

reappointment and filing requirements of 28 U.S.C. §§1692 and 754 was insufficient to create personal jurisdiction over Defendants. Only upon the Receiver's meeting these requirements did this court acquire a factual basis for asserting personal jurisdiction over Defendants. The Receiver, at that juncture, was obligated to serve Defendants anew in the lawsuit. He chose not to do so but instead sought to rely upon Rule 15's relation-back principles concerning amended pleadings. However, and as correctly decided by Judge Kaplan and discussed below, these principles do not apply in this case because the jurisdictional defect in issue was factual as opposed to technical. Furthermore, even the line of cases permitting late compliance with § 754 in the absence of prejudice does not enhance the Receiver's position as Defendants would grossly be prejudiced were this lawsuit now permitted to go forward. Finally, the Receiver's arguments regarding a transfer and presence of specific jurisdiction should also be rejected.

In summary, the court should adopt Judge Kaplan's recommendation and dismiss this case in its entirety.

II.

FACTUAL BACKGROUND (CHRONOLOGY)

The following chronology, based largely upon Judge Kaplan's findings, assists in understanding how and why it was determined the Receiver did not abide by the jurisdictional rules pertaining to this matter:

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|--------------------|---|
| November 13, 1998: | Receiver appointed in the <i>Funding Resource</i> litigation; No. 3-98-CV-2689-M, in the United States District Court for the Northern District of Texas. |
| November 23, 1998: | Deadline under 28 U.S.C. §754 for the Receiver to have filed in the United States District Court for the Western District of Kentucky a copy of the complaint in the <i>Funding Resources</i> |

litigation, as well as his order of appointment as Receiver.

- November 29, 1999: Receiver files this action against Defendants, both Kentucky citizens, in the Northern District of Texas. Receiver contends Defendants have certain liability relating to receivership assets.
- February 23, 2000 In apparent acknowledgment of previous non-compliance with 28 U.S.C. §754, Receiver obtains an order reappointing him as Receiver in the *Funding Resource* litigation.
- March 2, 2000: Receiver files copy of complaint in *Funding Resources* litigation, as well as his order of appointment as Receiver, in the United States District Court for the Western District of Kentucky.
- April 24, 2000 Receiver files amended complaint in this matter, asserting personal jurisdiction under 28 U.S.C. §§1692 and 754.

III.

ARGUMENT

a. **Doctrine of Relation Back Not Applicable.**

In objecting to Judge Kaplan's recommendation the Receiver all but acknowledges that missing the November 23, 1998 deadline amounted to non-compliance with 28 U.S.C. §754. This, of course, means the court originally lacked personal jurisdiction over Defendants in this matter. 28 U.S.C. §754. In an attempt to breathe new life into the case, the Receiver argues his recent March 2, 2000 attempted adherence to §754 coupled with his April 24, 2000 amended pleading invokes the doctrine of relation back. Fed. R. Civ. P. 15. In making this argument he cites numerous authorities, all of which address the relation-back of amendments curing technical, not factual, defects in jurisdictional pleading. *E.g. Kamerman v. Pakco Companies*, 75 F.R.D. 673, 675 (S.D.N.Y. 1977); *MacGowan v. Barber*, 127 F.2d 458, 459-60 (2d Cir. 1942); *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979), cert. denied, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed. 2d 434. The Receiver argues that

contrary to Judge Kaplan's holding, no new service on Defendants is required because Rule 15's relation-back provisions retroactively resurrect his April 24, 2000 allegations of personal jurisdiction over Defendants.

The Receiver's arguments are premised on an erroneous assumption that the lack of personal jurisdiction over Defendants originated from a technically deficient pleading of personal jurisdiction. That is, an assumption that the jurisdictional defects in the Receiver's pleadings were technical in nature as opposed to factual. The distinction is critical, for although a district court may permit pleading amendments to cure technically defective jurisdictional allegations, such amendments are not allowed to retroactively cure defective jurisdictional facts. *Whitmire v. Victus Ltd. T/A Master Design Furniture*, 212 F.3d 885, 888 (5th Cir. 2000)(citing *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 831, 104 L.Ed. 2d 893, 109 S.Ct. 2218 (1989)).² "The reason for the limitation on the district court's power to authorize an amendment [where the nature of the jurisdictional defect is factual] is apparent: never having had the power to act in the matter, the court never had authority to permit an amendment to the complaint." *Falise v. American Tobacco Co.*, 241 B.R. 63, 66 (E.D.N.Y. 1999)(Weinstein, J.)

Here the jurisdictional defects in issue were factual, not technical. Before March 2, 2000 this court had no factual basis for asserting personal jurisdiction over Defendants because the Receiver had not satisfied the reappointment and filing requirements of 28 U.S.C. §754. Once those

²*Whitmire* and the later-cited *Falise* case both involve a plaintiff's attempt to amend to relate back not under Rule 15, but rather under 28 U.S.C. §1653. Importantly, the "case law indicates that Section 1653 serves essentially as a specific application of Rule 15." *Asset Value Fund Limited Partnership v. The Care Group, Inc.*, 179 F.R.D. 117, 119 (S.D.N.Y. 1998). Accordingly, the rules established in *Whitmire* and *Falise* regarding amending to cure technical versus factual defects apply with equal force to the Receiver's efforts to amend and relate back under Rule 15 here. See *Falise*, 241 B.R. at 65.

requirements were satisfied on March 2, only then did the court acquire a factual basis for asserting personal jurisdiction over Defendants. At that time the Receiver, to preserve any chance of salvaging the case, was obligated to serve Defendants anew.³ *Securities and Exchange Commission v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996); *Prejean v. Sonarrach*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981). He did not do so but instead chose to file an amended complaint in hopes Rule 15's relation-back rules would favorably apply. As discussed, *supra*, and as correctly determined by Judge Kaplan, these rules are not applicable in the circumstances of this case. The court should therefore adopt Judge Kaplan's recommendation of dismissal.

b. This Court Cannot Transfer the Matter.

The Receiver alternatively argues this case is ripe to be transferred instead of dismissed. The Defendants, however, are unable to locate any request for such a venue-related transfer in the Receiver's briefing to Judge Kaplan. It generally is improper to raise a request of this type for the first time in objecting to a magistrate's findings. *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994) cert. denied 513 U.S. 1163, 130 L.Ed. 2d 1091, 115 S.Ct. 1128 (1995). In any event, a transfer in the circumstances present here would do little good. Service anew would still be required and Defendants would, as discussed in footnote 3, *supra*, still endure a great deal of prejudice from a

³In reality, to have served Defendants anew at this juncture would have been fruitless since the limitations on the Receiver's claims, as the Receiver freely acknowledges, had already expired. Receiver's Objections, 6. Hoping to avail himself of the line of cases requiring prejudice cited by Judge Kaplan at Recommendation, 5, e.g. *Securities and Exchange Commission v. American Capital Investments, Inc.*, 98 F.3d 1133, 1142 (9th Cir. 1996), the Receiver boldly insinuates this limitations expiration cannot constitute prejudice sufficient to preclude the court from excusing his late compliance with §754. The Receiver cites *Securities and Exchange Commission v. Equity Service Co.*, 632 F.2d 1092, 1095 (3rd Cir. 1980) for the proposition that lack of notice is the only event that prejudices defendants sufficiently to preclude excusing a federal receiver's failure to comply with §754. Even a cursory reading of *Equity Service*, however, makes clear the Third Circuit did not hold as the Receiver claims. See *Equity Service*, 632 F.2d 1092, 1095 (3rd Cir. 1980) (“...to the extent that appellants are correct that notice is the purpose of the statute. . .”) In any event, one strains to imagine any ruling more prejudicial than permitting a federal receiver to proceed with time-barred causes of action.

limitations standpoint were this case allowed to proceed in another district. The court should accept Judge Kaplan's recommendations and dismiss this matter in its entirety.

c. **No Other Basis for Asserting Personal Jurisdiction Over Defendants.**

Having lost all arguments for personal jurisdiction over Defendants pursuant to 28 U.S.C. §§ 1692 and 754, the Receiver lastly posits this court has always maintained personal jurisdiction over Defendants under a specific jurisdiction theory. He claims an April 8, 1998 letter allegedly written by Defendant James Conway to Darney Butler conflicts with Mr. Conway's affidavit statement that he never transacted nor solicited business in Texas. Objections, 7-8. The Receiver urges Mr. Conway's alleged letter constitutes evidence sufficient to support a finding of personal jurisdiction over Defendants under a theory of specific jurisdiction. *Id.*

As an initial matter the Receiver never attached the letter (and authenticating materials) to his Response to Defendants' Motion to Dismiss for the purpose of arguing specific jurisdiction.⁴ He instead attached it to an April 25, 2000 Response to a Motion to Strike filed by Defendants asking that portions of the Receiver's Response to Defendants' Motion to Dismiss be stricken. By not originally attaching the letter and related materials to his Response to Defendants' Motion to Dismiss the Receiver waived any ability to rely upon it now.

But even assuming the letter was properly before Judge Kaplan and arguments regarding specific jurisdiction were timely and properly made, the letter cannot support a finding of specific jurisdiction. "Specific jurisdiction is appropriate when the nonresident defendant's contacts with

⁴It is ironic that in his briefing to Judge Kaplan the Receiver actually eschewed any bases for personal jurisdiction over Defendants, including specific jurisdiction, other than the statutory basis provided in 28 U.S.C. §§ 1692 and 754. An argument therefore lies that he has waived any right to now rely upon specific jurisdiction as a ground for obtaining personal jurisdiction over Defendants. *Cupit*, 28 F.3d at 535.

the forum state arise from, or are directly related to, the cause of action.” *Felch v. Transportes Lar-Mex S.A.*, 92 F.3d 320, 324 (5th Cir. 1996). The court “must determine whether the present litigation resulted from injuries arising out of or related to the nonresident defendant’s contacts with the forum state.” *Id.* To the extent the letter may indicate a single, solitary contact between Mr. Conway and a Texas citizen, the Receiver has not demonstrated by competent evidence any nexus between that contact and the present litigation. In fact, and as briefed to Judge Kaplan, Exhibit “C” to the Receiver’s Response to [Defendants’] Motion to Strike (excerpts from Mr. Conway’s deposition) confirms the transaction discussed in the letter was never even consummated.

IV.

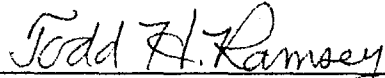
CONCLUSION

For the foregoing reasons Defendants respectfully ask this court to adopt in all things Judge Kaplan’s recommendation of dismissal on the basis of non-compliance with 28 U.S.C. §§ 1692 and 754, to dismiss this case with prejudice to any refiling of same, to tax any and all costs of court to the Receiver, and for such other and further relief to which Defendants are justly entitled.

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 31st day of July, 2000 a true and correct copy of the foregoing document was served by certified mail, return receipt requested to Receiver Michael Quilling in compliance with the Federal Rules of Civil Procedure.



TODD RAMSEY