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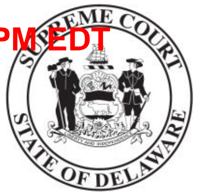

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARION #2-SEAPORT TRUST U/A/D JUNE 21, 2002, Defendant Below-Appellant, v. TERRAMAR RETAIL CENTERS, LLC, Plaintiff Below-Appellee.	No. 306, 2019 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 12875-VCL

APPELLANT'S OPENING BRIEF

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Dated: August 22, 2019

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NATURE OF PROCEEDINGS

This action represents the culmination of a 16-year effort by Terramar Retail Centers, LLC ("Terramar"), the managing member of Seaport Village Operating Company LLC (the "Company"), to extract for itself all value from an already existing and successful commercial property overlooking the Pacific Ocean known as San Diego Seaport Village ("Seaport Village" or "Phase I"). Terramar achieved its goal, without creating any value for the Company, by breaching numerous contractual provisions in the Company's Operating Agreement intended to protect the interests of the two minority members, Marion #2-Seaport Trust U/A/D June 21, 2002 (the "Trust") and San Diego Seaport Village, Ltd. ("Limited"). Since 2003, through its wrongful conduct, Terramar has diverted to itself approximately $75 million of the Company's cash flow, and has paid itself at least $20 million of unauthorized "fees," while distributing almost nothing to the minority members.

Unsatisfied with taking virtually all of the Company's cash flow, Terramar devised a plan to unilaterally force a liquidation of the Company's assets and collect 100% of the proceeds, despite the fact that the Operating Agreement requires the consent of at least one minority member to dissolve. Realizing that its scheme was unlawful and would result in the co-members' filing suit in California (the State where all members and Seaport Village are located), Terramar acted pre-emptively, filing an complaint for declaratory judgment in the Court of Chancery falsely

claiming that a dispute existed regarding interpretation of certain terms in the Operating Agreement that were clear on their face and the interpretation of which had never been disputed by the Trust.

Terramar brought this action in Delaware because it believed the Court of Chancery was a favorable forum, based on Vice Chancellor Laster's entry of judgment in Terramar's favor in an earlier matter brought by Limited (*Seaport Village Ltd. v. Terramar Retail Centers, LLC*, C.A. No. 8841-VCL). The Trust was not a party to that prior action, which was tried before Terramar commenced its liquidation scheme and did not address many of the key issues in this action. Terramar's ploy was successful because ultimately Vice Chancellor Laster allowed the determinations formed in the prior action to influence rulings in this proceeding, even though the Trust had no opportunity to present evidence in the earlier case. Indeed, in this action the trial court made findings in Terramar's favor that were contradicted by the undisputed evidentiary record, but were based on inaccurate impressions formed in the prior action.

To avoid the Operating Agreement's requirement that 75% of members must consent to dissolve the Company, Terramar manipulated a "put" right in Section 9.5 of the Operating Agreement to try to improperly execute a unilateral liquidation of the Company's assets and collect 100% of the sale proceeds. The "put" right was intended to provide the minority members a fair opportunity to purchase Terramar's

member interest. However, instead of following Section 9.5's detailed procedure, Terramar refused to comply and frustrated the Trust's efforts to purchase Terramar's interest, all for the purpose of improperly taking advantage of a unilateral liquidation mechanism. The liquidation provision in Section 9.5 was intended to apply only if Terramar first complied with the Section 9.5 requirements, and the trial record showed conclusively that Terramar did not do so.

In an effort to create a non-existent controversy over the Operating Agreement's provisions governing the "put" process, Terramar requested two narrow declarations:

> 1. Terramar "is entitled to unilaterally sell all of [the Company's] property and assets to a third party in connection with [the Company's] dissolution"; and
>
> 2. Terramar "correctly calculated the Waterfall Distribution," *i.e.*, the division of proceeds from selling the Company's assets.

A410.

Since the Trust had never asserted that Terramar was prohibited from selling to a third party if the requirements of the "put" process were met, Terramar's declaratory judgment claim was completely illusory. The Trust confirmed this when it answered the complaint and averred that Terramar is permitted to sell the Company's assets to a third party in connection with the Company's dissolution, but

only if Terramar first complied with all of the requirements of the "put" process. A2623-A2624.

Prior to answering the complaint in Delaware, the Trust filed its own action against Terramar in the Superior Court of California. Anxious to avoid a California forum, Terramar moved to stay the California action, but the California court denied Terramar's motion by finding that an action involving California residents and California real estate should proceed in California. A1843. Terramar then attempted to strike key allegations in the California complaint concerning Terramar's failure to follow the Section 9.5 "put" procedure requirements. This motion also was denied, thus squarely placing Terramar's failure to comply with the "put" requirements before the California court. A2891.

Given the California court's jurisdiction over this issue, the Trust moved the Court of Chancery to dismiss or stay this action in deference to the California proceeding. While the Trust's motion was pending, Terramar moved for an expedited case scheduling order. Over the Trust's objection, the Court of Chancery granted Terramar's request on the ground that the Delaware action was narrow and the California action was broad. As the Court of Chancery stated: "my action is narrow … my little action has [nothing] … to do with the big [California] action." A2478.

Since the Trust's answer confirmed that the issue on which Terramar was seeking a declaration was undisputed, the Court of Chancery should have granted the Trust's motion to dismiss or stay. Indeed, the trial court itself had previously recognized that its role was to "address the Delaware LLC interpretative issues," while leaving determination of factual circumstances to California. A2492. Without any "Delaware LLC interpretative issues" to adjudicate, the Court of Chancery should have deferred to the California court. Instead, the trial court erred by effectively re-writing Terramar's pleading and expanding the scope of the Delaware action beyond Terramar's narrow claim to include the issue already before the California court – whether Terramar "properly exercised" the "put" and "has the power to dissolve the Company." Ex. C, ¶2.

Adhering to the expedited schedule, trial was conducted only five months after the Court re-wrote Terramar's complaint. Despite uncontradicted evidence that Terramar had breached Section 9.5 of the Operating Agreement, had failed to comply with the conditions precedent in Section 9.5 and had breached every provision of the Operating Agreement intended to provide the minority members a fair opportunity to purchase Terramar's membership interest (and thereby avoid a forced dissolution), the Court of Chancery erroneously ruled in Terramar's favor.

The purpose of this appeal is to correct the numerous reversible errors reflected in the Memorandum Opinion and interlocutory pre-trial orders. Terramar

has already extracted virtually all of the approximately $75 million in net cash flow generated by Seaport Village while creating absolutely no value for the Company and its minority members. Terramar should not now be allowed to further take advantage of the Trust by dissolving the Company and taking 100% of the tens of millions of dollars that will be generated by that sale.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by declining to dismiss or stay this action, and in the process re-writing and expanding the scope of this declaratory judgment action beyond the confines of Terramar's pleadings to include issues not raised by the complaint and already before the California court.

2. The Court of Chancery erred when it (i) interpreted and enforced the Settlement Agreement, which by its terms must be interpreted and enforced by the California Superior Court, and (ii) held that the Settlement Agreement prohibited consideration of undisputed evidence of Terramar's misconduct that inflated Terramar's claimed priorities under the Operating Agreement and the sale price Terramar demanded for its membership interest.

3. The Court of Chancery erred when it held that statutes of limitation prohibited consideration of undisputed evidence of Terramar's misconduct that inflated Terramar's claimed priorities under the Operating Agreement and the sale price Terramar demanded for its membership interest.

4. The Court of Chancery erred by (i) finding that Terramar was not required to satisfy all conditions in Section 9.5 of the Operating Agreement prior to forcing the Company's dissolution; (ii) finding that Terramar disclosed its true opinion of Company Fair Market Value; (iii) concluding that Terramar demanded a purchase price for its membership interest that was calculated accurately; (iv)

disregarding evidence proving that Terramar did not negotiate in good faith as the Operating Agreement required; and (v) holding that the Operating Agreement imposed a "joint purchase requirement."

STATEMENT OF FACTS

I. BEFORE TERRMAR'S INVOLVEMENT, SEAPORT VILLAGE WAS A SUCCESSFUL ENTERPRISE.

In 2003, the owners of the Seaport Village ground leasehold offered Terramar[1] an opportunity to purchase a 50% *pari passu* interest in Seaport Village at a discounted price of $7 million. A5594. At that time, Seaport Village faced only one obstacle: The lessor, the Port of San Diego (the "Port"), had conditioned any extension of the Phase I lease upon redevelopment of the Old Police Headquarters ("Phase II"), a troubled property adjacent to Phase I. A5555; A5566; A5594. To address the Port's desire to redevelop Phase II, Terramar was invited to join as a strategic partner who would use its balance sheet to obtain inexpensive third party debt and its development experience to meet the Port's demands for developing Phase II (which would, in turn, achieve the parties' goal of extending the Phase I ground lease beyond 2018). A5594-A5599.

The transaction with Terramar included forming the Company, in which Terramar obtained a 50% managing membership interest, to hold the ground lease rights to Phase I. A5592-A5593. At that time, the Trust obtained a 25% minority membership interest in the Company as consideration for past services rendered to Limited by M.A. Cohen & Co., a licensed broker and advisory firm that assigned its

[1] At the time, Terramar was named GMS Realty, LLC. For ease of reference, where possible this entity is referred to as "Terramar."

rights to the Trust. A5655. Limited obtained the remaining 25% interest in the Company. A111.

II. THE PARTIES ENTER A *PARI PASSU* AGREEMENT SUBJECT TO CERTAIN NARROW EXCEPTIONS.

The members agreed to a *pari passu* deal. During negotiations, Terramar expressed concerns that the Port might select another party to redevelop Phase II, and thereby jeopardize the Company's ability to secure a Phase I ground lease extension. A55-A56; A5597-A5599. To protect against this scenario, Terramar negotiated for a $7 million priority on distributions of net cash flow and sale proceeds (the "IRR Entitlement") in the unlikely event Phase II was not redeveloped by the Company and, accordingly, the Phase I ground lease was not extended by at least 25 years (the "Cut-Off Condition") before July 2005 (the "Cut-Off Date"). A72. The Operating Agreement provided that if the Phase I ground lease was extended after the Cut-Off Date, the IRR Entitlement would immediately cease and the other members would have a priority until they received an amount equal to the amount previously paid to Terramar. A72.

Terramar was incentivized to diligently pursue redevelopment of Phase II in order to secure a long-term Phase I ground lease extension. Even if the Phase I ground lease was not extended before the Cut-Off Date, Seaport Village provided consistent streams of after-debt service cash flow that easily (and quickly) would

have repaid Terramar's IRR Entitlement, while still allowing the other members to receive $7 million in "catch-up" distributions. A5597-A5599.

III. TERRAMAR EXTRACTS $20 MILLION FROM THE COMPANY IN UNAUTHORIZED "FEES" TO AVOID REPAYMENT OF THE IRR ENTITLEMENT.

After assuming its fiduciary role as Manager, Terramar began misusing its control over the Company to divert millions of dollars of cash flow to itself. The trial record shows – and Terramar does not dispute – that between 2003 and 2010, Terramar collected more than approximately $32 million from the Company's net cash flow. A113-A140; A169-A182; A234-A264; A270-A286. Over the same time period, the Company made very limited distributions to the other members, and Terramar never explained to the other members where the money went or how much was paid to Terramar. *Id.* While this cash flow would have repaid Terramar's $7 million investment (and covered catch-up payments to the other members), Terramar credited only limited amounts against the IRR Entitlement. A5602-A5603.

During trial, Terramar did not dispute evidence showing that it received approximately $20 million labeled as "fees" and "pre-development costs." A5596-A5597. These unauthorized "fees," which in fact were disguised distributions, should have been credited against the IRR Entitlement.

None of these "fees" to Terramar, however, were authorized by Section 5.4(d) of the Operating Agreement because they (i) were not paid under a contract between

the Company and Terramar, and (ii) did not reflect "market fees." *Id.* Not a single contract between Terramar and the Company was ever produced or offered at trial. Absent such contracts, Terramar could not be paid any fees, let alone $20 million. Additionally, the Operating Agreement does not allow Terramar to charge the Company for "pre-development costs" relating to Phase II. A78. Moreover, the uncontroverted trial record established that the fees paid to Terramar were millions of dollars above market. A287-A289; A5804. By causing the Company to pay these unauthorized "fees," Terramar breached the Operating Agreement in order to collect over $20 million of cash flow without crediting it as distributions against the IRR Entitlement while, at the same time, the accrual on that priority grew exponentially. A5596-A5597; A5602-A5603.

IV. TERRAMAR IMPROPERLY ISSUES AND SELF-FUNDS A CAPITAL CALL.

In July 2010, Terramar issued a capital call for $20.08 million to refinance the Company's inexpensive senior debt. A265-A266. Terramar did so in breach of its covenant, in Section 3.2(a) of the Operating Agreement, "not to issue a Capital Call Notice unless [Terramar] has made a good faith effort to secure third party financing from lenders … covering as much as possible" of the necessary funding. A67. Instead, Terramar funded 100% of the capital call, thereby requiring the Company to pay Terramar a 12% accrual compounded annually, without making any good

faith effort to obtain financing from outside lenders to cover "as much as possible" of the capital needed to repay the senior debt.

At trial, Terramar argued that it satisfied its covenant to make "a good faith effort to secure third party financing" by engaging an outside broker, Holliday Fenoglio Fowler ("HFF"), to solicit lenders. However, the record contains no evidence that HFF or Terramar actually contacted any lenders or presented any lender term sheets to the Company. A183-A222. Moreover, Terramar's retention of HFF was itself an independent breach of Section 5.4(b) of the Operating Agreement, which obligates the Company to engage M.A. Cohen & Co. as the exclusive "outside mortgage broker" for third party financing. A78. The uncontroverted record shows that Terramar did not hire M.A. Cohen & Co. prior to issuing the capital call and never disclosed HFF's engagement to the Trust. A5601.

In reality, Terramar never wanted to refinance the Company's debt by borrowing from a third party lender at prevailing interest rates of 3%-4%. Instead, the unlawful capital call allowed Terramar to create a new priority under the Operating Agreement for principal and accruals, and thus divert even more cash flow to itself without paying down the IRR Entitlement.

V. TERRAMAR ENSURES THAT THE "CUT-OFF CONDITION" IS NOT SATISFIED.

To improperly preserve the IRR Entitlement and its excessive return on unnecessary self-funded capital, Terramar took extraordinary efforts, in breach of its

contractual and fiduciary obligations, to ensure that the Company *did not* secure a long-term extension of the Phase I ground lease. For example, the lone Phase I ground lease proposal Terramar made to the Port during the years 2004-2009 would have extended the lease by only 20 years, which, as Terramar was well aware, would not have satisfied the "Cut-Off Condition" and extinguished the growing IRR Entitlement. A167; A5578.

In 2010, Terramar made another proposal for a Phase I ground lease extension in conjunction with redeveloping Phase I and Phase II. A267-A269. The Port agreed to the proposal, subject only to re-negotiating the Phase I ground rent. A5578-A5580. However, Terramar inexplicably agreed to a Phase II ground lease *without* an accompanying extension for the Phase I ground lease. A5578-A5581; A5603. All parties, including Terramar, testified at trial that Phase II was a troubled property (A5477; A5488; A5514-A5515); thus, the only legitimate reason to agree to redevelop Phase II would be to obtain a long-term extension of the Phase I ground lease.

Had Terramar secured a ground lease extension on Phase I concurrent with executing the ground lease on Phase II, Terramar's IRR Entitlement would have ceased and the extension would have created tens of millions of dollars of value for all members. Instead, by entering into a ground lease on Phase II *without* an

extension of the Phase I ground lease, Terramar prevented the "Cut-Off Condition" from being satisfied and maintained the growing IRR Entitlement.

In 2015, the Company made an updated development proposal to the Port that included a long-term extension of the Phase I ground lease. The Port ultimately recommended that its board reject the Company's proposal, which the Port staff did on October 6, 2015. While Terramar claimed to the Trust and the Port that it would challenge the decision, Terramar never did so. Terramar also never submitted a revised proposal or attempted to take advantage of a Port policy allowing for short-term ground lease extensions without board approval. A141-A166. Instead, Terramar once again chose to perpetuate the IRR Entitlement, which would have been extinguished had the Phase I ground lease had been extended.

VI. TERRAMAR AND THE TRUST ENTER A SETTLEMENT AGREEMENT GOVERNED BY CALIFORNIA LAW AND SELECTING A CALIFORNIA VENUE.

In early October 2015, the Trust entered into a Settlement Agreement with Terramar (the "Settlement Agreement") in reliance upon Terramar's false assurances that the Company would diligently seek to obtain an extension of the Phase I ground lease. A5528-A5530. The Settlement Agreement provides unambiguously that "[a]ny action related to enforcement or interpretation of this Agreement shall be brought in the Superior Court of the State of California." A1950. The Settlement Agreement further provides that it is governed by California law. *Id.*

VII. TERRAMAR PURPORTEDLY EXERCISES THE "PUT."

Section 5.6 of the Operating Agreement expressly prohibits a "sale or disposition of all or any substantial portion of Company Property" without written consent of members owning at least 75% of the Company. A79-A80. To avoid this requirement, Terramar manipulated a contractual "put" right as a means to unilaterally liquidate the Company's assets and take 100% of the proceeds.

The Operating Agreement gives Terramar the right to "put" its membership interest to the other members for sale. Section 9.5 sets forth a detailed, multi-step process intended to facilitate a negotiated purchase of Terramar's membership interest. First, Terramar must deliver a "Buy-Out Notice" to the other members that "shall include a statement of [Terramar's] opinion of":

> 1. The "*Company Fair Market Value*," defined as the Company's fair market value, taking into account the fair market value of Seaport Village and all other assets and liabilities of the Company; and
>
> 2. The "*GMS Purchase Price*," defined as the amount that would be distributed to Terramar, pursuant to Section 4.1, "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."

A87-A88. In response to the Buy-Out Notice, the other members may dispute Terramar's claimed "Company Fair Market Value." A88. If such a dispute is raised, then the Operating Agreement mandates that "the parties shall, in good faith, attempt

to reach a mutually acceptable Company Fair Market Value" within 30 days. *Id.* If that negotiation process does not result in an agreed-upon sale of Terramar's interest, then the parties may use an appraisal process to determine Company Fair Market Value. *Id.* As a last resort, in the event that Terramar complies with the foregoing requirements and a negotiated purchase of Terramar's interests does not occur, Section 9.5 then permits Terramar to pursue a dissolution of the Company and distribute the liquidation proceeds among the members. A89.

On December 18, 2015, Terramar delivered a letter to the Trust and Limited purporting to constitute a "Buy-Out Notice" under Section 9.5(a) of the Operating Agreement. A290; A5582-A5583; A5476. In the Buy-Out Notice, Terramar asserted without any explanation that the Company Fair Market Value was $42,932,927. A290. The Buy-Out Notice further demanded a Purchase Price of $55,445,552 for Terramar's 50% membership share of the Company, again without any explanation. *Id.* Terramar only later explained, in this litigation, that its "gross" fair market value was actually $55,445,552, and the statement of Company Fair Market Value in the Buy-Out Notice was "net" of Terramar's outstanding member loan. A5576; A5583; A5687-A5688.

VIII. TERRAMAR REFUSES TO NEGOTIATE WITH THE TRUST IN GOOD FAITH.

After receiving Terramar's Buy-Out Notice, the Trust timely delivered a "Notice of Dispute" pursuant to Section 9.5(b). A5476. In the Notice of Dispute,

the Trust requested that Terramar "provide details on the assumptions and calculations that resulted in the amounts specified in [the Buy-Out Notice] for both the Company Fair Market Value and the GMS Purchase Price." A291. The Trust requested this information in a good faith effort to reach mutual agreement on the "Company Fair Market Value" as the Operating Agreement requires. *Id*.

Terramar, however, never provided the Trust the requested details for Terramar's "assumptions and calculations" and refused to negotiate at all, let alone in good faith. During the 30-day negotiation period mandated by Section 9.5(c), Terramar provided the Trust only a handful of irrelevant and non-responsive November 2015 financial statements for the Company. A303-A359. None of these documents provided any explanation or support for Terramar's opinion of Fair Market Value or the underlying calculation of the Purchase Price or Terramar's purported priorities. Terramar later claimed that it would furnish additional materials, but only if the Trust executed a non-disclosure agreement, which prohibited the Trust from sharing any information with any potential capital source. A373-A377.

Despite this, the Trust worked with Desert Troon Companies, a pension advisor familiar with Seaport Village, to negotiate a transaction under which the Trust, with Desert Troon, would purchase Terramar's membership interest in response to the "put." In February 2016, Mr. Cohen communicated to Terramar's

CEO, Hugh Zwieg, that the Trust and Desert Troon had a strong interest in purchasing Terramar's membership interest. A179; A5478. To that end, Desert Troon requested that Terramar provide basic information for Seaport Village and furnished Terramar with an already executed NDA. A378. Terramar, however, refused to either consider the proposed transaction or provide any information to Desert Troon. A387-A399.

IX. TERRAMAR IMPROPERLY INSISTS THAT ITS MEMBERSHIP INTEREST MUST BE PURCHASED JOINTLY BY THE TRUST AND LIMITED.

When the Trust persisted in its attempt to purchase Terramar's membership interest in response to the "put," Terramar refused to sell its membership interest unless it was purchased *jointly* by both the Trust and Limited. A5586-A5588; A5613-A5614. Mr. Zwieg testified that he made this demand not because he believed it was required by the Operating Agreement, but because Terramar deemed it to be in Terramar's best interest. A3976-A3977; A5586-A5588. In reality, Terramar imposed this arbitrary requirement to prevent the Trust from purchasing Terramar's membership interest.

X. TERRAMAR FILES AN ILLUSORY, PRE-EMPTIVE DECLARATORY JUDGMENT ACTION TO GRAB JURISDICTION IN DELAWARE.

Recognizing that it would likely be sued in California, Terramar commenced this action as the final step of its plan to liquidate the Company and keep all sales

proceeds. Terramar believed that Delaware was a favorable forum because in November 2015, shortly before Terramar purported to activate the "put," Vice Chancellor Laster issued a bench ruling granting judgment in Terramar's favor on the claims previously filed by Limited, in an action to which the Trust was not a party.

Undoubtedly hoping to capitalize on that result, Terramar filed a pre-emptive complaint asking the Court of Chancery to declare that: (i) Terramar "is entitled to unilaterally sell all of [the Company's] property and assets to a third party in connection with [the Company's] dissolution"; and (ii) Terramar "correctly calculated the Waterfall Distribution" under which Terramar claims it would be entitled to 100% of sale proceeds. A410. The Trust moved under Rule 12(b)(2) to dismiss the action for lack of personal jurisdiction. The Court of Chancery denied that motion, in an opinion that this Court affirmed on interlocutory appeal.

XI. THE TRUST MOVES TO STAY THIS ACTION IN FAVOR OF THE CALIFORNIA ACTION.

While the jurisdictional motion was pending, the Trust filed a complaint against Terramar in the California Superior Court after Terramar listed the properties for sale. In the California action (*Marion #2-Seaport Trust U/A/D June 21, 2002 v. Terramar Retail Centers, LLC*, Case No. SC127822), the Trust alleges several causes of action arising from Terramar's breaches of its fiduciary and contractual

duties, including a claim that Terramar failed to comply with the "put" requirements set forth in Section 9.5 of the Operating Agreement.

After this Court remanded the action, the Trust moved to stay or dismiss it, on *forum non conveniens* grounds, in favor of the pending California action. At that time, the California court had denied a motion by Terramar to stay the California action and had denied a motion by Terramar to strike the Trust's allegation that Terramar had failed to comply with Section 9.5. A1843; A2891. In addition, the parties had commenced discovery in the California action. A1974-A2106.

While the Trust's motion to stay the Delaware action was pending, and before Terramar had even filed its opposition to the Trust's motion to dismiss, Terramar sought entry of an expedited case scheduling order in Delaware that would result in a Delaware trial before any trial of the California action. A2107-A2117.

XII. THE TRIAL COURT ENTERS A SCHEDULING ORDER, DENIES A STAY AND RE-WRITES TERRAMAR'S CLAIM.

When the trial court heard argument on Terramar's motion for a case scheduling order, the court expressed its view that Terramar's Delaware declaratory judgment claim was narrow – seeking only a declaration "that says Terramar … under the contract can sell to third parties, period, stop" (A2477) – and distinct from the Trust's broader claims in California. The trial court decided to enter a case schedule, observing that:

> [T]here's likely a comparative advantage in having a Delaware court address the Delaware LLC interpretative issues and then leaving it for the California court to address issues of California law in terms of how that Delaware contract potentially operates, not in terms of the contract itself operating, but how it impacts factual circumstance that may or may not be raised on the ground in California.

A2492-A2493.

The court's scheduling order required the Trust to file "a substantive answer to the complaint" no later than June 28, 2018, before the court was to hear or decide the Trust's motion to stay. A2496. The Trust complied by filing an answer, which made it clear that the Trust had never disputed Terramar's right to sell the Company's assets to a third party following a valid dissolution. A2623-A2624. Because the trial court had not yet ruled on the Trust's motion to stay, the Trust noted and reserved its right under Rules 13 and 15 to amend the pleading to assert, by way of counterclaim or affirmative defense, claims alleged in the California action. A2605; A2629.

The trial court later denied the Trust's motion to dismiss or stay, ruling that the two actions would "proceed in parallel." Ex. C, ¶16. In its Order, the court stated for the first time that it would adjudicate whether Terramar "properly exercised a buyout option" and "has the power to dissolve the Company and can sell the Company's property and assets." *Id.*, ¶2.

XIII. THE ACTION PROCEEDS TO TRIAL.

The Trust moved for re-argument and requested amendment of the case scheduling order to (i) allow the Trust to assert certain California claims as counterclaims in Delaware, and (ii) coordinate discovery between the two actions. A3288-A3299. The trial court denied the Trust's motion and declined to modify the case schedule. A3563-A3565.

The court held trial on January 23-24, 2019. On May 22, 2019, the trial court issued the Memorandum Opinion declaring that Terramar (i) "may dissolve the Company and unilaterally sell its assets to a third party," and (ii) "has correctly calculated the allocation of proceeds from the sale of the Company's assets after a dissolution." Ex. B, pp. 36, 46.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY EXPANDED THE SCOPE OF ISSUES RAISED IN THIS ACTION.

A. QUESTIONS PRESENTED.

Did the Court of Chancery err by declining to dismiss or stay this action, and in the process re-writing and expanding the scope of this declaratory judgment action beyond the confines of Terramar's pleadings to include issues not raised by the complaint and already before the California court? A2796-A2798, A3290-A3292.

B. SCOPE OF REVIEW.

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). This Court should reverse unless "the findings and conclusions of the [trial] Court are supported by the record and are the product of an orderly and logical [reasoning] process." *Id.* (internal quotations omitted).

C. MERITS OF ARGUMENT.

When the Court of Chancery denied the Trust's motion to dismiss or stay this action in favor of the California action, the 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 – primarily the Trust's claim that Terramar's attempt to exercise the "put" did not comply with Section 9.5 of the Operating Agreement and was invalid.

Terramar's prayer for relief sought only a declaration that Terramar was "entitled to sell all of [the Company's] property and assets to a third party in connection with [the Company's] dissolution." A410. The Chancery Rules unambiguously obligated Terramar to plead "a demand for judgment for the relief to which the party deems itself entitled" (Ct. Ch. R. 8(a)), and Terramar did *not* demand a declaration that it complied with the requirements of Section 9.5 that must be satisfied before Terramar may dissolve the Company. It is axiomatic that Terramar is bound by its allegations and cannot seek relief that it never requested in its complaint. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 816 n.10 (Del. Ch. 2005) (rejecting, as a violation of Rule 8(a), plaintiffs' attempt in briefing to assert a claim not alleged in their complaint), *aff'd*, 906 A.2d 766 (Del. 2006).

When the Trust's answer mooted Terramar's illusory claim for declaratory judgment, leaving the California court to resolve the Trust's claim challenging Terramar's compliance with Section 9.5, the Court of Chancery should have dismissed or stayed this matter in deference to the California action. Instead, the court erred by denying the Trust's motion and re-writing Terramar's complaint to seek declaratory relief that *Terramar itself had not requested* – *i.e.*, a declaration that Terramar "properly exercised a buyout option" and "has the power to dissolve the Company and can sell the Company's property and assets." Ex. C, ¶2.

The Court of Chancery should not have tried issues that were not raised in Terramar's pleading, but should have dismissed or stayed this action in deference to the California court. Reversing the Final Order and Judgment, and denying Terramar's request for declaratory relief, will remedy the trial court's errors.

II. THE TRIAL COURT HELD INCORRECTLY THAT THE TRUST'S CHALLENGES TO TERRAMAR'S CONDUCT WERE RELEASED.

A. QUESTIONS PRESENTED.

Did the Court of Chancery err when it (i) interpreted and enforced the Settlement Agreement, which by its terms must be interpreted and enforced by the California Superior Court, and (ii) held that the Settlement Agreement prohibited consideration of undisputed evidence of Terramar's misconduct that inflated Terramar's claimed priorities under the Operating Agreement and the sale price Terramar demanded for its membership interest? A5863-A5865.

B. SCOPE OF REVIEW.

On questions of subject matter jurisdiction, the Court considers *de novo* whether the trial court correctly formulated and applied legal principles. *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004). 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 Products & Chemicals, Inc.*, 872 A.2d 944, 950 (Del. 2005).

C. MERITS OF ARGUMENT.

At trial, the Trust offered evidence proving that, over 16 years, Terramar improperly inflated its claimed priorities under the Operating Agreement by diverting at least $20 million of cash flow to itself, under the guise of "fees," that should have been credited as distributions against those priorities. This evidence

further demonstrated that Terramar improperly demanded an inflated purchase price for its membership interest, which incorporated the manipulated priorities, in breach of Section 9.5 of the Operating Agreement. Terramar did not dispute this evidence, and thus the trial court should have found that Terramar failed to prove its compliance with the Operating Agreement.

The trial court, however, completely disregarded this evidence in entering judgment for Terramar, finding that the Trust's release of "claims" against Terramar in the Settlement Agreement effectively erased Terramar's 16-year history of misconduct from the record. This holding was erroneous for two reasons: First, the trial court had no authority to apply the Settlement Agreement, which by its terms may only be enforced or interpreted by the California Superior Court. Second, even if the trial court had jurisdiction to interpret the Settlement Agreement (which it did not), its interpretation was incorrect as a matter of law. When these errors are reversed, the evidence of Terramar's inflated purchase price that the trial court incorrectly disregarded compels judgment in the Trust's favor.

1. The Trial Court Should Not Have Interpreted Or Enforced The Settlement Agreement.

Terramar and the Trust expressly agreed that the Settlement Agreement "shall be construed under and in accordance with the laws of the State of California …. Any action related to enforcement or interpretation of this Agreement *shall be brought in the Superior Court of the State of California*." A1950 (emphasis added).

This Court has recognized that "[a] valid forum selection clause must be enforced." *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013). The Court of Chancery, however, committed reversible error when it failed to consider the Settlement Agreement's forum selection clause and ruled that the release barred the Trust from offering any of Terramar's conduct predating October 2, 2015 to contest Terramar's declaratory judgment claims. *See* Ex. B, pp. 37-40.

2. The Trial Court Interpreted The Settlement Agreement Incorrectly.

Additionally, the trial court's interpretation of the release has no support in the contract's plain language or applicable law. The Settlement Agreement release applies only to affirmative claims, not to defenses. In Section 2.1, the parties released "each other from any and all manner of claims, actions or causes of action, … through the date of this Agreement," subject to certain exceptions. A1946-A1947.

Although the release refers to "claims, actions or causes of action," it expressly does *not* include defenses. The parties could have used language that specifically released defenses, but did not. A release must be unambiguous, and when it is silent regarding defenses it does not prohibit a party from raising defenses based on pre-release facts. *See Comvest Capital II, LP v. Selkoe*, 2016 WL 1735532, at *4 (Del. Super. Apr. 26, 2016) ("The release provision … does not bar [defendant] from raising the implied covenant as a defense because the release provisions say

nothing about releasing defenses, and a release must be unambiguous."); *Solis v. Kirkwood Resort Co.*, 114 Cal. Rptr. 2d 265, 269 (Ct. App. 2001) (under California law, "contract principles apply when interpreting a release" and "[a] prior release must be 'clear, unambiguous and explicit'") (quoting *Olsen v. Breeze, Inc.*, 55 Cal. Rptr. 2d 818, 825 (Ct. App. 1996)).

While the trial court acknowledged this omission from the release's express language, the court nonetheless incorrectly inferred that the Trust *intended* to release all defenses that would "shift value between Terramar and the Trust." Ex. B, p. 39. There is no record evidence to support the trial court's inference, and the court cited none. Moreover, the trial court had no basis to look beyond the four corners of the Settlement Agreement, since the parties expressly defined the release to exclude affirmative defenses. The foregoing authorities make clear that, if the language of a release *is* ambiguous concerning its application to "defenses," then it must be construed *against* including defenses within the scope of the release.

In this action, Terramar did not seek damages or payment of money from the Trust; rather, Terramar asked for declaratory relief concerning its own conduct. To rebut this, the Trust offered uncontroverted evidence proving that the purchase price Terramar demanded from the Trust was vastly overstated because Terramar's history of misconduct inflated Terramar's claimed priorities. This does not seek "to impose losses on Terramar and recover on [the Trust's] own behalf" (Ex. B, p. 40), but rather

shows that Terramar's claimed entitlement to a Purchase Price based on priorities that were previously paid is invalid and cannot support entry of declaratory relief. Proffering evidence to refute Terramar's claims was not an "affirmative defense" and could not have been barred by the Settlement Agreement. *See Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense.").

III. THE TRIAL COURT HELD INCORRECTLY THAT THE TRUST'S CHALLENGES TO TERRAMAR'S CONDUCT WERE TIME-BARRED.

A. QUESTION PRESENTED.

Did the trial court err when it held that statutes of limitation prohibited consideration of undisputed evidence of Terramar's misconduct that improperly inflated Terramar's claimed priorities under the Operating Agreement and the sale price Terramar demanded for its membership interest? A5865-A5866; A6164-A6173.

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. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004).

C. MERITS OF ARGUMENT.

It is a "well-established rule that affirmative defenses are not ordinarily subject to the statute of limitations so long as they are properly pled and arise from the same transaction as the claims in the original complaint." *U.S. Philips Corp. v. Samsung Elecs. Co., Ltd.*, 2011 WL 13142645, at *2 (D. Del. Mar. 25, 2011). *See also United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 72 (1956); *Wells v. Rockefeller*, 728 F.2d 209, 215 (3d Cir. 1984); *Delaware Chemicals, Inc. v. Reichhold Chemicals, Inc.*, 121 A.2d 913, 918 (Del. Ch. 1956). Neither of the authorities cited

by the trial court, *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450 (Del. 2016) ("*Finger Lakes*"), and *TIFD III-X LLC v. Fruehauf Prod. Co., LLC*, 883 A.2d 854 (Del. Ch. 2004) ("*TIFD*"), departed from this rule, since both opinions recognized that a recoupment claim is not barred by statutes of limitations if it "arises out of the same transaction or occurrence as the plaintiff's suit." *TIFD*, 883 A.2d at 859. *See also Finger Lakes*, 151 A.3d at 454.

The trial court misapplied the rule by concluding that the Trust's defenses "do not arise out of the same transaction as the claims that Terramar has asserted under Section 9.5 of the [Operating] Agreement." Ex. B, p. 43. As re-written by the trial court, Terramar's claim for declaratory relief focused on whether Terramar complied with the requirements of Section 9.5 governing how Terramar must exercise the "put." The uncontroverted record, which the trial court disregarded based on its misapplication of the statute of limitations, showed that Terramar grossly inflated its contractual priorities and demanded a purchase price that was overstated by millions of dollars. The evidence offered by the Trust proving that Terramar overstated its purchase price, therefore, related directly to Terramar's compliance with Section 9.5. It is inconceivable that the Trust's challenges to Terramar's claimed purchase price "do not arise out of the same transaction" as Terramar's claim for a declaration that the purchase price is valid. Thus, the Trust's defenses cannot be time-barred under *Finger Lakes* or *TIFD*.

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

A. QUESTIONS PRESENTED.

Did the trial court err by (i) concluding that Terramar was not required to satisfy all conditions in Section 9.5 of the Operating Agreement before forcing the Company's dissolution; (ii) finding that Terramar disclosed its true opinion of Company Fair Market Value; (iii) concluding that Terramar demanded a purchase price for its membership interest that was calculated accurately; (iv) disregarding evidence proving that Terramar did not negotiate in good faith as the Operating Agreement required; and (v) holding that the Operating Agreement imposed a "joint purchase requirement"? A5804-A5831.

B. SCOPE OF REVIEW.

The interpretation of contracts raises questions of law that the Court reviews *de novo*. *Honeywell*, 872 A.2d at 950.

C. MERITS OF ARGUMENT.

1. Terramar Was Required To Comply With All Terms Of Section 9.5 Before Dissolving The Company.

In the Memorandum Opinion, 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. Ex. B, p. 28 n.13. As the plaintiff, Terramar bore the burden of proving

its entitlement to declaratory judgment. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008). Additionally, "a party who seeks to recover upon a contract must prove such facts as are necessary to establish a compliance with conditions precedent thereto." *Metro. Life Ins. Co. v. Jacobs*, 1 A.2d 603, 606 (Del. 1938). Therefore, Terramar was not entitled to declaratory judgment unless it proved that it satisfied each and every obligation required by Section 9.5 of the Operating Agreement before Terramar could lawfully dissolve the Company and sell its assets. *See Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 WL 3548206, at *10-11 (Del. Ch. Aug. 16, 2012), *aff'd*, 75 A.3d 101 (Del. 2013).

2. Terramar Did Not Disclose Its True Opinion Of "Company Fair Market Value," As Required By Terramar's Contractual And Fiduciary Duties.

Section 9.5(a) expressly required that Terramar's Buy-Out Notice "shall include" a statement of "Company Fair Market Value" as defined by the Operating Agreement. A87. Terramar's contractual and fiduciary duties did not permit Terramar to provide arbitrary numbers, but required a good faith, truthful statement of Terramar's opinion of Company Fair Market Value. *See Sussex Life Care Associates v. Strickler*, 1988 WL 156833, at *4 (Del. Ch. June 13, 1989) ("[P]artners owe fiduciary duties to their fellow partners, and this duty has been held to encompass a duty of full disclosure by a selling partner to the buying partners.").

The starting point of "full disclosure" is honesty, which required Terramar to disclose its true opinion of Company Fair Market Value, not an inflated number designed to equal Terramar's claimed priorities.

Additionally, "once [fiduciaries] voluntarily undertake to make certain disclosures to the [equityholders], they are obligated, under the so-called duty of complete candor, to disclose all material facts." *Ciro, Inc. v. Gold*, 816 F. Supp. 253, 266 (D. Del. 1993). No conceivable definition of "complete candor" would permit Terramar to provide an inflated Company Fair Market Value and then refuse to disclose "the assumptions and calculations" underlying that amount when requested to do so by the Trust in its Notice of Dispute delivered under Section 9.5(b). Terramar violated the rule that, when the manager of a Delaware entity "chooses to disclose a course of events or to discuss a specific subject, … it cannot do so in a materially misleading way, by disclosing only part of the story, and leaving the reader with a distorted impression." *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018).

As Terramar's witnesses testified at trial, the Buy-Out Notice reflected a "gross" Company Fair Market Value of $55,445,552, inclusive of Terramar's Member Loan balance. A5567; A5583; A5687-A5688. This figure, however, was contrived and did not reflect Terramar's true opinion of Company Fair Market Value. Rather, Terramar's true opinion of "gross" Fair Market Value at the time of

the Buy-Out Notice was $43,221,916, as recorded in an internal Terramar spreadsheet entitled "Sell Today @ end of 2015" (A3574-A3576, the "2015 Valuation Spreadsheet"), the only document ever produced by Terramar evidencing Terramar's analysis and calculations of the combined "gross" Fair Market Value of Phase I and Phase II. A5616-A5619.

The 2015 Valuation Spreadsheet disclosed that, according to Terramar's internal calculations, the values for Phase I and Phase II at the end of December 2015 were $9,562,544 and $34,996,133, respectively, resulting in a combined "gross" value for Phase I and Phase II of $44,558,677. A3574-A3576. The 2015 Valuation Spreadsheet uses industry standard valuation methodologies which were endorsed by Tim Pettit (Terramar's CFO) and supported by his trial testimony. A5684.

According to Terramar's own expert, who calculated Terramar's claimed priorities as of the date of the Buy-Out Notice, the sum of the priorities fell within 0.0098% of the stated "gross" Fair Market Value. A5704. The trial court never considered that Terramar's stated Fair Market Value "coincidentally" resulted in a number virtually identical to Terramar's claimed priorities. This implausible "coincidence" demonstrates Terramar's true approach to deriving the Fair Market Value stated in the Buy-Out Notice – Terramar concealed its true opinion of value shown in the 2015 Valuation Spreadsheet, and simply aggregated its priorities and inserted that sum as its purported Fair Market Value.

In finding for Terramar, the trial court ignored this evidence and instead accepted uncritically the trial testimony of Mr. Pettit purporting to describe *how* Terramar determined its opinion of "Company Fair Market Value" stated in the Buy-Out Notice. Ex. B, pp. 23-24. Mr. Pettit's testimony, however, was not corroborated by any contemporaneous documents, *because Terramar intentionally withheld all such documents from discovery*. The trial court acknowledged that, while "[t]he ideal starting point for analyzing the Trust's challenge [to the Buy-Out Notice] would be Terramar's underlying calculations," Terramar's tactical decision not to disclose them created a "gap in the evidentiary record." *Id.* Nonetheless, the trial court drew no inferences from the "gap" Terramar created and instead gave full weight to Mr. Pettit's unsupported, self-serving oral testimony.

This was reversible error. Based on Terramar's intentional withholding of relevant evidence, the trial court should have inferred that the evidence would have contradicted the Fair Market Value stated in Terramar's Buy-Out Notice. *See Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 792 n.510 (Del. Ch. 2017) ("[U]nder settled principles of Delaware law, … failure to produce evidence would permit the court to draw a negative inference about what the evidence would show."). At a minimum, absent any corroborating evidence, Mr. Pettit's testimony should have been disregarded as not credible. *See Envo, Inc. v. Walters*, 2012 WL 2926522, at *7 (Del. Ch. July 18, 2012), *aff'd,* 2013 WL 1283533 (Del. Mar. 28, 2013).

Terramar did not provide a good faith, truthful statement of Terramar's opinion of Fair Market Value, and thereby breached not only its contractual obligations under Section 9.5, but also its fiduciary duty of candor. The trial court's judgment should be reversed and Terramar's request for declaratory relief should be denied.

3. Terramar Overstated Its Purchase Price By Improperly Inflating Its Claimed "Priorities" Under the Operating Agreement.

Section 9.5(a) defines the GMS Purchase Price as the "amount that would be distributed to GMS … if a hypothetical cash sale of the assets of the Company … resulted in net proceeds to the Company equal to the Company Fair Market Value." A87. Thus, in order to determine the appropriate price to demand for Terramar's membership interest, the Operating Agreement requires that Terramar properly determine and disclose to its co-members, in connection with the "put" process, the total distributions to which Terramar lawfully would be entitled from sale proceeds generated by a hypothetical sale at Fair Market Value. *Id.* Thus, if Terramar demanded a Purchase Price that was overstated because Terramar inflated its claimed priorities, Terramar breached Section 9.5(a).

The trial record showed that Terramar breached the Operating Agreement in several material ways that improperly inflated its claimed priorities and therefore caused its demanded Purchase Price to be incorrect. As discussed above, the trial

court erroneously excused these admitted breaches by relying upon the Settlement Agreement and statutes of limitation. The evidence disregarded by the trial court, when properly considered, shows that Terramar demanded an overstated Purchase Price and, therefore, failed to comply with Section 9.5(a).

a) *Terramar's Improper "Fees."*

By admittedly taking fees from the Company that are not authorized by the Operating Agreement, Terramar received disguised distributions that should have been counted against Terramar's claimed priorities for purposes of determining the Purchase Price. Section 5.4(d) identifies limited categories of services for which the Company may engage and compensate Terramar, and prohibits payment to Terramar for the enumerated services absent a contract between Terramar and the Company. A78. Section 5.4(d) further requires that the Company only pay Terramar "market fees," on reasonable terms and conditions. *Id.*

The Trust proved at trial – and Terramar did not dispute – that Terramar received millions of dollars in pre-development fees for Phase II years before the Company had executed a ground lease for Phase II. A5714. Terramar breached the Operating Agreement by taking these "fees" because nothing in Section 5.4(d) permits the Company to pay "pre-development fees" to Terramar.

Terramar also breached the Operating Agreement by taking pre-development fees without entering into a contract with the Company. Terramar did not produce

in discovery a single contract between itself and the Company, and no Terramar witness testified that any such contracts exist. Not only were the "pre-development fees" unauthorized by Section 5.4(d) and paid without a contract, the record demonstrated that they also exceeded market by millions of dollars. A287-A289.

These payments should have been treated as distributions of cash flow to Terramar and applied to reduce Terramar's priorities. By not properly accounting for unauthorized amounts that Terramar admittedly received, Terramar's Purchase Price was materially overstated and breached Section 9.5.

b) ***Terramar's Improper Capital Call.***

Terramar's unnecessary capital contribution of $20,080,000 also breached the Operating Agreement, improperly inflated Terramar's claimed priorities and overstated the demanded Purchase Price. Section 3.2 prohibits Terramar from issuing a Capital Call Notice "unless it has made a good faith effort to secure third party financing … covering as much as possible" of the Company's capital needs. A67. However, when the Company's senior debt was coming due in 2010, Terramar made no good faith effort to seek financing from any lenders to cover all or part of the capital needed to repay the senior debt. Terramar offered no evidence that it contacted any lenders other than the senior debt holder.

Additionally, while Section 5.4(b) requires the Company to engage M.A. Cohen & Co. as the exclusive "outside mortgage broker" for third party financing,

the undisputed record shows that Terramar breached this obligation by *not* engaging M.A. Cohen & Co. and instead retaining HFF without disclosing HFF's engagement to the Trust. By not contacting its own lenders to obtain inexpensive third party debt, by not engaging M.A. Cohen & Co. to obtain inexpensive third party debt, and by offering no evidence showing that HFF contacted any lenders to obtain inexpensive third party debt, Terramar breached its duty to make a good faith effort to obtain third party debt. Instead, Terramar inflated its claimed priorities and the Purchase Price by self-funding more than $20 million at a 12% compounded rate of interest.

4. Terramar Did Not Negotiate With The Trust In Good Faith As Required By Section 9.5(c).

The Trust timely delivered a Notice of Dispute to Terramar in compliance with Section 9.5(b), expressing its willingness to negotiate and requesting that Terramar provide "details on the assumptions and calculations that resulted in the amounts specified in [the Buy-Out Notice] for both the Company Fair Market Value and the GMS Purchase Price." A291. The Notice of Dispute triggered Terramar's obligation under Section 9.5(c) to negotiate with the Trust "in good faith, [and] attempt to reach a mutually acceptable Company Fair Market Value." A88. The trial court erroneously excused Terramar's failure to comply with this obligation.

a) *Terramar Refused To Provide Requested Information.*

Despite the Trust's reasonable request, and Terramar's contractual and fiduciary obligations to provide the information requested by the Trust, during the Section 9.5 process Terramar never furnished to the Trust any assumptions or calculations used to determine the Company Fair Market Value or Purchase Price stated in the Buy-Out Notice. Although Terramar identified non-responsive and irrelevant documents that were mostly provided earlier in an unrelated context, it is undisputed that Terramar never provided the requested assumptions or calculations until three years after the Buy-Out Notice, when Terramar was forced to produce the 2015 Valuation Spreadsheet, which disclosed Terramar's true opinion of Fair Market Value – which was $12 million less than the Fair Market Value stated in the Buy-Out Notice.

Despite this record, the trial court found that Terramar satisfied its contractual and fiduciary duties of good faith and disclosure. The court also accepted Terramar's claim that the Trust had no *bona fide* interest in purchasing Terramar's interest and, therefore, Terramar was excused from negotiating. Contrary to the trial court's finding, the evidence established that the Trust came forward with a well-funded and motivated capital source that had an interest in purchasing Terramar's membership interest. A179; A5478. The record also showed that Terramar refused to allow any information to be provided to the Trust's capital source.

b) *The Operating Agreement Has No "Joint Purchase Requirement."*

The trial court also excused Terramar's admitted refusal to entertain the Trust's offer by misinterpreting the Operating Agreement as mandating a joint purchase of Terramar's membership interest by *both* the Trust and Limited. This interpretation finds no support in (and is contradicted by) the Operating Agreement's express language, and Terramar conjured this contract-based argument only as a belated, litigation-based strategy. This was confirmed by Mr. Zwieg, who testified that he imposed a joint purchase condition on the Trust *not* based on his interpretation of the Operating Agreement, but rather because Terramar deemed it to be in its own best interest. A3976-A3977. Therefore, Terramar admitted that the Operating Agreement contains no "joint purchase requirement." Consistent with Mr. Zwieg's testimony, at no time before post-trial briefing did Terramar *ever* contend in this action that Section 9.5 required a joint purchase by the Trust and Limited.

The trial court, however, ignored Terramar's admission and erred by holding, as a matter of law, that Section 9.5 mandates a joint purchase of Terramar's interest by both Limited and the Trust, even though the contractual language expresses no such requirement. The only term relied upon by Terramar (and the trial court) is the introductory clause of Section 9.5, which authorizes Terramar to issue the Buy-Out Notice "indicating to all other Members and to the Company that GMS desires to

have its interest purchased by the other Members of the Company." A87. This language only concerns Terramar's obligation to give *notice* to all other members, and neither contemplates nor requires a "joint purchase." The joint purchase requirement is inconsistent with any logical or practical interpretation of the Operating Agreement. Forcing two parties to jointly raise tens of millions of dollars, jointly negotiate a purchase and agree on all conditions and obligations necessary to effectuate a purchase was never contemplated in the Operating Agreement, is impractical and would create an insurmountable obstacle to any purchase of Terramar's membership interest.

The trial court erred by incorrectly finding that the Operating Agreement impliedly required that the members maintain their proportionate percentage shares in the Company. Not only is there no evidence of any such intent by the contracting parties, the Operating Agreement *refutes* the trial court's interpretation. Specifically, Section 9.1 expressly contemplates "Permitted Transfers" of membership interests between members without the consent of the other member. A85. Moreover, Section 9.4 provides that if a third party offers to purchase a member's interest, the other members have an opportunity to maintain their *pro rata* shares; but if a members elects not to do so, the other member may increase its percentage ownership. A86-A87.

In recent years, this Court has emphasized that "[t]he basic business relationship between parties must be understood to give sensible life to any contract." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 927 (Del. 2017). The only sensible way to interpret Terramar's "put" right is to consider its ultimate objective – *i.e.*, a negotiated sale of Terramar's membership interest. Each step of the process mandated by Section 9.5 is intended to promote this goal, including the parties' obligation to work in good faith to negotiate and agree upon the "Company Fair Market Value." By inferring a "joint purchase requirement" where none is expressly imposed, the trial court incorrectly made it *less* likely that the "put" process would result in a negotiated sale of Terramar's interest.

The trial court's interpretation does not give "sensible life" to Section 9.5, but runs contrary to the "put's" intent, express contractual provisions, and any practical application of the Operating Agreement, and thus is reversible error. Because Terramar breached Section 9.5 and failed to deal with the Trust in good faith, it had no right to proceed to any subsequent steps set forth in Section 9.5(c) or a dissolution and sale as provided in Section 9.5(d).

5. Terramar Breached The Implied Covenant Of Good Faith And Fair Dealing.

The implied covenant of good faith and fair dealing "inheres in every contract governed by Delaware law," including LLC agreements. *Miller v. HCP & Co.*, 2018

WL 656378, at *8-10 (Del. Ch. Feb. 1, 2018), *aff'd*, 194 A.3d 908 (Del. 2018). This Court has held that the implied covenant applies when a "party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the [other] party reasonably expected" or when a contract "can be reasonably read to imply certain other conditions … that would prescribe certain conduct, because it is necessary to vindicate the apparent intentions and reasonable expectations of the parties." *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017).

Under this Court's precedent, the implied covenant is intended to remedy precisely what Terramar has done. In a *pari passu* transaction such as this, the minority members "reasonably expected" to share in the "fruits" of millions of dollars in cash flow that were consistently being generated by Seaport Village before and after Terramar was invited to join. For years, Terramar engaged in predatory conduct which breached express terms of the Operating Agreement and, even if not breaching specific provisions of the Operating Agreement, flies in the face of how a Manager and fiduciary should treat minority members.

The Trust cannot be expected to have specifically bargained for prohibitions on Terramar's predatory conduct; rather, the implied covenant "is well-suited to imply contractual terms that are so obvious—like a requirement that the general partner not engage in misleading or deceptive conduct …—that the drafter would not have needed to include the conditions as express terms in the agreement."

Dieckman, 155 A.3d at 361-62. This Court should not sanction conduct that will allow Terramar to sell the Company's assets, and collect 100% of the proceeds, after Terramar distributed to itself over $75 million of net cash flow and acted in every conceivable way to benefit Terramar to the minority members' detriment.

CONCLUSION

As described above, the Court of Chancery committed numerous points of error, each of which independently supports reversal. Accordingly, the Trust respectfully requests that the Court (i) reverse the Court of Chancery's Final Order and Judgment, (ii) deny Terramar declaratory relief on all claims, and (iii) and award the Trust, as the "prevailing party" pursuant to Section 12.12 of the Operating Agreement, reimbursement from Terramar of all attorneys' fees, costs and expenses incurred by the Trust in this action.

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