

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re: National Century Financial Enterprises, Inc. Financial Investment Litigation.

**Case No. 2:03-MD-1565-JLG-MRA
Judge Graham
Magistrate Judge Abel**

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Rebecca S. Parrett, Plaintiff, vs. Bank One, N.A., et al., Defendants.
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No. CIV-03-541 PHX-MHM

City of Chandler, et al., Plaintiffs, vs. Bank One, N.A., et al., Defendants.

No. 03-CIV-1220-PHX-ROS

State of Arizona ex rel. Peterson, et al, Plaintiffs, vs. Credit Suisse First Boston Corp., et al., Defendants.
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No. 03-CIV-1618-PHX-FJM

Crown Cork & Seal Company, Inc. Master Retirement Trust, et al., Plaintiffs, vs. Credit Suisse First Boston Corp., et al., Defendants.
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No. 03-CIV-2084-PHX-PGR

**REBECCA PARRETT’S CONSOLIDATED RESPONSE TO THE POULSEN/KULD
AND AYERS/E&D CONSOLIDATED MOTIONS TO DISMISS,
AND JOINDER WITH THE ARIZONA NOTEHOLDERS’ RESPONSE
TO THE POULSEN/KULD CONSOLIDATED MOTION TO DISMISS**

For the reasons set forth in the following supporting memorandum, Rebecca S. Parrett (“Parrett” or “Plaintiff”), who is the Plaintiff in *Parrett v. Bank One, N.A., et al.*, Arizona case No. CIV-03-541 PHX-MHM, and a Defendant in *City of Chandler v. Bank One, N.A.*, No. CIV 03-1220-PHX-ROS, *State of Arizona, et al. v. Credit Suisse First Boston Corp., et al.*, No. CIV 03-1618-PHX-FJM, and *Crown Cork & Seal Company, Inc. Master Retirement Trust, et al. v.*

Credit Suisse First Boston Corp., et al., No. 03-CIV-2084-PHX-PGR (collectively, “the Arizona cases”), hereby responds to the Ayers and E&D Investments, Inc. (“Ayers/E&D”) consolidated motion to dismiss for lack of personal jurisdiction (Dk. 86), and responds, and joins with the response (Dk. 240) filed by the *City of Chandler, State of Arizona* and *Crown Cork* Plaintiffs (collectively, “the Arizona Noteholders”) to, the Poulsen and Kuld Corporation (“Poulsen/Kuld”) consolidated motion to dismiss for lack of personal jurisdiction and defective process (Dk. 81).

**MEMORANDUM IN SUPPORT OF PARRETT’S RESPONSE AND JOINDER
RELATING TO THE POULSEN/KULD AND AYERS/E&D MOTIONS
TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I. THE POULSEN/KULD MOTION TO DISMISS

A. Nationwide Contacts

As the Arizona Noteholders properly conclude in their response to the Poulsen/Kuld motion to dismiss, that motion, which Parrett agrees is spurious and probably sanctionable, can and should be summarily denied based on one indisputable fact alone. That fact is the Poulsen/Kuld Defendants are subject to personal jurisdiction because a nationwide-contacts test applies since this case was removed from State court to Federal court solely on the basis of bankruptcy-relatedness. As the Arizona Noteholders point out, this fact has already been admitted by the other ten Defendants who filed personal jurisdiction challenges in this case, and they have since stipulated that they are subject to personal jurisdiction for these reasons in the event that the pending remand motions in the Arizona cases ultimately are denied.¹

Because the Arizona Noteholders have fully briefed this point in their response to the Poulsen/Kuld motion to dismiss, there is no need for Parrett to take any more of the Court’s time to reiterate that. Therefore, Parrett concurs and joins with, and adopts as her own argument, the

¹ For some reason, the Ayers/E&D Defendants’ stipulation included the Arizona Noteholders cases but not the Parrett case, which is the reason that the Arizona Noteholders’ response does not address the Ayers/E&D motion to dismiss.

legal authority and reasoning on this issue set forth in the Arizona Noteholders' memorandum in support of the Poulsen/Kuld response to the motion.

B. The Poulsens' Contacts with Arizona

The Poulsen/Kuld Defendants argue that their so-called limited or non-existent contacts in or with the State of Arizona are insufficient for the courts in that State to exercise either general or specific personal jurisdiction over them in any of the four Arizona cases, including the *Parrett* case. As the Arizona Noteholders ably demonstrate in their response to the Poulsen/ Kuld motion to dismiss, that argument fails completely in light of the deposition testimony of both Lance Poulsen and Barbara Poulsen and the other documentary evidence cited therein.

Because the Arizona Noteholders have responded to and fully have addressed the Poulsen/Kuld Defendants' assertions, there is no need for Parrett to take any more of the Court's time to reiterate that, either. Therefore, except to the extent that there is any allegation, imputation or inference that Parrett knowingly committed any wrongful act that injured the Arizona Noteholders or any other plaintiffs in this litigation, she, again, concurs and joins with, adopts as her own response, and incorporates by reference, the evidence, facts, legal authority, and arguments set forth in the Arizona Noteholders' memorandum and exhibits attached thereto in support of their response to the Poulsen/Kuld motion. That evidence and legal authority clearly and unquestionably establish that the courts of the State of Arizona have both general and personal jurisdiction over the Poulsen/Kuld Defendants in this case as well as in the Arizona Noteholders cases.

C. Jurisdiction over Kuld Corporation

As for the Defendants' argument that the courts in the State of Arizona lack either general or specific personal jurisdiction over Kuld Corporation, again, the Arizona Noteholders have responded to and have fully addressed that issue in their response to the Poulsen/Kuld

motion. Therefore, Parrett also concurs and joins with, adopts as her own response, and incorporates by reference, the facts and arguments set forth in the memorandum and exhibits attached thereto in support of the Arizona Noteholders' response on this issue. Those facts and arguments clearly and unquestionably establish that the courts of the State of Arizona have both general and personal jurisdiction over Kuld Corporation in this case as well as the three Arizona Noteholders cases.

D. Service of Process on the Poulsens

The Poulsen Defendants further argue to dismiss the complaint in the *Parrett* case for (a) lack of service of process on Barbara Poulsen, and (b) defective service on Lance Poulsen on the grounds that (1) it was untimely and (2) the wrong summons was used, *i.e.*, that an Arizona Superior Court, rather than a U.S. District Court summons was used to serve the complaint on him.

As for the alleged untimeliness of service on Lance Poulsen, this Court on December 17, 2003, extended the time limit for Parrett to effect service of process on any unserved defendants to February 16, 2004. (*See* Order, dated Dec. 17, 2003 (Dk. No. 24)). A copy of the *Parrett* complaint and a summons were served on January 6, 2004, some six weeks before the extended deadline. (*See* B. Poulsen Decl. (Mot. to Dismiss Ex. 2), ¶ 15). Therefore, that service was timely because it was effected within the extended time allowed by the Court, and Poulsen's assertion to the contrary is totally false and unfounded.

Poulsen's assertion that the wrong summons was used is yet another red herring. While technically a new summons from the U.S. District Court should have been issued to replace the Arizona Superior Court summons after this case was removed from that court, but the indisputable fact remains that the summons that was used provided Poulsen with adequate notice of the action that had been filed against him, including a copy of the only complaint that exists in the

Parrett case, along with other documents showing him in what court that complaint is pending. Moreover, one of those documents was this Court's Case Management Order ("CMO"), entered on December 19, 2003 (Dk. 28), which clearly informed both Lance and Barbara Poulsen of the where the action was and the date by which they had to respond to the Complaint in this case.

Case law is clear that such technical error can and should be disregarded, or at least *Parrett* should be allowed to amend or re-serve a new summons because Poulsen received adequate notice of this action. After all, that is the purpose for Rule 4, of the Federal Rules of Civil Procedure. *See, e.g., George W. v. U.S. Dep't of Educ.*, 149 F. Supp. 2d 1195, 1200-01 (E.D. Cal. 2000) ("technical defect in the form of the summons may still amount to substantial compliance with Rule 4."); *see also, Tipton v. Adkins (In re Tipton)*, 257 B.R. 865, 870 (Bankr. E.D. Tenn. 2000) (citing *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991); *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir.1989)).

Regardless of any defect in service, Poulsen has waived that defect by appearing numerous times in this case, after the date of the questioned service on January 6th, and after the filing of the Poulsen/Kuld motion to dismiss for lack of personal jurisdiction and defective service on January 30th, including the following:

- responding to and opposing *Parrett's* motion to remand this case to State court on February 10, 2004 (Dk. 111);
- responding to and opposing her motion for an extension of time to amend her complaint on February 17, 2004 (Dk. 120);
- filing a substantive Rule 12(b) motion to dismiss the *Parrett* complaint on March 1, 2004 (Dk. 149); and
- appearing at a deposition on March 31, 2004, at which he gave testimony relevant to all four Arizona cases, including answers to questioning by Plaintiff's counsel, which testimony has been extensively cited in the Arizona Noteholders' response.

In light of Poulsen's activity in this case and the indisputable fact that Poulsen received a

copy of the summons and complaint, it is simply inconceivable that he could now complain that he has insufficient notice of the action and claims brought against him by Parrett. Otherwise, why and how could he have opposed Parrett's motions to remand, to extend the time for amending her complaint and to dismiss her complaint on substantive grounds, none of which said anything about lack of personal jurisdiction or defective service.

Inasmuch as the defendant has not made any representations to this Court that he did not in fact receive the summons and complaint ... , he cannot be heard to complain of insufficient notice of the pendency of the action brought against him by the plaintiffs Accordingly, ... ***plaintiffs' summons and complaint are not defective for insufficiency of process***

Zandee v. Colisto, 505 F. Supp. 180, 181 (C.D. Mich. 1981) (emphasis added).

As another federal court observed:

Moreover, [defendant]'s action in entering an appearance and filing his motion to dismiss ... demonstrated clearly that he was not only aware of, but thoroughly familiar with the nature of, the [plaintiff's claim] him. Thus, the inference is inescapable that [he] had adequate notice of the pendency and nature of the litigation against him.

Transamerica Ins. Co. v. U.S., 9 Cl. Ct. 316, 319 (1986), *aff'd U.S. v. Rush Engineers*, 802 F.2d 472 (Fed. Cir. 1986), 804 F.2d 645 (Fed. Cir. 1986); *accord United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir.1984) ("Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.").

In short, as the District Court in *Kness v. Grimm*, 761 F. Supp. 513, 515 (N.D. Ill. 1990), made clear, even where service of process is technically incomplete or deficient, that issue is waived under the circumstances present in this case. In addition, Rule 61, Fed. R. Civ. P., provides, "***The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.***" (Emphasis added). Moreover, Poulsen has not and cannot demonstrate any prejudice for any defect in, or insufficiency of, service in this case. "***Dismissal is generally not justified absent a showing of preju-***

dice.” *United Food*; accord *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir.1994) (emphasis added). However, in the event that the Court finds any merit to Poulsen’s arguments about a defect in the summons, under Rule 4(a), “The court may allow [it] to be amended.”

These same principles apply to Barbara Poulsen’s argument that she was not served with the complaint. She, like her husband, has received adequate notice of this action, and she has waived, and has not and cannot show any prejudice from, any lack of, or defect in, service. She, by her own admission, received a copy of the summons, complaint and CMO, she was a party with her husband to all of the filings described above, and she, too, appeared at her own deposition on March 31, 2004, at which she gave testimony relevant to all four Arizona cases, including answering questions by Plaintiff’s counsel, which testimony, again, has been extensively cited in the Arizona Noteholders’ response. However, again, should the Court find any merit to her argument about insufficiency of service, under Rule 4(m), the Court may allow Parrett a short period of time to cure that insufficiency.

II. THE AYERS/E&D INVESTMENTS MOTION TO DISMISS

A. Nationwide Contacts

For the reasons discussed above, the Ayers/E&D motion to dismiss is just as spurious and sanctionable as the Poulsen/Kuld motion, and it can and should be summarily denied for the same, single indisputable fact alone. Like the Poulsen/Kuld Defendants, the Ayers/E&D Defendants are subject to personal jurisdiction because a nationwide-contacts test applies since this case was removed from State court to Federal court solely on the basis of bankruptcy-relatedness. Again, as the Arizona Noteholders point out in their response to the Poulsen/Kuld motion, this fact has already been admitted by the other nine Defendants, who filed personal jurisdiction challenges in this case, and have since stipulated that they are subject to personal jurisdiction for these reasons should the pending remand motions in the Arizona cases ultimately be denied.

Ayers/E&D also stipulated to this fact in regard to the Arizona Noteholders cases, but for some reason that stipulation did not include the Parrett case. Regardless, the principle of nationwide contacts applies equally to the Ayers/E&D Defendants in this case as well because the basis for the removal was the same in this case as it was in the three Arizona Noteholders cases. Just because Ayers/E&D refused to stipulate in this case does not make the principle of nationwide contacts any less applicable. Again, there is no need for Parrett to take any more of the Court's time to argue this point any further because the legal authority and reasoning set forth in the Arizona Noteholders' memorandum in support of their response to the Poulsen/Kuld motion, which Parrett has adopted, applies equally to the Ayers/E&D motion.

B. Ayers' Contacts with Arizona

Donald Ayers had essentially the same or similar contacts with the State of Arizona as did Lance Poulsen, and therefore, the same facts, legal authority and arguments about Arizona jurisdiction over Poulsen discussed in the Arizona Noteholders' response apply equally to Ayers. Based on the numerous facts and evidence included in the Arizona Noteholders' response, which tie Ayers, as well as Poulsen, to Arizona, and based on Parrett's Declaration, which is attached as Exhibit 1 and incorporated herein by reference, Ayers, like Poulsen, had extensive contacts with and in the State of Arizona between 1993 and 2002. In addition to those contacts described in the Arizona Noteholders' response, Ayers contacts with Arizona also include the following:

- In 1993, Ayers and his former wife Parrett purchased a second home, as joint tenants with right of survivorship, in the Desert Mountain residential development in Scottsdale, Arizona, where they visited many times on both National Century Financial Enterprises, Inc. ("NCFE") business and for pleasure. (Parrett Declaration, Ex. 1, ¶ 1).
- In 1995, Ayers and Parrett sold that home and bought another home in the Desert Mountain Development in Scottsdale, which they also owned as joint tenants with right of survivorship until they got divorced in 1998. (*Id.* ¶ 2).
- Prior to 1995, Ayers and Parrett lived primarily in Ohio, but during 1995, they lived

- more in Arizona at their Scottsdale home than in Ohio. Therefore, they then considered themselves full-time residents of Arizona, and they filed their joint State and Federal income tax returns in Arizona as Arizona residents. (*Id.* ¶ 3).
- From 1993 through 1999, Ayers had several meetings in Phoenix, Arizona, with Bruce Gulledge, who worked in the Phoenix offices of Peacock, Hislop, Staley & Givens, Inc., a business evaluation and financial services firm, regarding such services for NCFE, including doing a public and/or private offering for NCFE. (*Id.* ¶ 4).
 - From 1993 through 2001, Ayers also had several meetings with NCFE clients, such as Ortho Rehab, Inc., Doctors Community Healthcare Corporation, and Parc Place, in the Phoenix area. During this time and well into 2002, he also called and received calls by telephone to and from Arizona with executives of these NCFE clients located in the Phoenix area. (*Id.* ¶ 5).
 - Ayers set up his own office at the Scottsdale, Arizona, office of NCFE in 1995 and spent some time there every month thereafter, including frequent visits after 1995. NCFE's Scottsdale office played a significant part of the "trend analysis" of NCFE and it occupied a meaningful part of NCFE's history as detailed in all of the NCFE Private Placement Memoranda and in the Complaints filed in the NCFE litigation. The Scottsdale office was also touted in NCFE's promotional literature, which was given to lenders, brokers and investors, as the office from which NCFE serviced many of its clients. (*Id.* ¶¶ 6-7; Ariz. Noteholders' Resp. at 6-7).
 - Ayers was listed as director and vice president on the NCFE FY 1995, FY 1996, FY 1997-98, FY 1998-99 and FY 1999-00 Arizona Annual Reports filed with the Arizona Corporation Commission ("ACC") (NCFE had registered with the ACC as a foreign corporation doing business in Arizona on April 17, 1995, and filed annual reports with the ACC for each fiscal year thereafter through 2000). (Parrett Decl. ¶¶ 8-9; Ariz. Annual Rpts., attached as Exhibits 2-6; ACC Filings R. for NCFE, attached as Exhibit 7).
 - Except for the one for FY 1995, Ayers personally signed all Arizona Annual Reports, in which he declared "under penalty of law, that all corporate income tax returns required by Title 43 of the Arizona Revised Statutes have been filed with the Arizona Department of Revenue[,] and "that [he] ... examined [each] report ... and to the best of [his] knowledge and belief they are true, correct and complete." (Parrett Decl. ¶ 9; Exhs. 3-6).
 - Also in 1995, Ayers met with Sam Eichenberg from the Finova Group, Inc., a commercial lender, in Scottsdale, Arizona, to discuss financial business matters relating to NCFE. (Parrett Decl. ¶ 10).
 - In March and June of 1996, Ayers attended meetings in Scottsdale, Arizona, with co-Defendants Lance Poulsen, NCFE's CEO, and Carey Purcell, NCFE's attorney, regarding NCFE business, policy, operations and transactions. (*Id.* ¶ 11).

- On NCFE’s behalf, Ayers attended and/or participated in the Asset Backed Securitization Conferences held in Scottsdale and Phoenix in 1998, 1999, 2000 and 2001, at which he participated in promoting NCFE’s asset-backed securitizations and notes to institutional lenders and to prospective clients and investors. These annual conferences were one of the most important business events for the NCFE Board of Directors, of which Ayers was a member. Accordingly, substantial NCFE business was conducted at these conferences. (*Id.* ¶¶ 12-13; Ariz. Noteholders’ Resp. at 7).
- Ayer’s present wife, co-Defendant Elise Ayers, accompanied him to most of the conferences held in 1999 to 2001, and she also attended events related to these conferences that he attended with the institutional lenders, bankers, prospective clients and investors. (Parrett Decl. ¶ 13).
- At least two NCFE or NCFE affiliated company Board of Director meetings were held in Phoenix during this time, and Ayers was present at both. NCFE also conducted numerous board meetings, which he participated in, via telephone conference calls to the NCFE Scottsdale office. (*Id.* ¶ 14; *see also*, Ariz. Noteholders’ Resp. at 8).
- Ayers was involved in other high-level NCFE strategy meetings held in Arizona, as well, including NCFE’s Fiscal Year 2001 Annual Strategic and Plan Review in Scottsdale, and strategic discussions between him and co-Defendant Lance Poulsen. (L. Poulsen Dep. At 82-83, attached as an exhibit to the Ariz. Noteholders’ Resp.).

Therefore, Ayers’ assertion that had did not have the “minimum contacts” with Arizona to bring him within the personal jurisdiction of a court in the State of Arizona is simply not true and is completely unfounded.

C. Jurisdiction over E&D Investment, Inc.

In response to the argument that there are insufficient contacts with Arizona for the jurisdiction of the courts in that State over E&D, the same arguments set forth above and in the Arizona Noteholders’ response in regard to Kuld, apply to E&D, because E&D was established and is used for the same, single purpose as Kuld, *i.e.*, solely to serve as a vehicle for holding title to Ayers’ shares of NCFE stock (Parrett Decl. ¶ 15). Like Kuld, E&D has no other purpose, no separate business or activity, no separate office, no separate identity from Ayers, and therefore, E&D is Ayers’ alter ego for the same reasons that Kuld is Poulsen’s alter ego.

III. CONCLUSION

For the reasons set forth above and in the Arizona Noteholders' Response to similar arguments raised by Poulsen/Kuld, Federal and State courts in Arizona have personal jurisdiction over Lance Poulsen, Barbara Poulsen, Donald Ayers, Elise Ayers, Kuld Corporation and E&D Investments, Inc. Therefore, the Poulsen/Kuld and Ayers/E&D motions to dismiss for lack of personal jurisdiction should be denied. In the alternative, in the event that the Court finds any problem with the service on the Poulsens, it should allow Parrett a reasonable amount of time to amend the summons and re-serve Lance Poulsen and complete service on Barbara Poulsen. However, that should not be necessary because both Lance and Barbara Poulsen have, as have the Ayers, waived any defect in service on them.

DATED: March 30, 2004

Respectfully submitted,

s/ **William A. Miller**

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2004, I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel who have registered as CM/ECF participants, and I hereby certify that on the same date, I mailed by United States Postal Service this document to the following non-CM/ECF participants:

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