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DAVIS WRIGHT TREMAINE LLP

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

MARK CHRISTOPER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; ERIC HAWKES, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM CROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL BROWN, an individual; GARY BOWEN, an individual,

Defendants.

Case No. 23CV423435
Assigned to the Hon. Evette Pennypacker

SPECIALLY APPEARING DEFENDANT KEM C. GARDNER'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Hearing Date: March 26, 2024
Time: 9:00 a.m.
Dept.: 6

Complaint Filed: September 21, 2023

Specially-appearing Defendant Kem C. Gardner ("Mr. Gardner") respectfully submits this Opposition to Plaintiff's "Motion for Reconsideration of Order Granting Defendants' Motions To Quash Service Of The Complaint And Summons For Lack Of Personal Jurisdiction" ("Reconsideration Motion" or "Motion"), which purports to seek reconsideration of the Court's February 20, 2024 order granting Mr. Gardner's Motion To Quash Service Of Summons ("Motion to Quash").

I. INTRODUCTION

Section 1008 of the California Code of Civil Procedure strictly limits a party's ability to ask a court to reconsider a ruling: it requires the moving party to show that there are "new or different facts, circumstances, or law" (C.C.P. § 1008(a)), which the party "could not, with reasonable diligence," have presented to the Court before its ruling was issued. *New York Times Co. v. Super. Ct.*, 135 Cal. App. 4th 206, 213 (2005).

Plaintiff has not come close to meeting this stringent requirement. Instead, he asks this Court to reconsider its February 20, 2024 ruling granting Mr. Gardner's Motion to Quash (the "Order") based on the same arguments he made in his opposition (the "Opposition") to the Motion to Quash. That is insufficient as a matter of law. *See Jones v. P.S. Dev. Co.*, 166 Cal. App. 4th 707, 725 (2008) (plaintiff's contention that trial court's ruling was based on "multiple errors of law and a failure or refusal to consider the evidence presented in opposition to" a motion for summary judgment did not constitute a "new fact or circumstance," as required to support a motion for reconsideration).

Even if mere error could satisfy Section 1008, Plaintiff's Motion still should be denied, because here there was no error; this Court correctly found that Plaintiff failed to meet his burden of showing the Court has either general or specific jurisdiction over Mr. Gardner. Order at 6-9. Mr. Gardner neither resides nor is domiciled in California, and none of Plaintiff's claims arise out of any alleged conduct by Mr. Gardner in or directed at California. *Id.*

Because Plaintiff's Motion was filed in violation of Section 1008 and controlling law, this Court should deny the Motion immediately and take its hearing off calendar.

II. FACTUAL BACKGROUND

Plaintiff claims he is a "federal whistleblower in what [is] alleged to be the longest and most lucrative water grab[] in the State of Utah." Compl. ¶ 1. He alleges that Defendants—all of whom are Utah residents—"perpetuated a fraudulent scheme to retire senior water rights vis-à-vis duplicitous water claims….for the construction and massive expansion of a luxurious private urban development" in Salt Lake City, Utah. *Id.* ¶ 2. His Complaint asserts claims for libel, libel per se, false light and intentional infliction of emotional distress based on emails sent

by other defendants and statements on the website for a public drinking water facility in Salt Lake, the Emigration Canyon Improvement District ("ECID"). Compl. ¶¶ 79-111; 10.

Plaintiff's jurisdiction allegations are sparse. He alleges the Court has jurisdiction for two reasons: (1) because the ECID website, though directed at Utah residents, is "routed through San Jose, California"; and (2) because "Defendants published false and defamatory statement[s] for the purpose of obtaining continued payment of monies from property owners residing in California." *Id.* ¶¶ 4, 21. The Complaint does not allege any facts indicating that the purported "payment of monies from property owners residing in California" were paid to Mr. Gardner at any point since 1998. It also does not allege that Mr. Gardner made any of the allegedly defamatory statements, or that he has any current association with ECID. *Id.* Instead, the Complaint includes a blanket allegation that "each Defendant was acting as the agent, servant, employee, partner, co-conspirator, and/or joint venture of each remaining Defendant." *Id.* ¶ 20.

Mr. Gardner filed his Motion to Quash on December 29, 2023, and the Court granted the Motion in an Order dated February 20, 2024. In the Order, the Court found that it lacked general jurisdiction over Mr. Gardner because Plaintiff had not shown Mr. Gardner had substantial, continuous contact with California, and that it lacked specific jurisdiction over him because Plaintiff's claims did not arise out of Mr. Gardner's contacts with the state, namely a partial interest in a timeshare in Carlsbad, California. *Id.* at 6-9. It also denied Plaintiff's request for jurisdictional discovery because the only evidence Plaintiff offered in support of the request was two deposition notices, and Plaintiff otherwise offered nothing beyond conclusory allegations that any of the Defendants targeted the state. *Id.*

III. PLAINTIFF'S MOTION SHOULD BE DENIED BECAUSE HE FAILED TO SATISFY THE STRICT REQUIREMENTS OF C.C.P. § 1008.

Plaintiff's reconsideration motion does not identify any new facts, circumstances, or law that would change the outcome of Mr. Gardner's Motion to Quash. Instead, he asks the Court to reconsider its Order based on information and argument it already considered—and rejected. Plaintiff therefore fails to meet his threshold burden under Section 1008(a), the Motion should be denied immediately, and the hearing should be taken off calendar.

A. Plaintiff Had The Burden Of Demonstrating New Facts, Circumstances, Or Law.

Code of Civil Procedure § 1008 allows a party to seek reconsideration of an order **only** if "new or different facts, circumstances, or law" can be shown. *See* Cal. Code Civ. Proc. § 1008(a). Because re-litigating issues after they have been adjudicated poses such an obvious potential for abuse of the judicial process, Section 1008 prohibits parties from making renewed motions unless this requirement is met. As the California Supreme Court has explained, the statutory restrictions imposed by the Legislature mean that a party "may not file" a motion to reconsider without satisfying the requirements of Section 1008; "[t]he court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion." *Le Francois v. Goel*, 35 Cal. 4th 1094, 1108 (2005). *See also id.* (recognizing that where the moving party has not complied with the requirements of Section 1008, the other side should "not bear the burden of preparing opposition unless the court indicated an interest in reconsideration"). The Court further explained that these strict requirements "serve a purpose": "They are 'designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.'" *Id.* at 1104 (citation omitted).

Moreover, the requirement that the moving party demonstrate "new or different" facts or law does not mean that a lack of diligence or claim of ignorance by the moving party will be rewarded. To the contrary, reconsideration motions based on facts or law that a party **could have** discovered with reasonable diligence must be denied: "[t]he burden under section 1008 is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party **could not, with reasonable diligence**, have discovered or produced it at the trial." *New York Times Co.*, 135 Cal. App. 4th at 212–13 (emphasis added). *See also Shiffer v. CBS Corp.*, 240 Cal. App. 4th 246, 254–55 (2015) (rejecting reconsideration motion where study evaluating asbestos exposure, letter concerning air quality, and expert witness's post-summary judgment declaration basing new opinions on those materials were not "new" evidence because documents were produced two weeks before the expert's original declaration, and a month before the summary judgment hearing); *In re*

Marriage of Herr, 174 Cal. App. 4th 1463, 1468 (2009) (any "facts of which the party seeking reconsideration was aware at the time of the original ruling are not 'new or different'"); *Hennigan v. White*, 199 Cal. App. 4th 395, 405–06 (2011) (denying motion for reconsideration that was based on information known to the parties at the time of the original ruling).

Given these strict requirements, a party's displeasure with a court's ruling also is not a basis for seeking reconsideration—nor is an argument that the court "erred" in its ruling. *Le Francois*, 35 Cal. 4th at 1108; *Jones*, 166 Cal. App. 4th at 725. If the moving party fails to comply with Section 1008, the court must deny the reconsideration motion. CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, Ch. 9(I)-E (The Rutter Group 2023); *see also Tuchscher Dev. Enters., Inc. v. San Diego Unif. Port Dist.*, 106 Cal. App. 4th 1219, 1245 (2003) ("[a]n order denying a motion for reconsideration is interpreted as a determination that the application does not meet the requirements of section 1008").

Where, as here, a party attempts to re-assert arguments that were already raised, there is no obligation for the Court to even consider the Motion. As one appellate court emphasized, "[w]hen the grounds of the new motion are in substance no different from those of the previous motion, the court obviously is not obliged to reconsider." *City & Cnty. of San Francisco v. Muller*, 177 Cal. App. 2d 600, 603 (1960). The basis for refusing is clear: "renewal of the same motion may be a serious burden on the court, and a means of abuse of judicial process." *Id.* Consequently, "it has long been settled that the court will refuse to consider a new motion supported by **substantially the same showing** as the one denied." *Id.* (emphasis in original).

B. Plaintiff Failed To Meet His Burden Under Section 1008(a).

With respect to Mr. Gardner, Plaintiff's Motion argues reconsideration is proper on two grounds: (1) because the clerk purportedly rejected Mr. Gardner's Motion to Quash[1]; and (2) because the Court did not allow Plaintiff to "produce evidence of uncontested jurisdictional facts." Mot. at 3-5. Plaintiff raised both of these arguments in his Opposition to the Motion to

[1] Plaintiff in a footnote also claims that counsel for Mr. Gardner failed to meet and confer with him before setting the hearing on the Motion to Quash. That argument also was raised in Plaintiff's Opposition. *See* Opp. at 4 (claiming the Motion to Quash was "null and void" on that basis).

Quash, and the Court properly rejected them. But even if the Court had committed error—which it did not—that would not justify reconsideration. *E.g.*, *Jones*, 166 Cal. App. 4th at 725 (claims of "errors" in summary judgment ruling did not meet criteria for reconsideration motion). Because Plaintiff's Motion does not even attempt to identify any "new facts, circumstances, or law" that would change the outcome of the Court's Order, it does not meet the requirements of Section 1008, and should be denied without a hearing.

First, Plaintiff's Opposition also argued that the Court should deny the Motion to Quash because the clerk purportedly rejected the Motion, and the argument therefore does not constitute "new facts, circumstances, or law" sufficient to meet the jurisdictional requirements of Section 1008. *See* Opp. at 2 n.1 (claiming that the "Clerk of Court rejected the filing" and arguing that accepting the filing would be "contrary to Rule 3.1110"). *See also Gilberd v. AC Transit*, 32 Cal. App. 4th 1494, 1500 (1995) (rejecting reconsideration motion based on matters already presented to the trial court).

Second, Plaintiff's muddled arguments about jurisdiction also were previously presented in his Opposition to the Motion to Quash. In the Reconsideration Motion, Plaintiff argues that Mr. Gardner in the declaration he filed in support of his Motion ("Gardner Declaration") "did not contest" the Complaint's "verified allegations" that defamatory statements were posted on a San Jose server, were of and concerning Plaintiff, were read by California residents, that "as a result, California property owners paid monies" to Mr. Gardner, and that the Court therefore should have allowed Plaintiff to "produce evidence" of the jurisdictional facts. Mot. at 5-6. Plaintiff in his Opposition to the Motion to Quash likewise (wrongly) claimed that Mr. Gardner was required to refute each of Plaintiff's jurisdictional allegations in the Gardner Declaration, and that absent sworn refutations, the same "allegations of the Complaint" he identifies in the Reconsideration Motion should be considered "uncontested." Opp. at 5-6. He further argued that, if the Court found jurisdiction lacking, it should "allow plaintiff sufficient time to conduct discovery on jurisdictional issues." Opp. at 9.

Thus, all of the bases for Plaintiff's Reconsideration Motion were previously presented to the Court, and do not meet the requirements for a reconsideration motion. *Le Francois*, 35 Cal.

4th at 1108 ("[t]he court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion.") The Motion should be denied on this ground alone.

IV. PLAINTIFF'S "ERROR" ARGUMENTS ARE BASELESS.

As discussed above, a litigant's claim that a court's decision was erroneous is not grounds for reconsideration. *See* Section III.A; *see also, e.g., Jones*, 166 Cal. App. 4th at 725. But even if "error" was a basis for reconsideration (which it is not), this Court should deny Plaintiff's Motion, because the Order granting the Motion to Quash was not erroneous.

First, as Mr. Gardner explained in his Reply in support of the Motion to Quash, the clerk apparently at some point rejected the Motion for failure to include a notice of motion, but then reversed the rejection upon realizing the Motion ***did*** contain a notice, in the same document as the memorandum of points and authorities. *See* 1/2/2024 Clerk Rejection Letter. As also explained in the Reply, the clerk's error had no impact on Plaintiff, who was timely electronically served with the Motion more than 16 court days before the February 20, 2024 hearing, on January 22, 2024. *See* C.C.P. § 1005(b); Reply at 6 (explaining that 16 court days before February 20, 2024 is January 25, 2024). The clerk's harmless and quickly-corrected error is not grounds for reconsidering the Motion to Quash.

Second, the Court properly found that Plaintiff did not meet his burden of showing, by a preponderance of the evidence, that the Court has jurisdiction over Mr. Gardner, or that Plaintiff was entitled to jurisdictional discovery. *See* Order at 6-10. Personal jurisdiction can be general or specific. General jurisdiction over a defendant is proper if the individual is domiciled in the forum, or where a defendant's contacts with the forum state are so "substantial, continuous, and systematic" that they become "at home" in the forum state. *Brue v. Shabaab*, 54 Cal. App. 5th 578, 590–591 (2020). A court may exercise specific jurisdiction over a non-resident defendant when the defendant: (1) "purposefully directed" actions at forum residents or "purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum"; (2) the dispute "is related to or arises out of a defendant's contacts with the forum"; (3) and "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"

Vons Companies, Inc. v. Seabest Foods, Inc., 14 Cal. 4th 434, 447 (1996). The Court in its Order properly found that it lacks general jurisdiction over Mr. Gardner, who resides in Utah and is domiciled there. Order at 7.

The Court also correctly found it lacked specific jurisdiction over Mr. Gardner. Order at 7-8. The only allegations in the Complaint tying Mr. Gardner to California were Plaintiff's vague assertions that activities allegedly undertaken by other defendants were "perpetuated for the private profit of" and "on behalf" of Mr. Gardner, Opp. at 6-8, and that each of the Defendants "was acting as the agent, servant, employee, partner, co-conspirator, and/or joint venture of each remaining Defendant." Compl. ¶ 20. As the Court found, however, Plaintiff provided "no evidence…establishing agency or a conspiratorial relationship among Defendants." Order at 9. *See also Goehring v. Superior Ct. (Bernier)*, 62 Cal. App. 4th 894, 904–05 (1998) ("[J]urisdiction over each defendant must be established individually"). Furthermore, the Complaint itself alleges that Mr. Gardner transferred his interest in the underlying water system 25 years ago, in 1998, and nowhere alleges that Mr. Gardner has any connection with the alleged "continued payment of money from property owners residing in California." Compl. ¶¶ 21, 40. *See Farris v. Capt. J. B. Fronapfel Co.*, 182 Cal. App. 3d 982, 990 (1986) (A nonresident alleged tortfeasor may not be subject to California jurisdiction if the tortious conduct is "too remote in time and causal connection" to the injuries suffered in California). The Court also properly concluded that Mr. Gardner's interest in a California timeshare is insufficient to confer specific jurisdiction, because Plaintiff offered no evidence "of any nexus, much less a substantial nexus, between Plaintiff's claims and Mr. Gardner's California timeshare ownership." Order at 9 (citing *Snowney v. Harrah's Entertainment, Inc.*, 35 Cal. 4th 1054, 1068 (2005)). *See also Greenwell v. Auto-Owners Ins. Co.*, 233 Cal. App. 4th 783, 801 (2015) (A court may exercise specific jurisdiction only "if there is a substantial connection or nexus between forum contacts and the litigation").[2]

[2] Plaintiff's unsupported claim that Mr. Gardner "conducts extensive business in California through The Boyer Company L.C., the Gardner Group, and rPlus Energies," and his reference to Mr. Gardner's 9% ownership in two California radio stations in 1985 fail for the same reason. Mot. at 2 n.2. Plaintiff also raised those arguments in his Opposition to the Motion to Quash, meaning they also are not "new facts" sufficient to justify reconsideration. *See id.* at 4

Third, Plaintiff also did not meet his burden of showing he was entitled to jurisdictional discovery, which required him to demonstrate that "discovery is likely to lead to the production of evidence of facts establishing jurisdiction." *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100, 127 (2005). Here, Plaintiff's only offering on this issue was two deposition notices. Opp. at 9-10; Order at 10. The Court also properly found that was insufficient.

Because Plaintiff's Motion does not identify any actual "errors" in this Court's ruling on the Motion to Quash, even if an "error" was proper grounds for reconsideration—which it is not—he would not have satisfied his burden.

II. CONCLUSION

For the reasons set forth above, Mr. Gardner respectfully requests that the Court deny Plaintiff's Motion for Reconsideration without further briefing and take the pending hearing off calendar.

DATED: March 13, 2024.

Respectfully submitted,

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By: _____
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n.5, Declaration of Mark Christopher Tracy In Support Of Opposition To Defendant Kem Crosby Gardner's Motion To Quash ¶ 5 & Ex. B. *See also In re Marriage of Herr*, 174 Cal. App. 4th at 1468 (information the party was aware of "at the time of the original ruling are not 'new or different'" for reconsideration). In any event, even if Plaintiff were correct about any of that, none of Plaintiff's claims arise out of those purported "contacts" so they are irrelevant.

DAVIS WRIGHT TREMAINE LLP

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 50 California Street, 23rd Floor, San Francisco, California 94111.

I caused to be served a copy of the following documents:

SPECIALLY APPEARING DEFENDANT KEM C. GARDNER'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

On March 13, 2024, I caused the above documents to be served on each of the persons listed below by the following means:

☑ BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from email address ayshalewis@dwt.com to the person(s) at the e-mail address listed below. I did not receive, within reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 13, 2024, at San Francisco, California.

Aysha D. Lewis