

1 Nicholas C. Larson - 275870  
2 [NLarson@mpbf.com](mailto:NLarson@mpbf.com)  
3 Miguel E. Mendez-Pintado - 323372  
4 [MMendezpintado@mpbf.com](mailto:MMendezpintado@mpbf.com)  
5 MURPHY, PEARSON, BRADLEY & FEENEY  
6 520 Pike Street, Suite 1205  
7 Seattle, WA 98101  
8 (206) 219-2008 - Main  
9 (206) 489-5101 – Fax

6 Mark Shem, Esq. – 152860  
7 [MShem@bortonpetrini.com](mailto:MShem@bortonpetrini.com)  
8 Borton Petrini, LLP  
9 95 South Market Street, Suite 400  
10 San Jose, CA 95113  
11 (408)535-0870  
12 Attorneys for Defendant  
13 PAUL BROWN

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF SANTA CLARA**  
13

14 MARK CHRISTOPHER TRACY, an  
15 individual,

16 Plaintiff,

17 v.

18 COHNE KINGHORN PC, a Utah Professional  
19 Corporation; SIMPLIFI COMPANY, a Utah  
20 Corporation; JEREMY RAND COOK, an  
21 individual; JENNIFER HAWKES, an  
22 individual; MICHAEL SCOTT HUGHES, an  
23 individual; DAVID BRADFORD, an individual;  
24 KEM KROSBY GARDNER, an individual;  
25 WALTER J. PLUMB III, an individual; DAVID  
26 BENNION, an individual; R. STEVE  
27 CREAMER, an individual PAUL BROWN, an  
28 individual; GARY BOWEN, an individual,

Defendants.

Case No.: 23CV423435

**SPECIALY APPEARING DEFENDANT  
PAUL BROWN'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

Date: March 26, 2024  
Time: 9:00 A.M.  
Dept: 6  
Judge: The Honorable Evette D.  
Pennypacker

26 //  
27 //  
28 //

1 **I. INTRODUCTION**

2 Plaintiff brings this motion requesting that the Court reconsider its February 21, 2024, Order  
3 Granting Motions to Quash. Specially Appearing Defendant Paul Brown (“Brown”) respectfully  
4 requests that the Court deny Plaintiff’s Motion for Reconsideration. Plaintiff’s Motion for  
5 Reconsideration is procedurally defective under Code of Civil Procedure § 1008 and should be denied  
6 because: (1) it is not based on any “new or different facts, circumstances or law”; and (2) Plaintiff has  
7 not offered any satisfactory explanation for his failure to present the allegedly new information and  
8 arguments at the Court’s initial hearing on the Motions to Quash. Plaintiff’s Motion is nothing more  
9 than an attempt to re-argue the same factual allegations he already advocated unsuccessfully to this  
10 Court on the Motions to Quash and unsuccessfully litigated before both the state and federal courts in  
11 Utah.

12 Plaintiff’s Motion for Reconsideration fails to provide any procedural or substantive basis for  
13 the Court to reverse its Order on Motions to Quash and should therefore be denied.

14 **II. FACTUAL BACKGROUND**

15 Plaintiff filed this action alleging causes of action for defamation, false light, and intentional  
16 infliction of emotional distress. (See, Complaint at ¶¶ 79-111.) However, the primary factual  
17 allegations of Plaintiff’s Complaint relate to the Emigration Canyon Improvement District (“EID”),  
18 located in Utah, and allegedly fraudulently obtained water rights in Utah. A majority of Plaintiff’s  
19 claims arise from the alleged conduct of the “Emigration Oaks Defendants” – identified in the  
20 Complaint as Kem Crosby Gardner, Walter J. Plumb III and David M. Bennion – and EID. (Complaint  
21 at ¶¶ 24-78.) EID is a small public entity that has the authority to provide water and sewer service to  
22 residents within Emigration Canyon, which is located in Salt Lake County, Utah. Plaintiff  
23 acknowledges that Brown is a resident of Utah. (Complaint at ¶ 18.) Plaintiff also acknowledges that  
24 the alleged conduct in this action occurred in Utah in connection with EID. (Complaint at ¶¶ 65-78.)  
25 Further, the only allegation that Plaintiff raised against Brown is that Brown, a Utah resident, allegedly  
26 sent an email to the residents of Emigration Oaks Public Utility District (“PUD”) – a residential PUD  
27 in Utah. (Complaint at ¶¶ 23, 76).

28 //



1 offering it earlier. (*Gilberd v. AC Transit*, 32 Cal.App.4th 1494, 1500 (1995) [Claim that trial court  
2 misinterpreted state law in its initial decision did not establish that motion to reconsider was based  
3 upon new or different facts, circumstances or law]; *Baldwin v. Home Sav. of America*, 59 Cal.App.4th  
4 1192, 1198 (1997) [Opinion issued two years before trial court’s initial ruling on plaintiff’s motion for  
5 attorney fees could have been provided to trial court prior to that ruling, and did not provide “new”  
6 facts to authorize reconsideration].)

7         The burden under Section 1008 “is comparable to that of a party seeking a new trial on the  
8 ground of newly discovered evidence: the information must be such that the moving party could not,  
9 with reasonable diligence, have discovered or produced it at the trial. (*New York Times Co. v. Sup. Ct.*,  
10 135 Cal.App.4th 206, 212-13 (2005) [Trial court erred in granting motion for reconsideration of  
11 summary judgment order where motion was based on evidence known to or available to the party  
12 seeking reconsideration before the summary judgment hearing].)

13         A party seeking reconsideration of a prior order based on “new or different facts, circumstances  
14 or law” must provide a satisfactory explanation for failing to present the information at the first  
15 hearing; **i.e., a showing of reasonable diligence**. (*Garcia v. Hejmadi*, 58 Cal.App.4th 674, 690 (1997)  
16 [Movant was not entitled to vacation of summary judgment as matter of law, on claims that there was  
17 evidence showing triable issues of fact not presented in initial opposition, where the information was  
18 known to the attorney at time of initial opposition, and he provided no explanation of why it was not  
19 presented at that time]; *California Correctional Peace Officers Ass’n v. Virga*, 181 Cal.App.4th 30, 47  
20 (2010) [In a renewed motion for attorney’s fees treated as a motion for reconsideration under Section  
21 1008, the trial court acted within its discretion in concluding that state agencies had no satisfactory  
22 reason for not presenting their legal theory that they were entitled to attorney fees in a previous motion  
23 for fees.] “According to the plain language of the statute, a court acts in excess of jurisdiction when it  
24 grants a motion to reconsider that is not based upon “new or different facts, circumstances, or law.”  
25 (*Gilberd*, 32 Cal.App.4th at 1500.)

26 //

27 //

28 //

1           **1. Plaintiffs’ Motion for Reconsideration is not based on any “new or different facts,**  
2           **circumstances or law”**

3           Motions for reconsideration are properly denied where they are based on evidence that *could*  
4 *have been* presented in connection with the original motion. (*Morris v. AGFA Corp.*, 144 Cal.App.4th  
5 1452, 1460 (2006); *Hennigan v. White*, 199 Cal.App.4th 395, 405-406 (2011).) In *Morris*, the  
6 California Court of Appeal affirmed the trial court’s denial of a motion for reconsideration based upon  
7 a physician’s declaration that “could have been presented with the original motion” and was thus not a  
8 proper basis for reconsideration. (*Morris*, 144 Cal.App.4th at 1460, 1468.) Similarly, in *Hennigan*, the  
9 California Court of Appeals affirmed the trial court’s denial of a motion for reconsideration because  
10 the new declarations consisted of information the moving party was aware of at the time of filing and  
11 arguing the original motion. (*Hennigan*, 199 Cal.App.4th at 405-06.)

12           New law is case law that was decided, or statutory law that was enacted after the court took the  
13 underlying motion under submission. (*See, e.g., In re Marriage of Oropallo*, 68 Cal.App.4th 997,  
14 1001-02; *Baldwin*, 59 Cal.App.4th at 1196 [two-year-old case law was not new law because it could  
15 have been provided to the court before ruling].) “Different law” is case law or statutory law that  
16 existed when the court took the motion under submission but was not asserted by the parties. (*Baldwin*,  
17 59 Cal.App.4th at 1196). To establish “different law” as a ground for relief, the movant must show that  
18 it exercised reasonable diligence in researching and presenting all relevant legal arguments and  
19 persuasive authority in the underlying motion. (*Even Zohar Construction & Remodeling, Inc. v.*  
20 *Bellaire Townhouse, LLC*, 61 Cal.4th 830, 839 (2015).) Disagreeing with the court’s decision or  
21 arguing that the court “misinterpreted” law is insufficient to establish new or different law under  
22 Section 1008. (*Gilbred*, 32 Cal.App.4th at 1500.) Further, on a motion for reconsideration the plaintiff  
23 is required to demonstrate how the new or different law, fact or circumstance affected the merits of the  
24 case. (*Id.*)

25           **a. Plaintiff’s Motion fails to identify any new or different law.**

26           Plaintiff’s Motion for Reconsideration is procedurally improper because it fails to identify any  
27 new or different facts, law or circumstances that would warrant consideration of Plaintiff’s Motion.  
28 Plaintiff’s Motion does not allege any new or different facts related to Brown. Plaintiff’s only

1 argument related to Brown’s Motion to Quash relates to Plaintiff’s procedural challenges to the  
2 declarations filed in support of the Motion to Quash. Plaintiff’s argument is that pursuant to California  
3 Code of Civil Procedure § 472(a) the Court should not have considered the declarations filed in  
4 support of Brown’s Motion to Quash. Aside from being a misstatement of the law, Plaintiff’s argument  
5 fails because it is neither new nor would it affect the merits of Brown’s Motion to Quash.

6 First, the current version of California Code of Civil Procedure § 472 was effective as of  
7 January 1, 2021 – over three years prior to the hearing on Brown’s Motion to Quash. Accordingly,  
8 Section 472 is not considered new or different law. Additionally, Plaintiff fails to identify why this  
9 argument was not raised in opposition to or during the hearing regarding Brown’s Motion to Quash.  
10 Accordingly, because Plaintiff does not cite to new law, the Court should not consider Plaintiff’s legal  
11 argument.

12 Even if the Court were to consider Plaintiff’s legal argument, Plaintiff’s argument is deficient  
13 and would have no impact on the merits of the Court’s Order. Plaintiff cites to California Code of Civil  
14 Procedure § 472(a) which discusses the procedure for amending pleadings. “[P]leadings are the formal  
15 allegations by the parties of their respective claims and defenses, for the judgment of the Court.” (Code  
16 of Civil Procedure § 420.) Pleadings include “complaints, demurrers, answers, and cross-complaints.”  
17 (Code of Civil Procedure § 422.10). Declarations in support of motions are not considered pleadings  
18 subject to Section 472. Further, as the Court has already explained, the Court is vested with the  
19 discretion to consider additional evidentiary matter on reply when it poses no prejudice to the opposing  
20 party. (*Hahn v. Diaz-Barba*, 194 Cal.App.4th 1177, 1193 (2011).)

21 Even if Plaintiff’s argument were legally correct, which it is clearly not, Plaintiff’s argument  
22 would have no bearing on the merits of Brown’s Motion or the Court’s Order. “When a nonresident  
23 defendant challenges personal jurisdiction, the plaintiff bears the burden of proof by a preponderance  
24 of the evidence to demonstrate that the defendant has sufficient minimum contacts with the forum state  
25 to justify jurisdiction.” (*DVI, Inc. v. Superior Court*, 104 Cal.App.4th 1080, 1090 (2002).) The plaintiff  
26 must present facts demonstrating that the conduct of the defendants related to the pleaded cause of  
27 action is sufficient to constitute constitutionally cognizable “minimum contacts.” (*Id.*)

28 //

1 Plaintiff's complaint acknowledges that Brown is a resident of Utah, and the sole allegation  
2 against Brown relates to alleged communications in Utah between Utah residents. Accordingly, on the  
3 face of the Complaint, Plaintiff's allegations fail to allege sufficient minimum contacts to establish the  
4 Court's personal jurisdiction over Brown. Plaintiff has yet to submit any arguments or evidence that  
5 even purports to show that Brown had minimum contacts with the State of California.

6 **b. Plaintiff's Motion fails to identify any new or different facts or circumstances.**

7 Plaintiff's Motion for Reconsideration also generally argues that the Court did not allow  
8 Plaintiff to present evidence of allegedly uncontested facts. Plaintiff does not allege whether or how  
9 these alleged facts relate to Brown. Further, none of the facts identified in Plaintiff's Declaration relate  
10 to Plaintiff's claims against Brown or even purport to establish personal jurisdiction over Brown in  
11 California. However, to the extent that Plaintiff later argues that these "facts" relate to Plaintiff's  
12 claims against Brown, they are neither new nor different facts.

13 Plaintiff's Declaration cites to alleged facts from 1995-96 and 2018- September 2023.  
14 (Declaration of Mark Christopher Tracy In Support of Memorandum of Points of Authorities In  
15 Support of Motion to Reconsider Order Granting Defendant's Motions to Quash for Lack of Personal  
16 Jurisdiction ("Tracy Decl.") at ¶¶ 2-3, 6, 10, 12.) This alleged evidence is not "new" because it was  
17 accessible before Plaintiff filed his Opposition to Brown's Motion and before the hearing on the  
18 Motions to Quash. Plaintiff produces no evidence indicating that this alleged evidence was newly  
19 discovered or otherwise not accessible to Plaintiff before Brown's Motion to Quash.

20 In fact, Plaintiff's Declaration indicates that Plaintiff was aware of this information before the  
21 hearing on the Motions to Quash. For example, Paragraph 2 of Plaintiff's Declaration cites to  
22 information from a 1995 "Master's Thesis" which Plaintiff references in the Complaint. (Compare  
23 Tracy Decl. at ¶ 2 with Complaint at ¶ 26(e).) Additionally, Paragraph 3 of Plaintiff's Declaration  
24 expressly acknowledges that Plaintiff received that information in April 2018 – over five years before  
25 the hearing on the Defendants' Motions to Quash. (Tracy Decl. at ¶ 3.) Paragraphs 4 and 6 of  
26 Plaintiff's Declaration appear to cite to public records from the 1980s, 1996, and 2021, all of which  
27 would be available to Plaintiff before the hearing on the Motions to Quash. (*Id.* at ¶¶ 4-6.) Paragraphs  
28 5, 7, 8, of Plaintiff's Declaration cite to links and screenshots from the internet. (*Id.* at ¶¶ 5, 7, 8.)

1 However, Plaintiff fails to provide any information regarding when this information became available,  
2 why Plaintiff did not present these alleged facts sooner or whether Plaintiff was diligent in searching  
3 for these alleged facts. Next, Paragraph 10, states that Plaintiff obtained this information in September  
4 of 2023, well before the Motions to Quash were filed in this action. (*Id.* at ¶ 10.) Paragraphs 9, 11 and  
5 12 of Plaintiff’s Declaration raise alleged facts that Plaintiff already raised in the Complaint and are  
6 thus neither new nor different. (Compare Tracy Decl. at ¶¶ 9, 11-12 with Complaint ¶¶ 5, 26(d)-(f), 65-  
7 78.)

8 Further, as was discussed in Brown’s Motion for Order Finding Plaintiff to be a Vexatious  
9 Litigant, Plaintiff’s Declaration attempts to interject many of same factual allegations that Plaintiff  
10 raised before the Third District Court of the State of Utah and the United States District Court for the  
11 District of Utah. (Compare Tracy Decl. at ¶ 2, 11-12 with Declaration of Miguel Mendez-Pintado in  
12 Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and  
13 Entry of Prefiling Order at Ex. A at ¶¶ 14-19, 21-24; Exhibit D at ¶¶ 17, 25-26, 43-45; Exhibit F at ¶¶  
14 300-326.) Accordingly, because Plaintiff previously filed actions based on some of the same allegedly  
15 “new” facts and because the allegedly “new” facts were available for years prior to this litigation,  
16 Plaintiff clearly had access to these alleged facts before the hearing on the Motions to Quash. Plaintiff  
17 could have provided these alleged facts in Opposition to the Motions to Quash or during the Court’s  
18 hearing on the Motions to Quash. Plaintiff provides no explanation for why these alleged facts were  
19 not previously introduced.

20 Based on the foregoing, because Plaintiff’s alleged evidence is not new or different and could  
21 have been presented in connection with Plaintiff’s opposition to the original motion, the Court should  
22 deny Plaintiff’s Motion for Reconsideration. (*Morris*, 144 Cal.App.4th at 1460; *Henning*, 199  
23 Cal.App.4th at 405-06.)

24 Plaintiff’s Motion for Reconsideration is clearly not based on any “new or different facts,  
25 circumstances, or laws” as required by Section 1008. Rather, Plaintiff’s Motion for Reconsideration is  
26 really nothing more than an attempt to re-argue and expand upon the very same points that Plaintiff  
27 already advocated unsuccessfully to this Court in its initial hearing on the Motions to Quash. This  
28 alone renders Plaintiff’s Motion for Reconsideration procedurally defective and constitutes sufficient



1 grounds for the Court to deny the Motion.

2 **2. Plaintiff has failed to offer any satisfactory explanation or showing of reasonable**  
3 **diligence for the failure to present any supposedly new information at the time of the**  
4 **first hearing.**

5 Even if Plaintiff’s Motion presented new or different facts and law than those already argued  
6 before the Court, Plaintiff would be required to provide a satisfactory explanation for failing to present  
7 **the information at the first hearing, i.e., a showing of reasonable diligence.** (*Garcia*, 58 Cal.App.4th at  
8 690.) The court in *Gracia* was quite clear in discussing the critical importance of the reasonable  
9 diligence requirement of Section 1008:

10 Garcia’s argument, if accepted, would effectively eviscerate the threshold showing of  
11 diligence which has long required an “explanation” of why the “newly discovered” matter  
12 was not presented earlier. Garcia would have us say this requirement is met by anything  
13 not previously “presented” to the court. The miserable result would be to defeat the  
14 Legislature’s stated goal of reducing the number of reconsideration motions and would  
remove an important incentive for parties to effectively marshal their evidence.

15 (*Id.*, at 688-689.)

16 Plaintiff’s Motion for Reconsideration contains no explanation whatsoever – much less a  
17 showing of reasonable diligence – for his failure to present these supposedly “new” facts, evidence and  
18 legal arguments to the Court at the time of the first hearing on the Motions to Quash. That is because  
19 Plaintiff’s Motion is not, in fact, based upon any new facts or law, but rather is just a re-hash of the  
20 same facts and argument that Plaintiff’s already argued in Opposition to the Motions to Quash. And  
21 even if there was a particular point that wasn’t fully raised previously at the hearing, Plaintiff has not  
22 provided any compelling or statutorily viable, reason for this Court to reconsider such arguments now.

23 Plaintiff’s failure to make any showing whatsoever regarding his reasonable diligence in  
24 presenting the arguments raised in this Motion for Reconsideration, during the original hearing on the  
25 Motions to Quash is an additional reason that the Court should deny Plaintiff’s Motion for  
26 Reconsideration.

27 //

28 //

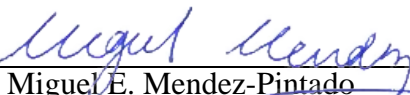
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IV. CONCLUSION**

As demonstrated herein, there is simply no basis, procedurally or substantively, for this Court to reconsider or alter its prior Order Granting Motions to Quash.

DATED: March 13, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By   
Miguel E. Mendez-Pintado  
Attorneys for Defendant  
PAUL BROWN

1 **CERTIFICATE OF SERVICE**

2 I, Joan E. Soares, declare:

3 I am a citizen of the United States, am over the age of eighteen years, and am not a party to or  
4 interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San  
5 Francisco, California 94104.

6 On March 13, 2024, I served the following document(s) on the parties in the within action:

7 **SPECIALLY APPEARING DEFENDANT PAUL BROWN’S OPPOSITION TO**  
8 **PLAINTIFF’S MOTION FOR RECONSIDERATION**

9 **XX** **VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to  
10 transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My  
email address is JSoares@mpbf.com.


11 Mark Christopher Tracy  
12 1130 Wall St #561  
13 La Jolla, CA 92037  
14 E-mail: [mark.tracy72@gmail.com](mailto:mark.tracy72@gmail.com)  
[m.tracy@echo-association.com](mailto:m.tracy@echo-association.com)  
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

15 Charlie Y. Chou  
16 **Kessenick Gamma LLP**  
17 1 Post Street, Suite 2500  
18 San Francisco, CA 94014  
19 Legal Assistant: Sarah Nguyen  
[snguyen@kessenick.com](mailto:snguyen@kessenick.com)  
20 Administrative Assistant: Anna Mao  
[amao@kessenick.com](mailto:amao@kessenick.com)  
E-mail: [cchou@kessenick.com](mailto:cchou@kessenick.com)  
Phone: (415) 568-2016

Attorney For Defendants  
COHNE KINGHORN, P.C., SIMPLIFI  
COMPANY, JEREMY RAND COOK, ERIC  
HAWKES, JENNIFER HAWKES,  
JENNIFER HAWKES, MICHAEL SCOTT  
HUGHES, DAVID BRADFORD, DAVID  
BENNION AND GARY BOWEN

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
22 a true and correct statement and that this Certificate was executed on March 13, 2024.

23 By   
24 Joan E. Soares