

FILED
FEB 21 2024

Clerk of the Court
Superior Court of CA County of Santa Clara
BY R. TIEN DEPUTY

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

MARK CHRISTOPHER 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; PAUL BROWN, an individual; GARY BOWEN, an individual;

Defendants.

Case No. 23CV423435

**ORDER GRANTING MOTIONS TO
QUASH**

1 The following Motions to Quash came on for hearing before the Court on February 20,
2 2024: Specially Appearing Defendants’ Cohne Kinghome PC, Simplifi Company, Jeremy
3 Cook, Eric Hawkes, Jennifer Hawkes, Michael Hughes, David Bradford, David Bennion, Gary
4 Bowen (collectively “Kinghome Defendants”); Specially Appearing Defendant Kem Gardner’s;
5 and Specially Appearing Defendant Paul Brown’s. Pursuant to California Rule of Court 3.1308,
6 the Court issued its tentative rulings granting these motions on February 16, 2024. The parties
7 appeared, and Mr. Tracy sought to persuade the Court to reverse its tentative rulings, relying in
8 large part on *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 775 to argue that posting
9 material on a website accessible in California is sufficient contact with California for the Court
10 to exercise jurisdiction over these defendants. The Court disagrees; the Defendant in that case
11 distributed magazines directly into the forum, and if Plaintiff’s argument were true, the Internet
12 will have swallowed specific and general jurisdiction entirely, since under Plaintiff’s theory any
13 person or corporate entity posting information on social media or other websites in a way that’s
14 accessible to anyone in California—whether intentionally or not—would be subject to this
15 Court’s jurisdiction. As explained during argument, that is simply not the law. The Court
16 accordingly formally adopts its tentative ruling below.

17 **I. Background**

18 Plaintiff claims he is a “federal whistleblower in what [is] alleged to be the longest and
19 most lucrative water grab [] in the State of Utah.” (Complaint ¶ 1.) According to the complaint,
20 Defendants “perpetuated a fraudulent scheme to retire senior water rights vis-à-vis duplicitous
21 water claims....for the construction and massive expansion of a luxurious private urban
22 development” in Salt Lake City, Utah. (Complaint ¶ 2.)

23 On September 26, 2014, Plaintiff filed suit under the Federal Claims Act in the Federal
24 Court for the District of Utah relating to a public drinking water system in Salt Lake County
25 operated by the Emigration Canyon Improvement District (“ECID”), a public entity. Plaintiff’s
26 suit was ultimately dismissed after several appeals. (Complaint ¶¶ 7, 61-64.)

27 In this action, Plaintiff asserts claims for libel, libel per se, false light, and intentional
28 infliction of emotional distress based on emails sent by some of the Defendants and statements

1 posted on the ECIDs website, www.ecid.org. (Complaint ¶¶ 79-111.) Plaintiff acknowledges the
2 individual Defendants are Utah residents and the corporate Defendants are organized in Utah,
3 their headquarters are located in Utah, and they operate in accordance with the laws of Utah.
4 (Complaint ¶¶ 7-20) Plaintiff also acknowledges the alleged false and defamatory statements
5 were made in association with ECID and in Utah. (Complaint ¶¶ 65-78.) Plaintiff nevertheless
6 alleges this Court has jurisdiction because (1) the ecid.org website, though directed at Utah
7 residents, is “routed through San Jose, California; and (2) “Defendants published false and
8 defamatory statement[s] for the purpose of obtaining continued payment of monies from
9 property owners residing in California.” (Complaint ¶¶ 4, 21.)

10 **II. Legal Standard**

11 A defendant may specially appear and move to quash service of summons for lack of
12 personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). When a
13 defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the
14 initial burden of demonstrating facts justifying the exercise of jurisdiction. (*Jayone Foods, Inc.*
15 *v. Aekyung Industrial Co. Ltd.* (2019) 31 Cal.App.5th 543, 553.) “[T]he burden of proof is upon
16 the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence.”
17 (*Evangelize China Fellowship, Inc. v. Evangelize Ching Fellowship Hong Kong* (1983) 146
18 Cal.App.3d 440, 444.)

19 Plaintiff cannot rely on vague and conclusory assertions of ultimate facts. (*Strasner v.*
20 *Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222.) Plaintiff must
21 provide affidavits and other authenticated documents to demonstrate competent evidence of
22 specific evidentiary facts that would permit a court to form an independent conclusion on the
23 issue of jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100,
24 113.) Evidence of the jurisdictional facts or their absence may be in the form of declarations.
25 “Where there is a conflict in the declarations, resolution of conflict by the trial court will not be
26 disturbed on appeal if the determination is supported by substantial evidence. However, where
27 the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is
28 subject to personal jurisdiction is one of law. (*Elkman v. National States Ins. Co.* (2009) 173

1 Cal.App.4th 1305, 1312-1313; see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233
2 Cal.App.4th 783, 789, citing *Elkman*.)

3 Under the minimum contacts test, personal jurisdiction may be either general or specific.
4 (*Snowney v. Harrahs Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062.) Where general
5 jurisdiction exists due to a non-resident defendants “continuous and systematic” activities in a
6 state, the defendant can be sued on causes of action not related to its activities within the state.
7 (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) Absent the showing adequate to confer
8 general jurisdiction, a defendant may still be subject to specific jurisdiction, meaning
9 “jurisdiction in an action arising out of or related to the defendants contacts with the forum
10 state.” (*Healthmarkets, Inc. v. Super. Ct.* (2009) 171 Cal.App.4th 1160, 1167.)

11 If a non-resident defendants contacts with California are not sufficient for general
12 jurisdiction, it may still be subject to California’s specific personal jurisdiction if a three-prong
13 test is met: (1) defendant must have purposefully availed itself of the states benefits, (2) the
14 controversy must be related to or arise out of the defendants contacts with the state, and (3)
15 California’s exercise of jurisdiction over the defendant comports with fair play and substantial
16 justice. (*Pavlovich v. Super. Court* (2002) 29 Cal.4th 262, 269.) Plaintiff bears the burden of
17 establishing the first two requirements. If the plaintiff does so, the burden shifts to the
18 defendant to show that California’s exercise of jurisdiction would be unreasonable. (*Greenwell*,
19 233 Cal.App.4th at 792.)

20 **III. Analysis**

21 Defendants contend the Court lacks personal jurisdiction over them because (1) they are
22 Utah residents with no substantial, continuous, and systematic contacts in California, (2) they
23 have not purposefully directed any actions at California residents, (3) they have not
24 purposefully conducted any activities in California, and (4) this dispute is not related, nor does
25 it arise from Defendants alleged contacts with California.

26 Alternatively, Defendants request dismissal of this action on the grounds of inconvenient
27 forum pursuant to Code of Civil Procedure section 418.10(a)(2). Defendants argue (1) none
28 conducted business in California or had any contact with California, (2) Plaintiffs claims arise

1 from alleged wrongful conduct occurring exclusively in Utah, and (3) nothing in the complaint
2 indicates that California residents would benefit from this litigation.

3 Plaintiff alleges Defendants engaged in the following wrongful conduct:

- 4
- 5 • June 1, 2013, correspondence in which ECID Trustees announced a “fire-hydrant rental
6 fee.” (Complaint ¶ 65.)
- 7 • June 2014 correspondence in which ECIDs manager, Mr. Hawks, stated “... residents
8 have not been clear about facts surrounding the Emigration Improvement District” and
9 “the District has taken measures to hold down development in the Canyon by
10 thoughtfully allocating water connections.” (Complaint ¶ 66.)
- 11 • Defendant Kinghorn through Mr. Cook reported to Salt Lake Tribune reporter that “the
12 majority of the accusations [filed by Mr. Tracy] are completely false and inaccurate, and
13 the statements that are correct are used to support absurd conspiracy-theory
14 conclusions.” In the same article, Mr. Hawkes stated that “the Utah special service holds
15 the canyons most senior water right.” (Complaint ¶¶ 69, 70.)
- 16 • October 6, 2015, letter to Canyon residents, Mr. Hughes as chairman for ECID
17 chairman, Mr. Bradford as ECIDs trustee stated that “[Mr. Hughes] was fully exonerated
18 and went on to become an expert witness for the National Association of Dealers as well
19 as the SEC in Washington DC.” (Complaint ¶ 71.)
- 20 • Mr. Hawk published a statement on the ECID website reporting that the lead levels in
21 drinking water “is likely the result of plumbing within the homes tested and not water
22 provided by the Emigration Improvement District.” (Complaint ¶ 72.)
- 23 • November 18, 2018, ECID stated “it needs to set the record straight relative the
24 relationship between its recent water right change application [and the development
25 plans submitted to Salt Lake County]. There is none! Zero! Nada! The District has had
26 zero communication with Mr. Walsh.” (Complaint ¶ 73.)
- 27 • November 14, 2-18 email correspondence from “agarybowen@msn.com” to several
28 members of the press stating that Mr. Tracy “is of the devil, who is the father of
contentions” and “Lord Jesus Christ recorded in the Book of Mormon” required such
things should be done away with.” (Complaint ¶ 74.)
- Email correspondence and phone call in which Mr. Bowen accused Mr. Tracy of
committing fraud and that the matter “should be referred to Office of the Utah Attorney
General for criminal investigation.” (Complaint ¶ 75.)
- December 15, 2018, email correspondence sent from paul.h.brown@verizon.net to
Emigration Oaks resident stating that the FCA litigation and protest of change

1 applications ... has the potential of shutting down our only water supply... If you are
2 among those supporting or encouraging these actions, please stop.” (Complaint ¶ 76.)

- 3 • September 22, 2022, Mr. Hawkes, as manager of ECID posted a notice of water rate
4 increase on ecid.org and stated that “the District has been required to defend against a
5 series of meritless lawsuits filed by a former resident of Emigration Canyon named
6 Mark Tracy. All of the various actions have been decided in favor of the District.”
7 (Complaint ¶ 77.)
- 8 • January 19, 2023, in a public hearing conducted via Zoom platform, Mr. Cook stated
9 that Mr. Tracy was “hiding assets” and thus had committed perjury before the Utah State
10 third District Court. (Complaint ¶ 78.)

9 A. Personal Jurisdiction

10 1. General Jurisdiction

11 To assert general jurisdiction over the Defendants for these alleged false and defamatory
12 statements, Plaintiff has the burden of showing each Defendants continuance and systematic
13 contact with the State of California “as to render it essentially at home in the forum State”.
14 (*Saimler AG v. Bauman* (2014) 571 U.S. 117, 127.) In assessing a defendant’s contacts with the
15 forum state for purposes of general jurisdiction, the court looks at the contacts as they existed
16 from the time the alleged conduct occurred to the time of service of summons. (*Strasner v.*
Touchstone Wireless Repair & Logistics, LP (2016) 5 Cal.App.5th 215, 222-223.)

17 Plaintiff asserts procedural challenges to Mr. Browns and Mr. Bowens motions, but he
18 does not address the substantive issues those motions raise. Mr. Brown and Mr. Bowen
19 resubmitted their declarations in accordance with the laws of California without any change to
20 their contents. The general rule of motion practice, which applies here, is that new evidence is
21 not permitted with reply papers. ... “[T]he inclusion of additional evidentiary matter with the
22 reply should only be allowed in the exceptional case ... and if permitted, the other party should
23 be given the opportunity to respond.” (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-
24 1538.) Whether to accept new evidence with the reply papers is vested in the trial courts sound
25 discretion. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308; *Carbajal v.*
26 *CWPSC, Inc.*, (2016) 245 Cal. App. 4th 227, 241, *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th
27 1177, 1193 [“While additional evidentiary matter submitted with the reply ordinarily should not
28 be allowed, the court has discretion to consider it when it poses no prejudice to the opposing

1 party”].) The Court will consider the resubmitted declarations since the content of each
2 declaration was not changed and no new evidence was presented.

3 The Court also has authority to extend the time for filing and hearing of a motion to
4 quash. “[S]cheduling a hearing date beyond 30 days should not invalidate a motion to quash.”
5 (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1296; Code of Civ. Proc. §§
6 418.10(a) and (b).) Plaintiff was not prejudiced by the extended hearing date since the Courts
7 record shows he was served with amended notices informing him of the scheduled hearing date
8 and had sufficient time to file his oppositions.

9 As for substance, Plaintiff acknowledges Defendants reside in Utah, are domiciled in
10 Utah, and/or are Utah professional corporations with offices in Utah. Aside from Mr. Gardner,
11 who has a timeshare interest in a California property, none of the other moving Defendants own
12 or have any real property interests in California. Aside from Mr. Bowen, who has sold
13 approximately 500 copies of his self-published book on Amazon, **none of the remaining moving**
14 **Defendants has conducted any business in California.**

15 Mr. Gardner attests he acquired a percentage interest in a timeshare located in Carlsbad,
16 California, and he stays at the property a handful of times each year for vacation lasting few
17 days to a week. (Declaration of Kem Gardner ¶ 4.) Mr. Bowen attests he has sold approximately
18 500 copies of his book, through Amazon, in the last four years and it is possible that Amazon
19 shipped some of the books to California residents. (Declaration of Gary Bowen ¶ 5, 6.)

20 This is insufficient to demonstrate the type of substantial, continuous conduct necessary
21 to demonstrate general jurisdiction. Accordingly, Plaintiff fails to meet his burden of proving
22 general jurisdiction over the moving-Defendants.

23 2. Specific Jurisdiction

24 To assert specific jurisdiction over the Defendants, Plaintiff has the burden of showing
25 each Defendant purposefully (1) directed its/his/her activities at California residents, (2) derives
26 a benefit from its/his/her activities in California, or (3) invoke privileges and protections of
27 California’s laws by purposefully engaging in significant activities within the State or by
28 creating continuing obligations between himself and the residents of California. “As the name

1 and definition of purposeful availment make plain, an out-of-state defendants conduct toward
2 the forum State or its residents is relevant to the jurisdictional analysis only if that conduct is
3 purposeful, deliberate, and intentional. [Citations.] An out-of-state defendants contact with a
4 forum state that is random fortuitous or attenuated is not enough. [Citations.] This is why the
5 mere fact that the out-of-state defendants conduct has some effect on a California resident is not
6 enough, by itself, to constitute purposeful availment [citations]; to count, that effect must
7 be *intended* [citations].” (*Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243,
8 254.) In tort cases, “purposeful availment” is based upon “intentional actions expressly aimed at
9 the forum state causing harm, the brunt of which is suffered -and which the defendant knows is
10 likely to be suffered -in the forum state.” (*Jewish Defense Organization, Inc. v. Sup. Ct. of Los*
11 *Angeles County (Rambam)* (1999) 72 Cal.App.4th 1045, 1054.)

12 Once Plaintiff shows purposeful availment, he must then demonstrate his claims for
13 defamation, false light, and emotional distress are related to or arise out of Defendants contacts
14 with the State of California. This test does not require a “causal relationship between the
15 defendants in-state activity and the litigation.” (*Ford Motor Co. v. Montana Eighth Judicial*
16 *District Court* (2021) 141 S.Ct. 1017, 1026.) The “arise out” of standard “asks about causation,”
17 but “relate to” does not. (*Ibid.*) “When determining whether specific jurisdiction exists, courts
18 consider the relationship among the defendant, the forum, and the ligation.” (*Pavlovich v.*
19 *Superior Court* (2002) 29 Cal.4th 262, 269.)

20 Here, Plaintiffs specific allegations against (1) Mr. Brown is that he sent a false and
21 defamatory email to the residents of Emigration Oaks; (2) Mr. Bowen is that he made calls and
22 sent defamatory emails to a local press and the Deputy Utah State Engineer, Boyd Clayton; (3)
23 Mr. Hawkes are that he, as ECIDs manager, posted false statements on ECIDs website and
24 made false statements to a local reporter; (4) Mr. Cook is that he made defamatory statements to
25 a local press reporter and in a public hearing that was conducted on the Zoom platform; and (5)
26 Mr. Hughes and Mr. Bradford is that they made false statements in a letter that was sent to the
27 local Canyon residents. (Complaint ¶¶ 65-78.) Plaintiff further alleges all Defendants were/are
28

1 agents, collaborators, and co-conspirators with each other Defendants. (Complaint ¶ 21.)
2 Although Plaintiff claims false statements were posted on ECIDs website, ECID is not a party.

3 **There is no evidence these alleged actions were deliberately directed at California**
4 **residents or establishing agency or a conspiratorial relationship among Defendants.** There is no
5 evidence showing **Defendants (1) intentionally routed ECIDs website through San Jose, (2)**
6 **deliberately posted false statements knowing it would be read by California residents, (3) the**
7 **postings were read by property owners residing in California, and (4) as the result, California**
8 **property owners paid monies to the moving Defendants.** Consequently, the Court finds that Mr.
9 Brown, Mr. Bowen, and Kinghorn Defendants did not purposefully avail themselves of the
10 privilege of conducting activities in California.

11 Mr. Gardner's timeshare interest in a California property satisfies the "purposeful
12 availment" requirement and establishes contact with the State of California. (*Buchanan v. Soto*
13 (2015) 241 Cal.App.4th 1353, 1363; *Easter v. American West Financial* (9th Cir. 2004) 381
14 F.3d 948, 961; *Sher v. Johnson* (9th Cir. 1990) 911 F.2d 1357, 1363.) However, to assert
15 specific jurisdiction over Mr. Gardner, there must be a substantial nexus or connection between
16 his fractional property ownership and Plaintiffs claims. (*Snowney*, 35 Cal.4th at 1068.) The
17 more significant the forum contacts are, the less related to the cause of action they need to be.
18 (*Ibid.*) Here there is no evidence of any nexus, much less a substantial nexus, between
19 Plaintiff's claims and Mr. Gardner's California timeshare ownership.

20 Plaintiff fails to satisfy his initial burden of establishing the necessary jurisdictional facts
21 to justify the trial courts exercise of specific jurisdiction, thus the burden does not shift to
22 Defendants to demonstrate that assertion of jurisdiction would be unreasonable. (*Pavlovich*, 29
23 Cal.4th at 269; *Malone v. Equitas Reinsurance Ltd.*, (2000) 84 Cal.App.4th 1430, 1437 n.3.)

24 Defendants' motions to quash are GRANTED.

25 **A. Jurisdictional Discovery**

26 "A plaintiff is generally entitled to conduct discovery with regard to a jurisdictional
27 issue before a court rules on a motion to quash. Granting of a discovery request lies in the
28 discretion of the trial court." (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 911

1 (internal quotes and citations omitted.) A court may deny such a request when it “could
2 reasonably conclude further discovery would not likely lead to production of evidence
3 establishing jurisdiction.” (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487.)

4 There must be some basis in fact to justify jurisdictional discovery. (*In re Automobile*
5 *Antitrust Cases* (2005) 136 Cal.App.4th 100, 127 [“In order to prevail on a motion for a
6 continuance for jurisdictional discovery, the plaintiff should demonstrate that discovery is likely
7 to lead to the production of evidence of facts establishing jurisdiction”].) When a plaintiff is not
8 able to make an offer of proof of the existence of “additional relevant jurisdictional evidence,” a
9 court does not abuse its discretion in denying jurisdictional discovery. (*Ibid.*) Other than two
10 deposition notices, Plaintiff offers no factual basis to justify continuing these motions for
11 discovery. The evidence already before the Court is such that the Court concludes such
12 discovery would be futile.

13 Accordingly, Plaintiff’s request for additional jurisdictional discovery is DENIED.

14 **C. Inconvenient Forum**

15 Defendants alternate argument under the doctrine of forum non-conveniens is moot.

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17 **IT IS SO ORDERED.**

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20 Date:

February 20, 2024



21 The Honorable Erette D. Pennypacker
22 Judge of the Superior Court



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
CIVIL DIVISION

RE: **Mark Tracy vs Cohne Kinghorn PC et al**
Case Number: **23CV423435**

PROOF OF SERVICE

Order Granting Motions to Quash was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 02/21/2024.
CLERK OF THE COURT, by Rachel Tien, Deputy.

cc: Mark Christopher Tracy 1130 Wall St. #561 La Jolla , CA 92037
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