

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MARK CHRISTOPHER TRACY,

Plaintiff and Appellant,

v.

COHNE KINGHORN PC, SIMPLIFI
COMPANY, JEREMY RAND COOK,
ERIC HAWKES, JENNIFER HAWKES,
MICHAEL SCOTT HUGHES, DAVID
BRADFORD, KEM CROSBY GARDNER,
DAVID BENNION, PAUL HANDY
BROWN and GARY A. BOWEN,

Defendants and Respondents.

Court of Appeals No. H052028

Superior Court of California, County of Santa Clara
Case. No. 23CV423435
The Honorable Evette D. Pennypacker Judge

APPELLANT'S REPLY TO RESPONDENT
KEM C. GARDNER'S ANSWERING BRIEF

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Plaintiff-Appellant
In propria persona

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 4

ARGUMENT 6

 I. RESPONDENT GARDNER’S ANSWERING BRIEF IS
 UNTIMELY 6

 II. MISCITATION OF UNCONTESTED AND VERIFIED
 JURISDICTIONAL ALLEGATIONS OF THE
 COMPLAINT..... 7

 III. GROSS MISREPRESENTATION OF THE COURT
 RECORD 9

 IV. CITATION OF ERRONEOUS AND UNSUPPORTED
 LEGAL ARGUMENTS 10

CONCLUSION 11

CERTIFICATE OF COMPLIANCE..... 13

TABLE OF AUTHORITIES

CASES

Albertson v. Raboff
(1960) 185 Cal.App.2d 372 9

Hoffman v. City of Palm Springs
(1957) 169 Cal.App.2d 64 9

Kern County Dept. of Child Support Services v. Camacho
(2012) 209 Cal.App.4th 1028 10

People v. Catlin
(2001) 26 Cal.4th 81 10

People v. Graham
(2024) 102 Cal.App.5th 787 10

RULES

Rule 8.60(c) CRC 6

INTRODUCTION

Plaintiff Mark Christopher Tracy (“Mr. Tracy” and “Appellant”) respectfully submits this Reply to Defendant Kem Crosby Gardner’s Answering Brief (“Gardner Answering Brief,” and “GAB” and “Respondent Gardner” respectively).¹

Respondent Gardner urges this Court to affirm the trial court’s ruling that a California court lacks personal jurisdiction to adjudicate defamatory statements of and concerning a California resident, published in San José, California, for the purpose of extracting payment of monies from California citizens and residents because (i) the verified Complaint contains no specific allegations that Respondent Gardner directed activities or personally received any payment of monies from California citizens and residents; and (ii) even if Defendant Gardner conducted business in California through the companies The Boyer Company, the Gardner Group, and rPlus Energies, he was not “involved in his personal participation.”

Respondent Gardner further postulates that the trial court did not abuse its discretion when it denied Plaintiff’s Request for Reconsideration because Mr. Tracy “could have discovered” with reasonable diligence

¹ “AA” refers to the Appellant’s Appendix, “ARA” refers to the Appellant’s Reply Appendix to Kinghorn Respondents’ Consolidated Reply Brief and “ARGB” refers to the Appellant’s Reply Appendix to Respondent Gardner’s Answering Brief.

information of a \$460 million-dollar renewable energy agreement concluded by the Gardner Group for numerous construction projects “in the western United States” brokered by Los Angeles Attorney Jeffery R. Atkins.

These arguments fail.

Unable to repudiate the facts and legal arguments of Appellant’s Opening Brief, in an untimely filing, Respondent Gardner now attempt to discredit Mr. Tracy in the eyes of this Court,² by (i) grossly misciting the verified and uncontested jurisdictional allegations of the Complaint; (ii) flagrantly misrepresenting the court record; (iii) and advancing new legal arguments on appeal contrary to the jurisdictional facts attested by Defendant Gardner himself under penalty of perjury.

² To continue active concealment of fraud and lead contamination of the drinking water system constructed by Respondent Gardner (AA219-25) at the expense of California citizens and residents (AA164-77), Respondent Gardner’s actions before this Court to discredit Mr. Tracy are both necessary and expected. *See e.g., Jeffery Wigand: The Big Tobacco Whistleblower*, 60 Minutes - CBS Broadcasting Inc., February 4, 1996, available at the website administered by Google LLC https://youtu.be/1-Vu8LrUDk?si=S_Q4W4cRtzio-zv9; and Brian Maffly, *We Don't Need Your Water': Emigration Canyon Water Fight Breaks Out In Court*, Salt Lake Tribune, June 18, 2015, at A1, available at the website administered by the Newspaper Agency Corporation <https://archive.sltrib.com/article.php?id=2618507&itype=CMSID> (AA107); and Emma Penrod, *In Bad Faith - Utah Regulators Gave the Mormon Church a Pass on Contaminated Drinking Water*, High Country News, September 2, 2018, available at the website administered by High Country News <https://www.hcn.org/issues/51-15/>.

This Court should vacate the order of trial court granting Respondent Gardner's motion to quash service of process for lack of personal jurisdiction, remand for further proceedings, and award Mr. Tracy costs of appeal.

ARGUMENT

I. RESPONDENT GARDNER'S ANSWERING BRIEF IS UNTIMELY

Following submission of Appellant's Opening Brief, on the final day of the response deadline, at the express request of Respondent Gardner, Mr. Tracy agreed to extend the deadline an additional 32 days until November 4, 2024 ("Stipulation Agreement"). (ARGB004-6.)

Respondent Gardner however failed to file a Response Brief and declined to file an additional extension request as required under Rule 8.60(c) CRC.

Upon discovery that the GAB was accepted by the court clerk 23 days past the agreed deadline, Mr. Tracy contacted Respondent Gardner's legal representative for clarification and/or correction of the court record, whereby Attorney Sarah Burns offered no reason or explanation for the grossly belated filing. (ARGB003.)

As Respondent Gardner failed to comply with the terms of the Stipulation Agreement, the Court should strike the GAB from the record in its entirety and rule on the unopposed Appellant's Opening Brief.

II. MISCIATION OF UNCONTESTED AND VERIFIED JURISDICTIONAL ALLEGATIONS OF THE COMPLAINT

Assuming arguendo that the GAB was timely filed, Respondent Gardner argues that “Plaintiff alleges no facts whatsoever [...] what any of the Defendants’ intent was—let alone what Mr. Gardner’s intent was—or that any of the Defendants actually received any ‘payment of monies’ from ‘California property owners.’” (GAB at p. 19.)

Respondent Gardner’s representation is demonstrably false.

The verified Complaint alleges that statements knowingly published behalf of and for the economic benefit of Respondent Gardner via a server located in San José, California were of and concerning a resident of the State of California (AA009 at ¶4; AA010 at ¶6) and intended by to fraudulently induce continued payment of monies from citizens and residents of Venice, Rancho Cucamonga, Corona Del Mar, Coto de Caza, Mountain View, San Rafael, Bayside, Loomis, and San Diego, California (AA009 at ¶6) to service yet outstanding federally-back debt of an economically unfeasible and “preposterously oversized” water system constructed by Respondent Gardner for the private profit of Respondent Gardner’s. (AA012 at ¶12.)³

³ See also Emma Penrod, *Paranoia and a ‘Preposterously’ Oversized Water Tank*, High Country 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>. (A075.)

Moreover, the verified Complaint records that

[Respondent Gardner] perpetuated a fraudulent scheme to retire senior water rights vis-a-vis duplicitous water claims removed [by Respondent Gardner] from the only active federal military cemetery created by an Act of Congress, signed into law by United States President Ulysses S. Grant in 1874, subject to the reversionary interest to be “forever used for the burial of the dead,” but however misappropriated [by Respondent Gardner] for the construction and massive expansion of a luxurious private urban development marketed and sold to unsuspecting California residents as the “Bel Air of Salt Lake City.” (AA002 at ¶2)

The fraudulent consolidation of senior water rights, and active concealment of lead contamination of drinking water by Respondent Gardner at the expense of California citizen and residents continue to date unabated. (AA159-77AA076.) The economic and ecological damage caused by the water system constructed by Respondent Gardner contrary to expert hydrology studies is a matter of public record. AA008 at ¶8.)⁴

⁴ See also Brian Maffly, *Lead shows up in Emigration Canyon drinking water*, Salt Lake Tribune, November 8, 2019, available at the website administered by the Newspaper Agency Corporation <https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/> and Brian Maffly, *Why is Emigration Creek — a historic Utah waterway — dry? Blame runs from climate change to drought to development to water-sucking wells*, Salt Lake Tribune, September 8, 2018, available at the website administered by the Newspaper Agency Corporation <https://www.sltrib.com/news/environment/2018/09/08/why-is-emigration-creek/>; see also Amy Joi O’Donoghue, *Emigration Canyon and Groundwater Pumping in Utah: What’s at Risk?* Desert News, January 2, 2019, available at the website administered by the Desert News Publishing Company at <https://www.deseret.com/2019/1/2/20662500/emigration-canyon-and->

As Respondent Gardner failed to contest any verified jurisdictional allegation in the sworn affidavits filed by under penalty of perjury under the laws of California, (AA47-9), Mr. Tracy had no additional burden of proof contrary to the trial court’s ruling.⁵ *Atkins, Kroll & Co. v. Broadway Lbr. Co.* (1963) 222 Cal.App.2d 646, 653-654 (citing *Albertson v. Raboff* (1960) 185 Cal.App.2d 372, 388; *Hoffman v. City of Palm Springs* (1957) 169 Cal.App.2d 645, 648)).

III. GROSS MISREPRESENTATION OF THE COURT RECORD

Respondent Gardner insists Mr. Tracy “could have discovered” with reasonable diligence a 460-million dollar renewable energy deal by the Gardner Group for future construction projects “within the western United States” brokered by Los Angeles attorney Jeffery A. Atkin of the law firm Foley & Lardner LLP. (GAB at pp. 21-2.)

This representation is again demonstrably false.

[groundwater-pumping-in-utah-what-s-at-risk/](https://www.deseret.com/2019/1/18/20663650/district-s-water-diversion-will-continue-in-utah-s-emigration-canyon/); and Amy Joi O’Donoghue, *District’s water diversion will continue in Emigration Canyon*, <https://www.deseret.com/2019/1/18/20663650/district-s-water-diversion-will-continue-in-utah-s-emigration-canyon/> January 18, 2019, available at the website administered by Bonneville International Corporation;

⁵ In the instant action, Mr. Tracy has collected thousands of pages of documents spanning a period of over a century, and secured hundreds of hours of voice recordings. Respondent Gardner’s reluctance to contest any allegation under penalty of perjury is not unexpected. (*See e.g.*, AA164-225.)

The court record documents that the press release of the Gardner Group deal was first published on February 23, 2024, while the trial court's order granted Defendant Gardner's motion to quash service of the Complaint and Summons was issued two days prior thereto on February 21.

The trial court's ruling "Plaintiff cites no legally cognizable basis under Code of Civil Procedure section 1008" is without basis in fact or law.

IV. CITATION OF ERRONEOUS AND UNSUPPORTED LEGAL ARGUMENTS

Respondent Gardner argues that "a nonresident corporate shareholder is not subject to the personal jurisdiction of the California courts even if the corporation is so subject, absent the shareholder's personal participation in the transaction sufficient to warrant personal jurisdiction." (citing *Indiana Plumbing Supply, Inc. v. Standard of Lynn, Inc.*, 880 F. Supp. 743, 751 (C.D. Cal. 1995) (finding jurisdiction over corporation but not its officer).⁶

The factual foundation of this legal argument is demonstrably false.

⁶ The record show that Attorney Sarah Burns refused to correct the trial court record that Respondent Gardner owns (or did own) a percentage interest in two California radio stations and has extensive business interests in the forum state. (AA119-121) As such, the Court should disregard new legal arguments first raised during appellate proceedings. *People v. Catlin* (2001) 26 Cal.4th 81, 122-23 [holding that arguments not raised before the trial court are waived]; *People v. Graham* (2024) 102 Cal.App.5th 787, 798 ["It is axiomatic that arguments not raised in the trial court are forfeited on appeal."] [quoting *Kern County Dept. of Child Support Services v. Camacho*, (2012) 209 Cal.App.4th 1028, 1038.]

In his sworn affidavit, Respondent Gardner affirmed under penalty of perjury that “I do not conduct business *on behalf of myself in California*” (emphasis added)(AA48 at ¶3) and “[I] left [The Boyer Company] and started my own, KC Gardner Company, L.C., which is a separate Utah limited liability company.” (*Id.* at ¶5.)

As the court record demonstrates, Respondent Gardner is not only “a corporate shareholder,” KC Gardner Company has extensive business relations in the forum state and Respondent Gardner conducts business in California with his “personal participation.”

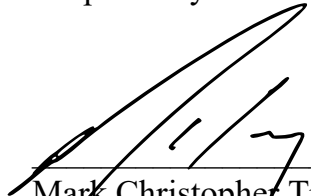
The trial court’s rulings “[a]side from Mr. Bowen [...] none of the remaining moving Defendants has conducted any business in California” (AA142) and that jurisdictional discovery regarding Respondent Gardner’s extensive business relations in the forum state “would be futile” (AA145) and there was no legal basis for Mr. Tracy’s Request for Reconsideration is clearly erroneous.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court’s order quashing service of process, remand for further proceedings consistent with its opinion and award Mr. Tracy costs of this appeal.

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Respectfully Submitted,

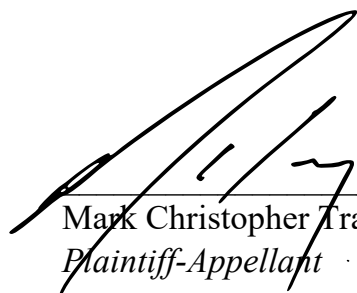


Mark Christopher Tracy
Plaintiff-Appellant

DATED: December 17, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this Reply Brief contains 1,741 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.



Mark Christopher Tracy
Plaintiff-Appellant