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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 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. Rollins, Jr., John W. Rollins, St., Leslie W. Haworth, David B. Thomas, Henry B. Tippie, James L. Wareham, Grover C. Wrenn,

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Michael J. Bragagnolo, and Henry H. Taylor : Brief of Appellee

Utah Supreme Court

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

Andrew Deiss; Williams & Hunt; Counsel for Defendants/Respondents John R. Grainger, James r. Bullock, and Leslie W. Haworth; Terence H. Campbell; Cotsirilos, Tighe & Streicker; Additional Counsel for Respondents James r. Bullock and Leslie w. Haworth; Carl E. Poli; Stone, McGuire & Benjamin; Additional Counsel for Respondent John R. Grainger.

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., 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.,

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, 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 THE
APPELLEES JAMES R.
BULLOCK, JOHN R.
GRAINGER AND
LESLIE W. HAWORTH

Case No: 01-0300722
MI

Judge: David S. Young

APPEAL FROM THE FINAL ORDER OF DISMISSAL FOR LACK OF
PERSONAL JURISDICTION OVER THE DEFENDANTS ENTERED IN THE
THIRD DISTRICT COURT BY THE HONORABLE DAVID S. YOUNG

Andrew Deiss
Williams & Hunt
257 East 200 South
Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678
Counsel for Defendants/Respondents
John R. Grainger, James R. Bullock,
and Leslie W. Haworth

JUL 25 1999

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Andrew Deiss
Williams & Hunt
257 East 200 South
Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678
Counsel for Defendants/Respondents
John R. Grainger, James R. Bullock,
and Leslie W. Haworth

Terence H. Campbell
Cotsirilos, Tighe & Streicker
33 N. Dearborn Street
Suite 600
Chicago, Illinois 60602
(312) 263-0345
Additional Counsel for
Respondents James R. Bullock
and Leslie W. Haworth

Carl E. Poli
Stone, McGuire & Benjamin
801 North Skokie Boulevard
Suite 100
Northbrook, Illinois 60062
(847) 205-9700
Additional Counsel for
Respondent John R. Grainger

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See Addendum A for the text of these provisions.

I. JURISDICTIONAL STATEMENT

James R. Bullock, John R. Grainger, and Leslie W. Haworth (each a "Canadian Director," collectively the "Canadian Directors")¹ are among a number of former officers and directors of Laidlaw Environmental Services, Inc. (and its successor entity, Safety-Kleen Corporation) who were sued in Utah state court by Plaintiffs ("Plaintiffs"). The Canadian Directors, in addition to the other individual defendants, moved to dismiss the complaint for lack of personal jurisdiction. (RA 041).² After full briefing and oral arguments by the parties, the Third District Court of Utah dismissed the complaint against each of the Defendants-Appellees ("Defendants"). (RA 0578, p. 22; RA 0553-0554).

The Third District Court certified the dismissal for lack of personal jurisdiction as a final judgment under Rule 54(b) of the Utah Rules of Civil Procedure on August

¹ James R. Bullock, Leslie W. Haworth and John R. Granger are Canadian citizens. As all prior filings in this case have referred to these individual defendants as the "Canadian Directors," this brief will continue to use that term as a matter of consistency.

² "RA" refers to the Record on Appeal, as paginated by the Clerk of the Court.

6, 2002. (RA 0555-0556). Consequently, the Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARDS OF APPELLATE REVIEW

Plaintiffs misstate the issues presented by this appeal in their opening brief. The issue presented for review is not whether a Utah court may exercise personal jurisdiction over "officers and directors who in person or through an agent transact business" in Utah. Plaintiff-Appellants' Brief (hereafter "App. Br."), p. 2. That non-controversial proposition has no application in this case. Indeed, the trial court granted Defendants' motions to dismiss precisely because the Plaintiffs failed to make a single supportable allegation that any of the three Canadian Directors participated in the transaction at issue, either personally or through an agent, nor do Plaintiffs allege that the Canadian Directors have any other jurisdictional contacts with the State of Utah.

The true issues presented for review are as follows: (1) whether a Utah court may properly exercise specific personal jurisdiction over a non-resident director based on presumptive statutory liability, despite the fact

that the director has not transacted any business in Utah either personally or through an agent and has no other contacts with Utah; and (2) whether Utah Code Annotated Section 61-1-26, which provides for substituted service of process, provides an independent basis for personal jurisdiction without regard to Due Process considerations.

The trial court dismissed the complaint against the Canadian Directors due to a lack of personal jurisdiction. This determination is reviewed for "correctness." See *Arguello v. Industrial Woodworking Machine Co.*, 838 P.2d 1120, 1121 (Utah 1992). In reviewing the decision of the trial court, the facts asserted in Defendants' affidavits are taken to be true, unless controverted. *Id.*

III. STATEMENT OF THE CASE

A. Nature of the Case and Procedural History

This litigation is but one episode in a series of protracted lawsuits arising from a purported accounting fraud alleged to have been perpetrated at Laidlaw Environmental Services, Inc. ("LES") (now, after a 1998 merger, known as Safety-Kleen Corporation ("Safety-Kleen")). (RA 011-017). In addition to the instant

litigation, there are four coordinated federal lawsuits currently pending in the United States District Court, District of South Carolina, the jurisdiction where LES had its principal place of business and where its board of directors met.³ Further, a lawsuit in the State of California, which is substantially similar to the present lawsuit, was previously dismissed for lack of personal jurisdiction for precisely the same reasons that the Utah trial court dismissed this case against Defendants. See *Eaton Vance Distributors, Inc. et al. v. Winger, et al.*, in the Superior court of Sacramento County, California, Docket No. 01 AS 01376 (hereafter "Eaton Vance"); (RA 0582-0606; 053-055).⁴

³ See *In re Safety-Kleen Bondholders Litigation*, 3:00-CV-1145-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Shareholder Litigation*, 3:00-CV-736-17 (D.S.C.) (Anderson, J.); and *In re: Laidlaw Stockholder Litigation*, 3:00-CV-855-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Rollins Shareholder Litigation*, 3:00-CV-1343-17 (Anderson, J.).

⁴ In March of 2003, the California Court of Appeal, Third Appellate District affirmed the dismissal for lack of personal jurisdiction in an unpublished opinion (not to be cited or relied on, pursuant to California Rule of Court, Rule 977(a)). The Plaintiffs in that case have sought to further appeal the dismissal to the California Supreme Court.

In the California *Eaton Vance* case, four plaintiffs, three of whom are also plaintiffs in the instant case, brought a lawsuit against the same group of defendants as in this case. In addition to the identity of parties, the jurisdictional issues in the California suit are virtually identical to those in the present case; in both California and Utah the Plaintiffs argued that specific personal jurisdiction may be based on state statutes providing for control person liability for securities fraud. See California Corporations Code Section 25540; Utah Code Ann. § 61-1-22(4) (hereafter "Section 61-1-22(4)"); (RA 0591-0599). Indeed, Plaintiffs admit in their brief before this Court that the California statute is "worded virtually identically" to Section 61-1-22(4). App. Br., p. 23. As noted above, the Superior Court of Sacramento County, California dismissed the California lawsuit on October 26, 2001, and that decision has since been affirmed on appeal. (RA 053-055; fn.4 *supra*).

In the present case, Plaintiffs (ten East-Coast institutional investment firms) allege that they were defrauded on July 1, 1997, when they purchased bonds (the "Bonds") issued by Tooele County, Utah and secured by LES.

See Complaint, RA 01-023. The plaintiffs have sued three senior LES officers and every person who served as a director on the LES Board at the time the Bonds were issued. (RA 018-020, 023). Plaintiffs contend that they were fraudulently induced to purchase bonds through misleading offering materials. (RA 002-010).

James R. Bullock, John R. Grainger, and Leslie W. Haworth were among the directors who served on the Board of LES at the time the Bonds were issued. (Affidavits of Canadian Directors, RA 042, 046, 050-051). It is undisputed that none of these Canadian Directors participated in the issuance of the Bonds, drafted any of the offering materials for the bonds, or marketed the Bonds. (RA 042, 045, 050). The Canadian Directors no longer serve on the board of LES or its successor-entity, Safety-Kleen. (RA 042, 046, 050).

On July 1, 2001, Plaintiffs filed a complaint in the Third District Court of Utah, asserting a claim against thirteen individuals who at various times served as officers or directors of LES and Safety-Kleen. (RA 01-023). In response to this lawsuit, the Canadian Directors filed a motion to dismiss the complaint for lack of

personal jurisdiction. (RA 040-041). The Canadian Directors submitted sworn declarations in support of their motion stating, *inter alia*, that they are Canadian citizens, that they had and have no contacts with Utah, and that they did not "market the Bonds to prospective investors or draft the offering materials for the Bonds." (RA 041-043, 049-051, 045-047). Importantly, none of these sworn declarations were rebutted by plaintiffs, and therefore must be taken to be true. See *Arguello*, 838 P.2d at 1121.

After a full hearing, the trial court dismissed the complaint for lack of personal jurisdiction on June 19, 2002. (RA 0553-0554). The court rejected the Plaintiffs' argument that an assertion of liability under Section 61-1-22(4) -- which provides that persons who "control" an entity found to have violated Utah's securities laws may be held *liable* for acts of the controlled entity -- is sufficient to establish *personal jurisdiction* over the defendants. Utah Code Ann. § 61-1-22(4). Plaintiffs now appeal this decision.

B. Statement of Relevant Facts

Plaintiffs' statement of facts neglects to mention a number of material facts. For that reason, the Canadian Directors hereby provide a statement of relevant facts as follows:

1. The Canadian Directors (a) did not participate in the issuance of the bonds; (b) did not draft the offering materials for the bonds; and (c) did not market the bonds to the Plaintiffs or anyone else. (RA 042, 045, 050).

2. None of the Canadian Directors has ever had any significant contacts with Utah. The Canadian Directors have never lived in Utah, paid taxes in Utah, owned property in Utah, nor had any contractual obligations with any Utah resident. (RA 042, 046, 050).

3. Defendants John R. Grainger, James R. Bullock, and Leslie W. Haworth are Canadian citizens, residing in the Toronto area of Canada when this lawsuit was filed.⁵ (RA 043, 047, 051).

⁵ Leslie Haworth is also a citizen of the U.K. (RA 043).

4. The Canadian Directors are former outside directors of LES, the corporate entity that purportedly secured the bonds purchased by the Plaintiffs. (RA 042, 046, 050).

5. The ten Plaintiffs, MFS Series Trust III (on behalf of MFS Municipal High Income Fund), Merrill Lynch High Yield Municipal Bond Fund, Inc., MuniHoldings Fund, Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio, Merrill Lynch Municipal Strategy Fund, Eaton Vance Distributors, Inc., T. Rowe Price Associates, Inc., John Hancock Funds, Inc., and Putnam Investments, Inc., are institutional purchasers of the bonds. None of the Plaintiffs reside in Utah. (RA 021). MFS Municipal High Income Fund is a series of MFS Series Trust III, which is a Massachusetts business trust with its principal offices in Boston. *Id.* Merrill Lynch High Yield Municipal Bond Fund, Inc., MuniHoldings Fund, Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio, and Merrill Lynch Municipal Strategy Fund are incorporated in Maryland and managed by an entity based in New Jersey. *Id.* Eaton Vance Distributors, Inc. and Putnam Investments, Inc. are each incorporated in Massachusetts and have principal places of

business in Boston. *Id.* T. Rowe Price Associates, Inc. is a Maryland Corporation with its principal place of business in Baltimore. *Id.* Finally, John Hancock Funds, Inc. is a Delaware corporation which also has its principal place of business in Boston. *Id.*

6. Safety-Kleen is a Delaware corporation with its principal place of business in South Carolina. (RA 021, 0178). The predecessor-entity, LES, was a subsidiary of Laidlaw Inc. (RA 046, 020). LES also had its principal place of business in South Carolina. (RA 0110).

7. On January 22, 2002, the Canadian defendants and others moved to dismiss the complaint for lack of personal jurisdiction. (RA 041). In their court papers, the Canadian defendants argued that they were not subject to personal jurisdiction in Utah and did not have the requisite minimum contacts with this State. (See, e.g., RA 085-091).

8. There are four class action securities lawsuits pending in the federal district court in South Carolina against the same group of defendants arising out of the same accounting matters at issue in the Plaintiffs' complaint. (See *In re Safety-Kleen Bondholders Litigation*,

3:00-CV-1145-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Shareholder Litigation*, 3:00-CV-736-17 (D.S.C.) (Anderson, J.); and *In re: Laidlaw Stockholder Litigation*, 3:00-CV-855-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Rollins Shareholder Litigation*, 3:00-CV-1343-17 (Anderson, J.). In addition, a separate, substantively identical lawsuit filed in California was dismissed for lack of personal jurisdiction on October 26, 2001 (RA 053-055), and that decision has now been affirmed on appeal. See fn.4 supra.

IV. SUMMARY OF ARGUMENTS

In order for a Utah court to exercise specific personal jurisdiction over the Canadian Directors, Plaintiffs must make a showing that each defendant has engaged in conduct enumerated in the Utah long-arm statute. See, e.g., *Harnischfeger Engineers, Inc. v. Uniflo Conveyor, Inc.*, 883 F. Supp. 608, 612-613 (D. Utah 1995). Plaintiffs must further satisfy the two requirements of the Due Process Clause by establishing: (1) that defendants have "minimum contacts" with the forum state; and (2) that the exercise of jurisdiction over each defendant is fair and reasonable. *Id.* Moreover, the Court must assess each defendant individually with respect to these jurisdictional

considerations, without regard to whether jurisdiction over the corporation with which they are associated is proper. See *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987).

The Canadian Directors have no relevant contacts with the State of Utah, nor did they did participate in the bond offering, issuance, or marketing, whether personally or through an agent. In an attempt to avoid these dispositive facts, Plaintiffs misconstrue two Utah statutes as somehow exponentially expanding the personal jurisdictional reach of Utah. Plaintiffs' position is plainly without merit. Section 61-1-22(4) is a liability statute that confers "control person" liability with respect to securities fraud. Because liability and jurisdiction are independent inquiries, Section 61-1-22(4) has no impact on the determination of personal jurisdiction. See *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990). Similarly, Section 61-1-26 has no relevance to the question of personal jurisdiction. Section 61-1-26 provides solely for substituted service of process for violations of Utah securities law where a basis of personal jurisdiction is already established.

Even assuming, *arguendo*, that these statutes were somehow relevant to analysis here, personal jurisdiction over the Canadian Directors is still improper because such an exercise of jurisdiction would offend due process since the Canadian Directors clearly lack the requisite "minimum contacts" with Utah. Furthermore, considering the burden on the Canadian Directors of defending this lawsuit in Utah, the slight interest of Utah in this litigation, and the interests of judicial economy, exercising personal jurisdiction in this case would also be constitutionally unreasonable. The trial court correctly determined that the complaint against the Canadian Directors should be dismissed for lack of personal jurisdiction, and this dismissal should be affirmed.

V. ARGUMENT

Plaintiffs claim on appeal that Utah has specific (as opposed to general) personal jurisdiction over the Canadian Directors.⁶ See, e.g., App. Br., p. 14. Under

⁶ Plaintiffs apparently concede, as they must, that general jurisdiction does not exist for any of the Canadian Directors. The Canadian Directors did not have continuous and systematic contacts with Utah that would justify the exercise of general jurisdiction. See *Burger King v.*

Utah law, any claim of specific jurisdiction must satisfy a three part inquiry:

(1) the defendant's acts or contacts must implicate Utah under the Utah long-arm statute; (2) a "nexus" must exist between the plaintiff's claims and the defendant's acts or contacts; and (3) application of the Utah long arm statute must satisfy the requirements of federal due process.

Harnischfeger, 883 F. Supp. at 612-613 (D. Utah 1995). Therefore, in order to justify specific personal jurisdiction, Plaintiffs must not only show that the defendants have engaged in conduct enumerated in the Utah long-arm statute, but Plaintiffs must also establish that the exercise of personal jurisdiction comports with Constitutional Due Process. *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 916 (D. Utah 1991); Utah Code Ann. § 78-27-24; United States Constitution, Amdt. 14.

Due process permits the exercise of personal jurisdiction only when two criteria are satisfied: (1) the defendant has sufficient "minimum contacts" with the forum state; and (2) the exercise of personal jurisdiction is "reasonable" such that jurisdiction does "not offend

Rudzewicz, 471 U.S. 462 (1985); (Affidavits of Canadian Directors, RA 042, 045-46, 050-51).

traditional notions of fair play and substantial justice.'" *Harnischfeger*, 883 F. Supp. at 614 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Furthermore, "[e]ach defendant's contacts with the forum state must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984). Plaintiffs thus bear the burden of showing that each of the Canadian Directors has "minimum contacts" with Utah as individuals, apart from their mere roles as directors of LES. *Id.* at 790; *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F.Supp.2d 1318, 1320 (D. Utah 1998) ("[W]hen the court's jurisdiction is contested, the plaintiff has the burden of proving jurisdiction exists") (citations omitted). As discussed below, Plaintiffs failed to plead that the Canadian defendants have any contacts with Utah, much less that each of them took actions directed at Utah that could give rise to the exercise of specific jurisdiction in this case. For all the reasons discussed herein, the trial court's order of dismissal should be affirmed.

A. The Trial Court Correctly Determined That The Canadian Defendants Do Not Have The Requisite Minimum Contacts With Utah.

A finding of "minimum contacts" must be based on "some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Harnischfeger*, 883 F.Supp. at 614. To meet this "purposeful availment" requirement, plaintiffs must show that each of the Canadian Directors "'deliberately' has engaged in significant activities within a State or has created 'continuing obligations' between himself and residents of the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (citations omitted); see also *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112 (1987) (to establish purposeful availment the plaintiff must show "an action of the defendant purposefully directed toward the forum State") (emphasis in original). Furthermore, the defendant's alleged conduct must be causally linked to the claims stated in the complaint at issue. *Roskelley v. Lerco, Inc.*, 610 P.2d 1307, 1311 (Utah 1980) (claims must "arise out of" defendants contacts with forum state).

Plaintiffs cannot establish minimum contacts between any of the Canadian Directors and the State of Utah because the Canadian Directors have not engaged in any conduct with respect to the Bonds at issue in this case. The Canadian defendants did not participate in the issuance of the Bonds. (RA 042, 045, 042). They did not draft offering materials for the bonds, nor did they market the Bonds to prospective investors. *Id.* Furthermore, the Canadian Directors have never resided in Utah nor had any contractual obligations with any Utah resident. *Id.* These facts, as asserted in the affidavits of the Canadian Directors, are uncontroverted and must be accepted as true. *Arguello*, 838 P.2d at 1121 (since plaintiff failed to controvert affidavit, "the facts asserted in the affidavit are taken as true"). Accordingly, Plaintiffs' claim of specific jurisdiction fails on its face.

In light of these determinative facts, Plaintiffs attempt to evade an individualized analysis of minimum contacts altogether. Instead of asserting that the Canadian Directors personally undertook actions that were directed at Utah -- something the Plaintiffs cannot do -- Plaintiffs seek to satisfy the requisite "minimum contacts" solely by virtue of the fact that the Canadian defendants served as directors of LES. Indeed, there can be no doubt that this is what Plaintiffs seek

to do, as admitted by the Plaintiffs' counsel when questioned by the trial court:

Trial Court: So you're saying that the very fact that [defendants] were directors of a corporation that issued these bonds is sufficient to establish long-arm jurisdiction . . . ?

Plaintiffs' Counsel: That's exactly what I'm saying.

RA 0578, p. 17. See also, e.g., App. Br. p. 29) (citing *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal.App.3d 696, 703-704 (1990)).⁷ Plaintiffs' approach is not merely legally misguided, it is constitutionally impermissible. "Jurisdiction over the representatives of a corporation may not be predicated on the jurisdiction over the corporation itself, and jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state." *Ten Mile Industrial Park v. Western Plains Service Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987);

⁷ Plaintiffs' reliance on the California case *Seagate Technology v. A.J. Kogyo Co.* is misleading. The *Seagate Technology* Court ruled that to establish jurisdiction, the action taken by a corporate officer "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)." 219 Cal.App.3d at 704-705 (emphasis added).

see also *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1984) ("jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him"); *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").

This Court has expressly held that it is necessary to distinguish between a corporation and its officers in assessing whether "minimum contacts" exist. For example, in *SII Megadiamond, Inc. v. American Superabrasives Corp.*, this Court found that the defendant corporation, American Superabrasives Corp., had engaged in conduct sufficient to meet the requirements of "minimum contacts." 969 P.2d 430, 436 (Utah 1998). The officers of the corporation, on the other hand, had no such contacts with the state of Utah, thereby precluding the exercise of specific personal jurisdiction over the officers because "[m]inimum contacts must be found as to each defendant over whom the court exercises jurisdiction." *Id.* at 437 (quoting *Home-Stake Prod. v. Talon Petroleum*, 907 F.2d 1012, 1020 (10th

Cir.1990)). The Court noted that "specific personal jurisdiction arises only out of the actual transactions between the defendant and the forum." *SII Megadiamond, Inc.*, 969 P.2d at 437. In the instant case, the Canadian Directors have engaged in no "actual transactions" in the State of Utah, thus precluding a finding of personal jurisdiction over these individuals.

Similarly, in *Ten Mile Industrial Park*, the Tenth Circuit was faced with a situation closely analogous to the present case. The plaintiffs there sought to exercise specific personal jurisdiction over the members of the executive committee of a company on the basis that personal jurisdiction over the corporation was proper and the executive committee "had the ability to control the activities" of the corporation. 810 F.2d at 1526. The Court rejected this argument, finding that the individual defendants lacked sufficient contacts with Utah, particularly where the plaintiffs "offered only conclusory allegations which [were] unsupported by affidavit or other competent evidence." *Id.* at 1527. Plaintiffs in the case at bar, like the plaintiffs in *Ten Mile Industrial Park*, have offered nothing more than "conclusory allegations"

that the Canadian Directors had any contacts with Utah -- allegations which have been completely controverted by the directors' unrebutted affidavits. (RA 041-043, 045-047, 049-051). This is patently insufficient to support a claim of personal jurisdiction.

Plaintiffs' attempts to distinguish *SII Megadiamond* and *Ten Mile Industrial Park* are without merit. The fact that these cases did not address a statute identical to Section 61-1-22(4) is irrelevant; due process requirements apply to every determination of personal jurisdiction, whether or not jurisdiction is based on a specific statute. See *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"); cf. Utah Code Ann. § 78-27-22 (Utah long-arm statute applies only to the extent of due process).

The complaint makes no allegations suggesting that the Canadian Directors had any contact with Utah beyond that derived solely from their official position with the corporation. To the contrary, the complaint does nothing more than make vague, collective references to the thirteen

defendants as a group. (See, e.g., App. Br., pp. 29, 31). These allegations fail to demonstrate that the court has personal jurisdiction over the Canadian Directors. Because the Plaintiffs did not (and cannot) demonstrate that the Canadian defendants have the requisite minimum contacts with Utah, the trial court's ruling must be affirmed.

B. Section 61-1-22(4) of the Utah Code Does Not Eliminate the Constitutional Minimum Contacts Requirement.

In their attempt to escape the inexorable conclusion that the Canadian Directors do not have the requisite minimum contacts with Utah for purposes of due process, Plaintiffs next claim that Section 61-1-22(4) of the Utah Annotated Code provides them with an alternative basis for jurisdiction. See, e.g., App. Br., pp. 11-12. Section 61-1-22(4), however, is a *liability* statute which provides that a person who "controls a seller or buyer liable [for securities fraud]" is presumed to be jointly and severally liable with the controlled person or entity. Utah Code Ann. § 61-1-22(4). According to Plaintiffs, an allegation of *liability* under Section 61-1-22(4) is, *ipso facto*, sufficient to establish *personal jurisdiction* over the Canadian defendants. This is plainly incorrect. No

Utah court has ever ruled that an allegation of liability under Section 61-1-22(4) is alone sufficient to confer personal jurisdiction over a non-resident defendant, nor is this assertion consistent with the requirements of constitutional due process. This Court should decline the Plaintiffs' invitation to rewrite the law to suit their purposes.

1. The Plaintiffs Improperly Conflate Liability With Personal Jurisdiction and Ignore Due Process Requirements.

Rather than attempting to make a jurisdictional showing, Plaintiffs focus much of their brief erroneously equating liability to jurisdiction. See App. Br., pp. 18-28. Plaintiffs' argument, however, ignores the well-established principle that "[l]iability and jurisdiction are independent. Liability depends upon the relationship between the plaintiff and the defendants and between individual defendants. Jurisdiction depends only upon each defendant's relationship with the forum." *Sher v. Johnson*, 911 F.2d at 1365 (emphasis added). Jurisdiction over the Canadian Defendants cannot stand solely on Plaintiffs' allegations of liability. See *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d at 1309 ("it is the jurisdictional facts,

and not whether plaintiff has stated a claim upon which relief may be granted, which concern us here"); *cf. Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F.Supp.2d at 1321 (the mere allegation that the defendant has caused tortuous injury within the state does not necessarily establish that the defendant possesses the constitutionally required minimum contacts). Plaintiffs have not - and cannot - cite any authority to the contrary.

Even when liability is presumed to arise from a defendant's position as a "controlling person," courts have steadfastly (and rightfully) demanded that the requirements of due process be satisfied. See *Schlatter v. Mo-Comm Futures Ltd.* 662 P.2d 553 (Kan. 1983) (hereafter *Schlatter*); see also *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) (holding that a federal statute that imposes joint and several liability for businesses under common control is an insufficient basis for asserting personal jurisdiction); *Taylor-Rush v. Multitech Corp.*, 217 Cal.App.3d 103, 114 (1990) (in lawsuit alleging violations of California's controlling person statute, which is

virtually identical to Utah's Section 61-1-22(4), court quashed the service of summons issued against individual defendants because of lack of "evidence that [the defendants] participated in or directed any tortious act or omission."). Further, as noted above, the California trial court rejected the same "control person liability" argument in the *Eaton Vance* case against the same group of defendants. (RA 0578, 0553-0554).

Indeed, as the Plaintiffs recognize in their brief, the Kansas Supreme Court has also rejected this "liability" theory of jurisdiction. (App. Br., pp. 35-37); *Schlatter*, 662 P.2d 553. In *Schlatter*, the court held that a control person statute "establishes the basis for liability of persons involved ... but it does not establish the jurisdiction of the court to submit such persons to liability." *Id.* at 563 (citation omitted). The court ruled that it did not have personal jurisdiction because the plaintiff had not shown the existence of "any act, action or activity by either defendant ... which would meet the minimum contacts necessary to satisfy federal constitutional due process requirements." *Id.*

The Plaintiffs' tortured attempt to distinguish *Schlatter* is entirely unavailing. The *Schlatter* court -- like all other courts to address the issue -- held that, regardless of statutory liability, jurisdiction must be established in accordance with Constitutional Due Process. *Id.* Statutory semantics cannot trump the mandate of the Fourteenth Amendment; thus, the slight differences between the Kansas "control person" statute and the Utah statute are inconsequential. Plaintiffs also complain that the *Schlatter* case was decided in the context of a motion for summary judgment as opposed to a motion to dismiss the complaint. (App. Br., p. 39). However, Plaintiffs cite no authority indicating that constitutional principles differ depending upon the stage of the litigation where the jurisdictional challenge is made, nor does such a distinction make sense with respect to resolving a question of personal jurisdiction.

Plaintiffs' notion of "automatic jurisdiction" under Section 61-1-22(4) simply cannot be reconciled with the "minimum contacts" requirement of the United States Constitution and prior rulings of the Utah Supreme Court. Utah law is clear that a plaintiff must establish that each

defendant has minimum contacts with Utah before haling a defendant into this forum. See, e.g., *Harnischfeger*, 883 F. Supp. at 612; *SII Megadiamond*, 969 P.2d at 437; Utah Code Ann. § 78-27-22 (Utah long-arm statute is explicit that state courts may exercise personal jurisdiction only to the "extent permitted by the due process clause of the 14th Amendment to the United States Constitution."). Even if the Utah legislature explicitly wished to expand the reach of Utah's personal jurisdiction, it could not evade the requirements of constitutional due process. "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. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996). "Each individual has a liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful 'contacts, ties or relations.'" *Burger King Corp. v. Rudzewicz* 471 U.S. at 471-472 (citations omitted). Plaintiffs have failed to show minimum contacts in this case; thus, regardless of any claimed statutory authority, an assertion of personal

jurisdiction over the individual Canadian Defendants is constitutionally improper.

2. The Out-of-State Authorities Cited by Plaintiffs Are Distinguishable And Do Not Abrogate The Constitutional Minimum Contacts Test.

Plaintiffs cite a handful of federal cases to support the notion that liability may justify an exercise of personal jurisdiction. See App. Br., pp. 26, 43-45, citing: *McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 640 (E.D. Tex. 1999); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1013-14 (D.N.J. 1996); *Landry v. Price Waterhouse Chartered Accountants*, 715 F. Supp. 98, 101-02 (S.D.N.Y. 1989); *San Mateo County Trans. Dist. v. Dearman, Fitzgerald & Roberts Inc.*, 979 F.2d 1356 (9th Cir. 1992). Plaintiffs' reliance on these cases -- which involve claims brought under Section 20(a) of the Securities Exchange Act of 1934 -- is entirely misplaced.

As an initial matter, the *McNamara* court noted that because the federal Securities Exchange Act confers "nationwide service" of process, it could evaluate the exercise of jurisdiction under a "national contacts" standard. See *McNamara*, 46 F. Supp. 2d at 633, 641; see

also *San Mateo*, 979 F.2d at 1358 (noting that the "court may have jurisdiction wherever [the defendant] might be found"). In contrast, the Plaintiffs in this case were required to show that each Canadian defendant had minimum contacts with Utah - something they have not, and cannot do.

Moreover, in the four federal cases cited by Plaintiffs, the findings of personal jurisdiction were based not merely on allegations of liability, but rather on specific, supported allegations that the defendants had personally engaged in wrong-doing. For example, in *McNamara*, the insider defendants had participated in specific unlawful activities, including the promotion of the investment in question, the execution of fraudulent documents, and preparation of false press releases. *McNamara*, *supra*, 46 F. Supp. 2d at 640; see also *Derensis*, *supra*, 930 F. Supp. at 1014 (defendants personally approved and disseminated the statements at issue and knew that those statements would influence the price of securities); *Landry*, 715 F. Supp. at 102 (factual allegations sufficient to indicate that attorney was intimately involved in the pertinent transactions).

In *San Mateo*, the Court determined that there was a "colorable showing" that a brokerage firm's vice president and treasurer might be liable as a controlling person under federal law because the defendant was alleged to have been personally involved in the bond trades at issue. *San Mateo, supra*, 979 F.2d at 1357.⁸ The facts of this case stand in stark contrast; here, the Canadian defendants did not participate in the bond transactions at issue, did not prepare offering materials for the bonds, did not have any contacts with the Plaintiffs, and did not market the bonds to investors. (RA 042, 045-046, 050-051). Thus, unlike the federal cases cited by Plaintiffs, minimum contacts are completely lacking in the case at bar.

3. Plaintiffs' Novel Attempt to Shift the Burden of Proof Concerning the Existence of Jurisdictional Contacts Lacks Any Merit.

It is well-established that Plaintiffs bear the burden of showing that each defendant has the requisite minimum contacts with Utah. "In a motion to dismiss for

⁸ The *San Mateo* decision has also been described as "utterly inconsistent" with longstanding Supreme Court precedent on personal jurisdiction. *In re Baan Co. Securities Litigation*, 81 F. Supp. 2d 75, 79-82 (D.D.C. 2000).

lack of personal jurisdiction, the *plaintiff* bears the burden of establishing that the exercise of personal jurisdiction over the defendant is proper." *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 647 (D. Utah 1998) (emphasis added).⁹ In an attempt to avoid this burden, Plaintiffs proffer yet another legal proposition that has never been adopted by this or any other Utah court, namely that the assertion of control person liability under Section 61-1-22(4) somehow shifts the burden of proof to the defendants to disprove liability in order to show a lack of jurisdictional contacts. See App. Br., p. 24.

The Plaintiffs' argument should be rejected. The caselaw is uniform that the burden of establishing personal jurisdiction falls on the plaintiff, and Plaintiffs - quite tellingly -- cite not a single case holding otherwise. In addition, Plaintiffs' unsupported argument, if accepted, would turn Constitutional Due Process analysis on its head by requiring the court to determine liability under Section 61-1-22(4) before deciding whether it has any jurisdiction

⁹ The Plaintiffs admit, as they must, that they have the burden of showing minimum contacts. See App. Br., p. 32.

over the defendants. Plaintiffs' approach makes no sense, whether from a legal or practical perspective.

In *Central States, Southeast and Southwest Areas Pension Fund*, the Court addressed at length the process by which courts determine personal jurisdiction:

The [Plaintiffs'] argument that [personal jurisdiction] analysis changes where a federal statute premises liability on corporate affiliation ignores the process by which courts determine whether specific personal jurisdiction exists and confuses liability and jurisdiction. . . . If the court determines at the second step 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 (citations omitted). Similarly, jurisdiction and liability are two separate inquiries (citations omitted). The fact that a defendant would be liable under a statute if personal jurisdiction over it could be obtained is irrelevant to the question of whether such jurisdiction can be exercised.

230 F.3d at 944. The Plaintiffs' attempt to shift the burden is utterly antithetical to well-established due process considerations, which are designed to prohibit

prosecution of a cause of action against a defendant who lacks "minimum contacts" with the forum state. See *Roskelley*, 610 P.2d at 1310. Again, the trial court's order of dismissal must be affirmed.

C. The Exercise of Jurisdiction Over the Canadian Defendants Would Be Constitutionally Unreasonable.

In addition to the inadequate showing of minimum contacts between the Canadian Directors and the State of Utah, Plaintiffs have further failed to satisfy the second prong of the Due Process analysis: whether the exercise of personal jurisdiction would be "reasonable." Courts consider a number of factors to determine whether the exercise of jurisdiction is "reasonable":

(1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

DeMoss, 762 F. Supp. at 919-20 (citations omitted). All of these factors weigh against the assertion of jurisdiction over the Canadian Directors.

First, the burden of litigating in Utah would pose a severe burden to the Canadian Directors. All of the Canadian Directors are foreign citizens, and the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal*, 480 U.S. at 114; (RA 043, 047, 051). In a lawsuit that may require foreign nationals to submit themselves to a foreign judicial system, the plaintiffs face a "higher jurisdictional barrier" in asserting jurisdiction over the foreign defendants. *Rano v. Sipa Press*, 987 F.2d 580, 588 (9th Cir. 1993); accord *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 662-63 (Utah 1989) (there are "important differences between assertions of jurisdiction in the interstate context and those in the international context"). However, consistent with their complete failure to conduct an individualized assessment of minimum contacts, Plaintiffs also fail to address the unique burdens facing the foreign-national Canadian Directors.

In addition, Plaintiffs did not plead any facts evidencing that the Canadian Directors could "foresee" that

they would be haled into a Utah court. See *Worldwide Volkswagen v. Woodson*, 44 U.S. 286, 292 (1980). Plaintiffs' citation to a litany of "control person" statutes codified in other states does not suggest that the Canadian defendants could have foreseen that they would be sued in Utah - and certainly not by these Plaintiffs, none of whom even reside in Utah -- for a bond issuance with which they had no personal involvement. App. Br., pp. 34-35.

Second, Utah's interest in adjudicating this lawsuit is slight. As noted above, the Canadian Directors have (and had) no substantial contacts with Utah, nor did they participate in the bond transactions at issue. Moreover, the company accused of violating securities laws - LES (now known as Safety-Kleen) - is a Delaware corporation, with its principal place of business at all relevant times in South Carolina. (RA 0178, 050). Plaintiffs cannot demonstrate that Utah's interests in this action outweigh the interests held by the state of South Carolina with respect to the alleged improper conduct, or that the application of South Carolina law would compel an unjust result. In addition, none of the Plaintiffs in the

instant case is a Utah resident. (RA 021). Utah's interest in exercising personal jurisdiction is thus minimal. See Utah Code Ann. § 78-27-22 (Utah long-arm statute was intended to "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.") (emphasis added).

Third, the Plaintiffs have not demonstrated that they have any individual interest in having this dispute heard in Utah. Due process is concerned with the plaintiff's ability to obtain "convenient and effective" relief; it defies logic to think that it is "convenient" for the Plaintiffs -- all large East Coast investment firms -- to litigate their claims in Utah. *DeMoss*, 762 F. Supp. at 919-20. Plaintiffs are not Utah residents. (RA 021). The alleged accounting fraud occurred in South Carolina, not Utah. As Plaintiffs' choice of forum is not consistent with the concerns of "reasonability," it should be entitled to little deference.

Fourth, notions of judicial economy weigh heavily against the exercise of jurisdiction. The Canadian

Directors have appeared in no less than five securities class action lawsuits, four of which are currently being litigated in federal court in South Carolina with respect to the *same* accounting issues that Plaintiffs reference in their complaint.¹⁰ And, not surprisingly, the documents and witnesses relevant to the alleged fraud are located primarily in South Carolina - *not Utah*. Since Plaintiffs claims should properly have been brought in South Carolina, this Court should not encourage piecemeal litigation here.

Finally, the fifth factor - the states' shared interest in furthering substantive policies - does not weigh in favor of asserting personal jurisdiction over the Canadian Directors. This lawsuit should properly have been pursued in a forum with sufficient personal jurisdiction, where contacts between the directors and the forum actually exist. Satisfying the constitutional concerns of due

¹⁰ The four active cases are *In re Safety-Kleen Bondholders Litigation*, 3:00-CV-1145-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Shareholder Litigation*, 3:00-CV-736-17 (D.S.C.) (Anderson, J.); and *In re: Laidlaw Stockholder Litigation*, 3:00-CV-855-17 (D.S.C.) (Anderson, J.); *In re Safety-Kleen Rollins Shareholder Litigation*, 3:00-CV-1343-17 (Anderson, J.). Another case, *In re Laidlaw Bondholder Litigation*, has been settled. 3:00-CV-2518-17 (Anderson, J.).

process, therefore, is the most significant policy consideration in this case. Plaintiffs' argument fails at every turn, and the trial court's order of dismissal should be affirmed.

D. The Plaintiffs Have Failed to Show That the Canadian Directors Engaged in Any Contacts Enumerated in the Utah Long-Arm Statute.

Plaintiffs' failure to meet the requirements of due process dooms their appeal. In addition, Plaintiffs have also failed to satisfy the jurisdictional requirements of the Utah long-arm statute. Section 78-27-22 limits Utah's exercise of personal jurisdiction to situations where the defendant has engaged in certain enumerated conduct. Utah Code Ann. § 78-27-22; *Harnischfeger*, 883 F.Supp. at 612-613. Plaintiffs claim that the Canadian Directors, by virtue of nothing more than their position as alleged controlling persons of LES, "transacted business" that had effects in Utah either personally or by way of an agent. See App. Br., p. 31. However, as discussed at length above, Plaintiffs are unable to muster any *facts* to support their jurisdictional claims.

The "transaction of any business" requires "some substantial activity with some degree of continuity."

Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257, 1259 (Utah 1976). However, as noted above, Plaintiffs cannot show that the Canadian Directors had any relevant contact whatsoever with the State of Utah. The only relevant evidence before this Court is contained in the uncontroverted sworn declarations of the Canadian Directors, which establish that these individuals did not participate in any way with the Bonds at issue in this case.

Furthermore, the Canadian Directors have not engaged in any relevant conduct in Utah through an agent. An individual's status as a director does not make one, "as such, an agent of the corporation," Restatement (Second) of Agency § 14C. Plaintiffs cite neither legal authority nor a factual basis to support their claim that LES, or its Chief Financial Officer Paul Humphreys, somehow acted as the agents of the individual directors for purposes of establishing personal jurisdiction. Plaintiffs' claim in this regard is further contradicted by the numerous cases distinguishing between corporations and their directors on jurisdictional matters. See *Ten Mile Industrial Park*, 810 F.2d at 1524 (discussed *supra*); *SII Megadiamond, Inc.*, 969

P.2d at 437 (same). As Plaintiffs have utterly failed to adduce any contacts between the Canadian Directors and Utah, jurisdiction is improper under the Utah long-arm statute.

E. Section 61-1-26, Which Provides for Substituted Service of Process, Is Not Sufficient To Permit the Exercise of Jurisdiction and is Trumped by Due Process Considerations.

In their final effort to manufacture a basis for jurisdiction, Plaintiffs suggest that a service of process statute, which permits service upon a defendant through the Secretary of State if he cannot otherwise be served in Utah, somehow provides an independent basis for to justify the exercise of specific personal jurisdiction over the Canadian Directors. Utah Code Ann. § 61-1-26; App. Br., pp. 36-38. Plaintiffs' reliance upon Section 61-1-26 is misplaced. As previously noted with regard to Section 61-1-22(4) (discussed *supra*), nothing within Section 61-1-26 abrogates constitutional due process requirements or purports to provide an independent basis for jurisdiction. See *Burger King Corp.* 471 U.S. at 471-472. Instead, Section 61-1-26 merely states that if personal jurisdiction through the service of process cannot "otherwise be obtained in this State," a plaintiff may serve the

defendant with the complaint at the Office of the Secretary of State. Such statutes are commonplace and are intended to provide plaintiffs with a *location of service* when a defendant who is subject to personal jurisdiction in the State cannot be found within the forum; they do not provide an independent statutory basis for the assertion of personal jurisdiction itself.

In making this argument, Plaintiffs confuse the requirement that there be a "basis of personal jurisdiction" with the "acquisition of personal jurisdiction." The constitution requires that the "basis" of personal jurisdiction be tied to specific minimum contacts and fairness. See *International Shoe*, 326 U.S. 310. The "acquisition" of personal jurisdiction, on the other hand, is concerned with ensuring proper service of process upon those individuals for whom there is already an appropriate basis of jurisdiction. See *Ziller Electronics Lab GmbH v. Superior Court*, 206 Cal.App.3d 1222, 1229 (Calif. 1988) ("Personal jurisdiction over a nonresident defendant depends upon the existence of essentially two criteria: first, a *basis* for jurisdiction must exist due to 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."); cf. *Rudd v. Crown International*, 488 P.2d 298, 300 (Utah 1971) ("Defendant concedes that under the long-arm statute its activities within the state are sufficient to confer jurisdiction upon the courts . . . The dispute concerns the method of serving process.").

Predictably, Plaintiffs do not address this precedent. Instead, they cite to two out-of-state cases that do not stand for the proposition pushed on this Court: *American Microtel, Inc. v. Massachusetts*, 1995 WL 809575 (Mass. Super. Ct. Jan. 27, 1995) (hereafter *American Microtel*), and *Brown v. Investment Mgmt. and Research, Inc.*, 475 S.E.2d 754 (S.C. 1996) (hereafter *Brown*). (App. Br., pp. 34-35). Plaintiffs attempt to mislead the court by asserting that *American Microtel* is "directly on point." App. Br., p. 37. The *American Microtel* court explicitly noted that it was not considering the "exercise of personal jurisdiction by a court," but was in fact concerned with whether the Director of Massachusetts' Securities Division had the power to impose sanctions in an administrative

proceeding. *American Microtel, supra*, 1995 WL 809575 at *11 (emphasis added). Although the court indicated in dicta in a footnote that the long-arm statute might hypothetically supply personal jurisdiction, the Massachusetts court certainly did not suggest that the constitutionally-mandated "minimum contacts" test would become irrelevant in those circumstances. *Id.* at *11 n.8.

The *Brown* decision is also inapposite. As an initial matter, the *Brown* court unambiguously and intentionally disregarded due process considerations. 475 S.E. 2d at 758, fn. 6 ("[r]espondents . . . also argue that the assertion of personal jurisdiction over them would violate federal standards of due process. The trial judge specifically declined to address this issue in his order. Therefore, any due process objections are more properly addressed by the trial court on remand"). In any event, the court found that the South Carolina long-arm statute supplied jurisdiction when the plaintiff alleged that the defendant personally engaged in fraudulent and negligent misrepresentations. *Brown*, 475 S.E.2d at 756-57. After ascertaining that the court already had jurisdiction under the long-arm statute, the court noted that the South


Carolina service of process statute would also permit the exercise of jurisdiction when the defendants, "by their actions," agreed to submit to jurisdiction. *Id.* at 757. By contrast, Plaintiffs here have alleged that the Canadian defendants are subject to jurisdiction merely by virtue of their status as outside directors of LES - a basis which the trial court correctly ruled was insufficient as a matter of law.

VI. CONCLUSION

For the foregoing reasons, the trial court properly dismissed the complaint against defendants John R. Grainger, James R. Bullock, and Leslie W. Haworth. The ruling of the trial court should be affirmed.

Dated: June 24, 2003

Respectfully submitted,



Andrew Deiss
Attorney for Defendant/Appellants
Bullock, Grainger & Haworth

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

Penny L. Edwards, being duly sworn, says that she is employed in the law offices of Williams & Hunt, attorneys specially appearing for proposed Defendants/Appellees: James R. Bullock, John R. Grainger, and Leslie W. Haworth, herein; that she served the attached **Brief of Appellees James R. Bullock, John R. Grainger and Leslie W. Haworth** in Case No. 20020719-SC before the Utah Supreme Court upon the parties listed below by placing two true and correct copies thereof in an envelope addressed to:

Counsel for Plaintiffs

Scott Walker
ABBOTT & WALKER
3651 North 100 East, Suite 300
Provo, Utah 84604

Richard M. Heimann
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California 94111-
3999

Thomas M. Sobol
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
214 Union Wharf
Boston, Massachusetts 02109-1216

Daniel P. Chiplock
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
780 Third Avenue, 48th Floor
New York, New York 10017-2024

Counsel for Defendants

Michael W. Homer
Paul C. Farr
SUITTER AXLAND
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

James R. Streicker
Terence H. Campbell
COTSIRILOS, TIGHE & STREICKER,
LTD.
33 North Dearborn Street, Suite
600
Chicago, Illinois 60602

Meredith N. Landy
Dhaivat H. Shah
O'MELVENY & MYERS LLP
990 Marsh Road
Menlo Park, California 94025

Carl E. Poli
STONE, MCGUIRE & BENJAMIN
801 Skokie Boulevard
Northbrook, Illinois 60062

Tory E. Griffin
DOWNEY, BRAND, SEYMOUR & ROHWER
555 Capitol Mall, 10th Floor
Sacramento, CA 95814-4686

William R. Warne
Michael J. Thomas
DOWNEY BRAND SEYMOUR & ROHWER,
LLP
555 Capitol Mall, 10th Floor
Sacramento, California 95814

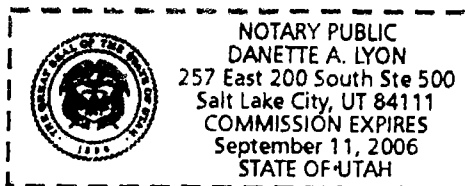
Howard M. Hoffman
Law Offices of Howard M. Hoffman
8880 Cal Center Drive, Suite 165
Sacramento, California 95826

E. Barney Gesas
CLYDE, SNOW, SESSIONS & SWENSON
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216

and causing the same to be mailed first class, postage prepaid,
on the 24th day of June, 2003.

Penny L. Edwards
Penny L. Edwards

SUBSCRIBED AND SWORN TO before me this 24th day of
June, 2003.



Danette A. Lyon
Notary Public

ADDENDUM A

UTAH CODE ANNOTATED

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

- (1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1), Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.
(b) Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.
- (2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.
- (3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.
- (4) (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.
(b) There is contribution as in cases of contract among the several persons so liable.
- (5) Any tender specified in this section may be made at any time before entry of judgment.
- (6) A cause of action under this section survives the death of any person who might have been a plaintiff or defendant.
- (7) (a) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first.

(b) No person may sue under this section if:

(i) the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt; or

(ii) the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

(8) No person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void.

(10) (a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity.

(b) This chapter does not create any cause of action not specified in this section or Subsection 61-1-4(6).

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

(1) Section 61-1-1, Subsection 61-1-3(1), Sections 61-1-7, 61-1-15.5, 61-1-17, and 61-1-22 apply to persons who sell or offer to sell when:

(a) an offer to sell is made in this state; or

(b) an offer to buy is made and accepted in this state.

(2) Section 61-1-1, Subsection 61-1-3(1), and Section 61-1-17 apply to persons who buy or offer to buy when:

(a) an offer to buy is made in this state; or

(b) an offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state whether or not either party is then present in this state, when the offer:

(a) originates from this state; or

(b) is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

(4) For the purposes of this section, an offer to sell or to buy is accepted in this state when acceptance:

(a) is communicated to the offeror in this state; and

(b) has not previously been communicated to the offeror, orally or in writing, outside this state, and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when:

(a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than $\frac{2}{3}$ of its circulation outside this state during the past 12 months; or

(b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

- (7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.
- (b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another.
- (c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.
- (8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.
- (b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last-known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.
- (9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.