UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LI FEN YAO, as Administrator of the Estate of Sam Mingsan Chen Plaintiff, v. ROBERT CHEN, OTTER AUDITS LLC, and RC SECURITY LLC, Defendants.	Case No. 8:23-cv-00889-TDC

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

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INTRODUCTION

Defendants' Motion to Dismiss demonstrated that this Court has no personal jurisdiction over any of the Defendants—because *the Complaint* failed to allege any conduct by any Defendant that occurred in or targeted Maryland. Plaintiff's Opposition fails to rebut the plain truth that this Court lacks general or specific personal jurisdiction over any of the Defendants.

The Opposition provides no basis for personal jurisdiction over Defendant Robert Chen, who neither lives nor works in Maryland. The Opposition does not, because it cannot, refute this dispositive fact. Its best effort is to mention Discord chat messages between Robert Chen and non-party David Chen, but these are irrelevant. It is well settled that online communications (especially ones that are not relevant to the allegations in the Complaint, ECF No. 1), without more, are insufficient to establish personal jurisdiction over a defendant. *See* Mem. in Supp. of Defs.' Mot. to Dismiss ("Opening Br."), ECF No. 27-1 at 14–16.

Nor does the Opposition provide any basis for personal jurisdiction over Defendants RC Security and Otter Audits, South Dakota companies who conduct no business in Maryland and have no offices or employees in Maryland. The Opposition does not, because it cannot, refute this.

Plaintiff tries to create Maryland personal jurisdiction over the South Dakota corporate defendants by impermissibly introducing a new theory of "successor liability" (alleged nowhere in the Complaint)—namely an unfounded claim that the South Dakota corporate defendants assumed non-party entity OtterSec LLC's liabilities, and thus that the Complaint could circumvent the complete lack of personal jurisdiction over Defendants RC Security and Otter Audits if it could establish personal jurisdiction over non-party OtterSec. But this new, irrelevant allegation fails as well. First, Plaintiff did not adequately plead successor liability in the Complaint. Second, OtterSec could never have been liable for the claims in this case, so it is impossible for successor liability

to apply to the South Dakota corporations. Third, successor liability is also impossible because OtterSec was not subject to Maryland jurisdiction. Fourth, Plaintiff does not and cannot identify any facts *in the Complaint*, or any new facts added in the Opposition, that add up to the kind of unusual corporate relationship that would make Otter Audits and RC Security liable in place of the defunct non-party OtterSec. In fact, Plaintiff's Opposition—which does not cite a single case from Maryland or the Fourth Circuit explaining the exceptions to the general rule of successor ***non***-liability—never explains how it can meet the standards that such cases set for overcoming the general rule of successor non-liability.

Finally, Plaintiff fails to engage with the longstanding Maryland policy against deciding cases concerning the "internal affairs" of foreign corporations.

It is worth noting that at the Court's September 15, 2023 hearing, the Court invited Plaintiff's counsel to amend the Complaint. Plaintiff's counsel declined, despite being well aware of Defendants' arguments against personal jurisdiction outlined three months prior to the hearing, *see* Notice of Intent to File Mot. to Dismiss, ECF No. 21 (filed June 5, 2023), and summarized by defense counsel at the hearing.[1] For these reasons, and for those stated in Defendant's Opening Brief ("Opening Br."), ECF No. 27-1, the Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

Plaintiff's Opposition glosses over or omits many facts that, while inconvenient to the claims in this case, are relevant to their adjudication. A few merit clarification, because they further show that the dissolution of OtterSec and creation of separate entities Otter Audits and RC Security

[1] Plaintiff's counsel also disregarded the Court's instruction, made at the same hearing, that a party should follow the Case Management Order's instructions for constructing a Joint Record if they intended to submit more than 5 exhibits or more than 50 pages' worth of exhibits. Plaintiff's Opposition is supplemented by two declarations to which Plaintiff attached a combined eleven exhibits comprising close to one hundred pages.

are not "the type of unusual transaction that would give rise to successor liability." *68th St. Site Work Grp. v. Airgas, Inc.*, No. 20-cv-3385, 2021 WL 4255030, at *9 (D. Md. Sept. 16, 2021).

1. Counsel for Sam and David Chen *demanded* the Dissolution of OtterSec, which, in any event, was required by its Operating Agreement.

Dissolution of OtterSec here was certainly not "unusual." *Id.* The Operating Agreement required it, and counsel for Sam and David demanded it—two material facts *omitted* from both Plaintiff's Complaint and Opposition.

OtterSec's Operating Agreement, which is an exhibit to David Chen's declaration, provides, in Section 1.3, that "[t]he Company will continue perpetually unless . . . [among other possibilities] (c) [t]he death, resignation, expulsion, bankruptcy, retirement of a member or the occurrence of any other event that terminates the continued membership of a member of the company." Decl. of David Chen ("D. Chen Decl.") Ex. 5-D, Operating Agreement, J.R.081 (emphasis added). Section 1.4 provides that if a member dies, and *if* there are at least two remaining members, those remaining members will have a limited opportunity to continue the company. *Id.* Upon the death of Sam Chen, there was only one remaining member of OtterSec: Robert Chen. Consequently, Section 1.4 could not apply, and Section 1.3 required dissolution.[2]

On July 27, 2022, months before the dissolution of OtterSec, Sam and David's (shared) counsel pounced upon this and wrote to OtterSec's corporate counsel, insisting that "pursuant to the [O]perating [A]greement, it appears that OtterSec no longer has the right to continue." Exhibit 6, 2d. Decl. of R. Chen ("R. Chen 2d Decl."), ¶ 8, J.R.132. Citing the provisions of the Operating Agreement quoted above, Sam and David's counsel wrote that "[b]ecause Sam's

[2] As a matter of ***Wyoming*** law, the death of a member does not make the deceased member's estate a member of the LLC. It only entitles the estate to certain limited membership rights to access information and to similar rights as a transferee. *See* Wyo. Stat. Ann. § 17-29-504 (2023) (citing *id.* §§ 17-29-502(c), 17-29-410).

passing leaves only Robert as the remaining Member of OtterSec, its seems that Sections 1.3(c) and 1.4 control, which require dissolution." *Id.*

2. Robert Chen paid hundreds of thousands of dollars for OtterSec assets in a public sale and auction process in which Plaintiff and David chose not to participate.

Plaintiff and David Chen (as well as many others) had notice and opportunity to purchase OtterSec's assets and declined. Consistent with Sam and David's counsel's demands of mid-July 2022 and the express terms of the OtterSec Operating Agreement, Robert Chen dissolved OtterSec on September 17, 2022. R. Chen 2d Decl. ¶ 10, J.R.132. A winding-up process took place over the next week. OtterSec's corporate counsel provided notice to counsel for David and for the estate's representative, the Plaintiff here, that OtterSec's assets would be sold and that OtterSec would be accepting offers for such assets over the next several days. *Id.* ¶ 11. Notice was also provided to Jump Crypto and to all OtterSec's then-current contractors. *Id.* ¶ 12, J.R.133. ***None*** of these parties expressed any interest in purchasing any of OtterSec's assets. *Id.* ¶¶ 11–12, J.R.132–33.

With no other buyers interested in OtterSec's assets, Robert Chen personally bought them on September 24, 2022, paying hundreds of thousands of dollars to OtterSec. *Id.* ¶¶ 13–14, J.R.133. The assets he purchased included, among other things, intellectual property rights in OtterSec's logos, OtterSec's website, its social media accounts, the code it used to perform its audits, and its computers. *Id.* ¶ 13. He also purchased the right to a cryptocurrency wallet that contained OtterSec funds, and where future funds owed to OtterSec were expected to be received. *Id.*

3. Otter Audits LLC and RC Security LLC did not assume the business of non-party OtterSec LLC.

Non-party OtterSec, a ***Wyoming*** corporation founded by Robert and David, operated two lines of business: It performed security audits of software code and it also developed and executed trading strategies, making money by using those strategies to invest in and trade cryptocurrencies

on the blockchain., R. Chen 2d Decl. ¶ 3, J.R.131.[3] The funds that David discusses having lent to OtterSec in his declaration, *see* D. Chen Decl. ¶ 20, J.R.064, were used by David as capital for the trading side of the business. R. Chen 2d Decl. ¶ 4, J.R.131. They were not used to fund any auditing operations; nor were they used for basic business expenses like rent or salaries.

Otter Audits, in contrast, is completely uninvolved in this trading line of business. Otter Audits does not run any trading strategies.*Id.* ¶ 16, J.R.133. Otter Audits performs security audits of software code used by companies operating on the blockchain. *Id*. Otter Audits also reviews code, used by cryptocurrency exchanges, off-chain wallets used to store cryptocurrency assets, and off-chain applications. *Id.*

RC Security has even less in common with OtterSec. It is a security consulting firm that has employed Robert Chen as an independent contractor since 2022. *Id.* ¶¶ 17, 20 J.R. 133–34. RC Security has no involvement in investments or trading. Along with blockchain security audits, RC Security has advised security committees on best practices and has evaluated vulnerabilities in airport infrastructures and blockchain code. It also licenses intellectual property. *Id.* ¶ 17, J.R.133. Through RC Security, Robert has been paid to evaluate vulnerabilities in Android devices and has collected reward payments for identifying software vulnerabilities. *Id.*

4. David Chen's home was never the center of OtterSec's operations.

David Chen's declaration presents facts that, devoid of context, paint the inaccurate picture that his family's home was somehow the center of non-party OtterSec's operations. In reality, while OtterSec did use one server in the Chen family home while David worked there, it also used numerous other servers located across the globe, *id.* ¶ 5, J.R.132, and while David did keep a

[3] After he stopped working for OtterSec, David sabotaged the trading side of OtterSec's business by deleting the servers and communications channels that OtterSec used to conduct its trading work. David then used strategies and assets that had belonged to OtterSec to personally make over half a million dollars in the month after his abrupt departure.

hardware ledger wallet connected to some of OtterSec's funds in his home, OtterSec generally kept its funds in an account at Evolve Bank & Trust, based in Tennessee, in online cryptocurrency exchanges, and in an online payments system used to pay contractors, *id.* ¶ 7. David's Declaration also misrepresents the nature of the hardware ledger wallet and hardware security key. Neither actually holds any cryptocurrency. They are used to access cryptocurrency stored in cyberspace, on a blockchain. David did not have the crypto-equivalent of a safe full of OtterSec's cash in his home; he had something more like the keys to safety deposit boxes located outside of Maryland.

ARGUMENT

I. THIS COURT HAS NO PERSONAL JURISDICTION OVER ROBERT CHEN.

Plaintiff's Opposition—focused primarily on OtterSec and the South Dakota Defendants—makes no argument whatsoever for personal jurisdiction over Robert Chen himself. It does not argue that Robert Chen was "at home" in Maryland and subject to general jurisdiction here. *See* Opening Br. at 8. Nor does it attempt to explain how Robert Chen, as opposed to non-party OtterSec, had contacts with Maryland that could bring him within the coverage of the Maryland long-arm statute in a manner consistent with constitutional due process. *See id.* at 8–9 *et seq.* (noting that "specific jurisdiction must be assessed on a claim-by-claim as well as defendant-by-defendant basis," *id.* at 9 (quotation marks omitted)). The Opposition attempts to emphasize Robert's online communications with Sam and David, but these types of communications, made largely by Robert in his capacity as an officer of non-party OtterSec, are no basis for personal jurisdiction over Robert. *See id.* at 14–16.

II. PLAINTIFF'S OPPOSITION IMPROPERLY AND UNSUCCESSFULLY ATTEMPTS TO AMEND THE COMPLAINT.

After rejecting the Court's invitation to amend the Complaint, Plaintiff filed an Opposition that improperly introduces a number of new facts not present in the Complaint. In any event, these

unalleged facts make no difference with respect to personal jurisdiction.

A. Only *Jurisdictional Evidence* from Outside the Pleadings Can Be Considered on a Motion to Dismiss for Lack of Personal Jurisdiction.

In assessing a challenge to jurisdiction, the court "may consider evidence outside the pleadings," but should only evaluate whether "the *material jurisdictional* facts" are in dispute. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768–69 (4th Cir. 1991) (emphasis added). A Plaintiff opposing a motion to dismiss for lack of jurisdiction may introduce jurisdictional evidence, but may not amend the Complaint *via* its Opposition or supporting declarations. *See 68th St. Site Work Grp.*, 2021 WL 4255030, at *11 ("Plaintiff is not permitted to amend its complaint via its opposition to a motion to dismiss"). In other words, a plaintiff may introduce evidence to support jurisdictional allegations already in the Complaint, but may not add new allegations, theories of liability, or claims in an opposition brief.

Plaintiff twice urges the Court to consider "the allegations of the Complaint . . . as amplified by the facts set forth" in David Chen's declaration. Mem. of Law in Opp'n to Defs.' Mot. to Dismiss ("Opp'n Br.") at 2, 11, ECF No. 28. But an opposition is not the place to "amplify [a] few conclusory allegations contained in [the] Complaint," *68th St. Site Work Grp.*, 2021 WL 4255030, at *11. The "amplified" facts nowhere present in the Complaint include, for instance, those concerning a "hardware Ledger wallet," D. Chen Decl. ¶¶ 15–18, J.R.062–63; OtterSec's FTX account, *id.* ¶ 19, J.R.063–64; a loan, *id.* ¶ 20, J.R.064, and a computer server, *id.* ¶¶ 27–29, J.R.065–67. They also include some important facts that Plaintiff failed to introduce in the Complaint, like the fact that non-party David Chen was in Maryland while working for non-party OtterSec. *Id.* ¶ 3, J.R.058. In the Opposition, Plaintiff also attempts to explain, for the first time, which provision of the Maryland long-arm statute applies here, Opp'n Br. at 13–15, and to articulate a theory of successor liability that the Complaint only vaguely references, *see infra*

Section III.A, D. Such "belated identification" of crucial personal jurisdiction requirements come far too late, and the Court should reject Plaintiff's attempt to "use its Response to plug some of the holes in its Complaint." *68th St. Site Work Grp.*, 2021 WL 4255030, at *13.

B. The Opposition's New Facts Have No Bearing on the Court's Personal Jurisdiction Over Defendants.

Rather than engage with Defendants' extensive explanations of why the Court lacks general or specific jurisdiction over each Defendant, Plaintiff's Opposition focuses on introducing new facts relating primarily to non-party David Chen's work for non-party OtterSec. None of these new facts, jurisdictional or otherwise, have any bearing on the analysis of personal jurisdiction over Defendants. Plaintiff does not dispute Robert Chen's out-of-state residence or either corporation's out-of-state place of incorporation or principal place of business, so Plaintiff can only rely on specific jurisdiction under the Maryland long-arm statute and relevant jurisdictional tests established in the Fourth Circuit. *See* Opening Br. at 8–9. Plaintiffs' new "facts" relating to Maryland do not help establish personal jurisdiction because contacts with the forum state can give rise to specific jurisdiction only "[i]f those contacts form the basis for the suit." *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397 (4th Cir. 2003). The contacts Plaintiff identifies have nothing to do with her claims.

Because specific jurisdiction depends on the extent to which claims "arise out of" a *defendant's* contacts with a forum state, *Jones v. Mutual of Omaha Ins. Co.*, 639 F. Supp. 3d 537, 549 (D. Md. 2022), there is no detail of any relevance to personal jurisdiction in non-party David's work for non-party OtterSec, his decision to loan money to the company, the hardware located in his home, or the work of other OtterSec contractors. The Opposition adds no evidence connected with any action by Robert Chen or the South Dakota Defendants that forms the basis for liability.

None of Plaintiff's new facts brings Robert or the South Dakota Defendants under the coverage of subsection (b)(1) or (b)(4) of the Maryland long-arm statute, as would be required for specific jurisdiction. *See* Opp'n Br. at 13–15 (identifying these subsections). Subsection (b)(1) of the Maryland long-arm statute remains inapplicable because entering into a contract with a Maryland resident to do work not focusing on Maryland does not amount to transacting business in the state under the meaning of subsection (b)(1). *See Joseph M. Coleman & Assocs., Ltd. v. Colonial Metals*, 887 F. Supp. 116, 118 n.2 (D. Md. 1995) (expressing doubt that "a company . . . which (1) simply entered into a contract with a Marylander to have consulting work performed in connection with renegotiating agreements centered in [another state], (2) never entered into Maryland in regard to that contract, and (3) merely directed correspondence and telephone calls into Maryland . . . can reasonably be said to have 'transacted business' in Maryland."). The Opposition alleges—for the first time—that *both* South Dakota Defendants are covered by this subsection simply because *one of them* employs a former OtterSec contractor, William Wang. Opp'n Br. at 14.[4] Such contacts do not suffice under subsection (b)(1) for Otter Audits (and certainly not for RC Security, with which Mr. Wang has no relationship). R. Chen 2d Decl. ¶ 22, J.R.134. *See Joseph M. Coleman & Assocs., Ltd.,* 887 F. Supp. at 118 n.2.

These alleged Maryland connections fall even shorter of the mark with respect to subsection (b)(4) because it "require[s] greater contacts than those necessary to establish jurisdiction under subsection (b)(1)." *Am. Ass'n of Blood Banks v. Boston Paternity, LLC*, No. 08-cv-2046, 2009 WL 2366175, at *8 (D. Md. July 28, 2009). Subsection (b)(4) "has been construed as a general jurisdiction statute" requiring "more than systematic and continuous contacts," which

[4] Mr. Wang works as a contractor for Otter Audits, through a Wyoming LLC. R. Chen 2d Decl. ¶ 22, J.R. 134.

can only be found "in the 'exceptional case'" not present here. *Orbita Telcom SAC v. Juvare LLC*, 606 F. Supp. 3d 240, 250 (D. Md. 2022) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

The novel Maryland contacts in the Opposition additionally fail to make personal jurisdiction over Defendants any more consistent with due process. Defendants never purposely availed themselves of the benefits of Maryland, *see* Opening Br. at 13–16, and the Opposition's details concerning their wholly online contacts with Maryland are not significant to the jurisdictional analysis, as Defendants never "made in-person contact" with any Maryland resident. *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278 (4th Cir. 2009) (listing factors relevant to purposeful availment).

Regardless of where employees or contractors were located, the claims here arise out of the internal affairs of a Wyoming corporation and conduct directed toward that Wyoming corporation and that state. *See* Opening Br. at 11–18. Plaintiff barely argues otherwise, suggesting only that if all the "connections to Maryland" and "conduct directed towards Maryland residents" are considered, it is "clear" that the claims arise out of these contacts. Opp'n Br. at 18.[5] Plaintiff never specifies how each of her claims arises out of the contacts, even though—for specific jurisdiction to apply—she must do so. Since the contacts Plaintiff highlights are primarily those of non-party David, and because she does not, and cannot, show how those contacts gave rise to the specific claims in her Complaint, specific jurisdiction over the Defendants is not permissible.

[5] Plaintiff's nonspecific argument on this aspect of specific jurisdiction sounds more like an argument for general jurisdiction based on "continuous and systematic" forum contacts.

III. SUCCESSOR LIABILITY IS NO BASIS FOR PERSONAL JURISDICTION OVER THE SOUTH DAKOTA DEFENDANTS.

The only argument that the Opposition advances for personal jurisdiction over Otter Audits and RC Security is a seriously flawed one relying on the doctrine of successor liability. The "general rule" in this forum is that a corporation acquiring some or all of the assets of another "does not acquire the liabilities and debts of the predecessor," unless one of four "traditional" exceptions to this default rule is implicated. *Nissen Corp. v. Miller*, 594 A.2d 564, 565–66 (Md. 1991). These exceptions are: (1) that the successor assumed the predecessor's liabilities; (2) that the successor is a mere continuation of the predecessor; (3) that a transaction between the corporations was a de facto merger; and (4) that the transaction was fraudulent. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 173 (4th Cir. 2013). No such exception has been properly alleged here, and none applies.

A. The Complaint Does Not Succeed in Alleging Successor Liability.

The Complaint does not invoke the doctrine of successor liability with anything approaching the clarity required to put Defendants on notice that Plaintiff intended to argue that it has any bearing on this case. Plaintiff needed to do more than allege that the South Dakota Defendants are "successors in interest" to non-party OtterSec and allude to the theory in a generalized way. The Complaint needed to "identify which of the four exceptions it is invoking for successor liability" **and** to include "facts supporting the invocation of the chosen exception." *68th St. Site Work Grp.*, 2021 WL 4255030 at *9. Plaintiff did neither.

The term "successor liability" does not appear in the Complaint. Nor does the Complaint state that the South Dakota Defendants are "liable as successors to OtterSec." At two points, the Complaint refers to the South Dakota Defendants as "OtterSec's successors" or "successors to OtterSec." Compl. ¶¶ 6, 110. More often, the word "successors" appears in the Complaint in the

context of an assertion that the South Dakota Defendants "are OtterSec's *successors in interest*." Compl. ¶¶ 129(e), 143, 144, 148 & p. 33 (emphasis added). A "successor in interest" is a completely distinct legal concept from successor liability. A successor in interest is "[s]omeone who follows another in ownership or control of property." *Successor in Interest*, Black's Law Dictionary (11th ed. 2019). A successor in interest "retains the same *rights* as the original owner," *id.* (emphasis added), but does assume the owner's *liabilities* unless successor *liability* applies.

Plaintiff's Complaint also fails to identify the exception under which the South Dakota Defendants are supposedly liable as successors to OtterSec. The Complaint includes passing references to three of the four exceptions to the general rule—"de facto merger," "mere continuation," and "fraudulent transaction." Compl. ¶ 109. All three references appear in the Complaint's penultimate paragraph of factual allegations, and none is supported. The Opposition is no clearer, quoting this same language without support, Opp'n Br. at 12 (quoting Compl. ¶¶ 109–10), and invoking exceptions in a "shotgun" fashion, mentioning three theories in passing without any "clarity to allow the defendant to frame a responsive pleading." *Baxter v. AmeriHome Mortgage Co., LLC*, 617 F. Supp. 3d 346, 351 (D. Md. 2022) (describing a "shotgun pleading").

B. The South Dakota Defendants Cannot Be Liable as OtterSec's Successors for Claims for Which OtterSec Itself Could Not Possibly Have Been Liable.

Plaintiff's new campaign to assert successor liability depends, at its core, on the notion that Otter Audits and RC Security should "acquire the liabilities and debts of" non-party OtterSec, supposedly the predecessor here. *Nissen Corp.*, 594 A.2d at 566. The claims in this case, however, could never have been brought against non-party OtterSec. The first cause of action alleges that the OtterSec logo is being used to create the false impression that Otter Audits and RC Security are actually OtterSec. Compl. ¶ 117. The second seeks a declaration stating the same, and additionally stating that the estate is entitled to an interest in the South Dakota Defendants. *Id.*

¶ 129. The third, fourth, and fifth concern the dissolution of OtterSec and establishment of the South Dakota Defendants. *See id.* ¶¶ 131–50.[6] The seventh alleges that Defendants tortiously interfered with OtterSec's business relationships, *id.* ¶¶ 156–159, and the eighth demands an accounting of, among other things, the estate's "rightful interest in Otter Audits and RC Security," *id.* ¶ 161. Not one of these claims would be viable, or even coherent, if leveled against OtterSec, as none depend on any conduct undertaken by OtterSec itself. In a Title VII case, this court observed that, when relying on successor liability, "[a] federal court has jurisdiction over a . . . claim against a defendant-employer . . . when the theory of liability rests on the actions of a different employer . . . ." *U.S. EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 564 (D. Md. 2018). Likewise here, when the "theory of liability" *does not rest* on the actions of the supposed predecessor corporation, the predecessor has no liabilities for the successor to acquire, and successor liability has no role to play. Otter Audits and RC Security therefore cannot possibly have acquired any liabilities of OtterSec in connection with Plaintiff's claims.

C. Successor Liability Is Impossible Because Personal Jurisdiction over OtterSec Could Not Be Established.

The only way that successor liability could ever yield jurisdiction over the South Dakota Defendants is if this Court could exercise personal jurisdiction over Wyoming-based OtterSec, the alleged predecessor corporation. OtterSec lacks the requisite Maryland contacts, so personal jurisdiction over the South Dakota Defendants based on successor liability is not possible.

General jurisdiction over OtterSec in Maryland would plainly be inappropriate, as OtterSec was not "at home" in Maryland. *See Daimler AG*, 571 U.S. at 137 (2014). It was incorporated in **Wyoming** and had its principal place of business or "nerve center" in **Washington** state where Robert Chen, the only member who also took an active role in running the business, was exercising

[6] The sixth is brought against only Robert Chen. *Id.* ¶¶ 151–55.

"direction, control, and coordination" over OtterSec. *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010); *see also* D. Chen Decl. ¶ 11 (indicating that Robert and David did not expect Sam Chen to "play any active role in the business"). David Chen and other contractors worked in Maryland (on matters unrelated to this case) at *Robert's* direction from **Washington**, not Maryland. *See, e.g.*, D. Chen Decl. ¶ 15 ("Robert asked me to take responsibility for handling OtterSec's money . . . ."); *id.* ¶ 23 ("Robert counter-signed" agreements with contractors "for OtterSec").

Specific jurisdiction over OtterSec based on the allegations in this Complaint is also inappropriate because the underlying controversy about the internal affairs of OtterSec is focused on ***Wyoming***, not Maryland. *See* Opening Br. at 1 n.1, 3, 17–18, 19 (discussing Maryland's "internal affairs doctrine"). The new facts alleged in the Opposition do not bring OtterSec within the reach of Maryland's long-arm statute or make the exercise of jurisdiction consistent with constitutional due process, for the same reasons that they do not make the exercise of jurisdiction over Robert appropriate, as explained above and in Defendants' opening brief. *See supra* Section II.B; *see also* Opening Br. at 9–18.

The Opposition's newly alleged facts are not jurisdictionally significant Maryland contacts for OtterSec. The funds connected with—not stored on—the hardware in non-party David Chen's possession were held on the blockchain, not in Maryland. OtterSec did not open an office or maintain a registered agent in Maryland; rather, David decided to work from his home. Maryland locations used by David and the other contractors do not make the exercise of jurisdiction over OtterSec constitutionally reasonable, since their locations were completely immaterial to Robert and to OtterSec. *See Fields v. Sickle Cell Disease Ass'n of Am., Inc.*, 376 F. Supp. 3d 647, 653 (E.D.N.C. 2018) ("Plaintiff's choice to complete her work in North Carolina for her own reasons is a unilateral decision that cannot be fairly attributed to the defendant as an attempt to avail itself

of the privileges of conducting business in North Carolina."), *aff'd*, 770 F. App'x 77 (4th Cir. 2019). David and the other three contractors he mentions in his declaration may have each unilaterally decided to work independently from Maryland, but that does not amount to non-party *OtterSec* "deliberately engag[ing] in significant or long-term business activities *in the forum state*" and purposely availing itself of the privilege of doing business in Maryland. *Consulting Eng'rs Corp.*, 561 F.3d at 278 (emphasis added). OtterSec did not care where contractual duties (which all took place in cyberspace) were performed, and the choice-of-law and choice-of-venue clauses in its agreements with contractors and employees pointed to Wyoming, OtterSec's home state. *See* Ex. 5-E at 5, J.R.090; Ex. 5-F at 6, J.R.098; Ex. 5-G at 6, J.R.105.

D. Plaintiff's Complaint Does Not Allege Facts Sufficient to Establish Any of the Four Exceptions to the Default Rule of Successor Non-Liability.

The Complaint likewise fails to plead any facts providing a "specific basis" why the default rule of successor non-liability does not apply. A claim relying on successor liability can only survive a motion dismiss where the plaintiff has identified "facts supporting the invocation of the chosen exception." *68th St. Site Work Grp.*, 2021 WL 4255030 at *9. The facts alleged must provide "a specific basis for successor liability"—a reason why the relationship between predecessor and successor is "the type of unusual transaction that would give rise to successor liability under one of the four exceptions." *Id*. (quoting *Leonard v. Bed, Bath & Beyond, Inc.*, No. 15-cv-00284, 2016 WL 158587, at *3 (E.D.N.C. Jan. 8, 2016)). Plaintiff's failure on this count means this Court cannot exercise personal jurisdiction over the South Dakota Defendants.[7]

[7] In *68th Street Work Group*, the Court noted that "for personal jurisdiction to be exercised over [d]efendants" under a successor liability theory, the "[p]laintiff must first have adequately pleaded a theory of successor liability." *Id.* at *8. Evaluating these pleadings entailed adjudicating parts of the 12(b)(2) motion under a 12(b)(6) standard. *See id.* at *8 n.4 ("[I]f the Complaint fails to state a plausible claim for successor liability, then this Court also lacks personal jurisdiction.").

Neither of the cases that Plaintiff cites is inconsistent with this standard. Both provide that successor liability cannot be imposed unless the plaintiff alleges a particular theory of successor liability and a basis for applying it beyond mere speculation (which is all that Plaintiff has set forth). In *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438 (4th Cir. 1990), the district court found "evidence supporting the imposition . . . of successor liability." *Id.* at 455. Likewise, in *Hartford Mut. Ins. Co. v. Hoverzon, LLC*, No. 20-cv-2713, 2021 WL 1390317 (D. Md. Apr. 13, 2021), the plaintiff "provided sufficient evidence to establish" a "mere continuation," but the court noted that "[c]ommon ownership or control alone"—the only evidence this Plaintiff presents—"is generally insufficient to establish" that the exception applies. *Id.* at *5. In both cases, the court insisted on greater factual support than what Plaintiff has provided here.

Plaintiff's Opposition identifies the following allegations from its Complaint as supposedly giving rise to successor liability: (1) that Defendant Robert Chen "secretly formed Otter Audits and RC Security in South Dakota on September 13, 2022"; (2) that he "unilaterally dissolved OtterSec on October 6, 2022"; (3) that he "transfer[red] OtterSec's assets . . . to Otter Audits and RC Security"; and (4) that the South Dakota Defendants are "engaged in the exact same business as Otter Sec" and "hold[] themselves out to be OtterSec." Opp'n Br. at 11. None of these supposed "facts" (most are untrue) suggests successor liability. The adverbs "secretly" and "unilaterally" are conclusory characterizations, the inclusion of which is insufficient to transform ordinary business decisions into something nefarious.

Robert Chen's actions in dissolving OtterSec and forming two new corporations, as alleged in the Complaint, do not suggest an "unusual transaction" in any way. Robert was not only within his rights as the sole surviving member of OtterSec to dissolve the company, but was required to do so by the terms of OtterSec's Operating Agreement. Sam and David's counsel demanded

dissolution, and thereafter, Robert instructed OtterSec's corporate counsel to comply. R. Chen 2d Decl. ¶¶ 8–10. The claim that dissolution was "improper[]" is not plausible because the Operating Agreement required it, and because Sam and David demanded it.[8]

Robert was not required to tell David or Sam's estate that he was planning to form two new companies, neither of which took over OtterSec's business. In any event, his incorporation of the two companies in South Dakota was not secret, but entirely public, as evinced by the fact that the Complaint states exactly when and where the corporations were established. Compl. ¶ 100. (Their Articles of Incorporation, also public, have been attached to Plaintiff's counsel's declaration. *See* Decl. of Stephen Plotkin Exs. B–C, ECF Nos. 28-3 to -4). The Complaint itself undercuts the suggestion that assets were merely "transferred" to the South Dakota Defendants: it explains that Robert's counsel told David's counsel there would be a sale of OtterSec's assets. Compl. ¶ 102; *see also* R. Chen 2d Decl. ¶ 11. Plaintiff nowhere asserts that she or David had any interest in purchasing these assets—because they did not.

That the South Dakota Defendants conduct some of the same personal service business and license assets that formerly belonged to OtterSec is insignificant. "[I]n the absence of identification of a specific basis for successor liability," such similarities do not transform the corporate succession from "a run-of-the-mill sale" into "the type of unusual transaction that would give rise to successor liability under one of the four exceptions." *68th St. Site Work Grp.*, 2021 WL 4255030, at *9 (quoting *Leonard*, 2016 WL 158587, at *3). It is perfectly natural that Robert, an entrepreneur and cybersecurity expert, after having to dissolve the company he founded, would found other cybersecurity firms over the course of his career.

[8] There are no allegations regarding the manner in which OtterSec was dissolved, as opposed to the fact of its dissolution.

E. Plaintiff's Opposition Fails to Support the Imposition of Successor Liability.

The Opposition fails to identify, let alone argue for, an exception to the general rule of successor non-liability that applies here. Instead, Plaintiff persists in a "shotgun" strategy of invoking several theories without explaining how any single one would actually apply and without citing a single case listing the exceptions or explaining what it would mean for a successor corporation to be a "de facto merger," a "mere continuation," or part of a "fraudulent transaction." Opp'n Br. at 12 (quoting Compl. at ¶¶ 109–10). Such cases do exist, and their requirements only underscore the gaps in the Opposition.[9]

The test for a de facto merger includes factors like whether there is a "continuity of . . . general business operations," "continuity of ownership," "prompt cessation of the seller corporation's operations," and whether the successor corporation "assum[ed] . . . obligations ordinarily necessary for the uninterrupted continuation of normal business operations of the seller." *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 334 (D. Md. 1993). There is no continuity of ownership between non-party OtterSec and the South Dakota Defendants because Sam was an owner of OtterSec, *see, e.g.*, Opp'n Br. at 4, and had no involvement at all with RC Security or Otter Audits. Half of the owners are different. Plaintiff does not allege otherwise.

There is no continuity of business operations because RC Security and Otter Audits have not continued OtterSec's business. Neither develops or executes proprietary trading strategies regarding cryptocurrencies on the blockchain like OtterSec did. *See* R. Chen 2d. Decl. ¶¶ 16–17, J.R.133. Each consults on a broader range of security issues than OtterSec did. RC Security is a personal consulting company through which Robert provides services (as an independent contractor) that OtterSec did not provide. *Id.* ¶ 17. Providing cybersecurity personal consulting

[9] In the following discussion, Defendants cite to federal cases from relevant jurisdictions, but do not mean to suggest any particular position on the choice-of-law analysis. See Opening Br. at 19.

service is Robert Chen's expertise. Any company he works for will provide some of the same services he provided through OtterSec—but that does not make them a successor business any more than hiring a lateral partner would make the hiring firm a successor to the lateral's prior firm. The two companies may operate in one of OtterSec's markets, but they do not provide half the services OtterSec did, and, conversely, each provides services and has other sources of income that OtterSec never had. *See* J.R.131, 133, R. Chen 2d. Decl. *id.* ¶¶ 3, 16–17, J.R.131–33.

A "mere continuation" exists when "after the transfer of assets, only one corporation remains, and there is an identity of stock, stockholders, and directors between the two corporations." *HRW Sys., Inc.*, 823 F. Supp. at 330. That is not the case here. There is no identity of stock and ownership did not transfer. Half the ownership is different. There are no directors. Two distinct companies with different operations, not "only one corporation," remain here.

A "fraudulent transaction" is one "made with an actual intention to hinder, delay, or defraud creditors" and will typically display some indicia or "badges of fraud" like "inadequacy of consideration," unusual transactions, or "insolvency caused by the transfer." *United States ex rel. Bunk v. Gov't Logistics N.V.*, 842 F.3d 261, 276 (4th Cir. 2016). Plaintiff alleged no specific facts required to plead fraud. In fact, David admits that he and his family learned the details of the transaction only from Robert's filings in this litigation. *See* D. Chen Decl. ¶ 33, J.R.068. This amounts to an admission that Plaintiff, David's mother, had no basis for alleging the transaction was fraudulent. Allegations concerning a fraudulent transaction "may need to satisfy the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure." *Gov't Logistics N.V.*, 842 F.3d at 275. Under the heightened standard a plaintiff must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "[C]onclusory

assertions . . . are inadequate." *United States ex rel. Taylor v. Boyko*, 39 F.4th 177, 193 (4th Cir. 2022).

IV. MARYLAND POLICY IS OPPOSED TO ADJUDICATING SUCH CASES.

Plaintiff understates Defendants' case against litigating in Maryland. Far from simply focusing on Defendants' physical location and the need to apply foreign law, *see* Opp'n Br. at 19, Defendants' brief also explained that Maryland has no interest in adjudicating this dispute regarding the internal affairs of a Wyoming corporation. *See* Opening Br. at 19–20. Maryland courts have an entire doctrine founded on this notion. *See id.* at 1 n.1, 3, 17–18, 19 (discussing the "internal affairs" doctrine). Plaintiff ignores the longstanding position of the Maryland courts that "[w]ith regard to foreign corporations, Maryland courts have traditionally declined to interfere in management disputes under the 'internal affairs doctrine.'" *N.A.A.C.P. v. Golding*, 679 A.2d 554, 559 (Md. 1996); *see also Condon v. Mut. Reserve Fund Life Assn,* 42 A. 944, 948 (Md. 1899). In other jurisdictions, Plaintiff's arguments regarding a plaintiff's interest in convenient relief and the feasibility of an alternative forum might be valid considerations when evaluating the reasonableness of the exercise of personal jurisdiction, *see, e.g.*, *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007), but these are not relevant to the Fourth Circuit's factors, *see* Opening Br. at 18–20; Opp'n Br. at 19 (identifying the same factors).

V. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE.

A district court may dismiss a complaint with prejudice and without leave to amend if the plaintiff has declined to amend after having notice of the pleadings' deficiencies. *E.g. City of Pontiac Policemen's & Firemen's Retirement Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014). Such a remedy is warranted here because Plaintiff's counsel declined an opportunity to amend after having been on notice for three months of its case personal jurisdiction deficiencies.

CONCLUSION

For the foregoing reasons, the Complaint must be dismissed under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction over any of the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 5, 2024, I filed the foregoing Reply Memorandum via CM/ECF which serves a copy on all counsel of record.

/s/ Rachel Clattenburg
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