

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 FUND, INC., AND PUTNAM INVESTMENTS, INC., v. KENNETH W. WINGER, JOHN R. GRAINGER, PAUL R. HUMPHREYS, JAMES R. BULLOCK, JOHN W.

Recommended Citation

Brief of Appellee, *MFS Series Trust III v. Winger*, No. 20020719.00 (Utah Supreme Court, 2002).
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GROVER C. WRENN, MICHAEL J.
BRAGAGNOLO, and HENRY H. TAYLOR, :
Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MFS SERIES TRUST III (on behalf of MFS
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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 FUND, INC., AND PUTNAM
INVESTMENTS, INC.,

Plaintiffs/Appellants,

v.

KENNETH W. WINGER, JOHN R.
GRAINGER, PAUL R. HUMPHREYS, JAMES
R. BULLOCK, JOHN W. ROLLINS, JR., JOHN
W. ROLLINS, SR., 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.

Supreme Court Case No.: 20020719

BRIEF OF APPELLEES

**(David E. Thomas, Jr., John W. Rollins,
Jr., John W. Rollins, Sr., James L.
Wareham, Grover C. Wrenn, and
Henry B. Tippie)**

Appeal from Decision of Third District
Court, County of Tooele, The Honorable
David S. Young

4

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FILED
UTAH SUPREME COURT

JUN 24 2003

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	2
A. The Bonds, Their Issuance, And The Plaintiffs/Appellants	2
B. The Defendants/Respondents.....	3
C. The Gravamen Of The Action	4
D. The Suit And The Ruling On Motion To Dismiss	5
III. STANDARD OF REVIEW	10
IV. SUMMARY OF ARGUMENT	10
V. ARGUMENT	11
A. The Trial Court Correctly Found That The Outside Director Defendants Did Not Have The Requisite “Minimum Contacts” With Utah To Permit The Exercise Of Personal Jurisdiction	11
B. Basic Principles Governing Specific Jurisdiction.....	12
C. Actions Of The Corporation Are Not Attributable To The Outside Directors Because The Court Did Not Find That The Outside Directors Did Anything Related To The Allegations In This Case.....	14
D. Personal Jurisdiction Under Utah Law, And The Case Of D.A. v. State.....	16
E. The Theory Of Control Person Liability Is An Insufficient Basis To Establish Jurisdiction Over Individual Directors In This Case.....	18
1. Assuming Well-Pled Allegations Of Control Person Liability Suffice To Establish Jurisdiction, They Are Facially Defective Here	18
2. Prima Facie Allegations Of A Cause Of Action Are Not A Substitute For Evidence Proving Minimum Contacts	20
3. Even When Fully Applicable, The Control Person Statute Does Not Work A Substantive Change In The Principles Used To Define The Jurisdiction Of Utah Courts And Plaintiffs Have Failed To Bring Themselves Within The Requirements Of 61-1-22(4).....	29

TABLE OF CONTENTS
(continued)

	Page
4. The Requirement Of Proof Of Minimum Contacts, Even In A Case Subject To § 61-1-22(4), Is A Proper Interpretation Of Utah Law, Consonant With The Requirements Of State And Federal Due Process.....	31
F. Section 61-1-26 Governs Service Of Process And Is Not An Independent Basis For the Exercise Of Personal Jurisdiction	32
G. The Exercise Of Personal Jurisdiction Over The Outside Director Defendants Would Not Comport With “Fair Play And Substantial Justice”	34
VI. CONCLUSION	36
VII. ADDENDUM	36

TABLE OF AUTHORITIES

	Page
CASES	
<i>American Microtel, Inc. v. Secretary of State</i> , No. CA935874, 1995 WL 809575 (Mass. Super. Jan. 27, 1995).....	33
<i>American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert</i> , 94 F.3d 586 (9th Cir. 1996)	22
<i>Anderson v. American Soc’y Of Plastic And Reconstructive Surgeons</i> , 807 P.2d 825 (Utah 1990).....	7
<i>Arguello v. Indus. Woodworking Mach. Co.</i> , 838 P.2d 1120 (Utah 1992).....	6, 10, 11, 12
<i>Asahi Metal Indus. Co. v. Superior Court</i> , 480 U.S. 102 (1987).....	12, 13, 29, 35
<i>Bank of Am. Nat’l Trust and Sav. Assoc. v. GAC Properties Credit</i> , 389 A.2d 1304 (Del. Ch. 1978)	32-33
<i>Binder v. Gordian Sec., Inc.</i> , 742 F. Supp. 663 (N.D. Ga. 1990).....	30-31
<i>Boddy v. Theiling</i> , 199 S.E.2d 379 (Ga. App. 1973)	30
<i>Bowden v. Robinson</i> , 67 Cal. App. 3d 705 (1977)	28
<i>Brown v. Investment Management and Research, Inc.</i> , 475 S.E.2d 754 (S.C. 1996)	33
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	12, 28, 34
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	5-6, 12, 15, 24
<i>Central States, Southeast and Southwest Areas Pension Fund v. Reimer</i> <i>Express World Corp.</i> , 230 F.3d 934 (7th Cir. 2000), <i>cert. denied</i> , 532 U.S. 934 (2001)	21
<i>Clements v. Tomball Ford, Inc.</i> , 812 F. Supp. 202 (D. Utah 1993).....	6
<i>Courtney v. Waring</i> , 191 Cal. App. 3d 1434 (1987)	30
<i>D.A. v. State</i> , 603 P.2d 607 (Utah 2002).....	passim
<i>Derensis Coopers & Lybrand Chartered Accountants</i> , 930 F. Supp. 1003 (D.N.J. 1996).....	23, 27
<i>Eastwood v. Froelich</i> , 60 Cal. App. 3d 523 (1976)	28, 30

TABLE OF AUTHORITIES
(continued)

	Page
<i>Eaton Vance Distributors v. Grainger</i> , No. C040158, 2003 WL 1521896 (Cal. Ct. App. Mar. 25, 2003).....	9, 27
<i>Far West Capital, Inc. v. Towne</i> , 46 F.3d 1071 (10th Cir. 1995)	12-13
<i>Goelitz v. Lathrop</i> , 3 N.E.2d 305 (Ill. App. Ct. 1936)	30
<i>Gohler, IRA v. Wood</i> , 919 P.2d 561 (Utah 1996).....	19
<i>Gowdy v. Richter</i> , 314 N.E.2d 549 (Ill. App. 3d 1974).....	30
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958).....	12, 27
<i>Harbourvest Int’l Private Equity Partners II-Direct Fund, L.P. v. Axent Techs., Inc.</i> , No. 99-2188, 2000 WL 1466096 (Mass. Super. Aug. 21, 2000)	33
<i>Harnischfegger Eng’rs, Inc. v. Uniflo Conveyor, Inc.</i> , 883 F. Supp. 608 (D. Utah 1995).....	13
<i>Hydro Eng’g, Inc. v. Landa, Inc.</i> , 231 F. Supp. 2d 1130 (D. Utah 2002)	12
<i>In re Baan Co. Securities Litigation</i> , 81 F. Supp. 2d 75 (D.D.C. 2000), <i>approved</i> , 245 F. Supp. 2d 117 (D.D.C. 2003)	26, 27, 34
<i>In re Daimler-Chrysler AG Sec. Litig.</i> , 197 F. Supp. 2d 86 (D. Del. 2002).....	21, 25, 26
<i>In re Disonics Securities Litigation</i> , 599 F. Supp. 447 (N.D. Cal. 1984)	19, 20
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	11, 12, 24
<i>Landry v. Price Waterhouse Chartered Accountants</i> , 715 F. Supp. 98 (S.D.N.Y. 1989)	23, 27
<i>LeDuc v. Kentucky Cent. Life Ins. Co.</i> , 814 F. Supp. 820 (N.D. Cal. 1992).....	15
<i>Levitz v. Warrington</i> , 877 P.2d 1245 (Utah Ct. App. 1994)	19
<i>McNamara v. Bre-X Minerals Ltd.</i> , 46 F. Supp. 2d 628 (E.D. Tex. 1999).....	23, 24, 27
<i>National Petroleum Mktg., Inc. v. Phoenix Fuel Co.</i> , 902 F. Supp. 1459 (D. Utah 1995).....	15
<i>Neways, Inc. v. McCausland</i> , 950 P.2d 420 (Utah 1997).....	7

TABLE OF AUTHORITIES
(continued)

	Page
<i>Patriot Sys., Inc. v. C-Cubed Corp.</i> , 21 F. Supp. 2d 1318 (D. Utah 1998)	6, 13
<i>Paulos v. Best Sec., Inc.</i> , 109 N.W. 2d 576 (Minn. 1961)	33
<i>Phone Directories Co., Inc. v. Henderson</i> , 8 P.3d 256 (Utah 2000).....	16
<i>Piantes v. Hayden-Stone, Inc.</i> , 514 P.2d 529 (Utah 1970).....	32
<i>Roskelley & Co. v. Lerco, Inc.</i> , 610 P.2d 1307 (Utah 1980).....	6, 12, 35
<i>San Mateo County Transit District v. Dearman</i> , 979 F.2d 1356 (9th Cir. 1992)	24, 26, 27
<i>Schlatter v. Mo-Comm Futures, Ltd.</i> , 662 P.2d 553 (Kan. 1983).....	21
<i>Seagate Tech. v. A.J. Kogyo Co.</i> , 219 Cal. App. 3d 696 (1990)	14-15
<i>SEC v. The Infinity Group Co.</i> , 27 F. Supp. 2d 559 (E.D. Pa. 1998)	25
<i>Securities Investor Prot. Corp. v. Vigman</i> , 764 F.2d 1309 (9th Cir. 1985)	34
<i>See Ten-Mile Indus. Park v. Western Plains Serv. Corp.</i> , 810 F.2d 1518 (10th Cir. 1987)	14-15
<i>Sher v. Johnson</i> , 911 F.2d 1357 (9th Cir. 1990)	16, 26, 29
<i>Sherman v. Lloyd</i> , 181 Cal. App. 3d 693 (1986)	28
<i>SII Megadiamond, Inc. v. American Superabrasives Corp.</i> , 969 P.2d 430 (Utah 1998).....	12
<i>Stack v. Lobo</i> , 903 F. Supp. 1361 (N.D. Cal. 1995).....	34
<i>Steenblik v. Lichfield</i> , 906 P.2d 872 (Utah 1995).....	29, 30
<i>Taylor-Rush v. Multitech Corp.</i> , 217 Cal. App. 3d 103 (1990)	15, 30, 31
<i>The Neptune Society Corp. v. Longanecker</i> , 194 Cal. App. 3d 1233 (1987)	28, 30
<i>United States Liability Insurance Co. v. Haidinger-Hayes, Inc.</i> , 1 Cal. 3d 586 (1970)	14, 15

TABLE OF AUTHORITIES
(continued)

	Page
<i>Wegerer v. First Commodity Corp.</i> , 744 F.2d 719 (10th Cir. 1984)	15
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	27-28

STATUTES

15 U.S.C. § 78aa	25, 34
Cal. Corp. Code § 25504	9
Cal. Corp. Code § 25550	9, 10, 34
Utah Code Ann. § 61-1-1	19
Utah Code Ann. § 61-1-1(2)	5
Utah Code Ann. § 61-1-22(1)	19
Utah Code Ann. § 61-1-22(4)	passim
Utah Code Ann. § 61-1-26	1, 9, 11, 32
Utah Code Ann. § 61-1-26(8)	32
Utah Code Ann. § 78-27-22	11, 13
Utah Code Ann. § 78-27-24	29
Utah Code Ann. § 78-3a-110(3)	17
Utah Code Ann. § 78-3a-110(13)	29, 32

I. INTRODUCTION

Although Plaintiffs introduce a myriad of different reasons why the Utah courts should exercise personal jurisdiction over a group of nonresident outside directors who have zero jurisdictional contacts with Utah, the gist of their appeal can be reduced to a single question: Can the Utah legislature pass a law that expands the jurisdictional reach of the Utah courts beyond the limitations imposed by the Fourteenth Amendment to the U.S. Constitution?

The trial court correctly answered in the negative. It should be affirmed. Plaintiffs' jurisdictional theory relies on allegations of control person liability under Utah Code Ann. § 61-1-22(4) and their purported jurisdiction-conferring effects.¹ However, the Utah legislature never intended § 61-1-22(4) to confer jurisdiction. Even had the legislature so intended, this section would at most provide a state law basis for personal jurisdiction and would not have any bearing on the separate and indispensable requirement that any assertion of personal jurisdiction by the courts of this state comply with the requirements of federal due process. The substitution of service provisions of § 61-1-26 similarly provide only a state law basis for jurisdiction, and do not of themselves satisfy the Fourteenth Amendment.

¹ All statutory references are to the Utah Code Ann., unless otherwise noted.

II. STATEMENT OF THE CASE

A. The Bonds, Their Issuance, And The Plaintiffs/Appellants

Plaintiffs are ten non-resident institutional investors² who allegedly purchased revenue refunding bonds issued by Tooele County in a July 1, 1997 bond offering.³ RA 022. These Pollution Control Refunding Revenue Bonds were issued by Tooele County under an Indenture of Trust between Tooele County and U.S. Bank. RA 022, 0646-48, 0653. BancAmerica Securities, Inc., was the placement agent. RA 0655. Tooele County had a loan agreement with Laidlaw Environmental Services, Inc. (“LES”), whereby the bond proceeds were loaned to LES. RA 022. Tooele County assigned to U.S. Bank its rights to receive loan payments. RA 0647-48, 0650-51. The bonded indebtedness was not secured by any LES assets. RA 0647-48.

LES resulted from the May 1997 merger of Rollins Environmental Services, Inc. (“Rollins”), and a subsidiary of the Canadian company Laidlaw, Inc. (“Laidlaw”). RA 020. In May 1998, LES merged with Safety-Kleen Corporation and the new company continued as Safety-Kleen. RA 020.

² MFS Series Trust III, Eaton Vance Distributors, Inc., John Hancock Funds, Inc. and Putnam Investments, Inc. are domiciled in Massachusetts; T. Rowe Price Associates, Inc., is domiciled in Maryland; and Merrill Lynch High Yield Bond Fund, Inc., Muniholdings Fund, Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio and Merrill Lynch Municipal Strategy Fund are domiciled in New Jersey. RA 021.

³ Citations to the Record On Appeal will appear as “RA ____.” As Appellants note, RA 0644-0717, is a double-sided document in which only alternate pages have been paginated. Appellants reference the contents of non-numbered pages by citing to the page numbers between which the cited text may be found. *See* Brief of Appellants (hereinafter “BOA”) at 6 n.4. In the interest of consistency, the outside director Defendants will follow suit.

B. The Defendants/Respondents

The Defendants/Respondents fall into three groups. One group includes current or former “inside” directors (*i.e.*, those also holding executive positions) of Safety-Kleen and/or its predecessors. These are Kenneth W. Winger, Paul R. Humphreys, Michael J. Bragagnolo, and Henry H. Taylor. RA 018-20.

The second group consists of individuals who are both Laidlaw executives and current or former directors of Safety-Kleen and/or its predecessors. Laidlaw was a major shareholder of Safety-Kleen, and the majority shareholder of LES. RA 020. This group includes James R. Bullock, John R. Grainger, and Leslie W. Haworth. RA 019.

A third group includes “outside” directors of Safety-Kleen and/or its predecessors (*i.e.*, persons who did not hold management positions during the relevant period). RA 018-19. Outside director Defendants Rollins, Jr., Rollins, Sr., and Tippie were outside directors of Safety-Kleen and LES, and had served in that same capacity at Rollins before the May 1997 formation of LES through the merger of Rollins and a Laidlaw subsidiary. RA 0162-64, 0168-70, 0177-79. Outside director Defendants Thomas and Wareham became outside directors of LES in June 1997 and continued their service with Safety-Kleen. RA 0165-67, 0171-73. Outside director Defendant Wrenn became an outside director of LES in July 1997 and continued his service with Safety-Kleen.⁴ RA 0174-76. This brief is filed on behalf of the outside director Defendants.

⁴ Plaintiffs concede that there is no basis for the exercise of personal jurisdiction over Defendant Wrenn, and do not appeal the trial court’s ruling as to him. BOA at 10 n.6.

C. The Gravamen Of The Action

Plaintiffs allege they bought and held bonds in reliance on false and misleading financial statements of Rollins, Laidlaw, and LES incorporated by reference in the July 1997 Preliminary Offering Memorandum that was used to solicit purchase of the bonds. RA 011-12, 022. They say the bonds have become worthless. RA 011.

Plaintiffs condemn four accounting practices, yet their complaint specifically links most of these to specific Defendants *other than the outside directors*. First, they allege *Defendant Kenneth W. Winger* decided to reduce reserves for environmental liabilities, thereby increasing revenues. RA 015-16. Second, they allege the “useful lives” of certain assets were lengthened, affecting depreciation. RA 015. Third, they allege double-billing supposedly occurred, with the knowledge of *Defendants Winger, Humphreys and Bragagnolo*. RA 014-15. Fourth, they allege the *insider Defendants* maintained an inadequate accounting system. RA 013-14.

These irregularities were allegedly discovered after the books were audited at the behest of outside director Tippie “due to Tippie’s concerns about the Company’s reported revenue.” RA 013. The audit found overstated revenue. As a result, top executives Winger, Bragagnolo, and Humphreys were placed on administrative leave pending investigation by a special committee of the Safety-Kleen board of directors, which included outside director Defendants.⁵ RA 012. Safety-Kleen’s independent auditor, PriceWaterhouseCoopers LLP, withdrew certain previously issued reports of financial

statements, and Safety-Kleen announced those statements would be restated. RA 012.

Two months later, around May 30, 2000, Safety-Kleen missed debt payments totaling close to \$60M. RA 011. On June 30, 2000, Safety-Kleen filed a Chapter 11 bankruptcy proceeding. *Id.* The bonds remain in default and liquidity has “all but dried up.” *Id.*

D. The Suit And The Ruling On Motion To Dismiss

Plaintiffs filed suit on July 1, 2001, alleging five “counts”: statutory violations of §§ 61-1-1(2) and 61-1-22(4), and three common law claims for fraud and negligent misrepresentation. On January 22, 2002, the outside director Defendants made a special appearance and filed a motion to dismiss for lack of personal jurisdiction. Each outside director Defendant filed a sworn affidavit showing his lack of jurisdictional contacts with Utah. RA 165-79. These affidavits established that none of the outside director Defendants has ever lived in Utah, met or spoken with the Plaintiffs, or traveled to Utah to do business with the Plaintiffs. *Id.* None of them was served with the summons or complaint in Utah, none consented to the exercise of jurisdiction by the Utah courts. *Id.* Each outside director Defendant further attested that he did not “negotiate, structure, solicit, investigate, assist or in any way participate in the issuance of Pollution Control Refunding Revenue Bonds issued by Tooele County on July 1, 1997.” *Id.*

In considering the existence of personal jurisdiction, “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790

⁵ Outside director Defendants Thomas and Wrenn assumed interim senior executive officer positions with Safety-Kleen in March 2000--following the resignations of Messrs. Winger, Humphreys and Bragagnolo--at the request of the Board. RA 165-67, 174-76.

(1984). To survive a motion to dismiss for lack of personal jurisdiction, plaintiffs must make a *prima facie* showing that the court has personal jurisdiction over each defendant. *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1320 (D. Utah 1998).

Plaintiffs cannot make the requisite showing through the conclusory allegations of their complaint; it must be made by well-pled allegations of jurisdictional facts that are not controverted by defendants' supporting affidavits. *Id.* If defendants submit affidavits refuting the existence of contacts between themselves and Utah, contradictory allegations in a complaint hold no weight; plaintiffs must come forward with affidavits establishing the existence of specific jurisdictional contacts. *Arguello v. Indus. Woodworking Mach. Co.*, 838 P.2d 1120, 1121 (Utah 1992)(finding that because defendant submitted an affidavit refuting jurisdictional facts and plaintiff did not submit a counter-affidavit "the facts asserted in the [defendant's] affidavit are taken as true and the facts recited in the complaint are considered only to the extent they do not contradict the affidavit"); *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1310 (Utah 1980) ("[W]hen 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."); *see Clements v. Tomball Ford, Inc.*, 812 F. Supp. 202, 205 (D. Utah 1993) ("Where a defendant has specifically rebutted a complaint's jurisdictional allegations by affidavit, plaintiff cannot rely on those allegations, but must submit his own affidavits, depositions etc.").

Rather than filing counter-affidavits attesting to the existence of jurisdictional contacts between any Defendant and Utah, the Plaintiffs merely tendered an affidavit

from their attorney. The principal office of this affidavit was to attach a copy of the 1997 Preliminary Offering Memorandum and the Loan Agreement between Tooele County and LES. RA 0608-0721. These documents do not identify *any* actions taken by outside director Defendants. The Preliminary Offering Memorandum merely identifies them as non-management directors of Safety-Kleen. RA 0682. Had Plaintiffs submitted counter-affidavits attesting to jurisdictional facts, any factual conflicts in the affidavits would have been resolved in their favor. *See Neways, Inc. v. McCausland*, 950 P.2d 420, 422 (Utah 1997); *Anderson v. American Soc’y Of Plastic And Reconstructive Surgeons*, 807 P.2d 825, 827 (Utah 1990).

Plaintiffs argue this Court must accept the jurisdictional theories in their Complaint because Defendants did not adduce affidavits rebutting their “jurisdictional claim.” BOA at 15. However, Defendants submitted affidavits showing they had no jurisdictional contacts with Utah, and absolutely no involvement in the bond offering. Plaintiffs adduced *no* evidence showing *any* outside director involvement in the bond offering, the Preliminary Offering Memorandum, the financial statements incorporated in the Preliminary Offering Memorandum, or other subjects of Plaintiffs’ complaint. There is no factual conflict in the documentary evidence, only Plaintiffs’ naked jurisdictional theories. Jurisdictional theories hold no weight without jurisdictional contacts.

Plaintiffs misdescribe the facts that were before the trial court, a grievous deficiency given the trial court’s role as a fact finder. For example, Plaintiffs claim it is “undisputed” that the “securities were issued or caused to be issued in Utah by LES” and that the “securities were offered and sold to [them] by way of false or misleading

statements.” BOA at 18. But as the Preliminary Offering Memorandum that Plaintiffs themselves introduced into evidence makes clear, the securities were issued by Tooele County, not LES, and there is no evidence that LES “caused” the issuance. RA 0646-48. There is no evidence plotting the location where the securities were issued. There is no evidence fixing the location where Plaintiffs purchased the securities. None of the Plaintiffs is a Utah corporation. RA 021. There is no evidence any one of them has a Utah office. There is no evidence describing the manner in which the bonds were purchased, *i.e.*, did Plaintiffs purchase bonds at the initial bond offering or later, in the secondary market.⁶ Indeed, there is no evidence that Plaintiffs received any financial statements, read them, or relied upon them. There is not even evidence that Plaintiffs received the Preliminary Offering Memorandum.

Based on the jurisdictional facts adduced (or lack thereof), and Plaintiffs’ failure to meet their burden of establishing a *prima facie* case that personal jurisdiction was

⁶ This would be significant because securities purchased in the secondary market would have little or no nexus with the circumstances surrounding the initial offering. Even assuming that the bonds were initially issued in Utah (for which there is no evidence), all of the potential jurisdictional contacts that one might consider arising from an initial offering in Utah, *i.e.*, correspondence and contact with entities in Utah regarding the initial offering, business trips to Utah in connection with the initial offering, etc., would be irrelevant if the Plaintiffs’ claims pertained to alleged fraud in connection with remote purchases in the secondary market.

Furthermore, Plaintiffs’ legal theory of jurisdiction turns on the assumption that they have made a *prima facie* case for liability under the Utah securities laws. Putting aside the patent deficiencies of such a theory, no *prima facie* case for liability can exist unless Safety-Kleen was the offerer or seller of securities, and unless there was privity between Safety-Kleen and the Plaintiffs. *See infra* Section IV.E.1. By failing to allege even the most basic circumstances of how they came to acquire these securities, and from whom, Plaintiffs have failed to make the *prima facie* case of liability upon which their jurisdictional theory is dependant.

appropriate, the trial court correctly granted Defendants' motion to dismiss.

The result below was foreshadowed by the rejection of Plaintiffs' jurisdictional theories in California. The allegations in Plaintiffs' complaint in Utah are a mirror-image of another complaint Plaintiffs filed against these same Defendants in California Superior Court in Sacramento, on March 5, 2001--asserting identical claims arising from the very same allegedly misleading financial statements, in connection with revenue refunding bonds issued by a California public entity. Just as in Utah, Plaintiffs sought to have the California courts exercise personal jurisdiction over the Defendants without any showing of minimum contacts between each Defendant and California.

The California trial court rejected Plaintiffs' theories, and was affirmed by the California Court of Appeals in *Eaton Vance Distributors v. Grainger*, No. C040158, 2003 WL 1521896 (Cal. Ct. App. Mar. 25, 2003). These courts specifically rejected Plaintiffs' argument that California Corporation Code § 25504 (the California counterpart to § 61-1-22(4)) conferred jurisdiction on the basis of control person liability:

[T]he plaintiffs have impermissibly conflated two distinct concepts: liability and jurisdiction. . . . Liability depends on the relationship between the plaintiffs and the defendants; jurisdiction depends only upon each defendant's relationship with the forum. 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. Thus, a California court has jurisdiction only over those individual officers and directors who have personally established the requisite minimum contacts with California.

Id. at 2003 WL 1521896, at *5 (citations omitted). Plaintiffs also unsuccessfully argued that substitution of service under California Corporations Code § 25550 (the California counterpart to § 61-1-26) was sufficient to confer personal jurisdiction in the absence of

minimum contacts. *Id.* at *7-8. The California court squarely rejected this argument, stating that plaintiffs had confused the procedural requirement of effective service of process (as provided under § 25550) with the separate and indispensable requirement that a nonresident defendant must have minimum contacts with the forum state. *Id.*

Plaintiffs have traveled from state to state seeking to topple the due process requirements of the Fourteenth Amendment. They should find Utah no more hospitable than California in this regard.

III. STANDARD OF REVIEW

This Court must review the trial court's ruling for "correctness." *Arguello*, 838 P.2d at 1121. The trial court's ruling was correct and necessary in light of governing Utah law and the unflinching requirements of Constitutional due process.

IV. SUMMARY OF ARGUMENT

The Fourteenth Amendment to the U.S. Constitution, U.S. Supreme Court precedent, and the unequivocal rulings of this Court, require that Plaintiffs proffer jurisdictional facts establishing that *each* individual Defendant had minimum contacts with Utah. Each outside director Defendant submitted an uncontroverted affidavit attesting that he had no contact with the State of Utah and no involvement with the July 1997 Safety-Kleen bond offering. Therefore, the trial court correctly ruled, as it must, that it could not exercise personal jurisdiction over these Defendants.

The trial court's ruling is consonant with this Court's holding in *D.A. v. State*, 603 P.2d 607 (Utah 2002), a case that Plaintiffs fail to cite anywhere in their brief. In *D.A. v.*

State, the Court held that a nonresident defendant must have constitutionally-required minimum contacts with Utah in every instance, regardless of the state law basis for personal jurisdiction. Thus, neither § 61-1-22(4) (control person allegations) nor § 61-1-26 (substitution of service) can authorize personal jurisdiction in the absence of minimum contacts. Section 61-1-22(4) is particularly unsuitable for this task because Plaintiffs were never in privity with Safety-Kleen with respect to the bond offering (as is required to state a *prima facie* case under § 61-1-22(4)) and because § 61-1-22(4) was never meant to provide even a state law basis for personal jurisdiction. In essence, Plaintiffs seek to have the Utah courts exercise personal jurisdiction over these Defendants solely because they were board members of Safety-Kleen. The Fourteenth Amendment does not permit jurisdiction to be established on such an attenuated basis.

V. ARGUMENT

A. **The Trial Court Correctly Found That The Outside Director Defendants Did Not Have The Requisite “Minimum Contacts” With Utah To Permit The Exercise Of Personal Jurisdiction**

Utah courts may exercise jurisdiction over nonresidents to the “fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.” Utah Code Ann. § 78-27-22. The central inquiry is whether the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice” as articulated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and subsequent Supreme Court cases. *Arguello*, 838 P.2d at 1123.

Personal jurisdiction may be general or specific. Plaintiffs proceeded before the trial court, and now on appeal, under the theory of specific jurisdiction.

B. Basic Principles Governing Specific Jurisdiction

The exercise of specific jurisdiction depends upon the “quality and nature’ of the minimum contacts [with Utah] and their relationship to the claim asserted.” *Id.* at 1123 (quoting *International Shoe*, 326 U.S. at 319). In other words, plaintiffs’ claims must “arise[] out of some contact defendant[s] [have] with the forum state, some action taken by the defendant[s] by which it can be shown that defendant[s] [have] ‘purposefully availed [themselves] of the privilege of conducting activities within the forum state.’” *Roskelley*, 610 P.2d at 1311 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Purposeful availment means an “an action of the *defendant[s]* purposefully directed toward the forum state.” *SII Megadiamond, Inc. v. American Superabrasives Corp.*, 969 P.2d 430, 437 (Utah 1998) (emphasis added) (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987)). If a plaintiff proves facts allowing the exercise of specific jurisdiction, the court must still consider whether the exercise of jurisdiction is reasonable. *SII Megadiamond*, 969 P.2d at 435-36 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). If it is not, jurisdiction will not be established. *Id.*

Jurisdiction cannot rest on the fact that Utah is affected by the actions of the defendant in another place. A defendant must personally act in a way that is expressly aimed at, and foreseeably causes injury in, Utah. *Calder v. Jones*, 465 U.S. at 789-90. Utah must be the “focal point of the tort and its harm.” *Hydro Eng’g, Inc. v. Landa, Inc.*, 231 F. Supp. 2d 1130, 1135 (D. Utah 2002). A purely financial injury to Utah residents is not sufficient to create jurisdictional contacts. *Far West Capital, Inc. v. Towne*, 46

F.3d 1071, 1078-80 (10th Cir. 1995) (naked allegations of financial injury to Utah residents not sufficient to establish “minimum contacts”); *Patriot Sys.*, 21 F. Supp. 2d at 1324 (personal jurisdiction cannot be predicated on purely financial injury caused by nonresident); *Harnischfegger Eng’rs, Inc. v. Uniflo Conveyor, Inc.*, 883 F. Supp. 608, 613 & n.6 (D. Utah 1995) (recognizing that financial injury to a Utah resident “has been flatly rejected by the Utah courts as a basis for exercising specific personal jurisdiction” and personal jurisdiction on that grounds would “likely violate federal due process”). This is even more forceful where, as here, Defendants are not being sued by Utah residents, but by out-of-state investors with no connection to Utah. See Utah Code Ann. § 78-27-22 (“[T]he public interest demands the state *provide its citizens with an effective means of redress* against nonresident persons, who, through certain significant minimal contacts with this state, *incur obligations to citizens . . .*” (emphasis added)); *Asahi*, 480 U.S. at 114 (noting that a state’s “legitimate interests” in a dispute are “considerably diminished” when the plaintiff is not a forum resident).

Jurisdiction depends on the actions of the defendant, not the unilateral actions of the plaintiff. *Hanson*, 357 U.S. at 253 (“The unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum State.”). Thus, even if Plaintiffs had or could have alleged that they pooled the bonds in a mutual fund under their control, and sold shares of this mutual fund to Utah residents (of which there is no evidence), this would not suffice to create a jurisdictional contact between Utah and any Defendant. *Far West Capital*, 46 F.3d at 1078-80.

C. Actions Of The Corporation Are Not Attributable To The Outside Directors Because The Court Did Not Find That The Outside Directors Did Anything Related To The Allegations In This Case

Plaintiffs do not even attempt to show that the outside directors personally did anything related to the allegations of the complaint. Attribution of a corporation's jurisdictional contacts to a director is only possible if plaintiffs prove the director participated in or directed the corporation's tortious actions, hence expressly aiming tortious activity at Utah and foreseeably causing harm in Utah.

Plaintiffs rely on *Seagate Tech. v. A.J. Kogyo Co.*, 219 Cal. App. 3d 696 (1990), a case that actually illustrates the flaws in their theory. BOA at 29. A nonresident officer or director *who causes* a corporation to commit torts in California may be sued in California *for his acts* and the corporation's jurisdictional contacts resulting from these torts may be imputed to the officer or director who caused them:

An act taken by a corporate officer may subject the officer to in personam jurisdiction. The act must be one for which the officer would be personally liable and the act must in fact create contact between the officer and the forum state. (For example, no personal contact would result from doing nothing more than ratifying an act taken by the corporation or another corporate officer.)

Id. at 703-04. *Seagate* does not sanction the imputation of corporation minimum contacts to individual directors *in the absence of evidence showing the character and quality of the director's own individual acts.*

Thus, *Seagate* is of no help to Plaintiffs, absent evidence that each outside director Defendant took affirmative acts aimed at Utah.⁷ See *Ten-Mile Indus. Park v. Western*

⁷ Plaintiffs also cite to *United States Liability Insurance Co. v. Haidinger-Hayes, Inc.*, 1

Plains Serv. Corp., 810 F.2d 1518, 1527 (10th Cir. 1987) (“Jurisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself, and jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state.”); *Wegerer v. First Commodity Corp.*, 744 F.2d 719, 727 (10th Cir. 1984) (“Jurisdiction over the individual officers of a corporation, however, may not be obtained merely by accomplishing jurisdiction over the corporation.”); *National Petroleum Mktg., Inc. v. Phoenix Fuel Co.*, 902 F. Supp. 1459, 1469 (D. Utah 1995) (“[E]mployee contacts with a jurisdiction ‘are not to be judged according to their employer’s activities there.’”)(quoting *Calder*, 465 U.S. at 790)); accord *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 825 (N.D. Cal. 1992) (“There is no evidence of any purposeful action taken by this defendant either in or directed at California which is in any way connected with the fraud alleged in this action. Plaintiffs seek to establish personal jurisdiction over this individual on nothing more than his corporate title.”); *Taylor-Rush v. Multitech Corp.*, 217 Cal. App. 3d 103, 114 (1990) (holding that outside directors of a foreign corporation did not have sufficient contacts for personal jurisdiction when there was “no evidence that they participated in or directed any tortious conduct or omission either within or without California”).

Cal. 3d 586 (1970), although this case does not address personal jurisdiction at all. *Haidinger-Hayes* merely stands for the unremarkable proposition that a director of a corporation may be liable for his own tortious conduct. *Id.* at 595.

D. Personal Jurisdiction Under Utah Law, And The Case Of *D.A. v. State*

In past years, this Court has balanced the interplay of Utah personal jurisdiction law and federal due process through a number of different formulations. In some instances, this Court has applied a three-pronged test, the first two prongs addressing the requirements of the Utah long-arm statute, and the necessary third prong addressing the requirements of federal due process. *E.g., Phone Directories Co., Inc. v. Henderson*, 8 P.3d 256, 260 (Utah 2000). Other cases have reduced this formulation to a single line: “[W]e frequently make a [federal] due process analysis first because any set of circumstances that satisfies due process will also satisfy the long-arm statute.” *SII Megadiamond*, 969 P.2d at 433.

With the December 20, 2002, case of *D.A. v. State*, 63 P.3d 607 (Utah 2002), this Court acknowledged the multitude of extant formulations and clarified that there was one unified test for assessing specific personal jurisdiction:

First, the court must assess whether *Utah law* confers personal jurisdiction over the nonresident defendant. This means that a court may rely on any Utah statute affording it personal jurisdiction, not just Utah’s long-arm statute. 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.

Id. at 612; accord *Sher v. Johnson*, 911 F.2d 1357, 1360 (9th Cir. 1990)(“There are two limitations on a court’s power to exercise personal jurisdiction over a nonresident defendant: the applicable state personal jurisdiction rule and the constitutional principles of due process.”). Remarkably, Plaintiffs’ opening brief does not even cite *D.A. v. State*, even though it is the leading Utah authority on the question presented, nor does it

anywhere acknowledge the two-prong jurisdictional inquiry that it establishes.

This Court held that § 78-3a-110(3)⁸ was an alternative basis for jurisdiction, *under state law*, to the Utah long-arm statute in juvenile court proceedings. Although the Utah legislature explicitly authorized the exercise of personal jurisdiction for such proceedings under § 78-3a-110(3), this did not obviate the requirement that any assertion of jurisdiction must also comply with the requirements of federal due process. *D.A. v. State*, 63 P. 3d at 613 (“Despite our conclusion that Utah law confers personal jurisdiction over *D.A.*, federal law nevertheless mandates that we consider whether exercising jurisdiction over her comports with the due process requirements of the Fourteenth Amendment.”).

The ruling in *D.A. v. State* highlights the fundamental flaw in Plaintiffs’ theory of personal jurisdiction. They cast about for alternative theories of jurisdiction, whether through allegations of control person liability under § 61-1-22(4), *see infra* Section IV.E., or substitution of service under § 61-1-26, *see infra* Section IV.F. As is discussed below, these theories do not confer jurisdiction, even under Utah law. Even if they did, Plaintiffs have missed the all-important constitutional question. As the trial court found, the assertion of personal jurisdiction over these Defendants would violate federal due process.

⁸ Section 78-3a-110(13), confers jurisdiction over nonresident parents in Utah juvenile courts: “If the parents . . . cannot be found within the state . . . (c) [s]ervice of summons as provided in this subsection shall vest the court with jurisdiction . . . in the same manner and to the same extent as if the person served was served personally within the state.”

E. The Theory Of Control Person Liability Is An Insufficient Basis To Establish Jurisdiction Over Individual Directors In This Case

Plaintiffs try to evade the rule that a corporation's minimum contacts are not attributed to individual directors unless the plaintiffs prove the directors participated in or directed the corporation's acts. Plaintiffs contend that allegations of control person liability under § 61-1-22(4) of the Utah securities laws trigger jurisdiction in Utah courts.⁹ They say § 61-1-22(4) shifts to the Defendants the burden of showing their lack of involvement in securities law violations. Therefore, Plaintiffs say, they are relieved of the burden of proving the minimum contacts of a "control person" in response to a motion to dismiss. They say allegations of § 61-1-22(4) liability either establish jurisdiction or, at least, shift to Defendants the burden of proving lack of personal jurisdiction in Utah courts. BOA at 15-16.

This argument has no merit.

1. Assuming Well-Pled Allegations Of Control Person Liability Suffice To Establish Jurisdiction, They Are Facially Defective Here

Plaintiffs' argument fails because the complaint does not allege *prima facie* control person liability under § 61-1-22(4). Every count in Plaintiffs' complaint fails to state a viable or coherent cause of action given the requirements of § 61-1-22(4).

Counts I and II cannot give rise to control person liability under § 61-1-22(4),

⁹ "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, . . . 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 case 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).

because the allegations of the complaint do not state *prima facie* primary liability under § 61-1-22(1) (which creates a private remedy for violations of § 61-1-1). Liability under § 61-1-22(1) only attaches to a person who actually “offers, sells, or purchases a security,” and secondary liability to the control person under § 61-1-22(4) only to the same extent as the “seller or buyer.” Utah Code Ann. § 61-1-22(1), (4); *Levitz v. Warrington*, 877 P.2d 1245, 1246 n.2 (Utah Ct. App. 1994) (“Section 61-1-22(4)(a) makes a person liable only if *buyers or sellers* under his or her control are liable under Section 61-1-22(1)(a).”). Not only does liability under § 61-1-22(1) attach only to an actual seller, but this seller is liable only to “the person . . . buying the security from him.” In other words, Plaintiffs must be in privity with Safety-Kleen in order to give rise to control person liability under § 61-1-22(4). *See Gohler, IRA v. Wood*, 919 P.2d 561, 565-66 & n.6 (Utah 1996) (holding that there is no liability under section 61-1-22(4) unless plaintiff is in privity with seller).

It is undisputed that *Tooele County*, not Safety-Kleen, was the issuer of the bond offering and BankAmerica Securities was the placement agent. RA 022, 0646-48, 0655. Although the complaint does not specify whether Plaintiffs purchased the bonds in the initial offering by Tooele County or in the after-market, they could not have purchased them from Safety-Kleen as Safety-Kleen (or any of its predecessor entities) never issued, owned or sold the bonds. Because Safety-Kleen itself is not liable under § 61-1-22(1), none of its alleged control persons can be liable under § 61-1-22(4).

This requirement is exemplified by *In re Disonics Securities Litigation*, 599 F. Supp. 447 (N.D. Cal. 1984), a case that construes the analogous control person statute

under the California securities laws. The court held that the corporation's officers and directors could not be subject to control person liability because the complaint failed to allege strict privity between the corporation and the plaintiffs. *Id.* at 459. The court reached this conclusion despite allegations that the officers and directors participated in preparing the registration statement, prospectus, and certain financing mechanisms for the initial offering. *Id.* at 458. Here, of course, Plaintiffs did not allege *any* participation by the outside directors in the subject matter of the complaint.

The remaining counts (Counts III, IV, and V) in the complaint are common law fraud and negligence claims, and cannot possibly give rise to control person liability because § 61-1-22(4) only imposes control person liability for statutory primary violations of the Utah Securities Act.

Assuming that control person liability is material to the existence of jurisdiction, the complaint does not allege it.

2. Prima Facie Allegations Of A Cause Of Action Are Not A Substitute For Evidence Proving Minimum Contacts

There is no support in Utah law for either (a) dispensing with plaintiffs' burden of *proving* minimum contacts, or (b) testing jurisdiction by reference to whether a complaint sets out the *prima facie* elements of a cause of action.

Allegations in support of a theory of liability are not *facts* discharging plaintiffs' burden of proving the minimum contacts of the defendants:

If the court determines . . . that a defendant does not have sufficient minimum contacts with the forum, then its personal jurisdiction analysis ends without examining the plaintiff's causes of action. The laws on which the suit are based would be irrelevant because a state or federal statute

cannot transmogrify insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action, since this would violate due process.

Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 944 (7th Cir. 2000), *cert. denied*, 532 U.S. 934 (2001) (rejecting an analogous attempt to establish personal jurisdiction by showing “control” liability under a federal statute); *see also In re Daimler-Chrysler AG Sec. Litig.*, 197 F. Supp. 2d 86, 99 (D. Del. 2002) (rejecting an attempt to premise personal jurisdiction on “control person” allegations under the federal securities laws because “[t]he Court cannot adjudicate the question of liability without first establishing whether the Court has jurisdiction over the parties”); *Taylor-Rush*, 217 Cal. App. 3d at 103, 114 (rejecting argument that allegations of individual liability as “control persons” under the California securities laws could be the basis for the exercise of personal jurisdiction over three officers and directors because “[t]here is no evidence that they participated in or directed any tortious act or omission either within or without California.”); *Schlatter v. Mo-Comm Futures, Ltd.*, 662 P.2d 553, 563 (Kan. 1983) (“[T]he court must first have *in personam* jurisdiction [over non-resident director defendants] before the statutory liability [under the control person provisions of the Kansas securities laws] may be applied. Jurisdiction depends upon [long-arm statute] and the constitutional guarantees of due process.”).

Nor is it enough to argue that the requirements of constitutional due process are too burdensome, or violate public policy by making it more difficult to impose statutory liability against a particular nonresident:

Even if [nonresident defendant] would be liable under [the Comprehensive

Environmental Response, Compensation and Liability Act (“CERCLA”)), [plaintiff] may not use liability as a substitute for personal jurisdiction. Even if the requirement of personal jurisdiction allows a parent corporation to avoid liability, and thus undercuts CERCLA’s sweeping purpose to affix the ultimate cost of cleaning up these disposal sites to the parties responsible for the contamination, liability is not to be conflated with amenability to suit in a particular forum. Personal jurisdiction has constitutional dimensions, and regardless of policy goals, Congress cannot override the due process clause, the source of protection for non-resident defendants.

American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 590-91 (9th Cir. 1996) (citations omitted) (internal quotation marks omitted).

Not only do Plaintiffs conflate jurisdiction and liability, but their theory of jurisdiction proves too much. Although Plaintiffs fault Defendants for failure to introduce documentary evidence rebutting their control person allegations, with the next breath they state that it is impossible to refute control personal liability-based jurisdiction in a motion to dismiss:

In short, Appellees bear the burden of proving that they are not liable as control persons under the Utah securities laws. Absent doing so—*involving a factual inquiry which would be premature at this stage of the proceedings*—Defendants-Appellees must be presumed to have committed knowing acts within or having effects in Utah, including but not limited to directing LES’ activities in connection with the issuance.

BOA at 18 (emphasis added). In other words, according to Plaintiffs, the Utah courts can assert personal jurisdiction over every director of every company, anywhere in the world, so long as a plaintiff files an unverified complaint alleging control person liability under the Utah securities laws, and there is simply no evidence that the nonresident director can introduce to challenge this assertion of jurisdiction. Not only is such a theory without support under Utah law, but it plainly violates constitutional due process.

Plaintiffs misuse federal authority in their attempt to give the Utah courts an unconstitutional reach. However, each of the federal cases that Plaintiffs cite show that courts do not premise personal jurisdiction solely on naked allegations of control person liability, but rather on affirmative acts intentionally aimed at the forum.

Landry v. Price Waterhouse Chartered Accountants, 715 F. Supp. 98 (S.D.N.Y. 1989), illustrates this point well. The court held that plaintiffs met their burden by showing that a Canadian corporate director sued under a federal control person theory was a “behind the scenes player” in both the management of the company, *and* a critical corporate transaction that impacted the company’s shares on NASDAQ. *Id.* at 102. Personal jurisdiction was premised on these affirmative acts which were aimed at the United States and caused foreseeable effects there.

The other cases Plaintiffs cite fall under this same rule. In *Derensis Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003 (D.N.J. 1996), the court held that it could exercise personal jurisdiction because plaintiffs made a *prima facie* showing that the foreign defendants “approved and disseminated financial statements that they knew would influence the price of [the company’s] securities on the NASDAQ market.” *Id.* at 1014. In other words, the court’s holding was premised on affirmative acts purposefully directed at the United States.

Plaintiffs cite *McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628 (E.D. Tex. 1999), which found personal jurisdiction over the officers and directors of yet another Canadian company. In *McNamara*, the court found that plaintiffs made a *prima facie* case for the exercise of personal jurisdiction using extensive affidavits and documentary

evidence. *Id.* at 638-41. This showing indicated that each foreign officer or director had minimum contacts with the United States and engaged in affirmative acts of purposeful availment with foreseeable consequences in the United States: each helped secure the company's NASDAQ listing, approved and/or signed the company's SEC filings, reviewed and/or wrote the allegedly false press releases, and promoted the company's stock to U.S. investors and analysts. *Id.* at 641.

San Mateo County Transit District v. Dearman, 979 F.2d 1356 (9th Cir. 1992), comes from this same genre. The trial court dismissed for lack of personal jurisdiction a case against the principal of a brokerage firm because plaintiffs failed to show the level of control required for liability under Section 20(a) of the Securities Act of 1933 ("Securities Act"). The Ninth Circuit expressed concern with the district judge's approach, whereby the plaintiffs' failure to establish liability on a motion to dismiss led the court to find no jurisdiction. *Id.* at 1358. The court stated that the standard of control person liability was lower than the district court thought, and "[e]ven lower is the standard for personal jurisdiction, which exists if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for the fraud." *Id.* Taken out of context, this one sentence appears to put the *San Mateo* at odds with the U.S. Supreme Court's requirement of minimum contacts under *International Shoe*, and the requirement that each individual director's jurisdictional contacts must be assessed separately from the corporation under *Calder*.

But, just past the surface, the *San Mateo* decision does not retain an unconstitutional hue. The district judge improperly imposed on plaintiffs an initial

evidentiary burden to prove that defendant was a control person in order to survive a motion to dismiss for lack of personal jurisdiction. The Ninth Circuit rejected this formulation through reference to the self-executing service of process language of the Securities Act: “If the suit is to enforce a liability created by the Securities Act, the court has jurisdiction of the defendant wherever he may be found.” *Id.* (construing 15 U.S.C. § 78aa). This language does not represent a broad departure from the basic tenets of Fourteenth Amendment due process; rather, it is merely the method of obtaining personal jurisdiction in federal question cases, such as those under the federal securities laws. Plaintiffs may file suit in any federal district, provided that the defendant has constitutionally-required minimum contacts with the United States. *DaimlerChrysler*, 197 F. Supp. 2d at 93 n.4 (“Because jurisdiction in this case is based on a statute that provides for nationwide service of process, the relevant minimum contacts inquiry focuses on the defendant’s contacts with the United States as a whole, rather than with a particular state.”); *SEC v. The Infinity Group Co.*, 27 F. Supp. 2d 559, 563 (E.D. Pa. 1998) (same).

Though the Ninth Circuit was required to clarify the plaintiffs’ pleading standard for liability, it did not address (as the issue was apparently not presented for appeal), whether indeed the defendant had sufficient minimum contacts with the forum to permit personal jurisdiction. It appears that corporate bonds that were the focus of the alleged fraud were regulated in the U.S. by the National Association of Securities Dealers (“NASD”), and that there was some evidence that the individual defendant may have been affirmatively involved in dealing with the NASD and others regarding the bond

offering. *San Mateo*, 979 F.2d at 1357. The defendants apparently had jurisdictional contacts with the United States. In contrast to Plaintiffs' strained interpretation of *San Mateo*, the Ninth Circuit directly rejected Plaintiffs' theory in *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990). The Ninth Circuit found personal jurisdiction over a partnership, but rejected an argument that this would confer jurisdiction over the individual partners because they were jointly and severally liable for the obligations of the partnership:

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.

Id. at 1365.

As recent federal decisions reveal, the mere allegations of control person liability are no substitute for the minimum contacts required by the Fourteenth Amendment.

In *DaimlerChrysler*, the court expressly rejected the theory that allegations of "control person" liability provide indicia of minimum contacts sufficient to create personal jurisdiction over an executive of a foreign corporation. The court held that such an approach "improperly merges" the question of liability with the "independent threshold consideration" of personal jurisdiction; the court "decline[d] to sidestep the time-honored and well-established due process analysis required for the exercise of personal jurisdiction." 197 F. Supp. 2d at 99.

DaimlerChrysler follows and relies upon the holding in *In re Baan Co. Securities Litigation*, 81 F. Supp. 2d 75 (D.D.C. 2000), *approved*, 245 F. Supp. 2d 117 (D.D.C. 2003). *Baan* also rejected the argument that allegations of federal control person liability

are sufficient to satisfy the plaintiffs' burden of proving minimum contacts, and specifically distinguishes *McNamara*, *Derensis*, *Landry* and *San Mateo*:

The staggering implications of the acceptance of that theory makes it understandable that the cases, including the ones upon which plaintiffs try to rely, have never gone that far. To the contrary, each (with one exception) have required more than the allegation that defendant controlled the entity which performed the act claimed to have violated the pertinent securities law before asserting jurisdiction over its person.

Id. at 80.

Baan cautioned against reading too much into one sentence in the Ninth Circuit's *San Mateo* decision, for that would be "utterly inconsistent with the persistent insistence of the Supreme Court since the decision in [*Hanson v. Denckla*], that personal jurisdiction be premised on a showing that the defendant has, by his acts, purposefully availed himself of the forum's benefits."¹⁰ *Id.* at 81-82 (citation omitted).

These concerns are appropriately taken to heart. Constitutional due process requires that it be "foreseeable" that any out-of-state activity would subject a nonresident to personal jurisdiction in the Utah courts. Foreseeability, in this context, does not mean a kind of general foreseeability that by serving as a director one might get sued in any state with securities statutes. Rather, it must be foreseeable that the "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287

¹⁰ Indeed, the California Court of Appeal, in affirming the trial court's refusal to establish jurisdiction over these same Defendants, held that Plaintiffs' interpretation of *San Mateo* would give it an unconstitutional effect. *Eaton Vance*, 2003 WL 1521896, at *7.

(1980).

Plaintiffs argue that Utah, and forty-one other states, have control person statutes. BOA at 34 & n.12. But this means, under Plaintiffs' jurisdictional theory, that by joining the board of a company that makes routine SEC filings, the outside directors may be haled into court in any of these forty-two states merely on the basis of the allegation of control person liability. The potentially unlimited scope of personal jurisdiction under such a theory is why the United States Supreme Court has rejected minimum contacts based on the foreseeability of effects in a forum state and held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State."¹¹ *Burger King*, 471 U.S. at 474-75.

Plaintiffs also argue that while "there is so little caselaw" addressing scenarios in which a corporation's directors move to dismiss a complaint sounding in state securities laws, "[m]uch more precedent" exists for construing liability under such laws. BOA at 46-47. This argument is spurious. There have been thousands upon thousands of cases construing and considering the scope of liability under different statutes.¹² We cannot

¹¹ Adherence to the traditional test for minimum contacts does not allow directors to escape potential responsibility for their alleged actions. They can be sued in federal court, in their home states, or in other states where minimum contacts exist (as for example the domicile of the corporation on whose board they serve).

¹² Plaintiffs point to a handful of cases in which state courts have considered liability on the merits against officers or directors of a corporation. None of these cases address personal jurisdiction. *See generally Steenblik v. Lichfield*, 906 P.2d 872 (Utah 1995); *Sherman v. Lloyd*, 181 Cal. App. 3d 693 (1986); *Bowden v. Robinson*, 67 Cal. App. 3d 705 (1977); *Eastwood v. Froelich*, 60 Cal. App. 3d 523 (1976); *The Neptune Society Corp. v. Longanecker*, 194 Cal. App. 3d 1233 (1987).

assume that any time a court reaches the merits in an action, it must have leap-frogged federal due process.

3. **Even When Fully Applicable, The Control Person Statute Does Not Work A Substantive Change In The Principles Used To Define The Jurisdiction Of Utah Courts And Plaintiffs Have Failed To Bring Themselves Within The Requirements Of 61-1-22(4)**

Jurisdictional analysis has two components: does a statute authorize jurisdiction; and would the exercise of that statutory jurisdiction comport with constitutional requirements. *D.A. v. State*, 63 P.3d at 612; *accord Sher*, 911 F.2d at 1360.

There is nothing in the language or history of § 61-1-22(4) suggesting that the Legislature meant for that statute to define the jurisdiction of Utah courts. Statutes that confer jurisdiction, such as § 78-27-24 (long-arm statute) or § 78-3a-110(13) (juvenile court jurisdiction) do so explicitly.

Nothing in Utah law suggests that a statute creating a cause of action or allocating burdens of proof thereby confers jurisdiction on Utah courts. Plaintiffs are again mixing liability apples and jurisdictional oranges. *See supra* Section IV.E.2. There are causes of action where the plaintiff's burden of proof is relatively slight, and few defenses are available. But in such situations (strict liability comes to mind) courts still adhere to minimum contacts analysis with the burden of proof on plaintiffs. *See generally Asahi Metal Indus. Co.*, 480 U.S. 102 (1987).

There is no support for the broad "presumption" Plaintiffs would have the Court draw from § 61-1-22(4). The case of *Steenblik v. Lichfield*, 906 P.2d 872 (Utah 1995), recognizes an allocation to the defendant of the burden of proof as to the state of mind of

the control person. *Id.* at 876-77. That directors or officers may bear the burden, at trial, of establishing their state of mind in connection with the allegedly wrongful acts, does not equate with a presumption that these directors or officers have engaged in tortious acts aimed at Utah for jurisdictional purposes. At a loss for any authority that the Utah securities laws create such a presumption, Plaintiffs point to three cases interpreting California franchise law. Like *Steenblik*, these cases hold that defendants have the burden of establishing an innocent state of mind at trial.¹³ While Plaintiffs delve into California franchise law, they avoid the one California decision interpreting the control person provisions of the California securities laws, which holds that allegations of control person liability do not confer jurisdiction. *Taylor-Rush*, 217 Cal. App. 3d at 113-14.

Plaintiffs also cite to dated authority from Illinois and Georgia to support their theory. These cases leave the question of jurisdiction untouched, and employ now-obsolete interpretations of the control person provisions of their respective states. More recent cases show that Illinois and Georgia courts take an even more restrictive view of liability than this Court did in the *Steenblik* opinion; in these jurisdictions plaintiffs must prove knowledge or culpability for control person liability to attach. *Compare Goelitz v. Lathrop*, 3 N.E.2d 305, 315 (Ill. App. Ct. 1936) with *Gowdy v. Richter*, 314 N.E.2d 549, 561 (Ill. App. 3d 1974) (director was not subject to control person liability because plaintiff failed to meet burden of showing that director had “knowledge” of the alleged violation); *compare Boddy v. Theiling*, 199 S.E.2d 379, 382 (Ga. App. 1973) with *Binder*

¹³ See generally *Neptune Society*, 194 Cal. App. 3d at 1248; *Courtney v. Waring*, 191 Cal. App. 3d 1434 (1987); *Eastwood*, 60 Cal. App. 3d at 523.

v. Gordian Sec., Inc., 742 F. Supp. 663, 667-68 (N.D. Ga. 1990) (“[M]ere status as an officer of [the corporation] does not make [defendant] a ‘controlling person.’”).

4. **The Requirement Of Proof Of Minimum Contacts, Even In A Case Subject To § 61-1-22(4), Is A Proper Interpretation Of Utah Law, Consonant With The Requirements Of State And Federal Due Process**

Even if § 61-1-22(4) permitted personal jurisdiction in Utah over nonresidents, the exercise of that jurisdiction would still be limited by due process. Upon a fact-based inquiry, the trial court found a lack of the minimum contacts, as required by the Fourteenth Amendment. Utah cannot by statute assert jurisdiction beyond the limits set by minimum contacts and due process:

[A]ny legislative enactment of personal jurisdiction, in or out of the long-arm statute, cannot justify on its own the assertion of jurisdiction. The true safeguard on the extension of personal jurisdiction is the constitutional due process analysis, with its focus on minimum contacts and on traditional notions of fair play and substantial justice. Therefore, this test recognizes the legislature’s authority to provide for the extension of personal jurisdiction as limited by established constitutional due process requirements.

D.A. v. State, 63 P.3d at 612.

Assuming, *arguendo*, that the Utah securities statutes empowered Utah courts to automatically exercise personal jurisdiction against any individual based solely on allegations that he is a “control person,” such statutory authority would be trumped by the federal due process requirement that an individual have “minimum contacts” with Utah.

Id.; accord *Taylor-Rush*, 217 Cal. App. 3d at 113-14.

F. Section 61-1-26 Governs Service Of Process And Is Not An Independent Basis For the Exercise Of Personal Jurisdiction

Section 61-1-26 provides one of several means to serve process.¹⁴ It does not, as Plaintiffs claim, confer “jurisdiction over a non-resident defendant in a manner consistent with federal constitutional due process concerns.” BOA at 36.

Plaintiffs rest their argument on these words in § 61-1-26(8): “and personal jurisdiction over him cannot otherwise be obtained in this state . . . [substitute service shall have] . . . the same force and validity as if served on him personally.” BOA at 37. However, this court held in *D.A. v. State* that although the near-identical language of § 78-3a-110(13) provided a basis for personal jurisdiction under Utah law, the requirements of federal due process were a separate and indispensable inquiry. 63 P.3d at 612-13. Substitution of service statutes, like § 61-1-26 and § 78-3a-110(13), serve as alternatives to the Utah long-arm statute and confer jurisdiction under state law (*Piantes v. Hayden-Stone, Inc.*, 514 P.2d 529, 530 (Utah 1970)), but do not obviate the requirements of federal due process. *See D.A. v. State*, 63 P.3d at 612-13.

Courts in other states have recognized the differences between state securities statutes governing service of process and the minimum contacts necessary for personal jurisdiction. *Bank of Am. Nat’l Trust and Sav. Assoc. v. GAC Properties Credit*, 389

¹⁴ “When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or other hereunder, and he has not 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 division or director to be his attorney to receive service of any lawful process in any noncriminal suit . . . which grows out of that conduct and which is brought under this chapter or any rule or other hereunder, with the same force and validity as if served on him personally.” Utah Code Ann. § 61-1-26(8).

A.2d 1304, 1309-10 (Del. Ch. 1978) (Delaware securities statute still required constitutionally-mandated minimum contacts for the exercise of personal jurisdiction); *Paulos v. Best Sec., Inc.*, 109 N.W. 2d 576, 579-82 (Minn. 1961) (Minnesota securities statute was an adequate basis for substitute service of process, but minimum contacts are required for exercise of personal jurisdiction). Plaintiffs concede that the substitution of service sections under the securities laws of Delaware and Minnesota, are “nearly identical” to Utah, BOA 34 n.13, so these cases are highly persuasive.

Plaintiffs cite *Brown v. Investment Management and Research, Inc.*, 475 S.E.2d 754 (S.C. 1996), where the South Carolina Supreme Court held that an analogous substitution of service statute authorized personal jurisdiction under state law. However, the court left open the possibility that the exercise of jurisdiction over particular defendants might violate due process – an issue “more properly addressed by the trial court on remand.” *Id.* at 757 n.6.

American Microtel, Inc. v. Secretary of State, No. CA935874, 1995 WL 809575 (Mass. Super. Jan. 27, 1995), also relied upon by the Plaintiffs, is distinguishable because it considers the exercise of personal jurisdiction by the Massachusetts Securities Division in an administrative proceeding to regulate the conduct of an unregistered broker-dealer. When the personal jurisdiction of a court is obtained through the very same substitute of service statute, the court’s exercise of personal jurisdiction must “also comport with the requirements of Due Process.” *Harbourvest Int’l Private Equity Partners II-Direct Fund, L.P. v. Axent Techs., Inc.*, No. 99-2188, 2000 WL 1466096, at *7 n.12 (Mass. Super. Aug. 21, 2000).

Plaintiffs' argument is also undermined by case law construing section 27 of the Securities Exchange Act of 1934, which permits service of process "wherever the defendant may be found." 15 U.S.C. § 78aa. Despite this broadly worded statute, plaintiffs must still prove that a defendant has minimum contacts with the United States before personal jurisdiction is established. *Securities Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (holding that for personal jurisdiction through service effected under section 27, the nonresident must still have constitutionally required minimum contacts with the United States); *Baan*, 81 F. Supp. 2d at 77 ("It does not follow, however, that merely because service has been effected in accordance with American rules of procedure, that alien defendants can be thereby made subject ipso facto to the jurisdiction of any American court. Instead, aliens may claim the Fifth Amendment protection from being haled into an American court in a manner which contradicts traditional (and American) notions of fair play and justice.").

G. The Exercise Of Personal Jurisdiction Over The Outside Director Defendants Would Not Comport With "Fair Play And Substantial Justice"

Even if the other elements of specific jurisdiction had been met in this case (and they were not), the exercise of jurisdiction over the outside directors would be unreasonable and would not comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476. During the relevant period, the record shows that the outside directors were not executives and they were not involved in the day-to-day management of Safety-Kleen. *See Stack v. Lobo*, 903 F. Supp. 1361, 1376 (N.D. Cal. 1995) ("[O]rdinarily, outside directors are not involved in a corporation's day-to-day affairs.").

Plaintiffs have not alleged specific facts, or produced any evidence, establishing that any of the outside directors affirmatively directed any act at Utah or participated in creating any false financial statement or report. It is unreasonable to subject any outside director to jurisdiction based on the singular fact of board membership.

It is particularly unreasonable to subject outside directors Thomas and Wareham to jurisdiction because they joined the board in June 1997. RA 0165-67, 0171-73. The vast majority of the financial statements incorporated in the Preliminary Offering Memorandum that Plaintiffs allegedly relied upon in making their purchases predate June 1997. RA 011-12. Only one document, LES's Form 8-K dated June 11, 1997, even appears to be within the allegedly "relevant" time frame when these two outside directors served on the board. *Id.* There is no coherent allegation that the outside directors Wareham and Thomas assisted in manipulating the data on a Form 8-K.

Utah also lacks an interest in adjudicating this case. Neither Plaintiffs nor the Defendants are Utah residents. *See Asahi*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished."). The equities similarly weigh against Plaintiffs because they are not only non-residents, but "sophisticated business entit[ies]" who can litigate in an appropriate forum where the Defendants have the requisite jurisdictional contact, as readily as in Utah. *Roskelley*, 610 P.2d at 1313 (holding that plaintiffs' relative sophistication weighed against the exercise of personal jurisdiction over non-resident defendants).

VI. CONCLUSION

The order on the motions to dismiss should be affirmed.

VII. ADDENDUM

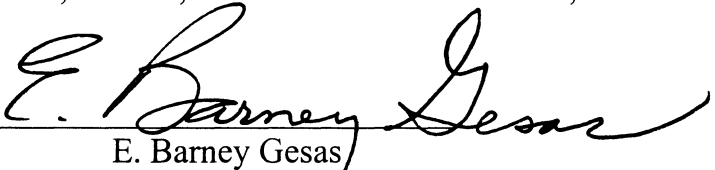
An Addendum is attached as pages A-1 to A-20, pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure.

Dated: June 24, 2003

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ADDENDUM

C

UTAH CODE, 1953
TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION
CHAPTER 1. UTAH UNIFORM SECURITIES ACT

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Current through the 2002 5th Special Session

61-1-1 Fraud unlawful.

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) employ any device, scheme, or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

History: C. 1953, 61-1-1, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 4.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. --Sections 61-1-1 to 61-1-41 (L. 1925, ch. 87, §§ 1 to 10, 10x, 11 to 18, 20 to 27; 1927, ch. 59, § 1; 1929, ch. 79, § 1; R. S. 1933, 82-1-1 to 82-1-41; L. 1941 (1st S. S.), ch. 29, §§ 1, 2; C. 1943, 82-1-1 to 82-1-41; L. 1957, ch. 129, § 1; 1961, ch. 149, § 1), relating to the state securities commission, were repealed by Laws 1963, ch. 145, § 1 (see § 61-1-30). Present § § 61-1-1 to 61-1-30 were enacted by § 1 of the act.

Comparable Provisions.--Ariz. Rev. Stat. § 44-1801 et seq.

Colo. Rev. Stat. Title 11, Art. 51.

C

UTAH CODE, 1953
TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION
CHAPTER 1. UTAH UNIFORM SECURITIES ACT

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Current through the 2002 5th Special Session

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.

(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).

History: C. 1953, 61-1-22, enacted by L. 1963, ch. 145, § 1; 1979, ch. 218, § 7; 1983, ch. 284, § 32; 1986, ch. 107, § 2; 1990, ch. 133, § 15; 1991, ch. 161, § 14; 1998, ch. 13, § 62.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

C

UTAH CODE, 1953
TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION
CHAPTER 1. UTAH UNIFORM SECURITIES ACT

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Current through the 2002 5th Special Session

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 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.

History: C. 1953, 61-1-26, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 36; 1990, ch. 133, § 17; 1992, ch. 216, § 6; 1997, ch. 160, § 11.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1997 amendment, effective May 5, 1997, inserted "61-1-15.5" in the series of sections in Subsection (1) and inserted "or notice filing" in Subsection (7) (b).

Cross-References. --Corporations doing business in state to have resident agent, § 16-10a-1508.

NOTES TO DECISIONS

ANALYSIS

Foreign contracts.
In personam jurisdiction.
Pleadings.

Foreign contracts.

Act did not apply to contracts made and entered into in another state. United States Bond & Fin. Corp. v. National Bldg. & Loan Ass'n of Am., 80 Utah 62, 12 P.2d 758, rehearing denied, 80 Utah 70, 17 P.2d 238 (1932) (decided under former law).

In personam jurisdiction.

Subsection (8) does not provide the exclusive method of acquiring jurisdiction over one in violation of the Securities Act, but simply gives a special means of doing so; it does not prevent the obtaining of personal jurisdiction by any other means provided by statute and, in particular, does not preclude the use of § 78-27-22, the "long-arm statute." Piantes v. Hayden-Stone, Inc., 30 Utah 2d 110, 514 P.2d 529 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893, rehearing denied, 416 U.S. 963, 94 S. Ct. 1983, 40 L. Ed. 2d 314 (1974).

C

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART III. Procedure
CHAPTER 27. MISCELLANEOUS PROVISIONS

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Current through the 2002 5th Special Session

78-27-22 Jurisdiction over nonresidents --Purpose of provision.

It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

History: L. 1969, ch. 246, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Meaning of 'this act'. --The term "this act," in the second paragraph, means Laws 1969, ch. 246, which enacted § § 78-27-22 to 78-27-28.

Cross-References. --Foreign corporations, registered office and agent, § 16-10a-1508.

Foreign fraternal, service of process upon commissioner, § 31A-14-203.

Nonresident motorists, long-arm provision, § 41-12a-403.

Service of process, Rules of Civil Procedure, Rule 4.

C

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART I. Courts
CHAPTER 3a. JUVENILE COURTS
PART 1. GENERAL PROVISIONS

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Current through the 2002 5th Special Session

78-3a-110 Summons --Service and process --Issuance and contents --Notice to absent parent or guardian --Emergency medical or surgical treatment -- Compulsory process for attendance of witnesses when authorized.

(1) After a petition is filed the court shall promptly issue a summons, unless the judge directs that a further investigation is needed. No summons is required as to any person who appears voluntarily or who files a written waiver of service with the clerk of the court at or prior to the hearing.

(2) The summons shall contain:

(a) the name of the court;

(b) the title of the proceedings; and

(c) except for a published summons, a brief statement of the substance of the allegations in the petition.

(3) A published summons shall state:

(a) that a proceeding concerning the minor is pending in the court; and

(b) an adjudication will be made.

(4) The summons shall require the person or persons who have physical custody of the minor to appear personally and bring the minor before the court at a time and place stated. If the person or persons summoned are not the parent, parents, or guardian of the minor, the summons shall also be issued to the parent, parents, or guardian, as the case may be, notifying them of the pendency of the case and of the time and place set for the hearing.

(5) Summons may be issued requiring the appearance of any other person whose presence the court finds necessary.

(6) If it appears to the court that the welfare of the minor or of the public requires that the minor be taken into custody, the court may by endorsement upon the summons direct that the person serving the summons take the minor into custody

at once.

(7) Upon the sworn testimony of one or more reputable physicians, the court may order emergency medical or surgical treatment that is immediately necessary for a minor concerning whom a petition has been filed pending the service of summons upon his parents, guardian, or custodian.

(8) A parent or guardian is entitled to the issuance of compulsory process for the attendance of witnesses on his own behalf or on behalf of the minor. A guardian ad litem or a probation officer is entitled to compulsory process for the attendance of witnesses on behalf of the minor.

(9) Service of summons and process and proof of service shall be made in the manner provided in the Utah Rules of Civil Procedure.

(10) Service of summons or process shall be made by the sheriff of the county where the service is to be made, or by his deputy; but upon request of the court service shall be made by any other peace officer, or by another suitable person selected by the court.

(11) Service of summons in the state shall be made personally, by delivering a copy to the person summoned; provided, however, that parents of a minor living together at their usual place of abode may both be served by personal delivery to either parent or copies of the summons, one copy for each parent.

(12) If the judge makes a written finding that he has reason to believe that personal service of the summons will be unsuccessful, or will not accomplish notification within a reasonable time after issuance of the summons, he may order service by registered mail, with a return receipt to be signed by the addressee only, to be addressed to the last-known address of the person to be served in the state. Service shall be complete upon return to the court of the signed receipt.

(13) If the parents, parent, or guardian required to be summoned under Subsection (4) cannot be found within the state, the fact of their minor's presence within the state shall confer jurisdiction on the court in proceedings in minor's cases under this chapter as to any absent parent or guardian, provided that due notice has been given in the following manner:

(a) If the address of the parent or guardian is known, due notice is given by sending him a copy of the summons by registered mail with a return receipt to be signed by the addressee only, or by personal service outside the state, as provided in the Utah Rules of Civil Procedure. Service by registered mail shall be complete upon return to the court of the signed receipt.

(b) If the address or whereabouts of the parent or guardian outside the state cannot after diligent inquiry be ascertained, due notice is given by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending. The summons shall be published once a week for four successive weeks. Service shall be complete on the day of the last publication.

(c) Service of summons as provided in this subsection shall vest the court with jurisdiction over the parent or guardian served in the same manner and to the same extent as if the person served was served personally within the state.

(14) In the case of service in the state, service completed not less than 48 hours before the time set in the summons for the appearance of the person served, shall be sufficient to confer jurisdiction. In the case of service outside the state, service completed not less than five days before the time set in the summons for appearance of the person served, shall be sufficient to confer jurisdiction.

(15) Computation of periods of time under this chapter shall be made in accordance with the Utah Rules of Civil Procedure.

History: C. 1953, 78-3a-110, enacted by L. 1997, ch. 365, § 24.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Effective Dates. --Laws 1997, ch. 365 became effective on March 21, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

Cross-References. --Process, U.R.C.P. 4.

Time, U.R.C.P. 6.

NOTES TO DECISIONS

Child's marital status.

Because the juvenile court had jurisdiction over a 16-year-old married minor and the jurisdiction over her parents was not dependent on the child's majority status under § 15-2-1, the court had broad authority to summon the parents to court. T.G. v. State, 1999 UT App 268, 987 P.2d 1272.

U.C.A. 1953 § 78-3a-110

UT ST § 78-3a-110

END OF DOCUMENT

C

WEST'S ANNOTATED CALIFORNIA CODES
CORPORATIONS CODE
TITLE 4. SECURITIES
DIVISION 1. CORPORATE SECURITIES LAW OF 1968
PART 6. ENFORCEMENT
CHAPTER 1. CIVIL LIABILITY

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Current through Ch. 14 of 2003-04 Reg.Sess. urgency legislation,
Ch. 12 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 25504. Joint and several liability of other persons, partners, etc., with persons liable under section 25501 or 25503

Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, 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.

CREDIT(S)

1977 Main Volume

(Added by Stats.1968, c. 88, p. 281, § 2, operative Jan. 2, 1969.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1977 Main Volume

Former § 25504, which related to contents of application required of corporate applicant, added by Stats.1949, c. 384, p. 708, § 1, was repealed by Stats.1968, c. 88, p. 243, § 1, operative Jan. 2, 1969 and was derived from Stats.1917, c. 532, p. 675, § 3; Stats.1931, c. 423, p. 941, § 2; Stats.1941, c. 615, p. 2064, § 1.

LAW REVIEW AND JOURNAL COMMENTARIES

Collateral participant liability under state securities laws. Douglas M. Branson, 19 Pepp.L.Rev. 1027 (1992).

C

WEST'S ANNOTATED CALIFORNIA CODES
CORPORATIONS CODE
TITLE 4. SECURITIES
DIVISION 1. CORPORATE SECURITIES LAW OF 1968
PART 6. ENFORCEMENT
CHAPTER 4. SERVICE OF PROCESS

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Current through Ch. 14 of 2003-04 Reg.Sess. urgency legislation,
Ch. 12 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 25550. Appointment of commissioner to receive service of process; service upon commissioner; forwarding notice and copy of process; affidavit of compliance

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 under subdivision (h) of Section 25102, Section 25165 or Section 25240, and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the commissioner or his successor in office 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 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, but it is not effective unless (a) the plaintiff, who may be the commissioner in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (b) the plaintiff's affidavit of compliance with this section 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.

CREDIT(S)

1977 Main Volume

(Added by Stats.1968, c. 88, p. 285, § 2, operative Jan. 2, 1969. Amended by Stats.1973, c. 390, p. 850, § 20.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1977 Main Volume

The 1973 amendment inserted, in the first sentence, the words "subdivision (h) of Section 25102".

Prior law: Former § 25900, added by Stats.1949, c. 384, p. 717, § 1.



UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

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Current through P.L. 108-32, approved 06-17-03

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Dec. 4, 1987, Pub.L. 100-181, Title III, § 326, 101 Stat. 1259.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1987 Acts. Senate Report No. 100-105, see 1987 U.S. Code Cong. and Adm. News, p. 2089.

References in Text

This chapter, referred to in text, in the original read "this title". See References in Text note set out under § 78a of this title.

Codifications

As originally enacted section contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted "the district court of the United States for the District of Columbia" for "the Supreme Court of the District of Columbia", and Act June 25, 1948, as amended by Act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia". Pub.L. 100-181 struck out reference to the United States District Court for the District of Columbia. Previously, such words had been editorially eliminated as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which provides that "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district", and section 88 of Title 28 which provides that "the District of Columbia constitutes one judicial district".

[For delegation of functions of the President under section 5003(d)(1) of Pub.L. 100-418 to the Secretary of State, see section 3-101 of Ex.Ord. No. 12661, Dec. 27, 1988, 54 F.R. 779, set out as a note under section 2901 of Title 19, Customs Duties.]

Amendments

1987 Amendments. Pub.L. 100-181, § 326(1), (2), struck from the first sentence ", the United States District Court for the District of Columbia," following "district courts of the United States"; and substituted in the fourth sentence "sections 1254, 1291, 1292, and 1294 of Title 28" for "sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347)".

Transfer of Functions

For transfer of the functions of the Securities and Exchange Commission, with certain exceptions, to the chairman of such commission, see Reorg. Plan No. 10 of 1950, § § 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

CROSS REFERENCES

Costs, see Fed.Rules Civ.Proc. Rule 54, 28 USCA.

Jurisdiction of offenses and suits under--

Investment Advisers Act of 1940, see 15 USCA § 80b-14.

Investment Company Act of 1940, see 15 USCA § 80a-43.

Public Utility Holding Company Act of 1935, see 15 USCA § 79y.

Securities Act of 1933, see 15 USCA § 77v.

Trust Indenture Act of 1939, see 15 USCA § 77vvv.

One form of action, see Fed.Rules Civ.Proc. Rule 2, 28 USCA.

Securities Investor Protection Corporation's authority to file application for protective decree with any court of competent jurisdiction specified in this section upon determining member failed or in danger of failing to meet obligations to customers, see 15 USCA § 78eee.

Special venue provisions of this section as unaffected by Federal Rules of Criminal Procedure, see Notes of Advisory Committee under Fed.Rules Cr.Proc. Rule 18, 28 USCA.

(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 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

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

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

*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

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

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 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

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

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 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

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

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; *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,

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

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...."

Published, (Cal. Rules of Court, Rules 976, 977)

END OF DOCUMENT

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

IN THE UTAH SUPREME COURT

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 FUND, INC., AND PUTNAM
INVESTMENTS, INC.,

Plaintiffs/Appellants,

v.

KENNETH W. WINGER, JOHN R.
GRAINGER, PAUL R. HUMPHREYS, JAMES
R. BULLOCK, JOHN W. ROLLINS, JR., JOHN
W. ROLLINS, SR., 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.

CERTIFICATE OF SERVICE

Trial Court Case No. 01-300722 MI

Appellate Court No. 20020719

This is to certify that two (2) copies of

**Brief of Appellees (David E. Thomas, Jr., John W. Rollins, Jr., James L.
Wareham, Grover C. Wrenn and Henry B. Tippie)**

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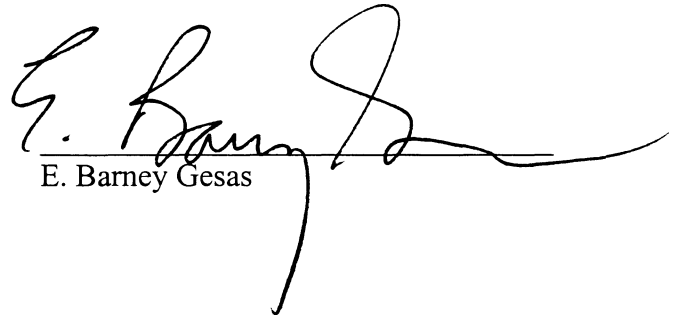
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Supreme Court Case No.: 20020719

BRIEF OF APPELLEES

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Jr., John W. Rollins, Sr., James L.
Wareham, Grover C. Wrenn, and
Henry B. Tippie)**

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Court, County of Tooele, The Honorable
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