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Case #23CV423435
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SANTA CLARA**
10 **UNLIMITED JURISDICTION**

11 MARK CHRISTOPHER TRACY, an
12 individual,
13 Plaintiff,
14 v.
15 COHNE KINGHORN P.C., a Utah Professional
16 Corporation; SIMPLIFI COMPANY, a Utah
17 Corporation; JEREMY RAND COOK, an
18 individual; ERIC HAWKES, an individual;
19 JENNIFER HAWKES, an individual;
20 MICHAEL SCOTT HUGHES, an individual;
21 DAVID BRADFORD, an individual;
22 KEM CROSBY GARDNER, an individual;
23 WALTER J. PLUMB III, an individual;
24 DAVID BENNION, an individual; R. STEVE
25 CREAMER, an individual PAUL HANDY
26 BROWN, an individual; GARY A. BOWEN,
27 an individual
28 Defendants.

Case No.: 23CV423435

Honorable Evette D. Pennypacker
[Dept. 6]

**MEMORANDUM AND POINTS OF
AUTHORITY IN SUPPORT OF
OPPOSITION TO DEFENDANT
KEM CROSBY GARDNER’S MOTION
TO QUASH SERVICE OF PROCESS
FOR LACK OF PERSONAL
JURISDICTION**

Hearing Date: February 20, 2024
Time: 09:00 am (PST)

Action Filed: September 21, 2023
Trial Date: TBD

24 **INTRODUCTION**

25 Plaintiff Mark Christopher Tracy (“Mr. Tracy” and “Plaintiff”) respectfully submits this
26 memorandum and points of authority in support of his opposition to the motion to quash service of
27 summons for lack of personal jurisdiction filed pursuant to Code of Civ. P. § 418.10(a)(1) by Defendant
28 Kem Crosby Gardner (“Defendant Gardner” and “Defendant”).

1 Defendant Gardner argues that this Court lacks jurisdiction because there is no proof of actual
2 delivery of the Complaint and Summons. Motion of Specially Appearing Defendant Kem C. Gardner to
3 Quash Service of Summons and Complaint for Lack of Personal Jurisdiction (“Gardner Memo.” and
4 “Motion), pp. 9-10.¹ Also, The Boyer Company LC was “not authorized” to accept service of process,
5 as the Defendant was “last associated” with his former company 20 years ago. *Id.*, Next, the Complaint
6 does not allege any conduct in the State of California attributable to the Defendant (*id.*, p. 12) and
7 because Defendant Gardner has no personal or business connections in the forum state “other than [a]
8 timeshare interest,” he does not “consent” to the jurisdiction of this Court. *Id.*, pp. 11-14. Lastly, it would
9 offend traditional notions of fair play because Defendant Gardner has taken “no action that he could
10 reasonably believe would subject him to suit in California.” *Id.*, pp. 14-15.

11 These arguments fail.

12 First, Defendant Gardner waived jurisdictional objections by failing to provide Mr. Tracy proper
13 notice prior to the filing deadline per California Rules of the Court and then neglected to conduct a
14 mandatory meet and confer required by local court rules when the notice of the motion was served some
15 26 days later. Next, even a perfunctory review of the Complaint reveals purposeful tortious conduct
16 occurring both within and directed towards residents of the forum state by, on behalf of, and in the
17 economic interest of Defendant Gardner thereby establishing this Court’s exercise of personal
18 jurisdiction.

19 In the alternative, because Defendant Gardner submitted sworn declarations, which appear to be
20 demonstrably false, the Court should stay the Motion for 180 days to allow discovery of any relevant,
21 contested jurisdictional facts.

22 ARGUMENT

23 The present litigation addresses construction of a legally and technically defunct drinking water
24 system of the luxurious private urban development “Emigration Oaks” marketed and sold by Defendant

25 ¹ On January 2, 2023, the Clerk of the Court rejected the filing with the remark “NO MOTION
26 ATTACHED TO THE ENVELOPE,” but appears to have scheduled a hearing for “Motion: Order”
27 but not “Motion: Quash” on January 22, 2024. To date, it is unclear if the court has subsequently
28 accepted the filing contrary to Rule 3.1110 of the California Rules of the Court. Out of an abundance
of caution, this opposition will however address the Motion as if accepted by the court.

1 Gardner to unsuspecting California residents as “the Bel Air of Salt Lake City” immediately following
2 the 2002 Olympic Winter Games, and Defendant’s collaborative effort to defame Mr. Tracy when
3 concealment of his fraudulent activities proved futile. *Id.*, ¶¶ 4, 29-56.

4 Service of process and this Court’s exercise of personal jurisdiction over Defendant Gardner are
5 above reproach.

6 **I. Service of Process**

7 Contrary to Defendant Gardner’s sworn declaration, a local newspaper reported that despite his
8 departure as President of The Boyer Company LC sometime in May 2004, Defendant maintained an
9 office at the company and continued co-ownership of properties with the same.² *See* Declaration of
10 Mark Christopher Tracy (“Tracy Decl.”), ¶ 5, Exhibit B.

11 In this light, it is entirely comprehensible why Rachel Carrier of The Boyer Company accepted
12 service of process as the self-identified agent of Defendant Gardner. *See* Amended Proof of Service of
13 Summons, filing no. 14045716.

14 Even if service was improper at the office of Defendant Gardner’s former company, after an
15 unidentified “house sitter” refused to accept service at his place of residence, Mr. Tracy served a Second
16 Complaint and Summons at Defendant Gardner’s place of business identified in the Motion thereby
17 curing any purported deficiencies.³ *See* Second Proof of Service of Summons, filing no. 14045716.

18 **II. Legal Framework for the Exercise of Jurisdiction for Out-of-State Defendants**

19 When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has
20 the initial burden of demonstrating facts justifying the exercise of jurisdiction. *State of Oregon v.*
21 *Superior Court*, 24 Cal. App.4th 1550, 1557 (1994).

22 //

23 ² Dave Anderton, *Gardner to leave Boyer Co.*, May 24, 2004, Desert News, available at the website
24 administered by the Desert News Publishing Company
25 [https://www.deseret.com/2004/5/25/19830721/gardner-to-leave-boyer-](https://www.deseret.com/2004/5/25/19830721/gardner-to-leave-boyer-co#:~:text=After%20more%20than%2030%20years,company%20to%20the%20Boyer%20family)
[co#:~:text=After%20more%20than%2030%20years,company%20to%20the%20Boyer%20family](https://www.deseret.com/2004/5/25/19830721/gardner-to-leave-boyer-co#:~:text=After%20more%20than%2030%20years,company%20to%20the%20Boyer%20family).

26 ³ Following service of process for Codefendants Paul Handy Brown and Gary A. Bowen, it appears
27 Defendant Gardner instructed both his unidentified “house guest” and the office manager of the
28 Gardner Group to refuse service of process in an apparent (but futile) attempt to defeat this Court’s
jurisdiction. *See e.g.*, Second Proof of Service of Summons, filing no. 14045716.

1 By ignoring state and local court rules of notice and consultation causing economic damage and
2 loss, Defendant Gardner waived objection to this Court’s exercise of personal jurisdiction.

3 **IV. The Motion to Defeat Jurisdiction is Devoid of Basis in Fact and Law**

4 Assuming arguendo that Defendant Gardner had properly raised jurisdictional objections and not
5 caused Mr. Tracy pecuniary harm, the present action is also entirely consistent with California’s long-
6 arm statute and the due process clause of the Constitution of the United States.

7 A state court’s exercise of personal jurisdiction over a nonresident defendant (who has not been
8 served with process within the state) per Code Civ. P. § 410.10 requires compliance with the due process
9 clause of the federal Constitution, which in turn mandates that the defendant has such minimum contacts
10 so the assertion of jurisdiction does not violate “traditional notions of fair play and substantial justice.”
11 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also Burnham v. Superior Court*,
12 495 U.S. 604, 618-619 (1990).

13 Personal jurisdiction may be either general or specific. The former provides that a nonresident
14 defendant may be subject to litigation if his (or her) contacts in the forum state are “substantial [...]”
15 continuous and systematic” (*Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445, 446 (1952)), while the
16 later demands that the defendant has purposefully availed himself (or herself) of forum benefits (*Burger*
17 *King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985)) and the controversy is related to or “arises out of
18 a defendant’s contacts with the forum” (*Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408,
19 414 (1984)).

20 **A. Factual Jurisdictional Allegations of the Complaint**

21 In support of the Motion to defeat this Court’s jurisdiction, Defendant Gardner declared under
22 penalty of perjury that “other than the timeshare interest” he does not own real estate, or any interest in
23 real estate, conducts no business “on behalf of myself,” does not vote, and does not pay taxes in
24 California.⁷ Gardner Decl. ¶¶ 3, 4, 7.

25 As Defendant Gardner limited his factual assertion regarding lack of jurisdiction to property
26 ownership, vague business conduct, voter registration, and paying taxes, the following allegations of the

27 ⁷ These assertions are inconsequential to the Motion and, upon cursory review, appear to be
28 demonstrably false. *See e.g.*, Tracy Decl. ¶ 5, Exhibit B.

1 Complaint are uncontested:

2 1. Plaintiff Mark Christopher Tracy (“Tracy” and “Plaintiff”) is a California resident and
3 federal whistleblower in what has been alleged to be the longest and most lucrative water grabs in the
4 history of Utah. Compl. ¶ 1.

5 2. This scheme was, and is, being perpetuated for the private profit of Defendant Gardner,⁸
6 including land developer Walter J. Plumb III,⁹ and R. Steve Creamer,¹⁰ at the expense of California
7 citizens and residents.¹¹ *Id.*, ¶ 2.

8 3. Specifically, since December 1, 1984, Codefendant Cohne Kinghorn P.C., acting on
9 behalf of a Defendant Gardner,¹² began fraudulently inducing long-time residents of Emigration Canyon
10 to abandon senior water rights,¹³ and yield to duplicitous water claims stripped from the only active
11 federal military cemetery created by an Act of Congress, signed into law by United States President
12 Ulysses S. Grant in 1874, subject to the reversionary interest to be “forever used for the burial of the
13 dead,” but however misappropriated by Defendant Gardner for the construction and massive expansion

14 ⁸ See e.g., Lee Davidson, *Utah’s biggest individual political donor is a software CEO, helping right-*
15 *wing GOP causes to the tune of \$777K. Eight others gave more than \$200K each*, Salt Lake Tribune,
16 August 13, 2018, available at the website administered by the Newspaper Agency Corporation
<https://www.sltrib.com/news/politics/2018/08/13/utahs-biggest-individual/>.

17 ⁹ See e.g., Taylor W. Anderson, *Meet the man spending \$100,000 to defeat Utah’s medical marijuana*
18 *initiative*, Salt Lake Tribune, May 25, 2018, available at the website administered by the Newspaper
19 Agency Corporation [https://www.sltrib.com/news/politics/2018/05/25/meet-the-man-spending-](https://www.sltrib.com/news/politics/2018/05/25/meet-the-man-spending-100000-to-defeat-utahs-medical-marijuana-initiative/)
20 [100000-to-defeat-utahs-medical-marijuana-initiative/](https://www.sltrib.com/news/politics/2018/05/25/meet-the-man-spending-100000-to-defeat-utahs-medical-marijuana-initiative/); Codefendant Walter J. Plumb III appears to
21 have avoided service of process and has not yet entered appearance. See e.g., Second Proof of Service
22 of Summons, filing no. 9444693.

23 ¹⁰ Davidson, *supra* note 5; Request for Entry of Default against Codefendant R. Steve Creamer is
24 currently pending. See filing no. 9352600.

25 ¹¹ See e.g., Brian Maffly, *‘We Don’t Need Your Water’: Emigration Canyon Water Fight Breaks Out*
26 *In Court*, Salt Lake Tribune, June 18, 2015, at A1, available at the website administered by the
27 Newspaper Agency Corporation <https://archive.sltrib.com/article.php?id=2618507&itype=CMSID>.

28 ¹² Misuse of special service water districts for private profit has received national attention. See e.g.,
Special Districts: Last Week Tonight with John Oliver, Home Box Office, March 7, 2016, available at
the website administered by Google LLC <https://www.youtube.com/watch?v=3saU5racsGE>.

¹³ See e.g., *Emigration Canyon Improvement District Water Rates*, subheading “Water Rights,”
available at the website administered by Codefendants Simplifi Company through Codefendants Eric
and Jennifer Hawkes <https://www.ecid.org/water-rates>, last visited February 4, 2024 at 1:53 PM.

1 of Emigration Oaks,¹⁴ marketed and sold to unsuspecting California residents immediately following
2 the 2002 Olympic Winter Games as the “Bel Air of Salt Lake City.”¹⁵ *Id.*, ¶¶ 2, 57.

3 4. In furtherance of this ongoing fraud, and to ensure continued payment of monies from
4 property owners residing in Venice, Rancho Cucamonga, Corona Del Mar, Coto de Caza, Mountain
5 View, San Rafael, Bayside, Loomis, and San Diego, California, Codefendant Cohne Kinghorn P.C.,
6 Codefendant Cohne Kinghorn P.C., on behalf of Defendant Gardner, miscited and withheld expert
7 hydrology reports expressly warning against aquifer depletion via operation of large-diameter
8 commercial wells constructed by the Defendant while simultaneously concealing governmental records
9 evidencing extensive lead contamination,¹⁶ and inadequate emergency-fire protection,¹⁷ in a small-
10 mountain community identified as especially prone to wild-fire fatalities.¹⁸ *Id.*, ¶ 3.

11 5. When however, the suppression of expert studies and public records proved unsuccessful,
12 Codefendant Cohne Kinghorn P.C., on behalf of Defendant Gardner, resorted to a collaborative smear
13 campaign publishing false and defamatory statements against Mr. Tracy on the world-wide web via a
14 server located in San Jose, California under the slogan “STAY INFORMED – GET THE FACTS!”
15 (emphasis in original) *Id.*, ¶¶ 4, 20.

16 ¹⁴ See e.g., Emma Penrod, *Paranoia and a ‘Preposterously’ Oversized Water Tank*, High Country
17 News, June 28, 2019, available at the website administered by High Country News
<https://www.hcn.org/issues/51.12/water-paranoia-and-a-preposterously-oversized-water-tank-in-utah>.

18 ¹⁵ See e.g., Dennis Romboy, *Emigration Canyon: Its historical significance, offbeat aura lend the area*
19 *plenty of flavor*, Desert News, July 25, 2006, available at the website administered by the Desert News
20 Publishing Company [https://www.deseret.com/2006/7/25/19964952/emigration-canyon-its-historical-](https://www.deseret.com/2006/7/25/19964952/emigration-canyon-its-historical-significance-offbeat-aura-lend-the-area-plenty-of-flavor)
21 [significance-offbeat-aura-lend-the-area-plenty-of-flavor](https://www.deseret.com/2006/7/25/19964952/emigration-canyon-its-historical-significance-offbeat-aura-lend-the-area-plenty-of-flavor); see also correspondence to United States
22 Congressional Representatives, dated September 19, 2020, available at the website administered by
23 The ECHO-Association https://echo-association.com/?page_id=6908, last edited on December 7,
24 2022.

25 ¹⁶ See e.g., email correspondence dated July 6, 2020, from Codefendant Eric Hawkes to Codefendants
26 Utah Attorney Jeremy Rand Cook, Michael Scott Hughes, and David Bradford, available at the website
27 administered by The ECHO-Association https://echo-association.com/?page_id=4955.

28 ¹⁷ See e.g., Emigration Improvement District (aka Emigration Canyon Improvement District) Trustee
Meeting Minutes, dated October 13, 2013, available at the website administered by The ECHO-
Association https://echo-association.com/?page_id=7603, last edited on March 24, 2022 at 11:07 AM.

¹⁸ Thomas J Cova, Justin P Johnson, *Microsimulation of Neighborhood Evacuations in the Urban*
Wildland Interface, Environment and Planning A 2002, volume 34, 2211-29 available at the website
administered by The ECHO-Association https://echo-association.com/?page_id=7603, last edited on
March 24, 2022 at 11:07 AM.

1 6. In August 2018, Emigration Canyon Steam suffered total depletion for the first time in
2 recorded history as predicted in expert hydrology reports withheld and misrepresented to California
3 residents by Defendant Gardner.¹⁹ *Id.*, ¶ 52.

4 7. The environmental and economic damage caused by willful groundwater depletion and
5 drinking-water contamination by Defendant Gardner is a matter of public record.²⁰ *Id.*, ¶1.

6 **B. Minimum Contact with the Forum State**

7 With his acknowledgement of the purchase of a timeshare in Carlsbad, California more than
8 fifteen years ago, (Gardner Decl. ¶ 4) Defendant Gardner conceded that he has purposely availed
9 himself to the rights and benefits of the forum state and has therewith minimum contact with the State
10 of California.²¹ Even without the benefit of this opposition memorandum, Plaintiff has met his burden
11 of production.

12 ¹⁹ Mismanagement of scarce water resources in Utah has gained national attention. *See e.g., Water:*
13 *Last Week Tonight with John Oliver (HBO)*, Home Box Office, March 7, 2016, available at the
14 website administered by Google LLC [https://youtu.be/jtxew5XUVbQ?si=nlt-](https://youtu.be/jtxew5XUVbQ?si=nlt-MGNKupuyTIPv&t=970)
15 [MGNKupuyTIPv&t=970](https://youtu.be/jtxew5XUVbQ?si=nlt-MGNKupuyTIPv&t=970); *see also* Brian Maffly, *Why is Emigration Creek — a historic Utah*
16 *waterway — dry? Blame runs from climate change to drought to development to water-sucking wells*,
17 Salt Lake Tribune, September 8, 2018, available at the website administered by the Newspaper
18 Agency Corporation <https://www.sltrib.com/news/environment/2018/09/08/why-is-emigration-creek/>;
19 *see also* Amy Joi O’Donoghue, *Emigration Canyon and Groundwater Pumping in Utah: What’s at*
20 *Risk?* Desert News, January 2, 2019, available at the website administered by the Desert News
21 Publishing Company at [https://www.deseret.com/2019/1/2/20662500/emigration-canyon-and-](https://www.deseret.com/2019/1/2/20662500/emigration-canyon-and-groundwater-pumping-in-utah-what-s-at-risk)
22 [groundwater-pumping-in-utah-what-s-at-risk](https://www.deseret.com/2019/1/2/20662500/emigration-canyon-and-groundwater-pumping-in-utah-what-s-at-risk); *see also* Amy Joi O’Donoghue, *District’s water*
23 *diversion will continue in Emigration Canyon*, January 18, 2019, available at the website administered
24 by Bonneville International Corporation [https://www.ksl.com/article/46471323/districts-water-](https://www.ksl.com/article/46471323/districts-water-diversion-will-continue-in-emigration-canyon)
25 [diversion-will-continue-in-emigration-canyon](https://www.ksl.com/article/46471323/districts-water-diversion-will-continue-in-emigration-canyon); *see also* compilation of media reports by CNN, High
26 Country News, The Washington Post, and Business Insider available at the website administered by
27 The ECHO-Association at https://echo-association.com/?page_id=405, last edited on September 13,
28 2023 at 12:32 AM.

20 ²⁰ *See e.g., Ground Collapse and Fissures in Emigration Oaks PUD*, December 13, 2020, available at
the website administered by Google LLC
[https://www.youtube.com/watch?time_continue=4&v=r3YsR6dPktM&embeds_referring_euri=https%
3A%2F%2Fecho-association.com%2F&source_ve_path=MzY4NDIsMjg2NjY&feature=emb_logo](https://www.youtube.com/watch?time_continue=4&v=r3YsR6dPktM&embeds_referring_euri=https%3A%2F%2Fecho-association.com%2F&source_ve_path=MzY4NDIsMjg2NjY&feature=emb_logo);
see also Utah Division of Water Rights public hearing for permanent change applications no. a44045
(57-7796), December 18, 2018, available at the website administered by Google LLC
<https://www.youtube.com/watch?v=2bEPqIzQ9gc>.

21 ²¹ Any additional factual argument advanced in the Memo, including speculative “motives” of the
Plaintiff, not supported by a declaration under penalty of perjury under the laws of California is
inadmissible hearsay. *Kulshrestha v. First Union Commercial Corp.*, 33 Cal.4th 601, 610 (2004).

1 **C. Defendant Gardner Failed to Identify a Compelling Reason to Defeat Jurisdiction**

2 Once it has been decided that a defendant purposefully established minimum contacts within the
3 forum State, these contacts may be considered in light of other factors to determine whether the assertion
4 of personal jurisdiction would comport with “fair play and substantial justice.” *International Shoe Co.*
5 *v. Washington*, 326 U.S. at 320.

6 In this regard, the court may evaluate “the burden on the defendant,” “the forum State’s interest
7 in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the
8 interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the
9 “shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide*
10 *Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

11 In the present case, Defendant Gardner have cited no hinderance or burden in adjudicating the
12 present action before this Court and given the purposeful tortious conduct by the Defendant both within
13 and directed towards residents of California, a “compelling reason” required to defeat this Court’s
14 jurisdiction remains to date undiscernible.²²

15 **V. The Court Should Stay the Motion if Any Compelling Reason Should Arise**

16 Should Defendant Gardner make a compelling case that the exercise of jurisdiction by this Court
17 is unreasonable, it is long established that a trial court has discretion to continue the hearing on a motion
18 to quash service of summons for lack of personal jurisdiction to allow plaintiff sufficient time to conduct
19 discovery on jurisdictional issues. *HealthMarkets, Inc. v. Superior Court*, 171 Cal.App.4th 1160, 1173
20 (2009).

21 In order to prevail on a motion for a continuance for jurisdictional discovery, “the plaintiff should
22 demonstrate that discovery is likely to lead to the production of evidence of facts establishing

23 ²² The vexatious litigant order, repeatedly cited by Defendant Gardner’s attorney-of-record Sarah
24 Burns, Codefendants Cohne Kinghorn P.C., Utah Attorney Jeremy Cook, Gary A. Bowen,
25 Codefendant Paul Handy Brown’s attorney-of-record Miguel Mendez-Pintado, drafted by
26 Codefendant Utah Attorney Jeremy Rand Cook, and executed by Utah Third District Court Judge
27 Mark Kouris during appellate proceedings before the Utah Supreme Court, provides no evidence how
28 the exercise of personal jurisdiction by this Court poses a burden to Defendant Gardner. *See e.g.*, Brief
of Petitioner for Writ of Extraordinary Relief, *Tracy v. Hon. Kouris*, No. 20210743 (UT, October 11,
2021); *see also* Motion to Reinstate Time for Filing Appeal, *Tracy v. Simplifi et. al*, No. 200905074
(Utah 3rd Dist., April 15, 2022); *see also* Tracy Decl. ¶ 5, Exhibit B.

1 jurisdiction.” *In re Automobile Antitrust Cases I & II*, 135 Cal.App.4th 100, 127 (2005).

2 In the present case, following similar attempts to defeat of this Court’s jurisdiction by
3 Codefendants Paul Handy Brown and Gary A. Bowen, Mr. Tracy served Notice of Disposition and
4 Request for Production of Documents on January 17, and January 19 reasonably calculated to evidence
5 minimum contact with the forum state should the Court rule that jurisdictional objections were not
6 waived. *See* Tracy Decl. ¶ 7, Exhibit D and ¶ 8, Exhibit E.

7 Similar discovery notice for Defendant Gardner will be served at the earliest opportunity.

8 **CONCLUSION**

9 Based on the foregoing reasons, Mr. Tracy respectfully requests that the Court deny Defendant
10 Gardner’s motion to quash service of process for lack of personal jurisdiction in its entirety, or in the
11 alternative, stay the Motion for 180 days to allow for discovery of any material, contested jurisdictional
12 fact properly submitted to the Court.

13 //

14 //

15 DATED: February 6, 2024

By: 

Mark Christopher Tracy
Pro Se Plaintiff