

1 Charlie Y. Chou (SBN 248369)
2 **KESSENICK GAMMA LLP**
3 1 Post Street, Suite 2500
4 San Francisco, CA 94014
5 Telephone: (415) 568-2016
6 Facsimile: (415) 362-9401
7 cchou@kessenick.com

8 Attorneys for Defendant Gary Bowen

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11 MARK CHRISTOPHER TRACY, an
12 individual,

13 Plaintiff,

14 v.

15 COHNE KINGHORN, PC, a Utah professional
16 corporation; SIMPLIFI CO., a Utah
17 corporation; JEREMY COOK, a Utah resident;
18 ERIC HAWKS, a Utah resident; JENNIFER
19 HAWKES, a Utah resident; MICHAEL
20 HUGHES, a Utah resident; DAVID
21 BRADFORD, a Utah resident; KEM
22 GARDNER, a Utah resident; WALTER
23 PLUMB, a Utah resident; DAVID BENNION,
24 a Utah resident; R. STEVE CREAMER, a Utah
25 resident; PAUL BROWN, a Utah resident; and
26 GARY BOWEN, a Utah resident,

27 Defendants.

Case No. 23CV423435

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SPECIALLY APPEARING DEFENDANT
GARY BOWEN'S MOTION TO QUASH
SERVICE OF SUMMONS AND
COMPLAINT FOR LACK OF PERSONAL
JURISDICTION AND MOTION TO
DISMISS FOR INCONVENIENT FORUM**

Date:

Time:

Dept: 6

Judge: The Honorable Evette D. Pennypacker

1 Specially appearing defendant Gary Bowen (“Bowen”) submits this *Memorandum of Points*
2 *and Authorities in Support of Specially Appearing Defendant Gary Bowen’s Motion to Quash*
3 *Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for*
4 *Inconvenient Forum.*

5 **I. INTRODUCTION**

6 The Court lacks personal jurisdiction over specially appearing defendant Gary Bowen
7 (“Bowen”) because Bowen is a resident of the State of Utah, is not a resident of the State of California,
8 and Plaintiff’s claims against Bowen allege facts occurring exclusively in the State of Utah. Plaintiff
9 cannot meet his burden of proof in establishing that Bowen has the requisite contact with California
10 sufficient to establish personal jurisdiction. In the alternative, because all the events identified in the
11 Complaint allegedly occurred in Utah, Bowen respectfully requests that the Court should find that in the
12 interest of substantial justice, this action should be dismissed on the ground of inconvenient forum.

13 Plaintiff has spent years fighting a spurious battle with a Utah governmental entity and its
14 members, officers and attorneys in Utah courts. The Utah entity at issue – the Emigration Canyon
15 Improvement District, or “EID” for short – is a small public entity that has authority to provide
16 water and sewer service to residents within Emigration Canyon, which is located in Salt Lake
17 County, Utah. Plaintiff has, in fact, filed so many meritless claims in Utah concerning the EID and
18 its officers that a Utah court has declared Plaintiff to be a “vexatious litigant,” which precludes him
19 from filing suit in Utah state courts absent permission from the presiding Judge of Utah’s Third
20 District Court in and for Salt Lake County. Declaration of Gary Bowen In Support of Memorandum
21 of Points and Authorities (“Bowen Decl.”), ¶ 4 and Ex. A.

22 In an attempt to circumvent his vexatious litigant bar, Plaintiff had now filed a lawsuit in
23 this Court that alleges all the same issues and complaints that Plaintiff has previously alleged in his
24 multiple Utah lawsuits. While there are several problems with this filing, the most immediate is
25 that none of the Defendants, including Bowen, reside in or have any significant connection with the
26 State of California, let alone Santa Clara County. Plaintiff did not name the EID (the entity he
27
28

1 directs his allegations toward), but numerous individuals affiliated therewith, each of whom
2 Plaintiff acknowledges in his Complaint are residents of Utah, including Bowen.

3 As a result, this Court lacks personal jurisdiction over Bowen. Alternatively, this is the
4 improper forum for a dispute that relates only to Utah residents and their purported actions that took
5 place in Utah. Accordingly, Bowen request that this Court dismiss this action.

6 **II. RELEVANT FACTS RELATING TO JURISDICTION**

7 1. Plaintiff's Complaint names thirteen defendants, each of whom Plaintiff specifically
8 acknowledges is a resident of or resides in Utah. *See* Complaint, ¶¶ 7-19.

9 2. Bowen is a resident of Utah and does not have any residential or business
10 connections with California. Bowen Decl., ¶ 3.

11 3. Plaintiff sets forth no allegation that any of the defendants, including Bowen, had
12 any tie to or connection with the State of California.

13 4. Plaintiff makes only two arguments why the Court should exercise jurisdiction.
14 First, Plaintiff alleges that false and defamatory statements were made on the Emigration Canyon
15 Improvement District ("EID") website, <https://www.ecid.org>, and that EID's website is published
16 on a platform in California and routed through San Jose, California. Second, Plaintiff alleges
17 defendants published false and defamatory statements for purposes of obtaining continued payment
18 of monies from property owners residing in California. Complaint, para 21.

19 5. However, while the Complaint references EID and its website, <https://www.ecid.org>,
20 the Complaint does not name EID as a party, and there is no allegation that Bowen published
21 anything on the EID website.

22 6. Likewise, the only entity that receives any payment of monies from property owners
23 is EID.

24 7. As described in the very website cited in the Complaint, EID is a small public entity
25 that has authority to provide water service to residents within Emigration Canyon, which is located
26 in Salt Lake County, Utah. *See id.*

27 //

1 8. Thus, Plaintiff’s argument is that this Court has jurisdiction because defendants
2 allegedly published false and defamatory statements against Plaintiff so that EID, which is a public
3 entity and not a party, could obtain continued payments of property taxes and water usage fees from
4 property owners in Emigration Canyon, Utah, which property owners also happen to own property
5 or reside in California. *See id.*

6 9. Not only is it a ridiculous assertion that defendants published allegedly false and
7 defamatory statements against Plaintiff to somehow assist EID in collecting property taxes and
8 water usage fees, there is no possible basis for the Court to have jurisdiction over the defendants
9 because some property owners in Emigration Canyon who pay taxes and fees to EID also have
10 property in California.

11 10. The Complaint fails to allege that any named defendants, including Bowen, have
12 sufficient contacts to enable this Court to obtain personal jurisdiction over said defendants. *See*
13 *Complaint.*

14 11. Plaintiff has filed this lawsuit in California because he has been barred from filing
15 any further actions in the State of Utah. *See Decision and Order Denying Motion to Vacate,*
16 *Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious*
17 *Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* (the “Vexatious Litigant
18 Order”). A copy of the Vexatious Litigant Order is attached as **Exhibit A** to the Declaration of
19 Gary Bowen.

20 **III. ARGUMENT**

21 **A. California Code of Civil Procedure § 418.10(a)(1) – Lack of Personal Jurisdiction**

22 Pursuant to California Code of Civil Procedure § 418.10(a)(1), a defendant may move the
23 court for an order to quash service of summons on the ground of lack of personal jurisdiction.
24 “When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of
25 proof by a preponderance of the evidence to demonstrate that the defendant has sufficient minimum
26 contacts with the forum state to justify jurisdiction.” *DVI, Inc. v. Superior Court* (2002) 104
27 Cal.App.4th 1080, 1090. The plaintiff must present facts demonstrating that the conduct of the
28

1 defendants related to the pleaded cause of action is sufficient to constitute constitutionally
2 cognizable “minimum contacts.” *Id.* Mere conclusory jurisdictional allegations are insufficient to
3 make this showing. *BBA Aviation PLC v. Superior Court* (2010) 190 Cal.App.4th 421, 429.

4 Under California’s long-arm statute, California state courts may exercise jurisdiction over
5 nonresident defendants only if doing so would be consistent with the “Constitution of this state
6 [and] of the United States.” Code of Civil Procedure § 410.10. The statute “manifests an intent to
7 exercise the broadest possible jurisdiction limited only by constitutional considerations.” *Sibley v.*
8 *Superior Court* (1976) 16 Cal.3d 442, 445. Accordingly, California’s long-arm statute allows state
9 courts and local federal courts to exercise personal jurisdiction on any basis allowable under the
10 Due Process Clause of the 5th Amendment. *Ratcliffe v. Pedersen* (1975) 51 Cal.App.3d 89, 91.

11 The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant
12 if the defendant has sufficient “minimum contacts” with the forum such that “maintenance of the
13 suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co.*
14 *v. Washington* (1945) 326 U.S. 310, 316. “The substantial connection between the defendant and
15 the forum state necessary for a finding of minimum contacts must come about by an action of the
16 defendant purposefully directed toward the forum State.” *Asahi Metal Industry Co. v. Superior*
17 *Court* (1987) 480 U.S. 102, 112. “Personal jurisdiction is not determined by the nature of the
18 action, but by the legal existence of the party and either its presence in the state or other conduct
19 permitting the court to exercise jurisdiction over the party.” *Greener v. Workers’ Comp. Appeals*
20 *Bd.* (1993) 6 Cal.4th 1028, 1035. “Personal jurisdiction may be either general or specific.” *Vons*
21 *Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445. A nonresident defendant is
22 subject to a forum’s general jurisdiction when the defendant’s contacts are substantial continuous
23 and systematic. *Id.* Such conduct must be so wide ranging that the defendant is essentially
24 physically present within the forum. *DVI*, 104 Cal.App.4th at 1090.

25 Absent such contacts, a defendant may be subject to specific personal jurisdiction if: (1)
26 “the defendant has purposefully availed himself or herself of forum benefits” with respect to the
27 matter in controversy, (2) the “controversy is related to or arises out of the defendant’s contacts

1 with the forum” and (3) the exercise of jurisdiction would “comport with fair play and substantial
2 justice.” *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (internal quotations omitted)
3 *citing Vons*, 14 Cal.4th at 446. The difference between specific and general jurisdiction is that
4 specific jurisdiction requires the litigation to arise out of the defendant’s conduct with the forum.
5 *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) 582 U.S. 255, 262 (“In other
6 words, there must be an affiliation between the forum and the underlying controversy, principally,
7 an activity or occurrence that takes place in the forum State and is therefore subject to the State’s
8 regulation.”) (internal quotations omitted).

9 The purposeful availment inquiry focuses on the defendant’s “intentionality” and is satisfied
10 “when the defendant purposefully and voluntarily directs his activities toward the forum so that he
11 should, expect by virtue of the benefit he receives, to be subject to the court’s jurisdiction based on
12 his contacts with the forum.” *Pavlovich*, 29 Cal.4th at 269 . The purposeful availment requirement
13 is intended to ensure a defendant will not be hauled into a jurisdiction solely as a result of “random,
14 fortuitous, or attenuated” contacts, or as a result of the “unilateral activity” of another party or third
15 person. *Id.* Purposeful availment asks whether the defendant’s “conduct and connection with the
16 forum State are such that he should reasonably anticipate being hauled into court there.” *World-
17 Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297. For the purpose of determining
18 personal jurisdiction, each defendant’s contacts with the forum state must be assessed individually.
19 *Calder v. Jones*, (1984) 465 U.S. 783, 790.

20 Plaintiff’s Complaint admits that Bowen is a Utah resident. Complaint, ¶ 19. Plaintiff’s
21 sole allegations against Bowen are that in November 2018, Bowen sent an email to Utah local press
22 and an email to Deputy Utah State Engineer Boyd Clayton. *Id.*, ¶¶ 74, 75.

23 Not only are the alleged email correspondence from approximately five years ago outside
24 any possible statute of limitation for a defamation claim, as an individual residing in Utah, Bowen
25 has not made any substantial, continuous and systematic contact with the State of California. The
26 Complaint does not identify any conduct directed at the State of California. Accordingly, the
27 Complaint fails to establish general jurisdiction as a basis for the Court’s personal jurisdiction.

1 Additionally, the Complaint fails to allege any facts establishing that Bowen purposefully
2 availed himself of the benefits of this forum or that this litigation arises from Bowen’s contact with
3 California, if any. The Complaint identifies no basis for specific personal jurisdiction in California.
4 Additionally, even if the alleged emails were sent to a resident of California, which they were not, it
5 is well established that this would be insufficient to confer personal jurisdiction. *Axiom Foods, Inc.*
6 *v. Acerchem International, Inc.* (9th Cir. 2017) 874 F.3d 1064, 1070 (holding that newsletters and
7 emails not specifically targeted at California were insufficient to establish minimum contact with
8 California); *Gray & Co., v. Firstenberg Machinery Co., Inc.* (9th Cir. 1990) 913 F.2d 758, 760-61
9 (holding that phone calls and mailing invoices to a resident was insufficient contact with a forum to
10 establish personal jurisdiction); *Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, 16 (adopting
11 the Seventh Circuit’s reasoning that sending email blasts failed to show a relation between the
12 defendant and the forum).

13 Based on the foregoing, Plaintiff’s Complaint fails to allege any conduct whatsoever by
14 Bowen in, directed to, or related to the State of California. Accordingly, the Court lacks personal
15 jurisdiction over Bowen. Bowen respectfully requests that the Court quash service of summons and
16 complaint in this action pursuant to California Code of Civil Procedure 418.10(a)(1).

17 **B. California Code of Civil Procedure § 418.10(a)(2) – Inconvenient Forum**

18 In the alternative, Bowen respectfully requests that the Court dismiss this action on the
19 grounds of inconvenient forum pursuant to California Code of Civil Procedure 418.10(a)(2).
20 California Code of Civil Procedure 418.10(a)(2) “permits a defendant challenging jurisdiction to
21 object on inconvenient forum grounds if the defendant’s challenge to jurisdiction should be
22 denied.” *Global Financial Distributors, Inc. v. Superior Court* (2019) 35 Cal.App.5th 179, 190
23 (internal quotations omitted). Forum *non conveniens* is an equitable doctrine, under which a court
24 within its discretionary power may decline to exercise jurisdiction over a cause of action when the
25 action may be more appropriately and justly tried elsewhere. *Id.* The Court must balance several
26 factors including the availability of a suitable alternative forum, the private interests of the litigants
27 and the public interest of the forum state. *Cal-State Business Products & Services, Inc., v. Ricoh*

1 (1993) 12 Cal.App.4th 1666, 1675.

2 In the present action, the interests of justice support the dismissal of this action on the
3 grounds of inconvenient forum. Each of the named Defendants in this action, including Bowen, are
4 residents of Utah, not California. The Complaint does not allege that any Defendant conducted
5 business in California or had any contact with California. Further, Plaintiff's claims arise from
6 alleged conduct occurring exclusively in Utah. There are no facts in the Complaint that would
7 indicate that the residents of California would benefit from the litigation of matters arising
8 exclusively in Utah in a California Court. The circumstances of this action demonstrate that Utah is
9 the more appropriate forum to adjudicate this action.

10 Based on the foregoing, Bowen respectfully requests that if the Court grants Bowen's
11 motion to quash service for lack of personal jurisdiction, or in the alternative, the Court dismiss this
12 action under California Code of Civil Procedure 418.10(a)(2) on the ground of inconvenient forum.

13 **CONCLUSION**

14 This Court lacks personal jurisdiction over Bowen because he is a resident of Utah and has no
15 connection to the State of California. Further, Plaintiff's claims against Bowen arise from alleged
16 conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should
17 quash service of process and complaint in this action for lack of personal jurisdiction under California
18 Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action pursuant
19 to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

20
21 DATED: November 28, 2023

KESSENICK GAMMA LLP

22
23 By: 

24 Charlie Y. Chou
25 Attorneys for Defendant Gary Bowen
26
27
28