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

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RESPONDENTS' APPENDIX

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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 OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Date: March 26, 2024
Time: 9:00 A.M.
Dept: 6
Judge: The Honorable Evette D. Pennypacker

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I. INTRODUCTION

Plaintiff brings this motion requesting that the Court reconsider its February 21, 2024, Order Granting Motions to Quash. Specially Appearing Defendant Paul Brown ("Brown") respectfully requests that the Court deny Plaintiff's Motion for Reconsideration. Plaintiff's Motion for Reconsideration is procedurally defective under Code of Civil Procedure § 1008 and should be denied because: (1) it is not based on any "new or different facts, circumstances or law"; and (2) Plaintiff has not offered any satisfactory explanation for his failure to present the allegedly new information and arguments at the Court's initial hearing on the Motions to Quash. Plaintiff's Motion is nothing more than an attempt to re-argue the same factual allegations he already advocated unsuccessfully to this Court on the Motions to Quash and unsuccessfully litigated before both the state and federal courts in Utah.

Plaintiff's Motion for Reconsideration fails to provide any procedural or substantive basis for the Court to reverse its Order on Motions to Quash and should therefore be denied.

II. FACTUAL BACKGROUND

Plaintiff filed this action alleging causes of action for defamation, false light, and intentional infliction of emotional distress. (See, Complaint at ¶¶ 79-111.) However, the primary factual allegations of Plaintiff's Complaint relate to the Emigration Canyon Improvement District ("EID"), located in Utah, and allegedly fraudulently obtained water rights in Utah. 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. (Complaint at ¶¶ 24-78.) EID is a small public entity that has the authority to provide water and sewer service to residents within Emigration Canyon, which is located in Salt Lake County, Utah. Plaintiff acknowledges that Brown is a resident of Utah. (Complaint at ¶ 18.) Plaintiff also acknowledges that the alleged conduct in this action occurred in Utah in connection with EID. (Complaint at ¶¶ 65-78.) Further, the only allegation that Plaintiff raised against Brown is that Brown, a Utah resident, allegedly sent an email to the residents of Emigration Oaks Public Utility District ("PUD") – a residential PUD in Utah. (Complaint at ¶¶ 23, 76).

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There is absolutely no merit to the claim that Brown defamed Plaintiff, and there is no basis for jurisdiction in California because Brown is a Utah resident without any continuous or systematic contact with California and none of the alleged conduct in the Complaint occurred in California. Additionally, as was explained in both Brown's Motion to Quash Service and Motion for Order Finding Plaintiff to be a Vexatious Litigant, this is not Plaintiff's first attempt to litigate claims related to allegedly fraudulently obtained water rights in Utah. Seemingly, the reason this action is now before a California court is because Plaintiff has been sanctioned by a state and federal court in Utah, and is now subject to a pre-filing vexatious litigant order with the state courts of Utah.

Based on the fact that Brown is a Utah resident without any continuous or systematic contacts with California and the fact that Plaintiff's claims arise out of conduct in Utah, Brown filed a Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction and Motion to Dismiss for Inconvenient Forum pursuant to California Code of Civil Procedure § 418.10. Plaintiff asserted procedural challenges to Brown's Motion to Quash without addressing the substantive issues related to personal jurisdiction. The Court issued a Tentative Order granting Brown's Motion to Quash, as well as the Motions to Quash filed by other defendants in this action. Following oral argument on the Tentative Order, the Court issued an Order Granting the Motions to Quash.

Now, Plaintiff brings the current Motion for Reconsideration of the Court's Order Granting the Motions to Quash. With regard to the portion of the Court's Order granting Brown's Motion to Quash, it appears that Plaintiff's only argument relates to amended declarations which the Court addressed in its Order. Additionally, Plaintiff generally alleges that he was not allowed to present evidence of uncontested facts. However, it does not appear that any of these allegedly uncontested facts relate to Plaintiff's claims against Brown.

III. LEGAL ARGUMENT

One of the key statutory requirements for a motion for reconsideration under Code of Civil Procedure § 1008(a) is that the motion must be based on "new or different facts, circumstances or law" than those which were before the court at the time of the original ruling. The legislative intent in creating this requirement was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not

offering it earlier. (*Gilberd v. AC Transit*, 32 Cal.App.4th 1494, 1500 (1995) [Claim that trial court misinterpreted state law in its initial decision did not establish that motion to reconsider was based upon new or different facts, circumstances or law]; *Baldwin v. Home Sav. of America*, 59 Cal.App.4th 1192, 1198 (1997) [Opinion issued two years before trial court's initial ruling on plaintiff's motion for attorney fees could have been provided to trial court prior to that ruling, and did not provide "new" facts to authorize reconsideration].)

The burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial. (*New York Times Co. v. Sup. Ct.*, 135 Cal.App.4th 206, 212-13 (2005) [Trial court erred in granting motion for reconsideration of summary judgment order where motion was based on evidence known to or available to the party seeking reconsideration before the summary judgment hearing].)

A party seeking reconsideration of a prior order based on "new or different facts, circumstances or law" must provide a satisfactory explanation for failing to present the information at the first hearing; i.e., a showing of reasonable diligence. (*Garcia v. Hejmadi*, 58 Cal.App.4th 674, 690 (1997) [Movant was not entitled to vacation of summary judgment as matter of law, on claims that there was evidence showing triable issues of fact not presented in initial opposition, where the information was known to the attorney at time of initial opposition, and he provided no explanation of why it was not presented at that time]; *California Correctional Peace Officers Ass'n v. Virga*, 181 Cal.App.4th 30, 47 (2010) [In a renewed motion for attorney's fees treated as a motion for reconsideration under Section 1008, the trial court acted within its discretion in concluding that state agencies had no satisfactory reason for not presenting their legal theory that they were entitled to attorney fees in a previous motion for fees].) "According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon "new or different facts, circumstances, or law." (*Gilberd*, 32 Cal.App.4th at 1500.)

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1. Plaintiffs' Motion for Reconsideration is not based on any "new or different facts, circumstances or law"

Motions for reconsideration are properly denied where they are based on evidence that *could have been* presented in connection with the original motion. (*Morris v. AGFA Corp.,* 144 Cal.App.4th 1452, 1460 (2006); *Hennigan v. White,* 199 Cal.App.4th 395, 405-406 (2011).) In *Morris,* the California Court of Appeal affirmed the trial court's denial of a motion for reconsideration based upon a physician's declaration that "could have been presented with the original motion" and was thus not a proper basis for reconsideration. (*Morris,* 144 Cal.App.4th at 1460, 1468.) Similarly, in *Hennigan,* the California Court of Appeals affirmed the trial court's denial of a motion for reconsideration because the new declarations consisted of information the moving party was aware of at the time of filing and arguing the original motion. (*Hennigan,* 199 Cal.App.4th at 405-06.)

New law is case law that was decided, or statutory law that was enacted after the court took the underlying motion under submission. (*See, e.g., In re Marriage of Oropallo,* 68 Cal.App.4th 997, 1001-02; *Baldwin,* 59 Cal.App.4th at 1196 [two-year-old case law was not new law because it could have been provided to the court before ruling].) "Different law" is case law or statutory law that existed when the court took the motion under submission but was not asserted by the parties. (*Baldwin,* 59 Cal.App.4th at 1196). To establish "different law" as a ground for relief, the movant must show that it exercised reasonable diligence in researching and presenting all relevant legal arguments and persuasive authority in the underlying motion. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouse, LLC,* 61 Cal.4th 830, 839 (2015).) Disagreeing with the court's decision or arguing that the court "misinterpreted" law is insufficient to establish new or different law under Section 1008. (*Gilbred,* 32 Cal.App.4th at 1500.) Further, on a motion for reconsideration the plaintiff is required to demonstrate how the new or different law, fact or circumstance affected the merits of the case. (*Id.*)

a. Plaintiff's Motion fails to identify any new or different law.

Plaintiff's Motion for Reconsideration is procedurally improper because it fails to identify any new or different facts, law or circumstances that would warrant consideration of Plaintiff's Motion. Plaintiff's Motion does not allege any new or different facts related to Brown. Plaintiff's only

argument related to Brown's Motion to Quash relates to Plaintiff's procedural challenges to the declarations filed in support of the Motion to Quash. Plaintiff's argument is that pursuant to California Code of Civil Procedure § 472(a) the Court should not have considered the declarations filed in support of Brown's Motion to Quash. Aside from being a misstatement of the law, Plaintiff's argument fails because it is neither new nor would it affect the merits of Brown's Motion to Quash.

First, the current version of California Code of Civil Procedure § 472 was effective as of January 1, 2021 – over three years prior to the hearing on Brown's Motion to Quash. Accordingly, Section 472 is not considered new or different law. Additionally, Plaintiff fails to identify why this argument was not raised in opposition to or during the hearing regarding Brown's Motion to Quash. Accordingly, because Plaintiff does not cite to new law, the Court should not consider Plaintiff's legal argument.

Even if the Court were to consider Plaintiff's legal argument, Plaintiff's argument is deficient and would have no impact on the merits of the Court's Order. Plaintiff cites to California Code of Civil Procedure § 472(a) which discusses the procedure for amending pleadings. "[P]leadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court." (Code of Civil Procedure § 420.) Pleadings include "complaints, demurrers, answers, and cross-complaints." (Code of Civil Procedure § 422.10). Declarations in support of motions are not considered pleadings subject to Section 472. Further, as the Court has already explained, the Court is vested with the discretion to consider additional evidentiary matter on reply when it poses no prejudice to the opposing party. (*Hahn v. Diaz-Barba*, 194 Cal.App.4th 1177, 1193 (2011).)

Even if Plaintiff's argument were legally correct, which it is clearly not, Plaintiff's argument would have no bearing on the merits of Brown's Motion or the Court's Order. "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*, 104 Cal.App.4th 1080, 1090 (2002).) 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*.)

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Plaintiff's complaint acknowledges that Brown is a resident of Utah, and the sole allegation against Brown relates to alleged communications in Utah between Utah residents. Accordingly, on the face of the Complaint, Plaintiff's allegations fail to allege sufficient minimum contacts to establish the Court's personal jurisdiction over Brown. Plaintiff has yet to submit any arguments or evidence that even purports to show that Brown had minimum contacts with the State of California.

b. Plaintiff's Motion fails to identify any new or different facts or circumstances.

Plaintiff's Motion for Reconsideration also generally argues that the Court did not allow Plaintiff to present evidence of allegedly uncontested facts. Plaintiff does not allege whether or how these alleged facts relate to Brown. Further, none of the facts identified in Plaintiff's Declaration relate to Plaintiff's claims against Brown or even purport to establish personal jurisdiction over Brown in California. However, to the extent that Plaintiff later argues that these "facts" relate to Plaintiff's claims against Brown, they are neither new nor different facts.

Plaintiff's Declaration cites to alleged facts from 1995-96 and 2018- September 2023. (Declaration of Mark Christopher Tracy In Support of Memorandum of Points of Authorities In Support of Motion to Reconsider Order Granting Defendant's Motions to Quash for Lack of Personal Jurisdiction ("Tracy Decl.") at ¶¶ 2-3, 6, 10, 12.) This alleged evidence is not "new" because it was accessible before Plaintiff filed his Opposition to Brown's Motion and before the hearing on the Motions to Quash. Plaintiff produces no evidence indicating that this alleged evidence was newly discovered or otherwise not accessible to Plaintiff before Brown's Motion to Quash.

In fact, Plaintiff's Declaration indicates that Plaintiff was aware of this information before the hearing on the Motions to Quash. For example, Paragraph 2 of Plaintiff's Declaration cites to information from a 1995 "Master's Thesis" which Plaintiff references in the Complaint. (Compare Tracy Decl. at ¶ 2 with Complaint at ¶ 26(e).) Additionally, Paragraph 3 of Plaintiff's Declaration expressly acknowledges that Plaintiff received that information in April 2018 – over five years before the hearing on the Defendants' Motions to Quash. (Tracy Decl. at ¶ 3.) Paragraphs 4 and 6 of Plaintiff's Declaration appear to cite to public records from the 1980s, 1996, and 2021, all of which would be available to Plaintiff before the hearing on the Motions to Quash. (*Id*. at ¶¶ 4-6.) Paragraphs 5, 7, 8, of Plaintiff's Declaration cite to links and screenshots from the internet. (*Id*. at ¶¶ 5, 7, 8.)

However, Plaintiff fails to provide any information regarding when this information became available, why Plaintiff did not present these alleged facts sooner or whether Plaintiff was diligent in searching for these alleged facts. Next, Paragraph 10, states that Plaintiff obtained this information in September of 2023, well before the Motions to Quash were filed in this action. (*Id*. at ¶ 10.) Paragraphs 9, 11 and 12 of Plaintiff's Declaration raise alleged facts that Plaintiff already raised in the Complaint and are thus neither new nor different. (Compare Tracy Decl. at ¶¶ 9, 11-12 with Complaint ¶¶ 5, 26(d)-(f), 65-78.)

Further, as was discussed in Brown's Motion for Order Finding Plaintiff to be a Vexatious Litigant, Plaintiff's Declaration attempts to interject many of same factual allegations that Plaintiff raised before the Third District Court of the State of Utah and the United States District Court for the District of Utah. (Compare Tracy Decl. at ¶ 2, 11-12 with 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 at Ex. A at ¶¶ 14-19, 21-24; Exhibit D at ¶¶ 17, 25-26, 43-45; Exhibit F at ¶¶ 300-326.) Accordingly, because Plaintiff previously filed actions based on some of the same allegedly "new" facts and because the allegedly "new" facts were available for years prior to this litigation, Plaintiff clearly had access to these alleged facts before the hearing on the Motions to Quash. Plaintiff could have provided these alleged facts in Opposition to the Motions to Quash or during the Court's hearing on the Motions to Quash. Plaintiff provides no explanation for why these alleged facts were not previously introduced.

Based on the foregoing, because Plaintiff's alleged evidence is not new or different and could have been presented in connection with Plaintiff's opposition to the original motion, the Court should deny Plaintiff's Motion for Reconsideration. (*Morris*, 144 Cal.App.4th at 1460; *Henning*, 199 Cal.App.4th at 405-06.)

Plaintiff's Motion for Reconsideration is clearly not based on any "new or different facts, circumstances, or laws" as required by Section 1008. Rather, Plaintiff's Motion for Reconsideration is really nothing more than an attempt to re-argue and expand upon the very same points that Plaintiff already advocated unsuccessfully to this Court in its initial hearing on the Motions to Quash. This alone renders Plaintiff's Motion for Reconsideration procedurally defective and constitutes sufficient

grounds for the Court to deny the Motion.

2. Plaintiff has failed to offer any satisfactory explanation or showing of reasonable diligence for the failure to present any supposedly new information at the time of the first hearing.

Even if Plaintiff's Motion presented new or different facts and law than those already argued before the Court, Plaintiff would be required to provide a satisfactory explanation for failing to present the information at the first hearing, i.e., a showing of reasonable diligence. (*Garcia*, 58 Cal.App.4th at 690.) The court in *Gracia* was quite clear in discussing the critical importance of the reasonable diligence requirement of Section 1008:

> Garcia's argument, if accepted, would effectively eviscerate the threshold showing of diligence which has long required an "explanation" of why the "newly discovered" matter was not presented earlier. Garcia would have us say this requirement is met by anything not previously "presented" to the court. The miserable result would be to defeat the Legislature's stated goal of reducing the number of reconsideration motions and would remove an important incentive for parties to effectively marshal their evidence.

(*Id.*, at 688-689.)

Plaintiff's Motion for Reconsideration contains no explanation whatsoever – much less a showing of reasonable diligence – for his failure to present these supposedly "new" facts, evidence and legal arguments to the Court at the time of the first hearing on the Motions to Quash. That is because Plaintiff's Motion is not, in fact, based upon any new facts or law, but rather is just a re-hash of the same facts and argument that Plaintiff's already argued in Opposition to the Motions to Quash. And even if there was a particular point that wasn't fully raised previously at the hearing, Plaintiff has not provided any compelling or statutorily viable, reason for this Court to reconsider such arguments now.

Plaintiff's failure to make any showing whatsoever regarding his reasonable diligence in presenting the arguments raised in this Motion for Reconsideration, during the original hearing on the Motions to Quash is an additional reason that the Court should deny Plaintiff's Motion for Reconsideration.

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IV. CONCLUSION

As demonstrated herein, there is simply no basis, procedurally or substantively, for this Court to reconsider or alter its prior Order Granting Motions to Quash.

DATED: March 13, 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 13, 2024, I served the following document(s) on the parties in the within action:

SPECIALLY APPEARING DEFENDANT PAUL BROWN'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

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.

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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 13, 2024.

By Joan E. Soares
Joan E. Soares

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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 HAWKES, 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 DEFENDANTS COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Date: March 26, 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, David Bennion and Gary Bowen (collectively "Defendants") submits this memorandum in opposition to plaintiff's *Motion to Reconsider Order Granting Defendants' Motion to Quash Service of Process for Lack of Personal Jurisdiction* (the "Motion to Reconsider").

I. INTRODUCTION

Plaintiff Mark Christoper Tracy ("Plaintiff" or "Mr. Tracy") has filed multiple actions against defendants in Utah courts based on what Mr. Tracy alleges to be the "longest and most lucrative water grabs in the history of the State of Utah." *Motion to Reconsider*, p. 5. However, not only have Utah state and federal courts found that Mr. Tracy's vast conspiracy theories don't have any merit, but both Utah state and federal courts have found the actions to vexatious and harassing; awarded attorney fees against Mr. Tracy; and Mr. Tracy has been deemed a vexatious litigant in Utah state court. Like Mr. Tracy's multiple actions in Utah, this matter lacked merit, and Mr. Tracy's Motion to Reconsider is yet another baseless attempt to harass Defendants and require Defendants to expend funds defending against Mr. Tracy's frivolous claims.

Mr. Tracy makes three arguments in his Motion to Reconsider. First, Mr. Tracy argues that defendant Kem Gardner's Motion to Quash was rejected by the Court. Second, Mr. Tracy argues that the Court improperly allowed the defendants Bowen and Brown to amend pleadings after Mr. Tracy filed his opposition. Third, Mr. Tracy argues that the Court did not allow him to present evidence of uncontested facts. However, the Motion to Reconsider is not based on any "new or different facts, circumstances or law"; and Mr. Tracy has not offered any satisfactory explanation for his failure to present the allegedly new information and arguments at the Court's initial hearing on the Motions to Quash. Accordingly, the Court should deny the Motion to Reconsider.

II. ARGUMENT

California Code of Civil Procedure section 1008 governs a motion for reconsideration, and provides in pertinent part that such motion must be based on "new or different facts, circumstances, or law" than those before the court at the time of the original ruling. The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstances not previously considered, and some valid reason for not offering it earlier. *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. The burden under § 1008 is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial. *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212. A party seeking reconsideration of a prior order based on "new or different fact, circumstances or law" must provide a satisfactory explanation for failing to present the information at the first hearing. *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690.

A. Kem Gardner's Motion to Quash Was Accepted by the Court.

Mr. Tracy first argues that the Court should reconsider its ruling because the Court never accepted Kem Gardner's Motion to Quash. However, Mr. Tracy has previously argued this point, and Mr. Tracy does not provide any new or different facts, circumstances, or law that would justify reconsideration by the Court.

Specifically, in his *Memorandum of Points and Authority in Support of Opposition to Defendant Kem Crosby Gardner's Motion to Quash Service of Process for Lack of Personal Jurisdiction*, Mr. Tracy argued:

> "On January 2, 2023, the Clerk of the Court rejected the filing with the remark "NO MOTION ATTACHED TO THE ENVELOPE," but appears to have scheduled a hearing for "Motion: Order" but not "Motion: Quash" on January 22, 2024. To date, it is unclear if the court has subsequently accepted the filing contrary to Rule 3.1110 of the California Rules of the Court.

> Out of an abundance of caution, this opposition will however address the Motion as if accepted by the court."

Footnote 1.

The Court clearly rejected this argument since the Court considered Mr. Gardner's Motion to Quash. Thus, simply restating an argument that was raised before the Court and could have been raised during oral arguments without any new facts, circumstance or law is not sufficient grounds for a Motion to Reconsider.

B. The Court Correctly Considered the Amended Bowen and Brown Declarations.

Mr. Tracy next argues that the Court improperly allowed defendants Bowen and Brown to amend pleadings after Mr. Tracy filed his opposition. In its Order, the Court considered Mr. Tracy's arguments with respect to the Bowen and Brown declarations and found "the Court will consider the resubmitted declarations since the content of each declaration was not changed and no new evidence was presented." *Order*, p. 7.

In the Motion to Reconsider, Mr. Tracy argues that the Court erred because California Code of Civil Procedure § 472(a) only allows a party to amend a pleading *once* without leave of Court. However, section 472(a) discusses the procedure for amending pleadings. "[P]leadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court." Code of Civil Procedure § 420. Pleadings include "complaints, demurrers, answers, and cross-complaints." Code of Civil Procedure § 422.10. Declarations in support of motions are not considered pleadings subject to Section 472. In addition, even if section 472(a) was applicable, section 472(a) is not new law, and Mr. Tracy fails to provide a valid reason for not raising the argument in his opposition or during the hearing.

Finally, as the Court stated in its Order, the Court is vested with the discretion to consider additional evidentiary matter on reply when it poses no prejudice to the opposing party. *Hahn v.*

Diaz-Barba, 194 Cal.App.4th 1177, 1193 (2011). The purpose of the amended Bowen declaration was to simply clarify that Mr. Bowen sold approximately 500 copies of his self-published book on Amazon and that it was possible that Amazon shipped some of the books to California residents. Mr. Tracy argued that the book sales provided the Court with jurisdiction. Thus, although the Court found that the book sales did not demonstrate general jurisdiction, there is no possibility that the Court's acceptance of the Amended Bowen Declaration prejudiced Mr. Tracy.

C. Mr. Tracy's Argument That the Court Did Not Allow Him to Present Evidence of Uncontested Facts is Without Merit.

Mr. Tracy's final argument is that the Court did not allow him to present evidence of uncontested facts. Mr. Tracy argues that the declarations submitted by defendants "did not contest Plaintiff's verified allegations" and the Court did not "provide Plaintiff an opportunity to produce evidence of uncontested jurisdictional facts." However, the Court clearly read the Complaint. Therefore, if Mr. Tracy's position is that there were facts in his Complaint that were uncontested, it is unclear how Mr. Tracy was not allowed to present those facts to the Court.

In addition, to the extent Mr. Tracy's argument is that his declaration in support of the Motion to Reconsider contains additional facts that should be considered by the Court, none of the facts are ***new*** facts that could not have discovered prior to filing the Complaint and included in Mr. Tracy's previous oppositions. Mr. Tracy also fails to provide any instance in which the Court denied him the ability to present the evidence in his declaration. *See Morris v. AGFA Corp.,* 144 Cal.App.4th 1452, 1460 (2006) (motions for reconsideration are properly denied where they are based on evidence that *could have been* presented in connection with the original motion). Thus, Mr. Tracy's arguments that the Court did not allow him to present evidence, or the Court should now consider facts that could have previously been presented, are without merit.

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Finally, a number of the "new facts" have nothing to do with jurisdiction and are simply a continuation of Mr. Tracy's attempt to assert his grievances with the Emigration Improvement District. For example, paragraph 2 of the Tracy Declaration references an excerpt from a 1995 Thesis that has nothing to do with a California court having jurisdiction in this matter. Paragraph 3 alleges that in 2018 a tax foreclosure sale was initiated against a property in Utah while the resident was purportedly in an assisted living facility in California. Mr. Tracy's inclusion of these "facts" is just further evidence that this action has nothing to do with a legitimate claim and is instead just another attempt by Mr. Tracy to harass Defendants because he opposes development in Emigration Canyon, Utah.

III. CONCLUSION

For ten years, Mr. Tracy has been obsessed with attacking the Emigration Improvement District and anyone associated with development in Emigration Canyon. Mr. Tracy claims to have no assets and no ability to pay any judgments against him. Therefore, although Defendants have been awarded over $95,000 in attorneys' fees against Mr. Tracy, Mr. Tracy appears to believe that he can simply continue to file frivolous *pro se* actions and smotions against Defendants without any repercussion. Mr. Tracy's Motion to Reconsider is no exception. Mr. Tracy presents no new or different fact, circumstances or law, and the one statute relied on by Mr. Tracy is not applicable to his argument. Accordingly, the Court should deny the Motion to Reconsider.

DATED: March 13, 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

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 March 13, 2024, I served the following documents described as:

SPECIALLY APPEARING DEFENDANTS COHNE KINGHORN, P.C., SIMPLIFI COMPANY, JEREMY RAND COOK, ERIC HAWKES, JENNIFER HAWKES, MICHAEL SCOTT HUGHES, DAVID BRADFORD, DAVID BENNION AND GARY BOWEN'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

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

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Kem Crosby Gardner and
Defendant Walter J. Plumb III

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 March 13, 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 March 13, 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: March 13, 2024

Sarah Nguyen

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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
Assigned to the Hon. Evette Pennypacker

SPECIALLY APPEARING DEFENDANT KEM C. GARDNER'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Hearing Date: March 26, 2024
Time: 9:00 a.m.
Dept.: 6

Complaint Filed: September 21, 2023

Specially-appearing Defendant Kem C. Gardner ("Mr. Gardner") respectfully submits this Opposition to Plaintiff's "Motion for Reconsideration of Order Granting Defendants' Motions To Quash Service Of The Complaint And Summons For Lack Of Personal Jurisdiction" ("Reconsideration Motion" or "Motion"), which purports to seek reconsideration of the Court's February 20, 2024 order granting Mr. Gardner's Motion To Quash Service Of Summons ("Motion to Quash").

I. INTRODUCTION

Section 1008 of the California Code of Civil Procedure strictly limits a party's ability to ask a court to reconsider a ruling: it requires the moving party to show that there are "new or different facts, circumstances, or law" (C.C.P. § 1008(a)), which the party "could not, with reasonable diligence," have presented to the Court before its ruling was issued. *New York Times Co. v. Super. Ct.*, 135 Cal. App. 4th 206, 213 (2005).

Plaintiff has not come close to meeting this stringent requirement. Instead, he asks this Court to reconsider its February 20, 2024 ruling granting Mr. Gardner's Motion to Quash (the "Order") based on the same arguments he made in his opposition (the "Opposition") to the Motion to Quash. That is insufficient as a matter of law. *See Jones v. P.S. Dev. Co.*, 166 Cal. App. 4th 707, 725 (2008) (plaintiff's contention that trial court's ruling was based on "multiple errors of law and a failure or refusal to consider the evidence presented in opposition to" a motion for summary judgment did not constitute a "new fact or circumstance," as required to support a motion for reconsideration).

Even if mere error could satisfy Section 1008, Plaintiff's Motion still should be denied, because here there was no error; this Court correctly found that Plaintiff failed to meet his burden of showing the Court has either general or specific jurisdiction over Mr. Gardner. Order at 6-9. Mr. Gardner neither resides nor is domiciled in California, and none of Plaintiff's claims arise out of any alleged conduct by Mr. Gardner in or directed at California. *Id.*

Because Plaintiff's Motion was filed in violation of Section 1008 and controlling law, this Court should deny the Motion immediately and take its hearing off calendar.

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—all of whom are Utah residents—"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. His Complaint asserts 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 website for a public drinking water facility in Salt Lake, the Emigration Canyon Improvement District ("ECID"). Compl. ¶¶ 79-111; 10.

Plaintiff's jurisdiction allegations are sparse. He alleges the Court has jurisdiction for two reasons: (1) because the ECID 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. The Complaint does not allege any facts indicating that the purported "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 filed his Motion to Quash on December 29, 2023, and the Court granted the Motion in an Order dated February 20, 2024. In the Order, the Court found that it lacked general jurisdiction over Mr. Gardner because Plaintiff had not shown Mr. Gardner had substantial, continuous contact with California, and that it lacked specific jurisdiction over him because Plaintiff's claims did not arise out of Mr. Gardner's contacts with the state, namely a partial interest in a timeshare in Carlsbad, California. *Id.* at 6-9. It also denied Plaintiff's request for jurisdictional discovery because the only evidence Plaintiff offered in support of the request was two deposition notices, and Plaintiff otherwise offered nothing beyond conclusory allegations that any of the Defendants targeted the state. *Id.*

III. PLAINTIFF'S MOTION SHOULD BE DENIED BECAUSE HE FAILED TO SATISFY THE STRICT REQUIREMENTS OF C.C.P. § 1008.

Plaintiff's reconsideration motion does not identify any new facts, circumstances, or law that would change the outcome of Mr. Gardner's Motion to Quash. Instead, he asks the Court to reconsider its Order based on information and argument it already considered—and rejected. Plaintiff therefore fails to meet his threshold burden under Section 1008(a), the Motion should be denied immediately, and the hearing should be taken off calendar.

A. Plaintiff Had The Burden Of Demonstrating New Facts, Circumstances, Or Law.

Code of Civil Procedure § 1008 allows a party to seek reconsideration of an order **only** if "new or different facts, circumstances, or law" can be shown. *See* Cal. Code Civ. Proc. § 1008(a). Because re-litigating issues after they have been adjudicated poses such an obvious potential for abuse of the judicial process, Section 1008 prohibits parties from making renewed motions unless this requirement is met. As the California Supreme Court has explained, the statutory restrictions imposed by the Legislature mean that a party "may not file" a motion to reconsider without satisfying the requirements of Section 1008; "[t]he court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion." *Le Francois v. Goel*, 35 Cal. 4th 1094, 1108 (2005). *See also id.* (recognizing that where the moving party has not complied with the requirements of Section 1008, the other side should "not bear the burden of preparing opposition unless the court indicated an interest in reconsideration"). The Court further explained that these strict requirements "serve a purpose": "They are 'designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.'" *Id.* at 1104 (citation omitted).

Moreover, the requirement that the moving party demonstrate "new or different" facts or law does not mean that a lack of diligence or claim of ignorance by the moving party will be rewarded. To the contrary, reconsideration motions based on facts or law that a party **could have** discovered with reasonable diligence must be denied: "[t]he burden under section 1008 is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party **could not, with reasonable diligence**, have discovered or produced it at the trial." *New York Times Co.*, 135 Cal. App. 4th at 212–13 (emphasis added). *See also Shiffer v. CBS Corp.*, 240 Cal. App. 4th 246, 254–55 (2015) (rejecting reconsideration motion where study evaluating asbestos exposure, letter concerning air quality, and expert witness's post-summary judgment declaration basing new opinions on those materials were not "new" evidence because documents were produced two weeks before the expert's original declaration, and a month before the summary judgment hearing); *In re*

Marriage of Herr, 174 Cal. App. 4th 1463, 1468 (2009) (any "facts of which the party seeking reconsideration was aware at the time of the original ruling are not 'new or different'"); *Hennigan v. White*, 199 Cal. App. 4th 395, 405–06 (2011) (denying motion for reconsideration that was based on information known to the parties at the time of the original ruling).

Given these strict requirements, a party's displeasure with a court's ruling also is not a basis for seeking reconsideration—nor is an argument that the court "erred" in its ruling. *Le Francois*, 35 Cal. 4th at 1108; *Jones*, 166 Cal. App. 4th at 725. If the moving party fails to comply with Section 1008, the court must deny the reconsideration motion. CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, Ch. 9(I)-E (The Rutter Group 2023); *see also Tuchscher Dev. Enters., Inc. v. San Diego Unif. Port Dist.*, 106 Cal. App. 4th 1219, 1245 (2003) ("[a]n order denying a motion for reconsideration is interpreted as a determination that the application does not meet the requirements of section 1008").

Where, as here, a party attempts to re-assert arguments that were already raised, there is no obligation for the Court to even consider the Motion. As one appellate court emphasized, "[w]hen the grounds of the new motion are in substance no different from those of the previous motion, the court obviously is not obliged to reconsider." *City & Cnty. of San Francisco v. Muller*, 177 Cal. App. 2d 600, 603 (1960). The basis for refusing is clear: "renewal of the same motion may be a serious burden on the court, and a means of abuse of judicial process." *Id.* Consequently, "it has long been settled that the court will refuse to consider a new motion supported by **substantially the same showing** as the one denied." *Id.* (emphasis in original).

B. Plaintiff Failed To Meet His Burden Under Section 1008(a).

With respect to Mr. Gardner, Plaintiff's Motion argues reconsideration is proper on two grounds: (1) because the clerk purportedly rejected Mr. Gardner's Motion to Quash[1]; and (2) because the Court did not allow Plaintiff to "produce evidence of uncontested jurisdictional facts." Mot. at 3-5. Plaintiff raised both of these arguments in his Opposition to the Motion to

[1] Plaintiff in a footnote also claims that counsel for Mr. Gardner failed to meet and confer with him before setting the hearing on the Motion to Quash. That argument also was raised in Plaintiff's Opposition. *See* Opp. at 4 (claiming the Motion to Quash was "null and void" on that basis).

Quash, and the Court properly rejected them. But even if the Court had committed error—which it did not—that would not justify reconsideration. *E.g.*, *Jones*, 166 Cal. App. 4th at 725 (claims of "errors" in summary judgment ruling did not meet criteria for reconsideration motion). Because Plaintiff's Motion does not even attempt to identify any "new facts, circumstances, or law" that would change the outcome of the Court's Order, it does not meet the requirements of Section 1008, and should be denied without a hearing.

First, Plaintiff's Opposition also argued that the Court should deny the Motion to Quash because the clerk purportedly rejected the Motion, and the argument therefore does not constitute "new facts, circumstances, or law" sufficient to meet the jurisdictional requirements of Section 1008. *See* Opp. at 2 n.1 (claiming that the "Clerk of Court rejected the filing" and arguing that accepting the filing would be "contrary to Rule 3.1110"). *See also Gilberd v. AC Transit*, 32 Cal. App. 4th 1494, 1500 (1995) (rejecting reconsideration motion based on matters already presented to the trial court).

Second, Plaintiff's muddled arguments about jurisdiction also were previously presented in his Opposition to the Motion to Quash. In the Reconsideration Motion, Plaintiff argues that Mr. Gardner in the declaration he filed in support of his Motion ("Gardner Declaration") "did not contest" the Complaint's "verified allegations" that defamatory statements were posted on a San Jose server, were of and concerning Plaintiff, were read by California residents, that "as a result, California property owners paid monies" to Mr. Gardner, and that the Court therefore should have allowed Plaintiff to "produce evidence" of the jurisdictional facts. Mot. at 5-6. Plaintiff in his Opposition to the Motion to Quash likewise (wrongly) claimed that Mr. Gardner was required to refute each of Plaintiff's jurisdictional allegations in the Gardner Declaration, and that absent sworn refutations, the same "allegations of the Complaint" he identifies in the Reconsideration Motion should be considered "uncontested." Opp. at 5-6. He further argued that, if the Court found jurisdiction lacking, it should "allow plaintiff sufficient time to conduct discovery on jurisdictional issues." Opp. at 9.

Thus, all of the bases for Plaintiff's Reconsideration Motion were previously presented to the Court, and do not meet the requirements for a reconsideration motion. *Le Francois*, 35 Cal.

4th at 1108 ("[t]he court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion.") The Motion should be denied on this ground alone.

IV. PLAINTIFF'S "ERROR" ARGUMENTS ARE BASELESS.

As discussed above, a litigant's claim that a court's decision was erroneous is not grounds for reconsideration. *See* Section III.A; *see also, e.g., Jones*, 166 Cal. App. 4th at 725. But even if "error" was a basis for reconsideration (which it is not), this Court should deny Plaintiff's Motion, because the Order granting the Motion to Quash was not erroneous.

First, as Mr. Gardner explained in his Reply in support of the Motion to Quash, the clerk apparently at some point rejected the Motion for failure to include a notice of motion, but then reversed the rejection upon realizing the Motion ***did*** contain a notice, in the same document as the memorandum of points and authorities. *See* 1/2/2024 Clerk Rejection Letter. As also explained in the Reply, the clerk's error had no impact on Plaintiff, who was timely electronically served with the Motion more than 16 court days before the February 20, 2024 hearing, on January 22, 2024. *See* C.C.P. § 1005(b); Reply at 6 (explaining that 16 court days before February 20, 2024 is January 25, 2024). The clerk's harmless and quickly-corrected error is not grounds for reconsidering the Motion to Quash.

Second, the Court properly found that Plaintiff did not meet his burden of showing, by a preponderance of the evidence, that the Court has jurisdiction over Mr. Gardner, or that Plaintiff was entitled to jurisdictional discovery. *See* Order at 6-10. Personal jurisdiction can be general or specific. General jurisdiction over a defendant is proper if the individual is domiciled in the forum, or where a defendant's contacts with 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). 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). The Court in its Order properly found that it lacks general jurisdiction over Mr. Gardner, who resides in Utah and is domiciled there. Order at 7.

The Court also correctly found it lacked specific jurisdiction over Mr. Gardner. Order at 7-8. The only allegations in the Complaint tying Mr. Gardner to California were Plaintiff's vague assertions that activities allegedly undertaken by other defendants were "perpetuated for the private profit of" and "on behalf" of Mr. Gardner, Opp. at 6-8, and 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. As the Court found, however, Plaintiff provided "no evidence…establishing agency or a conspiratorial relationship among Defendants." Order at 9. *See also Goehring v. Superior Ct. (Bernier)*, 62 Cal. App. 4th 894, 904–05 (1998) ("[J]urisdiction over each defendant must be established individually"). Furthermore, the Complaint itself alleges that Mr. Gardner transferred his interest in the underlying water system 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." Compl. ¶¶ 21, 40. *See 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). The Court also properly concluded that Mr. Gardner's interest in a California timeshare is insufficient to confer specific jurisdiction, because Plaintiff offered no evidence "of any nexus, much less a substantial nexus, between Plaintiff's claims and Mr. Gardner's California timeshare ownership." Order at 9 (citing *Snowney v. Harrah's Entertainment, Inc.*, 35 Cal. 4th 1054, 1068 (2005)). *See also Greenwell v. Auto-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").[2]

[2] Plaintiff's unsupported claim that Mr. Gardner "conducts extensive business in California through The Boyer Company L.C., the Gardner Group, and rPlus Energies," and his reference to Mr. Gardner's 9% ownership in two California radio stations in 1985 fail for the same reason. Mot. at 2 n.2. Plaintiff also raised those arguments in his Opposition to the Motion to Quash, meaning they also are not "new facts" sufficient to justify reconsideration. *See id.* at 4

Third, Plaintiff also did not meet his burden of showing he was entitled to jurisdictional discovery, which required him 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). Here, Plaintiff's only offering on this issue was two deposition notices. Opp. at 9-10; Order at 10. The Court also properly found that was insufficient.

Because Plaintiff's Motion does not identify any actual "errors" in this Court's ruling on the Motion to Quash, even if an "error" was proper grounds for reconsideration—which it is not—he would not have satisfied his burden.

II. CONCLUSION

For the reasons set forth above, Mr. Gardner respectfully requests that the Court deny Plaintiff's Motion for Reconsideration without further briefing and take the pending hearing off calendar.

DATED: March 13, 2024.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
SARAH E. BURNS

By: _____
Thomas R. Burke

Attorneys for Specially-Appearing Defendant
Kem C. Gardner

n.5, Declaration of Mark Christopher Tracy In Support Of Opposition To Defendant Kem Crosby Gardner's Motion To Quash ¶ 5 & Ex. B. *See also In re Marriage of Herr*, 174 Cal. App. 4th at 1468 (information the party was aware of "at the time of the original ruling are not 'new or different'" for reconsideration). In any event, even if Plaintiff were correct about any of that, none of Plaintiff's claims arise out of those purported "contacts" so they are irrelevant.

DAVIS WRIGHT TREMAINE LLP

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 50 California Street, 23rd Floor, San Francisco, California 94111.

I caused to be served a copy of the following documents:

SPECIALLY APPEARING DEFENDANT KEM C. GARDNER'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

On March 13, 2024, I caused the above documents to be served on each of the persons listed below by the following means:

☑ BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from email address ayshalewis@dwt.com to the person(s) at the e-mail address listed below. I did not receive, within reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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Attorneys for Defendant Paul Brown

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 13, 2024, at San Francisco, California.

Aysha D. Lewis

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In propria persona

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

MARK CHRISTOPHER TRACY, an individual, Plaintiff, v. COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; ERIC HAWKES, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM CROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL HANDY BROWN, an individual; GARY A. BOWEN, an individual Defendants.	Case No.: 23CV423435 Honorable Evette D. Pennypacker [Dept. 6] **MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF OPPOSITION TO DEFENDANT PAUL HANDY BROWN'S MOTION FOR VEXATIOUS LITIGANT ORDER** Hearing Date: April 9, 2024 Time: 09:00 am (PDT) Action Filed: September 21, 2023 Trial Date: TBD

INTRODUCTION

In propria persona Plaintiff Mark Christopher Tracy ("Mr. Tracy" and "Plaintiff") respectfully submits this memorandum and points of authority in support of his opposition to Defendant Paul Handy Brown's motion for this Court to declare Plaintiff a vexatious litigant pursuant to Code of Civ. P. § 391(b)(2), and/or subsections (3), and/or subsection (4)("Defendant Brown" and "Brown Memo).

As a party to this action, now having entered general appearance,[1] Defendant Brown argues that the court should exercise its discretionary authority because the present action is "substantially similar" to the federal False Claims Act litigation prepared for argument before the United States Supreme Court ("FCA Litigation"), and in separate legal action pursuant to the Utah Government Records Access and Management Act, Utah state court judge Mark A. Kouris declared Mr. Tracy to be a vexatious litigant for having requested access to public records evidencing lead contamination of drinking water,[2] and groundwater depletion,[3] as mandated under the federal Safe Drinking Water Act of 1974, and in the sole custody of codefendants Simplifi, Eric and Jennifer Hawkes ("GRAMA Litigation").

These arguments fail.

As Defendant Brown was not a defendant in any state or federal litigation commenced by Mr. Tracy to date, and at no time did Plaintiff file an unmeritorious legal action or file a motion for an improper purpose, [4] the requirements of subsections (2) and (3) are insufficient for the Court to grant Defendant Brown's Motion.

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[1] Although Defendant Brown submitted the instant motion via "special appearance," any request for the court to exercise jurisdiction other than dismissing the action for lack of personal jurisdiction constitutes general appearance. *Slaybaugh v. Superior Court* (1977) 70 Cal. App.3d 217, 222.

[2] *See* Brian Maffly, *Lead Shows Up in Emigration Canyon Drinking Water*, Salt Lake Tribune, November 8, 2019 available at the website administered by the Newspaper Agency Corporation at https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/ last visited on March 25, 2024.

[3] Brian Maffly, *Why is Emigration Creek — a historic Utah waterway — dry? Blame runs from climate change to drought to development to water-sucking wells*, Salt Lake Tribune, September 8, 2018, available at the website administered by the Newspaper Agency Corporation https://www.sltrib.com/news/environment/2018/09/08/why-is-emigration-creek/; *see also* Amy Joi O'Donoghue, *Emigration Canyon and Groundwater Pumping in Utah: What's at Risk?* Desert News, January 2, 2019, available at the website administered by the Desert News Publishing Company at https://www.deseret.com/2019/1/2/20662500/emigration-canyon-and-groundwater-pumping-in-utah-what-s-at-risk/; *see also* Amy Joi O'Donoghue, *District's water diversion will continue in Emigration Canyon*, January 18, 2019, available at the website administered by Bonneville International Corporation https://www.deseret.com/2019/1/18/20663650/district-s-water-diversion-will-continue-in-utah-s-emigration-canyon/; *see also* compilation of media reports by CNN, High Country News, The Washington Post, and Business Insider available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=405, last edited on September 13, 2023 at 12:32 AM.

[4] Contrary to Defendant Brown's recitals, no state or federal litigation commenced by Mr. Tracy against the Defendants was determined on the merits of the allegations. Brown Memo. p. 13.

Moreover, the present action addresses solely the recovery of economic damage and loss suffered for the reputational harm caused by Defendants' false and defamatory statements and is thus no way "substantially similar" to any previous legal action under the requirements of Code of Civ. P. § 391(b) subsection (4).

ARGUMENT

The court exercises its discretion in determining whether a person is a vexatious litigant, and an order will be upheld upon appellate review if supported by substantial evidence. *Holcomb v. US Bank Nat. Ass'n* (2005) 29 Cal.Rptr.3d 578, 580.

Moreover, it is long recognized, that frequent appearance as a plaintiff or defendant in state and federal proceedings is itself immaterial and a person may only be declared a vexatious litigant if court determines that she or he comes within the specific requirements enumerated in Code Civ. P. § 391 (b) subsections (1) - (5). *Roston v. Edwards* (1982) 127 Cal.App.3d 842, 847.

I. A First-Time Defendant May Not Claim Relief Per Subsection 2

Defendant Brown argues that it is immaterial he was not a party to action in any case commenced by Mr. Tracy, because the statute "does not require a connection between previous relitigating attempts" because the "purpose is to curtail future harm from litigants who have a past" per the purported rulings of *Goodrich* and *Holcom*. Brown Memo. at 11-12.

This interpretation is however neither supported by the express wording of the statute nor the case law cited by Defendant Brown.

Code of Civil P. § 391 (b)(2) requires that a vexatious litigant "repeatedly relitgates or attempts to relitigate […] the validity of the determination *against the same defendant* […] or […] any of the issues of fact or law, […] *against the same defendant* […] as to whom the litigation was finally determined (emphasis added).

Moreover, in *Goodrich*, the same plaintiff argued the same issues in three motions against the same defendant relating to the same judgment and in *Holcomb* under the statutory requirements of "repeatedly," the court denied relief for only two prior relitigation attempts against the same defendant *Goodrich v. Sierra Vista Regional Medical Center* (2016) 246 Cal.App.4th 1260, 1267; *Holcomb* (2005) 29 Cal.Rptr.3d 578, 584.

As a first-time adversarial party to the plaintiff, Defendant Brown may claim no relief under Subsection (2).

II. The Federal Civil Rights Lawsuit was Not Ruled "Meritless" Per Subsection 3

Code of Civil P. § 391 (b)(2) requires that a vexatious litigant "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."

Defendant Brown argues that Mr. Tracy has shown a "past pattern and practice of meritless pleadings" and thus his "true intent" is "to relitigate alleged Utah water right issues" under the purported standards of *Goodrich*, 246 Cal.App.4th 1260, 1267 and *Holcomb*, 29 Cal.Rptr.3d 578. Brown Memo. p. 14.

In support of this legal argument, Defendant Brown cites federal Civil Rights Litigation. Brown Memo. p.12. However, like the court noted in *Holcomb*, it is impossible to discern what particular motion or pleading was completely meritless or made for any improper purpose. *Holcomb*, 29 Cal.Rptr.3d 578, 586. Moreover, unlike the decision in *Holcomb*, Chief District Court Judge Robert J. Shelby expressly ruled that the codefendants had not "demonstrated that the claims […] were 'entirely meritless' or the facts asserted had no basis" and Utah Magistrate Judge Cicila R. Romero had likewise expressly denied the codefendants' request to declare Mr. Tracy a vexatious litigant in the federal district court for the district of Utah. Request for Judicial Notice, ¶ 9, Exhibit G.

With no evidence that the Civil Rights Lawsuit was completely meritless or that any motion or pleading was made for an improper purpose by Mr. Tracy, Defendant Brown can claim no relief under Subsection (3).

III. Claims for Monetary Damages Are Not "Substantially Similar" Per Subsection 4

Code of Civil P. § 391 (b)(4) lastly defines a vexatious litigant, inter alia, as "a person who ... [...] [h]as 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*" (emphasis added).

Although not specifically defined by the statute, Black's Law Dictionary defines "substantially" in part as "[e]ssentially [...] in the main [...] materially; in a substantial manner," while "similar" is

described in part as "having a general likeness, although allowing for some degree of difference." ((Black's Law Dict. (5th ed. 1979) at p. 1240.)

Subdivision (b)(4) is only therefore satisfied, when the proceeding in which the party was declared a vexatious litigant, and the proceeding in which he or she is sought to be declared a vexatious litigant in reliance on the earlier proceeding, arise from essentially the same facts, transaction or occurrence as determined "by examination of the factual circumstances that underlie the two proceedings and the pleadings." *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1581.

Apart from the fact that Utah state judge Mark S. Kouris issued the Amended Judgement during appellate review of Mr. Tracy's denied request to access state records in the sole possession of codefendants Simplifi, Eric and Jennifer Hawkes and is thus null and void for want of jurisdiction,[5] (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725-6), the pleadings of the present case are neither related to receipt and misuse of federally-backed funds, nor the coefendants' refusal to disclose public records evidencing drinking water contamination and groundwater depletion.

Indeed, as noted in Defendants' own words, they could no longer remain silent, and freely decided to commence a public smear campaign discrediting the merits of FCA Litigation despite the positive knowledge that the allegations were in fact true.[6] These false and defamatory statements were published in order to prevent Mr. Tracy from obtaining financing necessary for the United States Supreme Court to review the circuit split created by former Utah State Supreme Court Judge Jill N. Parish and Tenth Circuit Court of Appeals following the cursory repudiation of the Federal Court of Claims ruling in *Jena* v. *United States*. Request for Judicial Notice, ¶¶ 1, 2, Exhibits A and B.

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[5] Request for Judicial Notice, ¶¶ 3-8, Exhibits C, D, E and F. *See also*, Brian Maffly, '*We Don't Need Your Water': Emigration Canyon Water Fight Breaks Out In Court*, Salt Lake Tribune, June 18, 2015, at A1, available at the website administered by the Newspaper Agency Corporation https://archive.sltrib.com/article.php?id=2618507&itype=CMSID, last visited on March 25, 2024; and Emma Penrod, *Paranoia and a 'Preposterously' Oversized Water Tank*, High County News, June 28, 2019, available at the website administered by High Country News https://www.hcn.org/issues/51.12/water-paranoia-and-a-preposterously-oversized-water-tank-in-utah.

[6] Declaration of Mark Christopher Tracy, ¶¶ 2-6, Exhibits A, B, C, D, and E.

As claims for monetary damages resulting from false and defamatory statements are unique and distinct from previous state and federal litigation, Defendant Brown can claim no relief under Subsection 4.

CONCLUSION

Based on the foregoing reasons, Mr. Tracy respectfully requests that the Court deny Defendant Brown's Motion in its entirety.

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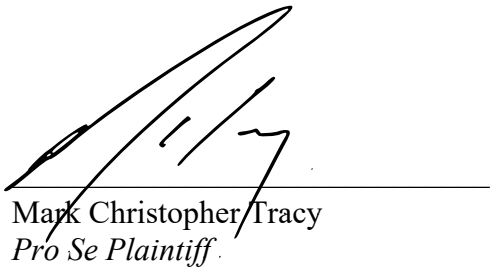
DATED: March 26, 2024

By: 

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Pro Se Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; ERIC HAWKES, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM CROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL HANDY BROWN, an individual; GARY A. BOWEN, an individual

Defendants.

Case No.: 23CV423435

Honorable Evette D. Pennypacker
[Dept. 6]

DECLARATION OF MARK CHRISTOPHER TRACY IN SUPPORT OF OPPOSITION TO PAUL HANDY BROWN'S MOTION FOR VEXATIOUS LITIGANT ORDER

Hearing Date: April 9, 2024
Time: 09:00 am (PDT)

Action Filed: September 21, 2023
Trial Date: TBD

I, Mark Christopher Tracy, declare as follows:

1. I am 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 information and belief, all of which is true and correct of my own personal knowledge, and if called to testify, I would competently testify thereto;

2. Attached as **Exhibit A** is a true and correct copy of a letter entitled "Emigration Improvement District vs. Mark Tracy's Allegations" signed by codefendants Eric Hawkes, Michael Scott Hughes, and David Bradford dated September 21, 2015 and transmitted via United State Postal Service per permit no. 571.
3. Attached as **Exhibit B** is a true and correct copy of a community letter transmitted via United States postal service by codefendants David Bradford and Michael Scott Hughes dated October 6, 2015;
4. Attached as **Exhibit C** is a true and correct copy of the Meeting Minutes of the Board of the Emigration Oaks Property Owners Association ("EOPOA") dated June 16, 2015, and presided over by Defendant and EOPOA President Paul Handy Brown;
5. Attached as **Exhibit D** is a true and correct copy of the community correspondence transmitted electronically by Defendant and EOPOA President Paul Handy Brown dated December 15, 2018 at 4:02:19 PM MST;
6. Attached as **Exhibit E** is a true and correct copy of an electronic correspondence transmitted from codefendant Jeremy Rand Cook dated January 21, 2023 at 5:42 PM.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This Declaration was executed on this 26th day of March 2024, in Del Mar, California.

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Mark Christopher Tracy

EXHIBIT A

Emigration Improvement District (EID) vs. Mark C. Tracy's Allegations

September 21, 2015

To Emigration Canyon residents:

The Emigration Improvement District (EID) has received numerous inquiries from Canyon residents regarding the lawsuit filed by Mark Christopher Tracy against the District and various individuals associated with EID. Like us, you may have first read about the allegations in an article by Brian Maffly that was published in the Salt Lake Tribune titled "We Don't Need Your Water."

The District has not previously issued a formal response to the allegations in the lawsuit, and some residents have construed EID's silence regarding the allegations as an admission of guilt. Quite the opposite is true. EID is extremely confident that the allegations in the lawsuit are completely meritless and that EID will prevail in the lawsuit. However, EID is a public entity that is paid for by you and other residents in the Canyon, and the primary concern of EID's board of trustees is to protect your assets and minimize the financial impact of the lawsuit on the District. Therefore, EID has reluctantly refrained from formally responding to the allegations in order to minimize Mr. Tracy's opportunities to use EID's response to delay resolution of the lawsuit, thereby increasing the cost of litigation. The lawsuit has now progressed to the point that EID's silence is no longer a strategic advantage, and EID would like to set the record straight.

The lawsuit was filed under a federal law called the False Claims Act, which allows an individual to sue on behalf of the federal government to recover money that was fraudulently obtained from the federal government. If successful, the person bringing the lawsuit is entitled to a portion of any recovery and the remainder is paid to the federal government. Thus, the lawsuit was not brought by the federal government, and the federal government has denied the opportunity to intervene in the lawsuit to date.

Although it is difficult to make sense of Mr. Tracy's allegations, Mr. Tracy's primary theory appears to be that in or about 2001, EID, together with EID's current and former trustees and managers, and multiple professional consultants and engineering firms, conspired with Steve Creamer, Larry, Siv and Charles Gillmor, and David Nuescheler to defraud the federal government as part of a loan from the Utah Division of Drinking (which utilized federally-backed grant money) by overbuilding EID's water system to enable large scale development in the Canyon. Mr. Tracy alleges that the scheme has increased the commercial value of property owned by EID (which is of course owned by all residents in the Canyon since EID is a public entity), Mr. Creamer, the Gillmors and Mr. Nuescheler in excess of **$500,000,000.00**. Although the District is certainly proud of the District's public water system and the District thinks that all property owners in the Canyon benefit from a reliable public water system and robust fire protection in the Canyon, the assertion that property owned by those individuals has increase in value by half a billion dollars is obviously absurd. Moreover, if the District's 2002 loan was just an elaborate scheme to enable large scale development in Emigration Canyon, it was the most poorly executed scheme in history. Apart from the Emigration Place (which uses Salt Lake City water), no significant new developments have been constructed in the Canyon in the last 13 years, and EID has not received any requests for water service for future large scale developments. In fact, the opposite is true. Unlike Mr. Tracy, who is not a long time Canyon resident, EID's trustees and the other parties that are accused of this scheme have been in support of and instrumental in efforts to preserve open space and limit development in the canyon for years.

Mr. Tracy also alleges that on January 3, 2001, the Utah Division of Drinking Water (DDW) issued a commitment of funds letter that required EID to comply with the Clean Water Act as part of the $1,400,000 loan EID obtained from DDW to fund the drilling of the Brigham Fork well and construction of EID's one million gallon storage tank. Tracy alleges that EID violated the Clean Water Act, and therefore EID is liable to the federal government for damages caused by EID's breach of the bond requirements. EID did not violate the Clean Water Act. In fact, EID recently obtained a $60,000 grant from the Utah Division of Water Quality (which is responsible for enforcing the Clean Water Act in Utah), to conduct a pilot program to address possible contamination in Emigration Creek.

Likewise, although the inaccuracies in the lawsuit would take pages to fully rebut, the following are a few examples of the many clear inaccurate facts. Mr. Tracy claims that EID has borrowed $6,306,000 of federally-backed funds. In fact, of the three loans EID has obtained since 2002, only one involved federal funds. The other two loans were through the Utah Division of Water Resources and did not involve any federal funds. Mr. Tracy alleges EID purchased an easement from Salt Lake City for $14,500 to build a one million gallon storage tank, but EID never recorded the easement and instead built a two million gallon storage tank on property owned by Steve Creamer. The storage tank is in fact one million gallons, and was built on the easement purchased from SLC, which easement is recorded as Entry No. 7994211. Mr. Tracy alleges EID obtained its primary water right in 1988 from the Emigration Dam and Ditch Company. EID actually obtained the water rights in 1975 from the Utah Department of Transportation. Mr. Tracy alleges that no hydrological data or study supported the placement of EID's new Upper Freeze Creek Well, which was drilled in 2014. In fact, EID has spent years studying the geology in the Canyon to determine the best possible location for future wells, and to date, the Upper Freeze Creek Well has performed far better than anyone could have imagined. Thus, although it is unclear where Mr. Tracy is obtaining his information, it is clear that the information is simply not accurate.

We offer one more as further evidence of the lack of seriousness it conveys. Mr. Tracy alleges the District installed an 8-inch supply line to the Skycrest Community in order to provide water to potentially 17 homes with four fire hydrants placed within 2 and 20 feet of Spring Glen Water Company fire hydrants. Mr. Tracy claims the 8" supply line far exceeds the capacity needed for 17 homes, and it was installed for the future development of a large 130 acre parcel located at the top of Skycrest Lane. The District did install an 8" water line to the Skycrest Community, partly to service current and future subscribers and partly to provide adequate fire flow. An 8" water line is necessary to meet the current fire flow code requirements (1500 gallons per minute for two hours at 20 psi). Recognizing that the Spring Glen system was insufficient to meet code (a 60,000 gallon tank with a recharge of 35 gpm), the Trustees decided to place EID fire hydrants there. As for the Gilmore property, you should know that Bob and Franci not only have no plans to develop their 42.5 acres (not 130 acres, as Mr. Tracy alleges), they have discussed establishing a conservatorship to preclude its future development. All these facts could have been easily verified, but obviously were not.

Finally, some of you may have heard that EID has budgeted $40,000 to defend EID's current and former trustees who were individually named in the lawsuit. This is not true. In order to defend the District in the lawsuit, EID recently increased the 2015 budget for attorney's fees from $15,000 to $55,000. Obviously, due to EID's limited budget, EID would have definitely preferred to utilize this money for improvements in EID's system to benefit residents. Like all public employees, EID is required by Utah law to defend the trustees against any claims for actions brought against them in their official capacity. However, to date, EID has not filed any additional motions or taken any additional action to defend the trustees that EID would not have taken to defend EID and EID's assets.

In summary, Mr. Tracy, and any other individuals that funded or supported the lawsuit, brought the action against EID for their own political and financial gain at significant expense to the taxpayers in Emigration Canyon. Accordingly, we hope all residents will take the time to review the allegations and assist EID in its continued efforts to dispose of the lawsuit without EID being required to spend even more of your money. For more details regarding the lawsuit, EID activities, meetings, questions, and documentation, please visit EID's website (www.ECID.org) or contact the District Manager or any of the Trustees.

Sincerely,

Eric Hawkes - MGR
(p) 801-243-5741, eric@ecid.org

Michael Hughes - Chair
(p) 801-651-3201, mike@ecid.org

Mark Stevens - Co-Chair
(p) 801-971-3360, mark@ecid.org

David Bradford, Clerk
(p) 801-556-5013, dave@ecid.org

Emigration Improvement District
PO Box 58945
Salt Lake City, UT 84158

Presorted Standard
U.S. Postage
PAID
Salt Lake City, UT
Permit #571

RA0005

Current Resident
1278 N Pinecrest Canyon Rd
Salt Lake City UT 84108-1797

EXHIBIT B

6 Oct 2015

Dear Emigration Canyon resident:

You may have recently received a letter from Mark Tracy. In it, he alleges past misbehavior on the part of several of us who have been managing the Emigration Canyon water district. We're struck by the malign influence Mr. Tracy has brought into Canyon affairs. We also note that he is so bankrupt of ideas (other than turning the affairs of the Canyon upside down) that he has resorted to these scurrilous accusations and an irresponsible, baseless lawsuit in order to achieve his ends. This is particularly interesting because Mr. Tracy apparently does not live in the Canyon. We can only assume he is desperate to do what he can to ensure that Jamie White and Trevor Irons are elected EID trustees. White and Irons have indicated that one of the first things they will do if elected is settle the lawsuit Mr. Tracy filed against the District. That is the only way Mr. Tracy could be rewarded for his inept efforts at self-aggrandizement, as the current EID board will aggressively defend the District and your assets and is confident the District will win. If White's complicity in the Tracy lawsuit is not clear, in spite of his and Iron's association with the ECHO group, it is worth noting that White's attorney (John P. Mertens, PIA Anderson Dorius Reynolds & Moss) was one of the attorneys involved in the original filing of the Tracy lawsuit.

None of the charges Tracy levels in his letter is true. What follows is a summary of his allegations and our response.

1. Accusation: *Don Barnett, the District hydrologist, did not object to Tracy's question about adding 5,000 new homes in the Canyon.* Our response: Don is the author of the original study indicating that Canyon water resources could support about 700 residences, a number Tracy's own hydrologist confirmed. The idea that Barnett would support a huge increase in homes in the Canyon is absurd.

2. Accusation: *There are problems with the District's water rights that prevent EID from issuing water letters for new building permits and jeopardize our ability to provide water to residents.* Our response: Mr. Barnett is also our water rights expert, and has carefully managed those very senior rights. The District's ability to provide water to residents in the Canyon is not in jeopardy. Our attorney has filed a response to Tracy's legal action against your water rights and is confident Tracy's action will be dismissed.

3. Accusation: *EID trustees inappropriately and without notice increased property taxes in the Canyon, and raised their trustee fee to $416.16 per hour.* Our response: All actions the Board takes are properly noticed, including (especially) the certification of the tax rate last June. There was no increase in the amount of tax the District received. The State legislature authorized a small increase in the tax *rate* to offset the decline in assessed valuation of properties in the Canyon and elsewhere in the state, and that was the rate that was properly adopted. Trustees receive a small stipend for their service that amounts to $5,000/year, or $416.16 per month (not per hour, as Tracy stated) as permitted by State law, something Tracy and his associates should know. The fact that they don't is further evidence of their shoddy research, inexperience, and lack of common sense.

4. Accusation: *Fred Smolka, as president of Home Savings and Loan, was found guilty of multiple securities violations and defrauded 71 homeowners, and therefore is unfit to serve as EID treasurer.*

Our response: Although the case during the savings and loan disaster of 30 years ago was complicated, one fact is not—Mr. Smolka was never even charged for any mishandling of the affairs of Home Savings and therefore was not found guilty of any wrongdoing. Mr. Smolka was a victim, along with many others, of the savings and loan meltdown. Fred is honest and meticulous in all he does and enjoys the full support of the Board. This misrepresentation of history is typical of the lengths to which Tracy and his ECHO associates will go to besmirch honorable men carrying out public service.

5. Accusation: *While working as a securities broker, Mike Hughes was found guilty of theft of client funds, improper trading, and obstruction of a securities investigation.* Our response: This is another of Tracy's despicable efforts to misrepresent the facts of this 20-year-old case for his own ends. There was a customer complaint against Mr. Hughes that was reviewed by a five-member arbitration panel. That panel determined that the arguments and allegations were without merit and that the plaintiffs never proved any violation of the Rules of Fair Practice. Mr. Hughes was fully exonerated and went on to become an expert witness for the National Association of Securities Dealers as well as the SEC in Washington DC. This is certainly not the story Mr. Tracy wants to tell but the truth has never prevented him from making wild claims.

6. Accusation: *Fred Smolka waived water right lease and impact fees (totaling $11,500) for EID trustee David Bradford during Bradford's construction of his home in the Canyon.* Our response: Where to begin? (1) Bradford was not a trustee when he built his home; (2) he paid the full $6000 for a water right lease during construction; (3) he paid all of the customary charges to connect to the system, purchased a water meter, and connected the meter to his home; (4) he has been paying for the impact fee over time at the full rate. Neither he nor any other trustee receives any special treatment by EID for their service to the community.

7. Accusation: *Since Feb 2014, over 12 criminal complaints have been filed against the current EID trustees, District manager Eric Hawkes, and Fred Smolka.* Our response: Anyone can file a complaint, and the Auditor's office keeps them all sealed until they are investigated. This is clearly part of a long-term strategy by Tracy and his ECHO associates to try to influence the election. Since the trustees and their associates have done nothing wrong, nothing will come of the Auditor's office investigation. You decide whether these accusations are even remotely credible.

Finally, Tracy and his ECHO organization (which appears to number about 40 Canyon residents) intends to bring legal action to dissolve Emigration Canyon Township. We suspect that White and Irons have a similarly disruptive plan in mind for the EID, if they are elected. We think the township model has served the community well and are looking forward to the chance to vote for the Metro Township model, which we fully support. Which side of these issues do you come down on? We hope you take the time to mail in your ballot, and ask for your support to defeat the efforts to disrupt the community and the water system.

Sincerely,

Mike Hughes and Dave Bradford


David Bradford - EID Trustee
130 S Skycrest Lane
Salt Lake City, UT 84108
SALT LAKE CITY UT 840
06 OCT 2015 PM 3 L
FOREVER
Karen Penske
1278 N Pinecrest Canyon Rd
Salt Lake City, UT 84108
84108179778

EXHIBIT C

Date of Meeting:	06.16.15 **Time:** 6:30 p.m. – 8:00 p.m.
Meeting Location:	Fire Station #119, 5025 East Emigration Canyon Road, SLC, UT 84108
Attendees:	Doug Braun, Paul Brown, Jack Christensen, Kathy Christensen, Frank Fisher, Naomi Keller, Mike McHugh, Jason Stucki, Brian Usher
Absent:	Chris Arthur

Call to Order

- Paul Brown, President, called the meeting to order at 6:30 p.m. at the Emigration Fire Station.

Roll Call

- A quorum was present with the following trustees in attendance:
  - Officers Present: Paul Brown, President; Mike McHugh, Vice President; Naomi Keller, Secretary/Treasurer.
  - Board Members Present: Doug Braun, Kathy Christensen, Frank Fisher, Mike McHugh, Jason Stucki, Brian Usher.
  - Manager: Jack Christensen.
  - Absent: Chris Arthur.

Special Agenda Items

- County boundaries vote on ballot November 2015.
  - Paul and Frank attended the County public hearing.
    - No boundary changes proposed for Emigration Canyon Township.
    - Emigration Canyon residents will be given the option of:
      a. Remaining as the existing township (no change), or
      b. Incorporating into a city (if they select this option, then they will need to decide which services will change).
  - Next public hearing on 06.30.15. Naomi to notify EOPOA residents via email.

Approval of Minutes

- Frank motioned to approve the 05.19.15 Board Meeting Minutes. Unanimously approved.

Discussion

Financial and Manager Reports

- Financial Report:
  - Naomi motioned to approve FYTD finance report and post on EOPOA website. Unanimously approved.
- Manager Report:
  - Naomi motioned to approve the Consent Agenda items. Unanimously approved.

Property Owner Items and Follow Up from Earlier Meetings

- **Lot 161**: No response from owner/attorney. Board unanimously agreed to reinstate fees retroactively and pursue lien proceedings (per Jack, fines are $5,895 to date; Jack mailed a statement directly, not through Curtis). Curtis to provide board with formal opinion/summary of case (recap of communications, fees, hearing, etc.; definitive timing for next steps); requested by 07.15.15.

Committee Reports

- Committee assignments:
  - Roads/Snow Removal: **Mike McHugh**
  - CC&Rs: **Frank Fisher**, Doug Braun
    - Weeds subcommittee: **Paul Brown**
  - Architectural Review Committee (ARC): **Jason Stucki**, Jack Christensen, Brent Tippets (Brian Usher if needed)
  - Safety/Security: **Kathy Christensen**, Brian Usher (Jason Stucki if needed)
  - Welcome: **Chris Arthur**
- Roads/Snow Removal (**Mike**, Jack)
  - Discussed road repair plans, crib wall bids; new issue with keystone wall at top entrance (owner near keystone wall concerned about his boulder wall – common property or private?).

- Mike will chase down estimates, timelines from Roger; ready to present plan at July meeting (Naomi to update owners via email since we previously told them road overlays would happen this summer).

- CC&Rs (**Frank**, Doug):
  - Curtis provided the "bare bones" CC&Rs update (removing Boyer/water rights/expansion verbiage, updating for current laws). Board members reviewed.
    - Agreed to send document out to owners for review. Will highlight a section for review (first section for review/input: Section VII Use and Building Restrictions); 21-day open comment period (written comments due by 07.10.15).
  - Weeds subcommittee to help owners identify noxious weeds, manage/eradicate them.
    - Naomi will look for previous materials sent out by Cricket/Whitney. Update and re-send to owners.
  - Kathy volunteered to contact owners with trees that do not comply with the "minimum overhang of 13.5' over paved roads" county guideline. Need to document when owner was notified of compliance (for CC&R follow up).
- ARC (**Jason**, Jack, Brent)
  - Lot 167: owners have resubmitted revised plans for ARC review; will send construction deposit (no ARC review fee to be assessed).
- Safety/Security (**Kathy**, Brian):
  - Roads will be closed to non-owners/guests for the 4th of July weekend and the 24th of July weekend.
    - Naomi will include reminder in email report to owners.
    - Jack to provide specific instructions (including vehicle sticker applications) to security company/officers.
  - Jason offered to liaise with UFA to have them write an evacuation plan/protocol for EOPOA.
- Welcome (**Chris**):
  - Two new owners in June (Lot 171, Phyllis Allen; Lot 406, Ken Gow).
  - Chris to provide an update on owners contacted.
- Website (**Jack**):
  - N/A.
- EOPOA Resident Survey:
  - Need a board member to coordinate issuing a resident survey to gauge interest in gates and speed bumps (and any other issues). Naomi to issue survey online via SurveyMonkey.com.

Unfinished Business

- Easement for Creamer: Paul to review and mark up document (e.g., no subdividing), circulate to board.

New Business (to be discussed at next Board Meeting)

- Annual summer party: Saturday, 09.12.15. Naomi to distribute planner detailing volunteer assignments/needs. Naomi will coordinate sending out the evite.
- Need to review Association Manager's annual contract.

Community News from ECCC, EID and/or Township Meetings

- See Manager's Report.

Adjournment

- Naomi motioned to adjourn the meeting at 8:00 p.m.; unanimously approved.

Date of Next Meeting:	07.18.15	**Time:**	6:30 p.m. – 8:00 p.m.
Meeting Location:	Fire Station #119, 5025 East Emigration Canyon Road, SLC, UT 84108		
Notes Prepared By:	Naomi Keller	**Date Issued:**	06.30.15

EXHIBIT D

EMAIL ECCC CO-CHAIRMAN PAUL BROWN:

From: "Emigration Oaks Property Owners Association" <Messenger@AssociationVoice.com>
Date: December 15, 2018 at 4:02:19 PM MST
To: XXXXXXXXXX
Subject: EID water matters
Reply-To: "Paul Brown" <paul.h.brown@verizon.net>

I recently received a letter from ECHO, the self-styled Emigration Canyon Home Owners association, dated 3 December, and addressed “Dear Emigration Canyon Home/Property Owner.” Among other things, the letter solicited a membership fee of $85,000 in order to share any attorney fees awarded in a lawsuit between Mark Tracy and the Emigration Improvement District (EID). Perhaps you received the same letter.

I will not be paying such a membership fee, and I don't advise others to do so, either.

As you may recall, in September 2014, Mark Tracy filed a ”qui tam” suit against EID (and others), alleging that the EID water system was built with funds fraudulently obtained from the US government. In a qui tam suit, if successful, the person filing retains part of the amount awarded, plus other benefits. The remainder goes to the government. The case has not been resolved.

In 2015, two candidates allied with ECHO were defeated in the EID board election. Had the election gone differently, the two would have constituted a board majority and could have settled the suit - resulting in payments to Mr. Tracy and those supporting his suit.

Earlier this year, EID filed an application with the Utah state engineer to change the locations of some of its water diversions. ECHO objected, as did several residents of Emigration Canyon. The application and objections are subject to a hearing next Wednesday, December 19.

EID's defenses of these legal matters have been paid from fees and taxes collected from canyon residents and water users. Any payments, should the suit be successful, will come from the same sources.

In my opinion, these maneuvers only hurt me, and people like me, who use EID water. A win for ECHO and Mr. Tracy has the potential of shutting down our only water supply. There is no “upside.” If you are among those supporting or encouraging these actions, please stop.

EXHIBIT E

From: **Jeremy Cook** JCOOK@ck.law
Subject: RE: Per Se and False Light Defamation - Settlement Agreement (Tracy v. Jeremy R. Cook, Emigration Improvement District and Simplifi Company)
Date: January 21, 2023 at 5:42 PM
To: The ECHO-Association m.tracy@echo-association.com
Cc: John Reeves reeves@appealsfirm.com

Mr. Tracy,

As you are aware, yesterday I filed a motion for you to appear for another debtor examination in Utah Third District Court based on a judgment obtained against you by my clients for attorney fees in a Governmental Records Access and Management Act (GRAMA) case you filed. This is a separate judgment from the over $92,000 judgment that Judge Parrish awarded against you in the FCA matter based on Judge Parrish's finding that the lawsuit was vexatious and harassing. The state court judgment was obtained in the same case in which Judge Kouris, who is the presiding judge of Utah's Third District Court, found you to be a vexatious litigant and entered an order prohibiting you from filing any future lawsuits in Utah courts without the permission of the presiding judge of the Third District Court. At this point, as you have already filed a bar complaint against me and a federal court action against me, both of which were summarily dismissed, I highly doubt Judge Kouris is going to allow you to file a defamation lawsuit against me without filing a huge bond to pay my attorney fees and costs when you ultimately lose, as you have in the other six cases you filed against me or my clients. I anticipate that Judge Kouris will also require you to pay the attorney fees due and owing to my clients before he allows you to file another case against me.

Based on the Fee Agreement between you and Mr. Reeves' firm, you were supposed to pay Mr. Reeves $50,000 by January 20, 2023. As you have indicated in a past debtor exam that you have no assets to pay the over $100,000 of judgments for attorney fees that have been awarded against you to my clients, assuming you made the payment, I am certainly interested to question you regarding where you obtained the funds to pay Mr. Reeves $50,000. On the other hand, since you are asking me to pay $75,000 to Mr. Reeves, I have to assume that means you have not actually paid Mr. Reeves any money for his work. I guess I will find out if Judge Kouris grants my motion for a debtor exam, which I am confident he will grant.

In summary, I respectfully decline your ridiculous offer to settle yet another meritless claim. Also, although I don't anticipate you will not ever make the payment, I look forward to you paying the $2,500 deposit to EID for the GRAMA request since I anticipate that Judge Parrish will find that an unearned deposit is subject to a writ of execution.

Thanks,
Jeremy

Cohne | Kinghorn

Jeremy R. Cook
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Phone: 801.363.4300 (after hours ext. 133) | Cell: 801.580.8759
jcook@ck.law

From: The ECHO-Association <m.tracy@echo-association.com>
Sent: Saturday, January 21, 2023 2:15 PM
To: Jeremy Cook <jcook@ck.law>
Cc: John Reeves <reeves@appealsfirm.com>
Subject: Per Se and False Light Defamation - Settlement Agreement (Tracy v. Jeremy R. Cook, Emigration Improvement District and Simplifi Company)

Mr. Cook,
On January 19, 2023, during the public hearing before the Utah State Records Committee ("***SRC***") concerning the denied request for access to government records created by your law firm Cohne Kinghorn P.C., and submitted to Emigration Improvement District ("***EID***" aka Emigration Canyon Improvement District aka ECID) for payment of taxpayer funds under the Utah Government Records and Management Act, you made false and slanderous statements accusing San Diego, California resident Mark Christopher Tracy ("***Mr. Tracy***") of "hiding assets" and therewith giving false testimony under oath during an official Utah State court proceedings on July 7, 2021--a second-degree felony under Utah Code Ann. 76-8-502 (*see* SRC audio recording *Tracy v. Emigration Improvement District*, Case No. 2022-162 (part 1), at 28:05, link attached below)("***SRC Audio Recording***").
Your testimony appears to have been intended to shame and discredit Mr. Tracy as well as to induce the SRC to reverse its order requiring your client to produce legal invoices for in-camera review without renumeration (*see* SRC order dated June 29, 2022 available at https://echo-association.com/?page_id=8974), and thereby prevent disclosure of meetings between EID managers and private land-developers Walter J. Plumb III and R. Steve Creamer as documented by your law firm, and thus hinder discovery of evidence of a possible unlawful agreement to defraud the Government (*see* https://echo-association.com/?page_id=10489; and https://echo-association.com/?page_id=4648; *see also* Application for Extension of Time at 3, *US ex rel. Tracy v. Emigration Improvement District et al.*, No. 22A636 (S.Ct. January 13, 2023)) (*see also* your apparent admission regarding misuse of EID public funds for the private legal expense of Simplify Company (*see* SRC Audio Recording (part 1), at 30:20).
Based upon your false and slanderous statements, the SRC reversed its order and granted your client's demand for pre-payment of **$2,500.00** prior to locating government records "stored in boxes" by public records officer Eric Hawkes of the Simplifi Company at an undisclosed location (*see* SRC audio recording (part 1) beginning at 41:30, below).
As an attorney licensed in the State of Utah, you are aware that your testimony before the SRC is both *per se* defamatory and a false light statement made in reckless disregard of the truth, is not privileged and was published with the intention to discredit, embarrass, and shame Mr. Tracy to both the SRC and Emigration Canyon Home and Property Owners.
Prior to filing legal action in a court of appropriate jurisdiction, to resolve this matter without taxing scarce judicial resources, Mr. Tracy will accept settlement payment in the amount of **$75,000.00** if transmitted to appellate attorney John M. Reeves, Jr., prior to **January 27, 2023** (cc'ed here) [click here for contract information].
Moreover, we will also require an agreement signed by both you and your clients to refrain from and to immediately discontinue publishing false and defamatory statements with a liquidated damage clause in the amount of **$25,000.00** per day, per infraction (*see* EID letter dated September 22, 2022, marked with the identifier "{00638134.DOCX /}" attached below and currently published by Simplifi Company at "https://www.ecid.org").
Please feel free to have a legal representative contact me directly with any questions and we look forward to working toward a quick and amicable resolution of this matter.
Kind Regards,
Mark Christopher Tracy
Tel. 929-208-6010
San Diego, California

Mark Christopher Tracy
1130 Wall St #561
La Jolla, California 92037
--
Eschersheimer Landstrasse 42
60322 Frankfurt am Main
Germany
--
Email: m.tracy@echo-association.com
Telephone: +1 (929) 208-6010
+49 (0)172 838 86 37
Pro Se Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

MARK CHRISTOPHER TRACY, an individual,

Plaintiff,

v.

COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; ERIC HAWKES, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM CROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; R. STEVE CREAMER, an individual PAUL HANDY BROWN, an individual; GARY A. BOWEN, an individual

Defendants.

Case No.: 23CV423435

Honorable Evette D. Pennypacker
[Dept. 6]

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO DEFENDANT PAUL HANDY BROWN'S MOTION FOR VEXATIOUS LITIGANT ORDER

Hearing Date: April 9, 2024
Time: 09:00 am (PDT)

Action Filed: September 21, 2023
Trial Date: TBD

Pursuant to California Evidence Code §§ 452, 453, in support of the Opposition to Defendant Paul Handy Brown's Motion for Vexatious Litigant Order, in prorpria pesona Plaintiff Mark Christopher Tracy hereby requests for the Court to take judicial notice of the following:

1. "Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," *USA ex rel. Tracy v. Emigration Improvement District*

et al., no. 22A636, January 11, 2023. A true and correct copy is attached hereto as **Exhibit A**, and is also available at the website administered by the United States Supreme Court at https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/22A636.html last visited on March 24, 2024.

2. "Opinion and Order," *Jana v. United States,* United States Court of Federal Claims, No. 94-203C, September 3, 1998. A true and correct copy is attached as **Exhibit B**.

3. "Affidavit of Jeremy R. Cook in Support of Motion for Attorney Fees and Costs Pursuant to 31 U.S.C. § 3730(d)(4) and U.S.C. § 1937," *USA ex rel. Tracy v. Emigration Improvement District et al.,* United States District Court for the District of Utah, No. 2:14-cv-00701-JNP, June 22, 2018, at Exhibit No. 1, page 11 (ECR Document 228-1), recording correspondence between Defendants Cohne Kinghorn P.C., Jeremy Rand Cook, and Paul Handy Brown on 5/11 and 5/16/2018. A true and correct copy is attached hereto as **Exhibit C**.

4. "On Petition for Writ of Extraordinary Relief from Amended Judgment, Orders of Filing, Minute Entries, and Writ of Execution Issued by the Honorable Mark S. Kouris," Utah State Third District Court, No. 20210743-CA.

5. "Notice to Court and Real Parties in Interest," *Tracy v. Hon. Kouris*, Utah State Third District Court, No. 20210743-CA, October 22, 2021. A true and correct copy is attached as **Exhibit D**.

6. "Brief of Petitioner for Petition for Writ of Certiorari" in *Tracy v. Hon. Kouris*, No. 20210891-SC, Utah State Supreme Court, October 11, 2021.

7. "Response to Petition for Writ of Certiorari," in *Tracy v. Hon. Kouris*, No. 20210891-SC Utah State Supreme Court, December 8, 2021. A true and correct copy is attached as **Exhibit E**.

8. "Motion to Reinstate Period for Filing Direct Appeal in a Civil Case," *Tracy v. Simplifi et al.,* No. 200905074, Utah State Third Judicial District Court, April 15, 2022. A true and correct copy is attached as **Exhibit F**.

9. "Memorandum Decision and Order Adopting Report and Recommendation," *Tracy v. Simplifi et al.*, No. 2:21-cv-00444-RJS-CMR, United States District Court for the District of Utah, March 24, 2022. A true and correct copy is attached as **Exhibit G**.

These documents are properly the subject of judicial notice as records of a court of record of the United States or of any state of the United States – namely the Third Judicial District Court of Utah, the United States District Court for the District of Utah, and the Supreme Court of the United States of America. Accordingly, the documents are subject of judicial notice pursuant to Evidence Code § 452(d)(2).

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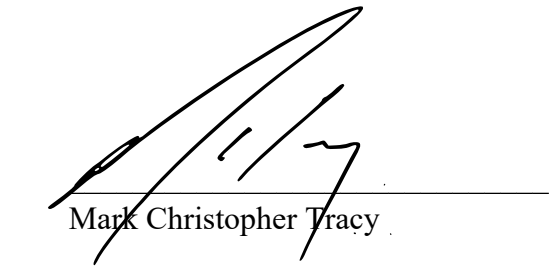
Dated: March 26, 2024



Mark Christopher Tracy

EXHIBIT A

No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. MARK CHRISTOPHER TRACY,
Applicant,

v.

EMIGRATION IMPROVEMENT DISTRICT, et al.,
Respondents.

Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

**To the Hon. Neil M. Gorsuch,
Circuit Justice for the Tenth Circuit**

JOHN M. REEVES
Counsel of Record
REEVES LAW LLC
7733 Forsyth Blvd., Suite 1100--#1192
St. Louis, MO 63105
314-775-6985
reeves@appealsfirm.com
Counsel for Applicant
Mark Christopher Tracy

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE TENTH CIRCUIT:

Pursuant to Rule 13.5, counsel for Mark Christopher Tracy respectfully requests a 30-day extension of time, up to and including March 1, 2023, in which to file its petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit issued on November 1, 2022. Tracy did not file a petition for rehearing in the Tenth Circuit. In the absence of an extension, the deadline to file the petition for a writ of certiorari will expire on January 30, 2023. This Court's jurisdiction would be invoked under 8 U.S.C. § 1254(1).

1. The case concerns the tolling provisions of the statute of limitations under the False Claims Act (FCA) and whether, when a party seeks damages as a result of the false claim actually being paid, such damages are an essential element to an FCA violation such that the statute of limitations does not begin to run until the false claim is actually paid. Petitioner Tracy filed the underlying lawsuit on behalf of the federal government pursuant to the *qui tam* provisions of 31 U.S.C. § 3730(b). He originally filed the lawsuit on September 26, 2014. His third amended complaint—the operative one—raises one false claim act count against multiple defendants, including the Emigration Improvement District (EID), a Utah Special Service District. EID, conspiring with others, fraudulently induced the Utah administrator of the federal drinking Water State Revolving Fund (DWSRS) to grant it a $1.86 million loan based upon a duplicitous water claim stripped from the only active military cemetery created by an Act of Congress and used for the construction, remediation, and massive

expansion of a luxurious private urban development. The loan was ostensibly to be used for helping 67 residents in Emigration Canyon, Utah. According to EID, the residents needed access to a community water system because their private wells had pollution problems. The loan, EID continued, would address these problems through the building of several large-diameter commercial wells, which were predicted in hydrology studies misrepresented and withheld from the federal government to dewater senior perfected water rights and the Emigration Canyon stream "with almost certainty." In fact, the loan served as nothing more than a front for EID to enrich certain private actors at the expense of the existing low-income residents of Emigration Canyon. Tracy sought not only civil penalties but also damages from the actual payment of the yet outstanding DWSRS loan to EID. The Government declined to intervene in the case.[1]

It is undisputed that EID submitted its final claim for release of construction retainage funds on September 13, 2004—that is, ten years and thirteen days before Tracy filed his lawsuit on September 26, 2014. It is also undisputed that the government paid EID construction retainage funds on or after September 29, 2004—that is, less than ten years before Tracy filed his lawsuit on September 26, 2014. The defendants below moved to dismiss on the ground that the FCA's statute of limitations barred the case. That statute provides that no civil action may be brought

[1] After the Government declined to intervene, the district court issued an order (Doc. 200) directing, among other things, that the parties "serve all notices of appeal upon the United States." The Government did not participate in the proceedings in the Tenth Circuit, but in an abundance of caution Tracy is serving this application upon both the Solicitor General of the United States and the United States Attorney for the District of Utah.

either "(1) more than 6 years after the date on which the violation of section 3729 is committed or (2) more than 3 years after the date when facts material to the action are known or reasonably should have been known . . . but in any event no more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b). Despite the fact that Tracy was (and is) seeking damages for the actual payment of the false claim, the district court concluded that the term "violation" did not include the payment of the false claim. Accordingly, it dismissed the case.

2. In affirming the district court, the Tenth Circuit acknowledged that at least one other court—the Court of Federal Claims—has concluded that the FCA's statute of limitations does not begin to run until the government actually makes payment on a false claim and that if a plaintiff is seeking damages, this additional element also constitutes a violation of the FCA. (Op.9). *See Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998). But the Tenth Circuit then concluded that it was unaware of any actual circuit split on this matter. (Op.9). To the contrary, the Second Circuit has explicitly held that where the plaintiff is seeking damages, the statute of repose does not begin to run until the government actually makes a payment on the false claim. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993), *cert. denied*, 508 U.S. 973, 113 (1993). According to the Second Circuit, the FCA's "limitations period . . . 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.'" *Id*. (quoting *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 829 (S.D. N.Y. 1986)). It thus recognizes, unlike the Tenth Circuit, that a violation of the FDA depends on the nature of the relief sought. If a party is not seeking any damages, the statute of limitations begins to run at the time

the claim is submitted, because at that point all of the elements necessary to the violation have been carried out. On the other hand, if a party is seeking damages following a payment, the statute of limitations cannot begin to run until payment is actually made, as until that point no violation has actually occurred. The Third Circuit has implicitly recognized the same. *See United States v. Klein*, 230 F.Supp. 426, 441-42 (W.D. Pa. 1964), *order aff'd*, 356 F.2d 983 (3d Cir. 1966). The First and Fifth Circuits, by contrast, have come down on the same side as the Tenth Circuit. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *Smith v. United States*, 287 F.2d 299, 304 (5th Cir. 1961). At least one law professor, furthermore, has recognized that a split exists between the federal appellate courts on this matter. *See* Joel. D. Hesch, *A Comprehensive Analysis of the False Claim Act's Unique Statute of Limitations: The Supreme Court's ruling in* Cochise Consultancy, Inc. *was a Good Start But Left Much to Do*, 70 Syracuse L. Rev. 773, 780 (2020); *see also* Scott K. Zesch, *When Does Statute of Limitations Begin to Run in Action under False Claims Act (31 U.S.C.A. §§ 3729-3733)*, 139 A.L.R. 645 § 4 (1997).

3. Undersigned counsel respectfully requests a 30-day extension of time to file a petition for a writ of certiorari, up to and including March 1, 2023. Undersigned counsel was recently retained in this matter, and did not represent Tracy in the lower courts. In addition, undersigned counsel—a solo appellate practitioner—has two other briefing deadlines in the Missouri Court of Appeals due at the end of January that would make this Court's current deadline of January 30, 2023, difficult to meet. Specifically, undersigned counsel has a briefing deadline of January 26, 2023, in *State v. Bodenhamer*, No. ED110766, and a briefing deadline of January 27, 2023, in *State*

RA

v. Wiggley, No. ED110950. This case presents important and complex issues regarding the statute of limitations for the FCA and whether damages are an element under the FCA and how the statute of limitations is calculated in cases of implied false certification and fraudulent inducement recognized by this Court. *See United Health Servs., Inc. v. US ex rel. Escobar,* 579 U.S. 176, 186 (2016) ("[I]implied false certification theory can … provide a basis for [False Claims Act] liability"); *US ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) ("The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded."), *superseded on other grounds as stated in Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 412 (2011). The requested extension would enable undersigned counsel to devote the necessary time to research the legal issues and write a petition that addresses them in the depth and scope they deserve.

Accordingly, Tracy respectfully requests an extension of time up to and including March 1, 2023, in which to file his petition for a writ of certiorari.

Respectfully submitted,

/s/ John M. Reeves

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Date: January 11, 2023

EXHIBIT B

tions for a protective order are thus granted as to document request three, subsections (a) and (d), of plaintiffs' second set of interrogatories, filed on January 13, 1998. To the extent that communications are otherwise privileged or protected, those communications shall retain their privileged or protected status despite disclosure to defendant, its attorneys, or their agents.

JANA, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 94–203C.

United States Court of Federal Claims.

Sept. 3, 1998.

any assertion of privilege; (2) the particular communications must be confidential and part of an ongoing common enterprise; and (3) the attorney-client privilege does not apply to scientific data. These arguments are not applicable at this point. The court is not determining the discoverability of any particular documents. In the event the parties cannot agree on the status of particular documents, an individual determination may be necessary.

[redacted]

Donald O. Ferguson, San Antonio, TX, for plaintiff.

Harold D. Lester, Jr., Washington, D.C., with whom were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and James M. Kinsella, Assistant Director, for defendant.

Opinion and Order [1]

WEINSTEIN, Judge.

Plaintiff, Jana, Inc. (Jana) has moved for partial summary judgment on eight of the government's thirteen counterclaims for fraud under: the False Claims Act (FCA), as amended, 31 U.S.C. §§ 3729–3733 (1994); section 5 of the Contract Disputes Act of 1978(CDA), as amended, 41 U.S.C. § 604 (1994); and the common law. Plaintiff also seeks dismissal of defendant's special plea in fraud under 28 U.S.C. § 2415 (1994) and of defendant's claim for an offset under 28 U.S.C. § 1503 (1994). The first seven counterclaims arise from allegedly false claims under a 1980 time and materials contract with the Department of the Navy (Navy) to develop aeronautical/technical manuals and associated support services, contract No. N001–40–80–D–2454 (contract 2454). The eighth through thirteenth counterclaims concern a 1984 cost-plus-fixed-fee indefinite-delivery contract with the Navy, No. N001–40–85–D–E–260 (contract E–260), also to provide aeronautical manuals and related services.[2] The motion is denied.

The counterclaims were filed on May 17, 1995. On June 8, 1995, plaintiff moved to dismiss all of these counterclaims for lack of jurisdiction. The first ground argued is that all but five of plaintiff's invoices under these contracts having been submitted and reviewed by the government prior to October 27, 1986 were barred thereafter by the six-year statutes of limitations in the pre–1986 FCA [3] and Section 5 of the CDA, 41 U.S.C.

1. This opinion and order originally was filed on August 19, 1998. It is being reissued for publication at the government's request.

2. Plaintiff seeks dismissal of counterclaims one and two and eight through thirteen. Counterclaims one and two are for FCA damages in connection with false claims under contract 2454. Counterclaims 8 through 13 relate to contract E–260; counterclaims 8 and 9 are for FCA damages.

3. The FCA was amended in 1986 to provide two alternate statutes of limitation for civil actions under the FCA. Such actions must now be brought either within 6 years of the date the FCA violation is committed, § 3731(b)(1), or within "3 years after the date when facts material to the right of action are known or reasonably should

§ 604. Plaintiff argues that both statutes began to run upon the submission of a false invoice and did not begin, as the government argues, when the government made final payment of the claim. Second, plaintiff argues that defendant's allegations of jurisdiction were insufficient. Defendant argues that the six-year statute was equitably tolled, at the earliest, on April 26, 1990.

On November 15, 1995, the court ruled that the 1986 amendment to the FCA, adding 31 U.S.C. § 3731(b)(2) to the six-year statute of limitation under § 3731(b)(1), should be applied retroactively. Under 31 U.S.C. § 3731(b)(2), if the government doesn't know of the violation, the statute is not tolled until 3 years after the government knew or should have known of the false claim, but in no event until 10 years from the date of the violation. The court thus held that the only counterclaims barred were the portions of the first, second, eighth and ninth counterclaims based on false claims in connection with contract 2454 that were submitted before May 17, 1989 (6 years before the counterclaims were filed) and neither re-asserted subsequently nor discovered after May 17, 1992 (3 years before the counterclaims were filed). *See Jana, Inc. v. United States*, 34 Fed. Cl. 447 (1995).

The court's November 15, 1995 opinion also held that there was no statute of limitation for a special plea in fraud under 28 U.S.C. § 2415 or for common-law fraud counterclaims. Defendant, as required by the November, 1995 order, has presented the basis for its contention that the government did not discover the violation until after May 17, 1992. Thereafter, at the government's request, discovery was extended until after the Defense Contract Audit Agency (DCAA) completed an audit of plaintiff's claim under contract E–260, which was initially scheduled to be completed on December 31, 1996, but was not actually completed until July 10, 1997, due to plaintiff's delays in providing information to the auditor. Discovery closed on September 29, 1997.

Plaintiff's motion for partial summary judgment contends that the counterclaims regarding contract E–260 are barred, either by the FCA's six-year statute of limitations or because the July 10, 1997 DCAA audit report on the incurring, allowability, and allocation of costs found no fraud associated with contract E–260. Alternatively, plaintiff requests a ruling that the 3–year statute of limitations under the post–1986 FCA began to run in April or May of 1990, when the Department of Justice (DOJ) first received notice that certain irregularities had occurred with respect to this contract, and thus that the counterclaims were barred by the time they were filed in this court on May 17, 1995. Thus, effectively, plaintiff contends that the 3–year statute trumps the six-year statute. *See* 31 U.S.C. § 3731(b). Plaintiff also claims that the government has failed to plead fraud with the particularity required by Rule 9(b) of the Rules of the United States Court of Federal Claims (RCFC). And plaintiff yet again asks the court to reconsider its November 15, 1995 decision that the 1986 FCA amendment was retroactive and, thus, that defendant's FCA counterclaims regarding violations prior to May 17, 1989 under contract 2454 were not barred by the six-year statute but only until 3 years after defendant learned of the false claims (in 1992).[4]

Defendant continues to argue that the six-year statutory bar on claims for damages under the FCA does not begin to run until the date of payment of the fraudulent claim, within seven years of the violation, although the civil claim begins to run on the date of submission.[5] Defendant contends that this

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," § 3731(b)(2), whichever occurs last. *See* False Claims Amendments Act of 1986, Pub.L. 99–562, § 5, 100 Stat. 3153, 3158.

4. Plaintiff's first request for reconsideration and its "supplemental" motion for the same, both filed out of time, were returned unfiled because a motion for reconsideration of an order is due within 10 days of the order, *see* RCFC 83.2(f), and there was no showing of "excusable neglect," RCFC 6(b), to justify the late filing.

5. Plaintiff maintains that knowledge by any government official triggers the statute. Defendant argues that the relevant official is a DOJ Civil Division employee. The court has already con-

did not occur until October (or, at the earliest, July) of 1992. If so, the May 17, 1995 filing occurred within the three year time period allowed by the 1986 amendment to the FCA. Defendant also claims that the six-year statute, 31 U.S.C. § 3731(b)(1), does not begin to run until the date of final payment of a false claim, not, as plaintiff contends, on the date of plaintiff's request for payment. Alternatively, defendant contends that the 3-year statute did not begin to run until the government reasonably should have discovered the fraud, which event, it claims, occurred within ten years after the alleged violation(s).

Background [6]

The following material facts are not in dispute:

On February 8, 1980, the Navy Regional Contracting Office (NRCC) awarded Jana a time-and-materials contract (contract 2454) in the amount of $4,492,445.00, to provide aeronautical/technical publication services to the Navy. Plaintiff's payment vouchers for delivery order ZZN5 under contract 2454 were signed by the contractor's representative between September 10, 1984 and March 9, 1987, and approved by the contracting officer (CO) between October 18, 1984 and March 17, 1987. Under contract 2454's delivery order ZZM3, Jana, by the contractor's representative, signed payment vouchers between August 13, 1984 and September 15, 1986, which were approved by the CO between September 25, 1984 and September 15, 1986. Contract 2454 is not the subject of this motion, except insofar as plaintiff again seeks to reopen the court's decision that the FCA statute of limitations was extended by the 1986 amendment.

On or about January 2, 1985, effective November 29, 1984, the contracting officer awarded Jana contract E–260, a cost-plus-fixed-fee indefinite-delivery contract for providing similar technical publication services for the NRCC, in the amount of $19,602,-182.00.

On or about September 16, 1993, Jana submitted its final invoices for contract E–260. Jana submitted certified claims to the contracting officer, in the amount of $53,-217.77 under contract 2454 and $529,695.75 under contract E–260, on or about January 3, 1994. Jana filed suit in this court on March 29, 1994, pursuant to the CDA, codified at 41 U.S.C. §§ 601–613, based on a deemed denial of its claims. *See* 41 U.S.C. § 605(c). On May 17, 1995, defendant filed its answer, which included thirteen counterclaims under the FCA, the CDA, common law fraud principles, a special plea in fraud under 28 U.S.C. § 2415, and a claim for an offset under 28 U.S.C. § 1503, for alleged fraud in connection with contracts 2454 and E–260.

As far as the record discloses, the government first became aware of the possibility of irregularities in Jana's time records related to the claims under contract 2454 in the spring of 1990, when a former Jana employee approached Mr. Robert J. Harrison, an auditor with the DCAA, and informed him that Jana had altered time cards to switch costs from an Army firm, fixed-price contract, which had been assigned labor charge code number 850179, to delivery order ZZM3 under contract 2454, which was a cost-reimbursement time and materials contract, to which delivery order plaintiff assigned the labor charge code of 850479. He showed Mr. Harrison a copy of a time card identifying time worked on job number "850179," as well as a copy of the same time card after it had been altered to show "850479," apparently by changing the "1" in 850179 to a "4," thus improperly billing the charge to the time and materials contract. Plaintiff has proffered no contemporaneous evidence that the informant provided the government with any other evidence or specific allegations regarding mischarges on other contracts or delivery orders, nor any contemporaneous evidence (other than two additional time cards [7]) in support of the informant's allegations.

cluded that defendant's argument is correct. *See* November 15, 1995 decision at note 6.

6. The facts and procedural background of this case are detailed more fully in the court's November 15, 1995 opinion, *Jana,* 34 Fed. Cl. at 448–449.

7. It is not clear from the record who (the former employee or Mr. Harrison) unearthed the other two time cards.

On May 24, 1990, Mr. Harrison sent to the Naval Investigative Service (NIS) an "Early Alert of Suspected Irregularity Referral Relating to Jana, Inc." (Early Alert) regarding delivery order ZZM3 under contract 2454. The Early Alert stated, in part: "The attached [Early Alert] form provides information that suggests a reasonable basis for suspicion of fraud, corruption, or other unlawful activity affecting government contracts. * * * Among the contracts being performed by the contractor were a Firm–Fixed–Price contract (Jana's Charge No. 850179) and a Time and Materials contract (Jana's Charge No. 850479). A copy of the time card provided by the informant ... reflects charges to the firm-fixed-price contract ...; whereas, the actual time card ... reflects charges to the Time and Materials contract.... Apparently the numeral one ... as entered by the employee on his time card [for the Fixed–Price Contract] was altered to reflect a numeral four ..., [thus] charg[ing the time] to the Time and Materials contract. * * * all three [time cards] indicate the charge number was altered." The time card presented by the informant was attached to the Early Alert.

Included on the distribution list for the Early Alert were the NIS, the DCAA, the Defense Logistics Agency, and the DPFU. The latter evidently refers to the Defense Procurement Fraud Unit within the Criminal Division of the DOJ.

In or about September, 1991, Mr. Winstanley F. Luke, an Assistant United States Attorney (AUSA), civil branch, for the Western District of Texas, was assigned a case of alleged fraud involving Jana, in connection with contract 2454, Delivery Order ZZM3. In November, 1991 he met with an NIS investigator, Ms. Cecilia Gomez, regarding possible mischarging by Jana on Delivery Order No. ZZM3. Mr. Luke, who was authorized to file civil FCA cases on behalf of the government, has stated under oath that he did not believe that the NIS had yet developed sufficient evidence upon which he could act or make a determination of whether Jana had violated the FCA.

On July 10, 1992, at their second meeting, Ms. Gomez informed Mr. Luke of a preliminary laboratory report, based on a random sample of time cards related to Delivery Order No. ZZM3, showing forensic evidence of numerous alterations. Mr. Luke swears that this was the first time he had a "concrete suspicion" that Jana had engaged in fraudulent mischarging under that delivery order. On October 14, 1992, the NIS issued a final Report of Analysis describing forensic laboratory findings (erasures, alterations, different ink, additional strokes, or write-overs) based on this scientific sampling of time cards under contract 2454. Mr. Luke swore in his deposition that he had no knowledge at that time of the involvement of a contract or delivery order other than ZZM3 under contract 2454.

Discussion

A party moving for summary judgment initially must "show ... the absence of a genuine issue concerning any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). While the showing need not be based on affidavits, some proffer of evidence admissible to establish the material facts relied upon must be made. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The statute of limitations on a government counterclaim is an affirmative defense subject to waiver or estoppel. *See, e.g., Fisher v. Vassar College*, 70 F.3d 1420, 1452 (2d Cir.1995). Whether a claim is barred by the applicable statute of limitations is a question of law. *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir.1997); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 (9th Cir.1991).

[redacted] The burden of establishing that the statute of limitations bars a government claim is on the non-claimant. *See Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed.Cir.1993) (burden of proof is on party that raises the affirmative defense); *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1406 (9th Cir.1995) (party raising the statute of limitations as an affirmative defense has the burden of proving the action is time-barred). Thus, the burden of proving the counterclaim is barred is on the plaintiff.

Plaintiff contends that the Early Alert must be deemed to have provided such notice of material facts as to trigger the amended FCA's three-year statute of limitations at the time it was first received by DOJ Civil Division employees, allegedly in May, 1990. Plaintiff alleges that, although DPFU "technically" was within DOJ's Criminal Division Fraud Section, it was staffed (in part) by attorneys from the DOJ's Civil Division (in addition to attorneys from the DOJ Criminal Division [and the military services], and AUSAs for the Eastern District of Virginia). Plaintiff also claims that the six-year statute bars the counterclaims because the violations occurred between 1982 and 1986.

However, plaintiff has proffered no direct evidence that any employee of the Civil Division actually saw the Early Alert on or soon after it was sent in 1990. Defendant, on the other hand, has submitted documentation indicating that, after June 6, 1989, the DPFU terminated its practice of routinely screening DOJ procurement fraud allegations. Defendant also has submitted documentation indicating that no more than one Civil Division attorney ever participated in the DPFU, and that this attorney's participation was limited to a liaison, not permanent employee, function. Defendant contends that this evidence indicates that it was unlikely that the DOJ attorney was on the distribution list for the Early Alert.

In addition, defendant points out, and plaintiff does not dispute, that the Early Alert allegations were, in any event, limited to one delivery order, Delivery Order No. ZZM3 for contract 2454, and thus "were insufficient to create a concrete suspicion of a fraudulent time mischarging scheme" involving other delivery orders or contracts. (The counterclaims also relate to other delivery orders under contract 2454). Defendant notes that the Early Alert itself referred only to a "suspected" irregularity, and mentioned no unfavorable evidence unearthed by any government investigation.

Defendant states, and plaintiff does not dispute, that information regarding possible time card falsifications relating to another delivery order under contract 2454, delivery order ZZN5, was not received until May of 1994. An investigatory file on this delivery order was created on May 5, 1994. Results from laboratory testing of random samples of time cards under delivery order ZZN5 were received on January 11, 1995. Ms. Gomez during this period received a case file to begin investigation of certain charges under contract E–260 (such as cross-charging charges between delivery orders, and charging administrative personnel costs directly to the contract rather than as overhead).

On April 4, 1995, DOJ requested a DCAA audit of contract E–260. Defendant has provided a copy of correspondence indicating that DOJ instructed the DCAA auditor to assume that Jana's time and accounting records (again, with respect to contract E–260, not contract 2454) were accurate and had not been fraudulently altered. This instruction is reflected in the report's prefatory statement that its review "addressed only the quantum issues of the claim, without regard to entitlement."

The audit report, issued on July 10, 1997, concluded: "The contractor has submitted adequate cost or pricing data. The claim was prepared in accordance with appropriate provisions of FAR [Federal Acquisition Regulations] and DFARS [Defense Department Federal Acquisition Regulations]." The 1997 audit report therefore "consider[ed] the claim to be acceptable as a basis of negotiation of a fair and reasonable settlement." The report took "no exception to the $529,696 claimed by the contractor."

Because plaintiff bears the burden of proffering evidence which, if admissible, would support its statement of facts, *see Advanced Cardiovascular Sys.*, 988 F.2d at 1161, plaintiffs assertion that the DOJ Civil Division received notice of the alleged false claims on May 24, 1990, or any time before May 17, 1992, must be rejected.

Rule 9(b) Objection

Plaintiff's objection that the circumstances constituting fraud or mistake were not alleged with sufficient particularity has been waived by plaintiff's failure to make that objection in plaintiff's response to the counterclaims or, for that matter, for almost

two and one-half years after the counterclaims were filed. *Cf. Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 980 (4th Cir.1990) (Issues of fraud were appropriately treated as if raised in pleadings where no objection was made at trial to the admission of evidence showing fraud.) Further, lack of particularity in the complaint may be cured by a later disclosure. *See United States ex rel. Schiff v. Atlantic Basin Iron Works*, 53 F.Supp. 268, 271 (E.D.N.Y.1943) (complaint alleging false claim against the United States not dismissible even though lacking in particularity; rather, bill of particulars would be required). Here, defendant has fully disclosed, not only the basis for the FCA claim, but also the substantial evidence upon which it intends to rely.

Ironically, plaintiff claims that there was evidence of sufficient particularity to put defendant on notice of the fraud, yet, on the other hand, that the evidence was insufficiently detailed for purposes of RCFC 9(b). The stated basis for plaintiffs RCFC 9(b) objection thus is inconsistent with its argument that the Civil Division's notice was adequate. It is also incorrect. Plaintiff actually was informed of the particulars of defendant's fraud claim when, prior to the issuance of the report on which the FCA counterclaims were based and, thus, long before the filing of the counterclaims, plaintiff was given ample opportunity to review the report and learn the basis of defendant's fraud allegations. Moreover, any lingering doubt as to the basis for defendant's counterclaims must be deemed eliminated by plaintiff's full opportunity to obtain discovery from defendant, when this discovery exhaustively elicited the basis for defendant's counterclaims.

Finally, dismissals of complaints based on a RCFC 9(b) objection have been ordered, only at the trial stage or when the party against whom the objection is raised is intransigent about providing information. Presumptively, a plaintiff would not be prejudiced by non-disclosure at early stages of litigation, and the prejudice may be eliminated by full disclosure during discovery or by amendment of the FCA complaint or counterclaim. *Cf. Hayduk v. Lanna*, 775 F.2d 441, 445 (1st Cir.1985) (dismissal of plaintiff's fraud claim appropriate when plaintiff ignored two opportunities to amend the complaint).

[redacted] In sum, the remedy for failure to allege fraud with the particularity required by rule 9(b), generally, is an order requiring particularity, not dismissal. Dismissal generally is granted only when a FCA complainant fails to amend following the objection. A RCFC 9(b) objection may be waived if not timely made in responsive pleading. *See Todaro v. Orbit Int'l Travel, Ltd.*, 755 F.Supp. 1229, 1234 (S.D.N.Y.1991). Also, a RCFC 9(b) objection, even if not waived, should not bar a counterclaim by the government. This may be surmised from RCFC 59(a)(2), which provides that, "upon satisfactory evidence ... that any fraud, wrong, or injustice has been done the United States," a counterclaim raised within 2 years after the final disposition of a case against the United States may provide the basis for the court to grant the United States a new trial. Finally, on the merits, it is hard to see how much more information defendant could have provided.

Retroactivity of the 1986 FCA Amendments

[redacted] The court again declines to reconsider its November 15, 1995 determination that the 1986 FCA amendment is to be applied retroactively, both on the grounds that, as a motion for reconsideration, it was not timely filed, *see* RCFC 59, and on the merits. Recent case law supports the court's prior decision that the statute of limitations is retroactive for an FCA claim that was not stale at the time it was filed.[8] *See, e.g., United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.N.Y.1998) (FCA amendment's statute of

8. Defendant's argument that reconsideration is precluded by the "law of the case" doctrine is misplaced. Law of the case rules prohibit a court from revisiting questions of fact or law necessarily decided by an appellate court or coordinate court in the same case, not from altering a prior ruling made by the same trial court. A trial court may revisit its own decisions at any time. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

limitation applies to all claims arising within six years prior to the October 27, 1986 effective date). *See also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (FCA amendment does not apply retroactively to revive a claim already barred under the pre-existing statutory scheme at the time of the amendment's enactment).

Event(s) Triggering the Running of the FCA's New Statute of Limitations

Plaintiff contends that the six-year statute of limitations of 31 U.S.C. § 3731(b)(1) and the ten-year statue of repose of 31 U.S.C. § 3731(b)(2) began to run on the date the false claim was submitted, regardless of when, or whether, the claim was paid. Defendant, on the other hand, contends that, for an FCA claim for actual damages, the limitations period began to run on the date on which the false claim was paid, since the government did not incur actual damages until it had made payment in reliance upon the false claim.

The resolution of this issue affects several vouchers of Delivery Orders ZZN5 and ZZM3 of contract 2454, which were submitted prior to May 17, 1985, but were paid after that date. Vouchers 8 and 9 of Delivery Order ZZN5, were signed by the contractor's representative (and presumably submitted for payment) on May 16, 1985, and May 13, 1985, respectively, but were approved by the CO for payment (and presumably paid) on June 13, 1985 and June 6, 1985, respectively. *See* Appendix to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, pg. 8. Vouchers 9 and 10 of Delivery Order ZZM3, also were signed by the contractor's representative (and presumably submitted for payment) on May 16, 1985, and May 13, 1985, respectively, and were approved by the CO for payment (and presumably paid) on June 13, 1985 and June 6, 1985, respectively. *Id.* at 9. FCA claims based on these vouchers, therefore, would be time-barred by the ten-year repose provision if the running of the repose period is triggered by the submission of the false claim, rather than by the payment of the claim.

As plaintiff correctly points out, there is no binding precedent on this issue from the U.S. Supreme Court, the Federal Circuit, or the Court of Claims. The decisions from other circuits have been split on the issue. The majority of district courts (and a court of appeals) considering the issue have concluded that, if the government makes payment on a submitted false claim, the FCA statute of limitations starts running on the date payment was made, rather than on the (earlier) date the claim was submitted. *See, e.g., United States v. Incorporated Village of Island Park*, 888 F.Supp. 419, 441 (E.D.N.Y. 1995) (six-year statute of limitations period of § 3731(b)(1) begins to run on date of submission of claim for payment, or, if the claim is paid, from the date of payment); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.1993) (noting the same in dicta); *United States ex rel. Duvall v. Scott Aviation*, 733 F.Supp. 159, 161 (W.D.N.Y.1990) ("[i]t is the payment not the request which triggers the statute"); *United States v. Klein*, 230 F.Supp. 426, 441 (W.D.Pa.1964) (holding that 31 U.S.C. § 235, the predecessor to § 3729, did not become operative until final payment had been made on the false claims), *aff'd*, 356 F.2d 983 (3d Cir.1966). *Cf. United States ex rel. Hartigan v. Palumbo Bros.*, 797 F.Supp. 624, 629 (N.D.Ill.1992) (claim is not complete, for purposes of determining applicability of 1986 amendments to FCA, before the last date when the Government paid any money on a particular claim). However, some lower court cases have concluded that the statute of limitations starts running on the date of the false claim submission rather than of its payment. *See. e.g., United States v. Vanoosterhout*, 898 F.Supp. 25, 29 (D.D.C.1995), *aff'd*, 96 F.3d 1491 (D.C.Cir.1996); *United States ex rel. Colunga v. Hercules, Inc.*, No. 89–CV–954 B, 1998 WL 310481 *2–3 (D.Utah Mar. 6, 1998); *United States ex rel. Condie v. Board of Regents of Univ. of Cal.*, No. C89–3550–FMS, 1993 WL 740185 *3 (N.D.Cal. Sept. 7, 1993).[9]

9. Plaintiff cites Scott K. Zesch, Annotation, *When Does Statute of Limitations Begin to Run in Ac-*

The statutory language of sections 3729 and 3731(b) supports defendant's position that, if a false claim is paid, the limitations periods of section 3731(b) begin to run from the date of payment. Section 3731(b) provides that both the six and ten year limitations periods begin to run on "the date on which the violation of section 3729 is committed." *See* 31 U.S.C. § 3731(b)(1) and (2). The question therefore is what constitutes a violation of section 3729 for purposes of triggering the statute of limitations. It is clear that the submission of a false claim, whether or not the claim is paid, is a violation of section 3729, *see* section 3729(a)(1), for which the false claimant is liable to the government for civil penalties and for 2–3 times the actual damages sustained by the government as a result of the false claim. *See* § 3729(a). However, since section 3729 provides for the false claimant to be liable for actual damages, this suggests that when payment is made on the false claim, the "violation of section 3729" encompasses not only the false claim but also the payments on that claim.

[redacted] Moreover, "[u]nder federal law governing statutes of limitation, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed.Cir. 1991). In the case of a FCA claim seeking civil penalties, all events necessary to state a claim have occurred upon the submission of the false claims to the government. However, in the case of a FCA claim for actual damages, all the events necessary to state the government's claim do not occur until the government has made full payment on the claim, since the government does not incur actual damages until then.

[redacted] For the reasons stated above, the court holds that, when the government pays a false claim, the FCA statute of limitations begins to run on the date of final payment. Therefore, defendant's counterclaims relating to Vouchers 8 through 32 of Delivery Order ZZN5, and Vouchers 9 through 26 of Delivery Order ZZM3, are not barred by section 3731(b)(2)'s ten year statute of repose.

Conclusion

For the reasons stated above, plaintiff's motion for partial summary judgment is denied. The parties shall jointly prepare and submit a proposed schedule for further proceedings on or before August 28, 1998.

[redacted]

FIREARMS TRAINING SYSTEMS, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 98–476C.

United States Court of Federal Claims.

Sept. 4, 1998.

[redacted]

tion under False Claims Act (31 U.S.C.A. §§ 3729–3733), 139 A.L.R. 645 § 4 (1997) and "the cases cited therein" for the proposition that the majority rule is that the limitation period begins to run when a claim is presented to the government agency for payment, rather than when the claim is paid. Most of the cases cited in § 4 of the annotation did not address the issue of whether the date of payment or of claim submission was the triggering date for the FCA statute of limitations, but merely held that the limitation period begins to run *no earlier* that the date on which the false claim is submitted. *See, e.g., United States v. Ettrick Wood Prods., Inc.*, 774 F.Supp. 544, 552, 552 n. 12 (W.D.Wis.1988) (holding that the statute does not begin to run until, at least, a demand has been made upon the government, but determining that the facts of that case made it unnecessary to choose between the date of demand and the date of actual payment as the triggering date for the running of the statute of limitations).

EXHIBIT C

Jeremy R. Cook (10325)
William G. Garbina (13960)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Email: jcook@cohnekinghorn.com
wgarbina@cohnekinghorn.com
Attorneys for Emigration Improvement District, Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales and Eric Hawkes

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA Ex. Rel. Mark Christopher Tracy, Plaintiff, vs. EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; *et al.* Defendants.	**AFFIDAVIT OF JEREMY R. COOK IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO 31 U.S.C. § 3730(d)(4) AND 28 U.S.C. § 1927** **Case No.: 2:14-cv-00701 JNP-PMW** **Judge: Jill N. Parrish** **Magistrate Judge: Paul M. Warner**

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Pursuant to DUCivR 54-2(f), **Jeremy R. Cook**, being duly sworn and on his oath, deposes and says as follows:

1. I am an attorney at law duly qualified to practice law in the state of Utah and a partner of the law firm of Cohne Kinghorn, a professional corporation.

2. I am lead counsel for defendant Emigration Improvement District in the above-titled action.

3. To the best of my knowledge, the exhibits attached to the Motion as Exhibits A - G are true and correct copies of the documents.

4. The hourly rates for the attorneys that performed work on this matter are as follows:

Jeremy R. Cook (JRC) - $220.00
William Garbina (WGG) - $265.00 - $280.00

5. Based on my experience with other attorneys and firms and Salt Lake City performing the same or similar work, the hourly rates are reasonable in the Salt Lake City, Utah market for such persons given their level of experience and expertise. In addition, as District attorney, Mr. Cook charges Emigration Improvement District as significantly discounted rate, which rate was not adjusted for this matter.

6. The schedule attached hereto as Exhibit 1 is a detailed summary indicating the amount of time spent by each attorney of my firm who performed work in this this litigation after on or after November 24, 2015. All the work included in Exhibit 1, was necessary to achieve the result obtained and the time spent for each task is reasonable. The lodestar calculation is based on the current billing rates for the attorneys listed on Exhibit 1. The schedule was prepared from daily time records regularly prepared and maintained by my firm. The hours,

rates and charges are the same as those billed to and paid for by Emigration Improvement District in this matter.

7. As reflected in Exhibit 1, the total number of hours expended by Cohne Kinghorn in connection with this matter was 506.8 hours. The total lodestar for the firm is **$118,831.00**.

8. The firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expense items. The firm is not seeking any expense items associated with this matter.

9. The Court has previously awarded Emigration Improvement District attorney's fees the amount of $19,936.00 related to the wrongful lien filed by Plaintiff. The fees requested in this Motion do not include any fees that were previously awarded to Defendants.

Jeremy R. Cook

VERIFICATION

I certify that I have read the foregoing Affidavit and am familiar with its contents and that the statements made in it are true and correct to the best of my knowledge, information, and belief except as to those statements which are matters of opinion as to which I believe the same to be true.

Dated this 22 day of June, 2018.

Jeremy R. Cook

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 22nd day of June 22, 2018.

DIANE J. HANEY
Notary Public
State of Utah
Comm. No. 680853
My Comm. Expires Jan. 11, 2019

Notary Public
Residing in Salt Lake County, Utah

EXHIBIT 1

8031.06	04/30/2018	#	A	1	280	0.2	56.00	Analyze opposition response time; reply to J. Cook regarding same.	ARCH
8031.06	05/10/2018	#	A	1	220	1.5	330.00	Meeting with client to discuss status and strategy.	ARCH
8031.06	05/11/2018	#	A	1	220	0.5	110.00	Draft email to Paul Brown regarding Oaks HOA meeting update and message.	ARCH
8031.06	05/16/2018	#	A	1	220	0.3	66.00	Draft email to Paul Brown on case status.	ARCH
8031.06	05/23/2018	#	A	1	220	0.1	22.00	Analyze email from Mr. Tracy.	ARCH
8031.06	05/25/2018	#	A	1	220	2.4	528.00	Analyze opposition to motion to dismiss and case law cited by Mr. Tracy. Begin formulating reply brief.	ARCH
8031.06	05/25/2018	#	P	1	280	1.4	392.00	Analyze Tracy's Memorandum in Opposition to Motion to Dismiss.	573
8031.06	05/29/2018	#	P	1	280	3.1	868.00	Research regarding Tracy's claim of promissory fraud and analysis.	575
8031.06	05/29/2018	#	P	1	280	0.2	56.00	Analyze pleadings regarding extension for Tracy's response.	576
8031.06	05/29/2018	#	P	1	280	1.1	308.00	Analyze J. Parrish's Memorandum Decision and Order in US ex rel Brooks v. Stevens-Henager.	577
8031.06	05/31/2018	#	A	1	220	4.2	924.00	Continue work on Motion to Dismiss. Meeting with Will Garbina regarding same.	ARCH
8031.06	05/31/2018	#	P	1	280	1.4	392.00	Conference with J. Cook regarding Tracy's arguments, distinguishing cases, and strategy for reply.	574
8031.06	06/01/2018	#	P	1	220	7.2	1,584.00	Continue drafting reply brief in support of motion for summary judgment including revisions to organize arguments on direct false claims versus reverse false claims. Research additional cases on promissory fraud. Review files on DDW correspondence regarding approval and inclusion in prior briefs filed by Plaintiff. Analyze email from Paul Brown regarding letter to residents from Mr. Tracy.	578
8031.06	06/04/2018	#	P	1	220	5.2	1,144.00	Continue work on reply brief in support of motion to dismiss.	579
8031.06	06/05/2018	#	P	1	220	1.7	374.00	Continue drafting reply memorandum.	583
8031.06	06/06/2018	#	P	1	220	4.5	990.00	Continue drafting reply brief on direct false claim liability on statute of limitations. Additional research on case law regarding same.	580
8031.06	06/07/2018	#	P	1	220	3.3	726.00	Meeting with Will Garbina on reply brief and arguments. Analyze draft changes and discuss same. Analyze filing and exhibit issues.	581
8031.06	06/11/2018	#	P	1	220	5.5	1,210.00	Analyze prior motions for attorney fees and begin drafting revisions based on Third Amended Complaint. Research case law on inclusion of all pleadings in motion for attorney fees. Compile correspondence from Mr. Tracy to residents.	582
Total for Client ID 8031.06					**Billable**	**497.2**	**118,831.00**	Emigration Improvement District Litigation	
							GRAND TOTALS		
					Billable	**497.2**	**118,831.00**		

EXHIBIT D

Brent M. Johnson (5495)
Attorney for Hon. Mark S. Kouris
Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Tel: (801) 578-3800

IN THE UTAH SUPREME COURT

MARK CHRISTOPHER TRACY, dba Emigration Canyon Home Owners Association Plaintiff and Petitioner, vs. SIMPLIFI COMPANY; JENNIFER HAWKES; and ERIC HAWKES, Defendants and Respondents.	**NOTICE TO COURT AND REAL-PARTIES-IN-INTEREST** Case No. 20210743 Trial Court No. 200905074

Judge Mark S. Kouris, by and through counsel Brent M. Johnson of the Administrative Office of the Courts, provides notice to the court and the real-parties-in-interest that Judge Kouris will not be filing a response to Mark Christopher Tracy's Petition for Extraordinary Relief. Counsel has had an opportunity to review the Petition and based on the facts and the issues being raised, the real-parties-in-interest are in the best position to make the appropriate arguments.

Dated this 22nd day of October, 2021.

/s/Brent M. Johnson
Brent M. Johnson
Administrative Office of the Courts

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing document was delivered via e-filing and electronic mail as follows on this 22nd day of October, 2021.

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
Email: m.tracy@echo-association.com
Plaintiff and Petitioner

Jeremy R. Cook
Cohne Kinghorn, P.C.
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Email: jcook@ck.law
Attorneys for Simpli Company, Jennifer Hawkes and Eric Hawkes

/s/ Minhvan Brimhall
Minhvan Brimhall
Legal Secretary to Brent M. Johnson

EXHIBIT E

Keisa L. Williams (16195)
Attorney for Hon. Mark S. Kouris
Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Tel: (801) 578-3800
Email: keisaw@utcourts.gov

IN THE UTAH SUPREME COURT

MARK CHRISTOPHER TRACY, Petitioner, vs. HON. MARK S. KOURIS, Respondent, SIMPLIFI COMPANY, JENNIFER HAWKES, and ERIC HAWKES, Real- Parties-in-Interest.	**RESPONSE TO PETITION FOR WRIT OF CERTIORARI** Case No. 20210891-SC Court of Appeals No. 20210743-CA Trial Court No. 200905074

Judge Mark S. Kouris, by and through counsel Keisa L. Williams of the Administrative Office of the Courts, provides a response to Mark Christopher Tracy's petition for writ of certiorari. Judge Kouris opposes the certiorari but will not be filing a formal response.

Dated this 8th day of December, 2021.

/s/Keisa L. Williams
Keisa L. Williams
Administrative Office of the Courts

RA

EXHIBIT F

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com
Pro se Petitioner

IN THE THIRD DISTRICT COURT OF 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.	**MOTION TO REINSTATE PERIOD FOR FILING DIRECT APPEAL IN A CIVIL CASE** **Case No.: 200905074** **Judge: Mark S. Kouris**

Pursuant to Rule 4(g) Utah Rules of Appellant Procedure ("URAP") and Rule 7 Utah Rules of Civil Procedure ("URCP"), Mark Christopher Tracy ("Mr. Tracy") dba Emigration Canyon Home Owners Association ("The ECHO-Association") respectfully submits the following *Motion to Reinstate Period for Filing Direct Appeal in a Civil Case.*

CONCISE STATEMENT OF THE RELIEF REQUESTED AND GROUNDS FOR THE RELIEF REQUESTED

Mr. Tracy seeks appellate review of the Amended Judgement issued by the district court on April 30, 2021, ruling Mr. Tracy to be a vexatious litigant subject to a prefiling order in future litigation and awarding attorney fees and costs in the amount of $9,029.00.

As opposing counsel failed to serve Mr. Tracy a copy of the Amended Judgement executed by the court over Mr. Tracy's pro forma objections until June 10, 2021, and failed to file proof of service with the court as required under to Rule 58A(g) URCP, the court should reinstate the thirty-day period for filing direct appeal pursuant to Rule 4(g) URCP.

The present motion is timely and appropriate.

STATEMENT OF FACTS

1. On April 30, 2021, during appellant review before the Utah Supreme Court, this court entered an Amended Judgement finding Mr. Tracy to be "a vexatious litigant" subject to a prefiling order for future litigation pursuant to Utah R. Civ. P. 83(b)(5).[1] *See* Amended Judgement, dated April 30, 2021, attached as Exhibit A.
2. The opposing party failed to serve Mr. Tracy a copy of the executed amended judgement and failed to file proof of service with the court per Rule 58A(g) URCP.[2]
3. During the status hearing on June 15, 2021, and upon Mr. Tracy's inquiry, the district court confirmed execution of the amended judgement, and opposing counsel transmitted a copy of the same. *See* excerpt of Certified Transcript pages 1, 18-21, attached as Exhibit B.
4. Mr. Tracy submitted Notice of Appeal of the Amended Judgement the same day.[3]

[This Section Intentionally Blank]

[1] The Amended Judgement prepared by opposing counsel incorrectly cited Rule 83(b)(4) URCP (prefiling order in pending litigation) instead of subsection (b)(5)(prefiling order in future litigation). Out of an abundance of caution, Mr. Tracy has included all necessary certifications for a prefiling order in pending litigation per subsection (d). *See* Declaration Mark Christopher Tracy infra.
[2] *See Tracy v. Hon. Kouris*, Case No. 20210754-CA (Utah, Writ of Certiorari denied, December 8, 2021).
[3] *Id.*

5. Unbeknownst to Mr. Tracy, the district court withheld the notice of appeal from the court docket and returned the same to Mr. Tracy via United States postal service 85 days later, on September 11, 2021, based upon a non-existent prefiling order in existing litigation.[4]
6. Upon Mr. Tracy's Petition for Writ of Extraordinary Relief, the Utah Court of Appeals ruled that the Notice of Appeal filed on June 10, 2021, was untimely and the present motion appropriate. *See* Order dated November 2, 2021, attached as Exhibit C.
7. The Utah Court of Appeal remitted the case back to the district court on February 10, 2022, *See* Remittitur, dated February 10, 2022, attached as Exhibit D.[5]

ARGUMENT

Under Rule 4(g) URCP, the trail court "shall" reinstate the thirty-day period for filing a direct appeal if by the preponderance of the evidence: (A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule; (B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and (C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

As Mr. Tracy lacked actual notice of the Amended Judgment, exercised due diligence while the opposing party failed to serve a copy of the signed judgement until June 10, 2021, the court should grant the present motion and reinstate the period for filing a direct appeal of the Amended Judgment.

---

[4] *Id.*

[5] Mr. Tracy's appeal of the original judgement is currently pending before the Utah Supreme Court. *Tracy v. Simplifi et. al.,* Case No. 20220219-SC (Utah, Writ of Certorari filed February 23, 2022).

CONCLUSION

Based upon the foregoing, Mr. Tracy requests the Court grant the motion and allow Mr. Tracy to file notice of appeal of the Amended Judgement within thirty days of the court's decision.

DATED this 15th day of April 2022.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

EXHIBIT A

The Order of the Court is stated below:
Dated: April 30, 2021 08:52:33 AM
/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.	**AMENDED JUDGMENT** Case No. 200905074 Judge: Kouris

The Court hereby finds as follows:

1. Pursuant to the Court's *Memorandum Decision and Order*, Respondents' Motion to Dismiss is **GRANTED**.

2. Pursuant to the Court's *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 (the "**Motion to Vacate Order**"), Mr. Tracy's Motion to Vacate is **DENIED**.

3. Pursuant to the Motion to Vacate Order, 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.

4. The Court awards judgment in favor of respondents Simplifi Company, Eric Hawkes and Jennifer Hawkes and against petitioner Mark Christopher Tracy for attorney fees in the amount of Nine Thousand Twenty-Nine Dollars (**$9,029.00**).

5. The Court further orders that this judgment may be augmented for interest, attorney fees and costs incurred in obtaining and collecting the judgment as permitted by the Utah Rules of Civil Procedure.

Approved as to form:

_____
Mark Christopher Tracy

– Court's Signature and Date Appear at Top of First Page of this Document –

EXHIBIT B

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

-o0o-

MARK CHRISTOPHER TRACY,	)	
	)	
Plaintiff,	)	Case No. 200905074
	)	
vs.	)	STATUS HEARING
	)	
SIMPLIFI COMPANY, ERIC HAWKES and JENNIFER HAWKES,	)	
	)	
Defendants.	)	

-o0o-

BE IT REMEMBERED that on the 10th day of June, 2021, commencing at the hour of 8:56 a.m., the above-entitled matter came on for hearing before the HONORABLE MARK KOURIS, sitting as Judge in the above-named Court for the purpose of this cause and that the following proceedings were had.

-o0o-

RA

THE COURT: Mr. Cook, response?

MR. COOK: Your Honor, there was an amended--I mean, you--the Court issued a judgment, we filed an amended judgment, and it was entered by the Court. So I'm not--I'm a little confused about what he's--

MR. TRACY: The amended judgment was--was signed by the Court? I never received it.

MR. COOK: I believe the amended judgment was signed by the Court.

MR. TRACY: I don't believe it--

MR. COOK: I thought that's what you were objecting to.

MR. TRACY: No. No. I--I objected to the proposed amended judgment. I never received a copy of it. If the amended judgment's been signed by the Court, then--then I can go ahead and appeal that immediately. Again, I--to amended judgment that's already--that's already been appealed, I don't believe that the Court would have jurisdiction. That's exactly why I filed this.

Again, if the Court signed the--

THE COURT: Let's see, it looks like--I see something here, Mr. Cook, if we're representing--if we're looking at the same document, I see something here that was signed on April 30th, 2--2021. And that's an amended judgment.

RA

There's an amendment after that one?

MR. TRACY: Yeah, there's an amended judgment, I--so there should be two judgments here; the original judgment and the second judgment, the amended judgment finding me to be a vexatious litigant.

THE COURT: Right.

MR. TRACY: I have never received a copy that's signed by the Court.

THE COURT: That was signed--

MR. TRACY: (Inaudible)

THE COURT: --that was signed by--on April 30th, 2021, and it's titled amended judgment and it talks about the vexatious litigant portion as well as the actual judgment of the $9,000.

MR. TRACY: And that's the (inaudible) and that amended judgment is the plan, the 58 Alpha, 'cause you had to--again, I--it--was there a sepa--separate judgment that was signed for that, your Honor? 'Cause again, I did not--

THE COURT: A separate judgment?

What I just read to you is what was signed. So I--I'm not sure what you're asking me. I don't understand where you're going here.

MR. TRACY: There was--there was the amended--so there was a memorandum order finding me to be a vexatious litigant and then a--a (sic) amended judgment that's separate

RA

from that; correct, your Honor?

THE COURT: Yes, it's an amended--yes, it's titled an amended judgment, so the answer, I guess to your question is yes.

MR. TRACY Perfect, your Honor. If I could--if I could have Mr. Cook forward it, I did not receive that, which is exactly why I filed the objection to that because it was again, signed by the Court, the original judgment is already pending with the Utah Court of Appeals.

So if I could have a--a copy of that, (inaudible) really appreciate it, then I can expedite appellate proceedings for that.

THE COURT: That's fine. And the--the appellate proceeding as well is also under the vexatious litigant portion. You understand that as well; right?

MR. TRACY: I understand that, yes.

THE COURT: Okay.

MR. TRACY: (Inaudible)

THE COURT: All right. Very good. Well, it sounds like we're set then. All right.

If that's the case then, we'll adjourn. Thanks, everyone and we'll take care of what needs to be taken care of.

MR. TRACY: I do appreciate your time, your Honor.

THE COURT: All right.

RA

MR. COOK: Thank you, your Honor.

(Whereupon, this hearing was concluded.)

EXHIBIT C

IN THE UTAH COURT OF APPEALS

MARK CHRISTOPHER TRACY, D/B/A EMIGRATION CANYON HOMEOWNERS ASSOCIATION, Petitioner, *v.* THE HONORABLE MARK S. KOURIS, SIMPLIFI COMPANY, JENNIFER HAKWES, AND ERIC HAWKES, Respondents.	ORDER Case No. 20210743-CA

Before Judges Orme, Pohlman, and Tenny.

This matter is before the court on Mark Christopher Tracy's Petition for Extraordinary Relief and Motion for an Emergency Stay. Extraordinary relief is proper only when the petitioner has "'no other plain, speedy and adequate remedy'" at law. *State v. Stirba*, 972 P.2d 918, 921 (Utah Ct. App. 1998) (quoting Utah R. Civ. P. 65B(a)); *see also* Utah R. App. P. 19(b)(4) (requiring petitioner to explain in his petition why no other plain, speedy or adequate remedy exists). Further, this court's decision to grant extraordinary relief is entirely discretionary. *See Newman v. Behrens*, 1999 UT App 90, ¶ 10, 980 P.2d 1191. Tracy has failed to demonstrate that this court should exercise its discretion to grant him extraordinary relief. While the district court rejected Tracy's notice of appeal for failing to comply with the requirements imposed on a vexatious litigant, that notice of appeal, if accepted, would have been untimely as it was filed more than thirty days after entry of the final order Tracy seeks to have reviewed. He is now using this petition as a substitute for a direct appeal, which is not allowed. *See Gilbert v. Maughan*, 2016 UT 31, ¶ 15, 379 P.3d 1263 (stating that a petition for extraordinary relief "is not a proceeding for general review, and cannot be used as such"). Furthermore, Tracy has not demonstrated that this court should exercise its discretion to grant him the remedies he requests.

IT IS HEREBY ORDERED that the petition for extraordinary relief is denied.[1]

Dated this 2nd day of November, 2021.

FOR THE COURT:

Jill M. Pohlman

Jill M. Pohlman, Judge

[1] Because we are denying the petition for extraordinary relief, the motion for an emergency stay is also necessarily denied.

EXHIBIT D

IN THE UTAH COURT OF APPEALS

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MARK CHRISTOPHER TRACY, Petitioner, *v.* THE HONORABLE MARK S. KOURIS, Respondent.	REMITTITUR Appellate Case No. 20210743-CA THIRD DISTRICT, SALT LAKE Trial Court Case No.: 200905074

The above-entitled case was submitted to the court for decision and the decision has been issued.

Decision Issued: November 2, 2022

Notice of Remittitur Issued: February 10, 2022

Lisa A. Collins

Lisa A. Collins
Clerk of Court

By: Hannah Hunter
Hannah Hunter
Judicial Assistant

STATE OF UTAH
JAN 1, 1987
COURT OF APPEALS

Date: Feb. 10, 2022

EXHIBIT G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MARK CHRISTOPHER TRACY, Plaintiff, v. SIMPLIFI COMPANY, a Utah Corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46, Defendants.	**MEMORANDUM DECISION AND ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 2:21-cv-00444-RJS-CMR Chief District Judge Robert J. Shelby Magistrate Judge Cecilia M. Romero

Before the court are the parties' Objections[1] to Magistrate Judge Cecilia M. Romero's Report and Recommendation,[2] in which Judge Romero recommends that the Defendants' Motions to Dismiss[3] be granted but denies Defendants' request for attorneys' fees. For the reasons stated below, the Objections are overruled, the Report and Recommendation is adopted in its entirety, the Defendants' Motions to Dismiss are granted, and the Complaint[4] is dismissed with prejudice.

[1] Dkt. 13 (Defendants Cook, Hawkes, Hawkes, and Simplifi's Objection to Report and Recommendation); Dkt. 14 (Defendant Bennion's Objection to Report and Recommendation); Dkt. 15 (Plaintiff Tracy's Objection to Report and Recommendation).

[2] Dkt. 12 (Report and Recommendation).

[3] Dkt. 6 (Motion to Dismiss filed by Defendants Cook, Hawkes, Hawkes, and Simplifi); Dkt. 7 (Motion to Dismiss filed by Defendant Bennion).

[4] Dkt. 2 (Complaint).

FACTUAL BACKGROUND[5]

The suit is brought by Plaintiff Mark Christopher Tracy, along with his "registered dba entity," the Emigration Canyon Homeowners Association, or ECHO-Association.[6] Tracy alleges that "from sometime in 2013 to the present day," the Defendants "knowingly conspired to impair a constitutionally protected property right to safe drinking water and thus the use and enjoyment of a private home in Emigration Canyon" which is in Salt Lake County, Utah.[7]

Specifically, Tracy alleges the Defendants act through the Emigration Improvement District (EID), a special service water district created in 1968 by Salt Lake County.[8] Tracy alleges: (1) that EID contracts with Defendant Simplifi Corporation to perform management and accounting services, (2) Defendant Jennifer Hawkes is a current officer and director of Simplifi, (3) her spouse, Defendant Eric Lee Hawkes, is the current general manager of EID, (4) Defendant Jeremy Cook represents the Hawkes in pending EID-related litigation, and (5) Defendant Bennion "is a religious leader and LDS member" with no direct interest in EID or Simplifi.[9] Tracy alleges that together, Defendants act "to unlawfully enrich themselves through the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints Emigration Canyon Ward."[10] Tracy specifically alleges the Defendants began wrongfully imposing and collecting a "fire-hydrant rental fee" from Emigration Canyon

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[5] Because Judge Romero's Report and Recommendation concerns a Motion to Dismiss, the well-pleaded allegations in the Complaint are assumed to be true and viewed in the light most favorable to the non-moving party, Tracy. *See Beedle v. Wilson*, 422 F.3d 1059, 1063 (citation omitted).

[6] Complaint (Dkt. 1) ¶ 1.

[7] *Id.* at 2 (Introduction).

[8] *Id.* ¶¶ 10–11. Notably, EID is not named as a Defendant in this action. *See id.* ¶¶ 2–6 (naming Defendants).

[9] *Id.* ¶¶ 3–6.

[10] *Id.* at 2 (Introduction).

residents who are not LDS members, including longtime resident Karen Penske, and also demanded past due payment from Penske.[11]

PROCEDURAL HISTORY

On July 22, 2021, Tracy filed his Complaint pro se against Simplifi, Jennifer and Eric Lee Hawkes, Cook, and Bennion.[12] Tracy brings the action under 42 U.S.C. § 1983 and § 1985 on behalf of Karen Penske.[13] Specifically, the Complaint states that "[f]or good and valuable consideration, Canyon property owner and LDS non-member [Penske] assigned legal right and title to Civil Rights Act claims to [ECHO]."[14] The Complaint alleges Penske acquired the perfected underground water right 57-8582 to water attained from Emigration Canyon's Twin Creek Aquifer to serve her private home, EID acquired the Boyer Water System[15] and caused contamination in Penske's private well, and Defendants (collectively) began to charge Penske a "fire hydrant rental fee."[16] The Complaint further alleges that Defendants only certified "delinquent accounts" to the city of Salt Lake, including Penske's, belonging to "LDS Nonmembers."[17] The Complaint seeks damages against the Defendants "for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants to include monetary renumeration for economic damage and loss" as well as "punitive damages for malicious and/or reckless conduct" as alleged in the Complaint.[18]

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[11] *Id.* ¶¶ 34–40.

[12] *See id.* at 1 (Caption).

[13] *Id.*

[14] *Id.* at 2 (Introduction).

[15] Tracy alleges the Boyer Water System has contaminated the aquifer due to the actions of Defendants. *Id.* ¶¶ 18, 24.

[16] *Id.* ¶¶ 10–46.

[17] *Id.* ¶ 37.

[18] *Id.* at 11 (Request for Relief).

On August 9, 2021, the case was assigned to the undersigned.[19] On August 11, 2021, the case was referred to Judge Romero pursuant to 28 U.S.C. § 636(b)(1)(B).[20]

On August 27, 2021, Defendants Simplifi, Jennifer Hawkes, Eric Hawkes, and Jeremy Cook (Defendants) filed a Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure.[21] These Defendants argued the Complaint should be dismissed pursuant to Rule 12(b)(1) because Penske's § 1983 and § 1985 claims cannot be assigned, and therefore Tracy lacked standing to bring the suit.[22] The Defendants further argued the Complaint should be dismissed pursuant to Rule 12(b)(6) because Tracy failed to allege sufficient facts to support his theory of § 1983 and § 1985 claims based on discrimination against LDS nonmembers.[23] The Defendants additionally sought an award of attorneys' fees pursuant to 42 U.S.C. § 1988,[24] a determination Tracy is a vexatious litigant so that a pre-filing order may be imposed on him,[25] and finally, for a show cause order to issue requiring Tracy to provide the basis for the allegations made in the Complaint.[26]

On September 22, 2021, Defendant Bennion filed his own Motion to Dismiss.[27] In it, he argued: (1) Tracy lacked standing to bring the claim due to the unassignability of § 1983 and § 1985 claims, (2) the statute of limitations barred Tracy's claims as brought against Bennion, and

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[19] Dkt. 4 (Docket Text Order).

[20] Dkt. 5 (Docket Text Order Referring Case). Under 28 U.S.C. § 636(b)(1)(B), the magistrate judge handles all matters in a case up to a Report and Recommendation on a dispositive motion.

[21] Dkt. 6 (Defendants' Motion to Dismiss).

[22] *Id.* at 6–7.

[23] *Id.* at 7–10.

[24] *Id.* at 10–12.

[25] *Id.* at 12.

[26] *Id.* at 13–14.

[27] Dkt. 7 (Defendant Bennion's Motion to Dismiss).

(3) Tracy's claim lacked specific factual allegations concerning Bennion, and thus failed to satisfy pleading standards in Rule 8, Federal Rules of Civil Procedure.[28] Bennion also incorporated by reference the arguments for dismissal in the Defendants' Motion.[29]

On September 24, 2021, Tracy filed a Memorandum in Opposition to the Motions to Dismiss, arguing he had standing to bring Penske's § 1983 and § 1985 claims or in the alternative, "should be granted leave to assert impairment of his own constitutionally protected property right." Tracy further argued the action was timely and the claims were sufficiently pleaded.[30] On October 7 and 8, 2021, the Defendants and Defendant Bennion each filed a Reply in support of their Motions to Dismiss.[31]

On January 19, 2022, Judge Romero issued a Report and Recommendation (the Report), recommending the Motion to Dismiss be granted pursuant to Rule 12(b)(1).[32] Because Judge Romero found the Rule 12(b)(1) argument dispositive, she did not consider the Defendants' Rule 12(b)(6) arguments.[33] She also determined an award of attorneys' fees was not warranted, and did not recommend imposing a pre-filing restriction or issuing a show-cause order.[34]

On February 2, 2022, the parties filed three Objections to the Report.[35] The court turns to the parties' arguments.

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[28] *Id.* at 1 (summarizing argument).

[29] *Id.* at 1–2.

[30] Dkt. 8 (Memorandum in Opposition to Motion to Dismiss).

[31] Dkt. 9 (Defendants' Reply in Support of Motion to Dismiss); Dkt. 10 (Defendant Bennion's Reply in Support of Motion to Dismiss).

[32] Dkt. 12 (Report and Recommendation).

[33] *Id.* at 3.

[34] *Id.* at 9–10.

[35] Dkt. 13 (Defendants' Objection to Report and Recommendation); Dkt. 14 (Defendant Bennion's Objection to Report and Recommendation); Dkt. 15 (Plaintiff Tracy's Objection to Report and Recommendation).

LEGAL STANDARDS

Tracy proceeds pro se. While the court "liberally construe[s] pro se pleadings," "pro se status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil . . . Procedure."[36]

The applicable standard of review in considering objections to a magistrate judge's report and recommendation depends on whether a party lodges an objection to it.[37] When assessing unobjected-to portions of a report and recommendation, the Supreme Court has suggested no further review by the district court is required, but neither is it precluded.[38] This court generally reviews unobjected-to portions of a report and recommendation for clear error.[39]

However, Federal Rule of Civil Procedure 72(b)(2) allows parties to file "specific written objections to the proposed findings and recommendations."[40] In those instances, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."[41] To qualify as a proper objection that triggers de novo review, the

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[36] *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994) (citation omitted).

[37] *See* Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

[38] *See Thomas v. Arn*, 474 U.S. 140, 149 (1985) ("The [Federal Magistrate's Act] does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection."); *id.* at 153–54 (noting that "it is the district court, not the court of appeals, that must exercise supervision over the magistrate," so that "while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard").

[39] *See, e.g.*, *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made [to a magistrate judge's report and recommendation], the district court judge reviews those unobjected portions for clear error.") (citations omitted); *see also* Fed. R. Civ. P. 72(b) Advisory Committee's note to 1983 amendment ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (citing *Campbell v. U.S. Dist. Court for N. Dist. of Cal.*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879).

[40] Fed R. Civ. P. 72(b).

[41] *Id.* 72(b)(3); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("De novo review is statutorily and constitutionally required when written objections to a magistrate's report are timely filed with the district court.") (citations omitted).

objection must be both timely—that is, made within fourteen days—and "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute."[42] Thus, de novo review is not required where a party advances objections to a magistrate judge's disposition that are either indecipherable or overly general.[43]

A defendant may move to dismiss a complaint under Rule 12(b)(1) on the ground that the court lacks subject matter jurisdiction.[44] Motions to dismiss for lack of subject matter jurisdiction take two forms: facial and factual.[45] Defendants' Motions constitute a facial challenge. A facial attack on subject matter jurisdiction challenges the sufficiency of the allegations in the complaint, accepting as true the allegations therein.[46]

A plaintiff bears the burden of establishing subject matter jurisdiction.[47] The subject matter jurisdiction of federal courts is limited to cases in which the plaintiff can demonstrate he or she has met the case or controversy requirement of Article III, namely, that: "(1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision."[48] These three elements of Article III standing—injury, causation, and redressability—are

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[42] *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996) ("[W]e hold that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.").

[43] *See id.* ("Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review.") (citation omitted); *see also Moore v. Astrue*, 491 F. App'x 921, 922 (10th Cir. 2012) (upholding district court's clear error review of magistrate judge's report and recommendation because Plaintiffs objected only "generally to every finding" in the report).

[44] Fed. R. Civ. P. 12(b)(1).

[45] *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated on other grounds by Cent Green Co. v. United States*, 531 U.S. 425, 437 (2001).

[46] *Id.* (citation omitted).

[47] *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

[48] *Winsness v. Yocom*, 433 F.3d 727, 731–32 (10th Cir. 2006) (citation omitted).

necessary for the court to exercise subject matter jurisdiction.[49] To demonstrate injury, a plaintiff must show they have a personal stake in the outcome of the case.[50]

ANALYSIS

As a threshold issue, all three Objections are timely because they were each filed on February 2, 2022, within fourteen days of the Report.[51] The court considers each Objection in turn.

I. Tracy's Objection to Judge Romero's Report is Overruled

For the reasons explained below, Tracy's Objection to the Report is overruled. First, the court summarizes Judge Romero's analysis of the parties' Rule 12(b)(1) arguments before turning to Tracy's objection.

In the Report, Judge Romero explained that while "[a] plaintiff is generally required to assert his own legal rights and interests, and not those of third parties,"[52] "an assignee may satisfy the case and controversy requirement through a valid assignment."[53] Judge Romero then determined that claims brought under 42 U.S.C. §§ 1983 and 1985 are not assignable, and accordingly recommended dismissing the Complaint for lack of subject matter jurisdiction. As to § 1983 claims, Judge Romero noted this court previously decided in *American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon* that § 1983 claims are not assignable under Utah law.[54] That case explained that under Supreme Court precedent and federal law, because § 1983 provides no guidance on whether an individual may transfer the right to sue,

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[49] *Schutz v. Thorne*, 415 F.3d 1128, 1133 (10th Cir. 2005).

[50] *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

[51] *See* Defendants' Objection; Defendant Bennion's Objection; Tracy's Objection.

[52] Report (Dkt. 12) at 5 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[53] *Id.* (citing *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008)).

[54] *Id.* at 5 (citing No. 2:08-cv-875, 2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016).

courts must look to state law to determine whether such a claim can be assigned.[55] Because § 1983 claims are characterized as personal injury torts,[56] and under Utah law, such personal injury tort claims cannot be assigned, § 1983 claims cannot be assigned.[57] The *American Charities* court observed that this result accords with the purpose of § 1983, which is to allow individuals to assert their own civil rights, a purpose that is not met by assigning those rights to disinterested third parties.[58] Guided by *American Charities*, Judge Romero determined that Penske could not assign her to § 1983 claim to Tracy, a disinterested third party.[59] Judge Romero further observed that Tracy's argument in Opposition that *American Charities* had been abrogated by a later Tenth Circuit decision was incorrect, because the Tenth Circuit dismissed the appeal as moot based on a change in the underlying Utah law in the dispute but did not overturn or even address the analysis concerning § 1983.[60] As to the § 1985 claims, Judge Romero found that because "courts in this district" have also characterized § 1985 claims as personal injury claims, under the same logic, those claims also may not be assigned in Utah because Utah law forbids the assignment of personal injury claims.[61]

First, the court determines whether Tracy's objection is specific enough to trigger de novo review of any section of the Report. Most of Tracy's Objection is spent enumerating the general facts of the case, including a history of the water rights in Emigration Canyon.[62]

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[55] 2016 WL 4775527, at *5 n.57 (citing *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); 42 U.S.C. § 1988(a)).

[56] *Id.* (citing *Wilson*, 471 at 280).

[57] *Id.* at *6 (citing *State Farm Mut. Ins Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 459 (Utah 1969)).

[58] *Id.*

[59] Report (Dkt. 12) at 5.

[60] *Id.* at 5 n.2 (citing *American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329 (10th Cir. 2019)).

[61] *Id.* at 7 (citing *Desai v. Garfield Cty. Gov't*, No. 2:17-cv-00024-JNP-EJF, 2018 WL 1627205, at *3 (D. Utah Feb. 16, 2018), *report and recommendation adopted*, 2018 WL 1626521 (D. Utah Mar. 30, 2018)).

[62] *See* Tracy's Objection (Dkt. 15) at 1–7.

However, he does lodge a specific objection to Judge Romero's determination that under a previous decision of this court, § 1983 and § 1985 claims are not assignable in Utah.[63] Specifically, Tracy contends that the decision was "vacated," and that under the Supreme Court's decision in *Wilson v. Garcia*, "the present case specially address a constitutional right to the use and enjoyment of private property in the form of a senior perfected water right and should be evaluated as such when deciding if the assignment of statutory federal civil right must be determined by state law."[64] Accordingly, the court will determine de novo whether § 1983 and § 1985 claims are assignable.

As to § 1983 claims, Judge Romero correctly determined that such claims are not assignable. Judge Romero was correct that the later Tenth Circuit decision vacating an appeal of *American Charities* did not address or overturn the analysis of assignability. Rather, that later decision recognized that a change in Utah law concerning charitable organizations rendered the appeal moot.[65] The Tenth Circuit did not address the lower court's analysis of assignability.[66]

Additionally, *Wilson v. Garcia* does not change this analysis, as Tracy contends. In fact, *Wilson v. Garcia* was superseded by a statute,[67] which recognizes "in all cases where [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as

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[63] *Id.* at 7–10.

[64] *Id.* at 8–9 (citing *Wilson*, 471 U.S. at 267).

[65] *American Charities*, 909 F.3d at 331–32 (explaining appeal was rendered moot by change in Utah law).

[66] *See id.*

[67] *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 380–81 (2004) (recognizing abrogation of *Wilson* by statute).

the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause."[68] Accordingly, when a federal statute is silent on the assignability of claims, as § 1983 is, the court must determine whether such a claim would be assignable in the state where it sits.[69] Because § 1983 claims are characterized as personal injury torts, and such claims are not assignable under Utah law, § 1983 claims are not assignable.[70]

For the same reason, Judge Romero was correct that § 1985 claims are not assignable. The Tenth Circuit has recognized that § 1985 claims are treated as personal-injury claims, and accordingly, the state law of personal injury has been applied to § 1985 claims to determine issues including the applicable statute of limitations.[71] Therefore, such claims would also not be assignable under Utah law as Utah law prohibits the assignment of personal injury claims.[72]

Accordingly, the court agrees with Judge Romero's determination that both § 1983 claims and § 1985 claims are not assignable under Utah law, and accordingly, Tracy lacks standing to bring the suit. Judge Romero correctly determined that, having failed to demonstrate standing, Tracy's Complaint must be dismissed pursuant to Rule 12(b)(1).[73]

Finally, the court must determine whether dismissal is with or without prejudice. Judge Romero's report determined that amendment would be futile in light of the unassignability of §

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[68] 42 U.S.C. § 1988(a); see also American Charities, 2016 WL 4775527, at *5 n.57 (citing *Wilson*, 471 U.S. at 267; 42 U.S.C. § 1988(a)).

[69] *American Charities*, 2016 WL 4775527, at *6.

[70] *Id.*

[71] *Lyons v. Kyner*, 367 F. App'x 878, 881–82 (10th Cir. 2010) (unpublished) (collecting cases); *see also Buck v. Utah Labor Com'n*, 73 Fed. App'x 345, 348 (10th Cir. 2003) (unpublished) (upholding district court's application of Utah's statute of limitations to § 1983 and § 1985 claims).

[72] *See American Charities*, 2016 WL 4775527, at *6.

[73] Judge Romero did not reach the Defendants' Rule 12(b)(6) arguments because the 12(b)(1) arguments were dispositive. The court agrees with Judge Romero's determination, and accordingly does not reach the Defendants' Rule 12(b)(6) arguments.

1983 and § 1985 claims, and that dismissal should be with prejudice.[74] Tracy did not lodge a specific objection to this section of Report, only generally stating he "should be granted leave to assert his own constitutionally protected water right."[75] Because objections that are overly general are not sufficient to trigger de novo review,[76] and Tracy does not address Judge Romero's analysis as to why amendment would be futile, this section of the Report is reviewed only for clear error. Finding no clear error in Judge Romero's determination,[77] the court concurs and dismisses Tracy's Complaint with prejudice.

II. Defendants' Objections to Judge Romero's Report are Overruled

For the reasons explained below, Defendants' Objections to the Report are overruled. First, the court summarizes Judge Romero's recommendations concerning attorneys' fees and a show-cause order before turning to Defendants' Objections.

Judge Romero explained that under Tenth Circuit precedent, "[r]arely will a case be sufficiently frivolous to justify imposing attorneys' fees on the plaintiff,"[78] the purpose of awarding fees is to "deter a plaintiff from filing patently frivolous and groundless suits," and that this case was not sufficiently frivolous to support an award of attorneys' fees.[79] As to filing restrictions, Judge Romero took judicial notice of six other lawsuits Tracy has filed against Defendants associated with EID or Simplifi, including one in federal court,[80] but explained that

[74] Report (Dkt. 12) at 7–8.

[75] Tracy's Objection (Dkt. 15) at 10 (citing Complaint ¶ 29).

[76] *One Parcel of Real Prop.*, 73 F.3d at 1060.

[77] *See* Report (Dkt. 12) at 8 (noting the Complaint contains no supporting facts suggesting Tracy has standing to assert a claim on his own, and that the Complaint is based on asserting the assignability of Penske's rights).

[78] *Id.* at 9 (citing *Thorpe v. Ancell*, 367 F. App'x 914, 924 (10th Cir. 2010) (quoting *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995)).

[79] *Id.*

[80] *Id.* at 9–10.

one other suit filed in federal court did not "demonstrate[] an abusive lengthy history of litigation in this court which would warrant imposition of filing restrictions."[81] Finally, Judge Romero concluded that issuing a show-case order was unnecessary given the recommendation of dismissal with prejudice.[82]

Defendants Simplifi, Jennifer Hawkes, Eric Hawkes, and Cook object first to Judge Romero's determination an award of attorneys' fees is not merited,[83] and second to her determination a show-cause order is not necessary following dismissal of Tracy's Complaint with prejudice.[84] As to the first objection concerning attorneys' fees, Defendants contend that "it is hard to imagine a more frivolous and unreasonable case," especially since most of the allegations in the Complaint concern the EID, but the EID is not named as a Defendant.[85] Defendants emphasize that Tracy has been found a vexatious litigant in Utah state court and that the claims concerning religious discrimination had "absolutely no factual support" to argue attorneys' fees are merited.[86] In short, the Defendants argue that Judge Romero's application of the law of attorneys' fees to the facts of this case was not correct, but do not disagree with her characterization of the relevant law. The court will review this objection de novo.

As to the second objection, Defendants argue that because Judge Jill Parrish of this court cautioned Tracy in a related case he "began taking liberty with facts," and that certain facts in

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[81] *Id.* at 10 (citing *Blaylock v. Tinner*, 543 F. App'x 834, 836 (10th Cir. 2013)).

[82] *Id.*

[83] Defendant Bennion joins in this first objection alone and incorporates the other Defendants' argument by reference. *See* Bennion's Objection (Dkt. 14) at 1–2.

[84] *See* Defendants' Objection (Dkt. 13). Defendants do not object to Judge Romero's determination that Tracy's Complaint should be dismissed with prejudice, *id.* at 1, nor do they object to her determination that Tracy should not be found to be a vexatious litigant in federal court, *id.* at 1–2 ("Defendants object to the recommendation that attorney's fees should not be awarded to Defendants, and that an Order to Show Cause is unnecessary given the recommendation of dismissal.").

[85] *Id.* at 2.

[86] *Id.* at 3.

this Complaint were untrue, a show-cause order is necessary to deter Tracy from continuing to file lawsuits.[87] Again, the Defendants do not disagree with Judge Romero's explication of the relevant law, but rather, her application of the law to this case's facts. The court will also review this objection de novo.

As to the first objection, Defendants claim Judge Romero said the attorneys' fees issue was a "close call,"[88] however, Judge Romero made this observation in connection to her recommendation to not to impose filing restrictions, a section of the Report to which Defendants did not object.[89] The court agrees with Judge Romero that an award of attorneys' fees is not justified in this case.

Under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party" to seek an award of attorney's fees.[90] While this provision is applied "liberally" to prevailing plaintiffs, prevailing defendants may not be awarded attorneys' fees unless the court determines the claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[91] A frivolous suit is "based on an indisputably meritless legal theory" or one whose "factual contentions are clearly baseless."[92] Judge Romero correctly observed it is the rare case in which imposing attorneys' fees is justified, and that the purpose for imposing attorneys' fees against plaintiffs in § 1983 cases is to deter baseless filings in the

[87] *Id*. at 4–5. Defendants also state that Tracy "has consistently taken the position he has no assets to satisfy the current attorneys' fee judgments against him," and imply that a show-cause order is necessary to deter him since awards of attorney's fees have not done so in the past. See id.

[88] *Id.* at 2.

[89] Report (Dkt. 12) at 10.

[90] 42 U.S.C. § 1988(b).

[91] *Thorpe v. Ancell*, 367 F. App'x 914, 919 (10th Cir. 2010) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978)).

[92] *Id.* (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

future.[93] Indeed, the Supreme Court has cautioned that in determining whether a claim is frivolous, unreasonable, or groundless, courts must avoid "post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."[94]

Here, Tracy's Complaint focused on Penske's grievances with the EID and Simplifi, including fees assessed against her, collection proceedings, and the contamination of her personal well. Tracy's legal theory was that Penske could assign § 1983 and § 1985 claims arising out of these alleged facts to him. While the court determined that those claims are not assignable, that determination required an analysis of binding precedent concerning § 1985 claims as applied to the law of assignability under Utah law, an issue not yet determined by this court. Accordingly, while Tracy's claims ultimately fail, the claims were not "indisputably meritless" at the time they were brought. Moreover, the Defendants have not shown that the factual contentions concerning Penske's well and fees assessed against her are "clearly baseless." While the court agrees with Judge Romero it is "curious" EID was not named as a Defendant in this suit, because the Supreme Court cautions against "post hoc" reasoning and awards of attorneys' fees are the exception, and not the rule,[95] the court agrees with Judge Romero an award of attorneys' fees is not merited.

As to the second objection, the court first notes Judge Romero's analysis of this issue is quite brief, stating without citation to law that because the court recommends dismissal with

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[93] Report (Dkt. 12) at 10 (citing *Thorpe*, 367 F. App'x at 920).

[94] *Christiansburg*, 434 U.S. at 421–22.

[95] See *Kornfeld v. Kornfeld*, 393 F. App'x 575, 578 (10th Cir. 2010) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 243 (2010) (noting that under the "bedrock principle known as the 'American Rule,'" "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.")).

prejudice, an order to show cause is unnecessary.[96] Similarly, Defendants do not provide any citations to law in objecting to this conclusion, but instead assert that based on the Tracy's past litigation history, a show-cause order is necessary to deter him from baseless future filings.

Under Rule 11, a party certifies that by presenting any filing to the court, the "legal contentions are warranted by existing law," "the factual contentions have evidentiary support" or will likely have evidentiary support after further investigation, and the filing is not presented for an "improper purpose," such as to harass.[97] A party may motion for sanctions to be imposed under Rule 11, but such a motion must be filed separately from any other motion and specifically describe the conduct at issue.[98] The defendants have not filed a separate Rule 11 motion.[99] The parties instead ask the court to exercise its own inherent authority under the Rule to issue a show-cause order to Tracy as to why conduct in the suit has not violated Rule 11(b).[100]

While the court would have jurisdiction to issue a show-cause order following a dismissal with prejudice,[101] the court declines to issue a show-cause order in these circumstances. In declining to issue such an order, the court notes as discussed above, Defendants have not demonstrated the claims in this case were "entirely meritless" or the facts asserted had no basis. Additionally, this case was resolved on the pleadings without "substantially burden[ing]" the

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[96] Report (Dkt. 12) at 10.

[97] Fed. R. Civ. P. 11.

[98] *Id.* 11(c)(2).

[99] *See* Defendants' Motion to Dismiss (Dkt. 6) at 13–14 (asking the court to issue an Order to Show Cause).

[100] Fed. R. Civ. P. 11(b)(3).

[101] *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990) (holding a court may enforce Rule 11 after voluntary dismissal and observing: "It is well established that a federal court may consider collateral issues after an action is no longer pending.").

court.[102] Accordingly, the court agrees with Judge Romero that issuing a show-cause order is not necessary.

III. The Report and Recommendation is Adopted

Finding no clear error in the remainder of the Report, the court adopts it in its entirety, and accordingly grants the Motions to Dismiss, dismisses Tracy's Complaint with prejudice, and declines to impose attorneys' fees, determine that Tracy is a vexatious litigant, or issue an order to show cause.

CONCLUSION

For the reasons stated above, the Parties' Objections[103] are OVERRULED, the Report and Recommendation[104] is ADOPTED in its entirety, the Motions to Dismiss[105] are GRANTED, and the Complaint[106] is DISMISSED WITH PREJUDICE. The clerk of court is directed to close the case.

SO ORDERED this 24th day of March, 2022.

BY THE COURT:

ROBERT J. SHELBY
United States Chief District Judge

[102] *See Dodds Ins. Servs. Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158–59 (10th Cir. 1991).

[103] Dkt. 13; Dkt. 14; Dkt. 15.

[104] Dkt. 12.

[105] Dkt. 6; Dkt. 7.

[106] Dkt. 1.

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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 REPLY IN SUPPORT OF 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

Specially appearing defendant Paul Brown ("Brown") submits this Reply in support of Brown's Motion for Order Finding Plaintiff Mark Christopher Tracy ("Plaintiff") to be a Vexatious Litigant and Entry of a Prefiling Order ("Vexatious Litigant Motion") pursuant to California Code of Civil Procedure §§ 418.10(e)(1) and 391.7(a).

I. INTRODUCTION

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 the state and federal courts in Utah. Plaintiff has initiated six previous related litigations, all of which have been dismissed. Despite having different alleged causes of actions, these actions relate to the same core factual allegations -- allegedly fraudulently obtained water rights, Plaintiff's issues with the Emigration Improvement District ("EID") and development in Emigration Canyon. Now, despite having his cases dismissed six times, three times being informed by the Court that his allegations are baseless and twice being sanctioned for being a vexatious litigant, Plaintiff now seeks a seventh attempt to litigate the same previously raised facts. Concerningly, Plaintiff is now attempting to bring his vexatious claims to California – presumably because Plaintiff is barred from bringing claims in Utah state courts without permission from the presiding Judge of Utah's Third District Court in and for Salt Lake County -- even though none of the defendants reside in California and all of the alleged conduct occurred exclusively in Utah.

For the reasons set forth in the Vexatious Litigant Motion and this Reply, Brown respectfully requests that the Court: (1) find Plaintiff to be a vexatious litigant pursuant to California Code of Civil Procedure § 391(b) and § 391.7; (2) enter a prefiling order prohibiting Plaintiff from filing any new litigations 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; and (3) 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.

Additionally, Plaintiff has filed a Request for Judicial Notice in support of Plaintiff's Opposition to the Vexatious Litigant Motion. Brown hereby objects to Plaintiff's Request for Judicial Notice because the documents that Plaintiff has submitted are not relevant to Vexatious Litigant Motion. (California Evidence Code § 210).

II. FACTUAL BACKGROUND

As was more fully elaborated in Brown's Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction, Vexatious Litigant Motion and Opposition to Plaintiff's Motion for

Reconsideration, despite several failed efforts, Plaintiff is again attempting to relitigate allegations based on allegedly fraudulently obtained water rights and development in Utah.

On September 26, 2014, Plaintiff filed a Complaint against the EID and other defendants associated with the EID, some of which are named in the current action, in the United States District Court for the District of Utah alleging violations of the Federal False Claims Act ("FCA Litigation"). (*See*, Complaint at ¶ 61; 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 F). The presiding judge ultimately issued an Order dismissing the complaint and finding Plaintiff's "actions were both clearly vexatious and brought for the purpose of harassment" and that Plaintiff "brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives." (Mendez-Pintado Decl. at Ex. G ("FCA Attorney Fee Order")).

In August of 2020, Plaintiff filed a Petition with the Third District Court for the State of Utah based on the Government Records Access and Management Act against respondents associated with the EID. (Mendez-Pintado Decl. at Ex. A. (Petition for Judicial Review of Denied Request for Disclosure of Public Records) (hereinafter referred to as "Vexatious Litigant Petition".) This was Plaintiff's second petition before the Court raising identical issues against identical respondents. (Mendez-Pintado Decl. at Ex. B at p. 5.) In dismissing the previous Petition, the Court had informed Plaintiff that there was no basis to sue the named respondents. (*Id.*) Despite the Court's warning, Plaintiff filed the Vexatious Litigant Petition against the same named respondents. (Mendez-Pintado Decl. at Ex. A). Although the Vexatious Litigant Petition was captioned as a petition related to the denial of a request for the disclosure of public records, the majority of the substantive allegations related to alleged violations of the Clean Water Act and allegedly fraudulently obtained senior water rights. (*Id.*) Ultimately the Court issued two orders dismissing the petition, awarding respondents their attorney's fees, and finding Plaintiff to be a vexatious litigant because the petition was meritless, brought in bad faith and Plaintiff's motivation was to attack and harass the respondents. (Mendez-Pintado Decl. at Ex. B ("First Fee Order"); Ex. C ("Vexatious Litigant Order".)

In July of 2021, Plaintiff filed a Civil Rights Complaint in the United States District Court for the District of Utah (Mendez-Pintado Decl. at Ex. D ("Civil Rights Complaint")) The Civil Rights

Complaint did not allege that Plaintiff's civil rights had been violated, instead alleging that an Emigration Canyon resident had assigned her civil rights claim to Plaintiff. (*Id*.) Although the complaint purportedly raised religious discrimination claims, the complaint did not name a single governmental entity or governmental actor as required by 42 U.S.C. § 1983, instead naming EID related defendants. (*Id*.) Additionally, most of the allegations in the Civil Rights Complaint related to allegations of fraudulently obtained water rights and development in Emigration Canyon in Utah. (*Id*.) The Court dismissed the Civil Rights Complaint because Plaintiff lacked standing. (Mendez-Pintado Decl. at Ex. E.)

Additionally, the Memorandum Decision and Order Adopting Report and Recommendation related to the Civil Rights Complaint that Plaintiff submitted indicates that in fact Plaintiff had filed six related actions, before the Civil Rights Complaint, against defendants associated with EID. (Plaintiff's Request for Judicial Notice at Ex. G at p. 12.) Accordingly, it appears that the current action is actually Plaintiff's seventh attempt to relitigate issues related to allegedly fraudulently obtained water rights in Utah against defendants associated with EID.

In the current action, despite listing causes of actions for defamation, false light, and intentional infliction of emotional distress, Plaintiff's primary factual allegations relate to the EID and allegedly fraudulently obtained water rights in Utah. (See, Complaint.) There is no merit to Plaintiff's claims, and no basis for personal jurisdiction in California because Brown is a Utah resident without continuous or systematic contacts with California and none of the alleged conduct occurred in California. Yet, despite there being no connection between Plaintiff's claims and California, Plaintiff now insists on bringing this action in California, presumably because Plaintiff has been sanctioned by both a state and federal court in Utah and is now subject to a pre-filing vexatious litigant order with the state courts of Utah.

III. ARGUMENT

A. Filing the current motion does not constitute a general appearance.

In support of Plaintiff's Motion for Reconsideration of the Court's Order Granting Defendants' Motion to Quash, Plaintiff argued, on reply, that the filing of the Vexatious Litigant Motion constituted a general appearance waiving any challenges to personal jurisdiction. (See, Plaintiff's Reply in Support of Motion for Reconsideration). During oral argument, Plaintiff re-raised this argument. The Court correctly informed Plaintiff that the filing of the Vexatious Litigant Motion by a specially appearing

defendant did not establish personal jurisdiction over the specially appearing defendant. Despite knowing that the Vexatious Litigant Motion does not constitute a general appearance, Plaintiff continues to insist on this legally deficient position that Brown has waived the challenge to personal jurisdiction.

California Code of Civil Procedure 418.10(e)(1), which Brown cited in the Vexatious Litigant Motion, clearly explains that: "no act by a party who makes a motion under this section […] constitutes an appearance, unless the court denies the motion made under this section." California courts have consistently held that when a party files a motion challenging personal jurisdiction under Section 418.10, subsequent motions do not constitute a general appearance, instead the party is deemed to have specially appeared for all subsequent motions without waiving their jurisdictional challenge. (*Factor Health Management v. Superior Court*, 132 Cal.App.4th 246, 251-52 (2005); *Air Machine Com SRL v. Superior Court*, 186 Cal.App.4th 414, 426 (2010); *ViaView, Inc. v. Retzlaff*, 1 Cal.App.5th 198, 204 (2016).) The law is clear that "a party who moves to quash may – concurrently with or after filing a motion to quash – participate in the litigation and 'no act' by the party constitutes an appearance unless and until the proceedings on the motion to quash are finally decided adversely to that party." (*ViaView, Inc.*, 1 Cal.App.5th at 204.)

Based on the foregoing, the current Vexatious Litigant Motion does not constitute a general appearance in this action. Despite clear statutory language, established case law and the Court's explanation of clear law to Plaintiff, Plaintiff continues to insist on advancing legally deficient arguments in an attempt to harass Brown by prolonging this litigation.

B. Plaintiff is a vexatious litigant pursuant to California Code of Civil Procedure § 391(b)(2)

Next, Plaintiff attempts to impose new requirements under California Code of Civil Procedure 391(b)(2) that are not supported by the language of the statute. Plaintiff argues that Brown cannot bring a motion under Section 391(b)(2) because Brown was not a named defendant in Plaintiff's previous failed attempts to litigate the issues Plaintiff now raises.

The language of Section 391(b)(2) states that the subsection applies when a Plaintiff attempts to relitigate finally decided issues of fact or law against the same defendants. Which is exactly what Plaintiff is attempting to do in this litigation. The language of Section 391(b)(2) does not make it a pre-

requisite that the moving party on a vexatious litigant motion be one of the defendants in the previous litigation. Further as Brown explained in the Vexatious Litigant Motion, California courts have held that as a matter of policy, a connection between the moving party and the prior litigation is not necessary under Subsection 391(b)(2). (*Goodrich v. Sierra Vista Regional Medical Center*, 246 Cal.App.4th 1260, 1267; *Holcomb v. U.S. Bank Nat. Assn.*, 129 Cal.App.4th 1494, 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.) 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).)

Plaintiff's opposition does not address the policy considerations under Subsection 391(b)(2), nor does it cite to any case law requiring a connection between the prior defendants and the moving party on a motion pursuant to Subsection 391(b)(2). Further, Plaintiff does not challenge that the Plaintiff's Complaint raises issues of fact or law that were concluded during Plaintiff's six previously dismissed actions in Utah.

Based on the foregoing, the Court should find that Plaintiff is a vexatious litigant under the definition set forth in Section 391(b)(2).

C. Plaintiff is a vexatious litigant pursuant to California Code of Civil Procedure § 391(b)(3)

Under California Code of Civil Procedure 391(b)(3), a party may be 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 already 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, 1268).

Plaintiff attempts to argue that he is not a vexatious litigant because the United States District Court for the District of Utah found that Plaintiff's Civil Rights Litigation was not "entirely meritless." Yet, Plaintiff cannot simply cherry pick one case in which he was not sanctioned and ask the Court to

ignore all of Plaintiff's other prior vexatious litigations and Plaintiff's conduct in the present action. Plaintiff's prior course of litigation and tactics in the above captioned action demonstrate a past pattern of meritless litigation with an intent to continue these vexatious pleadings in California.

As was explained in the Vexatious Litigant Motion, Plaintiff has already been sanctioned for conducting litigation in bad faith. In the FCA Litigation, the United States District Court for the District of Utah found that Plaintiff's claims were clearly vexatious and in bad faith because Plaintiff brought the action for the primary purpose of harassing the defendants and airing his own personal grievances. (Mendez-Pintado Decl. at Ex. G (FCA Attorney Fee Order) at 6-9.) Similarly in 2021, the Third District Court for the State of Utah 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. (Mendez-Pintado Decl. at Exhibit C.)

The allegations in these two prior actions are substantially similar to the current complaint because they raise Plaintiff's frivolous theories regarding allegedly fraudulently obtained water rights. (Compare Complaint at ¶¶5, 26(d)-(f), 61 with Mendez-Pintado Decl. at Exhibit A ("Vexatious Litigant Petition") at ¶¶ 11-19, 22-24, 26, 32, 37, 38-42; Exhibit F (FCA Litigation) ¶¶ 300-326.) Plaintiff's Complaint 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 in Utah on September 26, 2014, under the False Claims Act."). In short, Plaintiff has now filed six cases related to the same factual theories, each of which have been dismissed, three courts have informed Plaintiff that his allegations are baseless, and two courts have sanctioned Plaintiff for being a vexatious litigant. Plaintiff's past course of conduct demonstrates a clear past pattern and practice of meritless pleadings that are likely to be repeated. Furthermore, now that Plaintiff has been barred from bringing litigation in Utah without first receiving permission from the Court, it appears that Plaintiff is intent on continuing this campaign of vexatious litigations in California.

Additionally, in the current litigation Plaintiff has continued his tactics by filing unmeritorious motions, pleadings, and engaging in tactics intended to cause unnecessary delay. First, during oral argument on Defendants' Motions to Quash, the Court explained that the issues before the Court were limited to personal jurisdiction and not the unrelated substantive allegations in Plaintiff's Complaint.

Yet, on Plaintiff's Motion for Reconsideration, Plaintiff ignored the Court, again trying to interject the same factual allegations raised and dismissed in previous litigations. (Compare Motion for Reconsideration at p 5; Declaration of Mark Christopher Tracy in Support of Motion for Reconsideration; with Mendez-Pintado Decl. at Ex. A at ¶¶ 14-19, 21-24; Ex. D. at ¶ 17, 25-26, 43-45; Ex. F at ¶¶ 300-326). Further, Plaintiff's Motion for Reconsideration itself was frivolous because it did not cite to any factual or legally cognizable basis for the Court to reconsider its Order Granting Defendants' Motions to Quash. (See, Plaintiff' Motion for Reconsideration.) Finally, during oral argument on Plaintiff's Motion for Reconsideration, the Court informed Plaintiff that his argument that the Vexatious Litigant Motion constituted a general appearance was legally unsupported. Yet, in an attempt to harass Brown and cause unnecessary delay, Plaintiff has decided to ignore the Court, clear statutory language and relevant case law by re-raising the frivolous argument that the Vexatious Litigant Motion constitutes a general appearance.

The Court should find Plaintiff to be a vexatious litigant under the definition of Section 391(b)(3).

D. Plaintiff is a vexatious litigant pursuant to California Code of Civil Procedure § 391(b)(4)

Under 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."

As was elaborated in the Vexatious Litigant Motion and in other sections of this Reply, Plaintiff has already been sanctioned for being a vexatious litigant in two previous actions based on the substantially similar allegations as the above captioned action. In 2014, the United States District Court for the District of Utah found Plaintiff to be clearly vexatious and acting in bad faith. (Mendez-Pintado Decl. at Ex. G at p. 6-9). Plaintiff's Complaint expressly states that the allegations in the above captioned action were raised in the FCA Litigation before the United States District Court for the District of Utah. (*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."). In April of 2021, the Third District Court in and for the State of Utah declared Plaintiff to be a vexatious litigant pursuant to Rule 83(a)(1) of the Utah Rules of Civil Procedure. (Mendez-Pintado Decl. at Ex. C.). The allegations in these two prior

actions are substantially similar to the current complaint because they raise Plaintiff's frivolous theories regarding allegedly fraudulently obtained water rights. (Compare Complaint at ¶¶5, 26(d)-(f), 61 with Mendez-Pintado Decl. at Exhibit A (Vexatious Litigant Petition) at ¶¶ 11-19, 22-24, 26, 32, 37, 38-42; Exhibit F (FCA Litigation) ¶¶ 300-326.) Plaintiff is a vexatious litigant under Section 391(b)(4).

Plaintiff argues that Section 391(b)(4) is inapplicable because 1) Plaintiff alleges that the Third District Court of Utah's Order declaring Plaintiff to be a vexatious litigant is "null and void for want of jurisdiction" and 2) Plaintiff contends that claims for monetary damages resulting from false and defamatory statements are "distinct" from the previous litigations. (Plaintiff's Opposition at 4-6.)

First, Plaintiff's contention that the Order declaring him to be a vexatious litigant is "null and void" is wholly devoid of any factual or evidentiary support. The documents that Plaintiff cites show that Plaintiff attempted to challenge the vexatious litigant determination. (Plaintiff's Request for Judicial Notice at Ex. C-F.) However, none of these documents show that the order was ever reversed, vacated or otherwise invalidated in any way. (*Id*.) In fact, one of the documents is an Order from the Utah Court of Appeals upholding the Order declaring Plaintiff to be a vexatious litigant. (Plaintiff's Request for Judicial Notice Ex. F (November 2, 2021, Order of the Utah Court of Appeals).) Accordingly, Plaintiff's own evidence disproves his allegation that the previous Vexatious Litigant Order is "null and void."

Despite previously admitting that the facts in the above captioned action were raised in the FCA Litigation, Plaintiff now attempts to distinguish this action from the FCA Litigation and the Vexatious Litigant Petition by pointing out that they are different causes of action. In both the FCA Litigation and in the Vexatious Litigant Petition, each Court noted that Plaintiff's factual allegations were unrelated to the alleged causes of action. (*Mendez-Pintado Decl. at Ex. C (Vexatious Litigant Order)* ("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.") ("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.")); (*Mendez-Pintado Decl. at Ex. G (FCA Attorney Fee Order*) ("Tracy's communications led

the court to conclude that Tracy 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.").

Additionally, in support of his position that the Court should find that the facts are not substantially similar because this action is a defamation case and the Vexatious Litigant Action was a records request case, Mr. Tracy cites to *Devereaux v. Latham & Watkins* 32 Cal.App.4th 1571, 1581(1995). However, *Devereaux* directly contradicts Mr. Tracy's position. In *Devereaux*, the Court found the actions were based on similar facts even though they were different types of actions. Specifically, the Court found: "[a]pplying this principle to the case at hand, we conclude that the Replevin action and the Indemnity/Injunction action are based on substantially similar facts." *Id.* The Court further held "it is of no significance that there are slightly different parties involved in this action as compared to the Replevin action. The statute does not require that the parties be the same, only that the proceedings arise from substantially similar facts." *Id*.

Plaintiff's past litigation tactics and present action make it evident that Plaintiff's strategy is to concoct new causes of actions for each litigation while alleging the same facts and circumstances, completely disregarding whether the factual allegations actually support the elements of the cause of action. However, because Section 391(b)(4) only requires that the proceedings arise from "substantially similar facts" the fact that Plaintiff lists new causes of actions for the same factual allegations is immaterial to a determination under Section 391(b)(4). (*Devereaux*, 32 Cal.App.4th at 1581.)

Based on the foregoing, Plaintiff is a vexatious litigant pursuant to Section 391(b)(4).

IV. CONCLUSION

For the reasons set forth herein, Mr. Brown respectfully requests that the Court grant the Vexatious Litigant Motion pursuant to California Code of Civil Procedure § 391 and § 391.7.

Dated: April 2, 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, CA 94104.

On April 2, 2024, I served the following document(s) on the parties in the within action:

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 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/

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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 April 2, 2024.

By Joan E. Soares
Joan E. Soares

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MARK CHRISTOPHER TRACY, an individual, Plaintiff, v. COHNE KINGHORN PC, a Utah Professional Corporation; SIMPLIFI COMPANY, a Utah Corporation; JEREMY RAND COOK, an individual; ERIC HAWKES, an individual; JENNIFER HAWKES, an individual; MICHAEL SCOTT HUGHES, an individual; DAVID BRADFORD, an individual; KEM CROSBY GARDNER, an individual; WALTER J. PLUMB III, an individual; DAVID BENNION, an individual; PAUL BROWN, an individual; GARY BOWEN, an individual; Defendants.	Case No. 23CV423435 **ORDER DECLARING PLAINTIFF A VEXATIOUS LITIGANT** ORDER ON SUBMITTED MATTER

Defendant Paul Brown's motion for an order declaring Plaintiff a vexatious litigant came on for hearing before the Court on April 9, 2024. Pursuant to California Rule of Court 3.1308, the Court issued its tentative ruling on April 8, 2024. The parties appeared for argument, and although the Court was not persuaded to change its conclusion that Plaintiff is a vexatious litigant, the Court took the matter under submission to draft a more fulsome opinion, which the Court now issues below.

I. 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." (Complaint ¶ 1.) According to the complaint, 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. (Complaint ¶ 2.)

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

In this action, Plaintiff asserts claims for libel, libel per se, false light, and intentional infliction of emotional distress based on emails sent by some of the Defendants and statements posted on the ECIDs website, www.ecid.org. (Complaint ¶¶ 79-111.) Plaintiff acknowledges the individual Defendants are Utah residents and the corporate Defendants are organized in Utah, their headquarters are located in Utah, and they operate in accordance with the laws of Utah. (Complaint ¶¶ 7-20) Plaintiff also acknowledges the alleged false and defamatory statements were made in association with ECID and in Utah. (Complaint ¶¶ 65-78.)

II. Legal Standard

Code of Civil Procedure sections 391 to 391.8 are "designed ... to protect opposing parties harassed by meritless lawsuits, [and] to conserve court time and resources and protect the interests of other litigants who are waiting for their legal cases to be processed through the courts." (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 1005.) A vexatious

litigant is "a person who has, while acting in propria persona, initiated or prosecuted numerous meritless litigations, relitigated or attempted to relitigate matters previously determined against him or her, repeatedly pursued unmeritorious or frivolous tactics in litigation, or who has previously been declared a vexatious litigant in a related action." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169-70 (*Shalant*); Code. Civ. Proc. § 391(b).)

Code of Civil Procedure section 391.1 provides that in any litigation pending in a California court, the defendant may move for an order requiring the plaintiff to furnish a security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant. (Code. Civ. Proc. § 391.6.) If, after a hearing, the court finds for the defendant on these points, it must order the plaintiff to furnish security "in such amount and within such time as the court shall fix." (Code. Civ. Proc. § 391.3.) The plaintiff's failure to furnish that security is grounds for dismissal. (Code. Civ. Proc. § 391.4.)

Code of Civil Procedure section 391.7 "operates beyond the pending case" and authorizes a court to enter a "prefiling order" that prohibits a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge. The presiding judge may also condition the filing of the litigation upon furnishing security as provided in Code of Civil Procedure section 391.3. (Code. Civ. Proc. § 391.7(b); *Shalant, supra,* at 1170.)

III. Requests for Judicial Notice

Plaintiff requests the Court to judicially notice:

- Ex. A - Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," USA ex rel. Tracy v. Emigration Improvement District et al., no. 22A636, January 11, 2023.

- Ex. B - "Opinion and Order," *Jana v. United States*, United States Court of Federal Claims, No. 94-203C, September 3, 1998.

- Ex. C - Affidavit of Jeremy R. Cook in Support of Motion for Attorney Fees and Costs Pursuant to 31 U.S.C. § 3730(d)(4) and U.S.C. § 1937, *USA ex rel. Tracy v. Emigration Improvement District et al.*, United States District Court for the District of Utah, No. 2:14-cv-00701-JNP, June 22, 2018, at Exhibit No. 1, page 11 (ECR Document 228-1),

recording correspondence between Defendants Cohne Kinghorn P.C., Jeremy Rand Cook, and Paul Handy Brown on 5/11 and 5/16/2018.

- Ex. D - On Petition for Writ of Extraordinary Relief from Amended Judgment, Orders of Filing, Minute Entries, and Writ of Execution Issued by the Honorable Mark S. Kouris, Utah State Third District Court, No. 20210743-CA.

- Ex. E - Notice to Court and Real Parties in Interest, *Tracy v. Hon. Kouris*, Utah State Third District Court, No. 20210743-CA, October 22, 2021.

- Ex. F - Brief of Petitioner for Petition for Writ of Certiorari in *Tracy v. Hon. Kouris*, No. 20210891-SC, Utah State Supreme Court, October 11, 2021.

- Ex. G - Response to Petition for Writ of Certiorari, in *Tracy v. Hon. Kouris*, No. 20210891-SC Utah State Supreme Court, December 8, 2021.

- Ex. H - Motion to Reinstate Period for Filing Direct Appeal in a Civil Case, *Tracy v. Simplifi et al.*, No. 200905074, Utah State Third Judicial District Court, April 15, 2022.

- Ex. I - Memorandum Decision and Order Adopting Report and Recommendation, *Tracy v. Simplifi et al.*, No. 2:21-cv-00444-RJS-CMR, United States District Court for the District of Utah, March 24, 2022.

Mr. Brown requests the Court to judicially notice the following:

- Ex. A - Plaintiff's Petition for: (1) Judicial Review of Denied Request for Disclosure of Public Records; (2) Injunction for Violations of the Government Records Access and Management Act; (3) Award of Attorney Fees and Costs, which Plaintiff filed with the Third District Court of the State of Utah on August 10, 2020, with the Case Number 200905074.

- Ex. B - The Memorandum Decision and Order issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on February 24, 2021, for Case Number: 200905074.
- Ex. C - The Decision and Order Denying Motion to Vacate, Awarding Attorney's Fees and Finding Petitioner Mark Christopher Tracy to Be a Vexatious Litigant and Subject to Rule 83 of the Utah Rules of Civil Procedure issued by the Honorable Mark Kouris of the Third District Court of the State of Utah on April 15, 2021, for Case Number: 200905074.

- Ex. D - Plaintiff's Civil Rights Complaint filed with the United States District Court for the District of Utah on July 22, 2021, under the Case Number: 2:21-cv-00444.

- Ex. E - The United States Court of Appeals for the Tenth Circuit's Order and Judgment issued on June 8, 2023, related to the District Court Case Number 2:21-cv-00444-RJS.

- Ex. F - Plaintiff's Third Amended Complaint alleging violation of the Federal False Claims Act filed on April 16, 2018, before the United States District Court for the District of Utah, under the Case Number 2:14-cv-00701-JNP-PMW.

- Ex. G - Order Granting In Part and Denying In Part Defendant's Motion for Attorney's Fees and Costs and Granting Defendant's Motion to Amend issued by the Honorable Jill N. Parrish of the United States District Court for the District of Utah issued on October 29, 2021, in the Case Number 2:14-cv-701-JNP.

The parties' requests for judicial notice are granted, in part. The Court may properly take judicial notice of the fact that another Court made a particular factual finding and of the existence of any document in a court file. However, the truth of the matters asserted in those documents, including the factual findings of the court sitting as the trier of fact in the other matter, is not the proper subject of judicial notice. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1562-1570.)

IV. Analysis

Specially appearing Defendant, Mr. Brown contends Plaintiff can be declared a vexatious litigant under Code of Civil Procedure sections 391(b) (4), (3), and (2). Code of Civil Procedure section 391 defines a vexations litigant as a person who:

> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
>
> (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the 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.

(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.

(4) 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.

(Code. Civ. Proc. § 391(b).)

Under Code of Civil Procedure section 391(b)(4), "when the proceeding in which the party was declared a vexatious litigant, and the proceeding in which he or she is sought to be declared a vexatious litigant in reliance on the earlier proceeding, arise from essentially the same facts, transaction or occurrence," the party may be again declared a vexatious litigant. (*Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1581.) "This can be determined by examination of the factual circumstances that underlie the two proceedings and the pleadings." (*Id.*)

Mr. Brown's judicially noticed Exhibits A-G are comprised of prior claims Plaintiff brought that resulted in judgments and other decisions adverse to Plaintiff. On April 15, 2021, in *Mark Christopher Tracy, DBA Emigration Canyon Home Owners Association v. Simplifi Company, et.al.,* ease No. 200905074, the Third District Court in and for the State of Utah found Plaintiff to be a vexatious litigant pursuant to Utah Rules of Civil Procedure, Rule 83. On October 29, 2021, in *United States of America ex rel. Mark Christopher Tracy, v. Emigration Improvement District, et.al.,* case no. 2:14-cv-701-JNP, the United States District Court for the District of Utah awarded Defendants their attorneys' fees after finding Mr. Tracy's actions to be vexatious and brought primarily for purposes of harassment.

The instant case is for libel, libel per se, false light and intentional infliction of emotional distress based on emails sent by some of the Defendants, and statements that were posted on the ECID's website, www.ecid.org. However, it arises from substantially similar

facts and involves the same occurrences as in Plaintiff's previous actions and proceedings in Utah. At its core, this case involves what Plaintiff alleges to be ECID and Defendants' fraudulent scheme to retire senior water rights vis-à-vis duplicitous water claims, improper/illegal operation of Emigration Oaks Water System, improper/illegal digging of two Boyer water wells, all for the construction and massive expansion of luxurious private urban development in Salt Lake City, Utah. Indeed, in the first 12 pages of the complaint, Plaintiff essentially reiterates the same allegations he made in his previous Utah proceedings. In ¶ 61 of his complaint, Plaintiff indicates that his "above-listed allegations were filed in United States Federal District Court for the District of Utah on September 26, 2014, under the Federal False Claims Act."

Plaintiff nevertheless contends Code of Civil Procedure section 391(b)(4) is inapplicable because his current claims for monetary damages are not related to receipt and misuse of federally-backed funds or to Defendants' refusal to disclose public records evidencing drinking water contamination and groundwater depletion. The Court is not persuaded.

Plaintiff's defamation claim pertains to the comments Defendants allegedly made regarding Plaintiff's claims and legal actions against them and ECID; claims and legal actions that involved ECID and Defendants' alleged fraudulent scheme to misuse federally-backed funds, retire senior water rights vis-à-vis duplicitous water claims, improper/illegal operation of Emigration Oaks Water System, and improper/illegal digging of two water wells, all for the construction and massive expansion of luxurious private urban development in Salt Lake City, Utah. To prevail on his causes of action for libel, Plaintiff must prove a publication that is false, defamatory, unprivileged, and has a natural tendency to injure or causes special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) Therefore, the underlying facts leading to the publication must be tried to assess its falsity.

Based on the foregoing, the Court finds Plaintiff to be a vexatious litigant pursuant to Code of Civil Procedure section 391(b)(4). The Court thus need not address Plaintiff's vexatious status under Code of Civil Procedure sections 391(b)(2) or (3).

Mr. Brown's request for a prefiling order is GRANTED. Plaintiff is prohibited 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 and posting a security.

Specially appearing defendant Mr. Brown is ordered to prepare a form of pre-filing order consistent with this order for the Court's review within 10 days of service of this formal order.

IT IS SO ORDERED.

Date: April 15, 2024

The Honorable Evette D. Pennypacker
Judge of the Superior Court

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

FILED
APR 16 2024
Clerk of the Court
Superior Court of CA County of Santa Clara
BY D. CRISWELL DEPUTY

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

PROOF OF SERVICE

ORDER DECLARING PLAINTIFF A VEXATIOUS LITIGANT was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

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

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 04/16/2024. CLERK OF THE COURT, by David Criswell, Deputy.

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