section 3104(c)(1) as a result of the nexus between the formation of Operating and Terramar's claims to enforce the Operating Agreement.

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 3104(c)(1). *See, e.g., Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2013 WL 6184066, at *2 (Del. Ch. Nov. 21, 2013); *In re Mobilactive Media, LLC*, 2013 WL 297950, at *28

(Del. Ch. Jan. 25, 2013); *EBG Hldgs. LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *5-6 (Del. Ch. Sept. 2, 2008). Here, that is exactly what occurred. Indeed, the Operating Agreement expressly states that the members of Operating "wish[ed] to form a Delaware limited liability company for the purpose and on the terms and conditions set forth herein." A208.

a. Because the Trust Does Not Exist Separately From Cohen, the Trust Meaningfully Participated in the Formation of a Delaware Entity.

The Trust contends that it never participated in the formation of Operating because (1) Cohen's actions should not be imputed to the Trust, and (2) neither Cohen nor the Trust had any authority to dictate terms of the Operating Agreement as a passive recipient of membership interest who did not directly receive any deal proceeds; and (3) the Trust had no equity interest in Seaport Village. OB 20-23. Recognizing the inherent weaknesses in its position, the Trust then attacks the Court of Chancery's factual inferences. *Id.* 23-26. The Trust's arguments are flawed for numerous reasons.

(i) Cohen's Actions Are the Actions of The Trust.

The Trust argues that the Court of Chancery should have "distinguish[ed] the capacity in which, or the entity on whose behalf, [Cohen] was

acting." *Id.* 20. Based on both the law and the facts, Cohen's actions in negotiating the transaction that resulted in the formation of Operating were the actions of the Trust. The Trust's contrary contention (*id.* 20-21) is untenable.

The Trust's position ignores that it is not a natural person and can only act through its representatives, and, that under governing California law, "an ordinary express trust is not an entity separate from its trustees[.]" *Presta v. Tepper*, 179 Cal. App. 4th 909, 914 (2009) (citation omitted). Under California law, Cohen ***is*** the Trust, and, therefore, it is not a question of imputation: Cohen's actions are the actions of the Trust.

Moreover, the Trust does not assert that anyone ***other than*** Cohen ever acted on its behalf with respect to the Terramar Transaction (or ever). And, Cohen chose to form the Trust to hold his 25% interest in Operating, the entity that the Parties created to implement the deal that Cohen negotiated as a principal. Cohen negotiated deal terms that were memorialized in the Operating Agreement of Operating, which the Trust through its Trustee (Cohen) signed. To induce Terramar to participate in the deal, both Cohen (personally) and the Trust covenanted to provide certain indemnities, and to make certain representations and warranties, to Terramar. Thus, the Court of Chancery correctly found that Cohen's activities in the formation of Operating are properly those of the Trust.

(ii) Cohen Influenced and Negotiated Deal Terms on Behalf of the Trust.

The Trust does not deny that Cohen brokered the deal but instead attempts to minimize his involvement and authority. OB 20. However, as the Court of Chancery correctly held, Terramar's Complaint and briefing demonstrate Cohen's substantial involvement in the "business deal that Terramar seeks to enforce[, which] was embodied in the Operating Agreement and implemented through the creation of [Operating]." Op. 16.

(iii) The Trust's Claims Regarding Cohen's Lack of Direct Ownership in Seaport Village are Irrelevant.

The Trust argues that it had no authority over deal terms because of Cohen's had no direct equity ownership of Lending, Limited or Seaport Village, and no management rights in those entities. These facts do not move the dial. Whether or not Cohen possessed legal rights to vote or govern the predecessor entities to Operating, the record demonstrates that Cohen had influence over the transaction giving rise to Terramar's claim. Cohen was Taubman's equal economic partner and caused the Trust to receive a 25% interest in Operating, identical to that received by Taubman. The record supports a reasonable inference that Cohen, on behalf of the Trust, meaningfully participated in the formation of Operating regardless of his ownership in any of its predecessor entities.

(iv) The Court of Chancery Drew Entirely Reasonable Inferences From the Record.

The Trust argues that the Court of Chancery drew inappropriate inferences from the facts alleged. None of the inferences or conclusions made by the Court of Chancery is unreasonable. Moreover, to sustain jurisdiction, Terramar only had to make a prima facie showing. It did so and Cohen never refuted under oath, or through contemporaneous documents, a single fact shown by Terramar.

First, the Trust argues that the Court of Chancery "accepted at face value prior deposition testimony" that Cohen negotiated the deal, while ignoring other testimony that Taubman had her own counsel. OB 24-25. But there is no inconsistency: it is entirely reasonable for Taubman to have been represented by counsel ***and*** for Cohen to have been negotiating the deal. Both Limited's principal (Taubman) and Terramar's attorney (Stipanov) had the exact same recollection, from opposite sides of the deal, that Cohen was the primary deal negotiator for the Limited/Cohen interests. The fact that Taubman had her own lawyer in no way calls this testimony into question, and certainly does not establish that Terramar failed to make a prima facie showing that the Trust (through Cohen) participated in the negotiations. This is particularly true since the Trust does not deny

participating in the negotiations (though it erroneously claims that he was doing so as a broker). *Id.*

Second, the Trust quibbles with whether Cohen's receipt of an exclusive brokerage right is a logical consequence of Cohen's involvement in the formation of Operating. *Id.* 24. The Trust points to the distinction without difference of the Trust's involvement versus Cohen's, highlights the benefits that the broker provision allegedly bestowed upon Taubman, and claims (with no support) that the fees were "below market" and with "limited exceptions" "never occurred." *Id*. Notwithstanding these assertions, it was reasonable for the trial court to infer that without Cohen's substantial role in the Terramar Transaction, this provision in the Operating Agreement would not exist, and that Cohen's negotiation of that right for himself evidences his influence over the deal.

Thus, the Court of Chancery did not err in holding that the record supports a reasonable inference that the Trust, through Cohen, played a meaningful role in forming Operating and negotiating the Operating Agreement. *See* Op. 17.

b. Terramar's Claim Arises From Operating's Formation.

Delaware courts have applied Section 3104(c)(1) to cases in which the only transaction in Delaware was the formation of a Delaware entity ***if*** there is a

sufficient nexus between the entity's formation and the claims to confer specific jurisdiction. *See* Op. 12; *Vadem*, 2012 WL 1564155, at *7; *Shamrock Hldgs. of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006) (citing *Cairns v. Gelmon,* 1998 WL 276226, at *3 (Del. Ch. May 21, 1998)). "Section 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause." *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1197 (Del. Ch. 2010) (internal quotations omitted).

Terramar's claim does "arise from" Operating's formation under Delaware law. The Court of Chancery properly analyzed Delaware law to find that a reasonable nexus exists between a Delaware entity's formation and claims arising under constitutive documents that govern the entity, because the formation of Operating "set in motion a series of events which form the basis for the cause of action before the court." Op. 17. In other words, forming a company is the act that gives "legal life to [an operating agreement] as a legally viable contract[,]" and disputes arising under that document are sufficiently related to the formation of the entity as a basis for personal jurisdiction. *Id.* 16-17.

Terramar seeks a declaratory judgment to enforce the critical economic rights that it was promised by Cohen on behalf of the Trust (which was going to be a 25% member of Operating) during the negotiation of the Operating

Agreement. Plaintiffs' claims thus inherently arise directly out of the entity's formation.

(i) The Trust's Position That the Claim Must Arise From the Filing of a Delaware Certificate of Formation is Unsupported By Delaware Law.

The Trust attempts to narrow the required nexus by arguing that Terramar's declaratory judgment claim does not "arise from" the ***filing of Operating's Certificate of Formation***. *See* OB 20 (emphasis added). This framing of the nexus requirement is unsupported by Delaware law and was properly rejected by the Court of Chancery.

The Court of Chancery accurately analyzed *Papendick* and its progeny in finding that jurisdiction is proper even if the cause of action does not relate specifically to the filing of the certificate of formation or actual steps taken to form the entity. *See* Op. 16-17 (citing *Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979)). Under *Papendick*, where the formation of the Delaware entity is an "integral part of [the total transaction] . . . to which the plaintiff's instant cause of action relates . . . [the nonresident] purposefully avail[s] itself of the benefits and protections of the laws of the State of Delaware" such that the exercise of personal

jurisdiction over the nonresident is appropriate. *Id.* 15 (internal quotations omitted).

In rejecting the Trust's attempt to narrow a sufficient nexus to one involving the act of filing documents necessary to create a Delaware entity, the Court of Chancery correctly observed that "[w]hen the contract in question is the constitutive document governing the Delaware entity itself, the relationship [between the formation and cause of action arising under that contract] is significantly closer [than in *Papendick*]. Indeed, it is as close as it can be." *Id.* 16.

(ii) The Trust's Assertion That the Formation of a Delaware Entity Must be Wrongful Before it Can Support the Basis for Personal Jurisdiction is Similarly Unsupported by Delaware Law.

The Trust argues that the Court of Chancery improperly found a nexus between Operating's formation and Terramar's declaratory judgment claim because Operating was not formed as part of a wrongful scheme. OB 27-29. The Trust's position misapprehends Delaware law.

For the purpose of Section 3104(c)(1), Delaware law does not require that "the act of creating [a Delaware] entity through a filing with the Secretary of State [be] taken by a non-resident defendant for the purpose of *effectuating or facilitating* wrongful conduct giving rise to the plaintiff's cause of action." *Id.* 27

(emphasis in original); *see* Op. 18-19 (citing *Papendick*, 410 A.2d at 152). Instead, "[t]he exercise of specific personal jurisdiction requires a nexus between the forum-directed conduct and the claim being asserted[,]" and "[w]hether a sufficient nexus exists necessarily depends on the nature of the claim." Op. 18.

The cases cited by the Trust, such as *Pinkas* and *Gelmon*, involve the formation of a Delaware entity as part of a wrongful scheme where "the claim that the plaintiff sought to assert involved wrongful conduct, such as a claim for fraud or for breach of fiduciary duty." *Id.* (citing *Connecticut Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011); *Gelmon*, 1998 WL 276226, *3).

The additional cases the Trust relies on to support this argument before this Court are distinguishable for the same reason. *See Vadem*, 2012 WL 1564155, at *3 (asserting claims for breach of fiduciary duty, usurpation of corporate opportunity, rescission, conspiracy, and aiding and abetting); *Hamilton Partners*, 11 A.3d at 1188, 1197 (asserting breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims); *Haisfield v. Cruver*, 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994) (asserting claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and usurpation of corporate opportunities). As concisely stated by the Court of Chancery, "[i]f the claim turns on a wrongful

conduct or scheme, then the formation of the Delaware entity must relate to the wrongful conduct or scheme before it can support the exercise of specific personal jurisdiction." Op. 18.

The Trust has not cited any authority that contests the Court of Chancery's reading of Delaware precedent regarding the relationship between forum-directed conduct and claims at issue. As properly held by the Court of Chancery, when the underlying claims turn on contract interpretation, the determinative question is "whether the formation of the Delaware entity was an 'integral part' of the contractual relationship that the plaintiff seeks to enforce." *Id.* 19 (citing *Papendick*, 410 A.2d at 152). The Court of Chancery correctly held that the formation of Operating was an integral part of the contractual relationship that the Terramar seeks to enforce—its rights under the Operating Agreement. *See id.* ("[T]he Company and its operating agreement are inextricably linked.").

(iii) The Trust Mistakenly Interprets the Court of Chancery's Opinion as Broader Than Written.

The Trust, as a last-ditch effort, argues that the Court of Chancery's holding subjects "*any* minority member of a Delaware LLC . . . to personal jurisdiction in Delaware . . . for *any* claim relating to the LLC or its members." OB 29-30. The Trust contends that the Court of Chancery's holding would subject

all minority members of Delaware LLCs to personal jurisdiction "based on nothing more than the LLC's existence under Delaware law[.]" *Id.* 30. This is not a fair reading of the Court of Chancery's holding. *See, e.g.*, Op. 26 ("In this case, the Trust was not merely a passive minority investor who acquired and owned equity in a Delaware entity.").

The Court of Chancery's holding is necessarily limited to nonresident minority members who ***meaningfully participate*** in the negotiation of an underlying transaction resulting in the formation of the Delaware entity. *Id.* 17-18, 26. The holding is further restricted by the fact that the claims in this case relate directly to core issues that the parties negotiated at the time of the Delaware entity's formation. *Id.* 18, 24-26. Terramar would not have contributed its funding, Operating would not have been formed, and there would be no Operating Agreement to interpret without the inclusion of those core rights. *See* p. 7-10, *supra*. Moreover, the claim here seeks interpretation of the governing document of a Delaware entity in order to enforce a right to dissolve the entity—a right that implicates the internal affairs of a Delaware entity. Op. 24; *see Sternberg v. O'Neil*, 550 A.2d 1105, 1125 (Del. 1988) ("Delaware has more than an interest in providing a sure forum for . . . litigation involving the internal affairs of its domestic corporations. Delaware has an obligation to provide such a forum.")

(internal citations and footnote omitted); *In re Carlisle Etcetera LLC*, 114 A.3d 592, 601-06 (Del. Ch. 2015) (explaining Delaware's particular interest in dissolving entities that it has formed).

The Trust also implies that the passage of fourteen years makes the nexus between the formation and Terramar's claim unreasonable. OB 19-20, 29. However, the transaction was intended to be of long duration – the Seaport Village sublease had 16 years to run, and a lease extension was expressly contemplated. Terramar's exit right – which only became exercisable four years after formation of Operating and was not timed limited – was a central issue negotiated in the underlying transaction. Its import is unaffected by the passage of time, and the dissolution right is the same today as it was when it became exercisable in 2006. Because the parties in 2002 negotiated a long-lived redemption right, it is not at all surprising that that right is being exercised some years after the negotiation granting it, as the trial court properly recognized. *See* Op. 27, 29 ("The Trust contemplated a long-term relationship with the Company when the parties formed it. That relationship included the possibility that Terramar would exercise its Put Right and Dissolution right years later. The Trust cannot complain now that it could not have anticipated being haled into a Delaware court.").

In asserting its argument that the Court of Chancery's holding is broader than other Delaware precedent, the Trust relies on the same authority argued to and rejected by the Court of Chancery in its well-reasoned opinion except for one additional case, *LVI Grp. Invs., LLC v. NCM Grp. Hldgs., LLC*, 2017 WL 3912632 (Del. Ch. Sept. 7, 2017). *Compare* OB 30-33, *with* Op. 19-24 (distinguishing *Pinkas* and *Fisk Ventures* factually from its holding in the Opinion). The Trust argues that the *LVI* court "applied a narrower view of the 'nexus' requirement" after the issuance of the Court of Chancery's Opinion. OB 32. In actuality, the court in *LVI Grp. Invs.* ***relied on*** the Court of Chancery's Opinion as support for its holding that the nexus before the court was "not tight, and [the defendant's] act . . . [did] not form a source of the claim[.]" *LVI Grp. Invs.*, 2017 WL 3912632, at *6.

The present case is also factually distinguishable from *LVI*. The plaintiff in *LVI Grp. Invs.* brought claims against an individual counterclaim-defendant, Mr. Cutrone, for alleged breach of fiduciary duty in connection with a merger between LVI and NCM, two Delaware LLCs, to form NorthStar (the "Merger"). *Id.* at *1. The plaintiff argued that the court should exercise personal jurisdiction over Mr. Cutrone, a nonresident officer of one of the Delaware pre-merger entities, under Section 3104(c)(1) as a result of his involvement in the

execution and filing of a certificate of merger that pre-dated and facilitated the Merger at issue. *Id.* at *4-5. The court rejected the plaintiff's argument, finding that the ministerial act of executing the merger certificate was Mr. Cutrone's only connection with the challenged Merger, and that act "[did] not form a source of the claim[.]" *Id.* at *6 ("Cutrone did *not* file the Certificate here, and avers he did not cause it to be filed, and neither the Certificate itself nor the Certificate Merger it effected is at issue in the claims before me."). Notably, the court framed Mr. Cutrone's minimal involvement with the transaction by quoting the Court of Chancery's Opinion, stating, "[T]his court has declined to exercise personal jurisdiction over defendants who were not meaningfully involved in structuring the underlying transaction or negotiating the terms of the deal." *Id.* at *5 (quoting *Terramar Retail Ctrs., LLC v. Marion # 2–Seaport Tr. U/A/D/ June 21, 2002*, 2017 WL 3575712, at *8 (Del. Ch. Aug. 18, 2017)). Here, of course, Cohen ***was*** "meaningfully involved" in the structuring and negotiation of the Terramar Transaction.

Finally, there is no support for the Trust's "sky is falling" claim that the Opinion subjects "any" minority member to jurisdiction in Delaware for "any" claim as a result of its investment in a Delaware LLC. OB 29-30. Here, the Trust was not a mere investor. Instead, as the trial court properly found, the Trust

(through its agent, Cohen) structured the underlying transaction and negotiated its terms. The Trust now contests those terms. As recognized by the Court of Chancery, the nexus between Terramar's declaratory judgment claim and the formation of Operating is "as close as it c[ould] be." Op. 16. The parade of horribles that the Trust conjures up as a result of the Opinion results from a misreading the Court of Chancery's well-reasoned opinion.

2. Subjecting the Trust To Personal Jurisdiction in Delaware Does Not Violate Due Process.

To determine if the exercise of personal jurisdiction under the Delaware Long-Arm Statute violates the Due Process Clause of the Fourteenth Amendment, the "focus of th[e] inquiry is whether [the nonresident defendant] engaged in sufficient 'minimum contacts' with Delaware to require it to defend itself in the courts of this State consistent with the traditional notions of fair play and justice." *Mobileactive*, 2013 WL 297950, at *29 (citation omitted). The requisite minimum contacts exist if the nonresident can "'reasonably anticipate' being required to defend itself in Delaware's courts." *Id.* (citation omitted). This Court has ruled that conferring personal jurisdiction based on the single act of formation of a Delaware entity, where the formation is related to the cause of action, does not offend due process because the nonresident purposely availed him

or herself of the privilege of conducting activities in Delaware. *See Papendick*, 410 A.2d at 152-53; *Mobilactive*, 2013 WL 297950, at *29; *Shamrock*, 421 F. Supp. 2d at 804.

The Trust argues that the Court of Chancery violated its constitutional due process because it is a passive nonresident member of a Delaware LLC that conducts no business in Delaware, and litigation in Delaware will subject it to unfair burdens. OB 33-34.[6] The Trust's creative description of its participation and role in the Terramar Transaction and the claim at issue does not accurately reflect the record and must fail.

The Trust has never put forth any argument regarding the burdens that would be imposed on the Trust by litigating in Delaware until now. *See* A58-63; A198-99; A929-31. Accordingly, this argument is barred by S. Ct. Rule 8.

Even if considered on the merits, the Trust's "burden" argument fails. The Trust primarily relies on *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), as holding that ***the***

[6] In fact, the Trust has veto rights over a wide variety of "Major Decisions" (A229-30) and is asserting violation of those rights in the California Action (A1300), so it is arguably not a "passive" investor at all.

"'primary concern' in evaluating the constitutionality of specific jurisdiction is 'the burden on the defendant.'" OB 33-34.

First, *Bristol-Meyers Squibb* is easily distinguishable on its facts. Bristol-Meyers Squibb Company ("BMS") sold the drug Plavix to distributors, who then sold Plavix to pharmacies throughout the country. In the suit, a class of plaintiffs, mostly non-residents of California, sued BMS in California, alleging that Plavix had harmed them. The California State Court of Appeal asserted personal jurisdiction over BMS, which is incorporated in Delaware, headquartered in New York and does not conduct any direct activity in California, and found that general jurisdiction was lacking but specific jurisdiction existed. The U.S. Supreme Court ultimately reversed, holding that California courts also lacked specific personal jurisdiction over BMS: "BMS's decision to contract with McKesson, a California company, to distribute Plavix ***nationally*** does not provide a sufficient basis for personal jurisdiction." *Bristol-Myers Squibb*, 137 S. Ct. at 1777 (emphasis added).

Therefore, the *plaintiffs* were actually "smaller" parties, to which the Trust analogizes itself, and the *defendant* was a "well-funded, large commercial enterprise" similar to how the Trust describes Terramar, the plaintiff here. *See* OB 34. Additionally, the case implicated interstate federalism, which is not a concern here. Without even specifically analyzing any burden on BMS, the U.S. Supreme

Court found, on other grounds, that BMS's contacts with California were insufficient to exercise personal jurisdiction.

Moreover, the Trust's selective quote from *Bristol-Meyers Squibb* concerning "burdens" does not attribute the quote's original source: *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *Woodson* recognizes that in evaluating minimum contacts with a forum state, reasonableness of the litigation burden is "a primary concern" but emphasizes that it must be "considered in light of other relevant factors[:]"

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, ***will in an appropriate case be considered in light of other relevant factors***, including the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum, . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies[.]

Id. at 292 (emphasis added). *Woodson* was cited by the Court of Chancery when it properly balanced these factors in accordance with Delaware law in the present case. *See* Op. 27.

The Trust accuses Terramar of filing its action "for the express purposes of forum-shopping, imposing these burdens upon the Trust and depriving the Trust of its right to pursue relief in California for Terramar's breaches of its fiduciary and contractual duties[.]" OB 34. However, a California court has already held that any claim to dissolve Operating must be brought in Delaware. Op. 6. Given that the Trust has refused to honor Terramar's exit rights, Terramar's only effective remedy is a suit in Delaware – as the trial court properly recognized. *See id.* 27-28 ("Absent jurisdiction over the Trust, Terramar might have sought to determine its rights under the Operating Agreement through an *in rem* dissolution proceeding, ***but this too would have resulted in litigation in this court***." (emphasis added)). Therefore, Terramar is not forum-shopping.

Nor is this a case where Terramar is trying to deprive a "natural plaintiff" of its choice of forum" through a "preemptive" lawsuit. OB 1-2, 8, 15, 17, 34. Terramar has not deprived the Trust of any of its rights. Rather, the Trust is attempting to thwart the rights that were granted to Terramar at the outset of the parties' contractual relationship.

To pass Constitutional muster, jurisdiction in a forum is proper only if a nonresident defendant's minimum contacts "relate to some act by which the defendant . . . deliberately created obligations between itself and the forum."

Albert v. Alex. Brown Mgmt. Servs., Inc., 2005 WL 2130607, at *15 (Del. Ch. Aug. 26, 2005). This test is easily met here. As properly held by the Court of Chancery, the Trust purposely availed itself of the benefits and protections of the laws of the State of Delaware by forming a Delaware entity for the purpose of consummating the Terramar Transaction, and the Trust should have anticipated that it might be required to adjudicate the terms of that transaction in Delaware. *See* Op. 26.

The Trust describes its involvement in the Terramar Transaction as merely "obtain[ing] a non-controlling minority interest in an entity that others opted to form under Delaware law." OB 35. As discussed above, this is simply not true. Rather, the Trust acted through Cohen, its sole representative, to structure and negotiate the transaction, including the conscious choice to form Operating as a Delaware LLC. *See* p. 10-13, 21-23, *supra*.

The Trust argues that even if it participated in forming Operating, it should not be required to defend claims in Delaware that have no causal connection to Operating's formation. OB 35-37. The cases cited by the Trust demonstrate an insufficient nexus between the challenged transactions and actions in Delaware. *Id*. 35-36. For reasons already discussed, these cases are easily distinguishable, as the nexus here between Operating's formation and Terramar's claim is as close as it can be. *See* p. 25-35, *supra*. For example, the Trust relies on

Kahuka Holdings as rejecting personal jurisdiction, but the case did not even reach the question of personal jurisdiction given its holding dismissing the case in favor of arbitration; any discussion of personal jurisdiction in the case is therefore non-binding dicta. *See* Op. 20-21.

The Trust revives its irrelevant point that it could not have reasonably anticipated litigating in Delaware because in other agreements, the parties "consistently chose the law of California to govern their affairs." OB 36-37. This only serves to highlight that the parties were conscious of how to choose California law and did not here. The parties could have formed Operating under the protection of California law but instead chose Delaware.

Therefore, the Terramar has established that the Trust has minimum contacts with Delaware such that its due process rights will not be violated by subjecting it to personal jurisdiction.

II. THE COURT OF CHANCERY PROPERLY TOOK JUDICIAL NOTICE IN ACCORDANCE WITH DELAWARE RULE OF EVIDENCE 201.

A. Question Presented

Whether the Court of Chancery acted within its discretion in taking judicial notice under Delaware Rule of Evidence 201 ("D.R.E. 201") of prior proceedings. *See* A1230.

B. Scope of Review

The Court of Chancery's decision to take judicial notice pursuant to D.R.E. 201 is reviewed by this Court under an abuse of discretion standard of review. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005).

C. Merits of Argument

The Trust alleges that the Court of Chancery erred procedurally and substantively in taking judicial notice of certain facts in its opinion. Neither of the Trust's arguments is persuasive.

1. Rule 201 Does Not Requires a Trial Court to Give Notice to a Party Prior to Judicially Noticing Facts.

The Trust selectively quotes one sentence from Rule 201(e) in asserting that Vice Chancellor Laster erred in taking judicial notice in the Opinion without first giving notice to the Trust. *See* OB 39 ("D.R.E. 201(e) ("A party is

entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."). Notably, nowhere in the sentence quoted by the Trust is there a requirement of *prior* notice, and the sentence omitted from the Trust's quotation clarifies that "[i]n the absence of prior notification, the request ***may be made after judicial notice has been taken***." D.R.E. 201(e)[7] (emphasis added).

The cases cited by the Trust do not support its position that notice ***must*** be given by the Court of Chancery before taking judicial notice. In *Barks v. Herzberg*, the Delaware Supreme Court, in *dicta*, expressed its opinion that a trial court judge should give full notice to counsel regarding facts to be judicially noticed. *Barks v. Herzberg*, 206 A.2d 507, 509 (Del. 1965). The Court, however, went on to note that "at bar, the error, ***if it was error***, was non-prejudicial at worst." *Id.* at 509 (emphasis added). *Tribbitt v. Tribbitt* is easily distinguished. There, the Delaware Supreme Court criticized the Family Court for "reject[ing]

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[7] Amended D.R.E. 201(e) (effective January 1, 2018) is substantively the same: "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." 2017 DELAWARE COURT ORDER 0009 (D.O. 0009).

unrefuted testimony by the Husband's expert and substitut[ing] for that testimony the results of its own internet search." *Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008). Vice Chancellor Laster did not reject any evidence presented by the Trust in favor of judicially noticed facts, nor does the Trust assert that he did so.

In compliance with Rule 201, the Trust had "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed" through its motion for reargument. D.R.E. 201(e). Vice Chancellor Laster carefully considered the Trust's arguments and found that the Trust "misapprehend[ed] the Opinion." OB Ex. B at 2. Vice Chancellor Laster clarified that "the court took 'judicial notice *of the prior proceedings*'" and went on to justify each of the four instances in which he took judicial notice. *Id.* at 2-3 (explaining the facts that he judicially noticed as: "procedural facts about a prior action that Limited filed against Terramar in California and a prior action that Limited filed against Terramar in this court[;]" "[t]he issuance of a post-trial decision[;]" "[t]he fact that the California court . . . ruled . . . that any claim to dissolve [Operating] must be brought in Delaware[;]" and that the court "heard the prior proceeding and hence has some familiarity with Seaport Village, the entities involved, and Terramar").

Because Vice Chancellor Laster committed no violation of Rule 201, there was no violation of the Trust's due process rights. *See* OB 39 (claiming that the Vice Chancellor's violation of Rule 201 resulted in a violation of due process).

2. Vice Chancellor Laster Judicially Noticed Facts in Accordance With Rule 201.

The Trust accuses the Court of Chancery of being influenced by evidence heard in the Prior Action and relying on premature impressions in deciding its Opinion. None of the four examples the Trust gives support its contention.

First, the Trust asserts that the Court of Chancery "described Terramar's claim as one for '*breach of contract*' . . . [which] suggests, therefore, that the trial court incorrectly inferred from its views developed during the Prior Action that the Trust acted wrongfully in its dealings with Terramar." OB 40. First, the gravamen of the complaint ***is*** for breach of contract – Terramar alleges that the Trust, as a party to the Operating Agreement, is improperly interfering with Terramar's exercise of rights under that contract, and thereby preventing Terramar's exercise of those contractual rights.[8] Moreover, the Trust's position

[8] The Trust's own position in the California Action that *it chose to affirmatively bring* prior to the issuance of the Opinion demonstrates that the (Continued . . .)

misconstrues the Court of Chancery's point. The Court of Chancery was simply distinguishing the cases that the Trust cited in arguing that "the formation of a Delaware entity must be 'part of a wrongful scheme' before a court can exercise personal jurisdiction under *Papendick*." Op. 18. The Court of Chancery explained that the type of claim here does not implicate wrongfulness and is more akin to a breach of contract claim. The Trust's argument that the Vice Chancellor predetermined this case based on his experience in the Prior Action thus should be rejected.

Second, the Trust complains that the Court of Chancery recognized that Taubman formed Lending with Cohen's assistance. *See* OB 40. Lending was an entity at issue in a prior action. Vice Chancellor Laster has already stated that he has "familiarity with Seaport Village, the entities involved, and Terramar" and properly judicially noticed facts related to the parties, including the formation of Lending by Taubman with the help of Cohen in refinancing the Yasuda Loan. *See* OB Ex. B at 3. The Trust does not contend that the trial court's finding is erroneous. Further, the details of the formation of Lending are largely irrelevant to

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(. . . continued)

Trust refuses to honor Terramar's rights under the Operating Agreement, which would in fact result in a breach of contract.

the issue of whether there is personal jurisdiction over the Trust. *See* OB 40 (recognizing that Lending was formed before the Trust was created in 2002); *id.* 41 (recognizing that "the fact record in the Prior Action . . . relates to conduct predating the facts alleged in Terramar's declaratory judgment action"). Even if Vice Chancellor Laster improperly failed to cite to the record with respect to this statement (he did not), the error is entirely non-prejudicial to the Trust.

Third, the Trust notes that the Court of Chancery reiterated a California court's holding that "any claim for dissolution must be brought in Delaware." OB 40; Op. 3. Vice Chancellor Laster has already stated that he took judicial notice of the California court's ruling. OB Ex. B at 3. The Trust attempts to split hairs in arguing that only a *statutory* claim for dissolution of Operating under the LLC Act was dismissed by the California court, not any claims under the Operating Agreement for dissolution. Yet, the ruling says *any* claim for dissolution, and, regardless, the fact of a California court's ruling is properly subject to judicial notice.

Fourth, the Trust complains that the Court of Chancery recognized that at the time of the Terramar transaction *in 2002*, Cohen had an existing and ongoing relationship with Taubman and Limited. *See* Op. 17. Again, the Trust does not (and cannot) dispute this fact. The Trust's attack on the Court of

Chancery's statement does not indicate improper judicial notice and actually demonstrates the Court of Chancery's correct reading of the record. *See* OB 40-41. The Court of Chancery never said that *the Trust* had an ongoing relationship with Taubman and Limited, only Cohen. The Court of Chancery also only stated that Cohen's relationship was ongoing as of *2002*. The Trust's assertion that Cohen's professional relationship with the Taubman parties ended in 2003 (*id.* 41) is therefore irrelevant. The record presented by Terramar clearly supports the Court of Chancery's statement that Cohen had a professional relationship with the Taubman parties as of the date of the Terramar Transaction.

Nothing in the trial court's opinion indicates that the Court of Chancery bound the Trust under collateral estoppel principles to factual findings made in the Prior Action that would affect its ruling regarding personal jurisdiction. The trial court's instances of judicial notice fully comport with D.R.E. 201 and should be upheld. Even if the trial court abused its discretion with respect to a certain instance of judicial notice challenged by the Trust (it did not), the record established by Terramar clearly supports a reasonable inference of finding personal jurisdiction over the Trust with respect to this action. Therefore, the trial court's purported errors are non-prejudicial to the Trust, and this Court should uphold the Court of Chancery's finding of personal jurisdiction.

CONCLUSION

For the foregoing reasons, Terramar respectfully requests that the Court affirm the Court of Chancery's denial of the Trust's Motion to Dismiss with prejudice.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2018, she caused a copy of the foregoing document to be electronically served, via File & Serve*Xpress*, upon the following counsel of record:

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