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10 Bowen

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA

13 MARK CHRISTOPHER TRACY, an
14 individual,

15 Plaintiff,

16 v.

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

Defendants.

Case No. 23CV423435

**REPLY MEMORANDUM 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: January 11, 2024

Time: 9:00 a.m.

Dept: 6

Judge: The Honorable Evette D. Pennypacker

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

5
6 **I. INTRODUCTION**

7 In his *Memorandum and Points of Authority in Support of Opposition to Defendant Bowen’s*
8 *Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion*
9 *to Dismiss for Inconvenient Forum* (the “Opposition”), plaintiff Mark Christopher Tracy
10 (“Plaintiff”) does not provide any evidence or make any arguments as to why this Court has
11 jurisdiction over Bowen. Instead, Plaintiff argues that the Motion should be denied based on two
12 technical grounds. First, Plaintiff argues that that the Motion is without evidentiary support
13 because Bowen failed to execute his declaration under penalty of perjury pursuant to the laws of the
14 State of California. Second, Plaintiff argues that the Motion should be denied because the hearing
15 was not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). Neither of
16 these arguments have any merit.

17
18 The instant action is, in fact, nothing more than Plaintiff’s continued obsession with
19 harassing defendants over the development of a relatively small residential neighborhood and a
20 public drinking water system in Emigration Canyon, Utah over 25 years ago. Complaint, ¶ 37.
21 Plaintiff does not live in Emigration Canyon and does not own any real estate in Emigration
22 Canyon, so it is unclear why Plaintiff has harbored a decade long obsession with bringing frivolous
23 litigation against anyone that has ever had any association with Emigration Improvement District or
24 development in Emigration Canyon. However, what is clear is that there is no merit to his claims,
25 and certainly no basis for Plaintiff to bring an action against defendants in California. In paragraph
26
27

1 61 of the Complaint, Plaintiff alleges that “[t]he above-listed allegations were filed in United States
2 Federal District Court of Utah on September 26, 2014, under the False Claims Act (the “FCA
3 Litigation”).” See *USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al.*,
4 2:14-cv-00701. In other words, almost all the substantive allegations in the Complaint are just a
5 recital of allegations and issues that Plaintiff has alleged in previous litigation in Utah. On October
6 29, 2021, the Utah Federal District Court Judge Parrish issued an *Order Granting in Part and
7 Denying in Part Defendants’ Motion for Attorneys’ Fees and Cost and Granting Defendants’
8 Motion to Amend* in the FCA Litigation (the “FCA Attorney Fee Order”). *Id.*, Docket No. 342. In
9 the FCA Attorney Fee Order, Judge Parrish found: “Thus, having found that Tracy’s actions were
10 both clearly vexatious and brought for the purpose of harassment, the court need not reach the
11 question of whether Tracy’s claim was clearly frivolous.” Based on the finding, Judge Parrish
12 awarded defendants \$92,665 in attorneys’ fees and costs for expenses against Plaintiff, none of
13 which have been paid. Plaintiff has also been deemed a vexatious litigant by Utah state courts
14 based on his frivolous and vexatious actions against defendants in Utah state court.

17 **II. ARGUMENT**

18 **A. Any Defect in the Bowen Declaration Does Not Justify Denial of the Motion.**

19 Plaintiff first argues that that the Motion is without evidentiary support because Bowen
20 failed to execute his declaration under penalty of perjury pursuant to the laws of the State of
21 California. Bowen, however, filed an Amended Declaration which was identical to his original
22 declaration, but which was under penalty of perjury pursuant to the laws of the State of California.
23 Thus, any defect was corrected and does not serve as a basis to deny the motion.
24

25 Moreover, even if the original Bowen Declaration was defective, when a defendant moves
26 to quash service of process based on lack of personal jurisdiction, “[t]he plaintiff has the initial
27

1 burden of demonstrating facts justifying the exercise of jurisdiction.” *Pavlovich v. Superior Court*
2 (2002) 29 Cal.4th 262, 273 (Pavlovich); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14
3 Cal.4th 434, 449 (Vons). Only when a plaintiff carries that burden does it then shift to the defendant
4 to demonstrate that the court's exercise of personal jurisdiction over it would be unfair or
5 unreasonable. (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Vons*, supra, at pp. 447-
6 448.).

7
8 Plaintiff has failed to articulate any facts that would justify the exercise of jurisdiction.
9 Plaintiff acknowledges in his Complaint that Mr. Bowen is a resident of Utah, and Plaintiff’s sole
10 allegations against Bowen are that Bowen sent an email to Utah local press and an email to Deputy
11 Utah State Engineer Boyd Clayton in November 2018 (Complaint, ¶¶ 19, 74 and 75). Plaintiff does
12 not even attempt to argue in his Opposition how these facts support jurisdiction, and Plaintiff does
13 not make any substantive arguments in his Opposition in response to the Motion.
14

15 Finally, Bowen moved to quash for both lack of jurisdiction under California Code of Civil
16 Procedure § 418.10(a)(1) and inconvenient forum under California Code of Civil Procedure §
17 418.10(a)(2). As Plaintiff alleges in the Complaint, all of the general allegations in this Complaint
18 were also included in a False Claim Act case that Plaintiff previously filed against almost the
19 identical defendants in the United States Federal District Court for the District of Utah. Complaint
20 ¶ 61; see also *USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al.*, 2:14-
21 cv-00701. All of the general allegations relate solely to Emigration Canyon in Utah and issues
22 related to development in Emigration Canyon, and the allegations have been repeated by Mr. Tracy
23 in multiple lawsuits in Utah that have been found to be frivolous, vexatious and harassing.
24

25 Plaintiff failed to make any argument in response to Bowen’s motion to quash for inconvenient
26 forum, which is not contingent upon the Bowen Declaration and serves as an alternative ground for
27

1 the Court to grant the Motion.

2 Accordingly, Plaintiff's contention that the Court should deny the Motion based on an
3 alleged defect in the Bowen Declaration is without merit.

4 **B. California Court's Do Not Require a Hearing Within 30 Days.**

5 Plaintiff's only other argument is that the Motion should be denied because the hearing was
6 not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). However,
7 despite the statute's use of the word "shall," courts have not construed Code of Civil Procedure
8 section 418.10, subdivision (b), to impose a mandatory requirement that a hearing be noticed or
9 held within 30 days.
10

11 In *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286 (Olinick), for instance, the
12 defendant filed the notice of its motion to stay or dismiss based on inconvenient forum, pursuant to
13 Code of Civil Procedure section 418.10, subdivision (a), on May 4, 2004. (*Olinick*, supra, at p.
14 1295.) It then designated a hearing date of July 1, and the parties later stipulated to move the date to
15 July 21, which the trial court approved. (*Ibid.*) The Court of Appeal rejected the plaintiff's
16 arguments that a mandatory 30-day timeline governs the motion and that "by failing to designate a
17 hearing date within the 30-day period, [defendant] waived its right to bring the motion under [Code
18 of Civil Procedure] section 418.10." (*Id.* at p. 1296.)
19

20 The Court of Appeal noted that subdivision (a) of the statute provides that "[a] defendant,
21 on or before the last day of his or her time to plead or within any further time that the court may for
22 good cause allow, may serve and file a notice of motion" (*Olinick*, supra, 138 Cal.App.4th at
23 p. 1296, quoting Code Civ. Proc., § 418.10, subd. (a).) It explained that, "the statute reflects the trial
24 court is authorized to extend the time for filing such a motion" (*Olinick*, supra, at p. 1296), and
25 cited with approval treatise language stating that "[s]cheduling a hearing date beyond 30 days
26
27

1 should not invalidate a motion to quash. Nothing in [Code of Civil Procedure section] 418.10
2 suggests the court must overlook the lack of personal jurisdiction or proper service because of a
3 defendant's failure to schedule a hearing date within 30 days." (*Ibid.*, quoting *Weil & Brown, Cal.*
4 *Practice Guide: Civ. Proc. Before Trial* (The Rutter Group 2005) ¶ 3:381.) The court therefore
5 rejected the argument that a "tardy hearing date on a motion to stay or dismiss under section 418.10
6 deprives the trial court of jurisdiction to consider the merits of the motion." (*Olinick, supra*, at p.
7 1296.)

8
9 Similarly, in *Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, the
10 Court of Appeal rejected the same argument in the context of a motion to quash that was noticed for
11 hearing 99 days after filing because that was the first available court date. (*Id.* at p. 972.) Citing
12 *Olinick*, the court held that "'a tardy hearing date on a motion . . . under [Code of Civil Procedure]
13 section 418.10' does not `deprive[] the trial court of jurisdiction to consider the merits of the
14 motion.'" (*Id.* at p. 969, fn. 4, quoting *Olinick, supra*, 138 Cal.App.4th at p. 1296; *Edmon &*
15 *Karnow, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2022) ¶ 3:381
16 ["scheduling a hearing date beyond 30 days does not invalidate the motion"].).

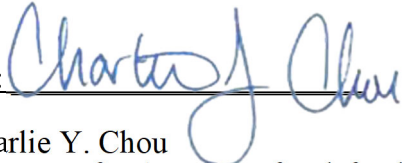
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18 In this case, the Court noticed the hearing at the first available date. Clearly, a defendant
19 cannot be subject to jurisdiction of the Court simply because the earliest available hearing date was
20 more than 30 days out.

21 22 CONCLUSION

23 This Court lacks personal jurisdiction over Bowen, and any of the other defendants, because all
24 the individual Defendants are residents of Utah and both entities are Utah corporations without offices
25 or a presence in California. Further, Plaintiff's claims against Defendants arise from alleged conduct
26 occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash
27

1 service of process and complaint in this action against all the defendants for lack of personal jurisdiction
2 under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss
3 this action against all the defendants pursuant to California Code of Civil Procedure § 418.10(a)(2)
4 based on inconvenient forum.
5

6
7 DATED: January 4, 2024. **KESSENICK GAMMA LLP**

8 By: 

9 Charlie Y. Chou
10 Attorneys for Attorneys for defendants Cohne Kinghorn,
11 P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes,
12 Jennifer Hawkes, Michael Scott Hughes, David Bradford,
13 David Bennion and Gary Bowen
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1 **PROOF OF SERVICE**

2 *Tracy v. Cohne Kinghorn, et al.,*
3 *Santa Clara County Superior Court Case No. 23CV423435*

4 I, Sarah Nguyen, state: My business address is 1 Post Street, Suite 2500, San Francisco, CA
5 94104. I am employed in the City and County of San Francisco where this service occurs or
6 mailing occurred. The envelope or package was placed in the mail at San Francisco, California. I
7 am over the age of eighteen years and not a party to this action. On January 4, 2024, I served the
8 following documents described as:

9 **REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANT
10 GARY BOWEN’S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT
11 FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR
12 INCONVENIENT FORUM**

13 on the following person(s) in this action addressed as follows:

14 Mark Christopher Tracy
15 1130 Wall Street, # 561
16 La Jolla, CA 92037
17 Email: m.tracy@echo-association.com
18 Email: mark.tracy72@gmail.com

19 Nicholas C. Larson
20 Miguel E. Mendez-Pintado
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28 *Attorneys for Defendant PAUL BROWN*

1 X **BY FIRST CLASS MAIL:** I am readily familiar with my firm’s practice for
2 collection and processing of correspondence for mailing with the United States Postal
3 Service, to-wit, that correspondence will be deposited with the United States Postal
4 Service this same day in the ordinary course of business. I sealed said envelope and
5 placed it for collection and mailing on January 4, 2024, following ordinary business
6 practices.

7 X **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties
8 to accept service by electronic transmission on January 4, 2024, I caused the
9 documents to be sent to the person(s) at the electronic notification address(es) listed
10 above. Within a reasonable time, the transmission was reported as complete and
11 without error.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct and that this declaration was executed this date at San Francisco,
14 California.

15 Dated: January 4, 2024

16 
17 _____
18 Sarah Nguyen