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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.

**RESPONDENTS'
MOTION TO DISMISS**

Tier 2

Case No. 200905074

Judge: Mark S. Kouris

Respondents Simplifi Company (“**Simplifi**”), Eric Hawkes (“**Mr. Hawkes**”) and Jennifer Hawkes (“**Mrs. Hawkes**”) (collectively “**Respondents**”) through counsel, and pursuant to Utah Rule of Civil Procedure 12(b)(6), respectfully move the Court to dismiss the petition in the above-captioned matter (the “**Petition**”) in its entirety.

7. In 2014, Mr. Tracy filed **Case No.: 2:14-cv-00701-JNP-PMW** (the “**FCA Action**”) against EID and multiple other parties in the United States District Court for the District of Utah.

8. The FCA Action generally alleges that EID violated the federal false claims act as part of a loan that EID obtained in 2002 from the Utah Division of Drinking Water to make improvements to its public drinking water system.

9. On March 9, 2017, the United States District Court for the District of Utah, the Honorable Jill N. Parrish presiding, ordered entry of judgment in the FCA Action against Mr. Tracy awarding EID \$29,936.00 in damages based on Mr. Tracy filing a lis pendens against EID’s water rights, which the Court found was a wrongful lien.

10. On February 15, 2019, Judge Parrish issued another *Order Granting in Part and Denying in Part Defendant’s Motion for Attorneys’ Fees and Costs* (the “**FCA Fee Order**”) awarding EID \$92,665.00 to be paid by Mr. Tracy.¹

11. In the FCA Fee Order, Judge Parrish found that: “Tracy’s behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys’ fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4).” *Id.*, p. 12.

12. On August 19, 2019, Judge Chon issued a *Memorandum Decision and Order* granting EID’s motion to dismiss a separate action filed by ECHO against EID (Case No. 190901675). Mr. Tracy appealed Judge Chon’s decision, but the matter has been remanded back to Judge Chon for a determination whether Mr. Tracy can represent ECHO *pro se*.

13. EID has provided documents in response to multiple GRAMA requests submitted to EID by Petitioner.

14. On June 10, 2020, Mr. Tracy sent an email to EID’s representative, Mr. Hawkes at the email address “eric@ecid.org” requesting copies of EID’s telemetry data (the “**GRAMA**

¹ After the FCA Action was appealed, the United States Supreme Court overturned Tenth Circuit precedent with respect to the applicable statute of limitations. Accordingly, the case has been remanded back to Judge Parrish and the fee award has been vacated because EID is not the prevailing party at this time.

Request”). The GRAMA Request provided that Mr. Tracy would pay the fees associated with the GRAMA Request and specifically requested that EID notify Mr. Tracy if the amount of fees necessary to accomplish the GRAMA Request would exceed \$100.00. *Petition*, Exhibit AA.

15. On June 29, Mr. Hawkes responded to Mr. Tracy that the data sought in the GRAMA Request required the use of custom computer software to access. Mr. Hawkes informed Mr. Tracy that although EID could send the raw data to Mr. Tracy, Mr. Hawkes instead asked for time to determine how to make the data accessible in a more widely used format.

16. That same day, Mr. Tracy responded to Mr. Hawkes that if Mr. Hawkes would identify the software involved, Mr. Tracy would inquire of his own IT consultant whether Mr. Tracy could obtain equivalent software.

17. On Thursday, July 9, 2020, Mr. Hawkes sent a response email to Mr. Tracy that indicated that the data requested by the GRAMA Request could be made available in one of two formats. Mr. Hawkes reiterated that the raw data requested could be produced in a format which can only be accessed by the use of custom software which uses “LGH Files,” or in the alternative, the data could be exported to a format compatible with Microsoft Excel. *Petition*, Exhibit BB.

18. That same day, Mr. Tracy responded to Mr. Hawkes and stated: “Dear Mr. Hawkes, Memory stick and postage is unnecessary - just send me the file per email or Dropbox as my last GRAMA request. The first 1/4 hour of staff time may not be charged as per Utah Code sec. 63G-2-203 (2)(c). You may invoice me for the remainder of the fees outlined below.” See Exhibit 1.

19. On July 15, 2020, Mr. Hawkes emailed a link to a “zip” file that contained all of the telemetry data from 2004 to present. In the email, Mr. Hawkes stated: “The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a fee would be

associated with completing the task. Let me know if you have any questions regarding the GRAMA.” See Exhibit 2.

20. Although EID had already provided the data in the format requested by Mr. Tracy, on July 17, 2020, Mr. Tracy sent an email to the Chief Administrative Officer of EID indicating that he wanted the data in Microsoft Excel format. *Petition*, Exhibit CC. However, instead of acknowledging or accepting the estimated costs, Mr. Tracy took issue with EID’s estimate to convert the files to the Excel format and argued that the costs were excessive. *Petition*, Exhibit CC.

21. On the same day Petitioner filed this action, Petitioner filed a separate, similar action against Respondents that has since been ruled upon by the Honorable Judge Faust (Case No. 200905123) (the “**Lead GRAMA Case**”).

22. In the *Memorandum Decision and Order* entered on September 16, 2020 in the Lead GRAMA Case (attached hereto as Exhibit 3), Judge Faust found that “Petitioner has failed to cite any case law to support the position that Respondents are proper or necessary parties to [the] action,” and that “Petitioner [did not] cite to any provision or language in GRAMA supporting the position that it can sue an individual or private company based on a governmental entity’s alleged failure to respond to a GRAMA request.”

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) should be granted where, even accepting the factual allegations as true and drawing all reasonable inferences in the plaintiff’s favor, the plaintiff is not entitled to relief. See *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 10, 21 P.3d 198. The sufficiency of the pleadings is determined by the facts pled, not the conclusions stated. See *id.* ¶ 26. “To survive a motion to dismiss, the complaint must allege facts sufficient to satisfy each element of a claim, otherwise the plaintiff has failed to show that she is entitled to relief.” *Harvey v. Ute Indian Tribe of the Uintah & Ouray*

Reservation, 2017 UT 75, ¶ 60, 416 P.3d 401; *see also St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 201 (Utah 1991) (dismissing complaint for failure to plead facts supporting element of claim alleged).

In evaluating a motion to dismiss, the district court may “consider documents that are referred to in the complaint and [are] central to the plaintiff's claim” and may also “take judicial notice of public records.” *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (citations and internal quotation marks omitted). *See also Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226 (same).

ARGUMENT

The Court should dismiss the case because Mr. Tracy has no basis for suing Respondents based on a claim that EID purportedly failed to respond to a GRAMA request. Moreover, EID complied with the GRAMA request when it provided the data and notified Mr. Tracy that it could provide the data in a different format for the estimated \$3,000 in associated fees. Finally, EID has no obligation to provide the data in a format not regularly maintained by EID.

I. THERE IS NO BASIS FOR SUING RESPONDENTS ON A CLAIM THAT EID ALLEGEDLY FAILED TO RESPOND TO A GRAMA REQUEST.

It is clear that EID is a governmental entity and, as such, EID is subject to Utah's Government Records Access and Management Act (“GRAMA”). *See Utah Code § 63G-2-101 et seq.* However, although the GRAMA request was submitted to EID and purportedly appealed to the chief administrative officer of EID, EID is not a party to this action and Petitioner is not seeking relief against EID. Rather, Petitioner has inexplicably named Simplifi, Mr. Hawkes, and Mrs. Hawkes personally. The Respondents are not subject to GRAMA and Petitioner cannot

possibly articulate a legal claim under GRAMA which would entitle Petitioner to relief from either of the two individuals or the private corporation he has named in this Petition.

Utah Code Ann. § 63G-2-103(11)(b) states that the term “Governmental entity” also means: (i) every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in subsection (11)(a) that is funded or established by the government to carry out the public's business. Mr. Hawkes, Mrs. Hawkes and Simplifi are clearly not governmental entities; not an office or agency of EID; and not “funded or established by the government to carry out the public’s business.” *Id.*

Furthermore, the statute states that a government entity includes every office or agency of an entity listed in Subsection (11)(a), not that the office, agency, or committee is a separate governmental entity for purpose of GRAMA. For example, Utah Code Ann. § 63G-2-401 states that a requester “may appeal an access denial to the chief administrative officer of the governmental entity.” If a City had a cemetery advisory board, the chief administrative officer would be the chief administrative officer of the City, not the chief administrative officer of the cemetery advisory board. Petitioner acknowledges this distinction in his July 17, 2020 email, which he directs to: “Michael Scott Hughes, Chief Administrative Officer of Emigration Improvement District.” *See Petition*, Exhibit CC (emphasis added). Thus, even if Simplifi and Mr. Hawkes could be considered an office or agency of EID (which they clearly are not), the governmental entity is EID.² The records are public records and subject to GRAMA because they are records of EID, not because they are records of Mr. Hawkes, Simplifi or Mrs. Hawkes.

² Mrs. Hawkes has absolutely no involvement in EID. Instead, Petitioner appears to name her because she is a member of the Emigration Canyon Metro Township Council.

Nothing in the statute even remotely suggests that a lawsuit can be brought against an employee, individual or private contractor as opposed to the actual governmental entity.

In summary, even when accepting the factual allegations presented in the Petition as true and drawing all reasonable inferences in favor of Petitioner, Petitioner is not entitled to relief from any one of the Respondents. Therefore, the Petition must be dismissed pursuant to Utah R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

II. EID RESPONDED TO THE GRAMA REQUEST.

Based on Mr. Tracy's own allegations, it is undisputed that EID not only provided the data requested by Mr. Tracy, but Mr. Tracy was able to access the data.

On July 15, 2020, Mr. Hawkes emailed to Mr. Tracy a link to a "zip" file that contained all of the telemetry data from 2004 to present. In the email, Mr. Hawkes stated: "The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a fee would be associated with completing the task. Let me know if you have any questions regarding the GRAMA." See [Exhibit 1](#).

In paragraph 51 of the Petition, Petitioner alleges: "After receipt of the data file from Mr. Hawkes, The ECHO-Association reported that the file transmitted by Mr. Hawkes on July 15, 2020 did not match the water levels previously reported by Mr. Hawkes to the EID trustees" See *Petition*, ¶ 51. In other words, not only did Petitioner receive the data files for the requested telemetry data, but Petitioner was apparently able to access the data.

In summary, EID not only provided a data file to Petitioner which EID reasonably believed to be responsive to the GRAMA Request, but EID also suggested to Petitioner that for

an estimated cost of \$3,000 EID could deliver the requested data in Petitioner's preferred format. Accordingly, the Petition is without merit and should be dismissed.

II. EID IS NOT REQUIRED TO PROVIDE THE DATA IN A DIFFERENT FORMAT.

EID does not maintain the data in an Excel format and EID is not required to convert the data to a different format. Utah Code Ann. § 63G-2-201 states in part:

- (8) In response to a request, a governmental entity is not required to:
 - (a) create a record;
 - (b) compile, format, manipulate, package, summarize, or tailor information;
 - (c) provide a record in a particular format, medium, or program not currently maintained by the governmental entity

(emphasis added).

As set forth above, EID provided the data to Petitioner in the format maintained by EID and provided Mr. Tracy with information on the software that could be acquired to access the data. Therefore, although EID volunteered to provide the data in a different format if Petitioner paid the costs to convert the data, EID has no obligation to accommodate Petitioner by converting the data to a different format.

Accordingly, even if there was merit to Mr. Tracy's claim that EID could convert the data to Excel format for the less than the approximately \$3,000 (which EID disputes), GRAMA specifically indicates that EID is not required to compile or format the data into Excel format.

CONCLUSION

There is clearly no basis for suing Respondents, and even if Petitioner had properly brought the Petition against EID, the Petition fails as a matter of law. Accordingly, the Court should find that the Petition is meritless and not asserted in good faith. Based on the foregoing,

the Respondents respectfully request that the Court grant the Motion and dismiss the present action pursuant to Utah R. Civ. P. 12(b)(6).

DATED this 28th day of December, 2020.

COHNE KINGHORN

/s/ *Jeremy R. Cook*

Jeremy R. Cook

Tim Nielsen

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December 2020, a true and correct copy of the foregoing document was served by email and first-class mail to the following:

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094

/s/ Jeremy Cook

EXHIBIT

1

From: The ECHO-Association <m.tracy@echo-association.com>

Date: July 9, 2020 at 9:10:47 AM MST

To: Eric Hawkes <Eric@ecid.org>

Subject: Re: Appeal - Chief Administrative Officer (ECHO-Association GRAMA Request from June 10, 2020)

Dear Mr. Hawkes,

Memory stick and postage is unnecessary - just send me the file per email or Dropbox as my last GRAMA request.

The first 1/4 hour of staff time may not be charged as per Utah Code sec. 63G-2-203 (2)(c).

You may invoice me for the remainder of the fees outlined below.

Kind Regards,

Mark Christopher Tracy

On Jul 9, 2020, at 7:41 AM, Eric Hawkes <eric@ecid.org> wrote:

Hi Mr. Tracy,

We can get the raw data files copied to a memory stick in Windows Format. The cost would be \$60 for an estimated one hour of labor, memory stick, and postage. The software needed for the "raw data" is LGH File Inspector available at Softwaretoolbox.com.

The alternative option is to provide the data to you in an excel format, however the cost would be an estimated \$3000.00 for the software and the engineer/ IT to extract the data to an excel file.

Please let me know how you would like to proceed.

Thanks,
Eric Hawkes
801-243-5741

On Mon, Jun 29, 2020 at 11:17 AM The ECHO-Association <m.tracy@echo-association.com> wrote:

Dear Mr. Hawkes,

I assume by "metadata" you are referring to "raw data" which is organized by a software program.

If you identify the software involved in compiling the raw data, I can find out from our IT consultant if the software is available and then have you forward a copy of the telemetry file without further effort or delay.

Kind Regards,

Mark Christopher Tracy

From: Eric Hawkes <eric@ecid.org>
Date: June 29, 2020 at 9:12:29 AM PDT
To: The ECHO-Association <m.tracy@echo-association.com>
Subject: Re: Appeal - Chief Administrative Officer (ECHO-Association GRAMA Request from June 10, 2020)

Mr. Tracy,

With respect to your GRAMA request for the telemetry data, the data requires custom software programs to access the data. Therefore, although we could have complied with the GRAMA request by simply providing the metadata to you, it would not have been beneficial. We are looking into whether it is possible to provide the data in a format that you can access. I expect that we will have some additional information in the next few days.

Thanks,

Eric Hawkes

On Sat, Jun 27, 2020 at 2:57 PM The ECHO-Association <m.tracy@echo-association.com> wrote:

Dear Mr. Hawkes,

We were able to successful download the link provided by you below in fulfillment of our GRAMA request from June 15, 2020 regarding the EID Trustee

meeting conducted via the Zoom electronic platform as related to the operation of unapproved drinking water infrastructure (*i.e.*, "black PVC pipes") and your refusal to answer questions regarding lead contamination of the water system operated by the Simplifi Company for the Emigration Improvement District ("**EID**" aka ECID)

Thank-you.

However, we note that you failed to confirm receipt or respond to our GRAMA request from **June 10, 2020** regarding telemetry data (water level reports) for water sources and storage facilities operated by EID.

We hereby appeal your *de facto* denial of our GRAMA request under Utah Code sec. 63G-2-204 (9) to the Chief Administrative Officer of EID under Utah Code sec. 63G-2-204 (1)(a).

This GRAMA request and appeal is related to massive ground subsidence and fissures reported by the ECHO-Association in its community press release from June 24, 2020 (*see* https://echo-association.com/?page_id=6908). Salt Lake Tribune environmental reporter Brian Maffly is cc'ed here.

For the purpose of this appeal to the Chief Administrative Officer please note the following:

GRAMA Requestor:

Mark Christopher Tracy "doing business as" the Emigration Canyon Home Owners Association ("**ECHO-Association**")

Mailing Address:

1160 E. Buchnell Drive
Sandy, Utah 84094

Daytime Phone Number:

929-208-6010

Relief Sought:

COPIES OF ALL TELEMTRY DATA (WATER LEVEL REPORTS) FOR THE BOYER WELL NO. 1, BOYER WELL NO. 2, BRIGHAM FORK WELL, UPPER FREEZE CREEK WELL, BOYER TANK AND WILDFLOWER RESERVOIR SINCE SEPTEMBER 1, 2004.

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010

On Jun 27, 2020, at 12:29 PM, The
ECHO-Association <[m.tracy@echo-
association.com](mailto:m.tracy@echo-association.com)> wrote:

Begin forwarded message:

From: Eric Hawkes
<eric@ecid.org>
Date: June 25, 2020
at 8:31:35 PM PDT
To: ECHO Association
<[m.tracy@echo-
association.com](mailto:m.tracy@echo-association.com)>
Subject: GRAMA
Request - EID MTG
June 11th



_EID Meeting
June 11 - 2020.zip

Mr. Tracy,

Attached is the
recording of the
Emigration
Improvement
District Board
Meeting for June
11, 2020 as per
your GRAMA
request dated
June 15, 2020.

Thanks,

--

Eric Hawkes
(p) 801.243.5741
(e) eric@ECID.org
(w) www.ECID.org

<GRAMA - ECHO - EID Trustee Mtg
Zoom - June 11, 2020.pdf>

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Eric Hawkes
(p) 801.243.5741
(e) eric@ECID.org
(w) www.ECID.org

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Eric Hawkes
(p) 801.243.5741
(e) eric@ECID.org
(w) www.ECID.org

E X H I B I T

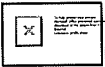
2

From: Eric Hawkes (via Google Drive) <drive-shares-noreply@google.com>
Sent: Wednesday, July 15, 2020 11:55 AM
To: Jeremy Cook
Cc: dbarnett@barnettwater.com; m.tracy@echo-association.com
Subject: EID InTouch History (2).zip

eric@ecid.org has shared the following file:



EID InTouch History (2).zip



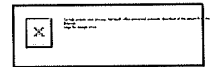
Dear Mr. Tracy,

The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a fee would be associated with completing the task. Let me know if you have any questions regarding the GRAMA.

Thanks,
Eric Hawkes
District Manager



Google Drive: Have all your files within reach from any device.
Google LLC, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA



E X H I B I T

3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK CHRISTOPHER TRACY, dba
EMIGRATION CANYON HOME
OWNERS' ASSOCIATION,

Petitioners,

vs.

SIMPLIFI COMPANY, a Utah
Corporation, ERIC HAWKES, an
Individual, and JEN NIFER HAWKES,
an Individual,

Respondents.

MEMORANDUM DECISION
AND ORDER

Case No. 200905123

Honorable Robert P. Faust

The above-entitled matter comes before the Court pursuant to Respondents Simplifi Company's ("Simplifi"), Eric Hawkes' ("Mr. Hawkes") and Jennifer Hawkes' ("Mrs. Hawkes") (collectively "Respondents") Motion to Dismiss. The matter was submitted for decision on September 14, 2020. Although oral argument was requested, the Court is not persuaded a hearing would be of assistance in the instant. Accordingly, the ruling with respect to the Motion will be addressed in the following Memorandum Decision and Order:

The basis for this action is that the Emigration Improvement District ("EID"), which is subject to the Utah Government Records Access and Management Act ("GRAMA"), failed to adequately respond to a request of Petitioner for public records of EID related to lead testing results for EID's public drinking water system. Based upon the allegation, EID is a necessary party and Petitioner has failed to cite any case law to support the position that Respondents are proper or necessary parties to this action. Indeed, GRAMA applies to "governmental entities." *See Utah Code Ann. 63G-2-103(11)*. Simplifi and Mr. Hawkes are not governmental entities.

The reason the records are public records is because they are records of EID (a governmental entity) and produced on behalf of EID. Petitioner does not cite to any provision or language in GRAMA supporting the position that it can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

EID has legal authority and control over its documents, and in fact, responded to the GRAMA request and provided documents to Petitioner that EID believed were responsive to his request. In its initial response, EID indicated to Petitioner that Petitioner could likely acquire the requested documents more quickly through the Utah Division of Drinking Water; and it appears that Petitioner was provided, or had access to, all of the documents he was requesting prior to filing this action.

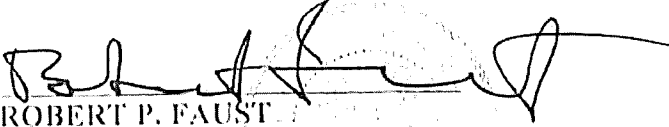
In sum, there is no evidence to suggest that EID has ever taken the position that the documents were not public records of EID and not controlled by EID, or that Petitioner had any reason to believe it was necessary to sue Respondents to obtain EID's records. Accordingly, Respondents' Motion to Dismiss is granted.

Additionally, Petitioner's Objection is an improper sur-reply that is not permitted under URCP Rule 7 and is, therefore, stricken. Petitioner's Objection to Motion to Strike Petitioner's Objection to Reply Memorandum is overruled.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 16th day of September 2020

BY THE COURT:

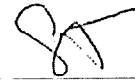

ROBERT P. FAUST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed/mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 16th day of September 2020:

Mark Christopher Tracy
1160 East Buchnell Drive
Sandy UT 84094
m.tracy@echo-association.com

Jeremy Cook
111 E Broadway, Ste. 1100
Salt Lake City UT 84111
JCOOK@CK.LAW

A handwritten signature in black ink, appearing to be 'J. Cook', is written above a horizontal line.