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 BRIEF

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Plaintiff-Appellant
In propria persona

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INTRODUCTION

Plaintiff Mark Christopher Tracy ("Mr. Tracy" and "Appellant") respectfully submits this Reply and Appellant's Reply Appendix ("ARA") to the Consolidated Response Brief filed on behalf of Defendants Cohne Kinghorn P.C., Simplifi Company, Gary A. Bowen, Eric and Jennifer Hawkes, Michael Scott Hughes, David Bradford, Attorneys Jeremy Rand Cook, David Bennion, and Paul Handy Brown ("CRB" and "Kinghorn Respondents").

Kinghorn Respondents urge this Court to affirm the trail 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) Appellant was previously "sanctioned" in foreign proceedings; (ii) all events occurred "exclusively" in Utah; and (iii) the verified Complaint fails to establish personal jurisdiction under the purported authority of the Fourth District Court of Appeal and the California Supreme Court.

Kinghorn Respondents further postulate that the trial court did not abuse its discretion and disadvantage the Plaintiff when it permitted Respondents Brown and Bowen to repeatedly amend sworn affidavits after Mr. Tracy filed hearsay objection, but then ruled that jurisdictional discovery

would be "futile" due to the fact that Mr. Tracy "chose to ignore" the substance of inadmissible evidence.

These arguments fail.

Unable to repudiate the facts and legal arguments of Appellant's Opening Brief, in a belated and defective filing, Kinghorn Respondents now attempt to discredit Mr. Tracy in the eyes of this Court,[1] by (i) grossly misciting the verified and uncontested jurisdictional allegations of the Complaint; (ii) fragrantly misrepresenting the court record; (iii) citing irrelevant and inapplicable court rulings; and (iv) postulating erroneous and unsupported legal arguments.

This Court should vacate the order of trail court granting the Kinghorn Respondents' motions to quash service of process for lack of personal

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[1] To continue active concealment of fraud and lead contamination of drinking water (AA219-25) at the expense of California citizens and residents (AA164-77), Respondents' actions before this Court to discredit Mr. Tracy are both necessary and expected. *See e.g., Jeffery Wigand: The Big Tabacco 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 County News, September 2, 2018, available at the website administered by High Country News https://www.hcn.org/issues/51-15/.

jurisdiction, remand for further proceedings, and award Plaintiff costs of appeal.

ARGUMENT

I. KINGHORN RESPONDENTS' CONSOLIDATED BRIEF IS UNTIMELY AND DEFECTIVE

Following the timely submission of Appellant's Opening Brief, on the final day of the response deadline, at the request of Kinghorn Respondents, Mr. Tracy agreed to extend the deadline an additional 32 days until November 4, 2024 ("Stipulation Agreement"). (ARA003-4) On the last day of the extended deadline, Kinghorn Respondents filed the CBR and supporting Appendix, but the electronic filing simultaneously served on Mr. Tracy was reported as rejected by the court. (ARA005-7.) Kinghorn Respondents then amended the filing, but for unknown reasons failed to include service of the altered documents to Mr. Tracy via the "File & ServeXpress" on 11/4/2024 at 6:50:27 PM, contrary to the Certificate of Service signed by Juliana C. Schuh under penalty of perjury.[2] (CRB at pp. 33-5.)

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[2] Prior thereto, Kinghorn Respondents filed and served Mr. Tracy two (2) separate Response Briefs and Appendices via File & ServeExpess, all of which were immediately followed by a notice of rejection and notice of default by the court clerk. Only when Appellant received notice from the court that the default was rescinded due to a "clerical error," did Mr. Tracy inquire why the CRB and Respondents' Appendix were not properly served although entered into the court record. (ARA009.)

Upon discovery that the amended CRB and Appendix filed with the court had been withheld, Mr. Tracy contacted Kinghorn Respondents' legal representative for clarification and/or correction of the court record (ARA012-3.) Rather than acknowledge the error or correct the filing, Kinghorn Respondents "refiled" the CRB and Appendix (AA010) along with the same incorrect Certificate of Service falsely attesting to service date of November 4 and not November 21.[3] (CBR at pp. 33-5.)

To date, this Court has not approved the November 21 filing, and Kinghorn Respondents' legal representative has refused to correct the CBR evidencing a known false Certificate of Service. (*Id.*)

As Kinghorn Respondents failed to comply with the terms of the Stipulation Agreement and refused to correct a demonstrably false Certificate of Service following notification, the Court should strike the CRB from the record in its entirety and rule on the unopposed Appellant's Opening Brief.

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

Assuming arguendo that the CRB was timely ad properly filed, under the subheading "Factual Allegations Raised in Appellant's Complaint," Kinghorn Respondents insist that "the allegations [of the verified Complaint]

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[3] Attorney Larson executed and filed a separate "Proof of Service" affirming that the CRB and Appendices were served to Appellate on November 21, 2024, per electronic correspondence. (ARA014-5.) To date, this document has not been accepted for filing by the court clerk.

related to the individual Respondents have no connection to California […] and lacks any factual allegation that any Respondent did anything related to or directed at the State of California." (CRB at pp 13-4.)

Kinghorn Respondents' representation is demonstrably false.

The verified Complaint alleges that statements knowingly published by Kinghorn Respondents 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 Respondents 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 outstanding federally-back debt of an economically unfeasible and "preposterously oversized" water system for the economic benefit of co-Defendants Creamer, Plumb and Gardner. (AA012 at ¶12.)[4] The fraudulent consolidation of senior water rights, and active concealment of lead contamination of drinking water by Kinghorn Respondents at the expense of California citizen and residents continue to date unabated. (*Id.*) The

[4] *See* Emma Penrod, *Paranoia and a 'Preposterously' Oversized Water Tank*, High County 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.)

economic and ecological damage caused by Kinghorn Respondents are now a matter of public record. (AA076 at ¶12.)[5]

As Kinghorn Respondents failed to contest any verified jurisdictional allegation in the sworn affidavits filed by under penalty of perjury under the laws of California, [AA045-6; AA047-9; AA050; AA052-4; AA055-6; AA057-9; AA060-1; AA062-3; AA064-5; AA067-9], Mr. Tracy had no additional burden of proof.[6] *Atkins, Kroll & Co. v. Broadway Lbr. Co.* (1963) 222 Cal.App.2d 646, 653-654 (citing *Albertson v. Raboff* (1960) 185

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[5] *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-groundwater-pumping-in-utah-what-s-at-risk/; 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;

[6] 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. Kinghorn Respondents' reluctance to contest any allegation under penalty of perjury is not unexpected. (*See e.g.*, AA164-225.)

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

Kinghorn Respondents insist that "[i]n Respondent Brown's Reply in Support of the Motion [to quash service of process for lack of personal Declaration substantially complied with the California Rules of Procedure. (000143-145 [sic].)" [7]

This representation is demonstrably false.

Respondent Brown did not argue before the trail court that he (and Attorney Miguel E. Mendez-Pintado) were free to disregard Code of Civ. P. § 2015.5, but rather only contended that "[t]he Declarations' intent to attest to the truthfulness of the statements under penalty of perjury is evident and should be considered valid for the purpose of the Motion." (RA000175.)

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[7] Respondents' citation to the Respondents' Appendix is incorrect. The original and [First] Amended Declaration of Defendant Brown were filed on November 20 and November 21, 2023, respectively [AA029-30 and AA031-2] while the [Second] Amended Declaration of Defendant Brown was submitted on January 4, 2024 [AA064-5] and was subsequent to Appellant's objection to the inadmissible hearsay evidence filed with the trail court [AA036] and is recorded at RA000174-8.

Respondents provided the trail court with no authority for this legal argument, nor does it appear that any court in the United States of America has made such an erroneous ruling.[8]

Next, Kinghorn Respondents insist,

> […] Respondent Bowen submitted a substantively identical Amended Declaration. (AA 45-46.) The only change made to Respondent Bowen's Declaration is that the attestation statement was updated to reflect that the Declaration was signed in Utah under penalty of perjury under the laws of the State of California. (AA 45-46.) (CBR at p. 19.)

This representation is demonstrably false.

Defendant Bowen's original declaration and [First] Amended Declaration were filed on November 22 and December 6, 2023, respectively (AA038-9 and AA45-6) and only the later was executed under penalty of perjury under the laws of California after Mr. Tracy had already filed hearsay objection two day prior thereto. (AA040-44.)

Moreover, on February 1, 2024, twenty-one (21) days *after* the court had postponed its ruling on the Motion (AA066), Respondent Bowen conceded in a Second Amended Declaration that he had marketed and distributed a religious writing in the forum state. (AA067-9.)[9]

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[8] Respondent Brown refused to produce any jurisdictional discovery document and failed to attend a sworn deposition scheduled in Salt Lake City, Utah on February 15, 2024. (AA097-101.)

[9] Respondent Bowen refused to produce a single jurisdictional discovery document and failed to attend a sworn deposition scheduled in Salt Lake City, Utah on February 13, 2024. (AA092-5.)

As Respondent Bowen filed his [Second] Amended Declaration as a stand-alone document [AA067-9] twenty-eight days *after* submission of his Reply Memorandum [RA180-6], which formed the basis of the trail court's ruling [AA142], the reference to the laws of California was not the only material change made to Respondent Bowen's sworn affidavit contrary to Kinghorn's representations to this Court and the trial court's ruling.

Lastly, Kinghorn Respondents argue that Mr. Tracy is not allowed to advance new legal arguments during appellate proceedings, as he failed to request leave of the court to conduct jurisdictional discovery in his Opposition to the Motions to quash service of process filed by Defendant Brown and Defendant Bowen. (CRB at p. 29.)

The factual basis for this argument is demonstrably false.

Once it became evident that the superior court would allow Kinghorn Respondents to repeatedly amend inadmissible hearsay evidence (AA142) and burden the plaintiff with a non-existent obligation to produce evidence of uncontested jurisdictional allegations (AA145), Mr. Tracy filed a timely Request for Reconsideration pleading for additional time to conduct jurisdictional discovery. [10] (AA150).

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[10] As Kinghorn Respondents' argument appears only to apply to Defendants Brown and Bowen and is silent regarding all other Kinghorn Respondents, the Opening Brief regarding Cohne Kinghorn PC, Simplifi Company, Bennion, Hughes, Bradford and Jennifer and Eric Hawkes is

As such, the question of jurisdiction discovery was properly raised in the trail court and is not presented for the first time during appellate proceedings.

Lastly, under the CRB subheading "Appellant's Previous Vexatious Litigations" Respondents postulate, "[t]he United States Court of Appeals for the Tenth Circuit has affirmed the District Court's decision to impose sanctions against Appellant because the litigation was "clearly vexatious and brought primarily for the purpose of harassment." (CRB at p. 14.)

This representation is both immaterial to the trial court's ruling regarding a California court's exercise of personal jurisdiction and demonstrably false.[11]

IV. CITATION OF INAPPLICABLE LEGAL AUTHORITIES

Kinghorn Respondents argue that in "nearly identical factual allegations [to the present case]" the California Fourth District Court of Appeal and held that "merely using a website hosted in California is

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uncontested as related to the issue of Mr. Tracy request for jurisdictional discovery.

[11] As Attorney Mendez-Pintado had no "personal knowledge" of foreign court proceedings, and did not file a Request for Judicial Notice, the ruling was not properly submitted to the superior court per California Evidence Code §§ 452, 453. (RA000049.) Moreover, a cursory review reveals that the Tenth Circuit Court of Appeals did not "affirm" the findings of the Utah federal district court judge Jill N. Parish after twice overruling her dismissal, but rather ruled that Mr. Tracy's former legal counsel had failed to argue the issue on appeal, and thus was not subject to appellate review. (RA000064.)

insufficient to establish personal jurisdiction" in *Jewish Defense Organization, Inc., v. Superior Court* (1999) 72 Cal.App.4th 1045, 1055-63.

The factual foundation of this legal argument is demonstrably false.

In *Jewish Defense*, the Plaintiff did not reside in California, and the court specifically noted that in libel cases it is "reasonable that the brunt of harm from defamation of an individual to be felt in his domicile." *Jewish Defense Organization* at 1050 (citing *Gordy v. Daily News, L.P.* (9th Cir. 1996) 95 F.3d 829, 833).[12]

Kinghorn Respondents' reliance on *Pavlovich*, 29 Cal.4th 262, 274-76, *Strasner v. Touchstone Wireless Repair & Logistics, LP*, (2016) 5 Cal.5th 215, 230-32 (*Strasner*), and *Hungerstation LLC v. Fast Choice LLC*, (9th Cir. 2021) 857 Fed.Appx. 349, 351 (unpublished)(*Hungerstation*) likewise fails.

In *Pavovich*, the court applied the liable effects test articulated by the United States Supreme Court in *Calder v. Jones* (1984) 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (*Calder*), to business torts and found that the record failed to demonstrate that Defendant aimed his tortious conduct at or

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[12] As noted in the *Jewish Defense* ruling cited by the trail court, the appropriate jurisdictional analysis for in libel cases is whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state. (citing *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 447). This issue was never argued by Kinghorn Respondents, the verified Complaint fulfills Plaintiff's burden of proof as related to the exercise of personal jurisdiction.

intentionally targeted California – an issue uncontested in the present case. Likewise, in *Strasner*, the court addressed injuries when a Touchstone employee allegedly uploaded a private photograph of a New York Plaintiff to her Facebook page from a mobile telephone she had returned to T-Mobile, and in *Hungerstation*, the court addressed whether the act of using a third-party company's server in the United States to host illegally-obtained information by a company located in Saudi Arabia, without more, is sufficient to convey personal jurisdiction of a foreign defendant.

The uncontested Complaint and court record documents libelous statements published against Mr. Tracy as a resident of California, intended to secure continued payment of monies from California citizens and residents and the jurisdictional allegations of the present action were thus not limited to "merely using a website hosted in California" and nothing more.[13]

V. ERRONEOUS AND UNSUPPORTED LEGAL ARGUMENTS

Kinghorn Respondents further contest that "[t]he only reason that this action is now before a California court is because Appellant has been

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[13] As Kinghorn Respondents never contested any jurisdictional allegation related to the *Calder* effects test nor objected to the sufficiency of the verified Complaint related to the *Calder* effects test, Mr. Tracy has met his initial burden of demonstrating facts justifying the exercise of jurisdiction under *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444.

"sanctioned" by state and federal courts in Utah, and is now subject to a pre-filing vexatious litigant order with the state courts of Utah. (CRB at p. 16.)

Kinghorn Respondents offer this Court no evidentiary basis for this speculative argument,[14] and is both irrelevant to the question of the trial court's exercise of personal jurisdiction, and immaterial to appellate review of the trial court's ruling.[15]

Kinghorn Respondents next argue that Mr. Tracy "chose to ignore the substance of Respondents Brown and Bowen's Motions to Quash and their respective declarations, instead choosing to focus on procedural challenges" and was therefore not prejudiced when the trial court permitted Respondents Brown and Bowen to repeatedly amend sworn affidavits after Mr. Tracy filed hearsay objection. (CRB at p. 22.)

Respondents cite no legal authority that a party must address inadmissible evidence submitted to the court, nor does it appear that any

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[14] As a Pro se Plaintiff, litigation strategy is not subject to discovery and thus Mr. Tracy declined to present a counter-affidavit to Co-Defendant Cook's sworn declaration regarding his "personal knowledge" of Appellant's motives and personal intentions. (AA052-4.)

[15] Kinghorn Respondents however failed to inform this Court that the ruling of Utah State Third District Court Judge Mark A. Kouris drafted by Co-Defendant Jeremy R. Cook and issued sua sponta without notice or hearing during appellate proceedings is null and void for lack of jurisdiction (RA00653) and to date, Judge Kouris has prevented appellate review of his order. (*Id.*) Likewise, Respondents failed to inform this Court that a similar motion by Co-Defendant Cook was expressly rejected by United States Chief District Judge Robert J. Shelby. (RA000688.)

court in the United States of America has rendered such an erroneous ruling.[16]

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.

Respectfully Submitted,

DATED: December 11, 2024

Mark Christopher Tracy
Plaintiff-Appellant

[16] On the contrary, there is overwhelming authority that an argument on the merits of a motion constitute waiver of procedural objections. *See e.g., Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this Reply Brief contains 3,034 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