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Court of Chancery Finds Personal Jurisdiction Over Out-of-State Trust Due to Trustor's Involvement in the Formation of Delaware LLC

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In *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust U/A/D/ June 21, 2002*, Civil Action No. 12875-VCL (Del. Ch. August 18, 2017), the Delaware Court of Chancery denied an out-of-state defendant's motion to dismiss for lack of personal jurisdiction, finding that defendant's trustor was actively involved in negotiating both the underlying business deal and the terms of the operating agreement of the Delaware limited liability company at issue.

Terramar involves Seaport Village, a specialty shopping center in San Diego, California, developed in 1978 by the Taubman family. The Taubman family initially funded Seaport Village through an entity named San Diego Sea Port Village, Ltd. ("Limited"), which secured $40 million in financing from a Japanese bank. After defaulting on the loan in 1998, Limited decided to engage an individual named Cohen, a real estate professional well-versed in capital sourcing, to refinance Limited's loan. With Cohen's assistance, Limited formed San Diego Lending Co., LLC ("Lending"), to facilitate a $24 million borrowing to purchase the original loan from the Japanese bank. As part of the restructuring, Cohen, Limited, and Lending entered into a complex agreement, which, among other things, gave Cohen the right to receive cash flows from Limited and Lending, mimicking a 50% interest in the entities.

By 2002, Limited needed additional capital. Terramar Retail Centers, LLC ("Terramar"), a real estate development company, agreed to provide Limited with $7 million. Cohen, Limited, and Terramar joined forces to form Seaport Village Operating Company, LLC (the "Company"), a Delaware limited liability company. Terramar received a 50% interest in the Company, whereas Cohen and Limited split equally the remaining 50%. To hold his 25% interest, Cohen created the Marion #2-Seaport Trust (the "Trust").

To govern the internal business affairs of the Company, the Trust, Limited, and Terramar entered into an operating agreement dated September 1, 2002. Cohen was especially active in negotiating the business deal and operating agreement. Among other things, the operating agreement provided Terramar with the right to request that all other members buy out its interest at a fair market value at any time after January 1, 2006 (the "put right"). The put right was bolstered by providing Terramar with the additional right to dissolve the Company and sell its assets to third parties if the other members did not purchase Terramar's interest within 6 months of exercising the put right. In 2015, Terramar exercised its put right pursuant to the terms of the operating agreement; however, both the Trust and Limited disputed Terramar's assessment of the Company's fair market value.

After not receiving the requisite purchase price within the 6-month window, Terramar filed a complaint in the Court of Chancery, seeking a declaration that it had the right to dissolve the Company and sell its assets. In response, the Trust filed a motion to dismiss, arguing that the Court lacked personal jurisdiction over the Trust for purposes of claims asserted under the Company's operating agreement.

In determining that it had personal jurisdiction over the Trust, the Court applied a familiar two-step analysis. The Court began by assessing whether the plaintiff satisfied Delaware's long-arm statute before proceeding to analyze whether the exercise of personal jurisdiction would comport with the Due Process Clause of the United States Constitution.

The vast majority of the Court's analysis in *Terramar* was spent grappling with the Delaware long-arm statute, which provides that a Delaware court may exercise specific personal jurisdiction over a non-resident who "in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State . . . ." The Court found that the mere formation of a Delaware entity, as was the case here, constitutes a transaction of business within Delaware sufficient to establish specific personal jurisdiction. However, to find specific (not general) personal jurisdiction, there must also be a nexus between the formation of the Delaware entity and the cause of action asserted in the lawsuit. The Court found this nexus to exist, because Terramar's claims are based in the Company's operating agreement, and the business arrangement Terramar seeks to enforce is embodied in the operating agreement and implemented through the Company's creation.

The Court also looked to the Trust's degree of involvement in the formation of the Company. The Court concluded that sufficient evidence existed in the record to support an inference that the Trust, through Cohen, played a meaningful role in the Company's formation. Specifically, the Court found that Cohen brokered the formation of the Company, had an existing and ongoing relationship with Limited, possessed contractual rights in entities which resembled equity, and maintained an exclusive right to broker future financings. Further, the Court noted that most conversations negotiating the underlying business deal and operating agreement flowed through Cohen.

Finally, the Court evaluated whether the exercise of personal jurisdiction comported with constitutional due process. In doing so, the Court analyzed whether the Trust purposefully established minimum contacts with Delaware and evaluated those minimum contacts in light of notions of fair play and substantial justice. In Delaware, courts have consistently held that meaningful participation in the formation of a Delaware entity constitutes sufficient minimum contacts to satisfy constitutional due process. The Court found this standard to be satisfied, emphasizing that the Trust was not merely a passive investor, but rather actively participated (through Cohen) in negotiating the deal that resulted in the formation of the Company. This level of participation and involvement, the Court reasoned, should have put the Trust on notice that it may be hailed into Delaware to adjudicate disputes. The Court did give "pause" to the passage of time between the Company's initial formation and the commencement of the current litigation; however, the Court explained that this did not violate due process, because the parties contemplated a long-term relationship upon formation, which was evidenced by the inclusion of the put right that could be properly exercised by Terramar years after the date of formation.

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