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IN THE UTAH SUPREME COURT

MARK CHRISTOPHER TRACY, d/b/a Emigration Canyon Home Owners Association, Plaintiff and Petitioner, vs. SIMPLIFI COMPANY; JENNIFER HAWKES; and ERIC HAWKES, Defendants and Respondents.	**RESPONSE TO PETITION FOR WRIT OF EXTRAORDINARY RELIEF FROM AMENDED JUDGMENT, ORDERS OF FILING AND WRIT OF EXECUTION** **Appellate Case No.: 20210743** **District Court Case No. 200905074**

Respondents Simplifi Company, Jennifer Hawkes and Eric Hawkes ("Defendants" or "Respondents") hereby provide the following response in opposition to Petitioner Mark Christopher Tracy's ("Mr. Tracy") Petition for Extraordinary Relief From Amended Judgment, Orders of Filing and Writ of Execution (the "Petition").

INTRODUCTION

Mr. Tracy is not a "federal whistleblower." The federal false claims act case that he filed against the Emigration Improvement District ("EID")[1] and people associated with EID has been

[1] EID is a small local district with a three-member elected board of trustees that is authorized to provide water and sewer service in Emigration Canyon.

dismissed, and the Honorable Judge Parrish previously awarded EID and other defendants over $93,000 in legal fees based on her finding that the case was frivolous, vexatious and harassing.[2] Mr. Tracy is simply a relentless litigant who apparently believes that EID is actually a vast conspiracy responsible for what he describes as the "longest, most lucrative, and perhaps most economically destructive water grabs in the history of the State of Utah" and that filing endless litigation against EID and people associated with EID will somehow expose this purported vast conspiracy. Judge Kouris is the latest judge to find that Mr. Tracy's claims completely lack merit and were not brought in good faith.

Judge Kouris' decision does not warrant extraordinary relief. Because a decision to grant or deny a petition for extraordinary writ is discretionary, *see Carpenter v. Riverton City*, 2004 UT 68, ¶ 4, 103 P.3d 127, that discretion should be applied to deny the Petition. This is true for several reasons.

First, the arguments set forth by Mr. Tracy are legally unsupported. Mr. Tracy either cites to inapposite case law or provides no citation to legal authority whatsoever.

Second, most of the arguments presented by Mr. Tracy rely on the assertion that the district court "lacked jurisdiction" to enter various orders. These arguments are plainly wrong, as described below.

Third, the remaining argument presented by Mr. Tracy relies on an assertion that the trial court "abused its discretion," which is unsupported and not the proper subject of a petition for extraordinary writ in any event.

[2] *United States of America ex rel Mark Christopher Tracy v. Emigration Improvement District, et al.*, Case No. 2:14-cv-00701.

Ultimately, Mr. Tracy cites incorrect facts and omits relevant facts to obtain relief that has been denied to him by numerous courts in state and federal jurisdictions, while providing no legal basis for the relief sought.

As such, Respondents request that the Petition be denied.

RELEVANT FACTS

1. On August 19, 2019, Judge Chon issued a *Memorandum Decision and Order* granting a motion to dismiss filed by EID in a separate action brought by Mr. Tracy against EID (Case No. 190901675).

2. On October 15, 2019, Judge Scott issued a *Memorandum Decision and Order* granting EID's motion to dismiss a case filed by ECHO against EID (Case No: 190904621).

3. On or about July 31, 2020, Mr. Tracy filed a separate action against Mr. Hawkes, Mrs. Hawkes and Simplifi based on EID's purported denial of a GRAMA request (Case No. 200905123) (the "Faust GRAMA Case").

4. On September 16, 2020, Judge Faust issued that certain *Memorandum Decision and Order* granting defendants' Motion to Dismiss in the Faust GRAMA case (the "Faust Ruling").

5. In the Faust Ruling, Judge Faust found "Petitioner does not cite to any provision or language in GRAMA supporting the position that it can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request"; and Petitioner "failed to cite any case law to support the position that Respondents are proper or necessary parties to this action."

6. On March 30, 2021, Judge Parrish entered that *Memorandum Decision and Order Granting Defendants' Motion to Dismiss* dismissing a federal false claims act file by Mr. Tracy against EID and other parties, including Mr. Hawkes. See *United States of America ex rel Mark*

Christopher Tracy v. Emigration Improvement District, et al., Case No. 2:14-cv-00701 [Docket No. 298].

7. Mr. Tracy filed this action on or about July 31, 2020. *See* docket.

8. On February 10, 2021, Judge Kouris issued a *Memorandum Decision and Order* granting Respondents' motion to dismiss in this case and awarding Respondents' attorney fees. *See id.*

9. Judgment was entered in favor of Respondents for their award of attorney fees on February 24, 2021. *See id.*

10. Mr. Tracy then filed a motion to vacate the district court's order and judgment on Respondents' motion to dismiss. Before that motion was decided, however, Mr. Tracy also filed a notice of appeal on March 26, 2021. *See id.*

11. No motion to stay execution of the judgment pending appeal was filed and no stay was ordered. *See id.*

12. On April 15, 2021, the district court entered an order (1) denying Mr. Tracy's motion to vacate, (2) finding him a vexatious litigant, and (3) ordering that Mr. Tracy pay Respondents' additional attorney fees. *See id.*

13. Accordingly, the judgment was amended to include Respondents' additional attorney fees on April 29, 2021. *See id.*

14. After the 14-day stay provided by Utah R. Civ. P. 62 passed, Respondents filed an application for writ of garnishment on May 18, 2021, which was issued the following day. The writ of garnishment was served but did not result in any collection for the Defendants. *See id.*

15. On June 15, 2021, Respondents filed a motion for Mr. Tracy to attend a post-judgment hearing to identify property. An order requiring Mr. Tracy to attend such a hearing was issued on June 17, 2021. *See id.*

16. On July 7, 2021, the Court held a telephonic hearing and heard Mr. Tracy's objections to the debtor's exam. *See id.* Specifically, the docket reflects:

> 1:43 Matter is recalled. Mr. Tracy presents objections.
> 1:47 Mr. Cook responds.
> 1:49 The Court denies Mr. Tracy's objections and will proceed with the debtor examination.

17. On July 9, 2021, subsequent to the debtor's examination in which Mr. Tracy claimed to have no assets to satisfy the judgment against him, Defendants filed a writ of execution to execute on Mr. Tracy's causes of action and the water right he claimed to own. *See id.*

18. Paragraph 1 of the Petition in this matter states: "Petitioner The ECHO-Association is registered with the Utah Division of Corporations and Commercial Code as a "dba entity" of Mr. Tracy and is the owner of surface water right no. 57-8947 (a16183) located in Emigration Canyon, Salt Lake County, Utah." *See id.*

19. On July 26, 2019, Mr. Tracy, through his former legal counsel, filed a *Memorandum in Opposition to Motion to Dismiss*, p. 12.[3] In response to EID's argument that a dba cannot own a water right, Mr. Tracy argued:

> The District next argues that the named plaintiff, Emigration Canyon Homeowners Association, is not a natural person and therefore cannot own a water right. This argument misunderstands the nature of a dba. When a person or entity transact business under a dba, the person or entity is transacting business on its own behalf. The complaint alleges that the Emigration Canyon Homeowners Association is a dba of Mr. Tracy. When the complaint alleges that Emigration Canyon Homeowners Association owns the water right at issue, it is alleging that Mr. Tracy owns the water right at issue.

[3] *Emigration Canyon Home Owners Association v. Kent Jones, et al.* Case No. 190904621 (emphasis added).

ARGUMENT

1. The District Court Had Jurisdiction to Enter Writs of Execution and to Order Mr. Tracy to Appear at a Supplemental Proceeding.

Mr. Tracy makes various arguments throughout his Petition that the district court "lacked jurisdiction" to issue writs of garnishment or execution, or to order Mr. Tracy to appear at a supplemental hearing. *See* Petition, pp. 21, 24-26. These arguments are contrary to and ignore Utah law.

Rule 62 of the Utah Rules of Civil Procedure makes clear that, upon entry of a judgment, execution of that judgment is only stayed for 14 days. *See* Utah R. Civ. P. 62(a) ("No execution or other writ to enforce a judgment may issue until the expiration of 14 days after entry of judgment, unless the court in its discretion otherwise directs."). After that time period, a judgment creditor is free to attempt collection of that judgment absent a stay of proceedings and the posting of a supersedeas bond. *See id*., 62(d) ("The stay is effective when the supersedeas bond is approved by the court.").

Such collection may be effectuated pursuant to the issuance of a writ of execution or garnishment pursuant to Rules 64, 64D and 64E. *See id*., 64, 64D and 64E. Nothing in Utah law prohibits the issuance of a writ of execution pending an appeal (where no stay has been entered). To the contrary, Rules 64, 64D and 64E allow for the same. A judgment creditor is also entitled to require a judgment debtor to appear at supplemental proceedings. *See id*., 64(c).[4]

Here, the judgment for attorney fees at issue was first entered on February 24, 2021. When the judgment was modified on April 29, 2021, no post-judgment relief was sought until May 18, 2021. *See* docket. As such, the 14-day stay set forth in Rule 62(a) was complied with,

[4] Mr. Tracy appeared at the debtor's examination so the issue is moot.

while no stay was ever ordered by the Court. *See id*. As such, there is no basis for Mr. Tracy's argument that the district court erred by entering the writs or relief at issue, let alone lacked jurisdiction to enter the same.

Indeed, Mr. Tracy never explains how the district court could have "lost" jurisdiction to enter such orders. Even if a writ of execution is issued regarding property that is exempt, that does not mean the district court did not have jurisdiction to enter the writ.

Mr. Tracy's argument that federal actions cannot be the subject of a writ of execution is also not only unsupported, but wrong. *See RMA Ventures California v. SunAmerica Life Ins.*, 576 F. 3d 1070 (10th Cir. 2009). Likewise, Mr. Tracy's position that the Court lacked jurisdiction to issue the writ against water right no. 57-8947 (a16183) is directly contradicted by his own allegations in the Petition and in his previous court filings. Specifically, paragraph 1 of the Petition states: "Petitioner The ECHO-Association is registered with the Utah Division of Corporations and Commercial Code as a "dba entity" of Mr. Tracy and is the owner of surface water right no. 57-8947 (a16183) located in Emigration Canyon, Salt Lake County, Utah." The judgment was based on an award of attorneys' fees against the Petitioner because the lawsuit was frivolous. Thus, because the Petition specifically alleges that the Petitioner is the owner of the water right, it is clearly subject to execution. Mr. Tracy's position is even more preposterous because he has previously argued in no uncertain terms that he is the owner of the water right. ("When a person or entity transact business under a dba, the person or entity is transacting business on its own behalf. The complaint alleges that the Emigration Canyon Homeowners Association is a dba of Mr. Tracy. When the complaint alleges that Emigration Canyon

Homeowners Association owns the water right at issue, it is alleging that Mr. Tracy owns the water right at issue.").[5]

Finally, even if the issue of whether a writ was wrongfully issued had anything to do with jurisdiction to enter that writ, there is no merit to Mr. Tracy's argument that a chose in action, including the right of appeal on a chose in action, cannot be executed against. *See Applied Medical Technologies, Inc. v. Eames*, 2002 UT 18, 44 P.3d 699; *Lamoreaux v. Black Diamond Holdings, LLC*, 2013 UT App 32, 296 P.3d 780; *Cougar Canyon Loan, LLC v. Cypress Fund, LLC*, 2020 UT 28, 466 P.3d 171; *see also Alarn Protection Tech., LLC v. Bradburn*, 2021 UT 25.

As such, Mr. Tracy's arguments that the district court lacked jurisdiction to enter writs or orders regarding collection of a judgment are unsupported and wrong.

2. The District Court Had Jurisdiction to Amend its Order.

Mr. Tracy argues that the district court "lacked jurisdiction" to amend its own order. This argument also fails.

As set forth in the very case cited by Mr. Tracy, *National Advertising Co. v. Murray City*, 2006 UT App 75, 131 P.3d 872, a district court may amend its ruling or judgment upon the filing of a post-judgment motion (as was done here), when that ruling "does not impact the legal issues raised on appeal." *Id*., ¶ 22. This was the case here, as the court simply denied Mr. Tracy's motion to vacate the earlier ruling, increased the award of attorney fees, and found Mr. Tracy to be a vexatious litigant. None of the rulings made in the April 29, 2021 judgment effected the issues decided in the motion to dismiss. As such, and as held in *National Advertising Co.*, there

[5] *Emigration Canyon Home Owners Association v. Kent Jones, et al.* (Case No. 190904621); *Memorandum in Opposition to Motion to Dismiss, p. 12.*

is no merit to Mr. Tracy's claim that the district court was without jurisdiction to modify its prior ruling.[6]

3. Mr. Tracy Fails to Show an Abuse of Discretion as to the Vexatious Litigant Decision and Fails to Show that an Abuse of Discretion is Properly Resolved on a Petition for Extraordinary Relief.

"Rule 83 authorizes a court to impose restrictive orders on vexatious pro se litigants." *Strand v. Nupetco Associates LLC*, 2017 UT App 55, ¶ 5, 397 P.3d 724; *see also* Utah R. Civ. P. 83. "The purpose of such orders is to curb the litigant's vexatious conduct." *Id*. The only requirements of imposing such an order are two findings:

> First, [the district court] must find by clear and convincing evidence that "the party subject to the order is a vexatious litigant." *See* [URCP] 83(c)(1)(A). Second, the court must find, again by clear and convincing evidence, that "there is no reasonable probability that the vexatious litigant will prevail on the claim"—that is, the litigant's claim pending before the court. *See id*. R. 83(c)(1)(B).

Id. Each of these findings, without dispute, were made by the district court. *See* April 15, 2021 Decision and Order.

Mr. Tracy argues the district court abused its discretion in rendering this decision, but provides no basis for finding such an abuse. This is not an issue of law, but one that depends highly on the facts as found by the district court. As the district court is in the best position to make such determinations, Mr. Tracy is unable to show why this issue should be reviewed and resolved pursuant to a petition for extraordinary relief.

Moreover, Mr. Tracy's argument that it is was a "gross and flagerant (sic) abuse of discretion" for the Court to find that Mr. Tracy's conduct was "harassment and vexatious" is without merit. The simple fact is that Mr. Tracy knowingly and intentionally filed this case

[6] The Utah Court of Appeals recently issued a decision on the identical issues presented in Mr. Tracy's appeal in this matter, finding that "[i]n short, Tracy is not entitled to relief under the facts alleged in his petition because the alleged denial of the GRAMA request was made by the District, not Respondents." *Order*, Case No. 20200705-CA, p. 4.

against the wrong parties so that Respondents, and not EID, would have to respond to the Petition. Judge Kouris recognized Mr. Tracy's abuse of the judicial system, and found:

> "As set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant."

See April 15, 2021 *Decision and Order*. Judge Kouris also found that EID had in fact responded to the GRAMA request. Specifically, in his February 24, 2021 M*emorandum Decision and Order*, p. 2, Judge Kouris found:

> On June 27, 2020, Mr. Tracy sent an email to Mr. Hawkes acknowledging receipt of a different GRAMA request for a link to a Zoom meeting of EID's board of trustees, and appealing the de facto denial of the GRAMA request for the telemetry data. On July 9, 2020, Mr. Hawkes sent an email to Mr. Tracy that stated: "We can get the raw data files copied to a memory stick in Windows Format. The cost would be $60 for an estimated one hour of labor, memory stick, and postage. The software needed for the "raw data" is LGH File Inspector available at Softwaretoolbox.com. The alternative option is to provide the data to you in an excel format, however the cost would be an estimated $3000.00 for the software and the engineer/ IT to extract the data to an excel file. Please let me know how you would like to proceed."

Mr. Tracy has a right to request records from a governmental entity. Mr. Tracy does not have the right to use the purported denial of a GRAMA request by a government entity as an excuse to sue Respondents simply to harass them and require them to expend time, money and resources defending against a meritless action.

4. Mr. Tracy's Argument That the District Court Lacked Jurisdiction to Impose Sanctions Under Rule 83 is Unsupported and Incorrect.

Finally, Mr. Tracy submits a one-sentence argument that the district court "lacked jurisdiction to refuse recording and docketing" of certain pleadings. Pet., p. 26. No authority is cited for this argument, as it is plainly contrary to Rule 83 itself. Rule 83 provides that, after

finding a pro se party to be a "vexatious litigant," a court "may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to . . . abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action." Utah R. Civ. P. 83(b)(4). *See also Nupetco Associates LLC,* 2017 UT App 55, ¶ 5. As such, there is no basis for an argument that the district court was without jurisdiction to enter the order in question.

CONCLUSION

In summary, the fact that Mr. Tracy continues to file motions based on completely unsupported legal arguments is the epitome of why Judge Kouris awarded fees and found him to be a vexatious litigant. Accordingly, for each of the reasons set forth above, Respondents request that Mr. Tracy's Petition be denied.

DATED this 20th day of October 2021.

COHNE KINGHORN

/s/ Jeremy R. Cook
Jeremy R. Cook
Attorneys for Simplfi Company, Jennifer Hawkes, and Eric Hawkes

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October 2021, a true and correct copy of the foregoing document was served by email to the following:

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
m.tracy@echo-association.com

/s/ Jeremy Cook