

2002

MFS SERIES TRUST ffl (on behalf of MFS MUNICIPAL HIGH INCOME FUND), MERRILL LYNCH HIGH YIELD MUNICIPAL BOND FUND, INC., MUNIHOLDINGS FUND, INC., MERRILL LYNCH MUNICIPAL BOND FUND, THE NATIONAL PORTFOLIO, MERRILL LYNCH MUNICIPAL STRATEGY FUND, EATON VANCE DISTRIBUTORS, INC., T. ROWE PRICE ASSOCIATES, INC., JOHN HANCOCK FUNDS, INC., and PUTNAM INVESTMENTS, INC. v. KENNETH W. WINGER, JOHN R. GRAINGER, PAUL R. HUMPHREYS, JAMES R. BULLOCK, JOHN W.

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#### Recommended Citation

Brief of Appellee, *Putnam Investments v. Winger*, No. 20020719.00 (Utah Supreme Court, 2002).  
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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  
MUNICIPAL HIGH INCOME FUND),  
MERRILL LYNCH HIGH YIELD  
MUNICIPAL BOND FUND, INC.,  
MUNI HOLDINGS FUND, INC., MERRILL  
LYNCH MUNICIPAL BOND FUND, THE  
NATIONAL PORTFOLIO, MERRILL  
LYNCH MUNICIPAL STRATEGY FUND,  
EATON VANCE DISTRIBUTORS, INC.,  
T. ROWE PRICE ASSOCIATES, INC.,  
JOHN HANCOCK FUNDS, INC., and  
PUTNAM INVESTMENTS, INC.,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

Supreme Court Case No. 20020719

**BRIEF OF APPELLEE  
HENRY H. TAYLOR**

Appeal from Decision of  
Third District Court, County of Tooele

Case No. 010300722 MI  
Judge L. A. Dever

3

**FILED**  
UTAH SUPREME COURT  
JUN 27 2003

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## TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTIONAL STATEMENT .....	1
II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW .....	1
III. STATEMENT OF FACTS .....	2
IV. SUMMARY OF ARGUMENT .....	6
V. ARGUMENT .....	8
A. Appellants Failed To Marshal Evidence.....	10
B. Regardless Of How Utah Code Ann. § 61-1-22(4) And Utah Code Ann. § 61-1-26(8) Are Construed, Neither Can Be Read To Confer Personal Jurisdiction Over Taylor .....	11
1. Because Liability Is Distinct From Jurisdiction, It Is Not Enough For Appellants Merely To Show That Taylor Is Presumptively Liable Under Utah Code Ann. § 61-1-22(4) .....	12
2. Appellants’ Cases Are Unavailing.....	16
3. Utah Code Ann. § 61-1-26 Is Merely A Service Of Process Statute And Does Not Provide An Independent Basis For Jurisdiction.....	20
C. Appellants Have Failed To Establish That Taylor Has Sufficient Minimum Contacts With Utah Such That Asserting Jurisdiction Over Him Would Comport With Due Process .....	24
1. Appellants Have Failed To Establish That Taylor Purposefully Availed Himself Of The Privilege Of Conducting Personal Business In Utah.....	24
2. Appellants’ Claims Do Not Arise Out Of Or Have A Substantial Connection With Taylor’s Limited Corporate Contacts With Utah.....	27
3. Appellants’ Reliance On Taylor’s “Presumed” Contacts With Utah Is Misplaced, Since Basing Personal Jurisdiction on Presumed Acts Would Violate Due Process.....	29

**TABLE OF CONTENTS**  
**(continued)**

	<b><u>Page</u></b>
D. This Court’s Exercise Of Jurisdiction Over Taylor Would Be Inherently Unfair.....	31
1. The Burden On Taylor To Litigate In Utah Is Great.....	31
2. Utah’s Interest In This Matter Is Slight .....	32
3. Appellants’ Interest In Obtaining Relief Does Not Support Utah Jurisdiction .....	33
4. Judicial Efficiency Does Not Support Jurisdiction.....	33
VI. CONCLUSION.....	33



## TABLE OF AUTHORITIES

	<u>Page</u>
 <b>CASES</b>	
<i>Am. Life &amp; Cas. Ins. Co. v. First Am. Title Co. of Utah</i> , 772 F. Supp. 574 (D. Utah 1991) .....	25
<i>American Microtel, Inc. v. Massachusetts</i> , No. 93-5874, 1995 Mass. Super. LEXIS 593 at *28-30 (Apr. 10, 1995) .....	22, 23
<i>American Telephone &amp; Telegraph Company v. Compagnie Bruxelles Lambert</i> , 94 F.3d 586 (9th Cir. 1996) .....	12, 13, 30
<i>Anderson v. Am. Soc’y of Plastic and Reconstructive Surgeons</i> , 807 P.2d 825 (Utah 1990) .....	10
<i>Arguello v. Indus. Woodworking Mach. Co.</i> , 838 P.2d 1120 (Utah 1992) .....	8, 9, 10
<i>Asahi Metal Indus Co. v. Superior Court</i> , 480 U.S. 102 (1987) .....	9, 29
<i>Bank of Am. v. Nat’l Trust and Sav. Ass’n v. GAC Props. Credit, Inc.</i> , 389 A.2d 1304 (Del. Ch. 1978) .....	22
<i>Brown v. Carnes Corp.</i> , 611 P.2d 378 (Utah 1980) .....	31
<i>Brown v. Inv. Mgmt. &amp; Research, Inc.</i> , 475 S.E.2d 754 (S.C. 1996) .....	23, 24
<i>Burger King Corp. v. Radzewicz</i> , 471 U.S. 462 (1985) .....	26, 29
<i>Calder v. Jones</i> , 465 U.S. 783 (1984) .....	26, 27
<i>D.A. v. State (In the Interest of W.A.)</i> , 63 P.3d 607 (Utah 2002) .....	1, 8, 21, 30
<i>Dakota Indus., Inc. v. Ever Best Ltd.</i> , 28 F.3d 910 (8th Cir. 1994) .....	13
<i>Derensis v. Coopers &amp; Lybrand Charters Accountants</i> , 930 F. Supp. 1003 (D.N.J. 1996) .....	20
<i>Dobbs v. Chevron USA, Inc.</i> , 39 F.3d 1064 (10th Cir. 1994) .....	25
<i>Far West Capital, Inc. v. Towne</i> , 46 F.3d 1071 (10th Cir. 1995) .....	10, 27
<i>Goehring v. Superior Court</i> , 73 Cal. Rptr. 2d 105 (Cal. Ct. App. 1998) .....	25
<i>Holmes v. Sec. Investor Prot. Corp.</i> , 503 U.S. 258 (1992) .....	18
<i>In Re Baan Co. Securities Litigation</i> , 81 F. Supp. 2d 75 (D.D.C. 2000) .....	16, 19, 22
<i>Int’l Shoe Co. v. Washington</i> , 326 U.S. 310 (1945) .....	9, 18, 26

# TABLE OF AUTHORITIES

## (Continued)

	<u>Page</u>
<b>CASES (cont.)</b>	
<i>Johnson v. Creative Arts &amp; Wool Masters, Inc.</i> , 743 F.2d 947 (1st Cir. 1984).....	18
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984).....	26
<i>Landry v. Price Waterhouse Chartered Accountants</i> , 715 F. Supp. 98 (S.D.N.Y. 1998) .....	20
<i>Langlois v. Déjà Vu, Inc.</i> , 984 F. Supp. 1327 (W.D. Wash. 1997).....	13
<i>LeDuc v. Ky. Cent. Life Ins. Co.</i> , 814 F. Supp. 820 (N.D. Cal. 1992).....	25
<i>Mallory Eng'g v. Ted R. Brown &amp; Assoc.</i> , 618 P.2d 1004 (Utah 1980).....	9
<i>McNamara v. Bre-X Minerals, Ltd.</i> , 46 F. Supp. 2d 628 (E.D. Tex. 1999).....	20
<i>Parry v. Ernst Home Ctr. Corp.</i> , 779 P.2d 659 (Utah 1989).....	31
<i>Pellegrini v. Sachs &amp; Sons</i> , 522 P.2d 704 (Utah 1974) .....	10
<i>Rush v. Savchuk</i> , 444 U.S. 320 (1980).....	13, 26
<i>San Mateo County Transit District v. Fitzgerald</i> , 979 F.2d 1356 (9th Cir. 1992) ....	16, 17, 18, 19
<i>SBKC Serv. Corp. v. 111 Prospect Partners, L.P.</i> , 969 F. Supp. 1254 (D. Kan. 1997) .....	14
<i>Schlatter v. Mo-Comm Futures, Ltd.</i> , 662 P.2d 553 (1983).....	14, 15
<i>Seagate Tech. v. A.J. Kogyo Co.</i> , 268 Cal. Rptr. 586 (Cal. Ct. App. 1990) .....	26
<i>Sec. Investor Prot. Corp. v. Vigman</i> , 764 F.2d 1309 (9th Cir. 1985) .....	18
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977) .....	12
<i>Sher v. Johnson</i> , 911 F.2d 1357 (9th Cir. 1990).....	12, 13, 14
<i>SII MegaDiamond, Inc. v. Am. Superabrasives Corp.</i> , 969 P.2d 430 (Utah 1998) .....	8, 9, 10, 26, 29, 31
<i>Synergetics v. Marathon Ranching Co.</i> , 701 P.2d 1106 (Utah 1985).....	9, 10, 31
<i>Taylor-Rush v. Multitech Corp.</i> , 265 Cal. Rptr. 672 (1990).....	15

## TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
 <b>CASES (cont.)</b>	
<i>Tri-West Ins. Servs., Inc. v. Seguros Monterrey Aetna, S.A.</i> , 93 Cal. Rptr. 2d 78 (Cal. Ct. App. 2000).....	21
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah Ct. App. 1991) .....	11
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980) .....	30
 <b>STATUTES</b>	
California Corporations Code § 25504 .....	15, 16
Kansas Stat. Ann. § 17-1268(b).....	14
Utah Code Ann. § 61-1-1(2) .....	2
Utah Code Ann. § 61-1-22.....	14
Utah Code Ann. § 61-1-22(4) .....	2, 11, 12, 15, 20, 21, 29, 30
Utah Code Ann. § 61-1-26.....	11, 20, 30
Utah Code Ann. § 61-1-26(8) .....	11, 20, 21, 23
Utah Code Ann. § 78-2-2(3)(j) .....	1
Utah Code Ann. § 78-27-22.....	8
 <b>OTHER</b>	
Securities Act of 1934, 15 U.S.C. § 78.....	16, 17

## TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTIONAL STATEMENT .....	1
II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW .....	1
III. STATEMENT OF FACTS .....	2
IV. SUMMARY OF ARGUMENT .....	6
V. ARGUMENT .....	8
A. Appellants Failed To Marshal Evidence.....	10
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1. Because Liability Is Distinct From Jurisdiction, It Is Not Enough For Appellants Merely To Show That Taylor Is Presumptively Liable Under Utah Code Ann. § 61-1-22(4) .....	12
2. Appellants' Cases Are Unavailing.....	16
3. Utah Code Ann. § 61-1-26 Is Merely A Service Of Process Statute And Does Not Provide An Independent Basis For Jurisdiction.....	20
C. Appellants Have Failed To Establish That Taylor Has Sufficient Minimum Contacts With Utah Such That Asserting Jurisdiction Over Him Would Comport With Due Process .....	24
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**TABLE OF CONTENTS**  
**(continued)**

	<b><u>Page</u></b>
D. This Court’s Exercise Of Jurisdiction Over Taylor Would Be Inherently Unfair.....	31
1. The Burden On Taylor To Litigate In Utah Is Great .....	31
2. Utah’s Interest In This Matter Is Slight .....	32
3. Appellants’ Interest In Obtaining Relief Does Not Support Utah Jurisdiction .....	33
4. Judicial Efficiency Does Not Support Jurisdiction.....	33
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## **I. JURISDICTIONAL STATEMENT**

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j). On June 19, 2002, the trial court entered an order granting defendants' motions to dismiss the complaint for lack of personal jurisdiction. (Record on Appeal ("RA"), at 543-42.) On August 6, 2002, the trial certified the dismissal of the complaint as a final judgment. (RA 518-16.)

## **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

The issue presented by this appeal is whether the trial court correctly determined that the Due Process Clause of the United States Constitution bars Utah's asserting personal jurisdiction over Henry Taylor when (a) Taylor's only connection with Utah is his status as an officer or director of a corporation that issued securities in Utah through allegedly misleading information, and (b) Utah law creates a rebuttable presumption that Taylor, merely by virtue of his status as an officer or director, may be jointly and severally liable under Utah's securities laws. Appellants filed a timely notice of appeal. (RA 559-52.)

Whether a court has personal jurisdiction over a defendant under Utah law and the Due Process Clause of the United States Constitution is a question of law, which is reviewed for "correctness." D.A. v. State (In the Interest of W.A.), 63 P.3d 607, 611 (Utah 2002). The Court may affirm the trial court's ruling "if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis of its ruling." Id.

### **III. STATEMENT OF FACTS**

1. This action arises out of the July 1997 issuance of pollution control bonds (the “Bonds”) by Tooele County (the “Bond Issuance”). The Bonds were secured by a loan agreement for which Laidlaw Environmental Services, Inc. (“LESI”) and its successor Safety-Kleen Corporation (“Safety-Kleen”), a Delaware corporation with its principal place of business in South Carolina, was the primary obligor. (RA 22, ¶ 1.)

2. Appellants<sup>1</sup> are institutional purchasers of the Bonds, each of which is foreign to Utah. (RA 21, ¶¶ 4-9.)

3. Appellants claim venue is proper in Tooele County, Utah, based upon a forum selection clause contained in the Indenture of Trust between the County of Tooele, as issuer, and U.S. Bank, as trustee, dated July 1, 1997. (RA 22, ¶ 2.) None of the individual defendants, including Henry Taylor (“Taylor”), was a party to the Indenture of Trust. (RA 285-193.)

4. Appellants’ Complaint – the substance of which is alleged solely on information and belief – sets forth five (5) causes of action, only three (3) of which are pled against Taylor. In general, the Complaint alleges that the named defendants participated in and/or aided and abetted LESI with respect to materially false statements regarding LESI’s financial condition. With respect to Taylor, the complaint alleges causes of action under Utah Code Ann. §§ 61-1-1(2) and 61-1-22(4), as well as a claim

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<sup>1</sup> “Appellants” refers to 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 Munch Municipal Bond Fund, The National Portfolio, Merrill Lynch Municipal Strategy Fund, Eaton Vance Distributors, Inc., T. Rowe Price Associates, Inc., John Hancock Funds, Inc., and Putnum Investments, Inc., collectively.

for negligent misrepresentation. (RA 10-02, ¶¶ 67-76, 77-88, 108-121.) There are no allegations of any intentional conduct by Taylor. (Id.)

5. Taylor is a resident of Columbia, South Carolina, and has been a resident of South Carolina all of his life. Until November 16, 2001, Taylor was the Senior Vice President, Secretary and General Counsel of Safety-Kleen. On November 16, 2001, Taylor resigned his position as Senior Vice President, Secretary and General Counsel of Safety-Kleen and now serves as Special Counsel and consultant to Safety-Kleen. (RA 185, ¶ 1.)

6. From May 1997 until January 9, 2001, Taylor held the office of Vice President, Secretary and General Counsel of Safety-Kleen. Safety-Kleen was known as Laidlaw Environmental Services, Inc. (“LESI”) from May 1997 through November 24, 1998 (although LESI did business as Safety-Kleen from July 1, 1998 through November 24, 1998). From May 1990 until May 1997, Taylor served as Secretary and Vice President, Legal Affairs of Laidlaw Environmental Services (US), Inc., renamed Safety-Kleen (US), Inc. in July 1998; and thereafter merged into Safety-Kleen Services, Inc. in September 1998. (RA 185, ¶ 1.)

7. Safety-Kleen maintains its principal executive offices in Columbia, South Carolina. Currently, Safety-Kleen and 73 of its United States subsidiaries are seeking relief in the United States Bankruptcy Court for the District of Delaware (District of Delaware Case No. 00-2303). (RA 185, ¶ 2.)

8. Taylor has never visited Utah for personal reasons. (RA 185-84, ¶ 3.) Taylor owns no real property in Utah, has no immediate family in Utah, and has never conducted any personal business in Utah. Taylor is an attorney licensed in the State of



South Carolina. Taylor is not a member of the State Bar of Utah, and has never appeared *pro hac vice* in any Utah court, state or federal. Taylor does not maintain a residence or office in Utah. Taylor has never maintained any bank accounts in Utah. Taylor is not a member of any limited partnership, general partnership, limited liability company, joint venture, or other business entity in Utah. Taylor has never paid or owed any taxes, including, but not limited to, income or gross receipt taxes, in or to the State of Utah. Taylor has never been a party to any lawsuit in Utah, or otherwise availed himself of the laws of the State of Utah. (RA 183, ¶ 10.)

9. All of Taylor's physical contacts with Utah have been solely in his capacity as a corporate agent for Safety-Kleen (Clive), Inc., which is incorporated in the State of Oklahoma. Safety-Kleen (Clive), Inc., is a subsidiary of Safety-Kleen Services, Inc., which, in turn, is a subsidiary of Safety-Kleen. Taylor was Secretary of Safety-Kleen (Clive), Inc., from approximately January 1, 1995, through March 17, 2000. From approximately March 17, 2000, through approximately November 16, 2001, Taylor was President and director of Safety-Kleen (Clive), Inc. (RA 185-84, ¶ 3.)

10. As part of Taylor's corporate duties on behalf of Safety-Kleen (Clive), Inc., to the best of Taylor's recollection, he has made only one (1) trip to Utah. Taylor believes this trip occurred in or around May of 1995, and involved a trip to Safety-Kleen (Clive), Inc.'s incineration facility in Clive, Utah (since he had never seen it), and a meeting with various Utah regulators concerning new management of this facility. This trip to Utah involved no personal business for Taylor. (RA 184, ¶ 4.)

11. Other than Taylor's one trip to Utah on behalf of Safety-Kleen (Clive), Inc., he does not recall ever traveling to Utah on behalf of any other entity related to Safety-

Kleen, including Safety-Kleen itself. The Bond Issuance underlying this litigation had nothing to do with Safety-Kleen (Clive), Inc. (RA 184, ¶ 5.)

12. Taylor has not been to Utah in any capacity since his last visit here in or about May 1995. (RA 184, ¶ 6.)

13. Safety-Kleen currently has two (2) subsidiaries that are limited liability companies organized under the laws of the State of Utah – SK Services, L.C., and SK Services (East), L.C. Taylor previously served as Secretary of these Utah limited liability companies, although existing corporate records do not reflect the entire period of time during which Taylor held such position. (RA 184, ¶ 7.)

14. Safety-Kleen previously had two other subsidiaries organized or incorporated in Utah – ECDC Environmental, L.C., and East Carbon Development Financial Partners, Inc. The first of these corporations was sold in approximately November of 1997, and the second was merged into Safety-Kleen (US), Inc., in August 1998. Taylor does not believe he ever served as an officer or manager of these companies, and no corporate records reviewed by Taylor show that he was ever listed as such. (RA 184, ¶ 8.)

15. None of the four (4) Utah-based subsidiaries of Safety-Kleen referred to above were involved in the Bond Issuance underlying the instant civil action. Taylor does not recall ever traveling to Utah on behalf of any of these entities. (RA 183, ¶ 9.)

16. Taylor never spoke with any representative of the Appellants in this action with respect to the Bond Issuance. At the time of the Bond Issuance, Taylor had no basis to know that any of the Appellants in this action had any connection to Utah. Taylor never personally attended any meetings in Utah pertaining to the Bond Issuance. (RA

183, ¶ 11.) Indeed, Taylor's role in the issuance of the bonds that are the subject matter of the current litigation was limited to acts taken solely in his capacity as corporate Vice President, Secretary, and/or General Counsel for Safety-Kleen, as follows:

- On or about July 9, 2001, Taylor affixed his signature to the General Certificate of Laidlaw Environmental Services, Inc. for the purpose of identifying himself as the General Counsel for and an Authorized Borrower Representative of LESI.
- On June 3, 1997, acting in his corporate capacity as Secretary of LESI, Taylor affixed his signature to a Certificate of Change of Registered Agent and Registered Office (the "Registered Agent Certificate"), attesting to LESI's designation of The Corporation Trust Company as its registered agent. A copy of the Registered Agent Certificate was included as an exhibit to the General Certificate of Laidlaw Environmental Services, Inc. in connection with the Bond Issuance.
- The Loan Agreement between LESI and Tooele County, Utah, which is dated July 1, 1997, also bears Taylor's signature in his corporate capacity as Vice President, General Counsel, and Secretary. The sole purpose of this signature was to attest to the signature of Paul R. Humphreys, the Senior Vice President and Chief Financial Officer of LESI.
- On or about July 9, 1997, in his capacity as General Counsel for LESI, Taylor caused to be delivered a letter in which he expressed certain opinions pursuant to Section 7(c)(1) of the July 2, 1997 Bond Placement Agreement. Importantly, however, the July 9, 1997 letter specifically exempts from its coverage any opinions or representations regarding certain portions of the Offering Memorandum, including the financial statements of LESI contained in the Offering Memorandum.

(RA 183-82, ¶¶ 12-15; RA 191-88.)

#### **IV. SUMMARY OF ARGUMENT**

This Court should affirm the trial court's judgment, if only because Appellants failed to marshal evidence supporting the dismissal of Henry Taylor. This appeal is

based entirely on the misguided argument that Taylor is subject to Utah jurisdiction solely because Appellants have sued him under Utah's securities laws. *Alleged* liability, and personal jurisdiction, are distinct. By focusing solely on alleged liability, Appellants ask this Court to ignore the constitutional due process principles at the heart of personal jurisdiction analysis. Allowing Utah to exercise jurisdiction over Taylor, simply because Utah has enacted a statute purportedly creating presumptive liability against Taylor because of his status as an officer of a corporation, would impermissibly deprive Taylor of due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Thus, notwithstanding Appellants' lengthy discussion of Taylor's alleged liability under Utah's securities laws, the issue before this Court is straightforward – whether Utah's assertion of personal jurisdiction over Taylor violates due process of law. It does. Appellants have offered no evidence to meet their burden of demonstrating that Taylor, a resident of South Carolina, *personally* and *purposefully* availed himself of the privilege of transacting business in Utah such that the exercise of jurisdiction over Taylor would comport with traditional notions of fair play and substantial justice. Indeed, the only evidence alleged by Appellants is merely that Taylor was an officer of LESI at the time of the Bond Issuance, and that Taylor signed various documents in connection with the Bond Issuance in his corporate capacity. But those simple acts are legally insufficient to establish personal jurisdiction over Taylor in his individual capacity.

Even if Taylor's alleged corporate contacts with Utah were considered by the Court, those contacts have nothing to do with the alleged financial misrepresentations upon which Appellants base their entire complaint. Tellingly, Appellants' complaint

contains no allegations of intentional conduct by Taylor in connection with the alleged financial misrepresentations.

Taylor, therefore, respectfully requests that this Court affirm the trial court's order dismissing the complaint against him for lack of personal jurisdiction.

## V. ARGUMENT

This Court recently clarified the test for determining whether personal jurisdiction exists over a nonresident defendant. It stated:

The proper test to be applied in determining whether personal jurisdiction exists over a nonresident defendant involves two considerations. 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.

D.A., 63 P.3d at 612; see Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1122 (Utah 1992) ("Generally, whether a state can exercise specific jurisdiction over a nonresident defendant is determined by two factors: the breadth of the forum state's jurisdictional statute and the due process limitations on jurisdiction imposed by the Fourteenth Amendment to the United States Constitution."). See also Utah Code Ann. § 78-27-22 (long-arm statute authorizing jurisdiction to the "extent permitted by the due process clause of the Fourteenth Amendment of the United States Constitution"). Accordingly, Utah courts "frequently make a due process analysis first because any set of circumstances that satisfies due process will also satisfy the long-arm statute." SII

MegaDiamond, Inc. v. Am. Superabrasives Corp., 969 P.2d 430, 433 (Utah 1998); see Arguello, 838 P.2d at 1122-23.

Utah follows federal precedent. “To exercise jurisdiction consistent with due process, the nonresident defendant must have ‘minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” Arguello, 838 P.2d at 1123 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). “In order to determine whether the exercise of jurisdiction over a nonresident defendant would offend traditional notions of fair play and substantial justice, [the Utah Supreme Court] has recognized that ‘the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation, to each other.’” Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1110 (Utah 1985) (quoting Mallory Eng’g v. Ted R. Brown & Assoc., 618 P.2d 1004, 1007 (Utah 1980)). The assessment of that relationship involves determining “whether the defendant has *purposefully* availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Id. (emphasis added) (internal quotation omitted); see SII MegaDiamond, 969 P.2d at 437 (quoting Asahi Metal Indus Co., v. Superior Court, 480 U.S. 102, 112 (1987)) (“a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state”). In addition, the cause of action must arise out of or have a substantial connection with the activities within the forum state. Synergetics, 701 P.2d at 1110; see SII MegaDiamond, 969 P.2d at 437 (quoting Int’l Shoe, 326 U.S. at 319) (“the contested obligations must ‘arise out of and be connected with the activities of the forum state’”). “Finally, ‘the determination of whether Utah can justify asserting personal

jurisdiction over defendants hinges on the balancing of the fairness to the parties and the interests of the State in asserting jurisdiction.’” SII MegaDiamond, 969 P.2d at 435 (quoting Synergetics, 701 P.2d at 1110-11).

Appellants do not and cannot allege that Taylor engaged in any conduct directed at or in Utah. Appellants argue only that Utah courts have specific jurisdiction over Taylor, conceding that Utah courts lack general jurisdiction over Taylor. (Appellants’ Opening Brief (“Appellants’ Op. Br.”), at 14.) “Specific jurisdiction gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state. For such jurisdiction to exist, the defendant must have certain minimum local contacts.” Arguello, 838 P.2d at 1122.

Importantly, Appellants “bear[] the burden of establishing personal jurisdiction” over Taylor. Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1075 (10th Cir. 1995). See also Pellegrini v. Sachs & Sons, 522 P.2d 704, 708 (Utah 1974). Where, as here, Taylor supports a motion to dismiss for lack of personal jurisdiction with affidavit testimony, Appellants must make a prima facie showing of proper jurisdiction by affirmative evidence. See Anderson v. Am. Soc’y of Plastic and Reconstructive Surgeons, 807 P.2d 825, 827 (Utah 1990). No such rebuttal was offered or attempted here.

As demonstrated below, Appellants failed to meet their burden, and thus this Court should affirm the trial court’s decision.

#### **A. Appellants Failed To Marshal Evidence.**

Contrary to Appellants’ statement on page 2 of their brief, that the trial court’s ruling was “based on documentary evidence alone,” the trial court relied, in part, on affidavits, including the affidavit of defendant and appellee Henry Taylor. Under Utah

law, appellants were required to marshal the evidence supporting the trial court's ruling. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). This failure to marshal un rebutted evidence dooms this appeal.

**B. Regardless Of How Utah Code Ann. § 61-1-22(4) And Utah Code Ann. § 61-1-26(8) Are Construed, Neither Can Be Read To Confer Personal Jurisdiction Over Taylor.**

Appellants set forth the following rationale for why personal jurisdiction over all of the individual defendants is proper:

(1) securities were issued or caused to be issued in Utah by LES; (2) the securities were offered and sold to Appellants by way of false or misleading statements; and (3) Appellees were directors and officers of LES at the time of the Issuance.

(Appellants' Op. Br., at 18.) Based on these facts, Appellants contend that defendants "are presumed by [Utah Code Ann. § 61-1-22(4)] to have knowingly or negligently committed a tort having effects in this state, thereby satisfying the 'minimum contacts' test for jurisdiction." (Appellants' Op. Br., at 46.) Indeed, Appellants' arguments are based solely on defendants *presumed*, rather than actual, acts. (Appellants' Op. Br., at 16-18, 28-32.) Appellants then argue that through Utah Code Ann. § 61-1-26, the Utah Legislature intended to confer personal jurisdiction over all persons potentially liable under Utah's securities laws, including those persons presumptively liable under Utah Code Ann. § 61-1-22(4). (Appellants' Op. Br., at 36-38.) Thus, Appellants reason, the exercise of personal jurisdiction over defendants is entirely proper.

Appellants confuse liability with jurisdiction, ignore due process requirements, and thus erroneously rely on Utah Code Ann. § 61-1-22(4) and § 61-1-26.



**1. Because Liability Is Distinct From Jurisdiction, It Is Not Enough For Appellants Merely To Show That Taylor Is Presumptively Liable Under Utah Code Ann. § 61-1-22(4).**

Without considering personal jurisdiction issues, the Utah Legislature enacted Utah Code Ann. § 61-1-22(4)(a), which provides:

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.

Nothing in this section indicates any intent on the part of the Utah Legislature to subject officers or directors to *personal jurisdiction* in Utah. By its terms, Utah Code Ann. § 61-1-22(4)(a) merely creates a rebuttable presumption that Taylor, as an officer of LESI at the time of the Bond Issuance, is liable under Utah's securities laws. However, alleged liability and purposefully availing oneself of a state's laws are qualitatively and legally different.

Merely because Taylor may be presumed liable does not mean that he is subject to personal jurisdiction in Utah. "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." Sher v. Johnson, 911 F.2d 1357, 1365 (9<sup>th</sup> Cir. 1990) (citing Shaffer v. Heitner, 433 U.S. 186, 204 & n.19 (1977)). Thus, regardless of the defendants' potential

joint liability, “jurisdiction over each defendant must be established individually.” Id. (citing Rush v. Savchuk, 444 U.S. 320 (1980)).

Based on these fundamental principles, the court in Sher found that it lacked personal jurisdiction over individual partners, even though the court had jurisdiction over the partnership and the partners were jointly and severally liable for the obligations of the partnership. Sher, 911 F.2d at 1365-66. Similarly, the court in American Telephone & Telegraph Company v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996), found that it lacked jurisdiction over a defendant’s parent corporation even though that corporation was liable for environmental cleanup costs under federal law. Id. at 590-91 (“Even if [the parent corporation] would be liable under CERCLA, AT&T may not use liability as a substitute for personal jurisdiction. . . . [L]iability is not to be conflated with amenability to suit in a particular forum.”). Other cases have also found that liability is no substitute for jurisdiction. See Dakota Indus., Inc. v. Ever Best Ltd., 28 F.3d 910, 915 (8th Cir. 1994) (“Generally, when the corporate veil is pierced, the individuals may be liable for the corporation’s actions. Whether an individual is subject to the jurisdiction of a federal court is a separate threshold issue, which the district court conflated with the issue of the individuals’ liability for corporate actions.”) (internal citation omitted); Langlois v. Déjà Vu, Inc., 984 F. Supp. 1327, 1334 (W.D. Wash. 1997) (“Even if a congressional statute paints as broad a liability stroke as possible, the individuals subject to liability under such statute would still only be amenable to suit in the jurisdiction where it would be ‘fair’ to call them into court.” To hold otherwise would “knock heads with the United States Constitution.”).

All of these cases are analogous to the situation here, where Appellants have argued that this Court has personal jurisdiction over Taylor because Taylor is presumptively liable under Utah Code Ann. § 61-1-22. As in the above cases, however, Appellants may not use liability as a substitute for personal jurisdiction. While neither the Utah state or federal courts nor the Tenth Circuit Court of Appeals has addressed the issue decided by the Ninth Circuit in Sher and American Telephone & Telegraph Company, the rule of those cases has been favorably cited by other federal courts in the Tenth Circuit. See SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 969 F. Supp. 1254, 1260 (D. Kan. 1997), affirmed in part and vacated in part, 153 F.3d 728 (10<sup>th</sup> Cir. 1998) (finding, based on the Sher court's "well reasoned analysis," that the court lacked jurisdiction over the general partner even though it had jurisdiction over the partnership).

In addition, several courts have applied the fundamental distinction between liability and jurisdiction to situations where, as here, control persons are alleged to be liable under the applicable securities laws. In Schlatter v. Mo-Comm Futures, Ltd., 662 P.2d 553 (1983), the Kansas Supreme Court found that no personal jurisdiction existed over two directors of a corporation that allegedly sold securities based on false and misleading statements. In so holding, the court specifically rejected the argument that because the directors were presumptively liable under Kansas Stat. Ann. § 17-1268(b)<sup>2</sup> –

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<sup>2</sup> Kansas Stat. Ann. § 17-1268(b) provides:

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

which is nearly identical to Utah Code Ann. § 61-1-22(4) – they necessarily were subject to jurisdiction in Kansas. Id. at 563. “It is true that the statute establishes the basis for liability of persons involved in the sale of unregistered securities but it does not establish the jurisdiction of the court to submit such persons to liability.” Id. The court proceeded to find that the corporate directors lacked the minimum contacts with Kansas “necessary to satisfy federal constitutional due process requirements.” Id.

Similarly, in Taylor-Rush v. Multitech Corp., 265 Cal. Rptr. 672 (1990), the plaintiffs alleged that personal jurisdiction existed over corporate officers and directors based on allegations of their control person liability under California Corporations Code § 25504 – the California equivalent of Utah Code Ann. § 61-1-22(4).<sup>3</sup> Id. at 677 & n.3. The court rejected this argument, and found that no minimum contacts existed because

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reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

<sup>3</sup> California Corporations Code § 25504 provides:

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.

“[t]here is no evidence that they participated in or directed any tortious acts or omission either within or without California.” Id. at 678.<sup>4</sup>

Finally, the court in In Re Baan Co. Securities Litigation, 81 F. Supp. 2d 75 (D.D.C. 2000) rejected the argument that a showing of control person liability under federal securities acts was sufficient to confer jurisdiction over the control person, stating that such a theory “goes too far.” Id. at 79-82. In a subsequent opinion, the court in In re Baan reiterated its earlier ruling, again rejected jurisdiction based solely on an allegation of control person liability, and noted that such an approach “impermissibly conflates statutory liability with the Constitution’s command that the exercise of personal jurisdiction must be fundamentally fair.” In re Baan, 245 F. Supp. 2d 117, 129 (D.D.C. 2003).

## **2. Appellants’ Cases Are Unavailing.**

The cases relied upon by Appellants do not inform a decision here. Appellants rely heavily on San Mateo County Transit District v. Fitzgerald, 979 F.2d 1356 (9th Cir. 1992), for the proposition that personal jurisdiction over an individual exists “if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for the fraud.” (Appellants’ Op. Br., at 26.) While at first glance the Ninth Circuit’s ruling in San Mateo may seem to support Appellants’ position, further examination reveals that San Mateo has no application here.

In San Mateo, the plaintiff sought to hold the Treasurer and Vice President of a brokerage firm, as well as the brokerage firm itself, liable under the federal Securities Act

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<sup>4</sup> In a case with many of the same parties to the present appeal, the California Court of Appeal recently rejected the very same arguments made by Appellants here. The decision was not published.

of 1934, 15 U.S.C. § 78 et seq. San Mateo, 979 F.2d at 1357. The officer moved to dismiss on the ground that the court lacked personal jurisdiction over him. Id. Specifically, the officer argued that he was not a “controlling person” within the meaning of Section 20(a) of the Securities Act, 15 U.S.C. § 78t(a), and therefore the court lacked jurisdiction over him under the Securities Act. San Mateo, 979 F.2d at 1357. The trial court agreed with the officer, and granted his motion to dismiss. Id.

The Ninth Circuit reversed, finding that jurisdiction over the officer existed because the plaintiff had made a sufficient showing of potential liability as a control person under Section 20(a) of the Securities Act. Id. at 1357-58. To reach this conclusion, the Ninth Circuit examined the provision of the Securities Act dealing with service of process, 15 U.S.C. § 78aa. The Ninth Circuit concluded that because the Securities Act authorized worldwide service of process and permitted jurisdiction over the defendant “wherever he may be found,” the district court improperly dismissed the officer for lack of personal jurisdiction. San Mateo, 979 F.2d at 1358.

Notably, however, the court in San Mateo did not engage in a due process analysis to determine whether the officer had sufficient minimum contacts with the forum state. Id. at 1357-58. Indeed, such an analysis would have been improper, since the officer was being accused, in federal court, of violating a federal statute.

‘Minimum contacts’ with a particular district or state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries. It is clear that Congress can provide for nationwide service of process in federal court for federal question cases without falling short of the requirements of due process.

Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985), rev'd on other grounds, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) (quoting Johnson v. Creative Arts & Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984)) (emphasis in original). Thus, because Section 27 of the Securities Act authorizes worldwide service of process, the question of whether a federal court has personal jurisdiction over a particular party “becomes whether the party has sufficient contacts with the United States, not any particular state.” Vigman, 764 F.2d at 1315-16.

This distinction in the minimum contacts analysis under the federal securities laws is critical to understanding why the holding in San Mateo does not support Appellants' position. There was no dispute in San Mateo as to whether the officer had sufficient minimum contacts with the United States. Whether the officer had sufficient minimum contacts with California was irrelevant, because the only dispute was whether the plaintiff had adequately stated a claim for liability under the Securities Act. Under the specific facts presented in San Mateo, therefore, the issues of liability and personal jurisdiction were one and the same. That is not so here.

The personal jurisdiction analysis applied in San Mateo is far different from the analysis where, as here, a state court's jurisdiction rests on a state long-arm statute. See Vigman, 764 F.2d at 1315 (noting that the line of cases flowing from International Shoe apply where the issue involves a state court's jurisdiction over a non-resident defendant). In such cases, the state court must determine whether the defendant purposefully established sufficient minimum contacts with the forum state. Id.

As a result of this difference, it is unfortunate, although perhaps not surprising, that the court in San Mateo found that “[i]f the suit is to enforce a liability created by the

Securities Act, the [district] court has jurisdiction over the defendant wherever he may be found.” San Mateo, 979 F.2d at 1358. But as at least one court has correctly noted, this one sentence from San Mateo, if “read to permit the exercise of jurisdiction based on no more than an allegation that the defendant controlled the entity which performed that act complained of,” is “utterly inconsistent with the persistent insistence of the Supreme Court . . . that personal jurisdiction be premised on a showing that the defendant has, by his acts, purposefully availed himself of the forum’s benefits.” In Re Baan, 81 F. Supp. 2d at 81-82 (internal citation omitted); see In re Baan, 245 F. Supp. 2d at 129 (“it simply goes too far to hold, as the Ninth Circuit did in San Mateo, that mere control status is sufficient to create personal jurisdiction”). The language of San Mateo upon which Appellants rely, therefore, must be specifically limited to the facts and law before the court *in that case*. San Mateo, therefore, does not and should not support Appellants’ position here.

Appellants’ reliance on other federal district court cases decided under the federal Securities Act is similarly misplaced. (See Appellants’ Op. Br., at 43-45.) In the cases cited by Appellants – each of which deals with the issue of whether a defendant foreign to the United States could be subject to suit within the United States – the federal court simply did not conclude that an individual’s presumed liability as a control person was sufficient to confer jurisdiction over those individuals. Instead, in each case the federal court carefully examined the culpable conduct of each individual defendant involved to determine whether each defendant had purposefully established sufficient minimum contacts with the United States. In Re Baan, 81 F. Supp. 2d at 79-82 (carefully analyzing the cases cited by Appellants here, and concluding that each of the cases “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”); see McNamara v. Bre-X Minerals, Ltd., 46 F. Supp. 2d 628, 640-41 (E.D. Tex. 1999) (separately analyzing culpable conduct of each individual defendant to determine whether jurisdiction was proper); Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (sustaining exercise of jurisdiction over individuals based on allegation that “they approved and disseminated financial statements that they knew would influence the price of Nesmont securities on the NASDAQ market”); Landry v. Price Waterhouse Chartered Accountants, 715 F. Supp. 98, 102 (S.D.N.Y. 1988) (finding that jurisdiction over individual defendant was proper because he was a “behind the scenes player” in the transaction).

Accordingly, the cases cited by Appellants offer no support for their assertion that the issues of liability and jurisdiction are one and the same. Thus, Appellants’ allegations that Taylor is presumptively liable under Utah Code Ann. § 61-1-22(4) are, by themselves, insufficient to state a prima facie case for personal jurisdiction over Taylor.

**3. Utah Code Ann. § 61-1-26 Is Merely A Service Of Process Statute And Does Not Provide An Independent Basis For Jurisdiction.**

Utah Code Ann. § 61-1-26 provides, in pertinent part:

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

and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

Utah Code Ann. § 61-1-26(8)(a).

Appellants argue that this provision grants Utah courts personal jurisdiction to enforce Utah's securities laws in *any* case where an individual is presumptively liable under Utah Code Ann. § 61-1-22(4). (Appellants' Op. Br., at 36-38.) Appellants read this statute much too broadly, and ignore the due process issues at the heart of any jurisdictional analysis.

As recently explained by the Utah Supreme Court:

**[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., 63 P.3d at 612 (emphasis added). Accordingly, regardless of who the Utah Legislature intended to reach through Utah Code Ann. § 61-1-26(8), the exercise of jurisdiction over any person still must comport with due process.

Other courts have properly rejected attempts to utilize broad service of process statutes as a basis for jurisdiction. See Tri-West Ins. Servs., Inc. v. Seguros Monterrey Aetna, S.A., 93 Cal. Rptr. 2d 78, 80 (Cal. Ct. App. 2000) (rejecting the plaintiff's argument that personal jurisdiction existed in light of a broad service of process statute, and finding that before service of process statutes may be utilized to obtain jurisdiction over a nonresident, the power to exercise jurisdiction must be found to exist and must be

consistent with due process); Bank of Am. v. Nat'l Trust and Sav. Ass'n v. GAC Props. Credit, Inc., 389 A.2d 1304, 1309 (Del. Ch. 1978) (explaining that a state's service of process statutes can only be applied to obtain jurisdiction over nonresident defendants where such nonresidents have constitutionally sufficient minimum contacts with the forum state); In re Baan, 245 F. Supp. 2d at 126 (noting that the service of process statute under the Securities Exchange Act, providing for service of process "wherever the defendant may be found," does not end the jurisdictional inquiry. "[T]he court's assertion of personal jurisdiction must, as always, comport with the requirements of the Constitution.")

The two state cases relied upon by Appellants are unpersuasive and distinguishable. (Appellants' Op. Br., at 37-38.) Neither case stands for the proposition that a service of process statute is sufficient, in and of itself, to confer personal jurisdiction over officers or directors when their corporations sell securities in the forum state.

In the first case, an unpublished decision from the Massachusetts Superior Court, personal jurisdiction was found proper over the CEO and majority shareholder of a company that sold shares based on representations that the company would obtain and manage wireless cable television stations. American Microtel, Inc. v. Massachusetts, No. 93-5874, 1995 Mass. Super. LEXIS 593, at \*28-30 (Apr. 10, 1995). The court found that jurisdiction existed over the CEO of the corporation based on an administrative finding, supported by the CEO's testimony, that the CEO controlled the corporation. Id. The court then stated, without analysis, that because the CEO controlled the corporation, jurisdiction over him could be obtained through the service of process provisions in

Massachusetts' securities laws. Id. Here, there has been no finding or even allegation that Taylor controlled LESI. In fact, Appellants have not submitted any evidence that Taylor actually controlled LESI generally or controlled the Bond Issuance specifically. Absent such evidence, or any other evidence showing Taylor's minimum contacts with Utah, the service of process statute is entirely irrelevant. In any event, to the extent American Microtel can be read to support Appellants' argument that a state can exercise jurisdiction over individuals by creating presumptive liability and enacting a broad service of process statute, it is inconsistent with the holdings of the Utah Supreme Court and the United States Supreme Court, as explained at length throughout this brief.

The second state case relied on by Appellants is equally unavailing. In that case, an investment broker in South Carolina brokered the sale of shares in a Louisiana oil well held by two foreign corporations, Summit and Cajun. Brown v. Inv. Mgmt. & Research, Inc., 475 S.E.2d 754, 755 (S.C. 1996). The court based its finding of jurisdiction on its acceptance of the facts as pled in the complaint, which alleged that the defendants transacted business in the state through its investment broker, made fraudulent misrepresentations through that broker, and sold securities in the state. Id. at 757. Importantly, the court did not tie or equate jurisdiction over the officers and/or directors of the defendant corporations because of their joint and several liability under South Carolina's securities laws. In fact, the officers and directors of the defendant corporations were not even defendants in the lawsuit. Id. at 755. The only individual defendants before the court were the direct agents of the defendant corporations, and those individuals were allegedly liable and subject to jurisdiction for their own affirmative acts in selling securities in South Carolina. Id. at 755, 757-58. And, because

the individuals had engaged in these affirmative acts, they were subject to service under South Carolina's service of process statute. *Id.* at 757. In other words, the service of process statutes only became relevant to the jurisdictional analysis after the defendants were found to have engaged in sufficient acts directed at the forum state. *Id.* Brown, therefore, does not support Appellants' argument.

Accordingly, Utah Code Ann. § 61-1-26(8) – a service of process statute – cannot and should not provide the basis for jurisdiction over Taylor here *unless* the exercise of such jurisdiction otherwise comports with due process. As demonstrated below, however, Appellants failed to and could not make this showing.

**C. Appellants Have Failed To Establish That Taylor Has Sufficient Minimum Contacts With Utah Such That Asserting Jurisdiction Over Him Would Comport With Due Process.**

Once this Court properly focuses on the due process analysis and applies the facts, it will find that Taylor lacks sufficient minimum contacts with Utah. Thus, asserting jurisdiction over him would violate due process. Contrary to Appellants' arguments, minimum contacts cannot be established by *presumed* acts, and cannot be established based on the acts of others.

**1. Appellants Have Failed To Establish That Taylor Purposefully Availed Himself Of The Privilege Of Conducting Personal Business In Utah.**

Taylor had no contacts with Utah in his personal capacity. (RA 185-83, ¶¶ 3-6, 10.) Moreover, while Taylor was an officer and/or director of various Safety-Kleen subsidiaries incorporated in Utah, those subsidiaries were not involved in the Bond Issuance, and have no connection with the financial statements underlying Appellants' complaint. (RA 185-83, ¶¶ 3-9.) Finally, Appellants have not offered any evidence that

Taylor committed any intentional act that was expressly aimed at Utah. Significantly, Appellants do not even allege that Taylor made any intentional misrepresentation or committed any intentional act expressly aimed at Utah. To the contrary, the allegations against Taylor are based solely on untargeted, unintentional acts, and alleged negligence. (RA 10-02, ¶¶ 67-76, 77-88, 108-121.)

At most, therefore, Appellants can establish that Taylor, in his capacity as an officer or General Counsel of Safety-Kleen, signed a few documents in connection with the Bond Issuance. (RA 183-82, ¶¶ 12-15.) By signing various documents in his corporate capacity, however, Taylor in no way “purposefully availed himself” of the privilege of conducting *personal* activities in Utah. See LeDuc v. Ky. Cent. Life Ins. Co., 814 F. Supp. 820, 824-25 (N.D. Cal. 1992) (rejecting assertion that directors of corporation purposefully availed themselves of the California forum where the directors signed agency contracts which assisted the corporation in developing further business in California); Am. Life & Cas. Ins. Co. v. First Am. Title Co. of Utah, 772 F. Supp. 574, 579 (D. Utah 1991) (where individual’s contact with Utah was as an agent for client, such contact cannot be considered “purposeful availment of the privilege of conducting activities in Utah” for purposes of establishing jurisdiction over such individual); Goehring v. Superior Court, 73 Cal. Rptr. 2d 105, 112-14 (Cal. Ct. App. 1998) (by signing various documents related to the transaction at issue, including a sales agreement, a security agreement, an escrow agreement, and a UCC financing statement, the partners did not purposefully establish minimum contacts with California). See also Dobbs v. Chevron U.S.A., Inc., 39 F.3d 1064, 1068 (10<sup>th</sup> Cir. 1994) (affirming dismissal of claims against individuals based on lack of general or specific jurisdiction over corporate

employees where actions in forum state were minor and presence in the forum state was at the direction of the employer); Seagate Tech. v. A.J. Kogyo Co., 268 Cal. Rptr. 586, 590-91 (Cal. Ct. App. 1990) (“no personal contact would result from doing nothing more than ratifying an act taken by the corporation or another corporate officer”).

Although it is not entirely clear, Appellants apparently argue that when LESI issued the bonds in Utah, it must have been acting as Taylor’s agent as well as the agent of the other individual defendants. (See Appellants’ Op. Br., at 29, 31-32.) Tellingly, Appellants provide no legal support for their argument that a corporation acts as an agent for its officers and directors, or that officers and directors act as agents for one another, for purposes of constitutional due process analysis. In fact, just the opposite is true.

It is well-established that “[e]ach defendant’s contacts with the forum State must be assessed individually,” Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 782, n.13 (1984), and that the assertion of jurisdiction over one defendant based on the activities of another would be “plainly unconstitutional.” Rush, 444 U.S. at 331-32 (the requirements of International Shoe “must be met as to each defendant”). Indeed, the purposeful availment requirement ensures that a party will not be haled into court “solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts, or of the ‘unilateral activity of another party or a third person.’” Burger King Corp. v. Radzewicz, 471 U.S. 462, 475 (1985) (internal citations omitted). Thus, an individual’s contacts with the forum state are *not* to be judged according to his or her employer’s in-forum activities. Calder v. Jones, 465 U.S. 783, 790 (1984). Indeed, the Utah Supreme Court has specifically ruled that an individual’s mere status as an officer of a corporation is insufficient to give rise to personal jurisdiction over that individual. SII MegaDiamond, 969 P.2d at 437 (finding

that Utah lacked jurisdiction over two officers of the defendant corporation). Contrary to Appellants' suggestions, therefore, the acts of LESI and/or Safety-Kleen are entirely irrelevant to the question of whether Utah can assume personal jurisdiction over Taylor.

Appellants additionally suggest that because Taylor should have foreseen being subject to potential liability in Utah as an officer of LESI, he necessarily and purposefully availed himself of the privilege of conducting activities in Utah when he signed various documents related to the Bond Issuance in his corporate capacity. In demonstrating purposeful availment for jurisdiction purposes, however, "the mere fact that [the defendant] can 'foresee' that [his conduct will] have an effect in [the forum state] is not sufficient for an assertion of jurisdiction." Calder, 465 U.S. at 789. Likewise,

the mere allegation that an out-of-state defendant has tortiously interfered with contractual rights or has committed other business torts that have allegedly injured a forum resident does not necessarily establish that the defendant possesses the constitutionally required minimum contacts. Instead, in order to resolve the jurisdictional question, a court must undertake a particularized inquiry as to the extent to which the defendant has purposefully availed itself of the benefits of the forum's laws.

Far West Capital, 46 F.3d at 1079.

Accordingly, Appellants have failed to prove that Taylor purposefully availed himself of the privilege of conducting activities in Utah.

**2. Appellants' Claims Do Not Arise Out Of Or Have A Substantial Connection With Taylor's Limited Corporate Contacts With Utah.**

Appellants do not dispute that Taylor signed only a few documents in relation to the Bond Issuance. Moreover, and more importantly, Appellants do not contend that their claims "arise out of" or have a "substantial connection with" those documents.



Indeed, any such contention would be frivolous. Appellants' complaint, by its terms, predicates liability on claims of false and misleading financial information, yet Appellants have not alleged that Taylor personally made any such misstatements or that Taylor engaged in any intentional conduct. (RA 10-02, ¶¶ 67-76, 77-88, 108-121.) The absence of such allegations is not surprising because, in none of the documents signed by Taylor in connection with the Bond Issuance, does Taylor either explicitly or implicitly attest to LESI's financial condition. (RA 183-82, ¶¶ 12-15.)

Of the few documents signed by Taylor, the only document even remotely connected with Appellants' allegations of material misrepresentations is Taylor's opinion letter dated July 9, 1997. (RA 183-82, ¶¶ 12-15.) That letter, which Taylor wrote in his capacity as General Counsel of LESI, was delivered to Utah as part of the bond transaction closing documents. In that letter, however, Taylor specifically indicated he was *not* expressing any opinion regarding the LESI financial statements, or the financial state of LESI generally. (RA 182, ¶ 15; RA 191-88.) Thus, even if Taylor's acts in his corporate capacity were considered to be acts by which Taylor purposefully availed himself of the privilege of conducting activities in Utah, Appellants cannot prove that their claims "arise out of" or have "substantial connection with" Taylor's letter of July 9, 1997, or any of the other documents signed by Taylor in connection with the Bond Issuance. Certainly, Taylor could not have reasonably anticipated that signing these documents would have subjected him to being hauled into court in Utah to defend against allegations regarding alleged misrepresentations of LESI's financial condition. Those contacts had nothing to do with the alleged misrepresentations regarding LESI's financial condition that form the basis of Appellants' claims in this lawsuit.

Appellants' claims against Taylor, therefore, arise out of the mere fact that Taylor was an officer of LESI at the time the Bonds were issued. But, as explained, that is not enough to warrant the exercise of personal jurisdiction over Taylor. See SII MegaDiamond, 969 P.2d at 437.

**3. Appellants' Reliance On Taylor's "Presumed" Contacts With Utah Is Misplaced, Since Basing Personal Jurisdiction on Presumed Acts Would Violate Due Process.**

Appellants do not and cannot dispute that Taylor has no personal contacts with Utah, or that his only acts connected to Utah were taken in his corporate capacity. Appellants nevertheless seek to avoid the substantial inadequacy of their evidentiary showing by arguing that pursuant to Utah Code Ann. § 61-1-22(4), Taylor and the other individual defendants are *presumed* to have committed tortious acts causing effects in Utah. Appellants' argument ignores fundamental due process principles at the heart of the jurisdictional analysis.

As the Utah Supreme Court has recognized, "specific person jurisdiction arises only out of the *actual* transactions between the defendant and the forum state." SII MegaDiamond, 969 P.2d at 437 (emphasis added). The United States Supreme Court has similarly recognized that jurisdiction is proper only where the contacts with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." Burger King, 471 U.S. at 475 (emphasis in original); see Asahi Metal, 480 U.S. at 112 ("A finding of minimum contacts must come about by an action *of the defendant* purposefully directed toward the forum state") (emphasis added).

The above is true regardless of the Utah Legislature's apparent intent to hold officers and directors individually liable under its securities laws. The Utah Legislature cannot circumvent the due process protections of the United States Constitution. See D.A., 63 P.3d at 612. Indeed, if "presumed" acts could serve as the basis for specific jurisdiction, then a state could easily avoid the limits on jurisdiction imposed by the Due Process Clause of the United States Constitution. Specifically, if Appellants' argument were correct, any state legislature could exercise jurisdiction over an individual simply by enacting a statute declaring that such individual is presumed to be jointly and severally liable based on a presumption that the individual engaged in certain acts. This could never be the law.

A state legislature's powers are not and should not be as broad as Appellants suggest. The concept of "minimum contacts" not only protects defendants from the burden of litigating in a distant or inconvenient forum, but it also "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). In other words, "personal jurisdiction has constitutional dimensions, and regardless of policy goals, [the legislature] cannot override the due process clause, the source of protection for non-resident defendants." American Tel. & Tel. Co., 94 F.3d at 591.

Thus, even if Utah Code Ann. § 61-1-22(4) and § 61-1-26 purport to confer jurisdiction based on presumptive liability alone (and they do not), constitutional due process mandates operate to negate the effect of those sections.

**D. This Court's Exercise Of Jurisdiction Over Taylor Would Be Inherently Unfair.**

Even if this Court finds that Taylor purposely established minimum contacts within Utah (which he did not), that finding would not end the analysis. In addition to the minimum contacts analysis set forth above, “the determination of whether Utah can justify asserting jurisdiction over defendants hinges on the balancing of the fairness to the parties and the interests of the state in assuming jurisdiction.” SII MegaDiamond, 969 P.2d at 435; see Synergetics, 701 P.2d at 1110; Brown v. Carnes Corp., 611 P.2d 378, 380 (Utah 1980). These factors strongly favor a finding that the exercise of jurisdiction over Taylor would not comport with fair play and substantial justice.

**1. The Burden On Taylor To Litigate In Utah Is Great.**

Taylor would labor under a heavy burden if he were forced to litigate this matter in Utah, over 2,000 miles from his home. See Parry v. Ernst Home Ctr. Corp., 779 P.2d 659, 668 (Utah 1989) (noting that a “non-resident defendant faces substantial inconvenience in litigating in a foreign forum”). This is a complex civil matter brought by numerous large corporations and entities. Taylor, in contrast, is an individual, and fairness dictates that he should not be forced to defend himself in a complex multi-party action far from home.

Moreover, many if not most of the pertinent witnesses and documents are located in South Carolina, the state of Safety-Kleen's home office. This matter is likely to generate a significant volume of written discovery, and trigger extensive deposition testimony. Taylor's ability to attend depositions and protect his rights through direct participation in his defense is severely constrained by the distance between his home and

Appellants' proposed forum. The burden placed on Taylor to meaningfully participate in his defense in such a remote forum is substantial, and places him at a severe disadvantage. Appellants do not suggest anything to the contrary.

**2. Utah's Interest In This Matter Is Slight.**

Utah has little real interest in this action. None of the Appellants are incorporated in Utah. (RA 21, ¶¶ 4-9.) None of the Appellants maintain their principal places of business in Utah. (*Id.*) Thus, none of the *parties* to this action have any real connection to Utah sufficient to give Utah a meaningful interest in litigating Appellants' claims. The fact that the Bonds were issued in Utah, by a subdivision of the state, does not weigh in favor of jurisdiction over Taylor. This dispute centers on LESI's financial condition and on the Appellants' bond holdings. Utah is not a party to the dispute, and the litigation does not impact the policy behind the statutory provisions creating the Bonds. Thus, the issuance of the Bonds by a Utah governmental entity adds nothing to Utah's interest in litigating this matter.

Tellingly, the Appellants' tenuous assertion of venue in Tooele County is based upon the Indenture of Trust, an agreement to which Taylor is not even a party. (RA 22-21, ¶ 3.) Although venue is not at issue here, Appellants' reliance on the Indenture of Trust to set this matter in Utah is evidence of the remoteness of Utah's interest in this action. Taylor, who is not a party to the Indenture of Trust and not bound by the venue provision, should not be forced to litigate this matter in Utah based upon this dubious connection to Utah.

**3. Appellants' Interest In Obtaining Relief Does Not Support Utah Jurisdiction.**

Appellants' interests in obtaining relief do not militate toward a finding that jurisdiction over Taylor in Utah would be fair. Appellants could just as easily litigate this action in an appropriate forum where jurisdiction could be had over Taylor. Appellants cannot show that similar relief is unavailable under the substantive law of another forum, or by the application of that forum's choice of law rules. Moreover, Appellants are all foreign to Utah, which further hampers the importance of their desire to seek relief in a remote forum. In short, Appellants' apparent desire to bring this action in Utah in order to obtain relief under Utah's securities laws is not consistent with fair play and substantial justice.

**4. Judicial Efficiency Does Not Support Jurisdiction.**

This matter is in its infancy. To date, Utah has invested relatively few judicial resources towards the prosecution of this matter. Given this relatively small investment of judicial resources, there is no compelling reason for this Court to continue to allow Appellants to litigate this claim in Utah. Moreover, Appellants cannot show that dismissal of this action would result in the underlying issues being litigated in multiple fora. The most appropriate forum for this action is South Carolina, and there is no impediment to Appellants litigating their claims there. Judicial efficiency supports a finding that exercise of jurisdiction over Taylor is not reasonable.

**VI. CONCLUSION**

Appellants confuse jurisdictional issues with liability issues. They ignore the due process requirements at the very heart of any jurisdictional analysis, set forth by the

United States Supreme Court and Utah Supreme Court. Regardless of the potential scope of liability for Taylor under Utah's securities laws, Utah courts lack personal jurisdiction over Taylor because the exercise of such jurisdiction over him would not comport with due process. Taylor's only connection with Utah stems from his corporate acts as an agent of LESI and/or Safety-Kleen – acts that have nothing whatsoever to do with the alleged misrepresentations forming the basis of this lawsuit.

Moreover, Appellants do not and cannot dispute that forcing Taylor to defend himself in Utah would seriously prejudice Taylor, and would not serve any legitimate purpose since the Appellants, too, are foreign to Utah, and Utah has only a slight interest in this matter.

Accordingly, Taylor respectfully requests that the Court affirm the trial court's dismissal of the complaint against him for lack of personal jurisdiction.

DATED this 27th day of June, 2003.

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**CERTIFICATE OF MAILING**

I hereby certify that on the 27th day of June, 2003, I caused to be mailed, first-class, postage pre-paid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEES** to each of the following:

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