

2002

MFS SERIES TRUST III (on behalf of MFS MUNICIPAL HIGH INCOME FUND), MERRILL LYNCH HIGH YIELD MUNICIPAL BOND FUND. INC., MUNIHOLDINGS FUND, INC.. MERRILL LYNCH MUNICIPAL BOND FUND, THE NATIONAL PORTFOLIO, MERRILL LYNCH MUNICIPAL STRATEGY FUND, EATON VANCE DISTRIBUTORS, INC.. T. ROWE PRICE ASSOCIATES, INC.. JOHN HANCOCK FUNDS, INC., and PUTNAM INVESTMENTS, INC. v. KENNETH W. WINGER, JOHN' R. GRAINGER, JAMES R. BULLOCK. PAUL R. HUMPHREYS, JOHN W.

Recommended Citation

Brief of Appellee, *Putnam Investments v. Winger*, No. 20020719.00 (Utah Supreme Court, 2002).
https://digitalcommons.law.byu.edu/byu_sc2/2252

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

ROLLINS, SR., JOHN W. ROLLINS, JR.. LESLIE
W. HAWORTH, DAVID B. THOMAS. JR.,
HENRY B. TIPPIE, JAMES L. WAREHAM,
GROVER C. WRENN. MICHAEL J.
BRAGAGNOLO, and HENRY H. TAYLOR :
Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott Walker; Abbott & Walker; Richard M. Heimann; Lieff, Cabraser, Heimann & Bernstein; Attorneys for Plaintiffs.

Michael W. Homer; Jesse C. Trentadue; Paul C. Farr; John D. Luthy; Attorneys for Defendant.

IN THE SUPREME COURT OF THE STATE OF UTAH

MFS SERIES TRUST III (on behalf of MFS
MUNICIPAL HIGH INCOME FUND),
MERRILL LYNCH HIGH YIELD
MUNICIPAL BOND FUND, INC.,
MUNI HOLDINGS FUND, INC., MERRILL
LYNCH MUNICIPAL BOND FUND, THE
NATIONAL PORTFOLIO, MERRILL
LYNCH MUNICIPAL STRATEGY FUND,
EATON VANCE DISTRIBUTORS, INC., T.
ROWE PRICE ASSOCIATES, INC., JOHN
HANCOCK FUNDS, INC., and PUTNAM
INVESTMENTS, INC.,

Plaintiffs/Appellants,

vs.

KENNETH W. WINGER, JOHN R.
GRAINGER, JAMES R. BULLOCK, PAUL R.
HUMPHREYS, JOHN W. ROLLINS, SR.,
JOHN W. ROLLINS, JR., LESLIE W.
HAWORTH, DAVID B. THOMAS, JR.,
HENRY B. TIPPIE, JAMES L. WAREHAM,
GROVER C. WRENN, MICHAEL J.
BRAGAGNOLO, and HENRY H. TAYLOR,
Defendants/Appellees.

2

Case No. 20020719-SC

BRIEF OF APPELLEE
MICHAEL J. BRAGAGNOLO

Appeal from a Final Order of Dismissal for Lack of Personal Jurisdiction over the Defendants
Entered in the Third District Court by The Honorable David S. Young

Scott Walker
ABBOTT & WALKER
3651 N. 100 E. #300
Provo, UT 84604

Richard M. Heimann
LIEFF, CABRASER, HEIMANN & BERNSTEIN,
LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111

Michael W. Homer (#1535)
Jesse C. Trentadue (#4961)
Paul C. Farr (#8719)
John D. Luthy (#8880)
SUITTER AXLAND
175 S. West Temple, #700
Salt Lake City, UT 84101

Attorneys for Defendant/Appellee
Michael J. Bragagnolo

Attorneys for Plaintiffs/Appellants

23 2003

IN THE SUPREME COURT OF THE STATE OF UTAH

MFS SERIES TRUST III (on behalf of MFS
MUNICIPAL HIGH INCOME FUND),
MERRILL LYNCH HIGH YIELD
MUNICIPAL BOND FUND, INC.,
MUNI HOLDINGS FUND, INC., MERRILL
LYNCH MUNICIPAL BOND FUND, THE
NATIONAL PORTFOLIO, MERRILL
LYNCH MUNICIPAL STRATEGY FUND,
EATON VANCE DISTRIBUTORS, INC., T.
ROWE PRICE ASSOCIATES, INC., JOHN
HANCOCK FUNDS, INC., and PUTNAM
INVESTMENTS, INC.,

Plaintiffs/Appellants,

vs.

KENNETH W. WINGER, JOHN R.
GRAINGER, JAMES R. BULLOCK, PAUL R.
HUMPHREYS, JOHN W. ROLLINS, SR.,
JOHN W. ROLLINS, JR., LESLIE W.
HAWORTH, DAVID B. THOMAS, JR.,
HENRY B. TIPPIE, JAMES L. WAREHAM,
GROVER C. WRENN, MICHAEL J.
BRAGAGNOLO, and HENRY H. TAYLOR,

Defendants/Appellees.

Case No. 20020719-SC

BRIEF OF APPELLEE
MICHAEL J. BRAGAGNOLO

Appeal from a Final Order of Dismissal for Lack of Personal Jurisdiction over the Defendants
Entered in the Third District Court by The Honorable David S. Young

Scott Walker
ABBOTT & WALKER
3651 N. 100 E. #300
Provo, UT 84604

Richard M. Heimann
LIEFF, CABRASER, HEIMANN & BERNSTEIN,
LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111

Michael W. Homer (#1535)
Jesse C. Trentadue (#4961)
Paul C. Farr (#8719)
John D. Luthy (#8880)
SUITTER AXLAND
175 S. West Temple, #700
Salt Lake City, UT 84101

Attorneys for Defendant/Appellee
Michael J. Bragagnolo

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PARTIES.....	1
JURISDICTIONAL STATEMENT.....	1
ISSUE AND STANDARD OF REVIEW.....	1
DETERMINATIVE PROVISIONS.....	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT.....	8
THE TRIAL COURT PROPERLY GRANTED BRAGAGNOLO’S MOTION TO DISMISS FOR LACK OF JURISDICTION.....	8
A. Due process requires a showing that Bragagnolo has minimum contacts with Utah before a Utah court can properly exercise jurisdiction over him.....	8
B. Plaintiffs’ allegations of Bragagnolo’s joint liability are insufficient alone to demonstrate that he has minimum contacts with Utah given his affidavit testimony contesting those allegations.....	9
C. Plaintiffs’ jurisdictional argument based on Utah Code Ann. § 61-1-22(4) (2000) runs counter to due process by confusing jurisdiction with liability and by circumventing the requirement that each defendant be shown to have minimum contacts with the forum state.....	13
D. Other courts that have addressed whether jurisdiction can be based on statutes analogous to section 61-1- 22(4) have rejected the theory as violative of due process.....	16
E. Plaintiffs’ argument based on Utah Code Ann. § 61-1- 26 (2000) misinterprets that statute as one creating a basis for jurisdiction without a showing of minimum contacts rather than as one providing merely an alternative means of serving process.....	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

UTAH CASES

<u>Anderson v. Am. Soc’y of Plastic & Reconstructive Surgeons,</u> 807 P.2d 825 (Utah 1990).....	10, 18
<u>Arguello v. Indus. Woodworking Mach. Co.,</u> 838 P.2d 1120 (Utah 1992).....	10, 12, 18
<u>In re W.A.,</u> 2002 UT 127, 63 P.3d 607.....	8
<u>Mallory Eng’g v. Ted R. Brown & Assoc.,</u> 618 P.2d 1004 (Utah 1980).....	15
<u>Piantes v. Hayden-Stone, Inc.,</u> 30 Utah 2d 110, 514 P.2d 529 (1973).....	20
<u>Radcliffe v. Akhavan,</u> 875 P.2d 608 (Utah Ct. App. 1994)	9
<u>Rhoades v. Wright,</u> 622 P.2d 343 (Utah 1980).....	15
<u>Roskelley & Co. v. Lerco, Inc.,</u> 610 P.2d 1307 (Utah 1980).....	10, 18
<u>SII Megadiamond, Inc. v. American Superabrasives Corp.,</u> 969 P.2d 430 (Utah 1998).....	8
<u>Steenblik v. Lichfield,</u> 906 P.2d 872 (Utah 1995).....	13, 16
<u>Wagner v. Clifton,</u> 2002 UT 109, 62 P.3d 440.....	1

FEDERAL CASES

United States Supreme Court Cases

International Shoe Co. v. Washington,
326 U.S. 310, 66 S. Ct. 154 (1945).....9, 15

Rush v. Savchuk,
444 U.S. 320, 332, 100 S. Ct. 571 (1980).....15

United States Circuit Court Cases

American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert,
94 F.3d 586 (9th Cir. 1996).....14, 15

Howard v. Everex Sys., Inc.,
228 F.3d 1057 (9th Cir. 2000).....19

Hollinger v. Titan Capital Corp.,
914 F.2d 1564 (9th Cir. 1990).....19

San Mateo County Transit Dist. v. Dearman, Fitzgerald & Roberts, Inc.,
979 F.2d 1356 (9th Cir. 1992).....19

Sher v. Johnson,
911 F.2d 1357 (9th Cir. 1990).....14

United States District Court Cases

Derensis v. Coopers & Lybrand Chartered Accountants,
930 F. Supp. 1003 (D.N.J. 1996).....19

Harnischfeger Engineers, Inc. v. Uniflo Conveyor, Inc.,
883 F. Supp. 608 (D. Utah 1995).....15

In re Baan Co. Sec. Litig.,
81 F. Supp. 2d 75 (D.D.C. 2000).....18

<u>Landry v. Price Waterhouse Chartered Accountants,</u> 715 F. Supp. 98 (S.D.N.Y. 1989).....	19
--	----

<u>McNamara v. Bre-X Minerals Ltd.,</u> 46 F. Supp. 2d 628 (E.D. Tex. 1999).....	19
---	----

CASES FROM OTHER STATES

<u>Am. Microtel, Inc. v. Secretary of State,</u> 1995 WL 809575, 3 Mass. L. Rptr. 479 (Mass. Super. Ct.).....	21
--	----

<u>Boddy v. Theiling,</u> 199 S.E.2d 379 (Ga. Ct. App. 1973).....	19
--	----

<u>Bowden v. Robinson,</u> 67 Cal. App. 3d 705 (Cal. Ct. App. 1977).....	19
---	----

<u>Brown v. Inv. Management & Research, Inc.,</u> 475 S.E.2d 754 (S.C. 1996).....	21, 22
--	--------

<u>Courtney v. Waring,</u> 191 Cal. App. 3d 1434 (Cal. Ct. App. 1987).....	19
---	----

<u>Eaton Vance Dist., Inc. v. Grainger,</u> No. C040158, 2003 WL 1521896 (Cal. Ct. App. March 25, 2003).....	16
---	----

<u>Eastwood v. Froehlich,</u> 60 Cal. App. 3d 523 (Cal. Ct. App. 1976).....	19
--	----

<u>Goelitz v. Lathrop,</u> 3 N.E.2d 305 (Ill. App. Ct. 1936).....	19
--	----

<u>Kamen v. Lindly,</u> 94 Cal. App. 4 th 197 (Cal. Ct. App. 2001).....	19
---	----

<u>Neptune Soc. Corp. v. Longanecker,</u> 194 Cal. App. 3d 1233 (Cal. Ct. App. 1987).....	19
--	----

<u>Schlatter v. Mo-Comm Futures, Ltd.</u> , 662 P.2d 553 (Kan. 1983).....	16, 17, 18
<u>Seagate Tech. V. A.J. Kogyo Co., Ltd.</u> , 219 Cal. App. 3d 696 (Cal. Ct. App. 1990).....	19
<u>Sherman v. Lloyd</u> , 181 Cal. App. 3d 693 (Cal. Ct. App. 1986).....	19
<u>United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.</u> , 463 P.2d 770 (Cal. 1970).....	19

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1.....	2
Utah R. App. P. 24(a)(6).....	2
Kan. Stat. Ann. § 17-1268(b) (Supp. 1982).....	16, 17
Utah Code Ann. § 61-1-1 (2000).....	4
Utah Code Ann. § 61-1-22(4) (2000).....	2, 6, 7, 13, 15, 16, 17, 19
Utah Code Ann. § 61-1-26(8)(a) (2000).....	2, 5, 7, 20, 21, 22
Utah Code Ann. § 78-2-2(3)(j) (2002).....	1

PARTIES

The parties to this appeal are those indicated in the caption, with the exception of defendants Kenneth W. Winger and Paul R. Humphreys. Winger and Humphreys are not parties to the appeal because neither responded to the original complaint or filed a motion to dismiss.

JURISDICTIONAL STATEMENT

Plaintiffs seek review of the trial court's dismissal of their complaint for lack of personal jurisdiction over Defendants, which was certified by the trial court as a final judgment. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (2002).

ISSUE AND STANDARD OF REVIEW

The issue in this appeal is whether the trial court properly dismissed the complaint for lack of jurisdiction over a defendant alleged to have been a control person of a company in violation of Utah's securities laws and thereby liable for the company's alleged violations, when it is undisputed that he had no personal contacts with Utah.

“‘[T]he propriety of a motion to dismiss is a question of law, [which this Court] review[s] for correctness, giving no deference to the decision of the trial court.’”

Wagner v. Clifton, 2002 UT 109, ¶ 8, 62 P.3d 440 (citation omitted).

DETERMINATIVE PROVISIONS

The following are constitutional and statutory provisions “whose interpretation[s] [are] determinative of the appeal or of central importance to the appeal.” Utah R. App. P. 24(a)(6). The text of these provisions is set forth in Addendum A of this brief.

- U.S. Const. amend. XIV, § 1
- Utah Code Ann. § 61-1-22(4) (2000)
- Utah Code Ann. § 61-1-26(8)(a) (2000)

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings Below

This is an appeal from an order of dismissal for lack of personal jurisdiction over the defendants. (R. 517, 552-59) Plaintiffs are institutional investors domiciled in various East Coast states. (R. 21) Defendant Michael J. Bragagnolo is a non-Utah resident alleged to have been “among the top officers of Safety-Kleen.” (R. 18-20, 313) Safety-Kleen is a Delaware corporation with its executive offices in South Carolina. (R. 21)

Plaintiffs purchased bonds issued by Tooele County, Utah and secured by a loan agreement between the county and Safety-Kleen. (R. 22) Plaintiffs later filed a complaint against Defendants, alleging as to Bragagnolo claims for fraud, negligent

misrepresentation, and violations of Utah's securities laws, all in connection with the county's issuance of the bonds. (R. 2-10, 23) Defendants moved for dismissal of the complaint, asserting that the trial court lacked jurisdiction over them. (R. 41, 98, 181, 312) The trial court granted the motions and certified the dismissal as a final judgment. (R. 517, 555) Plaintiffs filed a timely notice of appeal. (R. 552-59)

STATEMENT OF THE FACTS

On July 1, 1997, Tooele County issued bonds to fund a hazardous waste incineration facility. (R. 22) These bonds were initially issued by the county "in book-entry form" to The Depository Trust Company located in New York. (R. 645, 648, 650-51)¹ Plaintiffs purchased their respective interests in the bonds through The Depository Trust Company's book-entry system in New York. (R. 22, 645, 648, 650-51) The bonds were secured by a loan agreement between Tooele County and Safety-Kleen, a Delaware corporation with its executive offices in South Carolina.² (R. 21-22)

¹ These record citations are to pages of the Preliminary Offering Memorandum issued in conjunction with issuance of the bonds. Although that document contains text on either side of its pages, only one side of each page has been given a record number. The document also appears to have been placed in the record so as to read back to front rather than front to back. For the sake of consistency in citation, Bragagnolo refers in this brief to the pages as numbered in the record, but notes the above to aid the Court.

² The current Safety-Kleen was formed through a series of mergers and transactions between Laidlaw Inc., LES, and the former Safety-Kleen Corporation. (R. 20) The merger creating the current Safety-Kleen was not completed until 1998, (id.) and the loan agreement giving rise to this case was originally between the county and LES. (R. 643) However, in this brief, Bragagnolo refers only to Safety-Kleen because LES assumed the Safety-Kleen name (R. 20) and because further details of the corporate

The offering memorandum Plaintiffs relied on when they decided to invest in the bonds contained Safety-Kleen's financial reports for 1997. (R. 11-12) After Plaintiffs invested in the bonds, Safety-Kleen announced that it had discovered "accounting irregularities" in its financial reports for 1997. (R. 17) Subsequently, Safety-Kleen defaulted on the bonds and filed for chapter 11 bankruptcy. (R. 11)

Plaintiffs filed a complaint in Utah District Court, alleging that Defendants were officers and directors of Safety-Kleen and directly responsible for the misstatements in the company's 1997 financial statements. (R. 2-20, 23) As to Bragagnolo, Plaintiffs alleged: "[He] served at all relevant times as a Director, Executive Vice President and Chief Operating Officer of Safety-Kleen. Prior to the Merger, Bragagnolo held senior executive positions with LES. Bragagnolo served as a Director of Safety-Kleen . . . and he served as [Chief Operating Officer.]" (R. 19) Additionally, Plaintiffs alleged that Bragagnolo "substantively participated in the sale of [the] Bonds"; (R. 10) was "personally responsible for" the financial statements relied on by Plaintiffs; (R. 8) knew of facts that made the "financial statements false and misleading"; (R. 9) and had the power to influence or prevent the statements' issuance (R. 8). (See generally R. 3-10) Plaintiffs' brought claims against Bragagnolo for fraud, negligent misrepresentation, and violations of the Utah Uniform Securities Act, Utah Code Ann. § 61-1-1 (2000), et seq. (R. 3-10) The record does not indicate that Plaintiffs

history are not relevant to the issue presented.

relied on Utah Code Ann. § 61-1-26(8)(a) (2000)'s substitute service provision to serve Defendants with copies of the complaint and summons.

Bragagnolo filed a motion to dismiss, asserting that the trial court lacked personal jurisdiction over him. (R. 310-12) In support of that motion, Bragagnolo filed an affidavit, wherein he stated: "I am not now, nor have I ever been, a resident of the state of Utah." (R. 313) In another affidavit, he stated:

4. I have never been a director of either Safety-Kleen or Laidlaw Environmental Services.
5. In my position at Safety-Kleen and Laidlaw Environmental Services, I did not have any management oversight or control over the accounting department.
6. I did not participate in the preparation of any of the financial statements, financial reports, or other financial documents alleged by plaintiffs to contain untrue statements or to omit material facts, nor did I participate in the preparation of the offering memorandum, registration statement, or other SEC reports or filings referred to by plaintiffs in their complaint.
7. I was not responsible for any of the documents described in the preceding paragraph; did not sign any of those documents; and did not see any of them before they were made public.
8. I did not participate in the marketing or sale of the bonds complained of in this action; never discussed the sale or purchase of those bonds with any potential buyer; and did not make, authorize, or approve any

representations made in connection with the sale of those bonds.

9. I have not been to Utah for any reason since leaving Safety Kleen. (R. 435)

Based on the pleadings and Bragagnolo's affidavits, the trial court granted his motion to dismiss for lack of personal jurisdiction. (R. 517) It later certified that dismissal as a final judgment, (R. 555) and Plaintiffs timely appealed. (R. 552-59)

SUMMARY OF THE ARGUMENT

When a defendant moves to dismiss for lack of jurisdiction and submits an affidavit contesting the plaintiff's allegations relative to jurisdiction, and the plaintiff relies solely upon the unverified allegations in his or her complaint to respond to the motion to dismiss, then the facts stated in the defendant's affidavit are taken as true. In this case, Bragagnolo moved for dismissal for lack of jurisdiction and submitted an affidavit contesting the allegations of the complaint that Plaintiffs rely on for their assertion of jurisdiction. Plaintiffs did not respond to Bragagnolo's affidavit. Consequently, Bragagnolo's affidavit establishes that he had no minimum contacts with Utah. Therefore, this Court should affirm the trial court's dismissal of the claims against Bragagnolo for lack of jurisdiction over him.

Plaintiffs' reliance on section 61-1-22(4) as a basis for jurisdiction runs counter to the requirements of due process. Section 61-1-22(4) imposes liability upon

directors of companies in violation of Utah's securities laws. It also imposes a burden on a defendant shown to be a control person of a company to prove his lack of knowledge of the company's misconduct in order to avoid personal liability. Although this section speaks to director liability, it does not provide a basis for jurisdiction. Liability and jurisdiction are separate and distinct legal concepts. Liability turns on the relationship between the parties; whereas jurisdiction turns on the relationship between the defendant and the forum state. Furthermore, jurisdiction as to each defendant must be demonstrated separately. To base jurisdiction on section 61-1-22(4) would allow allegations of an individual's joint liability with a company with minimum Utah contacts to suffice as a demonstration of minimum contacts as to the individual defendant. Not only would such a result run counter to due process, but the courts that have addressed this argument have rejected it. This Court should do likewise.

Plaintiffs' reliance on section 61-1-26(8)(a) as a basis for jurisdiction is also misplaced. Section 61-1-26(8)(a) is a substitute service statute. It provides an alternative means for serving process on an out-of-state defendant. Not only is the record silent as to whether Plaintiffs used this alternative means for serving process on Bragagnolo, but the substitute service statute does not serve as a basis for jurisdiction over him in any event.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED BRAGAGNOLO’S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

- A. Due process requires a showing that Bragagnolo has minimum contacts with Utah before a Utah court can properly exercise jurisdiction over him.

This Court considers two factors in determining whether Utah courts have jurisdiction over a nonresident defendant: “First, the court must assess whether Utah law confers personal jurisdiction over the nonresident defendant. . . . Second, assuming Utah law confers personal jurisdiction over the nonresident defendant, the court must assess whether an assertion of jurisdiction comports with the due process requirements of the Fourteenth Amendment.” In re W.A., 2002 UT 127, ¶ 14, 63 P.3d 607 (emphasis omitted).³ “[This Court] frequently make[s] [the] due process analysis first[, however,] because any set of circumstances that satisfies due process will also satisfy the long-arm statute.” SII Megadiamond, Inc. v. American Superabrasives Corp., 969 P.2d 430, 433 (Utah 1998).

“Due process requires that before a court can exercise personal jurisdiction over a nonresident defendant, the nonresident defendant’s contacts with Utah must be

³ Prior to In re W.A., this Court had “applied various tests in determining whether personal jurisdiction exists over a nonresident defendant.” 2002 UT 127 at ¶ 11. In In re W.A., however, the Court “clarif[ied] the law regarding this issue” and outlined the two-part test cited above. Id. at ¶ 14.

‘such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’” Radcliffe v. Akhavan, 875 P.2d 608, 612 (Utah Ct. App. 1994) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)) (additional citation omitted). Plaintiffs must, therefore, show that Bragagnolo “purposefully established minimum contacts within Utah, the forum state, such that [he] could reasonably anticipate being haled into court here,” in order to satisfy the due process prerequisite to Utah’s exercise of personal jurisdiction over him. Id. Plaintiffs have failed to make this showing.

- B. Plaintiffs’ allegations of Bragagnolo’s joint liability are insufficient alone to demonstrate that he has minimum contacts with Utah given his affidavit testimony contesting those allegations.

Plaintiffs’ argument that Bragagnolo has sufficient minimum contacts for a Utah court to properly exercise jurisdiction over him relies on two sets of allegations: (1) those alleging that Safety-Kleen has sufficient minimum contacts with Utah relative to issuance of the bonds to support a Utah court’s exercise of jurisdiction over it; and (2) those alleging that Bragagnolo acted as a control person of Safety-Kleen and had knowledge of, or control over, its issuance of the bonds and thus also has minimum contacts with Utah. (Br. of Appellants at 18)

Plaintiffs’ allegations of Bragagnolo’s status relative to Safety-Kleen are therefore essential to their jurisdictional claim. In practical terms, this means that whether Bragagnolo was a control person with knowledge of Safety-Kleen’s

wrongdoing is determinative of both Utah jurisdiction over Bragagnolo and Bragagnolo's liability. This Court has already "decide[d] how to proceed when jurisdiction turns on the same facts as the merits of the case." Anderson v. Am. Soc'y of Plastic & Reconstructive Surgeons, 807 P.2d 825, 826 (Utah 1990).

The approach taken by [this Court in such circumstances] is motivated by concern for flexibility, judicial economy, and preservation of substantial rights. In [the trial court's] discretion, . . . it may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. If it proceeds on documentary evidence alone (i.e., the first two methods), the plaintiff is only required to make a prima facie showing of personal jurisdiction. The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor.

Id. (emphasis added). More specifically, when a plaintiff "relie[s] on facts alleged in his unverified complaint for his assertion of jurisdiction" and the defendant responds with an "affidavit setting forth its version of the jurisdictional facts," on appeal, "the facts asserted in the affidavit are taken as true and the facts recited in the complaint are considered only to the extent that they do not contradict the affidavit." Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1121 (Utah 1992); see also Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1310 (Utah 1980) ("when jurisdiction is challenged, plaintiff cannot solely rely on allegations of jurisdiction in its complaint in

the face of an affidavit by defendant which specifically contradicts those general allegations”).

In this case, the allegations in Plaintiffs’ complaint relevant to whether Bragagnolo has minimum contacts with Utah by virtue of being a control person of Safety-Kleen are as follows: “[He] served at all relevant times as a Director, Executive Vice President and Chief Operating Officer of Safety-Kleen. Prior to the Merger, Bragagnolo held senior executive positions with LES. Bragagnolo served as a Director of Safety-Kleen . . . and he served as [Chief Operating Officer.]” (R. 19) Additionally, Plaintiffs alleged that Mr. Bragagnolo “substantively participated in the sale of [the] Bonds”; (R. 10) was “personally responsible for” the financial statements relied on by Plaintiffs; (R. 8) knew of facts that made the “financial statements false and misleading”; (R. 9) and had the power to influence or prevent the statements’ issuance (R. 8). (See generally 3-10)

Bragagnolo squarely contested these allegations by affidavit testimony:

4. I have never been a director of either Safety-Kleen or Laidlaw Environmental Services.
5. In my position at Safety-Kleen and Laidlaw Environmental Services, I did not have any management oversight or control over the accounting department.
6. I did not participate in the preparation of any of the financial statements, financial reports, or other financial documents alleged by plaintiffs to contain

untrue statements or to omit material facts, nor did I participate in the preparation of the offering memorandum, registration statement, or other SEC reports or filings referred to by plaintiffs in their complaint.

7. I was not responsible for any of the documents described in the preceding paragraph; did not sign any of those documents; and did not see any of them before they were made public.
8. I did not participate in the marketing or sale of the bonds complained of in this action; never discussed the sale or purchase of those bonds with any potential buyer; and did not make, authorize, or approve any representations made in connection with the sale of those bonds.
9. I have not been to Utah for any reason since leaving Safety Kleen. (R. 435)

He also gave affidavit testimony stating: “I am not now, nor have I ever been, a resident of the state of Utah.” (R. 313)

Plaintiffs failed to offer affidavits or other evidence countering Bragagnolo’s affidavits. Therefore, this Court takes “the facts asserted in [Bragagnolo’s] affidavit[s] . . . as true.” Arguello, 838 P.2d 1120. Because Plaintiffs’ jurisdictional theory depends on Bragagnolo being a director of Safety-Kleen with knowledge and/or control of that company’s alleged wrongdoing, and because the facts of Bragagnolo’s affidavit completely undermine that theory, this Court should affirm the trial court’s dismissal for lack of jurisdiction.

- C. Plaintiffs' jurisdictional argument based on Utah Code Ann. § 61-1-22(4) (2000) runs counter to due process by confusing jurisdiction with liability and by circumventing the jurisdictional requirement that each defendant be shown to have minimum contacts with the forum state.

Notwithstanding the foregoing, Plaintiffs contend that Bragagnolo must wait until trial, and there disprove his liability, in order to defeat jurisdiction. (Br. of Appellants at 18) Plaintiffs base their argument on Utah Code Ann. § 61-1-22(4) (2000), (Br. of Appellants at 19-21) which makes "a partner, an officer, a director, a person of similar status or function, or a seller of securities [of an entity in violation of section 61-1-1] . . . liable for violations committed by the entity unless that person proves the affirmative defense that he lacked knowledge of the unlawful acts." Steenblik v. Lichfield, 906 P.2d 872, 876 (Utah 1995).⁴ Plaintiffs insist that these bald allegations of liability under section 61-1-22(4) are a basis for jurisdiction. This is simply not the case.

⁴ Section 61-1-22(4) states in full:

[E]very partner, officer, or director of [a company in violation of section 61-1-1, as Safety-Kleen is alleged to be], every person occupying a similar status or performing similar functions, [and] every employee of such a seller or buyer [of securities] who materially aids in the sale or purchase . . . [of those securities is] also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Utah Code Ann. § 61-1-22(4) (2000).

As the Ninth Circuit explained in an analogous context: “Liability and jurisdiction are independent. Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant’s relationship with the forum. Regardless of their joint liability, jurisdiction over each defendant must be established individually.” Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) (citation omitted) (analyzing whether “jurisdiction over the partnership establishes jurisdiction over the partners” when “the liability of the partnership would establish the joint and several liability of each individual partner”). Indeed, “liability is not to be conflated with amenability to suit in a particular forum.” American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996) (holding that although a statute may make a parent company liable for its subsidiary’s tort in a particular state, that state is precluded from exercising jurisdiction over the parent company absent a showing of minimum contacts between the parent company and the state).

Case law authoritative to this jurisdiction accords with the two key principles articulated by the Ninth Circuit: (1) jurisdiction turns on the defendant’s relationship with the forum and not on whether a theory of liability has been plead; and (2) regardless of potential joint liability, “jurisdiction over each defendant must be established individually.” Sher, 911 F.2d at 1365. As to the first principle, this Court has also held that the “[r]elationship between the defendants and the forum” is

dispositive of the minimum contacts inquiry. Rhoades v. Wright, 622 P.2d 343, 346 (Utah 1980); accord Mallory Eng'g v. Ted R. Brown & Assoc., 618 P.2d 1004, 1007-08 (Utah 1980); see also Harnischfeger Engineers, Inc. v. Uniflo Conveyor, Inc., 883 F. Supp. 608, 614-15 (D. Utah 1995). As to the second principle, the United States Supreme Court has held that “[t]he requirements of International Shoe . . . must be met as to each defendant over whom a state court exercises jurisdiction.” Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 579 (1980).

These two principles evidence that “[p]ersonal jurisdiction has constitutional dimensions.” Am. Tel. & Tel., 94 F.3d at 591. Indeed, “the due process clause [is] the source of protection for non-resident defendants,” id., from being haled into court in a state with which they have “no contacts, ties, or relations.” Mallory, 618 P.2d at 1007. Plaintiffs assert that by pleading a prima facie case of Defendants’ joint liability with Safety-Kleen under section 61-1-22(4) they have established jurisdiction over each Defendant in Utah. This argument runs squarely counter to the protections of due process, which require that jurisdiction depend not on liability, and that jurisdiction be demonstrated for each defendant individually. This Court should, therefore, reject Plaintiffs’ section 61-1-22(4) argument as violative of due process and affirm the trial court’s dismissal for lack of jurisdiction.⁵

⁵ Plaintiffs emphasize the provision of section 61-1-22(4) that places the burden on a defendant to prove lack of knowledge of his company’s wrongdoing once his status as a control person has been established. (Br. of Appellants at 22) This provision has no

- D. Other courts that have addressed whether jurisdiction can be based on statutes analogous to section 61-1-22(4) have rejected the theory as violative of due process.⁶

In Schlatter v. Mo-Comm Futures, Ltd., 662 P.2d 553 (Kan. 1983), the Kansas Supreme Court was presented with the same argument Plaintiffs make here based on section 61-1-22(4). The operative language of Kan. Stat. Ann. § 17-1268(b) (Supp. 1982)⁷ is identical to that of Utah Code Ann. § 61-1-22(4) (2000). In Schlatter, it

bearing on liability before trial, let alone on jurisdiction. The burden to prove lack of knowledge attaches only after prima facie evidence of a defendant's status as a control person has been offered at trial. See Steenblik v. Lichfield, 906 P.2d 872, 877 (Utah 1995) ("If it is established that the defendant functioned in or occupied one of these positions, [then] the defendant has the burden of proving that he did not know[.]" (emphasis added)). Plaintiffs have not "established" that Bragagnolo was a control person of Safety-Kleen. Therefore, as yet he bears no burden of disproving his knowledge of wrongdoing. Clearly, the provision likewise does not create a presumption of jurisdiction that can only be rebutted at trial.

⁶ In an unpublished decision, the California Court of Appeals considered the same jurisdictional arguments raised by Plaintiffs here in an appeal from a California case involving the same plaintiffs and defendants as this case. See Eaton Vance Dist., Inc. v. Grainger, No. C040158, 2003 WL 1521896 (Cal. Ct. App. March 25, 2003). The California court rejected Plaintiffs' arguments as well. The Eaton Vance opinion is attached at Appendix F.

⁷ Kan. Stat. Ann. § 17-1268(b) (Supp. 1982) states:

Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that such nonseller did not know, and in the exercise of reasonable care could not have

was uncontested that the defendants were directors of a company that had violated Kansas's securities laws. Schlatter, 662 P.2d at 555-56. The defendants, however, moved to dismiss for lack of jurisdiction, as it was undisputed that they had no contacts with Kansas. Id. at 563. As here, despite their failure to dispute the defendant's lack of contacts with the state, the plaintiffs argued that Kan. Stat. Ann. § 17-1268(b) provided a basis for jurisdiction over the defendants. The Kansas court held that although the analogous Kansas statute provided a basis for the defendants' liability, it did not provide a basis for Kansas to assert jurisdiction over them:

It is true that the statute establishes the basis for liability of persons involved in the sale of unregistered securities but it does not establish the jurisdiction of the court to submit such persons to liability. In the present case the court must first have in personam jurisdiction of [the defendants] before the statutory liability may be applied. Jurisdiction depends upon [the long-arm statute] and the constitutional guarantees of due process as previously discussed.

Id. at 563. Plaintiffs attempt to distinguish Schlatter on the basis that it was uncontested in that case that the defendants had no minimum contacts with the state. However, by

known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

Highlighting the language "every partner, officer, or director . . . who materially aids in the sale," id., Plaintiffs claim that the Kansas statute "is materially different from the Utah statute in . . . its language." (Br. of Appellant's at 40) A simple reading of each statute shows that Plaintiffs are plainly mistaken. Section 61-1-22(4) also contains the language "every partner, officer, or director . . . who materially aids in the sale." Utah Code Ann. § 61-1-22(4) (2000).

failing to respond to Bragagnolo's affidavits in support of his motion to dismiss, Plaintiffs have likewise rendered his lack of minimum contacts with Utah an uncontested matter. See Anderson v. Am. Soc'y of Plastic & Reconstructive Surgeons, 807 P.2d 825, 826 (Utah 1990); Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1121 (Utah 1992); Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1310 (Utah 1980). Schlatter is therefore materially indistinguishable from this case on this issue.

The United States District Court for the District of Columbia has also stated that

to permit the exercise of jurisdiction based on no more than an allegation that the defendant controlled the entity which performed the act complained of . . . creates the very horrible . . . paraded: a lawsuit in any [jurisdiction] against a defendant, domiciled or doing business [anywhere] on the face of the earth, based on the purchase of [securities] and the mere allegation of control over the entity which performed the act complained of.

In re Baan Co. Sec. Litig., 81 F. Supp. 2d 75, 82 (D.D.C. 2000). Thus, as the Schlatter court explained, a plaintiff must demonstrate the forum court's jurisdiction over a defendant before any statutory liability may be applied. Furthermore, as the District of Columbia court stated, to allow jurisdiction on the basis of a joint liability statute would result in circumvention of the due process requirement to demonstrate the minimum contacts of each individual defendant. This Court should follow Kansas's and the

District of Columbia District Court’s lead and reject the notion that section 61-1-22(4), creating a theory of liability, also establishes jurisdiction.⁸

⁸ The whole of Plaintiffs’ brief confuses the issues of liability and jurisdiction. Thus, the majority of cases Plaintiffs cite from other jurisdictions in support of their argument based on section 61-1-22(4) address liability under statutes analogous to 61-1-22(4), not whether those statutes act as a basis for jurisdiction. See Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th Cir. 2000); Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 463 P.2d 770, 775 (Cal. 1970); Kamen v. Lindly, 94 Cal. App. 4th 197 (Cal. Ct. App. 2001); Courtney v. Waring, 191 Cal. App. 3d 1434 (Cal. Ct. App. 1987); Neptune Soc. Corp. v. Longanecker, 194 Cal. App. 3d 1233 (Cal. Ct. App. 1987); Sherman v. Lloyd, 181 Cal. App. 3d 693 (Cal. Ct. App. 1986); Bowden v. Robinson, 67 Cal. App. 3d 705 (Cal. Ct. App. 1977); Eastwood v. Froehlich, 60 Cal. App. 3d 523 (Cal. Ct. App. 1976); Boddy v. Theiling, 199 S.E.2d 379, 382 (Ga. Ct. App. 1973); Goelitz v. Lathrop, 3 N.E.2d 305, 314 (Ill. App. Ct. 1936).

The cases that Plaintiffs cite that do address jurisdictional issues in the context of statutes similar to section 61-1-22(4) are each distinguishable on their facts. The respective courts simply conclude that the plaintiffs met their burden of making a prima facie demonstration of minimum contacts—something Plaintiffs here failed to do when they did not respond to Bragagnolo’s affidavits—and that therefore jurisdiction was proper. See San Mateo County Transit Dist. v. Dearman, Fitzgerald & Roberts, Inc., 979 F.2d 1356, 1357-58 (9th Cir. 1992) (concluding that jurisdiction over a defendant was proper after the plaintiff produced a letter and deposition testimony supporting exercise of jurisdiction); McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628 (E.D. Tex. 1999) (engaging in fact-intensive analysis of jurisdictional issues after submission of affidavits by all parties); Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (concluding jurisdiction existed over non-resident defendants where the plaintiffs made a prima facie showing that the defendants were “controlling persons” of the company and the defendants apparently conceded as much); Landry v. Price Waterhouse Chartered Accountants, 715 F. Supp. 98, 100-02 (S.D.N.Y. 1989) (addressing jurisdictional issues after submission of affidavits of third-party plaintiffs); Seagate Tech. V. A.J. Kogyo Co., Ltd., 219 Cal. App. 3d 696, 699-700, 704-06 (Cal. Ct. App. 1990) (essentially concluding that, although the defendant submitted a “declaration” in support of his motion to dismiss as well as a letter referred to in his declaration, the facts in his declaration and related letter did not rebut the plaintiff’s prima facie showing of jurisdiction).

- E. Plaintiffs' argument based on Utah Code Ann. § 61-1-26(8)(a) (2000) misinterprets that statute as one creating a basis for jurisdiction without a showing of minimum contacts rather than as one providing merely an alternative means of serving process.

Plaintiffs assert that “[s]ection 61-1-26 of the Utah Code [also] grants Utah courts personal jurisdiction to enforce the securities laws.” (Br. of Appellants at 36)

They rely specifically upon subsection (8)(a) of section 61-1-26, which provides:

When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

Utah Code Ann. § 61-1-26(8)(a) (2000) (emphasis added).

This is a substitute service statute. It provides a means for serving process on, and thus “acquiring jurisdiction” over, an out-of-state defendant who cannot otherwise be served. Piantes v. Hayden-Stone, Inc., 30 Utah 2d 110, 514 P.2d 529, 530 (Utah 1973) (emphasis added). It does not grant a basis for personal jurisdiction that would circumvent the minimum contacts requirement. Cf. id. at 529-30 (addressing

whether the predecessor to section 61-126(8)(a) is “the exclusive method of acquiring jurisdiction” only after discussing the defendant’s minimum contacts).

Plaintiffs rely on two cases in support of their argument based on section 61-1-26(8)(a). Neither is apposite. In the first case, Am. Microtel, Inc. v. Secretary of State, 1995 WL 809575, 3 Mass. L. Rptr. 479 (Mass. Super. Ct.), Plaintiffs argue that “Massachusetts . . . interpreted this same provision in a Massachusetts’ statute . . . as extending jurisdiction over an individual who claimed that he had done no act and had engaged in no conduct within the jurisdiction of the state.” (Br. of Appellants at 37-38) Microtel, however, was a case in which, after taking evidence at an administrative hearing, the hearing officer found that the defendant controlled two companies in violation of Massachusetts securities law, and thus implicitly concluded that he had established minimum contacts with the state. See id. at *10. Jurisdiction having been demonstrated, the Microtel court therefore concluded that service of process under Massachusetts’s analog to section 61-1-26 was a permissible means of acquiring jurisdiction in the administrative proceedings. See id. at **10-11.

Plaintiffs also argue that “in Brown v. Inv. Management & Research, Inc., [475 S.E.2d 754 (S.C. 1996)], the South Carolina Supreme Court interpreted a statutory provision identical to Utah Code Ann. § 61-1-26(8) to mean that violations of that state’s securities provisions ‘as a matter of law . . . submitted [Appellees] to personal jurisdiction in South Carolina.’ Id. at [757].” (Br. of Appellants at 38) Plaintiffs

quotation of Brown is misleading. The South Carolina court actually “[held] as a matter of law that in selling securities in this state, Respondents submitted to personal jurisdiction in South Carolina.” Id. (emphasis added). The Brown court held that the defendants actually sold securities in South Carolina. Therefore, the court first concluded that the respondents had established minimum contacts with South Carolina and then applied their analog to section 61-1-26(8)(a) simply to acquire jurisdiction over those respondents.

The record is silent as to whether Plaintiffs used section 61-1-26(8)(a)’s alternative means for serving process on Bragagnolo, and at any rate, section 61-1-26(8)(a) clearly is not intended as a basis for jurisdiction. If all that were required as a basis for jurisdiction was for plaintiffs to serve process, the minimum contacts requirement would be rendered meaningless. Section 61-1-26(8)(a) provides an alternate means of service on a non-resident defendant when a basis for jurisdiction over that defendant has already been demonstrated. Plaintiffs have failed to demonstrate that Bragagnolo established minimum contacts with Utah. Therefore, service of process on him, by whatever means, was ineffectual to confer personal jurisdiction over him in Utah. Accordingly, this Court should reject Plaintiffs’ jurisdictional argument based on section 61-1-26(8)(a) and affirm the trial court’s dismissal for lack of jurisdiction.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's dismissal of Plaintiffs' complaint as to Bragagnolo for lack of jurisdiction.

DATED this 23 day of June, 2003.

SUITTER AXLAND

By: 

Michael W. Homer

Jesse C. Trentadue

Paul C. Farr

John D. Luthy

Attorneys for Defendant / Appellee

Michael J. Bragagnolo

CERTIFICATE OF SERVICE,

I HEREBY CERTIFY that ² ~~a~~ true and correct ^{Copies} ~~copy~~ of the foregoing **BRIEF OF APPELLEE MICHAEL J. BRAGAGNOLO** was mailed, first class United States mail, postage prepaid, on this 23 day of June, 2003, to the following:

Scott Walker, Esq.
Abbott & Walker
3651 North, 100 East, Suite 300
Provo, UT 84604
Attorneys for Plaintiffs

Richard M. Heimann, Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center W
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Attorneys for Plaintiffs

Mark O. Morris, Esq.
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, UT 84101-1004
Attorneys for Defendant Henry H. Taylor

William R. Warne, Esq.
Tory E. Griffin, Esq.
Downey, Brand, Seymour & Rohwer LLP
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686
Attorneys for Defendant Henry H. Taylor

Andrew G. Deiss, Esq.
Williams & Hunt
275 East 200 South, Suite 500
Salt Lake City, UT 84145-5678
Attorneys for Defendants James R. Bullock, John R. Grainger and Leslie W. Haworth

E. Barney Gesas, Esq.
Clyde, Snow, Sessions & Swenson, P.C.
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, UT 84111-2216
Attorneys for Defendants David E. Thomas, Jr., John W. Rollins, Jr., John W. Rollins, Sr., James L. Wareham, Grover C. Wrenn, and Henry B. Tippie


G:\7099\2\BRIEF.wpd

ADDENDUM A

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CODE ANNOTATED

61-1-22. Sales and purchases in violation — Remedies — Limitation of actions.

(1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1), Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

(b) Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4) (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(b) There is contribution as in cases of contract among the several persons so liable.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) A cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(7) (a) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first.

61-1-22 cont

- (b) No person may sue under this section if
 - (i) the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt, or
 - (ii) the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt
- (8) No person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract
- (9) A condition, stipulation or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void
- (10) (a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity
 - (b) This chapter does not create any cause of action not specified in this section or Subsection 61-1-4(6)

61-1-26. Scope of the act — Service of process.

- (1) Section 61-1-1, Subsection 61-1-3(1), Sections 61-1-7, 61-1-15 5, 61-1-17, and 61-1-22 apply to persons who sell or offer to sell when
 - (a) an offer to sell is made in this state, or
 - (b) an offer to buy is made and accepted in this state
- (2) Section 61-1-1, Subsection 61-1-3(1), and Section 61-1-17 apply to persons who buy or offer to buy when
 - (a) an offer to buy is made in this state, or
 - (b) an offer to sell is made and accepted in this state
- (3) For the purposes of this section, an offer to sell or to buy is made in this state whether or not either party is then present in this state, when the offer
 - (a) originates from this state, or
 - (b) is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer
- (4) For the purposes of this section, an offer to sell or to buy is accepted in this state when acceptance
 - (a) is communicated to the offeror in this state, and
 - (b) has not previously been communicated to the offeror, orally or in writing, outside this state, and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance
- (5) An offer to sell or to buy is not made in this state when
 - (a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than $\frac{2}{3}$ of its circulation outside this state during the past 12 months, or
 - (b) a radio or television program originating outside this state is received in this state
- (6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state

(7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent

(b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another

(c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows

(8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally

(b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last-known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend

ADDENDUM B

MARK O. MORRIS (4636)
SNELL & WILMER LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

FILED
JRD DISTRICT COURT TOOELE

02 JUN 19 PM 5:30

FILED BY _____

WILLIAM R. WARNE (Cal. Bar No. 141280)
TORY E. GRIFFIN (Cal. Bar No. 186181) (admitted in Utah *pro hac vice*)
DOWNEY, BRAND, SEYMOUR & ROHWER LLP
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686
Telephone: (916) 441-0131
Facsimile: (916) 441-4021

Attorneys for Defendant
HENRY H. TAYLOR

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

MFS SERIES TRUST III (on behalf of MFS
MUNICIPAL HIGH INCOME FUND),
MERRILL LYNCH HIGH YIELD
MUNICIPAL BOND FUND, INC.,
MUNIHOLDINGS FUND, INC., MERRILL
LYNCH MUNICIPAL BOND FUND, THE
NATIONAL PORTFOLIO, MERRILL
LYNCH MUNICIPAL STRATEGY FUND,
EATON VANCE DISTRIBUTORS, INC.,
T. ROWE PRICE ASSOCIATES, INC.,
JOHN HANCOCK FUNDS, INC., AND
PUTNAME INVESTMENTS, INC.,

Plaintiffs,

— v.

KENNETH W. WINGER, JOHN R.
GRAINGER, JAMES R. BULLOCK, PAUL
R. HUMPHREYS, JOHN W. ROLLINS,
SR., JOHN W. ROLLINS, JR., LESLIE W.
HAWORTH, DAVID B. THOMAS, JR.
HENRY B. TIPPIC, JAMES L.
WAREHAM, GROVER C. WRENN,
MICHAEL J. BRAGAGNOLO, and
HENRY H. TAYLOR,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

Case No. 01-300722MI

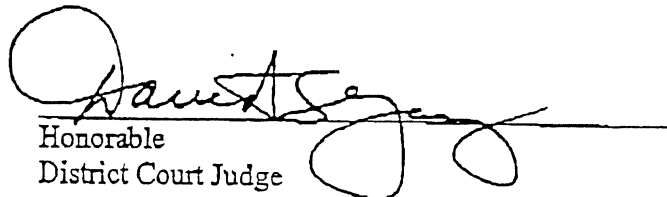
Honorable David S. Young

Defendants Henry H. Taylor; John R. Grainger; James R. Bullock; Leslie W. Haworth; John W. Rollins, Sr.; John W. Rollins, Jr.; David E. Thomas, Jr.; Henry B. Tippie; James L. Wareham; Grover C. Wrenn and Michael J. Bragagnolo's Motions to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction came on for regularly scheduled hearing on Monday, May 13, 2002, at approximately 2:00 p.m. Counsel for the plaintiff and for the moving defendants made their appearances on the record. Based upon the memoranda of law, oral argument of counsel, and for good cause shown.


IT IS HEREBY ORDERED that all of the defendants' Motions to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction are hereby granted, and Plaintiffs' Complaint is hereby dismissed as to these defendants without prejudice to re-filing in an appropriate forum, but with prejudice to re-filing in Utah.

DATED this 17th June day of May, 2002.


BY THE COURT


Honorable
District Court Judge

APPROVED AS TO FORM



Scott Walker
Abbott & Walker
3651 North 100 East, Suite 300
Provo, UT 84564

Attorneys for Plaintiffs



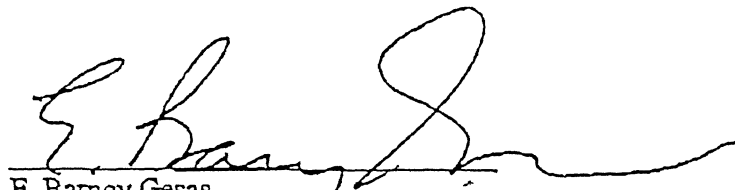
J. Rand Hirschi
Sutcliffe Axland
175 South West Temple, Suite 700
Salt Lake City, UT 84101-1380

Attorneys for Defendant Michael Braganolo



Andrew G. Deiss
Williams & Hunt
275 East 200 South, Suite 500
Salt Lake City, UT 84145-5678

Attorneys for Defendants James R. Bullock, John
R. Grainger and Leslie W. Haworth



E. Barney Gesas
Clyde, Snow, Sessions & Swenson, P.C.
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216

Attorneys for Defendants David E. Thomas, Jr.,
John W. Rollins, Jr., John W. Rollins, Sr.,
James L. Wareham, Grover C. Wrenn, and
Henry B. Tippie

ADDENDUM C

01300722MI

5157-12774

01 JUL - 2 11:05

COPY

Dan Chiplock

212-3559500

1 Scott Walker
2 ABBOTT & WALKER
3 3651 North, 100 East, Suite 300
4 Provo, UT 84604
5 Telephone: (801) 373-1112
6
7 Richard M. Heimann (of counsel)
8 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
9 Embarcadero Center West
10 275 Battery Street, 30th Floor
11 San Francisco, California 94111-3999
12 Telephone: (415) 956-1000
13
14 Thomas M. Sobol (of counsel)
15 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
16 214 Union Wharf
17 Boston, MA 02109-1216
18 Telephone: (617) 720-5000
19
20 Attorneys for Plaintiffs

IN THE THIRD DISTRICT, COUNTY OF TOOELE,
STATE OF UTAH

Toole

14 MFS SERIES TRUST III (on behalf of MFS)
15 MUNICIPAL HIGH INCOME FUND),)
16 MERRILL LYNCH HIGH YIELD)
17 MUNICIPAL BOND FUND, INC.,)
18 MUNIHOLDINGS FUND, INC., MERRILL)
19 LYNCH MUNICIPAL BOND FUND, THE)
20 NATIONAL PORTFOLIO, MERRILL)
21 LYNCH MUNICIPAL STRATEGY FUND,)
22 EATON VANCE DISTRIBUTORS, INC.,)
23 ROWE PRICE ASSOCIATES, INC., JOHN)
24 HANCOCK FUNDS, INC., and PUTNAM)
25 INVESTMENTS, INC.)

Plaintiffs,

Case No. _____

COMPLAINT FOR VIOLATION OF
THE UTAH SECURITIES ACT AND
FOR COMMON LAW FRAUD AND
NEGLIGENT
MISREPRESENTATION

DEMAND FOR JURY TRIAL

v

22 KENNETH W WINGER, JOHN R
23 GRAINGER, JAMES R. BULLOCK,
24 PAUL R. HUMPHREYS, JOHN W
25 ROLLINS, SR., JOHN W ROLLINS, JR.,
26 LESLIE W HAWORTH, DAVID B
27 THOMAS, JR., HENRY B TIPPLE, JAMES
28 L WAREHAM, GROVER C WRENN,
MICHAEL J BRAGAGNOLO, and HENRY
H. TAYLOR,

Defendants

1
2 Plaintiffs make the following allegations on information and belief, based upon the
3 investigation by their counsel which has included review and analysis of public statements,
4 publicly-filed documents, press release and news articles, analysts' statements, relevant
5 accounting rules and related literature, and other investigations except for those allegations that
6 pertain to the Plaintiffs' personal circumstances, such allegations being made on their personal
7 knowledge:

8 NATURE OF THIS ACTION

9 1. Plaintiffs bring this action on behalf of themselves as purchasers or acquirers
10 of certain bonds issued by Tooele County ("the County") on July 1, 1997, secured by a loan
11 agreement for which Laidlaw Environmental Services, Inc. ("LES") and its successor Safety-Kleen
12 Corp. ("Safety-Kleen" or the "Company") was the primary obligor, and retained through March 6,
13 2000 ("the relevant time period") in reliance upon LES' and the Company's materially false and
14 misleading financial statements. These bonds were entitled Pollution Control Refunding Revenue
15 Bonds, due July 1, 2007 (the "Bonds"). This action alleges that Defendants made written or oral
16 communications containing material false statements or omissions about LES' and Safety-Kleen's
17 business, finances, and future prospects in connection with the offer for sale of those Bonds, and
18 that Plaintiffs bought and retained the Bonds in reliance on said statements and were injured
19 thereby.

20 JURISDICTION AND VENUE

21 2. This Court has jurisdiction, under U.C.A. 1953 s. 78-27-24, over the claims
22 asserted herein under the Utah Securities Act, U.C.A. 1953 s. 61-1-1 et. seq., which have been
23 brought to recover damages that Plaintiffs have sustained as a result of Defendants' willful
24 participation in activities violative of section 61-1-1(2) of that Act. The court similarly has
25 jurisdiction over common law claims arising out of the same facts under U.C.A. 1953 s. 78-27-24

26 3. Venue as to these claims is proper pursuant to U.C.A. 1953 s. 78-13-7,
27 whereby the Parties to the indenture of trust securing the Bonds contracted for the performance of
28

1 the indentures in Toole County, and contracted that this county was the available fora wherein
2 causes of action relating to these Bonds should be filed.

3 **THE PARTIES**

4 4. Plaintiff MFS Series Trust III is a Massachusetts business trust, of which
5 MFS Municipal High Income Fund is a series Massachusetts Financial Services Company, with
6 principal offices at 500 Boylston St., Boston, MA 02116, is the investment advisor to MFS
7 Municipal High Income Fund.

8 5. Merrill Lynch High Yield Municipal Bond Fund, Inc., MuniHoldings Fund,
9 Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio, and Merrill Lynch Municipal
10 Strategy Fund are funds incorporated in Maryland and managed by Merrill Lynch Investment
11 Managers, L.P., with principal offices at 800 Scudders Mill Road, Plainsboro, NJ 08536.

12 6. Eaton Vance Distributors, Inc. is an institutional purchaser of the Bonds, and
13 is an investment management company incorporated in Massachusetts, with principal offices at 24
14 Federal Street, Boston, MA 02110.

15 7. T Rowe Price Associates, Inc. is an institutional purchaser of the Bonds, and
16 is a Maryland corporation with principal offices at 100 East Pratt Street, Baltimore, MD 21202

17 8. John Hancock Funds, Inc. is an institutional purchaser of the Bonds, and is a
18 Delaware corporation with offices at 101 Huntington Avenue, Boston, MA 02199.

19 9. Putnam Investments, Inc. is an institutional purchaser of the Bonds, and is a
20 Massachusetts corporation with offices at 1 Post Office Square, Boston, MA 02109.

21 10. Safety-Kleen Corp., a non-defendant in this action, is a Delaware corporation
22 having its principal executive offices at 1301 Gervais Street, Suite 300, Columbia, SC 29201.
23 Safety-Kleen provides industrial waste services designed to collect, process, recycle and dispose of
24 hazardous and industrial waste streams. The Company provides these services from approximately
25 280 collection and processing locations in 45 states and seven Canadian provinces. On June 9,
26 2000, Safety-Kleen filed a chapter 11 petition under the United States Bankruptcy Code in the
27 Bankruptcy Court for the District of Delaware and thus is a non-defendant in this action at this time
28

11. The current Safety-Kleen was formed when LES acquired all of the outstanding capital stock of the former Safety-Kleen Corporation ("Old Safety Kleen") in a tender offer and subsequent merger completed in May 1998 (the "Merger"). As part of the Merger, the entire Board of Old Safety Kleen was replaced by directors of LES, including Defendants Bullock and Winger, who assumed management control over the Company. LES subsequently announced on June 22, 1998 that effective July 1, 1998 it would begin doing business as Safety-Kleen under the NYSE ticker symbol "SK". On November 25, 1998, LES officially changed its name to Safety-Kleen Corporation.

12. Laidlaw Inc ("Laidlaw"), a non-defendant in this action, is an Ontario, Canada corporation, with 87 subsidiary or affiliate corporations in the State of Delaware, which owns approximately 44% of Safety-Kleen common stock. On May 15, 1997, Laidlaw merged its hazardous waste services business into Rollins Environmental Services, Inc. ("Rollins"), which was renamed LES. The consideration received in this transaction consisted of: (i) \$400 million in cash and assumption of debt, (ii) 120 million common shares of LES, and (iii) a \$350 million 12 year 5% Convertible Debenture, resulting in a 67 percent ownership of LES by Laidlaw prior to the Merger which created Safety-Kleen Corp. On June 28, 2001, Laidlaw filed a chapter 11 petition under the United States Bankruptcy Code in the Bankruptcy Court for the Western District of New York, and thus is a non-defendant in this action at this time.

13. Defendant Kenneth W. Winger ("Winger") served as President, Chief Executive Officer and a Director of Safety-Kleen since the Merger, and held the same positions at LES from May 1997 until the Merger. Winger served as a Director of Safety-Kleen until the Board placed him on administrative leave on or about March 6, 2000, and he served as CEO until he resigned on or about May 12, 2000. As of October 18, 1999, Winger beneficially owned 42,326 shares of the Company's common stock.

14. Defendant Paul R. Humphreys ("Humphreys") was the Company's Senior Vice President, Finance and Chief Financial Officer since the Merger. Prior to the Merger, Humphreys held senior executive positions at LES. Humphreys served as a Director of Safety-Kleen until the Board placed him on administrative leave on or about March 6, 2000, and he served

1 as CFO until he resigned on or about May 12, 2000. As of October 18, 1999, Humphreys
2 beneficially owned 9,000 shares of the Company's common stock.

3 15. Defendant Michael J. Bragagnolo ("Bragagnolo") served at all relevant times
4 as a Director, Executive Vice President and Chief Operating Officer of Safety-Kleen. Prior to the
5 Merger, Bragagnolo held senior executive positions with LES. Bragagnolo served as a Director of
6 Safety-Kleen until the Board placed him on administrative leave on or about March 6, 2000, and he
7 served as COO until he resigned on or about May 12, 2000.

8 16. Defendant James R. Bullock ("Bullock") was the Chairman of the Board and
9 a Director of Safety-Kleen since the Merger, until he resigned from those positions on or about
10 January 25, 2000. Bullock was also Chairman of the Board of Directors of LES from 1997, through
11 the Merger, and is currently a Director and an executive officer of Laidlaw Inc. ("Laidlaw")

12 17. Defendant John R. Grainger ("Grainger") served as a Director of LES since
13 1997, when he was also President, Chief Executive Officer, and a director of Laidlaw at all relevant
14 times.

15 18. Defendant John W. Rollins, Sr. ("Rollins, Sr.") served at all relevant times as
16 a Director of Safety-Kleen and LES until he died on April 4, 2000.

17 19. Defendant Leslie W. Haworth ("Haworth") served as a Director of LES since
18 May 1997 and later of Safety-Kleen. He also served as an executive officer of Laidlaw. Haworth
19 served as the Chairman of the Audit Committee of the Board of Safety-Kleen until March 23, 1999.

20 20. Defendant John W. Rollins, Jr. ("Rollins, Jr.") served at all relevant times as
21 a Director of Safety-Kleen and LES. Rollins, Jr. is a member of the Human Resources and
22 Compensation Committee of the Board of Safety-Kleen.

23 21. Defendant David B. Thomas, Jr. ("Thomas") served as a Director of
24 Safety-Kleen and LES since June 1997. Thomas is a member of the Human Resources and
25 Compensation Committee of the Board of Safety-Kleen.

26 22. Defendant Henry B. Tippie ("Tippie") served as a Director of Safety-Kleen
27 and LES since 1997. Tippie is the Chairman of the Audit Committee of the Board of Safety-Kleen.
28

1 23. Defendant James L. Warcham ("Wareham") served at all relevant times as a
2 Director of Safety-Kleen and LES since June 1997. Wareham is a member of the Audit Committee
3 of the Board of Safety-Kleen.

4 24. Defendant Grover C. Wrenn ("Wrenn") served at all relevant times as a
5 Director of Safety-Kleen, and as a Director of LES since July 1997. Wrenn is a member of the Audit
6 Committee of the Board of Safety-Kleen.

7 25. Defendant Henry H. Taylor ("Taylor") served at all relevant times as a
8 Director, Vice President, General Counsel and Secretary of Safety-Kleen, and as a Director of LES
9 since May 1997.

10 26. The Defendants listed in paragraphs 13 through 25 are referred to collectively
11 herein as the "Individual Defendants."

12 27. Each Defendant had the opportunity to commit and participate in the
13 misconduct alleged. The Individual Defendants were among the top officers of Safety-Kleen who
14 controlled its press releases, corporate reports, United States Securities and Exchange Commission
15 ("SEC") filings, and its communications with analysts. Thus, they were among those who
16 controlled the public dissemination of, and could falsify, the information about Safety-Kleen's
17 business, products, financial results, and future prospects that reached the Plaintiffs and affected the
18 price of the Bonds complained of herein.

19 SUBSTANTIVE FACTUAL ALLEGATIONS

20 Background: The Acquisitions forming Safety-Kleen

21 28. In May, 1997, Rollins Environmental Services, Inc. ("Rollins"), the largest
22 commercial hazardous waste incineration company in North America, acquired Laidlaw Inc.'s
23 hazardous and industrial waste operations (the "Rollins Acquisition"). Upon consummation of the
24 Rollins Acquisition, which was accounted for as a reverse acquisition, Rollins changed its name to
25 Laidlaw Environmental Services, Inc. to finance the Rollins Acquisition, LES: (i) issued
26 120 million shares of LES Common Stock, (ii) issued a \$350.0 million 5% subordinated convertible
27 pay-in-kind debenture (the PIK Subordinated Debenture") and (iii) paid \$349.1 million in cash to
28 Laidlaw Inc. ("Laidlaw").

1 29. In April 1998, LES acquired by means of a tender offer approximately 94%
2 of the common stock of the Old Safety Kleen, to be followed by a short-form merger in which the
3 remaining outstanding shares of the former Safety-Kleen Corporation would be acquired by LES
4 (together the "Safety-Kleen Acquisition").

5 30. In May, 1998, LES consummated the Safety-Kleen Acquisition. The
6 aggregate consideration of the Safety-Kleen Acquisition was approximately \$1.1 billion in cash and
7 the issuance of approximately 168 million shares of Common Stock of LES.

8 31. Pursuant to the Merger Agreement, Laidlaw was entitled to designate to the
9 Safety-Kleen Board the number of directors as would make the percentage of directors designated
10 by Laidlaw approximately equal to the aggregate voting power of the Safety-Kleen shares held by
11 Laidlaw. Accordingly, following the merger, seven former directors of Old Safety Kleen resigned
12 from their positions on the Board and Laidlaw designated as replacements Winger, Bullock, Rollins,
13 Thomas, Wareham, Wrenn and Haworth, and these designees were all elected as directors of the
14 Company.

15 **LES' and Safety-Kleen's Fraudulent Accounting Practices**

16 32. On March 6, 2000, Safety-Kleen announced that it had uncovered material
17 "accounting irregularities" in its financial reports, leading it to place its three top executives --
18 Defendants Kenneth W. Winger ("Winger"), Michael Bragagnolo ("Bragagnolo") and Paul R.
19 Humphreys ("Humphreys") -- on leave while a Special Committee appointed by Safety-Kleen's
20 Board of Directors ("the Board") investigated the extent to which the Company would need to
21 restate its financial reports dating back at least to the end of fiscal year 1998. Winger, Bragagnolo
22 and Humphreys all subsequently resigned as officers and directors of the Company.

23 33. In its March 6, 2000 announcement, the Company admitted that its
24 previously reported financial results from as early as the end of 1997 had been materially misstated.
25 Indeed, the next day, PricewaterhouseCoopers LLP, the Company's accountant "orally advised
26 [Safety-Kleen] that it was withdrawing its previously issued reports on the financial statements of
27 the registrant for the years ended August 31, 1999, 1998 and 1997." These opinions had stated that
28 Safety-Kleen's financial statements for fiscal years 1997, 1998, and 1999 had been prepared in

1 conformity with Generally Accepted Accounting Principles ("GAAP"). As such, the financial
2 statements published by the Company and upon which Plaintiffs relied in purchasing the bonds
3 were withdrawn by the Company's accountants. In response, the value of the Bonds which
4 Plaintiffs purchased plunged dramatically.

5 34. Indeed, the Company's financial statements for the fiscal years 1997, 1998,
6 and 1999, as well as the first quarter of fiscal 2000, had improperly recognized revenue in violation
7 of the Company's own revenue recognition policy and GAAP.

8 35. GAAP are those principles recognized by the accounting profession as the
9 conventions, rules and procedures necessary to define accepted accounting practice at a particular
10 time. Regulation S-X (17 C.F.R. §210.4-01(a)(1)) states that financial statements filed with the SEC
11 which are not prepared in accordance with GAAP are presumed to be misleading and inaccurate.
12 Regulation S-X also requires that interim financial statements comply with GAAP 17 C.F.R. §
13 210.10-01(a).

14 36. Beginning in 1997 or earlier, the defendants caused LES to artificially inflate
15 its reported revenue and income by a wide variety of fraudulent practices. In each case, LES and
16 later Safety-Kleen reported revenue and income in a manner not in conformity with GAAP.
17 Following are some of the particular fraudulent practices that defendants employed:

18 A. Liability Reserves

19 37. Both LES' and Safety-Kleen's landfills were divided into "cells," with each
20 cell capable of handling a particular volume of waste. Old Safety-Kleen, LES, and other
21 predecessors of LES were required under GAAP to provide reserves to cover the environmental
22 costs of closing each cell. The amount of the reserves for closing costs that Old Safety-Kleen
23 provided for each cell was based in part on the total upfront construction cost of a cell. Old
24 Safety-Kleen's engineering department and fixed assets department calculated this figure. Through
25 the life of the cell, Old Safety-Kleen were required to amortize the closing costs and expense the
26 amount of amortization, reducing the Company's reserves by the same amount.

27 38. Beginning in 1997 or earlier, without any factual justification, LES reduced
28 the amount of its own environmental reserves to levels below that Company's actual probable

1 environmental liabilities. The amounts of these reductions were added to LES' reported income.
2 Following the Merger, Safety-Kleen's environmental reserves were reduced to levels below the new
3 Company's actual probable environmental liabilities and the amounts of the fraudulent reductions
4 were included in Safety-Kleen's reported income, which was overstated by those amounts. The
5 decision to reverse the reserves was made by Safety-Kleen's CFO, defendant Wiager.

6 B. Extended Amortization

7 39. As part of its retrieval and clean up of oil, fluids and chemicals, Old
8 Safety-Kleen had parts cleaners and other equipment placed at customers' locations, as well as at
9 the Company's own treatment centers and landfills. Companies in the waste management business
10 are required to depreciate the cost of its equipment over their actual useful lives, as required by
11 GAAP

12 40. During the relevant time period, the "useful lives" used to calculate
13 depreciation of existing customer premises equipment were lengthened from five to twenty years,
14 which grossly exceeded the actual economic lives of the equipment, with the purpose and effect of
15 artificially increasing reported earnings, by decreasing reported expenses.

16 C. Two Kinds of Double Billing

17 41. One of Safety-Kleen's basic services is the retrieval and either recycling or
18 destruction of oil, fluids and chemical. Typically the Company has a driver from one of its branches
19 retrieve waste material and deliver it to a division facility for a few days (generally less than 10).
20 The branch then sent the waste to a recycling plant, a landfill or an incinerator.

21 42. Safety-Kleen (and Old Safety-Kleen before it) billed its customers for oil,
22 fluids and chemicals that the Company cleans up and retrieves for recycling. Bills were sent to the
23 customers by the branch that handles the service contract. The recycling plant, landfill or incinerator
24 would bill the division that retrieved the waste for its costs. These costs were deducted from the
25 Branch Operating Allowance -- an account used to pay intercompany billing. In some instances, the
26 amount of both bills were fraudulently included in Safety-Kleen's reported revenue and income,
27 even though one of them was simply an intercompany account which would not result in any actual
28 income to the consolidated company.

1 43. Safety-Kleen also introduced a simpler form of double billing in fiscal 1998.
2 It simply mailed bills to its customers twice, and accounted for both bills as income. Many
3 customers complained, and in some individual cases the Company made accounting adjustments,
4 but the Company continued this practice through the end of the relevant time period.

5 44 Since customers would pay only once, the effect of both kinds of double
6 billing was to inflate Safety-Kleen's accounts receivables and assets as well as its reported revenue.

7 45. Beginning in late 1998 and continuing in 1999, four senior vice presidents in
8 charge of Safety-Kleen's regional sales and operations in the United States reported these problems
9 to defendant Bragagnolo at monthly conference calls, usually held around the tenth of the month.
10 The Senior Vice Presidents also discussed these problems with defendants Winger and Humphreys,
11 who joined many of the monthly conference calls. Those defendants responded to the mounting
12 reports by dismissing them as "isolated incidents."

13 D. The Systems Conversion

14 46. Beginning immediately after the Merger, LES accounting systems were
15 found not to be equipped to handle Safety-Kleen transactions. Moreover, after the Merger, the
16 insider Defendants terminated Old Safety-Kleen's experienced accounting personnel. As a result,
17 during the Summer of 1998, Safety-Kleen missed meeting its weekly payroll four times because it
18 could not process the paychecks. Even though the Company failed to make its payroll as a result of
19 personnel firings and systems conversions, the Insider Defendants pressed on with their conversion
20 of Old Safety-Kleen's accounting systems.

21 47. Old Safety-Kleen's principal accounting system was the BAP (Branch
22 Automated Processing) computer system. BAP had been designed solely for Old Safety-Kleen, and
23 by the time of the Merger, Old Safety-Kleen was in a second generation of BAP - known as "Daddy
24 BAP" by Company personnel. The BAP had Company pricing and revenue information contained
25 in the system. On a daily basis, Old Safety-Kleen branch personnel would enter each day's work
26 onto the BAP from service representatives control sheets with tickets for customer services. That
27 information was then downloaded to the accounting department.

28

1 48. After the Merger, the Insider Defendants forced Old Safety-Kleen to convert
2 its accounting systems (most importantly the BAP), which handled 500,000 customers and 5 million
3 transactions per year, to LES' accounting system (PeopleSoft), which had only been used for 15,000
4 customers and 150,000 transactions per year. The LES system, however, was not equipped to
5 handle the increase of millions of transactions.

6 49. Indeed, during and after the PeopleSoft conversion, Safety-Kleen had a
7 materially significant problem with accounts receivable because the new system could not tell
8 which customers had paid their invoices. In one Illinois branch, there were about \$2 million worth
9 of invoices that had been paid but could not be reconciled to specific customers. Safety-Kleen
10 blindly deposited the checks and kept billing its customers. When customers complained,
11 Safety-Kleen branch personnel were directed to tell their customers as little as possible and state
12 that it was an isolated incident, even though the branch personnel knew otherwise.

13 B. The Internal Audit Finds Completely Fictitious Revenue Entries

14 50. In January, 2000, Defendant Tippie approached Greg Williamson,
15 SafetyKleen's internal audit director, and requested an internal audit due to Tippie's concerns about
16 the Company's reported revenues.

17 51. Three internal auditors, Arliss Herrera ("Herrera"), Anthony Holden
18 ("Holden"), and Alan Townsend ("Townsend"), reviewed the Company's revenues from August
19 1999 through February 2000 and determined that they were overstated. They further reviewed the
20 Company's revenues and discovered that revenues, for fiscal years 1997 through 1999 were also
21 overstated. The three auditors calculated that the total overstatement ran in excess of hundreds of
22 millions of dollars.

23 52. Herrera, Holden and Townsend found journal entries that were made to
24 increase revenues, but had nothing to do with billing. They were strictly paper entries for which no
25 money was ever exchanged. Indeed, it was Herrera, Holden and Townsend who found the phantom
26 \$500,000 to \$20 million entries. Herrera, Holden and Townsend never found any supporting
27 documentation for the bogus entries
28

1 53. The internal audit was completed within three weeks of Tippie's request to
2 Williamson. Upon completing their work, Herrera, Holden and Townsend transmitted their results
3 to Williamson, who prepared a formal report that was submitted to the Audit Committee of the
4 Board of Directors.

5 54. When word leaked that Herrera, Holden and Townsend had discovered
6 massive overstatements of revenue, the Company's Controller, William Ridings went to the Board
7 meeting on March 4, 2000, announced himself as a whistleblower, and proceeded to disclose to the
8 Board that financial fraud had occurred at Safety-Kleen.

9 55. Within two days, defendants Winger, Humphreys, and Bragagnolo were
10 placed on administrative leave pending the results of a larger investigation into accounting
11 irregularities at Safety-Kleen.

12 56. On March 7, 2000, the Company announced that PWC "was withdrawing its
13 previously issued reports on the financial statements of Safety-Kleen for the years ended August 31,
14 1999, 1998 and 1997" and publicly announced that those financial statements would be restated.

15 57. By definition (see Accounting Principles Board Opinion No. 20), a
16 restatement of financial statements means that those financial statements when issued were
17 materially false.

18 58. By announcing the future restatement of its financial statements,
19 Safety-Kleen (previously LES) has admitted that the representations made in the financial
20 statements for fiscal years ended August 31, 1997, 1998, and 1999, as well as the first quarter of
21 fiscal 2000, were materially false and misleading when made. APB No. 20 ¶ 13.

22 59 The Offering Memorandum accompanying the Bonds purchased by Plaintiffs
23 in the Utah issuances dated July 1997 incorporated, inter alia, directly or by reference: Laidlaw,
24 Inc.'s Quarterly Report on Form 10-Q for the first quarter ended November 30, 1996, Laidlaw,
25 Inc.'s Quarterly Report on Form 10-Q for the second quarter ended February 28, 1997; LES'
26 Reports on Form 8-K dated May 30, 1997 and June 11, Pro Forma Condensed Combined Summary
27 Financial Data for Rollins Environmental Services, Inc. and Laidlaw Subsidiaries (including LES)
28 for the six months ended February 28, 1997; Pro Forma Combined Financial Statements and

1 Statement of Operations for Rollins Environmental Services, Inc. and Laidlaw Subsidiaries for the
2 six months ended February 28, 1997; Laidlaw Hazardous Waste Services Management's Discussion
3 and Analysis of Financial Condition and Results of Operations for the six months ended February
4 28, 1997, Laidlaw Hazardous Waste Services Combined Statements of Income for the six months
5 ended February 28, 1997, and Laidlaw Hazardous Waste Services Combined Statements of Cash
6 Flows for the six months ended February 28, 1997. Laidlaw, Inc.'s Quarterly Reports incorporated
7 financial statements from its subsidiaries, including LES.

8 60. The financial statements described in the preceding paragraph, delivered to
9 the Plaintiff purchasers in the Offering Memorandum, comprise a portion of those financial
10 statements that the Company has since withdrawn. As a result of Defendants' inclusion of these
11 financial statements, the Offering Memorandum contained materially false and misleading
12 statements in violation of section 61-1-22 of the Utah Securities Act.

13 61. The Securities and Exchange Commission ("SEC") has commenced its own
14 investigation of the Company's financial statements and reporting.

15 62. Safety-Kleen announced that it had initiated a forensic audit of its financials
16 and that the release of its quarterly financial results would be delayed pending further review by the
17 forensic auditors.

18 63. On or about May 30, 2000, Safety-Kleen missed debt payments totaling
19 \$59.8 million

20 64. On June 9, 2000, the Company filed for bankruptcy under Chapter 11 of the
21 Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

22 65. The Bonds remain in default, and liquidity has all but dried up.

23 66. While the Company has not as yet disclosed how its financial statements are
24 materially false or the precise amount of the restatements, the significant actions taken by the
25 Company make clear that Defendants acted improperly in inflating Safety-Kleen's (previously
26 LES') financial results since the beginning of fiscal year 1997 and thereby misled Plaintiffs in
27 violation of the Utah Securities Act, section 61-1-22

28 **CLAIMS FOR RELIEF**

COUNT I

Violation of U.C.A. § 61-1-1(2) Against Defendants Winger, Bullock, Humphreys, Bragagnolo, Grainger, Haworth, Rollins, Sr., Rollins, Jr., Thomas, Tippie, Wareham, Wrenn and Taylor

67. Plaintiffs incorporate and reallege each allegation in paragraphs 28 through 66 above as if fully set forth here, and further allege as follows:

68. The sale of the Bonds was accomplished through the issuance of a Preliminary Offering Memorandum ("Offering Memorandum"), dated June 23, 1997.

69. The Offering Memorandum contained untrue statements of material fact required to be stated therein and/or necessary to make the statements in the Offering Memorandum not misleading, including but not limited to audited, unaudited and Pro Forma financial statements from 1997, and management discussions thereof.

70. On March 7, 2000, Safety-Kleen withdrew its audited financial statements for 1997, among other years, and publicly announced that those financial statements would be restated.

71. By definition (see Accounting Principles Board Opinion No. 20), a restatement of financial statements means that those financial statements when issued were materially false.

72. Defendants Winger, Bullock, Humphreys, Haworth, Bragagnolo, Grainger, Haworth, Rollins, Sr., Rollins, Jr., Thomas, Tippie, Wareham, Wrenn and Taylor signed and/or were aware of the contents of the financial statements incorporated in the Offering Memorandum.

73. Defendants Winger, Bullock, Humphreys, Bragagnolo, Grainger, Haworth, Rollins, Sr., Rollins, Jr., Thomas, Tippie, Wareham, Wrenn and Taylor were also directors and/or officers of LES at the time that the Offering Memorandum was issued and the Bonds sold, and substantively participated in the sale of those Bonds..

74. Prior to the sale of the Bonds and in the years following, Bullock, Winger, Bragagnolo, Humphreys, Haworth, Wareham, Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr., Thomas, and Taylor had knowledge of or reasonable ground to believe that the Company's Registration Statements and Prospectuses contained untrue statements of material fact and/or omitted material facts required to be stated therein to make the statements in the Registration

1 Statements and prospectuses not misleading. Each of these Defendants had knowledge of or
2 reasonable ground to believe in the existence of facts which made the Company's Registration
3 Statements, prospectuses and other financial statements false and misleading.

4 75. Plaintiffs had no knowledge of the falsities contained in the Offering
5 Memorandum and relied on those false statements to their detriment.

6 76 As a result of the Defendants' conduct, Plaintiffs suffered damages.

7 COUNT II

8 Violation of U.C.A. §§61-1-1(2) and 61-1-22(4) Against Bullock, Winger, Bragagnolo,
9 Humphreys, Haworth, Wareham, Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr., Thomas,
and Taylor

10 77. Plaintiffs repeat and allege each and every allegation contained above as if
11 fully set forth herein.

12 78. This Count is brought pursuant to Sections 61-1-1(2) and 61-1-22(4) of the
13 Utah Securities Act on behalf of the Plaintiffs against Defendants Bullock, Winger, Bragagnolo,
14 Humphreys, Haworth, Wareham, Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr., Thomas, and
15 Taylor.

16 79. Although LES and Safety-Kleen are not parties, nor are Plaintiffs asserting
17 claims against LES or Safety-Kleen in this action, LES (later Safety-Kleen) committed a primary
18 violation of Section 61-1-1(2) of the Corporations Code, by selling the Bonds by means of false
19 statements as incorporated in the Offering Memorandum (as described herein).

20 80. Defendants Bullock, Winger, Bragagnolo, Humphreys, Haworth, Wareham,
21 Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr., Thomas, and Taylor, and non-defendant Laidlaw,
22 controlled LES (later Safety-Kleen) within the meaning of Section 61-1-22(4) of the Utah Securities
23 Act. Winger, Humphreys, Bragagnolo, and Taylor were each a Director and an executive officer of
24 Safety-Kleen, previously LES, Grainger, Bullock and Haworth were each a Director and an
25 executive officer of non-defendant Laidlaw, Rollins, Sr., Rollins, Jr., and Thomas each served as
26 Directors of LES during the relevant time period and then Safety-Kleen; and Tippie, Wareham, and
27 Wrenn are each directors of Safety-Kleen (and formerly of LES) who served on the Audit
28 Committee of the Board during the relevant time period. By virtue of their high level positions with

1 the Company, their participation on the Audit Committee, and their participation and/or awareness
2 of the Company's operations and/or intimate knowledge of the false financial statements filed by
3 the Company with the SEC and disseminated to Plaintiffs, these Defendants had the power to
4 influence and control and did influence and control, directly or indirectly, the decision-making
5 process of the Company, including the content and dissemination of the financial statements and
6 public filings which Plaintiffs contend are false and misleading. These Defendants were provided
7 with, or had unlimited access to, copies of the Company's reports, press releases, public filings,
8 financial statements and other statements alleged by Plaintiffs to be false and misleading prior to
9 and/or shortly after these statements were issued or publicly disseminated and had the ability to
10 prevent their issuance or public dissemination or cause the statements to be corrected.

11 81 Defendants Winger, Bullock, Bragagnolo and Humphreys, as the senior
12 officers of Safety-Kleen (and its predecessor LES) were personally responsible for the financial and
13 Registration Statements incorporated by the Offering Memorandum, along with the Company's
14 Forms 10-Q, 8-K, 10-K and other SEC filings and press releases during the relevant time period.

15 82. Laidlaw was, and is, the controlling shareholder of Safety-Kleen and
16 exercised control through its designees to the Board and its 44% stockholding in the Company.

17 83. LES, the primary obligor of the Bonds issued by Tooele County, was a
18 wholly owned subsidiary of Laidlaw. Laidlaw was later the controlling stockholder of
19 Safety-Kleen. Laidlaw thus controlled LES (later Safety-Kleen) at the time LES made materially
20 false and misleading statements in their public filings and in the Offering Memorandum.

21 84. Prior to the sale of the Bonds and in the years following, Bullock, Winger,
22 Bragagnolo, Humphreys, Haworth, Wareham, Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr.,
23 Thomas, and Taylor had knowledge of or reasonable ground to believe that the Company's
24 Registration Statements and Prospectuses contained untrue statements of material fact and/or
25 omitted material facts required to be stated therein to make the statements in the Registration
26 Statements and prospectuses not misleading. Each of these Defendants had knowledge of or
27 reasonable ground to believe in the existence of facts which made the Company's Registration
28 Statements, prospectuses and other financial statements false and misleading.

1 85. The materially false and misleading statements by these Defendants, along
2 with Safety-Kleen (and LES) as alleged herein, were made in connection with the purchases of the
3 Bonds by Plaintiffs.

4 86. At the time Plaintiffs purchased the Bonds, they did not know of any of the
5 false and/or misleading statements and omissions, and relied upon the representations made by LES
6 (later Safety-Kleen) and the Defendants.

7 87. As a direct and proximate result of the wrongful conduct of these Defendants
8 Plaintiffs suffered damages.

9 88. By virtue of their positions as controlling persons, Bullock, Winger,
10 Humphreys, Bragagnolo, Haworth, Tippie, Wareham, Wrenn, Grainger, Rollins, Sr., Rollins, Jr.,
11 Thomas, and Taylor are liable pursuant to Section 61-1-22(4) of the Utah Securities Act.

12 **COUNT III**

13 **For Fraud Against Defendants Winger, Bullock, Humphreys, and Bragagnolo.**

14 89. Plaintiffs repeat and allege each and every allegation contained above as if
15 fully set forth herein

16 90. Defendants Winger, Bullock, Bragagnolo and Humphreys, as the senior
17 officers of Safety-Kleen (and its predecessor LES) were personally responsible for the Registration
18 Statements and prospectuses incorporated by the Offering Memorandum accompanying the sale of
19 the Bonds, along with the Company's Forms 10-K and other SEC filings and press releases during
20 the relevant time period during which the Plaintiffs retained the bonds.

21 91. Those documents contained untrue statements of material fact and/or omitted
22 material facts required to be stated therein to make the statements in those statements and
23 prospectuses not misleading. Specifically, the Safety-Kleen (and its predecessor LES) 1997, 1998
24 and 1999 audited financial statements have been withdrawn and will be restated, which is an
25 admission that they were false when issued (see Accounting Principles Board Opinion No. 20)

26 92. Each of Defendants Winger, Bullock, Humphreys and Bragagnolo were a
27 Director and an executive officer of Safety-Kleen who had the power to influence and control and
28 did influence and control, directly or indirectly, the decision-making process of the Company,

1 including the content and dissemination of the financial statements and public filings which
2 Plaintiffs contend are false and misleading. These Defendants were provided with or had unlimited
3 access to copies of the Company's reports, press releases, public filings, financial statements and
4 other statements alleged by Plaintiffs to be false and misleading prior to and/or shortly after these
5 statements were issued or publicly disseminated and had the ability to prevent their issuance or
6 public dissemination or cause the statements to be corrected. Each Defendant had knowledge of or
7 reasonable ground to believe that the Company's Registration Statements and Prospectuses
8 contained untrue statements of material fact and/or omitted material facts required to be stated
9 therein to make the statements in the Registration Statements and prospectuses not misleading.
10 Each of these Defendants had knowledge of or reasonable ground to believe in the existence of facts
11 which made the Company's Registration Statements, prospectuses and other financial statements
12 false and misleading.

13 93. In particular, Winger, Humphreys and Bragagnolo, as executive officers of
14 Safety-Kleen had direct and supervisory involvement in and controlled the Company's day-to-day
15 operations. Bullock was directly involved through his role as Chairman of the Board.

16 94. The materially false and misleading statements by these Defendants, along
17 with Safety-Kleen (and LES) as alleged herein, were made in connection with the purchases of the
18 Bonds by Plaintiffs

19 95. Plaintiffs relied on the materially false and misleading statements of the
20 Defendants (and Safety-Kleen and LES) in purchasing the Bonds. In particular, Plaintiffs relied on
21 the Registration Statements, Offering Memoranda, and prospectuses issued in connection with the
22 marketing and sale of the Bonds and the financial statements contained in and made a part of those
23 documents. Plaintiffs also relied on the public filings and press releases of Safety-Kleen and LES
24 during the relevant time period thereafter, including Safety-Kleen's Forms 10-K and 10-Q, in
25 deciding to retain those Bonds.

26 96. At the time Plaintiffs purchased the Bonds, they did not know of any of the
27 false and/or misleading statements and omissions, and relied upon the representations made by the
28 Defendants.

97 These materially false and misleading statements proximately caused Plaintiffs to purchase and retain the Bonds, and thereby proximately caused Plaintiffs to suffer damages

98 The Plaintiffs suffered damages both in their purchase of overvalued Bonds and by their retention of the Bonds in the face of false information, where they could have sold the Bonds, had Defendants not negligently misrepresented the Company's financial position, at a more favorable price than that which was available subsequent to March 6, 2000

COUNT IV

For Fraud Against Wareham, Tippie and Wrenn

99 Plaintiffs repeat and allege each and every allegation contained above as if
fully set forth herein

100 Each of Defendants Tippie, Wareham, and Wrenn were directors of Safety-Kleen and served on the Audit Committee of the Board during the relevant time period. By virtue of their positions as directors and audit committee members, these Defendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making process of the Company, including the content and dissemination of the financial statements and public filings which Plaintiffs contend are false and misleading.

101 These Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings, financial statements and other statements alleged by Plaintiffs to be false and misleading prior to and/or shortly after these statements were issued or publicly disseminated and had the ability to prevent their issuance or public dissemination or cause the statements to be corrected

102 In particular, Tippie, Wareham and Wrenn were intimately involved with and controlled the Company's accounting and its financial reporting through their service on the Audit Committee of the Board. Each of these Defendants knew facts or had access to information suggesting that Safety-Kleen's financial statements, and public statements, were false. Moreover, each of these defendants, as members of the audit committee, failed to check information that they had a duty to monitor.

103. The materially false and misleading statements by these Defendants, along with Safety-Kleen (and LES) as alleged herein, were made in connection with the purchases of the Bonds by Plaintiffs.

104. Plaintiffs relied on the materially false and misleading statements of the Defendants (and Safety-Kleen and LES) in purchasing and retaining Bonds. In particular, Plaintiffs relied on the Registration Statements, Offering Memoranda, and prospectuses issued in connection with the marketing and sale of the Bonds and the financial statements contained in and made a part of those documents. Plaintiffs also relied on the public filings and press releases of Safety-Kleen and LES during the relevant time, including Safety-Kleen's Forms 10-K and 10-Q in deciding to purchase and later retain the Bonds.

105. At the time Plaintiff purchased the Bonds, they did not know of any of the false and/or misleading statements and omissions, and relied upon the representations made by the Defendants or Safety-Kleen.

106. These materially false and misleading statements proximately caused Plaintiffs to purchase and retain the Bonds and thereby proximately caused Plaintiffs to suffer damages.

107. The Plaintiffs suffered damages both in their purchase of overvalued Bonds and by their retention of the Bonds in the face of false information, where they could have sold the Bonds, had Defendants not negligently misrepresented the Company's financial position, at a more favorable price than that which was available subsequent to March 6, 2000.

COUNT V

For Negligent Misrepresentation Against Bullock, Winger, Bragagnolo, Humphreys, Haworth, Wareham, Tippie, Wrenn, Grainger, Rollins, Sr., Rollins, Jr., Thomas, and Taylor

108. Plaintiffs incorporate and reallege each allegation above as if fully set forth here, and further allege as follows:

109. The Bonds were offered for sale, and sold, in July 1997 through an Offering Memorandum.

1 110. Plaintiffs acquired the Bonds in an offering which was covered by the
2 Offering Memorandum.

3 111. The Offering Memorandum contained untrue statements of material fact
4 required to be stated therein and/or necessary to make the statements in the Offering Memorandum
5 not misleading, including but not limited to audited, unaudited and Pro Forma financial statements
6 from 1997, and management discussions thereof.

7 112. On March 7, 2000, Safety-Kleen withdrew its audited financial statements for
8 1997, among other years, and publicly announced that those financial statements would be restated

9 113. By definition (see Accounting Principles Board Opinion No. 20), a
10 restatement of financial statements means that those financial statements when issued were
11 materially false.

12 114. Defendants Winger, Bullock, Humphreys, Haworth, Bragagnolo, Grainger,
13 Haworth, Rollins, Sr., Rollins, Jr., Thomas, Tippic, Wareham, Wrenn and Taylor signed and/or
14 were aware of the contents of the financial statements incorporated in the Offering Memorandum.

15 115. Defendants Winger, Bullock, Humphreys, Bragagnolo, Grainger, Haworth,
16 Rollins, Sr., Rollins, Jr., Thomas, Tippic, Wareham, Wrenn and Taylor were directors and/or
17 officers of LES at the time that the Offering Memorandum was issued and the Bonds sold.

18 116. Prior to the sale of the Bonds and in the years following, Bullock, Winger,
19 Bragagnolo, Humphreys, Haworth, Wareham, Tippic, Wrenn, Grainger, Rollins, Sr., Rollins, Jr.,
20 Thomas, and Taylor had knowledge of or reasonable ground to believe that the Company's
21 Registration Statements and Prospectuses contained untrue statements of material fact and/or
22 omitted material facts required to be stated therein to make the statements in the Registration
23 Statements and prospectuses not misleading. Each of those Defendants had knowledge of or
24 reasonable ground to believe in the existence of facts which made the Company's Registration
25 Statements, prospectuses and other financial statements false and misleading.

26 117. Laidlaw was, and is, the controlling shareholder of Safety-Kleen and
27 exercised control through its designees to the Board and its 44% stockholding in the Company.
28

1 118 LES, the primary obligor of the bonds issued by Tooele County, was a
2 wholly owned subsidiary of Laidlaw. Laidlaw was later the controlling stockholder of
3 Safety-Kleen. Laidlaw thus controlled LES (later Safety-Kleen) at the time LES made materially
4 false and misleading statements in their public filings and in the Offering Memorandum.

5 119. Plaintiffs had no knowledge of the falsities contained in the Offering
6 Memorandum and relied on those false statements to their detriment.

7 120. As a direct result of the Defendants' conduct, Plaintiffs suffered damages.

8 121. The Plaintiffs suffered damages both in their purchase of overvalued Bonds
9 and by their retention of the Bonds in the face of false information, where they could have sold the
10 Bonds, had Defendants not negligently misrepresented the Company's financial position, at a more
11 favorable price than that which was available subsequent to March 6, 2000.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs pray for judgment as follows:

14 1. Awarding Plaintiffs rescissory and/or compensatory damages and punitive
15 damages, including treble damages pursuant to U.C.A. 1953 s. 61-1-22(2), together with appropriate
16 pre-judgment interest on the purchase-price of the Bonds at the maximum rate allowable by law;

17 2. Awarding Plaintiffs reasonable attorneys' fees and costs; and

18 3. Awarding such other relief as this Court may deem just and proper.
19
20
21
22
23
24
25
26
27
28

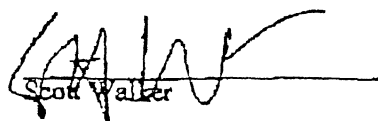
JURY DEMAND

Plaintiffs demand a trial by jury.

DATED July 1, 2001

ABBOTT & WALKER

By.


Scott Walker

3651 North, 100 East, Suite 300
Provo, UT 84604
Telephone: (801) 373-1112

LIEFF, CABRASF, HEIMANN
& BERNSTEIN, LLP

Richard M. Heumann (of counsel)
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California 94111-3999
Telephone (415) 956-1000

Thomas M. Sobol (of counsel)
214 Union Wharf
Boston, MA 02109-1216
Telephone (617) 720-5000

ADDENDUM D

J. Rand Hirschi (#1503)
Mark J. Morrise (#3840)
SUITTER AXLAND
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Attorneys for Defendant Michael J. Bragagnolo

IN THE THIRD JUDICIAL DISTRICT, COUNTY OF TOOELE
STATE OF UTAH

MFS SERIES TRUST III (on behalf of MFS
MUNICIPAL HIGH INCOME FUND), et al.,

Plaintiffs,

vs.

KENNETH W. WINGER, et al.,

Defendants.

**AFFIDAVIT OF DEFENDANT
MICHAEL BRAGAGNOLO
IN SUPPORT OF
MOTION TO DISMISS FOR
LACK OF PERSONAL
JURISDICTION**

Case No.: 01-0300722MI

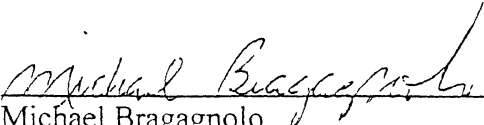
Judge David Young

State of Michigan)
) ss.
County of Wayne)


Michael Bragagnolo, being first duly sworn, avers as follows:

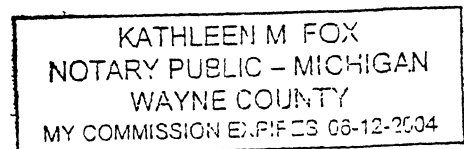
1. I am a defendant in the above-captioned action and have personal knowledge of the facts stated in this affidavit.
2. If called as a witness, I could competently testify as to the facts stated in this affidavit.

3. I am not now, nor have I ever been, a resident of the state of Utah.


Michael Bragagnolo

On this 3 day of January, 2002, personally appeared before me, Michael Bragagnolo, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to on this instrument, and acknowledged he executed the same.


Notary Public
Residing at: Bank One Center 45345 Ford Rd
My commission expires: 6-12-2004 MI 48187



ADDENDUM E

J. Rand Hirschi (#1503)
Mark J. Morrise (#3840)
SUITTER AXLAND
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Attorneys for Defendant Michael J. Bragagnolo

IN THE THIRD JUDICIAL DISTRICT, COUNTY OF TOOELE

STATE OF UTAH

MFS SERIES TRUST III (on behalf of MFS
MUNICIPAL HIGH INCOME FUND), et al.,

Plaintiffs,

vs.

KENNETH W. WINGER, et al.,

Defendants.

**REPLY AFFIDAVIT OF
DEFENDANT
MICHAEL BRAGAGNOLO
IN SUPPORT OF
MOTION TO DISMISS
FOR LACK OF
PERSONAL JURISDICTION**

Case No.: 01-0300722MI

Judge David Young

State of Michigan)
) ss.
County of Wayne)

Michael Bragagnolo, being first duly sworn, avers as follows:

1. I am a defendant in the above-captioned action, have read plaintiffs' complaint, and have personal knowledge of the facts stated in this affidavit.

2. If called as a witness, I could competently testify as to the facts stated in this affidavit.

3. I have not worked at my job with Safety-Kleen Corp. or Laidlaw Environmental Services, Inc. since March 2000, when I was placed on administrative leave. I have not been employed by those entities for over 18 months.

4. I have never been a director of either Safety-Kleen or Laidlaw Environmental Services.

5. In my position at Safety-Kleen and Laidlaw Environmental Services, I did not have any management oversight or control over the accounting department.


6. I did not participate in the preparation of any of the financial statements, financial reports, or other financial documents alleged by plaintiffs to contain untrue statements or to omit material facts, nor did I participate in the preparation of the offering memorandum, registration statement, or other SEC reports or filings referred to by plaintiffs in their complaint.

7. I was not responsible for any of the documents described in the preceding paragraph; did not sign any of those documents; and did not see any of them before they were made public.

8. I did not participate in the marketing or sale of the bonds complained of in this action; never discussed the sale or purchase of those bonds with any potential buyer; and did not make, authorize, or approve any representations made in connection with the sale of those bonds.


9. I have not been to Utah for any reason since leaving Safety Kleen.

Date: March 10, 2002


Michael Bragagnolo

On this 10 day of March, 2002, personally appeared before me, Michael Bragagnolo, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to on this instrument, and acknowledged he executed the same.

[SEAL]


Notary Public
Residing at: 45320 Ford Rd
My commission expires: May 19, 2002

DONALD JAY HARRIS
Notary Public, Wayne County, MI
My Commission Expires May 19, 2002

ADDENDUM F

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))



Only the Westlaw citation is currently available

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Court of Appeal, Third District, California

EATON VANCE DISTRIBUTORS, INC , et al ,
Plaintiffs and Appellants,

v

John R. GRAINGER, et al , Defendants and
Respondents

No. C040158.
(Super.Ct.No. 01AS01376).

March 25, 2003

Richard M. Heimann, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA, for Plaintiff and Appellant

Geoffrey Alan Goodman, Murphy Austin Adams Schoenfeld, Sacramento, CA, Meredith N. Landy, Brobeck Phleger & Harrison, East Palo Alto, CA, Howard M. Hoffman, Sacramento, CA, William Ross Warne, Downey Brand Seymour & Rohwer, Sacramento, CA, Carl E. Poli Stone, McGuire & Benjamin, Northbrook, IL, Eric S. Mattson Sidley, Erin E. Kelly Sidley, Austin, Brown & Wood, Chicago, IL, for Defendants and respondents

DAVIS, J

*1 In this action arising from corporate accounting fraud, the plaintiffs appeal from an order that quashed service of summons on several nonresident corporate officers and directors (Code Civ. Proc., §§ 418.10, subd. (a)(1), 904.1, subd.

(a)(3)). The trial court found it lacked personal jurisdiction over these individuals. We agree and affirm the order.

There are three issues: (1) do the officers and directors have sufficient "minimum contacts" with California to sustain personal jurisdiction, (2) does Corporations Code section 25504, which equates a corporation's liability for securities fraud with that of a person who controls the corporation, provide a basis for personal jurisdiction, and (3) does Corporations Code section 25550, which provides for substituted service of process on the Commissioner of Corporations, provide a basis for personal jurisdiction? We answer all three questions no.

BACKGROUND

In July 1997, Laidlaw Environmental Services, Inc. (LES) guaranteed a \$19.5 million bond issuance. The bonds were issued by the California Pollution Control Financing Authority. The bond proceeds allowed LES to refinance the costs of two hazardous waste treatment facilities in California. At the time of the bond issuance, LES was a partially-owned subsidiary of Laidlaw, Inc. (Laidlaw), a Canadian corporation. In May 1998, LES became Safety-Kleen Corporation (Safety-Kleen). Safety-Kleen is a Delaware corporation headquartered in South Carolina, and it assumed LES's obligations under the guarantee arrangement for the bond issuance.

In March 2000, Safety-Kleen announced that it had discovered "accounting irregularities" in the LES/Safety-Kleen financial statements filed for the 1997-1999 fiscal years. The bonds became worthless following Safety-Kleen's announcement. In June 2000, Safety-Kleen (and according to plaintiffs, Laidlaw too) filed for bankruptcy. A month later, Safety-Kleen announced that it had reduced its reported earnings for the 1997-1999 fiscal years by approximately \$534 million, and had sustained a loss of about \$833 million in the 2000 fiscal year.

The plaintiffs are five East Coast-based institutional purchasers of the bonds: Eaton Vance

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))

Distributors, Inc., T Rowe Price Associates, Inc., Delaware Investment Advisors, Putnam Investments, Inc., and John Hancock Funds, Inc. The plaintiffs purchased the bonds on behalf of several mutual funds designed to provide tax-free income to California investors and investment opportunities for residents of other states

Based on the "accounting irregularities" that rendered the bonds worthless, the plaintiffs sued Laidlaw as well as the officers and directors of LES at the time of the bond issuance. The plaintiffs alleged fraud, negligent misrepresentation, and violation of fraud-based California securities laws (Corp Code, §§ 25400, 25401, 25403, 25500, 25501)

Several of the sued officers and directors, none of whom live in California, moved successfully to quash service of summons based on lack of personal jurisdiction. These officers and directors are Michael Bragagnolo, Henry Taylor, James Bullock, John Grainger, Leslie Haworth, John Rollins, Sr. (now deceased), John Rollins, Jr., David Thomas, Henry Tippie, James Wareham, and Grover Wrenn. (The plaintiffs have not challenged the ruling on Wrenn's motion because he became an officer or director of LES shortly after the bond issuance.)

*2 This appeal ensued from the order quashing service

DISCUSSION

1. Basic Jurisdiction and Review Principles

California's courts may exercise personal jurisdiction over a nonresident individual on any basis consistent with the federal or state Constitutions (*Pavlovich v Superior Court* (2002) 29 Cal 4th 262, 268 (*Pavlovich*), *Vons Companies, Inc v Seabest Foods, Inc* (1996) 14 Cal 4th 434, 444 (*Vons*), Code Civ Proc, § 410.10). The due process clause provides the constitutional focus (*Vons supra* 14 Cal 4th at p 444, *International Shoe Co v Washington* (1945) 326 U.S. 310, 316, 320 [90 L Ed 95]).

The due process clause sets forth two requirements to establish a basis for personal jurisdiction. (1) the

nonresident defendant must have sufficient "minimum contacts" with California and (2) the exercise of jurisdiction over the defendant must be "reasonable" (*Vons, supra*, 14 Cal 4th at pp 444, 449, *Burger King Corp v Rudzewicz* (1985) 471 U.S. 462, 471-472, 475-477 [85 L Ed 2d 528]).

In the minimum contacts analysis, courts have identified two types of personal jurisdiction: general jurisdiction and specific jurisdiction (*Pavlovich, supra* 29 Cal 4th at pp 268-269; *Vons, supra* 14 Cal 4th at p 445, *Serafini v Superior Court* (1998) 68 Cal App 4th 70, 78, 80 (*Serafini*), *Tracinda Corp v DaimlerChrysler AG* (D Del 2002) 197 F Supp 2d 86, 93 (*Tracinda*)). General jurisdiction may exist if the defendant's contacts with the forum state are substantial, continuous and systematic (*Vons supra*, 14 Cal 4th at p 445). Where general jurisdiction cannot be shown, as is true here, a court may assume specific jurisdiction over a defendant in a particular case (*Goehring v Superior Court* (1998) 62 Cal App 4th 894, 904 (*Goehring*)). Specific jurisdiction exists when the defendant has purposefully directed his activities toward the forum state, and the litigation arises out of or relates to those activities (*Pavlovich, supra* 29 Cal 4th at p 269, *Taylor-Rush v Multitech Corp* (1990) 217 Cal App 3d 103, 112 (*Taylor-Rush*), *Tracinda, supra*, 197 F Supp 2d at p 93).

When a nonresident defendant moves to quash service of summons on jurisdictional grounds, the plaintiff has the initial burden of demonstrating that sufficient minimum contacts exist between the defendant and the forum state to justify the exercise of personal jurisdiction (*Vons supra*, 14 Cal 4th at p 449, *Taylor-Rush, supra*, 217 Cal App 3d at p 112). If the plaintiff makes this showing, then the defendant must demonstrate that the exercise of jurisdiction would be unreasonable (*Vons, supra*, 14 Cal 4th at p 449). When there is conflicting evidence, the trial court's factual determinations are upheld if substantial evidence supports them (*Ibid*). If there is no conflicting evidence, the question of jurisdiction is one of law and the reviewing court engages in independent review (*Ibid*).

2. Minimum Contacts

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))

*3 The principle of specific jurisdiction that applies here is that personal jurisdiction may be exercised over a defendant who has caused an effect in the forum state by an act or omission occurring elsewhere (*Taylor-Rush*, *supra* 217 Cal App 4th at p 112) Under this principle, jurisdiction may be invoked only where the defendant committed the act or omission intending or expecting to cause effects in California (*Pavlovich*, *supra*, 29 Cal 4th at pp 269-273, *Goehring* *supra*, 62 Cal App 4th at p 909, *Serafini*, *supra*, 68 Cal App 4th at p 81)

In applying this principle to nonresident corporate officers and directors who allegedly have engaged in tortious or tortious-related corporate conduct, the following must be noted The mere fact that California has jurisdiction over the nonresident corporation does not mean that the state has jurisdiction over the corporation's nonresident officers and directors (*Calder v Jones* (1984) 465 U S 783, 790 [79 L Ed 2d 804] (*Calder*), see *Goehring*, *supra*, 62 Cal App 4th at p 904) The requirements of personal jurisdiction must be met as to each defendant over whom a state court exercises jurisdiction, thus, each defendant's contacts with the forum state must be assessed individually (*Calder*, *supra*, 465 U S at p 790) To establish a basis for personal jurisdiction, the officer or director must have personally directed or actively participated in the tortious conduct, and that conduct must have been purposefully directed toward the forum state (*Seagate Technology v A J Kogyo Co* (1990) 219 Cal App 3d 696, 701-704 (*Seagate*), *Taylor-Rush*, *supra*, 217 Cal App 3d at pp 112-114, *Serafini*, *supra*, 68 Cal App 4th at pp 80-81, see *Pavlovich*, *supra*, 29 Cal 4th at pp 269-273) Doing nothing more than simply ratifying an action taken by the corporation or by another corporate officer or director is not enough (*Seagate*, *supra*, 219 Cal App 3d at p 704)

The plaintiffs presented the following evidence to establish minimum contacts regarding the nonresident officers and directors who moved to quash service of summons

The plaintiffs submitted the offering memorandum for the bond issuance The offering memorandum specified the LES corporate roles of the individual

defendants at the time of the bond issuance Bragagnolo was LES's chief operating officer, responsible for operations, sales and marketing (Bragagnolo was placed on leave, and subsequently resigned, following the disclosure of the "accounting irregularities" by LES/Safety-Kleen) Taylor was LES's general counsel and secretary, responsible for legal affairs, regulatory compliance and governmental relations Bullock, Grainger and Haworth were LES directors, and held high executive positions with Laidlaw or related entities Rollins, Sr, Rollins, Jr, Thomas, Tippie and Wareham were outside directors of LES

The plaintiffs also noted that the offering memorandum incorporated numerous corporate financial statements from the 1997 fiscal year that contained material misstatements resulting from the "accounting irregularities " These corporate financial statements, plaintiffs asserted, "were signed by, among others, [d]efendant Henry Taylor "

*4 The plaintiffs further noted that the offering memorandum identified defendants Haworth, Tippie and Wareham as "Audit Committee Members " Such members oversaw LES's " 'financial reporting process and internal controls' " and considered " 'major changes and major questions of choice regarding appropriate auditing and accounting principles and practices to be followed when preparing corporate financial statements' "

Finally, the plaintiffs noted that, "[a]s the managing officers and directors , the defendants [moving to quash service] controlled, managed and operated LES, later Safety-Kleen, and in so doing, transacted business in California by virtue of, at a minimum, the operation of facilities in California, the directed offering of the Bonds to Plaintiffs, [and] the continuing obligation to disclose financial information prepared in accordance with generally accepted accounting principles for the benefit of holders and beneficial holders of the Bonds "

This evidence does not show which individual officers and directors personally directed or actively participated in the alleged tortious conduct, or whether they purposefully directed that conduct

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))

toward California Plaintiffs state generally that the officers and directors collectively controlled, managed and operated LES and thereby directed the offering of the bonds to the plaintiffs. From this evidence, one can only speculate that individual officers and directors personally directed or actively participated in the tortious conduct, this does not suffice to establish specific personal jurisdiction (*Serafini, supra*, 68 Cal App 4th at p 81) Merely identifying defendants Haworth, Tippie and Wareham as audit committee board members (and listing the general functions of that committee's members) suffers from a similar vagueness.

The plaintiffs do get more specific regarding defendants Taylor and Bragagnolo. As LES's general counsel and secretary, Taylor signed some of the "irregular" corporate financial statements that the offering memorandum incorporated. Nevertheless, as part of the bond issuance, Taylor, in his general counsel and secretary capacity for LES, issued a required legal letter opinion that specifically excluded from its coverage any opinions or representations regarding the accuracy of the corporate financial statements incorporated in the offering memorandum. As for Bragagnolo, he submitted a declaration stating that he neither signed nor prepared the offering memorandum or the incorporated financial statements. Bragagnolo also noted that he did not participate in the sale or marketing of the bonds, and did not make, authorize, or approve any representations made in connection with the sale of the bonds.

The trial court properly found that the plaintiffs failed to show that individual officers and directors had sufficient minimum contacts with California for purposes of personal jurisdiction.

3. Control Person Statute—Corporations Code Section 25504

*5 At the hearing on the motions to quash (and continuing on appeal), the plaintiffs shifted their focus from a traditional minimum contacts analysis to an analysis based on Corporations Code section 25504. (All further undesignated section references are to the Corporations Code.) It was at the hearing on the motions to quash that plaintiffs first cited

section 25504. Section 25504 equates a corporation's liability for securities fraud with that of a person who controls the corporation. As we shall explain, while section 25504 provides a basis for establishing liability, it does not provide an independent basis for establishing personal jurisdiction.

Section 25504 states as relevant:

"Every person who directly or indirectly controls a person liable under Section 25501, every principal executive officer or director of a corporation so liable, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist" ("Person" is defined as including individuals and corporations (§ 25013)). Section 25501 specifies the remedies for section 25401 violations. Section 25401 makes it unlawful for any person to offer or sell a security in California via false statements or omissions. The plaintiffs have alleged sections 25401 and 25501 as jurisdictional bases in their complaint.

The plaintiffs argue that "the basic facts which form the grounds for personal jurisdiction are undisputed: (1) securities were issued or caused to be issued in California by LES, (2) the securities were offered and sold to [the plaintiffs] by way of false or misleading statements, and (3) [the defendants moving to quash service] were directors and officers of LES at the time of the Issuance." Section 25504, plaintiffs argue, provides "a presumption of the knowing commission of a tort by the officers and directors of an entity liable for securities fraud." By virtue of this liability under section 25504, plaintiffs assert, the nonresident officers and directors have personally committed direct acts or omissions in California or acts or omissions that had effects in California, this justifies California's exercise of personal jurisdiction. Bringing the argument full circle, the plaintiffs maintain this conduct satisfies the constitutional requirement of minimum contacts.

We disagree with the plaintiffs for two related

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))

reasons Two California decisions involving state securities law violations, *Goehring* and *Taylor-Rush*, respectively illustrate these reasons

First, the plaintiffs have impermissibly conflated two distinct concepts liability and jurisdiction " 'Liability and jurisdiction are independent' " (*Goehring*, *supra*, 62 Cal App 4th at pp 904-905, quoting *Sher v Johnson* (9th Cir 1990) 911 F 2d 1357, 1365) Liability depends on the relationship between the plaintiffs and the defendants, jurisdiction depends only upon each defendant's relationship with the forum (*Goehring*, *supra*, 62 Cal App 4th at p 905) Although individual officers and directors may be jointly and severally liable under section 25504 for their corporation's securities fraud, *jurisdiction* over each defendant must still be established individually (See *ibid*) Thus, a California court has jurisdiction only over those individual officers and directors who have personally established the requisite minimum contacts with California (See *ibid*)

*6 *Goehring* applied this distinction between liability and jurisdiction in the analogous context of a lawsuit against a partnership and its individual partners for fraud, negligent misrepresentation, and fraud-based state securities law violations (*Goehring*, *supra* 62 Cal App 4th at pp 900-901) Although recognizing that individual partners are jointly and severally liable for the partnership's torts and related conduct, *Goehring* concluded that jurisdiction over each partner must still be established individually (*Id* at pp 904-905) As another court has observed, liability may not be used "as a substitute for personal jurisdiction", "[p]ersonal jurisdiction has constitutional dimensions, and regardless of policy goals, [a legislature] cannot override the due process clause, the source of protection for non- resident defendants " (*AT & T Co v Compagnie Bruxelles Lambert* (9th Cir 1996) 94 F 3d 586, 590-591)

Second, the plaintiffs' argument violates the related jurisdictional principle that "[e]ach defendant's contacts with the forum State must be assessed individually " (*Calder*, *supra*, 465 U S at p 790) The mere fact that a state has jurisdiction over a nonresident corporation does not mean it

necessarily has personal jurisdiction over the corporation's nonresident officers and directors (*Ibid* , see *Goehring*, *supra*, 62 Cal App 4th at p 904)

The *Taylor-Rush* decision illustrates this principle in the context of a lawsuit alleging, similar to the lawsuit here, liability under sections 25401 and 25504 In *Taylor-Rush*, a California plaintiff sued a nonresident corporation and six of its nonresident officers and directors for fraud, conspiracy to defraud, and liability under sections 25401 and 25504 based on an alleged fraudulent purchase of securities in California (*Taylor-Rush*, *supra*, 217 Cal App 3d at pp 107-108, 113) The *Taylor-Rush* court did not find personal jurisdiction over the nonresident officers and directors by simply invoking section 25504 Instead, the court analyzed the extent of *each* officer's and director's participation in the challenged acts or omissions and how those acts or omissions related to California (*Id* at pp 113-114) By contrast, the plaintiffs' approach here has been to deal with the officers and directors collectively rather than individually

At its core, the plaintiffs' reading of section 25504 simply equates the corporate positions of the nonresident officers and directors with minimum contacts on their part That is not constitutionally allowed As this court stated in *Ruger v Superior Court* (1981) 118 Cal App 3d 427, 433, an individual's "corporate position as officer [or, we add, as director] does not supply the missing link for a constitutionally cognizable relationship with California supplying the basis for personal jurisdiction For personal jurisdiction to lie, the character, quality, and nature of [that individual's] activity must bear a substantial relationship to the causes of action beyond that derived solely from his official position with the corporation " In short, the plaintiffs' jurisdictional analysis under section 25504 improperly trumps the constitutional requirement of minimum contacts

*7 Finally, the plaintiffs' reliance on certain federal decisions-- construing the federal statute on securities violations and control persons--is misplaced (15 U S C § 78t, *McNamara v Bre-X Minerals Ltd* (E D Tex 1999) 46 F Supp 2d 628,

(Cite as: 2003 WL 1521896 (Cal.App. 3 Dist.))

Derensis v Coopers & Lybrand Chartered Accountants (D N J 1996) 930 F Supp 1003, *Landry v Price Waterhouse Chartered Accountants* (S D N Y 1989) 715 F Supp 98, *San Mateo County Transit District v Dearman Fitzgerald and Roberts, Inc* (9th Cir 1992) 979 F 2d 1356) In each of those decisions, save one, the finding of personal jurisdiction was based on more than a showing that the defendant controlled the entity alleged to have violated the securities law, the lone exception, the *San Mateo* decision, has been described as "utterly inconsistent" with longstanding Supreme Court precedent on personal jurisdiction (*In re Baan Co Securities Litigation* (D D C 2000) 81 F Supp 2d 75, 79-82, accord, *Tracinda, supra*, 197 F Supp 2d at p 99)

We conclude the plaintiffs have not established personal jurisdiction over the nonresident officers and directors based on section 25504

4. Section 25550

Pulling out all stops, the plaintiffs look to section 25550 as providing a basis for personal jurisdiction over the nonresident officers and directors. Assuming for the sake of argument that plaintiffs can raise this issue for the first time on appeal, they are wrong on the merits.

Section 25550 provides in relevant part

"When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this law or any rule or order hereunder, whether or not he has filed a consent to service of process , and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the commissioner to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him which grows out of that conduct and which is brought under this law or any rule or order hereunder, with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the commissioner "

Section 25550, as specified by its language and chapter heading, is simply a service of process statute. Under section 25550, a nonresident who "engages in conduct" violating California's securities laws is deemed to have appointed the California Commissioner of Corporations to receive service of process on its behalf regarding that conduct. Section 25550 does not establish a basis for personal jurisdiction. Again, the plaintiffs have confused distinct concepts. This time they have confused the "basis of personal jurisdiction" over a nonresident defendant with "acquiring personal jurisdiction" over that defendant. These are different concepts. "Personal jurisdiction over a nonresident defendant depends upon the existence of essentially two criteria: first, a *basis* for jurisdiction must exist due to [a] defendant's minimum contacts with the forum state; second, given that basis for jurisdiction, jurisdiction must be *acquired* by service of process in strict compliance with the requirements of our service statutes" (*Ziller Electronics Lab GmbH v Superior Court* (1988) 206 Cal App 3d 1222, 1229, see also *In re Marriage of Martin* (1989) 207 Cal App 3d 1426, 1431, 1433 [concluding that an analogous service of process statute cannot provide a basis for jurisdiction, but may be used to acquire jurisdiction if a basis for jurisdiction exists])

*8 Nor may section 25550 piggyback on section 25504 to establish personal jurisdiction here; we have concluded that section 25504 does not provide a jurisdictional basis here. In the end, section 25550 , viewed alone or with section 25504, cannot supplant the constitutional requirement of minimum contacts. In light of our resolution, we deny the request for judicial notice submitted by defendants Grainger, Bullock and Haworth and joined in by Bragagnolo.

DISPOSITION

The order quashing service of summons is affirmed.

We concur: SCOTLAND, P J , and RAYE, J

2003 WL 1521896 (Cal App 3 Dist) Not Officially Published, (Cal Rules of Court, Rules 976, 977)