

2002

MFS Series Trust III, Merrill Lynch High Yield Municipal Bond Fund, Inc., Muniholdings Fund, Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio, Merrill Lynch Strategy Fund, Eaton Vance Distributors, Inc., T. Rowe Price Associates, Inc., John Hancock Funds, Inc., Putnam Investments, Inc., v. Kenneth W. Winger, John R. Grainger, Paul R. Humphreys, James R. Bullock, John W. Rollins, Jr., John W. Rollins, Sr., Leslie W. Haworth, David B. Thomas, Jr., Henry B. Tibbie, James L. Wareham, Grover C. Wrenn, Michael J. Scott Walker, Abbot and Walker, Richard M. Heimann, Lieff, Cabraser, Heimann and Bernstein, LLP; Attorneys for Appellants.

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#### Recommended Citation

Reply Brief, *MFS Series Trust III v. Winger*, No. 20020719.00 (Utah Supreme Court, 2002).

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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,

v.

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

Defendants/Appellees.

Supreme Court Case No: 20020719

REPLY OF APPELLANTS

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Third District Court, County of  
Tooele

Case No: 01-0300722 MI

Judge: David S. Young

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**FILED**  
UTAH SUPREME COURT

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## **I. INTRODUCTION<sup>1</sup>**

As set forth by Appellants (the “Bondholders”) in their opening brief, this appeal raises the issue of whether personal jurisdiction is proper over corporate officers and directors who are alleged to have committed acts (or actionable inaction) in violation of Utah’s securities laws within Utah or which affected persons or businesses within Utah. Appellants established before the trial court that Appellees were “Executive Officers and Directors” of LES at the time of the issuance. (RA 0682). Appellants specifically alleged that Appellees controlled LES, and thereby committed a tort within or at a minimum having effects in this state, at the time of the offering of the securities that were issued and sold by means of material misstatements. (RA 09-07). Even absent such allegations, Utah law explicitly presumes the same. Utah Code Ann. § 61-1-22(4).

The affidavits submitted by Appellees to the trial court did not contest the key facts set forth in the Complaint and submitted to the trial court in opposition to Appellees’ motions to dismiss. In opposing Appellees’ motions to dismiss in the trial court, the Bondholders submitted evidence of the following facts which remain uncontested, despite Appellees’ inappropriate attempts to introduce unsupported fact argument now: (1) LES caused securities to be issued in Utah;

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<sup>1</sup> This Reply brief simultaneously replies to the four separate briefs filed by Appellees as follows: Brief of Appellees David E. Thomas, Jr., John W. Rollins, Jr., John W. Rollins, Sr., James L. Wareham, Grover C. Wrenn, and Henry B. Tippie (“Thomas et al. Br.”) (June 24, 2003); Brief of Appellee Henry H. Taylor (“Taylor Br.”) (June 27, 2003); Brief of Appellee Michael J. Bragagnolo (“Bragagnolo Br.”) (June 23, 2003); and Brief of Appellees James R. Bullock, John R. Grainger and Leslie W. Haworth (“Bullock et al. Br.”) (June 24, 2003).

(2) those securities were offered and sold to the Bondholders by means of false or misleading statements; and (3) Appellees were directors and officers of LES at the time of the Issuance. See BOA 18<sup>2</sup>. Neither Appellees nor the trial court below addressed the relevant evidence and law. Appellees have continued this tack, reiterating the same arguments made before the trial court, namely that:

(a) liability does not equal jurisdiction; and (b) mere corporate title does not confer jurisdiction over a corporate officer. These general principles are simply unresponsive to Appellants' argument and to the circumstances of this case.

## **II. ARGUMENT**

### **A. Appellees Misstate the Applicable Facts on Appeal.**

Appellees continue to rely on wholly inapplicable facts to contest Utah's personal jurisdiction over them. Further, they attempt to introduce new factual argument inappropriately on appeal, in an apparent attempt to discredit the Bondholders' "prima facie" case for liability. This approach is impermissible under Utah law. Neways, Inc. v. McCausland, 950 P.2d 420, 422 (Utah 1997); Anderson v. American Society of Plastic Surgeons, 807 P.2d 825 (Utah 1990).<sup>3</sup>

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<sup>2</sup> "BOA" refers to Brief of Appellants, filed April 25, 2003.

<sup>3</sup> Appellee Taylor's additional contention that Appellants "fail[ed] to marshal un rebutted evidence," thereby "doom[ing]" the appeal, is simply confused. Taylor Br. at 10-11. The Utah Supreme Court considers parties' affidavits to be "documentary evidence," and reviews any legal decision taken thereon for "correctness" only. Phone Directories Co., Inc. v. Henderson, 8 P. 3d 256, 258 (Utah 2000). The case on which Taylor relies for his argument imposes a "clearly erroneous" standard of review, which is clearly inapposite here. West Valley City v. Majestic Inv. Co., 818 P. 2d 1311 (Utah Ct. App. 1991). Moreover, as Appellants set forth previously, "because the propriety of a motion to dismiss is

First, Appellees now claim that there is no evidence that Appellants purchased the Bonds in the initial offering, or that Appellants even received the Preliminary Offering Memorandum. See Thomas et al. Br. at 8. However, the Bondholders alleged in their Complaint that they purchased the Bonds in an “offering that was covered by the Offering Memorandum” and that they relied to their detriment on the Offering Memorandum when purchasing the Bonds. (RA 09, 03). These allegations, in that they “pertain[ed] to the Plaintiffs’ personal circumstances,” were made based on their personal knowledge – not on “information and belief.” (RA 022). These matters were not contested by Appellees in their affidavits submitted to the trial court. (See Defendants’ Affidavits at RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177).

Appellees also now belatedly contend that there is no evidence that LES caused the Issuance. Thomas et al. Br. at 8. However, the evidence shows that the Bonds, entitled “Pollution Control Refunding Revenue Bonds (Laidlaw Environmental Services, Inc.) 1997 A”, were secured by a \$45.7 million loan agreement entered into by LES in the state of Utah. (RA 0643-0612). The

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a question of law,” the Utah Supreme Court “giv[es] no deference to the decision of the trial court.” Wagner v. Clifton, 62 P. 3d 440, 441 (Utah 2002). Finally, Appellants cited directly to Defendants’ Affidavits in their opening brief, and demonstrated how those affidavits in fact failed to rebut the facts giving rise to personal jurisdiction over Defendants-Appellees. BOA 11, 27. At this stage, the Court “accept[s] the factual allegations” set forth by plaintiffs “as true and consider[s] them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party.” Id.

Offering Memorandum identified LES as the “Obligated Person” under the Bonds (RA 0716), and that LES itself “requested that the County issue” the Bonds in order to refund and retire an earlier bond issuance and to continue financing “the costs of acquisition and construction by the Borrower [LES]” of a “Project.” (RA 0639). This Project consisted of constructing and operating “certain hazardous waste disposal facilities in the County” which were “owned by the Borrower [LES].” Id.

This evidence was presented in the lower court proceedings by Appellants. Appellees did not contest it at that time. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177).

Appellees also now attempt to dispute whether the Bonds were even issued in Utah. See Thomas et al. Br. at 8. Others, however, concede this fact. See, e.g., Taylor Br. at 2. The uncontested evidence in the lower court showed that the issuer was located in Utah, and that the Bonds were to be delivered to New York from Utah. (RA 0646-0645, 0650-51). Further, Utah law explicitly regulates the sale or offer of securities originating in this state. See Utah Code Ann. § 61-1-26. Appellees have not contested that, at a minimum, the offering originated in Utah. (RA 0646).

The pertinent uncontested facts underlying this appeal remain undisturbed on this appeal, and are that (1) LES caused securities to be issued in Utah; (2) those securities were offered and sold to Appellants by means of false or misleading statements; and (3) Appellees were directors or officers of LES at the

time of the issuance. (BOA at 18; RA 026-01, 0747-0742, 0682). Appellees did not contest any of these facts in the proceedings below. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177). They may not do so now.

**B. The Bondholders' Allegations and Proof Were Sufficient to Meet Their Burden at the Personal Jurisdiction Stage.**

Appellees contend that the Bondholders failed to set forth “sufficient facts” by which a Utah court may properly exercise personal jurisdiction over them. See generally Bullock et al. Br., Bragagnolo Br., Taylor Br., Thomas et al. Br. Appellees either ignore or belatedly contest evidence of the very facts on which Appellants rely.<sup>4</sup> Moreover, Appellees mischaracterize relevant analogous caselaw holding a corporation’s officers and directors personally accountable for the acts of the corporation over whom they exercise control, which may specifically be used for the purpose of exercising personal jurisdiction over them. Seagate Technology v. A.J. Kogyo, Co., 219 Cal. App. 3d 696 (1990). Finally, Appellants’ burden at this stage of the proceedings does not require that they prove the merits of their Complaint; such determination is only appropriate at trial.

**1. Appellants’ Burden**

On a defendant’s motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden of “mak[ing] a prima facie showing of personal jurisdiction.” Neways, 950 P. 2d at 422. Plaintiffs are only required to prove

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<sup>4</sup> See discussion supra at sections I and II.A.

jurisdiction by “a preponderance of the evidence” at trial or in an evidentiary hearing. Anderson, 807 P. 2d at 827. Courts addressing a motion to dismiss for lack of personal jurisdiction must take care to avoid resolving the merits of the controversy, and the plaintiff’s factual allegations must be accepted as true “unless specifically controverted by the defendant’s affidavits or by depositions.”

Neways, 950 P.2d at 422.

Appellants’ allegations and the undisputed facts in the record are sufficient to confer personal jurisdiction over Appellees at this stage of the proceedings. Appellants’ complaint alleges that Appellees controlled LES at the time of the unlawful sale of securities in Utah. (RA 09). Appellants produced further evidence before the trial court showing that Appellees transacted business in Utah either themselves or through an agent by way of, inter alia, the \$45.7 million loan signed for by the then Chief Financial Officer of LES, Paul Humphreys, underlying the Issuance. (RA 0643-0612). Appellees as a whole have done nothing more than to testify to their lack of domicile in Utah, and several to their lack of physical “participation” in the issuance. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177). For the purpose of determining jurisdiction, Appellees have not contested that they transacted business in Utah sufficient to confer personal jurisdiction over them through (a) their presumptive control of LES during the Issuance; (b) contracting to insure the Issuance through the loan to LES in this state; and (c) LES’ “ownership” of the project in Utah that was funded by the Issuance. See Utah

Code Ann. § 78-27-24.

Appellees' attacks on San Mateo County Transit District v. Dearman, Fitzgerald & Roberts, Inc., 979 F.2d 1356 (9th Cir. 1992) are unpersuasive.<sup>5</sup>

Appellants do not rely on San Mateo solely for the proposition that the trial court would have jurisdiction over a defendant "wherever he may be found" so long as the suit was brought to enforce a liability created by Utah securities law. Rather, San Mateo provides, under analogous federal law, that the pleading standard for asserting personal jurisdiction is substantially lower than that for liability. San Mateo, 979 F. 2d at 1358 ("[t]he standard for liability" under the federal securities laws "is lower than the district court thought. Even lower is the standard for personal jurisdiction, which exists if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for the fraud"). Here, the Bondholders have easily met their burden under section 61-1-22(4). San Mateo's reference to the pleading burden at the two separate stages of determining liability and jurisdiction further illustrates the difference between determining the merits of a case and the defendants' jurisdictional contacts. See also discussion infra at

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<sup>5</sup> In re Baan Company Securities Litigation, 81 F. Supp. 2d 75 (D.D.C. 2000), which Appellees cite in disagreement with San Mateo, is inapposite to the present analysis. In re Baan merely stands for the proposition that the Due Process clause is to be adhered to in all instances. Id. at 80. Appellants do not argue otherwise. See discussion infra at section II.B.2, 3. Moreover, with respect to the pleading requirements for setting forth either liability or for personal jurisdiction, San Mateo is a 9th Circuit opinion that remains good law and is unchallenged both in the 9<sup>th</sup> and 10<sup>th</sup> Circuits.

II.B.4.<sup>6</sup>

2. **It is Appellees' Personal and Unrefuted Acts, Not Their Mere Liability Under Section 61-1-22(4), Which Satisfy Utah's Long-Arm Statute and Due Process.**

Appellees assert, as they did in the trial court below, that the Bondholders ask this Court simply to equate the Appellees' liability with the right to exercise personal jurisdiction over them. See, e.g., Taylor Br. at 12 ("liability and jurisdiction are independent"). This oversimplifies, and thereby misconstrues, both the relevant facts and Appellants' argument. Appellees' liability under section 61-1-22(4) is merely one element of the jurisdictional analysis.

"Specific" personal jurisdiction arises over a non-resident defendant when he has purposefully availed himself of forum benefits, and where the controversy arises out of a defendant's contacts with the forum. See Neways, 950 P. 2d at 423 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985)).

Appellees' uncontroverted contacts with Utah satisfy this standard.

First, Appellants set forth specific allegations of Appellees' activities as

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<sup>6</sup> Several Appellees refer to a recent decision by the California Court of Appeal disagreeing with this reading of San Mateo, and affirming the dismissal of claims against these same defendants for lack of personal jurisdiction. See Thomas et al. Br. at 9; Bragagnolo Br. at 16. As pointed out by other of the Appellees, however, that decision was unpublished, and Cal. Rule of Court 977(a) flatly prohibits citation or reliance on it. See Bullock et al. Br. at 4, fn. 4; Taylor Br. at 16, fn. 4. The relevant rule is printed at the top of the opinion. Bragagnolo and Thomas et al. have nonetheless gone so far as to either directly quote from the opinion or attach it as an exhibit. For the reasons more fully detailed in Appellants' separately filed motion to strike, this Court should strike from the record Appellees' submissions to the extent they cite to or rely on Eaton Vance Distributors v. Grainger, No. C040158, 2003 WL 1521896 (Cal. Ct. App. Mar. 25, 2003).



control persons. (RA 09-08). Second, as officers and directors of a corporation at the time the corporation acted in violation of Utah securities laws, Appellees are personally liable, without the necessity of proof by Appellants, for the commission of a tort within or having effects in Utah. Utah Code Ann. § 61-1-22(4). Third, as analogous caselaw has held, for persons who are “personally responsible for causing the corporation to act,” that “act may be imputed to the officer[s] for purposes of establishing personal jurisdiction over [them].” Seagate Technology, 219 Cal. App. 3d at 703 (emphasis added). Appellees’ personal and imputed acts (and not merely the Appellees’ “corporate title”) (a) took place in the state; (b) had effects in the state; and (c) bear a substantial connection to the liability asserted here. Together, these facts constitute the “minimum contacts” necessary under Utah law to support personal jurisdiction. Neways, 950 P.2d at 423.

Appellate courts in other states have held that even the acts of a liable corporation – and not just the acts of the officers and directors as controlling persons – may be imputed to the individual officers and directors for the purpose of establishing personal jurisdiction over them. In Lundgren v. Superior Court, the California Court of Appeal issued a writ of mandate quashing the service of summons over an out of state shareholder of a corporation that was itself subject to personal jurisdiction in California. In doing so, however, the court specifically looked first to whether the acts or liability of any other in-state actor could be imputed to him. The court held that even though the out-of-state shareholder’s “denial of participation [stood] uncontradicted in this record,” before determining

whether personal jurisdiction over him was proper,

[w]e must look to the corporation law of Oregon to determine the relationship which Oregon law creates between a professional corporation chartered under that law and its shareholders. Specifically we must ascertain whether the acts of one shareholder-officer of an Oregon professional corporation are deemed to be the acts of another shareholder-officer.

Lundgren v. Superior Court, 111 Cal. App. 3d 477, 486 (1980) (emphasis added).

The Court examined Oregon's Professional Corporation Act, and found that even though the statute did hold any shareholder "jointly and severally liable" with any other shareholder for their tortious conduct, the plaintiff in the case before the Court did not fall within the definition of those eligible to recover.<sup>7</sup> The Court thus held:

Since R. A. Lundgren did not personally participate in the transaction which is the subject of the cross-complaint, and since the Oregon Corporation Law does not impute to him any legal responsibility to [plaintiffs] other than [those identified in the statute], it follows that R. A. Lundgren cannot be said to have had any "activity" in California and there is no basis for subjecting him to California jurisdiction in the pending action.

Lundgren, 111 Cal. App. 3d at 487.

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<sup>7</sup> The relevant language from the Oregon statute was as follows: "A shareholder of a professional corporation may be held...Jointly and severally liable with all of the other shareholders of the corporation for the negligent or wrongful acts or misconduct committed by any shareholder, or by a person under the direct supervision and control of any shareholder in the rendering of professional services on behalf of the corporation to a person receiving the service." 111 Cal. App. 3d at 486, n.2 (citing Ore. Rev. Stats. Ch. 58.185). The Court held that since plaintiff was not "a person receiving the service," the statute did not operate, and the acts of the liable shareholder could not be imputed to the defendant. Id. at 486.

The analysis and holding are directly applicable here. Section 61-1-22(4) provides “every principal executive officer or director of a corporation...[is] liable” under Utah’s Corporations Code, “unless” they prove that they “had no knowledge of or reasonable grounds to believe in the existence of facts by reason of which the liability” was alleged to exist. Utah Code Ann. § 61-1-22(4). Appellees did not meet this burden of proof (and in any event could not at the motions stage). See Lundgren, supra. Accordingly, the “activity” of the corporation should be imputed to them for the purpose of determining personal jurisdiction. Id; Seagate Technology, supra; Utah Code Ann. § 61-1-22(4).<sup>8</sup>

Appellees cite a litany of cases for the general proposition that liability and/or corporate title does not “automatically give rise to jurisdiction.” See, e.g., Bullock et al. Br. at 23-28; Bragagnolo Br. at 13-15; Taylor Br. at 12-16; Rollins Br. at 20-23. However, as Appellants previously demonstrated in their opening

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<sup>8</sup> In addition to the factors set forth in Appellants’ opening brief distinguishing Schlatter v. Mo-Comm Futures, Ltd., 662 P. 2d 553 (Kan. 1983) from the present case, that case also included no discussion of whether any act could be imputed to the officers and directors of a corporation in order to establish personal jurisdiction over them, as is explicitly considered by the foregoing cases. Seagate Technology, supra; Lundgren, supra. Additionally, Kansas’ statute is not identical to the Utah statute, as Bragagnolo contends (and other Appellees recognize). Bragagnolo Br. at 16-17, fn. 7; Taylor Br. at 15 (observing that the Kansas statute is “nearly identical” to Utah’s) (emphasis added). Kansas’ statute is different in at least one crucial respect, in that the phrase “who materially aids in the sale” modifies the entire list of corporate officers, directors and employees who may be held liable under the statute, rather than just “employee[s]” as set forth in the Utah statute. Compare Kansas Stat. Ann. § 17-1268(b) with Utah Code Ann. § 61-1-22(4).

brief, these cases are inapposite. See BOA 28-30. None of them implicates or arises under section 61-1-22(4) or analogous law.

For example, Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 112 (1987) holds generally that “[a] finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state,” but contrary to Appellees’ contention, does not stand for the unsupported assertion that “‘presumed’ acts could [not] serve as the basis for specific jurisdiction.” Taylor Br. at 30. Indeed, the court in Asahi, as with all of the other cases Appellees cite, was not faced with a factual or legal scenario like that presented here, where officers and directors are explicitly presumed liable under a state statute for causing a corporation to act, and where states interpreting analogous laws have permitted such acts to be imputed to them for the purpose of establishing personal jurisdiction over them. See SII Megadiamond, Inc. v. American Superabrasives, Corp., 969 P. 2d 430, 436 (Utah 1998) (breach of contract action); Rhoades v. Wright, 622 P. 2d 343 (Utah 1980) (wrongful death action); Mallory Engineering, Inc. v. Ted R. Brown & Assoc., Inc., 618 P. 2d 1004 (Utah 1980) (breach of contract action); Harnischfeger Engineers, Inc. v. Uniflo Conveyor, Inc., 883 F. Supp. 608, 610 (D. Utah 1995) (breach of contract action); see also Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F. 3d 934 (7th Cir. 2000) (interpreting non-analogous Multiemployer Pension Plan Amendments Act, and holding that facts were insufficient for court to pierce the corporate veil and assume personal jurisdiction

over corporate parent); American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996) (no presumptive liability question presented, and therefore no “imputed” acts possible); Sher v. Johnson, 911 F. 2d 1357 (9th Cir. 1990) (same); In re Daimler-Chrysler AG Sec. Litig., 197 F. Supp. 2d 86, 99 (D. Del. 2002) (holding that plaintiff’s allegations at least “raise[d] a colorable showing of personal jurisdiction” over defendant for acts violative of federal securities laws, and permitting plaintiffs to conduct jurisdictional discovery).

**3. Personal Jurisdiction Based on the Acts of Appellees, Imputed or Otherwise, Satisfies Due Process.**

The undisputed facts and allegations recited above, together with section 61-1-22(4), establish for pleading purposes the knowing or negligent conduct of Appellees having effects in Utah in violation of Utah’s securities laws. As such, they constitute constitutionally cognizable “minimum contacts” justifying the exercise of personal jurisdiction over Appellees. Neways, 950 P. 2d at 423.<sup>9</sup>

Appellees bear the burden of demonstrating that personal jurisdiction would be “unreasonable” – i.e., whether it comports with “traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S.

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<sup>9</sup> Appellees’ argument that “purely financial injury to Utah residents” cannot confer jurisdiction is misleading. The District Court decision which was affirmed by Far West Capital, Inc. v. Towne, 46 F. 3d 1071 (10th Cir. 1995) actually held that, additionally, “[o]ne factor which is indicative of whether the nonresident has purposefully availed himself of the privileges and protections of the laws of the forum state requires inquiry into which party initiated the formation of the relationship” between the forum and the nonresident. Far West Capital, Inc. v. Towne, 828 F. Supp. 909, 914 (D. Utah 1993). As set forth herein, LES initiated the Issuance.

310 (1945). Appellees have not attempted to argue that it would be unfair or unjust to call LES, as the controlled entity, to account in Utah for its violations of Utah securities law. For the same reasons, Appellees cannot do so with respect to themselves. See, e.g., Lundgren, supra. At a minimum, Appellees have failed to disprove that they knew or had reason to know of the existence of facts by reason of which LES potential liability under Utah Code Ann. § 61-1-1 et seq., could have been established. Hence, for pleading purposes, Appellees may be deemed to have knowingly committed a tort under Utah's securities laws either within or having effects in this state. Utah Code Ann. § 61-1-22(4); Seagate Technology, supra; Lundgren, supra.

LES initiated the sale of securities in Utah with the aid of material financial misstatements. (RA 0746, 022, 012-011). LES did so pursuant to a loan obligating them in the amount of \$45.7 million. (RA 0746, 0643-0612). These facts, in tandem with Utah's service statutes, manifestly implicate Utah's interest in enforcing its securities laws. Taken together, they demonstrate the "foreseeability" and hence the "reasonableness" of subjecting Appellees to personal jurisdiction here. International Shoe, supra; Utah Code Ann. § 61-1-22(4). The self-identified "Canadian" directors can argue no differently. Bullock et al. Br. at 34. "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on [an] alien defendant." Asahi, 480 U.S. at

Furthermore, the requirement of “individualized” determination with respect to personal jurisdiction over each of the Appellees is met by both their uniform status under the law, and their uniform failure to contest the relevant facts and allegations demonstrating their commission of a tort within or transaction of business in Utah. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). Appellees do not “fall into three groups” as Appellees contend. Thomas et al. Br. at 3. They fall into one – directors and officers of a liable entity – under the explicit terms of the statute. Utah Code Ann. § 61-1-22(4).

Appellees’ reliance on D.A. v. State (In the Interest of W.A.), 63 P. 3d 607 (Utah 2002) for the proposition that a Utah statute may not confer jurisdiction without constraint by the due process clause of the United States Constitution misses the mark. Appellants have not argued that the due process clause need not be satisfied in this instance. Rather, Appellants have argued that Appellees have sufficient minimum contacts with the state, as illustrated through, inter alia, their control of LES both in the Issuance itself and the Loan underlying it, so as to

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<sup>10</sup> In Asahi, the court declined to exercise personal jurisdiction over a Japanese corporation, when California’s interest in adjudicating the matter was “slight.” The facts are easily distinguishable from the present situation, however, as there were no American parties (the dispute was between a Japanese corporation and a Taiwanese corporation), and the dispute did not impact “safety standards” (which California presumably bore a strong interest in regulating), but rather merely indemnification. Asahi, 480 U.S. at 114-115. The present case involves the violation of Utah’s securities laws, which the state has an express interest in regulating and are thereby more analogous to “safety standards” than to “indemnification.”

satisfy due process concerns in connection with the exercise of personal jurisdiction over them. The Supreme Court in D.A., “did not reach the issue of whether [defendant] had sufficient contacts with Utah” so as to satisfy due process concerns, as it relied on the “status exception” to the due process clause. As far as the “sufficient contacts” test is concerned, therefore, D.A. is inapposite.

a. **Defendants Incorrectly Contend That Appellants Set Forth Utah Code Ann. § 61-1-26 as an Independent Basis for Jurisdiction.**

Contrary to Appellees’ contention, Appellants did not address section 61-1-26 in their opening brief as an “independent basis for the exercise of personal jurisdiction.” Thomas et al. Br. at 32. Instead, the Bondholders cite section 61-1-26, and analogous provisions in various states, in support of their argument that Appellees were on notice that they might be haled into court in Utah for their violations of this state’s securities laws. BOA at 36-44. Appellants raised the very existence of section 61-1-26, in other words, to illustrate the “foreseeability” of Appellees being haled into court here, in accordance with the due process clause, particularly where Utah law additionally assigns in-state acts or acts by an agent of a non-resident person having effects in Utah to violators of Utah’s corporations code. Utah Code Ann. §§ 61-1-26, 78-27-23 (providing that “‘transaction of business within this state’ mean[s] activities of a nonresident person, his agents, or representatives in this state” with effects in Utah) (emphasis added); Harnischfeger, supra (superseded by statute on other grounds). Appellants also raise section 61-1-26 as indicative of this state’s interest in



adjudicating violations of its securities laws. BOA at 36-37. Finally, Appellants set forth applicable caselaw interpreting provisions identical to section 61-1-26 to confer personal jurisdiction over out-of-state defendants under facts which are analogous to those present here.<sup>11</sup> American Microtel, Inc. v. Massachusetts, 1995 WL 809575, \*10-11 (Mass. Super. Jan. 27, 1995); Brown v. Investment Management and Research, Inc., 323 S.C. 395 (1996). Appellees' attempts to distinguish these cases are unavailing. Appellees' citation of Harbourvest International Private Equity Partners II-Direct Fund, L.P. v. Axent Technologies, Inc., 2000 WL 1466096 (Mass. Super. Aug. 21, 2000) for the simple proposition that the "court's exercise of personal jurisdiction must 'also comport with the requirements of Due Process'" misses the point. Thomas et al. Br. at 33. Appellants do not contend that section 61-1-26, and similar statutes, eliminate due process consideration. For starters, section 61-1-26 by its very language deems "conduct prohibited" under Utah's securities laws to be equivalent to consent to jurisdiction in the state. Utah Code Ann. § 61-1-26(8). It is this very "conduct" – whether imputed to Appellees or otherwise – that is at the heart of both the minimum contacts and due process analysis. Furthermore, it is the very existence of section 61-1-26 and its explicit language, when taken together with facts such

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<sup>11</sup> In American Microtel and in Brown, there was prima facie evidence of acts constituting an underlying securities violation in the state. Here, there is similar uncontested evidence with respect to LES, which for the reasons set forth above, permits the Court to impute those acts to Appellees sufficient to trigger this state's long-arm statute.

as those present here, including: (a) violations of a state's securities laws by a corporate entity; (b) presumed control of that entity by its officers and directors; (c) the imputed actions of those officers and directors taking place in or directed at the state, with effects in the state; and (d) transaction of business in this state either directly or by an agent, which demonstrate both the foreseeability of haling such officers and directors into court in the state in question, as well as the state's avowed interest in doing so.

4. **Appellees' Attempts to Discount Appellants' Argument Under *Seagate Technology* and Analogous State Law are Unpersuasive.**

Appellees rely upon Taylor-Rush v. Multitech Corp., 217 Cal. App. 3d 103 (1990), which they claim interprets Cal. Corp. Code § 25504, an analogous statute to section 61-1-22(4), in an attempt to discredit the Bondholders' reading of the Utah statute. Bullock et al. Br. at 24-25; Thomas et al. Br. at 30-31. However, Taylor-Rush is plainly distinguishable from the present case. The Court in Taylor-Rush considered allegations of breach of contract and fraud, including a "bland allegation of conspiracy" as to a company's officers and directors, without even discussing – much less finding – whether any corporation was or could be found liable under California's securities laws. As there was no liable corporation under Cal. Corp. Code § 25501, no liability could have attached to the officers and directors of any corporation under Cal. Corp. Code § 25504.<sup>12</sup> This scenario is

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<sup>12</sup> Section 25504 provides that "[e]very person who directly or indirectly controls a person liable under Section 25501...[and] every principle executive

readily distinguishable from the present case, where Appellants have set forth uncontested facts which would give rise to LES' liability under Utah's securities laws, and therefore Appellees' liability as controlling persons.

Goehring v. Superior Court, 62 Cal. App. 4th 894 (1998) is also inapposite, for the simple reason that it does not arise under Cal. Corp. Code § 25504. Rather, plaintiffs in that case charged the members of a partnership with violations of common law fraud, in addition to Cal. Corp. Code §§ 25110 and 25400. Neither of these latter two statutes, however, addresses control person liability, much less the presumptive form of liability which obtains under section 25504 (and by analogy to section 61-1-22(4)). Hence, in Goehring, under the analysis set forth by Appellants herein, it would not have been possible to impute the acts of the partnership or corporation to the partners, which in turn could have provided the necessary minimum contacts to satisfy California's version of the long-arm statute (Cal. Code Civ. Proc. §410.10).

Appellees recognize that there is little or no caselaw interpreting section 61-1-22(4) in the present context, but provide no meaningful rebuttal to the closest available analogies from other states provided by Appellants.

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officer or director of a corporation so liable" is liable jointly and severally "with and to the same extent as such person" or corporation. (Emphasis added). Hence, when the liable party under section 25501 is a person, section 25504 may arguably be read to require some proof of whether the alleged controlling person actually "directly or indirectly" controlled them. However, when the liable party under section 25501 is a corporation, section 25504 expressly eliminates any such requirement.

Section 61-1-22(4) places the burden of proof as to a defendant's lack of knowledge or reasonable grounds to believe in the existence of facts contributing to their liability on the defendant himself. Utah Code Ann. § 61-1-22(4). In applying the virtually identically worded Cal. Corp. Code § 31302, California courts have required precisely what Appellants assert is required in the present instance: proof, by Appellees, of their lack of knowledge or reasonable grounds to believe in the facts by which the underlying securities fraud is alleged to have arisen. See Eastwood v. Froelich, 60 Cal. App. 3d 523, 530-53 (1976). "Lack of knowledge or reasonable grounds to believe is an exemption to the liability imposed on corporate officers [by the securities laws]...the burden of proof rest[s] upon [the officers] to invoke the exemption." The Neptune Society Corporation, et al. v. Longanecker, 194 Cal. App. 3d 1233, 1248 (1987) (emphasis added). As pointed out in Appellants' opening brief, since the relevant officer in Neptune Society had failed to meet this burden, the Court affirmed judgment against her even though the record was "completely silent on [the defendant's] knowledge or involvement in the...issue altogether." Id.

In Courtney v. Waring, plaintiffs sought recovery from two vice-presidents and a director of an entity not named in the complaint but yet purportedly liable under section 31201 of the California Corporations Code. Courtney v. Waring, 191 Cal. App. 3d 1434, 1440 (1987). Holding that "while factual questions may arise as to the defendants' status," the court held that where, under the plain language of the statute, "each of the defendants [fell] within one of the statutory

categories ...the complaint adequately plead[ed] a cause of action under section 31302” and that, as such, “defendants [were] properly subject to suit.” Id. (emphasis added). Finally, in Eastwood, the California court affirmed that absent successful invocation of the “exemption” to liability under the securities statute, defendant officers and directors of a foreign corporation were “controlling persons” who could be subject to suit in California. Eastwood, 60 Cal. App. 3d at 531.

Appellees choose simply not to address these directly analogous cases,<sup>13</sup> and largely do not address out-of-state authority interpreting statutes similar to section 61-1-22(4).<sup>14</sup> Their limited attempts to distinguish these cases are also unpersuasive. In Binder v. Gordian Securities, 742 F. Supp. 663, 668 (N.D. Ga. 1990) (see Thomas et al. Br. at 30-31), the court actually held that the defendant’s position as vice-president and shareholder of the company was sufficient to deem him a “controlling person” under both federal and Georgia law. The court further stated that it was not necessary that plaintiff establish or allege that defendant “actually participated in the challenged transaction, as such a requirement would render meaningless the concept of secondary, ‘controlling person’ liability.” Id.

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<sup>13</sup> Appellees barely mention these cases, and do so only in a footnote to argue, incorrectly, that these cases “do not address” personal jurisdiction. Bragagnolo Br. at 19, n. 8; Thomas et al. Br. at 28, fn. 12.

<sup>14</sup> Only two of Appellees’ briefs mention the cases Appellants set forth, Goelitz v. Lathrop, 3 N.E. 2d 305 (Ill. App. Ct. 1936) and Boddy v. Theiling, 129 Ga. App. 273 (Ga. App. 1973). See Thomas et al. Br. at 30; Bragagnolo Br. at 19, fn. 8.

The court further distinguished defendant's status as vice-president and shareholder of the company in question with that where one's status as a "director, if anything, was only a misrepresentation...." Id. Appellees here have not contended and cannot contend that their positions as directors or officers of the company were mere "misrepresentations." Gowdy v. Richter, 20 Ill. App. 3d 514, 529 (1974) is similarly unpersuasive in the present context, as that case did not arise out of or even discuss a statute analogous to section 61-1-22(4), and dealt instead with the requirement of alleging an officer's or director's "culpability" in order to pierce the corporate veil. Id.; cf. Thomas et al. Br. at 30.

Appellees further misstate the federal authorities cited by Appellants. McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628, 635 (E.D. Tex. 1999) actually observed that the control-person provisions under federal securities law "ha[ve] been read liberally" and that they require only the "power to direct...short of actual direction" in order to establish a prima facie case for liability. The court additionally noted that a prima facie case for liability by necessity gave rise to personal jurisdiction. Id. at 636. Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003 (D. N.J. 1996) in fact held that defendants' mere presence on the auditing committee was sufficient to meet plaintiff's "culpable participation" pleading standard – an undeniably higher pleading burden than that under which Appellants are operating under section 61-1-22(4).

Appellees would essentially have this Court require that Appellants set forth the "culpable conduct of each individual defendant" in order to assert

personal jurisdiction over them. However, that showing is precisely what is not required under the explicit terms of section 61-1-22(4) in order to hold Appellees accountable for their control of an entity liable under Utah's securities laws. Appellees cannot require at the jurisdictional phase what would not even be required at trial. See, e.g., Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990) ("in an action based on section 20(a)" – the federal analog to section 61-1-22(4) – "the defendant who is a controlling person, and not the plaintiff, bears the burden of proof as to defendant's good faith.")

Several Appellees belatedly argue that the uncontested facts would not give rise to LES' section 61-1-22(1) liability as the company may not have been a "seller" of securities. See Thomas et al Br. at 19. However, such factual arguments are contradicted by the evidence and unchallenged allegations submitted by the Bondholders, and are foreclosed by Appellees' failure to raise them in the trial court. Neways, 950 P.2d at 422. In addition, full determination of fact questions relating to the company's potential liability would be premature at the pleadings stage. Id.; Anderson, 807 P.2d at 827.

Finally, §§ 61-1-1, 61-1-22 are closely modeled upon Section 12(2) of the Securities Act of 1933. See 15 U.S.C.A. § 771; cf. Steenblik v. Lichfield, 906 P.2d 872 (Utah 1995). Under the relevant federal securities laws, even where a securities offering is fully underwritten, hence making the underwriter the technical "seller," the company remains liable to purchasers on the offering. See, e.g., Pinter v. Dahl, 486 U.S. 622 (1988) (holding that liability under § 12 of the

Securities Act extends to any person “who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner”).<sup>15</sup>

### III. CONCLUSION

For the foregoing reasons, the trial court erred in finding that Appellees were not subject to personal jurisdiction in the state of Utah for their alleged violations of Utah’s securities laws. The judgment of the trial court should be reversed, and Appellees’ collective motions to dismiss the Complaint denied.

Dated: July 30, 2003

By: Richard M. Heimann /s/ Richard M. Heimann

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<sup>15</sup> The federal case on which Appellees rely for the notion that section 61-1-22(4) requires strict privity was decided prior to Pinter v. Dahl’s clarification of section 12. See Thomas et al. Br. at 19-20 (citing In re Diasonics Securities Litigation, 599 F. Supp. 447 (N.D. Cal. 1984)). Moreover, “[a]lthough... federal courts have construed similar state securities statutes, the decisions do not reflect state court analysis. They instead reflect a federal analysis of section 12(2) as applied to the state law in question.” Haberman v. Washington Power Supply System, 109 Wash. 2d 107, 129 (Wash. 1987).



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**IN THE UTAH SUPREME COURT**

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

**CERTIFICATE OF SERVICE**

Trial Court Case No: 01-300722 MI

Appellate Court No. 20020719

This is to certify that two (2) copies of

1. Reply of Appellants

was served by First Class Mail this 30th day of July, 2003, pursuant to Rule 26 of the Utah Rules of Appellate Procedure, on each of the following counsel at the addresses below:

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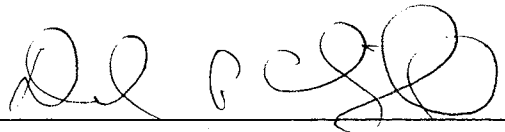
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Dated this 30th day of July, 2003.

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