

TABLE OF CONTENTS

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 5

ARGUMENT 9

I. The Superior Court Correctly Concluded that there was no Personal Jurisdiction over the Sisters under Delaware Law and Federal Due Process Principles. 9

Introduction..... 10

A. There is No Basis for “Agency-based” Personal Jurisdiction over the Sisters. 12

B. The Refusal to Credit the Sexual Assault of Falcone as a Basis for Jurisdiction over the Sisters Is Settled Law..... 18

C. Plaintiff Fails to Invoke and Sustain his Burden to Show “Conspiracy Jurisdiction.” 20

D. Specific Personal Jurisdiction Over the Sisters Would Violate Due Process. 22

II. The Superior Court was within its Discretion in Finding that Plaintiff was not entitled to Jurisdictional Discovery..... 25

III. Conclusion 30

EXHIBITS

Elliot v. The Marist Bros. of the Schools, Inc., **EXHIBIT A**
D. Del., C.A. No. 09-611-SLR, Robinson, S. (Dec. 21, 2009) (Mem. Op.)

Doe v. Diocese of Tulsa, **EXHIBIT B**
No. 08-L-10273, Slip op. (Ill. Cir. Ct. July 1, 2009)

TABLE OF AUTHORITIES

CASES

<u>AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.</u> , 871 A.2d 428 (Del. 2005)	11, 23
<u>Archdiocese of Milwaukee v. Superior Court</u> , 5 Cal. Rptr.3d 154 (Cal. App. 2003).....	20
<u>Benerofe v. Cha</u> , 1996 WL 535405 (Del. Ch. Sept. 12, 1996).....	27
<u>Boone v. Oy Partek Ab</u> , 724 A.2d 1150 (Del. Super. Ct. 1997).....	11-12
<u>Burger King Corp. v. Rudzewicz</u> , 471 U.S. 462 (1985).....	23
<u>Chao v. State</u> , 604 A.2d 1351 (Del. 1992).....	9
<u>Computer People, Inc. v. Best Intern. Group, Inc.</u> , 1999 WL 28819 (Del. Ch. Apr. 27, 1999).....	18, 21
<u>Dassen v. Boland</u> , 2011 WL 1225579 (Del. Super. March 23, 2011).....	18, 22, 28
<u>Doe v. Diocese of Tulsa</u> , No. 08-L-10273, Slip op. (Ill. Cir. Ct. July 1, 2009).....	19
<u>Doe v. Roman Catholic Diocese of Boise, Inc.</u> , 918 P.2d 17 (N.M. Ct. App. 1996)	12, 20
<u>Doe v. State</u> , 2013 WL 5006496 (Del. Supr. September 12, 2013).....	16
<u>Does v. CompCare, Inc.</u> , 763 P.2d 1237 (Wash. App. 1988)	20
<u>Dubroff v. Wren Holdings, LLC</u> , 2009 WL 1478697 (Del. Ch. May 22, 2009).....	21-22

<u>Elliot v. The Marist Bros. of the Schools, Inc.,</u> D. Del., C.A. No. 09-611-SLR, Robinson, S. (Dec. 21, 2009) (Mem. Op.) 18, 23	
<u>Fasciana v. Elec. Data Sys. Corp.,</u> 829 A.2d 160 (Del. Ch. 2003)	13
<u>Fearing v. Butcher,</u> 977 P.2d 1163 (Or. 1999)	16
<u>Gannett Co., Inc. v. State,</u> 571 A.2d 735 (Del. 1989)	9
<u>Graham v. McGrath,</u> 363 F. Supp. 2d 1030 (S.D. Ill. 2005).....	19
<u>Greenly v. Davis,</u> 486 A.2d 669 (Del. 1984)	27
<u>Hart Holding Co. v. Drexal Burnham Lambert Inc.,</u> 593 A.2d 535 (Del. Ch. 1991)	28
<u>Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.,</u> 611 A.2d 476 (Del. 1992)	9
<u>International Shoe Co. v. Washington,</u> 326 U.S. 310 (1945).....	23
<u>Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.,</u> 449 A.2d 210 (Del. 1982)	21
<u>Losten v. Ukrainian Catholic Diocese, et.al.,</u> 2010 WL 1918791 (Del. Super. May 13, 2010) (“Dismissal Order”)	2
<u>Mann v. Oppenheimer,</u> 517 A.2d 1056 (Del. 1986)	25
<u>Mary M. v. City of Los Angeles,</u> 814 P.2d 1341 (Cal. 1991)	16
<u>Moses v. Bd. of Educ. of the New Castle County Vocational Technical Sch.</u> <u>Dist.,</u> 602 A.2d 61 (Del. 1991)	9

<u>Naples v. The Diocese of Trenton,</u> 2010 WL 1731820 (Del. Super. Apr. 29, 2010)	18
<u>Pecoraro v. Sky Ranch for Boys, Inc.,</u> 340 F.3d 558 (8th Cir. 2003)	19
<u>Picard v. Wood,</u> 2012 WL 2865993 (Del. Ch. July 12, 2012)	28
<u>Pitts v. White,</u> 109 A.2d 786 (Del. 1954)	25
<u>Simms v. Christiana School Dist.,</u> 2004 WL 344015 (Del. Super. Jan. 30, 2004)	15-16, 19
<u>Sprint Nextel Corp. v. iPCS, Inc.,</u> 2008 WL 2737409 (Del. Ch. 2008)	13-14
<u>Tell v. Roman Catholic Bishops of Diocese of Allentown,</u> 2010 WL 1691199 (Del Super. Apr. 26, 2010)	18-19, 28
<u>Tichenor v. Archdiocese of New Orleans,</u> 32 F.3d 953 (5th Cir. 1994)	19
<u>Toe #2 v. Blessed Hope Baptist Church,</u> 2012 WL 1413552 (Del. Super. Jan. 31, 2012)	22
<u>Voe#2 v. Archdiocese of Milwaukee,</u> 700 F. Supp.2d 653 (D. Del. 2010)	18
 <u>STATUTES</u>	
10 Del. Code. § 3104(c) (the “Long Arm Statute”)	1
 <u>RULES</u>	
Ct. R. 8	21
 <u>CONSTITUTIONAL PROVISIONS</u>	
Fourteenth Amendment	8, 23
United States Constitution	8, 30

OTHER AUTHORITIES

Mark E. Chopko, “Stating Claims Against Religious Institutions,” 44 B.C.L.
Rev. 1089, 1113 (2003)16

Restatement (Second) of Agency §22815

Restatement (Third) of Agency, § 7.07(2).....18

NATURE OF PROCEEDINGS

Plaintiff, Michael Losten (“Losten” or “Plaintiff”), a Maryland resident, appeals the Superior Court’s dismissal for lack of personal jurisdiction of his claims against Sisters of St. Basil the Great, Inc.¹ and Jesus, Lover of Humanity Province (together, the “Sisters”), Pennsylvania entities that operated a facility in Maryland. He claims to be a victim of childhood sexual abuse of Edward (“Eddie”) Falcone and named the Sisters, Falcone, the Ukrainian Catholic Diocese of Philadelphia, St. Basil’s Ukrainian Catholic Church, and Catholic Diocese of Wilmington, in his lawsuit filed in New Castle County in July 2009. The Sisters moved to dismiss for lack of personal jurisdiction in October 2009; the Superior Court heard argument in March 2010; and the court ordered the Sisters dismissed on May 13, 2010. The Superior Court concluded that Plaintiff had not sustained his burden to plead and prove personal jurisdiction under the long arm statute, 10 Del. Code. § 3104(c) (the “Long Arm Statute”), and that personal jurisdiction could not be asserted without offending Due Process requirements. The trial court’s May 13, 2010 order, which is the sole subject of this appeal, did not include

¹ Sisters of St. Basil the Great, Inc. was incorrectly sued as “The Order of the Sisters of St. Basil the Great.” Sisters of St. Basil the Great, Inc. is a civil corporation that conducts the business of the ecclesiastical entity Jesus, Lover of Humanity Province, which is a canonical territory of the worldwide Order (not named in this lawsuit). For completeness, the Ukrainian Catholic Diocese of Philadelphia is also not the proper name of the church agency, which is the Ukrainian Catholic Archeparchy of Philadelphia. Additionally, Falcone was incorrectly identified as “Falconi”.

any other relief, or any order related to jurisdictional discovery.² Losten v. Ukrainian Catholic Diocese, et.al., 2010 WL 1918791 (Del. Super. May 13, 2010) (hereafter, “Dismissal Order,” with internal citations to slip opinion pages, see Exhibit A to Plaintiff’s Opening Brief).

The claim against the Catholic Diocese of Wilmington was withdrawn in November 2009. Falcone died in September 2010. But the claims against the Ukrainian Catholic Diocese of Philadelphia and Saint Basil parish church in Chesapeake City, Maryland (the “Ukrainian Catholic defendants”) persisted for several years. After the May 2010 dismissal, the Sisters had no involvement in this lawsuit until August 2012, when Plaintiff sought depositions and written discovery from the Sisters to advance his claims against the Ukrainian Catholic defendants, who he alleged supervised both the Sisters and Falcone. Plaintiff propounded interrogatories to two different sisters who served at the facility during the 1960s, Sister Genevieve Kotyk, O.S.B.M. and Sister Mary Bernarda Arkatin, O.S.B.M., both of whom provided full and complete responses to all questions, even where such questions were immaterial to the Ukrainian Catholic defendants.

Additionally, as part of his case in chief against the Ukrainian Catholic defendants,

² On June 24, 2009, Plaintiff served 72 requests for production, 26 interrogatories and requests for admission on all parties. These requests sought personnel, supervisory and management information about the parties and the accused. (Docket #1, Appendix A00001). The Sisters moved to stay that discovery (Docket #29, Appendix A00004) so that the court could consider preliminary motions to dismiss apart from the merits. At a hearing on October 20, 2009, the court stayed that discovery. (See Appendix B003).

Plaintiff was deposed on December 13 and 14, 2012, and Plaintiff's fact witness, Stephan Popovich, was deposed on December 15, 2012. Plaintiff also lodged documents and at least one affidavit (of Plaintiff's brother, Stephen Losten, who has never been deposed) in opposition to the Ukrainian Catholic defendants' motion for summary judgment. Ultimately Plaintiff resolved his claims against the Ukrainian Catholic defendants, and the case was finally dismissed on July 8, 2013. (Docket #135; see Appendix A00016). This appeal of the Superior Court's May 13, 2010 Dismissal Order followed.

SUMMARY OF ARGUMENT

1) **Plaintiff/Appellant**: 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.

a) **Defendant/Appellee Response**: *Plaintiff has failed to carry his burden under Delaware statutory and U.S. constitutional law, in the absence of evidence or specific allegations that the Appellees purposefully conducted such activities in Delaware to make them amenable to suit for the alleged crimes of a part-time volunteer.*

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

a) **Defendant/Appellee Response**: *Plaintiff never moved for and thus was never denied such discovery. In any event, he failed to sustain his burden to show there was a good faith factual dispute that required discovery to resolve.*

STATEMENT OF FACTS

The Sisters belong to an international order of religious women in the Ukrainian Catholic Church. While it is common to think of the “Roman Catholic Church” when one speaks of Catholics or the Church, in fact there are twenty-one other autonomous religious bodies organized into five liturgical traditions or “rites” in communion with the Roman Catholic Church, each of which acknowledges the Pope as its spiritual head. The Ukrainian Catholic Church is known as an “Eastern Catholic Church”, which has its own customs and particular norms of canon law.³ Beginning with their arrival in the United States from Ukraine in 1911, the Sisters served as educators and caretakers for an immigrant Church. Soon after their arrival, they established an orphanage in Chesapeake City, Maryland, primarily to care for the children who were orphaned or whose

³ To explain these specific facts as background for the Superior Court (March 5, 2010 Hearing Transcript p. 4 (A00071)], in support of its motion to dismiss, the Sisters lodged an affidavit from their then-Provincial Superior, Sister Laura Palka, O.S.B.M. (See Appendix B 005-012) (“Palka Affidavit”). The Palka Affidavit also explained the historical background of the Sisters’ operations at the facility in Maryland where Plaintiff resided, Falcone’s limited involvement with the Sisters, and the absence of contacts between the Sisters and Delaware. Because Plaintiff had asserted some generalized actions with Delaware, the Palka Affidavit made plain that the Sisters had no systematic and regular contacts with Delaware and specifically refuted that the alleged injuries arose from any purposeful activity of the Sisters in or directed to Delaware. Neither at that time in 2009, nor in the intervening four years since, has Plaintiff controverted a single fact noted by the Sisters, specifically as to the absence of contacts between them and Delaware.

parents were unable to care for them in the region's Ukrainian immigrant community.

The Orphanage was licensed by the State of Maryland and operated exclusively in Chesapeake City, Maryland, under the general authority of the Provincial Superior and her council in Pennsylvania. The facility was operated to care for pre-kindergarten age children; it was not a primary school nor did it usually house school-age children. Most of the property was a working farm which provided raw materials for meats, bread, vegetables and dairy products for consumption by the residents or trade with the community. The farm was worked by three or four adult men who sometimes lived on the property in their own house, apart from the Sisters and apart from the children. These men had no child care or recreational duties. After serving the community and children for 60 years, the Orphanage ceased operations in the early 1970s. During the last decades, Sister Augustine, assisted by Sister Daniel, both now deceased, supervised the daily operation of the Chesapeake City facility.

The Lostens are members of a large extended Ukrainian-American family from the Eastern Shore. Following his parents' divorce, Plaintiff, Michael Losten, with his brother, Stephen, was sent by his father to live at the Orphanage, beginning in 1962 until approximately 1970. It was during this time that Michael Losten says that he was sexually abused by Falcone. A volunteer custodian or

farmworker who lived at the Maryland facility from time to time, “Eddie” Falcone was raised as an orphan by the Sisters and the Sisters believe that the Orphanage was the only home he knew. As an adult in the 1960s, he owned a house and resided in Wilmington, Delaware where he either owned or worked at a camera store for several years. Even during that time, the Sisters believe that Falcone would return from time to time and help out around the facility as a custodian or farmhand on a voluntary basis. Plaintiff alleges he was abused by Falcone at the Orphanage in Maryland, as well as during overnight trips that he allegedly took with Falcone to Delaware.

The Sisters denied, and continue to deny, that Falcone was an employee of the Sisters in the 1960s or that he was assigned any duties involving the care of the children. Further, even if Falcone was employed by the Sisters, any abuse would have been outside the scope of his employment, would not have been to benefit or advance the work of the Sisters, and thus, as a matter of well-settled Delaware law, could not be considered as a basis for personal jurisdiction over the Sisters. If any trip to Delaware did take place, it was not, nor is it alleged to have been, directed by or in any way connected to the business of the Sisters. Significantly, nowhere does Plaintiff allege that the Sisters directed Falcone to take Plaintiff to Delaware for any purpose. In the four years since Plaintiff filed this lawsuit, he has not

produced a single fact to indicate that Falcone took any child to Delaware at the direction of the Sisters.

In the trial court, Plaintiff's strategy was to urge the court to ignore the Palka Affidavit and credit the text of the First Amended Complaint (Appendix A00018-00033) ("Compl.") as well-pleaded fact. As is discussed below, the trial court made no reference to the Palka Affidavit in resolving the motion to dismiss, but instead based its decision on flaws in Plaintiff's own pleadings. The court found that the Long Arm Statute did not reach the Sisters, because Falcone's alleged acts of sexual abuse occurred outside the scope of any employment and not at the Sisters' direction. (Dismissal Order, p. 11). Plaintiff failed to assert facts to demonstrate that the Sisters directed or authorized Falcone's tortious conduct in Delaware. (Id., p. 11-12). Lastly, the court held that, even if there was a basis for personal jurisdiction under the Long Arm Statute, the exercise of jurisdiction would not have been proper under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as Losten had not established that the Sisters could have reasonably anticipated being brought into court in Delaware or that suit in Delaware would be fair and reasonable. (Id., p. 12).

ARGUMENT

I. The Superior Court Correctly Concluded that there was no Personal Jurisdiction over the Sisters under Delaware Law and Federal Due Process Principles.

- 1) **Question Presented:** In the absence of any direct facts showing that the Sisters took any purposeful action towards the forum state, is there specific personal jurisdiction under the Long Arm Statute and the federal Due Process Clause?
- 2) **Scope of review:** The application of the Long Arm Statute necessarily involves a question of statutory interpretation which this Court may review to determine “whether the Superior Court erred as a matter of law in formulating or applying legal principles.” Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd., 611 A.2d 476, 480 (Del. 1992) (quoting Moses v. Bd. of Educ. of the New Castle County Vocational Technical Sch. Dist., 602 A.2d 61, 63 (Del. 1991)). To the extent the trial court’s application of the statute depends on findings of fact, this Court will accept those findings as true if they are supported by the record and are the product of an orderly deductive process. Hercules, 611 A.2d, at 480. The Superior Court’s conclusion that the exercise of jurisdiction did not comport with Due Process is a legal determination which this Court will review de novo. Id. (citing Chao v. State, 604 A.2d 1351, 1360 n. 7 (Del. 1992); Gannett Co., Inc. v. State, 571 A.2d 735, 739 (Del. 1989)).

3) Merits of Argument:

Introduction

Through interpretation in innumerable commercial and personal injury situations, Delaware law on personal jurisdiction is well-settled: a non-resident defendant is not subject to the jurisdiction of Delaware courts unless that defendant has taken some purposeful action directed at Delaware and the lawsuit arises out of that act of the defendant. The dismissal below of the Complaint against the Sisters is fully consistent with that black letter law. In the case at bar, the personal criminal actions of Falcone cannot, as a matter of law, constitute actions of the defendant Sisters and because they do not arise out of any action authorized by the Sisters. Plaintiff proffers nothing substantial to the contrary. Both the agency and conspiracy theories advanced by Plaintiff have been consistently rejected by courts in Delaware as bases for specific personal jurisdiction over out-of-state defendants under facts identical to this case, and there is nothing about this lawsuit that compels a different result or a departure from well-settled law.⁴

Non-resident Plaintiff agrees that he bears the burden of proving that the Pennsylvania defendant took some purposeful act in Delaware, without which the

⁴ Plaintiff devotes substantial attention in the Opening Brief to the legislative history of Delaware's Child Victim's Act ("CVA") and attaches approximately 415 pages of press clippings and hearing transcripts. None of this relates to the sole issue before the Court – the exercise of specific personal jurisdiction over the Sisters in Delaware. Nothing in the CVA amends or abrogates the well-settled Delaware law on personal jurisdiction, which is the basis for the Superior Court's dismissal of the Sisters from this case.

case must be dismissed. AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc., 871 A.2d 428, 437 (Del. 2005). Under the relevant provision of the Long Arm Statute, specific jurisdiction can only exist if Losten's claims arose out of tortious acts or omissions committed or directed by the Sisters *in Delaware*. See Boone v. Oy Partek Ab, 724 A.2d 1150, 1155 (Del. Super. Ct. 1997). On this point, Losten has utterly failed to prove anything. Little of what he alleges has substance as "fact," and none of it sustains his case.

Plaintiff would divert the Court to focus on the merits, whether through his lengthy but irrelevant filing of his counsel-created record about the Child Victim's Act or why, contrary to the law, he believes there is vicarious liability for Falcone's alleged criminal acts. Plainly, jurisdiction is legally very different than the merits. While Plaintiff may state a claim "on information and belief" subject to proof to follow, he must first establish a basis for Delaware courts to exercise personal jurisdiction over a defendant on something more than vague surmises. Even if Plaintiff might state a claim for vicarious liability, his effort gains him nothing on his appeal because he has not met his threshold burden to state any basis to conclude that the Sisters took any purposeful act themselves or through an authorized act of an agent in Delaware.

A. There is No Basis for “Agency-based” Personal Jurisdiction over the Sisters.

Specific personal jurisdiction must arise out of conduct that the Sisters took or authorized to occur in the forum state. Boone, 724 A.2d 1155; Accord. Doe v. Roman Catholic Diocese of Boise, Inc., 918 P.2d 17, 23 (N.M. Ct. App. 1996) (holding that New Mexico did not have personal jurisdiction over the Diocese of Boise, Idaho, because “it is the acts of [the diocese], not the acts of [the perpetrator], that must provide the basis for this state exercising personal jurisdiction over the [diocese]”). While the Complaint alleges a series of legal violations by the Sisters, such as gross negligence , breach of fiduciary duty , etc., it does not allege a single act that the Sisters took or directed in Delaware. Plaintiff relies only on the alleged crimes of Falcone. Although he asserts “permission,” “knowledge and consent” or awareness that Falcone was traveling in Delaware (Compl. ¶¶ 22-25), his only mention of jurisdiction states broadly that “[j]urisdiction over all defendants arises from the rapes, sodomy and assaults by Falconi [sic] on plaintiff within the State of Delaware which were approved and abetted by all defendants [not just the Sisters].” (Compl. ¶16). As stated, this is a legal conclusion. As a fact, this flies in the face of reality. The mission of the Sisters is to protect and care for children. It defies any sensible or rational conclusion that the Sisters would approve or knowingly facilitate child rape by any person.

Putting aside the sweeping and offensive conclusion, the Complaint does not support maintaining specific personal jurisdiction over the Sisters under the principles of agency law. Plaintiff must establish, not simply assert, that (1) an agency relationship existed between Falcone and the Sisters (see, e.g., Sprint Nextel Corp. v. iPCS, Inc., 2008 WL 2737409, 11 (Del. Ch. 2008)); (2) Falcone's actions were within the scope of his employment or agency, and (3) his conduct in Delaware was directed by the Sisters.

The starting point is for Plaintiff to establish that Falcone was the agent of the Sisters when he allegedly committed crimes against Plaintiff in Delaware. See Fasciana v. Elec. Data Sys. Corp., 829 A.2d 160, 169 n.30 (Del. Ch. 2003) (an agency relationship does not exist if the agent does not act for the benefit of the principal). The Complaint alleges that the Sisters ran the Orphanage and that Falcone was a caretaker (Compl. ¶¶ 8, 11) or was employed by the "Diocese and Church" (Compl. ¶ 29), or was an agent of all the defendants (Compl. ¶¶ 10, 30-33). Most of what is stated about the relationship with Falcone is a legal conclusion. Although from time to time, Falcone voluntarily assisted the Sisters at the Orphanage, it is not alleged that, when he was supposedly in Delaware with the Plaintiff, he was acting within any authorized agency or employment with the Sisters. For these purposes, because Plaintiff has not identified facts from which,

if true, a court could conclude that Falcone was acting as the Sisters' agent at the time of the alleged assaults, the specific jurisdiction analysis could end there.

Assuming *arguendo* that an agency relationship did exist between Falcone and the Sisters, the settled law of Delaware provides that "only the acts of the agent that are directed by the principal may serve as a basis to assert jurisdiction over the principal." Sprint Nextel, 2008 WL 2737409, at *11 (internal quotations/citations omitted). Significantly, Plaintiff does not allege that the Sisters employed Falcone to care for children. He alleges that Falcone was "the caretaker of the Orphanage." (Compl. ¶ 29). By all accounts, at the time of the events alleged here, Falcone was at most a volunteer and occasional custodian or farmhand, not a child care worker. Even information submitted by Plaintiff does not contradict this. Plaintiff's after-the-fact witness, Stephan Popovich, testified as to the limited nature of Falcone's duties:

And I guess [Falcone] just did -- I don't know exactly what he did, but he would do things. I know when the harvest, I guess the fruits or whatnot would come, they would set up a little stand in front of the property there with a big sign there and he, you know, helped with that and, you know, things along that line.

(See Transcript of December 15, 2012 Popovich deposition, p. 21, lines 5-10; Appendix B014).

Popovich had no knowledge of Falcone taking any boys on trips to Delaware (Id., p. 26, lines 2-4). Further, also after the record on this part of the case was complete, Plaintiff's brother, Stephen Losten remembers that Falcone took Plaintiff

and others to Delaware to attend to Falcone's camera business (specifically he remembers unloading cameras from the car). (See Stephen Losten Affidavit, ¶9; Appendix A00100-00101). This corroborates Plaintiff's testimony that Falcone worked at a Kodak store in Delaware. (See Transcript of December 14, 2012 Michael Losten deposition, 113:10-14, Appendix B017) ("Losten deposition"); Losten Second Supplemental Answers to Interrogatories #31, Appendix A00115). All indications are that if Falcone did take Plaintiff to Delaware, it was on Falcone's business, and there is simply nothing to support any other conclusion.

Even if this Court were to entertain the speculation that Falcone was acting as an agent of the Sisters in Delaware, notwithstanding that his duties as alleged and in fact related to maintaining the Orphanage property in Maryland, his duties did not and could not have included committing sex crimes against children. On this point Delaware law is clear.

In Simms v. Christiana School Dist., 2004 WL 344015 (Del. Super. Jan. 30, 2004), the court held that a resident advisor whose duties required daily contact with mentally and hearing impaired students in their dormitory rooms, acted outside the scope of employment when he sexually assaulted a student in the student's room during work hours. Simms rested on Restatement (Second) of Agency §228, under which an agent's conduct is considered within the scope of employment if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs within the authorized time and space limits;
- (c) it is activated, in part at least, by a purpose to serve the master;
- and,**
- (d) if force is used, the use of force is not unexpected.

All four factors must be met in order for the agent's conduct to fall within the scope of employment, and in *Simms*, the alleged sexual assaults failed them all.

Simms, *5-7. Notably, Plaintiff has not meaningfully addressed these factors. As he has stated it, Falcone was a caretaker of the Orphanage (Compl. ¶¶ 11, 12, 29).⁵ Criminal activity is not contemplated in those duties.

Finally, setting aside that Falcone's alleged crimes were not remotely connected to any authorized work,⁶ Plaintiff fails to make the required showing that Falcone's conduct in Delaware giving rise to the claim (and hence jurisdiction) was specifically directed by the Sisters. There is nothing of factual nature in the Complaint, discovery or other documents to support that any of Falcone's alleged

⁵ Plaintiff appeals to *Fearing v. Butcher*, 977 P.2d 1163 (Or. 1999), which propounds a theory of *respondeat superior* for liability purposes which is not the law in Delaware (or anywhere except Oregon). See Mark E. Chopko, "Stating Claims Against Religious Institutions," 44 B.C.L. Rev. 1089, 1113 (2003). Moreover as Plaintiff concedes, *Fearing* turned on whether the perpetrator's authorized duties of employment resulted in the acts which led to the injury. *Fearing*, 977 P.2d, at 1166. Even if *Fearing* were Delaware law, the record here is clearly distinguishable.

⁶ *Doe v. State*, 2013 WL 5006496 (Del. Supr. September 12, 2013) applies that rule. This Court held that vicarious liability was proper for an assault by a police officer against a prisoner when the police officer was doing the kind of work he was employed to perform (placing persons in physical custody through use of force and law) and that he was acting within authorized time and space limits when the alleged abuse took place. *Id.*, at *1-2; see also *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1350 n. 11 (Cal. 1991). Here, there is neither an allegation nor one shred of evidence that Falcone was even employed by the Sisters to perform any duties with respect to children or authorized, or if so, was expected to use force.

trips to Delaware were directed by the Sisters as part of their business. The Complaint alleges Falcone had permission to be there, which is all any witness stated, and even then it was speculative at best. (See Stephen Losten affidavit, ¶9; Appendix A00101; Losten deposition, 127:21-128:7, Appendix B018-019). Only Plaintiff’s brief says otherwise, that Falcone was “clearly acting in the ordinary course of the Sisters business, which was to take care of the children who resided at the Orphanage” (Plaintiff’s Opening Brief, p. 20). Not only is nothing offered in support of that remarkable assertion, but it is directly contradicted by the sworn statements of witnesses, including two Sisters responding to Plaintiff’s discovery.⁷ The mere allegation that Falcone performed some authorized act in Maryland does not then demonstrate that the Sisters directed Falcone to perform any act, much less a criminal act, in Delaware. This is precisely why, in this case, the Superior Court correctly concluded (Dismissal Order, p. 10):

Because [the Sisters] alleged they never directed, requested, or assigned Falcone to perform services, duties, or any other business on behalf of [the Sisters] in Delaware, jurisdiction in Delaware is improper. Furthermore, none of the alleged acts of abuse were to benefit or to further the work of the moving defendants and, therefore, the criminal acts of abuse did not fall within any agency relationship and were the acts of Falcone alone.

⁷ Both Sisters lived at the facility in the 1960s. Sister Genevieve Answers to Interrogatories #23, 28, 82, Appendix B026, B027, B035); Sister Bernarda Answers to Interrogatories #17, 19, 21, 33, Appendix B044, B046. See also Palka Affidavit ¶ 17, Appendix B011-012.

B. The Refusal to Credit the Sexual Assault of Falcone as a Basis for Jurisdiction over the Sisters Is Settled Law.

In dismissing the Sisters, the Superior Court acted consistently with its own recent decisions, as well as the decisions of the District Court of Delaware, which have all been clear that only acts of the agent that are directed by the principal may serve as a basis to assert jurisdiction over the principal. Dassen v. Boland, 2011 WL 1225579 at *6 (Del. Super. March 23, 2011) (citing *inter alia*, Restatement (Third) of Agency, § 7.07(2) and dismissing complaint because the alleged perpetrator was not the Georgia church's agent at the time of the alleged abuse in Delaware, and there was no evidence that the church directed or authorized the perpetrator's actions). Without that authorization, the court correctly concluded, the Long Arm Statute cannot reach the Sisters. Dismissal Order, p. 11 citing Naples v. The Diocese of Trenton, 2010 WL 1731820 (Del. Super. Apr. 29, 2010); Voe#2 v. Archdiocese of Milwaukee, 700 F. Supp.2d 653 (D. Del. 2010); Elliot v. The Marist Bros. of the Schools, Inc., D. Del., C.A. No. 09-611-SLR, Robinson, S. (Dec. 21, 2009) (Mem. Op.) (Exhibit A hereto); also citing Computer People, Inc. v. Best Intern. Group, Inc., 1999 WL 28819, *8 (Del. Ch. Apr. 27, 1999).

Plaintiff refers to Tell v. Roman Catholic Bishops of Diocese of Allentown, 2010 WL 1691199, *9 (Del Super. Apr. 26, 2010) (Plaintiff's Opening Brief, p. 18), but omits that the court in Tell granted motions to dismiss for lack of personal jurisdiction in two cases with almost identical facts to this case. Tell, 2010 WL

1691199, at *1,*12.⁸ Relying on Simms, Tell recognized that courts have “uniformly rejected the contention that a priest is acting within the scope of his employment when he sexually abuses a minor because the priest was not hired to engage in such conduct and because the abuse is not motivated by a purpose to serve the church.” Id., *10 and n. 61.

Courts have consistently declined to assert personal jurisdiction over non-resident institutional defendants for the criminal abuse of a minor by a cleric or religious. See, e.g., Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 562-63 (8th Cir. 2003) (Nebraska court lacked jurisdiction over South Dakota Diocese for plaintiff’s claims of alleged sexual abuse by priest in South Dakota and Illinois); Tichenor v. Archdiocese of New Orleans, 32 F.3d 953, 959-60 (5th Cir. 1994) (Mississippi court lacked jurisdiction over Louisiana Archdiocese for priest’s alleged sexual abuse of minor parishioner during trip to Mississippi; abuse beyond scope of employment); Graham v. McGrath, 363 F. Supp. 2d 1030, 1033-34 (S.D. Ill. 2005) (Illinois court lacked jurisdiction over Missouri Archdiocese for priest sexual abused in Illinois; abuse beyond scope of employment); Doe v. Diocese of Tulsa, No. 08-L-10273, Slip op. at p. 22 (Ill. Cir. Ct. July 1, 2009) (Illinois court lacked jurisdiction over Oklahoma Diocese for alleged sexual abuse of minor parishioner during vacation trip; abuse beyond scope of employment) (Exhibit B

⁸ In Tell, unlike here, the question of employment was not in dispute.

hereto); Doe v. Roman Catholic Diocese of Boise, 918 P.2d, supra at 23 (New Mexico lacked jurisdiction over Idaho Diocese because for abuse by priest of minor, even after receiving permission to visit other state). The few contrary cases involve a condition not present here – that the perpetrator was *directed to reside* in the forum state by the institutional defendant *because* he had committed acts of abuse in home state. Archdiocese of Milwaukee v. Superior Court, 5 Cal. Rptr.3d 154 (Cal. App. 2003); Does v. CompCare, Inc., 763 P.2d 1237 (Wash. App. 1988). In those cases the non-resident defendant purposefully acted to direct the perpetrator to the forum state and was held accountable in that state for the consequences of its authorized action. Nothing in this record satisfies that elemental proof issue.⁹

C. Plaintiff Fails to Invoke and Sustain his Burden to Show “Conspiracy Jurisdiction.”

As this Court knows, Delaware law allows for “conspiracy,” not as a separate basis for jurisdiction, but in very specific cases based on factual proof, to assure that non-resident parties who actively agree to cause some effect in Delaware are held accountable for that act. It is by design “exceptional,” lest it

⁹ Almost as if to concede the point, Plaintiff argues that even if Falcone’s abuse was not part of the scope of his job duties, that the Sisters ratified Falcone’s conduct, thereby creating a basis for jurisdiction (Plaintiff’s Opening Brief, p. 23). Plaintiff fails to provide any legal authority to support this argument, and fails to provide factual support for the time, place, and manner of any purported ratification. The attempt to add yet another theory for jurisdiction on appeal is procedurally and substantively meritless.

unconstitutionally undermine the law of personal jurisdiction that only a defendant's purposeful acts in the forum state can be used to measure amenability to suit. Computer People, 1999 WL 288119, at *6. Plaintiff's attempt to shoehorn in Delaware's narrow rule is not only legally untenable, but was not briefed below. It was advanced by Plaintiff in oral argument as an attempt to save his case. (March 5, 2010 Hearing Transcript, p. 19, Appendix A00086). The trial court did not address it in its Order. Thus, Plaintiff has waived the issue, and the Court is free to disregard it. (Supr. Ct. R. 8).

Assuming the matter is properly considered here, Plaintiff has failed to meet the "strict test" to "make a factual showing" each of five factors, starting with proof that "(1) a conspiracy to defraud existed [and] (2) the defendant was a member of that conspiracy...." Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc., 449 A.2d 210, 225 (Del. 1982). "Conclusory allegations are insufficient," and if "unsupported by evidence . . . will not be sufficient to overcome a motion to dismiss for lack of personal jurisdiction." Dubroff v. Wren Holdings, LLC, 2009 WL 1478697, at *7 (Del. Ch. May 22, 2009). Saying there was a conspiracy involving the Sisters is not sufficient. In a nearly identical case, the Superior Court rejected the plaintiff's conspiracy theory as a basis for personal jurisdiction, noting not only that the concept that the defendant diocese was conspiring with the perpetrator to commit a crime against children "defied logic,"

but also that the plaintiff's conclusory and unsupported allegations were insufficient to establish that there was any conspiracy between the defendants. Dassen, 2011 WL 1225579, at *7; See also Toe #2 v. Blessed Hope Baptist Church, 2012 WL 1413552, *4 (Del. Super. Jan. 31, 2012) (rejecting conspiracy jurisdiction without evidence of an agreement between the accused and the defendant).

Plaintiff's general and conclusory assertions of conspiracy do not demonstrate the requisite agreement to commit an illegal act. In the Opening Brief (p. 11), Plaintiff alleges that the Sisters conspired with Falcone and agreed not to punish him to enable him to continue sexually abusing children, to cover up his alleged sexual abuse and then lie about it. Those conclusory allegations contain no facts "from which the Court can infer that the defendants agreed to work together" with respect to any of the alleged conspiracies. Dubroff, 2009 WL 1478697, at *7. To suggest the Sisters, whose task it was to nurture children, could have been a party to such an agreement, is both baseless and offensive. This insinuation cannot create a basis for personal jurisdiction and deserves firm rejection by this Court.

D. Specific Personal Jurisdiction Over the Sisters Would Violate Due Process.

Even if Plaintiff satisfies his burdens to establish compliance with the Long Arm Statute or that there is a conspiracy to commit criminal acts in Delaware, he still must show that forcing the Sisters to defend themselves in Delaware is

consistent with the traditional notions of fair play and justice required by the Due Process Clause of the Fourteenth Amendment. AeroGlobal, 871 A.2d at 440 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)). For that, Plaintiff must indicate how the Sisters purposefully availed themselves of the benefits of acting in Delaware. As the Court knows, the “purposeful availment” requirement ensures that the Sisters not be haled into Delaware solely as a result of “random,” “fortuitous,” or “attenuated” contacts, or, of particular note in this case, the “*unilateral activity of another party or a third person.*” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)(emphasis added).

Plaintiff must demonstrate that, given what the Sisters did in Maryland, it was entirely “expectable” that they should be sued in Delaware. Most plainly for jurisdictional purposes, this calculus is not the same foreseeability test that is applied for liability purposes. Foreseeability of injury is not the “constitutional touchstone.” What is critical to the due process analysis is the foreseeability that, because of his own purposeful actions, “defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.” Id. at 474. This critical distinction requires more than the mere conclusory allegations, such as that the Sisters knew of Falcone’s alleged sexual abuse (Compl. ¶¶ 17, 26). Accord. Elliot, D. Del. No. 09-611-SLR, at *10 (Exhibit A). The relevant inquiry is whether, in allowing Falcone to perform as a caretaker of

the Orphanage's property in Maryland, the Sisters could reasonably expect being sued in Delaware for his crimes there. Falcone's personal criminal conduct in Delaware, if it occurred, does not constitute a purposeful act by the Sisters in Delaware. As the Superior Court correctly found, a Delaware court cannot exercise personal jurisdiction over the Sisters without violating Due Process.

II. The Superior Court was within its Discretion in Finding that Plaintiff was not entitled to Jurisdictional Discovery.

- 1) **Question Presented:** Was it an abuse of the discretion, on this record, for the Superior Court not to have ordered jurisdictional discovery before it dismissed the Sisters?
- 2) **Scope of review:** The application of the discovery rules is committed to the trial court's sound discretion. Mann v. Oppenheimer, 517 A.2d 1056, 1061 (Del. 1986). The scope and standard of review derive from that principle, and the relevant inquiry is whether the decision of the trial judge, if improper, amounted to an abuse of discretion. Id. (citing Pitts v. White, 109 A.2d 786, 788 (Del. 1954).
- 3) **Merits of Argument:**

As a threshold matter, Plaintiff never affirmatively moved for and therefore the trial court never entered an order denying jurisdictional discovery. Plaintiff fails to identify when the trial court actually denied any purported request for jurisdictional discovery, leaving the Sisters, and this Court, to guess as to what he is actually appealing. Plaintiff's appeal rather recites that it was "unreasonable not to afford plaintiff jurisdictional discovery in order to establish jurisdiction over Sisters." (Plaintiff's Opening Brief, p. 34). There is no order, as such, that is within the jurisdiction of this Court to review.

The only outright denial of discovery by the trial court concerned discovery directed to all defendants about the merits of Plaintiff's claim, and served with the initial complaint. (Docket #1, Appendix A00001). The Sisters moved to dismiss the action against them on October 2, 2009, and in conjunction with that motion, moved to stay all the pending discovery until the motion to dismiss was resolved. (Docket #29, Appendix, A00004). At an October 20, 2009 hearing, the trial court set a briefing schedule for the motion to dismiss, noting that "no discovery will take place." (Judicial Action Form, Docket #38, Appendix B053; see October 20, 2009 transcript, p. 10:8-15, Appendix B004). That discovery was the lengthy merits discovery (described *supra* at n. 2). And, in response to Plaintiff counsel's plea for discovery to sort out who should belong in the suit, the trial judge remarked, "[i]t's not the purpose of the Court to let you file a lawsuit and then figure out through discovery who should stay in." (*Id.*, pp. 6-7, Appendix B003). Jurisdictional discovery was never sought in that hearing or the subject of any subsequent motion.

Second, during consideration of the motion to dismiss, Plaintiff argued that the court could not consider the Palka Affidavit, without converting the motion into one for summary judgment and after allowing discovery. (See Plaintiff's Opposition to the Sisters' Motion to Dismiss, p. 2, Appendix A00038; *Id.*, Tab A, ¶4 ("Warner Affidavit"), Appendix A00047). While that is not Delaware law,

Greenly v. Davis, 486 A.2d 669, 670 (Del. 1984), Plaintiff's position has been that jurisdictional discovery would be needed *if* the trial court's considered the Palka Affidavit in ruling on the Sisters' motion to dismiss, which the trial court did not do.¹⁰

Plaintiff argued he had alleged enough in the Complaint to withstand the motion to dismiss. (See March 5, 2010 Hearing Transcript, p. 18, Appendix A00085). The trial court disagreed and, without relying on the Palka Affidavit, dismissed the Sisters due to Plaintiff's failure to "indicate that Falcone's acts of sexual abuse occurred within the scope of his employment and that the moving defendants directed the acts." (Dismissal Order, p. 11). Assuming the matter to have been properly appealed, he now has the extra burden to show why there was some fact, any fact, that connected the actions of the Sisters in Maryland to an alleged crime in Delaware.

Jurisdictional discovery is discretionary, as Plaintiff notes. See Benerofe v. Cha, 1996 WL 535405, *3 (Del. Ch. Sept. 12, 1996). But it is not automatic, and Plaintiff is responsible to show something that connects the non-resident defendant

¹⁰ Ms. Warner's affidavit stated that "should the Court refer to matters outside the initial pleadings," Plaintiff would need to depose Sister Laura Palka, to test the bases of her statements (Warner affidavit, ¶¶6, 8, Appendix A00048). Likewise, during oral argument on the motion on March 5, 2010, Plaintiff's counsel, Mr. Neuberger, repeated that Plaintiff should be given the opportunity to challenge the factual allegations contained in the Palka Affidavit, *if* the court considered it in ruling on the motion to dismiss. (March 5, 2010 Hearing Transcript, pp. 14, 18, Appendix A00081, A00085).

to the forum state that justifies further exploration. Dassen, 2011 WL 1225579, at *3 (noting that cases allowing jurisdictional discovery often have an overt connection to Delaware that deserves further scrutiny, such as that at least one party was a resident and/or the defendant school or church provided services in Delaware.) See also Picard v. Wood, 2012 WL 2865993, *2 (Del. Ch. July 12, 2012) (Plaintiff cannot “sue first and ask questions later,” citing Hart Holding Co. v. Drexal Burnham Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991)). Absent that basis, Plaintiff simply has no place to argue that the Superior Court denied relief that he never actually moved for.

On this point, Tell, also cited by Plaintiff, is instructive. In Tell, the Court denied plaintiff’s motion to take discovery prior to resolution of defendant’s motion to dismiss for lack of personal jurisdiction, finding that since there was no motion seeking leave to take discovery, the issue was waived. (Tell, 2010 WL 1691199, at *1 n. 28). The court found that when a plaintiff offers only speculation or conclusory assertions about contacts within a forum state, and when it is apparent to the trial court that the requested discovery will add nothing to the court’s consideration of the issue, a court is within its discretion in denying jurisdictional discovery. Id., *7.

Tell also makes clear that a plaintiff seeking jurisdictional discovery must show that the proposed discovery is necessary to resolve the legal issues raised by

the pending motion. Id. Plaintiff failed to make a *prima facie* case to sustain jurisdiction, and gave the trial court no basis to assume that allowing discovery would change that conclusion. Plaintiff has not shown how a denial of jurisdictional discovery, if one had actually occurred, would have been an abuse of discretion.¹¹ There is no reason to disturb that conclusion.

¹¹ Plaintiff does not mention that he propounded 83 interrogatories to Sister Genevieve and 61 interrogatories to Sister Bernarda, all of which were answered, despite the fact that many were outside the scope of that discovery. (See interrogatory responses Appendix B020-B037 (Sister Genevieve) and Appendix B038-B052 (Sister Bernarda)). Significantly, those responses only further reinforced the conclusion that 1) Falcone's duties with the Sisters did not involve the care of children, and 2) Falcone was never authorized or directed by the Sisters to take any actions in Delaware.

III. Conclusion

Liability for Plaintiff's abuse is not in the case at bar. Rather, the instant matter concerns only whether Plaintiff has satisfied his burden to show a basis for the exercise of personal jurisdiction over the Sisters under both Delaware's Long Arm Statute and the United States Constitution. Plaintiff has failed to meet these basic and essential requirements. Just as the Superior Court found, nothing before this Court demonstrates that the Sisters took or authorized a single act in Delaware out of which these alleged personal injuries arose. Nothing said by Plaintiff or any other witness in the three and a half years since dismissal was ordered has changed those facts. In these circumstances, applying settled law, the Superior Court properly dismissed the complaint against the Sisters. For the foregoing reasons of law and fact, this Court should affirm.

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