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## **NATURE OF THE PROCEEDINGS**

This is a childhood sexual abuse case under the landmark Delaware Child Victim's Act of 2007, 10 Del.C. § 8145 (the "Act"). Plaintiff/Appellant Michael Losten filed his Complaint against defendants the Order of the Sisters of St. Basil the Great, Ukrainian Catholic Diocese of Philadelphia, Jesus Lover of Humanity Province, St. Basil's Ukrainian Catholic Church, Catholic Diocese of Wilmington, and Eddie Falcone (Falcone was misspelled as Falconi in the Complaint) (collectively, "the institutional defendants"), on June 24, 2009. (Superior Court docket "D.I." 1). Plaintiff subsequently filed his First Amended Complaint (hereinafter referred to as "Compl.") on July 2, 2009. (D.I. 3).

The Sisters of St. Basil The Great, Inc. and Jesus, Lover Of Humanity Province (hereinafter "Sisters") moved to dismiss plaintiff's complaint for lack of personal jurisdiction. (See D.I. 27). On October 21, 2009 the Court ordered the parties to confer and set a briefing schedule on the motion to dismiss, and that no discovery would take place. (D.I. 38). The Catholic Diocese of Wilmington was voluntarily dismissed on November 5, 2009. (D.I. 50). Sisters then filed their Memorandum of Law in Support of their Motion to Dismiss on November 16, (D.I. 52). Plaintiff filed his Opposition on December 16, 2009. (D.I. 56). Sisters filed their Reply Brief on December 30, 2009. (D.I. 57). Oral argument was held March 5, 2010. (D.I. 59). On May 13, 2010, the Superior Court issued its

holding that the Court could not exercise personal jurisdiction over the Sisters.  
65, Exhibit A).

Plaintiff's case continued against the remaining defendants, Eddie Falcone, the Ukrainian Catholic Archdiocese of Philadelphia and St. Basil's Parish, where Plaintiff did have the chance to take some discovery. Eddie Falcone died in the interim and was dismissed pursuant to Rule 41 on September 26, 2012. (D.I.89). On July 8, 2013, a stipulation of dismissal was entered as to the remaining defendants. (D.I. 135) (Exhibit B).

Plaintiff filed a timely Notice of Appeal on July 8, 2013. (D.I. 136, A1-17).

This is Plaintiff/Appellant Michael Losten's Opening Brief and Appendix in support of his Appeal.

## **SUMMARY OF THE ARGUMENT**

1. The Sisters are subject to the personal jurisdiction of Delaware courts due to their actions in permitting Falcone to take Plaintiff and other boys on overnight trips to Delaware, despite their actual knowledge that he had abused children.

2. Alternatively, the Court abused its discretion in denying Plaintiff jurisdictional discovery into the issue of whether the Court could exercise personal jurisdiction.

## **STATEMENT OF FACTS**

### **A. The Legislative History Leading to the Landmark Child Victim’s Act.**

#### **1. The Widespread Public and Media Outcry Which Led to an Unprecedented Legislative Effort.**

**a. The Boston Scandal.** In January 2002, the Boston Globe published the first in a series of groundbreaking investigative articles and exposes which dramatically catapulted the cover-up of priest sexual abuse of children into the forefront of public consciousness. (A118-143).

**b. The Delaware Scandal.** Closer to home, a similar scandal soon emerged and received widespread media attention throughout Delaware. (A144-375).

**c. Widespread Public Support For Legislative Change Coalesces as Child Victim’s Voice.** In January 2007, massive community for legislative change to the statute of limitations coalesced at the website [www.childvictimsvoice.com](http://www.childvictimsvoice.com), which became a strong and powerful grass roots for legislative action. (A376-533).

**2. The General Assembly Responds to this Public Outcry.** In response to this public outcry, SB29 was introduced. As revealed in its Synopsis, purpose was to “repeal[] the statute of limitations in civil suits relating to child

sexual abuse cases and provide[] a two-year “window” in which victims can bring civil action in cases previously barred by the current statute.” (A376-377).

**a. The Legislative Hearings.** Much of the legislative history, including transcripts, minutes and other supporting documentation, has been preserved and is in the record. (A376-533). As detailed in section b., below, of the testimony and other evidence which moved the General Assembly to action concerned the need for a remedy for sexual abuse survivors who were taken across state lines and abused in states in addition to Delaware.

**b. The Widespread Nature of the Abuse Epidemic.** In his testimony before the legislature, Dr. James Walsh explained that 1 out of every 5 people were sexually abused as children. (Walsh 172; A482). Similarly, Representative Deborah Hudson also discussed these figures, that 1 in 5 children sexually abused, from 1 in 6 boys to 1 in 4 girls. (Hudson 4; A495). Senator Simpson explained that the sexual abuse of children “is pervasive in [our] society.” (Simpson 27; A386). Senator McDowell was “very disturbed” by the widespread abuse of Delaware citizens. (McDowell 99; A404). “[C]hild sex abuse is a very serious problem in Delaware.” (Hudson A408). Addressing this widespread problem is a responsibility “which we take very seriously.” (DeLuca 28, A386). Accordingly, in Representative Valihura’s words, this “is one of the most Bills we will see this year.” (Valihura 3; A440).

### **c. Widespread Public Support for this Remedial**

**Legislation.** Senator Sokola noted the “overwhelming support” for this bill (Sokola 101-102; A404-405), and specifically referenced two sections of the community support website: (1) the long guest book of supporters urging reform (A360-375); and (2) the lengthy list of public officials (current and retired), as well as law enforcement, public interest, religious and business organizations strongly supporting the Bill. (A357-359). This was “[o]ne of the largest coalitions to support a Bill in recent history.” (Conaty 8; A441). Senator Connor explained that he could not remember the last time the Senate Chamber had been as full in support of a Bill. (Connor 101; A404).

**d. Delaware as a Trendsetter.** It was undisputed that the Bill was “about accountability, accountability for the perpetrator; and validation, validation for the injury sustained by the victim.” (Moracco 93; A462). In enacting the Child Victim’s Act, “Delaware is on the forefront of what is in effect a for children.” (Hamilton 64; A510). As Senator Peterson, the primary legislative sponsor, explained, “this Bill is about the children. It’s about the children who had no power, who had no voice, who had no opportunity to bring their tormentors to justice.” (Peterson 104; A405). As Senator McBride eloquently explained -

So I think today is the day that Delaware, the state that started the nation, has a chance to lead in the United States of America. This would be the we’re only the second state to pass something like this, we have an

opportunity today for the victims and survivors, some of whom we have today, but there are many others. There are some in the building obviously and there are many others outside this building that are counting on us to them.

(McBride 103; A405). As noted above, the General Assembly unanimously enacted SB 29. (A405-406, A529-532).

**3. The Governor Signs the Bill Into Law.** The Governor then signed the Bill on July 10, 2007, declared the legislation to be “vitaly important,” and stated -

Ever since we passed Megan’s Law in 1998, we’ve been working to refine and strengthen Delaware’s laws relating to sex offenders ... Sexual predators that victimize children are learning that Delaware is not going to tolerate their horrendous crimes against the children of our state. I applaud the efforts of Senator Peterson and all of the co-sponsors for taking the lead on passing this vitaly important legislation.

(A533).

**4. Reasons for the Legislation.** The record reveals numerous reasons why the Act is proper social welfare legislation, reflecting the public policy of the State of Delaware, including:

1. To hold accountable *institutions* which hid or enabled child abusers. (Doyle 13; A382).
2. To encourage *institutions* to make the necessary preventative changes to protect children from pedophiles. (Doyle 13; A382).
3. To give survivors of childhood sexual abuse an opportunity to seek judicial relief and an incentive to come forward. (Peterson 104, A405; Turlish 15, A443; McBride 103, A405, Hamilton 2, A380).

4. To disclose information to the public, “bring out into the open” and shine “daylight” onto the cover up of sexual abuse of children. (Valihura 41; A449).

## **B. Defendants.**

1. Defendant Sisters of St. Basil the Great<sup>1</sup> ("Order") is a corporation that “owned, operated, staffed and otherwise controlled the St. Basil Orphanage ("Orphanage") located in Chesapeake City, Maryland” and was “responsible for hiring and supervising [Eddie] Falcon[e], who was at all times its employee and agent.” (Compl. ¶¶ 4,8,10, A19-20).

2. On information or belief, Defendant Order of Saint Basil the Great, Jesus, Lover of Humanity Province<sup>2</sup> ( the "Province"), is a foreign corporation that “owned, operated, staffed and otherwise controlled the St. Basil Orphanage ("Orphanage") located in Chesapeake City, Maryland” and was “responsible for hiring and supervising [Eddie] Falcon[e], who was at all times its employee and agent.” (Compl. ¶¶ 7, 8,10, A20).

Hereinafter, these defendants will be referred to as “Sisters.”

## **C. Sisters’ Actual Knowledge of Falcone’s Abuse.**

### **1. Knowledge that Falcone Was Sexually Abusing Children.**

“From approximately 1965 forward and throughout his tenure at the

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<sup>1</sup> Defendants have advised Plaintiff that the correct name is Sister of St. Basil the Great, Inc.

orphanage, Order had actual or constructive knowledge that Falcon[e] was sexually molesting young male children, such as plaintiff.” (Compl.¶17, A21). “When plaintiff was approximately 8 years old, a nun caught Falcon[e] molesting another child. The institutional defendants sent Falcon[e] away, but allowed him to return the Orphanage after a few months and continue to be in contact with the boys at the Orphanage, including plaintiff.” (Compl.¶ 26, A22).<sup>3</sup>

**2. Actual Knowledge That Falcone Was Taking Plaintiff and Other Children to Delaware.** “Falcon[e] also took Plaintiff, with the permission of the Orphanage authorities on overnight trips to Delaware on a regular basis. While in Delaware, Falcon[e] sexually assaulted, abused, raped and/or molested plaintiff at his home in Wilmington.” (Compl. ¶ 22, A22). “The nuns and priests employed by the institutional defendants were aware that plaintiff frequently

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<sup>2</sup> Defendants have advised Plaintiff that the correct name is Jesus, Lover of Humanity Province.

<sup>3</sup> Discovery has confirmed that the Sisters were aware that Eddie Falcone was abusing children, including Michael Losten’s brother, Stephen Losten:

One time, Eddie took me to the house with the long rows of beds. Sister Daniel had to be looking out the window and saw us, because she came to the house and saw where he was taking me. I’m assuming she knew what he was going to do= he was about to abuse me in the house. She stopped it. She said “Get your hands off of him.” Then he came and pushed her out the door. She fell to the ground. I remember Sister Daniels crying and talking to Sister Augustus about it and Sister Augustus mad. [] I told Sister Daniels a couple times Eddie Falcone was touching me and playing with me, but I didn’t tell her everything. I was scared of Eddie Falcone. I think Sister Daniels knew about the abuse and tried to protect me. All the Sisters had to have known about Eddie Falcone.

(S. Losten Aff. ¶¶ 10, 13, A101); see also Pl. interr resp. no. 29,32, A114-115 (Mrs. Karbonick, the Orphanage secretary, admitted that Falcone had abused a child and the Sisters were aware of

overnight with Falcon[e] in Delaware.” (Compl. ¶ 23, A22). “Falcon[e] took plaintiff to Delaware with authority from all defendants on several occasions with the consent and knowledge of all defendants.” (Compl. ¶ 25, A22).

**3. Falcone’s Abuse of Children in Delaware Was Within the Scope of His Employment.** “Falcon[e] was at all times a caretaker employed [by] the institutional defendants which were responsible for employing and supervising him.” (Compl. ¶ 30, A22). Falcone resided at the Orphanage. (Compl. ¶¶ 19, 21, A21). “Falcon[e]’s actions were of the kind the institutional defendants expected him to perform. His conduct was not unexpected by institutional defendants. His actions occurred substantially within the authorized time and space limits placed upon him by the institutional defendants. Falcon[e] was actuated at least in part by a purpose to serve them.” (Compl. ¶ 33, A23). “All [Falcone’s] contacts with plaintiff were made pursuant to his routine and regular job duties.” (Compl. ¶ 34, A23).

**4. Defendants Ratified the Abuse by Failing to Take Any Remedial Action.** “All acts, if any, initially done outside the scope of that consent were ratified, affirmed, adopted, acquiesced in, and not repudiated by the institutional defendants. Such acts were enabled by the agency relationship.” (Compl. ¶ 32, A23). The institutional defendants failed to stop the abuse once they

knew or should have known about it, and failed to warn plaintiff, and failed to protect him. (Compl. ¶¶ 17, 21-28, 32-33, 40-47, 60-63, A21-25, A27-28).

**D. The Institutional Defendants’ “Cover Up” of Falcone’s Abuse and Conspiracy to Commit Fraud.** Despite their actual knowledge that Falcone was sexually abusing children, “[t]he institutional defendants engaged in a ‘cover up’ of Falcon[e]’s sexual abuse of children.” (Compl. ¶ 39, A24). Defendants conspired

- with Falcon[e] and agreed not to punish him for sexually abusing numerous children. (Compl. ¶ 97, A31).
- with Falcon[e] to enable him to continue sexually abusing children into the future. (Compl. ¶ 98, A31).
- with Falcon[e] to cover up his history of sexually abusing young children. (Compl. ¶ 99, A31).
- with Falcon[e] to hide and actively suppress and intentionally misrepresent his sexual abuse of children and to induce plaintiff, and others, to engage and associate with Falcon[e]. (Compl. ¶ 100, A31).
- among themselves, with Falcon[e], and with other Bishops and Dioceses around the country to actively suppress and intentionally misrepresent the concrete evidence which warned of the dangers to children of child sexual abuse. This suppression and misrepresentation was done with the intent of causing plaintiff, plaintiff’s parents and others to remain ignorant of these dangers. (Compl. ¶ 101, A31).

They also made a “calculated business decision that it would be less costly cover-up Falcon[e]’s history of sexual abuse than to find a new caretaker.”

(Compl. ¶ 102, A21).

**E. Plaintiff Michael Losten.** In approximately 1962 or 1963, when plaintiff was approximately 5 years of age, he was sent to live at the Orphanage in Chesapeake City, Maryland, after his parents divorced. (Compl. ¶ 18, A21).

**F. Plaintiff is Sexually Abused.**

**1. The Maryland Abuse.** Falcon[e], the Orphanage caretaker, “sexually abused and assaulted plaintiff regularly between approximately 1962 and 1970 at Falcon[e]’s quarters on the premises of Orphanage.” (Compl. ¶ 21, A22).

**2. The Delaware Abuse.** “Falcon[e] also took Plaintiff, with the permission of the Orphanage authorities on overnight trips to Delaware on a regular basis. While in Delaware, Falcon[e] sexually assaulted, abused, raped and/or molested plaintiff at his home in Wilmington.” (Compl. ¶ 22, A22).

**a. Defendants Were Aware of These Trips to Delaware.** As previously noted, taking children on trips to Delaware was authorized and approved by the Sisters. (Compl. ¶¶ 16, 22, 23, 25, 29-34, A21-23). This was confirmed later in discovery:

Eddie abused me in his room in the red brick house, in his cabin which I believe is on the Elk River, and he also took Mike [Losten], Earl Cothin, and I separately to Delaware to his camera store. I remember unloading cameras from the car. **I know Sister Augustus had to have given[Eddie Falcone] permission to take us to Delaware since we were not allowed to leave the Orphanage.**

Aff. of S. Losten, ¶ 9, A101 (emphasis added).

## ARGUMENT

### **I. THE SUPERIOR COURT ERRED IN DECIDING THAT IT DID NOT HAVE PERSONAL JURISDICTION OVER THE SISTERS BECAUSE THE COMPLAINT ALLEGES THAT THE SISTERS KNOWINGLY ALLOWED FALCONE TO TAKE PLAINTIFF ON OVERNIGHT TRIPS TO DELAWARE DESPITE THEIR ACTUAL KNOWLEDGE THAT HE WAS SEXUALLY ABUSING CHILDREN.**

**A. Question Presented.** Did the Superior Court err in deciding that it did not have personal jurisdiction over the Sisters? (See D.I.65 - Opinion and Order, Exhibit A, D.I. 56 - Plaintiff Opp. to Mot. To Dismiss, A34-67, D.I. 138, Tr. of Mot. To Dismiss Oral Arg., A68-99).

**B. Scope of Review for Rule 12(b)(2) - Personal Jurisdiction.** The trial court's decision on a motion to dismiss for lack of personal jurisdiction is reviewed under a *de novo* standard. AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc., 871 A.2d 428, 437-38 (Del. 2005).

**1. Plaintiff's Preliminary Burden.** "[O]n a motion to dismiss for of personal jurisdiction, the record is viewed in a light most favorable to the nonmoving party, the allegations of the complaint are accepted as true and all reasonable inferences are considered most strongly in favor of plaintiff." Plummer & Co. Realtors v. Crisafi, 533 A.2d 1242, 1247 (Del. Super. 1987) (citing Greenly v. Davis, 486 A.2d 669, 670 (Del. 1984) and Harmon v. Eudaily, 407 A.2d 232, (Del. Super. 1979)). Plaintiff's burden is met by a "prima facie showing based on

pleadings and/or affidavits that jurisdiction is conferred by the Delaware long-arm statute." Id. at 1244.

Generally, a plaintiff does not have the burden to plead in its complaint facts establishing a court's personal jurisdiction over defendant.[] However, if the defendant moves to dismiss the complaint for lack of personal jurisdiction, then plaintiff bears the burden of establishing personal jurisdiction over the defendants.[] When ruling on a 12(b)(2) motion, the Court must decide, as a matter of fact, whether the defendant had enough connection with the state so that it does not offend traditional notions of fair play and justice for the Court to exercise jurisdiction over a defendant.[] If facts alleged in the complaint are insufficient to establish personal jurisdiction over defendants, then the trial court may allow the plaintiff to complete discovery in order to establish jurisdiction over defendant as long as plaintiff's claim of personal jurisdiction is not frivolous.[] If necessary, the trial court may hold an evidentiary hearing or decide the matter based on affidavits. When deciding a jurisdictional motion based upon affidavits, the court requires that plaintiff establish only a prima facie case.[] If, however, the court decides the motion after hearing testimony, plaintiff must establish personal jurisdiction by a preponderance of the evidence. [] The trial court is vested with a certain discretion in shaping the procedure by which a motion under Rule 12(b)(2) is resolved.[]

Benerofe v. Cha, 1996 WL 535405, \* 3 (Del. Ch. Sept. 12, 1996) (internal citations omitted) (Exhibit C) (citing, *inter alia*, Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 538, 541 (Del. Ch. 1991)).

This standard is very similar to the Third Circuit's:

It is well established that in deciding a motion to dismiss for lack of jurisdiction, a court is required to accept the plaintiff's allegations as true, and is to construe disputed facts in favor of the plaintiff.

Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 457 (3d Cir. 2003).<sup>4</sup> In order to determine whether a statutory basis for jurisdiction exists, first, a plaintiff must "present [] factual allegations that suggest with reasonable particularity the existence of the requisite contacts between the party and the forum state." Id. at (internal punctuation omitted). This requires plaintiff to prove that his claims are not "clearly frivolous." Id. If this showing is made "[plaintiff's] right to conduct jurisdictional discovery should be sustained." Id.

**2. Remedial Legislation is to be Liberally Construed.** "Under Delaware law, remedial statutes should be liberally construed to effectuate their purpose." Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1256, 1257 (Del. 2011); accord State v. Cephas, 637 A.2d 20, 25 (Del. 1994). In Sheehan this Court squarely addressed several aspects of the CVA. In addition to twice reaffirming that it was to be "liberally construed," the Court also warned against interpretations which "miss[] the self-evident intent of th[is] remedial legislation." Id. at 1256-57.

### **C. Merits of Argument - The Basics – Two-Step Analysis.**

Delaware courts apply a two-step analysis in determining the issue of jurisdiction over a nonresident. [] First... whether Delaware's long arm statute is applicable, recognizing that 10 *Del.C.* § 3104(c) is to be broadly

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<sup>4</sup> Since "the Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure []" this Court finds certain "federal cases appropriate for determining the proper interpretation of the Delaware Rules of Civil Procedure." Plummer v. Sherman, 861 A.2d 1238, 1242 (Del. 2004).

construed to confer jurisdiction to the maximum extent possible under the Due Process Clause.[] Next, the court must determine whether subjecting nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment. []

Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd., 611 A.2d 476, 480-81 (Del. 1992) (citations omitted).

**D. The Delaware Long Arm Statute.** Even outside the context of the application of remedial legislation, this Court has held that 10 Del. C. § 3104(c) “is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause.” Id. at 480.

**1. Specific Agency Jurisdiction under 10 Del. C. § 3104(c)(3).**

Plaintiff has made a proper showing under the agency theory of jurisdiction of 10 Del. C. § 3104(c)(3). “[A] court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent... causes tortious injury in the State by an act or omission in this State.” 10 Del. C. § 3104(c)(3). “[I]t is entirely possible for jurisdictional purposes that a defendant acts in this State *via* its agent. [] This can occur in two ways. Plaintiffs can show the defendant had dominion and control of the actor or plaintiffs can provide evidence of the standard princip[al] and agent relationship.” Boone v. Oy Partek Ab, 724 A.2d 1150, 1162, FN 3 (Del. Super. 1997) aff’d sub nom. Oy Partek Ab v. Boone, 707 A.2d 765 (Del. 1998).

All that is required of plaintiff by 10 Del. C. § 3104(c)(3) is that he make a prima facie showing in his Complaint that Sisters caused tortious injury in Delaware through an agent; i.e. that the Falcone was acting within the scope of his employment. “If the [nonresident] moving defendants are liable under the doctrine of respondeat superior, the conduct of the abusing... [employee] is attributable to his employer and will determine the jurisdictional issue.” Tell v. Roman Catholic Bishops of Diocese of Allentown, 2010 WL 1691199, \* 9 (Del. Super. Apr. 26, 2010) (Exhibit D).

This Court has held that where an agent of a nonresident defendant causes tortious injury in Delaware through an act in Delaware, that nonresident defendant is subject to personal jurisdiction in Delaware, pursuant to 10 Del. C. § 3104(c)(3). Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd., 611 A.2d 476, 481-82 (Del. 1992). The Court noted there that

While Bank Leu did not actively participate in Levine's giving the alleged false advice, we agree with the trial court's finding that Levine's acts in Delaware are attributable to Bank Leu pursuant to the “through an agent” language of Section 3104(c). It is not an arcane concept that conspirators are considered agents for jurisdictional purposes.

Id. at 481. There was no allegation that Bank Leu, the nonresident defendant in case, had directed Levine to give the false advice. The assertion was that Levine committed the tortuous act in Delaware and that was attributable to the principal, same as plaintiff alleges here.

### a. Scope of Employment.

It is, of course, fundamental that an employer is liable for the torts of his employee committed while acting in the scope of his employment. [citing Restatement (Second) of Agency, § 219] The liability thus imposed upon the employer arises by reason of the imputation of the negligence of the employee to his employer through application of the doctrine of *respondeat superior*.

Fields v. Synthetic Ropes, Inc., 215 A.2d 427, 432 (Del. 1965). So in order for the Sisters to be liable for Falcone's acts in Delaware he must have been acting within the scope of his employment. As this Court recently held:

The question of whether a tortfeasor is acting within the scope of his employment is fact-specific, and, ordinarily, is for the jury to decide. The phrase, 'scope of employment,' is, at best, indefinite. It is nothing more than a convenient means of defining those tortious acts of the servant not ordered by the master for which the policy of law imposes liability on the master. Under the *Restatement of Agency (2d)* § 228, conduct is within the scope of employment if, (1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not **unexpectable**.[]

Doe v. State, 2013 WL 5006496, \*1 (Del. Sept. 12, 2013) (citations and internal punctuation omitted) (emphasis added) (Exhibit E).

As to the first element, recognizing that any criminal act or sexual assault is not going to be what the tortfeasor/employee was hired to do, this Court explained:

The relevant test, however, is not whether Giddings' sexual assault was the ordinary course of business of the [employer], ... but whether the service itself in which the tortious act was done was within the ordinary course of such business.... .[] Stated differently, the test is whether the employee was acting in the ordinary course of business during the time frame within which

the tort was committed.

Doe, 2013 WL 5006496, at \* 2 (internal punctuation omitted). Here, Falcone, who resided at the Orphanage (see Facts at C.3), and was a known child abuser (see Facts at C.1), was taking Plaintiff, a resident orphan in the care of the Sisters, from the Orphanage to Delaware on authorized overnight trips alone. He was clearly acting in the ordinary course of the Sisters' business, which was to take care of the children who resided at the Orphanage, during the time frame when the tortious conduct occurred in Delaware. Id.

As to the second factor, the Sisters, Falcone's bosses and Losten's guardians and caretakers, authorized Falcone to take Plaintiff on these trips. See Facts at B., C.2-3.

As to the third and fourth factors, this Court has explained that this is usually a question for the jury.

The third factor—whether Giddings was activated in part to serve his employer—has been construed broadly as a matter for the jury to decide.[] If the act of cutting someone's throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, then a sexual assault can be considered a service to the police on the theory that part of what Giddings was doing was transporting a prisoner. Finally, to be within the scope of employment, any force used must be “not unexpected.” Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks.[] The record does not establish the Giddings' conduct was unforeseeable.

Doe, 2013 WL 5006496, at \* 2 (citations omitted); accord Doe v. Roman Catholic Diocese of Savannah, Case No. 2011-CP-27—00659, pp. 10-11 (S.C.C.P. Feb. 14, 2013) (“While the Defendants contend that a ground for its motion is that the actions of Priest Brown were personal and not those as its agent, that ground is not appropriate at the motion stage. ‘If there are any facts tending to prove an agency relationship, the question is one for the jury. Reid v. Kelly, 274 S.C. 171, 262 S.E.2d 24 (1980).” (citing Gamble v. Stevenson, 405 S.E.2d 350, 352 (Ct. App. 1991)) (Exhibit F).

The Oregon Supreme Court considered whether the priest’s employer could be vicariously liable for his sexual abuse of a young parishioner in Fearing v. Butcher, 977 P.2d 1163 (Or. 1999). The plaintiff alleged that the priest had used position to manipulate plaintiff and gain his friendship, trust and confidence. Id. at 1165. It was through the priest’s manipulation and abuse of his position that the priest got the opportunity to be alone with and sexually assault plaintiff. Id. at 1165. The Court held that a jury could reasonably infer that the “sexual assaults were the culmination of a progressive series of actions that began with and continued to involve [the predator priest’s] performance of the ordinary and authorized duties of a priest” or that the priest’s cultivation of a relationship with plaintiff was initially furtherance of his actual employment duties and eventually became mixed. Id. at 1167. The Court reasoned that an employee’s intentional torts are “rarely, if

ever...authorized expressly by the employer. In that context, then, it virtually will be necessary to look to the acts that led to the injury to determine if those acts were within the scope of employment.” Id. at 1166, FN.4. The Court held that the defendant Archdiocese could be vicariously liable “if acts that were within... [the priest perpetrator’s] scope of employment ‘resulted in the acts which led to injury plaintiff.’” Id. at 1166. Therefore, the Court concluded that the plaintiff’s allegations of sexual abuse by a priest were sufficient to state a claim against his employer, in that case the Archdiocese of Portland, based on the theory of respondeat superior.

Similarly here, Falcone, a known child abuser, was taking plaintiff on authorized overnight trips to Delaware and in the course of this authorized activity sexually assaulted him, something that was clearly not unexpected to the Sisters. (Facts at C.1-2.). Thus, the court below should have determined that Plaintiff had made a more than sufficient showing that Falcone was acting within the scope of employment when he sexually abused plaintiff and as such the abuse should be attributed to the Sisters.

**b. Ratification.** Of course, even if Falcone’s abuse of plaintiff in Delaware was not part of the scope of his job duties originally, Sisters ratified adopted the abuse by their acquiescence and failure to repudiate. Ratification has long been recognized under Delaware law:

The effect of a subsequent ratification is that it relates back and gives validity to the unauthorized act or contract, as of the date when it was made and affirms it in all respects as though it had been originally authorized. The act is legalized from its inception. Accordingly when the ratification occurs there is no further necessity of showing previous authority. The principle is tersely explained in the proposition that a ratification is equivalent to an original authorization.

Hannigan v. Italo Petroleum Corp. of Am., 47 A.2d 169, 173 (Del. 1945).

Ratification may be express or implied, and intent may be inferred from the failure to repudiate an unauthorized act, [] from inaction, [] or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act. []

Dannley v. Murray, 1980 WL 268061, \*4 (Del. Ch. July 3, 1980) (citations omitted).

The “affirmance” required to create ratification of an unauthorized signature on a negotiable instrument may arise by the retention of benefits with knowledge of the unauthorized acts, [] or such affirmance may arise from conduct which can be rationally explained only if there were an election to treat a supposedly unauthorized act as in fact authorized.

Id.

[W]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, his ratification is implied through his acquiescence.

Nevins v. Bryan, 885 A.2d 233, 254 (Del. Ch. 2005); see also Restatement (Second) of Agency § 94, cmt. a (1958) (“Silence under such circumstances that, according to ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred.”).

### **c. The Complaint Adequately Makes the Required**

**Preliminary Showing.** As set forth in the facts above, the Complaint more than adequately alleges agency jurisdiction over the Sisters:

- The Sisters knew that Falcone was abusing children at the Orphanage, its employee having caught him in the act.<sup>5</sup> (See Facts at C.1);
- Sisters permitted Falcone to take plaintiff and other Orphanage children on overnight trips to Delaware (See Facts at C.2);
- Falcone was an employee and agent of the Sisters who worked in their Orphanage. (See Facts at B.1);
- Falcone was acting as an agent of the Sisters when he abused plaintiff in Delaware. (See Facts at C.3);
- Despite all of this knowledge, defendants covered up Falcone's sexual abuse. (See Facts at D);
- Defendants ratified Falcone's abuse, bringing it within the scope of his job duties, by failing to take any remedial actions whatsoever to stop it, warn parents, report it to authorities or protect children, including plaintiff. (See Facts at C.4).

Accordingly, it is clear that Plaintiff has presented facts which more than

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<sup>5</sup> “[K]nowledge of an agent acquired while acting within the scope of his or her authority is imputable to the principal. Similarly, knowledge of an employee is imputed to the employer. This imputation occurs even if the employee does not communicate this knowledge to the principal/ employer.” E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1996 WL 111133, \*2 (Del.Super. Feb. 22, 1996) (internal citations omitted) (Exhibit H); accord Knetzger v. Centre City Corp., 1999 WL 499460, \*4 (Del.Ch. June 30, 1999) (Exhibit I); J.I. Kislak Mortg. Corp. of Del. v. William Matthews Builder, Inc., 287 A.2d 686, 689 (Del.Super. 1972) (Exhibit J).

suggest Sisters “had dominion and control of... [Falcone] or plaintiffs can provide evidence of the standard principle and agent relationship [between Sisters and Falcone].” Boone, 724 A.2d at 1156, FN 3 (Del. Super. 1997) aff’d sub nom. Oy Partek AB v. Boone, 707 A.2d 765 (Del. 1998). As a result Plaintiff met his of establishing personal jurisdiction under the agency theory.

**d. The Erroneous Ruling Below.** The trial court held that “Losten has failed to indicate that Falcone’s alleged acts of sexual abuse occurred within the scope of his employment and that the moving defendants directed the acts. Losten asserts that moving defendants gave Falcone permission to take Losten on overnight trips, however, this does not satisfy Plaintiff’s burden to assert facts that demonstrate moving defendants knew of, directed, or authorized the tortious conduct that allegedly was committed by Falcone in Delaware.” (D.I. 65, Opinion and Order, p. 11) (Exhibit A). However, since Plaintiff did assert that Sisters knew of the child abuse being perpetrated by Falcone and knew of, permitted, and authorized Falcone’s taking of Losten on overnight trips to Delaware, it is clear from the Complaint that the Sisters knew Falcone was abusing Losten in Delaware, yet continued to allow him to take Losten and other children on overnight trips.

As this Court has specifically held in the personal jurisdiction context:

It is a basic principle of law, indeed a matter of common sense, that a defendant has “reason to know” when he or she possesses information from which a person of reasonable intelligence *or of the superior intelligence of the actor* would infer that the fact in question exists, or that such person would govern his or her conduct upon the assumption that such fact exists.

Hercules, 611 A.2d at 484. Here, common sense dictates that the Sisters’ prior knowledge that Falcone was abusing children generally renders it a direct and reasonably foreseeable result that Plaintiff would be sexually abused when Falcone took him on solo overnight trips to Delaware, trips which the Sisters authorized.

**e. Analogous Case in the District of Delaware.** In a case where similar allegations were made, The District of Delaware held that-

It is evident that... [the abuser] performed the claimed acts of sexual molestation for his own sexual gratification and not at the direction of the defendants. Nevertheless, the question in the context of these cases is whether [1] defendants knew of such sexual conduct, [2] knew of... [the abuser’s] trips to Delaware with teenaged boys where such sexual misconduct occurred, and [3] did nothing to protect these boys from harm in Delaware.

Thompson v. Roman Catholic Archbishop of Washington, 735 F.Supp.2d 121, 129 (D.Del. 2010). Accordingly, there the Court held:

Because the plaintiffs have averred that defendant the Archbishop of Washington knew or should have known, that... [the abuser] was sexually molesting children and that... [the abuser] was taking children on trips to Delaware, plaintiffs have satisfied the minimal pleading requirements to conduct limited jurisdictional discovery as to defendant the Archbishop of Washington.

Id. Thus, the Court there permitted jurisdictional discovery, which was denied in

this case.

## 2. Conspiracy Jurisdiction.

### a. The Law. This Court has held:

We find that, under certain circumstances, the voluntary and knowing participation of an absent nonresident in a conspiracy with knowledge or reason to know of an act or effect in the jurisdiction can be sufficient to supply or enhance the contacts required with the jurisdiction for jurisdictional purposes.

Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc., 449 A.2d 210, 225 (Del.

1982). “The conspiracy theory rests in part upon the legal premise that the acts of a conspirator are imputed to all the other co-conspirators.” Id. “We therefore hold that a conspirator who is absent from the forum state is subject to the jurisdiction of the court...if the plaintiff can make a factual showing that:

(1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

Id. Thus, a defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.” Id. “It can further be said such participation is a substantial contact with the jurisdiction of a nature and

that it is reasonable and fair to require the defendant to come and defend an action there.” Id.

The conspiracy theory of jurisdiction is not, strictly speaking, an independent jurisdictional basis, but rather, is a shorthand reference to an analytical framework where a defendant's conduct that either occurred or had a substantial effect in Delaware is attributed to a defendant who would not otherwise be amenable to jurisdiction in Delaware.

Computer People, Inc. v. Best Int'l Grp., Inc., 1999 WL 288119, \*5 (Del. Ch. Apr. 27, 1999); accord Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 976 (Del. Ch. 2000). Specific to the childhood sexual abuse context, the Delaware Superior Court has allowed jurisdictional discovery into conspiracy jurisdiction upon sufficient factual showing. See Toe #2 v. Blessed Hope Baptist Church, Inc., et al., C.A. No. 09C-12-033, Witham, J. (Del. Super. June 30, 2010) at 11-12 (Exhibit K).

### **b. The Complaint Adequately Makes the Required**

**Preliminary Showing.** As set forth in the facts above, the Complaint more than adequately alleges conspiracy theory jurisdiction over the Sisters.

#### **(i) – (ii). Existence of and Defendants’ Membership in the**

**Conspiracy.** These first two factors are established by:

- Defendant’s knowledge that Falcone was sexually abusing children. (See Facts at C.1.)
- Defendants’ membership and participation in five specifically identified conspiracies to, inter alia, commit fraud by covering up this abuse and

actively hiding, suppressing and intentionally misrepresenting Falcone's sexual abuse of young children from parents, parishioners and the public. (See Facts at D.).

**(iii). A Substantial Act or Effect in Furtherance of the Conspiracy Occurred in Delaware.** This factor is established by Falcone's sexual abuse of plaintiff in Delaware (see Facts at F.2), which furthers the conspiracies (see Facts at D) by: (1) allowing Falcone to continue to sexually abuse young children; and (2) allowing Sisters to continue their "calculated business decision that it [was] less costly to cover-up Falcon[e]'s history of sexual abuse than to find a new caretaker." (Compl. § 102, A31).

**(iv). Sisters Knew or Had Reason to Know of the Abuse in Delaware.** This factor is established by defendants' knowledge that Falcone was abusing children generally (Facts at C.1) and was taking Plaintiff on overnight trips alone to Delaware. (Facts at C.2).

**(v). The Act in Delaware was a Direct and Foreseeable Result of the Conduct in Furtherance of the Conspiracy.** The fifth factor is established by the fact that the sexual abuse of a child is a direct and reasonably foreseeable consequence of allowing a known child abuser to take that a child on an overnight trip with the abuser. If the child abuser is abusing children on the Orphanage property, then surely he will abuse them when he gets them away on an overnight trip alone. That is just common sense. See Hercules, 611 A.2d at 484

(Del. 1992) (“It is a basic principle of law, indeed a matter of common sense, that a defendant has ‘reason to know’ when he or she possesses information from which person of reasonable intelligence *or of the superior intelligence of the actor* would infer that the fact in question exists, or that such person would govern his or her conduct upon the assumption that such fact exists.”).

**(vi). Plaintiff Has Met His Burden.** Accordingly, it is clear that plaintiff has presented a "prima facie showing based on the pleadings and/or affidavits that jurisdiction is conferred by the Delaware long-arm statute." Crisafi, 533 A.2d at 1244.

**E. Due Process is Not Violated.** Due process requires that Defendants have “fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign,” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (internal punctuation and citations omitted). “[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Id.

The court below held that “[n]one of the facts alleged in the Complaint suggest that moving defendants could have reasonably be[en] haled into court in Delaware or that suit in Delaware would be fair and reasonable.” (D.I.135, Opinion and Order, p. 12, Exhibit A).

However, that ruling was erroneous. It is evident that due process would not be violated by finding personal jurisdiction over defendants because the factual record establishes that Sisters had fair warning that their actions would subject them to Delaware law. Sisters knowingly allowed their employee Falcone, a well known child abuser, to take a young boy alone on trips to Delaware overnight. In so doing, Sisters had fair warning that they could be subject to Delaware law and could reasonably anticipate being held accountable here for their failure to warn and otherwise protect plaintiff and other children from sexual abuse that Falcone committed on them in Delaware.

Additionally, this Court has held that

a defendant who has so voluntarily participated in a conspiracy [as to be subject to personal jurisdiction in Delaware on the basis of conspiracy jurisdiction] with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.

Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc., 449 A.2d 210, 225 (Del. 1982).

Therefore, whether Sisters are subject to Delaware jurisdiction via 10 Del. C. § 3104(c)(3) or the conspiracy theory of jurisdiction, or both, due process is not violated.

## **II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LIMITED JURISDICTIONAL DISCOVERY.**

**A. Question Presented.** Did the Superior Court abuse its discretion by refusing to allow limited jurisdictional discovery? (D.I. 56 - Plaintiff Opp. to Mot. To Dismiss, A38, Exhibit A to Plaintiff Opp. To Mot. To Dismiss, A46-49, D.I.138 Tr. of Mot. To Dismiss Oral Arg., A79-82,85-86).

**B. Scope of Review for Rule 12(b)(2) - Personal Jurisdiction.** The trial court has discretionary control over the decision to allow discovery prior to a motion to dismiss under Rule 12(b)(2). Hart Holding Co. Inc. v. Drexel Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991). The standard of review with respect to pretrial discovery rulings is abuse of discretion. See Mann v. Oppenheimer & Co., 517 A.2d 1056, 1061 (Del. 1986).<sup>6</sup> Where “the court in reaching its conclusion overrides or misapplies the law, or the judgment exercised manifestly unreasonable, an appellate court will not hesitate to reverse.” Pitts v. White, 109 A.2d 786, 788 (Del. 1954).

**C. The Law.** In most cases where appropriate a Court may allow limited

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<sup>6</sup> “A district court’s decision to deny jurisdictional discovery is reviewed for abuse of discretion.” Toys "R" Us, Inc., 318 F.3d at 455. Since “the Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure [ ]” this Court finds certain “federal cases appropriate for determining the proper interpretation of the Delaware Rules of Civil Procedure.” Plummer, 861 A.2d at 1242.

discovery before resolving a motion to dismiss for lack of personal jurisdiction.

Tell v. Roman Catholic Bishops of Diocese of Allentown, 2010 WL 1691199, \* 7 (Del.Super. Apr. 26, 2010) (citing Hart Holding Co. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991)).

Only where the facts alleged in the complaint make any claim of personal jurisdiction over defendant frivolous, might the trial court, in the exercise of its discretionary control over the discovery process, preclude reasonable discovery in aid of establishing personal jurisdiction.

Hart Holding Co., 593 A.2d at 539; see Argument I.B.1, above; see Toe #2, C.A. No. 09C-12-033, Witham, J. (Del. Super. June 30, 2010) at 11-12 (Exhibit K).

Here, since the Court determined that the facts alleged in the complaint were insufficient to establish personal jurisdiction over the Sisters, the Court should permitted plaintiff to complete discovery in order to establish jurisdiction over defendants. See Benerofe v. Cha, 1996 WL 535405, \* 3 (Del. Ch. Sept. 12, 1996) (“If facts alleged in the complaint are insufficient to establish personal jurisdiction over defendants, then the trial court may allow the plaintiff to complete discovery order to establish jurisdiction over defendant as long as plaintiff’s claim of personal jurisdiction is not frivolous.[ ] If necessary, the trial court may hold an evidentiary hearing or decide the matter based on affidavits.”) (citations omitted). Here, the basis for jurisdiction over the Sisters was not frivolous as plaintiff has set forth at Argument § I.D. above. Therefore, it was unreasonable not to afford plaintiff

jurisdictional discovery in order to establish jurisdiction over Sisters.

**CONCLUSION**

For the aforementioned reasons, Delaware has personal jurisdiction over the Sisters. Alternatively, plaintiff has made the necessary showing to allow him to conduct jurisdictional discovery.

Respectfully Submitted,

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