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| **GARY W. STISSER,** | * | **IN THE** |
| ***Plaintiff,*** | * | **CIRCUIT COURT** |
| **v.** | * | **FOR** |
| **SP BANCORP, INC., *et al.,*** | * | **BALTIMORE CITY, PART 23** |
| ***Defendants.*** | * | **Case No.: 24-C-14-003610** |

* * * * * * * * * * * * * *

**MEMORANDUM OPINION**

The instant case arises from Plaintiffs Gary W. Stisser and Fundamental Partners' ("Plaintiffs") challenge to the actions of Defendants SP Bancorp, Inc. and its Board of Directors[1] (collectively, "SP Defendants"), Green Bancorp, Inc. and its subsidiary, Searchlight Merger Sub, Inc. (collectively, "Green Defendants"), and Commerce Street Capital, LLC ("CSC"),[2] in causing SP Bancorp to enter into a merger agreement with Green on October 17, 2014. Plaintiffs assert in Counts I through III of their First Amended Complaint that the SP Directors breached their fiduciary duties, as their conflicts of interest motivated them to steer the sale of SP Bancorp to Green. (First Am. Compl. ¶¶ 54-62). Plaintiffs contend in Count IV that Green aided and abetted the SP Board's breach of fiduciary duties by creating and exploiting the conflicts of interest. (*Id.* ¶¶ 63-65). Plaintiffs allege in Count V that CSC also aided and abetted the SP Directors' breaches of fiduciary duties. (*Id.* ¶¶ 66-68).

Currently at issue are SP Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and/or Failure to State a Claim Upon Which Relief can be Granted (docket

[1] The ten individual members of SP Bancorp's Board of Directors are Jeffrey L. Weaver, Paul M. Zmigrosky, Lora J. Villarreal, Carl W. Forsythe, P. Stan Keith, David L. Stephens, Jeffrey B. Williams, David C. Rader, Christopher C. Cozby, and Randy Sloan.

[2] "SP Directors" or "SP Board" refers to the ten individual members of SP Bancorp's Board of Directors. "Green" refers to Green Bancorp., Inc., and "Searchlight" refers to Searchlight Merger Sub., Inc.

#00031000)[3], filed on December 19, 2014, and Green Defendants' Motion to Dismiss the First Amended Consolidated Complaint (docket #00030000), filed on December 19, 2014. Plaintiffs filed an Opposition to Defendants' Motion to Dismiss (docket #00031001) on January 23, 2015. SP Defendants filed a Reply Memorandum to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss (docket #00041001) on February 13, 2015. Green Defendants filed a Reply Memorandum of Law in Further Support of their Motion to Dismiss (docket #00042000) also on February 13, 2015. A hearing was held on this matter on March 27, 2015.

Upon consideration of the parties' filings and arguments, it is this 8th day of April, 2015, by the Circuit Court of Baltimore City, Part 23, ordered that SP Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and/or Failure to State a Claim Upon Which Relief can be Granted is **GRANTED**. SP Directors shall be **DISMISSED** for lack of personal jurisdiction, and SP Bancorp shall be **DISMISSED** for failure to state a claim. Green Defendants' Motion to Dismiss the First Amended Consolidated Complaint is **GRANTED.** Green shall be **DISMISSED** for lack of personal jurisdiction, and Searchlight shall be **DISMISSED** for failure to state claim. The Court's reasoning is elaborated herein.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Gary W. Stisser and Fundamental Partners were shareholders of SP Bancorp and they brought this class action and derivative suit on behalf of all other similarly situated SP Bancorp shareholders. (First Am. Compl. ¶ 5). SP Bancorp is a bank holding company that is organized under the laws of Maryland. (*Id.* ¶ 6). Its principal place of business is in Plano, Texas, and it has no offices or employees in Maryland nor does it solicit business in Maryland.

[3] SP Defendants' memorandum in support of their motion to dismiss shall be referenced as "SP Mem." and its Reply as "SP Reply." Green Defendants' memorandum in support of their motion to dismiss shall be referenced as "Green Mem." and its Reply as "Green Reply." Plaintiffs' Opposition to Defendants' Motions to Dismiss shall be referenced as "Pls.' Opp'n."

Defendant Jeffrey L. Weaver was Director, President, and CEO of SP Bancorp. (*Id.* ¶ 7). Defendants Paul M. Zmigrosky, Lora J. Villarreal, Carl W. Forsythe, P. Stan Keith, David L. Stephens, Jeffrey B. Williams, David C. Rader, Christopher C. Cozby, and Randy Sloan were all Directors of SP Bancorp. (*Id.* ¶ 16). None of the directors reside in Maryland. (SP Mem. at 3).

In 2010, SP Bancorp was converted from a mutually owned thrift to a stock-based ownership structure. (*Id.* ¶ 32). Federal regulation imposed a three-year moratorium on third parties making offers to purchase SP Bancorp or SP Bancorp soliciting such offers.[4] On August 2, 2012, Weaver and Zmigrosky met with three representatives from Green in Dallas. (Pls.' Opp'n at 4). The meeting was held at a restaurant, and the individuals discussed a possible future merger of the banks. (*Id.* at 4-5; Greenwade Aff. ¶ 7). Defendant Green is a Texas-incorporated bank holding company with its headquarters in Houston, Texas. (Green Mem. at 5). Green operates branches and offices in Texas and Kentucky. (*Id.*). Green does not have any offices or employees in Maryland nor does it solicit business in Maryland. (*Id.*).

On July 2, 2013, the SP Board hired Commerce Street Capital to assist in finding potential merger candidates. (*Id.* ¶ 39). CSC is an investment banking firm that works with financial institutions and middle-market companies. (*Id.* ¶ 19) In September 2013, CSC presented an analysis of a merger of equals to the Board based on Green being the merger partner, though this was not told to the SP Directors. CSC owned three percent of Green's outstanding stock; however, this was not disclosed to the Board until March 31, 2014. (*Id.*). Upon learning this, the Board permitted CSC to continue negotiating with Green on behalf of SP

[4] The regulation states: "For three years after you [the converting bank] convert, no person may, directly or indirectly, acquire or offer to acquire the beneficial ownership of more than ten percent of any class of your equity securities without OTS's [Office of Thrift Supervision] prior written approval." 12 C.F.R. 563b.525(a). "[A]n offer is made when it is communicated. An offer does not include non-binding expressions of understanding or letters of intent regarding the terms of a potential acquisition." 12 C.F.R. 563b.525(b).

Bancorp, but also hired another financial advisor, Mercer Capital Management, Inc. ("Mercer") to work with CSC and to independently issue a fairness opinion. (*Id.* ¶ 40).

The SP Directors assembled a Strategic Review Committee, composed of Zmigrosky, Forsythe, Keith, and Williams, to consider the proposed merger. The SP Directors were also negotiating with another party, referred to as "Party A" in the Proxy Statement. The Strategic Review Committee had reservations about Party A's proposal, including significant execution risks and that it did not present as much value as Green's proposal. The Committee was also aware that Party A was specifically interested in employing Weaver following the merger.

Green President and CEO Geoffrey Greenwade delivered a letter of intent to Weaver on January 9, 2014, offering to purchase SP Bancorp for $25.91 per share with certain conditions. (First Am. Compl. ¶ 42). This letter was sent from Green's offices in Houston to SP Bancorp's headquarters in Plano, Texas. (Green Mem. at 6). The offer proposed that a merger agreement would contain retention agreements for certain members of SP Bancorp's senior management and non-competition covenants for the directors. On January 24, 2014, SP responded by letter stating it would be interested in a potential transaction at a higher price. This letter was sent within Texas. (Green Mem. at 6). In the following weeks, the parties entered into negotiations, conducted within Texas, which resulted in Green raising its offer and entering into a non-binding letter of intent. (*Id.*). Negotiations also continued among the parties in Texas and their counsel in New York as Green conducted due diligence at SP Bancorp's Texas offices. (*Id.*). In a conversation on March 28, 2014, Greenwade informed Weaver that he saw a role for him in the merged company. (First Am. Compl. ¶ 43).

On May 3, 2014, SP Bancorp announced that it had entered an agreement to be sold to Green for $29.55 per share, subject to potential adjustment. (*Id.* ¶ 48). SP Bancorp shareholders

would receive a cash payment of approximately 40% more than the closing price of SP Bancorp's shares the day before the merger's announcement. (Green Mem. at 2). Green also announced that Weaver would remain with the bank as an executive employee. (Pls.' Opp'n at 8). The Merger was unanimously approved by all ten SP Directors. Weaver was present at this meeting. (*Id.* at 7).

Defendants filed a proxy statement (the "Proxy") with the U.S. Securities and Exchange Commission ("SEC") and distributed it to shareholders. (First Am. Compl. ¶ 52). Plaintiffs alleged that the Proxy omitted material information concerning Weaver's conflicts of interest, SP Bancorp's financial projections, the sale process, and Mercer Capital's fairness opinion. (*Id.*). Defendants filed a supplemental disclosure with the SEC. (*Id.* ¶ 53). However, Plaintiffs assert that the supplemental disclosure still does not address all of the material omissions.

On June 10, 2014, Stisser, on behalf of himself and all similarly situated, brought a Class Action Complaint against SP Defendants and Green Defendants. On June 12, 2014, Plaintiff Fundamental Partners, on behalf of itself and all others similarly situated, brought a Class Action Complaint in this Court against SP Defendants and Green Defendants.[5] Plaintiffs Gary W. Stisser and Fundamental Partners filed a Motion for Consolidation and Appointment of Interim Co-Lead Counsel (docket #00003000) on June 27, 2014. This Court granted Plaintiffs' Motion for Consolidation, pursuant to Maryland Rule 2-503(a), on July 14, 2014. The consolidated case was captioned as *Gary W. Stisser v. SP Bancorp, Inc., et al.*, Case No.: 24-C-14-003610. Plaintiffs filed their First Amended Complaint (docket #00024000) against SP Bancorp, Green, and CSC on November 7, 2014.

[5] Case No. 24-C-14-003651.

The main thrust of Plaintiffs' First Amended Complaint is that Defendants' actions in causing SP Bancorp to enter into an agreement to be sold to Green for $29.55 per share (the "Sale Agreement") constituted a breach of fiduciary duties. (First Am. Compl. ¶ 1). In support of its allegations, Plaintiffs claim that SP Directors had conflicts of interest which led them to be unable to fairly evaluate the Sale Agreement and that the SP Directors attempted to conceal material information from Plaintiffs and public shareholders in the proxy statement that was filed with the SEC. (*Id.* ¶¶ 54-62).

Plaintiffs bring a single complaint against Green for aiding and abetting the SP Directors' alleged breach of fiduciary duties. Plaintiffs allege that Green not only aided and abetted the breaches of fiduciary duties by the SP Directors, but Green actively sought to create the conflicts leading to the breaches of fiduciary duties. The First Amended Complaint alleges that Green: (1) promised Weaver employment at the newly merged bank; (2) discussed potential transactions with Weaver less than three years after SP Bancorp had converted from a mutually owned thrift; (3) purchased loans SP Bancorp had made to three of its directors; (4) did not inform SP Bancorp that CSC owned three percent of Green's equity; (5) negotiated deal protection and indemnity provisions in the Merger Agreement; (6) negotiated the acquisition of SP Bancorp with intent to exploit the SP Directors' conflicts of interest; (7) obligated SP Bancorp to pay a $2 million termination fee under certain circumstances; and (8) agreed to indemnify the SP Directors for liability arising out of their wrongful conduct. (*Id.* ¶ 28).

Plaintiffs also institute a single complaint against CSC, asserting that CSC aided and abetted the SP Directors in the breaches of their fiduciary duties. (*Id.* ¶ 29). Specifically, Plaintiffs aver that CSC (1) deliberately failed to timely disclose its conflict of interest; (2)

favored a sale to Green in its own financial self-interest; (3) and deliberately concealed that Green was the bank in a presentation to the SP Board. (*Id.*).

Plaintiffs filed a Motion for a Preliminary Injunction on September 10, 2014 (docket #00015000), moving the Court to enjoin the consummation of the sale of SP Bancorp to Green. Green Defendants filed an Opposition to Plaintiffs' Motion for a Preliminary Injunction (docket #00015003) and SP Bancorp filed an Opposition (docket #00015002) on September 29, 2014. Subsequently, Green and SP Bancorp provided additional disclosures in the Proxy Statement. On October 10, 2014, this Court granted Plaintiffs' Motion to Withdraw their Motion for Preliminary Injunction (docket #00021000).

On October 17, 2014, SP Bancorp shareholders received $29.55 per share in a merger of SP Bancorp into a subsidiary of Green. (SP Mem. at 1). The wholly-owned subsidiary, Defendant Searchlight Merger Sub, Inc., is a Maryland corporation, created for the purpose of closing the merger in Maryland. (First Am. Compl. ¶ 18; Pls.' Opp'n at 12). Approximately 75.8% of the shares were voted in favor of the merger. (Pls.' Opp'n at 11). On October 17, 2014, the parties filed the Articles of Merger with the Maryland Department of Assessment and Taxation. (*Id.* at 13).

SP Defendants filed a Motion to Dismiss for Lack of Personal Jurisdiction and/or Failure to State a Claim Which Relief can be Granted (docket #000031000) on December 19, 2014, asserting that Counts I (Breach of Fiduciary Duties), II (Aiding and Abetting the Breaches of Loyalty, Fair Dealing, and Due Care), and III (Claim for Failure to Disclose) of the First Amended Complaint should be dismissed because (1) the court lacked personal jurisdiction over the SP Directors and/or (2) the Complaint fails to state a claim upon which relief can be granted. (SP Mem. at 1). In its Opposition to Defendants' Motion to Dismiss, Plaintiffs assert that the

Complaint states a legally cognizable claim against the Board, and, if that claim is proved, constitutes a breach of their fiduciary duties and entitle Plaintiffs to relief. (Pls.' Opp'n at 3). SP Defendants filed a Reply Memorandum to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss (docket #00041001) on February 13, 2015.

Green Defendants filed a Motion to Dismiss the First Amended Consolidated Complaint (docket #00030000) on December 19, 2014. Green Defendants adopt and incorporate the SP Defendants' Motion, arguing that since the Complaint does not state any primary claim for breach of fiduciary duties against the SP Directors, then the claims that the Green Defendants aided and abetted a breach of fiduciary duty must fail. (Green Mem. at 3). Moreover, the Green Defendants contend that Green should be dismissed as the Court lacks personal jurisdiction over Green. (*Id.*). Additionally, Green Defendants assert that Plaintiffs do not make any allegations about Searchlight's conduct. (*Id.* at 4). In Plaintiffs' Opposition to Defendants' Motion to Dismiss, they argue that Green is subject to personal jurisdiction in Maryland, as Green "transacted business" in the State by acquiring SP and that its aiding and abetting claim is a tortious injury. (Pls.' Opp'n at 17). Green Defendants filed a Reply Memorandum of Law in Further Support of their Motion to Dismiss (docket #00042000) on February 13, 2015.

A hearing was held on this matter on March 27, 2015.

## II. DISCUSSION AND ANALYSIS

### A. Applicable Standard

A motion to dismiss may be granted where the complaint fails to disclose, on its face, a legally sufficient cause of action. *Campbell v. Cushwa*, 133 Md. App. 519, 534 (2000). When considering a motion to dismiss, a court assumes the "well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party."

*Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 475 (2004); *accord RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010). Indeed, "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Figueiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991) (quoting *Sharrow v. State Farm Mutual*, 306 Md. 754, 768-69 (1986)). As such, the facts that comprise the cause of action must be pleaded with sufficient specificity, and bald assertions and conclusory statements will not suffice. *Bobo v. State*, 346 Md. 706, 708 (1997); *Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 350-51 (2012). A court should "order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, i.e., the allegations do not state a cause of action for which relief may be granted." *RRC Northeast, LLC*, 413 Md. at 643; *see also Lloyd v. General Motors Corp.*, 397 Md. 108, 121 (Md. 2007).

A court looks solely at the four corners of the complaint and its incorporated supporting exhibits to determine whether the plaintiff has alleged facts to support the claims asserted therein. *D'Aoust v. Diamond*, 424 Md. 549, 572 (2012); *Converge Servs.*, 383 Md. at 475. New facts introduced by motions to dismiss are not to be considered. *D'Aoust*, 424 Md. at 572. The court is careful not to confuse the standard applicable herein with the standard applicable to a motion for summary judgment. Where, as here, a party has moved to dismiss a plaintiff's cause of action, this Court focuses its analysis not on whether either party is entitled to judgment as a matter of law, but rather on whether the plaintiff has alleged any facts sufficient to allege a cause of action. *Davis v. DiPino*, 337 Md. 642, 648 (1995); *Campbell*, 133 Md. App. at 534. In determining whether claims have been alleged upon which relief may be granted, "there is a big difference between that which is necessary to prove the commission of a tort and that which is necessary merely to allege its commission." *Lloyd*, 397 Md. at 121; *Sharrow*, 306 Md. at 770.

If the basis for the motion to dismiss is a lack of jurisdiction, then either party may be entitled to limited discovery on that issue before any ruling on the motion. *Androutsos v. Fairfax Hosp.*, 323 Md. 634, 638-39 (1991). However, a trial court may grant motions to dismiss for lack of personal jurisdiction without permitting further discovery if there is a finding of a lack of personal jurisdiction. *See Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 11 (2005) ("[W]e determine that the Circuit Court did not abuse its discretion in denying BSI's request for discovery."); *GiveForward, Inc. v. Hodges*, 2014 WL 2159322, *5 (D. Md. May 22, 2014) (granting a motion to dismiss for lack of personal jurisdiction without permitting time for jurisdictional discovery, as the plaintiff "asserts that jurisdictional discovery would reveal additional contacts, but she does not specify in her allegations or even hint at what those additional contacts might be"). Here, Plaintiffs already have had the opportunity to conduct limited discovery, including taking the depositions of Weaver and the Chair of SP Bancorp's Board and reviewing Defendants' briefings on the preliminary injunction. Similar to the plaintiff in *GiveForward*, Plaintiffs have not provided any specific reasons how additional discovery would assist them in establishing personal jurisdiction.

**B. Personal Jurisdiction**

Pursuant to Maryland Rule 2-322(a), defendants to an action pending in Maryland may be dismissed on the ground that the courts of this state lack jurisdiction over them. As a threshold matter, the defense of personal jurisdiction must be raised "by motion to dismiss filed before the answer." Md. Rule 2-322(a). If the issue of jurisdiction over the person is not raised prior to the filing of an answer, the defense is waived. *Beyond Systems Inc. v. Secure Medical, Inc., et al.*, 168 Md. App. 186, 189 (2006). By both filing motions to dismiss, SP Defendants and Green

Defendants have properly challenged whether they are subject to personal jurisdiction in Maryland.

Plaintiffs "carry the burden to establish the propriety of personal jurisdiction." *CSR, Ltd. v. Taylor*, 411 Md. 457, 467 n.2 (2009). Determining whether a Maryland court has jurisdiction over an out-of-state defendant requires dual considerations. *Id.* at 472. First, the plaintiff must show that the requirements of the Maryland long-arm statute are satisfied. *Id.* Second, the exercise of jurisdiction must comport with the requirements imposed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 473. To satisfy the Due Process Clause, the out-of-state defendant must have established minimum contacts with the forum state such that haling him into the forum state comports with traditional notions of fair play and substantial justice. *Bond v. Messerman*, 391 Md. 706, 722 (2006); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Maryland courts "have consistently held that the purview of the long arm statute is coextensive with the limits of personal jurisdiction set by the due process clause of the Federal Constitution." *Beyond Systems*, 388 Md. at 15.

A party asserting personal jurisdiction must identify the specific Maryland statutory provision authorizing jurisdiction. *GiveForward*, 2014 WL 2159322, at *4. The court is permitted to exercise personal jurisdiction over an out-of-state defendant only if the defendant's contacts with the state satisfy one of the six statutory requirements set forth in Maryland's long arm statute. In relevant part, to have personal jurisdiction here, the defendants must have transacted business or performed any character of work or service in Maryland or caused tortious injury in Maryland by an act or omission in the State. MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1), (3).

"Transacting business" pursuant to § 6-103(b)(1) requires action that culminates in purposeful activity in Maryland but does not require physical presence in the state. *GiveForward, Inc.*, 2014 WL 2159322 at *4. Maryland courts have narrowly construed the phrase "transacting business"; for instance, significant negotiations or intentional advertising and selling in the forum state are considered "transacting business." *Aphena Pharama Solutions-Maryland LLC v. BioZone Labs., Inc.*, 912 F. Supp. 2d 309, 315 (D. Md. 2012). To confer personal jurisdiction under § 6-103(b)(3), both the tortious injury and tortious act must have occurred in Maryland. *GiveForward, Inc.*, 2014 WL 2159322 at *5; *Music Makers Holdings, LLC v. Sarro*, 2010 WL 2807805 at *4 (D. Md. July 15, 2010).

The substantiality of a defendant's contacts with the State of Maryland also dictates the breadth of jurisdiction that this Court may exercise over them. *See Presbyterian Univ. Hosp. v. Wilson*, 337 Md. 541, 550 (1995). A determination as to whether sufficient minimum contacts exist depends on the nature of the action brought and the nexus of the contacts to the subject matter of the action. *CSR*, 411 Md. at 476-77; *Camelback Ski Corp. v. Behning*, 312 Md. 330, 338 (1985). As such, the "minimum contacts" standard "is not susceptible of mechanical applications, and the facts of each case must be weighed." *CSR*, 411 Md. at 476. Specific jurisdiction exists "where the cause of action arises from, or is directly related to, the defendant's contacts with the forum state." *Id.* at 477. The Court of Appeals provided a three-prong inquiry to determine whether specific personal jurisdiction comports with due process:

> [W]e consider (1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities dictated at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.

*Id.* (quoting *Beyond Systems*, 388 Md. at 26); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). General jurisdiction, on the other hand, does not require that the cause of action arise out of the defendant's contacts in the forum. *CSR*, 411 Md. at 477. Instead, the defendant's contacts must be continuous and systematic. *Id.* In sum, "general jurisdiction exists when a party has been doing business generally in the forum state, but the cause of action is not related to those contacts. Specific jurisdiction exists where the cause of action arose out of a party's contacts with the forum state." *McGann v. Wilson,* 117 Md. App. 595, 603 (1997). Plaintiffs have the burden of demonstrating that the defendants have established sufficient contacts with Maryland to be subject to either "general" or "specific" jurisdiction here. *See Jason Pharmaceuticals v. Jianas Bros. Packaging Co.,* 94 Md. App. 425, 430-31 (1993).

In the context of both specific and general personal jurisdiction, it is essential "that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *CSR*, 411 Md. at 479 (quoting *Camelback Ski Corp. v. Behning*, 307 Md. 270, 277 (1986)). The absence of purposeful availment is an obstacle to whether the defendant's contacts with the forum amount to sufficient minimum contacts necessary for jurisdiction. *CSR*, 411 Md. at 479. The Supreme Court explained the rationale of "purposeful availment" in *Burger King*:

> The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 475-76 (internal citations omitted). Mere residency of a party to the contract is not alone sufficient for a state to assert jurisdiction, nor are telephone calls and correspondence from the plaintiff in the forum state sufficient on their own. *See Waldron v. Atradius Collections, Inc.*, 2010 WL 2367392, at *2 (D. Md. July 9, 2010) (finding that personal jurisdiction was not established because the crux of the case concerned breaches of the contract that occurred in Illinois, despite the fact that the defendant entered a contract with a Maryland resident which required the plaintiff to perform part of his services in Maryland). In *Ellicott Mach. Corp., Inc. v. John Holland Party Ltd.*, the only contact a private Australian corporation had with Maryland resulted from a single, short-term contract executed in Maryland, though the contract was performed in Australia. 995 F.2d 474 (4th Cir. 1993). The court held that while the defendant purposefully pursued the contract, it is a fairly insubstantial contact. *Id.* at 479. The Fourth Circuit further determined that the exercise of personal jurisdiction did not satisfy due process. *Id.* Additionally, it is well established in Maryland that the cause of action must arise from the contacts. *Talegen Corp. v. Signet Leasing and Financial Corp.*, 104 Md. App. 663, 672 (1995). The *Talegen* court held that the cause of action did not arise out of the mailing of substantial rental payments to Maryland, but instead arose from the defendant's alleged breach of the notice provision in the Master Lease that required defendant to provide the assignee with notice of the termination. *Id.* at 674. As such, the court concluded that defendant had not purposefully availed itself of the privilege of conducting activities in Maryland by mailing the payments to Maryland.

For the reasons articulated herein, Plaintiffs have shown that SP Bancorp and Searchlight are subject to personal jurisdiction in Maryland, but have failed to meet their burden of demonstrating that the SP Directors and Green have established sufficient contacts with this

State to be subject to either "general" or "specific" jurisdiction. Plaintiffs avow that only specific jurisdiction exists as to SP Directors and Green.

**i. Personal Jurisdiction over SP Bancorp and Searchlight**

"A court may exercise personal jurisdiction as to any cause of action over a person…organized under the laws of…the State." MD. CODE ANN., CTS. & JUD. PROC. § 6-102(a). Both SP Bancorp and Searchlight were organized under the laws of Maryland. (First Am. Compl. ¶¶ 6, 18; Green Mem. at 3). Neither SP Bancorp nor Searchlight denies that Maryland has personal jurisdiction over them. As such, this Court finds that Plaintiffs have met their burden of showing that SP Bancorp and Searchlight are subject to personal jurisdiction in Maryland.

**ii. Personal Jurisdiction over Green Defendants**

Plaintiffs have failed to show a "substantial connection" between Green and Maryland, as they have not demonstrated that Green engaged in "significant activities" or "created continuing obligations" in Maryland. There is no general jurisdiction, as the only possible connection with Maryland is through Green's subsidiary, Searchlight, which is incorporated in Maryland. The Supreme Court held in *Goodyear Dunlop Tires Operations, S.A. v. Brown* that a court may assert general jurisdiction over an out-of-state corporation "when their affiliations with the state are so 'continuous and systematic' as to render them essentially at home in the forum State." 131 S. Ct. 2846, 2851 (2011). *See also Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (holding that a party cannot assert general jurisdiction over a parent corporation based solely on the presence of its subsidiary in the State); *Cutcher v. Midland Funding, LLC*, 2014 WL 2109916 (D. Md. May 19, 2014) (holding that the case should be transferred as the company was not "at home" in Maryland despite having an office in Baltimore with Maryland employees). Here, there is no

dispute that Green is not required to submit to general jurisdiction in Maryland, given that its only tie to Maryland is the presence of its subsidiary, Searchlight, in the State.

Plaintiffs rely on *Vitro Elecs., Div. of Vitro Corp. of Am. v. Milgray Elecs., Inc.*, 255 Md. 498 (1969), for the proposition that filing articles of merger in Maryland is a "purposeful tortious act" under the Maryland long-arm statute. (Pls.' Opp'n at 18 n.17). In *Vitro*, the Court of Appeals examined whether the defendant committed a purposeful tortious act in Maryland when it exercised a certificate of compliance in the State. 255 Md. at 506. The Court held that if the execution of the certificate took place in Maryland or its delivery of the certificate to another corporation took place in Maryland, then "such action would have constituted a purposeful act within the State and an act which could have, *if the certificate had been fraudulently or negligently executed*, caused tortious injury" to the plaintiff. *Id.* (emphasis added). The matter was remanded to determine the place of the certificate's execution and the manner under which it was transmitted. *Id.* The holding in *Vitro* indicates that there may have been tortious injury in Maryland if the certificate of compliance was fraudulently or negligently executed. The case at bar is distinguishable from *Vitro* because, here, the filing of the articles of merger, which incorporated Searchlight, was not central to the case. The crucial issue in this case surrounds whether there were breaches in fiduciary duties and/or aiding and abetting such alleged breaches in the execution of the Merger Agreement between SP Bancorp and Green. The incorporation of Searchlight was not a part of this Merger Agreement. Indeed, Searchlight did not exist until after the parties agreed to the Merger. (Green Mem. at 11). In *Vitro*, on the other hand, the certificate of compliance, and whether it was fraudulently executed, was key to the plaintiff's case. Therefore, the filing of the articles of merger in Maryland was not a tortious act, and there was no injury in Maryland.

Moreover, even if the filing of the articles of merger was alone sufficient to be tortious action under § 6-103(b)(3), which it is not, Plaintiffs have failed to demonstrate how the incorporation of Searchlight caused tortious injury in Maryland. Section 6-103(b)(3) "require[s] that both the tortious injury and the tortious act must have occurred in Maryland." *GiveForward*, 2014 WL 2159322; *see also Dring v. Sullivan*, 423 F.Supp.2d 540, 546 (D. Md. 2006). In *GiveForward*, the Court held that while the defendant filed the declaratory judgment action in Maryland, plaintiff failed to show that the defendants committed any acts while in Maryland that caused tortious injury in the State; therefore, the plaintiff had not met its burden of showing that § 6-103(b)(3) was applicable. 2014 WL 2159322 at *5. Here, Plaintiffs have not shown any action that Green took in Maryland that caused injury in the State.

Plaintiffs assert that filing the articles of merger and incorporating Searchlight in Maryland demonstrate that Green purposefully availed itself, as it chose to incorporate in Maryland, as opposed to incorporating in any other state. However, Green did not "invoke" the benefits and protections of Maryland law. Green and SP Bancorp determined that the Merger Agreement would be governed by Delaware law and disputes would be exclusive subject to the jurisdiction of Delaware courts. (Green Mem. at 10). Additionally, all of Green's offices and branches were located in Kentucky and Texas; Green did not solicit business in Maryland; and none of the business operations that Green purchased in the Merger were located in Maryland. (*Id.*). Moreover, Green asserts that its conduct was not "directed at" or "intended to have its primary effect" in Maryland. (*Id.*). Green was not soliciting business or purchasing business operations in Maryland nor was it deriving benefits from the State. Even if some effect may be felt in Maryland given that SP Bancorp and Searchlight were incorporated there, courts have consistently found that such an "effect" is generally not consistent for a showing for a

"substantial connection" with Maryland. *See, e.g.*, *Bond*, 391 Md. at 730 ("The U.S. Supreme Court in *Burger King Corp.* made clear that the 'effect of the injury' analysis 'is not a sufficient benchmark for exercising personal jurisdiction.'").

Plaintiffs argue that forming a Maryland corporation to acquire another Maryland corporation and consummating the merger is a "significant activity." Green argues that case law demonstrates that far more is needed to reach the "significant activity" threshold than merely forming a subsidiary. *See, e.g., Vitro*, 255 Md. at 502. Plaintiffs have provided no support for their argument that forming a subsidiary is a "significant activity" that supports long arm jurisdiction. Green has not engaged in "significant activities" or "created continuing obligations" in Maryland. Green is incorporated in Texas and has its headquarters in Houston. All of its branches are in Texas, except a branch in Kentucky which was established subsequent to the Merger. Green has no local offices in Maryland nor does it conduct, transact, or solicit business in Maryland. Furthermore, it has no employees, addresses, telephone numbers, or agents for service of process in Maryland. No merger negotiations occurred in Maryland, and all of the meetings between Green and SP Bancorp occurred in Texas, except for negotiations by counsel in New York.

Plaintiffs provide no support for an allegation that there was a principal-agent relationship between Green and Searchlight. An out-of-state parent corporation is not subject to the jurisdiction of the forum state merely because it has a subsidiary present or doing business in that State. *See Debt Relief Network, Inc. v. Fewster*, 367 F. Supp. 2d 827, 830 (D. Md. 2005) ("[T]he mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent."); *Vitro*, 255 Md. at 504 (rejecting the attempt to "construe the relationship between the [parent and subsidiary] as that of principal and agent").

However, if a subsidiary is the "alter ego" of its parent corporation, to the extent that the parent corporation's domination and control renders the subsidiary a mere instrumentality of the parent, then the parent corporation may be held to be doing business within the State. *Debt Relief*, 367 F. Supp. 2d at 829-30. Forming a corporation for a particular purpose does not make the subsidiary an agent of the parent. Though the Plaintiffs vaguely allude that there may have been an alter ego relationship between Green and Searchlight, they do not provide any allegations in their First Amended Complaint to support this assertion.

For the reasons stated, Maryland has neither general nor specific jurisdiction over Green, and Green is therefore dismissed for lack of personal jurisdiction.

**iii. Personal Jurisdiction over SP Directors**

There is no dispute that SP Directors are not subject to general jurisdiction. There are no allegations that the SP Directors had continuous and systematic contacts with Maryland. *See CSR*, 411 Md. at 476. Furthermore, the SP Directors do not regularly conduct or solicit business in the State, there is no persistent course of conduct, and there is no evidence that they derive substantial revenue from any goods or services used or consumed in Maryland. Accordingly, this Court turns to the determination of whether SP Directors are subject to personal jurisdiction in Maryland as a result of any specific contacts with this State.

In considering whether specific jurisdiction exists, as discussed *supra*, this Court examines three factors: (1) the extent that the Defendants purposefully availed themselves of conducting activities in Maryland; (2) whether Plaintiffs' claims arise out of those activities directed at Maryland; and (3) whether an exercise of personal jurisdiction is constitutionally reasonable. *Beyond Systems*, 388 Md. at 26.

Plaintiffs concede that merely being a director of a Maryland corporation is not enough to be subject to personal jurisdiction. However, Plaintiffs posit that the SP Directors are subject to personal jurisdiction as they transacted business and caused tortious injury in Maryland. *See* MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1), (3). Plaintiffs assert that the SP Directors "transacted business in this state" by causing the merger between SP Bancorp and Searchlight to be consummated in Maryland with the filing of the Articles of Merger with the Maryland Department of Assessments and Taxation. (Pls.' Opp'n at 14). Plaintiffs have provided no support for its assertion that filing Articles of Merger in Maryland is considered transacting business in Maryland. Plaintiffs also contend that § 6-103(b)(3) provides jurisdiction as the Directors' alleged breaches of their fiduciary duties constitute a tort and that tort was complete when the merger was consummated in Maryland.

Generally, the fact that a corporation is doing business in a state is not sufficient to establish *in personam* jurisdiction over the corporation's directors, officers, and agents, as they have not "purposefully availed" themselves of the privilege of conducting activities in the forum state and have no reason to think they will be haled before a court in the forum state. *See Topik v. Catalyst Research Corp.*, 339 F.Supp. 1102, 1107 (1972); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (stating that it strains reason to suggest that anyone buying securities in a corporation formed in Delaware impliedly consents to be subject to Delaware's jurisdiction). The *Shaffer* Court determined that the defendants had not purposefully availed themselves of the privilege of conducting activities in Delaware and that they had no reason to expect to be haled into court in Delaware. 433 U.S. at 216. Following the *Shaffer* decision, Delaware enacted a statute that provided that non-resident directors of a corporation chartered in Delaware were subject to personal jurisdiction in Delaware. *See* 10 Del. Code Ann., § 3114 (1977).

In *American Freedom Train Found. v. Spurney*, the court held that the only conduct occurring in Massachusetts related to the antitrust violations was defendants' acceptance of positions as officers and directors of a Massachusetts corporation. 747 F.2d 1069, 1074 (1st Cir. 1984). Citing to *Shaffer*, the Court held that acceptance of these positions alone "falls far short of that necessary to give rise to plaintiff's cause of action." *Id.* The Court reasoned that it was "significant that Massachusetts, unlike some states, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the state of incorporation." *Id. See also Behm v. John Nuveen & Co.*, 555 N.W.2d 301 (Minn. Ct. App. 1996) (holding that since Minnesota does not have a similar jurisdictional statute as the one enacted in Delaware after *Shaffer*, "the non-resident directors and officers cannot fairly be held to have consented to personal jurisdiction in Minnesota courts"). Similar to Massachusetts and Minnesota, Maryland has no such statute.

A court may still find that having directors defend a suit in Maryland is not a violation of due process of law. In *Topik*, for instance, the court determined that the directors' annual trips to Maryland to attend meetings established certain minimum contacts such that maintenance of the suit did not violate due process. 339 F. Supp. at 1107. However, unlike in *Topik*, the SP Directors do not have sufficient minimum contacts with Maryland. None of the SP Directors resided in Maryland at the time of this action. All of its directors and shareholder meetings occurred in Texas and the negotiations of the Merger Agreement occurred in Texas.

Plaintiffs rely on *Sleph v. Radtke*, 76 Md. App. 418 (1988), to support their argument that the resolution of the SP Board approving the merger and authorizing the filing of the Articles of Merger is considered "transacting business" pursuant to § 6-103(b)(1). (Pls.' Opp'n at 15). However, this case is distinguishable in that the court in *Sleph* focused on the actions that five

individual defendants performed before and after the execution of the mortgage at issue there. The court concluded that those activities established sufficient purposeful activity. Here, Plaintiffs have failed to prove that the SP Defendants purposefully availed themselves of the laws of Maryland. Additionally, it was SP Bancorp, rather than the Directors, who signed and filed the Articles of Merger. (Enright Aff., Opp. Ex. 1). Thus, the SP Directors did not conduct any tortious act in Maryland. All voting and negotiations as to the Merger Agreement occurred in Texas and New York. *See Vitro*, 255 Md. at 499; *W.Va. Laborers Pen. Trust Fund v. Caspersen*, 829 N.E.2d 843 (Ill. 2005) ("The tort is not where the injured shareholder might reside; rather, it is where the board took action.").

For the aforementioned reasons, SP Directors are dismissed for lack of personal jurisdiction.

**C. Failure to State a Claim**

Given that this Court has dismissed this matter on personal jurisdiction grounds as to the SP Directors and Green, it is unnecessary to address the other issues raised in the Motions to Dismiss as to these Defendants. However, as Maryland has jurisdiction over SP Bancorp and Searchlight, it is necessary to examine whether Plaintiffs have sufficiently stated a claim as to these Defendants.

Plaintiffs concede that they do not provide any allegations in their First Amended Complaint against SP Bancorp. Count I is against the individual Defendants; Count II is against the individual Defendants other than Defendant Weaver; and Count III is against the individual Defendants. Instead, they assert that they named SP Bancorp as a party merely for procedural reasons as a necessary party. *See* First Am. Compl. ¶ 6 ("SP Bancorp is an indispensable party to this action because one of the forms of relief sought by Plaintiffs is a rescission of a sale of SP

Bancorp to Green."). As there are no allegations asserted against SP Bancorp in the First Amended Complaint, SP Bancorp shall be dismissed.

Plaintiffs' sole allegation against any of the Green Defendants is Count IV, which is specifically against Green, not Searchlight. There are no allegations that Searchlight was involved in aiding and abetting, and a motion to dismiss may be granted where the complaint fails to disclose a legally sufficient cause of action on its face. *See Campbell*, 133 Md. App. at 534. Plaintiffs assert that while there may not have been specific claims against Searchlight in the First Amended Complaint, Green and its subsidiary, Searchlight, are essentially one and the same as Searchlight is a phantom corporation. The Plaintiffs named Searchlight as a party because it is a necessary party and "one of the reliefs sought by Plaintiffs is the rescission of Searchlight Merger Sub's acquisition of SP Bancorp." (First Am. Compl. ¶ 18). Given that there are no allegations by Plaintiffs in the First Amended Complaint against Searchlight, Searchlight is dismissed for failure to state a claim.

## III. Conclusion

For the reasons stated herein, SP Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and/or Failure to State a Claim Upon Which Relief can be Granted is **GRANTED**. The ten SP Directors—Jeffrey L. Weaver, Paul M. Zmigrosky, Lora J. Villarreal, Carl W. Forsythe, P. Stan Keith, David L. Stephens, Jeffrey B. Williams, David C. Rader, Christopher C. Cozby and Randy Sloan—shall be **DISMISSED** for lack of personal jurisdiction, and SP Bancorp shall be **DISMISSED** for failure to state a claim. Green Defendants' Motion to Dismiss the First Amended Consolidated Complaint is **GRANTED.** Green shall be **DISMISSED** for lack of personal jurisdiction, and Searchlight shall be **DISMISSED** for failure to state a claim.

/s/ Audrey J.S. Carrión
The Honorable Audrey J.S. Carrión
Judge, Circuit Court for Baltimore City
Case No. 24-C-14-0036100

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