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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

D. RAY STRONG, as Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, the Castle Arch Opportunity Partners I, LLC Liquidating Trust and the Castle Arch Opportunity Partners II, LLC Liquidating Trust,

Plaintiff,

v.

KIRBY D. COCHRAN; JEFF AUSTIN; AUSTIN CAPITAL SOLUTIONS; WILLIAM H. DAVIDSON; DOUGLAS W. CHILD; CHILD, VAN WAGONER & ASSOCIATES, LLC, fka CHILD VAN WAGONER & BRADSHAW, PLLC; ROBERT CLAWSON; HYBRID ADVISOR GROUP; and DOES 1-50,

Defendants.

Civil Action No. 2:14-cv-00788-TC

MOTION OF DEFENDANTS TO DISMISS THE AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(2); AND SUPPORTING MEMORANDUM

Judge Tena Campbell

Magistrate Judge Evelyn J. Furse

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RELIEF REQUESTED

Defendant [1] ("") move to dismiss the Amended Complaint (hereafter, the "Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction based on this Motion and the Declaration of in Support of Motion to Dismiss the Amended Complaint for Lack of Personal Jurisdiction ("Decl.") submitted herewith as neither the factual allegations in the Amended Complaint meet Plaintiff's burden to establish personal jurisdiction over nor does have the minimum contacts necessary for this Court to exercise personal jurisdiction.

INTRODUCTION

While the original complaint was filed under the guise of federal securities claims and the nationwide service and jurisdictional provisions, the Amended Complaint dismisses the federal securities claims (and the statutory basis for jurisdiction), but nonetheless attempts to drag nonresident into Utah. The Amended Complaint acknowledges that is a resident of the State of California, but does not attempt to meet the burden of showing that this Court has personal jurisdiction over him. Plaintiff does not—and cannot—allege that himself, individually and separate from CAREIC, has the necessary "minimum contacts" with the State of Utah. Despite these undisputed facts that is a nonresident of the State of Utah, Plaintiff chose to sue in this district and improperly tries to subject to personal jurisdiction here. Exercising such jurisdiction over would not comport with due process clause of the Fourteenth Amendment because the only connection alleged is that Management Defendants' (allegedly inclusive of) out-of-state activities caused harm to a handful of

[1] previously maintained a "doing business as" bank account registered in such name.

residents of Utah that allegedly assigned their claims to Plaintiff. The United States Supreme Court, and two Tenth Circuit opinions, recently confirmed that this is not a legitimate basis for asserting personal jurisdiction. In *Walden*, the Supreme Court explained that specific jurisdiction requires that "the **defendant's suit-related conduct** must create a **substantial connection** with the forum State," whereby, "the [minimum contacts] relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State" itself, "not the defendant's contacts with persons who reside there." Walden v. Fiore, 134 S. Ct. 1115, 1121-1122 (2014) (emphasis added) (emphasis in original).

Here, Plaintiff's "reliance on its own Utah connections is misguided." *Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1180 (10th Cir. 2014). Based on the absence of any individualized factual allegations to demonstrate minimum contacts between ██████ and Utah or any alleged suit-related conduct creating a substantial connection with Utah, this Court should dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(2).

STATEMENT OF RELEVANT FACTS

I. GENERAL, NON-INDIVIDUALIZED JURISDICTIONAL ALLEGATIONS IN THE AMENDED COMPLAINT

Plaintiff's general, non-individualized jurisdictional allegations[2] related to the State of Utah are as follows:

A. On October 17, 2011, the Receiver for CAREIC filed a Chapter 11 bankruptcy petition in

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[2] Other than to the extent such allegations are not controverted by ██████'s declaration (*see supra* Statement of Relevant Facts ("SOF"), Section I), allegations in the Amended Complaint are accepted as true only for purposes of this Motion. Further, as provided herein, these allegations due to satisfy the due process requirements to exercise personal jurisdiction over ██████.

the United States Bankruptcy Court, District of Utah ("Bankruptcy Court"), entitled *In re: Castle Arch Real Estate Company, LLC et al.*, United States Bankruptcy Court for the District of Utah (Bankr. Case No. 11-35082) (the "Bankruptcy Case") and on October 20, 2011, the Receiver also filed Chapter 11 petitions for each of the other Debtors, other than CASV (collectively, these dates are referred to as the "Petition Date"). Amended Complaint ¶ 10.

B. "[C]ertain of the transactions, acts, practices and courses of business alleged in this Complaint took place in the District of Utah; and (b) the Debtors' Bankruptcy Case is pending in the Bankruptcy Court for the District of Utah, and this is a proceeding arising under Title 11, or arising in or related to the Debtors' Bankruptcy Case under Title 11." *Id.* ¶ 17.

C. "CAREIC Management continued to close substantial land purchases in, among other places, …Tooele, Utah." Id. ¶¶ 5, 48, 73, 78, 241.

D. "Management Defendants offered to sell the Relevant Securities Offerings in, at least,…Utah." *Id.* ¶ 266.

E. "CAREIC is a California limited liability [company], and subject to the securities laws of the State of California." *Id.*[3]

F. "CAS and CASDF are both Nevada limited liability [company], and subject to the securities laws of the State of Nevada." *Id.*[4]

II. SPECIFIC JURISDICTIONAL ALLEGATIONS RELATED TO [REDACTED] IN THE AMENDED COMPLAINT

The **sole, specified jurisdictional allegation related to** [REDACTED] "is a

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[3] Plaintiff refers to such entity as a "corporation," but [REDACTED] ssumes such allegation to be a typographical error.

[4] Plaintiff refers to such entities as a "corporation," but [REDACTED] assumes such allegation to be a typographical error.

resident of the State of California." Amended Complaint ¶ 25.[5]

III. SPECIFIC ALLEGATIONS RELATED TO THE ACTS, PRACTICES OR CONDUCT OF ████████ IN THE AMENDED COMPLAINT

A. De Facto Officer and Member of Board. ████████ "was a de facto officer and member of CAREIC's Board from its inception in 2004 until appointment of a Receiver in 2011. ████████ was denied a formal title, and his participation in the Company (at Board meetings and in drafting and structuring PPMs and other sales materials) was not disclosed in CAREIC's PPMs or its public filings[.]" Amended Complaint ¶ 25.[6] "████████directly participated in the management of the Debtors.[7]… ████████ regularly attended Board meetings, where he provided substantive advice and direction regarding the Debtors' securities offerings and fundraising activities, and participated like a Board member." *Id.* ¶ 45. "Employees of CAREIC refer to him as 'one of the founders of CAREIC,' and say that most of his work was done 'behind the scenes.' Thus, to the extent ████████ was not a Board member, he occupied a similar status and performed similar functions." *Id.*

B. Commented, Revised, Designed and Approved PPMs. "████████ is the designer of CASDF and its PPM. ████████ determined the structure of this offering, he personally drafted substantial portions of the offering documents, and he reviewed, edited, and approved the

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[5] *See also id.* ¶ 26 ("████████████████ is a California entity which was solely owned and managed by ████████n, and which received funds from the Debtors."

[6] Plaintiff alleges that "the Debtors did not accurately report the extent and scope of ████████'s participation[,]" not that ████████ failed to inform CAREIC or any of its officers, "because ████████ has been, since at least 2003, barred by the SEC from functioning as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock." *Id.* ¶¶ 25, 45, 168, 170, Rather, Plaintiff alleges that "CAREIC Officers and Directors knew that ████████ was subject to this statutory disqualification." *Id.* ¶¶ 169, 171.

[7] *See supra* footnote 6 ("the Debtors did not accurately report the extent and scope of ████████'s participation.").

contributions of others." *Id.* ¶¶ 45, 204 ("participated in meetings and telephone calls discussing the form, structure, and content of the CASDF PPM, and he approved the final version.").

"[REDACTED] individually commented on, revised, and approved Series E PPM." *Id.* ¶ 199.

"[REDACTED] reviewed and edited the CAS PPM. He participated in meetings and telephone calls discussing the form, structure, and content of the CAS PPM, and he approved the final version." *Id.* ¶ 202.

C. Key Member of CAREIC Sales Team. "[REDACTED] was a key member of the CAREIC sales team. He was deeply involved in the solicitation of investors using the CASDF, CAREIC, and other offering documents." *Id.* ¶ 45.

D. Highly Compensated. "CAREIC paid nearly $21,000 per month in compensation to [REDACTED]—a person with a lifetime securities ban." *Id.* ¶ 156.

IV. [REDACTED] MAINTAINS NO SUBSTANTIAL OR MEANINGFUL CONNECTION WITH THE STATE OF UTAH (SUIT-RELATED CONDUCT OR OTHERWISE)

While the Amended Complaint is devoid of any factual allegations specific to [REDACTED] and any substantial connection with the State of Utah, the Declaration of [REDACTED] in Support of the Motion to Dismiss the Amended Complaint for Lack of Personal Jurisdiction ("Decl.") submitted herewith establishes the following jurisdictional facts:

A. [REDACTED] a resident and domiciled in the State of California and has lived practically his entire life in the State of California (other than less than a year in Arizona after graduating high school). Decl. ¶ 4.

B. [REDACTED] was never served in this case, but waived service based on the nationwide service statutory provisions applicable to the federal securities claims contained in the original complaint. *Id.* ¶ 3.

C. [REDACTED] maintained a personal residence in the State of California throughout all

relevant time periods contained in the Amended Complaint, pays income taxes in the State of California, has a driver's license issued by the State of California and is registered to vote in the State of California. *Id.* ¶¶ 5-6.

D. ██████ is not employed in Utah or by a Utah entity and during his tenure at CAREIC, was not employed in Utah or by a Utah entity. *Id.* ¶ 6.

E. ██████ worked for CAREIC from approximately its formation in April 2004 until his resignation on or about **June 2009**, in his capacity in the title of Managing Director. During his tenure, he worked from the State of California and spent nearly all of his time in the State of California and only visited Utah for one or two meetings with CAREIC personnel, each of which was less than three days or less. *Id.* ¶¶ 7-8.

F. During ██████'s tenure, CAREIC maintained its principal place of business in the State of California. *Id.* ¶ 10.

G. ██████'s only correspondence, communications, telephone calls or similar correspondence with residents or otherwise directed to the State of Utah, or received from the State of Utah, were with personnel, officers, employees or contractors/agents with CAREIC (*e.g.*, Kirby Cochran, Douglas Child, David Hunt and Jad Howell). *Id.* ¶ 11. Other than such individuals, ██████ does not recall talking to, corresponding with or otherwise communicating directly with any residents in the State of Utah. *Id.* ¶ 15.

H. ██████ did not directly offer or solicit investments within the State of Utah or talk, correspond or otherwise communicate with potential investors residing in the State of Utah. *Id.* ¶ 12.

I. Upon review of the names of the alleged assigning investors made in Plaintiff's initial disclosures, ██████ did not recognize any of the names of those residing in the State of Utah

and did not speak or otherwise communicate with any such alleged assigning investors in the State of Utah. *Id.* ¶ 13.

J. [REDACTED] does not recall any specific direct communications related to the solicitation or offers of CAREIC securities in the State of Utah by CAREIC or its personnel, was not personally involved in reaching out to the State of Utah for the purpose of solicitation of investments or otherwise contracting for services on behalf of CAREIC in the State of Utah. *Id.* ¶ 14.

K. During his tenure, David Hunt served as securities counsel and drafted all of the PPMs for CAREIC and was responsible for drafting, risk and other disclosures and otherwise advising on securities law with respect to CAREIC's PPMs. *Id.* ¶ 16. [REDACTED] was not and has never been licensed as an attorney rather CAREIC engaged Hunt to perform general corporate and securities law functions. Similar to other personnel, [REDACTED] reviewed and provided certain input in PPMs, but did not draft the PPMs, advice or provide any legal advice related to the PPMs. Further, as [REDACTED] was not involved in the acquisition of the land acquisitions or real estate operations of CAREIC, he did not have the necessary knowledge to draft such PPMs. *Id.* Where relevant, [REDACTED] commented based on his prior sixteen year experience in the securities industry (prior to the bar in 2013). *Id.* ¶ 17.

L. [REDACTED] was not "the designer of CASDF and its PPM," but rather CASDF was modeled, structured and designed to replicate a nearly identical offering, the IMH Secured Loan Fund, LLC ("IMH"). David Hunt drafted the PPM, which is substantially similar in structure and characteristics to the modeled IMH PPM.[8] *Id.* ¶ 18.

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[8] IMH Secured Loan Fund, LLC was organized in May 2003, which the primary business was "making investments in senior short-term whole commercial real estate mortgage loans which were collateralized by first mortgages on real property." Interestingly, IMH faced similar issues to CASDF due to the "severe disruptions in the general real estate and related markets and the

M. [redacted] did not regularly attend board meetings, but did attend a few meetings including one or two in Utah as well as one in California and one in Wyoming. [redacted] did not understand CAREIC to function with a traditional board, but if the company did so operate, [redacted] did not: have a right to vote; serve on any committees; or control the direction of CAREIC or exercise day-to-day control of CAREIC, on matters related to the State of Utah or otherwise. *Id.* ¶ 18.

N. [redacted] has never resided in or been domiciled in the State of Utah. [redacted] does not: (i) have any clients in Utah, (ii) transact or conduct any business, work or service to or from any residents, corporations or business entities in Utah, (iii) derive any revenues from services or things used or consumed in Utah, (iv) own any interest in any real or personal property, now or in the past, in Utah, (v) entered into any contracts, agreements or obligations located, executed or to be performed within Utah, (vi) registered, nor have I been registered to my recollection in the past, to do business in Utah and do not pay any taxes or franchise fees in Utah, (vii) advertised, now or previously, any services in Utah, (viii) have or had employees, offices, agents or bank accounts in Utah, or (ix) have or had a phone or fax listings within Utah. *Id.* ¶¶ 22-31.

O. [redacted]'s contacts with Utah are extremely limited and has been to Utah less than ten times in his life, including two times for family vacations. *Id.* ¶ 32.

ARGUMENT

Plaintiff bears the burden of establishing a "prima facie showing that the facts alleged, if true, would support personal jurisdiction over" [redacted] when ruling on a Rule 12(b)(2) motion

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rapid decline in the global and U.S. economies," but was able to avoid a similar result to CASDF by a series of conversions to a publicly-reporting corporation to enable it to raise additional capital. *See* Form 10-K, FY 2016, IMH Financial Corporation, https://www.sec.gov/Archives/edgar/data/1397403/000139740317000009/ifcn2016123110k.htm.

to dismiss, early in the litigation, without holding an evidentiary holding. *Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1179–80 (10th Cir. 2014); *see Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). Plaintiff "may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). The allegations in Complaint must be taken as true to the extent not controverted by ██████'s affidavits, but "[i]f the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor." *Behagen v. Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir. 1984).[9] However, the Court need not draw inferences in plaintiff's favor nor accept as true "mere conclusory allegations," as opposed to "well pled facts." *Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987).[10] Further, "[t]he plaintiff has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading." *Pytlik v. Prof'l Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989). Only if the Plaintiff satisfies the prima facie showing, does the burden shift to ██████ to make a "compelling case" demonstrating why the Court's exercise of personal jurisdiction would be unjust. *Burger King*, 471 U.S. at 477.

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[9] "In order to defeat a plaintiff's prima facie showing of jurisdiction, a defendant must present a compelling case demonstrating 'that the presence of some other considerations would render jurisdiction unreasonable.'" *OMI Holdings*, 149 F.3d at 1091 (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

[10] "In light of these guidelines, and in the absence of a full evidentiary hearing, a district court relying on documentary evidence in its consideration of a motion to dismiss may not weigh the factual evidence. Thus, the determination involves an application of the law to the facts as set forth in the affidavits and complaints, favoring the plaintiff where a conflict exists, as well as a determination as to the legal sufficiency of plaintiff's jurisdictional allegations in light of the facts presented." *Id.*

Under Rule 12(b)(2), a court may dismiss a case for lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2). The Tenth Circuit has established a two-prong test for determining if the Court's assertion of personal jurisdiction is proper: (1) jurisdiction must comport with the state long-arm statute ("jurisdiction is authorized under Utah law") and (2) "the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1100 (10th Cir. 2009); *see also Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008); *see also Newsome*, 722 F.3d at 1264 (10th Cir. 2013) (Fed.R.Civ.P. 4(k)(1)(A) requires "focus first on state law, and particularly, the relevant state's long-arm statute."). As to the first prong, Utah's long-arm statute provides that that the statute "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." Utah Code Ann. § 78B-3-201(3). Because Utah law allows the exercise of jurisdiction to the same extent as due process under the United States Constitution, the only question is whether exercise of jurisdiction over the defendant is constitutional. *Rusakiewicz*, 556 F.3d at 1100 ("the Utah Supreme Court has explicitly said that 'any set of circumstances that satisfied due process will also satisfy the long-arm statute.'") (*quoting SII MegaDiamond, Inc. v. Am. Superabrasives Corp.*, 969 P.2d 430, 433 (Utah 2000)). Thus, in Utah this two-part inquiry "is reduced to a single question: did the defendants have sufficient "minimum contacts" with the state of Utah to establish personal jurisdiction over them?" *Rusakiewicz*, 556 F.3d at 1100. However, in the Tenth Circuit, "if the defendant's actions create sufficient minimum contacts," the Court "must then consider whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.'" *OMI Holdings*, 149 F.3d at 1091 ("inquiry requires a determination of whether a district court's exercise of personal

jurisdiction over a defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case.") (citations omitted).

A court may exercise either general (all-purpose) or specific (conduct-linked) jurisdiction over a nonresident defendant. Under general jurisdiction, a court may "resolve any dispute involving that party, not just the dispute at issue." *Newsome*, 722 F.3d at 1264 (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)). In contrast, a court may exercise specific jurisdiction over a defendant whose forum-related activities gave rise to the case before the court (*i.e.*, "jurisdiction specific to this dispute"). *Id.*

I. ████████ IS NOT SUBJECT TO GENERAL JURISDICTION IN UTAH

A court may assert general jurisdiction over a nonresident defendant if his "affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *see also Newsome*, 722 F.3d at 1264 ("As a general matter, then, if a nonresident party has 'continuous and systematic general business contacts with the forum state,' general personal jurisdiction might exist.") (citations omitted); *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 187 L. Ed. 2d 624 (2014) ("a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'") (citations omitted). In Utah, "'general personal jurisdiction permits a court to exercise power over a defendant without regard to the subject of the claim asserted.' For general personal jurisdiction to exist, 'the defendant must be conducting substantial and continuous local activity in the forum state.'" *Ho v. Jim's Enterprises, Inc.*, 29 P.3d 633, 636 (Utah 2001) (internal citations omitted).

Here, the threadbare jurisdictional allegations in the Complaint, admit that ██████ is a

resident and domiciled in California, not Utah. *See* Amended Complaint, ¶¶ 25-26 (Plaintiff admits [redacted] is a resident of the State of California and alleges that "[redacted] is a California entity."). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile[.]" *Goodyear Dunlop*, 564 U.S. at 924. Domicile is the place where one resides with the intent to remain indefinitely. *See Williams v. State of N.C.*, 325 U.S. 226, 229 (1945) ("Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."). Plaintiff alleges "subject matter jurisdiction…pursuant to 28 U.S.C. § 1332 because there is complete diversity among the parties." Amended Complaint, ¶ 16. Importantly, while not alleged in the Complaint, [redacted] possesses neither "continuous nor systematic" contacts as to render him essentially at home in Utah nor affiliations with Utah that are so "constant and pervasive" to permit the Court to exercise power over under the general personal jurisdiction. *See* Statement of Relevant Facts ("SOF"), Section IV, ¶¶ N-O; *see, e.g., Ho*, 29 P.3d at 637 n. 7 (principles for corporate defendants, not individuals, such as [redacted]).

II. PLAINTIFF HAS NOT MET BURDEN TO DEMONSTRATE THAT [redacted] SUBJECT TO SPECIFIC JURISDICTION IN UTAH

Specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop*, 564 U.S. at 919 (citation omitted). Specific jurisdiction "is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Id.* (citation omitted). Critically, "[e]ach **defendant's contacts with the forum State must be assessed individually**" and cannot be "judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added).

Importantly, the Due Process Clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. at 471-72. Accordingly, a court "may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citation omitted). In *Walden*, the Supreme Court explained that in cases—such as this one—involving intentional torts, specific jurisdiction requires that "the **defendant's suit-related conduct** must create a **substantial connection** with the forum State," 134 S. Ct. at 1121 (emphasis added), "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id*. at 1122 (citation omitted) (emphasis in original).

In addition, this "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id*. The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id*. "[I]t is the **defendant, not the plaintiff or third parties, who must create contacts with the forum State**." *Id*. at 1126 (emphasis added). "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id*. at 1122 (citations omitted). Thus "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id*. at 1123; *see also Burger King*, 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it

cannot"). Relatedly, "mere injury to a forum resident is not a sufficient connection to the forum." *Walden*, 134 S. Ct. at 1125.

The "proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* In the Tenth Circuit, courts typically make three inquiries to assess whether a defendant has sufficient contacts with the forum state to be subject to specific personal jurisdiction:

> (1) whether the defendant purposefully directed its activities at residents of the forum state;
>
> (2) whether the plaintiff's injury arose from those purposefully directed activities; and
>
> (3) whether exercising jurisdiction would offend traditional notions of fair play and substantial justice.

Newsome, 722 F.3d at 1264. If any of the three requirements are not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.

A. [redacted] Did Not Purposefully Direct His Activities at Utah

Under the purposeful direction prong, Plaintiff must show that [redacted]: (1) committed "an intentional action" that was (2) "expressly aimed at the forum state" (Utah) with (3) "knowledge that the brunt of the injury would be felt in the forum state." *Newsome*, 722 F.3d at 1264–65 ("Purposeful direction analyses traditionally tend to focus on a defendant's contacts such as travels to the forum, communications with forum residents, the course of business dealings with forum residents[.]").

As to group-plead allegations of the actions "Management Defendants" involving Utah, Plaintiff only alleges that "Management Defendants offered to sell the Relevant Securities Offerings in…Utah." Complaint at ¶ 266; *cf. id.* at ¶ 48 (Toole, Utah property purchased by CAREIC entities, not [redacted], and comprised part of "Debtors' real estate operations

in…Tooele, Utah.”).[11] Plaintiff only alleges that this activity targeted individuals in Utah, and one would assume that, Plaintiff contends that ██████ (included in alleged “Management Defendants”) expressly aimed these tortious activities at Utah because such Management Defendants offered securities to residents of Utah and would be injured in the state. In essence, Plaintiff argues that alleged assigning investors’ presence in Utah is sufficient to show that ██████ expressly aimed its activities at Utah.

This argument has been rejected by both the Supreme Court and the Tenth Circuit. *See Walden*, 134 S. Ct. at 1125 (*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum.”); *Rockwood Select Asset Fund*, 750 F.3d at 1180 (“*Walden* teaches that personal jurisdiction cannot be based on interaction with a plaintiff known to bear a strong connection to the forum state.”); *Anzures v. Flagship Rest. Grp.*, 819 F.3d 1277, 1280–81 (10th Cir. 2016) (“defendant's suit-related conduct did not create any meaningful contacts with [the forum] itself, and the fact that [the plaintiff] was affected [in the forum] (because he resides there) [was] insufficient to authorize personal jurisdiction over defendants.”) (*citing Walden*). Rather, this authority teaches that specific jurisdiction requires that the defendant’s suit-related activity create meaningful contacts with the forum state:

> …it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: [██████] relevant conduct occurred entirely in [California], and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.

Walden, 134 S. Ct. at 1126. “Thus, ‘a **plaintiff's contacts with the forum State cannot be ‘decisive** in determining whether the defendant's due process rights are violated.’”

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[11] *See also* general venue allegations that “certain of the transactions, acts, practices and courses of business alleged in this Complaint took place in the District of Utah.” *Id.* at ¶ 17.

Anzures v. Flagship Rest. Grp., 819 F.3d 1277, 1280 (10th Cir. 2016) (*quoting Walden*, 134 S. Ct. at 1119) (emphasis added). "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 134 S. Ct. at 1123.

Plaintiff has not alleged or argued any actions related to the conduct of ██████ that occurred in, or targeted, or availed himself of the State of Utah. Rather, the sole specific jurisdictional allegation against ██████ is that he is a resident of California (*see* SOF, § II), but even the general, group pled allegations do not demonstrate an intentional, purposeful direction to Utah by any defendant, other than the purchase of one property that ██████ had no authority thereon; rather the only connection is the Plaintiff or its assignors. *see* SOF, § I. Plaintiff's "reliance on its own Utah connections is misguided." *Rockwood Select Asset Fund*, 750 F.3d at 1180. Here, Utah was "not the focal point of defendants' suit-related activities." *Anzures*, 819 F.3d at 1282 (10th Cir. 2016);[12] *see Newsome*, 722 F.3d at 1268 ("express aiming element requires [Utah] to have been the

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[12] The analysis in *Anzures* is instructive to present factual allegations:

> Furthermore, Anzures (together with Mitilier) reached out to Hogan in Nebraska to form Industria, and Industria was created as a Nevada LLC, listed its principal place of business as being in Nebraska, and maintained its corporate office and bank account in Nebraska. Hence, the facts of record do not show that either defendant expressly aimed any conduct at Colorado regarding the formation or alleged alteration of Industria's funding or ownership structure or the reduction of Anzures's compensation. In short, defendants' suit-related conduct did not create any meaningful contacts with Colorado itself, and the fact that Anzures was affected in Colorado (because he resides there) is insufficient to authorize personal jurisdiction over defendants. *See Walden*, 134 S.Ct. at 1126. Neither Hogan nor Flagship had any reasonable expectation of being haled into court in Colorado to answer for any activities related to the funding of Industria, Industria's ownership structure, or Anzures's compensation.

Id. at 1281.

'focal point' of the tort."). Accordingly, because Plaintiff relies exclusively on its own connections with Utah, or the connection of a few alleged assigning investors' connections, **not those of** [redacted], to allege that [redacted]'s out-of-state activities were expressly aimed at Utah, Plaintiff has failed to show that these contacts meet the purposeful direction prong. *See Anzures*, 819 F.3d at 1282 ("There is nothing to suggest that [Utah] had any particular role in the structure of the parties' relationship regarding [CAREIC's] initial financing and ownership.").[13]

B. Injury Did Not Arise From [redacted]'s Purposefully Directed Activities

To determine if an injury arises out of those activities, courts in the Tenth Circuit apply either the but-for or the proximate-cause test:

> Under the [but-for] approach, any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction. The [proximate cause] approach, by contrast, is considerably more restrictive and calls for courts to examine whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim.

Newsome, 722 F.3d at 1269-70 (*quoting Dudnikov*, 514 F.3d at 1078).[14] While the Tenth Circuit has not chosen one over the other, both tests require a "true causal element," between defendants' forum contacts and the litigation. *See Newsome*, 722 F.3d at 1271 ("The import of the 'arising out of' analysis is whether the plaintiff can establish that the claimed injury resulted

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[13] *Id.* ("Here, Flagship did not purposefully avail itself of such privileges with regard to Industria's creation, funding, and ownership because Industria's members agreed to form Industria as a Nevada LLC, that its principal place of business would be (albeit, perhaps, nominally) in Nebraska, and that Industria's operating agreement—the contract at issue in Anzures's breach-of-contract claim—would be construed under Nevada law.").

[14] The Tenth Circuit rejected a third test, the "substantial connection" test as it "inappropriately blurs the distinction between specific and general personal jurisdiction." *See Dudnikov*, 514 F.3d at 1078. ("Under [substantial connection] theory, the relationship between the contacts and the suit can be weaker when the contacts themselves are more extensive.").

from the defendant's forum-related activities."). Here, one could argue a causal element based on the alleged misrepresentations or omissions contained in the PPMs or the solicitation of investors (while such is disputed), this would be misguided as Plaintiff fails even plead that "claimed injury resulted from the defendant's forum-related activities" – the Amended Complaint does not allege that ██████ himself, individually, directed such activities at Utah.

C. Exercising Personal Jurisdiction Over Nonresident ██████ Would Offend Traditional Notions of Fair Play and Substantial Justice

Only if Plaintiff satisfies its minimum contacts burden, then the Court "must still inquire whether the exercise of personal jurisdiction would "offend traditional notions of fair play and substantial justice." *Dudnikov*, 514 F.3d at 1080 (*quoting Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)); *see Newsome*, 722 F.3d at 1271 ("burden shifts to the defendant to demonstrate"); *see also Burger King*, 471 U.S. at 477 ("where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."). This determination usually involves five considerations:

> (1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving 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.
> *OMI Holdings*, 149 F.3d at 1095 (*citing Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 (1987)).

First, burden "of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction" and such burden weighs strongly in ██████'s favor (as well as all the defendants in the case – all are nonresidents of Utah and all

residing in California). *Id*. at 1096. With no present connections to Utah, "[i]n order to litigate the case in [Utah], Defendants will not only have to travel outside their home [state], they will also be forced to litigate the dispute in a foreign forum unfamiliar with the [California] law governing the dispute." *Id*. Second, this factor arguably goes in favor of Plaintiff, as Utah has "an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors." *Id*. However, this is "not a case where a [Utah] resident is attempting to recover directly from [█████ for acts committed by' █████, but this is an indirect action on behalf of alleged assigning investors. *Id*. Third, "Plaintiff may receive convenient and effective relief in another forum[,]" California, which maintains a significantly stronger connection to the underlying claims (CAREIC was a California LLC, bound by California governing law and where the significant majority of the alleged assigning investors reside). *Id*. at 1097. Here, there is no risk that "Plaintiff's chances of recovery will be greatly diminished by forcing him to litigate in another forum because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit[,]" as the majority of any testimony will be from California residents and the governing law is California. *Id*. Fourth, for the same reasons, Utah is not the "most efficient place to litigate the dispute." *Id*. (in such examination, courts look to the "location of witnesses," "where the wrong underlying the lawsuit occurred," "what forum's substantive law governs the case," and "whether jurisdiction is necessary to prevent piecemeal litigation."). Fifth, "the exercise of personal jurisdiction by Kansas affects the substantive social policy interests of other states[,]" in particular California, for the same reasons discussed herein. *Id*.

Here, while Plaintiff has not met its minimum contacts burden; nonetheless, the factors weigh in favor that Utah's exercise of personal jurisdiction would "offend traditional notions of

fair play and substantial justice."

III. GROUP PLEADING, CORPORATE ROLE OR STATE SECURITIES LAW ALTER ANALYSIS

In the avoidance of any doubt, Plaintiff may not rely on state securities law, jurisdiction over CAREIC or generalized group pleading to circumvent the clear rule that "personal jurisdiction requirements 'must be met as to each defendant.'" *Newsome*, 722 F.3d at 1265.

"Jurisdiction over the individual officers of a corporation, however, may not be obtained merely by accomplishing jurisdiction over the corporation." *Wegerer v. First Commodity Corp. of Boston*, 744 F.2d 719, 727 (10th Cir. 1984). "Mere corporate status can never be the basis for jurisdiction; '[e]ach defendant's contacts with the forum State must be assessed individually.'" *MFS Series Trust III ex rel. MFS Mun. High Income Fund v. Grainger*, 96 P.3d 927, 931 (Utah 2004) (*quoting Calder*, 465 U.S. at 790). "Thus, contacts giving rise to jurisdiction over a corporation cannot automatically be attributed to its officers and directors; rather, each individual defendant must have sufficient contacts….Due process is only satisfied based on the 'quality and nature of the activity' for each individual defendant." *Id*.

> [CAREIC's] contacts cannot be attributed to the individual [defendants] who were part of [CAREIC's] executive committee. Where the acts of individual principals of a corporation in the jurisdiction were carried out solely in the individuals' corporate or representative capacity, the corporate structure will ordinarily insulate the individuals from the court's jurisdiction… Jurisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself, and jurisdiction over the individual officers and directors must be based on their individual contacts with the forum state.

Ten Mile Indus. Park, 810 F.2d at 1527 (10th Cir. 1987) (internal citations omitted) (emphasis added). As clarified in *Newsome*, such limit implies the "no-imputed-contacts-rule," but *Ten Mile* must not be read too broadly to insulate employees, officers or directors under the fiduciary shield doctrine from jurisdiction based on their own, individual and affirmative substantial

contacts with the forum state. *Newsome*, 722 F.3d at 1276.[15] However, if CAREIC solicits investors in Utah (or another agent solicits investments in Utah), and the investment ends up injuring a Utah resident, that may be "enough to confer personal jurisdiction over the company in [Utah] courts in the ensuing [securities] suit[,] under the no-imputed-contacts rule, [Utah's] jurisdiction over the company does not necessarily give [Utah] jurisdiction over" ██████, as an alleged de facto officer and director. *Newsome*, 722 F.3d at 1275. ██████ "must have performed some affirmative action [himself] for this court to find that they 'purposefully availed' themselves." *MFS Series Trust*, 96 P.3d at 932; *see Walden*, 134 S. Ct. at 1123 ("A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum."); *see also supra* Section II. Otherwise, the mere employment by a company with an office in Utah, that retains securities counsel in Utah, would be "based on the 'random, fortuitous, or attenuated' contacts [██████ makes by interacting with other persons affiliated with the State." *Id.*; see *Miner v. Rubin & Fiorella, LLC*, 242 F. Supp. 2d 1043, 1048 (D. Utah 2003) ("Even assuming that the business dealings [and role with CAREIC] relate to the causes of action, the contacts are not sufficient to confer jurisdiction. The fact that [██████] performed work for a [company with an

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[15] "The fiduciary shield doctrine, by contrast, gives even greater protection to employees of companies. It maintains that even if a particular Kansas employee has substantial contacts with Oklahoma—e.g., the employee repeatedly traveled to Oklahoma to promote the product—those contacts will not count against the employee in the personal jurisdiction analysis so long as the employee acted solely on the corporation's behalf." *Id.* Thus, "an employee was not shielded from jurisdiction simply because her actions were undertaken as a corporate officer. Rather, the court may continue to exercise jurisdiction over such an employee **provided that jurisdiction is based on that employee's individual contacts with the forum state**." *Proficio Bank v. Wire Source, LLC*, No. 2:11-CV-808, 2012 WL 1448207, at *3 (D. Utah Apr. 26, 2012) (unpublished).

office and personnel in Utah] and received payments from that corporation is a mere fortuity.”).[16]

In *MFS Series Trust III*, the Utah Supreme Court addressed both unspecified group pleading (in dicta) and the jurisdictional limits of Utah Code Ann. § 61–1–22(4). The facts of the case are worth noting, and persuasive, where plaintiffs “brought suit alleging violations of Utah's securities laws and common law fraud and negligence” against various foreign outside directors and former officers, outside directors and executives of various holdings companies, predecessors and successors by purchasers of Tooele County bonds secured by a loan agreement between LES and Tooele County that incorporated LES’ financial reports into the bond offering documents. *Id*. at 929-30. “LES admitted that these financial statements contained material misstatements,” its successor, “Safety–Kleen filed for chapter 11 bankruptcy[,]” subsequently the “bonds became worthless and Safety–Kleen placed several LES officers, Humphreys, Winger and Bragagnolo, on administrative leave.” *Id*. at 930. Other than specific factual allegations of two executives related to the bond offering,[17] but disputed affidavit, “[a]ll other allegations were based solely on defendants’ corporate status” and “defendants’ status as officers or directors of the corporation to support personal jurisdiction over them.” *Id*. at 931–32. “In response to defendants' affidavits, plaintiffs submitted LES's offering memorandum for the bond issuance [that] listed the corporate roles of each defendant.” *Id*. at 931.

The Utah Supreme Court found an unpublished California Court of Appeal opinion

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[16] Thus, any telephone calls or mailing of legal documents to CAREIC’s office, or CAREIC’s counsel, located in Utah would not be enough. *Id*. at 1049. “It is well-established that phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts.” *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995).

[17] Taylor “signed some of the ‘irregular’ corporate financial statements in his role as general counsel and secretary” and “sent a letter expressing certain opinions regarding the bond placement agreement[,]” while alleging that “Bragagnolo was integrally involved in the preparation and publishing of the incorrect financial statements.” *Id*. at 931.

"extremely persuasive" due to the same jurisdictional issues in the case. *Id*. at 932 (*citing Eaton Vance Distributors, Inc. v. Grainger*, No. C040158, 2003 WL 1521896 (Cal. Ct. App. Mar. 25, 2003) (unpublished) (dealing with same officer and director defendants). The Utah Supreme Court observed:

> There the court undertook the same minimum contacts analysis that we have undertaken. *Eaton Vance* turned on the same question we are considering: is a control person liability statute sufficient to confer personal jurisdiction?
>
> In determining whether sufficient minimum contacts existed for California to exercise personal jurisdiction over the defendants, the *Eaton Vance* court reasoned that the
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> "evidence **does not show which individual officers and directors personally directed or actively participated in the alleged tortious conduct, or whether they purposefully directed that conduct toward [the forum state]**. Plaintiffs state generally that the **officers and directors collectively controlled, managed and operated LES and thereby directed the offering** of the bonds to the plaintiffs. From this evidence, **one can only speculate that individual officers and directors personally directed or actively participated in the tortious conduct**; this does not suffice to establish specific personal jurisdiction."

Id. at 932 (quoting *Eaton Vance*) (emphasis added). The same applies here, the Amended Complaint's general reliance on CAREIC Board, Directors or Management leaves one to "only speculate that individual officers and directors personally directed or actively participated in the tortious conduct; this does not suffice to establish specific personal jurisdiction." The Court held that the "sole contact between Utah and defendants is that defendants were directors or officers of LES or Safety–Kleen. It would not comport with notions of 'fair play and substantial justice' under *Burger King* to require defendants to answer personally in Utah courts." *Id*.

Further, the Utah Supreme Court made clear that a plaintiff may not "use the Utah long-arm statute in conjunction with section 61–1–22(4) of the Utah Code" to attempt "an end-run around fourteenth amendment due process requirements[.]" *MFS Series Trust III*, 96 P.3d at 932. Therein, the Court reasoned:

> According to plaintiffs, allegations of liability under section 61–1–22(4) of the Utah Code support personal jurisdiction over defendants. The relevant language states, "(a) Every person who directly or indirectly controls a seller or buyer liable, ... every *partner, officer, or director* of such a seller or buyer ... *who materially aids* in the sale ... is also *liable jointly and severally* with and to the same extent as the seller or purchaser...." Utah Code Ann. § 61–1–22(4) (2000) (emphasis added).
>
> Plaintiffs argue that this statute confers jurisdiction over liable parties, but conflating the concept of liability with that of jurisdiction in this manner is improper. "Liability and jurisdiction are independent. Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant's relationship with the forum." *Sher v. Johnson,* 911 F.2d 1357, 1365 (9th Cir.1990); (citing *Shaffer,* 433 U.S. at 204 & n. 19, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)). Section 61–1–22(4) speaks to liability only and does not purport to grant personal jurisdiction. Nothing in the statutory language indicates that the legislature intended to do so. Even if the statute attempted to confer personal jurisdiction, due process would still require an analysis of minimum contacts. Permitting allegations of liability under Utah's securities laws to automatically give rise to personal jurisdiction, without first considering whether each defendant "purposefully availed" himself of the benefits and protections of Utah's laws, would be to ignore the due process requirements of the fourteenth amendment. See *Intl. Shoe,* 326 U.S. at 316, 66 S.Ct. 154.

Id. at 932-33 (emphasis in original). "Minimum contacts are always necessary for the proper exercise of personal jurisdiction….Utah does not have the authority present under the federal securities laws for exercising personal jurisdiction over defendants based on national contacts." *Id*. at 933-34 (compared to Section 20 of the Securities Act of 1934 "state statutes cannot properly create such wide latitude in the exercise of personal jurisdiction.").

Thus, Plaintiff fails to allege "affirmative actions on the part of" ██████, instead of mere allegations on his status as a de facto officer or director, as the Court in Utah "must find minimum contacts based on [██████'s] 'purposeful availment' of the 'benefits and protections of [the forum state's] laws.'" *Id.* at 932 (*quoting Asahi*, 480 U.S. at 109). Mere inaction is

insufficient. *Id.* at 934.[18]

IV. PERSONAL JURISDICTION NOT WAIVED BASED ON DISMISSAL OF FEDERAL SECURITIES CLAIMS IN AMENDED COMPLAINT

While personal jurisdiction is "a personal defense which may be asserted or waived by a party[,]"[19] waiver is not applicable to the instant action where Plaintiff filed an Amended Complaint dismissing its federal securities claims. However, Federal Rule of Civil Procedure 12(g)(2) "limits the waiver rule to defenses that were 'available to the party but omitted from its earlier motion.'" *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1237 (10th Cir.), *cert. denied*, 137 S. Ct. 90, 196 L. Ed. 2d 37 (2016).

Here, Plaintiff initially brought this lawsuit under the guise of federal securities claims and its statutory framework for nationwide service of process and personal jurisdiction whereby the defenses of both service of process and personal jurisdiction were not available to [redacted].[20] Such federal claims in the original complaint arose under the Securities Exchange Act of 1934 (the "1934 Act"), Section 27 of which governs personal jurisdiction. 15 U.S.C. § 78aa. The statute provides that any action under the 1934 Act:

> may be brought . . . in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Id. Section 27 of the 34 Act "gives the district court the authority to serve defendants

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[18] Finding the Kansas Supreme Court's analysis in *Schlatter v. Mo-Comm Futures, Ltd.* persuasive under a comparable statute, whereby the court found that "K.S.A.1982 Supp. 60–308(b)(6) does not confer in personam jurisdiction on them. The statutory phrase 'acting within this state' requires something more than a failure to act on the part of a nonresident director. There is no showing that either Kircher or Johnmeyer acted in any way within the state of Kansas." *Schlatter v. Mo-Comm Futures, Ltd.*, 662 P.2d 553, 560 (Kan. 1983).

[19] *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986); *see also* Fed. R. Civ. P. 12(h)(1).

[20] *See* Dkt. 2 (claims under Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and Section 20(a) of the Securities Exchange Act of 1934).

nationwide." *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1257 (5th Cir. 1994). "'When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction.'" *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000) (*quoting Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997)). Thus, compared to traditional analysis focusing on minimum contacts with a forum state, "when a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States." *Busch*, 11 F.3d at 1258. "Given that the relevant sovereign is the United States [under Section 27 of the 1934 Act], it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States." *Id.*; *see also Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985) ("so long as a defendant has minimum contacts with the United States, Section 27 of the Act confers personal jurisdiction over the defendant in any federal district court."); *cf. Peay*, 205 F.3d at 1212 (potentially limited by the Fifth Amendment (as opposed to traditional Fourteenth Amendment analysis) that "requires the plaintiff's choice of forum to be fair and reasonable to the defendant[,] [which] 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'") (citations omitted).[21]

Thus, the first potential responsive pleading that ████ could raise this defense is in

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[21] "To establish that jurisdiction does not comport with Fifth Amendment due process principles, a defendant must first demonstrate 'that his liberty interests actually have been infringed.' The burden is on the defendant to show that the exercise of jurisdiction in the chosen forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id.*

response to the Amended Complaint.

CONCLUSION

For the reasons stated herein, [REDACTED] respectfully requests that the Court dismiss Plaintiff's Amended Complaint for lack of personal jurisdiction.

EVANS & KOB, PC

DATED: May 31, 2017

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-and-

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, I electronically filed the foregoing, and the Declaration of [REDACTED] in Support of Motion to Dismiss the Amended Complaint for Lack of Personal Jurisdiction, with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

and I hereby certify that I have mailed the document by United States Mail, first-class postage prepaid, to the following non-CM/ECF participants:

(No manual recipients)

/s/ Brett G. Evans