CIVIL COURT OF APPEAL CASE NO. H052028
Superior Court No. 23CV423435

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK CHRISTOPHER TRACY
Plaintiff and Appellant

v.

COHNE KINGHORN PC., et al.,
Defendants and Respondents

Appeal from the Superior Court of the State of California,
Santa Clara, Honorable Evette D. Pennypacker
Case No. 23CV423435

RESPONDENTS' APPENDIX ON APPEAL

Vol. I of III

Nicholas C. Larson - 275870
E-mail: NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
E-mail: mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY

Attorneys for Defendant and Respondent
PAUL BROWN

Timothy Kassouni
Kassouni Law
455 Capitol Mall, Suite 604
Sacramento, CA 95814
Tel. 916-930-0030
E-mail: timothy@kassounilaw.com

Attorneys for Defendants and Respondents
COHNE KINGHORN, PC,
JEREMY RAND COOK, ERIC HAWKES,

JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION, SIMPLIFI COMPANY, A UTAH CORPORATION, and GARY BOWEN

RESPONDENTS' APPENDIX

CHRONOLOGICAL INDEX

Volume I

Exhibit No.	Date	Description	Bates Nos.
1	11/20/2023	Specially Appearing Defendant Paul Brown's Notice of Motion and Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000012-RA000013
2	11/20/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000014-RA000021
3	11/20/2023	Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000022-RA000048
4	11/21/2023	Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	RA000049-RA000076
5	11/21/2023	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000077-RA000079
6	11/28/2023	Notice of Motion and Motion of Specially Appearing Defendant Gary Bowen to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000080-RA000081
7	11/28/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000082-RA000089

Exhibit No.	Date	Description	Bates Nos.
8	11/28/2023	Declaration of Gary Bowen in Support of Memorandum of Points and Authorities	RA000090-RA000098
9	12/06/2023	Amended Declaration of Gary Bowen In Support of Memorandum of Points and Authorities 9	RA000099-RA000107
10	12/29/2023	Declaration of Sarah E. Burns In Support of Specially Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	RA000108-RA000116
11	12/29/2023	Motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction	RA000117-RA000131
12	1/02/2024	Memorandum of Points and Authorities In Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000132-RA000142
13	1/4/2024	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	RA000143-RA000145
14	1/4/2024	Amended Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	RA000146-RA000173
15	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000174-RA000179

Exhibit No.	Date	Description	Bates Nos.
16	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complain for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000180-RA000187
17	2/09/24	Reply In support of motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	RA000188-RA000195
18	2/09/2024	Reply Memorandum In Support of Specially Appearing Defendant Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000196-RA000204
19	3/05/2024	Specially Appearing Defendant Paul Brown's Notice of Motion and Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000205-RA000207
20	3/05/24	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000208-RA000224

Volume II

Exhibit No.	Date	Description	Bates Nos.
21	3/05/2024	Declaration of Miguel Mendez-Pintado In Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000236-RA000394
22	3/11/2024	Supplemental Request for Judicial Notice In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000395-RA000553

Volume III

Exhibit No.	Date	Description	Bates Nos.
23	3/13/2023	Specially Appearing Defendant Paul Brown's Opposition to Plaintiff's Motion for Reconsideration	RA000565-RA000575
24	3/13/2024	Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	RA000576-RA000583

Exhibit No.	Date	Description	Bates Nos.
25	3/13/2024	Specially Appearing Defendant Kem C Gardner's Opposition to Plaintiff's Motion for Reconsideration	RA000584-RA000593
26	3/26/2024	Memorandum and Point of Authority in Support of Opposition to Defendant Paul Hand Brown's Motion for Vexatious Litigant Order	RA000594-RA000599
27	3/26/2024	Declaration of Mark Christopher Tracy In Support of Opposition to Paul Handy Brown's Motion for Vexatious Litigant Order	RA000600-RA000617
28	3/26/2024	Request for Judicial Notice In Support of Opposition to Defendant Paul Handy Brown's Motion for Vexatious Litigant Order	RA000618-RA000688
29	4/03/2024	Specially Appearing Defendant Paul Brown's Reply in Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	RA000689-RA000699
30	4/16/2024	Order Declaring Plaintiff a Vexatious Litigant	RA000700-RA000708

ALPHABETIC INDEX

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
9	12/06/2023	Amended Declaration of Gary Bowen In Support of Memorandum of Points and Authorities 9	I	RA000099-RA0000107
14	1/4/2024	Amended Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	I	RA000146-RA000173
5	11/21/2023	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000077-RA000079
13	1/4/2024	Amended Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000143-RA000145
8	11/28/2023	Declaration of Gary Bowen in Support of Memorandum of Points and Authorities	I	RA000090-RA000098
27	3/26/2024	Declaration of Mark Christopher Tracy In Support of Opposition to Paul Handy Brown's Motion for Vexatious Litigant Order	III	RA000600-RA000617
4	11/21/2023	Declaration of Miguel Mendez-Pintado In Support of Memorandum of Points and Authorities	I	RA000049-RA000076
21	3/05/2024	Declaration of Miguel Mendez-Pintado In Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	II	RA000236-RA000394
3	11/20/2023	Declaration of Paul Brown In Support of Memorandum of Points and Authorities	I	RA000022-RA000048
10	12/29/2023	Declaration of Sarah E. Burns In Support of Specially Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	I	RA000108-RA000116
26	3/26/2024	Memorandum and Point of Authority in Support of Opposition to Defendant Paul	III	RA000594-RA000599

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
		Hand Brown's Motion for Vexatious Litigant Order		
2	11/20/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000014-RA000021
7	11/28/2023	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000082-RA000089
12	1/02/2024	Memorandum of Points and Authorities In Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000132-RA000142
20	3/05/24	Memorandum of Points and Authorities In Support of Specially Appearing Defendant Paul Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order	I	RA000208-RA000224
11	12/29/2023	Motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction	I	RA000117-RA000131
6	11/28/2023	Notice of Motion and Motion of Specially Appearing Defendant Gary Bowen to Quash Service of Summons and Complaint for Lack of Personal	I	RA000080-RA000081

Exhibit No.	Date	Description	Vol. No.	Bates Nos.
		Jurisdiction and Motion to Dismiss for Inconvenient Forum		
30	4/16/2024	Order Declaring Plaintiff a Vexatious Litigant	III	RA000700-RA000708
17	2/09/24	Reply In support of motion of Specially Appearing Defendant Kem Gardner to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction.	I	RA000188-RA000195
18	2/09/2024	Reply Memorandum In Support of Specially Appearing Defendant Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000196-RA000204
16	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complain for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000180-RA000187
15	1/4/2024	Reply Memorandum In Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum	I	RA000174-RA000179
28	3/26/2024	Request for Judicial Notice In Support of Opposition to Defendant Paul Handy Brown's Motion for Vexatious Litigant Order	III	RA000618-RA000688
25	3/13/2024	Specially Appearing Defendant Kem C Gardner's Opposition to Plaintiff's Motion for Reconsideration	III	RA000584-RA000593

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23	3/13/2023	Specially Appearing Defendant Paul Brown's Opposition to Plaintiff's Motion for Reconsideration	III	RA000565-RA000575
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Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

SPECIALLY APPEARING DEFENDANT PAUL BROWN'S NOTICE OF MOTION AND MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date: 1/11/2023
Time: 9AM
Dept: 6
Judge: The Honorable

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on _____, at _____. in Department ___ of the above-entitled Court, Defendant Paul Brown ("Brown") will and hereby does move this Court for an order quashing service of summons and complaint for lack of personal jurisdiction under California Code of Civil Procedure Section 418.10(a)(1). Additionally, please take notice that Brown will and hereby does move this Court for an order dismissing the above captioned action on the ground of inconvenient forum under California Code of Civil Procedure Section 418.10(a)(2). The Court lacks personal jurisdiction over Brown as to each of the claims for relief asserted in the Plaintiff's Complaint. Mr. Brown is not a resident of California, Plaintiff's claims do not relate to any activity by Brown within the State of California and Brown does not have the requisite minimum contacts with California to subject him to the jurisdiction of the California Courts.

This motion is further based upon this Notice, the attached Memorandum of Points and Authorities, Declaration of Miguel Mendez-Pintado, the Declaration of Paul Brown, the record and files in this action, and any such further evidence and argument as may be presented prior to or at the time of the hearing on this Motion.

DATED: November 20, 2023.

MURPHY, PEARSON, BRADLEY & FEENEY

By: _____
Miguel E. Mendez-Pintado
Nicholas C. Larson
Attorneys for Defendant Paul Brown

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date:
Time:
Dept:
Judge: The Honorable

I. INTRODUCTION

The Court lacks personal jurisdiction over Specially Appearing Defendant Paul Brown ("Brown") because Brown is a resident of the State of Utah, is not a resident of the State of California, and Plaintiff's claims against Brown allege facts occurring exclusively in the State of Utah. Plaintiff cannot meet his burden of proof in establishing that Brown has the requisite contact with California sufficient to establish personal jurisdiction. In the alternative, because all of the events identified in the Complaint allegedly occurred in Utah, Brown respectfully requests that the Court should find that in the interest of substantial justice, this action should be dismissed on the ground of inconvenient forum.

Plaintiff has spent the past several years engaging in futile and vexatious litigations against a Utah governmental entity and its members, officers, and attorneys before both state and federal courts in Utah. The Utah entity as issue – the Emigration Canyon Improvement District ("EID") – is a small public entity that has the authority to provide water and sewer services to residents within Emigration Canyon, which is located in Salt Lake County, Utah. Both federal and state courts in Utah have sanctioned Plaintiff for vexatious litigation practices in cases factually related to this action. Additionally, as a result of Plaintiff's meritless claims in Utah concerning EID and its officers, a state court in Utah has declared Plaintiff to be a "vexatious litigant," precluding him from filing suit in Utah state courts absent permission from the presiding Judge of Utah's Third District Court in and for Salt Lake County.

Now Plaintiff seeks to litigate his claims in a new forum. However, Brown does not reside in California and has no significant connections with California. Accordingly, the Court lacks personal jurisdiction over Brown. Alternatively, this is the improper forum for a dispute relating only to Utah residents and conduct allegedly occurring in Utah. Accordingly, Brown respectfully requests that the Court quash service of summons on the ground of lack of personal jurisdiction pursuant to California Code of Civil Procedure § 418.10(a)(1). In the alternative, Brown respectfully requests that the Court dismiss this action on the ground of inconvenient forum pursuant to California Code of Civil Procedure § 418.10(a)(2).

II. BACKGROUND

Plaintiff's Complaint acknowledges that Brown is a resident of Utah. (Compl. ¶ 18) The Complaint alleges that Brown is the former Co-Chair of the Emigration Canyon Community Council located in Utah. (*Id*. ¶¶ 8, 18) Plaintiff's sole allegation against Brown is that Brown sent an email to the residents of Emigration Oaks PUD. (*Id*. ¶¶ 23, 76) According to the complaint, Emigration Oaks PUD is located in Salt Lake County, Utah. (*Id*. at ¶ 23) Brown is a resident of Utah and does not have any residential or business connections with California. (Declaration of Paul Brown.)

A majority of Plaintiff's claims arise from the alleged conduct of the Emigration Oaks Defendants – identified in the Complaint as Kem Crosby Gardner, Walter J. Plumb III, and David M. Bennion – and EID. (*Id*. at ¶¶ 24-78) EID is not a named defendant in this action. The Complaint is completely devoid of any facts alleging that Brown was associated with any other named Defendant. Further, the Complaint lacks facts indicating that any Defendant, let alone Brown, did anything related to or directed at the State of California.

Plaintiff has previously been unsuccessful in litigating claims related to the facts alleged in this Complaint. In fact, in 2022, the United States Court of Appeals for the Tenth Circuit affirmed the United States District Court for the District of Utah's issuance of sanctions against Plaintiff in a litigation against EID. (*United States Ex Rel. Tracy v. Emigration Improvement District* (10th Cir., November 1, 2022) 2022 WL 16570934.) The District Court's decision to impose sanctions was based on a finding that the litigation was "clearly vexatious and brought primarily for purposes of harassment." (*Id*.) A copy of the Tenth Circuit's Order is attached as **Exhibit A** to the Declaration of Miguel Mendez-Pintado. Further, as a sanction for vexatious litigation in related lawsuits, Plaintiff has been barred from filing any further actions in the State of Utah without permission from the presiding Judge of Utah's Third District Court in and for Salt Lake County. *See Decision and Order Dening Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* ("Vexatious Litigant Order"). A copy of the Vexatious Litigant Order is attached as

Exhibit B to the Declaration of Miguel Mendez-Pintado.

III. LEGAL ARGUMENTS

A. California Code of Civil Procedure § 418.10(a)(1) – Lack of Personal Jurisdiction

Pursuant to California Code of Civil Procedure § 418.10(a)(1), a defendant may move the court for an order to quash service of summons on the ground of lack of personal jurisdiction. "When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate that the defendant has sufficient minimum contacts with the forum state to justify jurisdiction." (*DVI, Inc. v. Superior Court* (2002), 104 Cal.App.4th 1080, 1090). The plaintiff must present facts demonstrating that the conduct of the defendants related to the pleaded cause of action is sufficient to constitute constitutionally cognizable "minimum contacts." (*Id.*) Mere conclusory jurisdictional allegations are insufficient to make this showing. (*BBA Aviation PLC v. Superior Court* (2010) 190 Cal.App.4th 421, 429)

Under California's long-arm statute, California state courts may exercise jurisdiction over nonresident defendants only if doing so would be consistent with the "Constitution of this state [and] of the United States." (Code of Civil Procedure § 410.10) The statute "manifests an intent to exercise the broadest possible jurisdiction limited only by constitutional considerations." (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445) Accordingly, California's long-arm statute allows state courts and local federal courts to exercise personal jurisdiction on any basis allowable under the Due Process Clause of the 5th Amendment. *Ratcliffe v. Pedersen* (1975) 51 Cal.App.3d 89,91)

The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." (*International Shoe Co. v. Washington*, (1945) 326 U.S. 310, 316) "The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112) "Personal jurisdiction is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct

permitting the court to exercise jurisdiction over the party." (*Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1035)

"Personal jurisdiction may be either general or specific." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, (1996) 14 Cal.4th 434, 445) A nonresident defendant is subject to a forum's general jurisdiction when the defendant's contacts are substantial continuous and systematic. (*Id*.) Such conduct must be so wide ranging that the defendant is essentially physically present within the forum. (*DVI*, 104 Cal.App.4th at 1090)

Absent such contacts, a defendant may be subject to specific personal jurisdiction if: (1) "the defendant has purposefully availed himself or herself of forum benefits" with respect to the matter in controversy, (2) the "controversy is related to or arises out of the defendant's contacts with the forum" and (3) the exercise of jurisdiction would "comport with fair play and substantial justice." (*Pavlovich v. Superior Court* (2002), 29 Cal.4th 262, 269 (internal quotations omitted) citing *Vons*, 14 Cal.4th at 446) The difference between specific and general jurisdiction is that specific jurisdiction requires the litigation to arise out of the defendant's conduct with the forum. (*Bristol-Myers Squibb Co. v. Superior Court of California*, (2017) 582 U.S. 255, 262) ("In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation.") (internal quotations omitted).

The purposeful availment inquiry focuses on the defendant's "intentionality" and is satisfied "when the defendant purposefully and voluntarily directs his activities toward the forum so that he should, expect by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his contacts with the forum." (*Pavlovich*, 29 Cal.4th at 269). The purposeful availment requirement is intended to ensure a defendant will not be haled into a jurisdiction solely as a result of "random, fortuitous, or attenuated" contacts, or as a result of the "unilateral activity" of another party or third person. (*Id*.) Purposeful availment asks whether the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (*World-Wide Volkswagen Corp. v. Woodson*, (1980) 444 U.S. 286, 297) For the purpose of determining

personal jurisdiction, each defendant's contacts with the forum state must be assessed individually. (*Calder v. Jones*, (1984) 465 U.S. 783, 790)

Plaintiff's Complaint acknowledges that Brown is a resident of Utah. (Complaint, ¶ 18) The Complaint states that Emigration Oaks PUD is a residential PUD located in Utah. (Complaint, ¶ 23) Plaintiff's sole allegation against Brown is that Brown allegedly sent an email to the residents of Emigration Oaks PUD – a residential PUD in Utah (Complaint, ¶¶ 23, 76).

As an individual residing in Utah, Brown has not made any substantial, continuous and systematic contact with the State of California. The Complaint does not identify any conduct directed at the State of California or any residents of California. Accordingly, the Complaint fails to establish general jurisdiction as a basis for the Court's personal jurisdiction.

Additionally, the Complaint fails to allege any facts establishing that Brown purposefully availed himself of the benefits of this forum or that this this litigation arises from Brown's contact with California. Plaintiff's sole claim against Brown – a resident of Utah – was that he allegedly sent an email to residents of Emigration Oaks PUD – also in Utah. Accordingly, Brown's alleged conduct occurred in Utah and was directed at residents of Utah. The Complaint identifies no basis for specific personal jurisdiction in California. Additionally, even if the alleged email was sent to a resident of California, it is well established that this would be insufficient to confer personal jurisdiction. (*Axiom Foods, Inc. v. Acerchem International, Inc.*, (9th Cir. 2017) 874 F.3d 1064, 1070 (holding that newsletters and emails not specifically targeted at California were insufficient to establish minimum contact with California), *Gray & Co., v. Firstenberg Machinery Co., Inc*., (9th Cir. 1990) 913 F.2d 758, 760-61 (holding that phone calls and mailing invoices to a resident was insufficient contact with a forum to establish personal jurisdiction), *Burdick v. Superior Court*, (2015) 233 Cal.App.4th 8, 16 (adopting the Seventh Circuit's reasoning that sending email blasts failed to show a relation between the defendant and the forum))

Based on the foregoing, Plaintiff's Complaint fails to allege any conduct whatsoever by Brown in, directed to, or related to the State of California. Accordingly, the Court lacks personal jurisdiction over Brown. Brown respectfully requests that the Court quash service of summons and

complaint in this action pursuant to California Code of Civil Procedure 418.10(a)(1).

B. California Code of Civil Procedure § 418.10(a)(2) – Inconvenient Forum

In the alternative, Brown respectfully requests that the Court dismiss this action on the grounds of inconvenient forum pursuant to California Code of Civil Procedure 418.10(2).

California Code of Civil Procedure 418.10(2) "permits a defendant challenging jurisdiction to object on inconvenient forum grounds if the defendant's challenge to jurisdiction should be denied." (*Global Financial Distributors, Inc. v. Superior Court*, (2019) 35 Cal.App.5th 179, 190) (internal quotations omitted) Forum non conveniens is an equitable doctrine, under which a court within its discretionary power may decline to exercise jurisdiction over a cause of action when the action may be more appropriately and justly tried elsewhere. (*Id*.) The Court must balance several factors including the availability of a suitable alternative forum, the private interests of the litigants and the public interest of the forum state. (*Cal-State Business Products & Services, Inc., v. Ricoh*, (1993) 12 Cal.App.4thh 1666, 1675)

In the present action, the interests of justice support the dismissal of this action on the grounds of inconvenient forum. Each of the named Defendants in this action are residents of Utah, not California. The Complaint does not allege that any Defendant conducted business in California or had any contact with California. Further, Plaintiff's claims arise from alleged conduct occurring exclusively in Utah. There are no facts in the Complaint that would indicate that the residents of California would benefit from the litigation of matters arising exclusively in Utah in a California Court. The circumstances of this action demonstrate that Utah is the more appropriate forum to adjudicate this action.

Based on the foregoing, Brown respectfully requests that if the Court denies Brown's motion to quash service for lack of personal jurisdiction, the Court, in the alternative, dismiss this action under California Code of Civil Procedure 418.10(a)(2) on the ground of inconvenient forum.

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IV. CONCLUSION

This Court lacks personal jurisdiction over Defendant Brown because Defendant Brown is a resident of Utah and has no connection to the State of California. Further, Plaintiff's claims against Defendant Brown arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash service of process and complaint in this action for lack of personal jurisdiction under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: November 20, 2023.

MURPHY, PEARSON, BRADLEY & FEENEY

By: _____
Miguel E. Mendez-Pintado
Nicholas C. Larson
Attorneys for Defendant Paul Brown

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

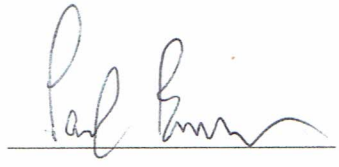
DECLARATION OF PAUL BROWN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date:
Time:
Dept:
Judge: The Honorable

I, Paul Brown, declare as follows:

1. I am a party to the action herein. I am over the age of eighteen and competent to testify. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.
2. I am a resident of Utah.
3. I do not have a residence in California, nor do I conduct any business in California.
4. I declare that under the penalty of perjury under the laws of Utah that the foregoing is true and correct and that this Declaration was executed on this 20th day of November 2023, in Salt Lake County, Utah.

DATED: November 20, 2023



Paul Brown

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA ex rel. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual, DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants - Appellees.

UNITED STATES OF AMERICA EX. REL. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

No. 21-4059
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual; DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual,

Defendants - Appellees,

and

BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants.

No. 21-4143
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **TYMKOVICH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Mark Tracy, acting as a qui tam relator, brought suit on behalf of the United States alleging that Emigration Improvement District (the District) and various other defendants made false statements to obtain a federal loan for a water project in violation of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., and that after the loan proceeds were disbursed, the District failed to comply with conditions of the loan and failed to report this noncompliance to the United States government.[1] In the operative complaint—the third amended complaint—he asserted a reverse false claim under § 3729(a)(1)(G) and a direct false claim under § 3729(a)(1)(A) and (B). In a series of orders entered over the course of the litigation, the district court dismissed both claims against all defendants. In Appeal No. 21-4059, Mr. Tracy appeals the district court's orders dismissing his direct false claim against all defendants as untimely under 31 U.S.C. § 3731(b)(2). He does not appeal the order dismissing the reverse false claim. In Appeal No. 21-4143, Mr. Tracy appeals the district court's order awarding attorneys' fees to a subset of defendants pursuant to the FCA's fee-shifting provision, 31 U.S.C. § 3730(d)(4). We procedurally consolidated

[1] The FCA's qui tam provisions allow an individual to sue on behalf of the government. 31 U.S.C. § 3730(b). Though the government may intervene and take over a private plaintiff's case, *id.* § 3730(b)(2), it declined to do so in this case. Mr. Tracy thus conducted the litigation as the relator. *See id.* § 3730(c)(3).

the appeals and, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm both orders.[2]

Background

Our decision in Mr. Tracy's prior appeal describes most of the factual and procedural background of the underlying litigation in some detail. *See United States ex. rel. Tracy v. Emigration Improvement Dist.* (*Tracy I*), 804 F. App'x 905, 907-09 (10th Cir. 2020). We do not repeat that background here, other than as necessary to provide context for our consideration of the issues presented in this appeal.

In *Tracy I*, we remanded for the district court to decide whether Mr. Tracy filed his complaint within the ten-year period established by § 3731(b)(2). *See* 804 F. App'x at 909. Following remand, a subset of defendants—Carollo Engineers, Inc., the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer—filed motions to dismiss the remaining claim against them pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred.[3]

[2] Our caption includes a number of defendants-appellees who did not participate in these appeals. The Boyer Company and City Development did not appear in the district court or participate in the appeals, but they remain in our caption as appellees because although Mr. Tracy did not serve them, he did not voluntarily dismiss his claims against them. Barnett Intermountain Water Consulting, Don Barnett, Joe Smolka, Kenneth Wilde, Kevin W. Brown, and Michael B. Georgeson also did not participate in the appeals, but they are listed as appellees because although Mr. Tracy conceded that his claim against them should be dismissed, he retained his right to appeal that resulting dismissal order.

[3] The moving defendants also sought dismissal on other grounds, but the district court did not address the alternative bases for dismissal.

The issue was whether the period started to run when the District filed the last claim for payment or on the date the government paid that claim. The parties did not dispute the relevant dates—according to documents attached to the third amended complaint, the District submitted its final request for payment on September 13, 2004, and the government paid the claim on September 29, 2004. Mr. Tracy filed suit on September 26, 2014—more than ten years after the District submitted the final claim but less than ten years after the government paid it.

The district court concluded that the relevant date for purposes of § 3731(b)(2) was the date the District submitted its final request for payment and that because Mr. Tracy filed suit more than ten years from that date, the claim was time-barred. The court thus granted the motions to dismiss and dismissed the claim against the moving defendants. The court then ordered Mr. Tracy to show cause why the claim should not also be dismissed as to the remaining defendants. He conceded that, in light of the court's decision on the motions to dismiss, his claim against the remaining defendants should be dismissed. Accordingly, the court dismissed the claim against those defendants and entered judgment in favor of all defendants.

A different subset of defendants—the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Eric Hawkes, and Lynn Hales—then moved for attorneys' fees and costs pursuant to § 3730(d)(4).[4] The district court granted the

[4] The motion also sought an award of fees against Mr. Tracy's counsel pursuant to 28 U.S.C. § 1927, but the moving defendants withdrew that portion of the motion after they reached a settlement with counsel.

motion after concluding that the action was clearly vexatious and brought for the purpose of harassment.

Discussion

1. Dismissal Order – Appeal No. 21-4059

Mr. Tracy first contends that the district court erred in concluding that the period for filing his claim started running when the District made its final request for payment. He insists that his claim was timely filed because the time period did not begin to run until the last date the government suffered damages—the date on which it made the payment induced by the last false claim. We disagree.

We review the district court's Rule 12(b)(6) dismissal de novo. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1278 (10th Cir.), *cert. denied*, 142 S. Ct. 477 (2021). "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). If the allegations show that the claim is time-barred, the complaint is subject to dismissal for failure to state a claim. *Id.* We review de novo whether a district court properly applied a limitations period, including its determination of the date the period began to run. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005).

Section 3731(b)(2) sets forth two limitations periods that apply to relator-initiated civil suits under the FCA. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1511-12 (2019). Specifically, it provides:

> A civil action under section 3730 may not be brought . . . more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

§ 3731(b)(2).

The different start dates for the two time periods is significant. The three-year period is a typical statute of limitations that starts to run when the government knew or should have known about the fraud, while the ten-year period is a statute of repose that places an outer limit on the otherwise applicable statute of limitations. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (discussing the difference between statutes of limitations and statutes of repose); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1211 (10th Cir. 2014) (same). As is the case for many repose periods, the ten-year period in § 3731(b)(2) starts running when a specific event occurs, not when the alleged injury occurs. *See CTS Corp.*, 573 U.S. at 8 (explaining that statutes of limitations typically begin to run when a cause of action accrues, meaning when the alleged injury occurred or was discovered, while a statute of repose begins to run when a specific event occurs, often "the date of the last culpable act or omission of the defendant . . . , even if [the repose] period ends before the plaintiff has suffered a resulting injury" (internal quotation marks omitted)). That date is the date the "violation is committed." § 3731(b)(2).

The question then, is when the defendants' alleged FCA violation was committed. Mr. Tracy's claim alleged the defendants violated § 3729(a)(1)(A) and

(B), which impose civil liability when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," § 3729(a)(1)(A), or uses a false record or makes a false statement material to a false claim, § 3729(a)(1)(B). Liability thus stems from the act of making a false claim, not from the government's payment of the claim. *See United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, 48 F.4th 1146, 1151 (10th Cir. 2022) ("The FCA imposes liability for fraudulent *attempts* to cause the government to pay out sums of money." (emphasis added) (internal quotation marks omitted)); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 & n.5 (1956) (recognizing that under a statute that is "essentially the equivalent" of the FCA, a contractor who submits a false claim for payment may be liable even if the claim did not actually induce the government to pay out funds or to suffer any loss).[5] We thus conclude that a "violation is committed" for purposes of § 3731(b)(2) when the defendant submits a false claim, not when the government pays the claim. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) (recognizing in dicta that because § 3731(b)(1) "t[ies] the start of the time limit to the date on which the violation of section 3729 is committed . . . , the time limit begins to

[5] Other circuit courts have also recognized that the FCA attaches liability to the claim for payment, not the government's wrongful payment. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (same).

run on the date the defendant submitted a false claim for payment" (internal quotation marks omitted)).

In so concluding, we reject Mr. Tracy's argument that because he sought actual damages, the ten-year period did not begin to run until the government paid the final claim. In support of that argument, he relies on *Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998), in which the Court of Federal Claims reasoned that because § 3729 provides that a false claimant may be liable both for civil penalties and actual damages, the ten-year period begins to run at different times depending on the relief sought. *See id.* at 743 (holding that where a suit seeks only civil penalties, the period begins to run when the false claim was submitted, but where a suit seeks actual damages, the period begins to run when the government pays the claim). But we are not bound by the Court of Federal Claims' decision or persuaded by its reasoning in *Jana*. Nothing in the statutory language suggests that Congress intended to establish different start-dates for the ten-year repose period depending on the relief sought. To the contrary, § 3731(b)(2)'s plain language provides that the clock starts ticking on "the date on which the violation is committed," not when the government suffers damage. Mr. Tracy cites no circuit court decision that follows *Jana*, and we have found none. He also cites no authority—and we are not aware of any—holding that a violation is committed and the ten-year period begins to run when the defendant accepts payment from the government on a false claim, as opposed to when he "knowingly presents" such a claim to the government, § 3729(a)(1)(A), or "makes a false statement material" to such a claim, § 3729(a)(1)(B).

Because the ten-year period started to run on September 13, 2009, when the District submitted the last claim, and Mr. Tracy did not file suit until September 26, 2014, we agree with the district court's determination that his claim was time-barred.

2. Attorneys' Fees Order – Appeal No. 21-4143

A. Legal Standards

Under § 3730(d)(4), a court may award attorneys' fees to the defendants in a qui tam action if (1) the government elected not to proceed with the action; (2) the defendants prevailed; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Each element of the third prong can independently sustain an award of attorneys' fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017 & n.5 (10th Cir. 2017) (upholding attorneys' fees award based solely on finding that the relator's claim was clearly frivolous and declining to address the other two elements because they were "not necessary to our disposition"). We review the district court's decision to award attorneys' fees for an abuse of discretion. *Id.* at 1017.

B. Additional Factual and Procedural Background

The following additional background information provides context for our review of the district court's fee order. In 2019, after entering the pre-*Tracy I* dismissal orders, the district court ordered Mr. Tracy to pay the District's attorneys' fees and expenses pursuant to § 3730(d)(4). That order was based in part on Mr. Tracy's having recorded a lis pendens against a portion of the District's water rights, claiming they were the subject of the FCA litigation, and sending letters to the

District's clients referencing the lis pendens and accusing the District of manipulating water rights. The district court concluded the lis pendens was a wrongful lien and released it. And, finding "no good faith basis for" Mr. Tracy having filed the wrongful lis pendens, the court determined that his recording of the lis pendens and his related conduct was vexatious, and awarded statutory damages and attorneys' fees. Suppl. App. at 90-91. That fee order was also based on the court's findings that the § 3729(a)(1)(G) claim (the reverse false claim) and some of Mr. Tracy's arguments and litigation conduct vis-à-vis the statute of limitations issue were frivolous. Finally, the court found that overall, the action was clearly vexatious and "indicate[d] bad faith and a clear intent to harass," *id.*, because Mr. Tracy used the litigation to "air personal grievances . . . in pursuit of an ulterior motive, rather than [to] seek money damages on behalf of the United States," *id.* at 91.

In *Tracy I*, after vacating the order dismissing the direct file claim, we vacated the 2019 fee order because we could not say that the District was the prevailing party until the district court decided whether any alleged violation of § 3729(a)(1)(A) or (B) occurred less than ten years before Mr. Tracy filed his initial complaint. 804 F. App'x at 909. We indicated that on remand the district court could enter a new fee order if it determined that the defendants seeking fees prevailed and that Mr. Tracy's claims and litigation conduct met the § 3730(d)(4) standard. *Id.*

On remand, the district court ordered Mr. Tracy to pay the attorneys' fees and costs of the defendants who sought an attorneys' fee award. Unlike the 2019 fee order in which the court found that aspects of the litigation satisfied each element of

the third prong of § 3730(d)(4), the fee order issued on remand was based only on findings that the action was "clearly vexatious" and "brought primarily for purposes of harassment." Aplt. App. at 311. Given its earlier finding that the lis pendens was "unreasonable and without foundation" and had nothing to do with the issues that arose in *Tracy I* and on remand, the district court found that Mr. Tracy's behavior with respect to the lis pendens was "clearly vexatious when it first occurred, and no subsequent developments change that finding." *Id.* at 310. The court further found that nothing in the subsequent litigation affected its finding in the 2019 fee order that Mr. Tracy's "actions indicated bad faith and a clear intent to harass." *Id.* Reiterating some of the most egregious examples it gave in the 2019 order of Mr. Tracy's "harassing behavior," *id.* at 311, the court again found that he "brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States," *id.* at 310. Having found that his actions were clearly vexatious and brought for the purpose of harassment, the court awarded fees on those grounds and did not address whether his claims were clearly frivolous.

C. Analysis

Mr. Tracy does not dispute that the first two prongs of the § 3730(d)(4) inquiry are satisfied here—the government declined to intervene in the action three times, and the defendants prevailed. But he contends that the district court abused its discretion in concluding that an award of fees was warranted under the third prong. Specifically, noting his success in *Tracy I*, he insists that his claims were not

frivolous, and he maintains that his reliance on *Jana* in support of his argument on remand was not unreasonable.

As explained above, however, the fee order at issue here was not based on a finding that his claims were frivolous. Instead, it was based on findings that the action was clearly vexatious and brought primarily for purposes of harassment, and those findings were sufficient to support the fee award. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d at 1017 & n.5. Mr. Tracy does not challenge those findings, so he has abandoned or waived any challenge he might have raised. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). And because he failed to address the basis for the district court's ruling, he has given us no reason to disturb it. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366, 1369 (10th Cir. 2015) (observing that "[t]he first task of an appellant is to explain to us why the district court's decision was wrong," and affirming where the appellate briefing "contain[ed] nary a word to challenge the basis of the" challenged ruling).

Conclusion

We affirm the district court's dismissal orders and resulting judgment for defendants in Appeal No. 21-4059. We also affirm the district court's attorneys' fee order in Appeal No. 21-4143. We deny as moot the motion filed by Eric Hawkes,

Jennifer Hawkes, and Simplifi Co., in Appeal No. 21-4059 to substitute them as the appellants in place of Mr. Tracy and to dismiss the appeal.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 1, 2022

Mr. Alan W. Dunaway
Mr. Jason M. Kerr
Price Parkinson & Kerr
5742 West Harold Gatty Drive
Salt Lake City, UT 84116

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Craig Robert Mariger

CMW/sls

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 23, 2022

Mr. D. Mark Jones
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's November 1, 2022 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Alan W. Dunaway
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Jason M. Kerr
Craig Robert Mariger

CMW/mlb

EXHIBIT B

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

DECLARATION OF MIGUEL MENDEZ-PINTADO IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date:
Time:
Dept:
Judge: The Honorable

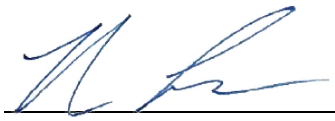
I, Miguel Mendez-Pintado, declare as follows:

1. I am an attorney duly licensed to practice in the State of California and before this Court and with the law firm of Murphy, Pearson, Bradley, and Feeney, attorneys of record for Specially Appearing Defendant Paul Brown. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of the November 1, 2022, Order and Judgment issued by the United States Court of Appeals for the Tenth Circuit.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure.

4. I declare that under the penalty of perjury under the laws of Washington that the foregoing is true and correct and that this Declaration was executed on this 21st day of November 2023, in Seattle, Washington .



Miguel Mendez-Pintado

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA ex rel. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual, DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants - Appellees.

UNITED STATES OF AMERICA EX. REL. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

No. 21-4059
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual; DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual,

Defendants - Appellees,

and

BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants.

No. 21-4143
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **TYMKOVICH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Mark Tracy, acting as a qui tam relator, brought suit on behalf of the United States alleging that Emigration Improvement District (the District) and various other defendants made false statements to obtain a federal loan for a water project in violation of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., and that after the loan proceeds were disbursed, the District failed to comply with conditions of the loan and failed to report this noncompliance to the United States government.[1] In the operative complaint—the third amended complaint—he asserted a reverse false claim under § 3729(a)(1)(G) and a direct false claim under § 3729(a)(1)(A) and (B). In a series of orders entered over the course of the litigation, the district court dismissed both claims against all defendants. In Appeal No. 21-4059, Mr. Tracy appeals the district court's orders dismissing his direct false claim against all defendants as untimely under 31 U.S.C. § 3731(b)(2). He does not appeal the order dismissing the reverse false claim. In Appeal No. 21-4143, Mr. Tracy appeals the district court's order awarding attorneys' fees to a subset of defendants pursuant to the FCA's fee-shifting provision, 31 U.S.C. § 3730(d)(4). We procedurally consolidated

[1] The FCA's qui tam provisions allow an individual to sue on behalf of the government. 31 U.S.C. § 3730(b). Though the government may intervene and take over a private plaintiff's case, *id.* § 3730(b)(2), it declined to do so in this case. Mr. Tracy thus conducted the litigation as the relator. *See id.* § 3730(c)(3).

the appeals and, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm both orders.[2]

Background

Our decision in Mr. Tracy's prior appeal describes most of the factual and procedural background of the underlying litigation in some detail. *See United States ex. rel. Tracy v. Emigration Improvement Dist.* (*Tracy I*), 804 F. App'x 905, 907-09 (10th Cir. 2020). We do not repeat that background here, other than as necessary to provide context for our consideration of the issues presented in this appeal.

In *Tracy I*, we remanded for the district court to decide whether Mr. Tracy filed his complaint within the ten-year period established by § 3731(b)(2). *See* 804 F. App'x at 909. Following remand, a subset of defendants—Carollo Engineers, Inc., the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer—filed motions to dismiss the remaining claim against them pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred.[3]

[2] Our caption includes a number of defendants-appellees who did not participate in these appeals. The Boyer Company and City Development did not appear in the district court or participate in the appeals, but they remain in our caption as appellees because although Mr. Tracy did not serve them, he did not voluntarily dismiss his claims against them. Barnett Intermountain Water Consulting, Don Barnett, Joe Smolka, Kenneth Wilde, Kevin W. Brown, and Michael B. Georgeson also did not participate in the appeals, but they are listed as appellees because although Mr. Tracy conceded that his claim against them should be dismissed, he retained his right to appeal that resulting dismissal order.

[3] The moving defendants also sought dismissal on other grounds, but the district court did not address the alternative bases for dismissal.

The issue was whether the period started to run when the District filed the last claim for payment or on the date the government paid that claim. The parties did not dispute the relevant dates—according to documents attached to the third amended complaint, the District submitted its final request for payment on September 13, 2004, and the government paid the claim on September 29, 2004. Mr. Tracy filed suit on September 26, 2014—more than ten years after the District submitted the final claim but less than ten years after the government paid it.

The district court concluded that the relevant date for purposes of § 3731(b)(2) was the date the District submitted its final request for payment and that because Mr. Tracy filed suit more than ten years from that date, the claim was time-barred. The court thus granted the motions to dismiss and dismissed the claim against the moving defendants. The court then ordered Mr. Tracy to show cause why the claim should not also be dismissed as to the remaining defendants. He conceded that, in light of the court's decision on the motions to dismiss, his claim against the remaining defendants should be dismissed. Accordingly, the court dismissed the claim against those defendants and entered judgment in favor of all defendants.

A different subset of defendants—the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Eric Hawkes, and Lynn Hales—then moved for attorneys' fees and costs pursuant to § 3730(d)(4).[4] The district court granted the

[4] The motion also sought an award of fees against Mr. Tracy's counsel pursuant to 28 U.S.C. § 1927, but the moving defendants withdrew that portion of the motion after they reached a settlement with counsel.

motion after concluding that the action was clearly vexatious and brought for the purpose of harassment.

Discussion

1. Dismissal Order – Appeal No. 21-4059

Mr. Tracy first contends that the district court erred in concluding that the period for filing his claim started running when the District made its final request for payment. He insists that his claim was timely filed because the time period did not begin to run until the last date the government suffered damages—the date on which it made the payment induced by the last false claim. We disagree.

We review the district court's Rule 12(b)(6) dismissal de novo. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1278 (10th Cir.), *cert. denied*, 142 S. Ct. 477 (2021). "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). If the allegations show that the claim is time-barred, the complaint is subject to dismissal for failure to state a claim. *Id.* We review de novo whether a district court properly applied a limitations period, including its determination of the date the period began to run. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005).

Section 3731(b)(2) sets forth two limitations periods that apply to relator-initiated civil suits under the FCA. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1511-12 (2019). Specifically, it provides:

> A civil action under section 3730 may not be brought . . . more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

§ 3731(b)(2).

The different start dates for the two time periods is significant. The three-year period is a typical statute of limitations that starts to run when the government knew or should have known about the fraud, while the ten-year period is a statute of repose that places an outer limit on the otherwise applicable statute of limitations. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (discussing the difference between statutes of limitations and statutes of repose); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1211 (10th Cir. 2014) (same). As is the case for many repose periods, the ten-year period in § 3731(b)(2) starts running when a specific event occurs, not when the alleged injury occurs. *See CTS Corp.*, 573 U.S. at 8 (explaining that statutes of limitations typically begin to run when a cause of action accrues, meaning when the alleged injury occurred or was discovered, while a statute of repose begins to run when a specific event occurs, often "the date of the last culpable act or omission of the defendant . . . , even if [the repose] period ends before the plaintiff has suffered a resulting injury" (internal quotation marks omitted)). That date is the date the "violation is committed." § 3731(b)(2).

The question then, is when the defendants' alleged FCA violation was committed. Mr. Tracy's claim alleged the defendants violated § 3729(a)(1)(A) and

(B), which impose civil liability when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," § 3729(a)(1)(A), or uses a false record or makes a false statement material to a false claim, § 3729(a)(1)(B). Liability thus stems from the act of making a false claim, not from the government's payment of the claim. *See United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, 48 F.4th 1146, 1151 (10th Cir. 2022) ("The FCA imposes liability for fraudulent *attempts* to cause the government to pay out sums of money." (emphasis added) (internal quotation marks omitted)); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 & n.5 (1956) (recognizing that under a statute that is "essentially the equivalent" of the FCA, a contractor who submits a false claim for payment may be liable even if the claim did not actually induce the government to pay out funds or to suffer any loss).[5] We thus conclude that a "violation is committed" for purposes of § 3731(b)(2) when the defendant submits a false claim, not when the government pays the claim. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) (recognizing in dicta that because § 3731(b)(1) "t[ies] the start of the time limit to the date on which the violation of section 3729 is committed . . . , the time limit begins to

[5] Other circuit courts have also recognized that the FCA attaches liability to the claim for payment, not the government's wrongful payment. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (same).

run on the date the defendant submitted a false claim for payment" (internal quotation marks omitted)).

In so concluding, we reject Mr. Tracy's argument that because he sought actual damages, the ten-year period did not begin to run until the government paid the final claim. In support of that argument, he relies on *Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998), in which the Court of Federal Claims reasoned that because § 3729 provides that a false claimant may be liable both for civil penalties and actual damages, the ten-year period begins to run at different times depending on the relief sought. *See id.* at 743 (holding that where a suit seeks only civil penalties, the period begins to run when the false claim was submitted, but where a suit seeks actual damages, the period begins to run when the government pays the claim). But we are not bound by the Court of Federal Claims' decision or persuaded by its reasoning in *Jana*. Nothing in the statutory language suggests that Congress intended to establish different start-dates for the ten-year repose period depending on the relief sought. To the contrary, § 3731(b)(2)'s plain language provides that the clock starts ticking on "the date on which the violation is committed," not when the government suffers damage. Mr. Tracy cites no circuit court decision that follows *Jana*, and we have found none. He also cites no authority—and we are not aware of any—holding that a violation is committed and the ten-year period begins to run when the defendant accepts payment from the government on a false claim, as opposed to when he "knowingly presents" such a claim to the government, § 3729(a)(1)(A), or "makes a false statement material" to such a claim, § 3729(a)(1)(B).

Because the ten-year period started to run on September 13, 2009, when the District submitted the last claim, and Mr. Tracy did not file suit until September 26, 2014, we agree with the district court's determination that his claim was time-barred.

2. Attorneys' Fees Order – Appeal No. 21-4143

A. Legal Standards

Under § 3730(d)(4), a court may award attorneys' fees to the defendants in a qui tam action if (1) the government elected not to proceed with the action; (2) the defendants prevailed; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Each element of the third prong can independently sustain an award of attorneys' fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017 & n.5 (10th Cir. 2017) (upholding attorneys' fees award based solely on finding that the relator's claim was clearly frivolous and declining to address the other two elements because they were "not necessary to our disposition"). We review the district court's decision to award attorneys' fees for an abuse of discretion. *Id.* at 1017.

B. Additional Factual and Procedural Background

The following additional background information provides context for our review of the district court's fee order. In 2019, after entering the pre-*Tracy I* dismissal orders, the district court ordered Mr. Tracy to pay the District's attorneys' fees and expenses pursuant to § 3730(d)(4). That order was based in part on Mr. Tracy's having recorded a lis pendens against a portion of the District's water rights, claiming they were the subject of the FCA litigation, and sending letters to the

District's clients referencing the lis pendens and accusing the District of manipulating water rights. The district court concluded the lis pendens was a wrongful lien and released it. And, finding "no good faith basis for" Mr. Tracy having filed the wrongful lis pendens, the court determined that his recording of the lis pendens and his related conduct was vexatious, and awarded statutory damages and attorneys' fees. Suppl. App. at 90-91. That fee order was also based on the court's findings that the § 3729(a)(1)(G) claim (the reverse false claim) and some of Mr. Tracy's arguments and litigation conduct vis-à-vis the statute of limitations issue were frivolous. Finally, the court found that overall, the action was clearly vexatious and "indicate[d] bad faith and a clear intent to harass," *id.*, because Mr. Tracy used the litigation to "air personal grievances . . . in pursuit of an ulterior motive, rather than [to] seek money damages on behalf of the United States," *id.* at 91.

In *Tracy I*, after vacating the order dismissing the direct file claim, we vacated the 2019 fee order because we could not say that the District was the prevailing party until the district court decided whether any alleged violation of § 3729(a)(1)(A) or (B) occurred less than ten years before Mr. Tracy filed his initial complaint. 804 F. App'x at 909. We indicated that on remand the district court could enter a new fee order if it determined that the defendants seeking fees prevailed and that Mr. Tracy's claims and litigation conduct met the § 3730(d)(4) standard. *Id.*

On remand, the district court ordered Mr. Tracy to pay the attorneys' fees and costs of the defendants who sought an attorneys' fee award. Unlike the 2019 fee order in which the court found that aspects of the litigation satisfied each element of

the third prong of § 3730(d)(4), the fee order issued on remand was based only on findings that the action was "clearly vexatious" and "brought primarily for purposes of harassment." Aplt. App. at 311. Given its earlier finding that the lis pendens was "unreasonable and without foundation" and had nothing to do with the issues that arose in *Tracy I* and on remand, the district court found that Mr. Tracy's behavior with respect to the lis pendens was "clearly vexatious when it first occurred, and no subsequent developments change that finding." *Id.* at 310. The court further found that nothing in the subsequent litigation affected its finding in the 2019 fee order that Mr. Tracy's "actions indicated bad faith and a clear intent to harass." *Id.* Reiterating some of the most egregious examples it gave in the 2019 order of Mr. Tracy's "harassing behavior," *id.* at 311, the court again found that he "brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States," *id.* at 310. Having found that his actions were clearly vexatious and brought for the purpose of harassment, the court awarded fees on those grounds and did not address whether his claims were clearly frivolous.

C. Analysis

Mr. Tracy does not dispute that the first two prongs of the § 3730(d)(4) inquiry are satisfied here—the government declined to intervene in the action three times, and the defendants prevailed. But he contends that the district court abused its discretion in concluding that an award of fees was warranted under the third prong. Specifically, noting his success in *Tracy I*, he insists that his claims were not

frivolous, and he maintains that his reliance on *Jana* in support of his argument on remand was not unreasonable.

As explained above, however, the fee order at issue here was not based on a finding that his claims were frivolous. Instead, it was based on findings that the action was clearly vexatious and brought primarily for purposes of harassment, and those findings were sufficient to support the fee award. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d at 1017 & n.5. Mr. Tracy does not challenge those findings, so he has abandoned or waived any challenge he might have raised. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). And because he failed to address the basis for the district court's ruling, he has given us no reason to disturb it. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366, 1369 (10th Cir. 2015) (observing that "[t]he first task of an appellant is to explain to us why the district court's decision was wrong," and affirming where the appellate briefing "contain[ed] nary a word to challenge the basis of the" challenged ruling).

Conclusion

We affirm the district court's dismissal orders and resulting judgment for defendants in Appeal No. 21-4059. We also affirm the district court's attorneys' fee order in Appeal No. 21-4143. We deny as moot the motion filed by Eric Hawkes,

Jennifer Hawkes, and Simplifi Co., in Appeal No. 21-4059 to substitute them as the appellants in place of Mr. Tracy and to dismiss the appeal.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 1, 2022

Mr. Alan W. Dunaway
Mr. Jason M. Kerr
Price Parkinson & Kerr
5742 West Harold Gatty Drive
Salt Lake City, UT 84116

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Craig Robert Mariger

CMW/sls

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 23, 2022

Mr. D. Mark Jones
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's November 1, 2022 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Alan W. Dunaway
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Jason M. Kerr
Craig Robert Mariger

CMW/mlb

EXHIBIT B

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

CERTIFICATE OF SERVICE

I, Joan E. Soares/, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On November 21, 2023, I served the following document(s) on the parties in the within action:

DECLARATION OF MIGUEL MENDEZ-PINTADO IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com/

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

E-Mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on November 21, 2023.

By Joan E. Soares
Joan E. Soares/

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

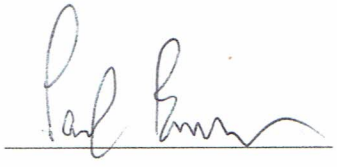
Case No. 23CV423435

AMENDED DECLARATION OF PAUL BROWN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date:
Time:
Dept:
Judge: The Honorable

I, Paul Brown, declare as follows:

1. I am a party to the action herein. I am over the age of eighteen and competent to testify. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.
2. I am a resident of Utah.
3. I do not have a residence in California, nor do I conduct any business in California.
4. I declare that under the penalty of perjury under the laws of Utah that the foregoing is true and correct and that this Declaration was executed on this 21st day of November 2023, in Salt Lake County, Utah.



Paul Brown

CERTIFICATE OF SERVICE

I, Joan E. Soares/, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On November 21, 2023, I served the following document(s) on the parties in the within action:

AMENDED DECLARATION OF PAUL BROWN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com/

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

E-Mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on November 21, 2023.

By Joan E. Soares
Joan E. Soares/

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for Defendant Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

NOTICE OF MOTION AND MOTION OF SPECIALLY APPEARING DEFENDANT GARY BOWEN TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date: 1/11/2024
Time: 9AM
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendant Gary Bowen submits this Notice of Motion and Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum (the "Motion").

TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on _____, at 191 North First Street, San Jose, CA 95113 in Department 6 of the above-entitled Court, Mr. Bowen will and hereby does move this Court for an order dismissing the Complaint filed by Plaintiff Mark Tracy ("Plaintiff").

This motion is made pursuant to Section 418.10 of the California Code of Civil Procedure on the grounds that this Court lacks personal jurisdiction over Gary Bowen and, alternatively, is an inconvenient forum for this resolution of Plaintiff's claims against Mr. Bowen. Mr. Bowen is a resident of Utah and has not established sufficient minimum contacts with California for this Court to exercise personal jurisdiction over him. Moreover, Plaintiff's allegations against Mr. Bowen involve conduct exclusively occurring in Utah and all of the evidence (documents, witnesses, *etc*.) relating to those allegations are located in Utah.

The motion will be based on this notice of motion, the accompanying memorandum of points and authorities in support of the motion, the Declaration of Gary Bowen, the files and records in this action and such other and further evidence as this Court may receive at or before the hearing.

DATED: November 28, 2023

KESSENICK GAMMA LLP

By: _____

Charlie Y. Chou
Attorneys for Defendant Gary Bowen

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for Defendant Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANT GARY BOWEN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date:
Time:
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendant Gary Bowen ("Bowen") submits this *Memorandum of Points and Authorities in Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum*.

I. INTRODUCTION

The Court lacks personal jurisdiction over specially appearing defendant Gary Bowen ("Bowen") because Bowen is a resident of the State of Utah, is not a resident of the State of California, and Plaintiff's claims against Bowen allege facts occurring exclusively in the State of Utah. Plaintiff cannot meet his burden of proof in establishing that Bowen has the requisite contact with California sufficient to establish personal jurisdiction. In the alternative, because all the events identified in the Complaint allegedly occurred in Utah, Bowen respectfully requests that the Court should find that in the interest of substantial justice, this action should be dismissed on the ground of inconvenient forum.

Plaintiff has spent years fighting a spurious battle with a Utah governmental entity and its members, officers and attorneys in Utah courts. The Utah entity at issue – the Emigration Canyon Improvement District, or "EID" for short – is a small public entity that has authority to provide water and sewer service to residents within Emigration Canyon, which is located in Salt Lake County, Utah. Plaintiff has, in fact, filed so many meritless claims in Utah concerning the EID and its officers that a Utah court has declared Plaintiff to be a "vexatious litigant," which precludes him from filing suit in Utah state courts absent permission from the presiding Judge of Utah's Third District Court in and for Salt Lake County. Declaration of Gary Bowen In Support of Memorandum of Points and Authorities ("Bowen Decl."), ¶ 4 and Ex. A.

In an attempt to circumvent his vexatious litigant bar, Plaintiff had now filed a lawsuit in this Court that alleges all the same issues and complaints that Plaintiff has previously alleged in his multiple Utah lawsuits. While there are several problems with this filing, the most immediate is that none of the Defendants, including Bowen, reside in or have any significant connection with the State of California, let alone Santa Clara County. Plaintiff did not name the EID (the entity he

directs his allegations toward), but numerous individuals affiliated therewith, each of whom Plaintiff acknowledges in his Compliant are residents of Utah, including Bowen.

As a result, this Court lacks personal jurisdiction over Bowen. Alternatively, this is the improper forum for a dispute that relates only to Utah residents and their purported actions that took place in Utah. Accordingly, Bowen request that this Court dismiss this action.

II. RELEVANT FACTS RELATING TO JURISDICTION

1. Plaintiff's Complaint names thirteen defendants, each of whom Plaintiff specifically acknowledges is a resident of or resides in Utah. *See* Complaint, ¶¶ 7-19.

2. Bowen is a resident of Utah and does not have any residential or business connections with California. Bowen Decl., ¶ 3.

3. Plaintiff sets forth no allegation that any of the defendants, including Bowen, had any tie to or connection with the State of California.

4. Plaintiff makes only two arguments why the Court should exercise jurisdiction. First, Plaintiff alleges that false and defamatory statements were made on the Emigration Canyon Improvement District ("EID") website, https://www.ecid.org, and that EID's website is published on a platform in California and routed through San Jose, California. Second, Plaintiff alleges defendants published false and defamatory statements for purposes of obtaining continued payment of monies from property owners residing in California. Complaint, para 21.

5. However, while the Complaint references EID and its website, https://www.ecid.org, the Complaint does not name EID as a party, and there is no allegation that Bowen published anything on the EID website.

6. Likewise, the only entity that receives any payment of monies from property owners is EID.

7. As described in the very website cited in the Complaint, EID is a small public entity that has authority to provide water service to residents within Emigration Canyon, which is located in Salt Lake County, Utah. *See id*.

//

8. Thus, Plaintiff's argument is that this Court has jurisdiction because defendants allegedly published false and defamatory statements against Plaintiff so that EID, which is a public entity and not a party, could obtain continued payments of property taxes and water usage fees from property owners in Emigration Canyon, Utah, which property owners also happen to own property or reside in California. *See id*.

9. Not only is it a ridiculous assertion that defendants published allegedly false and defamatory statements against Plaintiff to somehow assist EID in collecting property taxes and water usage fees, there is no possible basis for the Court to have jurisdiction over the defendants because some property owners in Emigration Canyon who pay taxes and fees to EID also have property in California.

10. The Complaint fails to allege that any named defendants, including Bowen, have sufficient contacts to enable this Court to obtain personal jurisdiction over said defendants. *See* Complaint.

11. Plaintiff has filed this lawsuit in California because he has been barred from filing any further actions in the State of Utah. *See Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* (the "Vexatious Litigant Order"). A copy of the Vexatious Litigant Order is attached as **Exhibit A** to the Declaration of Gary Bowen.

III. ARGUMENT

A. California Code of Civil Procedure § 418.10(a)(1) – Lack of Personal Jurisdiction

Pursuant to California Code of Civil Procedure § 418.10(a)(1), a defendant may move the court for an order to quash service of summons on the ground of lack of personal jurisdiction. "When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate that the defendant has sufficient minimum contacts with the forum state to justify jurisdiction." *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090. The plaintiff must present facts demonstrating that the conduct of the

defendants related to the pleaded cause of action is sufficient to constitute constitutionally cognizable "minimum contacts." *Id*. Mere conclusory jurisdictional allegations are insufficient to make this showing. *BBA Aviation PLC v. Superior Court* (2010) 190 Cal.App.4th 421, 429.

Under California's long-arm statute, California state courts may exercise jurisdiction over nonresident defendants only if doing so would be consistent with the "Constitution of this state [and] of the United States." Code of Civil Procedure § 410.10. The statute "manifests an intent to exercise the broadest possible jurisdiction limited only by constitutional considerations." *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445. Accordingly, California's long-arm statute allows state courts and local federal courts to exercise personal jurisdiction on any basis allowable under the Due Process Clause of the 5th Amendment. *Ratcliffe v. Pedersen* (1975) 51 Cal.App.3d 89, 91.

The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316. "The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112. "Personal jurisdiction is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct permitting the court to exercise jurisdiction over the party." *Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1035. "Personal jurisdiction may be either general or specific." *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 445. A nonresident defendant is subject to a forum's general jurisdiction when the defendant's contacts are substantial continuous and systematic. *Id*. Such conduct must be so wide ranging that the defendant is essentially physically present within the forum. *DVI*, 104 Cal.App.4th at 1090.

Absent such contacts, a defendant may be subject to specific personal jurisdiction if: (1) "the defendant has purposefully availed himself or herself of forum benefits" with respect to the matter in controversy, (2) the "controversy is related to or arises out of the defendant's contacts

with the forum" and (3) the exercise of jurisdiction would "comport with fair play and substantial justice." *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (internal quotations omitted) *citing Vons*, 14 Cal.4th at 446. The difference between specific and general jurisdiction is that specific jurisdiction requires the litigation to arise out of the defendant's conduct with the forum. *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) 582 U.S. 255, 262 ("In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation.") (internal quotations omitted).

The purposeful availment inquiry focuses on the defendant's "intentionality" and is satisfied "when the defendant purposefully and voluntarily directs his activities toward the forum so that he should, expect by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his contacts with the forum." *Pavlovich*, 29 Cal.4th at 269 . The purposeful availment requirement is intended to ensure a defendant will not be hauled into a jurisdiction solely as a result of "random, fortuitous, or attenuated" contacts, or as a result of the "unilateral activity" of another party or third person. *Id*. Purposeful availment asks whether the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297. For the purpose of determining personal jurisdiction, each defendant's contacts with the forum state must be assessed individually. *Calder v. Jones*, (1984) 465 U.S. 783, 790.

Plaintiff's Complaint admits that Bowen is a Utah resident. Complaint, ¶ 19. Plaintiff's sole allegations against Bowen are that in November 2018, Bowen sent an email to Utah local press and an email to Deputy Utah State Engineer Boyd Clayton. *Id*., ¶¶ 74, 75.

Not only are the alleged email correspondence from approximately five years ago outside any possible statute of limitation for a defamation claim, as an individual residing in Utah, Bowen has not made any substantial, continuous and systematic contact with the State of California. The Complaint does not identify any conduct directed at the State of California. Accordingly, the Complaint fails to establish general jurisdiction as a basis for the Court's personal jurisdiction.

Additionally, the Complaint fails to allege any facts establishing that Bowen purposefully availed himself of the benefits of this forum or that this litigation arises from Bowen's contact with California, if any. The Complaint identifies no basis for specific personal jurisdiction in California. Additionally, even if the alleged emails were sent to a resident of California, which they were not, it is well established that this would be insufficient to confer personal jurisdiction. *Axiom Foods, Inc. v. Acerchem International, Inc*. (9th Cir. 2017) 874 F.3d 1064, 1070 (holding that newsletters and emails not specifically targeted at California were insufficient to establish minimum contact with California); *Gray & Co., v. Firstenberg Machinery Co., Inc*. (9th Cir. 1990) 913 F.2d 758, 760-61 (holding that phone calls and mailing invoices to a resident was insufficient contact with a forum to establish personal jurisdiction); *Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, 16 (adopting the Seventh Circuit's reasoning that sending email blasts failed to show a relation between the defendant and the forum).

Based on the foregoing, Plaintiff's Complaint fails to allege any conduct whatsoever by Bowen in, directed to, or related to the State of California. Accordingly, the Court lacks personal jurisdiction over Bowen. Bowen respectfully requests that the Court quash service of summons and complaint in this action pursuant to California Code of Civil Procedure 418.10(a)(1).

B. California Code of Civil Procedure § 418.10(a)(2) – Inconvenient Forum

In the alternative, Bowen respectfully requests that the Court dismiss this action on the grounds of inconvenient forum pursuant to California Code of Civil Procedure 418.10(a)(2). California Code of Civil Procedure 418.10(a)(2) "permits a defendant challenging jurisdiction to object on inconvenient forum grounds if the defendant's challenge to jurisdiction should be denied." *Global Financial Distributors, Inc. v. Superior Court* (2019) 35 Cal.App.5th 179, 190 (internal quotations omitted). Forum *non conveniens* is an equitable doctrine, under which a court within its discretionary power may decline to exercise jurisdiction over a cause of action when the action may be more appropriately and justly tried elsewhere. *Id*. The Court must balance several factors including the availability of a suitable alternative forum, the private interests of the litigants and the public interest of the forum state. *Cal-State Business Products & Services, Inc., v. Ricoh*

(1993) 12 Cal.App.4th 1666, 1675.

In the present action, the interests of justice support the dismissal of this action on the grounds of inconvenient forum. Each of the named Defendants in this action, including Bowen, are residents of Utah, not California. The Complaint does not allege that any Defendant conducted business in California or had any contact with California. Further, Plaintiff's claims arise from alleged conduct occurring exclusively in Utah. There are no facts in the Complaint that would indicate that the residents of California would benefit from the litigation of matters arising exclusively in Utah in a California Court. The circumstances of this action demonstrate that Utah is the more appropriate forum to adjudicate this action.

Based on the foregoing, Bowen respectfully requests that if the Court grants Bowen's motion to quash service for lack of personal jurisdiction, or in the alternative, the Court dismiss this action under California Code of Civil Procedure 418.10(a)(2) on the ground of inconvenient forum.

CONCLUSION

This Court lacks personal jurisdiction over Bowen because he is a resident of Utah and has no connection to the State of California. Further, Plaintiff's claims against Bowen arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash service of process and complaint in this action for lack of personal jurisdiction under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: November 28, 2023

KESSENICK GAMMA LLP

By: _____

Charlie Y. Chou
Attorneys for Defendant Gary Bowen

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for Defendant Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWN, a Utah resident,

Defendants.

Case No. 23CV423435

DECLARATION OF GARY BOWEN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date:
Time:
Dept: 6
Judge: The Honorable Evette D. Pennypacker

I, Gary Bowen, declare as follows:

1. I am a party the action herein. I am over the age of eighteen and competent to testify. I believe the following to be true and correct to the best of my knowledge. I have personal knowledge of all facts stated herein except for those matters stated on information and belief, and as to those matters, I am informed and believe them to be true. If called upon to testify to these matters I could and would do so truthfully.

2. I am a resident of Utah.

3. I do not have a residence in California and I do not conduct business in California.

4. I am aware that the Plaintiff, Mark Christopher Tracy, has filed multiple lawsuits or legal actions against individuals in Utah. Plaintiff has filed so many of these actions, with no success, that the State Court in Utah has declared Plaintiff a "vexatious litigant" and precluding the Plaintiff from filing further actions without court approval in the State of Utah. *See Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* (the "Vexatious Litigant Order"). A copy of the Vexatious Litigant Order is attached hereto as **Exhibit A**.

5. I declare that under the penalty of perjury that the foregoing is true and correct and that this Declaration was executed on the 21st day of November, 2023.

DATED: November 21, 2023.

By: Gary Bowen
Gary Bowen

Exhibit A

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for Defendant Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWN, a Utah resident,

Defendants.

Case No. 23CV423435

AMENDED DECLARATION OF GARY BOWEN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date:
Time:
Dept: 6
Judge: The Honorable Evette D. Pennypacker

I, Gary Bowen, declare as follows:

1. I am a party the action herein. I am over the age of eighteen and competent to testify. I believe the following to be true and correct to the best of my knowledge. I have personal knowledge of all facts stated herein except for those matters stated on information and belief, and as to those matters, I am informed and believe them to be true. If called upon to testify to these matters I could and would do so truthfully.

2. I am a resident of Utah.

3. I do not have a residence in California and I do not conduct business in California.

4. I am aware that the Plaintiff, Mark Christopher Tracy, has filed multiple lawsuits or legal actions against individuals in Utah. Plaintiff has filed so many of these actions, with no success, that the State Court in Utah has declared Plaintiff a "vexatious litigant" and precluding the Plaintiff from filing further actions without court approval in the State of Utah. *See Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* (the "Vexatious Litigant Order"). A copy of the Vexatious Litigant Order is attached hereto as **Exhibit A**.

5. I declare that under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 5th day of December, 2023 in Salt Lake City, Utah.

By: _____
Gary Bowen

Exhibit A

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

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MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

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Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

THOMAS R. BURKE (CA State Bar No. 141930)
SARAH E. BURNS (CA State Bar No. 324466)
DAVIS WRIGHT TREMAINE LLP
50 California Street, 23rd Floor
San Francisco, California 94111-4701
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: thomasburke@dwt.com
sarahburns@dwt.com

Attorneys for Defendant Kem Crosby Gardner

DAVIS WRIGHT TREMAINE LLP

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

DECLARATION OF SARAH E. BURNS IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT KEM C. GARDNER'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION

[Motion to Quash Service of Summons and Complaint and Declaration of Kem C. Gardner concurrently filed]

Judge: The Hon. Evette Pennypacker
Department: 06

Date: To Be Assigned By The Court
Time: 9:00 a.m.

Complaint Filed: September 21, 2023

DECLARATION OF SARAH E. BURNS

1. I am over the age of 18 years old. I am an attorney admitted to practice before all the courts of the State of California and before this Court. I am an associate with the law firm of Davis Wright Tremaine LLP ("DWT"), and I am one of the attorneys representing Specially-Appearing Defendant Kem C. Gardner in this matter. The matters stated below are true of my own personal knowledge, except for those matters stated on information and belief, which I am informed and believe to be true.

2. Attached as **Exhibit 1** is a true and correct copy of the April 15, 2021 Decision and Order Denying Motion to Vacate and Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure, in *Mark Christopher Tracy v. Simplifi Company, et al.*, Third District Court in and for the State of Utah, Case No. 200905074, which I downloaded from the court's website.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 29, 2023, in Oakland, California.

Sarah E. Burns

Sarah E. Burns

DAVIS WRIGHT TREMAINE LLP

EXHIBIT 1

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS
District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

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Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

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Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

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Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

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VEXATIOUS LITIGANT

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> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

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(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

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(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

THOMAS R. BURKE (CA State Bar No. 141930)
SARAH E. BURNS (CA State Bar No. 324466)
DAVIS WRIGHT TREMAINE LLP
50 California Street, 23rd Floor
San Francisco, California 94111-4701
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: thomasburke@dwt.com
sarahburns@dwt.com

Attorneys for Specially-Appearing Defendant Kem Crosby Gardner

DAVIS WRIGHT TREMAINE LLP

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

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

[Declarations of Kem C. Gardner and Sarah E. Burns with Exhibit 1 concurrently filed]

Judge: The Hon. Evette Pennypacker
Department: 06

2/20/2024

Date: To Be Assigned By The Court
Time: 9:00 a.m.

Complaint Filed: September 21, 2023

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT as soon as counsel may be heard in Department 6 of the Superior Court of California, County of Santa Clara, located at 191 N. First Street, San Jose, CA 95113, specially-appearing defendant Kem C. Gardner will and hereby does move this Court for

an order quashing service of summons pursuant to Code of Civil Procedure § 418.10. This Motion is made on the following two independent grounds:

1. Plaintiff failed to properly serve Mr. Gardner with process in this matter. Plaintiff purports to have served Mr. Gardner, who is a Utah resident, by mail, but Plaintiff has provided no proof that Mr. Gardner ever received the service package and cannot, because Plaintiff sent it to an address that is not associated with Mr. Gardner. *See* Memorandum, Section IV.
2. The Court lacks personal jurisdiction over Mr. Gardner in any event. Mr. Gardner is a Utah resident; he does not have substantial ties to California, and certainly has not purposefully availed himself of its privileges; and Plaintiff's claims against Mr. Gardner all arise out of alleged activity in Utah. *See* Memorandum, Section V.

For all of these reasons, Mr. Gardner respectfully requests that this Court quash service of the summons and complaint, and dismiss him from the suit for lack of personal jurisdiction.

This Motion is based on this Notice; the attached Memorandum of Points and Authorities; the Declarations of Kem C. Gardner and Sarah E. Burns with Exhibit 1; all matters of which this Court may take judicial notice; all pleadings, files, and records in this action; and such other argument as may be received by this Court at the hearing on this Motion.

DATED: December 29, 2023

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: _____
THOMAS R. BURKE
SARAH E. BURNS

Attorneys for Specially-Appearing Defendant Kem C. Gardner

DAVIS WRIGHT TREMAINE LLP

TABLE OF CONTENTS

I. INTRODUCTION 6

II. FACTUAL BACKGROUND 6

III. LEGAL STANDARD 8

IV. PLAINTIFF HAS NOT PROPERLY SERVED MR. GARDNER 9

V. THE COURT LACKS PERSONAL JURISDICTION OVER MR. GARDNER 10

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

B. There Is No Specific Jurisdiction Over Mr. Gardner. 11

1. No Purposeful Availment or Direction. 12

2. No Claims Against Mr. Gardner Arise Out of California. 13

3. Violations of Fair Play and Justice 14

VI. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

American Express Centurion Bank v. Zara,
199 Cal. App. 4th 383 (2011) 9

BBA Aviation PLC v. Superior Court,
190 Cal. App. 4th 421 (2010) 10, 11

Bolkiah v. Sup.Ct.,
74 Cal. App. 4th 984 (1999) 10

Bombardier Recreational Prods., Inc. v. Dow Chem. Can. ULC,
216 Cal. App. 4th 591 (2013) 12

Brue v. Shabaab,
54 Cal. App. 5th 578 (2020) 11

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 12, 14

Canaan Taiwanese Christian Church v. All World Mission Ministries,
211 Cal. App. 4th 1115 (2012) 13

Dow Chem. Can. ULC v. Super. Ct.,
202 Cal. App. 4th 170 (2011) 12

Edmunds v. Superior Ct.,
24 Cal. App. 4th 221 (1994) 13, 14

Emigration Canyon Home Owners v. Emigration Improvement District,
Case No. 190901675, Third District of Utah (Feb. 25, 2019) 7

Emigration Canyon Home Owners v. Emigration Improvement District,
Case No. 190904621, Third District of Utah (June 11, 2019) 7

Gilbert v. Haller,
179 Cal. App. 4th 852 (2009) 10

Greenwell v. Auto-Owners Ins. Co.,
233 Cal. App. 4th 783 (2015) 13

In re Automobile Antitrust Cases I & II,
135 Cal. App. 4th 100 (2005) 8

Malone v. Equitas Reinsurance Ltd.,
84 Cal. App. 4th 1430 (2000) 12, 14

Mark Christopher Tracy v. Simplifi Company, et al.,
Case No. 200905074, Third District of Utah (Aug. 10, 2020) 7

Mark Christopher Tracy v. Simplifi Company, et al.,
Case No. 200905123, Third District of Utah (Aug. 10, 2020) 7

Picot v. Weston,
780 F.3d 1206 (9th Cir. 2015) 13

Ramos v. Homeward Residential, Inc.,
223 Cal. App. 4th 1434 (2014) 10

Ruttenberg v. Ruttenberg,
53 Cal. App. 4th 801 (1997) 9

Sacramento Suncreek Apartments, LLC v. Cambridge Advantaged Props. II,
187 Cal. App. 4th 1 (2010) 14

Shisler v. Sanfer Sports Cars, Inc.
146 Cal. App. 4th 1254 (2006) 11

Summers v. McClanahan,
140 Cal. App. 4th 403 (2006) 8

Vons Companies, Inc. v. Seabest Foods, Inc.,
14 Cal. 4th 434 (1996) 11, 13

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 14

Statutes

California Code of Civil Procedure
§ 410.10 ..... 8, 10
§ 415.40 ..... 9, 10
§ 418.10 10
§ 418.10(a)(1) 6, 8, 9, 10

Other Authorities

Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2019) § 4:414 ..... 9, 10

www.ecid.org 7, 12

I. INTRODUCTION

Pursuant to California Code of Civil Procedure Section 418.10(a)(1), Kem C. Gardner ("Mr. Gardner") specially appears for the limited purpose of challenging this Court's jurisdiction over him by moving to quash service of the Summons and Complaint.

In this lawsuit, Plaintiff Mark Tracy brings claims against more than a dozen Utah residents based on his yearslong fight with a Utah water district. Plaintiff's reason for bringing suit in California, rather than Utah, is obvious: In Utah, Plaintiff's repeated lawsuits on this same subject have resulted in him being declared a vexatious litigant, barring him from bringing suit unless he first receives permission from the presiding judge there. *See* Declaration of Sarah E. Burns ("Burns Decl.") Ex. 1. Fortunately, this lawsuit is easily dismissed as to Mr. Gardner, who does not reside in California, conduct any business, vote or own bank accounts here. While Mr. Gardner occasionally travels to California, ***none*** of Plaintiff's claims ***arise*** out of any alleged conduct by Mr. Gardner in California. Simply put, Plaintiff has not alleged any facts to show that Mr. Gardner should be hauled to court in California.

First, as a threshold matter, this Court lacks personal jurisdiction over Mr. Gardner because Plaintiff failed to properly serve him. It appears Plaintiff incorrectly mailed a copy of the Summons and Complaint to a business address for a company Mr. Gardner was last associated with *roughly 20 years ago*. This singular attempt by Plaintiff to effectuate service by mail was incomplete and defective.

Second, even assuming service was proper—and it was not—Plaintiff fails to proffer any facts to show why this Court may exercise personal jurisdiction over Mr. Gardner. Plaintiff acknowledges that Mr. Gardner is a Utah resident. Compl. ¶ 14. Plaintiff also fails to allege any facts—because none exist—to show that Mr. Gardner is subject to this Court's specific personal jurisdiction. Indeed, the Complaint is entirely devoid of any allegations regarding Mr. Gardner's *presence* in California—let alone any alleged misconduct in California.

II. FACTUAL BACKGROUND

Plaintiff claims he is a "federal whistleblower in what [is] alleged to be the longest and most lucrative water grab[] in the State of Utah." Compl. ¶ 1. He alleges that Defendants

"perpetuated a fraudulent scheme to retire senior water rights vis-à-vis duplicitous water claims….for the construction and massive expansion of a luxurious private urban development" in Salt Lake City, Utah. *Id.* ¶ 2. This is the last of many similar lawsuits[1] Plaintiff has brought based on the Emigration Oaks Water System, a public drinking water system in Salt Lake County operated by the Emigration Canyon Improvement District, a public entity. *Id.* ¶ 8. On April 8, 2021, Plaintiff was declared a vexatious litigant after a Utah court found that the repeated suits were "filed for the purpose of harassment." Burns Decl. Ex. 1 at 5. Under the terms of the vexatious litigant order, Plaintiff is prohibited from filing suit in any Utah state court without the permission of the presiding judge of Utah's Third District Court for Salt Lake County. *Id.*

In this Complaint, Plaintiff brings claims for libel, libel per se, false light and intentional infliction of emotional distress based on emails sent by other defendants, and statements on the Emigration Canyon Improvement District's website, www.ecid.org. Compl. ¶¶ 79-111; 10. He alleges that this Court has jurisdiction for two reasons: (1) because the ecid.org website, though directed at Utah residents, is "routed through San Jose, California"; and (2) because "Defendants published false and defamatory statement[s] for the purpose of obtaining continued payment of monies from property owners residing in California." *Id.* ¶¶ 4, 21.

Plaintiff's allegations as to specially-appearing Defendant Kem C. Gardner end in 2004 and all relate to actions taken in Utah. He alleges that Mr. Gardner "is an individual and resident of Utah" and that he constructed various water reservoirs that are part of the Emigration Oaks Water System in the 1990s. *Id.* ¶¶ 14, 24, 29. The Complaint expressly alleges that Mr. Gardner's "legal title and liability" in the water system was transferred to the Emigration Improvement District in 1998. *Id.* ¶¶ 40; 24 (including Mr. Gardner in definition of Emigration Oaks Defendants). The Complaint does not allege any facts indicating that the purported

[1] *See Emigration Canyon Home Owners v. Emigration Improvement District*, Case No. 190901675, Third District of Utah (Feb. 25, 2019); *Emigration Canyon Home Owners v. Emigration Improvement District*, Case No. 190904621, Third District of Utah (June 11, 2019); *Mark Christopher Tracy v. Simplifi Company, et al.*, Case No. 200905074, Third District of Utah (Aug. 10, 2020); *Mark Christopher Tracy v. Simplifi Company, et al.*, Case No. 200905123, Third District of Utah (Aug. 10, 2020).

"payment of monies from property owners residing in California" were paid to Mr. Gardner at any point since 1998. It also does not allege that Mr. Gardner made any of the allegedly defamatory statements, or that he has any current association with ECID. *Id.* Instead, the Complaint includes a blanket allegation that "each Defendant was acting as the agent, servant, employee, partner, co-conspirator, and/or joint venture of each remaining Defendant." *Id.* ¶ 20.

Mr. Gardner is a resident of Utah, and has been since 1988. Declaration of Kem C. Gardner ("Gardner Decl.") ¶ 2. He has never been a resident of California. *Id.* ¶ 3. He does not conduct business on behalf of himself in California, or maintain bank accounts in the state. *Id.* He does not pay taxes in the state. *Id.* His sole connection to the state is a partial interest in a timeshare here, and visiting the state approximately a handful of times per year. *Id.* ¶ 4.

According to a November 20, 2023 Proof of Service filed with the Court (the "11/20/23 Proof of Service"), Plaintiff attempted to serve Mr. Gardner by mailing a copy of the complaint and summons to 101 South 200 East, Suite 200, Salt Lake City, Utah 84111. That is not Mr. Gardner's home or business address. Gardner Decl. ¶¶ 5-7.

III. LEGAL STANDARD

Plaintiff bears the burden of showing that this Court has the power to exercise general or specific personal jurisdiction over a non-resident defendant. A plaintiff "carr[ies] the initial burden of demonstrating facts by a preponderance of evidence justifying the exercise of jurisdiction in California." *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100, 110 (2005) (affirming grant of motion to quash where plaintiff failed to present sufficient evidence to show a California court may exercise jurisdiction). *See also* C.C.P. § 418.10(a)(1).

To meet that burden, Plaintiff must show that Mr. Gardner, as an individual, possesses sufficient contacts with California such that, pursuant to California's long-arm statute, this Court may exercise jurisdiction on any basis not inconsistent with the constitutions of California and the United States. C.C.P. § 410.10. Further, if a party "challenges the court's personal jurisdiction on the ground of improper service of process[,] the burden is on the plaintiff to prove … the facts requisite to an effective service." *Summers v. McClanahan*, 140 Cal. App. 4th 403, 413 (2006) (internal quotes omitted).

IV. PLAINTIFF HAS NOT PROPERLY SERVED MR. GARDNER

Under controlling California law, Plaintiff was required to properly serve Mr. Gardner with the Summons and Complaint. "A party cannot be properly joined unless served with the summons and complaint; notice does not substitute for proper service. Until statutory requirements are satisfied, the court lacks jurisdiction over a defendant." *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 808 (1997). "Actual notice of the action alone … is not a substitute for proper service and is not sufficient to confer jurisdiction." *American Express Centurion Bank v. Zara*, 199 Cal. App. 4th 383, 392 (2011). *See also* Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2019) ("Rutter") § 4:414, p. 4-68 ("[a] defendant is under no duty to respond in any way to a defectively served summons," and it "makes no difference that defendant had actual knowledge of the action" as such "knowledge does not dispense with statutory requirements for service of summons"). Where, as here, service is improper, a motion to quash is appropriate. C.C.P. § 418.10(a)(1) (defendant can move to "quash service of summons on the ground of lack of jurisdiction.")

Plaintiff failed to properly serve Mr. Gardner. A plaintiff may serve a defendant residing in another state by: (a) utilizing the methods of service for persons within California, such as: personal delivery; substitute service; service of mail coupled with notice and acknowledgement, or publication; (b) certified or registered mail with return receipt requested, or (c) any service method permitted under the law of state where the service is made. C.C.P. § 413.10; *see also* C.C.P. § 415.40. Plaintiff has not properly served Mr. Gardner under California or Utah law.

Plaintiff's 11/20/23 Proof of Service states that he attempted to serve Mr. Gardner pursuant to Code of Civil Procedure Section 415.40, by mailing the Summons and Complaint with return receipt requested to 101 South 200 East, Suite 200, Salt Lake City, Utah 84111. Under that statute, however, the "proof of service shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed return receipt or other evidence." *See* C.C.P. § 417.20(a). Here the proof contains no such evidence, and it could it not, because 101 South 200 East is the address for The Boyer Company, L.C., not Mr. Gardner or his company, which is located at 201 South Main Street, Suite 2000, Salt Lake City, Utah. *See*

Gardner Decl. ¶¶ 5-6. Mr. Gardner has not been affiliated with The Boyer Company, L.C. since 2004, and that company is not authorized to accept service on Mr. Gardner's behalf. *Id.* ¶¶ 5, 7. Plaintiff therefore did not cause delivery to be made "to the defendant," nor provide proof of such, and service was therefore ineffective. C.C.P. § 415.40; *see also Bolkiah v. Sup.Ct.*, 74 Cal. App. 4th 984, 1001 (1999) (service by mail on a nonresident requires strict compliance with C.C.P. § 417.20(a)).

Because Plaintiff's attempt to serve Mr. Gardner failed to comply with the California requirements, and he has provided no evidence service was proper under Utah law, it was invalid and insufficient to confer jurisdiction. *See Ramos v. Homeward Residential, Inc.*, 223 Cal. App. 4th 1434, 1443 (2014) (voiding default judgment for lack of proper service where plaintiff provided no evidence the person to be served "actually received the documents"); *Gilbert v. Haller*, 179 Cal. App. 4th 852, 866 (2009) (service invalid where "no compliance at all" with statutory requirements). This Motion should be granted, and the summons quashed, for this reason alone.

V. THE COURT LACKS PERSONAL JURISDICTION OVER MR. GARDNER

A motion to quash service of summons under C.C.P. § 418.10 also is the proper method for seeking dismissal of a defendant for lack of personal jurisdiction. *See* C.C.P. § 418.10(a)(1); *BBA Aviation PLC v. Superior Court*, 190 Cal. App. 4th 421, 437 (2010) (directing trial court to grant motion to quash service of summons where it lacked personal jurisdiction); Rutter § 3:376 (recognizing that proper procedure is "a motion to quash service for lack of personal jurisdiction under C.C.P. § 418.10(a)(1)").

The ability of a California court to exercise personal jurisdiction over an out-of-state defendant must be consistent with the due process requirements of the federal and state constitutions. C.C.P. § 410.10; *BBA Aviation*, 190 Cal. App. 4th at 429. A defendant must have "minimum contacts with the state such that asserting jurisdiction does not violate traditional notions of fair play and substantial justice," which means that the defendant has engaged in "conduct in, or in connection with, the forum state … such that the defendant should reasonably anticipate being subject to suit in that state." *Id.* "Under the minimum contacts test, personal

jurisdiction may be either general or specific." *Id.* (quotation omitted). Plaintiff cannot meet his burden here, under either a general or specific theory of personal jurisdiction.

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

General jurisdiction over a defendant is proper if the individual is domiciled in the forum, or where a defendant's contacts in the forum state are so "substantial, continuous, and systematic" that they become "at home" in the forum state. *Brue v. Shabaab*, 54 Cal. App. 5th 578, 590–591 (2020). "[R]andom, fortuitous, or attenuated" contacts do not sustain a finding of general jurisdiction. *Shisler v. Sanfer Sports Cars, Inc.* 146 Cal. App. 4th 1254, 1259 (2006).

None of the requisite facts for the exercise of general jurisdiction are present. As Plaintiff concedes, Mr. Gardner resides in Utah. *See* Compl. ¶ 14. He is also domiciled there. Gardner Decl. ¶ 2. Mr. Gardner is registered to vote in Utah. *Id.*Other than a timeshare interest, Mr. Gardner does not own property in California. *Id.* ¶ 4. He does not maintain any bank accounts in California, and does not seek business opportunities in California or have any employees in California. *Id.* ¶ 3. Mr. Gardner has not appointed anyone to accept service on his behalf in California. *Id.* Mr. Gardner does not consent to jurisdiction in California. *Id.* Ultimately, Mr. Gardner is neither domiciled in California nor "made [himself] at home" in California and is consequently not subject to this Court's general jurisdiction. *Brue*, 54 Cal. App. 5th at 590–91.

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

Plaintiff also fails to meet the burden of showing—by a preponderance of evidence—that Mr. Gardner is subject to this Court's exercise of specific jurisdiction. A court may exercise specific jurisdiction over a non-resident defendant when the defendant: (1) "purposefully directed" actions at forum residents or "purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum"; (2) the dispute "is related to or arises out of a defendant's contacts with the forum"; (3) and "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Vons Companies, Inc. v. Seabest Foods, Inc.,* 14 Cal. 4th 434, 447 (1996).

1. No Purposeful Availment or Direction.

Plaintiff fails to meet the "purposeful availment" prong of the specific personal jurisdiction test because Plaintiff has not and cannot show any facts indicating that Mr. Gardner "purposefully and voluntarily directs [his] activities toward the forum so that [he] should expect, by virtue of the benefit [he] receives, to be subject to the court's jurisdiction based on [his] contacts with the forum." *Bombardier Recreational Prods., Inc. v. Dow Chem. Can. ULC*, 216 Cal. App. 4th 591, 602 (2013). These contacts must "proximately result from actions by the defendant himself that create a substantial connection with the forum State." *Dow Chem. Can. ULC v. Super. Ct.*, 202 Cal. App. 4th 170, 175 (2011) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))."[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Malone v. Equitas Reinsurance Ltd*., 84 Cal. App. 4th 1430, 1437 (2000).

Plaintiff has failed to allege Mr. Gardner purposefully availed himself of conducting business in California or purposefully directed any activities towards residents in California. The Complaint is entirely devoid of any facts suggesting Mr. Gardner engaged in any activities—let alone tortious activities—in California or directed towards California residents. The Complaint's ***only*** jurisdictional allegations are that some defendants made "false and defamatory statements on a website that is created and published on a digital platform in California and routed through San Jose" and that those defendants published the statements "for the purpose of obtaining continued payment of money from property owners residing in California." Compl. ¶ 21; *see also id.* ¶ 4. Plaintiff, however, does not allege that Mr. Gardner made any of the allegedly defamatory statements, or that he had any connection with the website, https://www.ecid.org, which Plaintiff alleges is affiliated with the Emigration Canyon Improvement District. Compl. ¶ 59. He also does not allege that Mr. Gardner has any connection with the alleged "continued payment of money from property owners residing in California." Compl. ¶ 21. To the contrary, he alleges that Mr. Gardner transferred his interest in the underlying water system to ECID 25 years ago, in 1998. *Id.* ¶ 40.

Mr. Gardner's only ties to California—that is, brief visits and an interest in a timeshare—are not alleged in the Complaint. *See generally* Compl. And California courts have long held that sporadic visits are not sufficient grounds for exercising specific jurisdiction over out-of-state defendants. By way of example, in *Picot v. Weston*, the Ninth Circuit held that the existence of an "agreement and [defendant's] two trips to California did not create sufficient minimum contacts to subject defendant to personal jurisdiction [in California]." 780 F.3d 1206, 1213 (9th Cir. 2015). Likewise, in *Edmunds v. Superior Ct.,* a California appellate court reversed the denial of a motion to quash where the non-resident defendant only visited California on a few occasions to represent a client. 24 Cal. App. 4th 221, 234 (1994); *see also e.g., Canaan Taiwanese Christian Church v. All World Mission Ministries,* 211 Cal. App. 4th 1115, 1127 (2012). In short, Mr. Gardner has done *nothing* to purposefully avail himself of the benefits of either conducting business in California or purposefully directing any conduct—let alone tortious conduct—in California.

2. No Claims Against Mr. Gardner Arise Out of California.

Plaintiff also fails to show that the controversy arises out of Mr. Gardner's contacts with the forum. A California court may exercise specific jurisdiction only "if there is a ***substantial*** connection or nexus between forum contacts and the litigation." *Greenwell v. Auto-Owners Ins. Co.,* 233 Cal. App. 4th 783, 801 (2015). Towards that end, "a court must consider "the nature of the relationship between the claim and the forum contacts" [] to determine whether the claim is *substantially* related to the forum contacts." *Id.* (quoting *Vons*, 14 Cal. 4th at 454).

The Complaint does not—and cannot—contain a single allegation that Mr. Gardner engaged in *any* forum-related conduct tied to the claims at-issue. *First*, Plaintiff has not alleged *any* facts demonstrating any connection—let alone a "substantial connection"—between the claims, Mr. Gardner, and California. All of the facts Plaintiff alleges related to Mr. Gardner concern actions he allegedly carried out ***in Utah***, not California. *E.g.*, Compl. ¶¶ 24-41. *Second*, jurisdiction is not proper merely because Mr. Gardner's alleged involvement—25 years ago—with the water district had some purported "effect" on California—that is not a "substantial connection" that would render the exercise of jurisdiction reasonable. That is, "[i]t does not

follow... that the fact that a defendant's actions in some way set into motion events which ultimately injured a California resident, will be enough to confer jurisdiction over that defendant [in] the California courts." *Edmunds*, 24 Cal. App. 4th at 236. *See also Sacramento Suncreek Apartments, LLC v. Cambridge Advantaged Props. II*, 187 Cal. App. 4th 1, 22 (2010) (finding no "substantial connection" between Oregon investors' passive investment in a limited partnership that built apartment houses in California and construction claims relating to those apartments). Because Plaintiff fails to show that his claims arise out of or relate to Mr. Gardner's activities in California, specific jurisdiction is not proper.

3. Violations of Fair Play and Justice

Because Plaintiff fails the first two prongs of the jurisdictional analysis and Mr. Gardner lacks even minimum contacts with California, the Court need not decide whether "the assertion of personal jurisdiction would comport with fair play and substantial justice." *See Malone*, 84 Cal. App. 4th at 1437 n.3 ("Because we conclude that defendants lacked the requisite minimum contacts with California, we do not reach the question of whether jurisdiction over them would comport with fair play and substantial justice."). Nevertheless, where, as here, a defendant's contacts with the forum are insufficient to satisfy the basic requirements for general or specific jurisdiction, the exercise of jurisdiction necessarily violates due process. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (internal quotation marks omitted).

Furthermore, the exercise of personal jurisdiction over Mr. Gardner would defeat one of the essential guarantees of fairness resulting from the constitutional limitations on personal jurisdiction: giving "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (citation and internal quotation marks omitted); *see also World-Wide Volkswagen*, 444 U.S. at 297 (noting that a "critical" inquiry is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"). Mr. Gardner has taken

no action that he could reasonably believe would subject him to suit in California. Therefore, subjecting Mr. Gardner to this lawsuit would not comport with traditional notions of fair play and substantial justice.

VI. CONCLUSION

Plaintiff has failed to effect service on specially appearing Defendant Kem C. Gardner, and has not established and cannot establish that he is constitutionally subject to personal jurisdiction in California. Therefore, 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: December 29, 2023.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: _____
THOMAS R. BURKE
SARAH E. BURNS

Attorneys for Specially-Appearing Defendant Kem C. Gardner

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANTS COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, AND DAVID BENNION'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date:
Time:
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion (collectively "Defendants") submits this *Memorandum of Points and Authorities in Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum*.

I. INTRODUCTION

The Court lacks personal jurisdiction over specially appearing Defendants because Defendants are all residents of the State of Utah or businesses located exclusively within the State of Utah, and Plaintiff's claims against Defendants allege facts occurring exclusively in the State of Utah. Plaintiff cannot meet his burden of proof in establishing that Defendants have the requisite contact with California sufficient to establish personal jurisdiction. In the alternative, because all the events identified in the Complaint allegedly occurred in Utah, Defendants respectfully request that the Court should find that in the interest of substantial justice, this action should be dismissed on the ground of inconvenient forum.

Plaintiff has spent years fighting a spurious battle in Utah courts with a Utah governmental entity and its officers, attorneys, and other individuals within Emigration Canyon, Utah. The Utah entity at issue – the Emigration Canyon Improvement District, or "EID" for short – is a small public entity that has authority to provide water and sewer service to residents within Emigration Canyon, which is located in Salt Lake County, Utah. As Plaintiff alleges in the Complaint, all of the general allegations in this Complaint were also included in a False Claim Act case that Plaintiff previously

filed against almost the identical defendants in the United States Federal District Court for the District of Utah. Complaint ¶ 61; *see also USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al*., 2:14-cv-00701. The False Claims Act case was dismissed, and the defendants were awarded over $90,000.00 in attorney fees against Mr. Tracy based on the Court's finding that the False Claims Act case vexatious and harassing. *Id*.

In addition to filing multiple federal court cases against Defendants in Utah, all of which generally allege the same set of purported facts and complaints against EID and people associated with EID, Plaintiff has filed multiple Utah state court cases against defendants. Based on multiple frivolous and vexatious lawsuits against defendants in Utah state courts, Plaintiff has been found to be a "vexatious litigant," which precludes him from filing suit in Utah state courts absent permission from the presiding Judge of Utah's Third District Court in and for Salt Lake County. Declaration of Eric Hawkes In Support of Memorandum of Points and Authorities ("Hawkes Decl."), ¶ 4 and Ex. A.

In an attempt to circumvent his vexatious litigant bar, Plaintiff had now filed a lawsuit in this Court that alleges all the same issues and complaints that Plaintiff has previously alleged in his multiple Utah lawsuits. While there are several problems with this filing, the most immediate is that none of the Defendants reside in or have any significant connection with the State of California, let alone Santa Clara County. Plaintiff did not name the EID (the entity he directs his allegations toward), but numerous individuals affiliated therewith, each of whom Plaintiff acknowledges in his Compliant are residents of Utah.

As a result, this Court lacks personal jurisdiction over Defendants. Alternatively, this is the improper forum for a dispute that relates only to Utah residents and their purported actions that took place in Utah. Accordingly, Defendants request that this Court dismiss this action.

II. RELEVANT FACTS RELATING TO JURISDICTION

1. Plaintiff's Complaint names thirteen defendants, each of whom Plaintiff specifically acknowledges is a resident of Utah or is an entity located in Utah. *See* Complaint, ¶¶ 7-19.

2. Plaintiff sets forth no allegation that any of the defendants had any tie to or connection with the State of California.

3. Plaintiff makes only two arguments why the Court should exercise jurisdiction. First, Plaintiff alleges that false and defamatory statements were made on the Emigration Canyon Improvement District ("EID") website, https://www.ecid.org, and that EID's website is published on a platform in California and routed through San Jose, California. Second, Plaintiff alleges defendants published false and defamatory statements for purposes of obtaining continued payment of monies from property owners residing in California. Complaint, para 21.

4. However, while the Complaint references EID and its website, https://www.ecid.org, the Complaint does not name EID as a party, and there is no allegation that Defendants published anything on the EID website.

5. Likewise, the only entity that receives any payment of monies from property owners is EID.

6. As described in the very website cited in the Complaint, EID is a small public entity that has authority to provide water service to residents within Emigration Canyon, which is located in Salt Lake County, Utah. *See id*.

7. Thus, Plaintiff's argument is that this Court has jurisdiction because defendants allegedly published false and defamatory statements against Plaintiff so that EID, which is a public entity and not a party, could obtain continued payments of property taxes and water usage fees from property owners in Emigration Canyon, Utah, which property owners also happen to own property or reside in California. *See id*.

8. Not only is it a ridiculous assertion that defendants published allegedly false and defamatory statements against Plaintiff to somehow assist EID in collecting property taxes and water usage fees, there is no possible basis for the Court to have jurisdiction over the defendants because some property owners in Emigration Canyon who pay taxes and fees to EID also have property in California.

9. The Complaint fails to allege that any Defendants have sufficient contacts to enable this Court to obtain personal jurisdiction over said defendants. *See* Complaint.

10. Plaintiff has filed this lawsuit in California because he has been barred from filing any further actions in the State of Utah. *See Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure* (the "Vexatious Litigant Order"). A copy of the Vexatious Litigant Order is attached as **Exhibit A** to the Declaration of Eric Hawkes.

III. ARGUMENT

A. California Code of Civil Procedure § 418.10(a)(1) – Lack of Personal Jurisdiction

Pursuant to California Code of Civil Procedure § 418.10(a)(1), a defendant may move the court for an order to quash service of summons on the ground of lack of personal jurisdiction.

"When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate that the defendant has sufficient minimum contacts with the forum state to justify jurisdiction." *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090. The plaintiff must present facts demonstrating that the conduct of the defendants related to the pleaded cause of action is sufficient to constitute constitutionally cognizable "minimum contacts." *Id*. Mere conclusory jurisdictional allegations are insufficient to make this showing. *BBA Aviation PLC v. Superior Court* (2010) 190 Cal.App.4th 421, 429.

Under California's long-arm statute, California state courts may exercise jurisdiction over nonresident defendants only if doing so would be consistent with the "Constitution of this state [and] of the United States." Code of Civil Procedure § 410.10. The statute "manifests an intent to exercise the broadest possible jurisdiction limited only by constitutional considerations." *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445. Accordingly, California's long-arm statute allows state courts and local federal courts to exercise personal jurisdiction on any basis allowable under the Due Process Clause of the 5th Amendment. *Ratcliffe v. Pedersen* (1975) 51 Cal.App.3d 89, 91.

The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316. "The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112. "Personal jurisdiction is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct

permitting the court to exercise jurisdiction over the party." *Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1035. "Personal jurisdiction may be either general or specific." *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 445. A nonresident defendant is subject to a forum's general jurisdiction when the defendant's contacts are substantial continuous and systematic. *Id*. Such conduct must be so wide ranging that the defendant is essentially physically present within the forum. *DVI*, 104 Cal.App.4th at 1090.

Absent such contacts, a defendant may be subject to specific personal jurisdiction if: (1) "the defendant has purposefully availed himself or herself of forum benefits" with respect to the matter in controversy, (2) the "controversy is related to or arises out of the defendant's contacts with the forum" and (3) the exercise of jurisdiction would "comport with fair play and substantial justice." *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (internal quotations omitted) *citing Vons*, 14 Cal.4th at 446. The difference between specific and general jurisdiction is that specific jurisdiction requires the litigation to arise out of the defendant's conduct with the forum. *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) 582 U.S. 255, 262 ("In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation.") (internal quotations omitted).

The purposeful availment inquiry focuses on the defendant's "intentionality" and is satisfied "when the defendant purposefully and voluntarily directs his activities toward the forum so that he should, expect by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his contacts with the forum." *Pavlovich*, 29 Cal.4th at 269 . The purposeful availment requirement is intended to ensure a defendant will not be hauled into a jurisdiction solely as a result of "random,

fortuitous, or attenuated" contacts, or as a result of the "unilateral activity" of another party or third person. *Id*. Purposeful availment asks whether the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297. For the purpose of determining personal jurisdiction, each defendant's contacts with the forum state must be assessed individually. *Calder v. Jones*, (1984) 465 U.S. 783, 790.

Plaintiff's Complaint admits that all the individual Defendants are Utah residents. Complaint, ¶¶ 9, 10, 11, 12, 13 and 16. Plaintiff also alleges that Cohne Kinghorn and Simplifi Company are both Utah corporations with offices located in Salt Lake City, Utah. In addition, all the general allegations in the Complaint relate to development in Emigration Canyon, Utah. Complaint, ¶¶ 22-60.

Instead, Plaintiff makes only two arguments why the Court should exercise jurisdiction. First, Plaintiff alleges that false and defamatory statements were made on the Emigration Canyon Improvement District ("EID") website, https://www.ecid.org, and that EID's website is published on a platform in California and routed through San Jose, California. However, the Complaint does not name EID as a party, and even if EID was a party, simply publishing information on a website that is hosted on a platform in California does not provide for general jurisdiction. In addition, the Complaint only alleges two purported defamatory statements that were published on the EID website. Complaint, ¶¶ 72, 77. Plaintiff first alleges that Mr. Hawkes published on the EID website that elevated lead levels in drinking water in EID's water system is likely the result of plumbing within homes tested and not water provided by EID. Complaint, ¶¶ 72. Mr. Tracy does not explain how this statement could have possibly defamed him or placed in him a false light.

Second, Mr. Tracy alleges that Mr. Hawkes posted a notice of water rate increase on EID's website which Notice included purported defamatory statements against Mr. Tracy. Again, posting information a website hosted by a company in California does not provide for general jurisdiction, but even if it did, the allegation is that EID posted a notice of water right increase on EID's website, and EID is not a party. The allegation does not provide a basis to assert that this Court has general jurisdiction over Mr. Hawkes, and certainly does not provide a basis to assert that the Court has general jurisdiction over any of the other Defendants.

Second, Plaintiff alleges defendants published false and defamatory statements for purposes of obtaining continued payment of monies from property owners residing in California. Complaint, para 21. However, the only entity that receives any payment of monies from property owners is EID, which is not a party.

Accordingly, the Complaint fails to establish general jurisdiction as a basis for the Court's personal jurisdiction.

Additionally, the Complaint fails to allege any facts establishing that Defendants purposefully availed themselves of the benefits of this forum or that this litigation arises from Defendants' contacts with California, if any. Again, all the allegations in the Complaint relate to issues involving Emigration Canyon, Utah and development in Emigration Canyon, and Mr. Tracy has previously alleged these exact same issues in multiple lawsuits in Utah courts.

Based on the foregoing, Plaintiff's Complaint fails to allege any conduct whatsoever by Defendants in, directed to, or related to the State of California. Accordingly, the Court lacks personal jurisdiction over Defendants. Defendants respectfully requests that the Court quash service of summons and complaint in this action pursuant to California Code of Civil Procedure

418.10(a)(1).

B. California Code of Civil Procedure § 418.10(a)(2) – Inconvenient Forum

In the alternative, Defendants respectfully requests that the Court dismiss this action on the grounds of inconvenient forum pursuant to California Code of Civil Procedure 418.10(a)(2). California Code of Civil Procedure 418.10(a)(2) "permits a defendant challenging jurisdiction to object on inconvenient forum grounds if the defendant's challenge to jurisdiction should be denied." *Global Financial Distributors, Inc. v. Superior Court* (2019) 35 Cal.App.5th 179, 190 (internal quotations omitted). Forum *non conveniens* is an equitable doctrine, under which a court within its discretionary power may decline to exercise jurisdiction over a cause of action when the action may be more appropriately and justly tried elsewhere. *Id*. The Court must balance several factors including the availability of a suitable alternative forum, the private interests of the litigants and the public interest of the forum state. *Cal-State Business Products & Services, Inc., v. Ricoh* (1993) 12 Cal.App.4th 1666, 1675.

In the present action, the interests of justice support the dismissal of this action on the grounds of inconvenient forum. Each of the named Defendants in this action are residents of Utah, not California. The Complaint does not allege that any Defendant conducted business in California or had any contact with California. Plaintiff has also filed at least numerous lawsuits in Utah against the Defendants, all of which are related to the same issue raised by Defendant in this matter. Further, Plaintiff's claims arise from alleged conduct occurring exclusively in Utah. There are no facts in the Complaint that would indicate that the residents of California would benefit from the litigation of matters arising exclusively in Utah in a California Court. The circumstances of this action demonstrate that Utah is the more appropriate forum to adjudicate this action.

Based on the foregoing, Bowen respectfully requests that if the Court grants Defendant's motion to quash service for lack of personal jurisdiction, or in the alternative, the Court dismiss this action under California Code of Civil Procedure 418.10(a)(2) on the ground of inconvenient forum.

CONCLUSION

This Court lacks personal jurisdiction over Defendants because all the individual Defendants are residents of Utah and both entities are Utah corporations without offices or a presence in California. Further, Plaintiff's claims against Defendants arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash service of process and complaint in this action for lack of personal jurisdiction under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: January 2, 2024

KESSENICK GAMMA LLP

By: _____

Charlie Y. Chou
Attorneys for Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

AMENDED DECLARATION OF PAUL BROWN IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 11, 2024
Time: 9:00 a.m.
Dept: 6
Judge: The Honorable Yvette D. Pennypacker

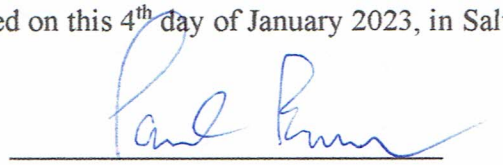
I, Paul Brown, declare as follows:

1. I am a party to the action herein. I am over the age of eighteen and competent to testify. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.

2. I am a resident of Utah.

3. I do not have a residence in California, nor do I conduct any business in California.

4. I declare that under the penalty of perjury under the laws of California that the foregoing is true and correct and that this Declaration was executed on this 4th day of January 2023, in Salt Lake County, Utah.



Paul Brown

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On January 4, 2024, I served the following document(s) on the parties in the within action:

AMENDED DECLARATION OF PAUL BROWN IN ISUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES AND AUTHORITIES

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

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

E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014

E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on January 4, 2024.

By _____
Joan E. Soares

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
mmendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206)-219-2008

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

AMENDED DECLARATION OF MIGUEL MENDEZ-PINTADO IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 11, 2024
Time: 9:00 a.m.
Dept: 6
Judge: The Honorable Yvette D. Pennypacker

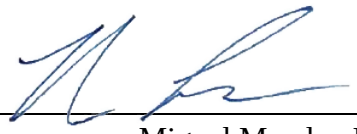
I, Miguel Mendez-Pintado, declare as follows:

1. I am an attorney duly licensed to practice in the State of California and before this Court and with the law firm of Murphy, Pearson, Bradley, and Feeney, attorneys of record for Specially Appearing Defendant Paul Brown. I have personal knowledge of the information set forth below, unless noted as based on information and belief, all of which is true and correct of my own personal knowledge, and if called upon to testify, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of the November 1, 2022, Order and Judgment issued by the United States Court of Appeals for the Tenth Circuit.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Decision and Order Denying Motion to Vacate, Awarding Attorney Fees, and Finding Petitioner Mark Christopher Tracy to be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure.

4. I declare that under the penalty of perjury under the laws of California that the foregoing is true and correct and that this Declaration was executed on this 4th th day of January 2024, in Seattle, Washington .



Miguel Mendez-Pintado

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA ex rel. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual, DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants - Appellees.

UNITED STATES OF AMERICA EX. REL. MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

No. 21-4059
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

v.

EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; FRED A. SMOLKA, an individual; MICHAEL HUGHES, an individual; DAVID BRADFORD, an individual; MARK STEVENS, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual,

Defendants - Appellees,

and

BARNETT INTERMOUNTAIN WATER CONSULTING, a Utah corporation; DON BARNETT, an individual; JOE SMOLKA, an individual; KENNETH WILDE, an individual; RONALD R. RASH, an individual; KEVIN W. BROWN, an individual; MICHAEL B. GEORGESON, an individual; THE BOYER COMPANY, a Utah company; CITY DEVELOPMENT, a Utah corporation; R. STEVE CREAMER, an individual; CAROLLO ENGINEERS, INC., a California professional corporation,

Defendants.

No. 21-4143
(D.C. No. 2:14-CV-00701-JNP)
(D. Utah)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **TYMKOVICH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Mark Tracy, acting as a qui tam relator, brought suit on behalf of the United States alleging that Emigration Improvement District (the District) and various other defendants made false statements to obtain a federal loan for a water project in violation of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., and that after the loan proceeds were disbursed, the District failed to comply with conditions of the loan and failed to report this noncompliance to the United States government.[1] In the operative complaint—the third amended complaint—he asserted a reverse false claim under § 3729(a)(1)(G) and a direct false claim under § 3729(a)(1)(A) and (B). In a series of orders entered over the course of the litigation, the district court dismissed both claims against all defendants. In Appeal No. 21-4059, Mr. Tracy appeals the district court's orders dismissing his direct false claim against all defendants as untimely under 31 U.S.C. § 3731(b)(2). He does not appeal the order dismissing the reverse false claim. In Appeal No. 21-4143, Mr. Tracy appeals the district court's order awarding attorneys' fees to a subset of defendants pursuant to the FCA's fee-shifting provision, 31 U.S.C. § 3730(d)(4). We procedurally consolidated

[1] The FCA's qui tam provisions allow an individual to sue on behalf of the government. 31 U.S.C. § 3730(b). Though the government may intervene and take over a private plaintiff's case, *id.* § 3730(b)(2), it declined to do so in this case. Mr. Tracy thus conducted the litigation as the relator. *See id.* § 3730(c)(3).

the appeals and, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm both orders.[2]

Background

Our decision in Mr. Tracy's prior appeal describes most of the factual and procedural background of the underlying litigation in some detail. *See United States ex. rel. Tracy v. Emigration Improvement Dist.* (*Tracy I*), 804 F. App'x 905, 907-09 (10th Cir. 2020). We do not repeat that background here, other than as necessary to provide context for our consideration of the issues presented in this appeal.

In *Tracy I*, we remanded for the district court to decide whether Mr. Tracy filed his complaint within the ten-year period established by § 3731(b)(2). *See* 804 F. App'x at 909. Following remand, a subset of defendants—Carollo Engineers, Inc., the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer—filed motions to dismiss the remaining claim against them pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred.[3]

[2] Our caption includes a number of defendants-appellees who did not participate in these appeals. The Boyer Company and City Development did not appear in the district court or participate in the appeals, but they remain in our caption as appellees because although Mr. Tracy did not serve them, he did not voluntarily dismiss his claims against them. Barnett Intermountain Water Consulting, Don Barnett, Joe Smolka, Kenneth Wilde, Kevin W. Brown, and Michael B. Georgeson also did not participate in the appeals, but they are listed as appellees because although Mr. Tracy conceded that his claim against them should be dismissed, he retained his right to appeal that resulting dismissal order.

[3] The moving defendants also sought dismissal on other grounds, but the district court did not address the alternative bases for dismissal.

The issue was whether the period started to run when the District filed the last claim for payment or on the date the government paid that claim. The parties did not dispute the relevant dates—according to documents attached to the third amended complaint, the District submitted its final request for payment on September 13, 2004, and the government paid the claim on September 29, 2004. Mr. Tracy filed suit on September 26, 2014—more than ten years after the District submitted the final claim but less than ten years after the government paid it.

The district court concluded that the relevant date for purposes of § 3731(b)(2) was the date the District submitted its final request for payment and that because Mr. Tracy filed suit more than ten years from that date, the claim was time-barred. The court thus granted the motions to dismiss and dismissed the claim against the moving defendants. The court then ordered Mr. Tracy to show cause why the claim should not also be dismissed as to the remaining defendants. He conceded that, in light of the court's decision on the motions to dismiss, his claim against the remaining defendants should be dismissed. Accordingly, the court dismissed the claim against those defendants and entered judgment in favor of all defendants.

A different subset of defendants—the District, Michael Hughes, Mark Stevens, David Bradford, Fred Smolka, Eric Hawkes, and Lynn Hales—then moved for attorneys' fees and costs pursuant to § 3730(d)(4).[4] The district court granted the

[4] The motion also sought an award of fees against Mr. Tracy's counsel pursuant to 28 U.S.C. § 1927, but the moving defendants withdrew that portion of the motion after they reached a settlement with counsel.

motion after concluding that the action was clearly vexatious and brought for the purpose of harassment.

Discussion

1. Dismissal Order – Appeal No. 21-4059

Mr. Tracy first contends that the district court erred in concluding that the period for filing his claim started running when the District made its final request for payment. He insists that his claim was timely filed because the time period did not begin to run until the last date the government suffered damages—the date on which it made the payment induced by the last false claim. We disagree.

We review the district court's Rule 12(b)(6) dismissal de novo. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1278 (10th Cir.), *cert. denied*, 142 S. Ct. 477 (2021). "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). If the allegations show that the claim is time-barred, the complaint is subject to dismissal for failure to state a claim. *Id.* We review de novo whether a district court properly applied a limitations period, including its determination of the date the period began to run. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005).

Section 3731(b)(2) sets forth two limitations periods that apply to relator-initiated civil suits under the FCA. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1511-12 (2019). Specifically, it provides:

> A civil action under section 3730 may not be brought . . . more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

§ 3731(b)(2).

The different start dates for the two time periods is significant. The three-year period is a typical statute of limitations that starts to run when the government knew or should have known about the fraud, while the ten-year period is a statute of repose that places an outer limit on the otherwise applicable statute of limitations. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (discussing the difference between statutes of limitations and statutes of repose); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1211 (10th Cir. 2014) (same). As is the case for many repose periods, the ten-year period in § 3731(b)(2) starts running when a specific event occurs, not when the alleged injury occurs. *See CTS Corp.*, 573 U.S. at 8 (explaining that statutes of limitations typically begin to run when a cause of action accrues, meaning when the alleged injury occurred or was discovered, while a statute of repose begins to run when a specific event occurs, often "the date of the last culpable act or omission of the defendant . . . , even if [the repose] period ends before the plaintiff has suffered a resulting injury" (internal quotation marks omitted)). That date is the date the "violation is committed." § 3731(b)(2).

The question then, is when the defendants' alleged FCA violation was committed. Mr. Tracy's claim alleged the defendants violated § 3729(a)(1)(A) and

(B), which impose civil liability when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," § 3729(a)(1)(A), or uses a false record or makes a false statement material to a false claim, § 3729(a)(1)(B). Liability thus stems from the act of making a false claim, not from the government's payment of the claim. *See United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, 48 F.4th 1146, 1151 (10th Cir. 2022) ("The FCA imposes liability for fraudulent *attempts* to cause the government to pay out sums of money." (emphasis added) (internal quotation marks omitted)); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 & n.5 (1956) (recognizing that under a statute that is "essentially the equivalent" of the FCA, a contractor who submits a false claim for payment may be liable even if the claim did not actually induce the government to pay out funds or to suffer any loss).[5] We thus conclude that a "violation is committed" for purposes of § 3731(b)(2) when the defendant submits a false claim, not when the government pays the claim. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) (recognizing in dicta that because § 3731(b)(1) "t[ies] the start of the time limit to the date on which the violation of section 3729 is committed . . . , the time limit begins to

[5] Other circuit courts have also recognized that the FCA attaches liability to the claim for payment, not the government's wrongful payment. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (same).

run on the date the defendant submitted a false claim for payment" (internal quotation marks omitted)).

In so concluding, we reject Mr. Tracy's argument that because he sought actual damages, the ten-year period did not begin to run until the government paid the final claim. In support of that argument, he relies on *Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998), in which the Court of Federal Claims reasoned that because § 3729 provides that a false claimant may be liable both for civil penalties and actual damages, the ten-year period begins to run at different times depending on the relief sought. *See id.* at 743 (holding that where a suit seeks only civil penalties, the period begins to run when the false claim was submitted, but where a suit seeks actual damages, the period begins to run when the government pays the claim). But we are not bound by the Court of Federal Claims' decision or persuaded by its reasoning in *Jana*. Nothing in the statutory language suggests that Congress intended to establish different start-dates for the ten-year repose period depending on the relief sought. To the contrary, § 3731(b)(2)'s plain language provides that the clock starts ticking on "the date on which the violation is committed," not when the government suffers damage. Mr. Tracy cites no circuit court decision that follows *Jana*, and we have found none. He also cites no authority—and we are not aware of any—holding that a violation is committed and the ten-year period begins to run when the defendant accepts payment from the government on a false claim, as opposed to when he "knowingly presents" such a claim to the government, § 3729(a)(1)(A), or "makes a false statement material" to such a claim, § 3729(a)(1)(B).

Because the ten-year period started to run on September 13, 2009, when the District submitted the last claim, and Mr. Tracy did not file suit until September 26, 2014, we agree with the district court's determination that his claim was time-barred.

2. Attorneys' Fees Order – Appeal No. 21-4143

A. Legal Standards

Under § 3730(d)(4), a court may award attorneys' fees to the defendants in a qui tam action if (1) the government elected not to proceed with the action; (2) the defendants prevailed; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Each element of the third prong can independently sustain an award of attorneys' fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017 & n.5 (10th Cir. 2017) (upholding attorneys' fees award based solely on finding that the relator's claim was clearly frivolous and declining to address the other two elements because they were "not necessary to our disposition"). We review the district court's decision to award attorneys' fees for an abuse of discretion. *Id.* at 1017.

B. Additional Factual and Procedural Background

The following additional background information provides context for our review of the district court's fee order. In 2019, after entering the pre-*Tracy I* dismissal orders, the district court ordered Mr. Tracy to pay the District's attorneys' fees and expenses pursuant to § 3730(d)(4). That order was based in part on Mr. Tracy's having recorded a lis pendens against a portion of the District's water rights, claiming they were the subject of the FCA litigation, and sending letters to the

District's clients referencing the lis pendens and accusing the District of manipulating water rights. The district court concluded the lis pendens was a wrongful lien and released it. And, finding "no good faith basis for" Mr. Tracy having filed the wrongful lis pendens, the court determined that his recording of the lis pendens and his related conduct was vexatious, and awarded statutory damages and attorneys' fees. Suppl. App. at 90-91. That fee order was also based on the court's findings that the § 3729(a)(1)(G) claim (the reverse false claim) and some of Mr. Tracy's arguments and litigation conduct vis-à-vis the statute of limitations issue were frivolous. Finally, the court found that overall, the action was clearly vexatious and "indicate[d] bad faith and a clear intent to harass," *id.*, because Mr. Tracy used the litigation to "air personal grievances . . . in pursuit of an ulterior motive, rather than [to] seek money damages on behalf of the United States," *id.* at 91.

In *Tracy I*, after vacating the order dismissing the direct file claim, we vacated the 2019 fee order because we could not say that the District was the prevailing party until the district court decided whether any alleged violation of § 3729(a)(1)(A) or (B) occurred less than ten years before Mr. Tracy filed his initial complaint. 804 F. App'x at 909. We indicated that on remand the district court could enter a new fee order if it determined that the defendants seeking fees prevailed and that Mr. Tracy's claims and litigation conduct met the § 3730(d)(4) standard. *Id.*

On remand, the district court ordered Mr. Tracy to pay the attorneys' fees and costs of the defendants who sought an attorneys' fee award. Unlike the 2019 fee order in which the court found that aspects of the litigation satisfied each element of

the third prong of § 3730(d)(4), the fee order issued on remand was based only on findings that the action was "clearly vexatious" and "brought primarily for purposes of harassment." Aplt. App. at 311. Given its earlier finding that the lis pendens was "unreasonable and without foundation" and had nothing to do with the issues that arose in *Tracy I* and on remand, the district court found that Mr. Tracy's behavior with respect to the lis pendens was "clearly vexatious when it first occurred, and no subsequent developments change that finding." *Id.* at 310. The court further found that nothing in the subsequent litigation affected its finding in the 2019 fee order that Mr. Tracy's "actions indicated bad faith and a clear intent to harass." *Id.* Reiterating some of the most egregious examples it gave in the 2019 order of Mr. Tracy's "harassing behavior," *id.* at 311, the court again found that he "brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States," *id.* at 310. Having found that his actions were clearly vexatious and brought for the purpose of harassment, the court awarded fees on those grounds and did not address whether his claims were clearly frivolous.

C. Analysis

Mr. Tracy does not dispute that the first two prongs of the § 3730(d)(4) inquiry are satisfied here—the government declined to intervene in the action three times, and the defendants prevailed. But he contends that the district court abused its discretion in concluding that an award of fees was warranted under the third prong. Specifically, noting his success in *Tracy I*, he insists that his claims were not

frivolous, and he maintains that his reliance on *Jana* in support of his argument on remand was not unreasonable.

As explained above, however, the fee order at issue here was not based on a finding that his claims were frivolous. Instead, it was based on findings that the action was clearly vexatious and brought primarily for purposes of harassment, and those findings were sufficient to support the fee award. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d at 1017 & n.5. Mr. Tracy does not challenge those findings, so he has abandoned or waived any challenge he might have raised. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). And because he failed to address the basis for the district court's ruling, he has given us no reason to disturb it. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366, 1369 (10th Cir. 2015) (observing that "[t]he first task of an appellant is to explain to us why the district court's decision was wrong," and affirming where the appellate briefing "contain[ed] nary a word to challenge the basis of the" challenged ruling).

Conclusion

We affirm the district court's dismissal orders and resulting judgment for defendants in Appeal No. 21-4059. We also affirm the district court's attorneys' fee order in Appeal No. 21-4143. We deny as moot the motion filed by Eric Hawkes,

Jennifer Hawkes, and Simplifi Co., in Appeal No. 21-4059 to substitute them as the appellants in place of Mr. Tracy and to dismiss the appeal.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 1, 2022

Mr. Alan W. Dunaway
Mr. Jason M. Kerr
Price Parkinson & Kerr
5742 West Harold Gatty Drive
Salt Lake City, UT 84116

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Craig Robert Mariger

CMW/sls

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 23, 2022

Mr. D. Mark Jones
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 21-4059, 21-4143, United States ex rel. Tracy v. Emigration Improvement Dist., et al
Dist/Ag docket: 2:14-CV-00701-JNP

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's November 1, 2022 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Timothy John Bywater
Jeremy Rand Cook
Alan W. Dunaway
Michael L. Ford
Robert L. Janicki
C. Michael Judd
Jason M. Kerr
Craig Robert Mariger

CMW/mlb

EXHIBIT B

The Order of the Court is stated below:
Dated: April 15, 2021 02:53:03 PM **/s/** MARK KOURIS District Court Judge

Prepared and Submitted by:

Jeremy R. Cook (10325)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**DECISION AND ORDER DENYING MOTION TO VACATE, AWARDING ATTORNEY FEES, AND FINDING PETITIONER MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND SUBJECT TO RULE 83 OF THE UTAH RULES OF CIVIL PROCEDURE** Case No. 200905074 Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act ("**GRAMA**"). This matter is before the Court on Petitioner's *Motion to Vacate Memorandum Decision and*

Judgement (sic) (the "**Motion**"). Oral arguments were held on April 7, 2021. The Court having considered the Motion, related memoranda, and the arguments of the parties at the hearing, hereby enters the following decision and order:

BACKGROUND

Emigration Improvement District ("**EID**") is a Utah local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy ("**Mr. Tracy**") submitted a GRAMA request to EID requesting telemetry data for EID's water wells and water tanks (the "**GRAMA Request**"). The GRAMA Request correctly designated the governmental entity as EID, and EID responded to the GRAMA request. After appealing the purported denial of the GRAMA Request to the chair of EID's board of trustees, Mr. Tracy brought this action. However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company ("**Respondents**").

On February 10, 2021, the Court held a hearing on Respondent's *Motion to Dismiss*. During the hearing, the Court issued is verbal ruling finding in part that GRAMA provides that a records request must be made to a governmental entity, and that EID was the governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) ("A person making a request for a record shall submit to the governmental entity that retains the record a written request . . ."). This Court's decision was the same as a decision issued by Judge Faust on September 16, 2020. *See* Case No. 200905123. In addition, on February 11, 2021, the day after the hearing in this matter, the State Records Committee of the State of Utah (the "**Records Committee**") heard the appeal of three separate GRAMA requests submitted by Mr. Tracy for records of EID. The Records Committee

found that submitting a GRAMA request to Simplifi Company or Respondents, as opposed to EID, was not proper and denied Mr. Tracy's appeals.

On February 11, 2021 (the day after this Court's decision), Mr. Tracy submitted a new GRAMA request to EID in which he again cc:d Jennifer Hawkes and again stated that the governmental entity was "Emigration Improvement District aka Emigration Canyon Improvement District c/o Simplifi Company." (the "**New GRAMA Request**"). In response to the New GRAMA Request, EID's attorney sent Mr. Tracy an email informing Mr. Tracy that based on his continued inclusion of Simplifi Company and Mrs. Hawkes in the New GRAMA Request, the fees awarded by this Court would need to be paid prior to a response to the New GRAMA Request (the "**Response Email**").

MOTION TO VACATE

Mr. Tracy brought this Motion based on the argument that the Response Email established "factual representations made to this court regarding the status of Simplifi as a 'private corporation' and Mrs. Hawkes having 'no direct involvement with EID' were designed to improperly influence the decision of the Court and were therefore fraudulent under Rule 60(b)(3) URCP.'" *See Motion*, p. 3. The Court finds that the Motion does not establish any fraud, misrepresentations, or other misconduct of Respondents, or justify relief under Rule 60(b)(3). Specifically, the Response Email only indicated that if Mr. Tracy wanted to continue to take the position that it was proper to submit a GRAMA request to EID c/o Simplifi Company or include Mrs. Hawkes in the GRAMA request, which position is contrary to the decision of this Court,

that Mr. Tracy would be required to pay the fees awarded to Respondents in this case. Nothing in the Response Email suggests that Respondents changed their representations to this Court or their legal arguments in this matter. Accordingly, the Court denies the Motion.

ATTORNEYS FEES

Mr. Tracy was informed at least six times by this Court, Judge Faust, the State Records Committee or EID's attorney that GRAMA requests should be made only to the public entity, Emigration Improvement District. At the hearing, Mr. Tracy was not able to provide any plausible explanation for disregarding the decision of this Court and continuing to include Simplifi Company or Mrs. Hawkes in the New GRAMA Request, which leads this Court to conclude that Mr. Tracy's reason for continuing to include Simplifi Company and Mrs. Hawkes was to continue to harass Respondents. Simply put, Mr. Tracy could have easily avoided any issues by following the decision and order of this Court, but inexplicably chose to disregard the Court's decision and continue to harass Respondents by including them in GRAMA requests that Mr. Tracy knew should be served only on EID.

The Court has previously found that an award of attorney fees is proper pursuant to Utah Code Ann. § 78B-5-825(1), and the Court finds that Respondents should be awarded their reasonable attorneys' fees responding to the Motion.

VEXATIOUS LITIGANT

Rule 83(a)(1) of the Utah Rules of Civil Procedure states that the court may find a person to be a "vexatious litigant" if the person does any of the following:

> (a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate

the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

The Court finds that Mr. Tracy has violated Rule 83(a)(1)(B) and 83(a)(1)(C). With respect to Rule 83(a)(1)(B), Mr. Tracy served and prosecuted this action after Judge Faust previously issued a decision on the same issue of law. *See* Case No. 200905123. After this Court issued its decision, Mr. Tracy ignored both decisions, again served GRAMA request to EID that were served c/o Simplifi Company and included Mrs. Hawkes, and then Mr. Tracy attempted to utilize EID's response to again argue to this Court that filing an action against on Respondents, and not EID, was proper. With respect to 83(a)(1)(C), the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment. The Court also finds that the Motion was unmeritorious.

The Court also finds that the Petition and the Motion were filed for the purpose of harassing Respondents in violation of Rule 11(b)(1) of the Utah Rules of Civil Procedure. As

set forth above, despite repeated opportunities from this Court, Mr. Tracy has failed to ever provide a plausible explanation of why he brought this action against Respondents, but intentionally failed to name the governmental entity, EID; or why Mr. Tracy continued to include Respondents in GRAMA requests despite repeatedly being informed that their inclusion was improper. In accordance with Rule 11(c)(2), the Court finds that an appropriate sanction to deter repetition of such conduct is to find that Mr. Tracy is a vexatious litigant.

Based on the foregoing, the Court finds petitioner Mark Christopher Tracy to be a vexatious litigant in accordance with U.R.C.P. 83(b)(4), and the Court orders that Mr. Tracy must obtain leave from the Presiding Judge of the Court prior to Mr. Tracy filing any future actions in Utah State Courts.

Approved as to Form:

/s/ Mark Christopher Tracy
Mark Christopher Tracy

COURT'S SIGNATURE AND DATE APPEAR AT TOP OF FIRST PAGE OF THIS DOCUMENT

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On January 4, 2024, I served the following document(s) on the parties in the within action:

AMENDED DECLARATION OF MIGUEL MENDEZ-PINTADO IN ISUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES AND AUTHORITIES

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

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

E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014

E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on January 4, 2024.

By _____
Joan E. Soares

Nicholas C. Larson (SBN 275870)
NLarson@MPBF.com
Miguel E. Mendez-Pintado (SBN 323372)
MMendezpintado@MPBF.com
520 Pike Street, Suite 1205
Seattle, WA 98101
Telephone: (206) 219-2008

Attorneys for defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE 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, a Utah resident; ERIC HAWKES, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL SCOTT HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM CROSBY GARDNER, a Utah resident; WALTER J. PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date: January 11, 2024
Time: 9:00 a.m.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendant Paul Brown ("Brown") submits this *Reply Memorandum of Points and Authorities in Support of Specially Appearing Defendant Paul Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum* (the "Motion").

I. INTRODUCTION

In his *Memorandum and Points of Authority in Support of Opposition to Defendant Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum* (the "Opposition"), plaintiff Mark Christopher Tracy ("Plaintiff") does not provide any evidence or make any arguments as to why this Court has jurisdiction over Brown. Instead, Plaintiff argues that the Motion should be denied based on two technical grounds. First, Plaintiff argues that that the Motion is without evidentiary support because Brown and his counsel, Miguel E. Mendez-Pintado, failed to execute their declarations under penalty of perjury pursuant to the laws of the State of California. Second, Plaintiff argues that the Motion should be denied because the hearing was not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). Neither of these arguments have any merit, and the Motion should be granted.

II. ARGUMENT

A. Any Defects in the Brown and Mendez-Pintado Declarations Do Not Justify Denial of the Motion.

Plaintiff first argues that that the Motion is without evidentiary support because Brown and his counsel, Miguel E. Mendez-Pintado, failed to execute their declarations under penalty of perjury pursuant to the laws of the State of California. This argument does not go to the material facts of the case. The 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. Despite this, to eliminate any procedural concerns, Brown and Miguel E. Mendez-Pintado have filed herewith Amended Declarations. These Amended Declarations are identical to their original declarations, but which are under penalty of perjury pursuant to the laws of the State of California. As such, any procedural defects have been cured, and do not serve as a basis to deny the motion.

//

Moreover, even if the original Brown and Mendez-Pintado Declarations were defective, when a defendant moves to quash service of process based on lack of personal jurisdiction, "[t]he plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction." *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273 (Pavlovich); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (Vons). Only when a plaintiff carries that burden does it then shift to the defendant to demonstrate that the court's exercise of personal jurisdiction over it would be unfair or unreasonable. (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Vons*, supra, at pp. 447-448.).

Plaintiff has failed to articulate any facts that would justify the exercise of jurisdiction. Plaintiff acknowledges in his Complaint that Brown is a resident of Utah, and Plaintiff's sole allegation against Brown is that Brown sent an email to residents of Emigration Oaks PUD, located in Salt Lake County, Utah. (Complaint, ¶¶ 23, 76) Plaintiff does not even attempt to argue in his Opposition how these facts support jurisdiction, and Plaintiff does not make any substantive arguments in his Opposition in response to the Motion.

Finally, Brown moved to quash for both lack of jurisdiction under California Code of Civil Procedure § 418.10(a)(1) and inconvenient forum under California Code of Civil Procedure § 418.10(a)(2). As Plaintiff alleges in the Complaint, all of the general allegations in this Complaint were also included in a False Claim Act case that Plaintiff previously filed against almost the identical defendants in the United States Federal District Court for the District of Utah. (Complaint ¶ 61; *see also USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al*., 2:14-cv-00701.) All of the general allegations relate solely to Emigration Canyon in Utah and issues related to development in Emigration Canyon, and the allegations have been repeated by Plaintiff in multiple lawsuits in Utah that have been found to be frivolous, vexatious and harassing. (Exhibit A to the Declaration of Miguel Mendez-Pintado) Plaintiff failed to make any argument in response to Brown's motion to quash for inconvenient forum, which is not contingent upon the Brown or Mendez-Pintado Declarations and serves as an alternative ground for the Court to grant the Motion.

Accordingly, Plaintiff's contention that the Court should deny the Motion based on alleged defects in the Brown and Miguel Mendez-Pintado Declarations is without merit.

B. California Court's Do Not Require a Hearing Within 30 Days.

Plaintiff's only other argument is that the Motion should be denied because the hearing was not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). However, despite the statute's use of the word "shall", courts have not construed Code of Civil Procedure section 418.10, subdivision (b), to impose a mandatory requirement that a hearing be noticed or held within 30 days. Moreover, Plaintiff was on notice of the hearing as other defendants had communicated the date, and, notably, Plaintiff filed his Opposition to the Motion, indicating awareness of the hearing. An Amended Notice was also sent promptly to Plaintiff once the hearing date was established.

In *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286 (*Olinick*), for instance, the defendant filed the notice of its motion to stay or dismiss based on inconvenient forum, pursuant to Code of Civil Procedure section 418.10, subdivision (a), on May 4, 2004. (*Olinick*, supra, at p. 1295.) It then designated a hearing date of July 1, and the parties later stipulated to move the date to July 21, which the trial court approved. (*Ibid*.) The Court of Appeal rejected the plaintiff's arguments that a mandatory 30-day timeline governs the motion and that "by failing to designate a hearing date within the 30-day period, [defendant] waived its right to bring the motion under [Code of Civil Procedure] section 418.10." (*Id*. at p. 1296.)

The Court of Appeal noted that subdivision (a) of the statute provides that "[a] defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion . . . " (*Olinick*, supra, 138 Cal.App.4th at p. 1296, quoting Code Civ. Proc., § 418.10, subd. (a).) It explained that "the statute reflects the trial court is authorized to extend the time for filing such a motion" (*Olinick, supra*, at p. 1296), and cited with approval treatise language stating that "[s]cheduling a hearing date beyond 30 days should not invalidate a motion to quash. Nothing in [Code of Civil Procedure section] 418.10 suggests the court must overlook the lack of personal jurisdiction or proper service because of a defendant's failure to schedule a hearing date within 30 days." (*Ibid., quoting Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial* (The Rutter Group 2005) ¶ 3:381.) The court therefore rejected the argument that a "tardy hearing date on a motion to stay or dismiss under section 418.10 deprives the trial court of jurisdiction to consider the merits of the motion." (*Olinick*, supra, at p. 1296.)

Similarly, in *Preciado v. Freightliner Custom Chassis Corp*. (2023) 87 Cal.App.5th 964, the Court of Appeal rejected the same argument in the context of a motion to quash that was noticed for hearing 99 days after filing because that was the first available court date. (*Id*. at p. 972.) Citing *Olinick*, the court held that "a tardy hearing date on a motion . . . under [Code of Civil Procedure] section 418.10" does not "deprive [] the trial court of jurisdiction to consider the merits of the motion." (*Id*. at p. 969, fn. 4, *quoting Olinick*, *supra*, 138 Cal.App.4th at p. 1296; *Edmon & Karnow*, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2022) ¶ 3:381 [scheduling a hearing date beyond 30 days does not invalidate the motion].).

In this case, the Court noticed the hearing at the first available date. Clearly, a defendant cannot be subject to jurisdiction of the Court simply because the earliest available hearing date was more than 30 days out. This is especially true given Plaintiff's awareness of the hearing and his filing of an Opposition.

III. CONCLUSION

This Court lacks personal jurisdiction over Brown, and any of the other defendants, because all the individual Defendants are residents of Utah and both entities are Utah corporations without offices or a presence in California. Further, Plaintiff's claims against Defendants arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash service of process and complaint in this action against all the defendants for lack of personal jurisdiction under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action against all the defendants pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: January 4, 2024.

MURPHY PEARSON BRADLEY & FEENEY

By _____
Nicholas C. Larson
Miguel E. Mendez-Pintado
Attorneys for Defendant Paul Brown

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On January 4, 2024, I served the following document(s) on the parties in the within action:

REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is ARoss@mpbf.com/

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

E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014

E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao

Attorney For Defendants COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on January 4, 2024.

By Joan E. Soares
Joan E. Soares

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

SUPERIOR COURT OF THE STATE 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, a Utah resident; ERIC HAWKES, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL SCOTT HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM CROSBY GARDNER, a Utah resident; WALTER J. PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANT GARY BOWEN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date: January 11, 2024
Time: 9:00 a.m.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendant Gary Bowen ("Bowen") submits this *Reply Memorandum of Points and Authorities in Support of Specially Appearing Defendant Gary Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum* (the "Motion").

I. INTRODUCTION

In his *Memorandum and Points of Authority in Support of Opposition to Defendant Bowen's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum* (the "Opposition"), plaintiff Mark Christopher Tracy ("Plaintiff") does not provide any evidence or make any arguments as to why this Court has jurisdiction over Bowen. Instead, Plaintiff argues that the Motion should be denied based on two technical grounds. First, Plaintiff argues that that the Motion is without evidentiary support because Bowen failed to execute his declaration under penalty of perjury pursuant to the laws of the State of California. Second, Plaintiff argues that the Motion should be denied because the hearing was not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). Neither of these arguments have any merit.

The instant action is, in fact, nothing more than Plaintiff's continued obsession with harassing defendants over the development of a relatively small residential neighborhood and a public drinking water system in Emigration Canyon, Utah over 25 years ago. Complaint, ¶ 37. Plaintiff does not live in Emigration Canyon and does not own any real estate in Emigration Canyon, so it is unclear why Plaintiff has harbored a decade long obsession with bringing frivolous litigation against anyone that has ever had any association with Emigration Improvement District or development in Emigration Canyon. However, what is clear is that there is no merit to his claims, and certainly no basis for Plaintiff to bring an action against defendants in California. In paragraph

61 of the Complaint, Plaintiff alleges that "[t]he above-listed allegations were filed in United States Federal District Court of Utah on September 26, 2014, under the False Claims Act (the "FCA Litigation")." *See USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al*., 2:14-cv-00701. In other words, almost all the substantive allegations in the Complaint are just a recital of allegations and issues that Plaintiff has alleged in previous litigation in Utah. On October 29, 2021, the Utah Federal District Cout Judge Parrish issued an *Order Granting in Part and Denying in Part Defendants' Motion for Attorneys' Fees and Cost and Granting Defendants' Motion to Amend* in the FCA Litigation (the "FCA Attorney Fee Order"). *Id.*, Docket No. 342. In the FCA Attorney Fee Order, Judge Parrish found: "Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous." Based on the finding, Judge Parrish awarded defendants $92,665 in attorneys' fees and costs for expenses against Plaintiff, none of which have been paid. Plaintiff has also been deemed a vexatious litigant by Utah state courts based on his frivolous and vexatious actions against defendants in Utah state court.

II. ARGUMENT

A. Any Defect in the Bowen Declaration Does Not Justify Denial of the Motion.

Plaintiff first argues that that the Motion is without evidentiary support because Bowen failed to execute his declaration under penalty of perjury pursuant to the laws of the State of California. Bowen, however, filed an Amended Declaration which was identical to his original declaration, but which was under penalty of perjury pursuant to the laws of the State of California. Thus, any defect was corrected and does not serve as a basis to deny the motion.

Moreover, even if the original Bowen Declaration was defective, when a defendant moves to quash service of process based on lack of personal jurisdiction, "[t]he plaintiff has the initial

burden of demonstrating facts justifying the exercise of jurisdiction." *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273 (Pavlovich); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (Vons). Only when a plaintiff carries that burden does it then shift to the defendant to demonstrate that the court's exercise of personal jurisdiction over it would be unfair or unreasonable. (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Vons*, supra, at pp. 447-448.).

Plaintiff has failed to articulate any facts that would justify the exercise of jurisdiction. Plaintiff acknowledges in his Complaint that Mr. Bowen is a resident of Utah, and Plaintiff's sole allegations against Bowen are that Bowen sent an email to Utah local press and an email to Deputy Utah State Engineer Boyd Clayton in November 2018 (Complaint, ¶¶ 19, 74 and 75). Plaintiff does not even attempt to argue in his Opposition how these facts support jurisdiction, and Plaintiff does not make any substantive arguments in his Opposition in response to the Motion.

Finally, Bowen moved to quash for both lack of jurisdiction under California Code of Civil Procedure § 418.10(a)(1) and inconvenient forum under California Code of Civil Procedure § 418.10(a)(2). As Plaintiff alleges in the Complaint, all of the general allegations in this Complaint were also included in a False Claim Act case that Plaintiff previously filed against almost the identical defendants in the United States Federal District Court for the District of Utah. Complaint ¶ 61; *see also USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al*., 2:14-cv-00701. All of the general allegations relate solely to Emigration Canyon in Utah and issues related to development in Emigration Canyon, and the allegations have been repeated by Mr. Tracy in multiple lawsuits in Utah that have been found to be frivolous, vexatious and harassing. Plaintiff failed to make any argument in response to Bowen's motion to quash for inconvenient forum, which is not contingent upon the Bowen Declaration and serves as an alternative ground for

the Court to grant the Motion.

Accordingly, Plaintiff's contention that the Court should deny the Motion based on an alleged defect in the Bowen Declaration is without merit.

B. California Court's Do Not Require a Hearing Within 30 Days.

Plaintiff's only other argument is that the Motion should be denied because the hearing was not held within 30 days pursuant to California Code of Civil Procedure § 418.10(b). However, despite the statute's use of the word "shall," courts have not construed Code of Civil Procedure section 418.10, subdivision (b), to impose a mandatory requirement that a hearing be noticed or held within 30 days.

In *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286 (Olinick), for instance, the defendant filed the notice of its motion to stay or dismiss based on inconvenient forum, pursuant to Code of Civil Procedure section 418.10, subdivision (a), on May 4, 2004. (*Olinick*, supra, at p. 1295.) It then designated a hearing date of July 1, and the parties later stipulated to move the date to July 21, which the trial court approved. (*Ibid*.) The Court of Appeal rejected the plaintiff's arguments that a mandatory 30-day timeline governs the motion and that "by failing to designate a hearing date within the 30-day period, [defendant] waived its right to bring the motion under [Code of Civil Procedure] section 418.10." (*Id*. at p. 1296.)

The Court of Appeal noted that subdivision (a) of the statute provides that "`[a] defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion . . . .'" (*Olinick*, supra, 138 Cal.App.4th at p. 1296, quoting Code Civ. Proc., § 418.10, subd. (a).) It explained that, "the statute reflects the trial court is authorized to extend the time for filing such a motion" (*Olinick*, supra, at p. 1296), and cited with approval treatise language stating that "`[s]cheduling a hearing date beyond 30 days

should not invalidate a motion to quash. Nothing in [Code of Civil Procedure section] 418.10 suggests the court must overlook the lack of personal jurisdiction or proper service because of a defendant's failure to schedule a hearing date within 30 days.'" (*Ibid., quoting Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial* (The Rutter Group 2005) ¶ 3:381.) The court therefore rejected the argument that a "tardy hearing date on a motion to stay or dismiss under section 418.10 deprives the trial court of jurisdiction to consider the merits of the motion." (*Olinick*, supra, at p. 1296.)

Similarly, in *Preciado v. Freightliner Custom Chassis Corp*. (2023) 87 Cal.App.5th 964, the Court of Appeal rejected the same argument in the context of a motion to quash that was noticed for hearing 99 days after filing because that was the first available court date. (*Id*. at p. 972.) *Citing Olinick*, the court held that "`a tardy hearing date on a motion . . . under [Code of Civil Procedure] section 418.10' does not `deprive[] the trial court of jurisdiction to consider the merits of the motion.'" (*Id*. at p. 969, fn. 4, *quoting Olinick, supra*, 138 Cal.App.4th at p. 1296; *Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2022) ¶ 3:381 ["scheduling a hearing date beyond 30 days does not invalidate the motion"].).

In this case, the Court noticed the hearing at the first available date. Clearly, a defendant cannot be subject to jurisdiction of the Court simply because the earliest available hearing date was more than 30 days out.

CONCLUSION

This Court lacks personal jurisdiction over Bowen, and any of the other defendants, because all the individual Defendants are residents of Utah and both entities are Utah corporations without offices or a presence in California. Further, Plaintiff's claims against Defendants arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash

service of process and complaint in this action against all the defendants for lack of personal jurisdiction under California Code of Civil Procedure § 418.10(a)(1). In the alternative, the Court should dismiss this action against all the defendants pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: January 4, 2024. **KESSENICK GAMMA LLP**

By: _____

Charlie Y. Chou
Attorneys for Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

PROOF OF SERVICE

Tracy v. Cohne Kinghorn, et al.,
Santa Clara County Superior Court Case No. 23CV423435

I, Sarah Nguyen, state: My business address is 1 Post Street, Suite 2500, San Francisco, CA 94104. I am employed in the City and County of San Francisco where this service occurs or mailing occurred. The envelope or package was placed in the mail at San Francisco, California. I am over the age of eighteen years and not a party to this action. On January 4, 2024, I served the following documents described as:

REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANT GARY BOWEN'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

on the following person(s) in this action addressed as follows:

Mark Christopher Tracy
1130 Wall Street, # 561
La Jolla, CA 92037
Email: m.tracy@echo-association.com
Email: mark.tracy72@gmail.com

Nicholas C. Larson
Miguel E. Mendez-Pintado
Autumn Ross
MURPHY PEARSON BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
NLarson@MPBF.com
mmendezpintado@mpbf.com
ARoss@mpbf.com

Attorneys for Defendant PAUL BROWN

X BY FIRST CLASS MAIL: I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing on January 4, 2024, following ordinary business practices.

X BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by electronic transmission on January 4, 2024, I caused the documents to be sent to the person(s) at the electronic notification address(es) listed above. Within a reasonable time, the transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: January 4, 2024

Sarah Nguyen

THOMAS R. BURKE (CA State Bar No. 141930)
SARAH E. BURNS (CA State Bar No. 324466)
DAVIS WRIGHT TREMAINE LLP
50 California Street, 23rd Floor
San Francisco, California 94111-4701
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: thomasburke@dwt.com
sarahburns@dwt.com

Attorneys for Specially-Appearing Defendant Kem Crosby Gardner

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

Specially-appearing defendant Kem C. Gardner ("Mr. Gardner") respectfully submits this Reply to Plaintiff's Opposition ("Opp.") to Mr. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction ("Motion").

I. INTRODUCTION

Plaintiff bears the burden of establishing personal jurisdiction by a preponderance of evidence. Instead of providing such evidence, Plaintiff focuses the majority of his Opposition on a variety of easily-dispelled attacks on Mr. Gardner's ***service*** of the Motion. He next claims it is enough for jurisdiction either that Mr. Gardner has a timeshare interest in San Diego, or that the Complaint in conclusory fashion alleges that ***other*** defendants took actions ***decades ago*** "on Mr. Gardner's behalf" that affected California. He finally points to a variety of disparate contacts Mr. Gardner purportedly had with California[1], for which he provides no evidence, and which in any event bear no relationship to the claims in this lawsuit. Because none of this comes close to establishing jurisdiction, the Court should grant Mr. Gardner's Motion and dismiss the Complaint as to him.

II. THE COURT LACKS PERSONAL JURISDICTION OVER MR. GARDNER

As set forth in the Motion, once a nonresident defendant challenges personal jurisdiction, "the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate the defendant has sufficient minimum contacts with the forum state to justify jurisdiction." *Thomson v. Anderson*, 113 Cal. App. 4th 258, 266 (2003) (emphasis added) (citing *Vons Cos. V. Seabest Foods, Inc.*, 14 Cal. 4th 434, 449 (1996)). To meet this burden, the plaintiff must "present ***facts*** demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute constitutionally cognizable 'minimum contacts.'" *Thomson*, 113 Cal. App. 4th at 266 (emphasis added). He also must present "competent ***evidence*** in affidavits and authenticated documentary

[1] The Declaration Plaintiff filed in support of his Opposition also contains an email he sent to counsel for Mr. Gardner threatening sanctions based on purported "falsities" in Mr. Gardner's Declaration. *See* Declaration of Mark Christopher Tracy ("Tracy Decl.") Ex. B. 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.

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

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

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

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

As set forth in the Motion, Mot. at 11, a court's exercise of specific jurisdiction over a non-resident defendant weighs whether the defendant: (1) "purposefully directed" actions at forum residents or "purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum"; (2) whether the dispute "is related to or arises out of a defendant's contacts with the forum"; and (3) whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.

4th 434, 447 (1996). Plaintiff has not met his burden to show any of the three factors weigh in his favor.

First, Plaintiff has not shown Mr. Gardner purposefully availed himself of conducting business in California or purposefully directed any activities towards residents in California. To make this showing, Plaintiff in the Opposition points to vague allegations in the Complaint about activities allegedly undertaken by defendant Cohne Kinghorn P.C. related to the Emigration Canyon Water District, which he claims were "perpetuated for the private profit of" and "on behalf" of Mr. Gardner. Opp. at 6-8. Though the Complaint asserts in conclusory fashion that each of the defendants "was acting as the agent, servant, employee, partner, co-conspirator, and/or joint venture of each remaining Defendant," Compl. ¶ 20, Plaintiff fails to offer ***facts***—much less ***evidence***—showing that any of those actions were ***actually*** done on Mr. Gardner's behalf or for his benefit. *See Goehring v. Superior Ct. (Bernier)*, 62 Cal. App. 4th 894, 904–05 (1998) ("[J]urisdiction over each defendant must be established individually"). And as Mr. Gardner pointed out in the Motion—and Plaintiff on Opposition does not deny—the Complaint itself alleges that Mr. Gardner transferred his interest in the underlying water system to ECID ***25 years ago***, in 1998, and nowhere alleges that Mr. Gardner has any connection with the alleged "continued payment of money from property owners residing in California[2]." Compl. ¶¶ 21, 40. *Farris v. Capt. J. B. Fronapfel Co.*, 182 Cal. App. 3d 982, 990 (1986) (A nonresident alleged tortfeasor may not be subject to California jurisdiction if the tortious conduct is "too remote in time and causal connection" to the injuries suffered in California).

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

[2] Even if Plaintiff had alleged facts (and produced evidence) showing that Mr. Gardner had received "payment of money from property owners residing in California" that also would not be sufficient because Plaintiff has offered nothing to show his purported actions were 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").

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

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

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[3] *See* Tracy Decl. Exhibit B; Supplemental Declaration of Sarah E. Burns ("Supplemental Burns Decl.") Ex. 2.

[4] The other documents Plaintiff references (but does not attach to the Opposition) also are of no consequence. Plaintiff claims the news article contained in Exhibit D to Exhibit B of the 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 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.

III. PLAINTIFF RECEIVED ADEQUATE NOTICE OF THE HEARING

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

As Plaintiff acknowledges, Mr. Gardner timely filed the Motion on December 29, 2023. Opp. at 4.[5] When the Motion was filed, the Motion's hearing date was left blank and the clerk of court subsequently set a February 20, 2024 hearing.[6] Given the February 20, 2024 hearing date, Code of Civil Procedure Section 1005(b) required that Plaintiff be provided notice of the hearing by January 25, 2024, i.e., 16 court days beforehand. *See* C.C.P. 1005(b). Counsel for Mr. Gardner served notice before that date, on January 22, 2024, by electronic service. *See* previously-filed Notice of Hearing on Specially-Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction. Realizing that Plaintiff had requested that electronic service be provided to not one, but two of his email addresses, counsel for Mr. Gardner then served the notice a second time, on January 24, 2022, to Plaintiff's second email address. *See* Proof of Service of Notice of Hearing on Specially-Appearing Defendant Kem C. Gardner's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction, filed January 24, 2024. In the meantime, the Court on January 11, 2024 set the hearings for two other defendants' motions to quash for the same day, *see* 1/11/2024 Minute Orders, and stated that "all three motions to quash will be heard on February 20, 2024 at 9 a.m. in Department 6." On January 21, 2024, Plaintiff emailed counsel for Mr. Gardner claiming he intended to seek sanctions based on the Motion. *See* Tracy Decl. Ex. B at

[5] In contrast, Plaintiff's Opposition was not timely. It was due February 5, 2024, nine court days before the February 20, 2024 hearing, *see* C.C.P. ¶ 1005(b), but was served February 6, 2024. *See* Proof of Service of Opposition to Defendant Gardner's Motion to Quash Service of 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.

2[7]. In short: Plaintiff both received sufficient formal notice of the Motion by the deadline, and had actual notice of it, before the deadline set by Section 1005. *See* C.C.P. 1005(b).

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

IV. THE COURT SHOULD NOT GRANT JURISDICTIONAL DISCOVERY

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

[7] Notably, Plaintiff nowhere in that email claimed that the February 20, 2024 hearing date 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.

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,

DAVIS WRIGHT TREMAINE LLP

By: _____
THOMAS R. BURKE
SARAH E. BURNS

Attorneys for Specially-Appearing Defendant Kem C. Gardner

DAVIS WRIGHT TREMAINE LLP

Charlie Y. Chou (SBN 248369)
KESSENICK GAMMA LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Telephone: (415) 568-2016
Facsimile: (415) 362-9401
cchou@kessenick.com

Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN, PC, a Utah professional corporation; SIMPLIFI CO., a Utah corporation; JEREMY COOK, a Utah resident; ERIC HAWKS, a Utah resident; JENNIFER HAWKES, a Utah resident; MICHAEL HUGHES, a Utah resident; DAVID BRADFORD, a Utah resident; KEM GARDNER, a Utah resident; WALTER PLUMB, a Utah resident; DAVID BENNION, a Utah resident; R. STEVE CREAMER, a Utah resident; PAUL BROWN, a Utah resident; and GARY BOWEN, a Utah resident,

Defendants.

Case No. 23CV423435

REPLY MEMORANDUM IN SUPPORT OF SPECIALLY APPEARING DEFENDANTS COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, AND DAVID BENNION'S MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND MOTION TO DISMISS FOR INCONVENIENT FORUM

Date: February 20, 2024
Time: 9:00 a.m.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

Specially appearing defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion (collectively "Defendants") submits this *Reply Memorandum of Points and Authorities in Support of Specially Appearing Defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, and David Bennion's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum*.

I. INTRODUCTION

Mark Christopher Tracy ("Plaintiff" or "Mr. Tracy") has spent the last ten years filing frivolous and vexatious litigation against defendants in Utah state and federal courts based on the same allegations in this action related to development and water rights in Emigration Canyon, Utah. In fact, Mr. Tracy acknowledges that the first twelve pages of allegations in the Complaint are just a repeat of the allegations asserted in a prior Federal False Claims Act case filed by Plaintiff. *See* Complaint, § 61 ("The above-listed allegations were filed in United States Federal District Court of Utah on September 26, 2014, under the False Claims Act (the "FCA Litigation")."[1] As a result of Mr. Tracy's completely meritless litigation in Utah, Mr. Tracy has been deemed a vexatious litigant

[1] On October 29, 2021, Judge Parrish issued that certain *Order Granting in Part and Denying in Part Defendants' Motion for Attorneys' Fees and Cost and Granting Defendants' Motion to Amend* (the "FCA Attorney Fee Order") in the FCA Litigation. *See Supplemental Declaration of Jeremy R. Cook*, ¶ 9, Exhibit E. In the FCA Attorney Fee Order, Judge Parrish found: "Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous." *Id*., p. 8. Based on the finding, Judge Parrish awarded defendants $92,665 in attorneys' fees and costs for expenses against Mr. Tracy, none of which have been paid. *Id*.

by Utah state courts. Because Mr. Tracy is unable to file any actions in Utah state courts without leave of the presiding judge, Mr. Tracy has brought this action in California again attempting to establish his meritless claims related to development and water rights in Emigration Canyon. *See Complaint*, ¶5 ("By this lawsuit, Plaintiff seeks to . . . . establish Defendants' liability for the fraudulent retirement of senior water rights, improper concealment of drinking water contamination and grossly inadequate emergency-fire protection.").

In his *Memorandum and Points of Authority in Support of Opposition to Kinghorn Defendant Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum* (the "Opposition"), Plaintiff makes four arguments why this case should not be dismissed. First, Plaintiff argues that the Defendants waived objections to the Court's jurisdiction because Defendants failed to meet and confer with respect to hearing date for this Motion. Second, Plaintiff lists a bunch of irrelevant facts that Plaintiff claims are uncontested and therefore the Court must deny the motion. Third, Plaintiff asserts that the Court has jurisdiction because Defendants published false or defamatory statements on the Emigration Improvement District webpage, and that webpage is hosted on a server located in California. Fourth, Plaintiff makes that conclusory assertion that "Kinghorn Defendants have cited neither hinderance or burden in adjudicating the present action before this Court . . . ." None of these arguments have any merit.

Furthermore, Plaintiff fails to even respond to Defendants' argument that the Court should dismiss this action on the grounds of inconvenient forum pursuant to California Code of Civil Procedure 418.10(a)(2). All of the allegations in the Complaint relate to issues in Emigration Canyon, Utah; none of the defendants have any contact with California; and by his own admission,

Mr. Tracy has filed cases against defendants in Utah based on the same facts and issues. Clearly, the interests of justice support the dismissal of this action on the grounds of inconvenient forum.

II. ARGUMENT

A. Failure to Confer on the Hearing Date Does Not Waive Defendant's Objection to the Court's Exercise of Jurisdiction.

Plaintiff filed this action in California even though none of the Defendants live in California; all of the allegations relate to development, water rights or other issues in Emigration Canyon; and Mr. Tracy has previously filed multiple actions in Utah against the same defendants based on the same facts and circumstances. Plaintiff is certainly aware that there is no possible basis for jurisdiction in this matter, and his purpose for filing this action in California is purely to continue to harass Defendants by requiring them to expend time, money and resources defending yet another frivolous case in California.

With respect to the hearing on this motion, counsel for Defendants followed the normal process of filing this Motion and waiting for the Court to assign a hearing date. Mr. Tracy was provided notice of the hearing date over forty-five days prior to the hearing. If Mr. Tracy was not able to appear on the date assigned by the Court, Mr. Tracy could have filed a motion for continuance. Thus, Mr. Tracy's assertion that the Court must deny the motion and assert jurisdiction over Defendants because Mr. Tracy purportedly had to cancel a planned business trip to Germany to appear at a hearing in a case that he filed is without merit.

B. The Purported Undisputed Facts Do Not Establish Jurisdiction.

Plaintiff next lists seven alleged facts from the Complaint that Plaintiff asserts are undisputed. However, Plaintiff does include any argument as to why the seven alleged undisputed

facts provide a basis for the Court to have jurisdiction, and even if true, none of the alleged facts would establish jurisdiction. For example, one of the alleged facts states: "In August 2018, Emigration Canyon Steam (sic) suffered total depletion for the first time in recorded history as predicted in expert hydrology reports withheld and misrepresented to California residents." Thus Mr. Tracy's argument is apparently that this Court has jurisdiction over Defendants for Plaintiff's claim of defamation and false light because some unidentified expert report prior to 2018 purportedly predicted depletion of Emigration Creek and the report was allegedly withheld and mispresented by an unidentified party to unidentified California residents. There is absolutely no link between the expert report and Mr. Tracy's defamation claim, and Mr. Tracy does not even allege that any of the Defendants drafted the report or had any involvement in the report. Moreover, even the alleged report had been "withheld", and some of the people that may have received a copy of the report lived in California, there is no possible basis that the allegation would establish jurisdiction over the Defendants in this action.

Simply put, none of the seven alleged undisputed facts would even remotely provide a basis for the Court to exercise jurisdiction in this matter, and Mr. Tracy fails to include any argument as to why the alleged facts provide jurisdiction.

C. The Assertion the Emigration Improvement District's Webpage Is Hosted on a Server in California Does Not Convey Jurisdiction Over Defendants.

Plaintiff next makes the one paragraph argument that the Court has jurisdiction because the webpage operated by Emigration Improvement District ("EID") is hosted on a server in California and alleged false and defamatory statements were published on EID's website. However, Plaintiff provides no response to Defendants' argument that the Complaint only includes two allegations of

purported statements published on EID's website. The first allegation is that Mr. Hawkes, who is EID's manager, published on EID's website that elevated lead levels in drinking water in EID's water system is likely the result of plumbing within homes tested and not water provided by EID. Complaint, ¶ 72. Mr. Tracy does not explain how this statement could have possibly defamed him or placed in him a false light. Second, Mr. Tracy alleges that Mr. Hawkes posted EID's notice of water rate increase on EID's website which notice included purported defamatory statements against Mr. Tracy. Even if hosting a webpage on a California server somehow established jurisdiction in California, the allegation does not provide a basis to assert that this Court has general jurisdiction over Mr. Hawkes, and certainly does not provide a basis to assert that the Court has general jurisdiction over any of the other Defendants.

In summary, the allegation the EID hosts its webpage on a server in California does not provide jurisdiction over Defendants, particularly since the assertion is only that EID posted information on its webpage, and EID is not a party.

D. Plaintiff's Conclusory Statement That Defendants Have Not Established Any Burden Does Not Provide a Basis to Deny the Motion.

Plaintiff next argues that once it has been established that a defendant purposefully established minimum contacts within the forum state, the contacts may be considered in light of other factors to determine whether personal jurisdiction would comport with "fair play and substantial justice", including an evaluation of the "burden on defendants." *Opposition*, p. 8. Plaintiff then asserts that Defendants have "cited neither hinderance nor burden in adjudicating the present action before this Court." However, not only has Plaintiff not established that Defendants have minimum contacts with California, but the burden on Defendants of having to defend this

action in California clearly favors the Court denying jurisdiction. All of the Defendants live in Utah, and all the allegations relate to development, water rights, or other issues in Emigration Canyon, Utah. Clearly, the burden on Defendants of having to defend this action in California outweighs any interest of California court's in adjudicating this dispute or the interest of the Plaintiff, who has already filed multiple cases in Utah state and federal courts based on the same facts and circumstances.

In summary, Plaintiff's assertion that the Court should deny the motion because Defendants have not established that there is a burden on them to defend this case in California is without merit.

E. The Court Should Grant the Motion Based On Defendants' Inconvenient Forum Argument.

California Code of Civil Procedure 418.10(a)(2) "permits a defendant challenging jurisdiction to object on inconvenient forum grounds if the defendant's challenge to jurisdiction should be denied." *Global Financial Distributors, Inc. v. Superior Court* (2019) 35 Cal.App.5th 179, 190 (internal quotations omitted). Section B of Defendant's Motion was based solely on an argument of inconvenient forum. However, Plaintiff failed to even address Defendants' inconvenient forum argument or provide any basis for the Court to not use its discretionary power to decline jurisdiction.

Based on the alleged facts in the Complaint, Utah courts are a more appropriate venue for this action. For example, Plaintiff begins the Complaint by stating: "Plaintiff is a federal whistleblower in what has alleged to be the longest and most lucrative water grabs in the history of the State of Utah." Complaint, ¶ 1. Likewise, all of the allegations in the Complaint relate to development, water rights or other issues in Utah. Plaintiff has also filed multiple actions in Utah

that Plaintiff acknowledges include almost identical facts to this action. See Complaint, ¶ 61.

In summary, the Court should deny jurisdiction because Utah is the more convenient forum.

F. The Court Should Not Stay the Motion or Grant Leave to Amend.

Mr. Tracy's final argument is that the Court should stay the Motion to allow Mr. Tracy to conduct discovery to "evidence minimum contacts with the forum state . . . ." Opposition, p. 9. However, as set forth above, Mr. Tracy failed to even argue that the Court should not dismiss the action on the grounds of inconvenient forum, and no amount of discovery related to Defendants minimum contacts with the forum state would alter the facts related to Defendants' inconvenient forum argument.

It is undisputed that all the allegations in the Complaint relate solely to development, water rights, and other issues in Emigration Canyon, Utah. Moreover, by Plaintiff's own admission, almost all of the allegations are identical to allegations alleged in previous litigation filed by Mr. Tracy in Utah.

Accordingly, because the action is more appropriately and justly tried in Utah, and discovery will not change the facts related to Defendants' inconvenient forum argument, the Court should deny Plaintiff's request to stay a decision, conduct discovery, or amend the Complaint.

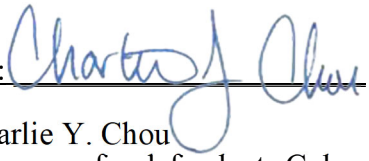
CONCLUSION

This Court lacks personal jurisdiction over Defendants because all the individual Defendants are residents of Utah and both entities are Utah corporations without offices or a presence in California. Further, Plaintiff's claims against Defendants arise from alleged conduct occurring exclusively in Utah with no connection to California. Accordingly, the Court should quash service of process and complaint in this action for lack of personal jurisdiction under California Code of Civil Procedure §

418.10(a)(1). In addition, as an alternative ground, the Court should dismiss this action pursuant to California Code of Civil Procedure § 418.10(a)(2) based on inconvenient forum.

DATED: February 9, 2024.

KESSENICK GAMMA LLP

By: 

Charlie Y. Chou
Attorneys for defendants Cohne Kinghorn, P.C., Simplifi Company, Jeremy Rand Cook, Eric Hawkes, Jennifer Hawkes, Michael Scott Hughes, David Bradford, David Bennion and Gary Bowen

Nicholas C. Larson - 275870
NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
MMendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
(206) 219-2008 - Main
(206) 489-5101 – Fax

Mark Shem, Esq. – 152860
mshem@bortonpetrini.com
Borton Petrini, LLP
95 South Market Street, Suite 400
San Jose, CA 95113
(408)535-0870

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE 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; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM KROSBY 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

SPECIALLY APPEARING DEFENDANT PAUL BROWN'S NOTICE OF MOTION AND MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

Date: April 9, 2024
Time: 9:00 A.M.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on April 9, 2024, at 9:00 A.M. in Department 6 of the above-entitled Court, Specially Appearing Defendant Paul Brown ("Brown") will and hereby does

move this Court for an order declaring Plaintiff to be a vexatious litigant and entry of prefiling order under California Code of Civil Procedure Section 391.7.

This motion is based upon this Notice, the attached Memorandum of Points and Authorities, Declaration of Miguel Mendez-Pintado with attached exhibits, the record and files in this action, and any such further evidence and argument as may be presented prior to or at the time of the hearing on this Motion.

Dated: March 5, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By _____
Miguel E. Mendez-Pintado
Attorneys for Defendant
PAUL BROWN

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 580 California Street, Suite 1100, San Francisco, California 94104.

On March 5, 2024, I served the following document(s) on the parties in the within action:

SPECIALLY APPEARING DEFENDANT PAUL BROWN'S NOTICE OF MOTION AND MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

Mark Christopher Tracy
1130 Wall St #561
La Jolla, CA 92037
E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao
amao@kessenick.com
E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants
COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on March 5, 2024.

By _____
Joan E. Soares

Nicholas C. Larson - 275870
NLarson@mpbf.com
Miguel E. Mendez-Pintado - 323372
MMendezpintado@mpbf.com
MURPHY, PEARSON, BRADLEY & FEENEY
520 Pike Street, Suite 1205
Seattle, WA 98101
(206) 219-2008 - Main
(206) 489-5101 – Fax

Mark Shem, Esq. – 152860
mshem@bortonpetrini.com
Borton Petrini, LLP
95 South Market Street, Suite 400
San Jose, CA 95113
(408)535-0870

Attorneys for Defendant
PAUL BROWN

SUPERIOR COURT OF THE STATE 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; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM KROSBY 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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

Date: **April 9, 2024**
Time: **9:00 A.M.**
Dept: **6**
Judge: **The Honorable Evette D. Pennypacker**

TABLE OF CONTENTS

Page

I. INTRODUCTION 5

II. FACTUAL AND PROCEDURAL BACKGROUND 6

III. ARGUMENT 7

A. Plaintiff Has Previously Been Declared a Vexatious Litigant in Utah State Court and This Action is Based on the Same or Substantially Similar Facts, Transactions, or Occurrences. 8

B. Plaintiff's Continuous Attempts to Relitigate the Same Issues Related to Alleged Fraudulent Water Rights Which Have Been Previously Dismissed Demonstrates Plaintiff's Vexatious Intent. 11

C. The Dismissal of This Action Would Not Divest the Court of Jurisdiction to Decide This Motion to Declare Plaintiff a Vexatious Litigant. 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Blizzard Energy, Inc. v. Schaefers
85 Cal.App.5th 802 (2022) 8

Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.
215 Cal.App.3d 353 (1989) 15

Goodrich v. Sierra Vista Regional Medical Center
246 Cal.App.4th 1260 (2016) 8, 11, 12, 14

Holcomb v. U.S. Bank Nat. Assn.
129 Cal.App.4th 1494 (2005) 8, 11, 14

Pittman v. Beck Park Apartments Ltd.
20 Cal.App.5th 1009 (2018) 8, 14, 15

Shalant v. Girardi
51 Cal.4th 1164 (2011) 8

Taliaferro v. Hoogs
237 Cal.App.2d 73 (1965) 11

STATUTES

42 U.S.C.
§ 1983 12

Code of Civil Procedure
§ 391(b) 7, 15

Code of Civil Procedure
§ 391(b)(2) 11, 14

Code of Civil Procedure
§ 391(b)(2), (3), (4) 7

Code of Civil Procedure
§ 391(b)(3) 11, 14

Code of Civil Procedure
§ 391(b)(4) 8, 11

Code of Civil Procedure
§ 391.7 ..... 8, 15

Code of Civil Procedure
§ 391.7(a) 5, 8, 11

Code of Civil Procedure
§ 418.10(e)(1) 5

TABLE OF AUTHORITIES
(continued)

Page

Code of Evidence § 452 7
Code of Evidence § 453 7

OTHER AUTHORITIES

Utah Rules of Civil Procedure
Rule 83(a)(1) 10

Pursuant to California Code of Civil Procedure §§ 418.10(e)(1) and 391.7(a), specially appearing defendant Paul Brown ("Brown") hereby moves the Court for an order finding Plaintiff Mark Christopher Tracy ("Plaintiff") to be a vexatious litigant and entry of a prefiling order prohibiting Plaintiff from filing any new litigation in the courts of California in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed.

I. INTRODUCTION

Emigration Canyon is a small canyon located just east of Salt Lake City, Utah. There are approximately 700 total homes in Emigration Canyon. In the late 1980s, a new residential neighborhood named Emigration Oaks was developed in Emigration Canyon. In conjunction with the development of the Emigration Oaks neighborhood, the developer constructed a water system which was transferred to a public entity named the Emigration Improvement District ("**EID**").

Plaintiff was not involved with the development of the Emigration Oaks subdivision; Plaintiff has never had any involvement with EID; and Plaintiff only lived in Emigration Canyon for a couple of years around 2012. Nevertheless, in 2014, Plaintiff filed a complaint in Utah federal district court against EID and multiple parties associated with EID (the "**FCA Litigation**"). The purported basis of the FCA Litigation was that defendants had violated the Federal False Claims Act in conjunction with a loan EID obtained in 2004 from a Utah state agency to construct improvements to EID's public drinking water system. However, in the lengthy FCA complaint, Plaintiff alleged everything from violation of the Clean Water Act to fraudulently obtaining senior water rights. The majority of the allegations in this action simply repeat allegations from the FCA Litigation.

After the FCA Litigation was ultimately dismissed, the court issued an Order Granting in Part and Denying in Part Defendants' Motion for Attorneys' Fees and Cost and Granting Defendants' Motion to Amend (the "**FCA Attorney Fee Order**"). In the FCA Attorney Fee Order, Judge Parrish found: "Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous."

In addition to the FCA Litigation, Plaintiff has filed three other actions against EID or people associated with EID in Utah state or federal courts, all of which have been dismissed. In each case,

Plaintiff alleged almost identical allegations to those contained in the FCA Litigation. As a result of the frivolous and harassing state court actions, Utah's Third Judicial District Court awarded defendants additional attorney fees and issued an order finding Plaintiff to be a vexatious litigant.

Plaintiff is the epitome of a vexatious litigant. Plaintiff has filed multiple cases against the same defendants based on the same facts and issues that Utah courts have found to be frivolous, vexatious and harassing. Although there is absolutely no merit to a claim that defendants defamed Plaintiff, and no basis for jurisdiction in California; because Plaintiff is subject to a prefiling order in Utah, Plaintiff now brings this action in California to assert the same facts and issues once again.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 26, 2014, Plaintiff filed a Complaint against EID, in the United States Federal District Court for the District of Utah alleging violations of the Federal False Claims Act ("FCA Litigation"). (*See*, Complaint at ¶ 61.) On October 29, 2021, Judge Parrish issued an Order Granting In Part and Denying In Part Defendant's Motion for Attorney's Fees and Costs and Granting Defendant's Motion to Amend. (*See,* Declaration of Miguel Mendez-Pintado in Support of Motion for Order Finding Plaintiff Mark Christopher Tracy to be a Vexatious Litigant and Entry of Prefiling Order (Mendez-Pintado Decl.) at Exhibit G ("FCA Attorney Fee Order")). In the FCA Attorney Fee Order, the Court held that Plaintiff's claims were clearly vexatious and that Plaintiff was acting in bad faith because Plaintiff brought the action for the primary purpose of harassing the defendants and airing his own personal grievances. (*Id.*) Based on this finding, Judge Parrish awarded the defendants $92,665 in attorneys' fees and costs for expenses against Plaintiff. (*Id*.)

On or about August 10, 2020, Plaintiff filed a Petition with the Third District Court for the State of Utah. (Mendez-Pintado Decl. at Exhibit A (Petition for Judicial Review of Denied Request for Disclosure of Public Records) (hereinafter "Vexatious Litigant Petition")). This was Plaintiff's second petition before the Court raising identical issues against identical respondents. (*See*, Mendez-Pintado Decl. at Exhibit B at p. 5.) In the previous petition, the Court had informed Plaintiff that there was no basis to sue the respondents. (*Id*.) Instead of amending the previous petition, Plaintiff filed a new petition naming the same respondents despite the Court's Order informing Plaintiff that there was no legal basis for suing the respondents. (*Id*.)

The Vexatious Litigant Petition sought: (1) Judicial Review of Denied Request for Disclosure of Public Records, (2) Injunction for Violations of the Government Records Access and Management Act; and (3) Award of Attorney Fees and Costs. (Mendez-Pintado Decl. at Exhibit A.) Despite being captioned as a petition related to the denial of a request for disclosure of public records, the majority of the substance of the Vexatious Litigant Petition raised allegations of violations of the Clean Water Act and fraudulently obtaining senior water rights. (*Id.*) On February 24, 2021, the Honorable Mark Kouris issued an order granting the respondents' motion to dismiss and awarding the respondents their reasonable attorneys' fees against Plaintiff. (*See*, Mendez-Pintado Decl., at Exhibit B ("First Fee Order").) Judge Kouris held that the action was without merit, the petition was not brought in good faith, and that Plaintiff's motivation was to attack and harass the respondents. (*Id*). Subsequently, Judge Kouris also issued an order finding Plaintiff to be a vexatious litigant pursuant to Utah Rules of Civil Procedure. (*See*, Mendez-Pintado Decl. at Exhibit C ("Vexatious Litigant Order").)

On or about July 22, 2021, Plaintiff filed a Civil Rights Complaint in the United States District Court for the District of Utah. (*See*, Mendez-Pintado Decl. at Exhibit D ("Civil Rights Complaint").) Plaintiff's Civil Rights Complaint again revolved primarily around allegations of fraudulently obtained water rights in Utah. (*Id*.) The Court ultimately dismissed this action because Plaintiff lacked standing. (*See*, Mendez-Pintado Decl., at Exhibit E ("Tenth Circuit Order").)

Pursuant to California Rule of Evidence Section 452 and 453, Brown respectfully requests that the Court take judicial notice of the pleadings, records and orders cited herein, which have also been attached to the Declaration of Miguel Mendez-Pintado.

III. ARGUMENT

Pursuant to California Code of Civil Procedure § 391(b), a vexatious litigant includes a person who: (1) after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona the same claims, or any of the issues of fact or law determined against the same defendant or defendants as to whom the litigation was finally determined; (2) has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence; or (3) in any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other

papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. (Cal. C. Civ. P. § 391(b)(2), (3), (4).)

Once a person has been found to be a vexatious litigant, the court may, on its own motion or the motion of any party, "enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (California Code of Civil Procedure § 391.7(a).)

The purpose of the vexatious litigant statute is to "curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the Court system and other litigants." (*Pittman v. Beck Park Apartments Ltd.*, 20 Cal.App.5th 1009, 1024 (2018) (quoting *Shalant v. Girardi*, 51 Cal.4th 1164, 1169 (2011).) The statute is aimed at litigants, not the particular topic of the litigation, accordingly, the venue in which prior vexatious litigations were filed is immaterial in determining whether the litigant themselves is a vexatious litigant. (*Blizzard Energy, Inc. v. Schaefers*, 85 Cal.App.5th 802, 804 (2022).)

On a motion pursuant to Section 391.7, the Court weighs the evidence, statutory criteria and whether the litigant has a reasonable probability of prevailing to determine whether a party is a vexatious litigant. (*Goodrich v. Sierra Vista Regional Medical Center*, 246 Cal.App.4th 1260, 1265 (2016).) When considering whether repeated pleadings and motions are sufficient to establish that the party is a vexatious litigant, the focus of the inquiry is not on the number of pleadings, but rather whether there is a past pattern or practice of meritless pleadings that carry the risk of repetition. (*Id*. at 1267-68). Further, while the statute does not require a connection between the prior meritless litigations and the movant, such a connection would weigh heavily in favor of a finding that a litigant is vexatious. (*Goodrich*, 246 Cal.App.4th at 1267 (citing *Holcomb v. U.S. Bank Nat. Assn.*, 129 Cal.App.4th 1494, 1505 (2005).)

A. Plaintiff Has Previously Been Declared a Vexatious Litigant in Utah State Court and This Action is Based on the Same or Substantially Similar Facts, Transactions, or Occurrences.

Pursuant to California Code of Civil Procedure § 391(b)(4), a vexatious litigant means a person who: "has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transactions, or

occurrences."

In 2014, Plaintiff filed a Complaint against EID in the United States District Court for the District of Utah alleging violations of the Federal False Claims Act. (Mendez-Pintado Decl. at Exhibit F.) The factual allegations raised in the FCA Litigation are substantially similar to the allegations that Plaintiff is raising in this action. (*Id*.; *see also* Complaint). Plaintiff acknowledges that the allegations in his current complaint were raised in the FCA Litigation. (*See,* Complaint § 61 ("The above-listed allegations were filed in United States Federal District Court of Utah on September 26, 2014, under the False Claims Act (the "FCA Litigation").) On October 29, 2021, the Court issued an Order Granting in Part and Denying in Part Defendant's Motion for Attorney's Fees and Costs and Granting Defendant's Motion to Amend. (Mendez-Pintado Decl. at Exhibit G.) In the FCA Attorney Fee Order, the Court held that Plaintiff's claims were clearly vexatious and that Plaintiff was acting in bad faith because Plaintiff brought the action for the primary purpose of harassing the defendants and airing his own personal grievances. (*Id*. at p. 6-8.) Based on this finding, the Court awarded the Defendants $92,665 in attorney's fees and costs for expenses against Plaintiff. (*Id*. at p. 8-9.)

In August of 2020, Plaintiff filed a petition for judicial review with the Third District Court for the State of Utah seeking judicial review related to a denied request for disclosure of public records. (*See* Mendez-Pintado Decl. Exhibit A ("Vexatious Litigant Petition").) This was Plaintiff's second petition before the Court addressing identical issues. (*See,* Mendez-Pintado Decl. Exhibit B at p. 5.) In the previous petition, the Court had informed Plaintiff that there was no basis to sue the respondents. (*Id*.) Instead of amending the previous petition, Plaintiff filed a new petition naming the same respondents despite the Court's Order informing Plaintiff that there was no legal basis for suing the respondents. (*Id*.)

Despite being captioned as a petition related to the denial of a request for disclosure of public records, the majority of the substance of the Vexatious Litigant Petition raised allegations of violation of the Clean Water Act and allegations of fraudulently obtained senior water rights. (Mendez-Pintado Decl. at Exhibit A.) Notably, the Vexatious Litigant Petition named as respondents a private corporation and individuals in their individual capacities. (*Id*.) The Vexatious Litigant Petition failed to name any government entity as required under the Utah Government Records Access and Management Act.

(Mendez-Pintado Decl. at Exhibit A, B.)

Following oral arguments on the respondent's motion to dismiss, the Court issued an order granting the motion to dismiss and awarding the respondents reasonable attorney fees against Plaintiff. (Mendez-Pintado Decl. at Exhibit B.) In the First Fee Order, the Court stated that "[t]he vast majority of the allegations and exhibits related to other complaints and issues that Mr. Tracy has with EID or Respondents, and are not necessary or proper for this action." (Mendez-Pintado Decl. at Exhibit B p. 4.) Additionally, the Court held that it was "not persuaded that Mr. Tracy believed he had any legitimate basis to sue Respondents, and his motivation for suing Respondents, as opposed to EID, was simply to harass Respondents." (*Id*. at p. 5.) Additionally, the Court noted that in a prior litigation, the Court had already dismissed Plaintiff's previous petition informing Plaintiff that there was no basis to sue respondent. (*Id*.) Nevertheless, Plaintiff filed another petition despite knowing that there was no legal basis supporting the petition. (*Id*.) Accordingly, the Court issued an order awarding the respondent's attorney's fees. (*Id*. at 5-6.)

Plaintiff filed a motion to vacate the Court's decision and judgment. (*See*, Mendez-Pintado Decl. at Exhibit C.) Following oral argument, the Court issued an Order upholding the award of attorneys' fees and finding Plaintiff to be a vexatious litigant pursuant to Rule 83(a)(1) of the Utah Rules of Civil Procedure. (*Id*.) Specifically, the Court explained that, "the Court has previously found that the Petition in this action including redundant and immaterial allegations that appear to relate to other claims and issues that Mr. Tracy has against EID, and that the Petition was frivolous and filed for the purpose of harassment." (*Id*. at p. 5.) The Court also found that the Petition and Motion to Vacate were filed for the purpose of harassing the Respondents. (*Id*. at p. 5.) Accordingly, the Court declared Plaintiff a vexatious litigant and ordered that Plaintiff must obtain leave from the presiding judge of the Court prior to filing any future action in Utah State Courts. (*Id*. at p. 6.)

The facts and allegations in this case are the same or substantially similar to the facts, transaction or occurrence in the Vexatious Litigant Petition. For example, Plaintiff's current Complaint and the Vexatious Litigant Petition both allege that EID related defendants fraudulently or illegally obtained water rights in violation of a 1966 Utah State Engineer Study and 1995 testimony before the State Engineer. (*See*, Complaint at ¶26(d)-(f); Mendez-Pintado Decl. at Exhibit A at ¶¶ 11, 14, 16.)

Additionally, in paragraph 5 of Plaintiff's Complaint, Mr. Tracy states: "By this lawsuit, Plaintiff seeks to . . . . establish Defendants' liability for the fraudulent retirement of senior water rights, improper concealment of drinking water contamination and grossly inadequate emergency-fire protection." The Vexatious Litigant Petition raised similar allegations throughout the Petition. (*See*, Mendez-Pintado Decl. at Exhibit A at ¶¶ 13, 15, 17, 18, 19, 22-24, 26, 32, 37, 38-42.) More specifically, in paragraph 19 of the Vexatious Litigant Petition, Mr. Tracy alleged that residents in Emigration Canyon were being forced to "abandon private wells with senior water rights." (*Id*. ¶ 19.) In paragraphs 40-42 of the Vexatious Litigant Petition, Mr. Tracy alleged that EID failed to inform residents of lead contamination. (*Id*. at ¶¶ 40-42.) In paragraph 27 of the Vexatious Litigant Petition, Mr. Tracy discussed the "fire-hydrant rental fee" that Mr. Tracy asserts is unlawful. (*Id*. at ¶ 20.)

Based on the foregoing, it is evident that both the Third District Court for the State of Utah and the United States District Court for the District of Utah have held that Plaintiff is a vexatious litigant. Additionally, the allegations raised in Plaintiff's current Complaint are the same or substantially similar to the facts, transactions, or occurrences alleged in the Vexatious Litigant Petition and the FCA Litigation. (Compare Complaint, with Mendez-Pintado Decl. at Exhibit A, F.) Accordingly, pursuant to California Code of Civil Procedure § 391(b)(4) and California Code of Civil Procedure § 391.7(a), the Court should find Plaintiff to be a vexatious litigant.

B. Plaintiff's Continuous Attempts to Relitigate the Same Issues Related to Alleged Fraudulent Water Rights Which Have Been Previously Dismissed Demonstrates Plaintiff's Vexatious Intent.

Pursuant to California Code of Civil Procedure § 391(b)(2) a person can be declared a vexatious litigant if the person: "after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, […] (ii) the cause of action, claim, controversy, or any issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." This section "does not require a connection between previous relitigation attempts and the movant or action in which security is sought." (*Goodrich*, 246 Cal.App.4th at 1267; *Holcomb*, 129 Cal.App.4th at 1505.) Connection is not required because the purpose of the statute is to curtail future harm from litigants who have a past pattern and practice of vexatious litigations. (*Holcomb*, 129 Cal.App.4th at 1505.) Accordingly, under

the statutory scheme, a person who relitigates groundless claims against one defendant can be required to give security before bringing unfounded claims against a new victim. (*Id*. (*citing Taliaferro v. Hoogs*, 237 Cal.App.2d 73, 74 (1965).)

Further, under California Code of Civil Procedure 391(b)(3), a party may be declared a vexatious litigant if they: "in any litigation while acting in propria persona, repeatedly file unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." The main question is not the number of pleadings or attempts to relitigate an issue the plaintiff has made, but rather whether there is a past pattern or practice of meritless pleadings that carry the risk of repetition. (*Goodrich*, 246 Cal.App.4th at 1265.)

As was discussed in the previous section, two Courts have already made findings that Plaintiff is a vexatious litigant based on identical or substantially similar allegations as those raised in the Complaint before the Court. (Mendez-Pintado Decl. at Exhibit C ("Vexatious Litigant Order"); Exhibit G (FCA Attorney Fee Order).) Additionally, in the First Fee Order, the Court noted that Plaintiff had previously filed an identical petition which the Court dismissed and informed Plaintiff that there was no basis to sue the respondents. (Mendez-Pintado Decl. at Exhibit B (First Fee Order).)

Next, in July of 2021, Plaintiff filed a Civil Rights Complaint before the United States District Court for the District of Utah. (Mendez-Pintado Decl. at Exhibit D (Civil Rights Complaint).) In the Civil Rights Complaint, Plaintiff did not argue that his civil rights were violated, but instead alleged that a resident in Emigration Canyon had assigned her civil rights claims to him. (*Id*.) In addition, although the Civil Rights Complaint purportedly raised religious discrimination claims, the complaint did not name a single governmental entity or actor as required by 42 U.S.C. § 1983. (*Id*.) Instead, like this action, the Civil Rights Complaint alleges claims related to fraudulently obtained water rights and development in Emigration Canyon, Utah. (*Id*.) The Court ultimately dismissed this action because Plaintiff lacked standing. (Mendez-Pintado Decl. at Exhibit E.)

In summary, this is now Plaintiff's fifth attempt to relitigate and reassert his conspiracy theories and false allegations against many of the same named Defendants. Each of these cases has been dismissed and three times the Court has informed Plaintiff that the allegations were baseless. Further, two courts have already sanctioned Plaintiff and found him to be a vexatious litigant acting in bad faith.

This clearly establishes a past pattern and practice of meritless pleadings. Furthermore, Plaintiff has been barred from bringing litigations in Utah without first receiving permission from the Court. Now, in an effort to circumvent the Utah Court's order, Plaintiff is bringing this litigation to California. This demonstrates a clear risk of repetition of Plaintiff's meritless and vexatious pleadings in California courts.

The filings in the instant action further demonstrate Plaintiff's intent to continue the pattern of relitigating his unfounded allegations of fraudulently obtained water rights. On February 29, 2024, Plaintiff filed a Motion for Reconsideration of the Court's Order Granting Motions to Quash. Brown will address Plaintiff's Motion for Reconsideration more fully in response to the motion, however, Brown notes that Plaintiff's Motion for Reconsideration and Plaintiff's Declaration in Support of the Motion highlight Plaintiff's attempt to relitigate the same facts and issues already previously decided.

First, Plaintiff's Motion for Reconsideration attempts to interject factual allegations related to what Plaintiff describes as, "the longest and most lucrative water grabs in the history of the State of Utah." *See*, Plaintiff's Motion for Reconsideration at p. 5. Additionally, Exhibit A to Plaintiff's Declaration is a document that Plaintiff contends is a "Master Thesis" referenced in a public hearing of the Utah State Engineer in 1995 related to construction of commercial wells in Utah and their impact on private wells. (*See*, Declaration of Mark Christopher Tracy In Support of Memorandum and Points of Authorities In Support of Motion to Reconsider Order Granting Defendant's Motion to Dismiss for Lack of Personal Jurisdiction ("Tracy Decl.") at ¶ 2 Exhibit A.) Plaintiff raised identical claims based on this alleged thesis and public hearing in the Vexatious Litigant Petition and in the Civil Rights Complaint. (Mendez-Pintado Decl. Ex. A at ¶¶ 14-19; Exhibit D at ¶¶ 17.) Plaintiff's Declaration alleges that he has evidence of impairments to and contamination of wells *in Utah.* (Tracy Decl. at ¶¶ 11-12.) Again, Plaintiff has already raised these same allegations in the Vexatious Litigant Petition, the Civil Rights Complaint and the FCA Litigation. Mendez-Pintado Decl. Exhibit A at ¶¶ 18-19, 21-24; Exhibit D at ¶¶ 25-26, 43-45; Exhibit F at ¶¶ 300-326. In short, Plaintiff's Declaration raises factual allegations and issues that have already been previously dismissed. (*See*, Mendez-Pintado Decl. at Exhibit B, C, E, G.)

Aside from being completely unrelated to the issue of personal jurisdiction, these allegations demonstrate Plaintiff's true intent in bringing this action – to relitigate alleged Utah water right issues.

Plaintiff's Complaint purports to bring claims for defamation, false light, and intentional infliction of emotional distress. (*See*, Complaint at ¶¶ 79-111.) Yet, Plaintiff is attempting to interject the same unsupported water right theories and issues that were dismissed in the previous Vexatious Litigant Petition, Civil Rights Complaint and FCA Litigation.

Here, Plaintiff may try to argue that Brown cannot bring this motion under Section 391(b)(2) because Brown was not a named party in these previous litigations. However, as the courts have made clear, connection between a movant and the prior litigation is not necessary to bring a motion for order declaring a litigant vexatious under Section 391(b)(2). (*Goodrich*, 246 Cal.App.4th at 1267; *Holcomb*, 129 Cal.App.4th at 1505.) Connection is not required because the intent of the vexatious litigant statute is to protect future victims from vexatious litigants who have demonstrated a pattern of attempting to relitigate the same finally determined issues and facts. (*Holcomb*, 129 Cal.App.4th at 1505.) Plaintiff's filings in this case make it abundantly clear that Plaintiff's true intent is to relitigate, in California, the same factual issues and claims that the state and federal courts of Utah have already finally dismissed.

Based on the foregoing, Brown respectfully requests that the Court find that Plaintiff is a vexatious litigant under California Code of Civil Procedure § 391(b)(2) and § 391(b)(3).

C. The Dismissal of This Action Would Not Divest the Court of Jurisdiction to Decide This Motion to Declare Plaintiff a Vexatious Litigant.

Before filing this motion requesting that the Court declare Plaintiff to be a vexatious litigant, Brown filed a motion to quash service of summons and dismiss this action for lack of personal jurisdiction. As discussed more fully in the motion to quash service of summons, Brown argued that Court should dismiss this action because the Court lacks personal jurisdiction over Brown. Brown is a resident of the State of Utah, is not a resident of the State of California and the Complaint fails to allege any conduct by Brown occurring in California.

The Court issued a tentative ruling granting Brown's motion to quash service of summons. Following oral argument, the Court has now issued an Order Granting Motions to Quash. The Court's Order Granting Motions to Quash does not preclude the Court from ruling on this Motion.

Generally, orders entered after the dismissal of an action are void because the court lacks subject matter jurisdiction after the complete dismissal of an action. (*Pittman*, 20 Cal.App.5th at 1022.)

However, the courts have carved out a number of exceptions to this rule to allow for the enforcement of statutory rights. (*Id*.) If a post dismissal motion involves collateral statutory rights – such as motions for attorneys' fees, motions for sanctions and motions to declare a party to be a vexatious litigant – the Court may retain jurisdiction to determine and enforce those rights. (*Id*. at 1022-1025.) The Court in *Pittman* reasoned that the purpose of these motions is to discourage litigants from engaging in bad faith tactics and compensate parties victimized by such tactics, therefore "there is no basis in logic or public policy to deny the victim the remedy of sanctions simply because, through the bad actor's own doing, the victim is no longer a party." (*Id*. at 1023 (quoting *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.*, 215 Cal.App.3d 353, 358 (1989).)

In *Pittman*, the Court concluded:

> a motion to declare a self-represented plaintiff a vexatious litigant deals with an ancillary issue and has no bearing on the finality of the judgement or dismissal. Retaining jurisdiction to decide a vexatious litigant motion is consistent with the purpose of the statute, which are 'designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants.'

(*Pittman*, 20 Cal.App.5th at 1024 (quoting *Shalant v. Girardi*, 51 Cal. 4th 1164, 1169 (2011).)

Based on the foregoing, the Court retains the jurisdiction to hear this motion and declare Plaintiff a vexatious litigant.

IV. CONCLUSION

For the reasons set forth herein, Mr. Brown respectfully requests that the Court find Plaintiff to be a vexatious litigant pursuant to California Code of Civil Procedure § 391(b) and § 391.7, and enter a prefiling order prohibiting Plaintiff from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Mr. Brown also respectfully requests that the Court require that Plaintiff post a bond in this case in the amount of defendants' reasonable attorney fees prior to the Court issuing an appealable ruling so that Plaintiff is not able to further harass defendants by simply appealing this matter without bond.

Dated: March 5, 2024

MURPHY, PEARSON, BRADLEY & FEENEY

By _____
Miguel E. Mendez-Pintado
Attorneys for Defendant
PAUL BROWN

CERTIFICATE OF SERVICE

I, Joan E. Soares, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is .

On March 5, 2024, I served the following document(s) on the parties in the within action:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING DEFENDANT PAUL BROWN'S MOTION FOR ORDER FINDING PLAINTIFF MARK CHRISTOPHER TRACY TO BE A VEXATIOUS LITIGANT AND ENTRY OF A PREFILING ORDER

XX	**VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is JSoares@mpbf.com.

Mark Christopher Tracy
1130 Wall St #561
La Jolla, CA 92037
E-mail: mark.tracy72@gmail.com
m.tracy@echo-association.com
Phone: (929) 208-6010

Attorney For Plaintiff in Pro per

Charlie Y. Chou
Kessenick Gamma LLP
1 Post Street, Suite 2500
San Francisco, CA 94014
Legal Assistant: Sarah Nguyen
snguyen@kessenick.com
Administrative Assistant: Anna Mao
amao@kessenick.com
E-mail: cchou@kessenick.com
Phone: (415) 568-2016

Attorney For Defendants
COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on March 5, 2024.

By _____
Joan E. Soares