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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

REPLY IN SUPPORT OF MOTION OF SPECIALLY APPEARING DEFENDANT KEM C. GARDNER TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION

[Supplemental Declaration of Sarah E. Burns with Exhibits 2-3 concurrently filed]

Judge: The Hon. Evette Pennypacker
Department: 06

Date: February 20, 2024
Time: 9:00 a.m.

Complaint Filed: September 21, 2023

1 Specially-appearing defendant Kem C. Gardner (“Mr. Gardner”) respectfully submits this
 2 Reply to Plaintiff’s Opposition (“Opp.”) to Mr. Gardner’s Motion to Quash Service of Summons
 3 and Complaint for Lack of Personal Jurisdiction (“Motion”).

4 I. INTRODUCTION

5 Plaintiff bears the burden of establishing personal jurisdiction by a preponderance of
 6 evidence. Instead of providing such evidence, Plaintiff focuses the majority of his Opposition on
 7 a variety of easily-dispelled attacks on Mr. Gardner’s *service* of the Motion. He next claims it is
 8 enough for jurisdiction either that Mr. Gardner has a timeshare interest in San Diego, or that the
 9 Complaint in conclusory fashion alleges that *other* defendants took actions *decades ago* “on Mr.
 10 Gardner’s behalf” that affected California. He finally points to a variety of disparate contacts
 11 Mr. Gardner purportedly had with California¹, for which he provides no evidence, and which in
 12 any event bear no relationship to the claims in this lawsuit. Because none of this comes close to
 13 establishing jurisdiction, the Court should grant Mr. Gardner’s Motion and dismiss the
 14 Complaint as to him.

15 II. THE COURT LACKS PERSONAL JURISDICTION OVER MR. GARDNER

16 As set forth in the Motion, once a nonresident defendant challenges personal jurisdiction,
 17 “the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate the
 18 defendant has sufficient minimum contacts with the forum state to justify jurisdiction.” *Thomson*
 19 *v. Anderson*, 113 Cal. App. 4th 258, 266 (2003) (emphasis added) (citing *Vons Cos. V. Seabest*
 20 *Foods, Inc.*, 14 Cal. 4th 434, 449 (1996)). To meet this burden, the plaintiff must “present *facts*
 21 demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute
 22 constitutionally cognizable ‘minimum contacts.’” *Thomson*, 113 Cal. App. 4th at 266 (emphasis
 23 added). He also must present “competent *evidence* in affidavits and authenticated documentary
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25 ¹ The Declaration Plaintiff filed in support of his Opposition also contains an email he
 26 sent to counsel for Mr. Gardner threatening sanctions based on purported “falsities” in Mr.
 27 Gardner’s Declaration. *See* Declaration of Mark Christopher Tracy (“Tracy Decl.”) Ex. B.
 28 Plaintiff has not served any sanctions motion, however, and the Tracy Declaration does not
 actually attach the documents referenced in the sanctions email. This Reply therefore does not
 address Plaintiff’s sanctions claims or “evidence” referenced in the email that Plaintiff has not
 put in the record in his Opposition.

1 evidence” to support the facts he alleges demonstrate that all jurisdictional criteria are met.
2 *Ziller Elecs. Lab GmbH v. Superior Ct.*, 206 Cal. App. 3d 1222, 1233 (1988) (“vague assertions
3 of ultimate facts rather than specific evidentiary facts permitting a court to form an independent
4 conclusion on” jurisdictional issues are not sufficient) (emphasis added). Absent evidence to
5 support the assertions of minimum contacts, denying a motion to quash is reversible error.
6 *Muckle v. Superior Court*, 102 Cal. App. 4th 218, 228 (2002) (issuing writ of mandate where
7 trial court denied motion to quash by relying on “unsubstantiated ‘alleged facts’”). Far from
8 making such a showing, Plaintiff here simply restates vague allegations from the Complaint and
9 cites irrelevant, decades-old “evidence”. He has failed to show the Court has either general or
10 specific jurisdiction over Mr. Gardner.

11 **A. There Is No General Jurisdiction Over Mr. Gardner.**

12 “For an individual, the paradigm forum for the exercise of general jurisdiction is the
13 individual's domicile.” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Because Plaintiff
14 argues only that Mr. Gardner has “minimum contact” with California, Opp. at 8, it does not
15 appear he is arguing that the Court has general. *See Boaz v. Boyle & Co.*, 40 Cal. App. 4th 700,
16 717 (1995) (“the standard for general jurisdiction is considerably more stringent” than the
17 minimum contacts required for specific jurisdiction). In any event, because Mr. Gardner is
18 domiciled in Utah, Gardner Decl. ¶ 2, and Plaintiff has not offered evidence to show anything
19 approaching “substantial, continuous, and systematic” contacts in California, the Court lacks
20 general jurisdiction over Mr. Gardner. *Brue v. Shabaab*, 54 Cal. App. 5th 578, 590–591 (2020).

21 **B. There Is No Specific Jurisdiction Over Mr. Gardner.**

22 As set forth in the Motion, Mot. at 11, a court’s exercise of specific jurisdiction over a
23 non-resident defendant weighs whether the defendant: (1) “purposefully directed” actions at
24 forum residents or “purposefully avail[ed himself or herself] of the privilege of conducting
25 activities within the forum”; (2) whether the dispute “is related to or arises out of a defendant’s
26 contacts with the forum”; and (3) whether “the assertion of personal jurisdiction would comport
27 with ‘fair play and substantial justice.’” *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.
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1 4th 434, 447 (1996). Plaintiff has not met his burden to show any of the three factors weigh in
2 his favor.

3 **First**, Plaintiff has not shown Mr. Gardner purposefully availed himself of conducting
4 business in California or purposefully directed any activities towards residents in California. To
5 make this showing, Plaintiff in the Opposition points to vague allegations in the Complaint about
6 activities allegedly undertaken by defendant Cohne Kinghorn P.C. related to the Emigration
7 Canyon Water District, which he claims were “perpetuated for the private profit of” and “on
8 behalf” of Mr. Gardner. Opp. at 6-8. Though the Complaint asserts in conclusory fashion that
9 each of the defendants “was acting as the agent, servant, employee, partner, co-conspirator,
10 and/or joint venture of each remaining Defendant,” Compl. ¶ 20, Plaintiff fails to offer **facts**—
11 much less **evidence**—showing that any of those actions were **actually** done on Mr. Gardner’s
12 behalf or for his benefit. See *Goehring v. Superior Ct. (Bernier)*, 62 Cal. App. 4th 894, 904–05
13 (1998) (“[J]urisdiction over each defendant must be established individually”). And as Mr.
14 Gardner pointed out in the Motion—and Plaintiff on Opposition does not deny—the Complaint
15 itself alleges that Mr. Gardner transferred his interest in the underlying water system to ECID 25
16 **years ago**, in 1998, and nowhere alleges that Mr. Gardner has any connection with the alleged
17 “continued payment of money from property owners residing in California².” Compl. ¶¶ 21, 40.
18 *Farris v. Capt. J. B. Fronapfel Co.*, 182 Cal. App. 3d 982, 990 (1986) (A nonresident alleged
19 tortfeasor may not be subject to California jurisdiction if the tortious conduct is “too remote in
20 time and causal connection” to the injuries suffered in California).

21 **Second**, none of the other purported “contacts” with California Plaintiff has identified are
22 sufficient to give this Court specific jurisdiction over Mr. Gardner either, because Plaintiff fails
23 to show his claims arise out of those contacts. *E.g.*, Mot. at 13-14. See also *Greenwell v. Auto-*

24 _____
25 ² Even if Plaintiff had alleged facts (and produced evidence) showing that Mr. Gardner
26 had received “payment of money from property owners residing in California” that also would
27 not be sufficient because Plaintiff has offered nothing to show his purported actions were
28 undertaken specifically to attract California residents, rather than Utah residents. *E.g.*, *AMA*
Multimedia, LLC v. Wanat, 970 F.3d 1201, 1211 (9th Cir. 2020) (no purposeful direction even
though United States was adult website’s “largest market” because defendant did not “tailor[]
website to attract U.S. traffic”).

1 *Owners Ins. Co.*, 233 Cal. App. 4th 783, 801 (2015) (A court may exercise specific jurisdiction
2 only “if there is a substantial connection or nexus between forum contacts and the litigation”).
3 Plaintiff’s claims have nothing whatsoever to do with Mr. Gardner’s interest in a San Diego
4 timeshare (or taxes paid on that interest)³, or in West Valley City Television Associates, which
5 the Federal Communications Commission report Plaintiff cites is an entity Mr. Gardner was a
6 limited partner of in 1985 and which at that time had a 9% interest in two radio stations in
7 Yermo and Mountain Press, California. *See* Opp. at 4 n. 5; Tracy Decl. ¶ 5 Ex. B; Supplemental
8 Burns Decl. Ex. 3. In sum, Plaintiff offers no facts whatsoever tying any contacts Mr. Gardner
9 purportedly had with California to the actual claims at issue here, i.e., the allegedly defamatory
10 statements upon which the lawsuit is based, Compl. ¶¶ 79-111; 10, or to the San Jose server upon
11 which Plaintiff bases jurisdiction. *Id.* ¶¶ 4, 21. *See also* *Edmunds v. Superior Ct.*, 24 Cal. App.
12 4th 221, 236 (1994) (“[i]t does not follow... that the fact that a defendant’s actions in some way
13 set into motion events which ultimately injured a California resident, will be enough to confer
14 jurisdiction over that defendant [in] the California courts”).⁴

15 **Third**, the Court need not reach whether “the assertion of personal jurisdiction would
16 comport with fair play and substantial justice” because Plaintiff failed the first two prongs of the
17 jurisdictional analysis. *Malone v. Equitas Reinsurance Ltd.*, 84 Cal. App. 4th 1430, 1437 n. 3
18 (2000). If it nonetheless does, Mr. Gardner has more than shown that he will be substantially
19 burdened by being hailed into a California court to fight a meritless lawsuit aimed at Utah
20 defendants based on Plaintiff’s dispute with a Utah water district that in Utah would be subject to
21 presuit screening under the terms of Plaintiff’s vexatious litigant order. *See* previously-filed
22 Declaration of Sarah E. Burns Ex. 1. *See also* Mot. at 14-15.

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24 ³ *See* Tracy Decl. Exhibit B; Supplemental Declaration of Sarah E. Burns (“Supplemental
Burns Decl.”) Ex. 2.

25 ⁴ The other documents Plaintiff references (but does not attach to the Opposition) also are
26 of no consequence. Plaintiff claims the news article contained in Exhibit D to Exhibit B of the
27 Tracy Declaration shows Mr. Gardner “appears to have maintained an office at The Boyer
Company as late as May 4, 2004,” but that is perfectly in line with Mr. Gardner’s sworn
28 declaration. *See* Gardner Decl. ¶ 5. Exhibit E to Exhibit B of the Tracy Declaration is a
screenshot of the website for the Gardner Group, which is Mr. Gardner’s *Utah* company. *See*
Gardner Decl. ¶¶ 5-6.

1 **III. PLAINTIFF RECEIVED ADEQUATE NOTICE OF THE HEARING**

2 Recognizing that he cannot show that this Court has personal jurisdiction over Mr.
3 Gardner, Plaintiff spuriously claims Mr. Gardner failed to provide adequate notice of the Motion
4 and that the Motion therefore is “null and void.” Opp. at 4. In fact, Plaintiff received more
5 notice than the rules require.

6 As Plaintiff acknowledges, Mr. Gardner timely filed the Motion on December 29, 2023.
7 Opp. at 4.⁵ When the Motion was filed, the Motion’s hearing date was left blank and the clerk of
8 court subsequently set a February 20, 2024 hearing.⁶ Given the February 20, 2024 hearing date,
9 Code of Civil Procedure Section 1005(b) required that Plaintiff be provided notice of the hearing
10 by January 25, 2024, i.e., 16 court days beforehand. *See* C.C.P. 1005(b). Counsel for Mr.
11 Gardner served notice before that date, on January 22, 2024, by electronic service. *See*
12 previously-filed Notice of Hearing on Specially-Appearing Defendant Kem C. Gardner’s Motion
13 to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction. Realizing that
14 Plaintiff had requested that electronic service be provided to not one, but two of his email
15 addresses, counsel for Mr. Gardner then served the notice a second time, on January 24, 2022, to
16 Plaintiff’s second email address. *See* Proof of Service of Notice of Hearing on Specially-
17 Appearing Defendant Kem C. Gardner’s Motion to Quash Service of Summons and Complaint
18 for Lack of Personal Jurisdiction, filed January 24, 2024. In the meantime, the Court on January
19 11, 2024 set the hearings for two other defendants’ motions to quash for the same day, *see*
20 1/11/2024 Minute Orders, and stated that “all three motions to quash will be heard on February
21 20, 2024 at 9 a.m. in Department 6.” On January 21, 2024, Plaintiff emailed counsel for Mr.
22 Gardner claiming he intended to seek sanctions based on the Motion. *See* Tracy Decl. Ex. B at
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25 ⁵ In contrast, Plaintiff’s Opposition was not timely. It was due February 5, 2024, nine
26 court days before the February 20, 2024 hearing, *see* C.C.P. ¶ 1005(b), but was served February
27 6, 2024. *See* Proof of Service of Opposition to Defendant Gardner’s Motion to Quash Service of
28 Process for Lack of Personal Jurisdiction or Inconvenient Forum.

⁶ According to the docket, the clerk apparently at some point rejected the filing for failure
to include a notice of motion, but then reversed the rejection upon realizing the Motion in fact
did contain a notice, in the same document as the memorandum of points and authorities. *See*
1/2/2024 Clerk Rejection Letter.

1 2⁷. In short: Plaintiff both received sufficient formal notice of the Motion by the deadline, and
 2 had actual notice of it, before the deadline set by Section 1005. *See* C.C.P. 1005(b).

3 Plaintiff's argument that service of the Motion was ineffective because counsel for Mr.
 4 Gardner "failed to verify their email addresses following Mr. Tracy's request" also fails. *Opp.* at
 5 4. Plaintiff explicitly agreed to accept electronic service and did not condition that acceptance on
 6 corollary acceptance by Mr. Gardner's counsel. *See* Tracy Decl. Ex. 6 (December 30, 2023
 7 email from Plaintiff stating "I hereby consent to electronic service for future filings pursuant to
 8 CCP § 1010.6(c)(2)...."). Section 1010 also does not condition the effectiveness of one party's
 9 consent to electronic service on another party's. *See* C.C.P. 1010(c)(3)(i). And more to the
 10 point: Plaintiff served his Opposition to the Motion *by electronic service only*, and in his proof
 11 states explicitly that the parties *did* agree to accept electronic service. *See* Proof of Service of
 12 Opposition to Defendant Gardner's Motion to Quash Service of Process for Lack of Personal
 13 Jurisdiction or Inconvenient Forum. The Court should ignore Plaintiff's spurious procedural
 14 bids to evade the inevitable end to his lawsuit.

15 **IV. THE COURT SHOULD NOT GRANT JURISDICTIONAL DISCOVERY**

16 As Plaintiff acknowledges in his Opposition, to show he is entitled to jurisdictional
 17 discovery, Plaintiff was required to demonstrate that "discovery is likely to lead to the
 18 production of evidence of facts establishing jurisdiction." *In re Automobile Antitrust Cases I &*
 19 *II*, 135 Cal. App. 4th 100, 127 (2005). Plaintiff's only attempt at meeting this burden is his
 20 inexplicable citation to discovery requests he served on other defendants. *See* *Opp.* at 9-10. He
 21 accordingly has not "offer[ed] *evidence* tending to support the existence of personal jurisdiction
 22 over" Mr. Gardner and the Court should deny his request for a continuance on the Motion to seek
 23 jurisdictional discovery. *Id.* at 127 (emphasis added).

27 ⁷ Notably, Plaintiff nowhere in that email claimed that the February 20, 2024 hearing date
 28 would not work for him, or mention the trip he now claims he will have to miss on its basis. *See*
 Tracy Decl. Ex. B.

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V. CONCLUSION

For all of the foregoing reasons and the reasons set forth in Motion, Mr. Gardner respectfully requests that his motion to quash service of summons for lack of personal jurisdiction be granted and that he be dismissed from this action for lack of personal jurisdiction.

DATED: February 9, 2024

Respectfully submitted,

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By: 
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